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ARTICLE

THE EMPIRE STRIKES OUT: CONGRESSIONAL RUMINATIONS ON THE CITIZENSHIP STATUS OF PUERTO RICANS

José Julián Alvarez González*

Since April 1989, Congress has been considering a bill that would provide for a referendum on the political status of Puerto Rico. The three options are enhanced commonwealth status, statehood, and independence. Under the terms of the bill as it currently stands, the prevailing option would be implemented automatically.

In this Article, Professor Alvarez considers the constitutional validity of a proposal to divest automatically Puerto Rican residents of United States citizenship in the event of independence, as well as an alternate proposal of forced election of citizenship. He concludes that automatic divestiture is almost certainly unconstitutional and that forced election of citizenship, as alternatively proposed, presents serious problems from the standpoints of constitutional law and policy. Building on the long history of United States citizenship congressionally conferred on Puerto Ricans, Professor Alvarez suggests that dual citizenship is the most practical solution for an independent Puerto Rico. This suggestion has been tentatively embraced by the Senate Committee on Energy and Natural Resources, which has primary responsibility over the plebiscite bill.

However much it may try to deny it, the United States has a colonial problem in Puerto Rico.[1] The people of Puerto Rico are

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This is a revised, footnoted, and expanded version of a memorandum I prepared for the Puerto Rican Independence Party (PIP), which that Party filed before the Committee on Energy and Natural Resources of the United States Senate on June 14, 1989. This Article, however, represents solely my views, and not necessarily those of the PIP. I have endeavored to retain the argument of the memorandum in its original form.

Fernando Martín, Carlos Gorrín, and Manuel Rodríguez Orellana provided helpful comments on the original memorandum; Antonio García Padilla, Angel Hermida, and David M. Helfeld did likewise concerning this version. I am indebted to all of them. Mistakes, of course, are mine alone.

[1] The subject of the political status of Puerto Rico is beyond the scope of this Article. The following are some sources in English on the subject: Helfeld, *Congressional Intent and Attitude Toward P.L. 600 and the Constitution of Puerto Rico*, 21 Revista Jurídica de la Universidad de Puerto Rico [Rev. Jur. U.P.R.] 255 (1952); Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1 (1953); Muñoz Marín, *Puerto Rico and the U.S.: Their Future Together*, 32 Foreign Aff. 541 (1954); Morales Yordán, *The Constitutional and International Status of the Commonwealth of Puerto Rico*, 18 Revista del Colegio de Abogados de Puerto Rico [Rev. Col. Ab. P.R.] 5 (1957); Hernández Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 Rev. Col. Ab. P.R. 207 (1959); Silving, *In the Nature of a Compact*, 20 Rev. Col. Ab. P.R. 159 (1960); García Passalacqua, *The Judicial Process and the Status of Puerto Rico*, 30 Rev. Jur. U.P.R. 141 (1961); Puerto Rico Bar Association, *The Power of the Congress to Enter into a Compact with the People of Puerto Rico and the Legal Status*

deeply divided on whether they should continue as a United States commonwealth, or opt to become either a state of the Union or an independent republic.[2] For reasons that are not yet clear, the Committee on Energy and Natural Resources of the United States Senate decided in early 1989 to sponsor legislation that would give the people of Puerto Rico an opportunity to exercise their right of self-determination.[3] The Committee,

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of the Compact, 22 REV. COL. AB. P.R. 341 (1962); Leibowitz, *The Applicability of Federal Laws to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219 (1967); Note, *Puerto Rico: Colony or Commonwealth?*, 6 N.Y.U. J. INT'L L. & POL. 115 (1973); Note, *Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041 (1974); Borg, *The Problem of Puerto Rico's Political Status*, 37 REV. COL. AB. P.R. 481 (1976); Berríos Martínez, *Independence for Puerto Rico: The Only Solution*, 55 FOREIGN AFF. 561 (1976); Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 FOREIGN POL'Y 66 (1978); Romero Barceló, *Puerto Rico, U.S.A.: The Case for Statehood*, 59 FOREIGN AFF. 60 (1980); Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT'L & COMP. L. 211 (1981); J. GARCÍA PASSALACQUA, PUERTO RICO: EQUALITY AND FREEDOM AT ISSUE (1984); Alvarez González, *Puerto Rico*, in CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES 23–44 (A. Blaustein & P. Blaustein eds. 1985); Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452 (1986).

In the Hispanic world, the legal name of a person is composed of a first name, a middle name, if any, and *two* last names. The first last name is the father's; the second, the mother's. It is a serious breach of etiquette—sometimes even an insult—to call a Hispanic by his or her second last name alone. One would hope that the Supreme Court of the United States, and federal government in general, could learn this lesson after 92 years of relations with Puerto Rico. *See, e.g.*, Califano v. [Gautier] Torres, 435 U.S. 1 (1978); Harris v. [Santiago] Rosario, 446 U.S. 651 (1980).

In this Article, the last names of Hispanics are not joined with a hyphen, since that is not a common practice in the Hispanic world. Hispanics, however, have often felt the need to engage in such practice in their dealings with Anglophones, in order to avoid embarrassing situations. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[2] The three status options of commonwealth, statehood, and independence are represented, respectively, by the Popular Democratic Party (PDP), the New Progressive Party (NPP), and the Puerto Rican Independence Party (PIP). Their presidents and principal leaders are, respectively, Governor Rafael Hernández Colón, former Governor Carlos Romero Barceló, and former Senator Rubén Berríos Martínez.

[3] According to most newspaper accounts of the events leading to the call for a plebiscite, the following is a chronology of events:

1. While vacationing in Scotland, after his successful re-election drive, Governor Rafael Hernández Colón decided to urge federal decision makers to hold a plebiscite on the Puerto Rican status question in 1991.
2. Governor Hernández Colón announced his plans on January 2, 1989, in his third inaugural address.
3. The Governor invited the two opposition party leaders in Puerto Rico to meet with him to agree on a course of action that would lead to the plebiscite.
4. The three party leaders met on January 17, 1989, and issued a joint statement, sent to President Bush and congressional leaders, urging them to initiate the process toward a plebiscite on the political status of Puerto Rico.
5. President Bush, in his February 9, 1989, State of the Union Address, urged Congress to take the necessary steps to permit Puerto Rico to exercise its right to self-determination. The President, moreover, expressed his personal preference for statehood for Puerto Rico.
6. Senator J. Bennett Johnston, Chairman of the Senate Committee on Energy and

headed by Chairman J. Bennett Johnston (D-La.) and by ranking minority member James McClure (R-Idaho), managed to get the leaders of Puerto Rico's three major political parties to agree on a plan for holding a referendum or plebiscite in 1991.[4]

Pursuant to this plan, the two senators introduced three bills in the Senate, each providing for a referendum, but with distinctly different characteristics. Under the first bill, the referendum would be a mere beauty contest between the three status options: (1) statehood with full powers and cultural identity duly recognized; (2) independence with full economic guarantees; and (3) enhanced commonwealth in permanent union.[5] Pursuant

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Natural Resources, met with Puerto Rico's three principal political leaders in San Juan on February 27, 1989. A procedural course of action was agreed upon at that meeting.

The following accounts in San Juan newspapers support aspects of this chronology: García Passalacqua, *A Resolver el Status en Cuatro Años*, El Nuevo Día, Jan. 3, 1989, at 7, col. 3; *Parties Unite for U.S. Pledge*, The San Juan Star, Jan. 18, 1989, at 1, col. 1; *Plebiscite Bill Drafted*, The San Juan Star, Feb. 15, 1989, at 1, col. 1. *See also* Weisman, *An Island in Limbo*, N.Y. Times, Feb. 18, 1990, § 6 (Magazine), at 29.

However, as these and other newspaper accounts also suggest, it may be quite naive to accept fully the above chronology. Previously undisclosed documents show that *federal* plans for a plebiscite in Puerto Rico had been laid as early as twelve years ago during the Carter administration. *Plebiscite Born in Carter Era*, The San Juan Star, July 3, 1989, at 1, col. 1. Additionally, in 1981, the General Accounting Office (GAO) unexpectedly issued a long report on the Puerto Rican status question, which outlined problems and explored the different status alternatives. *See* GENERAL ACCOUNTING OFFICE, PUERTO RICO'S POLITICAL FUTURE: A DIVISIVE ISSUE WITH MANY DIMENSIONS GGD-81-48 (Mar. 1981). The GAO recently updated this report for the Senate committee at Chairman Johnston's request. *See* GENERAL ACCOUNTING OFFICE, PUERTO RICO: INFORMATION FOR STATUS DELIBERATIONS (May 1989). It is a matter of record, moreover, that on the night of his re-election Governor Hernández Colón announced that he would not push for a status consultation in view of George Bush's election, since Bush was so openly committed to statehood for Puerto Rico. *Governor Urged to Persist on Status Agenda*, The San Juan Star, Nov. 11, 1988, at 12, col. 1. What made him change his mind so suddenly? It has been suggested by at least two political analysts that the Governor learned that President-elect Bush had decided to create a blue-ribbon status commission to study the problem and to make recommendations. If this were correct, the Governor's action was a pre-emptive strike to make it appear as if the initiative originated in San Juan, rather than in Washington. *See* García Passalacqua, *supra*; Quiñones Calderón, *Plebiscito . . . ¿o Concurso de Simpatías?*, El Mundo (Revista de la Semana), July 16, 1989, at 1–4. The above chronology also fails to explain such a deep, active commitment to the status question on the part of Senators Johnston and McClure. To suggest that they were simply responding to the wishes of Puerto Rico's political parties falls short of an adequate explanation.

Lest it appear odd that the Puerto Rican status question be under the primary jurisdiction of the Senate Committee on Energy and Natural Resources, I should point out that this committee is the successor to the former Committee on Interior and Insular Affairs.

[4] The details of this plan are described in Senator Johnston's opening statement at the start of the first set of hearings on the political status of Puerto Rico, on June 1, 1989. *See* 1 *Political Status of Puerto Rico: Hearings Before the Senate Comm. on Energy and Natural Resources on S. 170, S. 711, and S. 712*, 101st Cong., 1st Sess. 1–3 (1989) [hereinafter *Hearings*].

[5] S. 710, 101st Cong., 1st Sess. (1989).

to this bill, the only obligation of the United States would be to consult with the representatives of the prevailing formula to develop legislation to implement it. If approved, such legislation would be submitted to a second referendum in Puerto Rico. The second bill is similar to the first, except that the status options are defined in greater detail.[6]

The third bill, however, is self-executing.[7] The bill defines the three status options in minute detail and provides that the prevailing formula would be automatically implemented. As part of the self-executing mechanism, the third bill contains an enabling act for the statehood and independence options. If statehood prevailed, Puerto Rico would be automatically admitted to the Union;[8] if independence prevailed, Puerto Rico would be set on the road to independence, with strict timetables and pre-established terms and conditions.[9]

Each of the three parties drafted those portions of the three bills which concerned the status option that each favored. After receiving their input, Senators Johnston and McClure introduced all three bills on April 5, 1989.[10] Thereafter, the committee scheduled the first set of public hearings, held in Washington, D.C. on June 1–2, 1989.[11] At these hearings, the principal leader of each of the three parties testified.[12]

Early in the process the three parties and the two senators agreed that S. 712, the self-executing bill, would be the most desirable.[13] Therefore, the parties directed most of their efforts to drafting the terms and conditions for their respective status options under that bill.

The Puerto Rican Independence Party (PIP) concluded that dual citizenship was the only realistic solution for an independent Puerto Rico consistent with United States constitutional law. Accordingly, Title III of S. 712, concerning independence, provided that upon the advent of the Republic of Puerto Rico all of its citizens, as therein defined, who were citizens of the

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[6] S. 711, 101st Cong., 1st Sess. (1989).

[7] S. 712, 101st Cong., 1st Sess. (1989).

[8] *But see infra* notes 229–230 and accompanying text.

[9] *But see infra* note 157.

[10] S. 712 was co-sponsored by Senator Paul Simon (D-Ill.).

[11] *See* 1 *Hearings*, *supra* note 4, at i.

[12] *Id.* at 113, 288 (statements of former Governor Romero Barceló), 143, 255 (statements of former Senator Berríos Martínez), 158, 190 (statements of Governor Hernández Colón).

[13] *Id.* at 2 (statement of Chairman Johnston).

United States would become citizens of both nations, while retaining the right to renounce either citizenship.[14]

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[14] S. 712, 101st Cong., 1st Sess., tit. III, § 5.1 (1989) (Star Print version). Unless otherwise noted, all future references to this bill correspond, not to the Star Print version, but to the version finally approved by the Senate Committee on Energy and Natural Resources on August 2, 1989. *See infra* note 224 and accompanying text.

Whether "citizenship" and "nationality" are different concepts is still a subject of debate. For a taste of the debate, see Wiessner, *Blessed Be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 448–52 (1986) (citing Koessler, *"Subject," "Citizen," "National," and "Permanent Allegiance,"* 56 YALE L.J. 58 (1946)); Silving, *Nationality in Comparative Law*, 5 AM. J. COMP. L. 410 (1956). *See also* J. DE BURLET, NATIONALITÉ DES PERSONNES PHYSIQUES ET DÉCOLONISATION 15–45 (1975); Note, *Dual Nationality, Dominant Nationality and Federal Diversity Jurisdiction*, 38 WASH. & LEE L. REV. 77, 77 n.1 (1981); Comment, *Limiting Congressional Denationalization After* Afroyim, 17 SAN DIEGO L. REV. 121, 121 n.2 (1979); Note, *A New Approach to Dual Nationality*, 8 HOUS. J. INT'L L. 305, 305–06 (1986) [hereinafter Note, *A New Approach*].

In this Article I use the term "citizenship" to refer to the relationship between the United States and persons born in Puerto Rico. I subscribe to the view that "nationality refers to the bonds an individual has with those with whom he shares a common heritage, because nations can exist without sovereignty." Note, *A New Approach*, *supra*, at 305. *See also* F. HINSLEY, NATIONALISM AND THE INTERNATIONAL LEGAL SYSTEM 22 (1973) (nationality means "that sense or sentiment of being a nation ethnically, culturally or linguistically which undoubtedly can exist before the political loyalty is nationalized"). That is precisely the case of Puerto Rico. *See* P.I.P. v. E.L.A., 109 P.R. Dec. 685, 706–11 (1980) (Rigau, J., dissenting).

This problem is not peculiar to Puerto Rico. As I have stated elsewhere, *see* Alvarez González, *El Constitucionalismo Norteamericano y su Influencia en la América Latina: Otro Comentario*, 49 REV. COL. AB. P.R. 187, 194 (1988), the parallelism between the treatment the United States has accorded to Indian tribes and to the inhabitants of its colonial enclaves cries out for a serious, detailed study. First, the United States Department of Interior has historically played a common role in dealing with both "problems," through its Bureaus of Indian Affairs and of Insular Affairs. Second, the United States has imposed citizenship similarly on both groups. Curiously, most American Indians received their unilaterally imposed citizenship seven years after the Puerto Ricans. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253. Moreover, as I shall argue in the case of Puerto Rico, *see infra* text accompanying notes 49–86, and as it has been argued concerning that of American Indians, *see* Countryman, *Justice Douglas and American Citizenship*, 15 GONZ. L. REV. 957, 963, 966 (1980), the United States citizenship of both groups does not derive directly from the fourteenth amendment, but is wholly statutory. Third, the United States has used a common double-talk and ambivalence regarding sovereignty and self-rule, without addressing the concomitant problems of these subjects under international law. Fourth, the United States has commonly "negotiated" with these two groups, making "treaties" or "in-the-nature-of-compacts," *see, e.g.*, Pub L. No. 600, § 1, 64 Stat. 319 (1950), 48 U.S.C. § 731 (1982). Concerning American Indians, see generally Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Deloria, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989); Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989). With respect to Puerto Rico, see, for example, Cabranes, *supra* note 1; Berríos Martínez, *supra* note 1; Rodríguez Orellana, *The Decolonization of Puerto Rico in Light of International Legal Precedents: A Case for Post-Independence Advocacy*, 5 B.C. THIRD WORLD L.J. 45 (1984). Fifth, the judiciary has held a common attitude—paternalistic and teeming with rationalizations—in dealing with both problems. *Compare, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (although Indian nations are nations under international law, they are not foreign nations within the meaning of article III of the United States Constitution) *with* De Lima v. Bidwell, 182 U.S. 1 (1901) (Puerto Rico

On June 1, 1989, PIP President Rubén Berríos Martínez testified before the committee.[15] During a question and answer period, he alluded to the provision for dual citizenship and justified it as the only feasible solution under United States constitutional law, regardless of the desires of his party.[16] In reply, Chairman Johnston announced that the committee had ordered and received a study on this subject by the Congressional Research Service (CRS).[17] According to the study, Chairman Johnston revealed, the United States could unilaterally revoke the American citizenship of most Puerto Ricans in the event of Puerto Rican independence.[18] Thus, a controversial legal memorandum became public.[19] It immediately created a storm throughout Puerto Rico. The study was instantly praised

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is not foreign to the United States for tariff purposes) *and* Downes v. Bidwell, 182 U.S. 244 (1901) (Puerto Rico belongs to but is not a part of the United States and thus can be treated differently for purposes of taxation). Sixth, the United States has commonly characterized federal power over these groups as "plenary." *Compare* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) *with* Harris v. Rosario, 446 U.S. 651, 651–52 (1980). Seventh, the United States has gone beyond the law in dealing with property belonging to both sets of subjects; in the case of American Indians this has produced numerous lawsuits, while in Puerto Rico it finally produced one, which was ultimately settled. *See* Commonwealth of Puerto Rico v. United States, Civ. No. 80-2079 (D.P.R.Oct. 10, 1989) (Puerto Rico donated some 500 acres of land in San Juan harbor to the United States during World War II for the establishment of a naval base subject to automatic reversion of title if the base were disestablished; the base was disestablished in 1973, but the United States refused to recognize the reversionary clause unless Puerto Rico paid millions of dollars for "improvements."). Lastly, and no less important, the United States entered the territories in the same manner: armed and uninvited. For an analysis of some of these issues from the American Indian perspective, see Howland, *U.S. Law as a Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain*, 7 B.C. THIRD WORLD L.J. 61, 72–78 (1987), and sources cited therein.

[15] *See* 1 *Hearings*, *supra* note 4, at 143, 255.

[16] 1 *Hearings*, *supra* note 4, at 180. *See also id.* at 265–66.

[17] *Id.* at 180. *See* Congressional Research Service, Discretion of Congress Respecting Citizenship Status of Puerto Rico (Mar. 9, 1989) [hereinafter CRS Memo] (on file at the HARV. J. ON LEGIS.).

[18] CRS Memo, *supra* note 17.

[19] The author of the memorandum is Johnny H. Killian, Senior Specialist on American Constitutional Law of the CRS, a branch of the Library of Congress. The study was requested, as its first sentence reveals, by Chairman Johnston himself.

In deference to Mr. Killian, Chairman Johnston's request was "for a brief discussion" of the issue. CRS Memo, *supra* note 17, at 1. The request was honored indeed. The memo has four and one-third pages.

It is striking that Chairman Johnston felt that an issue of such importance could be adequately analyzed in "a brief discussion." It is doubly striking that apparently he felt no need to share the conclusions of the memorandum with the Puerto Rican political parties upon which he imposed such a hectic pace. Chairman Johnston seemingly was aware of those conclusions almost three months before the Washington hearings started. Yet, rather than share those conclusions and permit the parties to respond to them at the hearings, he apparently preferred to make the study public in the middle of the hearings, which were being transmitted live to Puerto Rico by most of the Island's television stations.

or denounced by different sectors of Puerto Rican public opinion.[20]

The potential political impact of the memorandum went far beyond the issue of independence. If, as the memorandum ultimately concludes, the Constitution does not constrain congressional discretion in decision making with regard to the citizenship status of Puerto Ricans, this is due to the legal structure defining Puerto Rico's *present* political status of commonwealth. Thus, this fact is crucial not only for the independence option, but also for the enhanced commonwealth option, either in its present or in modified form.[21]

Under the statement of purposes of the commonwealth proposal,[22] United States citizenship under a commonwealth status is described as "irreversible." If Congress were to accept the ultimate conclusion of the CRS memorandum, then it could not in good faith accept the commonwealth proposal's characterization of United States citizenship. Furthermore, the CRS memorandum claims Congress may revoke citizenship already granted. If that were possible Congress could provide that persons born in Puerto Rico after the effective date of the amendment would not acquire United States citizenship at birth. Thus, citizenship is plainly not irreversible, according to the CRS.

The conclusions of the CRS memorandum were promptly challenged by the PIP and the Popular Democratic Party (PDP), while the New Progressive Party (NPP) praised them.[23] For their

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[20] *See infra* note 23.

[21] PIP President Berríos made this point in an exchange with Chairman Johnston on the very day when the CRS memorandum became public. 1 *Hearings, supra* note 8, at 265–66. Chairman Johnston immediately recognized that this could become a politically explosive issue. *Id.* at 266.

[22] S. 712, 101st Cong., 1st Sess., tit. IV, subpart 1 (1989) (Star Print version). *See also id.*, subpart 2.

[23] Two days before a second set of hearings was scheduled to begin in Puerto Rico, and two weeks after the CRS memorandum became public, the PIP filed the 50-page memorandum on which this Article is based. *See* Preliminary Position Paper Submitted by the Puerto Rican Independence Party to the Committee on Energy and Natural Resources of the United States Senate Concerning the March 9, 1989, Memorandum of the Congressional Research Service on the Subject of the Citizenship Status of Puerto Ricans (June 14, 1989) (on file at the HARV. J. ON LEGIS.).

The PDP, through its principal leader, Governor Hernández Colón, initially assumed that the CRS memorandum did not concern citizenship under commonwealth, but only in an independent Puerto Rico. *See RCH Defends Outcome of Hearings*, The San Juan Star, June 7, 1989, at 1, col. 1. However, two legal analyses highly critical of that memorandum were shortly thereafter filed under PDP auspices. Professor Laurence Tribe, who previously had performed work on behalf of the PDP, *see* Memorandum of Law Re: NPP Statehood Resolutions (Oct. 12, 1984) (on file at the HARV. J. ON LEGIS.) (70-page brief discussing constitutional problems raised by proposals for statehood for Puerto Rico), authored one. Letter from Prof. Tribe to Senators Johnston and McClure

part, Senators Johnston and McClure called a press conference on June 16, 1989, hours before the second set of hearings on S. 712 were to begin in San Juan. In that press conference they insisted that the CRS memorandum did not necessarily represent their position on the subject, which was still unsettled.[24]

(June 13, 1989) (challenging the conclusions of the CRS Memo) (on file at the HARV. J. ON LEGIS.) [hereinafter Tribe Letter]. Senator McClure made express reference to this letter while interrogating Acting Deputy Attorney General Edward Dennis in a July 11 hearing. 3 *Hearings, supra* note 4, at 60. The law firm of Ramírez & Ramírez, of San Juan, prepared the other analysis, a 25-page memorandum to the President of the House of Representatives of Puerto Rico. Memorandum from Ramírez & Ramírez to José R. Jarabo (June 16, 1989) (on file at the HARV. J. ON LEGIS.) [hereinafter Ramírez Memorandum]. For Mr. Jarabo's written statement before the Senate Committee based on this memorandum, see 2 *Hearings, supra* note 4, at 86.

On the other hand, prominent NPP leaders, such as former Governor Romero Barceló and Senator Oreste Ramos, voiced their agreement with the CRS memorandum, claiming that it had dealt a lethal blow to commonwealth status and had shown that only under statehood would United States citizenship be truly irrevocable. *See Cantan Victoria Pipiolos y Estadistas*, El Nuevo Día, June 4, 1989, at 8, col. 1; *Ramos "Deporta" al ELA*, El Nuevo Día, June 9, 1989, at 5, col. 1. Other pro-statehood leaders made similar statements at the public hearings held in Puerto Rico on June 16, 17, and 19, 1989. 2 *Hearings, supra* note 4, at 19–20, 30–34 (statement of former Resident Commissioner Baltasar Corrada del Río); 257 (statement of Dr. Miriam Ramírez de Ferrer); 295–97 (statement of former Secretary of Justice Blas C. Herrero, Jr.); 767 (statement of former Secretary of Education Carlos E. Chardón); 786–88 (statement of former Senator Jesús Hernández Sánchez).

[24] *See Johnston Lamenta "Mal Entendido,"* El Mundo, June 17, 1989, at 3, col. 1. The senators claimed that United States citizenship was irrevocable under commonwealth, that the CRS memorandum dealt only with the issue of citizenship under independence, and that even under independence Congress had several options. *Id.* Senator Johnston went so far as to publish a newspaper column in Spanish expanding upon these arguments. *See* Johnston, *Irrevocable la Ciudadanía*, El Mundo, June 17, 1989, at 27, col. 1. In this column he suggested again that forced election of citizenship might be the solution for the independence option. *Id.* He had put forward this idea since the very first hearing in Washington, on June 1, 1989. Expressing some doubt as to the correctness—on the question of unilateral revocation of citizenship—of the CRS memorandum he had unveiled that very day, Chairman Johnston had suggested that a mechanism for forced election of citizenship would be a valid and desirable solution to the citizenship problem in an independent Puerto Rico. 1 *Hearings, supra* note 4, at 265–66, 268–69.

During the course of the hearings in Puerto Rico, both senators continued to comment on this issue. In his opening statement, Chairman Johnston reiterated the main thrust of his newspaper column, stating that the CRS memorandum "was intended to clarify Congress's option regarding United States citizenship . . . in the case of independence," that it was "an issue which the Committee must resolve," and that forced election of citizenship "may well be" the chosen option. 2 *Hearings, supra* note 4, at 2. Toward the end of the hearings he stated even more emphatically, "[W]e have not resolved how we would treat citizenship in an independent situation." *Id.* at 835. For his part, Senator McClure prepared and placed in the record a two-page statement entitled, "Comments on Citizenship and the CRS Memo." *Id.* at 790–91. Mincing no words, this statement argues "that neither I nor the Committee has taken any position," that the purpose of the memorandum was to present the various alternatives available to Congress, that "the purpose of the federal government is [not] to constantly test the limits of its power at the expense of local government," that "there is no proposal before the Committee to alter the citizenship of any person under any of the three options," that "individual citizenship is not a subject for casual abuse," that "any suggestion that the Congress

Just one month later, Chairman Johnston formally reversed his position against dual citizenship.[25] He expressly acknowledged that the views of the PIP had affected his thinking on the subject.[26] Finally, on August 1, 1989, both senators presented an amendment in the nature of a substitute of S. 712, which recognized dual citizenship.[27]

Although the conclusions of the CRS memorandum were put in such doubt that the committee leaders withdrew their initial reliance on them, that memorandum is still part of the public record. More importantly, it both raises and fails to raise questions that merit an elaborate discussion. Moreover, simply because the committee tentatively rejected the CRS position does not mean that the position has been defeated decisively. The full Senate, as well as the House and its pertinent committees, may still consider the CRS memorandum. Additionally, many of the questionable conclusions of the memorandum were subsequently supported by Acting Deputy Attorney General Edward Dennis when he testified on behalf of the United States Department of Justice.[28]

Part I of this Article analyzes the nature of the United States citizenship of Puerto Ricans and the constitutional constraints on congressional action concerning that citizenship. Using the CRS memorandum as a basis from which to analyze these questions, this Article identifies and explores some issues that the memorandum unjustifiably ignores and considers alternative so-

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would even consider stripping persons of their citizenship is totally irresponsible, whether or not we have that power," and that he had "not rejected nor accepted [dual citizenship]." *Id.* at 790–91. In Senator McClure's opinion, the CRS memorandum had "itself been useful in that it . . . produced two memoranda [the PIP and Ramírez memoranda] . . . examining the issue and raising additional issues which require further exploration." *Id.* at 790. The last two memoranda, Senator McClure added, "also contribute to a fuller understanding of alternatives." *Id.*

[25] That this was the original position of Senator Johnston, his claims in Puerto Rico notwithstanding, clearly emerges from the transcript of the first set of hearings. Senator Johnston could not have put it more clearly than when he stated, in an exchange with PIP President Berríos, that "it is inconsistent with independence to have dual citizenship." 1 *Hearings*, *supra* note 4, at 268.

The reversal occurred on July 11, 1989, in a public hearing transmitted live to Puerto Rico, while Chairman Johnston was interrogating Acting Deputy Attorney General Dennis, who argued that dual citizenship, while constitutional, was not a desirable solution. 3 *Hearings*, *supra* note 4, at 50–51.

[26] *Id.* at 51.

[27] S. 712, 101st Cong., 1st Sess. § 311 (1989), *reprinted in* S. REP. No. 120, 101st Cong., 1st Sess. 10–11 (1989). For a description of the details of the substitute, see pages 24–29 of this Committee Report.

[28] 3 *Hearings*, *supra* note 4, at 27–29, 60.

lutions. It also considers some possible consequences were the memorandum's position to be adopted.

Part II addresses the question of whether, as a matter of constitutional law or of policy, there is any other solution besides dual citizenship to the citizenship problem which an independent Puerto Rico would present.

I. THE NATURE OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS AND CONGRESSIONAL CONSTRAINTS ON THE SUBJECT

A. *The Problem Posed and the CRS's Analysis and Conclusion*

The CRS memorandum purports to answer "whether Congress may be constitutionally constrained in decision making with regard to the citizenship status of Puerto Ricans."[29] After a very short and incomplete description of how persons born in Puerto Rico acquired their United States citizenship,[30] the memorandum develops the argument to buttress its conclusion that Congress has a free—or almost free—hand under the Constitution to deal with the citizenship of Puerto Ricans.[31] In synthesis, the CRS argument is as follows:

1. *Afroyim v. Rusk*[32] held that persons born or naturalized in the United States, pursuant to the citizenship clause of the fourteenth amendment,[33] cannot be deprived of citizenship against their will.

2. *Rogers v. Bellei*[34] held that a person who was born in Italy and who acquired United States citizenship at birth under fed-

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[29] CRS Memo, *supra* note 17, at 1.
[30] *Id.*
[31] *Id.* at 2–4.
[32] 387 U.S. 253 (1967).
[33] U.S. CONST. amend. XIV, § 1, cl. 1.
[34] 401 U.S. 815 (1971).

eral statutes that recognize principles of *jus sanguinis*,[35] could be deprived of citizenship against his will for non-compliance with conditions subsequent that such statutes imposed. This involuntary deprivation of citizenship was constitutional since Bellei was not a fourteenth amendment-first sentence citizen, but a citizen purely by virtue of a statute. *Afroyim*'s principle did not apply to Bellei, who was neither born nor naturalized *in* the United States. Bellei, the Court simply reasoned, was born *in* Italy.[36]

3. *Downes v. Bidwell*,[37] the most important of the so-called "*Insular Cases*,"[38] held that Puerto Rico was an unincorporated

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[35] There are two basic rules for the acquisition of citizenship: *jus soli* and *jus sanguinis*. *Jus soli*, the traditional common law rule, provides that the place of birth determines a person's citizenship. *Jus sanguinis*, the traditional rule of the civil law, posits that citizenship is acquired derivatively, by descent. Under this rule a child acquires the citizenship of his or her parents, wherever he or she is born. Although these were once competing rules, they now complement each other in most legal systems. *See generally* 4 C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 11.5, at 11-15 to -16 (1988).

[36] The CRS memorandum errs when it states that the Court in *Bellei* decided that the plaintiff was ". . . naturalized *outside* the United States by statute . . . ." CRS Memo, *supra* note 17, at 2 (emphasis in original). Professor Laurence Tribe makes a similar mistake in his otherwise impeccable June 13, 1989, letter to Senators Johnston and McClure challenging the conclusions of the CRS memorandum. Tribe Letter, *supra* note 23, at 2. Justice Blackmun's opinion for the Court in *Bellei* simply did not address the notion, forcefully and lawyerly espoused by Justice Black in dissent, 401 U.S. at 839–41, that a person could be naturalized at birth. The Court held that although Bellei was born a United States citizen, *id.* at 818, he was not born in the United States and was not naturalized in the United States, and thus could not claim the protection of the citizenship clause of the fourteenth amendment. *Id.* at 827. The Court did not, however, hold that Bellei was naturalized outside the United States. One can more reasonably infer that the Court silently concluded that Bellei simply was not a naturalized citizen at all, whether under the Constitution or pursuant to a statute. *See* Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1034 (1976).

Bellei, along with the definitions of naturalization contained in § 101(c) of the Nationality Act of 1940, 54 Stat. 1137, and in § 101(a)(23) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1101(a)(23) (1988), is usually cited for the proposition that "the modern concept [is] that naturalization is the acquisition of citizenship after birth." 4 C. GORDON & S. MAILMAN, *supra* note 701, § 13.2a, at 13-10 (1988). *See also* Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 891, 893 & nn.70–71 (1988) [hereinafter Note, *The Natural-Born Citizen Clause*] (recognizing that this is the current rule, while arguing forcefully against it, citing United States v. Wong Kim Ark, 169 U.S. 649 (1898), and Justice Black's dissent in *Bellei*, in the context of an interpretation of the meaning of the natural-born citizen clause).

[37] 182 U.S. 244 (1901).

[38] The Court itself penned this name to refer to a group of cases it decided on May 27, 1901. The other cases are De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); Crossman v. United States, 182 U.S. 221 (1901); and Armstrong v. United States, 182 U.S. 243 (1901). The broader issue in these cases was whether the Constitution follows the flag; whether it applies generally to conquered territory. The specific issue was whether Congress, when legislating for Puerto Rico or the Philippines, was constrained by the uniformity clause, U.S. CONST. art. I, § 8, cl. 1, pursuant to which "all Duties, Imposts

territory and, as such, was not within the constitutional definition of "the United States," as that term is used in the uniformity clause.[39]

4. The 1917 grant of United States citizenship to Puerto Ricans did not incorporate Puerto Rico into the United States, according to the Supreme Court's decision in *Balzac v. Porto Rico*.[40]

5. Although some justices have questioned the modern vitality of the *Insular Cases* in other contexts,[41] a majority of the

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and Excises shall be uniform throughout the United States." The Court held that Congress was not so constrained.

Of the three opinions of the majority bloc in *Downes*, the most important was Justice White's. Its doctrine of territorial incorporation acquired the support of a majority of the Court three years later. *See* Dorr v. United States, 195 U.S. 138 (1904). By 1922, that support would be unanimous. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922). According to this doctrine, there are two types of territories under the American flag: incorporated and unincorporated. The Constitution is wholly applicable to incorporated territories as a limitation on federal power. For unincorporated territories, only those constitutional provisions which go to the very root of congressional power are applicable, particularly those which protect fundamental or natural rights. *Downes*, 182 U.S. at 290–91, 294–95 (White, J., concurring). Incorporated territories are those to which Congress has made an express or implicit promise of future statehood. Since there was no such promise in the case of Puerto Rico, but exactly the opposite, *id.* at 339–41, the Island was an unincorporated territory to which the Constitution had only limited application.

The next series of cases from the non-contiguous territories of the United States dealt mainly with issues of individual rights. These cases, to which the label *Insular Cases* is usually applied also, required the Supreme Court to hone the contours of the doctrine of territorial incorporation and determine which individual constitutional rights are "fundamental" and, as such, applicable to unincorporated territories. *See* Hawaii v. Mankichi, 190 U.S. 197 (1903) (indictment by grand jury and trial by jury not fundamental); Dorr v. United States, 195 U.S. 138 (1904) (trial by jury not fundamental); Kepner v. United States, 195 U.S. 100 (1904) (implying that protection against double jeopardy is fundamental); Trono v. United States, 199 U.S. 521 (1905) (reiterating *Kepner*); Grafton v. United States, 206 U.S. 333 (1907) (same); Rassmussen v. United States, 197 U.S. 516 (1905) (holding that Alaska was an incorporated territory to which the right to trial by jury applied); Dowdell v. United States, 221 U.S. 325 (1911) (following *Mankichi*); Ocampo v. United States, 234 U.S. 91 (1914) (same). The only case directly related to Puerto Rico during this period, Gonzales v. Williams, 192 U.S. 1 (1904), held that even though Puerto Ricans were not citizens but "nationals" of the United States, they had the rights of free ingress to that country.

For an analysis of these cases and their implications, see Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926); Ramírez, *Los Casos Insulares*, 16 REV. JUR. U.P.R. 121 (1946); Fuster, *The Origins of the Doctrine of Territorial Incorporation and its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, 43 REV. JUR. U.P.R. 259 (1974).

[39] U.S. CONST. art. I, § 8, cl. 1.

[40] 258 U.S. 298.

[41] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 14 (1957) (Black, J., with Warren, C.J., and Douglas and Brennan, JJ., plurality opinion); Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979) (Brennan, J., with Stewart, Marshall, and Blackmun, JJ., concurring); Harris v. Rosario, 446 U.S. 651, 653–54 (1980) (Marshall, J., dissenting).

Court has consistently applied their central doctrine.[42] More importantly, the CRS correctly argues, no Supreme Court decision has questioned the incorporation doctrine. It also implicitly argues that no Supreme Court decision has questioned seriously that Puerto Rico is still an unincorporated territory of the United States.[43]

6. Therefore, the CRS memorandum concludes, "the limitation of the first sentence of section 1 of the fourteenth amendment would not restrain Congress' discretion in legislating about the citizenship status of Puerto Rico."[44] Immediately thereafter it argues that for the purportedly small number of Puerto Ricans who were born *in* the United States, in the constitutional, *Bellei* sense, other alternatives may be available to Congress, such as "dual citizenship or some treaty provision requiring some choice."[45]

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[42] To support this statement, the CRS memorandum cites Califano v. Torres, 435 U.S. 1, 4 n.6 (1978), and Torres v. Puerto Rico, 442 U.S. 465, 469–70 (1979). The memorandum should have added Harris v. Rosario, 446 U.S. 651, 651–52 (1980), and Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7–8 (1982). *See also* Alvarez González, *The Protection of Civil Rights in Puerto Rico*, 6 ARIZ. J. INT'L & COMP. L. 88, 101 (1989):

> As to the question of the *Insular Cases* doctrine, however, the Court has spoken quite clearly. That doctrine is still in force and sets the standard to be followed in determining which provisions of the federal Constitution apply to Puerto Rico.

(Footnotes omitted).

However, the Court's application of the doctrine of the *Insular Cases* to post-1970 cases concerning Puerto Rico has produced a striking double standard. While it has treated Puerto Rico as a state in applying federal fundamental rights as a constraint on the actions of the Puerto Rican government, *see infra* note 123, the Court has not been similarly preoccupied with constraining the actions of the federal government. *See infra* note 185 and sources cited therein.

[43] This argument, truly crucial to the CRS conclusion, should not have been left implicit. There is sufficient, albeit not unquestionable, support for it in recent decisions. *See* Califano v. Torres, 435 U.S. 1; Torres v. Puerto Rico, 442 U.S. at 468–70; Harris v. Rosario, 446 U.S. at 651–52. *See also* Alvarez González, *supra* note 42, at 93.

[44] CRS Memo, *supra* note 17, at 4.

[45] *Id.* at 4–5. This last statement suggests (again implicitly) that Congress has the power to divest Island-born Puerto Ricans of United States citizenship and has no obligation to permit them to elect to retain it over citizenship in an independent—or, presumably, associated—Republic of Puerto Rico.

The concept of free association is one of three internationally accepted solutions to a colonial problem, the other two being independence and integration. *See* G.A. Res. 1541 (XV), 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960). Resolution 1541 (XV), along with its companion, Resolution 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960), were treated as international law by the International Court of Justice in 1975. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12. Resolution 1541 (XV) requires that free association "be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes," that it "respect[] the individuality and cultural characteristics of the territory and its peoples," guaranteeing to such territory "the right to determine its internal constitution without outside interference," and that it retain for these peoples "the freedom to modify the status of that territory through the ex-

In general, the CRS theory is not an utterly implausible exposition of the current state of United States constitutional law. Indeed, a better developed version of such theory has been under discussion in Puerto Rican law schools for decades.[46] But the theory is certainly not unassailable; indeed, stronger arguments can be marshaled for the opposite conclusion. Moreover, as formulated by the CRS, the theory is incomplete. It ignores crucial threshold questions and fails to consider what its practical consequences might be.

The following questions must be addressed before any reasonable conclusion can be reached:

First, do all Puerto Rican-born United States citizens possess the same type of citizenship, whether constitutional or legislative? This requires a consideration of the significance of the Nationality Act of 1940[47] and the Immigration and Naturalization Act of 1952.[48]

Second, what is the relevance of *Bellei* to naturalized citizens? Are persons naturalized in judicial proceedings before the United States District Court for the District of Puerto Rico in a different constitutional posture than persons born in Puerto Rico? Does this require a resolution of the question whether that court is legislative or constitutional in nature? Were Puerto Ricans who acquired United States citizenship collectively in 1917 naturalized in Puerto Rico or in the District of Columbia, where the statute was enacted? If the latter, are these citizens in a stronger constitutional position than those who acquired citizenship at birth in Puerto Rico?

Third, must the term "United States" have the same meaning throughout the Constitution? For citizenship purposes, is birth in Italy constitutionally indistinguishable from birth in Puerto Rico?

Fourth, may Congress, pursuant to section 5 of the fourteenth amendment, interpret the term "United States" in that amendment to include persons born in Puerto Rico, and thus confer

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pression of their will by democratic means and through constitutional processes." G.A. Res. 1541 (XV), *supra* at 30–31. The three main tenets of Resolution 1541 (XV) are thus the principles of sovereignty, internal autonomy, and revocability.

[46] For a rejection of this theory by a Puerto Rican commentator, see Rodríguez Suárez, *Congress Giveth U.S. Citizenship unto Puerto Ricans; Can Congress Take It Away?*, 55 REV. JUR. U.P.R. 627 (1986), *also published in* 48 REV. COL. AB. P.R. 37 (1987).

[47] Pub. L. No. 853, ch. 876, 54 Stat. 1137 (1940).

[48] Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

upon them fourteenth amendment-first sentence citizenship? Did Congress intend to do this?

Fifth, even if *Bellei* were understood to apply fully to Puerto Rico, is there another constitutional argument available, beyond that grounded on the citizenship clause of the fourteenth amendment? Might the fact that Bellei's citizenship at birth was conferred subject to conditions, while that of Puerto Ricans was not, serve to buttress a *constitutional* distinction under, for example, the due process clause of the fifth amendment?

Sixth, how confidently may one predict what the Supreme Court of the United States will decide concerning these issues? What may be the consequences of an erroneous prediction? Is it likely that the Court (or any federal court) will hear such a case, or might it avoid the issue by declaring it a non-justiciable political question? Might such a case arise before any divestiture or compulsory election of citizenship takes place?

I shall discuss each of these queries only to emphasize that, both separately and in the aggregate, they present serious issues that must be considered before reaching a sensible conclusion. Pandora's box having been opened, one cannot help but examine its contents.

B. *Brief Historical Survey of the United States Citizenship of Puerto Ricans*

Any consideration of the nature of the United States citizenship of Puerto Rican residents requires a brief recital of the political events which preceded its concession.[49] It also requires a consideration of congressional actions following the 1917 collective naturalization.

The Treaty of Paris of 1898,[50] by which Spain ceded Puerto Rico to the United States, provided in article IX: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[51] After almost two years of military government in Puerto Rico, under three successive military governors,[52]

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[49] For a comprehensive account in English, see J. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE (1979). *See also* Alvarez González, *supra* note 42, at 89–95.

[50] 30 Stat. 1754 (1898).

[51] *Id.* at 1759.

[52] Concerning this period, see E. BERBUSSE, THE UNITED STATES IN PUERTO RICO: 1898–1900 at 77–100 (1966).

Congress finally legislated to provide Puerto Rico with a civil government. The Foraker Act of April 12, 1900,[53] while creating a colonial government for Puerto Rico,[54] did not contain any provisions protecting the civil rights of Puerto Ricans.[55] More importantly for this discussion, the final version of the Foraker Act refused to confer United States citizenship on the inhabitants of Puerto Rico,[56] who were declared "citizens of Porto Rico."[57]

Section 5 of the Jones Act of 1917[58] collectively conferred United States citizenship on all "citizens of Porto Rico" as that term was defined in section 7 of the Foraker Act.[59] All such persons were granted the right to reject, within six months, the

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[53] Ch. 191, 31 Stat. 77 (1900) (codified as amended 48 U.S.C. §§ 733, 736, 738–40, 744, 866 (1982)).

[54] The governor, the judges of the Supreme Court, and the members of the Executive Council, the upper house of the legislature, which was a strange body that merged both legislative and executive functions, were appointed by the President of the United States with the advice and consent of the Senate. Only the lower house of the legislature, the House of Delegates, was an elected body. Its real power *vis-à-vis* the Executive Council and the governor was very slight. Alvarez González, *supra* note 42, at 91 n.12.

[55] Contrast that to the bill of rights in the similarly colonial Philippine Organic Act of 1902. Pub. L. No. 239, ch. 1369, 32 Stat. 691 (1902).

[56] In the words of Justice White, in his concurring opinion in Downes v. Bidwell, 182 U.S. 244 (1901),

> [A]s the act was reported from the committee it contained a provision conferring citizenship upon the inhabitants of Porto Rico, and this was stricken out in the Senate. The argument, therefore, can only be that rights were conferred, which, after considerations, it was determined should not be granted.

Id. at 341.

[57] 31 Stat. 77, 79, § 7 (1900), (48 U.S.C. § 733 (1982)). For an analysis of the ambiguity, limitations, and problems of this citizenship, see Capó Rodríguez, *The Relations Between the United States and Porto Rico*, 19 AM. J. INT'L L. 483, 510 (1919). *Compare* Gonzales v. Williams, 192 U.S. 1, 13 (1904) ("citizens of Porto Rico" are "nationals" of the United States, owe it allegiance, and have the right to travel between Puerto Rico and the United States with no immigration barriers) *with* Balzac v. Porto Rico, 258 U.S. 298, 308 (1922) (although "citizens of Porto Rico" were entitled "to the protection of their new sovereign . . . , it was an anomalous status"; United States citizenship gave them the right to vote upon resettling in a state of the Union).

The Foraker Act, moreover, changed the Island's name to "Porto Rico," a situation which remained unaltered until the approval of the Act of May 17, 1932, 47 Stat. 158.

[58] 39 Stat. 951, 953 (1917).

[59] 31 Stat. 77, 79 (1900). Whether the grant of United States citizenship to Puerto Ricans was a response to their yearning for it or was instead a congressional imposition has been always a subject of intense debate. On different occasions the Puerto Rican legislature and the Island's political parties asked for that citizenship. However, both the House of Delegates and the Puerto Rican Resident Commissioner to the United States, Luis Muñoz Rivera, ultimately opposed it, deeming that only second-class citizenship was offered. *See* Alvarez González, *supra* note 42, at 94 n.32. For a sampling of the different positions on the subject, see 2 J. TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 1–88, 109–10 (1981); J. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 85–93 (1985); J. CABRANES, *supra* note 49; Serrano Geyls, *El Misterio de la Ciudadanía*, 40 REV. COL. AB. P.R. 437 (1979).

citizenship thus conferred and remain "citizens of Porto Rico." Section 5 of the Jones Act also gave persons born in Puerto Rico of an alien parent[60] the right to claim affirmatively United States citizenship before the United States District Court for the District of Puerto Rico.[61]

In the words of one of the principal treatises on immigration and citizenship law: "The 1917 Act omitted to make any provision for persons thereafter born in Puerto Rico."[62] Thus, since the statute did not make *jus soli* the rule for the acquisition of United States citizenship by persons born in Puerto Rico, those born after 1917 on the Island could only acquire such citizenship derivatively under the statutes then in effect.[63] And persons born in Puerto Rico after 1917 to alien parents had to go through a process of judicial naturalization in order to become United States citizens.[64]

Subsequent congressional enactments on the subject were largely housekeeping measures designed to remedy some of these problems. Thus, in 1927 Congress gave all persons who had not claimed United States citizenship under the Jones Act of 1917, or who had affirmatively rejected it, one year in which to claim it.[65] Similarly, in 1934 Congress declared that "[a]ll persons born in Puerto Rico on or after April 11, 1899 (whether before or *after the effective date of this Act*) and not citizens, subjects, or nationals of any foreign power, are hereby declared to be citizens of the United States . . . ."[66] Lastly, in 1938 Congress again granted to those persons who previously had not claimed United States citizenship the opportunity to do so.[67]

Most residents of Puerto Rico who are American citizens trace their citizenship to section 302 of the Immigration and Nationality Act of 1952.[68] It provides:

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[60] This term included those Spanish citizens born in Spain who elected to preserve their citizenship and to remain in Puerto Rico, pursuant to article IX of the Treaty of Paris, 30 Stat. 1754, 1759 (1899).

[61] 39 Stat. 951, 953 (1917).

[62] 4 C. GORDON & S. MAILMAN, *supra* note 701, § 12.10, at 12-33.

[63] *See* Rev. Stat. § 2172 (2d ed. 1878). For a description of the distinction between *jus soli* and *jus sanguinis* see *supra* note 701.

[64] 4 C. GORDON & S. MAILMAN, *supra* note 701, § 12.10, at 12-33.

[65] Act of Mar. 4, 1927, Pub. L. No. 797, 44 Stat. 1418 (1927).

[66] Act of June 27, 1934, Pub. L. No. 477, 48 Stat. 1245 (1934) (emphasis added). The emphasized language is important because it actually made persons born in Puerto Rico after its effective date citizens of the United States at birth.

[67] Act of May 16, 1938, Pub. L. No. 521, 52 Stat. 377 (1938).

[68] 66 Stat. 236 (1952), 8 U.S.C. § 1402 (1988).

> All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.[69]

However, as recognized in the House report to this 1952 Act,[70] section 302 merely reproduced the text of sections 201(a) and 202 of the Nationality Act of 1940.[71] This 1940 statute, which became effective on January 13, 1941, defined "United States" as "the continental United States, Alaska, Hawaii, *Puerto Rico*, and the Virgin Islands of the United States."[72] It thereafter provided that "a person born in the United States, and subject to the jurisdiction thereof..." was a citizen of the United States at birth.[73]

Although the 1940 Act was the first in which Congress actually said that persons thereafter born in Puerto Rico were American citizens at birth, most persons born in Puerto Rico after 1917 did acquire that citizenship at birth, derivatively until 1934, and directly thereafter.[74] Nevertheless, the purpose of the 1940 Act, with respect to Puerto Rico, was "to eliminate much of the previous confusion and uncertainty regarding the nationality status of persons born and residing in Puerto Rico."[75] The bill's proponents did not contemplate any remarkable development in the juridical nature of that citizenship, only the elimination of legal complexities of Congress's own making.[76]

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[69] *Id.*

[70] H.R. REP. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1734.

[71] 54 Stat. 1137 (1940).

[72] 54 Stat. 1137, § 101(d) (1940) (emphasis added).

[73] 54 Stat. 1137, 1138, § 201(a) (1940). This explains the current language of the last sentence of 8 U.S.C. section 1402, quoted in the text above. The first sentence of section 1402 reproduces *ad verbatim* section 202 of the Nationality Act of 1940. 54 Stat. 1137, 1139 (1940).

[74] *See supra* note 66 and accompanying text.

[75] 4 C. GORDON & S. MAILMAN, *supra* note 701, § 12.10, at 12-34.

[76] H.R. 9890, 76th Cong., 3d Sess., which became the Nationality Act of 1940, was characterized by the ranking minority member of the House Committee on Immigration and Naturalization as "a clarification or simplification of the present naturalization laws." 86 CONG. REC. 11,942 (1940). Other legislators stated that the subject was "very much confused and needed codification," *id.* (views of Rep. Jenkins (R-Ohio)); that its purpose was "to revise and codify the nationality laws of the United States . . . in a compre-

An important piece of evidence in the legislative record of the 1940 Act suggests that the Executive Branch and the Congress understood, even at that early date, that the citizenship at birth granted to Puerto Ricans was of a different constitutional nature than that attaching to persons born in the states or in incorporated territories. The 1940 Act was preceded by a five-year study requested by the President, pursuant to an Executive Order of April 25, 1933, from a committee composed of the Secretary of State, the Attorney General, and the Secretary of Labor.[77] In its letter to the President of June 1, 1938, submitting its report, this committee stated:

> Since the citizenship status of persons born in the United States and the incorporated territories is determined by the fourteenth amendment to the Constitution, the proposed changes in the law governing acquisition of nationality at birth relate to birth in the unincorporated territories and birth in foreign countries to parents one or both of whom have American nationality. Cases of the latter kind are especially difficult of solution, in view of the necessity of avoiding discrimination between the sexes, and of the fact that, under the laws of many foreign countries, the nationality thereof is acquired through birth in their territories.[78]

It seems that the political branches understood that the United States citizenship of persons born in Puerto Rico was a legislated concession, not a constitutionally derived right. During the de-

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hensive nationality code . . . , to put into systematic order a consolidation and a restatement of the laws of citizenship, naturalization, and expatriation." *Id.* at 11,947 (views of Rep. Rees (R-Kan.), the principal author of the bill).

The House report on the bill, H.R. REP. NO. 2396, 76th Cong., 3d Sess. 1, contains a mere two pages of editorial comments, followed by a side-by-side comparison of the bill with the law then in effect. It states under the heading, "Purpose of the Bill":

> The primary purpose of the proposed nationality code is to bring together in orderly and systematic form a consolidation or restatement of the laws of the United States upon citizenship, naturalization, and expatriation.
>
> It is also the purpose of the proposed code to amend the present law with a view of making it more workable and to strengthen it where experience has found it to be weak and unenforceable.
>
> The proposed nationality code would repeal obsolete, conflicting, unnecessary, and undesirable problems and would permit more prompt, expeditious, economic enforcement and satisfactory administration of the laws upon these subjects.

Id.

On the other hand, the bill's formal proponent, Representative Dickstein (D-N.Y.), Chairman of the House Committee on Immigration and Naturalization, stated that "this bill would put an end to dual citizenship." 86 CONG. REC. 11,944 (1940). As Part II of this Article will show, this last purpose was not accomplished.

[77] *See* 86 CONG. REC. 11,943 (1940) (remarks of Rep. Dickstein).

[78] *Id.* at 11,945.

bate on H.R. 9890, an interesting, though confusing exchange took place. Representative Jenkins asked the bill's author, Representative Rees, a series of questions raised in a letter sent by a group which called itself "the American Coalition." One of these concerned the inclusion of Puerto Rico and the Virgin Islands within the definition of "United States" in the bill. It was argued that this would confer statehood on Puerto Rico. Representative Rees responded:

> ... We are in no wise making a State out of Puerto Rico. The term "State" is used only insofar as the question of naturalization is concerned. That is all there is to this. It is used only insofar as the naturalization laws are concerned. The citizens of Puerto Rico are citizens of the United States with the exception of a certain few there .... It just seems to us that if Puerto Rico is a part of the United States then the people born in Puerto Rico ought to be citizens of the United States. This bill places them in the position of becoming citizens of the United States.
>
> ...
>
> No; if it conferred statehood I would certainly object to it. I call the attention of the gentleman to the fact that it can be easily explained because they are not [sic] citizens of unincorporated States.[79]

The exchange continued:

> Mr. JENKINS of Ohio. I appreciate that what we do in this bill could not confer statehood, but it would complicate the thing if we do something here that would give citizens of that territory full recognition, the same as we would citizens of the State of New York.
>
> Mr. REES of Kansas. I agree with the gentleman that we do not want to confer statehood on Puerto Rico, and we do not do it in this bill. Let me call the attention of the gentleman to the fact that right now our courts down there naturalize citizens, and they have been doing it all the time.[80]

The above exchange is not a model of clarity, but at least it suggests again that Congress believed that United States citizenship for persons born in Puerto Rico was a matter of legislative decision and not of constitutional compulsion.[81]

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[79] 86 CONG. REC. 11,963–64 (1940).

[80] *Id.* at 11,964.

[81] This is also the position taken by the United States Department of Justice in its written presentation of July 24, 1989, before the Senate Committee on Energy and Natural Resources. *See* 3 *Hearings*, *supra* note 4, at 44–45.

The debate quoted above also suggests that Congress did not purport to act pursuant to its powers under section 5 of the fourteenth amendment to "enforce, by appropriate legislation, the provisions" of the citizenship clause of section 1 of that amendment, irrespective of the further issue of whether it constitutionally could reinterpret the meaning of "United States" in that clause.[82] In his June 13, 1989 letter to the Committee, Professor Laurence Tribe suggested that Congress indeed acted pursuant to section 5 in 1940:

> Puerto Rico, by Congress' own determination is "in" the United States for purposes of the fourteenth amendment. In the Immigration and Nationality Act ("INA"), Congress expressly included Puerto Rico in its geographic definition of the "United States."[83]

This conclusion does not necessarily follow. As the quoted language indicates, Professor Tribe bases his opinion exclusively on the statutory definition of "United States" in the 1940 Act, and does not seem to have explored the Act's legislative history. From the statutory language alone, it is impossible to ascertain whether Congress in 1940 consciously intended to broaden the meaning of the fourteenth amendment and to plunge into a constitutional haze.[84] Professor Tribe's reasoning amounts to saying that every time Congress includes Puerto Rico within a *statutory* definition of "United States," it does so with the intent of reinterpreting the *constitutional* meaning of that term. But it is not reasonable to impute such intent to Congress, without a close examination of the legislative record of each such measure.[85]

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[82] *See infra* note 110 and accompanying text.

[83] Tribe Letter, *supra* note 23, at 2–3.

[84] The Department of Justice also disagrees, albeit unexplainedly, with this aspect of Professor Tribe's argument. *See* 3 *Hearings, supra* note 4, at 60 (testimony of Acting Deputy Attorney General Dennis).

[85] The Constitution refers to "the United States" in places other than the fourteenth amendment. The uniformity clause, art. I, § 8, cl. 1, is one example. Downes v. Bidwell, 182 U.S. 244 (1901), held that the uniformity clause does not constrain congressional legislation concerning Puerto Rico because the Island is not comprised within "the United States." Therefore, Congress may include or exclude Puerto Rico from revenue measures as it sees fit. If Congress decided to define "the United States" in one such measure to include Puerto Rico, surely it would not be reasonable to conclude that "Puerto Rico, by Congress's own determination is 'in' the United States for purposes of the [uniformity clause]." Tribe Letter, *supra* note 23, at 2–3. One would have to find ample support in the legislative record before concluding that Congress has decided to do away with the *Insular Cases*.

It is against this historical background that one should confront the issues raised by the CRS memorandum. In sum, the United States citizenship of Island-born Puerto Ricans does not derive directly from the citizenship clause of the fourteenth amendment, but from various federal statutes.[86] As long as

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[86] *See* Comment, *Involuntary Expatriation:* Rogers v. Bellei—*A Chink in the Armor of* Affroyim [sic], 21 AM. U.L. REV. 184, 201 (1971). For a similar conclusion concerning the citizenship of American Indians, see Countryman, *supra* note 14, at 963, 966.

The Ramírez Memorandum, *supra* note 23, reaches a different conclusion. Central to that memorandum is the argument that Rogers v. Bellei, 401 U.S. 815 (1971), *see supra* notes 34–36 and accompanying text, cannot apply to the situation of American citizens born in Puerto Rico because that case dealt with citizenship acquired *jus sanguinis*, a subject which, the memorandum argues, is wholly outside the coverage of the citizenship clause. *Id.* at 16–17, 19. I disagree.

The *Bellei* Court made no such clear-cut distinction. Its simple reasoning was that Bellei was neither born nor naturalized *in* the United States. 401 U.S. at 827. As a matter of fact, the *Bellei* Court recognized twice that the plaintiff in Schneider v. Rusk, 377 U.S. 163 (1964) (holding that discrimination against naturalized citizens violates the equal protection component of the due process clause of the fifth amendment), was a fourteenth amendment-first sentence citizen. *See* 401 U.S. at 822, 827. Yet, as the *Bellei* Court also recognized, Mrs. Schneider acquired her citizenship derivatively, under principles of *jus sanguinis*, upon her mother's naturalization. 401 U.S. at 822.

The *Bellei* question, therefore, squarely turned on whether the plaintiff therein was born in the United States, as that term is used in the fourteenth amendment, and not necessarily on the *jus soli-jus sanguinis* distinction. While it is true that a person who acquires United States citizenship under principles of *jus sanguinis* usually will have been born outside of the United States, *Schneider* proves that some *jus sanguinis* citizens are within the purview of the fourteenth amendment. Conversely, while a person who acquires citizenship under principles of *jus soli* usually will have been born in the constitutional "United States," and thus will be a fourteenth amendment citizen, the *Insular Cases* show that United States sovereignty over territory is broader than the uniformity clause definition of "United States." The fact that Congress, in its discretion, has chosen to bestow citizenship on those born in certain territories over which the United States exercises sovereignty, does not necessarily make such persons fourteenth amendment citizens.

It is worthwhile to recall that some persons are born in the constitutional United States, and yet do not acquire United States citizenship at birth. In United States v. Wong Kim Ark, 169 U.S. 649 (1898), the Supreme Court held that, due to the fourteenth amendment requirement that citizens be subject to the jurisdiction of the United States, the following do not acquire United States citizenship at birth: "[C]hildren of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and . . . children of members of Indian tribes owing direct allegiance to their several tribes." *Id.* at 693. The *Wong Kim Ark* definition, however, does not address, nor could it have, the case of persons born in Puerto Rico. The opinion in that case was delivered on March 28, 1898, almost four months before the United States invaded Puerto Rico and three years before the decision in the *Insular Cases*. It does address the situation of Indians, and excludes them from the reach of the citizenship clause. The subsequent congressional decision to confer United States citizenship upon them has not, according to one view, changed anything. *See* Countryman, *supra* note 14. I submit that the citizenship status of Puerto Ricans who are born United States citizens cannot be superior to that of American Indians.

That is wholly apart from another constitutional parallelism between Puerto Ricans and American Indians: the use in the fourteenth amendment apportionment clause of the phrase "excluding Indians not taxed." U.S. CONST. amend. XIV, § 2. If non-taxation of a class of persons is a decisive criterion for fourteenth amendment purposes, as it seems to have been concerning American Indians, the general exemption of Puerto

Puerto Rico is not within the definition of "United States" in that clause, as the *Insular Cases* certainly suggest it is not, a constitutional issue under *that* clause should not arise in the event of unilateral congressional action. That, of course, does not rule out the possibility of a conflict with other constitutional provisions, an issue the CRS memorandum does not address.

C. *The Citizenship Status of Naturalized Citizens*

The CRS memorandum does not consider whether the *Bellei* holding is also applicable to naturalized citizens. Other than persons who were naturalized in judicial proceedings in one of the fifty states or the District of Columbia, and are thus unquestionably fourteenth amendment-first sentence citizens, two groups of naturalized citizens remain to be considered. The first group is composed of persons naturalized in the United States District Court for the District of Puerto Rico. The second group is composed of persons still living who were part of the class collectively naturalized in 1917 pursuant to section 5 of the Jones Act.[87]

1. Persons Naturalized in the Federal District Court for the District of Puerto Rico

If it is accepted that the principle of *Afroyim v. Rusk*[88] is not applicable to persons born in Puerto Rico,[89] the same reasoning implies that United States citizens naturalized in Puerto Rico also are not fourteenth amendment-first sentence citizens. If persons born *in* Puerto Rico are unprotected by the citizenship

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Rican residents from the internal revenue laws, *see* 48 U.S.C. § 734 (1982), would militate against interpreting the citizenship clause as applying to Puerto Rico. Indeed, the Supreme Court has considered Puerto Rico's exclusion from federal income taxes highly relevant in other contexts, stressing this fact to buttress its conclusion that federal discriminatory treatment of Puerto Rican residents in welfare programs does not violate the equal protection component of fifth amendment due process. Califano v. Torres, 435 U.S 1, 3 n.4 (1978); Harris v. Rosario, 446 U.S. 651, 652 (1980). *See also infra* note 108.

[87] 39 Stat. 951, 953 (1917).

[88] 387 U.S. 253 (1967) (persons born or naturalized in the United States, pursuant to the citizenship clause of the fourteenth amendment, cannot be deprived of citizenship against their will).

[89] This is the argument made in the CRS memorandum. *See supra* notes 32–45 and accompanying text.

clause, there is no reason for a different holding concerning persons naturalized *in* Puerto Rico.

The fact that naturalization takes place pursuant to federal statutes cannot make a constitutional difference since it is precisely pursuant to federal statutes that persons born in Puerto Rico acquire United States citizenship at birth. Moreover, if discrimination against naturalized citizens is constitutionally impermissible,[90] it is logical that discrimination against citizens at birth is likewise invalid under equal protection principles. Finally, whether the federal court in Puerto Rico is a "constitutional" or a "legislative" court[91] is completely irrelevant, since *Bellei*'s holding seems premised exclusively on geographical considerations. The crucial criterion under *Bellei* is whether a person was born or naturalized *in* the constitutional United States. Therefore, it makes no difference whether Congress entrusts the naturalization process, as it probably could,[92] to "legislative" or to "constitutional" courts in the fifty states, the District of Columbia, and the territories. The *Bellei* holding, as interpreted by the CRS, would require the conclusion that a citizen naturalized in a "legislative" court in Florida was naturalized *in* the United States, whereas a citizen naturalized in a federal court in Puerto Rico was not, even if such court were established under article III.

A contrary argument was made, however, by Justice Black in dissent in *Bellei*. There he argued that naturalization pursuant

[90] Schneider v. Rusk, 377 U.S. 163 (1964).

[91] Under either of the two theories developed by the Supreme Court to decide this issue, the United States District Court for the District of Puerto Rico is an article III court. First, its jurisdiction is exclusively limited to article III matters. *Compare Ex parte* Bakelite Corp., 279 U.S. 438 (1929), *with* Act of June 2, 1970, Pub. L. No. 91-272, 1970 U.S. CODE CONG. & ADMIN. NEWS (84 Stat.) 294, *and* Long v. Continental Casualty Co., 323 F. Supp. 1158 (D.P.R. 1970). Second, its judges are tenured and endowed with all other article III protections. *Compare* Glidden Co. v. Zdanok, 370 U.S. 530 (1962), *with* Act of Sept. 12, 1966, Pub. L. No. 89-571, 1966 U.S. CODE CONG. & ADMIN. NEWS (80 Stat.) 764 (amending sections of 28 U.S.C. § 134(a)(1982)). *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 4107, at 455 (1988).

[92] *See* Crowell v. Benson, 285 U.S. 22, 50–51 (1932) (developing public rights-private rights distinction, whereby public rights litigation may be entrusted to non-article III courts); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–70 (1982) (Brennan, J., plurality opinion) (reiterates *Crowell*). *But see* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585–86 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851, 853–54 (1986). These last two cases, while rejecting claims of right to access to an initial article III forum, also suggest that the private-public rights distinction is not decisive, but that pragmatic considerations are the key criteria.

As a matter of fact, Congress has extended to state courts jurisdiction to naturalize persons. *See* 8 U.S.C. § 1421(a) (1988).

to federal statutes is naturalization *in* the United States, wherever the citizen may be found.[93] He stated that the original draft of the citizenship clause referred to those "born in the United States or *naturalized by the laws thereof*,"[94] and concluded that the modification of the original was of a stylistic, not substantive nature.[95] Although Justice Black used this argument to buttress his conclusion that Bellei was a naturalized citizen, one need not conclude that the majority considered and rejected the whole argument. The majority opinion can be interpreted to state that Bellei simply was not a naturalized citizen at all, since he was *born* a United States citizen.[96] Under this reading, *Bellei* did not address citizenship by naturalization.

On balance, this argument would not likely be accepted. Justice Black certainly inferred its tacit rejection by the *Bellei* majority.[97] The majority opinion in that case seems considerably more concerned with geography than with legal niceties. Thus, if one assumes that *Bellei* is applicable to persons born in Puerto Rico, one should conclude also that its doctrine is applicable to persons naturalized in Puerto Rico.

2. Citizens Collectively Naturalized in 1917

A now relatively small group of Puerto Ricans received their United States citizenship by collective naturalization in 1917.[98] If Justices Black and Brennan's position regarding the proper interpretation of the meaning of "naturalized in the United States" were to prevail, this group's citizenship would also be of the fourteenth amendment-first sentence type. However, a rejection of that argument would not end the matter. Even if it is agreed that the *Bellei* holding is based on geographical factors,

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[93] 401 U.S. 815, 843 (1971). This also was the sole argument in Justice Brennan's short dissent. *Id.* at 845. The Ramírez Memorandum, *supra* note 23, at 19–20, relies on these dissents to buttress its argument that persons born in Puerto Rico are naturalized citizens under the citizenship clause. For the reasons stated in note 36, *supra*, I do not accept this argument either.

[94] 401 U.S. at 843 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866)) (emphasis in original).

[95] 401 U.S. at 843.

[96] *See supra* note 36.

[97] *See* 401 U.S. at 842–43: "The majority opinion appears at times to rely on the argument that Bellei, while he *concededly* might have been a naturalized citizen, was not naturalized 'in the United States.'" (Emphasis added). I fail to see, however, where in the majority opinion in *Bellei* such concession is to be found.

[98] Jones Act of 1917, 39 Stat. 953 (1917) (codified as amended at 8 U.S.C. § 1402 (1988)).

affecting both citizenship by birth and by naturalization, the question then arises whether the government naturalized this group of citizens in Puerto Rico or in the District of Columbia.

It could be argued that the critical factor under *Bellei*, regarding naturalization, should not be the locus of the citizen when naturalization takes place, but the locus of the governmental institution that confers such citizenship. Under this view, naturalization of persons by judicial proceeding would occur at the location of the court that confers citizenship.[99] Similarly, in the case of persons who have been naturalized directly by statute, the place of naturalization would be the District of Columbia, the site of Congress. This argument would lead to the conclusion that Puerto Ricans who were naturalized in 1917 are protected by the citizenship clause even if all other Puerto Rican-born persons are held not to be so protected.

Perhaps this argument is counterintuitive, but it certainly is not far-fetched. Whatever one's final conclusion, it is important to address this question.

D. *The Constitutional Definition of "United States"*

The CRS memorandum tacitly assumes that the definition of "United States" propounded in the *Insular Cases* for the uniformity clause also controls the interpretation of the citizenship clause of the fourteenth amendment. In other words, the CRS apparently believes that the term "United States" has a single, uniform meaning throughout the Constitution. That conclusion ultimately may be correct, but it is not so self-apparent that it may be accepted without any discussion.

The term "United States" could have different meanings depending on the context in which it is used. The uniformity clause is concerned with a strictly domestic matter, taxation. Feder-

[99] Although normally the location of the court and the residence of the applicant is the same, this need not always be the case. The petition for naturalization must be filed in the office of the clerk of a naturalization court with jurisdiction over the area in which the petitioner resides. Immigration and Naturalization Act of 1952 § 310(a), 8 U.S.C. § 1421(a) (1988). But an applicant may change his or her residence before the naturalization process is complete. If this occurs, the applicant *may, but is not compelled to,* request that the petition be transferred to the naturalization court exercising jurisdiction over his or her new place of residence. *Id.* § 335(i)(1), 8 U.S.C. § 1446(f)(1) (1988). The court in which the petition was filed has discretion over the transfer, subject to the consent of both the Attorney General and the transferee court. *Id.* Thus, a person may be naturalized by a court in, for example, New York, while that person resides in Puerto Rico.

alism presupposes that states exist on equal standing before the national government, and that government has an obligation to treat such states as equals.[100] That concern is not present where other, non-state entities are involved.[101] Citizenship poses an entirely different problem. It is a concept with both domestic and international repercussions, but "its significance is more international than domestic, and domestic as a reflection of international."[102] It is a concept which involves a reciprocal relationship between an individual and a nation, irrespective of where within that nation the individual may be found. The relationship is reciprocal because it involves a *quid pro quo*, whereby the individual promises allegiance, while the nation promises protection, particularly from other sovereign states.[103]

Curiously, the above distinction between the international and the domestic also reverberates in the *Insular Cases* themselves. In *Downes v. Bidwell*,[104] the two principal opinions of the majority bloc at times seem at pains to limit their holding to an interpretation of the meaning of "United States" in the uniformity clause.[105] In *De Lima v. Bidwell*,[106] decided on the same day

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[100] *See* Coyle v. Smith, 221 U.S. 559, 565 (1911) (equal footing doctrine); United States v. Texas, 339 U.S. 707, 717 (1950) (same). *But see* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) (limiting the requirement of equality to the process of admission of states); United States v. Ptasynski, 462 U.S. 74 (1983) (sustaining, against a challenge based on the uniformity clause, a federal tax that exempted most Alaskan oil).

[101] The Supreme Court consistently has avoided holding that the word "States," wherever used in the Constitution, may refer to Puerto Rico. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974); Examining Bd. v. Flores de Otero, 426 U.S. 572, 600–01 (1976); Torres v. Puerto Rico, 442 U.S. 465, 471 (1979); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7 n.6 (1982); Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 331 n.1 (1986). *Cf.* Puerto Rico v. Branstad, 483 U.S. 219, 229–30 (1987) (it is unnecessary to decide whether the extradition clause, art. IV, § 2, cl. 2, which literally only mentions "States," is applicable to Puerto Rico, since the statute enacted to enforce it, 18 U.S.C. § 3182 (1988), is also applicable to "Territories").

[102] Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 382 (1973).

[103] *See generally* G. HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW § 220, at 6–7 (1942); L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 293 (8th ed. 1955).

[104] 182 U.S. 244 (1901).

[105] 182 U.S. at 248–49, 287 (Brown, J.); *id.* at 341–42 (White, J.).

It should be acknowledged, however, that Justice Brown's separate opinion, for himself only, at one point suggested that the term "United States" in the citizenship clause encompassed only the states and those other jurisdictions to which Congress had affirmatively extended the Constitution. *Id.* at 251. Justice White's opinion, on the other hand, did not consider this question since one of the central characteristics of the incorporation doctrine therein proposed was that the grant of citizenship to the people of a territory would have the effect of implicitly incorporating such territory to the United States. *Id.* at 333, 340–41. The Supreme Court ultimately rejected that aspect of the incorporation doctrine in Balzac v. Porto Rico, 258 U.S. 298, 307–11 (1922).

[106] 182 U.S. 1 (1901).

as *Downes*, the Court held that upon ratification of the Treaty of Paris, Puerto Rico ceased to be a foreign country with respect to the United States. In his *Downes* opinion, Justice White attempted to restate the holdings of both cases:

> The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession . . . .[107]

All of the above considerations suggest that the *Downes* definition of "United States" is not necessarily applicable to the citizenship clause. The fact that citizenship is a concept closely connected to individual rights,[108] and one more relevant to the international, rather than to the domestic, realm, could lead the Supreme Court to hold that there is a constitutional difference between being born in Italy and being born in Puerto Rico.

The Court could hold that the term "United States" in the uniformity clause refers exlusively to the fifty states and the District of Columbia,[109] while the same term in the citizenship clause means any parcel of land over which the federal government exercises sovereignty. The United States obviously does not exercise sovereignty over Italy. It is equally obvious, however, that the United States does exercise sovereignty over Puerto Rico.

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[107] *Downes*, 182 U.S at 341–42.

[108] *See* Note, *A New Approach*, *supra* note 14, at 321–25 (viewing dual nationality as a human right).

The Ramírez Memorandum, *supra* note 23, argues that the citizenship clause "was intended to constitutionalize the grant of citizenship provided in the Civil Rights Act of 1866." *Id.* at 20. It goes on to argue that since the legislative history of that Act suggests that it was intended to apply both to states and territories, the reference to "United States" in the citizenship clause must be given the same meaning. *Id.* at 21. Although the argument is powerful, it fails to acknowledge that in 1866 the distinction between incorporated and unincorporated territories did not exist, nor were there any territories at that time which would fit the subsequent definition of "unincorporated," as developed in *Downes*, 182 U.S. 244. It is thus not possible to impute to the Framers of the fourteenth amendment the conscious intent to extend the coverage of the citizenship clause to the type of territory that was involved in the *Insular Cases*.

The Ramírez Memorandum also fails to explore the relevance to Puerto Rico of the 1866 Act's exclusion of "Indians not taxed." *See supra* note 86.

[109] No incorporated territories remain today. The last two territories that the Supreme Court considered "incorporated," Hawaii and Alaska, became states more than 30 years ago. None of the remaining territories or possessions of the United States—Puerto Rico, the Virgin Islands, Guam, American Samoa, and, most recently, the Northern Mariana Islands—has ever been considered "incorporated." *See, e.g.*, Granville-Smith v. Granville-Smith, 349 U.S. 1, 6 (1955).

Obviously, if the Court were to recognize explicitly this difference, it would destroy the CRS's ultimate conclusion, which is premised on the belief that the Supreme Court will not accord different meanings to the term "United States" throughout the Constitution. Although I ultimately agree with the CRS's implicit premise, I believe that the issue is a close one and deserves discussion.

E. *Congress's Power Under Section 5 of the Fourteenth Amendment and the United States Citizenship of Puerto Ricans*

My discussion of this topic will be very brief. At this stage, little more than an identification of the issue is necessary. A still unsettled issue of constitutional law concerns whether Congress has power, pursuant to its powers to enforce the fourteenth amendment, "to define constitutional rights unencumbered by judicial conceptions of those rights, at least insofar as the congressional definitions rationally relate to the language of the fourteenth amendment and violate none of the restrictions which the Bill of Rights imposes on Congress."[110]

The citizenship issue turns upon whether, if it is held that the definition of "United States" in the *Insular Cases* controls the judicial interpretation of the citizenship clause, Congress may nevertheless adopt a broader definition of that term and make the protections of such clause applicable to an additional category of citizens.[111] It is undeniable that the Nationality Act of

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[110] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14, at 341 (2d ed. 1988). Some cases which deal with this issue include Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); EEOC v. Wyoming, 460 U.S. 226 (1983); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). For a taste of the debate, see L. TRIBE, *supra*, § 5-14; Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 468–71; Nathanson, *Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict*, 27 WM. & MARY L. REV. 331 (1986); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982).

[111] The Ramírez Memorandum, *supra* note 23, at 22–23, makes a similar argument, although it does not expressly rely on section 5 of the fourteenth amendment.

A closely related argument was proposed recently to justify a congressional determination, as a matter of constitutional law, that any person who acquires United States citizenship at birth, wherever that takes place, is a "natural born Citizen" within the meaning of article II, section 1, clause 5. *See* Note, *The Natural-Born Citizen Clause*, *supra* note 36, at 883–84, 889, 892. The author explicitly argues that her proposal would make persons born in Puerto Rico eligible for the Presidency of the United States. *Id.*

1940, "[a]t least in regard to Puerto Rico and the Virgin Islands, . . . expanded the applicability of the fourteenth amendment rule."[112] The threshold question is whether Congress intended to act under its fourteenth amendment, section 5, powers. My examination of the legislative record suggests that it did not.[113] But, assuming that it did, the issue of the extent of Congress's power to act in this manner undoubtedly arises.

F. *The Relevance of* Bellei

Perhaps the most serious omission in the CRS memorandum is its total failure to consider whether there are any facts that may serve to provide a *constitutional* distinction between the situation in *Bellei* and that of Puerto Rican-born United States citizens and of citizens naturalized in Puerto Rico.[114] One need not look beyond the confines of the majority opinion in *Bellei* to find just such a possible distinction and to realize that it seemed crucial to the Supreme Court itself.

Bellei was born a United States citizen. But his citizenship was subject to a condition subsequent, which required him to reside in the United States continuously for five years between the ages of fourteen and twenty-eight.[115] Bellei failed to meet that condition, although, as the Court repeatedly stressed throughout its opinion,[116] he was warned about it several times. The Court held that Bellei was not a fourteenth amendment-first sentence citizen;[117] that Congress had power, at the time it granted statutory citizenship, to impose conditions for its reten-

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at 893 n.71. *See also* Medina, *The Presidential Qualification Clause in this Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 OKLA. CITY U. L. REV. 253 (1987).

[112] 4 C. GORDON & S. MAILMAN, *supra* note 701, § 12.5b, at 12-11.

[113] *See supra* text accompanying notes 79-80.

[114] The United States Department of Justice, in its memorandum of July 24, 1989, *see* 3 *Hearings*, *supra* note 4, at 43–45, also fails to consider this distinction.

[115] Rogers v. Bellei, 401 U.S. 815, 816 (1971). Since 1978, *Bellei*-type citizenship is no longer subject to such conditions subsequent. *See* 8 U.S.C. § 1401 (1988), *as amended by* § 1 of Pub. L. No. 95-432, 92 Stat. 1046 (1978). Although the statute was not made retroactive, the Immigration and Naturalization Service's interpretation is that such conditions are no longer applicable to persons who had not lost their citizenship before the Act's effective date. INS, CODES, OPERATIONS INSTRUCTIONS, REGULATIONS, AND INTERPRETATIONS, Interpretations § 301.1(b)(6)(xii) (1988). *See* 4 C. GORDON & S. MAILMAN, *supra* note 36, § 13.5a, at 13-33 to -34. Thus, the *Bellei* opinion seems to have been a Pyrrhic victory for the United States government, and Aldo Mario Bellei a lonely martyr. That is, it seemed so until now.

[116] *See Bellei*, 401 U.S. at 819, 836.

[117] *Id.* at 827.

tion;[118] and that in light of noncompliance with such conditions, and after repeated warnings of their existence, it did not violate due process to revoke Bellei's citizenship.[119]

Congress, however, granted citizenship to Puerto Ricans in 1917 subject to no conditions.[120] Subsequent statutes granting citizenship at birth to those born in Puerto Rico or permitting the naturalization of residents of the Island[121] did not contain any conditions for the retention of such citizenship, once granted. This fact presents a situation quite different from that considered in *Bellei.*

Although the Supreme Court has never held a federal law unconstitutional for violating the rights of residents of Puerto Rico,[122] the Court has repeatedly stated that residents of Puerto Rico are guaranteed fundamental constitutional rights from actions by both the government of Puerto Rico and the federal government.[123] The Court has specifically held that due process and equal protection are two such rights.[124] Therefore, Congress is indeed constrained by the requirements of due process and equal protection when it deals with the residents of Puerto Rico, and that includes the subject of citizenship.

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[118] *Id.* at 831, 833–34.

[119] *Id.* at 835–36.

[120] Act of Mar. 2, 1917, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953.

[121] *See supra* notes 65–73 and accompanying text.

[122] *See, e.g.*, Secretary of Agric. v. Central Roig Ref. Co., 338 U.S. 604 (1950); Califano v. Torres, 435 U.S. 1 (1978); Harris v. Rosario, 446 U.S. 651 (1980).

[123] *See generally* Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?* 110 F.R.D. 452 (1986); Alvarez González, *supra* note 42, at 100–06. Both of us conclude that all federal constitutional rights that apply to residents of the states *vis-à-vis* the states and the federal government likewise should apply to residents of Puerto Rico.

[124] Concerning due process, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974) ("'[T]here cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States,'" (quoting approvingly Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953))). *See also* Secretary of Agric. v. Central Roig Ref. Co., 338 U.S. at 616 ("However, not even resort to the Commerce Clause can defy the standards of due process. We assume that these standards extend to regulations of commerce that enmesh Puerto Rico.").

Regarding equal protection of the laws, see Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976); Califano v. Torres, 435 U.S. 1 (1978); Harris v. Rosario, 446 U.S. 651, 651–52 (1980). Although the equal protection clause is not textually applicable to the federal government, in the last four decades the Supreme Court has repeatedly held that the due process clause of the fifth amendment contains an equal protection component. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Buckley v. Valeo, 424 U.S. 1, 93 (1976). The only area in which the Court has held that the federal government is less constrained by equal protection principles than the states is that of discrimination against aliens. Mathews v. Diaz, 426 U.S. 67, 81–84 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88, 100–01 (1976).

I submit that under the most basic principles of due process, Congress simply may not unilaterally revoke the United States citizenship of any or all Puerto Ricans merely because a republic is proclaimed on the Island. In so suggesting, the CRS memorandum commits a grievous error.[125] Because the United States citizenship of Puerto Ricans was not made conditional, Congress cannot retroactively impose conditions that it does not generally recognize as causes of revocation of citizenship for all other United States citizens.[126] In this respect, whether the United

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[125] The Department of Justice makes the same mistake in its July 24, 1989 memorandum, where it states: "[I]t would appear reasonable to assume that provisions to the effect that citizens of the United States *who continue to reside in Puerto Rico after independence lose their United States citizenship*, or would have to opt for one or the other citizenship, would pass constitutional muster." *See* 3 *Hearings*, *supra* note 4, at 45 (emphasis added). It is difficult to understand why the Department of Justice would adopt a legal interpretation that might stimulate a substantial number of people to migrate to the continental United States.

[126] *Cf.* Note, *The Conditional Nature of Derivative Citizenship*, 8 U.C. DAVIS L. REV. 345, 367–71 (1975) [hereinafter Note, *The Conditional Nature*] (arguing that conditional citizenship violates due process and the principle of Schneider v. Rusk, 377 U.S. 163 (1964)). *See also* Tribe Letter, *supra* note 701, at 2–3:

> [I]f Congress could affect the permanence of its grants of citizenship by subsequently altering the geographical ground rules in place at the time of naturalization, the guarantee of the fourteenth amendment, which was recognized in [*Bellei*] itself, would mean nothing.

It is true that Congress provided for the severance of the status of "national" for all Filipinos upon the proclamation of Philippine independence, *see* § 14 of the Philippine Independence Act of 1934, 48 Stat. 456, 464 (1934), which became effective on July 4, 1946, pursuant to Presidential Proclamations Nos. 2695 and 2696 of that year, 3 C.F.R. 86–87 (1943–1948), *reprinted in* 60 Stat. 1352–54 (1946), and that the Supreme Court implicitly upheld the constitutionality of that measure. *See* Rabang v. Boyd, 353 U.S. 427 (1957). But all possible analogies end there. The status of national does not carry the type of individual legal entitlement that citizenship does. The Supreme Court implicitly recognized as much in *Rabang*, while rejecting appellant's attempt to analogize the status of national to that of citizen. *Id.* at 430. The *Rabang* Court, moreover, expressly distinguished the case of Filipinos from that of Puerto Ricans. *Id.* at 432 n.12. *See also* Cabebe v. Acheson, 183 F.2d 795 (9th Cir. 1950) (emphasizing the transitory nature of the status of national, in view of long-standing United States commitment to grant independence to the Philippines); Tugade v. Hoy, 265 F.2d 63, 66 (9th Cir. 1959) (upholding constitutionality of severance of Filipinos' status as nationals); Malangit v. I.N.S., 488 F.2d 1073, 1074 (4th Cir. 1973) (same; expressly distinguishing between nationals and citizens, while denying a constitutional attack based upon *Afroyim*).

Moreover, Congress limited its action to Filipinos who were nationals of the United States. It did not seem to believe that it had the power to deal in similar fashion with those Filipinos who became naturalized citizens under a special statute which authorized the naturalization of Filipino World War I veterans. *See* 40 Stat. 542 (1918). Thus, in section 8(a)(1) of the Philippine Independence Act, 48 Stat. 456, 462 (1934), Congress specifically excluded Filipinos who had become citizens of the United States from the declaration of alienage applicable to all other Filipinos. *See Cabebe*, 183 F.2d at 799.

In his written statement before the Senate Committee, Acting Deputy Attorney General Dennis argued that the Philippine precedent should control this issue. *See* 3 *Hearings*, *supra* note 4, at 28 n.3. Although he recognized the difference between a national and a citizen, he nevertheless went on to conclude, in pure *ipse dixit*, that "the principle remains the same." *Id.* at 28 n.3. He thus failed to consider the relevance of the judicial and congressional precedents just mentioned. Curiously, Mr. Dennis, in both his written

States citizenship of Puerto Ricans is or is not protected by the citizenship clause is absolutely irrelevant. United States citizens in Puerto Rico have a vested right to their citizenship that simply may not be arbitrarily and unilaterally destroyed by the federal government.[127]

A further point concerning equal protection must be considered. Neither Congress nor the Supreme Court has ever decided that dual citizenship is *per se* inconsistent with United States citizenship.[128] But even in the unlikely event that the Supreme Court held that Congress does have power to revoke a person's citizenship because of the mere fact that such person is found to possess a second one, Congress would have to exercise such power on a non-discriminatory basis. Although *Bellei* distinguished the holding of *Schneider v. Rusk*,[129] to the effect "that the rights of the native born and of the naturalized person are

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and oral presentations before the Senate Committee, *see* 3 *Hearings*, *supra* note 4, at 43–45, 50–52, 58–60, carefully limited his constitutional analysis to the forced election mechanism, and had nothing to say concerning unilateral revocation of citizenship. However, less than two weeks later, his subordinate, Deputy Assistant Attorney General John P. Mackey, wrote the July 24, 1989, Department of Justice memorandum that, as quoted *supra* note 103, unabashedly gave a seal of approval to the latter measure. Whether this was a change of policy or simply bureaucratic bungling, it is impossible to tell.

[127] At the very least, a person has a liberty interest in his or her citizenship, protected by the due process clause from arbitrary governmental deprivation. *See infra* note 135. This being no mere economic regulation, a stricter standard under substantive due process and equal protection should apply. *See* Gordon, *Dual Nationality and the United States Citizen*, 102 MIL. L. REV. 181, 187 (1983) [hereinafter Gordon, *Dual Nationality*] ("Since citizenship is a fundamental constitutional right, any legislation which proposes to interfere with that right should be subjected to close scrutiny."). *See also* Gordon, *The Power of Congress to Terminate United States Citizenship—A Continuing Constitutional Debate*, 4 CONN. L. REV. 611, 630 (1972) [hereinafter Gordon, *The Power of Congress*] (interpreting *Bellei* as standing for the proposition that due process "would preclude arbitrary, unreasonable or discriminatory impairments of American citizenship"). Professor Laurence Tribe makes this point very forcefully in his letter to the Committee. *See* Tribe Letter, *supra* note 701, at 3–5.

[128] *See, e.g.*, Perkins v. Elg, 307 U.S. 325, 329 (1939); Vance v. Terrazas, 444 U.S. 252, 272 (1980) (Stevens, J., concurring in part and dissenting in part), 276 (Brennan and Stewart, JJ., dissenting). Acting Deputy Attorney General Dennis conceded this in his written and oral presentations before the Senate Committee. *See* 3 *Hearings*, *supra* note 4, at 27–28, 50–51. However, Mr. Dennis's written statement argued that "'[d]ual' citizenship is allowed on an individual basis. But this is quite different from allowing virtually the entire population of Puerto Rico to maintain American citizenship while nevertheless residing on foreign soil." *Id.* at 28 n.3. He then went on to cite the Philippine "precedent."

I have already dealt with the Philippine "precedent" and have shown its inapplicability to the case of Puerto Rico. *See supra* note 126. Furthermore, Mr. Dennis's "difference" may have a basis in arithmetic, but not in law. He could not offer the committee a single legal reason that would require Congress to treat Puerto Ricans with a different yardstick from that applied to everyone else.

[129] 377 U.S. 163 (1964).

of the same dignity and are coextensive,"[130] on the ground that it referred to fourteenth amendment and not to statutory citizenship,[131] the *Schneider* principle should control any attempts to distinguish among classes of statutory citizens.[132] That principle should prevent Congress from prescribing revocation of citizenship for some, but not for all, statutory citizens who possess dual citizenship. Thus, revocation of citizenship or forced election, if constitutionally permissible, at the very least should not be tailored for only one group of statutory citizens.

A collective, non-individualized revocation of citizenship also would contravene basic principles of procedural due process by creating an irrebuttable presumption of intent to renounce one citizenship from the mere fact of acquisition of another.[133] The whole discussion in *Vance v. Terrazas*[134] concerning rebuttable presumptions and burdens of proof for expatriation hearings would be pointless if Congress could sweepingly single out a whole class of citizens and revoke their citizenship *en masse*, without any process whatsoever.[135] And the Court's decision in

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[130] *Id.* at 165.

[131] *Bellei*, 401 U.S. 815, 822–23.

[132] *Schneider*, after all, was decided under the equal protection component of fifth amendment due process. 377 U.S. at 168–69. *See* Note, *Problems of the Foreign-Born Citizen:* Rogers v. Bellei, 11 COLUM. J. TRANSNAT'L L. 304, 312–14 (1972) [hereinafter Note, *Problems*] ("Discrimination between types of citizenship when one has already become a citizen is clearly the issue of unfairness that *Schneider* dealt with."). *See also* Note, 13 HARV. INT'L L.J. 151, 153, 160 (1972) (same). It would seem reasonable to expect the federal judiciary to hold, at the very least, that the rights of a statutory citizen "are of the same dignity [as] and are coextensive [with]," 377 U.S. at 165, those of all other statutory citizens. Otherwise, *Schneider*'s repudiation of second-class citizenship, already seriously eroded by *Bellei*, would evolve into acceptance of third-class citizenship.

[133] *See, e.g.*, Vlandis v. Kline, 412 U.S. 441 (1976); United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973); Bell v. Burson, 402 U.S. 535 (1971).

[134] 444 U.S. 252 (1980). This case held that the federal government must prove by a preponderance of the evidence that a citizen voluntarily committed an expatriating act *and* that he or she had the intention to renounce his or her citizenship when so acting. Although the Court upheld the statutory rebuttable presumption of voluntariness, *see* 8 U.S.C. § 1481(b) (1988), it did require the government to provide independent proof of intent.

[135] It will simply not be enough to suggest that "some kind of process" was necessary in *Terrazas* because fourteenth amendment citizenship was involved in that case, while that arguably is not the case here. Whether citizenship is statutory or constitutional, a citizen has a liberty interest in it that cannot be denied without due process. As Justice Stevens pointed out in his separate opinion in *Terrazas*, "a person's interest in retaining his American citizenship is surely an aspect of 'liberty' of which he cannot be deprived without due process of law." 444 U.S. at 274. The majority opinion's contention that "expatriation proceedings are civil in nature and do not threaten a loss of liberty," *id.* at 266, must be read in context. What was at issue in *Terrazas* was precisely how much process was due, not whether any process was due. That some process was due, as every member of the Court agreed, is proof of the existence of the liberty interest to which Justice Stevens referred. It would be a strange constitutional system that prohib-

Kennedy v. Mendoza-Martinez[136] squarely held that Congress could not deprive a person of citizenship for draft-avoidance without affording him the procedural safeguards granted by the fifth and sixth amendments.

Such an action on the part of Congress also would be open to attack under the bill of attainder clause.[137] It would inflict punishment on a legislatively specified group of individuals.[138] Although the Supreme Court has said that "the Bill of Attainder Clause [is] not to be given a narrow historical reading, . . . but [is] instead to be read in light of the evil the Framers had sought to bar: legislative punishment of any form of severity, of specifically designated persons or groups,"[139] this would be a prime example of a measure of the type "historically associated with punishment."[140]

G. *Predicting Future Judicial Decisions*

One need not be a blind follower of Holmes in order to agree that he was not completely off target when he declared that law and prophecy have something in common.[141]

In the context of the law on expatriation, prediction is a particularly risky enterprise. The CRS theory, leaving aside its

ited deportation of an alien without due process, *see, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950), but did not accord a citizen—of whatever kind—a similar protection from attempts to revoke his or her citizenship.

[136] 372 U.S. 144 (1963).

[137] U.S. CONST. art. I, § 9, cl. 3.

[138] *See* United States v. Lovett, 328 U.S. 303, 315 (1946) (holding that the prohibition against bills of attainder extends to all "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ."). *See also* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984).

[139] United States v. Brown, 381 U.S. 437, 447 (1965).

[140] *See Minnesota Pub. Interest Research Group*, 468 U.S. at 853. Trop v. Dulles, 356 U.S. 86 (1958), held that it was cruel and unusual punishment to revoke a native-born person's citizenship as an explicit punishment upon court martial conviction. Of course, that the Legislative Branch acts against a whole group of persons, without a trial, does not make it any less punitive. *See also Mendoza-Martinez*, 372 U.S. 144.

See also Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); United States v. Lovett, 328 U.S. 303 (1946); United States v. Brown, 381 U.S. 437 (1965). On the subject of expatriation as cruel and unusual punishment, see Note, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1187–94 (1955); Comment, 56 MICH. L. REV. 1142, 1162–63 (1958). *See generally* L. TRIBE, *supra* note 110, §§ 10-4 to -5. *Cf.* Note, *Expatriation after* Terrazas v. Vance*: Right or Retribution?* 19 VA. J. INT'L L. 107 (1978).

[141] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

many flaws already shown, is built on some of the least solid precedents that can be found in American constitutional law. It relies most heavily on a five-four decision (*Bellei*), which distinguished another five-four decision, just four years old (*Afroyim*), which in turn overruled yet another five-four decision, handed down just nine years earlier (*Perez v. Brownell*).[142] And, lest it be forgotten, the most recent Supreme Court treatment of the subject, *Terrazas*, also was, as to some aspects, a five-four decision. Thus, Justice Blackmun's majority opinion in *Bellei* could have anticipated and paraphrased, but did not, his own statement for the Court just two years later, concerning decisions on Puerto Rico: "The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform."[143]

To make matters even worse, the CRS theory cannot merely rely on the crazy quilt of modern expatriation decisions but must, on top of that, couple those decisions with, precisely, "[t]he Court's decisions respecting the rights of the inhabitants

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[142] 356 U.S. 44 (1958). Referring in 1964 to the pre-*Afroyim* expatriation decisions, Professor Philip Kurland remarked: "If it is inappropriate to expect elegance from a Court dedicated to egalitarianism, it is not unreasonable to hope for workmanlike quality. It is, nevertheless, an unfulfilled wish." Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 169 (1964). Professor Kurland then went on to criticize the Court's expatriation decisions on the ground that they fail "to provide guidance for later litigation." *Id.* He ended: "It would be interesting to know what the 'law of the land' is on the subject of expatriation." *Id.* at 175.

Post-1964 decisions, however, show that dedication to egalitarianism is not at the heart of the Court's problems with this subject. As far as I know, the Burger Court was never criticized on that ground, on any subject. Yet it fared no better than its predecessor on the subject of expatriation, as *Bellei* and *Terrazas* illustrate.

[143] Examining Bd. v. Flores de Otero, 426 U.S. 572, 599 (1976). To confirm how aptly this marvelous piece of understatement also fits expatriation cases, one need only scan the voluminous legal literature on the subject. To cite only sources not cited elsewhere in this Article, see, *e.g.*, Note, *Protecting Citizenship: Strengthening the Intent Requirement in Expatriation Proceedings*, 56 GEO. WASH. L. REV. 341 (1988); Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1986); Note, *Comparison Between the Constitutional Protections Against the Imposition of Involuntary Expatriation and a Taxpayer's Right to Disclaim Citizenship*, 15 VAND. J. TRANSNAT'L L. 123 (1982); Comment, *Limiting Congressional Denationalization After* Afroyim, 17 SAN DIEGO L. REV. 121 (1979); Wasserman, *The Voluntary Abandonment of United States Citizenship*, 2 IMMIGR. & NATIONALITY L. REV. 537 (1979); Comment, *Congressional Versus Constitutional Citizenship: Goodbye Section 301(b); The Song Is Gone but the Melody Lingers On*, 2 GEO. MASON U. L. REV. 331 (1978); Note, *Expatriation:* Afroyim v. Rusk *and its Progeny*, 25 BUFFALO L. REV. 453 (1976); Note, *Expatriation in the United States: A Sui Generis Inquiry*, 38 ALB. L. REV. 942 (1974); Comment, *Expatriation Law in the United States: The Confusing Legacy of* Afroyim *and* Bellei, 13 COLUM. J. TRANSNAT'L L. 406 (1974); Comment, *Expatriation: Constitutional and Non-constitutional Citizenship*, 60 CALIF. L. REV. 1587 (1972); Wasserman, *Involuntary Expatriation of Statutory Americans*, 5 INT'L LAW. 413 (1971). With few exceptions, the *Bellei* decision has been the subject of the most searing criticism.

of Puerto Rico."[144] In order to reach its conclusion, the CRS must take the expatriation decisions and couple them with *Downes v. Bidwell*,[145] still another five-four decision where there were three separate opinions, creating a "disagreeing majority of one."[146]

The Senate Committee on Energy and Natural Resources was told that a "unanimous opinion written by Justice Powell is as good as gold."[147] What is the mineral analogue for a five-four decision by Justice Blackmun (*Bellei*), rendered in his first full year on the Court?

In view of the quite unstable state of the law in this area, Congress should seriously consider, as part of its assessment of its power concerning the United States citizenship of Puerto Ricans, whether it is advisable to push whatever legislation it enacts to what it perceives to be the constitutional limits or, instead, to stay well within such perceived limits.[148] The calculus should include factors such as the following: What might be the consequences, both domestic and international, of an erroneous prediction? Will the prediction ever be effectively tested, or is it likely that the federal courts, in view of the international dimensions of the controversy, will refuse to intervene and will brand the whole question as "political," subject to the final say of the political branches?[149] If the federal courts do remain open to this type of controversy, could the prediction be tested before Congress makes a final decision? What is the likelihood that a Puerto Rican-born United States citizen could obtain a judicial pronouncement on the subject by attempting to become a naturalized citizen through judicial proceedings in a federal court in one of the fifty states?[150]

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[144] *Flores de Otero*, 426 U.S. at 599.

[145] 182 U.S. 244 (1901).

[146] Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 169 (1901).

[147] 1 *Hearings*, *supra* note 4, at 315 (testimony of Prof. Paul Gewirtz). Professor Gewirtz used this expression while referring to United States v. Ptasynski, 462 U.S. 74 (1983), which held that a federal law that exempts most Alaska oil from its taxing provisions does not contravene the uniformity clause of the federal Constitution.

[148] Senator McClure's admonition that "the purpose of the federal government is [not] to constantly test the limits of its powers at the expense of local government," 2 *Hearings*, *supra* note 4, at 790, discussed *supra* note 701, would seem even stronger as applied to individual rights.

[149] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002–03 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ., arguing that the political question doctrine bars judicial review of the question of treaty abrogation without Senate participation). *See generally* L. TRIBE, *supra* note 110, § 3-13.

[150] *See En Manos Boricuas la Ciudadanía*, El Nuevo Día, June 9, 1989, at 4, col. 1 (mentioning Immigration and Naturalization Service preoccupation with inquiries to that

II. Dual Citizenship and Forced Election

A. *Constitutional Problems*

In this Article I shall not attempt to address at length the international and domestic issues which arise from the concept of dual citizenship, nor its advantages or disadvantages. It should be stressed, nevertheless, that traditional objections against dual citizenship have been re-examined in recent years. A growing body of commentary suggests that such objections have lost most of their justification in a world characterized by mobility and interdependence.[151]

I do wish to address a possible solution mentioned in the CRS memorandum, to which the chairman of the Senate committee also referred. In its concluding paragraphs, the CRS memorandum states that, as pertains exclusively to Puerto Rican fourteenth amendment-first sentence citizens, "either dual citizenship or some treaty provision requiring some choice might be alternatives."[152] For his part, Chairman Johnston initially suggested that the plebiscite statute contain a provision which would require all citizens of the Republic of Puerto Rico to

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effect by Puerto Rican residents). In view of the conclusion of the CRS memorandum, a Puerto Rican-born United States citizen, to whom the *Afroyim* principle of irrevocability apparently does not apply, might desire to acquire indisputably the status of fourteenth amendment-first sentence citizen.

Naturally, such an attempt would confront difficulties. The justiciability doctrine, particularly in its ripeness version, would be one such barrier. Moreover, it is not at all evident that this hypothetical litigant would satisfy the statutory requirements for naturalization. For obvious reasons, requirements for naturalization start from the premise that the applicant is not already a United States citizen. *See, e.g.*, 8 U.S.C. §§ 1427–1430 (1988). Although this issue could have arisen in regard to *Bellei*-type citizens who, prior to 1978, might have desired to obtain non-conditional citizenship through naturalization, I have not found any such case.

[151] *See, e.g.*, M. Akehurst, A Modern Introduction to International Law 109 (1970); Note, *A New Approach*, *supra* note 14, at 305–08, 322–26; Gordon, *Dual Nationality*, *supra* note 127, at 190; Note, *United States Loss of Citizenship Law After* Terrazas*: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. Int'l L. & Pol. 829, 878–79 (1984) [hereinafter Note, *Board of Appellate Review*]; Note, *Dual Nationality and the Problem of Expatriation*, 16 U.S.F. L. Rev. 291, 292, 302–15, 323–24 (1982) [hereinafter Note, *Dual Nationality*]; McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 Yale L.J. 900, 903 (1974); Note, *The Conditional Nature*, *supra* note 126, at 368 & n.145; Note, *Expatriation—A Concept in Need of Clarification*, 8 U.C. Davis L. Rev. 375, 392 (1975) [hereinafter Note, *Expatriation*].

[152] CRS Memo, *supra* note 701, at 4–5.

elect, within an unspecified period of time after independence, between Puerto Rican and United States citizenship.[153]

I have shown already the very serious, probably insurmountable constitutional problems that the CRS solution of unilateral revocation of statutory citizenship presents.[154] Therefore, any solution should treat all persons born in Puerto Rico and all residents of Puerto Rico uniformly, and not distinguish among types of citizenship. Moreover, it is difficult to understand the CRS reference to treaties.[155] Under its present political status, Puerto Rico clearly lacks the international and domestic capacity to enter into a treaty with the United States.[156] A sovereign Puerto Rico would certainly possess such capacity, but the question of citizenship is of such importance that it cannot reasonably be postponed until the advent of the Republic.[157] Congress

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[153] 1 *Hearings*, *supra* note 4, at 266, 268–70; 2 *id.* at 2, 835. *See also* Johnston, *Irrevocable la Ciudadanía*, El Mundo, June 17, 1989, at 27, col. 1.

[154] *See supra* Part I(F).

[155] CRS Memo, *supra* note 701, at 4–5.

[156] Not even those who argue that the Commonwealth of Puerto Rico may play a direct role in international affairs, *see, e.g.*, Reisman, *Puerto Rico and the International Process: New Roles in Association*, 11 REVISTA JURÍDICA UNIVERSIDAD INTERAMERICANA 533 (1977); Lacovara, *The Authority of the Commonwealth of Puerto Rico Under the United States Constitution to Join International Organizations and to Enter into International Agreements*, 11 REVISTA JURÍDICA UNIVERSIDAD INTERAMERICANA 449 (1977), go so far.

[157] Chairman Johnston had a similar, even stronger insight concerning the question of United States military installations in Puerto Rico. So much so that, as finally approved by the Senate Committee, S. 712 is not self-executing for just one of the status options: independence. This is due to the fact that section 312(a) of the bill provides that "[s]pecific arrangements for the use of military areas by the United States in Puerto Rico, and to meet United States defense interests, shall be negotiated . . . and approved . . . , and shall come into effect simultaneously with the proclamation of independence." S. 712, 101st Cong., 1st Sess. § 312(a) (1989), *printed in* S. REP. No. 120, 101st Cong., 1st Sess. 11 (1989). This provision then goes on to require that the agreements provide the United States with at least the same type of military use of Puerto Rico as existed prior to the referendum, as well as denial to any other nations of use of the Puerto Rican territory for military purposes, except with the consent of the United States. *Id.* Curiously, it does not seem that Puerto Rico's consent must be obtained for the use of its territory for military purposes by third nations at the invitation of the United States.

The effect of section 312 is to postpone the proclamation of independence until such time as the agreements therein contemplated have been approved (or so Congress wants to say).

Chairman Johnston's strong feelings concerning the necessity of a pre-independence agreement concerning defense matters contrast with his totally different posture regarding the issue of Spanish language under statehood. *See* 1 *Hearings*, *supra* note 4, at 364–72; 2 *id.* at 779–80; 3 *id.* at 388–92. On that subject, the chairman, reacting to the statehooders' proposal that S. 712 designate both Spanish and English as official languages of the state of Puerto Rico, S. 712, 101st Cong., 1st Sess., tit. II, § 17 (1989) (Star Print), believes it is a better idea to "just be silent on the question, just leave it out altogether." 1 *Hearings*, *supra* note 4, at 370. On such an important issue for the overwhelming majority of Puerto Ricans, however, silence is unacceptable. Chairman Johnston worried aloud that insistence on including the language issue may lead federal

created the problem in the first place, via the collective naturalization of 1917.[158] It is therefore fitting that Congress provide a solution to the citizenship issue, pursuant to a statute. For all of these reasons I shall not explore the CRS suggestion any further but shall, instead, take up Chairman Johnston's suggestion of a uniform solution of forced election of citizenship.

At the outset it should be acknowledged that the chairman's suggestion was, quite understandably, very preliminary and undeveloped. Still, it is worthwhile to explore what its final, detailed form could conceivably be in order to make some assessment of its merit and feasibility. It should be beyond discussion that its basic purpose would be to avoid dual citizenship.[159] But it also should be clear that such purpose can be met only within a reasonable time.[160] The transition period commencing on the day of independence and concluding on the deadline date for individual election of citizenship necessarily presupposes that

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legislators to conclude that Puerto Rico is too distinct and separate to join the Union. 1 *Hearings*, *supra* note 4, at 371. As I wrote in an op-ed column in *The San Juan Star*: "In this, he has hit the nail squarely on the head. That is precisely why silence on this issue, rather than golden, would be fraudulent. Disguises are fine, for carnivals." Alvarez González, *Don't Gamble with Puerto Rico's Vernacular*, The San Juan Star, July 14, 1989, at 14, col. 1 (discussing and rejecting Professor Paul Gewirtz's theory, based on the tenth amendment, the equal footing doctrine, substantive due process, and equal protection, about the unconstitutionality of any federal law that would make English the official language of government throughout the United States; *see* 1 *Hearings*, *supra* note 4, at 339–40). *But see* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990) (holding unconstitutional, as a violation of freedom of expression, an Arizona constitutional amendment which made English the official language "of all government functions and actions"). Governor Mofford, who opposed the amendment, has announced that the state will not appeal the decision. *See* Barringer, *Judge Nullifies Law Mandating Use of English*, N.Y. Times, Feb. 8, 1990, at 1, col. 1.

Furthermore, Chairman Johnston's plea for silence on the language question contrasts with his prior actions on the subject. He, along with Senator McClure, "sponsored the dreaded 1985 resolution calling for a constitutional amendment to make English the nation's official language." Weisman, *supra* note 3, at 32, col. 2. *See* S.J. Res. 20, 99th Cong., 1st Sess. (1985), 131 CONG. REC. S515 (Jan. 22, 1985). Senator McClure was one of the seven original sponsors of this joint resolution. *Id.* Senator Johnston became a co-sponsor two months later. *Id.* at S3345 (Mar. 20, 1985). A few months thereafter, Senator McClure successfully sponsored an amendment to an immigration bill to "express[] the sense of the Senate that English is the official language of the United States." *Id.* at S11,330 (Sept. 12, 1985).

[158] *See supra* note 58. To his credit, Senator McClure has recognized this fact since the beginning of the hearings. *See* 1 *Hearings*, *supra* note 4, at 109; 2 *id.* at 791. Although in the first of the above-cited statements he seemed to have it backwards ("[c]itizenship is probably the single greatest problem *which those advocating independence will have to resolve*" (emphasis added)), the second time around he had the correct insight ("We in Congress created these problems and we bear the responsibility to come up with a resolution.").

[159] Chairman Johnston expressly recognized this. *See* 1 *Hearings*, *supra* note 4, at 268.

[160] This is another fact that Chairman Johnston expressly recognized. *See* 2 *id.* at 2.

dual citizenship will be the rule in the short run. What the length of that transition period should, could, or would have to be is a matter I shall address shortly.[161]

But first, the validity *vel non* of any forced election, whatever its details may be, should be considered.[162] The most extended discussion of the constitutional validity of a federal statute requiring dual citizens to elect which citizenship they desire to retain is found in a two-paragraph dictum in *Rogers v. Bellei*. It deserves a full quotation:

> There are at least intimations in the decided cases that a dual national constitutionally may be required to make an election. In *Perkins v. Elg*, 307 U.S. 325, 329 (1939), the Court observed that a native-born citizen who had acquired dual nationality during minority through his parents' foreign naturalization abroad did not lose his United States citizenship "provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties." In *Kawakita v. United States*, 343 U.S., at 734, the Court noted that a dual national "under certain circumstances" can be deprived of his American citizenship through an Act of Congress. In *Mandoli v. Acheson*, 344 U.S. 133, 138 (1952), the Court took pains to observe that there was no statute in existence imposing an election upon that dual national litigant.
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> These cases do not flatly say that a duty to elect may be constitutionally imposed. They surely indicate, however, that this is possible, and in *Mandoli* the holding was based on the very absence of a statute and not on any theory of unconstitutionality. And all three of these cases concerned persons who were born here, that is, persons, who possessed fourteenth amendment citizenship; they did not concern a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory.[163]

The quoted passage warrants several comments. First, at least as concerns fourteenth amendment citizenship, Justice Blackmun's opinion fails to recognize that all three cases cited predate *Afroyim v. Rusk*.[164] It is difficult to square a forced election with *Afroyim*'s proclamation of the irrevocability of United States

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[161] *See infra* text accompanying notes 202–207.

[162] It bears emphasizing that although the Department of Justice argued in favor of the constitutionality of a forced election mechanism, at no time did it consider any of the arguments and problems that this Article addresses. *See* 3 *Hearings*, *supra* note 4, at 27–29 (written statement of Mr. Dennis), 43–45 (memorandum of Mr. Mackey), 58–60 (oral statements of Mr. Dennis).

[163] 401 U.S. 815, 832–33 (1971).

[164] 387 U.S. 253 (1967).

citizenship absent a voluntary *and* intentional action by the citizen that may legally constitute renunciation.[165] I submit that a dual, fourteenth amendment citizen who, confronted with a statutory requirement of election of citizenship, informs the United States of his intention to retain United States citizenship, cannot be deprived of that citizenship under *Afroyim* for deciding also to retain another citizenship. The only exception would be if the latter decision is accompanied by one of the affirmative acts which may constitute causes of expatriation under current law.[166]

Second, even if their dicta could be squared with *Afroyim*, all three cases cited, as well as *Bellei* itself, start from the premise that the forced election requirement would apply to *all* dual citizens. The *Bellei* dictum, therefore, does not by itself support such a statutory requirement addressed to just one group of dual citizens. As I shall argue shortly,[167] such a discriminatory requirement would present serious constitutional problems.

Third, the fact is that Congress has not only failed to follow *Bellei*'s advice, but instead has gone in the opposite direction. As previously stated,[168] just seven years after *Bellei*, Congress repealed all conditions subsequent for the retention of United States citizenship.[169] The House report on this measure termed these conditions "an inequity which should be removed."[170] It added:

> Loss of citizenship has been likened to banishment and exile. Citizenship should not be lightly conferred, but once

[165] *See id.* at 268. *See also* Vance v. Terrazas, 444 U.S. 252, 270 (1980).

[166] *See* 8 U.S.C. § 1481(a) (1988). *See also* Vance v. Terrazas, 444 U.S. 252 (1980). Section 1481(a) provides that the following acts, if performed "with the intention of relinquishing United States nationality," shall be causes of loss of that citizenship: (1) naturalization in a foreign state; (2) making an oath of allegiance to a foreign state; (3) service as an officer in a foreign army, or service in any capacity if such army is engaged in hostilities against the United States; (4) employment by a foreign state when the post requires an oath of allegiance to that state or when the employee possesses the citizenship of that state; (5) formal renunciation of United States citizenship while abroad, before a diplomatic officer of the United States; (6) formal renunciation of United States citizenship at home, while that country is at war, with the approval of and pursuant to the procedure prescribed by the Attorney General; (7) conviction of treason or other violent acts against the United States. 8 U.S.C. § 1481(a)(1)–(7) (1988). The expatriating acts numbered 1, 2, and 4 expressly require that the actor have attained the age of 18 years. *Id.*

[167] *See infra* text accompanying notes 179–190.

[168] *See supra* note 115.

[169] Pub. L. No. 95-432, § 1, 92 Stat. 1046 (1978).

[170] H.R. Rep. No. 1493, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2521, 2524.

> it is conferred, it should not be lightly, nor discriminatorily revoked . . . .[171]

The same 1978 statute also repealed section 350 of the Immigration and Naturalization Act of 1952,[172] the only provision which specifically dealt with dual citizens at birth. That section provided that if such persons voluntarily sought or claimed benefits of the foreign citizenship, they would lose United States citizenship by residing in the foreign country for three years after the age of twenty-two, unless they took an oath of allegiance to the United States. The House report stated that this provision was "rarely used" and was "greatly restricted in its operation and no longer serve[d] any useful purpose," due to judicial decisions.[173] It continued:

> The primary effect of this section is to cause needless anxiety among American citizens residing abroad. In addition, it is difficult to administer and has caused considerable confusion within the Departments of State and Justice.[174]

Both departments supported the 1978 amendments.[175] Thus, it seems that Congress, to whom the Constitution primarily entrusts the regulation of matters concerning naturalization and citizenship,[176] has been genuinely preoccupied with getting rid of discriminatory provisions on the subject, even in the face of judicial pronouncements that suggest that such provisions pass or might pass constitutional scrutiny.[177]

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[171] *Id.*

[172] 8 U.S.C. § 1482 (1970).

[173] H.R. REP. No. 1493, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2521, 2524.

[174] *Id.*

[175] *Id.* at 2521, 2525.

[176] U.S. CONST. art. I, § 8, cl. 4; amend. XIV, § 5.

[177] Congress's actions in 1978 suggest that it was not particularly impressed by the reasoning of the 1971 *Bellei* decision, whose existence the House report expressly recognized. *See* H.R. REP. No. 1493, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2521, 2524. In the words of a student commentator:

> The repeal of these . . . sections is highly significant. By recognizing the equality of protection due to all American nationals, in particular dual nationals born abroad, and by removing former barriers to the retention of American nationality by a dual national, Congress has acknowledged that dual nationality is a viable form of allegiance to the United States. Furthermore, congressional recognition of the unconstitutionality of discrimination between Americans on the basis of their status of nationality indicates the correct analysis to be applied in resolving the problem of denationalization of voluntary dual nationals.

Note, *Dual Nationality*, *supra* note 151, at 308.

Lastly, I should once more caution against conclusions based on the five-four decision in *Bellei*. And much less if based on language that was evidently dicta.

Assuming, *arguendo*, that a provision for forced election is constitutional, as well as that Congress be willing to change course abruptly and approve such provision, the further question arises whether forced election could be prescribed constitutionally for a single group of American citizens: Puerto Ricans. This is very doubtful.

Even if it is accepted, as I believe it should be,[178] that most Puerto Ricans possess statutory and not fourteenth amendment citizenship, that only means that they cannot claim protection under the citizenship clause of the Constitution. As stated earlier,[179] the equal protection component of fifth amendment due process is certainly a parameter against which any proposal for forced election must be measured. Any such proposal, if geared exclusively to Puerto Ricans, would probably run afoul of well settled equal protection principles and of the doctrine established in *Schneider v. Rusk.*[180]

Citizenship, once granted unconditionally, has been termed a "most precious right."[181] It certainly should be considered a "fundamental right" under equal protection analysis.[182] Any discrimination between classes of citizens, at least within the subgroup of statutory citizens, "should be subjected to close scrutiny."[183] Moreover, under another strand of equal protection analysis, such intense scrutiny is justified. A congressional statute which singled out Puerto Rican American citizens and gave

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[178] *See supra* text accompanying notes 49–86.

[179] *See supra* note 124 and accompanying text.

[180] 377 U.S. 163 (1964). *See also* Note, *Problems*, *supra* note 132, at 312–14.

[181] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963); *Schneider*, 377 U.S. at 167.

[182] *See* Gordon, *Dual Nationality*, *supra* note 127, at 187; Note, *The Conditional Nature*, *supra* note 126, at 370–71; Note, *Expatriation*, *supra* note 151, at 392; Schwartz, *American Citizenship after* Afroyim *and* Bellei*: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1012–13 & n.38 (1975).

[183] Gordon, *Dual Nationality*, *supra* note 127, at 187. And *cf.* Tribe Letter, *supra* note 701, at 6:

> No attempt by Congress to sever that relationship at the basic level of citizenship with respect to a geographically defined class of Americans could possibly survive *the heightened scrutiny that the courts would undoubtedly apply under the equal protection component of the fifth amendment's Due Process Clause.* As the Supreme Court made clear in *Plyler v. Doe*, 457 U.S. 202 (1982), no subclass of the populace—not even the children of illegal aliens—may be reduced to the second-class status of a shadow population.

(Emphasis added).

them treatment different from that accorded other statutory citizens who possess dual citizenship, whether Israeli, Panamanian, Vietnamese, or Iranian,[184] would operate against a "discrete and insular minorit[y] . . . and . . . may call for a correspondingly more searching judicial inquiry."[185]

Under this more exacting judicial scrutiny, and perhaps even under traditional equal protection analysis as well,[186] it would be difficult to find reasons that could justify such blatant discrimination. It is true that the Supreme Court has accorded greater leeway to Congress than to the states in making classifications that prejudice aliens.[187] But no similar reasons exist to justify granting Congress permission to prefer some classes of statutory citizens over others, let alone to prefer *all* such classes over *one*.

Schneider v. Rusk,[188] in which the Court required Congress to treat naturalized citizens and citizens at birth with the same yardstick, admittedly involved fourteenth amendment citizenship. But although *Bellei* held that the *Schneider* principle is not applicable to distinctions between fourteenth amendment and statutory citizens,[189] *Schneider*'s reasoning is fully applicable to

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[184] *Cf.* Note, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal*, 24 VA. J. INT'L L. 695 (1984); Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597 (1984).

[185] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938); Graham v. Richardson, 403 U.S. 365, 375 (1971). It must be acknowledged that the Supreme Court twice has ignored, albeit silently, similar arguments in the context of federal welfare programs which discriminate against residents of Puerto Rico. *See* Califano v. Torres, 435 U.S. 1 (1978); Harris v. Rosario, 446 U.S. 651 (1980). For my criticism of these decisions, see Alvarez González, *supra* note 42, at 115. In both of these cases the Court acted summarily, without briefs or oral argument, a fact which reduces their precedential value. *See* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974). The citizenship issue would not seem to lend itself to this type of summary treatment. If that issue ever reaches the Supreme Court, I would not expect the Court to be able to avoid the suspect class claim as easily.

[186] *See, e.g.*, Allegheny Pittsburgh Coal Co. v. County Comm'n, ___U.S. ___, 109 S. Ct. 633 (1989); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982). All of the above are cases where the Court struck down statutes under equal protection analysis, allegedly applying the traditional rational basis test. These cases show that although it is usually the norm that a measure will satisfy that test, exceptions are much more abundant in recent years. *See generally* L. TRIBE, *supra* note 110, §§ 16-2 to -4; Choper, *Economic and Social Regulations and Equal Protection*, in 3 J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980–1981 at 1–18 (1982).

[187] *Compare* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), *and* Mathews v. Diaz, 426 U.S. 67 (1976), *with* Graham v. Richardson, 403 U.S. 365 (1971), *and* Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).

[188] 377 U.S. 163 (1964).

[189] *Bellei*, 401 U.S. at 827.

attempts to distinguish among classes of statutory citizens, as previously discussed.[190]

In conclusion, assuming that forced election of citizenship is constitutionally permissible, Congress could require Puerto Ricans to choose between Puerto Rican and United States citizenship only if it refused to recognize altogether the concept of dual citizenship, at least where statutory citizens are involved, and required every such citizen to choose one citizenship over the other. Even this approach is not free from doubt. Congress would have to find an adequate justification to explain why dual citizenship is inimical to the national interests of the United States when statutory citizens are involved, while that is not the case with fourteenth amendment citizens. If no such justification can be found, as I think it cannot,[191] a complete congressional repudiation of the concept of dual citizenship would be necessary. This would pose squarely the constitutional question left open in the *Bellei* dictum concerning forced election of citizenship and would require a re-examination of the *Afroyim* principle.

In the absence of a constitutionally valid requirement for forced election of citizenship, citizens of Puerto Rico would become dual citizens upon the advent of the Republic and most probably would have little difficulty retaining such status, as federal law currently stands. As a practical matter, current federal law distinguishes between "voluntary" and "involuntary" dual citizens, for expatriation purposes.[192] The repeal in 1978 of the provision concerning dual citizens at birth[193] has left section

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[190] *See supra* note 132 and accompanying text. *See also* Note, *Dual Nationality*, *supra* note 151, at 308–11; Note, *The Conditional Nature*, *supra* note 126, at 367–71.

[191] Congress could attempt to justify the distinction on the ground that dual citizenship is contrary to the best interests of the United States but that the *Afroyim* principle prevents it from forcing fourteenth amendment citizens to choose one citizenship, while that principle does not apply to statutory citizens. I do not find this argument compelling. It fails to acknowledge that *Bellei* found the *Afroyim* principle inapplicable to statutory citizens in a very special context, where a person acquired United States citizenship subject to a condition with which he subsequently failed to comply. The *Afroyim* principle still could be found applicable to statutory citizens on due process grounds. It could be held that while Congress may impose conditions for the retention of citizenship which does not flow directly from the citizenship clause, it may not retroactively affect a person's right to retain a citizenship that was granted unconditionally. *See supra* notes 124–127 and accompanying text.

[192] *See* Note, *Dual Nationality*, *supra* note 151, at 303–11 (developing this concept from the fact that all expatriation provisions directed at dual nationals have been repealed, save for the voluntary application for naturalization in a foreign country or the voluntary and formal declaration of allegiance to such country). *See* 8 U.S.C. § 1481(a)(1)–(2) (1988).

[193] *See supra* note 115 and text accompanying notes 168–177.

349 of the Immigration and Naturalization Act[194] as the sole expatriation provision. In order to be subject to section 349's reach, the dual citizen must make some kind of affirmative act, such as "obtaining naturalization . . . upon his own application,"[195] "taking an oath or . . . other formal declaration of allegiance to a foreign state,"[196] serving as an officer in a foreign state's armed forces or serving in such armed forces when engaged in hostilities against the United States,[197] or holding employment in a foreign government.[198]

As federal law currently stands, therefore, any person who becomes a Puerto Rican citizen automatically upon the advent of independence would not, for that sole reason, be subject to expatriation proceedings. Puerto Rican citizens would thus be "involuntary" dual citizens, subject to no penalties under federal law for the mere possession of dual citizenship.[199] Furthermore, every Puerto Rican dual citizen who performed one of the affirmative acts provided in section 349 would have to do so voluntarily and with the intent to relinquish United States citizenship, under the *Terrazas*[200] standard, in order for expatriation to occur.[201] This standard, in turn, could require separate admin-

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[194] 8 U.S.C. § 1481 (1988).

[195] *Id.* § 1481(a)(1).

[196] *Id.* § 1481(a)(2).

[197] *Id.* § 1481(a)(3).

[198] *Id.* § 1481(a)(4). Moreover, all of these expatriating acts are subject to the voluntariness and intent standards discussed in Vance v. Terrazas, 444 U.S. 252 (1980). *See* 8 U.S.C. § 1481(b) (1988). Since federal law does not provide different standards for fourteenth amendment than for statutory citizens, it follows that expatriation of the latter also is subject to the *Terrazas* standards.

[199] *See* Note, *Dual Nationality, supra* note 151, at 303–08; Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1465 (1986).

[200] 444 U.S. 252 (1980).

[201] Even this possibility is not free from constitutional doubt. It has been forcefully argued that this discrimination between "voluntary" and "involuntary" dual citizenship is unconstitutional under the *Schneider* principle. *See* Note, *Dual Nationality, supra* note 151, at 308–11.

Four years after *Terrazas* was decided, a student commentator concluded that the State Department Board of Appellate Review, which hears all appeals in cases involving determinations of automatic loss of citizenship, had "made it increasingly difficult for the Government to succeed in loss of citizenship appeals." Note, *Board of Appellate Review, supra* note 151, at 877. According to this source:

> The Board's decisions have, in effect, changed the requirements for demonstrating intent. Mere proof of a person's voluntary performance of a statutory act of expatriation when he has reason to believe that the act may endanger citizenship is no longer sufficient. Rather, the current standard approaches a requirement of proof of a conscious purpose of losing that citizenship.

Id. at 878. *See also* 4 C. GORDON & S. MAILMAN, *supra* note 701, § 20.8b, at 20-62 (Supp. 1989) (citing more recent cases that reaffirm this trend).

istrative proceedings to deprive effectively each Puerto Rican public employee of his or her United States citizenship. The federal government would have its hands full.

Lastly, even if all of the above were incorrect and Congress could validly require Puerto Ricans, and Puerto Ricans alone, to elect one citizenship, the length of the period in which to make this decision would have to be settled. Even this is no easy matter. Complications arise primarily from the fact that hundreds of thousands of minors would be involved, some of them just born.

I suppose that Congress would not require parents to make a decision for their minor children or infer one or another decision from inaction as concerns such minors. If Congress did, in stark contrast to its prior actions in regulating expatriation,[202] a serious constitutional question would arise. Although some judicial statements suggest that the constitutional rights of minors in some contexts may be of a lesser degree than those of adults,[203] this should not be considered one of such contexts. After all, in the words of Justice Fortas, "whatever may be their precise impact, neither the fourteenth amendment nor the Bill of Rights is for adults alone."[204]

If minors must be recognized as having basic rights in quasi-criminal processes[205] and in aspects of procedural due process and freedom of expression in public schools,[206] and if care must be taken to respect their privacy,[207] it would seem *a fortiori* true that neither their parents nor the United States may make a valid, final decision for such minors concerning their citizenship status. For all of these reasons, it seems unavoidable that the transition period would have to be as long as eighteen years, at

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[202] Sections 349 and 351 of the 1952 Act, as amended, 8 U.S.C. §§ 1481, 1483 (1988), actually make it impossible for a person below the age of 18 to perform an irrevocable act of expatriation, with the possible exception of treason. *Cf.* Hertz, *supra* note 36, at 1040 & n.200. It should be recognized that this author states, *see id.* at 1041 n.202, that the Court's analysis in Perkins v. Elg, 307 U.S. 325, 342–50 (1939), "suggests that Congress may have the power to withdraw the right to make an election even before a minor 'dual citizen' is legally capable of availing himself on [sic] the election." Congress, however, has never put this *dictum* to the test.

[203] *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979).

[204] *In re* Gault, 387 U.S. 1, 13 (1967).

[205] *Id.*

[206] Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

[207] *See, e.g.*, Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976). *See generally* L. TRIBE, *supra* note 110, § 16-31 & n.8.

least for some Puerto Ricans. Webs, after all, are easier to make than to untangle.

B. *Some Practical Problems*

Any idea is as good as it works. One must therefore consider how well the forced election proposal would function in practice.

The Puerto Rican family is almost evenly divided by a relatively narrow span of ocean. Some three and a half million live on the Island; some two and a half million live in the continental United States.[208] In no small measure, that state of affairs has been propitiated, at times even encouraged, both by the government of Puerto Rico and by the federal government.[209] An initial denial of dual citizenship, with the concomitant erection of immigration barriers, may make it more difficult for the family to gather. But family ties among Puerto Ricans are as strong as, if not stronger than, their linguistic and cultural ties to the Hispanic world.[210] Many Puerto Ricans in the United States may one day decide to return home.[211] They surely will want to form part of the political community and not remain foreigners in their own land. And what about those who on the day of independence might elect to retain their United States citizenship and remain in Puerto Rico? Might they not soon feel the same urge? The Republic, in good faith, need not require of its people a Mexican-type oath that would include renunciation of

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[208] B. TAYLOR, PUERTO RICO: POLITICAL STATUS OPTIONS 6 (Congressional Research Service publication IB89065, updated Apr. 17, 1989).

[209] *See* López, *The Puerto Rican Diaspora: A Survey*, in A. LÓPEZ, THE PUERTO RICANS: THEIR HISTORY, CULTURE AND SOCIETY 313, 315–18 (1980); J. TORRUELLA, *supra* note 59, at 247–49; R. CARR, PUERTO RICO: A COLONIAL EXPERIMENT 209–10 (1984). On the subject of Puerto Rican migration to the United States, see generally Senior & Watkins, *Toward a Balance Sheet of Puerto Rican Migration* in SELECTED BACKGROUND STUDIES PREPARED FOR THE U.S.-P.R. COMMISSION ON THE STATUS OF PUERTO RICO 689 (1966); K. WAGENHEIM, PUERTO RICO: A PROFILE 197–203 (2d ed. 1975); M. MALDONADO DENIS, PUERTO RICO Y ESTADOS UNIDOS: EMIGRACIÓN Y COLONIALISMO (1976).

[210] *See* K. WAGENHEIM, *supra* note 209, at 196–97.

[211] Return migration is already a fact of life in Puerto Rico. *See, e.g.*, C. CINTRÓN & P. VALES, A PILOT STUDY: RETURN MIGRATION TO PUERTO RICO (1974).

United States citizenship.[212] Naturalization need not be difficult or risk a loss of United States citizenship. It could be as easy as Israeli naturalization is for American Jews.[213] A new generation of dual citizens may emerge.

Let me flip the coin. Some Puerto Ricans who on the day of independence elect to renounce United States citizenship may one day want to rejoin their relatives in the United States. Will Congress make it harder for Puerto Ricans than for any other nationality to apply for permanent residence and, eventually, for naturalization?

What about the children of those Puerto Ricans who retain their United States citizenship but remain on the Island? Is Congress seriously committed to approving an amendment tailored to exclude Puerto Ricans, and Puerto Ricans alone, from the *jus sanguinis* principles set out in section 301 of the Immigration and Naturalization Act of 1952, as amended in 1978?[214] This is exactly what the Senate committee ultimately decided to propose. As approved by the committee, at Chairman Johnston's behest, S. 712 recognizes dual citizenship for all citizens of the Republic of Puerto Rico who become United States citi-

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[212] The oath of allegiance to Mexico that the plaintiff in *Terrazas* was required to sign contained the following statement:

> I therefore expressly renounce [United States] citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of [the United States of America], of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

444 U.S. 252, 255 n.2 (1980).

[213] *See* Note, *Dual Nationality*, *supra* note 151, at 304–05; Levinson, *supra* note 199, at 1465. And, to my knowledge, this fact has not led to a souring of United States-Israel relations, in spite of repeated protests from Arab countries with whom the United States maintains diplomatic relations, stemming from the participation of American-Israeli dual citizens in armed conflicts against those nations. *See* Dionisopoulos, Afroyim v. Rusk*: The Evolution, Uncertainty and Implications of a Constitutional Principle*, 55 MINN. L. REV. 235, 251, 253–56 (1970); Murphy, *Loss of Nationality Under United States Law and Practice: A Foreign Policy Perspective*, 19 KAN. L. REV. 89, 100–01 (1970). On the contrary, it appears that the United States officially regards dual citizenship with sympathy in the Israeli context. According to one source:

> [T]he dual citizenship conferred upon American Jews under the Israeli Law of Return will normally not affect U.S. citizenship because it is presumed that Israeli citizenship is accepted without the intent to relinquish U.S. citizenship. *See* "Information on U.S. Law and Israeli Citizenship and Military Service," a fact sheet of the Department of State.

Note, *Board of Appellate Review*, *supra* note 151, at 861 n.225.

[214] 8 U.S.C. § 1401(c), (d) & (g) (1988). If not, those children also will be dual citizens. Surely, the United States cannot resent that Puerto Rico include in its sovereign Constitution a provision such as the following: "All persons born or naturalized in Puerto Rico, and subject to the jurisdiction thereof, are citizens of Puerto Rico."

zens prior to the date of certification of the results of the referendum or plebiscite, if such results favor the independence solution.[215] Chairman Johnston, however, coupled his new proposal with a different solution for persons born in Puerto Rico on or after the date of proclamation of independence. Any such persons would not be born United States citizens under *jus sanguinis* principles.[216]

Chairman Johnston's new proposal was incorporated under section 311 of the bill.[217] Subsection (b) guarantees that the United States citizenship of those Puerto Ricans who already possess it shall not be affected, but provides that no one born in Puerto Rico on or after the date of certification of pro-independence results of the referendum shall acquire such citizenship under principles of *jus soli*.[218] Subsection (c) denies United States citizenship, under principles of *jus sanguinis*, to persons born in Puerto Rico on or after the date of proclamation of independence.[219]

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[215] S. 712, 101st Cong., 1st Sess. § 311(b) (1989), *reprinted in* S. REP. No. 120, 101st Cong., 1st Sess. 10 (1989). The chairman's suggestion for forced election of citizenship was thus withdrawn, at least for the time being.

[216] *Id.* Chairman Johnston was already considering this idea by the time the third set of hearings, held in Washington, began on July 11, 1989. *See* 3 *Hearings, supra* note 4, at 51–52. He solicited and obtained Acting Deputy Attorney General Dennis's favorable review of this idea. *Id.*

[217] S. 712, 101st Cong., 1st Sess. § 311 (1989), *reprinted in* S. REP. No. 120, 101st Cong., 1st Sess. 10–11 (1989).

[218] *Id.*

[219] Subsection (c) provides:

> *Notwithstanding any other provision of law*, no person born outside of the United States after the Proclamation of Independence shall be a citizen of the United States at birth if the parents of such person acquired citizenship in the United States solely by virtue of being born in Puerto Rico prior to the Proclamation of Independence pursuant to the provisions of the Jones Act and the Immigration and Nationality Act.

Id. (emphasis added).

The interplay between subsections (b) and (c) requires the conclusion that persons who are born in Puerto Rico, of a parent who is a United States citizen, on or after the date when the pro-independence results of the referendum are certified, but before the date of proclamation of independence, shall be United States citizens at birth, under principles of *jus sanguinis*. As the bill currently stands, the transition period between both dates would be approximately two years, if everything goes smoothly. S. 712, §§ 301(a), 302, 303(b), 304(b), 307, *reprinted in* S. REP. No. 120, 101st Cong., 1st Sess. 8–9 (1989).

The denial of citizenship *jus sanguinis* to persons who are born in Puerto Rico after independence to a parent who is a United States citizen, if finally approved, would face serious constitutional problems under equal protection principles, as Professor Laurence Tribe argued in his letter to the Committee. *See* Tribe Letter, *supra* note 701, at 5–7. The situation would be indistinguishable, from a constitutional standpoint, from the forced election of citizenship mechanism, as applied only to Puerto Ricans. For the constitutional analysis concerning that latter proposal, see *supra* text accompanying notes 179–190. The legislative technique adopted may be different in form, but is

The above examples, of probable occurrence, show that it is quite difficult to unscramble the broken egg neatly. The 1917 decision, for better or for worse, cannot be undone as easily as the CRS assumes. There are human, historical, and political factors that need to be assessed. Most importantly, the cost of undoing the 1917 decision should not fall on the Republic of Puerto Rico or on Puerto Rican families. Old solutions that may have worked in 1776, 1787, or 1868 may no longer work in a world where few colonies remain.[220]

A new framework has emerged to govern nationality problems that accompany territorial change; two of its principal elements are the concepts of self-determination and of human rights.[221] According to this view:

> One of the elements of this new framework is the concept of self-determination. Because this concept has gained great significance in the twentieth century, nationality problems have come to be settled by reference to the criteria for self-determination of a people. *Newly independent countries applied not only the domicile principle, but also various other criteria in determining who were to be their nationals according to their own conceptions of the essence of their nations. These determinations of nationality by the domestic laws of newly independent countries were basically recognized by former metropolitan states.* Although the principle of automatic change is still important as a presumptive rule, its underlying rationale differs greatly from that of the earlier period. *The free and voluntary will of individuals who are to participate in the body politic of the territory should be considered most important for settling nationality problems.*
>
> Another important element of the new framework is the concept of human rights. Although human rights law has developed in a somewhat different context from that of nationality, it has been implicitly taken into consideration in settling nationality problems accompanying territorial

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identical in substance, to a not-so-hypothetical amendment to section 301 of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1401 (1988), that might read thus: "Any person born anywhere, *except for the island of Puerto Rico*, to a parent who is a United States citizen, shall be a United States citizen at birth."

Lastly, even if this proposal ultimately passes constitutional scrutiny, it may prove largely ineffective. Any Puerto Rican mother who is a dual citizen and who is determined to have her child born a United States citizen may simply catch a plane to the United States with no immigration barriers. The measure proposed in section 311(c), therefore, may have an effect completely different from that intended. It may prove to be a boon to airlines that operate the San Juan-Miami or San Juan-New York routes and to Florida and New York hospitals.

[220] *See* Onuma, *Nationality and Territorial Change: In Search of the State of the Law*, 8 YALE J. WORLD PUB. ORD. 1, 1–4 (1981).

[221] *Id.* at 3.

> change. Prevention of statelessness and *respect for the desires and actual lives of those whose status is affected by the change of territory or nationality exemplify this concern for human rights* . . . .[222]

The United States did not truly consult the people of Puerto Rico in 1917. If it really wants to consult them now, it should not *a priori* reject any solutions that may have the support of a considerable portion of the Puerto Rican body politic. True self-determination must take into account the people's wishes, their particular historical development, and the responsibility the United States assumed and has yet to discharge fully under article IX of the Treaty of Paris of 1898. The United States should not give the impression that it is providing disincentives for any one of the status options. Of that there are enough examples in the history of United States-Puerto Rico relations, such as the 1936, 1943, and 1945 Tydings Bills for the Independence of Puerto Rico.[223]

III. CONCLUSION

The CRS proposal for unilateral revocation of United States citizenship, in the event of Puerto Rican independence, is almost

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[222] *Id.* (footnotes omitted; emphasis added). The Department of Justice seems unaware of this developing framework. Its argument against dual citizenship, from an international standpoint, is based on the old rule which already victimized the inhabitants of Puerto Rico once, in 1898: "a transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign." 3 *Hearings*, *supra* note 4, at 28 (written statement of Mr. Dennis). In support of this rule, Mr. Dennis cited, *inter alia*, Chief Justice Marshall's 1828 decision in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, the same decision that originated the infamous, oxymoronic concept of legislative courts. *See generally* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 54 (2d ed. 1989); C. WRIGHT, THE LAW OF FEDERAL COURTS 40 (4th ed. 1983). *See also* 3 *Hearings*, *supra* note 4, at 43 & n.2 (Mackey memorandum) (applying the *Canter* rule, while recognizing that some treaties have permitted persons to "retain their former nationality, but usually at the 'heavy' price of leaving the territory").

[223] S. 4529, 74th Cong., 2d Sess. (1936); S. 952, 78th Cong., 1st Sess. (1943); S. 227, 78th Cong., 1st Sess. (1945). The story behind the first of these bills is a prime example of colonial politics. In response to the death, at the hands of the police, of three members of the Nationalist Party of Puerto Rico, two party members killed Police Chief Francis Riggs and were thereafter killed themselves while in police custody. Distraught over the death of his friend Riggs, Senator Millard Tydings (D-Md.), who would soon become Chairman of the Senate Committee on Territories and Insular Affairs, filed a bill for the independence of Puerto Rico. The terms of the bill were quite harsh, from both economic and political standpoints. Even advocates of independence, as later Governor Luis Muñoz Marín was at the time, perceived that retaliation, and not self-determination, was the driving force behind this bill. *See generally* R. CARR, *supra* note 209, at 62–63; J. TORRUELLA, *supra* note 59, at 122–27; 2 J. TRÍAS MONGE, *supra* note 59, at 225–28.

certainly invalid under long-standing principles of United States constitutional law. On the other hand, a requirement of election of citizenship, although not as clearly invalid, raises serious constitutional and policy issues concerning equal treatment. It also may very well fail to accomplish its main objective of avoiding dual citizenship. Traditional objections to the concept of dual citizenship have suffered considerable erosion in the last two decades. In view of the legal uncertainties that other solutions present, of the particular demographic characteristics and migration patterns of the Puerto Rican people, and of the requirements for true self-determination, dual citizenship may be the most workable solution for an independent Puerto Rico in light of the unilateral collective naturalization of 1917.

IV. POSTSCRIPT

The Senate Committee on Energy and Natural Resources finally approved S. 712, as extensively amended, on August 2, 1989, by the surprisingly close vote of eleven to eight.[224] Proceedings in the House, however, have barely started.[225]

There are growing indications that the plebiscite may not take place in 1991, after all. Notwithstanding Chairman Johnston's commitment, there seems to be no comparable attitude on the

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[224] S. REP. No. 120, 101st Cong., 1st Sess. 23 (1989). Most of the senators voting against the Bill in the committee voiced serious reservations concerning the cost of statehood. *See, e.g.*, the separate views of Senators Wallop (R-Wyo.) and Conrad (D-N.D.). *Id.* at 63, 65. There were objections also, even from senators voting in favor of the bill, to its self-executing nature. Several senators expressed serious reservations concerning the scenario of automatic statehood conferred upon a simple majority vote in the referendum. Senator Dale Bumpers (D-Ark.), who finally voted with the majority, *id.* at 23, was the most forceful advocate of these concerns. He reserved the right to offer an amendment on the floor of the Senate to require a specific super-majority vote and to eliminate the bill's self-executing nature and permit Congress to take a second look at the situation after the returns of the referendum are known. *See Plebiscite Bill Clears Senate Panel 11–7* [sic], The San Juan Star, Aug. 3, 1989, at 1, col. 1. *See also* Weisman, *supra* note 3, at 32, col. 2.

[225] On March 2, 1990, the House Insular and International Affairs Subcommittee held its first hearing on the Puerto Rican status question, in which the Island's three political party presidents testified. *See RHC Urges Status Equality*, The San Juan Star, Mar. 3, 1990, at 1, col. 3. Thus, it took the House nine months to start the process of hearings, after the Senate held its first hearing.

After its first hearing, the Subcomittee held hearings in Puerto Rico on March 9, 10, and 12. *See Hearings Scoreboard: No Winners, Fuster Loses Face*, The San Juan Star, Mar. 13, 1990, at 17, col. 1. In contrast to the Senate hearings, the House was not considering at that time any specific bill. *See infra* notes 227–228 and accompanying text.

part of most of his Senate colleagues.[226] Prospects in the House appear even bleaker. Although in late October 1989, Representative Robert Lagomarsino (R-Cal.) filed in the House an almost exact replica of S. 712,[227] it failed to gain the endorsement of the House leadership.[228] Three key House members, Speaker Thomas Foley (D-Wash.), Representative Morris Udall (D-Ariz.), Chairman of the House Committee on Interior and Insular Affairs, and Virgin Islands Delegate Ron de Lugo, Chairman of the Insular and International Affairs Subcommittee, are on record as steadfastly opposed to the Senate bill's self-executing provision, particularly as applied to statehood.[229] These problems, coupled with issues of timing and with the parallel efforts of the District of Columbia statehood movement,[230] have

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[226] *See Poll Shows Most U.S. Senators Undecided on Status Bill*, The San Juan Star, Dec. 11, 1989, at 3, col. 1. According to this account, a recent poll shows that "[m]ost U.S. senators are undecided or have no position on the Puerto Rico status plebiscite bill, which probably must be amended to get through the chamber." *Id.* The poll also showed that "a key worry of senators was that the plebiscite bill favored statehood over enhanced commonwealth and independence." *Id.*

Another chief worry of some influential senators concerns the cost of statehood. Just before the Senate Finance Committee held hearings on the bill, in mid-November 1989, the Congressional Budget Office released an updated study which places the cost of a four-year transition period to statehood at $9.2 billion. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: THE PUERTO RICO STATUS REFERENDUM ACT 7 (Nov. 2, 1989) [hereinafter CBO COST ESTIMATE]. *See also CBO Raises Statehood Tab*, The San Juan Star, Nov. 7, 1989, at 1, col. 3. This prompted Committee Chairman Lloyd Bentsen (D-Tex.) to order that a new study be conducted on the subject. *See Statehood Under Scrutiny*, The San Juan Star, Nov. 16, 1989, at 1, col. 3.

[227] *See* 135 CONG. REC. H7583 (Oct. 26, 1989).

[228] *De Lugo: Plebiscite Bill on Schedule*, The San Juan Star, Nov. 1, 1989, at 2, col. 2.

[229] *See Martín Sees Parties Submitting Separate Status Bills*, The San Juan Star, Dec. 17, 1989, at 4, col. 1. Representative Udall, in a letter to Senator Johnston, expressly refused to introduce the Senate bill in the House because of this provision, in addition to lack of unanimous support among Puerto Rican parties for the bill. *See Udall Rejects Plebiscite Bill*, The San Juan Star, Nov. 8, 1989, at 1, col. 4. Delegate de Lugo has stated that in the view of some House leaders, "a bill containing the self-executing provision 'stands little chance of becoming law . . . and could, therefore, prevent a status referendum from being held in 1991.'" *House to Hold Plebiscite Hearings Here in February*, The San Juan Star, Dec. 20, 1989, at 3, col. 1.

Reportedly, there have been attempts on the part of these leaders to force the statehooders to accept deleting the self-executing provision as pertains to statehood only. *Statehooders Face Compromise*, The San Juan Star, Dec. 10, 1989, at 1, col. 1. It has been suggested that these attempts are fed by the fear that a slim majority in favor of statehood may be the result of local political conditions and may decline after a few years following a grant of statehood. *Id.* There also have been attempts to have the three parties agree to the complete deletion of the self-executing provision from the bill. *See CRB Insists on Self-Executing Status Bill*, The San Juan Star, Dec. 21, 1989, at 4, col. 1. These attempts have been rebuffed by all three parties. *Id.* Also, a leadership-supported bill had not been introduced in the House by the spring of 1990.

[230] Puerto Rico's drive for a status plebiscite has focused more attention on the move for statehood for the District of Columbia. Some lawmakers have expressed the opinion that this coincidence is all for the best since, they mistakenly believe, Puerto Rico's

led the Puerto Rican Resident Commissioner to the United States, Jaime B. Fuster, all but to conclude that the plebiscite will not be held in 1991.[231]

Even if Mr. Fuster is right, all will not have been lost. The issue of self-determination for Puerto Rico may be postponed, but it cannot be permanently avoided. It is, it has been, and it will continue to be the single most important recurrent issue in Puerto Rican life. That issue is also a thorn in the side of the United States in the international arena.[232]

Furthermore, the legislative process on S. 712 has been enormously important. It undoubtedly will be a depository of experience for future references. The United States government has had to take a stand, however tentative, on what the real terms and conditions for Puerto Rican independence may look like.[233] The United States has had to wrestle with the question

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Republican majority would countervail the District's staunch support for the Democratic Party. *See D.C. Statehood Movement Gains Speed on Puerto Rico's Wings*, The San Juan Star, Dec. 10, 1989, at 18, col. 2. Anyone attuned to Puerto Rican politics knows that the Republican Party would stand little chance of electing a single candidate, were Puerto Rico to become a state. Accordingly, some Republicans who know this are even more worried by the Puerto Rico plebiscite bill. *See* Buchanan, *Puerto Rico as our 51st?*, Wash. Times, Feb. 26, 1990, at D1, col. 6. Thus, journalist Turner concludes, "congressional opposition to the District's statehood appears to be working against Puerto Rican statehood." Turner, *D.C. Statehood Movement Gains Speed on Puerto Rico's Wings*, *supra*.

[231] Fuster, *¿Habrá Plebiscito?*, El Mundo, Nov. 30, 1989, at 44, col. 1. Mr. Fuster bases this opinion on the controversial nature of the bill, on time constraints, on procedural difficulties in Congress, and on the significant fact that 1990 is an election year for all representatives and for one-third of all senators. At least one journalist agrees. *See* Maldonado, *What Jaime Fuster Is Telling Us*, The San Juan Star, Dec. 7, 1989, at 30, col. 1.

[232] *See* Alvarez González, *supra* note 2, at 228–43 (reproducing resolutions on Puerto Rico from the United Nations's Decolonization Committee). *See also* García Muñiz, *Puerto Rico and the United States: The United Nations Role 1953–1975*, 53 REV. JUR. U.P.R. 1 (1984); Rivera Lugo, *Puerto Rico ante la ONU (1976–1983): Autodeterminación y Transferencia de Poderes*, 53 REV. JUR. U.P.R. 267 (1984).

[233] I, for one, do not harbor the slightest hope that independence could triumph in a plebiscite in the near future. Most estimates conclude that independence is currently favored by approximately four to six percent of the Puerto Rican electorate. *See, e.g.*, *Más Firme el Voto por la Estadidad*, El Nuevo Día, Oct. 2, 1989, at 4, col. 1; García Passalacqua, *Vamos a Pedirla*, El Nuevo Día, Oct. 2, 1989, at 5, col. 2. From the standpoint of the independence movement, therefore, it is the process that is most important. And that process has helped to fell some long-standing myths. First, it has further discredited Commonwealth as a decolonizing solution. Second, it has shown the very real political, economic, and cultural problems that the statehood solution would present, both for Puerto Rico and for the United States. *See, e.g.*, Buchanan, *supra* note 230. Third, it has shown that the independence option is economically and politically viable. Lastly, it also has driven home to federal decision-makers the irrefutable fact that independence is, by far, the cheapest solution for the federal treasury. *See* CBO COST ESTIMATE, *supra* note 226; Weisman, *supra* note 3, at 32. This is a fact that PIP President Berríos repeatedly stated in the Senate Hearings, and which no senator challenged. *See* 1 *Hearings*, *supra* note 4, at 274–75, 283–84. Concerning the much

of what it wants to do—or what it can do—with a citizenship it so casually imposed in 1917 upon a whole nation. And at least some congressional leaders have concluded, however reluctantly, that dual citizenship may be the only practical solution for an independent Puerto Rico. Thus, notwithstanding all its shortcomings, the CRS memorandum deserves credit for bringing the citizenship issue to the forefront.

higher estimated cost of statehood, see generally Weisman, *supra*; *CBO Raises Statehood Tab*, The San Juan Star, Nov. 7, 1989, at 1, col. 3; *Statehood Under Scrutiny*, The San Juan Star, Nov. 16, 1989, at 1, col. 3. In this era of fiscal austerity, that is a highly significant factor.

ARTICLE

THE TAKINGS CLAUSE AND REGULATORY TAKEOVERS OF BANKS AND THRIFTS

CHRISTOPHER T. CURTIS*

Problems in the banking and thrift industries in recent years have attracted significant attention and motivated federal regulators to intervene. In this Article, Mr. Curtis examines regulatory and policy initiatives that allow regulatory entities to take control of financially ailing institutions. He addresses and rejects the argument that the actions of regulators who intervene under these provisions amount to takings that must be compensated under the takings clause of the fifth amendment. After an in-depth analysis of the provisions in light of the relevant takings law, Mr. Curtis concludes that the imposition of the regulatory burden in this context, although it may be severe, is justified.

In the banking and thrift industries, these are the times that try regulators' souls. In both industries, failures and threatened failures of federally insured and regulated depository institutions are occurring on a scale and magnitude that have prompted the regulators to exercise powers not previously asserted. Some of those assertions of authority have provoked claims that the regulators are taking property without just compensation in violation of the takings clause of the fifth amendment.[1]

To strengthen the thrift industry for the future and to forestall failures of the sort that bankrupted the thrift insurance fund, the Federal Home Loan Bank Board (Bank Board) (now replaced by the Office of Thrift Supervision) proposed, in conjunction with new risk-based regulatory-capital standards,[2] a regulation authorizing it to take control of institutions whose capital falls below a "subminimum" level that is less than that required by the regulatory-capital rule but more than zero.[3] The proposed rule defines capital deficiency of that magnitude to be an "unsafe or unsound condition to transact business," activat-

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[1] U.S. CONST. amend. V.

[2] Regulatory Capital Requirements for Insured Institutions, 53 Fed. Reg. 51,800 (1988) (to be codified at 12 C.F.R. pts. 561 & 563) (proposed Dec. 15, 1988). Risk-based capital standards, unlike traditional capital standards, take into account the riskiness as well as the magnitude of a depository institution's assets.

[3] Required Capital Levels for Insured Institutions; Regulatory Intervention, 54 Fed. Reg. 826 (1989) (to be codified at 12 C.F.R. pt. 563) (proposed Dec. 30, 1988).

ing the Bank Board's statutory authority to appoint a conservator or receiver to take control of the institution.[4] Because this so-called "early intervention" proposal would authorize takeovers of financially ailing institutions before they reach the point of book insolvency, it has been suggested that such takeovers would be takings of property for which the Constitution requires compensation.[5] Although the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[6] abolished the Bank Board,[7] it specifically authorizes the Bank Board's successor agency, the Office of Thrift Supervision, to exercise the early-intervention power that the Bank Board proposed.[8]

The Federal Deposit Insurance Corporation (FDIC) has also undertaken controversial initiatives. It has asserted that all of a holding company's subsidiary banks should share the costs of the FDIC's resolution of the failure of one or more of the holding company's subsidiary banks. The FDIC implemented this policy in its resolution of the 1988 First Republic failure, in which the FDIC took control of all of the holding company's subsidiary banks, including those that had previously been solvent, and applied their resources to the cost of constructing a new institution which assumed the assets and liabilities of the old banks.[9]

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[4] For the statutory provisions existing at the time of the Bank Board's proposal, see Home Owners' Loan Act of 1933, § 5(d)(6)(A)(iii), 12 U.S.C. § 1464(d)(6)(A)(iii) (1982) (federally chartered associations), and National Housing Act § 406(c)(1)(B)(i)(I), 12 U.S.C. § 1729(c)(1)(B)(i)(I) (1982) (institutions insured by the Federal Savings and Loan Insurance Corporation (FSLIC)).

[5] *See, e.g., Intervention Proposal: A Violation of the Law?*, Thrift Att'y, Feb. 17, 1989, at 1.

[6] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 183 [hereinafter FIRREA].

[7] *Id.* § 401(a)(2), 103 Stat. at 354.

[8] FIRREA § 301, 103 Stat. at 290–91, amends the Home Owners' Loan Act of 1933, §§ 5(d)(2)(A)(iii), 5(d)(2)(C)(iii), to provide that the Office of Thrift Supervision may place a savings association in conservatorship or receivership in case of "an unsafe or unsound condition to transact business, including having substantially insufficient capital . . . ."

In addition, California recently amended its statute governing state-chartered thrift institutions to authorize the state commissioner of savings-and-loan associations to place institutions in conservatorship for one year if certain conditions are met: for example, if such action is necessary to conserve the institution's assets, or if the institution is engaging in unsafe or unsound practices. The amendment's stated objective is to empower the government to take over such institutions before they become insolvent. *See* 52 Banking Rep. (BNA) 953 (May 1, 1989).

[9] *See* 51 Banking Rep. (BNA) 203 (Aug. 8, 1988). For the sake of simplicity, this Article describes the FDIC as taking control of banks. In fact the FDIC has no power to close an institution. An institution may be closed only by its primary regulator, upon a finding of statutorily prescribed grounds; the primary regulator then appoints the FDIC as receiver. Normally there is coordination among the primary regulator, the FDIC, and other affected agencies such as the Federal Reserve Board.

In the more recent MCorp failure, the FDIC also brought under its control as many of the holding company's subsidiary banks as it could, in order to apply all possible resources to resolving the problems of the most deeply insolvent subsidiary banks.[10] In both cases the holding company or its creditors brought suit (currently pending) challenging the legality of the FDIC's actions.[11] The gravamen of the complaint in each case was primarily statutory: lacking explicit statutory authorization,[12] the FDIC constructed a complicated sequence of actions in conjunction with the other bank regulators to achieve its objectives.[13] But the plaintiffs also alleged takings of property without just compensation.

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[10] *See* 52 Banking Rep. (BNA) 773 (Apr. 3, 1989).

[11] *See* 51 Banking Rep. (BNA) 840 (Nov. 14, 1988); 52 Banking Rep. (BNA) 830 (Apr. 10, 1989). The FDIC has also been sued by Texas American Bancshares Inc. as a result of the FDIC's takeover of that holding company's subsidiary banks. *See* 53 Banking Rep. (BNA) 179 (July 31, 1989).

[12] The FDIC relied primarily on section 13(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. § 1823(c)(1) (1988), which authorizes the agency to extend assistance to a bank "upon such terms and conditions as the Board of Directors may prescribe," and on its "bridge bank" authority, 12 U.S.C. 1821(i) (1988), which empowers the agency to transfer assets and liabilities of a failed bank to a bridge bank created for that purpose pending sale to another bank or some other resolution. *See* Brief in Support of the FDIC Defendants' Motion to Dismiss, Senior Unsecured Creditors' Comm. of First Republicbank Corp. v. FDIC (N.D. Tex.) (No. CA-3-88-2871-D) (defending FDIC actions) (on file at the HARV. J. ON LEGIS.).

[13] The FDIC extended assistance to the First Republic group's ailing lead bank in the form of a loan of fixed term and required, as a condition of extending the assistance, that all the other First Republic banks guarantee repayment and that the level of intragroup indebtedness—extensions of credit to the lead bank by its affiliated banks—not be reduced. The interim assistance agreement also provided that the lead bank's indebtedness to its affiliated banks be subordinated to the FDIC loan. Some time before the loan to the lead bank came due, the FDIC announced that it would not be renewed. The Comptroller of the Currency, primary regulator of the lead bank, thereupon reported to the Federal Reserve System that the lead bank was "no longer viable"; the Federal Reserve immediately called its loans to the bank, which the bank could not repay. The Comptroller then declared the bank insolvent and appointed the FDIC receiver. After giving effect to the affiliated banks' guarantee of the FDIC loan and to the subordination of intragroup indebtedness to the FDIC loan, the affiliated banks were also declared insolvent, by the Comptroller or by the Texas Banking Commissioner, as appropriate, and the FDIC was likewise appointed receiver for them. *See* 51 Banking Rep. (BNA) 203 (Aug. 8, 1988); Brief in Support of FDIC Defendants' Motion to Dismiss, *supra* note 12, at 5–9.

The FDIC was not able to take over the entire group of MCorp subsidiary banks, because MCorp, having First Republic's example before it, refused to accept assistance on the terms that the FDIC desired. The FDIC nevertheless was able to obtain control of most of the MCorp banks, because most had made advances to the insolvent lead banks. When transferring the lead banks' assets and liabilities to a newly created bridge bank, the FDIC did not cause the bridge bank to assume the lead banks' debts to the other subsidiary banks (although the FDIC did cause the bridge bank to assume similar debts to unaffiliated banks). Those affiliated banks were thereupon declared insolvent by their primary regulators and placed in the FDIC's receivership. *See* 52 Banking Rep. (BNA) 773 (Apr. 3, 1989). The FDIC used the same technique to take over the subsidiary

The FIRREA, in addition to restructuring the thrift industry, greatly extends the FDIC's powers over banks, *inter alia*, by providing explicitly that all bank subsidiaries in a holding-company group shall share liability for the costs of resolving the failure of one or more of their number.[14] With the enactment of these so-called "cross guarantee" provisions,[15] the Constitution is now the only ground upon which such FDIC action may be challenged.

This Article reflects on the application of the takings clause to regulatory control of insured depository institutions as a general matter, and concludes specifically that neither "early intervention," as proposed by the Bank Board and embodied in the FIRREA, nor the use of the resources of an entire holding company group to assist in resolving the problems of its most insolvent members, as practiced by the FDIC in the First Republic and MCorp resolutions and likewise embodied in the FIRREA, falls afoul of the constitutional restriction.

I. General Considerations

In this century, the difficult cases under the takings clause have generally been considered to be those involving "regulatory takings," in which a government regulation of general applicability restricts the use and reduces the value of property that remains in its owner's hands.[16] In contrast, the FIRREA's early-intervention provision authorizes, and the FDIC's resolutions of the First Republic and MCorp failures effectuated, actual takeover of the subject institutions by government agents. Those initiatives therefore place in unusually sharp focus the issue of whether the actions taken or proposed are unconstitutional takings of property, especially since "the character of the

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banks of Texas American Bancshares Inc. 53 Banking Rep. (BNA) 161, 179 (July 31, 1989).

[14] FIRREA § 206(a)(7); Federal Deposit Insurance Act, § 5(e). The cross guarantee provisions also apply to thrifts in a holding-company structure.

[15] *See* H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 325 (1989).

[16] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); *see generally* Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600 (1988).

government action" is an important element in analyzing whether a taking has occurred.[17]

Clearly, though, not all governmentally sponsored takeovers of enterprises are takings for which the Constitution requires payment of compensation. As a prominent example, bankruptcy trustees acting under the supervision of the bankruptcy courts routinely take control of enterprises formerly controlled by the enterprises' owners; such action is not a taking for which the owners must be compensated. The trustees, under the supervision of the courts, engage in wholesale modification and cancellation of the rights of owners and creditors; these modifications and cancellations are also not takings (for the most part). The circumstance of insolvency necessitates a readjustment of private rights in order to distribute loss of economic value fairly, as well as for other socially desirable purposes.[18] The government may undertake such readjustment without violating the takings clause.

The government's bankruptcy power is subject to the limitation of the takings clause.[19] Nevertheless, the circumstance of insolvency enables the government to take over businesses and to adjust and extinguish rights in them more radically than the takings clause would permit in ordinary conditions.[20] As a fundamental example, the debtor's debts are generally discharged at the conclusion of the bankruptcy proceeding, even if they have not been paid in full or at all. Debts are a species of property that ordinarily cannot be taken without just compen-

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[17] Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986) (quoting *Penn Central Transp. Co.*, 438 U.S. at 124).

[18] Appropriate purposes of the government's exercise of its bankruptcy power include not only fair allocation of the debtor's resources among the creditors, but also provision to the debtor of a "fresh start" in economic life discharged of past debts, *see* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934), and preservation to the public of a socially important enterprise. An example of bankruptcy legislation promoting the last purpose is the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 (1982), which created Conrail out of the ruins of the Penn Central and the other hopelessly insolvent railroads of the Northeast. *See* Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

[19] United States v. Security Indus. Bank, 459 U.S. 70, 75 (1982); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935); *In re* Bevill, Bresler & Schulman, Inc., 83 B.R. 880, 896 (Bankr. D.N.J. 1988).

[20] *See* Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983). For example, the bankruptcy power enables the government to compensate the possessor of extinguished rights by means of interest-bearing securities, when ordinarily cash or its equivalent might be required. *See Regional Rail Reorganization Act Cases*, 419 U.S. at 149–55.

sation, and only the circumstance of bankruptcy permits the government to cancel them without payment.[21]

Regulatory disposition of financially troubled banks and savings associations is an exercise of the bankruptcy power. However, banks and savings associations are not subject to the Bankruptcy Code.[22] Instead, they are subject to regulatory regimes administered by specialized agencies, which, among other responsibilities, supervise the reorganization or liquidation of banks and savings associations that become insolvent.[23] Just as the Bankruptcy Code ranks claims in order of priority and authorizes that some be paid in full before others are paid at all, so the regulatory structure applicable to depository institutions recognizes priorities of claims in cases of insolvency.[24] Depositors take priority over owners. A substantial part of the general regulatory effort with respect to depository institutions is directed toward preserving an institution's value for the benefit of its depositors. In seeking to preserve value for the depositors in cases of insolvency, the regulatory agencies exercise the bankruptcy power of the United States, and takings claims must be analyzed in that context.

The Bank Board's early-intervention proposal, and the FDIC's takeovers of nominally healthy subsidiaries of failing bank holding companies, differ from normal bankruptcy proceedings in one important aspect. The purpose of a bankruptcy proceeding is in part to allocate fairly the losses associated with an insolvent enterprise. The Bank Board and FDIC actions, however, involve institutions that are or allegedly were solvent, at least as reflected on their balance sheets.

But that fact does not necessarily remove the institutions from the scope of the government's bankruptcy power or render regulatory action against them a taking. Regulatory action is

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[21] In *Security Indus. Bank*, 459 U.S. at 74–75, the Court attempted to justify the protected status of security interests in bankruptcy by arguing that they are property while unsecured contract rights are not. *See* Rogers, *supra* note 20, at 988–95. Outside of bankruptcy, though, contract rights are property that cannot be taken without just compensation. *See, e.g.*, United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977); Lynch v. United States, 292 U.S. 571, 579 (1934); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123 (1924).

[22] Bankruptcy Code, 11 U.S.C. § 109(b)(2), (d) (1988) ("Who may be a debtor").

[23] *See* S. REP. No. 989, 95th Cong., 2d Sess. 31, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5817; H.R. REP. No. 595, 95th Cong., 1st Sess. 318, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6275.

[24] *See* 12 U.S.C. § 194 (1988) (distribution of assets of failed national banks); 12 C.F.R. § 389.11 (1990) (distribution priority rules for savings associations; formerly 12 C.F.R. § 569c.11 (1989)).

within the scope of the bankruptcy power if it addresses the situation of financial failure or threatened failure, even if the subject institution is at the moment solvent. In normal bankruptcy, the scope of the bankruptcy power extends beyond the strict confines of insolvency. For example, the trustee in bankruptcy may avoid "fraudulent transfers," payments or other transfers of property meeting the statutory criteria made within one year before the bankruptcy proceeding began, without regard to whether the debtor was insolvent at the time that it made the transfers.[25] Indeed, the trustee's power to avoid fraudulent or preferential transfers[26] normally entails recovering the transferred property from parties that not only are solvent at the time of transfer but remain solvent throughout the bankruptcy proceeding. Those parties are subject to the bankruptcy power not because of their own insolvency but because of their relationship with a financially failing entity. Whether a regulatory action is within the scope of the bankruptcy power therefore requires analyzing the circumstances in which the action is taken, not simply the precise state of the balance sheet of a particular affected party at a particular time. Regulatory agencies must have the flexibility necessary to deal with the many aspects of financial failure.

Similarly, the question of whether a regulatory action works a compensable taking of property requires examination of all circumstances rather than a focus on any particular element. The Supreme Court has repeatedly emphasized the *ad hoc* nature of the inquiry.[27] Of late, the Court has emphasized three elements as being especially significant: "the character of the governmental action," "the economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations."[28] In *Connolly v. Pension Benefit Guaranty Corp.*,[29] the Court upheld

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[25] Bankruptcy Code, 11 U.S.C. § 548. One of the various alternative statutory criteria is that the debtor was left with "an unreasonably small capital" to carry on its business, 11 U.S.C. § 548(a)(2)(B)(ii), a standard quite similar to the "substantially insufficient capital" standard that activates the Office of Thrift Supervision's early-intervention power under the Home Owners' Loan Act of 1933, § 5(d)(2)(A)(iii), *see supra* note 8.

[26] For preferential transfers, see Bankruptcy Code, 11 U.S.C. § 547.

[27] *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[28] Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986) (quoting *Penn Central Transp. Co.*, 438 U.S. at 124).

[29] 475 U.S. 211 (1986).

the constitutionality of statutory amendments[30] increasing the potential liability of employers who withdraw from multiemployer pension plans. Congress feared that these plans were underfunded and would collapse, leaving the federal guaranteeing agency with liability for substantial unpaid pension benefits that it could not pay. In upholding the amendments, the Court demonstrated that, in a case of new regulation in an already regulated area, all three factors enumerated above must be analyzed in light of the claimant's relationship to the regulated activity. Exactions that might otherwise have been held a taking were held not to be when analyzed in their regulatory context.

First, the government action did not physically appropriate the claimant companies' assets for the government's own use, but required that they be applied to fund the companies' obligations to pension-plan beneficiaries in a "public program that adjusts the benefits and burdens of economic life to promote the common good."[31] Second, although the economic impact of the challenged exactions was potentially severe,[32] its severity depended on the claimant companies' relationship with their pension plans, so that the burden could not be shown to be necessarily "always . . . out of proportion to [the employer's] experience with the plan."[33] Finally, the employers had no "reasonable investment-backed expectation" that they would not be subject to the new exactions, because those exactions were a reasonable extension of the existing regulatory scheme, foreseeably made necessary by financial exigencies.[34]

Connolly is an especially pertinent case because in it the Supreme Court upheld the constitutionality of extraordinary measures that were necessary to preserve the integrity of a government insurance fund. Bank and thrift failures that impose multibillion-dollar obligations on the bank and thrift insurance funds, and on the government that stands behind them, pose problems of similar urgency.

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[30] Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, 29 U.S.C. §§ 1381–1461 (1988) (amending the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, 29 U.S.C. § 1001 (1988)).

[31] *Connolly*, 475 U.S. at 225.

[32] In the case of one claimant, its liability under the challenged new provision of the federal pension law was almost 25% of its net worth. *Id.* at 222.

[33] *Id.* at 226.

[34] *Id.* at 226–27. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* at 227 (quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).

With the foregoing considerations in mind, we turn to specific instances in which the takings issue has been raised.

II. Early Intervention

The Bank Board's early-intervention proposal has been criticized as a taking because it contemplates government takeover of institutions that are not insolvent on their balance sheets. The Supreme Court has suggested that a physical occupation of private property constitutes a *per se* taking to which the *ad hoc*, multifactor approach used in most cases of so-called regulatory takings does not apply.[35] But that proposition cannot apply to regulatory takeovers of banks and thrift institutions, because they are not physical property. Organized in corporate or quasi-corporate form, they are legal persons and not natural persons. As entities, they are legal fictions. Gilbert and Sullivan averred that "a legal fiction is a solemn thing," but it is not a physical thing, and it is therefore not subject to physical occupation. The takeover is a legal act, not a physical act. The distinction is important. Taking a physical object is a simple act, easily understood. Taking over a legal entity is not simple, because the entity is not simple: it is an aggregation of legal rights. Consequently, to determine whether a taking has occurred, one must analyze the effect of the challenged regulatory action on the bundle of rights that make up the legal entity.

It is established that the takeover of an institution in bankruptcy is not a taking, and that the bankruptcy power is a broad power and one that the federal bank and thrift regulators exercise. We shall have more to say about that below. Outside of the context of financial failure, the legal rules applicable to takeovers of businesses are undeveloped, because public takeovers of businesses that are going concerns have rarely occurred in this country. Temporary government takeovers of enterprises, to secure their production for the national benefit in wartime or at other critical moments, are clearly temporary takings[36] and

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[35] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–27 (1982). *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74, 82–85 (1980) (state law requiring a shopping-center owner to admit persons for the purpose of unobtrusive speaking and leafleting not a taking of the owner's property).

[36] *See* United States v. Pewee Coal Co., 341 U.S. 114 (1951).

normally are effected through eminent domain proceedings.[37] But in other contexts, there is little judicial guidance.

In international law, which has been obliged to pay more attention to the problem and which like U.S. constitutional law requires governments to pay compensation for property taken, a case of expropriation of a business is clear only when the government permanently deprives its owners of use, control, and benefit of it.[38] Under that standard, owners of thrift institutions taken into conservatorship or receivership under the early-intervention policy would be hard pressed to show that they must be compensated for property taken.

First, since the subject institutions by definition are operating with less than the legally required minimum level of capital—early intervention is triggered by operation below what the Bank Board called a "subminimum" capital level[39]—they are already subject to extensive regulatory control of their operations. In particular, regulators can forbid the owners' withdrawal of dividends or other funds from the institutions.[40] Consequently, early intervention does not deprive the owners of financial benefits that they could legitimately expect to enjoy but for the intervention.

Second, while it is true that the owners of a capital-deficient institution that has been taken over by the Office of Thrift Supervision are deprived (at least temporarily) of control over the institution, the government's temporary assertion of control

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[37] *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[38] *See* Sea-Land Service, Inc. v. Iran, 6 IRAN-U.S. C.T.R. 149, 166 (1984); Starrett Housing Corp. v. Iran, 4 IRAN-U.S. C.T.R. 122, 154 (1983).

[39] Required Capital Levels for Insured Institutions; Regulatory Intervention, *supra* note 3.

[40] Stock institutions that have converted from mutual form are forbidden by rule from paying dividends that would reduce their capital below the regulatory minimum. 12 C.F.R. § 563b.3(g)(2) (1989). More generally, the Office of Thrift Supervision has statutory power to issue cease-and-desist orders to remedy violations of its rules, including the minimum-capital rule, and to halt "unsafe and unsound practice[s]," such as the withdrawal of funds from a capital-deficient institution. *See* Federal Deposit Insurance Act § 8(b), 12 U.S.C. § 1818(b) (1988), *amended by* FIRREA § 902, 103 Stat. at 450–53. The Bank Board had the same power under the National Housing Act, § 407(e), 12 U.S.C. § 1730(e) (1988), *repealed by* FIRREA § 407, 103 Stat. 363.

In its last days, the Bank Board formalized its general power to forbid capital distributions by undercapitalized thrifts in a proposed rule. 54 Fed. Reg. 33,926 (1989) (to be codified at 12 C.F.R. pts. 563 & 563B) (proposed Aug. 17, 1989).

to protect the soundness of an enterprise is not a taking.[41] Indeed, the continued private operation of a capital-deficient institution, with its risks of failure and drain on society's resources, can be likened to a "noxious use" of property, which can be suppressed without activating the takings clause.[42] A capital-deficient institution is more likely to fail than a healthy one. The failure of a financial institution disrupts the life of its community and works hardship on those who have looked to it for credit as well as on those who have lent to it or invested in it. The presence of deposit insurance aggravates the problem. Not only do the failed institution's liabilities to its depositors become the responsibility of the deposit insurer and therefore (in extreme times such as the present) of the nation, but the availability to the institution of insured funds with which to make its investments raises the problem of "moral hazard." That is, the managers' investment decisions may be distorted by their knowledge that if a risky, potentially high-yield investment is successful, the institution's owners will benefit, while if the investment fails and the institution fails with it, the government will clean up the wreckage. The problem is intensified by the easy availability of the insured funds, because depositors know their money is safe, have no incentive to supervise the wisdom of the managers' policies, and instead look only for the highest rates of return.[43] In such an atmosphere, the possibility of noxious use of the institution's resources is clear, as is the logic of taking control of the institution away from its owners.

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[41] In international law, though the right to control is recognized as a fundamental incident of ownership, temporary deprivation of that right may not be an expropriation, depending on the circumstances. *See* Foremost Tehran, Inc. v. Iran, 10 IRAN-U.S. C.T.R. 228, 250 (1986); *Starrett Housing Corp.*, 4 IRAN-U.S. C.T.R. at 155; Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 333–34 (1962).

[42] *See* Goldblatt v. Hempstead, 369 U.S. 590 (1962) (municipality may prohibit excavation below the water table, even where the regulation destroys the value of a business); Miller v. Schoene, 276 U.S. 272 (1928) (state may require destruction of cedar trees infected with a contagious rust without compensating for their value); Mugler v. Kansas, 123 U.S. 623 (1887) (state may ban sale of alcohol even if brewery is thereby rendered worthless). *See generally* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488–92 (1987); Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988)..

[43] *See* Fischel, Rosenfield & Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 314–15 (1987); W. Hoskins, Remarks at the Meeting of the Pennsylvania Bankers' Association (May 13, 1989), *reprinted in Deposit Insurance Should Rely on Market*, Am. Banker, July 18, 1989, at 11, col. 2; *Perils of Insuring Bank Deposits*, Wall St. J., May 8, 1989, at A1.

Prior to its development of the early-intervention proposal, the Bank Board already had specific statutory authority to take over institutions that posed unacceptable risks for reasons other than actual insolvency, including "substantial dissipation of assets or earnings" resulting from legal infractions or from "any unsafe or unsound practice," willful violation of a cease-and-desist order, and concealment of records.[44] Taking over an institution on the ground that its deficient capital condition constitutes an "unsafe or unsound condition to transact business"—another of the previously available statutory bases of action—is not conceptually different.

The presence of a positive capital account, representing book assets marginally in excess of book liabilities, does not render the takeover of a capital-deficient institution a taking of property. The capital account is only a bookkeeping entry, a way of describing the financial condition of the company. It is not a fund of money or another asset. It appears on the right-hand side of the balance sheet with the liabilities, not on the left-hand side with the assets. It is not something that one can exercise dominion over, transfer, or bequeath. In *Ruckelshaus v. Monsanto Co.*,[45] the Supreme Court discussed the attributes that an intangible asset may have;[46] a firm's capital account does not have them. Because it is not itself property, it is not something that can be taken.

Balance-sheet insolvency, the state of having liabilities in excess of book assets, is not a prerequisite to invocation of the bankruptcy power under the Bankruptcy Code. The bankruptcy laws that the Code replaced did require balance-sheet insolvency in conjunction with certain "acts of bankruptcy."[47] But the new Code provides that an involuntary bankruptcy proceeding may be predicated on the debtor's "generally not paying

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[44] The pre-FIRREA provisions were: Home Owners' Loan Act of 1933, § 5(d)(6)(A), 12 U.S.C. § 1464(d)(6)(A) (1988); National Housing Act § 406(c)(1)(B)(i)(I), 12 U.S.C. § 1729(c)(1)(B)(i)(I) (1988).

[45] 467 U.S. 986 (1984).

[46] Describing trade secrets, the Court said: "A trade secret is assignable . . . . A trade secret can form the res of a trust, . . . and it passes to a trustee in bankruptcy." *Id.* at 1002.

[47] *See* 2 COLLIER ON BANKRUPTCY ¶ 303.12[1] (15th ed. 1989); Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938). Even the former law required that balance-sheet insolvency be determined on the basis of a "fair valuation" of the debtor's assets, so that a debtor could not claim solvency simply on the basis of its book entries. *See* J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 15, at 11–12 (1956).

[its] debts as such debts become due,"[48] which is not the same thing as balance-sheet insolvency.[49] If the short-term creditors of a business were to become alarmed and demand repayment all at once, the business might not be able to meet their demands, even if it had a positive capital account and, indeed, even if it retained value as a going concern.[50] Invocation of the bankruptcy power is necessary precisely to preserve that value, which could be destroyed by a throng of impatient creditors tearing at the firm's vitals.[51] The government's takeover of the firm to preserve its value in such circumstances is a valid exercise of the bankruptcy power and not a taking, notwithstanding the presence of a positive capital account.[52]

In fact, the capital account does not necessarily correspond to either the liquidation value or the going concern value of the institution. Certainly, one would normally expect an institution with a positive capital account to be more likely to yield value on liquidation or sale than an institution without a positive capital account. But in many instances an institution with a positive capital account might have no actual value. This might be the case, for example, if some or many of the institution's assets, carried on its books at their cost at the time of acquisition, had subsequently declined in value. A rise in interest rates will cause an across-the-board reduction in value of the fixed-rate financial instruments carried in an institution's portfolio, while a collapse in a regional real estate market will similarly reduce the value of real estate loans, especially commercial loans, as defaults rise and collateral is of insufficient value to cover outstanding principal. In a period of rising interest rates or of widespread decline in real estate values, one would expect the balance sheets of thrift institutions, which specialize in real estate finance, to overstate systematically the institutions' values.[53] Therefore, it will not be surprising if many or all of the

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[48] Bankruptcy Code, 11 U.S.C. § 303(h)(1) (1988).

[49] *See* H.R. REP. No. 595, *supra* note 23, at 323–24 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 6280; S. REP. No. 989, *supra* note 23 at 34, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 5820.

[50] Fischel, Rosenfield & Stillman, *supra* note 42, at 308.

[51] *Id.*

[52] The case of a debtor that is not insolvent on the balance sheet but is nevertheless unable to pay its debts as they come due "is one of daily occurrence." J. MACLACHLAN, *supra* note 47, at 12.

[53] "Many savings institutions have mortgage-backed securities portfolios with a market value that is far less than the value at which they are carried on the institution's books." Stevenson, *Gibraltar To Sell Off Portfolio*, N.Y. Times, June 3, 1989, at 46, col. 6.

institutions to which the Office of Thrift Supervision applies its early-intervention power prove to have no actual value, but in fact require substantial cash infusions from the government in order to be liquidated or sold.[54]

The takings clause is not concerned with book entries but with realizable values. There is no simple test for ascertaining value for purposes of the takings clause; a court must look at the circumstances of the case to determine what compensation is "just."[55] To the extent that there is a uniform standard, it is not owners' equity as reflected on the books of the business but rather what the owners could realize on the market.[56] In each case the inquiry must be whether there is value present and, if so, whether the claimant has an entitlement sufficiently unqual-

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[54] The Bank Board's takeover of Gibraltar Savings of Beverly Hills, California, on grounds of substantial dissipation of assets, provoked an outcry because the institution was nominally solvent at the time of the takeover. *See* Hill, *Dealers in Issues of Gibraltar Assail Takeover*, Wall St. J., Apr. 4, 1989, at A4, col. 1. Gibraltar sued, alleging a taking of property without just compensation. Carson, *Gibraltar Sues Federal Regulators, Claiming Improper Seizure of Thrifts*, Am. Banker, Dec. 6, 1989, at 16. Nevertheless, the Bank Board estimated that rescuing Gibraltar from collapse would cost the insurance fund up to $2 billion. Am. Banker, Apr. 5, 1989, at 3. Later, the FDIC, managing agent for Gibraltar under contract with the FSLIC, announced that a pending sale of a portion of Gibraltar's mortgage-backed securities portfolio at a loss would wipe out the institution's positive paper value. Hill, *Gibraltar Plan To Dump Some Securities Paves Way for Sale of Branch Network*, Wall St. J., June 5, 1989, at A4.

Similarly, the Bank Board placed Lincoln Savings and Loan Association in conservatorship while it still had $20 million of "regulatory capital" (calculated according to more lenient standards than GAAP) on its books. Jefferson & Yoshihashi, *American Continental Chapter 11 Filing, U.S. Seizure of Lincoln Trigger a Fallout*, Wall St. J., Apr. 17, 1989, at C21, col. 1; 52 Banking Rep. (BNA) 907 (Apr. 24, 1989). Lincoln's principal, Charles Keating, already notorious for engaging battalions of lawyers and politicians to fend off the Bank Board's attempts to regulate his thrift, promptly sued the Bank Board on the ground that the agency could not take over Lincoln while the thrift was nominally solvent. Carson, *Lincoln Seizure Spurs Lawsuit*, Am. Banker, Apr. 20, 1989, at 3. Within four months, after regulators adjusted the accounting practices and asset values used by previous management, Lincoln was found to have a net worth of negative $906 million, and was expected to cost the government $2 billion or more overall. Jefferson, *American Continental's S&L Unit had $847 Million Loss in Half, California Says*, Wall St. J., July 31, 1989, at B5E, col. 1. Lincoln was then placed in receivership. Carson, *Lincoln Savings Declared Insolvent*, Am. Banker, Aug. 4, 1989, at 1; 53 Banking Rep. (BNA) 204 (Aug. 7, 1989). (A conservator operates an institution, while a receiver winds it up.) The legal war continued to escalate. *See* Knight, *$1.1 Billion Bank Fraud Suit Filed*, Wash. Post, Sept. 16, 1989, at A1, col. 6.

[55] *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950); United States v. Cors, 337 U.S. 325, 332 (1949).

[56] *Commodities Trading Corp.*, 339 U.S. at 123; United States v. New River Collieries Co., 262 U.S. 341, 344 (1923); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123, 126 (1924). As Justice Holmes said, "[T]he value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market." Ithaca Trust Co. v. United States, 279 U.S. 151, 155 (1929).

ified, and of which he has been sufficiently deprived, that compensation must be paid.

When the government takes over an institution under the FIRREA early-intervention authority, it does not appropriate for itself such value as may be in the institution;[57] rather, it seeks to preserve that value by forestalling further dissipation of it by improvident (or fraudulent) management. It is true that the government seeks to preserve the value of the institution and its assets for the benefit of the depositors in the first instance and not for the benefit of the owners except as lower-priority claimants. But that does not mean that anything has been taken from the owners. They know that the depositors' claim on the value of the institution is prior to theirs, and that value in the institution must be applied first to make the depositors whole. This arrangement, fundamental to the deposit-insurance scheme, is not conceptually different from the relationship between equity investors and senior debt holders in ordinary bankruptcy, and does not violate any legitimate investment-backed expectations.

To the extent that an institution has value beyond that necessary to make the depositors whole, the owners may recover that value. If a conservatorship is terminated and the institution restored to its owners, its value would of course be restored to them as well. In the event of a liquidation or a sale of the institution, the owners would share in the distribution of proceeds in the priority to which their ownership interests entitled them.[58]

There is a possibility that government takeover of an institution under the early-intervention authority might result in re-

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[57] Such appropriation is one of the factors that weighs toward a conclusion that a taking has occurred. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[58] *See* 54 Fed. Reg. 826, 828 (Jan. 10, 1989); 53 Fed. Reg. 25,129, 25,131 (July 5, 1988). If an institution is sold as a going concern, its owners are entitled to recover such going-concern value as it may have. But it is necessary to distinguish between the institution's going-concern value, if any, and the value of its franchise, which is created by the legal chartering scheme that the government administers. A failing thrift may be attractive to an out-of-state bank holding company because its charter provides an entry into a desirable market, even if the institution currently using the charter has no positive value itself. But the government need not pay for the value of the charter. "[T]he Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created . . . ." United States v. Fuller, 409 U.S. 488, 492 (1973). *See also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) ("no person is to have anything in the nature of a property right as a result of the granting of a license").

duction or destruction of value that would otherwise accrue to the owners. Such loss of value might occur if an institution with going-concern value were liquidated, destroying that value; if a conservator or receiver operated the institution at a loss or otherwise impaired its value; or if the institution were sold on unfavorable terms.

In the *Regional Rail Reorganization Act Cases*,[59] the Supreme Court recognized the possibility of an "erosion taking" in the context of the government's takeover of the bankrupt railroads of the Northeast. The trustees in bankruptcy of those railroads were required by the Reorganization Act to continue operating the railroads until a "Final System Plan" for the Northeast rail system could be devised and implemented by transferring the bankrupt roads' rail assets to the newly created Conrail. The Act provided for compensation to the debtors' estates for the rail assets at the time they were transferred, but made no provision for compensating the estates for erosion in value during the period of compelled loss operations that preceded that transfer. That erosion in value, the Court held, could constitute a taking for which compensation must be paid.[60]

But the subsequent decision of the Special Court created by the Reorganization Act[61] indicated the contours of the government's power to compel continued loss operations, and consequent erosion of the debtors' estates, without working a taking for which the Constitution required compensation. The court held that the government could compel a bankrupt railroad to continue operation at a loss for as long as it appeared reasonably possible that the railroad could be reorganized "on an income basis" (that is, as a going concern); if there was no such reasonable possibility, then loss operations could be compelled to continue for as long as was necessary for the relevant authorities (primarily the Interstate Commerce Commission) to process an application for abandonment of service. This was so even though the Constitution required that the abandonment application ultimately be granted because there was no possibility of reorganization on an income basis. The court reasoned that the period of pendency of the application would give the various

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[59] 419 U.S. 102 (1974).

[60] *Id.* at 123–24.

[61] *In re* Valuation Proceedings under §§ 303(c) and 306 of The Regional Rail Reorganization Act, 439 F. Supp. 1351 (Regional Rail Reorg. Ct. 1977).

public authorities breathing room in which to seek alternative arrangements for preserving service, such as the government takeover effected by the Reorganization Act. The owners of the bankrupt railroads could legitimately be required to bear the burden of loss operations for a limited time, because they had invested in a public service to which they knew a strong public interest attached. Compelling the owners to bear that loss therefore violated no legitimate investment-backed expectations.

The bank and thrift industries are similarly, or even more, impressed with the public interest, as is attested by the very existence of deposit insurance and its attendant regulatory regime designed to preserve the stability of the nation's financial system and to protect those who participate in it. Those who invest in the banking and thrift industries know the public interest that attaches to them, and are aware of the regulators' mission to protect the institutions' assets for the benefit of the depositors and to preserve the integrity of the deposit-insurance funds. To those ends, the regulators are commanded by statute to seek the least-cost resolutions to failures of depository institutions.[62] Investors must be aware of that mandate as well. It is possible that—financial matters being charged with uncertainty as much as any other aspect of the economy—a regulator intervening in the affairs of a financial institution may in some cases cause a loss in value to the owners. But that is a risk that the owners may reasonably be asked to accept, and is no more a taking than temporarily compelled loss operations of a railroad in bankruptcy, as explained by the special court in the wake of the Regional Rail Reorganization Act.

Indeed the risk of loss to owners resulting from regulatory intervention is much less for the owners of capital-deficient thrifts than for the owners of a railroad in bankruptcy. There the loss inexorably increases with every day that money-losing operations are compelled to continue. But the bank and thrift regulators' interest in preserving the value of a capital-deficient institution will normally be congruent with the owners'. Doubtless in many cases the owners will recover less than they would have liked. But that is not evidence that the regulators took anything from them. The regulators must enjoy the presumption

[62] 12 U.S.C. § 1823(c)(4)(A) (FDIC mandate with respect to banks and thrifts); former 12 U.S.C. § 1729(f)(4)(A) (FSLIC mandate with respect to thrifts).

that their actions while in control of an institution were in good-faith furtherance of their mandate to preserve value for the depositors at least cost to the government. It will be easy for the owners to allege otherwise, but hard for them to prove.[63]

Were the possibility of loss greater than it is, there would be no taking: the government may absolutely destroy valuable property where necessary to prevent noxious use of it, as the Supreme Court held regarding cedar trees in *Miller v. Schoene*[64] and a gravel quarry in *Goldblatt v. Town of Hempstead*.[65] While a physical threat like the cedar infestation more readily grips the mind as "noxious" than the moral hazard created by a capital-deficient depository institution, the moral hazard is no less grave for being intangible and insidious. If allowed to rage unchecked, it has the potential to create liabilities so huge as to crush the life out of a national economy. It is fair, for that reason, to regard the capital account even of a healthy institution as being not wholly its owners' own, but rather dedicated to the public purpose of absorbing the institution's business losses and serving as a security deposit to enforce prudent behavior by management. That, after all, is why the regulators require minimum capital.[66] If the institution's capital is eroded by business misfortunes, there is no taking; if it is eroded while the institution is under the control of a government agency attempting in good faith to halt its losses, the result should be no different.

The constitutional validity of the early-intervention proposal is affirmed by the Supreme Court's reasoning in *Connolly*. The overall statutory and regulatory scheme affecting insured depository institutions embodies a strong public interest supporting intrusive regulation to preserve value for the benefit of depositors. Because investors are well aware of that legal regime, and early intervention represents a logical extension of it, such intervention does not frustrate legitimate investment-backed expectations and is not a taking.

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[63] Judge Friendly was similarly skeptical of the large claims for erosion taking pressed by the bankrupt Northeastern railroads:

> "[T]here is a certain incongruity between the high demands which the investors make of the Act and the unhappy position they, or in any event most of them, occupied when it was enacted. The idea that billions of dollars of liquidation proceeds of these bankrupt railroads are lurking just around the corner is unrealistic in the last degree."

In re Penn Central Transp. Co., 384 F. Supp. 895, 917 (Regional Rail Reorg. Ct. 1974).

[64] 276 U.S. 272 (1928).

[65] 369 U.S. 590 (1962).

[66] *See* 53 Fed. Reg. 51,800, 51,801–02 (1988).

III. Bank Holding Company Groups

Claimants against the FDIC following its takeovers of the First Republic and MCorp subsidiary groups allege that the takeovers were wrongful because some of the institutions were not insolvent (or even capital-deficient). The fact is that the institutions were insolvent on their balance sheets at the time of takeover, and the takeovers were predicated on that fact. The objections are to the means by which the institutions were rendered insolvent.

Those means were essentially two. First, in both the First Republic and MCorp cases, the FDIC's bridge banks assumed the First Republic and MCorp lead banks' indebtedness to unrelated banks but not to their respective affiliates, requiring that the affiliates' extensions of credit to the lead banks be written down and rendering most of the affiliates insolvent.[67] Second, in the First Republic case, the FDIC required the solvent subsidiary banks to guarantee the FDIC's loan to the foundering lead bank, and that bank's failure, activating the affiliates' guarantees, rendered insolvent those affiliates that were not otherwise insolvent by reason of the subordination of their extensions of credit to the lead bank.[68]

The challenged action of the FDIC is therefore not the takeovers themselves, but rather the FDIC's requirement that members of the corporate group share in the misfortunes of the lead banks and contribute their resources to the FDIC's resolution of the lead banks' failures. The FIRREA cross-guarantee provision cuts through the procedural maneuvers to which the regulators have previously been compelled to resort and imposes liability directly on all insured members of the group for resolution costs caused by its insolvent members. The legislation

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[67] *See supra* note 13. In the MCorp case, the claimants' sense of injustice appears to have been greatly heightened by the fact that MCorp had previously entered a "standstill arrangement" with regulators to maintain intragroup extensions of credit at then-existing levels. *See* 52 Banking Rep. (BNA) 773, 774 (Apr. 4, 1989); 52 Banking Rep. (BNA) 830 (Apr. 10, 1989). There had been a like agreement in the First Republic case.

The federal district court presiding over MCorp's action against the FDIC stated that the FDIC's takeover of the MCorp group violated the provision of the National Bank Act requiring that all creditors of an insolvent national bank be treated alike. MBank New Braunfels, N.A. v. FDIC, 721 F. Supp. 120 (1989).

[68] *See supra* note 13.

therefore gives the FDIC a resolution tool of greatly increased power, for which the agency had lobbied publicly.[69]

The legal issue is what weight ought to be given to the economic reality of a corporate group's functioning. Although the various subsidiaries enjoy legally distinct status, they are not independently functioning units. The group functions as a single enterprise. In part, bank holding companies exist to avoid the effect of legal barriers to branching. Instead of operating through branches, the enterprise operates through subsidiary banks.[70] That legal structure does not dictate the shape of actual operations. In the case of the First Republic group, it appears that the nominally healthy subsidiaries were used to raise funds to support what the FDIC characterized as the "voracious lending activity" of the lead bank.[71] The nature of the group's activities is naturally disputed in the pending litigation, but it appears to be agreed by the parties that at all relevant times, extensions of credit from the various subsidiary banks to the lead bank were in the order of billions of dollars. It is apparent that the outlying banks functioned at least in part as deposit-taking offices for the lead bank. The same was true of the various MCorp subsidiaries. Indeed, the large intragroup extensions of credit to the lead banks were the very tool that the FDIC used to take over most of the First Republic and MCorp subsidiaries.

The government's bankruptcy power can break down the legal barriers between formally distinct members of a single enterprise. This can occur in several ways. If various members of a corporate group are bankrupt, the bankruptcy court may consolidate not only the proceedings but also the assets and liabilities of the different entities, creating a single pool from which creditors of all the entities can be paid and from which a reorganized enterprise can be created.[72] The courts call this practice "substantive consolidation."[73] The bankruptcy power also ex-

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[69] *See* 52 Banking Rep. (BNA) 773, 774 (Apr. 3, 1989). The FDIC announced that it had sent its first "bill" under the cross-guarantee provisions less than a month after the enactment of FIRREA. 53 Banking Rep. (BNA) 375 (Sept. 18, 1989).

[70] 2 M. MALLOY, THE CORPORATE LAW OF BANKS 685–86 (1988); Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 789, 816–17 (1979).

[71] Brief in Support of the FDIC Defendants' Motion to Dismiss, *supra* note 12, at 4.

[72] *See, e.g.*, Chemical Bank N. Y. Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966); Holywell Corp. v. Bank of N. Y., 59 Bankr. 340 (Bankr. S.D. Fla. 1986); *In re* Luth, 28 Bankr. 564 (Bankr. D. Ida. 1983).

[73] *See, e.g.*, *In re* F.A. Potts & Co., Inc., 23 Bankr. 569, 570–71 (Bankr. E.D. Pa. 1982); *In re* Food Fair, Inc., 10 Bankr. 123, 124 (Bankr. S.D.N.Y. 1981); *In re* Vecco Constr. Indus., Inc., 4 Bankr. 407, 409 (Bankr. E.D. Va. 1980).

tends to solvent affiliates of a bankrupt debtor. In the reorganization of the Northeast rail system following the collapse of the Penn Central and other major carriers, the government took rail properties not only from the bankrupt carriers but also from certain of their solvent affiliates, for which it paid not in cash but rather in securities of the reorganized road. The special court upheld that action on the ground that the bankruptcy power extended to the affiliates as integral elements of the overall enterprise.[74] And under the heading of "equitable subordination," a doctrine established by the Supreme Court in *Deep Rock*[75] and other cases,[76] a bankruptcy court will subordinate the claims of affiliated entities on a bankrupt debtor to claims of independent claimants where equity requires such a result in light of the unified nature of the overall enterprise.[77] None of these cases depends for its result on "piercing the corporate veil," a doctrine that requires a strong showing to overcome the presumption of corporate separateness;[78] instead, the cases reflect a determination that it is fair and reasonable in bankruptcy to treat the group members on the basis of their economic relationships, however proper may have been their segregation into discrete legal entities for other purposes.

In its resolution of the First Republic and MCorp failures, the FDIC practiced something very similar to equitable subordination: it treated the indebtedness of the lead banks to their affiliates as of lesser stature than the lead banks' indebtedness to independent banks, and thereby precipitated many of the affiliates into insolvency. Thereupon, the FDIC practiced something like substantive consolidation, applying the resources of all the banks toward resolution of the failure of the enterprise as a whole. The FDIC therefore did not depart markedly from established bankruptcy principles.

The FIRREA cross-guarantee provision, on the other hand, goes substantially farther. It imposes substantive liability on otherwise solvent affiliates simply by reason of their status as

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[74] *In re* Valuation Proceedings, 445 F. Supp. 994, 1002 (Regional Rail Reorg. Ct. 1977). As an alternative holding, the special court also ruled that the solvent affiliates could be paid for their property in marketable securities, rather than cash, even if the Reorganization Act could not be sustained as an exercise of the bankruptcy power. *Id.* at 1003–04.

[75] Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939).

[76] Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510 (1941); Pepper v. Litton, 308 U.S. 295 (1939).

[77] *See* Int'l Tel. & Tel. Corp. v. Holton, 247 F.2d 178 (4th Cir. 1957).

[78] *See In re* Wm. Gluckin Co., 457 F. Supp. 379, 383–84 (S.D.N.Y. 1978).

affiliates. The legislation therefore overcomes the spirit of limited liability that has generally survived even in bankruptcy.[79] However, the bankruptcy courts' tendency to consider the nature of the enterprise as a whole illustrates that to analyze whether the new legislation (as well as the FDIC's actions in the First Republic and MCorp resolutions) works a taking, it is necessary to consider the nature of the bank holding company and its subsidiaries as a single enterprise.

As in the case of the Bank Board's early-intervention proposal analyzed above, the FDIC's takeover of a bank is not a seizure of a physical thing, and the Supreme Court's treatment of "physical occupations" is therefore inapt. The status of a corporate body as a legal fiction is especially noticeable in the context of a corporate group, because the segregation of functions, assets, and liabilities into legally distinct entities is to a considerable extent arbitrary. As the cross-guarantee provisions of the pending legislation make clear, the underlying issue is not the takeovers *per se*, but the objective to which the takeovers were the means and which the legislation would achieve directly: application of the resources of formally healthy members of the corporate group to losses formally incurred by other, legally distinct, members of the group. Is such compulsory application of resources, in the context of a commonly held group of insured banks, a taking?

To clarify the analysis, it is necessary to distinguish between prospective and retrospective measures. Because the FIRREA cross-guarantee provision is now law, future investors in bank holding company groups will have no legitimate investment-backed expectation that it will not be enforced.[80] The issue of constitutionality can be raised only by investors like those of First Republic and MCorp, who invested at a time when the potential breakdown of intragroup corporate barriers to defray

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[79] *See* 2 P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS IN THE BANKRUPTCY OR REORGANIZATION OF PARENT AND SUBSIDIARY CORPORATIONS, INCLUDING THE LAW OF CORPORATE GUARANTIES § 2.13 (1985). For a case in which that principle did not survive, see FDIC v. Sea Pines Co., 692 F.2d 973 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

[80] An argument can be made that any and all property can be abolished prospectively without working a taking, with the possible exception of land, as to which any prospective abolition would necessarily affect current values. *See* Rogers, *supra* note 20, at 987 n.59. Supposing, if only for the purpose of a footnote, that there is a natural law of property which even prospective legislation cannot abrogate, the expectation of legal separateness of corporate-group members in the event of insolvency surely does not rise to that level.

the costs of resolutions was not clearly articulated in the law.[81] Of course, the class of all possible claimants, potentially comprising all investors in bank holding company groups at the time FIRREA was enacted, is a large one.

As to that class, the FDIC's actions in the First Republic and MCorp resolutions and the cross-guarantee provisions of the legislation work no taking. Because a bank holding company group functions economically as a single entity, it is reasonable to assemble the value of the entire system for the purpose of protecting the system's depositors. Investors in the holding company[82] suffer no cognizable harm or violation of legitimate investment-backed expectations because, like the claimants in *Connolly*, they are aware that the overall statutory and regulatory framework is directed to protecting depositors at least cost to the insurance fund, and that this framework is subject to reasonable extension in furtherance of that purpose as circumstances require. Investors cannot reasonably expect to defeat that purpose by segregating the assets and liabilities of a bank holding company group into formally distinct entities. In the circumstances, requiring members of the group to contribute to defraying the costs of assisting other members of the group for the purpose of protecting their depositors is constitutionally equivalent to requiring former members of multi-employer pension plans at issue in *Connolly* retroactively to make additional payments to the plans to fund the plans' obligations to their beneficiaries.

IV. CONCLUSION

The fundamental purpose of the takings clause is to ensure that the few are not unfairly made to bear burdens for the many.[83] In the situations discussed in this Article there is no

[81] *See* United States v. Security Indus. Bank, 459 U.S. 70 (1982), in which the Supreme Court, to avoid constitutional problems, gave only prospective effect to provisions of the Bankruptcy Code authorizing bankruptcy trustees to avoid certain liens.

[82] In the First Republic and MCorp takeovers, the FDIC protected unaffiliated creditors of the individual subsidiary banks; only investors in the holding company suffered loss. *See* 51 Banking Rep. (BNA) 207–08 (Aug. 8, 1988); 52 Banking Rep. (BNA) 830 (Apr. 10, 1989). The same is true under the new cross-guarantee legislation. Federal Deposit Insurance Act § 5(e)(2)(C)(ii), *amended by* FIRREA § 206(a)(7), 103 Stat. 202–03. Those parties who can make the most plausible argument that they legitimately relied on the legally distinct status of the subsidiaries are therefore not affected. *See In re* Flora Mir Candy Corp., 432 F.2d 1060 (2d Cir. 1970).

[83] Armstrong v. United States, 364 U.S. 40, 49 (1960).

unfair burden of constitutional dimension. Not only are investors aware of the long-standing regulatory structure of deposit insurance, but also they have affirmatively benefitted from the assistance it has given them in attracting deposits for the operations of their enterprises and for earning their profits. Here, there is more than the "average reciprocity of advantage" that for Justice Holmes meant that some regulatory interventions in economic activities are not takings:[84] there is active participation in and benefit from the loss-creating activity that, as the Supreme Court held in *Connolly*, justifies the imposition of burdens that may be more severe than those felt by regulated persons generally.[85]

Some argue that regulatory initiatives such as these will make it harder for the financial industry to attract capital.[86] Doubtless they will: all other things being equal, opportunities for private gain are likely to be greater, the more lightly lies the hand of regulation. But greater too may be the risk of financial damage beyond what the entrepreneurs themselves will suffer. These matters are for Congress and the agencies in making the policy judgment how far to use their constitutional power. May they exercise their judgment wisely.

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[84] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[85] 475 U.S. at 227–28.
[86] *See* 51 Banking Rep. (BNA) 203, 204 (Aug. 8, 1988); Hill, *supra* note 54, at A4.

ARTICLE

COMPENSATION FOR NEUROLOGICALLY IMPAIRED INFANTS: MEDICAL NO-FAULT IN VIRGINIA

DAVID G. DUFF*

I. INTRODUCTION

No-fault schemes for compensating the victims of medical injuries are far from novel in legal academic debate,[1] and have existed in Sweden and New Zealand for more than a decade.[2] With the 1987 enactment of the *Virginia Birth-Related Neuro-*

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[1] For proponents of no-fault, see AMERICAN BAR ASSOCIATION COMMISSION ON MEDICAL PROFESSIONAL LIABILITY, DESIGNATED COMPENSABLE EVENT SYSTEM: A FEASIBILITY STUDY (1979) [hereinafter ABA STUDY]; Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First Step Toward the Displacement of Liability for "Medical Malpractice,"* 31 U. CHI. L. REV. 279 (1964); Havighurst & Tancredi, *"Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance*, 613 INS. L.J. 69 (1974); and O'Connell, *No-Fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L.J. 21 (1975). For opponents of no-fault, see P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY 213–18 (1985); Epstein, *Medical Malpractice: The Case for Contract*, AM. BAR FOUND. RES. J. 87, 141 (1976) [hereinafter Epstein, *Case for Contract*]; and Epstein, *Medical Malpractice: Its Cause and Cure*, in THE ECONOMICS OF MEDICAL MALPRACTICE 245 (S. Rottenberg ed. 1978).

[2] On the Swedish patient insurance system, see Calabresi, *Policy Goals of the "Swedish Alternative"*, 34 AM. J. COMP. L. 657 (1986) [hereinafter Calabresi, *Swedish Alternative*]; Hellner, *Sweden*, in MEDICAL RESPONSIBILITY IN WESTERN EUROPE: RESEARCH STUDY OF THE EUROPEAN SCIENCE FOUNDATION 683, 708 (E. Deutsch & H.L. Schreiber eds. 1985); Oldertz, *Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden*, 34 AM. J. COMP. L. 635 (1986); and Oldertz, *The Swedish Patient Insurance System—8 Years of Experience*, 52 MED. LEGAL J. 43 (1984). On the New Zealand scheme, see Gellhorn, *Medical Malpractice Litigation (U.S.)—Medical Mishap Compensation (N.Z.)*, 73 CORNELL L. REV. 170 (1988); and Smith, *Compensation for Medical Misadventure and Drug Injury in the New Zealand No-Fault System: Feeling the Way*, 284 BRIT. MED. J. 1457 (1982). For a critical evaluation of both programs, see D. Duff, Compensation for Medical Injuries: A Legal and Economic Analysis 86–117 (Jan. 1989) (unpublished paper) (on file at the HARV. J. ON LEGIS.).

logical Injury Compensation Act,[3] medical no-fault made its first appearance in North America.[4]

Because of this novelty, the Virginia scheme is likely to be the subject of considerable attention. In fact, widely divergent assessments have already appeared. According to Larry Framme, chief lobbyist for the Medical Society of Virginia, the Act represents a "landmark first step not only towards a solution to the insurance crisis facing obstetricians but towards a comprehensive attack on the liability problems faced by the medical profession."[5] Indeed, the Florida Legislature found this solution so attractive that it adopted an almost identical bill in 1988.[6] Similar schemes have been proposed in North Carolina and Illinois.[7]

Recent academic analyses, on the other hand, have been considerably less enthusiastic. Preferring market approaches to the problem of medical liability, Richard Epstein raises objections of both policy and principle.[8] Another review challenges the Act on policy and constitutional grounds.[9] Jeffrey O'Connell, renowned both for his criticisms of the existing system of personal injury litigation[10] and for the design of numerous tort alternatives,[11] and himself a participant in the drafting

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[3] VA. CODE ANN. § 38.2-5000 (1989).

[4] A recent United States federal government program for compensating children with vaccine-related injuries has been excluded because it raises issues of manufacturers' liability, not medical malpractice. *See* Schwartz & Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?* 48 OHIO ST. L.J. 387 (1987); Inglehart, *Compensating Children with Vaccine-Related Injuries*, 316 NEW ENGLAND J. MED. 1283 (1987).

[5] Framme, *Cinderella: The Story of HB 1216*, 114 VA. MED. 284, 290 (1987).

[6] FLA. STAT. ANN. §§ 766.301–766.316 (West 1988).

[7] S.B. 788, 138th Leg., North Carolina (1987) (not enacted); H.B. 1472, Illinois (1987 and 1988) (not enacted). *See* Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 VA. L. REV. 1487, 1499 n.58 (1988) [hereinafter Note, *Innovative No-Fault Tort Reform*].

[8] Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, 74 VA. L. REV. 1451 (1988) [hereinafter, Epstein, *Market and Regulatory Approaches*].

[9] Note, *Virginia's Birth Related Neurological Injury Compensation Act: Constitutional and Policy Challenges*, 22 U. RICH. L. REV. 431 (1988) [hereinafter Note, *Constitutional and Policy Challenges*]. For an opposing constitutional analysis, see Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1504–14.

[10] *See, e.g.*, J. O'CONNELL & C. KELLY, THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE (1987).

[11] *See, e.g.*, Moore & O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267 (1984); O'Connell, *A Draft Bill to Allow Choice Between No-Fault and Fault-Based Auto Insurance*, 27 HARV. J. ON LEGIS. 143 (1990); O'Connell, *Neo-No-Fault Remedies for Medical Injuries: Coordinated Statutory and Contractual Alternatives*, 49 LAW & CONTEMP. PROBS. 125 (1986); O'Connell, *A*

process,[12] considers the scheme "imperfect" but defends it as a politically feasible experiment in no-fault patient compensation.[13] James Henderson, Jr., another proponent of medical no-fault,[14] has greeted the program with considerable skepticism.[15] Even Harvard Law School Professor Paul Weiler, whose sympathy of no-fault patient compensation might be expected to make him amenable to the plan,[16] concludes that the Virginia scheme represents a "stern test for the no-fault model."[17]

This Article reviews the Virginia Birth-Related Neurological Injury Compensation Program. Since a fair evaluation must logically refer to the objectives of legislative action, attention is initially directed at the context in which reform occurred and to the legislative history of the Virginia Bill. Next, this Article will examine in detail the specific provisions of the Act and report on the State's experience since the passage of legislation in March 1987. While this particular focus on the Virginia reform precludes a more thorough evaluation of medical no-fault generally,[18] some tentative conclusions are proffered regarding the significance of the Virginia Program as an example of broader schemes for compensating the victims of medical injuries. However, since the Program is designed to address only "birth-related neurological injuries," a thorough evaluation requires some analysis of the medical condition that gives rise to eligibility for compensation. It is to this task that this Article turns first.

"Neo-No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898 (1985); O'Connell, *Offers That Can't be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U.L. REV. 589 (1982); O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501 (1976).

[12] *See* O'Connell, *Pragmatic Constraints on Market Approaches: A Response to Professor Epstein*, 74 VA. L. REV. 1475, 1478–79 (1988).

[13] *See id.* at 1482.

[14] *See* ABA STUDY, *supra* note 1, at 58–79; Henderson, *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659, 662 (1982).

[15] *See* Henderson, *The Virginia Birth-Related Injury Compensation Act: Limited No-Fault Statutes as Solutions to the "Medical Malpractice Crisis,"* in 2 MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 194 (Roston & Bulger eds. 1989) [hereinafter 2 MEDICAL PROFESSIONAL LIABILITY].

[16] *See* P. Weiler, Legal Policy for Medical Injuries: The Issues, the Options and the Evidence 221–86 (Jan. 1988) (unpublished manuscript) (on file with Prof. Weiler at Harvard Law School).

[17] *Id.* at 285 n.320.

[18] *See* D. Duff, Compensation for Medical Injuries, *supra* note 2, at 68–120.

II. Birth-Related Neurological Impairment

The term "neurological impairment" includes "any problems stemming from damage to the brain which affect control of motor function, learning ability, and other neurologic functions."[19] Such problems include recurrent seizures (epilepsy), mental retardation, speech impairment (aphasia), various learning disabilities, and cerebral palsy[20]—a term which itself encompasses "a variety of motor disorders caused by nonprogressive brain abnormalities."[21]

Finding the source of these problems has proven to be a difficult task. The recent history of medical opinion on cerebral palsy illustrates this difficulty. It is estimated that between 2.0 and 2.5 infants out of every 1000 live births are born with cerebral palsy.[22] Another 0.3 per 1000 children are estimated to acquire the disability after birth.[23]

However, despite the frequency of the incidence of cerebral palsy, science has been unable to explain precisely what causes this neurological impairment in children.[24] In the 1950's, most cerebral palsy was presumed to result from physical injuries sustained during birth (perinatal insults) resulting in interruption of oxygen to the brain (asphyxia).[25] This view continues to permeate present-day clinical thinking and is also commonplace among lay people. According to one recent study:

> Many obstetricians and perinatologists, parents, lawyers, and judges (particularly in the United States) still believe that perinatal asphyxia and poor obstetric care are the major causes of cerebral palsy syndromes. The rationale for much obstetric monitoring and intervention in labor is that a reduction in perinatal asphyxia will markedly reduce the prevalence of cerebral palsy.[26]

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[19] D. Shepard, K. Pederson & C. Gallup, No-Fault Compensation for Neurologically Impaired Infants: An Exploration of the Issues for the Insurance Panel 2 (Oct. 1987) (unpublished manuscript, Harvard School of Public Health) (on file at the HARV. J. ON LEGIS.) [hereinafter Shepard].

[20] *Id.*

[21] Holm, *The Causes of Cerebral Palsy: A Contemporary Perspective*, 247 J. AM. MED. ASS'N 1473 (1982). *See also* Paneth & Stark, *Cerebral Palsy and Mental Retardation in Relation to Indicators of Perinatal Asphyxia*, 147 AM. J. OBSTET. GYNECOL. 960, 962 (1983).

[22] Shepard, *supra* note 19, at 1.

[23] *Id.*

[24] *Id. See also* Paneth & Stark, *supra* note 21, at 961.

[25] *See* Holm, *supra* note 21, at 1473.

[26] Stanley & Watson, *The Cerebral Palsies in Western Australia: Trends, 1968 to 1981*, 158 AM. J. OBSTET. GYNECOL. 89, 92 (1988).

More recent studies suggest that a reassessment of this previously established opinion is necessary. On the basis of Australian data, for example, Stanley and Watson conclude that "cerebral palsy is related little to events during the perinatal period."[27] Noting that only a minority of infants suffering asphyxia during birth develop chronic brain impairment, Paneth and Stark reject earlier conclusions that "perinatal asphyxia is *the* major cause of cerebral palsy and severe mental retardation."[28] Nelson and Ellenberg reach similar results, finding indications of asphyxia in only twenty-one percent of children suffering cerebral palsy, with less than half of these cases lacking an alternative causal explanation (including congenital malformations, a birth weight of 2000 grams or less, or microencephaly).[29]

Consequently, although perinatal events appear to explain few cases of neurological impairment, attention to perinatal events has generated "an exceedingly high rate of false positive identification" of neurological impairment.[30] Since the "acid test of an understanding of an outcome's cause is the ability to predict its occurrence," Nelson and Ellenberg conclude, "[w]e probably do not know what causes most cases of cerebral palsy."[31] Nevertheless, the fact that "information about events during labor, delivery, and the newborn period did not identify a substantially larger number of cases than information limited to major characteristics determined before labor began" suggests "a relatively small role for factors of labor and delivery in accounting for cerebral palsy" and a distinct possibility that "a substantial proportion of cases . . . may have been related partly or wholly to defects intrinsic to the fetus."[32]

What is true for cerebral palsy may be true for other neurological impairments as well. Indeed, the term "birth-related neurological injury" is perceived as something of a misnomer by many neurologists as most "birth-related neurological injuries"

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[27] *Id.* at 92.

[28] Paneth & Stark, *supra* note 21, at 965.

[29] The term "microencephaly" refers to the abnormal smallness of the head, especially in regard to cranial capacity. Nelson & Ellenberg, *Antecedents of Cerebral Palsy: Multivariate Analysis of Risk*, 315 NEW ENGLAND J. MED. 81, 85 (1986) [hereinafter Nelson & Ellenberg, *Antecedents of Cerebral Palsy*]. *See also* Nelson & Ellenberg, *The Asymptomatic Newborn and Risk of Cerebral Palsy*, 141 AM. J. DISEASES CHILD. 1333, 1335 (1987) [hereinafter Nelson & Ellenberg, *The Asymptomatic Newborn*].

[30] Nelson & Ellenberg, *Antecedents of Cerebral Palsy*, *supra* note 29, at 85.

[31] *Id.*

[32] *Id.* at 86.

have prenatal, not perinatal, explanations. As Shepard points out:

> [T]he issue in the so-called "birth-related trauma" cases is what genetic or risk factors were present that did not enable the child to emerge from the birth process unharmed. If the child asphyxiates, the question is not necessarily what went wrong in the delivery process, but what happened in the preceding nine months that prevented the child from surviving the birth process.[33]

Thus, explanations of neurological impairment in infants have increasingly come to emphasize prenatal determinants of fetal development instead of perinatal injury.[34]

III. THE CONTEXT OF LEGISLATIVE REFORM

Despite the absence of conclusive evidence or medical consensus on the causes of neurological impairment among infants, obstetricians and other health care workers engaged in the practice of delivering babies have become prominent targets of civil litigation. While North American tort law as a whole has experienced a significant expansion of liability over the past two decades,[35] the trend has been particularly acute in the area of medical malpractice.[36] Furthermore, in the 1980's obstetrics has been affected by this trend in increased liability more than any other field of medical practice. In particular, a major share of obstetrical liability involves neurologically impaired children. Brain damage to infants accounted for 31% of claims initiated

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[33] Shepard, *supra* note 19, at 11–12.

[34] *See id. See also* Paneth & Stark, *supra* note 21, at 965; Nelson & Ellenberg, *The Asymptomatic Newborn*, *supra* note 29, at 1335 ("In cases of mental handicap where cerebral palsy is not also present, it is unlikely that the damage is due to asphyxia during the birth process."). This emphasis on prenatal determinants includes a noticeable relationship between poverty and mild mental retardation, and growing evidence of the adverse effects of maternal drug abuse. *See* Paneth & Stark, *supra* note 21, at 961; Chasnoff, Griffith, MacGregor, Dirkes & Burns, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 J. AM. MED. ASS'N 1741 (1989).

[35] *See* U.S. DEPARTMENT OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986); ONTARIO TASK FORCE ON INSURANCE, FINAL REPORT (1986). *See also* Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Current Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929 (1987).

[36] The frequency of tort claims has risen from one tort claim per 100 doctors to an estimated 18 per 100 doctors between 1960 and the mid-1980's. *See, e.g.*, Weiler, *supra* note 16, at 4–17.

against American obstetricians in 1987.[37] According to the Physicians Insurance Association of America, cerebral palsy "is the second most prevalent diagnosis (following breast cancer) in total indemnity [value of claims paid] in obstetrics and gynecology."[38]

Explanations of this phenomenon are varied. High expectations for "the perfect baby" may prompt some parents to sue whenever the results are not as anticipated.[39] Others blame overly sympathetic judges and juries,[40] who often may be acting on the basis of outdated medical opinion.[41] Finally, others emphasize that parents have been forced to seek financial recompense through the tort system because of the severity of neurological injuries and the paucity of alternative sources of compensation.[42] In this respect, it must be noted that the vast majority of neurologically impaired infants remain uncompensated despite the increases in obstetrical liability.[43] In an admittedly rough calculation, Clifton ("Chip") Woodrum, delegate in the Virginia General Assembly and sponsor of the Virginia Act, estimates that only five percent of injuries compensable under no-fault would have been indemnified through the tort system.[44]

The dimensions of the obstetrical liability explosion, the specific characteristics that it exhibited in the State of Virginia, and the prevalent perceptions of its origins are central to understanding the objectives and structure of the Virginia Birth-Related Neurological Injury Program. Furthermore, since the detailed provisions of the Virginia Act were also shaped by the political

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[37] *See* 1 INSTITUTE OF MEDICINE, MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 76 (1989) [hereinafter 1 MEDICAL PROFESSIONAL LIABILITY].

[38] Shepard, *supra* note 19, at 1.

[39] *See* O'Connell & Kelly, *supra* note 10, at 86. *See also* 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 76.

[40] Memorandum from Sandra Kramer to the Institute of Medicine Committee to Study the Effects of Medical Professional Liability on the Delivery of Maternal and Child Health Care (May 28, 1988) ("Re: Virginia Birth-Related Neurological Injury Compensation Act") (on file at the HARV. J. ON LEGIS.) [hereinafter Kramer, Memorandum]. *See also* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1498, 1501, 1524.

[41] *See* Stanley & Watson, *supra* note 26 and accompanying text.

[42] For a brief review of such alternative sources, see Shepard, *supra* note 19, at 5–8.

[43] *See id.* at 1 (the number of malpractice suits is substantially less than the number of children born with cerebral palsy each year). *See also* P. Danzon, Medical Malpractice: An Overview of the Issues, University of Toronto Law and Economics Workshop Paper WSX-10, at 14 (1987) (estimating that, at most, one in five medical injuries involving negligence results in a malpractice claim).

[44] Telephone interview with Clifton Woodrum, Virginia General Assembly Delegate (Aug. 3, 1988).

context governing its passage, it is necessary to devote some attention to this process.

A. *Medical Malpractice and Obstetrical Care*

Compared to other areas of medical practice, obstetrical care is characterized by a high incidence of malpractice claims (claim frequency), a high percentage of paid claims (success rate), and a high average indemnity payment on paid claims (claim severity). According to one recent U.S. study, obstetricians were involved in 12.4% of all malpractice claims filed in 1984—the most of any specialty group—even though they comprised only 5.2% of all physicians practicing in the United States as of December 31, 1981, the year most patient injuries occurred for the malpractice claims closed in 1984.[45] Of these claims, more than 45% concluded with some payment to the plaintiff—a figure well above the 31.8% success rate over the entire study sample.[46] Furthermore, among allegations of obstetrical malpractice, the highest rates of success involved injuries related to labor and delivery.[47] Finally, the average indemnity payment in successful malpractice claims involving obstetricians ($177,509) was more than double the average paid out in the seventeen speciality areas surveyed by the study;[48] although obstetricians were involved in only 10% of all paid malpractice claims in the sample, they accounted for nearly 27% of the total dollar amount of malpractice compensation paid out.[49]

In both the United States and Canada the frequency and severity of claims is reflected in enormous increases in liability premiums for health care providers who deliver babies. The average premium paid by an American obstetrician rose from $10,900 in 1982, to $18,800 in 1984—more than double the average physician's premium of $8,400 in that year.[50] This trend

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[45] GENERAL ACCOUNTING OFFICE (GAO), MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984, at 54 (1987) [hereinafter GAO CLAIMS].

[46] *Id.* at 55. *See also* Daniels & Andrews, *The Shadow of the Law: Jury Decisions in Obstetrics and Gynecology Cases*, in 2 MEDICAL PROFESSIONAL LIABILITY, *supra* note 15, 161, at 173–75.

[47] *See* Daniels & Andrews, *supra* note 46, at 183.

[48] GAO CLAIMS, *supra* note 45, at 56.

[49] *Id.* at 39.

[50] GENERAL ACCOUNTING OFFICE (GAO), MEDICAL MALPRACTICE: INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS 28 (1986) [hereinafter GAO INSURANCE].

represents an average annual increase of more than 30%.[51] By 1986, after further annual increases of roughly 25%, mean liability premiums for self-employed American obstetricians and gynecologists reached nearly $30,000.[52] Furthermore, obstetricians in "high-risk" states like New York and Florida[53] and those practicing in claim-prone urban areas face significantly higher liability premiums.[54] Similarly, insurance fees for Canadian obstetricians increased dramatically from $500 in 1983, to $8,250 in 1987, and $9,800 in 1988.[55]

Soaring liability premiums and physicians' fear of civil litigation have noticeably effected obstetrical practice in North America.[56] In a 1985 survey by the American College of Obstetricians and Gynecologists (ACOG) of changes in the obstetrics/gynocology (ob/gyn) practice, "more than two-thirds of respondents reported having increased diagnostic testing in response to the risk of professional liability."[57] Other practice changes included increased documentation (68.2%), more frequent monitoring of procedures (58.8%), obtaining written informed consent more regularly (43.1%), consulting with other physicians more often (44.2%), and referring more patients to other physicians (37%).[58] Although often denounced as "defensive medi-

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[51] *Id.*

[52] 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 98. This recent report contains an excellent description of the obstetrical malpractice insurance market in the United States, and a comprehensive review of recent developments in the availability, affordability, and profitability of obstetrical malpractice insurance. *Id.* at 92–124.

[53] By 1986, obstetricians in New York and Florida faced annual malpractice insurance premiums of $35,133 and $59,537 respectively. *See* GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS 28 (1986).

[54] *See id.*

[55] Sellers, *The Potential Effect of Liability Claims on the Canadian Public Health Care System: A Need for Legal Reform and/or an Alternative to Litigation for the Compensation of Persons Disabled Because of a Medical Misadventure*, in ONTARIO TASK FORCE ON INSURANCE, *supra* note 35, at 363a; Silversides, 17.9 MILLION PAID OUT IN MALPRACTICE CLAIMS, Globe & Mail (Toronto, Ontario), May 28, 1987, at A12.

[56] *See* 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 73–91 (comprehensive survey of recent studies on this subject).

[57] American Medical Association Council on Long Range Planning and Development, *The Future of Obstetrics and Gynecology*, 258 J. AM. MED. ASS'N 3547, 3550 (1987) [hereinafter AMA Council Report].

[58] *Id.* at 3550. Canadian ob/gyns reported similar reactions in a recent survey which found that about 75% of respondents attributed their increased record-keeping to the threat of malpractice liability; roughly 70% claimed that they spent more time discussing treatment risks with patients, and about one-third reported increased performance of cesarian-sections and increased use of electronic fetal monitoring. Figures calculated from survey results in Working Group on Obstetrics and Gynecology, *Submission to the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care*, 69–70, 73–75, 57, and 60–61 (Sept. 1988) [hereinafter Working Group Report] (on file at the HARV. J. ON LEGIS.).

cine,"[59] it is difficult to characterize all these activities as socially wasteful, since many constitute precisely those injury prevention activities claimed to be positive benefits of medical malpractice.

Recent reports published by the Institute of Medicine disclose a more troubling consequence of increased obstetrical liability: marked reductions in the availability of obstetrical providers, particularly for high-risk pregnancies.[60] In a 1987 survey of ACOG members, 27.1% of respondents reported reducing their practice of high-risk obstetrics, 12.4% claimed to have decreased the number of babies delivered, and 12.0% indicated that they had totally eliminated the practice of obstetrics.[61] Furthermore, reports indicate that fewer medical students are choosing to enter the practice of obstetrics.[62] According to the Association of American Medical Colleges, the percentage of fourth-year medical students selecting obstetrical residencies fell from 8.8% in 1984 to 6.7% in 1987.[63]

Insurance-related restrictions on obstetrical practice are particularly severe among family physicians and nurse-midwives. Many obstetricians have raised their fees to offset the cost of rising liability insurance premiums[64] and often refuse to treat Medicaid patients because of inadequate reimbursement levels.[65] However, these groups of health care workers are either unable to command significantly higher fees or deliver too few babies to cover overhead insurance costs.[66] In one study of family practitioners in Arizona, 10.1% eliminated all obstetrical activity from their practice, while another 5.8% eliminated high

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[59] *See, e.g.*, Zuckerman, *Medical Malpractice Claims, Legal Costs, and the Practice of Defensive Medicine*, 3 HEALTH AFF. 128 (1984).

[60] *See* 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 35–53.

[61] American College of Obstetricians and Gynecologists, *Professional Liability Insurance and Its Effects*, (1987), cited in Working Group Report, *supra* note 58, at 26.

[62] 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 36–37.

[63] *Id.* at 37.

[64] AMA Council Report, *supra* note 57, at 3551.

[65] One 1983 study by the Guttmacher Institute found that more than 40% of physicians practicing obstetrics refuse to treat Medicaid patients. *Id.* Similar problems with the Ontario Health Insurance Plan fee scale have been cited by the Canadian Medical Association as one reason for doctors abandoning or choosing not to enter obstetrics. *See* Breckenridge, *Fear of Lawsuits Scares Doctors Out of Some Fields, Report Says*, Globe & Mail (Toronto, Ontario), Aug. 13, 1988, at A9, col. 1. In a recent Canadian study, nearly 40% of ob/gyns reporting a reduction or exclusion of obstetrics practice within the last five years cited inadequate compensation as a significant factor. Also, roughly 8% listed an insufficient number of cases each year; more than 20% cited the cost of insurance coverage. Working Group Report, *supra* note 58, at 50.

[66] 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 42–52.

risk and operative obstetrics.[67] In another survey, involving Florida family physicians, 18% reported dropping obstetrics, and 55% claimed to have limited their practices to low-risk deliveries.[68] According to the American Academy of Family Physicians (AAFP), 23.3% of its members ceased practicing obstetrics by the end of 1985 because of professional liability concerns.[69] A 1988 survey reported a more severe trend in Canada: 32.2% of family physicians had decreased or excluded one or more aspects of obstetrical care from their practices within the previous five years—with a rate substantially higher in rural areas and among older physicians.[70] Finally, by mid-1985 roughly one-third of the 800 private practice nurse-midwives in the United States had been notified that their malpractice insurance was to be withdrawn.[71] Although the American College of Nurse-Midwives (ACNM) was able to arrange a commercial policy in July 1986, premiums at maturity are projected to reach $7,000, compared to less than $250 in 1983.[72] A recent study found that malpractice premiums for nurse-midwives represent roughly 14% of the average nurse-midwife's gross income.[73]

By increasing the cost of an average delivery and by reducing the supply of health care workers willing or able to engage in obstetrics, the expansion of professional liability has heightened access barriers to obstetrical care in North America.[74] Specialists' fees are often beyond the reach of those without first party

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[67] Weiss, *The Effect of Malpractice Insurance Costs on Family Physicians' Hospital Practices*, 23 J. FAM. PRAC. 55, 56 (1986).

[68] Korcok, *Curbing the U.S. Medical Malpractice Crisis*, 131 CAN. MED. ASS'N J. 645, 646 (1984).

[69] 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 46.

[70] Woodward & Rosser, The Impact of Medical/Legal Liability on Patterns of General and Family Practice in Canada 12–21 (Sept. 1988) (Report Commissioned by The Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care).

[71] N.Y. Times, June 13, 1985, at C6, col. 1.

[72] Cohn, *Professional Liability Insurance and Nurse-Midwifery Practice*, in 2 MEDICAL PROFESSIONAL LIABILITY, *supra* note 15, at 104, 107–08.

[73] *Id.* at 110.

[74] *See generally* Lewis-Idema, *Medical Professional Liability and Access to Obstetrical Care: Is There a Crisis?*, in 2 MEDICAL PROFESSIONAL LIABILITY, *supra* note 15, at 78–96 (review of recent studies documenting this phenomenon). *See also* Brook, Brutoco & Williams, *The Relationship Between Medical Malpractice and Quality of Care*, 1975 DUKE L.J. 1197, 1213 (increased malpractice insurance rates for surgery led to decrease in number of physcians performing surgery); Working Group Report, *supra* note 58, at 29 (reporting that the number of Georgia counties without practicing obstetricians increased from 56 in 1984 to 70 in 1988); Dewees, Coyte & Trebilcock, Canadian Medical Malpractice Liability 9 (Sept. 1989) (Research Paper for the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care) (reporting on a recent study indicating a serious shortage of fully qualified ob/gyns in Canada, particularly in rural areas).

health insurance; in mid-1985, for example, the average New York obstetrician's fee for a routine delivery was $1,800.[75] On the other hand, many low-cost providers have restricted or eliminated obstetrical care altogether. In many U.S. states, Medicaid reimbursement rates are less than the malpractice insurance premiums alone,[76] rendering the provision of obstetrical care to low-income women a matter of individual charity rather than social welfare policy. Similarly, recent evidence suggests that Community and Migrant Health Centers are finding it increasingly difficult to fulfill their mandate to provide free and reduced-cost care to uninsured and low-income patients.[77] Access is particularly endangered both in rural areas—where family physicians are the primary and often the sole providers of prenatal care and delivery[78]—and among America's poor,[79] for whom nurse-midwives and community health centers constitute principal sources of obstetrical care.[80]

B. *The Virginia Insurance Crisis*

Virginia's experience with obstetrical liability parallels these North American trends. One 1987 report estimated that 70% of the State's obstetricians had been named in a malpractice suit at least once in their career.[81] In mid-1985, annual premiums for Virginia obstetricians varied from $13,828 in the rural northwestern part of the state to $21,963 in the urban area around Washington, D.C.[82] In each case, rates were considerably higher than the premiums charged to most other specialists.[83] By 1987, these premiums had increased to a range of $25,000 to $30,000.[84]

In a 1987 survey by the Medical Society of Virginia (MSV) and the Virginia Hospital Association (VHA), 40% of respond-

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[75] O'Connell & Kelly, *supra* note 10, at 89. This compares to a still not insubstantial fee of approximately $800 in a small, low-premium city like Parkersburg, West Virginia. *Id.*

[76] *See* 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 60–63.

[77] *See* Hughes, Rosenbaum, Smith, & Fader, *Obstetrical Care for Low-Income Women: The Effects of Medical Malpractice on Community Health Centers*, in 2 MEDICAL PROFESSIONAL LIABILITY, *supra* note 15, at 59 [hereinafter Hughes, *Obstetrical Care*].

[78] *See* Weiss, *supra* note 67, at 57.

[79] 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 54–65.

[80] *See id.* at 19, 54–72. *See also* Hughes, *Obstetrical Care*, *supra* note 77, at 62.

[81] Shepard, *supra* note 19, at 9.

[82] GAO INSURANCE, *supra* note 50, at 73.

[83] *Id.* at 71–74.

[84] Shepard, *supra* note 19, at 9.

ing obstetricians reported that they would be definitely or potentially dropping obstetrical practice in 1987 due to increasing malpractice premiums.[85] Another 40% anticipated or were considering such a move for 1988.[86] Fully 80% were considering early retirement because of soaring malpractice premiums.[87] More than 50% refused to handle Medicaid patients, due in large measure to a discrepancy between the $350 reimbursement per delivery and doctors' average estimate of $1,232 as a reasonable rate of reimbursement.[88] At the same time, however, a majority of respondents maintained that obstetrical services were already in short supply in their area.[89]

In 1986, a crisis of liability insurance *availability* was added to the problem of insurance *affordability*. At that time, the Virginia malpractice insurance market was dominated by three companies: the St. Paul Fire and Marine Insurance Company (the St. Paul)[90] with 45% of the market, the Virginia Insurance Reciprocal (the Reciprocal)[91] with 28%, and the Pennsylvania Hospital Insurance Company (PHICO) at 23%.[92] In the face of increasing obstetrical liability, each company not only increased rates,[93] but also attempted to reduce its exposure by restricting the supply of obstetrical liability insurance. Thus, for example, the Reciprocal refused to write coverage for new obstetricians unless they joined a group of obstetricians covered exclusively by the Reciprocal.[94] In July, PHICO announced its refusal to renew insurance coverage for any obstetrician practicing in a group of less than ten doctors.[95] Since this effectively excluded all practices except those affiliated with major universities,[96]

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[85] Medical Society of Virginia and Virginia Hospital Association, Fact Sheet (1987) (on file at the HARV. J. ON LEGIS.) [hereinafter MSV, Fact Sheet].

[86] *Id.*

[87] *Id.*

[88] *Id.* According to the St. Paul Fire and Marine Insurance Company, the average cost of malpractice insurance alone totalled $461 per baby delivered in 1987, assuming an obstetrician who works 48 weeks per year and delivers an average of three babies per week. Shepard, *supra* note 19, at 19.

[89] MSV, Fact Sheet, *supra* note 85.

[90] The St. Paul is the leading private provider of medical malpractice insurance in the United States.

[91] The Reciprocal is a so-called "bedpan mutual" controlled primarily by hospitals, with two physicians sitting on its board.

[92] MSV, Fact Sheet, *supra* note 85.

[93] The St. Paul announced premium increases of 15.2%. The Reciprocal and PHICO increased premiums respectively by 43% and 60%. *Rates are Going Up in Virginia*, Med. Liability Monitor, Aug. 18, 1986, at 1.

[94] *See* Shepard, *supra* note 19, at 9.

[95] *Id.* at 10.

[96] *Id.*

most of PHICO's policyholders had to look elsewhere for insurance coverage. In the face of this additional demand, however, the St. Paul and the Reciprocal declared moratoria on writing new policies for obstetrical insurance. As a result, 140 of the estimated 600 obstetricians practicing in the State risked total loss of coverage.[97]

In November, the crisis atmosphere deepened when a federal district court decision declared the State's $1 million ceiling on malpractice awards[98] to be a violation of the plaintiffs' constitutional right to a jury trial.[99] For the plaintiffs, the ruling sustained a $8.3 million jury award against a defendant obstetrician deemed to have negligently delivered the infant plaintiff—who, as a result, sustained severe physical and mental handicaps "including cerebral palsy, quadriplegia, blindness and mental retardation."[100] For health care providers, and obstetricians in particular, the decision portended further insurance premium increases.

Ultimately, the insurance crisis threatened to inhibit women's access to obstetrical care. According to Framme:

> Several obstetricians stopped delivering babies and limited their practice to gynecology. Others found that they could continue only by abandoning their current practice and either joining an existing insured group or accepting a hospital's offer of insurance—with the restrictive agreements attached to the offer. Others foresaw that they could continue to practice obstetrics only by reducing or eliminating deliveries of indigent or Medicaid mothers.[101]

Rural areas were particularly hard-hit. Already under-serviced by obstetrical specialists, patient access to obstetrical care was further curtailed by the restriction or withdrawal of those remaining practices. Even hospitals were affected—one rural hospital ceased all provision of obstetrical services, except in life-

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[97] *Id.*

[98] VA. CODE ANN. § 8.01-581.15 (1984).

[99] *See* Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986). For a useful discussion of the constitutional aspects of the case, see Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. RICH. L. REV. 95 (1987). The case itself, and the policy issues involved, are also discussed in Morris, *Will Tort Reform Combat Medical Malpractice Insurance Availability and Affordability Problems that Virginia's Physicians are Facing?*, 44 WASH. & LEE L. REV. 1463, 1469–77 (1987).

[100] *Boyd*, 647 F. Supp. at 792–93.

[101] Framme, *supra* note 5, at 284.

threatening situations.[102] Otherwise, patients were referred to a neighboring hospital forty-five miles away, where only two obstetricians—of an original group of seven—were left to perform deliveries or refer patients to yet another institution.[103]

C. *The Making of the Act*

1. Genesis

Faced with the dual prospects of physician inability to practice obstetrics and restricted patient access to obstetrical care, the Medical Society of Virginia (MSV) determined that prompt legislative action was essential. Skeptical about the possibility of timely passage of general tort reform,[104] and convinced that attempts to mandate coverage[105] would both deter new carriers[106] and "chase the few remaining malpractice carriers from the state,"[107] the MSV turned its attention to what it considered to be the only feasible solution: "Bring the existing Virginia carriers back into the market voluntarily."[108]

Consequently, the "starting point" of its legislative campaign was to approach the Virginia Reciprocal to ask "what would be required before it would lift its moratorium and resume writing coverage for obstetricians."[109] The Reciprocal's response was blunt:

> [I]f the legislature passes legislation which takes the "birth-related neurological injury" out of the tort system, we will lift the moratorium which the Reciprocal currently has on

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[102] *See* Bath County Community Hospital, Press Release, (Jan. 6, 1987) (on file at the HARV. J. ON LEGIS.).

[103] MSV, Fact Sheet, *supra* note 85.

[104] Framme, *supra* note 5, at 285. The Virginia General Assembly had rejected an earlier legislative proposal based on O'Connell's "neo-no-fault" scheme. *See* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1495, n.42.

[105] Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1488. Essentially, the creation of Physician's Joint Underwriting Association made coverage available to obstetricians as a last resort. Rates for this new scheme were 50% greater than private insurers' rates and contained the proviso that member physicians reimburse the fund for any losses incurred. As a result, physicians found it "oppressive."

[106] *See* Framme, *supra* note 5, at 285.

[107] *Id.*

[108] *Id.*

[109] Kramer, Memorandum, *supra* note 40, at 4.

> the writing of malpractice insurance for additional obstetricians.[110]

At the same time, the Reciprocal also promised an unspecified reduction in premiums charged to obstetricians, referring to this result as a "self-evident" consequence of the proposed legislative reform.[111]

This response "provided the conceptual framework for [Virginia's] Injured Infant Act."[112] From its very inception, therefore, the Program was intended only as a "safety-valve" for the existing liability regime, instead of as a replacement.[113] Quite simply, it was designed to address the "special problems of obstetricians"[114] by averting the "immediate crisis in the availability of obstetrical liability insurance and services."[115] As a result, even though its drafters consulted various legal authorities in the area of medical no-fault, including Jeffrey O'Connell[116]—the Virginia Program has little in common with the broad no-fault schemes outlined in the academic literature, nor with those established in Sweden and New Zealand.[117] In this respect, the origins of the Virginia Act appear to support Richard Epstein's pessimistic assessment that:

> The first rule of politics is that general solutions are often very hard to achieve because there will be no sponsors to introduce them. Political action does not start with overarching philosophical theories. It is galvanized by crisis, by dramatic incidents, and by the sense of dire necessity.[118]

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[110] Letter from Gordon D. McLean, Executive Vice-President, The Virginia Insurance Reciprocal to Ronald K. Davis, Virginia Surgical Associates, (chairman of MSV's Professional Liability Committee) Jan. 13, 1987 (on file at the HARV. J. ON LEGIS.).

[111] *Id.* The letter points out that "the amount of the premium reduction for obstetricians for whom we are providing 'prior acts' coverage will *initially* be quite small because we will continue to be liable for injuries which predate the effective date of the act." *Id.* (emphasis in original).

[112] Kramer, Memorandum, *supra* note 40, at 4.

[113] *Id.* It is thus mistaken to imply (as does Epstein, *supra* note 8, at 1468) that the limited scope of the Program was the result of political compromise with trial lawyers to ensure the passage of the Act. There is no evidence that the MSV ever contemplated a broader scheme, such that the existing Program should be perceived as a concession. Of course, it is possible that the MSV operated in response to a implicit political check on its options.

[114] Kramer, Memorandum, *supra* note 40, at 1.

[115] *Id.*

[116] *See supra* notes 10–13 and accompanying text.

[117] *See supra* notes 1–2.

[118] Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1464.

2. Compromise

Throughout the autumn of 1986, the MSV's Professional Liability Committee—working closely with the Reciprocal and the VHA—devised a first draft of the statute.[119] Sponsored by Delegate Woodrum, the initial version of the bill was filed on January 13, 1987 as House Bill 1216.[120] In its final form, however, the Virginia Program was shaped as much by the political compromises necessary to ensure its enactment as by the perceived crisis affecting liability insurance and obstetrical care.[121]

From the outset, the MSV sought to fashion a broad political constituency in favor of legislative action. Thus, as Kramer points out, it characterized the Virginia crisis as "a societal problem rather than merely a health care provider problem," and endeavored "to obtain legislative recognition" to this effect.[122] More pointedly, the proposed legislation included a clause requiring participating hospitals and physicians to enter into an agreement with the State Commissioner of Health "to provide obstetrical care to patients eligible for Medical Assistance Services and to indigent patients according to the terms of such agreement."[123] Judicious political strategy called for health care providers to offer this "*quid pro quo* in exchange for the major alteration made by the Act in the civil justice reparation system."[124] In the absence of any established plan for the provision of such care, however, and on the urging of the bill's legislative patron,[125] this "indigent care provision" was amended early in the legislative process to require that participants agree merely "to *participate* in the development and implementation" of such a program to provide obstetrical care to Medicaid patients and the indigent.[126] While Kramer argues that "the basic concept remained intact,"[127] the obligations that the

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[119] *See* Framme, *supra* note 5, at 286–88.
[120] *Id.* at 288.
[121] *See* Kramer, Memorandum, *supra* note 40.
[122] *Id.* at 8. Similarly, the Florida Act specifically declares that: "Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida." FLA. STAT. ANN. § 766.301(1)(c) (West Supp. 1989).
[123] Kramer, Memorandum, *supra* note 40, at 13.
[124] *Id.* at 13–14. *See also* Framme, *supra* note 5, at 287. On the problematic character of such a *societal* (as opposed to *individual*) *quid pro quo* in constitutional law, see Note, *Constitutional and Policy Challenges*, *supra* note 9, at 438–41.
[125] Kramer, Memorandum, *supra* note 40, at 13.
[126] VA. CODE ANN. § 38.2-5001 (Supp. 1989) (emphasis added).
[127] Kramer, Memorandum, *supra* note 40, at 13.

amended version imposes on Program participants are noticeably more lenient. Indeed, the laxity of the final draft is rendered explicit in the terms of an agreement with participating physicians and hospitals, which stipulates that:

> This agreement does not require participation in the Medicaid program . . . . [It is understood] that the Commissioner of Health has agreed that [health care providers] who wish to participate in the program in 1988 will be committed only to participation in the development of a local plan, with the understanding that agreements made in subsequent years will address a [provider's] obligation to participate in the implementation of an approved local plan.[128]

In its final form, therefore, the indigent care provision was substantially weakened.

Political considerations also dictated the optional nature of the scheme. Initiation of the bill by the MSV and the VHA made mandatory participation by physicians and hospitals inconceivable. First, explains Kramer, "the MSV was concerned about further encumbering the practice of obstetrics and possibly causing more physicians to abandon this specialty as a result of a mandatory assessment to fund an experimental program."[129] More generally she continues, it "had the support of the hospital and obstetrician trade associations in seeking passage of the bill. Had the assessments upon these groups been mandatory, the MSV might have lost their essential support."[130] Consequently, practitioners and hospitals engaged in the delivery of obstetrical care may elect whether or not to participate in the Program.[131] It is indicative of the weakness of political influence on the part of patient interests that health care providers are under no obligation to inform patients of their own status as participants or

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[128] Participating Hospital's Agreement and Participating Physician's Agreement [Attached to form letters from Dr. C.M. Kinloch Nelson to Hospital Administrators and Physicians (Nov. 23, 1987)], cited in Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1494–95.

[129] Kramer, Memorandum, *supra* note 40, at 11–12.

[130] *Id.* at 12. Kramer's further argument, that mandatory assessments would be difficult to enforce in the absence of "a publicly available source of information as to which physicians are practicing obstetrics," fails to account for the drafters' failure to consider the establishment of such a list. *Id.* at 11.

[131] *See* the definitions of "participating physician" and "participating hospital" in the VA. CODE ANN. § 38.2-5001 (Supp. 1989). While leaving physicians free to choose whether or not to enroll in the Plan, on the other hand, Florida mandates the participation of hospitals. FLA. STAT. ANN. § 766.314(4)(a) (West Supp. 1989).

non-participants in the Program.[132] Thus, patients are bound by the choice of the health care provider—a decision of which they need not even be apprised.[133]

Political compromise is most apparent in the Program's funding provisions, which—as one might anticipate—became "the single most controversial aspect of the Act," and experienced "the greatest substantive amendment during the legislative process."[134] Given their characterization of the crisis as a societal problem, the bill's drafters initially targeted the State's general revenues as "the most logical source" of finance.[135] This option, however, was immediately ruled out since Virginia budgets biennially and the next budget was not due until 1988.[136] Consequently, a second best alternative was adopted: to spread the costs of the Program throughout society as a whole "through assessments upon participating obstetricians and hospitals, all liability insurers, all accident and sickness insurers, all prepaid

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[132] This defect is noted by Epstein, *supra* note 8, at 1467, 1473; Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1516–18; and Kramer, Memorandum, *supra* note 40, at 25, 30–31. The Florida Bill improves upon the Virginia Act in this respect, by requiring hospitals and participating physicians to "provide notice to the obstetrical patients thereof as to participation in the limited no-fault alternative for birth-related neurological injuries." FLA. STAT. ANN. § 766.316 (West Supp. 1989). While the Institute of Medicine has suggested such an amendment to the Virginia Act, the Virginia Legislature has yet to act on this recommendation. 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 227.

[133] While a claimant might argue that a provider's failure to reveal its status as a participant constitutes a breach of duty, supporting a common law cause of action based on the absence of informed consent, the prospects for such an action are slight for three reasons. *See* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1517 n.145. First, the Act bars all other rights and remedies "arising out of or related to a medical malpractice claim" for injuries covered by the scheme. VA. CODE ANN. § 38.2-5002(B) (Supp. 1989). Since Virginia courts typically view informed consent cases as a variety of medical malpractice rather than an independent cause of action, such a claim would be excluded by the Act. *See* Bly v. Rhoads, 216 Va. 645, 648, 222 S.E.2d 783, 786 (1976). Second, even if a court were willing to admit such a common law action, Virginia's adherence to a standard of customary practice for evaluating the provider's duty of disclosure means that a plaintiff would have to establish that customary practice in the State of Virginia requires providers to disclose either their own status as participants or the patient's prospects with respect to damages in the event of malpractice. *See* Dietze v. King, 184 F. Supp. 944, 949 (E.D. Va. 1960). Finally, since a successful informed consent action requires the plaintiff to demonstrate that a reasonable patient would not have consented to the treatment if adequately informed, the plaintiff would also face the difficult task of proving that a reasonable patient would have chosen not to have her baby delivered by a participating physician in a participating hospital—an unlikely prospect given the slight chance of injury *ex ante* and the even smaller risk that an injury would fit within the narrow definition of the Act. *See* Dessi v. United States, 489 F. Supp. 722, 728 (E.D. Va. 1980). *See also infra* note 154 and accompanying text.

[134] Kramer, Memorandum, *supra* note 40, at 16.

[135] Framme, *supra* note 5, at 287.

[136] *Id.*

health plans, all HMOs and all PPOs."[137] While this approach is broadly consonant with the MSV's view of the crisis as societal in nature, public choice theory suggests an equally compelling reason for this strategy: "insurance companies," as Epstein is quick to point out, "are an easy populist target for attack, and their customers are too diffuse to protest."[138]

Despite this prognosis, insurance carriers mounted enough resistance to overturn the original funding arrangement.[139] They eliminated the proposed assessments against accident and sickness insurers, prepaid health plans, HMOs and PPOs, amended the levies on liability insurers so that they apply only if necessary "to maintain the Fund on an actuarially sound basis,"[140] and capped even these at a fixed percentage of net direct premiums written.[141] These measures, however, are unlikely to protect the insurers indefinitely. As Epstein rightly observes, in the absence of any historically required rate increases for Program participants, "the real question is not whether, but when, the contingent liability will kick in."[142]

Further controversy arose when a House debate erupted between representatives of the State's trial lawyers and supporters of the bill. As Framme recounts:

> Influential members of the House felt strongly that all physicians should help fund the program. An amendment requiring each licensed physician in the Commonwealth to pay $1,000 a year into the compensation fund was adopted. Others believed that trial lawyers should contribute an equal amount and that insurers should be relieved of a responsibility to contribute. In a key voice vote, an amendment assessing each Virginia trial lawyer $1,000 a year passed.[143]

Although the Senate eliminated the assessment on trial lawyers, the physician levy was retained but reduced to $250 per year.[144]

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[137] Kramer, Memorandum, *supra* note 40, at 8. *See also* Framme, *supra* note 5, at 287.

[138] Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1471.

[139] On the opposition of the State's insurance industry, see Framme, *supra* note 5, at 289.

[140] VA. CODE ANN. § 38.2-5020(E) (Supp. 1989).

[141] *Id.* § 38.2-5020(E)(2).

[142] Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1471. Not surprisingly, this eventuality has already come to pass. The State Bureau of Insurance recently invoked the applicable statutory clause to impose a levy of 0.1% of net direct premiums written on all liability insurers in the State. Telephone interview with Sandra Kramer, (Dec. 19, 1989).

[143] Framme, *supra* note 5, at 289.

[144] *Id.* at 290.

The MSV agreed to this, according to Kramer, "*purely* as a political compromise."[145]

On February 27, the Senate amendments came to a vote in the House, passing by an overwhelming vote of seventy-six to twenty-one (with two abstentions).[146] A few weeks later—despite last-ditch efforts by some insurers to kill the bill—the *Virginia Birth-Related Neurological Injury Compensation Act* was signed into law.[147] Only two months after its introduction into the House, the MSV proposal was a legal reality.

IV. Anatomy of the Act

The specific provisions of the Virginia Act are usefully addressed under four separate categories, dealing consecutively with the scope of the Program and the criteria according to which a claimant may be eligible for compensation, the institutions and procedures it establishes for the resolution of claims, the quantum of allowable compensation, and the means by which the scheme is financed. Each is examined in turn.

A. *Scope and Eligibility*

The first substantive section of the Act excludes "all other rights and remedies" of the "infant, his personal representative, parents, dependents or next of kin" in the event of a compensable birth-related neurological injury,[148] permitting a civil action for medical malpractice only "where there is clear and convincing evidence that . . . [the defendant] physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury" and "provided that such suit is filed prior to and in lieu of payment" under the Program.[149] Thus, in accordance with the reply of the Virginia Reciprocal,[150] the Act

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[145] Kramer, Memorandum, *supra* note 40, at 17 (emphasis in original). This fee remains a source of considerable dissatisfaction among Virginia physicians. *Id.* at 24.

[146] Framme, *supra* note 5, at 290.

[147] *Id.* at 289–90.

[148] VA. CODE ANN. § 38.2-5002(B) (Supp. 1989). A virtually identical provision appears in the Florida statute. FLA. STAT. ANN. § 766.303(2) (West Supp. 1989).

[149] VA. CODE ANN. § 38.2-5002(C) (Supp. 1989). *See also* the Florida statute. FLA. STAT. ANN. § 766.303(2) (West Supp. 1989).

[150] *See supra* note 110 and accompanying text.

undertakes to remove "birth-related neurological injuries" from the prevailing medical malpractice system.

On the other hand, given the voluntary nature of the Program—which, as already noted,[151] was an essential feature to secure the political support of obstetricians and hospitals—the Act could not guarantee the removal of *all* "birth-related neurological injuries" from the tort system. Instead, while the occurrence of such an injury constitutes a *necessary* condition for qualification under the Program, it alone is not sufficient. In addition, "obstetrical services" must have been "delivered by a participating physician at the birth"[152] and the birth must have "occurred in a participating hospital."[153]

Thus, two considerations enter into the determination of a compensable injury: one concerned with the characteristics of the injury, another with the status of the physician and the hospital. Each is considered more fully below.

1. Compensable Injury

The Virginia Act defines "birth-related neurological injury" as:

> [I]njury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently nonambulatory [unable to walk], aphasic [speech-impaired], incontinent [unable to control excretions voluntarily] and in need of assistance in all phases of daily living.[154]

The definition applies to live births only,[155] and specifically excludes "disability or death caused by genetic or congenital [existing prior to or at birth, but not inherited; distinguished from hereditary or genetic defects] abnormalities."[156] Thus, the expression itself combines four elements: injury locality ("brain or spinal cord"), causation ("deprivation of oxygen or mechanical injury"), timing ("in the course of labor, delivery, or the resuscitation in the immediate post-delivery period"), and conse-

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[151] *See supra* notes 129–133 and accompanying text.
[152] VA. CODE ANN. § 38.2-5008(A)(2) (Supp. 1989).
[153] *Id.* § 38.2-5008(A)(3).
[154] *Id.* § 38.2-5001.
[155] *Id.*
[156] *Id.* § 38.2-5014.

quence ("renders the infant permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living").

Two fundamental objectives entered into the formulation of this definition. First was the "critical need to capture those cases responsible for the unpredictable and excessive risk associated with insuring obstetrics."[157] On the other hand, the Act's framers had no desire to bring too many claims into the system. As Framme explains:

> The so-called "bad babies" had to be removed from the tort system. If the definition was too narrow, none would be removed and the new system would fail. If the definition were drawn too broadly, then too many infants would be included. The system could not afford to compensate them all.[158]

Second, the definition had to draw a sufficiently "bright line" to preclude extensive controversy over the criteria of eligibility.[159] If its terms were not precise, valuable resources would be wasted on litigating borderline claims. More seriously, imprecision could permit "a plaintiff's attorney . . . [to] circumvent the purpose of the Act [removing the 'bad babies' from the tort system] by convincing the . . . [adjudicator] that his [or her] client is not covered by the Act."[160] As Epstein points out, given the restrictions on allowable damages under the scheme,[161] the claimant who thinks negligence is clear will try to keep the case outside the statute, whereas the defendant will try to bring it within the statute."[162]

The apparent solution to each challenge was to include causal, chronological and consequential factors in the attributes of a "birth-related neurological injury." Narrowly drafted requirements of causation and timing would ensure that all injuries compensable under a negligence standard would qualify, but—at the same time—that very few others could make it into the new system. Conjointly, consequential criteria would screen out of the no-fault scheme all but the most severe injuries—precisely that category held responsible for the highest malpractice

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[157] Kramer, Memorandum, *supra* note 40, at 7.
[158] Framme, *supra* note 5, at 286.
[159] Kramer, Memorandum, *supra* note 40, at 7.
[160] *Id.*
[161] *See infra* notes 242–247 and accompanying text.
[162] Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1470.

awards and the greatest disruption to the obstetrical liability insurance market. In fact, the legislative process narrowed further the consequential element from that contemplated in the initial draft—supplanting an earlier requirement that the injury result in "permanent physical or mental impairments . . . which will render the infant unable to engage in substantial gainful activity upon reaching a sufficient life expectancy."[163] As Kramer recounts: "The primary reason for this change was to respond to concerns about the uncertainty of the cost of the Program, and whether available funding sources would be insufficient."[164] More recently, however, Kramer has expressed concern that the final definition might be "too tight"[165]—so that too few claims will be brought into the new system.

Although the MSV forecasts the annual number of claims at forty,[166] it will probably take several years before this figure is known with any degree of certainty.[167] Nevertheless, notes Kramer, the current definition has inspired "significant dissatisfaction and disagreement among the medical community": "Many obstetricians perceive the definition to be so narrow that they doubt they will see such an infant in their lifetimes. Others have estimated that 'hundreds' of babies will qualify for the program rather than the forty infants per year that the MSV has pro-

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[163] Kramer, Memorandum, *supra* note 40, at 7–8 (emphasis omitted). The initial definition also appears to have been considered too vague. According to Kramer: "A secondary reason for the amendment was concern that the original definition was not tight enough to prevent the plaintiffs' bar from obtaining coverage of injuries not perceived as those responsible for the liability problems of obstetricians (such as learning disabilities)." *Id.* at 16.

[164] *Id.*

[165] Telephone interview with Sandra Kramer (Aug. 3, 1988). Interestingly, though the Florida statute's definition of "birth-related neurological injury" is virtually identical to that of the Virginia legislation, the consequential damages available under the Florida act are significantly broader. The Florida statute refers to injury "which renders the infant permanently and substantially mentally and physically impaired." FLA. STAT. ANN. § 766.302(2) (West Supp. 1989). Legislative proposals in other states have followed Florida's lead in this respect. Illinois proposals would compensate birth-related neurological injuries rendering the infant "permanently nonambulatory, blind, aphasic, incontinent, *or* in need of assistance in all phases of daily living." Ill. H.B. 1472, 1987 Sess., at 2 (emphasis added). Similarly, North Carolina proposals eliminate the requirement that the infant be permanently nonambulatory, blind, aphasic, and incontinent, stipulating only that the "injury causes neurological damage rendering the infant in need of assistance in all phases of daily living." N.C.S.B. 788, 1987 Sess., at 1–2. *See also* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1499 n.58.

[166] The figure itself is based on 175 replies to a MSV survey of 600 Virginia neonatalogists, pediatricians and obstetricians. Shepard, *supra* note 19, at 15.

[167] *See infra* notes 276–277 and accompanying text.

jected."[168] One thing, however, is certain: if the medical community itself is this divided, the intended "bright line" has turned out more than a little bit blurred. Post-enactment developments are eloquent testimony to this reality:

> In an attempt to verify the number of infants covered by the existing definition, and to obtain data with which to refine the definition if necessary, the Williamson Institute for Health Studies has submitted a grant proposal to the Robert Wood Johnson Foundation. If funded, the study will include a comprehensive record review of perinatal center records and a review of insurance company records. Additionally, the MSV has established a multi-disciplinary task force to consider alternative definitions and other desirable changes to the Act.[169]

In other words, the drafting process continues.

2. Participants

To recall, eligibility requires the birth to occur "in a participating hospital"[170] and "obstetrical services" to be "delivered by a participating physician at birth."[171] Analysis of these additional qualifications of a compensable injury requires examination of the requirements of participation in the Plan and interpretation of the provisions themselves.

a. *Requirements.* Under the legislation adopted in 1987, any "physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time" and any "hospital licensed in Virginia" are eligible to participate in the Plan.[172] Recent amendments have extended eligibility to licensed nurse-midwives.[173] Beyond this, the requirements of participation are threefold. First, as already noted,[174] participants must enter into an agreement with the Commissioner of Health "to participate in the development of

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[168] Kramer, Memorandum, *supra* note 40, at 24. In light of their distance from the political context of the Virginia scheme, perhaps more weight should be accorded Shepard's characterization of the definition as "highly limited." *See* Shepard, *supra* note 19, at 11.

[169] Kramer, Memorandum, *supra* note 40, at 24.

[170] VA. CODE ANN. § 38.2-5008(A)(3) (Supp. 1989).

[171] *Id.* § 38.2-5008(A)(2).

[172] *Id.* § 38.2-5001.

[173] *Id.* § 38.2-5001 [amended 1989, c. 523].

[174] *See supra* note 126 and accompanying text.

a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation."[175] Second, participating physicians and hospitals must agree with their respective regulatory authorities (the State Board of Medicine and the State Department of Health) to submit to automatic review of all claims filed under the Program,[176] to determine whether "the alleged injury resulted from, or was aggravated by, substandard care on the part of the physician" or "the hospital at which the birth occurred," and to take "appropriate action" upon an affirmative ruling to this effect.[177] Finally, participants must pay annual assessments totalling $5,000 for individual physicians and nurse-midwives,[178] and $50 per delivery during the prior year up to a maximum of $150,000 for participating hospitals.[179]

b. *Interpretation.* While few problems seem likely in deciding whether a birth occurs in a participating hospital, concluding that "obstetrical services" were "delivered by a participating physician at the birth" involves difficult issues of interpretation. Indeed, only a few months after its passage, questions were raised concerning the statute's possible application to deliveries by non-participating residents and nurse-midwives acting under the supervision of a "participating physician." In November 1987, the Office of the Attorney General suggested that the Act might cover such deliveries, provided that they occur under "direct supervision" of a participating physician who is "actually in, or in close proximity to, the labor and delivery area where the birth occurs": "It is my view that the actual delivery of the infant by a participating physician . . . is not required by the Act. All the Act requires is that *obstetrical services* be delivered by a participating physician at the birth."[180]

Although a final decision remains to be made in the context of an actual claim, some residency programs reacted to this interpretation by enrolling only their head residents in the plan,

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[175] VA. CODE ANN. § 38.2-5001 (Supp. 1989).
[176] *Id.*
[177] *Id.* § 38.2-5004(B),(C).
[178] *Id.* § 38.2-5020(A).
[179] *Id.* § 38.2-5020(C).
[180] Letter from K. Marshall Cook, Senior Assistant Attorney General of Virginia, to C.M. Kinloch Nelson, M.D., Chairman, Virginia Birth-Related Neurological Injury Compensation Board, (Nov. 23, 1987) (emphasis in original).

thereby minimizing total assessments by having these participating physicians supervise deliveries performed by non-participating residents.[181] Similar financial incentives were created for participants to employ nurse-midwives to perform deliveries under their "direct supervision."

Recent legislative amendments—establishing a single $5,000 assessment for hospital residency positions (as opposed to individual residents),[182] and extending eligibility to nurse-midwives[183]—are clearly intended to discourage these strategies. Any hope that these new provisions will have a significant impact on program participation, however, is seriously misguided. To begin with, nurse-midwives (who, unlike residents, have not been offered a lower program assessment) are typically unable to afford annual assessments of $5,000.[184] Instead, they are likely to confine their practice to low-risk deliveries, or to establish some arrangement for supervision by participating physicians. More generally, even with reduced assessments, non-participants would be foolish to enroll when program coverage may be obtained more cheaply by channelling payments through a single supervising participant.[185] Consequently, one should expect not only the proliferation of such supervision arrangements, but also the prospect of prolonged litigation over the meaning of "obstetrical services" and over the extent and proximity of supervision provided by the specific participating physician.

B. *Claims Resolution*

The Virginia Act adopts an administrative model for the resolution of claims under the plan. This approach is often advocated for the accuracy, speed, and diminished cost that institu-

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[181] *See* Kramer, Memorandum, *supra* note 40, at 26.

[182] VA. CODE ANN. § 38.2-5020(B) [amended 1989, c. 523]. *See also* Virginia Birth-Related Neurological Injury Compensation Program, Plan of Operation, (Revised May 1989), § VIII(C)(2) [hereinafter Plan of Operation].

[183] VA. CODE ANN. § 38.2-5001 [amended 1989, c. 523].

[184] Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1516.

[185] In fact, the Program's Plan of Operation requires that participating nurse-midwives be under the supervision of a participating physician-obstetrician in any event. Plan of Operation, *supra* note 172, s.VI(I)(3)(a)(iii). Consequentially, it is not surprising that only five nurse-midwives have enrolled in the plan for 1990. Telephone interview with Elinor Pyles, Administrator, Virginia Birth Related Neurological Injury Compensation Program (Dec. 19, 1989).

tional expertise brings to claims adjudication.[186] In fact, the administrative costs of operating the plan are intended to amount to only $125,000 annually.[187] At less than one percent of the estimated annual payout to eligible claimants,[188] this figure would represent an extraordinary improvement on the existing malpractice system, which is reported to spend between fifty-five and sixty cents to deliver between forty and forty-five cents into the hands of injured patients.[189] On the other hand, this projected administrative overhead is also less than that found in social security and unemployment insurance plans, neither of which face the difficult causal inquiries of the Virginia scheme. This suggests that the estimate should be looked upon with considerable skepticism.

The following sections examine the provisions of the Act respecting claims resolution: the parties to the action, the adjudicative tribunals, disposition time, burden of proof, and appeal procedures.

1. Parties

The adversarial form of the current medical liability system is often blamed for both the high transactions costs and substantial delays that characterize malpractice compensation,[190] for undermining professional self-esteem,[191] and for damaging the doctor-patient relationship.[192] The Virginia Act addresses these criticisms in the context of a "birth-related neurological injury" by dissociating the physician and hospital named in the claim from involvement in its resolution.

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[186] *See, e.g.*, American Medical Association/Specialty Society Medical Liability Project, *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based Administrative System*, (1988). *See also* Weiler, *supra* note 16, at 222–27; and Kramer, Memorandum, *supra* note 40, at 6.

[187] Shepard, *supra* note 19 at 16.

[188] *See infra* note 266 and accompanying text.

[189] Weiler, *supra* note 16, at 129.

[190] *See, e.g.*, Danzon, *supra* note 1, at 16; and Weiler, *supra* note 16, at 126.

[191] *See, e.g.*, Charles, Wilbert, & Kennedy, *Physicians' Self-Reports of Reactions to Malpractice Litigation*, 141 AM. J. PSYCHIATRY 563 (1984); Charles, Wilbert, & Franke, *Sued and Non-Sued Physicians' Self-Reported Reactions to Malpractice Litigation*, 142 AM. J. PSYCHIATRY 437 (1985); Charles, Pyskoty, & Nelson, *Physicians on Trial—Self-Reported Reactions to Malpractice Trials*, WEST J. MED. 358 (1988).

[192] *See, e.g.*, Weiler, *supra* note 16, at 1–2, 15–16. *See also* Haines, *The Medical Profession and the Adversary Process*, 11 OSGOODE HALL L.J. 41 (1973); Sharpe, *Alternatives to the Court Process for Resolving Medical Malpractice Claims*, 26 MCGILL L.J. 1036 (1981).

Thus, while the Act stipulates that the physician and the hospital are to be mailed a copy of the claim petition,[193] there is no provision for their participation in formulating any response,[194] nor for their appearance at the hearing to determine the claim.[195] Nor does the Act require them to be notified of the time and place of a hearing.[196] Instead, these functions are performed by the Virginia Birth-Related Neurological Injury Compensation Program (the Program), which—along with the claimant[197]—is explicitly identified as a party to the proceeding.[198]

The Program is governed by a board of seven directors (the Board), consisting of one representative each of participating physicians, participating hospitals, liability insurers, and non-participating physicians, and three citizen representatives.[199] The Board is authorized to:

> (i) administer the Program, (ii) administer the Birth-Related Neurological Injury Compensation Fund, (iii) appoint a service company or companies to administer the payment of claims on behalf of the Program, (iv) direct the investment and reinvestment of any surplus in the Fund over losses and expenses, provided any investment income generated thereby remains in the Fund, (v) reinsure the risks of the Fund in whole or in part, and (vi) extend the deadline for participation in the Program.[200]

In addition, the Board is charged with the task of preparing a "plan of operation"—subject to approval by the State Corporation Commission[201]—to "provide for the efficient administration of the Program and for the prompt processing of claims made against the Fund pursuant to an award."[202] Thus, the Program functions on behalf of the participants as both insurer and agent in defending claims. It is a statutorily created mutual association with the additional role of displacing individual defendants in disputing claims.

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[193] VA. CODE ANN. § 38.2-5004(A)(2) (Supp. 1989).
[194] *Id.* § 38.2-5004(D).
[195] *Id.* § 38.2-5006(A).
[196] *Id.*
[197] Defined as the legal representative of the infant who files a claim "for compensation for a birth-related neurological injury to an infant." *Id.* § 38.2-5001.
[198] *Id.* § 38.2-5006(B).
[199] *Id.* §§ 38.2-5016(A), 38.2-5016(C)(1).
[200] *Id.* § 38.2-5016(F).
[201] *Id.* § 38.2-5017(C).
[202] *Id.* § 38.2-5017(B).

2. Tribunals

In addition to the Program, two further institutions are involved in the resolution of claims; the first, the Industrial Commission, to make the actual determination, and the second, the Medical Advisory Panel, to advise the first.

a. *Industrial Commission.* The Act authorizes the State's Industrial Commission—responsible for adjudicating claims under the Workers' Compensation Act[203]—to hear and determine claims under the Program.[204] This choice was made on the grounds of both principle and pragmatism. First, reliance on an already existing bureaucracy would minimize costs; as an agency accustomed to making decisions based on physiological causation, the Commission was an obvious candidate.[205] Discussions confirmed that it could handle the relatively small increase in caseload.[206] Second, the urgency of the perceived crisis made it impossible to contemplate the creation of a new adjudicative body;[207] moreover, the utilization of a familiar approach "increase[d] the likelihood that the General Assembly would consider seriously the MSV proposal."[208] Finally, a workers' compensation approach was considered more likely to withstand constitutional scrutiny.[209]

b. *Medical advisory panel.* The creation of expert physician panels to conduct pre-trial screening of medical malpractice claims was a popular state legislative reform after the "first malpractice crisis" in the mid-1970's.[210] Such panels were intended to enhance the accuracy of adjudicative decisions and to furnish authoritative medical information to each party in order to encourage the speedy resolution of claims.

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[203] *Id.* § 65.1, c. 2.
[204] *Id.* § 38.2-5003.
[205] Kramer, Memorandum, *supra* note 40, at 6.
[206] Framme, *supra* note 5, at 287.
[207] *Id.* at 286.
[208] Kramer, Memorandum, *supra* note 40, at 5.
[209] *Id.* For a comprehensive list of decisions holding unconstitutional legislative reforms addressing the forum for the resolution of malpractice claims, see Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROB. 5, 20–21 n.85 (1986). On the constitutional review of state reform of the malpractice law generally, see Weiler, *supra* note 16, at 56–70.
[210] *See, e.g.*, Weiler, *supra* note 16 at 46–47. *See also* Danzon, *supra* note 1, at 198–202.

In its original conception, the Virginia Plan contained no such institution. Nevertheless, a provision establishing a medical advisory panel was added during the legislative process after concern was expressed during the House floor debate that reduced damage awards[211] and Commission review of claimant attorneys' fees[212] would impair the claimant's incentive "to develop the proofs needed to establish that [the injury] met the definition of a compensable injury."[213] As a result, the Act requires the Deans of Virginia medical schools to "develop a plan whereby each claim filed with the Commission is reviewed by a panel of three qualified and impartial physicians":

> This panel shall file its report and recommendations as to whether the injury alleged is a birth-related neurological injury . . . with the Commission at least ten days prior to the date set for hearing . . . . At the request of the Commission, at least one member of the panel shall be available to testify at the hearing. The Commission must consider, but shall not be bound by, the recommendation of the panel.[214]

Although rationalized as a "pro-claimant" amendment, this purported objective is open to some doubt. According to one study of medical malpractice screening panels, such bodies may be "weakly biased" against claimants.[215] Although the Act requires that panel physicians be "impartial," this term remains undefined. It does not, however, appear to exclude participants in the Program. The twenty-one panelists selected as of August 1988 represent exactly those specialties whose interest in the Program is greatest: pediatric obstetricians, neurologists, and neonatalogists.[216] While the Commission is not bound by panel findings, it is inconceivable that the findings will not be accorded substantial weight.

3. Disposition Time

The existing civil liability system is notoriously slow in compensating the victims of medical injuries. According to a recent

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[211] *See infra* notes 242–247 and accompanying text.

[212] *See infra* note 246 and accompanying text.

[213] Kramer, Memorandum, *supra* note 40, at 19–20.

[214] VA. CODE ANN. § 38.2-5008(B) (Supp. 1989). A similar provision appears in the Florida legislation. *See* FLA. STAT. ANN. § 766.308(1) (West 1989).

[215] P. DANZON, *supra* note 1, at 200 (Of 9325 cases of various types decided judicially or by arbitration, while 14% of *all* decisions favoured plaintiffs, plaintiffs succeeded in only 9% of pre-screened malpractice cases).

[216] Telephone interview with Sandra Kramer, *supra* note 165.

study of malpractice claims closed in 1984, an average of 16.4 months elapsed between the occurrence of the injury and the filing of a claim, while another 25 months ensued before final disposition.[217]

The Virginia Act confronts this problem directly by mandating specific time periods for the disposition of claims under the Program. Claimants may initiate a claim up to ten years after the birth.[218] Once filed with appropriate documentation,[219] the Industrial Commission is immediately required to serve the Program,[220] which then has thirty days to file a response.[221] A hearing must occur no sooner than 45 days and no later than 120 days after the claim is first filed.[222] Thus, the Act provides for the disposition of all claims within a maximum duration of five months. Assuming the scheme is able to deliver on these deadlines, it will represent a significant improvement over the current medical malpractice system.

4. Burden of Proof

As previously outlined,[223] a successful claimant must prove the existence of a birth-related neurological injury, delivery of obstetrical services by a participating physician at the birth, and the occurrence of the birth at a participating hospital. While the last two requirements are relatively easily demonstrated, the same cannot be said as to the demonstration of a birth-related neurological injury. On the contrary, since the Act expressly excludes genetic and congenital defects[224]—which, as previously

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[217] *See* GAO CLAIMS, *supra* note 45, at 35. Moreover, as averages over a skewed distribution, these general figures conceal even longer delays for the most severe and costly injuries. While nearly 60% of claims were resolved less than two years after being filed, the disposition time of another 15%—consisting primarily of serious permanent disabilities involving the largest dollar amounts—exceeded four years. *Id.* at 32–35. Similar results were achieved in an earlier study of U.S. claims closed during the period 1975–78. *See* P. DANZON, *supra* note 1, at 193–94. *See also* P. Weiler, *supra* note 16, at 124–26. Thus, under the current malpractice system, those who presumably need compensation the most are forced to endure the longest delay.

[218] VA. CODE ANN. § 38.2-5013 (1988). The Florida statute establishes a seven-year limitation period. FLA. STAT. ANN. § 766.313 (West Supp. 1989).

[219] VA. CODE ANN. § 38.2-5004(A)(1) (1988).

[220] *Id.* § 38.2-5004(A)(2) (1988).

[221] *Id.* § 38.2-5004(D) (1988). In Florida this period is 45 days. FLA. STAT. ANN. § 766.305(3) (West Supp. 1989).

[222] VA. CODE ANN. § 38.2-5006(A) (1988). The applicable period in Florida is no sooner than 60 days and no later than 120 days. FLA. STAT. ANN. § 766.307(1) (West Supp. 1989).

[223] *See supra* notes 154–185 and accompanying text.

[224] *See supra* note 156 and accompanying text.

discussed, are currently believed to be the primary causes of infant neurological impairment[225]—proof of causation may be exceedingly difficult.[226] This difficulty exists even in cases of obvious perinatal trauma: given recent studies indicating chronic brain impairment among only a minority of infants suffering asphyxia during birth,[227] it is doubtful that *any* claim could succeed on a strict *but for* test of causation.

In an effort to alleviate this potential barrier to compensation, Delegate Bernard Cohen, a personal injury attorney, introduced a provision establishing a presumption that all infant neurological impairments were attributable to birth-related neurological injury, thus shifting to the Program the burden of proving noncompensable causation.[228] For the framers of the Bill, this was completely unacceptable, since it risked "greatly expanding the number of infants potentially compensated by the Fund."[229] In the end, while a presumption was added to the final draft, its language was amended so as to substantially weaken the effect. Thus, the Act currently reads:

> A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it has been demonstrated, to the satisfaction of the Industrial Commission, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that the infant was thereby rendered permanently nonambulatory, aphasic and incontinent.[230]

In effect, this presumption restates three of the four constituent elements of a "birth-related neurological injury" as it is defined elsewhere in the Act,[231] omitting only the timing component ("injury occurring in the course of labor, delivery, or the resuscitation in the immediate post-delivery period"). Thus, while claimants need not prove *when* the injury occurred to establish that the neurological injury is "birth-related," they must still prove that the injury was *caused by* "mechanical injury

[225] *See supra* notes 32–34 and accompanying text.
[226] *See supra* notes 24–34 and accompanying text.
[227] *See supra* notes 28–29 and accompanying text.
[228] *See* Kramer, Memorandum, *supra* note 40, at 20.
[229] *Id.*
[230] VA. CODE ANN. § 38.2-5008(A)(1) (1988). The Florida statute provides a presumption similar in purpose but crafted to comport with Florida's distinct definition of a "birth-related neurological injury" as one that renders the infant "permanently and substantially mentally and physically impaired." FLA. STAT. ANN. § 766.309(1)(a) (West Supp. 1989).
[231] *See supra* note 154 and accompanying text.

or oxygen deprivation" (as opposed to genetic or congenital factors).[232] It is then open to the Program to rebut a preliminary finding of a "birth-related neurological injury" by demonstrating the absence of any perinatal insult.

Even in its final form, therefore, the statutory presumption clearly makes it easier for a claimant to prove a compensable injury. For this reason, the initial drafters remain largely opposed.[233] Nevertheless, a compelling argument may be advanced in favour of the statutory presumption: since the factual information essential to the finding of a perinatal insult is more likely to reside with the physician and hospital named in the claim than with the claimant, its production in the course of adjudication is more efficiently handled by the Program, which may develop more effective procedures for the acquisition of this information than would each individual claimant.

Whether the initial presumption proposed by Delegate Cohen would have been preferable to that which was finally adopted cannot be answered without a more thorough evaluation of the objectives and scope of the scheme as a whole. It is, therefore, relegated to subsequent consideration.[234]

5. Appeal

Little need be said of the appeal mechanism contained in the Act, since it coincides with that of most administrative tribunals. A "review of the evidence" may be requested of the full Commission within twenty days of an initial determination or award.[235] Further appeal may be made to the Court of Appeals, where the Commission's determinations are deemed to be "conclusive and binding as to all questions of fact."[236]

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[232] For this reason, the Act has come under strong criticism from Robert Hall, former president of the Virginia Trial Lawyers Association. *See* Blodgett, *Baby Insurance*, 74 A.B.A. J. 35 (1988).

[233] Thus, Kramer writes of the provision: "Since this too has the potential to greatly expand the number of infants covered by the Fund, other states should consider carefully the implications of adopting this presumption rather than automatically including it in their legislation." Kramer, Memorandum, *supra* note 40, at 21.

[234] *See infra* notes 336–337 and accompanying text.

[235] VA. CODE ANN. § 38.2-5010 (1988).

[236] VA. CODE ANN. § 38.2-5011(A) (1988). A similar approach is adopted in the Florida statute. *See* FLA. STAT. ANN. § 766.311(1) (West Supp. 1989).

C. *Compensation*

As a means of compensating the victims of medical injuries, the medical malpractice system has been criticized as slow, wasteful and inequitable.[237] In addition to the enormous delays and transaction costs noted earlier,[238] the tort system devotes scarce premium dollars to assuaging losses such as pain and suffering and loss of enjoyment of life, overcompensates relatively minor injuries and undercompensates the most severe injuries,[239] and limits recovery to the small proportion of patients whose injuries are caused by professional negligence.[240] The Virginia scheme attempts to avoid these defects in the context of compensation for birth-related neurological injuries in four ways.

First, by paying damages on a periodic basis as they are incurred, rather than lump sum, the Program avoids lengthy and uncertain determinations regarding projected losses.[241] Combined with the exclusion of the physician and hospital from the claims resolution process and with the statutory schedule for claims disposition, this measure should ensure that benefits be-

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[237] *See, e.g.*, Williams, *Abandoning Medical Malpractice*, 5 J. LEGAL MED. 549, 577–80 (1984); and P. Weiler, *supra* note 16, at 121–33.

[238] *See supra* notes 189 and 217 and accompanying text.

[239] According to recent figures on malpractice claims closed in 1984, median and average payments for injuries classified as emotional, insignificant, and temporary exceeded median and average insurer estimates of economic losses, while the reverse was true where injuries were major and permanent. Furthermore, while insurer estimates of economic losses were less than indemnity payments in 61.8% of all paid claims within the study sample, economic losses exceeded recovery in 73.9% of major permanent total disabilities and in 88.3% of grave permanent total disabilities. An obvious pattern of overcompensation for small claims and undercompensation of large claims is demonstrated even more clearly when indemnity payments are compared to estimates of economic losses. For claims with economic losses valued at less than $50,000, median and average payments were consistently higher than estimated economic losses; the inverse holds for claims with estimated economic losses greater than $100,000. As a result, indemnity payments were less than half the claimant's estimated economic losses in more than 20% of paid claims in the sample, at the same time as another 48.6% of claimants recovered more than double the value of their economic losses. *See* GAO CLAIMS, *supra* note 45, at 45 - 47, 83. This effect is largely attributable to the process of claims settlement, which places the greatest pressure to settle on those with the fewest resources and the most severe injuries. *See, e.g.*, P. Weiler, *supra* note 16, at 131.

[240] *See, e.g.*, Mills, *Medical Insurance Feasibility Study*, 128 WEST J. MED. 360, 363 (1978).

[241] Although the Act was initially unclear on the matter, recent amendments stipulate that damages be paid as they accrue instead of in a lump sum. VA. CODE ANN. § 38.2-5009 (1989). The Florida statute contains a similar provision requiring periodic payment as expenses are incurred. FLA. STAT. ANN. § 766.310(2) (West Supp. 1989). On the initial ambiguity in the Act, see Framme, *supra* note 5, at 286; and Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1493–94.

gin to flow shortly after the filing of a legitimate claim. Matching compensation to actual losses also prevents the windfall gains and unforeseen losses that arise when lump sum damage projections turn out to have been inaccurate.

Second, by excluding compensation for any medical and rehabilitative expenses covered by collateral sources,[242] and by abolishing punitive damages and awards for pain and suffering, the scheme reduces over-insurance and double recovery and conserves limited resources to satisfy the most pressing compensation needs. As a result, it precludes the extravagance of current tort awards[243] in order to distribute funds among all injured infants.

Third, by establishing an administrative mechanism for the prompt payment of Program benefits and by restricting damages to "necessary and reasonable" medical and rehabilitative expenses,[244] lost earnings from age eighteen to sixty-five,[245] and "reasonable" legal expenses,[246] the Program eliminates incentives to settle claims and regulates damage payments according to the actual monetary needs of injured infants and their families. In each respect, the scheme promises to avoid the gross maldistri-

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[242] VA. CODE ANN. § 38.2-5009(1)(a)-(d) (1988). Identical provisions appear in the Florida Act. FLA. STAT. ANN. § 766.310(1)(a)1-4 (West Supp. 1989). For a review of existing private and public sources of insurance, see Shepard, *supra* note 19, at 7-8.

[243] *See, e.g.*, Boyd v. Bulada, 647 F. Supp. 781 (W.D. Va. 1986).

[244] "Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel." VA. CODE ANN. § 38.2-5009(1) (1988). The Act further limits medical and hospital expenses to "such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person." *Id.* § 38.2-5009(2) (1988). Similar wording appears in the Florida legislation, although the latter also specifically mentions expenses for "medically necessary drugs." FLA. STAT. ANN. § 766.310(1)(a) (West Supp. 1989). Although it is not specifically mentioned, compensation for this expense would likely be provided under the Virginia provision.

[245] Va. Code Ann. § 38.2-5009(3) (1988). This is "conclusively presumed . . . [to have been] fifty percent of the average weekly wage in the Commonwealth of workers in the private non-farm sector." *Id.* Recent amendments stipulate that these damages are "to be paid in regular installments beginning on the eighteenth birthday of the infant." *Id.* § 38.2-5009(3) (1988). Based on discussions with the Chief Deputy of the Industrial Commission of Virginia, one reviewer estimated that as of July 1, 1988, payments under this category would equal about $180 per week. *See* Schockmoehl, *Medical Negligence*, 22 U. RICH. L. REV. 717, 720 (1988). In place of a specific provision for lost earnings, the Florida scheme provides for periodic payment of up to $100,000 to the parent or legal guardian of an eligible infant. *See* FLA. STAT. ANN. § 766.310(1)(b) (West Supp. 1989). Depending on the applicable discount rate, these awards could involve relatively similar amounts.

[246] "Reasonable expenses incurred in connection with the filing of a claim . . . including reasonable attorney's fees." VA. CODE ANN. § 38.2-5009(4) (1989). *See also* FLA. STAT. ANN. § 766.310(1)(c) (West Supp. 1989).

bution characteristic of the current tort regime of injury compensation.[247]

Finally, by replacing medical negligence with medical cause as the primary criterion of eligibility for compensation,[248] the scheme is intended to distribute funds among those whose injuries previously would have remained uncompensated. In fact, according to a "very rough projection" by Delegate Woodrum, the Program should compensate forty infants per year compared to only two compensated through the current tort system.[249] If a recent $8.3 million award[250] for infant neurological impairment is representative of the tort compensation granted in such cases, an estimated $500,000 to $1.1 million compensation per infant under the no-fault scheme[251] would actually increase the total amount available for injured infants from $16.6 million under the tort system to anywhere between $20 million and $44 million under the new regime. Given the likelihood that the plan will achieve appreciable savings in legal and administrative overhead costs, the aggregate compensation actually delivered to injured infants and their families might be expected to increase under the no-fault scheme.

The prospects for this scenario are difficult to determine without reliable data on average awards, transaction costs, and numbers of successful claims under each regime. Nevertheless, difficulties in proving causation under the legislation raise serious doubts that the number of infants compensated by the Program will reach the optimistic figure projected by the scheme's spon-

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[247] *See supra* note 239.

[248] *See supra* notes 154–156 and accompanying text.

[249] Telephone interview with Delegate Woodrum (Aug. 3, 1988). The figure of 40 infants per year compensated by the Program is based on a debatable MSV estimate. *See supra* note 166 and accompanying text.

[250] *See* Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986).

[251] *See* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1519 n.148. This figure, derived from an actuarial study conducted for the Medical Society of Virginia by the Atlanta firm of Tillinghast, Nelson, and Warren, Inc., clearly represents only a rough approximation, particularly since it is based on the initial draft of the bill, requiring the infant to have suffered "permanent physical or mental impairments . . . which will render the infant unable to engage in substantial gainful activity upon reaching a sufficient life expectancy." Kramer, Memorandum, *supra* note 163 and accompanying text. Thus, according to Shepard, the firm "calculated this figure based on a version of the bill which differed from the one that actually became law." Shepard, *supra* note 19, at 16. Moreover, "[t]he firm only considered the medical care and life-maintenance costs of neurologically compromised infants; the wage allowance was not included." *Id.* Finally, as one recent review points out, as technological changes and improvements in quality of care increase the life expectancy of injured infants, total compensation will likely increase. *See* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1519 n.148.

sors.[252] Indeed, as James Henderson, Jr., has suggested, since the Program was created "precisely because . . . [birth-related neurological injuries] are among the most troublesome and costly to the providers of obstetric health care," it is plausible that "the aggregate compensation paid out to those who suffer such injuries will be less than the aggregate compensation . . . paid out under the traditional tort system."[253] As a result, there is considerable doubt as to whether the scheme provides a reasonable *quid pro quo* for the abolition of tort recovery.[254] In the end, of course, only time will tell.

D. *Funding*

The political compromises leading to the plan's final funding provisions have already been outlined.[255] In its final form, the Act provides for annual assessments of:

(1) $5,000 by each participating physician;[256]
(2) $50 per delivery at participating hospitals in the prior year, not exceeding $150,000 per hospital in any twelve-month period;[257]
(3) $250 from each non-participating physician "licensed by and practicing in the Commonwealth."[258]

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[252] *See supra* notes 166–167 and accompanying text.

[253] Henderson, *supra* note 15, at 200.

[254] On the significance of this *quid pro quo* analysis to the constitutional status of legislative amendment of private law rights, see Note, *Constitutional and Policy Challenges*, *supra* note 9, at 436–41. *See also* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143 (1981).

[255] *See supra* notes 134–145 and accompanying text.

[256] VA. CODE ANN. § 38.2-5020(A) (1988). The same figure appears in the Florida statute. FLA. STAT. ANN. §§ 766.314(4)(c), 766.314(5)(a) (West Supp. 1989).

[257] VA. CODE ANN. § 38.2-5020(C) (1988). The Florida scheme mandates an identical levy, but omits the $150,000 cap included in the Virginia statute, and exempts all publicly owned or operated hospitals. FLA. STAT. ANN. §§ 766.314(4)(a), 766.314(5)(a) (West Supp. 1989).

[258] VA. CODE ANN. § 38.2-5020(D) (1988). The Act nevertheless allows exemptions from this assessment for (1) physicians employed by the Commonwealth whose income from professional fees is less than ten per cent of their annual salary; (2) graduate medical students; and (3) physicians who have retired from active clinical practice. Interestingly, the Florida legislature adopted an identical $250 assessment on non-participating physicians. FLA. STAT. ANN. §§ 766.314(4)(b), 766.314(5)(a) (West Supp. 1989). *See also supra* notes 143–145 and accompanying text.

Furthermore, if necessary "to maintain the Fund on an actuarially sound basis,"[259] each and every insurance carrier "licensed to write and engaged in writing liability insurance in the Commonwealth" will be assessed a levy determined according to its proportionate share of the total net direct premiums written in the State,[260] up to a maximum value equal to 0.25% of the carrier's net direct premiums written.[261] Finally, if the Bureau of Insurance of the State Corporation Commission determines "that the Fund cannot be maintained on an actuarially sound basis subject to [these] maximum assessments," the Commission is required to "promptly notify the Speaker of the House of Delegates, the President of the Senate, and the Industrial Commission."[262]

Recurring references to "maintaining the Fund on an actuarially sound basis" allude to a serious defect in the Act: from the very outset, *the plan was not designed on an actuarially sound basis*. As Epstein points out:

> [T]he fees do not begin to approximate the risks that are covered. The Injured Infant Act does not reveal a budget estimate as to the total likely expenses, which is then made the target for the total charges imposed against the participants to the system. Quite the opposite, the statute contemplates that any shortfall that may develop shall be covered by all insurance carriers within the state, regardless of the lines of business they write.[263]

Based on the very rough estimate of forty compensable injuries per year,[264] and an even more problematic estimated per infant cost of $500,000,[265] the projected annual cost to the Program amounts to $20 million.[266] Assuming a 100% participation rate among eligible physicians and hospitals, however, unconditional

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[259] VA. CODE ANN. § 38.2-5020(B) (1988).
[260] *Id.* § 38.2-5020(B)(1) (1988).
[261] *Id.* §§ 38.2-5020(B)(2), 38.2-5021(A) (1988). An identical contingent liability is imposed by the Florida legislation, except this arises only after the transfer of up to $20 million to the fund from the Insurance Commissioner's Regulatory Trust Fund. *See* FLA. STAT. ANN. §§ 766.314(5)(b), 766.314(5)(c) (West Supp. 1989).
[262] VA. CODE ANN. § 38.2-5021(B) (1988).
[263] Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1471.
[264] *See supra* notes 166–169 and accompanying text.
[265] *See supra* note 251 and accompanying text. Note, moreover, that this figure is at the lowest end of the $500,000 to $1,100,000 range reported by the firm conducting the actuarial study for the Medical Society of Virginia.
[266] *See* Kramer, Memorandum, *supra* note 40, at 10.

revenues total only $8.7 million.[267] Adding to this sum an overly generous $10,625,000 maximum contingent liability on the part of targeted insurance companies,[268] projected expenditures still exceed total revenues by $675,000.[269] Although one review argues that the financial condition of the Fund may actually improve at lower rates of participation (since fewer infants will be eligible for compensation, while the contributions of non-participating physicians and liability insurers will remain fixed),[270] this is doubtful. On the contrary, the theory of adverse selection suggests that high-risk providers will become over-represented among Program participants as participation levels decrease.[271] Since these health care providers generate proportionately more eligible claims, Program costs may fall less than associated revenues (which are raised partly by assessments on participants). Thus, for example, if two-thirds of the State's providers of obstetrical care are responsible for 90% of the birth-related neurological injuries, and only these high-risk providers choose to participate in the Program, the Fund's projected shortfall actually *increases* to $775,000.[272]

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[267] This figure is calculated on the basis of an estimated 600 licensed obstetricians practicing in the state, a projected annual birth rate of 85,000 (but taking into account the $150,000 ceiling on the annual assessment of an individual hospital), and an approximate figure of 9000 practicing physicians in the State of Virginia. Thus, HB 1216 Cost Estimates project the following total amounts for each group: participating physicians—$3 million (600 at $5,000); participating hospitals—$3.45 million; non-participating physicians—$2.25 million (9000 at $250).

[268] This figure is grossly exaggerated since it is based on the original draft of the bill which contemplated levies on "all liability insurers, all accident and sickness insurers, all prepaid health plans, all HMOs and all PPOs." As outlined above, only liability insurers are assessed under the final version passed by the General Assembly. *See supra* notes 137–142 and accompanying text. According to Shepard, $5 million represents a more accurate amount. *See* Shepard, *supra* note 19, at 15.

[269] In Florida—which, for the most part, adopted identical levies to those in the Virginia Act—the outcome is even more extreme. According to the Bureau of Rates of the Department of Insurance and Treasurer, projected annual expenditures exceed anticipated yearly revenues by $22.75 million. Assuming the total exhaustion of the $20 million special transfer from the Insurance Commissioner's Regulatory Trust Fund (see *supra*, note 261), the plan still faces a shortfall of $2.75 million. *See* Letter from Jerome Vogel, Actuary, Bureau of Rates of the Florida Department of Insurance and Treasurer to Pamela Birch Fort, Staff Director, Senate Commerce Committee (Jan. 11, 1988) (on file at the HARV. J. ON LEGIS.).

[270] *See* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1518–19 n.148.

[271] *See infra* notes 283–288 and accompanying text.

[272] In such a situation, projected costs equal $18 million (90% of $20 million) while anticipated revenues total only $17,225,000 (the 400 participating physicians assessed at $5,000 each under the plan would contribute $2 million, the 9200 non-participating physicians assessed at $250 each would pay $2.3 million, the liability insurers would be assessed $10,625,000 and the participating hospitals would pay an estimated $2.3 million, equalling two-thirds of the $3.45 million estimated by HB1216 for a 100% hospital participation rate). *See supra* notes 267–268 and accompanying text.

On the other hand, as the scheme's defenders are quick to point out, in the initial years of the plan actual payments to injured infants should be much lower than projected revenues. As Kramer explains: "Since the statute of limitations in both the Act and the tort system is ten years, it is anticipated that in the initial years of the Program fewer than forty infants will receive awards, allowing the Program's Fund . . . some time to build up through investment income."[273] While this is undoubtedly true, there is no guarantee as to precisely how long this "grace period" will endure. As the Florida Bureau of Rates has concluded regarding the funding provisions of its own Plan: "[E]ach year newly injured persons would be added to the system until the actual cash payments would considerably exceed the funding."[274]

Of course, these are problems for future legislators (perhaps future taxpayers) to sort out. In the context of the Virginia insurance crisis, the ostensible motto was "act now, pay later." In any event, the originators of the bill really preferred that the Program be financed through the State's general fund.[275] Indeed, perhaps the most effective way to achieve this ultimate objective was to leave the Program dangerously underfunded.

V. AFTERMATH

Because the Virginia Act has been in effect only since January 1, 1988, any assessment of the scheme's operation and impact remains incomplete. In fact, as of December 1989, the Program had yet to experience a single claim.[276] This reflects both the inherent delay in filing any claim and the incentive created by a long limitation period to delay the initiation of legal action (so long as the costs of care can be privately borne in the interim) in order to develop a clearer picture of the cause and extent of the injuries for which compensation is claimed. For this reason, Kramer anticipates an average lag of four to six years in the filing of claims under the Virginia Plan.[277]

While the absence of claims makes it impossible to examine the operation of the Plan in adjudicating claims, or the accuracy

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[273] Kramer, Memorandum, *supra* note 40, at 10.
[274] *See* Letter from Jerome Vogel, *supra* note 269.
[275] *See supra* note 135 and accompanying text.
[276] Telephone interview with Elinor Pyles, *supra* note 185.
[277] Telephone interview with Sandra Kramer, *supra* note 165.

of projections as to the annual number of compensable claims and the average amount of compensation, it is possible to examine several indices bearing on the Plan's success in meeting its objectives thus far: the participation rate of eligible physicians and hospitals, and the impact that passage of the Act has had on both the availability and affordability problems of obstetrical insurance.

A. *Participation*

Given cost estimates based on participation rates of 100%,[278] initial participation rates of 70% of physicians and 65% of hospitals during 1988 were far from encouraging.[279] First, these results endanger the Program's already tenuous funding base.[280] While Kramer points to the $6.5 million currently collecting interest in the Fund as evidence of its health,[281] the short-sightedness of this view has already been established.[282]

Second, and potentially more troublesome, the ratio of participants to non-participants highlights the pervasive dilemma of adverse selection inherent in any voluntary insurance scheme. In the absence of express provisions for differential assessments based on the experience-rating of participants with different claims experience, it is entirely plausible that the physicians and hospitals who have chosen *not* to participate are precisely those who perceive themselves to be at low risk—either on account of the nature of their practice (*e.g.*, uncomplicated deliveries), or because they happen to be better doctors or safer hospitals. For these individuals and institutions, to participate in the Program would be to provide a direct subsidy to their high-risk colleagues[283]—a prospect that strains even the outer limits of professional fellowship. If this interpretation is correct, the Program faces the unattractive prospect of having

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[278] *See supra* note 267 and accompanying text.

[279] Of an estimated 600 eligible physicians, 422 participated in the Program in 1988. At the same time, of 72 potential hospitals, 47 enrolled in the Plan. Telephone interview with Sandra Kramer, *supra* note 165; telephone interview with Elinor J. Pyles, State Corporation Commission Bureau of Insurance (Aug. 3, 1988). *See also* Letter from Elinor J. Pyles, Administrator, Virginia Birth-Related Neurological Injury Compensation Program (Dec. 20, 1989) (on file at the HARV. J. ON LEGIS.).

[280] *See supra* notes 263–274 and accompanying text.

[281] Telephone interview with Sandra Kramer, *supra* note 165.

[282] *See supra* note 274 and accompanying text.

[283] *See* Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1473. *See also* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1518–19.

to defend only the higher-risk and poorer-quality obstetrical care providers. More to the point, if this circumstance should come to pass, the gulf between the revenue and the expenditure sides of the funding equation (given the current assessments) will begin to expand.[284] Absent an injection of funds from other sources, assessments will have to be raised. But then participants who view themselves as relatively low-risk will wish to drop out. Thus the entire risk pool will begin to unravel.[285] Only the fixed levies on liability insurers and non-participating physicians establish a lower limit on this process.

To encourage participation in a voluntary insurance plan, physicians and hospitals must perceive a positive benefit (whether financial or emotional) from such participation.[286] Absent a system of experience-rating to prevent cross-subsidization, some potential participants will probably fail to see any benefit whatsoever. As a result, considerable skepticism should be accorded the opinion, held by at least one representative of the Insurance Bureau of the State Corporation Commission, that participation will increase over time.[287] On the contrary, a slight decline in the number of participants from 1988 to 1989[288] supports precisely the "Market for Lemons" thesis just outlined.

B. *Insurance Availability*

In at least one respect, the Act appears to have been an unqualified success: the availability crisis of obstetrical liability insurance has vanished. Ten days after the bill was passed in March 1987, the Reciprocal began to insure new obstetricians again.[289] By September 1987, it had issued new policies to

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[284] *See supra* notes 264–272 and accompanying text.

[285] *Cf.* Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

[286] Short of a completely mandatory scheme, participation can also be increased in other ways. For example, in Virginia, the Reciprocal has made participation mandatory in order to qualify for malpractice insurance. *See* Shepard, *supra* note 19, at 12. Although this introduces a market rigidity, as long as the market includes competitors willing to offer a different policy, physicians and hospitals remain free to choose not to participate.

[287] Telephone interview with Elinor J. Pyles, *supra* note 279.

[288] Between 1988 and 1989, the number of physician participants fell from 422 to 402, while the number of participating hospitals declined from 47 to 42. *See* Letter from Elinor J. Pyles, *supra* note 279. At the time of writing, participation figures for 1990 were unavailable.

[289] *See* Blodgett, *supra* note 232, at 35. *See also* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1499 n.59.

twenty obstetricians.[290] Furthermore, the Medical Protective Company of Fort Wayne, Indiana—which, at a crucial stage in the legislative process had expressed willingness to enter the Virginia market "if the bill can and actually does remove the 'bad baby' risk from insuring an obstetrical practice"[291]—entered the market, expanding its coverage limits from $200,000 to the standard level of $1 million.[292]

For this reason alone, the Virginia Act is likely to appear attractive to other jurisdictions facing a similar crisis in the availability of liability insurance for obstetrical care. As noted above,[293] Florida has already followed Virginia's lead, and similar legislation has been proposed in North Carolina and Illinois.

C. *Insurance Affordability*

In terms of making liability insurance more affordable to obstetricians and hospitals with obstetrical services, however, the Plan has accomplished virtually nothing. Although the Act shields participating physicians and hospitals from the threat of medical malpractice in the event of a "birth-related neurological injury," it does not insulate them from civil liability upon the occurrence of a non-compensable injury deemed negligent according to conventional common law doctrine. Consequently, participants must still carry malpractice liability coverage, and must therefore continue to pay insurance premiums in addition to the Program's annual assessments. As of September 1988, these premiums ranged from $29,400 to $46,500 for self-employed obstetrician/gynecologists, depending on their geographical location in the State[294]—more than double the rates prevailing in 1984.[295]

While one would expect the reduced exposure that insurers face as a result of the plan to translate into reduced liability premiums for participants, this has only just begun to transpire.

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[290] *See* Shepard, *supra* note 19, at 17.

[291] Letter from Michael S. Mullen, President, The Medical Protective Company, to Delegate Clifton A. Woodrum, House of Delegates of Virginia (Feb. 18, 1987) (on file at the HARV. J. ON LEGIS.).

[292] Shepard, *supra* note 19, at 17.

[293] *See supra* notes 6–7 and accompanying text.

[294] St. Paul Fire and Marine Insurance Company sets rates at limits of $1 million per claim/$3 million per year. *See* 1 MEDICAL PROFESSIONAL LIABILITY, *supra* note 37, at 99.

[295] *See supra* note 82 and accompanying text.

Initially, of the companies currently operating in the Virginia market, only the Reciprocal offered to reduce liability insurance premiums to participating physicians and hospitals—and this only by 5%, and conditional upon a participation rate of 80% of all Virginia obstetricians and hospitals providing obstetrical services.[296] More recently, however, the Reciprocal decided to offer a $3,500 premium rate credit for all physicians participating in the Program.[297] So too, the St. Paul has promised participants a 10% premium rate credit (representing between about $3,000 and $4,500) to be phased in over a five-year period.[298] Even with these premium reductions, annual assessments of $5,000 mean that participating physicians incur *additional* annual insurance costs of between $500 and $2,000. More significantly, the Program appears to have done nothing to halt the general increase in the rate of obstetrical malpractice insurance.

Two reasons account for insurer unwillingness to immediately lower premiums for participants. First, since most malpractice coverage is now sold on a "claims-made" basis,[299] the benefits of insureds' participation in the Program will not be experienced until current injuries enter into the claims arena. On Kramer's calculation,[300] this would not occur for another four to six years. Thus, while the Commissioner of Insurance of the Virginia State Corporation Commission concludes that "potential premium savings are in the 10% to the 20% range for a mature claims made policy,"[301] the key word is "mature." Although rate reductions should increase as the system approaches the four to six year mark, discounts are understandably low or non-existent in the initial years.[302]

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[296] *See* Kramer, Memorandum, *supra* note 40, at 27.

[297] Telephone interview with Sandra Kramer, *supra* note 142.

[298] *Id.*

[299] "Claims-made" coverage insures against claims actually filed within the policy period, as opposed to "occurrence-based" policies which provide coverage for all claims arising out of an injury occurring during the policy period. In the absence of a short limitation period, the latter increases the risk to the insurer by creating a "long-tail" during which plaintiffs may initiate claims for which the insurer is responsible. "Claims-based" policies shift this risk to the insured by forcing the individual or institution to purchase explicit coverage over the life of this "tail" at points in time considerably closer to the initiation of the claims themselves. As a result, the insurer is better able to price the "socio-legal risk" as it manifests itself.

[300] *See supra* note 277 and accompanying text.

[301] Letter from Steven T. Foster, Commissioner of Insurance, to Licensed Liability Insurance Companies (May 10, 1988) (on file at the HARV. J. ON LEGIS.).

[302] *See supra* note 111.

Second, even abstracting from the specific characteristics of medical malpractice policies, insurers operating in the State face the undiversifiable risk that the Act might eventually be declared unconstitutional.[303] It was just such a declaration—regarding the State's $1 million ceiling on malpractice awards—that helped set off the Virginia crisis in the first place.[304] If such an event were ever to transpire, insurers who had offered premium discounts would lose the benefit of the bargain struck with insureds to encourage their participation in the Program. In an effort to shift the risk of such a declaration to its insureds, the St. Paul sought permission from the Commissioner of Insurance to include in its policies a proviso excluding from coverage any birth within the definition of the Act.[305] But, as Kramer recounts, "This was not acceptable to either the medical community or to the Commissioner of Insurance, since it would make it virtually impossible for any physician to participate. The potential risk would be too great for any individual to bear."[306]

Thus, absent some security in the endurance of the entity at the center of the bargain (the Program itself), the possibility of a premium reduction was foreclosed—and, with it, an immediate incentive to encourage physicians and hospitals to participate in the Program.

The State Insurance Bureau has responded to premium rate rigidity in two ways. First, it has extended to insurers the "carrot" of security against a declaration of the scheme's unconstitutionality: "As a compromise, the Commissioner has indicated that he will allow insurance companies to amend their policies to require Program participants to pay the insurer an amount equal to the amount of the discount in the event that the sole remedy provision of the Act is declared unconstitutional."[307]

Second, the Commissioner has used the "stick" of regulation to demand of "every company that maintains a filing for medical professional liability insurance for physicians, surgeons and hospitals" that they file with the Bureau of Insurance "an appropriate rate credit for participating physicians and hospitals."[308]

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[303] *See* Kramer, Memorandum, *supra* note 40, at 28.
[304] *See supra* notes 98–99 and accompanying text.
[305] *See* Kramer, Memorandum, *supra* note 40, at 28.
[306] *Id.*
[307] *Id. See also* Note, *Innovative No-Fault Tort Reform, supra* note 7, at 1520 n.156.
[308] Letter from Steven T. Foster, *supra* note 301.

Others would go further, recommending use of the even bigger stick of legislation. For example, according to Kramer:

> Legislators should be aware of the fact that insurance companies may not be willing to reduce premiums voluntarily. Particularly if one of the primary objectives of the legislation is to make professional liability insurance more affordable, states may want to expressly require insurance companies to pass on their diminished risk to policyholders in the form of reduced premiums.[309]

Indeed, the Florida Legislature initially seemed to be following this route.[310] However, the provision to this effect was not included in the final version of the legislation.[311]

Nevertheless, given the reasons already identified for the slow introduction of premium discounts in the context of the predominance of claims-made policies,[312] it is unclear what the Commissioner meant by "an appropriate rate credit"—or Kramer by "diminished risk." Perhaps the best safeguard of reasonable insurance premiums is the maintenance of a competitive market for insurance in the State.[313]

VI. Evaluation

As a short-term solution to the related crises affecting obstetrical insurance and obstetrical care in the State of Virginia, the *Virginia Birth-Related Neurological Injury Act* appears to have been a qualified success. Although malpractice premiums continue to rise, insurance availability clearly has been restored. Little is known, however, about the operation of the "indigent care provision"[314] or the success of the scheme in addressing

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[309] Kramer, Memorandum, *supra* note 40, at 28–29. *See also* Note *Innovative No-Fault Tort Reform*, *supra* note 7, at 1520–21. This recommendation has been adopted by the Institute of Medicine in its commentary on the Virginia Act. *See* 1 Medical Professional Liability, *supra* note 37, at 227.

[310] An earlier version of the bill before the Florida Senate stipulated that "insurers issuing insurance in this state shall reflect in their filings for rates, rating schedules, or rating manuals for medical malpractice insurance any savings or other effects realized by the insurer as a result of this act." Florida Birth-Related Neurological Injury Compensation Plan, Senate Bill 6E, § 81 (1988) (on file at the Harv. J. on Legis.).

[311] *See* Fla. Stat. Ann. §§ 766.301–766.316 (West Supp. 1989).

[312] *See supra* notes 299–302 and accompanying text.

[313] On the other hand, the inherent instability of unregulated insurance markets should not be disregarded. *See* Nye & Hofflander, *Economics of Oligopoly: Medical Malpractice Insurance as a Classic Illustration*, 54 J. Risk & Ins. 502 (1987). *See also* Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 Yale J. on Reg. 455 (1988).

[314] *See supra* notes 123–128 and accompanying text.

access barriers to obstetrical care. Finally, current participation rates and the tenuous financial position of the Program constitute a potential source of future crisis—a crisis that could prove fatal to the Program.

Regardless, it is as an experiment with no-fault compensation for medical injuries that the Virginia Program has attracted so much attention,[315] and as an alternative to the existing medical malpractice regime that the plan will ultimately be judged. While this is not the place to enter into a lengthy discussion on the virtues and vices of medical no-fault generally,[316] a few observations should nevertheless be made about the Virginia Plan as it relates to the schemes developed in the academic literature. As the first North American experiment in medical no-fault, it is on the basis of Virginia's experience that these theoretical plans may ultimately be judged. For the reasons that follow, I believe that this would be unfortunate.

While no two no-fault proposals share wholly identical characteristics, two objectives are central to all: deterrence or injury prevention, and compensation. The following sections consider the Virginia Plan from the perspective of each.

A. *Deterrence*

Two issues are central to the deterrence of medical injuries:[317] first, the *cause* of the injury; second, the *mechanism* to establish the appropriate incentives for its prevention. Moreover, the former issue is conceptually prior to the latter. It makes little sense to expect an injury to be prevented by an entity which is in no position to affect the outcome of a given activity. How does the Virginia scheme deal with each problem?

1. Causation

The Virginia Act distinguishes between *compensable* "birth-related neurological *injuries*" and *non-compensable* neurological *disability*.[318] By definition, the former are caused only "by the deprivation of oxygen or mechanical injury occurring in the

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[315] *See supra* notes 5–16 and accompanying text.

[316] *See* Weiler, *supra* note 16, at 221–86; Duff, *supra* note 2, at 68–120.

[317] *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 133–97 (1970) [hereinafter G. CALABRESI, COSTS OF ACCIDENTS].

[318] *See supra* notes 154–156 and accompanying text.

course of labor, delivery or resuscitation in the immediate post-delivery period,"[319] while the latter results from all other causes—particularly genetic or congenital factors.[320] Although compensable injuries are "birth-related," the Act is deliberately vague as to whether or not these are medically caused (iatrogenic). Specifically, the definition of a "birth-related neurological injury" ascribes the outcome not *directly* to medical causes, but instead to chronologically delimited events which may or may not be attributable to medical care.

From the perspective of injury prevention, this ambiguity is unfortunate. Since the realization of this objective requires that the entity deterred be capable of influencing the outcome, a knowledge of the person or persons causally responsible for the injury is essential to the identification of the entity (or entities) to be deterred. In the deterrence of "birth-related neurological injuries" this task of identification requires a judgment as to the *degree of iatrogenicity* of the injury—that is, the degree to which the injury is avoidable under a suitable standard of medical care[321]—to determine the extent to which health care providers should be charged with the task of injury prevention. Such an evaluation is absent in the Virginia Act.

One reason for this deficiency undoubtedly involves the political context of the Bill's enactment—specifically, an unwillingness on the part of physicians and hospitals to accept (even "no-fault") responsibility for any "birth-related neurological injury." To blame political considerations alone, however, would be a mistake. As outlined already,[322] determining the cause of neurological impairment in the case of a particular infant is exceedingly difficult. While some instances of neurological damage are undeniably of specifically medical origin, others apparently result from maternal behavior during pregnancy.[323] Some neurological injuries appear to be causally related to social

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[319] *See supra* note 154 and accompanying text.

[320] *See supra* note 156 and accompanying text.

[321] The designation of such a standard of medical care to evaluate iatrogenicity is one of the most difficult problems of no-fault compensation for medical injuries, reintroducing a notion of moral responsibility into a scheme that presents itself as indifferent to fault. *See* Harvard Medical Practice Study Group, Medical Care and Medical Injuries in the State of New York: A Pilot Study 26–29 (1987) (on file at the HARV. J. ON LEGIS.); Weiler, *supra* note 16, at 280–82; Duff, *supra* note 2, at 76–86. While the issue of medical causation is conceptually irrelevant from the perspective of *compensation* for disability, it is essential to the objective of injury *deterrence*.

[322] *See supra* notes 24–34 and accompanying text.

[323] *See supra* note 34 and accompanying text.

class.[324] Yet others stem from the inherent risks of pregnancy and childbirth,[325] and are avoidable only to the extent that women cease having babies. Only neurological injuries of medical origin constitute iatrogenic injuries, which alone are susceptible to physician and hospital efforts at prevention. The mother is the immediate cause of injuries that result from maternal behavior during pregnancy.[326] Poverty accounts for the neurological injuries causally related to social class, and—so long as human beings continue to reproduce—injuries caused by the inherent risks of pregnancy and childbirth are most accurately labelled unavoidable misfortunes. Nevertheless, there appears to be no clear test to distinguish conclusively among these causes in any given case. Consequently, as Weiler puts it: "Virginia may well be conducting its experiment in no-fault for medical injuries with a program that is the functional equivalent of having introduced workers' compensation to deal with a long-latency, non-signature disease such as lung cancer."[327]

In the face of this scientific indeterminacy, one option might be to disregard deterrence altogether, emphasizing injury compensation as the critical policy objective, and abandoning sustained legal efforts to identify the cause of the injury.[328] Another approach, apparently favored by Richard Epstein, is to avoid the centrality of the causation problem by returning to a negligence standard for injury compensation.[329] Neither alternative is appealing. While the former rejects efficiency and individual

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[324] *Id.*

[325] *See supra* note 33 and accompanying text.

[326] The term "immediate cause" emphasizes the potential causal roles of both prenatal diagnosis and care (raising again the question of iatrogenicity), and patient ignorance of pregnancy risks (suggesting a need for public education in this area). In Calabresi's framework there is considerable reason to doubt whether mothers represent the "least cost accident avoider" even for this category of infant neurological impairment. On the contrary, efforts to influence their behavior through financial incentives would probably entail what Calabresi has termed "externalization due to inadequate knowledge." G. CALABRESI, COSTS OF ACCIDENTS, *supra* note 317, at 148–49. Indeed, it is difficult to imagine financial incentives having any impact at all on maternal behavior during pregnancy. The risk of giving birth to a neurologically impaired child seems more than sufficient to deter a knowledgeable mother from conduct considered dangerous to the fetus. Where this is not the case, it is unlikely that economic incentives would perform this function either. In such instances, loss of custody might be one appropriate legal response. Moreover, where the mother retains custody, she implicitly bears the costs of the injury.

[327] Weiler, *supra* note 16, at 286 n.320.

[328] *See, e.g.*, Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755 (1985).

[329] "Ironically, a negligence standard, for all its flaws, may turn out to be more desirable, if only because fewer cases straddle the negligence/no negligence line than straddle the iatrogenic injury/birth defect or drug usage line." Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1470.

responsibility in favor of a questionable principle of collective responsibility,[330] the latter embraces the same liability system that gave rise to the Virginia crisis in the first place—a regime in which both deterrence and compensation are inadequately achieved.[331] From the perspective of injury deterrence, a preferable approach would have included some reference to medical cause. Notwithstanding its manifest unsuitability as a condition for compensation,[332] iatrogenicity could have governed provider contributions to the Fund—both as an aggregate proportion of total expenses,[333] and as a means of matching individual assessments to expected costs.[334] This policy would necessitate difficult causal inquiries, requiring procedural safeguards for program participants for whom a finding of medical cause could mean increased program levies. Nonetheless, the system would create incentives both for the avoidance of iatrogenic injury and for the creation of the scientific knowledge currently lacking. In this respect, the approach emphasizes dynamic rather than static efficiency.

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[330] *See* Trebilcock, *Incentive Issues in the Design of 'No-Fault' Compensation Systems*, 39 U. TORONTO L.J. 19 (1989) [hereinafter Trebilcock, *Incentive Issues*].

[331] *See, e.g.*, Weiler, *supra* note 16, at 113–68. Admittedly, Epstein would reconstitute this regime, liberating it from the dead hand of judicial regulation and leaving it to the "Invisible Hand" of the unregulated marketplace. *See* Epstein, *Case for Contract*, *supra* note 1; Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1453–63. As more than one critic have observed, however, asymmetric information in the market for medical services makes private contracts deficient as a means of regulating the relationship between patients and health care providers. *See, e.g.*, Shavell, *Theoretical Issues in Medical Malpractice*, in THE ECONOMICS OF MEDICAL MALPRACTICE, *supra* note 1, at 35; Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963).

[332] *See supra* note 321. Optimal insurance considerations and the enormous difficulties of both identifying the existence of an iatrogenic injury and attributing specific physical consequences to its occurrence suggest that disability itself, instead of medical cause, is the more appropriate criterion for compensation under any public scheme. *See* Duff, *supra* note 2, at 24–120.

[333] To the extent that some infant neurological impairment is attributable to nonmedical causes (maternal behavior, poverty, and unavoidable misfortune), general tax revenues are probably the most appropriate source of financing for the rest of the compensation fund. To impose levies on individual women whose drug habits place their fetuses at risk would be administratively infeasible and unlikely to achieve effective deterrence. *See supra* note 326. So too, financial levies on the poor are unfit to deter neurological impairment that is causally related to poverty itself. Finally, while it is arguable that the risk of unavoidable infant neurological impairment should be at least partly internalized to the activity of having children (*e.g.*, by mandating the purchase of newborn disability insurance by prospective parents), the next generation's character as a public resource (as well as a private benefit to each child's family) suggests a large role for public subsidization of the costs of bearing children. Nonetheless, a group at Loyola University is apparently formulating a proposal for a Birth-Related Neurological Injury Compensation Program in Illinois that would impose program costs on prospective parents. Telephone interview with Sandra Kramer, *supra* note 142.

[334] *See infra* notes 359–376 and accompanying text.

Interestingly, Delegate Cohen's initial presumption[335] would have achieved a result comparable in at least one respect to that envisioned here.[336] By imposing on the Program the burden of proving that an infant's neurological impairment did not result from a birth-related injury, incentives would have been created for the Program to inquire into the causes of neurological impairment in infants. Of course, the potential for this dynamic incentive was lost once the amended presumption was enacted.[337]

2. Mechanism

Given the identification of the entity to be deterred, a legal system can employ two fundamentally different techniques for the inducement of injury avoidance behavior: public regulation and the creation of private market incentives. Guido Calabresi has labelled these approaches respectively as collective or specific deterrence, and market or general deterrence.[338] Although each may function more effectively than the other in specific contexts, in no respect should the two be viewed as mutually exclusive.[339] On the contrary, in many settings, reliance on both is optimal.[340]

a. *Collective deterrence.* As already noted,[341] the Virginia Plan incorporates a specific mechanism of regulatory review to discourage substandard obstetrical care. All claims filed with the Industrial Commission are automatically referred to the Board of Medicine and the Department of Health—specialized administrative bodies invested with licensing and disciplinary authority over physicians and hospitals.

Several advantages are traditionally cited for such a system of specific deterrence.[342] First, to the extent that these regulatory boards usually involve significant professional representation,

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[335] *See supra* note 228 and accompanying text.
[336] On the other hand, even the initial presumption was marred by the terms of the definition itself.
[337] *See supra* notes 228–234 and accompanying text.
[338] *See* G. CALABRESI, COSTS OF ACCIDENTS, *supra* note 317, at 26–27.
[339] *Id.* at 68–129.
[340] *Id.* at 112–13.
[341] *See supra* notes 176–177 and accompanying text.
[342] *See, e.g.*, Trebilcock, *Regulating Service Quality in Professional Markets*, in THE REGULATION OF QUALITY 83 (D. Dewees ed. 1983) [hereinafter Trebilcock, *Professional Markets*].

medical expertise can be brought to bear directly on the articulation of standards of care and on the evaluation of individual cases. This will reduce information costs and the probability of errors in case-by-case adjudication. It will also generate more useful guidelines than do malpractice verdicts to govern future physician conduct. Second, to the extent that standards are set and administered through a collegial body within the profession, provider fear of uninformed and arbitrary judgment is likely to diminish, thereby leading to a decline in defensive practices. Third, the administrative agency is likely to focus not on the consequences of the provider's conduct in an individual case but on "a broader pattern of behavior which may indicate a serious risk for future patients."[343] As a result, it can be expected to better target risks which are most susceptible to prevention, and therefore encourage greater reductions in the rate of iatrogenic injury. Finally, by virtue of the boards' power to enforce exit from the market by revoking licenses to practice medicine, "the system may take care of recidivists more effectively than civil liability regimes."[344]

Typical criticisms, on the other hand, cite the "invidious choice" between a system of victim-initiated complaints (impeded by an absence of economic incentives to pursue disciplinary complaints, in contrast to the compensatory attractions of a civil action), and practice reviews and quality audits that are both costly and intrusive upon the doctor-patient relationship.[345] Also cited is the historically limited arsenal of available sanctions[346] and, above all, the tendency of self-regulatory bodies to—in the words of a former President of the American Federation of State Medical Boards—display more interest "in protecting medical colleagues than in safeguarding the public."[347]

The framers of the Bill, however, contend that these objections do not apply.[348] First, the automatic referral mechanism

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[343] Weiler, *supra* note 16, at 208.

[344] Trebilcock, *Professional Markets*, *supra* note 342, at 91.

[345] *Id.*

[346] *See, e.g.*, Dolan & Urban, *The Determinants of the Effectiveness of Medical Disciplinary Boards: 1960–1977*, 7 LAW & HUM. BEHAVIOR 203, 205 (1983).

[347] Derbyshire, *How Effective Is Medical Self-Regulation?*, 7 LAW & HUM. BEHAVIOR 193, 196 (1983).

[348] *See* Davis & Kramer, *The Policy Implications of the Injured Infant Act*, 5 VA. HOSP. ASS'N PERSP. 3 (1987). Ronald Davis is a Richmond physician and Chairperson of the Professional Liability Committee of the MSV which played the central role in drafting the Virginia Bill. *See supra* note 119 and accompanying text.

avoids costly and intrusive random audits by instituting a system of victim-initiated review—itself driven by the claimant's pursuit of compensation through the Program. Second, they insist, recent staffing changes at the Virginia Board of Medicine make it a more effective disciplinary body.[349] Finally, they add: "so long as the Injured Infant Act takes the form of an adjunct to the existing tort system, the deterrent effect of that system will continue to operate in tandem with any deterrent effect produced by the Injured Infant Act."[350]

Although the deterrent effects of the medical malpractice system are uncertain,[351] automatic referral clearly addresses the dilemma of costly and intrusive quality audits.[352] It also eliminates the discretionary capacity of professional bodies to determine the targets of regulatory investigation themselves.

On the other hand, despite structural changes to the Board of Medicine, considerable doubt remains as to its efficacy as a mechanism of routine quality control—as opposed to the prosecution of only the most egregious forms of professional misconduct. In a sample of eighty-eight violations acted on by the Board in 1987,[353] only eight involved "standard of care" violations; roughly 41% involved personal drug use, excessive prescribing, indiscriminate dispensing, incomplete drug records, or general "drug related" violations; 23% involved unprofessional conduct; and another twenty-one cases related to unlicensed practice, fraud, criminal conviction, sexual abuse and inappropriate advertising.[354]

Consequently, although the Virginia scheme's collective deterrence provisions represent a substantial improvement upon traditional models of public regulation,[355] their effectiveness is likely to remain substantially impaired. While further Board reform might well achieve noticeable improvements to this rec-

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[349] *See* Davis & Kramer, *supra* note 348. Specifically, the Board has established a full-time Medical Director, has a larger budget, and has imposed increased reporting responsibilities on the medical community. *See* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1503–04.

[350] Davis & Kramer, *supra* note 348, at 3. *See also* Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1503.

[351] *See, e.g.*, Weiler, *supra* note 16, at 133–68.

[352] *See supra* note 345 and accompanying text.

[353] Of 378 cases heard by the Virginia Board in 1987, no violations were found in 232 cases, violations were found in 106 cases, and 40 cases were "undetermined." The sample looked at 88 of the 106 substantiated violations. Note, *Constitutional and Policy Challenges*, *supra* note 9, at 451 n.127.

[354] *Id.* at 452 n.127.

[355] *See supra* notes 345–347 and accompanying text.

ord,[356] the experience in Virginia and throughout Canada[357] and the United States[358] suggests that collective or specific deterrence alone should not be viewed as a sufficient means for the prevention of medical injuries.

b. *Market deterrence.* The general or market approach imposes the costs of injuries on designated entities in proportion to their degree of causal responsibility, so that these entities may themselves determine an efficient level of investment in injury prevention.[359] The Virginia Program attaches little significance to this approach, relying instead almost solely on specific or collective deterrence.

In the Program, participating physicians are assessed a flat rate fee, regardless of the number or riskiness of deliveries performed in their practice.[360] Although hospital levies vary according to the number of deliveries in the previous year, no account is taken of their mix (high or low risk), and the total annual assessment is capped at $150,000.[361] In neither case are premiums rated to take account of claims experience. As a result, as already explained,[362] the scheme embodies an implicit subsidy of both substandard and high-risk providers, paid by participants of superior quality and those handling low-risk pregnancies. While one might question the utility of experience-rating individual physicians,[363] this practice should, at the very least, be implemented for institutional providers where sufficiently reliable claims data is available.[364]

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[356] Dolan and Urban, for example, report that the effectiveness of state disciplinary boards is strongly inversely related to the extent to which they are dominated by physicians. *See* Dolan & Urban, *supra* note 346, at 211–15.

[357] In a recent study of disciplinary actions by Canadian colleges of physicians and surgeons, the vast majority of cases resulting in sanctions involved allegations (such as substance abuse, sexual impropriety, or prescription/dispensing irregularities) other than negligence or incompetence. *See* Dewees, Coyte & Trebilcock, *supra* note 74, at 11–32.

[358] Of the 450,000 licensed physicians in the United States in 1984, only 1400 were disciplined by state medical licensing boards in that year. *See* Browning, *Doctors and Lawyers Face Off*, 72 A.B.A. J. 38, 39 (1986).

[359] *See* G. CALABRESI, COSTS OF ACCIDENTS, *supra* note 317, at 68–94.

[360] *See supra* note 256 and accompanying text.

[361] *See supra* note 257 and accompanying text.

[362] *See supra* note 283 and accompanying text.

[363] *See, e.g.*, Weiler, *supra* note 16, at 147–48. *But see* Ferber & Sheridan, *Six Cherished Malpractice Myths Put to Rest*, 52 MED. ECON. 150, 156 (1975); Nye & Hofflander, *Experience Rating in Medical Professional Liability Insurance*, 55 J. RISK & INS. 150 (1988); Rolph, *Some Statistical Evidence on Merit Rating in Medical Malpractice Insurance*, 48 J. RISK & INS. 247 (1981).

[364] *See* Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1473.

More significantly, the Program as a whole is subsidized by non-participating physicians who are assessed annual fees of $250 each,[365] and by liability insurance carriers accountable for conditional levies of anywhere between about $5 million and $10 million.[366] Neither assessment is justifiable on market deterrence grounds. Physicians with no involvement in providing obstetrical care are in no position to affect the outcome of obstetrical care provided by others.[367] Nor are writers of liability insurance (and their consumers) in lines other than obstetrics capable of influencing the injury prevention behavior of physicians and hospitals providing obstetrical care.

Of course, as already outlined,[368] it was politics—not principle—that brought the $250 physician levy into the scheme. So too, politics had something to do with the conditional assessments on liability insurers.[369] In the latter case, however, more than politics was involved. As already explained,[370] this contingent liability was rationalized on the basis of loss-spreading. The insurance crisis had created an accessibility crisis in obstetrical care, and this represented a "societal problem."[371] Consequently, everyone in the State was expected to contribute to the alleviation of the crisis by helping to fund the Program. In fact, since the Act explicitly entitles insurers to recover all assessments through rate increases and surcharges,[372] all consumers of liability insurance "help foot the bill" through higher premiums.[373]

Leaving aside the merits of the implicit public policy decision to subsidize all obstetrical care in the State,[374] if true loss-

[365] *See supra* note 258 and accompanying text.

[366] *See supra* notes 259–261, 268 and accompanying text. In fact, O'Connell speculates that this residual liability will actually fall primarily on automobile owners, since auto insurance is the largest source of insurance payment into the casualty insurance industry. *See* O'Connell, *supra* note 12, at 1479.

[367] On the other hand, some mandatory payment makes sense in the case of non-participants who are shielded from civil liability either by providing obstetrical services under the proximate supervision of a participating physician, or by performing related services such as anesthesiology or pediatrics. *See supra* notes 180–185 and accompanying text. *See also* Schockemoehl, *supra* note 245, at 722 (commenting on the "windfall immunity" that non-participants receive when their negligence contributes to a birth-related injury).

[368] *See supra* notes 143–145 and accompanying text.

[369] *See supra* notes 138–142 and accompanying text.

[370] *See supra* note 137 and accompanying text.

[371] *See supra* notes 122 and 135 and accompanying text.

[372] VA. CODE ANN. § 38.2-5020(B)(3) (Supp. 1989). *See also* FLA. STAT. ANN. § 766.314(5)(c)4 (West Supp. 1990).

[373] Blodgett, *supra* note 232 (referring to statement of Delegate Woodrum).

[374] Although, even here, if the legislature wished to encourage obstetrical care in rural areas and for the poor, it could have done so more directly.

spreading is the objective there is no principled reason for its reach to be confined to those who purchase liability insurance; on the contrary, general tax revenues are the appropriate source.[375] Of course, as the reader will recall, it is precisely here that politics entered into the picture.[376]

B. *Compensation*

Three alternative rationales are typically advanced for the existence of public programs to compensate for physical adversity. A communitarian argument proclaims it to be "in the national interest" to "protect all citizens . . . from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity."[377] Utilitarianism conceptualizes injury compensation as "secondary accident cost avoidance" and explains loss spreading in terms of the diminishing marginal utility of income.[378] Finally, a third approach explains social insurance for adversity on the basis of the following principle of distributive justice:[379] that those who cause adversity should bear its costs,[380] while unavoidable misfortune "is to be shared in common by the community as a whole."[381]

Since this is obviously not the place to enter into a detailed exegesis of each approach, suffice it to say that I find the third alternative most attractive ethically, and most compatible with the traditional emphasis that our legal system places on individ-

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[375] *See supra* note 333; Note, *Innovative No-Fault Tort Reform*, *supra* note 7, at 1518–19; Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985); Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (analyzing the incoherence of loss-spreading justifications for tort liability).

[376] *See supra* notes 136–138 and accompanying text.

[377] ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 39 (1967).

[378] *See* G. CALABRESI, COSTS OF ACCIDENTS, *supra* note 317, at 39–67. *See also* Calabresi, *Swedish Alternative*, *supra* note 2, at 657 (identifying a primary objective of the Swedish no-fault compensation program ensuring that no one is "so crushed by having to bear accident costs . . . as to result in significant additional harm to himself or the society").

[379] Although not explicitly stated there, the inspiration for much of this principle may be found in J. RAWLS, A THEORY OF JUSTICE (1971).

[380] This includes instances where the injured person causes the adversity. Thus, the principle accounts for reduced benefit levels (or disentitlement) to take account of *ex ante* moral hazard. *Ex post* moral hazard is addressed through the definition of adversity.

[381] Hutchinson, *supra* note 328, at 755 (quoting Lysias).

ual rights and responsibilities.[382] Given such a principle, the structure of a compensation scheme depends on the combination of two conceptually distinct considerations: what constitutes adversity? and what is its cause? The first question governs initial entitlement to compensation; the second determines who should pay.

Ignoring for the moment the interpretation of adversity, it is useful to reconsider the causes of infant neurological impairment from the perspective of distributive justice. Since in no respect can the infant be considered to have caused the injury, our principle of distributive justice requires compensation from some other source. So too, it identifies this source as providers of obstetrical care in cases of iatrogenic injury, and general tax revenues where neurological impairment is the result of unavoidable misfortune.[383]

Turning to the Virginia Act, two defects are immediately apparent. First, causation is inadequately specified, making the source of funds for compensating eligible claimants indeterminate.[384] Second, the two questions of adversity and cause have been inappropriately combined within the eligibility criteria for compensation. Thus, it is not sufficient that the infant be "permanently nonambulatory, blind, aphasic, incontinent, *or* in need of assistance in all phases of daily living."[385] Neurological impairment must also have been "caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery or resuscitation in the immediate post-delivery period."[386]

From a compensatory perspective, it is impossible to justify the compensation of infants suffering severe neurological impairment only where the cause of their condition meets the detailed test of a "birth-related neurological injury."[387] While Kramer regards the Virginia scheme as "more humane" because

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[382] This is not to deny the place of communitarianism in rationalizing *welfare* rights (as distinct from social *insurance* programs), nor the role of utilitarian considerations in the actual design of each of these broad categories of public programs.

[383] On the other hand, to the extent that the *activity* of having children is considered the morally relevant cause of unavoidable infant neurological impairment, it is arguable that prospective parents should bear the costs of this risk. *See supra* note 333. Nevertheless, for the reasons articulated earlier, general tax revenues represent a more appropriate source of funds for compensating unavoidable infant neurological damage, as well as that attributable to poverty or maternal drug abuse. *Id.*

[384] *See supra* notes 318–334 and accompanying text.

[385] *See supra* note 154 and accompanying text.

[386] *Id.*

[387] The same may be said of the deliberate exclusion of disability "caused by genetic or congenital abnormalities." *See supra* note 156 and accompanying text.

"compensation is determined by injury rather than by the fortuity of being able to prove that someone negligently caused an injury,"[388] the breadth of its humanity is really quite limited—replacing as it does the fortuity of proving negligence with the fortuity of proving causation. Equally disturbing is the disparate treatment of infants suffering a "birth-related neurological injury" based on whether the obstetrician or hospital is a participant or non-participant, since the health care provider has no obligation to inform the victim's parents.[389] More generally, it might be questioned why the State of Virginia has designed a scheme to compensate only a narrowly circumscribed class of neurologically impaired infants as opposed to those experiencing any other equally devastating adversity.[390] While this observation leads inexorably to the consideration of broader social insurance programs—perhaps along the lines of the New Zealand Accident Compensation plan[391]—this task is beyond the scope of this Article.[392]

VII. Conclusions

The *Virginia Birth-Related Neurological Injury Compensation Act* was begot of crisis and was shaped by the dimensions of that crisis as well as by the political compromises necessary to secure its rapid passage. As a result, it is ill-designed to address the central objectives of deterrence and compensation governing the sphere of public accident law. Instead, it represents a carefully crafted exercise in special interest legislation—promulgated in the interests of society as a whole, but conceived and orchestrated by a small segment of the medical community and the malpractice insurance industry. Moreover, although pas-

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[388] Kramer Memorandum, *supra* note 40, at 6.

[389] *See supra* notes 131–133, 170–185 and accompanying text.

[390] Even Richard Epstein, a resolute opponent of medical no-fault, makes this obvious criticism. Epstein, *Market and Regulatory Approaches*, *supra* note 8, at 1468. On the constitutional implications of this apparent denial of equal protection, see Note, *Constitutional and Policy Challenges*, *supra* note 9, at 443–50.

[391] *See* T. Ison, Accident Compensation: A Commentary on the New Zealand Scheme (1980); Gaskins, *Tort Reform in the Welfare State: The New Zealand Accident Compensation Act*, 18 Osgoode Hall L.J. 238 (1980); Klar, *New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective*, 33 U. Toronto L.J. 80 (1983).

[392] *But see* Ison, *Human Disability and Personal Income*, in Studies in Canadian Tort Law (L. Klar ed. 1977); Ison, *The Politics of Reform in Personal Injury Compensation*, 27 U. Toronto L.J. 385 (1977); Pierce, *Encouraging Safety: Tort Law and Government Regulation*, 33 Vand. L. Rev. 1281 (1980); Trebilcock, *Incentive Issues*, *supra* note 330.

sage of the Act managed to restore the availability of obstetrical insurance in the State, the long-term prospects for the vitality of the scheme as currently structured appear extremely dim. Finally, it remains to be seen whether the Act will withstand constitutional scrutiny.[393]

For policy-makers interested in alternatives to the current liability system for medical malpractice, two important conclusions follow from this review of the Act and the process of its passage. First, given the deliberately narrow scope of the Virginia Plan and the distinctive features associated with the context of its enactment, one would do better in evaluating no-fault schemes for medical injuries to look at the theoretical models found in the academic literature or at the existing schemes in New Zealand and Sweden than at the Virginia Birth-Related Neurological Injury Compensation Program.[394] Second, since the Virginia Program bears only slight resemblance to these broader no-fault schemes, the actual experience of the Virginia scheme should be cautiously applied in assessing the prospects for medical no-fault generally.

Regardless, detailed compensation programs like that in Virginia are likely to become a central ingredient in current legislative efforts to relieve physician anxiety and insurance market instability associated with the malpractice liability regime.[395] In my opinion, this strategy is unfortunate. First, while distinctive programs for specific injuries may be adequately structured to promote effective deterrence, they are manifestly unfit to achieve reasonable compensation for medical injuries.[396] Second, as the Virginia experience clearly demonstrates, such schemes are particularly susceptible to political "capture" by special interests who can distort what limited fairness and rationality even narrow compensation schemes might otherwise retain by securing, for example, funding arrangements that contradict basic deterrence requirements. Finally, political pressure for narrow compensation schemes impedes constructive efforts

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[393] *See* Note, *Constitutional and Policy Challenges*, *supra* note 9 (making a preliminary effort to test the constitutionality of the Act). *See also* Learner, *supra* note 254 (containing a more general discussion of the relevant constitutional issues).

[394] *See supra* notes 1 and 2.

[395] *See* Weiler, *supra* note 16, at 285; Henderson, *supra* note 15, at 210.

[396] *See supra* notes 387–392 and accompanying text. *See also* Duff, *supra* note 2, at 68–69.

to devise more comprehensive solutions to the medical liability crisis and to forge a broader consensus on tort reform.[397]

There are practical alternatives to the current medical liability system, but these require creativity to accomodate diverse interests, courage to resist special interests, and faith both in the capacity of human reason to honestly resolve difficult social problems and in the ability of democratic institutions to devise sensible programs to advance the general interest. The story of the *Virginia Birth-Related Neurological Injury Compensation Act*, unfortunately, suggests the absence of each of these virtues.

[397] To the extent that the Virginia Plan selects a narrow class of "troublesome and costly" claims for withdrawal from the tort system, it creates justifiable suspicion that physician groups have little genuine concern for patient interests. As a result, it reduces the likelihood of joint action by physician and patient interests toward a more efficient and humane compensation program for medical injuries.

NOTE

THE TITLE X FAMILY PLANNING SUBSIDIES: THE GOVERNMENT'S ROLE IN MORAL ISSUES

EDWARD G. REITLER*

When the government takes a moral stand on a controversial issue, it becomes a participant in the marketplace of ideas. Because such government speech may be very powerful, it raises concerns about freedom of speech. Such concerns typically have been addressed through traditional first amendment tools, such as unconstitutional conditions doctrine, public fora doctrine, an asserted right of the government to free speech, and the right to receive information.

This Note addresses the problem of government speech by examining regulations recently issued by the Department of Health and Human Services, which prohibit the use of federal family planning subsidies for abortion counseling. Treating these regulations as a form of government speech, Mr. Reitler questions the relevance and usefulness of traditional first amendment tools for evaluating government speech, and proposes three principles by which courts should judge government speech. Applying these principles, Mr. Reitler concludes that the family planning subsidy regulations do not violate the first amendment.

We ought . . . delicately and profoundly to respect one another's mental freedom: then only shall we bring about the intellectual republic; then only shall we have that spirit of inner tolerance without which all our outer tolerance is soulless, and which is empiricism's glory; then only shall we live and let live in speculative as well as in practical things.[1]

—William James

The individual, if left alone from birth, would remain primitive and beastlike in his thoughts and feelings to a degree that we can hardly conceive. The individual is what he is and has the significance he has not so much in virtue of his individuality, but rather as a member of a greater human

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[1] W. JAMES, THE WILL TO BELIEVE, AND OTHER ESSAYS 30 (unabr. Dover ed. 1956).

community, which directs his material and spiritual existence from the cradle to the grave.[2]

—Albert Einstein

On January 28, 1988, the United States Department of Health and Human Services (HHS) issued regulations[3] ("Regulations"), pursuant to its statutory authority under Title X of the Public Health Service Act,[4] proscribing federal subsidization of programs "where abortion is a method of family planning."[5] The current administration has assumed a striking stance by curtailing public funding of abortion counseling, and the Regulations have played a supporting role in the public controversy raging around the constitutionality of abortion rights, a controversy in which the recently decided case *Webster v. Reproductive Health Services*[6] has assumed center stage.[7] The Regulations reversed guidelines formed during the Carter administration which had required family planning clinics participating in Title X programs to provide counseling on *all* prenatal options, including abortion, after a woman tested positive for pregnancy.[8] The reversal can be ascribed, of course, to the anti-abortion ("pro-life") ideology of Presidents Reagan[9] and Bush.[10] By withholding public monies from those programs that would be entitled to the grants under Title X and HHS requisites if they did not offer abortion counseling, the Bush administration in effect subsidizes only those speakers who do not engage in abortion-related speech.[11] The

[2] A. EINSTEIN, IDEAS AND OPINIONS 13 (1954).

[3] Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning, 53 Fed. Reg. 2922–46 (1988) (codified at 42 C.F.R. §§ 59.1–.215 (1988)).

[4] Congress added Title X to the Public Health Service Act in 1970. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (1982)).

[5] Family Planning Services and Population Research Act of 1970 § 1008, 42 U.S.C. § 300a-6 (1982).

[6] ___ U.S. ___, 109 S. Ct. 3040 (1989).

[7] *See, e.g.*, Johnson, Webster vs. Reproductive Health Services, 262 J. A.M.A. 1522 (1989); Allen & Pearse, *The Implications of Webster for Practicing Physicians*, 262 J. A.M.A. 1510 (1989); *The Future of Abortion*, NEWSWEEK, July 17, 1989, at 14; *Abortion and the Churches*, NEWSWEEK, July 24, 1989, at 45; N.Y. Times, Oct. 23, 1989, at A16, col. 1.

[8] *See* PUBLIC HEALTH SERVICE OF HHS, PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES, 1981, at 12–13 [hereinafter PUBLIC HEALTH SERVICE GUIDELINES].

[9] *See A New Majority Ticks Off the Reagan Agenda*, NEWSWEEK, July 17, 1989, at 26.

[10] *See* N.Y. Times, Oct. 23, 1989, at A18, col. 1.

[11] *See* 42 C.F.R. § 59.8(a)(1) (1989) (clinics may not provide "counseling concerning the use of abortion as a method of family planning"); *infra* Part I(C).

Regulations thus achieve a pro-life moral impact in two important respects. First, the government enhances the speaking ability of those individuals and organizations that do not offer abortion as an alternative solution to unwanted pregnancies. Second, the government's affirmative dissociation from abortion rights ("pro-choice") advocates removes any federal imprimatur that might otherwise exist via continued funding.[12]

The propriety and legitimacy of such public moral statements constitute the subject matter of this Note.[13] The Note addresses the ramifications and legitimacy of government participation in the marketplace of ideas.[14] The Title X family planning subsidies serve as a model for this Note's examination of the competing individualist and communitarian themes, captured above in the contrasting visions of James and Einstein, that constitute the core of government speech issues.

These themes are a microcosm of the tension inevitable when any aggregation of individuals combines for purposes of common governance. The difficulties in determining where to draw the line between the individual's need for freedom of thought,

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[12] *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (announcing a right, grounded in the first amendment, to refrain from speaking).

[13] Commentary on the role of government speech in society is sparse. Some of the more important works, not all of which are confined to public subsidies, include: 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 696–728 (1970); J. TUSSMAN, GOVERNMENT AND THE MIND (1977); M. YUDOF, WHEN GOVERNMENT SPEAKS (1983); Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974); Karst, *Public Enterprise and the Public Forum, A Comment on* Southeastern Promotions Ltd. v. Conrad, 37 OHIO ST. L.J. 247 (1976); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530 (1966) [hereinafter Van Alstyne, *Comments and Footnotes*]; Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539 (1978); Comment, *Why the Government Is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988) [hereinafter Comment, *Counseling and Referral*]; Comment, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988) [hereinafter Comment, *Chastity Act*]; Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978); Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights*, 41 STAN. L. REV. 401 (1989) [hereinafter Note, *Gag Rule*].

[14] Hence this Note does not address the due process rights accorded women by Roe v. Wade, 410 U.S. 113 (1973). Instead, it deals with the limitations courts place on public subsidies as a means of preventing governmental domination of debate. Political limitations of government speech by subsidy are discussed *infra* Parts III(B)(3) and III(C). Part II addresses doctrines which touch upon the underlying governmental speech subsidies. However, this Note does not address the tangential issues of speech rights of government employees, *see, e.g.*, Connick v. Myers, 461 U.S. 138 (1983), or the availability of defamation or privacy actions against public officials, *see, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Doe v. McMillan, 412 U.S. 306 (1973).

choice, and movement and the community's need to inculcate its populace with certain baseline standards of morality seem intractable. Given their explicit prominence in public speech subsidies, libertarian and communitarian themes provide the mode of discourse through which commentators analyze the government's role in public debate.

Part I describes in greater detail the nature of the problem of government speech, the consequent need for a principled judicial approach, and the scope of Title X and the Regulations.[15] Part II introduces the various doctrines, generally related to the first amendment, through which courts grapple with the problem of governmental inculcation of values in the populace. The primary doctrinal manifestations of the problem are the unconstitutional conditions doctrine in public speech subsidies,[16] the public fora doctrine,[17] the government's potential first amendment right to free expression,[18] the public's right to receive information,[19] and the first amendment as promoting competition by non-government speech.[20]

The courts' use of these various traditional doctrinal tools often obfuscates the communitarian and individualist values at stake. Part III urges consideration of speech-by-subsidy cases in the context of three general principles that can be gleaned from the case law as underlying motivations of tribunals. These three tenets are that elected officials should not perpetuate themselves or their party through the spending of public monies[21] ("entrenchment principle"), that government should not so dominate the marketplace of ideas that little room is left for other viewpoints[22] ("drown-out principle"), and that government should respect the integrity of the individual and his or her capacity to make rational decisions[23] ("individual integrity principle"). Applying these principles to the abortion counseling funding context, this Note concludes that the Title X Regulations are not only a legitimate exercise of state power but also

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[15] *See infra* Part I(B)–(C).
[16] *See infra* Part II(A).
[17] *See infra* Part II(B).
[18] *See infra* Part II(C).
[19] *See infra* Part II(D).
[20] *See infra* Part II(E).
[21] *See infra* Part III(A).
[22] *See infra* Part III(B).
[23] *See infra* Part III(C).

a desirable example of public leadership in a debate that will be vigorously contested regardless of government participation.

I. Background

A. *Government Speech by Subsidy*

Government speech by subsidy is hardly an exceptional tool for policy implementation. In recent years, the government has prohibited the use of Medicaid funds for abortion,[24] required family planning organizations receiving federal aid to report to parents of minor women that the latter have requested contraceptive assistance,[25] and mandated that hospitals conform to a federally imposed code for preservation of the lives of defective newborn infants.[26] However, the communicative power of the federal purse is by no means limited to the parturition context. Important governmental statements have been made, for example, by denying federal education assistance to those who fail to register for the draft[27] and by conditioning federal highway assistance to states upon raising the legal drinking age to twenty-one.[28] Arguably, a message of federal impartiality could even be gleaned from Congress's proscription against editorializing by non-commercial educational broadcasting stations receiving federal funds.[29] On a broader plane, the government passively subsidizes private speakers by opening public parks, streets, and in some circumstances, buildings. Also deserving mention is the

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[24] Joint Resolution of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926, H.J. Res. 440 (the "Hyde Amendment"). *See* Harris v. McRae, 448 U.S. 297 (upholding the statute against a due process challenge).

[25] 48 Fed. Reg. 3600, 3614 (1983). *See* Planned Parenthood Fed'n v. Heckler 712 F.2d 650 (D.C. Cir. 1983) (invalidating regulations on statutory grounds); New York v. Schweiker, 557 F. Supp. 354 (S.D.N.Y. 1983).

[26] 45 C.F.R. § 84.55 (1985). *See* Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) (invalidating regulations on statutory grounds).

[27] 50 U.S.C. app. § 462(f) (1982). *See* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984) (upholding the condition).

[28] 23 U.S.C. § 158 (Supp. V 1987). *See* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding the minimum drinking age condition over federalism and twenty-first amendment challenges).

[29] Public Broadcasting Act of 1967, Pub. L. No. 90-129, § 201(8), 81 Stat. 365, 368 (codified as amended at 47 U.S.C. § 399 (1989)). *See* FCC v. League of Women Voters, 468 U.S. 364 (1984) (statute held unconstitutional as an impermissible content regulation).

federal subsidy of broadcasters by not charging fees for licenses, which would sell at substantial market prices.[30]

Despite Justice Stevens's admonition that "[o]rgans of official propaganda are antithetical to this nation's heritage,"[31] government speech by subsidies is pervasive in our society, and the vast majority of such subsidies have been unobjectional to the courts. Given the growth of "governmental largesse"[32] over the last few decades, the question is no longer whether the government has any role in the inculcation of values. Instead, it is a matter of how much governmental influence in individual choice is desirable.[33] While traditional time, place, and manner restrictions limit government's ability to discriminate in public fora among speakers by viewpoint,[34] government can engage in similar discrimination through more active forms of subsidization. At the heart of the issue of government speech by subsidy is the tension between fostering an efficient government able to implement needed policies and respecting the freedom of choice otherwise inhering in individuals and groups within the larger society.

B. *The Nature of the Problem and the Need for a Principled Approach to Government Subsidies of Speech*

The influence of government on the minds of the populace has grown enormously throughout this century. This phenomenon is to a large extent the product of the dramatic increase in

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[30] In 1978, for example, television stations sold for an average of $5,680,807, while the average radio outlet sold for $565,797. *See* Shiffrin, *supra* note 13, at 624 n.279.

[31] *League of Women Voters*, 468 U.S. at 416 (dissenting opinion).

[32] Professor Reich popularized this term in his landmark article *The New Property*, 73 YALE L.J. 733 (1964), and employed it to encompass government jobs, contracts, facilities, and transfer payments.

[33] It is absurd, then, in the modern contexts to adopt the position that government speech, irrespective of its advantages, is an illegitimate enterprise in a liberal democratic state. To do so would strip government of a primary means of protecting and enhancing democratic values; . . . of improving its leadership capacity; of enforcing its public policies and in the end, of securing its ability to survive.

J. TUSSMAN, *supra* note 13, at 115.

[34] *See* Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

federal spending during the past five decades.[35] During the Reagan years alone, expenditures in constant dollars rose twenty-six percent.[36] The expenditure of funds and the consequent exertion of influence encompass not only public programs but also actions in conjunction with private groups. For example, a significant number of the twenty-five major campaigns undertaken by the Advertising Council have been developed in cooperation with the federal government and funded by both public and private sources.[37] While once one could reasonably argue that if a citizen did not favor the conditions placed on a public subsidy, he should simply go about his business and dismiss the prospects of receiving that grant,[38] that answer has become increasingly unsatisfactory in light of the growing dependency of public and private recipients of federal money.[39]

Despite the potential presence of government as a looming "Big Brother," the capacity of individuals to resist inculcation should not be underestimated. Though the vulnerability of individuals varies with the context (for example, school children,

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[35] *See* BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1990, Table 24 at 10-45 (1989). Federal expenditures at 10-year intervals have been as follows:

Fiscal Year	Amount (to nearest billion of dollars)
1930	3
1940	9
1950	43
1960	92
1970	196
1980	590
1990	1,152 (est.)

[36] *Id.* at 2-1, Table 19 at 10-40.

[37] In 1972–73, there were eight such programs: Forest Fire Prevention (Office of Education); Rehabilitation of Handicapped People (Department of Health, Education, and Welfare (HEW)); Drug Abuse Information (HEW and Defense Department); Productivity (National Commission on Production); ACTION (volunteer service programs); U.S. Savings Bonds (Treasury Department); Minority Business Enterprise (Commerce Department); and Food, Nutrition, and Health (Agriculture Department and HEW). Often the individual programs are handled by advertising agencies with commercial accounts in the same field. The Food, Nutrition, and Health Campaign was managed by the same agency that handles campaigns for General Foods. Citing the worker productivity program as an example, critics contend that such cooperative efforts between government and the Advertising Council are heavily biased toward business interests. *See* M. YUDOF, *supra* note 13, at 58–59.

[38] *Cf.* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947) (subsidy denied to a state for failing to abide by federal order); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923) (involved conditional grants to state program but was decided on jurisdictional grounds).

[39] For reference to the intrusions of federal subsidy conditions in the educational world alone, see Bok, *The Federal Government and the University*, 58 PUB. INTEREST 80, 89 (Winter 1980).

because of their age and the compulsive nature of school attendance, are less able than adults to resist inculcation), an assumption implicit in our society is that people are generally rational and are not easily molded by bold-faced propaganda. Many commentators have questioned whether any empirical basis exists for the proposition that government speech distorts the free marketplace of ideas.[40] In addition, not only must federal speakers compete with both state and private speakers, but within the federal government the executive and legislative branches often clash with each other.[41] From this vantage point, there seems little possibility of government domination of the marketplace of ideas.

The government's participation in public service advertising is a case in point. Notwithstanding the extensive campaigns undertaken in conjunction with the Advertising Council,[42] there are doubts as to the effectiveness of this source of indirect federal speech. Today's Watergate-wise public is notoriously skeptical of what its government says.[43] In any event, many of the values espoused in these advertising campaigns, such as preventing forest fires,[44] would be generally accepted regardless of federal influence.

The debate concerning the force of discriminating public subsidies of speech and their effect on the American psyche is mirrored in the Title X context. One school of thought focuses on the impact that the Regulations will have on the young, uneducated, and indigent. This population is the most dependent on federally funded clinics. Given the paucity of health care services for the poor and for adolescents in general[45] and the need for prompt decisions regarding abortion,[46] pro-choice partisans fear that the unilateral approach of the Regulations will

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[40] *See, e.g.*, Comment, *Counseling and Referral, supra* note 13, at 1908; Carter, *Technology, Democracy, and the Manipulation of Consent* (Book Review), 93 YALE L.J. 581, 584 n.14 (1984); Schauer, *Is Government Speech a Problem?* (Book Review), 35 STAN. L. REV. 373, 379–83 (1983).

[41] *See* Comment, *Counseling and Referral, supra* note 13, at 1908.

[42] *See supra* note 37 and accompanying text.

[43] *See* M. YUDOF, *supra* note 13, at 61–62.

[44] *See supra* note 37.

[45] *See* Lincoln, Döring-Bradley, Lindheim & Cotterill, *The Courts, the Congress and the President: Turning Back the Clock on the Pregnant Poor*, 9 FAM. PLAN. PERSP. 207, 212–13 (1977).

[46] *See* Lebolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. A.M.A. 188, 191 (1982) (discussing study of relative mortality rates for women indicating that risk of death from abortion is 20 times lower than that from chidbirth).

have a tremendous effect on the number of unwanted pregnancies. Indeed, one such commentator concludes that there is little difference between subsidizing only non-abortion related speech in family planning clinics and proscribing abortion altogether.[47]

Conversely, the notion that women would be coerced by counseling that did not offer abortion as an alternative has been criticized.[48] Those who seek advice or action on abortion are hardly the captive audience that school children constitute. Fears that an actively pro-life administration will reduce public acceptance of abortion seem without merit in light of the thriving pro-choice movement.[49]

Obviously, there is a wide range of disagreement over the proper role of government in the abortion debate specifically and in the marketplace of ideas generally. At one extreme is the view calling for ultimate respect for individual choice over communitarian values. At the other lies the concept of government playing a supreme role in moral decisions. Neither pole is satisfactory. The difficulty lies in finding tenable niches in the large expanse of middle ground. Current legal doctrine is woefully inadequate not only in drawing workable compromises in the individualist-communitarian tension, but also in identifying the basic issues at stake.

Three general concerns seem to motivate most judicial decisions respecting government subsidies of speech: a respect for the capacity of individual choice, a desire to prevent government domination of the world of ideas, and an aversion to subsidies that unduly perpetuate the entrenched party. These concerns are encapsulated in the three principles introduced at the beginning of this Note.[50] They should be addressed explicitly in government subsidy adjudication rather than swept under the carpet of various first amendment doctrinal formulations.

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[47] *See* Note, *Gag Rule*, *supra* note 13, at 403–04 (While a clinic may be free to accept or reject government funding, "women clients are given no such choice when they unsuspectingly walk into the only clinic they can afford and receive slanted information that is government funded. From their perspective, it is irrelevant whether the cause of misinformation is conditional funding or direct censorship."); *cf.* Remarks in a panel discussion at Harvard Law School by Susan Newson, Planned Parenthood League of Massachusetts (Oct. 12, 1989) (counseling is one of the most important aspects of the abortion right).

[48] *See* Comment, *Counseling and Referral*, *supra* note 13, at 1914 ("Insofar as the government does not compel attendance in its health programs, its advocacy is directed at an audience entirely free to disregard or reject its views.").

[49] *See The New Political Rules*, NEWSWEEK, July 17, 1989, at 21 (most polls find that a majority of Americans oppose an outright ban on abortion).

[50] *See supra* notes 21–23 and accompanying text.

C. *The Scope of Title X and the Regulations*

In 1970, Congress added Title X[51] to the Public Health Service Act, which had previously established federal funding for public and non-profit private family planning projects.[52] The Title specifically prohibits funding programs "where abortion is a method of family planning."[53] In an apparent contradiction to the wording of Title X, the Carter administration issued HHS guidelines in 1980 mandating that participating clinics provide counseling on *all* pre-natal options, including abortion.[54] On September 1, 1987, HHS, under a directive from President Reagan, proposed new regulations more compatible with Title X's language.[55] HHS published the Regulations in final form on February 2, 1988, with only minor changes to what had been set out in the earlier notice of proposed rulemaking.[56]

Section 59.8(a)(1) of the Regulations flatly precludes funding for counseling "concerning the use of abortion as a method of family planning." Importantly, the regulatory proscriptions are limited only to *projects* which are direct recipients of Title X funding. Organizations may still perform or counsel abortion so long as the Title X project is sufficiently segregated from such other elements of the family planning entity.[57] Title X projects are only to refer women to social services that "promote the welfare of mother *and unborn child*."[58] Women may not be referred to any clinic whose principal business constitutes su-

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[51] *See supra* note 4.

[52] Title X should not be confused with a related portion of the Public Health Service Act proscribing the direct or indirect use of federal funds for abortion counseling to pregnant adolescents. Adolescent Family Life Planning Act of 1981, 42 U.S.C. §§ 300 to 300z-10 (1982) (Title XX) (AFLA). AFLA limits Title XX grants to programs or projects that do not offer abortion counseling or referral to adolescents unless the parents or guardians of the adolescents request such referral or counseling. Title XX grants may not go to projects or programs which advocate, promote, or encourage abortion. *Id.* § 300z-10. AFLA affirmatively encourages adoption, through selective subsidy, as an alternative to abortion. *See* S. REP. No. 161, 97th Cong., 1st Sess. 9 (1981).

[53] 42 U.S.C. § 300a-6 (1982).

[54] PUBLIC HEALTH SERVICE GUIDELINES, *supra* note 8, at 12–13.

[55] 52 Fed. Reg. 33,210–15 (1987).

[56] 53 Fed. Reg. 2922–33 (1988) (codified at 42 C.F.R. § 59 (1989)).

[57] *See* 42 C.F.R. § 59.9 (1989). The Secretary is charged with the duty of determining whether Title X projects are sufficiently separated from those programs associated with abortion. Relevant factors in this determination include: the existence of separate accounting records; the degree of separation from facilities (such as treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of these activities; the existence of separate personnel; and the extent to which signs and other forms of identification of Title X programs are in proximity to material promoting abortion. *Id.*

[58] *Id.* § 59.8(a)(2) (emphasis added).

pervision of abortion. Nor may Title X projects refer patients to a list of health care providers that is weighted with abortion clinics: if non-abortion family planning services exist in the community, a representative portion of such clinics must be included in any referral list.[59]

The Regulations place no restrictions on the amount of lobbying for or advocacy of abortion on the part of Title X recipients as long as federal financing is not used for such purposes.[60] Similarly, Title X recipients may pay dues or otherwise subsidize advocacy of or lobbying for abortion rights.[61] Employees of Title X projects may participate in pro-choice activities as long as they do not use Title X funds.[62] Thus, limitations on speech apply only within the narrow context of counseling pregnant women in a program that has decided to accept Title X grants.

The implications of the speech regulation, however, may be broader than the previous paragraph might suggest. Title X is the single largest public family planning program in the United States. It provides one third of all public funds assisting family planning clinics.[63] Such clinics received a total of $142,500,000 for fiscal year 1988. This sum was distributed to approximately 4000 clinics which served 4,300,000 people.[64] It may not be realistic to condition subsidies on the forbearance of abortion counseling and maintain that women still have the freedom of choice effectively to enjoy their substantive due process right to an abortion.

Thus, it is not surprising that the Regulations have been challenged in court. Federal lawsuits contesting the constitutionality of sections 59.8–.10 have been brought by Planned Parenthood in Denver, the American Civil Liberties Union in New York, and the National Family Planning and Reproductive Health Association in Boston. The Second Circuit recently upheld the

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[59] *Id.* §§ 59.8(a)(3), (b)(4).

[60] *Id.* § 59.10(b)(5).

[61] *See id.* § 50.10(b)(4).

[62] *See id.* § 59.10(b)(6)–.10(b)(7).

[63] At oral argument in the recent en banc decision of the First Circuit enjoining application of the Regulations, the government stated that Title X subsidies account for about 50% of the money supporting Title X programs. Massachusetts v. Secretary of Health and Human Serv., No. 88-1279, slip op. at 53 n.11 (Mar. 19, 1990) (en banc) (1990 WL 28033).

[64] N.Y. Times, July 31, 1987, at A1, col. 1 (cited in Note, *Gag Rule*, *supra* note 13, at 408).

Regulations in a two-to-one decision,[65] while a district court in the Tenth Circuit has invalidated them.[66] The First Circuit, in a recent en banc decision, has enjoined application of the Regulations on due process and free speech grounds.[67]

II. Government Subsidy of Speech and the First Amendment

Problems associated with government speech arise in a vast array of contexts. Not infrequently, these problems find their way into courts of law. However, there is no unified body of government speech doctrine through which judges can develop a coherent theory balancing individualist and communitarian concerns. Confronting government speech litigants is a host of doctrinal tools, none of which entirely captures the interests in need of redress. Generally, these tools are drafted from first amendment problems that are distant cousins of government speech. Part II of this Note demonstrates the inadequacies of current treatment of government speech by subsidy.

A. *The Doctrine of Unconstitutional Conditions in Public Subsidy of Speech*

One of the most common doctrinal tools used by courts to criticize government speech by subsidy is unconstitutional conditions doctrine. Justice Stewart explicated this standard in *Perry v. Sindermann*:[68]

> Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for a number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech.[69]

[65] New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989).

[66] Planned Parenthood Fed'n v. Bowen, 687 F. Supp. 1465 (D. Colo. 1988).

[67] Massachusetts v. Secretary of Health and Human Serv., No. 88-1279 (1st Cir. Mar. 19, 1989) (en banc).

[68] 408 U.S. 593 (1972). *See also* FCC v. League of Women Voters, 468 U.S. 364, 400 (1984); Regan v. Taxpayers With Representation, 461 U.S. 540, 544 (1983) (Blackmun, J., concurring); Harris v. McRae, 448 U.S. 297, 317 n.19 (1980); Maher v. Roe, 432 U.S. 464, 474 n.8 (1977); Speiser v. Randall, 357 U.S. 513, 518–19 (1958).

[69] 408 U.S. at 597.

Asserting this doctrine, one might argue that it is unconstitutional for the government to condition its grants upon the abortion clinics' giving up their right to free speech or upon their clients' giving up their right to receive certain information. In response to these arguments, Congress, the Executive Branch, and the administrative agencies typically justify their conditional grants by making a right-privilege distinction. Since, by definition, there is no constitutional right to a government grant of a privilege, conditioning that privilege upon delineated behavior by the recipient is not problematic even if the government could not have regulated that behavior directly.[70] The right-privilege distinction is designed to assure that individual actors are not deprived, through conditional grants, of that to which they are otherwise independently entitled.[71] The government has argued, and at least one judge, Judge Cudahy, has agreed, that governmentally provided abortion information is not a right, but a privilege. Judge Cudahy has written:

> Since a woman's freedom of choice, does not carry with it a constitutional entitlement to the "financial resources" to have an abortion, it seems equally clear to me that there is no entitlement to funds for pregnancy counseling which includes the abortion option . . . . [T]o fashion a constitutional right to governmentally provided abortion information standing apart from the right to the abortion itself, is ingenious but cannot withstand rigorous analysis.[72]

Because there is no right to this information, the government asserts, it may be regulated constitutionally through conditional grants. Whether or not one agrees with the government's assertion, it is clear that not all indirect regulation of constitutionally

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[70] *See* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). In the abortion counseling funding strictures, both Congress and HHS have acted to prohibit funding of family planning programs that offer abortion as an alternative to an unwanted pregnancy. 42 U.S.C. § 300a-6 (1982); 42 C.F.R. § 59 (1989). Particularly in its role as a private economic actor, government often indirectly regulates the speech of those with whom it transacts. *See, e.g.*, Connick v. Meyers, 461 U.S. 138 (1983) (government as employer); Greer v. Spock, 424 U.S. 828 (1976) (government as property owner).

[71] *See* L. TRIBE, CONSTITUTIONAL CHOICES 204 (1985).

[72] Planned Parenthood Ass'n v. Kempiners, 700 F.2d 1115, 1126 (7th Cir. 1983) (separate opinion addressing a similar state rule limiting abortion counseling). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-5, at 782 (2d ed. 1988) ("Thus, although . . . those who . . . counsel abortion may not be required to cease [that activity] as a condition of receiving public funding for their other activities, it certainly does not follow that government must pay for abortions or abortion counseling.").

protected activity is invalid.[73] Thus, the real issue is determining which conditions impermissibly interfere with individual rights. The right-privilege distinction restates the problem, but does little to resolve it.

Unconstitutional conditions doctrine has been employed to criticize the Title X subsidies.[74] In attempting to employ the doctrine to trigger judicial scrutiny of the Title X regulations, pro-choice advocates face several precedential hurdles. First, the courts traditionally defer when the government conditions certain jobs on an employee's abstention from constitutionally protected political activity.[75] In the same vein, the Supreme Court in *Cole v. Richardson*[76] upheld a loyalty oath as a condition of government employment. If the government may broadly curtail the constitutionally protected activities of its employees, it may arguably regulate indirectly and specifically such activities of those who receive government grants.

Pro-choice litigants must also address the Regulations' programmatic limitation. Clinics that accept Title X money may counsel and even perform abortions outside of the funded program.[77] Such an administrative scheme is much less intrusive than one that would prohibit the clinic itself from engaging in any abortion related activity.[78] As in *Regan v. Taxpayers With*

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[73] *See, e.g.*, Grove City College v. Bell, 465 U.S. 555, 575 (1984) ("[T]he Department may properly condition . . . assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with . . . the applicable regulations."); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947) (political activities of state employees may be restricted by the federal government where employees are paid in part with federal grants). *See also* DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 287–91 (D.C. Cir. 1989) (upholding the government's right to deny financial aid to private groups supporting abortions in foreign countries).

[74] *See* Note, *Gag Rule*, *supra* note 13, at 402 (analyzing the Title X regulations in terms of unconstitutional conditions doctrine).

[75] *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding federal statutory provision prohibiting executive branch employees from taking an active role in political campaigns); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (same).

[76] 405 U.S. 676 (1972).

[77] *See* 42 C.F.R. § 59.7 (1989).

[78] *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 400 (1984) (striking down an FCC ban on editorializing by non-commercial radio stations which received public funds because the ban prevented the stations "from using even wholly private funds to finance its editorial activity"); Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) (noting in dicta that denying all welfare benefits, as opposed to refusing to fund abortions, based on a woman's abortion decision would raise serious constitutional problems). *Accord* Planned Parenthood v. Arizona, 789 F.2d 1348, 1351 (9th Cir. 1986) (invalidating statutory prohibition on grants of state funds to organizations that offer abortion-related services, even if those organizations did not use state funds for those services). *But see* Massachusetts v. Secretary of Health and Human Serv., No. 88-1279, slip. op. at 56–58 (1st Cir. Mar. 19, 1990) (en banc) (holding that the segregation

Representation,[79] the regulated speakers are allowed to carry on their constitutionally protected activity upon compliance with the relatively minor burdens of segregating the publicly funded activities from those Congress seeks to avoid subsidizing.[80] In any event, separating funded programs from the remainder of the entity is certainly less of a burden than direct government intervention in the flow of abortion related information, such as banning advertisements for abortions.[81]

Despite these obstacles to applying the doctrine of unconstitutional conditions, pro-choice attorneys have persuaded some courts to invalidate the Regulations.[82] These courts object to the Regulations despite their programmatic limitations. In other words, these decisions maintain that HHS has no business attempting to influence any privately funded speech, whether that speech is funneled inside or outside of federally funded programs.

As captured in the dialogue between the district court and Judge Cudahy[83] in *Planned Parenthood Association v. Kempiners*,[84] deciding exactly what makes a condition to receipt of government largesse unconstitutional seems largely to be an arbitrary exercise. *Kempiners* dealt with an Illinois statute proscribing state family planning grants to organizations engaged in abortion counseling. The district court held that while the conditional grants enhanced the speaking ability of those who refrained from abortion counseling, they did not infringe free speech rights. Conversely, Judge Cudahy chastised the lower court for failing to see the statute as an unconstitutional pen-

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mandated by the Regulations is unconstitutional as too great a burden on clinics' free speech rights).

[79] 461 U.S. 540 (1983) (public interest organizations may still receive tax deductible contributions if they segregate their affiliated lobbying divisions which were not entitled to such contributions).

[80] *But see* Massachusetts v. Secretary of Health and Human Serv., No. 88-1279, slip op. at 56-58 (1st Cir. Mar. 19, 1990) (en banc) (distinguishing *Regan* on its facts and holding that the Regulations "fall squarely on the unconstitutional side of the line drawn in *Regan*").

[81] *See* Bigelow v. Virginia, 421 U.S. 809 (1975); Comment, *Counseling and Referral*, *supra* note 13, at 1913.

[82] *See* Massachussets v. Secretary of Health and Human Serv., No. 88-1279 (1st Cir. Mar. 19, 1990) (en banc); Planned Parenthood Fed'n v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988).

[83] *See Kempiners*, 700 F.2d at 1126–27 (separate opinion of Cudahy, J.).

[84] 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded*, 700 F.2d 1115 (7th Cir. 1983) (per curiam), *on remand*, 568 F. Supp. 1490 (N.D. Ill. 1983).

alty.[85] Neither court gave much in the way of analysis or reasoning. Both seemed satisfied with conclusory penalty-privilege discourse. Not only is the application of the right-privilege distinction typically arbitrary; in addition, the entire body of unconstitutional conditions doctrine itself is riven by inconsistencies.[86] Attempts to identify one or two dispositive factors in any one case are rebutted by other cases containing the same factors but lacking dispositive effect.

Beyond the conclusory nature and internal inconsistencies inherent in unconstitutional conditions doctrine, the doctrine is not a useful tool because its inquiry is misdirected. Ephemeral discussions of whether a government regulation affects a right or only a vulnerable privilege[87] do not advance the analysis of whether the speech subsidies are objectionable. Argument over the "nature" of a government grant, then, yields little in the way of resolving the crucial inquiry.[88] What is important in scrutinizing government speech by subsidy is not whether a right or privilege is being taken away, but the extent to which the three essential principles underlying objections to government speech are implicated. Often what is most problematic about speech subsidies is that given the government's size and its monolithic, and in some areas monopolistic, communication networks, the state has the power to dominate the world of ideas not only by regulating private speech, but also by drowning out that speech. Addressing the three principles would not, of course, eliminate the tremendous amount of judicial discretion in these cases, but it would guide courts in making the proper inquiries. At least in the government speech subsidy context, unconstitutional conditions doctrine leaves the judiciary ill-equipped to address the problems underlying issues of policy implementation by subsidy of private speakers.

B. *Public Fora and Government Subsidies*

In addition to the right-privilege distinction, litigants challenging public speech subsidies often take recourse in public

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[85] The Illinois statute did not have the programmatic limitations contained in the Regulations. Judge Cudahy indicated that a statute with such limitations may well survive unconstitutional conditions scrutiny. *See* 700 F.2d at 1124–25.

[86] *See* Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989).

[87] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

[88] *See* Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) (decrying the use of formalism in doctrinal analysis as distorting reality).

forum doctrine. This doctrine makes a distinction between public and non-public fora. In public fora, speech is entitled to the most protection, and the government may regulate only subject to certain restrictions. The crucial inquiry under this doctrine, then, is whether a forum is public or non-public. Once the nature of the forum is determined, however, the extent to which government may subsidize speech within that forum is still not clear.

Government indirectly subsidizes private speech in many contexts which could be considered "public" fora. At the most basic level, because the taxpayer bears the security and cleaning expenses of public demonstrations, the government indirectly subsidizes such demonstrations simply by opening up public streets, sidewalks, and parks to speakers subject to content neutral time, place, and manner regulations.[89] More direct forms of government subsidy of private speech are evident in its regulation of the broadcast industry. In *Red Lion Broadcasting Co. v. FCC*,[90] the Supreme Court upheld the FCC's fairness doctrine, which dictated that licensees allow individuals personally attacked on their radio and television stations equal time for response. Similarly, in *CBS v. FCC*,[91] section 312(a)(7) of the Communications Act of 1934, mandating that FCC licensees make time for political advertisements during periods proximate to elections,[92] survived a first amendment challenge by CBS, which sought to ban all political advertisements.

Opponents of speech subsidies argue that the subsidy itself is a public forum within which the state may not discriminate by viewpoint absent a compelling state interest.[93] Such an argument was pressed upon the Supreme Court in *Cornelius v. NAACP Legal Defense & Educational Fund*,[94] although the majority determined that the collective charity drive at issue was a non-public forum. In the Title X context, pro-choice lawyers insist that the Family Planning Services and Population Research Act subsidy scheme creates a public forum that must be open to

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[89] *Cf.* Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a reasonable user's fee for the public expense involved in policing a parade after the state supreme court had narrowed the construction of the fee requirement to necessitate non-discriminatory application).

[90] 395 U.S. 367 (1969).

[91] 453 U.S. 367 (1981).

[92] This provision was added by the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103, 86 Stat. 3, 4 (1972) (codified at 47 U.S.C. § 312(a)(7) (1989)).

[93] *See* Comment, *Chastity Act*, *supra* note 13, at 1932.

[94] The plaintiffs argued that the federal charity drive was a limited public forum. 473 U.S. 788, 796 (1985).

both pro-choice as well as pro-life speech. This argument was advanced by Planned Parenthood in *Kempiners*, but was rejected in a separate opinion (the majority did not reach the issue).[95]

To follow the public forum-speech subsidy argument to its logical end would emasculate a major form of public policy implementation. Government must take a leading role in at least some public issues, and it may not always be able to communicate its goals directly or efficiently. To treat a grant as itself a public forum would require the government to fund causes with which it does not agree, thus effectively nullifying government's ability to implement public policy through speech. No court has yet declared an "equal access" right for all viewpoints when government strikes a stance in public debate.[96]

The public forum doctrine, resilient as it may be, simply cannot satisfactorily stretch to cover government speech concerns.[97] As evidenced in *United States Postal Service v. Council of Greenburgh Civic Associations*[98] and *Perry Education Association v. Perry Local Educators' Association*,[99] courts engage in a metaphysical inquiry as to whether a contested form of communication takes place in a traditional public forum, a public forum by designation, or a non-public forum in a conclusory effort to determine the level of scrutiny with which they will review speech regulation.[100] Though the doctrine may serve individual liberties well in the "government as regulator" setting, it is of little utility in policing the government as a speaker or subsidizer of speech.[101] The motivations underlying the pro-

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[95] 700 F.2d at 1129.

[96] *See* Block v. Meese, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (noting that the first amendment does not prescribe government ideological neutrality) (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986); *cf.* Lathrop v. Donohue, 367 U.S. 820, 852–53 (1961) (Harlan, J., concurring) (noting that the question of whether government may establish political views has not been resolved).

[97] *See* Student Government Ass'n v. Board of Trustees, 868 F.2d 473 (1st Cir. 1989); Comment, *Chastity Act*, *supra* note 13, at 1932 (acknowledging that government conditional grant programs do not readily fit into public fora analysis).

[98] 453 U.S. 114 (1981); *see id.* at 140 (Brennan, J., dissenting) ("Having determined that a letterbox is not a public forum, the Court inexplicably terminates its analysis.").

[99] 460 U.S. 37 (1983); *see id.* at 57 (Brennan, J., dissenting) ("In focusing on the public forum issue, the Court disregards the first amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.").

[100] *See* L. TRIBE, *supra* note 71, at 209.

[101] *See* Tribe, *Toward a Metatheory of the First Amendment*, 10 SW. U.L. REV. 237, 244 (1978) (first amendment doctrine should distinguish between government as a censor and as a speaker).

posed trichotomy—fears of government domination of public debate, of government manipulation of freedom of choice on an individual basis, and of public expenditures perpetuating entrenched parties—receive little attention in public fora doctrinal formulations.

C. *Government's First Amendment Rights*

As noted above, three principles—the entrenchment principle, the drown-out principle, and the individual integrity principle—act as checks on the power of government. None of the three appears to take into account the public interest in effective administration of the laws. Indeed, the first amendment was written as a check upon the government to preserve individual liberty "as an end";[102] fear of government prompted the inclusion of a freedom of expression in the Bill of Rights.[103] The first amendment, then, is not a source of government power.[104] Nothing, however, prevents courts from weighing the communitarian interests furthered by allowing increased speech by government while considering the three principles. Indeed, communitarian concerns would surface most often in judicial consideration of the drown-out and individual integrity principles. There is thus no need for the government, when it finds itself in court over a public speech issue, to assert a right to speak.

Nonetheless, attorneys for the government often assert just such a first amendment speech right.[105] Professor Tribe, for example, did so on behalf of the City of Boston before the Supreme Court.[106] In *City of Boston v. Anderson*, the Massachusetts Supreme Judicial Court enjoined the city, its mayor, and several other elected officials from expending municipal funds in support of a particular viewpoint in a ballot referendum in an upcoming general election. Implying that there was no municipal right to first amendment protection, the Supreme

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[102] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See* T. EMERSON, *supra* note 13, at 6.

[103] *See generally* G. GUNTHER, CONSTITUTIONAL LAW 975 (11th ed. 1985).

[104] *See* J. WHITTON & A. LARSON, PROPAGANDA: TOWARD DISARMAMENT IN THE WAR OF WORDS 233–40, 242 (1964) ("The problem of freedom of speech in the constitutional sense simply does not arise when the government itself is doing the speaking."); Van Alstyne, *Comments and Footnotes*, *supra* note 13, at 531–37.

[105] *See, e.g.*, City of Boston v. Anderson, 439 U.S. 1060 (1979), *dismissing appeal from* 376 Mass. 178, 380 N.E.2d 628 (1978).

[106] *Id.*

Court dismissed the appeal for want of a substantial federal question.[107] Arguably, *Anderson* settles in the negative the question of whether government has a right to free expression. The question of whether such a right exists is not easily resolved, however. In both *Consolidated Edison v. Public Service Commission*[108] and *Central Hudson Gas v. Public Service Commission*,[109] the Supreme Court accorded first amendment rights to public utilities in the face of state regulation. Though utilities are not truly government actors, they share many characteristics with public entities.[110]

Two other cases are illuminating. *Buckley v. Valeo*,[111] which classified financing of political campaigns as protected speech, and *First National Bank v. Belotti*,[112] which held that corporations have free expression rights, both have implications for government speech by subsidy. One commentator has written:

> By suggesting that the first amendment protects political speech from any source, *Belotti*'s reasoning directs courts examining legislative or judicial bans on municipal electoral expenditures to determine initially whether those bans restrict political speech. *Buckley*'s reasoning implies that a city's political speech includes its expenditures to express views on political issues.[113]

Indeed, by giving corporations the right to present views uninhibited by state regulation during referendums, *Belotti* makes the case for counter-speech by local government much stronger.[114] In any event, what are ultimately most relevant are concerns about government domination of the marketplace of ideas and public expenditures that perpetuate an entrenched party. Openly addressing such policy questions, rather than taking the obscurantist approach of *Anderson*, in which the formalistic question of whether government is entitled to first

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[107] *Id.*

[108] 447 U.S. 530 (1980).

[109] 447 U.S. 557 (1980).

[110] This point was raised by then Justice Rehnquist in dissent as weighing against according first amendment rights to Central Hudson Gas. *Id.* at 585–87 (Rehnquist, J., dissenting).

[111] 424 U.S. 1 (1976) (per curiam).

[112] 435 U.S. 765 (1978).

[113] Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 541 (1980) (quoted in M. YUDOF, *supra* note 13, at 43).

[114] *See* City of Boston v. Anderson, 439 U.S. 1389 (Brennan, Circuit Justice 1978) (order granting application for stay of the Massachusetts Supreme Judicial Court); C. LINDBLOM, POLITICS AND MARKETS, chs. 13–14 (1977) (calling for government speech as an alternative to corporate domination of the marketplace of ideas).

amendment protection decided the case, will lead to sounder results.[115]

Professor Yudof, in his important work *When Government Speaks*, details other problems with a governmental right to free expression.[116] Could a member of the House of Representatives assert such a right against the House Committee on Ways and Means when it suppresses a subcommittee report? Could the Secretary of Labor enjoin an executive directive ordering an Occupational Safety and Health Administration study not to be released until further research is conducted? Yudof posits that a stronger case for a governmental first amendment right would be made out if one branch were to suppress the speech of another.[117] Congress, for example, might pass a statute forbidding the Executive from engaging in certain political activities. Alternatively, the federal government by statute or regulation could restrict certain forms of state or local government speech. Such encroachments, however, are probably more amenable to correction through the doctrines of separation of powers and federalism.[118]

Yudof argues that a more compelling case can be made for a free speech right for local governments,[119] as Tribe argued in *Anderson*. This view is in harmony with the principle of preventing government domination of particular realms of ideas, to the extent that localities have less resources to spend on speech subsidies than does the federal government. In addition, municipal and county governments are limited in size. Given modern mobility and electronic receiving devices, the chances that people of any local constituency will not be exposed to outside

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[115] In general, government actors have rarely been accorded constitutional rights. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (state could not raise due process claim against the federal government); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) (privileges and immunities clause does not apply to a municipal corporation); Trenton v. New Jersey, 262 U.S. 182 (1923); New Orleans v. New Orleans Water Works, 142 U.S. 79 (1891) (a city cannot assert a contracts clause action against its creator, the state). It should be noted, however, that municipalities have been allowed to assert equal protection, due process, and privacy rights in some very restricted circumstances, such as when they are acting in a proprietary capacity, *see* Proprietors of Mt. Hope v. City of Boston, 158 Mass. 509, 33 N.E. 695 (1893); Town of Huntington v. New York State Drug Abuse Control Comm'n, 84 Misc. 2d 138, 373 N.Y.S.2d 728 (Sup. Ct. 1975), or when a city is raising a constitutional claim against another state, *see* Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968).

[116] M. YUDOF, *supra* note 13, at 42–50.

[117] *Id.* at 45.

[118] *Id.*

[119] Nevertheless, Yudof concludes that even local governments should not be accorded free speech rights. *Id.* at 42–50.

ideas are extremely low. Indeed, many states allow lobbying activities by local governments because of the financial dependence of the latter on the former.[120] Allowing local governments to try to influence decisions at the state level through subsidy of speech poses few difficulties with the principle that government should not overwhelm public opinion.

Despite the considerations favoring local government speech, it does not follow that such speech should be constitutionally protected. Where states value the participation of localities, there is ample opportunity to pass protective legislation.[121] Were local governments given a constitutional right to speak through subsidy, courts would often be faced with the question of when state government actors were sufficiently like local government to be attributed a similar right. It is worth reiterating that the government interest in a particular speech subsidy surfaces in all three of the principles discussed above. For example, the principle of respect for individual rationality implicitly necessitates an inquiry into the state interests behind speech subsidies that unduly distort freedom of choice. Arguments about the existence of a constitutionally protected speech right for the government detract from the policy concerns associated with public speech subsidies.

D. *The Public's Right to Receive Information*

Instead of premising a governmental right to free speech on affirmative first amendment grounds, one might root such a prerogative in a possible right of the public to receive ideas.[122]

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[120] *See, e.g.*, MASS. GEN. L. ANN. ch. 40, § 5(15) (West 1985); MASS. GEN. L. ANN. ch. 3, § 50 (West 1988); N.Y. MUN. HOME RULE LAW § 40 (McKinney 1969); N.Y. LEGIS. LAW §§ 56, 66-b(7) (McKinney Supp. 1989). Although *Anderson* does not give local governments a constitutional right to speech during referenda, California has provided such a prerogative by statute. CAL. ELEC. CODE §§ 3525–3567, 3578, 3714, 4015, 4015.5, 5012–5016, 5157, 5157.5 (West 1977 & Supp. 1990).

[121] *See supra* note 120 and accompanying text.

[122] *See* Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion) (removal of books from school library violated students' right to receive ideas); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 756–57 (1976) (ban on pharmaceutical advertisement of prescription drugs violated consumers' right to commercial information); Kleindienst v. Mandel, 408 U.S. 753, 762–65 (1972) (right to receive information succumbed to the government's broad power to exclude aliens as the Court upheld a statute making foreign Communists ineligible for visas); Lamont v. Postmaster Gen., 381 U.S. 301, 305, 307 (1965) (statute permitting government to withhold from addressees mail from abroad containing "communist political propaganda" violated recipients' first amendment rights to receive information); Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U.L.Q. 1; Gellhorn, *The Right to Know: First Amendment*

Government, acting as proxy for the public, is often uniquely situated to gather and disseminate certain types of information. For instance, warnings about the health risks of tobacco and alcohol by private actors such as the American Cancer Society and Alcoholics Anonymous would reach a much smaller audience (relative to the tremendous advertising campaigns conducted by tobacco and alcohol companies) without both active and passive federal subsidization of such charitable organizations.[123]

A right to information exercised by the government on behalf of the public is not, however, the *sine qua non* of the advantages of government subsidy of "beneficial" speech. As discussed in the preceding section, first amendment rights check governmental encroachment on individual liberties. They are not an independent source of political power. For example, the Food and Drug Administration (FDA) could conceivably assert a "public right to receive information" claim in federal district court against a congressional oversight committee attempt to condition continued appropriations on the delay or non-disclosure of an FDA study containing information that certain General Foods products contained carcinogenic ingredients. But such a claim is already available directly to the public (rather than through the auspices of the FDA) in the form of conventional political influence doctrine in administrative law.[124] Other inter-branch conflicts might be more amenable to separation of powers law rather than government claims on behalf of the populace's need to know.

Overbreadth?, 1976 WASH. U.L.Q. 25; Comment, *Chastity Act*, *supra* note 13, at 1924; Note, *Gag Rule*, *supra* note 13, at 404. One commentator has suggested that a receipt of information right does not focus on the public's need for information. Rather, the doctrine serves as an "artistic camouflage to protect the interests of the willing speaker." M. YUDOF, *supra* note 13, at 46. Thus, the government could use the receipt of information right to protect speech subsidies much as a direct free speech right, which is discussed *supra* Part II(C).

[123] 26 U.S.C. § 501(c)(3) (Supp. V 1987) exempts charitable organizations such as Alcoholics Anonymous and the American Cancer Society from taxation and allows donors to such entities to deduct their contributions from income. Chief Justice Rehnquist has declared that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions." Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983).

[124] *See* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118 (3d Cir. 1981) (en banc); Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966); United States *ex rel.* Parco v. Morris, 426 F. Supp. 976 (E.D. Pa. 1977).

Allowing government the power to assert the public's "right to know" offers little aid in the abortion counseling funding context. Judicial balancing of state interests against individual liberty values recognizes the government's interest in making abortion-related value judgments and implementing those judgments by allocation of funds.[125] It is unclear how attributing constitutional dignity to such government interests would affect a court's balancing process.

Aside from the government's theoretical use of the public's right to receive ideas, the bulk of the "right to know" doctrine consists of cases where government regulates speech and not of government efforts to promulgate its views directly or by subsidy.[126] In the latter cases, government has had little need to invoke its position as a proxy for the majority to avoid judicial scrutiny of its speech subsidies.[127]

E. *The First Amendment as Promoting Competition by Non-Government Speech*

In contrast to situations where government serves as a regulator of speech, courts have generally been unwilling to use the first amendment directly to restrain government as speech subsidizer.[128] One reason for this reluctance may be that there are alternatives to direct censuring of government speech. For instance, instead of directly limiting a form of government speech in order to prevent its domination of the listening audience, a court could simply give more protection to speech by non-governmental entities and individuals in the hopes that fewer

[125] *See* Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding state's exclusion of funding for medically unnecessary abortions from its Medicaid program).

[126] *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982) (school board's effort to remove "Un-American" books from a school library); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (state proscribed pharmaceutical advertisements of prescription drugs). *See also* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (statutory limitations on personal campaign expenditures and campaign contributions).

[127] This critique of "right to know" doctrine should not be taken to mean that government should take no interest at all in its populace. To the contrary, the government's interest in the welfare of the populace has its place in this Note. The negative checks on government embodied in each proposed principle implicitly demarcate the initial line between legitimate state action and individual rights, a line that necessarily varies with the facts of each case.

[128] *See, e.g.*, Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983); P.A.M. News Corp. v. Butz, 514 F.2d 272 (D.C. Cir. 1975).

restraints on the populace will result in greater competition with government in the marketplace of ideas.

Professor Yudof argues that government would effectively grind to a halt if plaintiffs could force courts to enjoin what plaintiffs consider to be objectionable government speech.[129] The effect on the supposed beneficiaries of the communication, the public, would compound any error in judicial silencing of the government. Such judicial interventionism, Yudof fears, threatens to limit the policy implementation potential of the elected branches.[130]

However, an efficient model of law administration cannot be allowed to run unchecked by individual liberties. By hypothesis, if one public voice dominates debate, democratic pluralistic values are given short shrift. Yudof's remedy for oppressive government speech—increased judicial scrutiny of restrictions on non-governmental speech—is not responsive to these concerns. His approach would not allow public interest groups or similar litigants a cause of action on any given issue to prevent government domination of the marketplace of ideas.

Because Yudof would not allow such litigants into court to submit argument on the matter,[131] courts would somehow have to make their own amorphous attempts at determining the extent to which government dominates debate on a particular issue to check oppressive government speech. Then, those courts would have to respond by stretching the limits of current first amendment doctrine as applied to non-government litigants with free speech claims in order to restore the principle of a free and independent marketplace of ideas. This amounts to a very inexact remedy—one that will vary with each individual court's caseload and available time, and with its own idiosyncratic appraisal of the extent of coercive government speech. The wide range of policy judgments necessary under this approach rings of legislative responsibilities. Courts are much better at determining issues and facts when litigants submit them for argument.[132]

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[129] *See* M. YUDOF, *supra* note 13, at 204–07. Though Yudof acknowledges that the private sector will not always disagree with government, he writes that the structural advantages of pluralism are best achieved by enhancing non-public speech. *Id.* at 202.

[130] *Id.*

[131] Yudof leaves room for enjoining government speech only "in a few outrageous cases." *Id.* at 206.

[132] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). *But see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV.

Applying the Yudof approach to the Title X Regulations would deprive abortion counseling advocates of their most potent first amendment weapon: the argument that the government plays such a large role in pre-natal counseling funding[133] that it violates principles of respect for individual choice and of prevention of governmental domination of the abortion debate to allow government improperly to affect the choice of individual women. To be sure, other first amendment claims, such as limitations on the expression rights of the clinical counselors, would also be available. But the availability of related causes of action should not be mistaken as a rationale for denying the role of the three principles developed in Part III when examining government speech issues. Courts must be willing to act directly against government speech and government speech subsidy to address the values at stake in government speech cases.

III. Government Subsidy of Speech and Democracy

This Part discusses three principles that underlie most cases of government speech by subsidy. This three-principle system assumes that courts have the inclination and doctrinal means to limit governmental speech subsidies that contravene one or more of the principles (regardless of what content any one particular court invests in the principles). Instead of warping current first amendment doctrines to address these concerns, courts should forthrightly use the Constitution to criticize government speech. Utilizing doctrines such as unconstitutional conditions or public forum standards in speech subsidy analysis only obfuscates the concerns of the complainants and of the government. Instead, government speech subsidies should undergo the more meaningful scrutiny of this Note's trichotomy.

The proposed principled approach will not lend great certainty or reduce judicial discretion in this developing area of the law, however. The following analysis does not purport to construct an exhaustive doctrinal structure. This Note's goal is more humble. The principles serve only to identify the major concerns with government speech subsidies in today's world of mass communications. The full development of these three principles

1281, 1297 (1976) (judges in public law litigation settings take on more of a legislative factfinding role than that traditionally ascribed to courts).

[133] *See supra* Part I(B).

will ultimately require the multitude of applications that only the plodding course of case-by-case adjudication can provide. By considering the problems generated by government speech subsidies, however, courts will begin to ask the right questions.

A. *The Problem of Public Speech Subsidies and the Perpetuation of Entrenched Parties*

The notion that those in command of the public till can unilaterally expropriate public monies to fund their next campaign intuitively resembles outright thievery. Such conduct would seriously undermine our political democracy.[134] This obvious concern with government attempts to perpetuate entrenched political actors by subsidizing favored private speakers requires a principle against such behavior. Though the idea is simple, it bears some explication.

Giving content to a principle against perpetuation of entrenched groups by public expenditures is by no means a facile task. The principle should have its greatest force when the government allocates funds to influence elections.[135] Policing expenditures to influence campaigns is a baseline from which courts should not retreat.[136]

However, localities often have a vital interest in promulgating their views, and usually depend on state aid.[137] County and municipal entities have far fewer resources than the national government and pose much less of a threat to skew elections with their speech subsidies. Thus, one exception to this baseline might exclude political subsidies by local governments for the purpose of affecting statewide referenda.[138]

Other potential applications of this principle are far from clear. Public service advertisements (PSA's) serve as a case in point.[139] Though the Advertising Council nominally sponsors these gov-

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[134] *See* M. YUDOF, *supra* note 13, at 234 (discussing with approval an equality principle in the first amendment formulated in Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975)); Shiffrin, *supra* note 13, at 622.

[135] *See* Shiffrin, *supra* note 13, at 622.

[136] Although a Rawlsian notion of equality in political participation informs this principle, it would not require the elimination of private wealth disparity in all forms of political speech. *See* J. RAWLS, A THEORY OF JUSTICE 64–65 (1971). *Cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (rejecting redistribution of speech capabilities rationale in striking down statutory limitations on campaign expenditures).

[137] *See supra* Part II(C).

[138] *See* City of Boston v. Anderson, 439 U.S. 1389 (1978).

[139] *See supra* note 37.

ernment messages for the public good, an examination of the content of PSA's reveals that they also cast government in a favorable light. For example, PSA's tell us that the Department of Housing and Urban Development helps people by providing flood insurance, the President's Council on Physical Fitness and Sports wants us to live longer, and the Agriculture Department protects us from salmonella poisoning.[140] PSA's demonstrate that public funds are being expended in a myriad of situations in the hope that the expenditure will enhance a party's or an individual's public image. Similarly, the prospects of national exposure, as well as the pursuit of justice, motivate publicly funded congressional investigations.

This Note does not pretend to answer just where to draw the constitutional line. What the non-perpetuation principle does offer, however, is to guide the important inquiry into whether public speech subsidies of private parties impermissibly poison the electoral process. Although the principle could be applied much more vigorously and in contexts other than those immediately touching upon elections, the Title X Regulations do not pose much of a problem with the non-perpetuation principle in its baseline form. Polls contradict arguments that the Regulations increase the likelihood of another Republican President in 1992.[141] Absent a cognizable threat to the political process, the Title X funding strictures do not violate the principle against perpetuation of entrenched power.

B. *Government as a Participant in the Marketplace of Ideas: The Drown-out Principle*

1. The Case for Government Neutrality

Government neutrality on particular issues has never existed as a background rule because government accomplishes much of its policy implementation through communication subsidies. Government's proper role is to provide the public its policy and scientific viewpoints whether the issues be of moral, economic, or health significance.

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[140] *See* D. PALETZ, R. PEARSON & D. WILLIS, POLITICS IN PUBLIC SERVICE ADVERTISING ON TELEVISION 53–54 (1977) (quoted in M. YUDOF, *supra* note 13, at 61).

[141] Most Americans are against an outright ban on abortion. *See The New Political Rules*, NEWSWEEK, July 17, 1989, at 21.

Nonetheless, one does occasionally encounter appeals for government neutrality on particular issues.[142] Such appeals are often premised on the condition that while government has no affirmative duty to speak, when it undertakes to provide information it must do so in a non-discriminatory manner.[143] However, an overarching rule of equal access or non-discrimination in information distribution would lead to absurd results. Under such a rule, government subsidization of private groups' anti-drug campaigns would require matching government funds for entities like the National Organization to Reform Marijuana Laws, which advocates the legalization of drugs.[144] Other examples could include government subsidization of responses by the alcohol and cigarette industries to statements by the Surgeon General.[145]

It is thus unsurprising that the case law has accommodated government's need to act as a partisan even on controversial issues. The Constitution "presumably does not engraft an 'equal' time requirement onto the dispensation of state funds for the encouragement of matters reflecting a legitimate state interest."[146] The Supreme Court has sanctioned government non-neutrality in a variety of contexts. In *Regan v. Taxation With Representation*,[147] Justice Rehnquist affirmed congressional subsidization of veterans' lobbying groups even though other lobbying groups were denied the same benefit. Even more telling is *Bob Jones University v. United States*,[148] where the Court allowed the Internal Revenue Service to assume a moral position when allocating tax subsidies. As then-Judge Scalia once wrote, "[no] case suggest[s] that 'uninhibited, robust, and wide-open debate' consists of debate from which the government is excluded, or an 'uninhibited market place of ideas' one

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[142] *See, e.g.*, Comment, *Chastity Act*, *supra* note 13, at 1930–31 (stating that while forbidding sex education or not funding counseling is legitimate, viewpoint discrimination in funding sex education programs is not); Note, *Gag Rule*, *supra* note 13, at 426 (government does not have a constitutional duty to provide family planning information, but once it undertakes to promulgate such information it must present all sides fairly).

[143] *See* Note, *Gag Rule*, *supra* note 13, at 428.

[144] *See* Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11 n.6, Commonwealth v. Secretary of Health and Human Services, No. 88-1279 (1st Cir. Mar. 19, 1990).

[145] *See* Comment, *Counseling and Referral*, *supra* note 13, at 1911 n.78.

[146] Planned Parenthood Ass'n v. Kempiners, 700 F.2d 1115, 1128 (7th Cir. 1983) (Cudahy, J., separate opinion).

[147] 461 U.S. 540 (1983).

[148] 461 U.S. 574 (1983) (decided on statutory grounds).

in which the government's wares cannot be advertised."[149] Government positions on abortion implicate this line of authority as well. Underlying both *Harris v. McRae*[150] and *Maher v. Roe*[151] is a judicial willingness to allow the state to carry out anti-abortion policies so long as they do not infringe upon basic due process rights.

The concept of government neutrality raises intractable questions when applied. Neutrality is required, but neutral relative to what? Government inaction could be seen as preservation of the status quo. Even the most mundane government action can be interpreted in a plethora of respects. Given its vast size and innumerable responsibilities, government cannot and should not avoid all value judgments. Instead, the real dilemma involves deciding how energetically government can implement those judgments.

2. The Problem of Engineering Public Opinion

While government can take moral positions in its dispensation of subsidies,[152] the problem of government drowning out dissenting voices and thereby dominating public debate on any particular issue remains.[153] This problem leads to a second principle which courts should consider in cases of government speech by subsidy: first amendment doctrine proscribes those government subsidies which so skew civic debate that opposing

[149] Block v. Meese, 793 F.2d 1303, 1313 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986).

[150] 448 U.S. 297 (1980).

[151] 432 U.S. 464 (1977).

[152] The Supreme Court has implicitly *prevented* government from assuming a neutral role in speech subsidies. In striking down a ban on editorializing by non-commercial stations receiving public funds, the Court rejected the proffered government rationale for the regulation—that it was designed to deter excessive government influence over such stations. FCC v. League of Women Voters, 468 U.S. 364 (1983).

[153] If federal speech by subsidy were unlimited, Congress could use its spending power to upset balances achieved at the Constitutional Convention and maintained through two centuries of civil liberties and federalism case law. But to disallow conditional subsidies whenever government could not act directly imposes intolerable limitations on public policy implementation. The challenge is in ascertaining a defensible line somewhere between these poles. *See* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1106 (1987); Note, *Gag Rule*, *supra* note 13, at 429 ("A government as entrenched in its citizens' lives as ours is cannot avoid implicitly sending value-laden messages. And yet, because of the potentially overwhelming influence of the state, one feels that some lines must be drawn between unavoidable government ideology and outright 'brainwashing' or 'indoctrination.'").

views are prevented from reaching the public[154] or from receiving sufficient consideration. The remainder of this section develops the possibilities for the use and abuse of the second principle.

Though the power to speak may be essential to governance of modern society, "[t]he power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime."[155] Despite the obvious hazards of government speech, not *all* such speech undermines the second principle's protection of the marketplace of ideas. When employing the second principle, courts must distinguish between speech subsidies that provide an unobjectionable alternative voice and those that actually engineer public opinion. Courts should not consider speakers so timid or ideas so fragile that mere knowledge of government disagreement would stultify robust debate.[156] Insisting upon government neutrality on particular issues assumes that public debate is at an optimal level when conducted solely by private speakers with pluralistic views. However, government speech often offsets the vast communications resources controlled by corporate or wealthy interests.[157] Private individuals and non-charitable organizations have little incentive to advocate environmental conservation or to promulgate educational information about drugs.[158] The government has much to offer the public as a market participant.[159]

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[154] For instance, government subsidized speakers could simply occupy all avenues of a particular mode of communication. Given the scarcity of radio broadcast frequencies, for example, it is readily conceivable that publicly subsidized stations could broadcast a government message while denying like access to opposing viewpoints. The Supreme Court employed this rationale to uphold the FCC's fairness doctrine against a first amendment challenge in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[155] M. YUDOF, *supra* note 13, at 42. *See also* Shiffrin, *supra* note 13, at 566 n.3 ("'There needs protection also against tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and if possible, prevent the formulation of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon the model of its own.'") (quoting J.S. MILL, *On Liberty*, in THE UTILITARIANS 479 (Dolphin ed. 1961)). *Cf.* R. DWORKIN, A MATTER OF PRINCIPLE 353 (1985) (proposing a right of moral independence for individuals against societal definition of legal mores in the pornography context).

[156] *See* Block v. Meese, 793 F.2d 1303, 1313 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986).

[157] M. YUDOF, *supra* note 13, at 43; Shiffrin, *supra* note 13, at 623; Comment, *Counseling and Referral*, *supra* note 13, at 1905.

[158] *See* Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 482 (1st Cir. 1989) (discussing the need for the state's participation in public debate as a rationale for upholding selective governmental speech subsidies).

[159] *See* J. TUSSMAN, *supra* note 13, at 110–15; M. YUDOF, *supra* note 13, at 38–42.

Current case law squarely supports government's role as a subsidizer of partisan speech. As discussed in Part III(B)(1), *Regan*[160] and *Bob Jones University*[161] upheld selective government subsidies of veterans' lobbying groups and non-racist educational institutions respectively. *Block v. Meese* stands as a ringing endorsement of government participation in the marketplace of ideas.[162] Although opponents of such participation correctly point out that government attempts to equalize public debate have been found in violation of free speech protections, such attempts directly regulated private speakers and not government speech. For example, one critic of the Reagan administration's limitations on abortion counseling cites *Buckley v. Valeo*[163] and *First National Bank v. Bellotti*[164] for the proposition that government may not directly limit the speech of one group so that another may be heard.[165] But neither case addressed government efforts to equalize public debate by entering the fray as a speaker or speech subsidizer.

The real problem with current first amendment doctrine is not that it restricts government participation in public debate. To the contrary, courts have developed no means to police governmental domination of the marketplace of ideas. To resolve this problem, courts should infuse constitutional power into government speech doctrine to enable themselves to address both government regulation of private speech and government domination of private speakers by subsidizing selected favorites. While the market-domination result in either scenario can be the same, no current judicial framework addresses the latter problem.[166]

The Title X Regulations, by subsidizing only non-abortion related family planning speech, pose the risk of drowning out pro-choice advocacy. As with the AFLA proscriptions on adolescent abortion counseling funding,[167] the Regulations presumably prohibit clinic employees from responding to such questions as "what are the benefits of abortions?" Indeed, the lower

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[160] 461 U.S. 540 (1983).

[161] 461 U.S. 574 (1983).

[162] 793 F.2d 1303, 1314 (D.C. Cir. 1986), *cert. denied*, 478 U.S. 1021 (1986).

[163] 424 U.S. 1, 48–49 (1976).

[164] 435 U.S. 765 (1978).

[165] Comment, *Chastity Act*, *supra* note 13, at 1927, 1929. *See also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295–96 (1981) (limit on contributions to committees formed to support or oppose ballot measures held unconstitutional).

[166] *See* L. TRIBE, *supra* note 72, at 782–83.

[167] *See* Comment, *Chastity Act*, *supra* note 13, at 1928.

court in *Kempiners* struck down selective state funding of family planning clinics that did not offer abortion counseling by invoking the rationale of the second principle. That court held that the discriminatory subsidies impermissibly limited the stock of neutral abortion-related information.[168]

The *Kempiners* court is to be lauded for its willingness to analyze the effect of partisan public subsidies on the marketplace of ideas, but it may have been overly critical of the state action involved. It ruled the selective subsidies unconstitutional not because they overwhelmed the availability of abortion-related information, but only because they limited such information. All policy implementation by selective subsidization aims to influence the public by increasing the availability of particular information at the expense of opposing viewpoints. *Regan* states that government may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas,"[169] but this seemingly broad mandate has been interpreted as proscribing only "drown-out" and not mere reduction in frequency of dissemination of opposing messages.[170] *Kempiners*' interpretation of *Regan*, however, embraces the latter approach and effectively emasculates government's ability to fund private speakers decrying drug abuse, racism, or sexism without allocating matching subsidies to groups with opposing views.[171]

The Title X Regulations do not offend the principle against government domination of public debate. Fears that pro-life subsidies will stifle opposing views underestimate the resiliency and strength of pro-choice advocacy. The continued funding of abortion in some states after *Harris v. McRae*[172] and the failure of the pro-life movement to enact a constitutional amendment banning abortion are ample testimony to the vigor of pro-choice interests.[173] Furthermore, a fair amount of healthy skepticism exists regarding any government effort to persuade. This factor should not be ignored when evaluating whether or not speech subsidies violate the principle against government domination of the marketplace of ideas.[174]

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[168] 531 F. Supp. 320, 326–33 (N.D. Ill. 1981), *vacated and remanded*, 700 F.2d 1115 (7th Cir. 1983), *on remand*, 568 F. Supp. 1490, 1496–99 (N.D. Ill. 1983).

[169] 461 U.S. 540, 546 (1983).

[170] *See* Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 479 n.4 (1st Cir. 1989).

[171] *See id.*

[172] 448 U.S. 297 (1980).

[173] Comment, *Counseling and Referral*, *supra* note 13, at 1908–09.

[174] M. YUDOF, *supra* note 13, at 114.

The limitation of the funding proscription to Title X programs also mitigates the effect of the Regulations on the marketplace of ideas. A clinic can accept Title X money and still conduct abortion-related activities. Thus, the burden on those clinics which seek to continue abortion-related services but desire Title X monies is relatively slight.[175] In addition, these Title X conditions do not apply to any other federal funding programs. The Regulations in no way affect possible grants from other federal programs, nor do they reach state or local governments or private sources of capital.

3. Government as a Pluralist Participant in the Marketplace of Ideas

The risk that government might dominate public debate is also reduced by the reality that "government" is actually an amalgamation of speakers with widely differing viewpoints. Government does not speak in a monolithic voice. In our federal system, federal, state, and local governments each promulgate speech that is frequently at odds with other government speech. Within the federal government, Congress and the Executive often are not in harmonic unison when it comes to proffering viewpoints. For instance, in the early 1970's congressional pressure forced a temporary abandonment of commercial spots (paid for by the Executive) seeking to persuade people to join a volunteer army.[176] Even within the Executive Branch, communications, directly or by subsidy, are often fragmented by the differing goals and views held by various agencies as well as a general lack of coordination.[177] The multiplicity of government actors and government viewpoints enables private speakers to compete with government messages more effectively and makes

[175] *See* Appellant's Supplemental Brief at 12–13, Massachusetts v. Secretary of Health and Human Services, No. 88-1279 (1st Cir. Mar. 19, 1990). In that recently decided case, however, Judge Bownes writing for the majority disagreed with the Appellant's characterization of the relative burden on abortion clinics and enjoined application of the Regulations. No. 88-1279, slip op. at 53–54 (en banc). Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986), *aff'd mem. sub. nom.*, Babbitt v. Planned Parenthood, 479 U.S. 925 (1986), invalidated Arizona's refusal to fund family planning clinics that counseled abortion. Unlike the Regulations, the state law in that case did not make an exception for provision of abortion-related services with funds other than those provided by the state.

[176] *See* M. YUDOF, *supra* note 13, at 62.

[177] *See id.* at 55.

the possibility of drown-out by a unitary government voice more remote.

This governmental pluralism is at work in the Title X context. HHS could favor pro-life family planning clinics only after Congress passed the Family Planning Services and Population Research Act of 1970.[178] Congress can always change the Regulations. In addition, some eighteen state governments still subsidize abortions through Medicaid programs[179] despite the congressional opposition to abortion funding stated in the Hyde Amendment.[180] This splintering of views regarding abortion among government entities makes it less likely that the HHS stance on abortion counseling funding will dominate the marketplace of ideas.

C. *The Relationship Between Government and Individual Choice*

This Note's third principle demands that government respect the capacity for individual choice when making speech subsidies designed to persuade the populace. The principle of respect for individual choice prevents government from foreclosing options through indoctrination or "brainwashing." Although this principle overlaps with the principle against governmental domination of the marketplace of ideas, it would object to instances where government speech subsidies leave adequate room for alternate voices but nevertheless impermissibly influence small or vulnerable groups. Violations of this third principle would occur more readily in situations where the government has a special and sensitive relationship with those to whom it directs its speech. An example of this situation would include schoolchildren, whose tender age combines with compulsory attendance to create an atmosphere where government speech could be coercive.

The third principle's most obvious policy consideration is the one given in its nomenclature—respect for the capacity of individual choice. Self-determination and self-definition are not simply means of ensuring democracy (and thus fulfilling the

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[178] *Supra* note 4.

[179] Five of these states do so under court order. Colburn, *The Politics of Abortion*, Wash. Post, Sept. 8, 1987, (Health Section) at 14, col. 1.

[180] *Supra* note 24.

second principle's command), they are foundation values of liberalism.[181] Government must respect these individualist values by treating people "as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."[182]

Thus stated, the third principle is relatively uncontroversial. But this basic proposition aside, innumerable difficult issues remain. Which value judgments should be left to the individual? When should government instill values? Which values—those held by a majority? If majority values do control, a majority of which government—national, state or local? Should controlling values be traditional values or the personal beliefs of judges? The intractable nature of these questions probably dictates legislative answers in the first instance.

However, courts should not lie completely prostrate before popular beliefs when faced with government subsidy of private speech. They must be willing to confront openly contraventions of the three principles (however the principles are ultimately defined) with direct constitutional restraints. While the first two principles both enhance and reinforce democratic processes and institutions, the third principle ensures that democracy will not degenerate into majoritarianism.

Nevertheless, decisions on the desirability of government taking moral positions belong first to legislators. Courts should continue to leave ample room for government value judgments.[183] Whether it be a policy of favoring those who have served in the nation's armed forces[184] or a policy against segregated education,[185] the judiciary has shown deference to government moral positions. The proposition that government may attempt to persuade people of certain ideas or conduct is not a controversial one.[186] Government cannot avoid controversial de-

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[181] *See* C. FRIED, RIGHT AND WRONG 146–47 (1978) ("What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty.").

[182] R. DWORKIN, TAKING RIGHTS SERIOUSLY 272 (1977).

[183] *See, e.g.*, Comment, *Counseling and Referral*, *supra* note 13, at 1905.

[184] *See supra* note 147 and accompanying text.

[185] *See supra* note 148 and accompanying text. *See also* Norwood v. Harrison, 413 U.S. 455 (1973) (forbidding state from lending textbooks to segregated private schools).

[186] *See* L. TRIBE, *supra* note 72, at 807; Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); Comment, *Counseling and Referral*, *supra* note 13, at 1904–05 (citing Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1043 (1986)).

cisions. The state subsidizes innumerable scientific, cultural, and educational activities. Given the range of government activities implicating speech, litigants will inevitably claim that government is promoting a religious position when a museum displays exhibits on evolution[187] or that closing down a school newspaper is objectionable because public authority is taking a position on sex education.[188] Allowing such claims to succeed takes the vast majority of public policy decisions away from the legislature and executive and vests them instead in the unelected judiciary.

Beyond the issue of government taking moral positions is the related but more difficult problem of government actively instilling the values it assumes necessary for its perpetuation. Professor Tussman contends that government efforts to influence the minds of the citizenry are not only legitimate but among its most essential tasks. The very survival of the polity, according to Tussman, rests on its ability to recruit new members who will address societal problems.[189] Democratic values must be nurtured in the populace. Left to their own devices, men and women will not inevitably assume classical liberal values.[190] However, Tussman does not stress the danger that government inculcation may *undermine* democratic values rather than promote them. Who decides whether the ideas being inculcated really promote democracy?[191] Is democracy even the optimal order for our society? The principle of respect for individual choice allows for such values to be assumed and advocated by government, but it also mandates that the ultimate choice (which Tussman comes dangerously close to conceding to the state) be left to the individual.[192]

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[187] *E.g.*, Crawley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (finding no impermissible government speech by rejecting an Establishment Clause claim).

[188] *E.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). *See generally* Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 877–85 (1977).

[189] J. TUSSMAN, *supra* note 13, at 13–14.

[190] *Id.*; M. YUDOF, *supra* note 13, at 39. *But see* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 204–10 (1973) (describing a naturalist theory of democracy).

[191] Yudof points out that the promotion of democracy need not be the sole province of government. *See* M. YUDOF, *supra* note 13, at 41.

[192] For other arguments that courts should have little or no role in policing coercive government speech or speech subsidies, see M. YUDOF, *supra* note 13, at 243–47; Comment, *Counseling and Referral*, *supra* note 13, at 1907; Shiffrin, Book Review, 96 HARV. L. REV. 1745, 1750 (1983).

Though the state's authority to inculcate has been questioned in a variety of contexts,[193] the public school setting is by far the most active battleground.[194] Given the compulsory nature of attendance and the youth of the audience, government commands great power in this setting to instill political and moral values. Such inculcation may be accomplished by prescribing curricula (for example, civics instead of Marxist economics),[195] choosing textbooks or teachers,[196] or mandating ritualistic ceremonies.[197] Playing on Justice Jackson's famous epigram,[198] Professor Shiffrin has written, "[w]hen the ship to be steered is the public school, our fixed star is that officials high and petty *can* prescribe what shall be orthodox in politics, nationalism, and other matters of opinion."[199]

Few seriously question whether government should run our schools.[200] Yet given the danger of coercion associated with the school setting, courts should police state control of speech on campus by applying the third principle with greater vigor. However, recent decisions reflect a troubling deference to school authorities. For example, two recent Supreme Court cases have upheld schools' ability to proscribe objectionable forms of com-

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[193] *See, e.g.*, Greer v. Spock, 429 U.S. 828 (1976) (control of information on military bases).

[194] *See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982); Ambach v. Norwick, 441 U.S. 68, 80 (1979); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); Grove v. Mead School Dist., 753 F.2d 1528, 1533–34 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980); Carey v. Board of Educ., 598 F.2d 535, 543 (10th Cir. 1979).

[195] Shiffrin, *supra* note 13, at 568.

[196] *See* Ambach v. Norwick, 441 U.S. 68, 80 (1979) (holding that a state may condition employment for teachers on citizenship because formal association with the polity promotes "civic virtues and understanding").

[197] *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding mandatory flag salute), *overruled*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[198] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[199] Shiffrin, *supra* note 13, at 568 (emphasis in original). Shiffrin also details several state statutory provisions directing educators to instill particular values. *Id.* at n.11. The most interesting of these statutes states that instruction must

> emphasize the free-enterprise-competitive-economy of the United States of America as the one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth. It shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism, and the false doctrines of communism.

ALA. CODE § 16-40-3(c) (1975).

[200] *But see* J.S. MILL, ON LIBERTY 104–05 (Rappaport ed., 1978).

munication. *Hazelwood School District v. Kuhlmeier*[201] involved a principal who prevented publication of several student newspaper articles because of his concern over their references to divorce and teenage sexual activity. *Bethel School District v. Fraser*[202] upheld the punishment of a student for using sexual innuendo at a school assembly. Unquestionably, schools have an interest in disassociating themselves from disagreeable speech.[203] But both opinions noticeably fail to consider less draconian means of preventing student speech from bearing the imprimatur of school authority (such as disclaimers printed in student newspapers) while tolerating school administration control over the exchange of ideas in the classroom.

More relevant to government sponsorship as opposed to regulation of speech are *Mozert v. Hawkins County Board of Education*[204] and *Grove v. Mead School District*.[205] Both cases upheld a school board's authority to prescribe reading materials to schoolchildren over the religious objections of their parents. The principle of respect for individual choice rejects this deference to school authority by demanding that school boards leave some zone of intellectual freedom. It may be argued that the young age of schoolchildren reduces their capacity for rational choice and hence legitimizes the state's inculcation role. But the youth of students testifies to their vulnerability. Programs and policies that preclude choice on crucial matters of individuality should be subject to rigorous judicial scrutiny. Given the youth of students, it will often be their parents who claim that the third principle has been contravened. But this fact does not sap the strength of the preceding analysis. Until children attain a certain minimum age or independence, parents (out of necessity) must act as surrogates for them in the decisionmaking process.

Of course, the principle of respect for individual choice cannot sensibly be applied without regard for the consequent burden on the school system. When the burden is slight (as when the

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[201] 484 U.S. 260 (1988).

[202] 478 U.S. 675 (1986).

[203] "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'" Hazelwood School Dist. v. Kuhlmeier, 484 U.S. at 272 (quoting Bethel School Dist. v. Fraser, 478 U.S. at 683).

[204] 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

[205] 753 F.2d 1528, 1533–34 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985).

requested change is merely comparable alternative selections on a reading list), or the parents are able to relieve the school of the problem of disparate treatment of students (as when parents tutor their children in science or place them in a parochial school to avoid evolutionary theory), the third principle dictates that such alternatives be made available.

A second form of traditional government inculcation is wartime propaganda.[206] The intent of government speech is much the same in both the school and wartime propaganda contexts, but the latter poses little of the opportunity for abuse inherent in the former. Neither the captive audience nature of school attendance nor the uniform vulnerability of youth are implicated when government disperses information to the public at large. One need only look to the resiliency of the anti-war movement[207] and to the impotency of government propaganda[208] during the Vietnam conflict to gauge the reduced exigency of the third principle in this area relative to the school context. It is not inconceivable that government could ever violate the third principle during wartime espousal of values,[209] but transgressions would be more likely when the targets of the communications constitute smaller groups subject to greater government control than that of the general public.[210]

The Title X Regulations provide challenging analytic material for the third principle because the clinical consultation setting lies somewhere between the coercive nature of the classroom and the less objectionable realm of wartime propaganda directed at the general public. Perhaps the most compelling argument for employing the third principle to criticize the Regulations is the

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[206] The use of propaganda during World War I provides an interesting example of this type of goverment inculcation. Due to his dissatisfaction with the press during World War I, President Wilson formed the Committee on Public Information (otherwise known as the "Creel Committee" after its chairman, George Creel). This committee produced "canned" editorials and political cartoons with its own staff and subsidized the publication of books and the production of films and slides. These communications declared Wilson a "national leader and prime mover in the war effort." M. YUDOF, *supra* note 13, at 63. The Creel Committee sent brochures twice a month to school teachers who were expected to employ them in class discussion. The Committee also organized a speakers' bureau in which 75,000 enrolled. These speakers, who came to be known as "Four Minute Men," relayed the messages of the Creel Committee to the public in motion picture theatres across the nation. *Id.*

[207] *See* G. HERRING, AMERICA'S LONGEST WAR 170–73, 215–16, 241–42 (1986).

[208] *Id.* at 134 (discussing President Johnson's unsuccessful propaganda bid, through the "Target: College Campuses" program, to deflect growing anti-war sentiment).

[209] *See* H. LASSWELL, PROPAGANDA TECHNIQUE IN THE WORLD WAR 4–5 (1927).

[210] One paradigmatic example is indoctrination or brainwashing of political prisoners during wartime.

highly personal nature of the abortion decision. Justice Stevens once wrote that the abortion decision was "a difficult choice having serious and personal consequences of major importance to [a woman's] own future—perhaps to the salvation of her own immortal soul."[211] Such decisions should remain substantially free of government coercion to enable women to fulfill values of self-worth and independence.[212] Janet Benshoof[213] criticizes those who advocate protection of self-fulfillment values, such as political speech, in the public sphere alone.[214] Since males traditionally dominated the public sphere, constitutional protection of that sphere alone omits personal decisions of women in the private sphere (such as those concerning abortion). Because government tries to persuade women regarding their personal decisions, the argument continues, it legitimizes disrespect for their capacity to make rational decisions independently. Such disrespect, the argument concludes, contravenes the third principle.[215]

This argument proves too much. Those who advocate first amendment liberty in the public sphere do not address government speech, but government regulation of speech.[216] To adopt Benshoof's thesis, one must thus take an additional step by claiming that government persuasion is so convincing that it effectively is no different than direct regulation of a woman's reproductive choice. If it could be shown that pregnant women seeking counseling from subsidized family planning clinics are vulnerable in a sense similar to that of school children, it would constitute a prima facie case under the third principle for judicial intervention. Proof of such vulnerability is controversial at best. Unlike AFLA,[217] Title X is not directed solely at adolescents. Thus, Title X projects do not uniformly affect those who are most vulnerable to inculcation efforts.

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[211] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 781 (1986) (Stevens, J., concurring).

[212] "A woman's right to make that choice [to end her pregnancy] is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Id.* at 772 (majority opinion of Blackmun, J.).

[213] Comment, *Chastity Act*, *supra* note 13, at 1935. Benshoof is the Director of the Reproductive Freedom Project of the American Civil Liberties Union.

[214] *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Mieklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57.

[215] Comment, *Chastity Act*, *supra* note 13, at 1936.

[216] *See supra* note 214.

[217] *Supra* note 52.

Nor does Title X force pregnant women to associate with pro-life speech. The Regulations only proscribe abortion counseling and referral. They do not mandate pro-life advocacy. In this respect, the Regulations are a far cry from statutes requiring attending physicians to read specified material to women prior to abortion in an attempt to sway their decision.[218]

Furthermore, the Regulations do not create a shortage of abortion clinics. Even those clinics receiving Title X funds may carry on abortion counseling and referral as well as perform abortions, so long as those projects are segregated from those receiving federal monies. An analogy to the compulsory attendance feature of the public school system simply does not exist in the Title X context.

The government's interest in promulgating its views cannot be forgotten in the Title X analysis. "Title X, like virtually every other government program, has a point of view, and, if it is to accomplish its purpose through grants to private entities, it must place limits upon the uses to which the grants may be put."[219] Denying government the power to withhold funds employed to counsel abortion inevitably weakens the Bush administration's pro-life message. That message does not pose enough of a threat of overwhelming the abortion decision of pregnant women to justify judicial intervention.[220]

IV. Conclusion

Current analysis of government speech issues obfuscates the values at stake by utilizing doctrine developed for other first amendment problems, such as public fora or penalty-privilege doctrine. In dealing with public subsidies, courts must address different underlying communitarian and individualist concerns.

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[218] *See, e.g.*, Margaret S. v. Treen, 597 F. Supp. 636, 670–71 (E.D. La. 1984) (striking down a statute requiring a doctor to inform women that 24 hours after the abortion the latter must choose between having the fetus cremated, buried, or disposed of as waste tissue), *aff'd sub. nom.*, Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986).

[219] Appellant's Petition For Rehearing and Suggestion For Rehearing *En Banc* at 13, Massachusetts v. Secretary of Health and Human Services, No. 88-1279 (1st Cir. Mar. 19, 1990) (en banc). "[T]he state may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds.'" Webster v. Reproductive Health Serv., ___ U.S. ___, 109 S. Ct. 3040, 3052 (1989) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

[220] *See* Comment, *Counseling and Referral*, *supra* note 13, at 1912–14.

This Note offers three principles for analyzing and deciding government speech subsidy cases. Each principle mirrors an associated potential for abuse in the discriminatory dispensation of public funds for speech advocacy. These three problems—entrenchment of parties in power through the expenditure of public funds, manipulation of public opinion, and coercion at the individual level—capture what is to be feared most in public speech subsidies. Thus, the three problems provide the logical starting point for a principled inquiry into the legitimacy of particular speech subsidy dispensations.

The recently promulgated Title X Regulations survive application of the three principles. First, far from violating the principle against entrenchment, the Regulations, along with other pro-life policies, have provoked an outcry[221] that may ultimately damage the Bush administration. Next, Title X has not dominated the debate on abortion in contravention of the second principle. Indeed, the pro-life subsidy policy of the government has taken second chair to the battle over the constitutionality of abortion laws. Finally, the Regulations survive the scrutiny of the third principle of respect for self-determination. The subsidization of non-abortion related speech in family planning clinics does not create the atmosphere of coercion present in situations where the government has more control over the environment of ideas (such as military bases or schools) nor is it primarily aimed at a vulnerable segment of the population (such as prisoners or young students). Thus, the Title X Regulations are constitutional exercises of government speech by subsidy.

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[221] *See* Salholz, *Voting in Curbs and Confusion*, NEWSWEEK, July 17, 1989, at 16.

NOTE

THE JURISDICTIONAL RELATIONSHIP BETWEEN THE IROQUOIS AND NEW YORK STATE: AN ANALYSIS OF 25 U.S.C. §§ 232, 233

ROBERT B. PORTER*

The federal government has plenary authority over Indian affairs under the "trust" doctrine, and, absent express congressional delegation, states are presumed generally to have no jurisdiction over Indians. The federal government's current policy vis-à-vis the American Indians is to encourage Indian self-government, based upon federally granted and inherent sovereign tribal rights. The State of New York, however, historically has exercised some jurisdiction over Iroquois territory, which is located within the State's boundaries. Although Congress has enacted legislation granting some criminal and civil jurisdiction over Iroquois territory to New York, the relationship continues to be controversial.

In this Note, Mr. Porter analyzes the relationship among New York, the Six Nations of the Iroquois Confederacy, and the federal government. The author describes the general history of this relationship. He then discusses the unique federal law principles which govern Indian-state relationships, and contrasts those general principles with New York's justifications for its historical exercise of jurisdictional authority over the Iroquois. Mr. Porter argues that the effect of New York's assumption of jurisdiction on the Iroquois people and their governments has been to undermine the federal policy encouraging Indian self-government. Finally, the author proposes and discusses various schemes for reform, which he argues would promote Indian self-determination.

INTRODUCTION

For over 200 years, the Six Nations of the Iroquois Confederacy[1] and the State of New York have struggled for

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[1] The Confederacy, or the "Haudenosaunee" (People of the Longhouse), as they call themselves, refers to the historical alliance between the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations. The Mohawk, Oneida, Onondaga, Tonawanda Band of Senecas, and the Tuscaroras all retain governance by Chiefs in Council, and are active participants in the Confederacy. The Seneca Nation of Indians is a representative democracy that was formed in 1848 by a constitution adopted by the Seneca people and is a politically separate nation from the Confederacy. The Mohawks also retain some governance by elected officials. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 416–24 (1942 ed.) [hereinafter F. COHEN (1942 ed.)]; *see also* New York State Executive Chamber, Preliminary Report to the Governor on State-Indian Relations 3–6 (May 1988) (unpublished report on file with the author) [hereinafter Preliminary Report]. To the extent there is no single term that can describe all of the Iroquois

control over the land owned by the Six Nations.[2] During the early years of the American colonial period, when Iroquois power was at its peak, the political and military relationship between the colonies and the Confederacy was genuinely accomodating. But eventually, as the colonies sought to expand westward, large quantities of Iroquois land were transferred to New York in a series of early treaties with the colony, and later, with the State of New York.[3] Within twenty years after the Revolutionary War, almost all of what is now New York State had been relinquished by the Iroquois. Later, as conflicts increased between Indians and non-Indians on the remaining Iroquois lands, the State[4] enacted legislation designed to "protect" the Iroquois from the non-Indian world.[5] This legislation precipitated the substantial involvement of the State in the internal affairs of the Six Nations during the remainder of the nineteenth

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nations, they will be referred to in this Note by their historical designation of "Iroquois" or "Six Nations."

The current relationship between the Six Nations and the State, as accurately described by the State, is:

> The more traditional Indian nations do not officially recognize the legitimacy of a direct State role in Indian issues, but they do look to the State as a service provider pursuant to treaty obligations. They believe that a sovereign relationship exists only with the United States and that the State of New York has only an incidental, ministerial relationship with the nations as an agent of the United States. Accordingly, they do not acknowledge formal relations with the State, whether on issues of criminal jurisdiction, taxation or the regulation of other activities such as hunting and fishing. In actual practice, however, all Indian nations accept, albeit do not formally acknowledge, an official State role.

Preliminary Report at 2–3.

Although the Shinnecock Tribe and the Poospatuck Tribe are also located within the interior boundaries of New York State, jurisdictional issues involving their territory will not be discussed in this Note, since these Indians are recognized as an Indian nation only by New York State, and not the federal government. Accordingly, federal law does not apply to their affairs. *Id.* at 5.

[2] Within the confines of federal law, fee title to the lands of the Six Nations is held by the United States as sovereign. "Indian title," which is a right of occupancy good against all but the sovereign, is held by the Six Nations. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668 (1974); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

The Mohawks (Akwesasne) own 14,640 acres within the borders of the United States; the Oneidas, 35 acres; the Onondagas, 7300; the Cayugas, 0 acres; the Tonawanda Band of Senecas, 7549 acres; the Seneca Nation of Indians, 44,960 acres constituting three reservations (Allegany—21,680, Cattaraugus—22,640, Oil Springs—640); the Tuscaroras, 5700 acres. *See* L. HAUPTMAN, FORMULATING AMERICAN INDIAN POLICY IN NEW YORK STATE, 1970–1986 at App. III (1988). Currently, the Mohawks, Oneidas, Cayugas, and Senecas have outstanding land claims against New York State. *See generally* C. VECSEY & W. STARNA, IROQUOIS LAND CLAIMS (1988).

[3] *See* L. HAUPTMAN, *supra* note 2, at 7–9.

[4] Throughout this Note, the word "State," when capitalized, refers exclusively to New York.

[5] *See* L. HAUPTMAN, *supra* note 2, at 9–10.

and early twentieth centuries. Within the last forty years, New York has obtained even greater authority over Iroquois affairs by securing federal legislation granting the State partial criminal and civil jurisdiction over Iroquois territory.[6]

The general relationship between Indian nations and the United States is founded on the treaty-based and judicially defined "trust," which requires that the federal government provide for and protect Indian people. In contrast, the relationship between Indian nations and the states, and certainly the relationship between the Iroquois and New York, usually has been one of significant and perpetual conflict with sporadic periods of harmony. Foremost among the reasons for this conflict is the fact that although Indian territory is always located within a particular state (or states), state governments are presumed initially to have absolutely no authority over either the conduct of individuals on the reservations or the territory itself.

In the last thirty years, the Supreme Court has created a body of doctrine governing the interrelationship between the federal, Indian, and state governments based upon principles of Indian sovereignty and self-government. Such an effort to establish concrete and workable guidelines has not been seen since the early 1800's. Not only has the sovereignty of Indian governments recently been recognized to exist in many different areas,[7] but the Court has often vigorously upheld the actual exercise of Indian governmental authority in the face of powerful state and private interests. Most importantly, the Court has held that the inherent sovereignty of Indian nations serves as the "backdrop" for deciding all state-Indian conflicts.[8] Even though the Court has since retreated from reliance on a pure notion of sovereignty to preclude state jurisdiction in Indian territory,[9] it deliberately has strengthened the protective relationship between the federal and Indian governments to the extent that federal laws are broadly construed to preempt state legislation where the state legislation threatens to infringe upon federally granted and inherent sovereign tribal rights.[10]

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[6] Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1988)) (criminal jurisdiction); Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1988)) (civil jurisdiction).

[7] *See infra* note 62 and accompanying text.

[8] *See infra* note 81 and accompanying text.

[9] *See infra* note 74 and accompanying text.

[10] *See infra* notes 79–80 and accompanying text.

The purpose of this Note is to explore the contours of the jurisdictional relationship that currently exists between New York and the Six Nations in light of the federal legislation granting partial criminal and civil jurisdiction over Iroquois territory to the State.[11] Part I sets forth some detailed background on the historical relationship between the federal, Iroquois, and New York governments. Part II discusses the basic federal law principles that have been developed in recent years to govern state-Indian conflicts. Part III delineates and critiques the various sources upon which New York relies, or has relied, to justify its exercise of jurisdictional authority over the Iroquois. Part IV argues that granting jurisdiction over the reservations to the State has undermined the development of Indian self-government in contravention of current federal Indian policy. And finally, Part V delineates proposals for reform of the current jurisdictional scheme that would accomodate the mutual interests of the federal and Indian governments in attaining Indian self-determination.

I. The Influence of New York State on the Reservation: 1777–1948

The relationship between the Iroquois and New York State is a unique one, predating the American Revolutionary War and the formation of the United States. From these early origins until the granting of criminal jurisdiction to New York by the United States in 1948,[12] the State's self-defined role was as a guardian of the Indians,[13] in many ways analogous to the present role of the United States in national Indian affairs. However, throughout this period, New York was consistently at odds with the United States over which government had supreme control over the land and affairs of the Indian people originally neighboring, and later residing within, the State's borders.[14]

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[11] Since the analysis in this Note is limited to a discussion of 25 U.S.C. §§ 232 and 233, important regulatory jurisdictional issues such as environmental regulation and state taxation of Indian economic activity will not be addressed.

[12] *See supra* note 6.

[13] *See, e.g., infra* note 27 and accompanying text.

[14] *See generally* Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 BUFFALO L. REV. 1, 3–13 (1958); *see also* L. HAUPTMAN, *supra* note 2, at 3–17.

The first indication that New York harbored guardianship intentions was a provision in its original constitution mandating that any land transactions with the Indians be invalid unless made with the consent of the State legislature.[15] However, even though the State early on sought to control relations between its citizens and the Indians, the time following the Revolution was a period of relative parity between the State and the Iroquois Confederacy.[16] Since the members of the Confederacy had sided predominately with the British during the Revolution and had remained a significant military force, the Iroquois were still viewed as a threat to the existence of the United States. Thus, a primary goal of both New York and the Continental Congress was to conclude peace treaties with the Confederacy. Under the authority of the Articles of Confederation,[17] the United States concluded the Treaty of 1784 at Fort Stanwix, which secured peace with the Six Nations.[18]

Following the ratification of the United States Constitution, which gives Congress the power "to regulate commerce . . . with the Indian Tribes,"[19] the United States became increasingly involved in regulating Indian affairs. In 1790, the first of several Indian Trade and Intercourse Acts was enacted, mandating that Indian land purchases by non-Indians be conducted pursuant to federal treaty or in the presence of federal officials.[20] Although

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[15] N.Y. CONST. art. XXXVII (1777). A similar provision was contained in Art. I § 13 of the 1938 New York Constitution but was repealed Nov. 6, 1962, effective Jan. 1, 1963. Article XXXVII also is analogous to the federal Trade and Intercourse Acts. *See infra* note 20.

[16] F. COHEN (1942 ed.), *supra* note 1, at 416–19.

[17] *See* Oneida Indian Nation v. New York, 860 F.2d 1145, 1153–61 (2d Cir. 1988), *cert. denied* 110 S. Ct. 200 (1989), which held that although Article IX(4) of the Articles of Confederation was a grant of authority to the national government to make treaties with the Indians, it did not deprive the states of the right to extinguish title to Indian land within their borders. Article IX(4) provides, in part:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . .

[18] Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 5 (1904). The Treaty also guaranteed the land holdings of the Iroquois in exchange for their relinquishing claim to the western territory. This promise, and the Trade and Intercourse Acts, *see infra* note 20 and accompanying text, continues to serve as the basis for current land claims to areas in central New York State. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). *See generally* C. VECSEY & W. STARNA, *supra* note 2.

[19] U.S. CONST. art. I, § 8, cl. 3.

[20] Act of July 22, 1790, ch. 33, 1 Stat. 137. Without major change, the policy was continued in six other Acts, including the Act of June 30, 1834, ch. 161, 4 Stat. 729

the legislation was fully applicable to New York,[21] the State continued to purchase Indian lands, both with and without federal consent, on the grounds that it retained the sovereign power to do so.[22] Federal officals, though aware that the State's conduct was in violation of both federal law and the Constitution, did not act to correct the situation.[23]

The general indifference of the federal government aside, one likely explanation for the initial deference concerning Iroquois affairs was New York's argument that it retained power over the Iroquois under the Articles of Confederation.[24] Although it now appears that New York may have had a legitimate role in Indian affairs under the Articles,[25] this role necessarily was diminished by the system of federal government established by the Constitution. However, the overall inactivity of Congress with regard to the Iroquois undoubtedly contributed to New York's continued belief that it had much greater authority over both their person and their territory.[26] Regardless of whether this authority was valid, New York gradually and unilaterally

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(repealed in part) (codified forward and amended at 18 U.S.C. §§ 1152, 1160, 1165 (1982); 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, 264 (1988)); *see also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 110 n.388 (1982 ed.) [hereinafter, F. COHEN (1982 ed.)].

[21] *See Oneida Indian Nation*, 414 U.S. at 670–71. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." *Id.* at 670. *See also Oneida Indian Nation*, 470 U.S. at 245–48; Tuscarora Nation of Indians v. Power Authority of New York, 257 F.2d 885, 888–89 (2d Cir. 1958).

[22] *See* Gunther, *supra* note 14, at 6. For a reprinting of many of these treaties, see SPECIAL COMMITTEE APPOINTED BY THE N.Y. ASSEMBLY OF 1888 TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK, REPORT DOC. NO. 51, 190–382 (1889) [hereinafter, WHIPPLE REPORT].

[23] *See* Gunther, *supra* note 14, at 6.

[24] *See supra* note 17.

[25] *See* Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988), *cert. denied* 110 S. Ct. 200 (1989).

[26] The Supreme Court has recognized the nature of the relationship between New York and the Iroquois: "There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." Oneida Indian Nation v. County of Oneida, 414 U.S. 664, 678 (1974). *See also* Comment, *The New York Indians' Right to Self-Determination*, 22 BUFFALO L. REV. 985, 989–93 (1973).

Perhaps the genesis for the State's position was a December 16, 1786 agreement between New York and Massachusetts, which ceded to New York the "government, sovereignty and jurisdiction" over lands in western New York in exchange for "the right of preemption of the soil of the native Indians." Massachusetts eventually sold this "right of preemption" to a private individual, Robert Morris, on May 11, 1791, who used it to purchase most of what is now western New York State from the Senecas in 1797. The agreement was implicitly ratified by the United States, since the sale was supervised by a federal commissioner. *See* S. Doc. No. 154, 54th Cong., 2d Sess. 4 (1897) (letter from J.R. Jewell, United States Indian Agent).

began to assert control over reservation activity. In 1813, the State enacted legislation regulating reservation conduct, eventually expanding its influence to include the provision of health care, schools, and roads, in addition to benefits for non-Indians, such as railroad rights-of-way through the reservations.[27]

Notwithstanding the active State role during the early 1800's, New York clearly desired to be rid of the "Indian problem."[28] The Treaty of 1838,[29] arising out of the claim of the Ogden Land Company,[30] provided such an opportunity since the terms of the agreement provided for the relinquishment of all Iroquois lands and the removal of the Iroquois to the west. Nothwithstanding the State's preference, both this treaty and the compromise Treaty of 1842,[31] which returned the Allegany and Cattaraugus Reservations to the Seneca Nation, reestablished the United States as an active participant in the affairs of the Iroquois.[32]

Even though federal involvement in the 1838 and 1842 treaties strongly implied that New York did not have any unilateral authority to conduct land transactions, the State continued its attempts to exert jurisdictional authority over the reservations. Some of this authority was legitimated in *New York ex rel. Cutler v. Dibble*,[33] a Supreme Court decision upholding the right of the State to protect Indian lands from non-Indian intruders. However, the expansive interpretation of the State's power over the reservation in *Dibble* was short-lived. *The New York Indians*[34] involved an 1840 attempt by the State to tax lands the Senecas had agreed to relinquish pursuant to the Treaty of 1838, but had not vacated. The Court strongly repudiated the State's attempt to tax the reservation: "[T]he rights of Indians do not depend

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[27] *See* WHIPPLE REPORT, *supra* note 22, at 80-85 App. A, for a list of legislation affecting the Iroquois passed between 1813 and 1888.

[28] *See* F. COHEN (1942 ed.), *supra* note 1.

[29] Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 502 (1904).

[30] *See* WHIPPLE REPORT, *supra* note 22, at 34–37. The Ogden Land Company claim to the remaining Iroquois territory originated from the transfer of the preemption right from Massachusetts to Robert Morris. *See supra* note 25.

[31] Treaty with the Seneca, May 20, 1842, 7 Stat. 586, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 537 (1904).

[32] *See* Gunther, *supra* note 14, at 8. *See also* Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856), which involved an attempt by the Ogden Land Company to eject Tonawanda Senecas from lands which had been ceded to it in the Treaty of 1842. However, the Court denied the action, stating that "the removal of Indians from their ancient possessions" must be under the authority of the federal government and "under its care and superintendance." *Id.* at 370–71.

[33] 62 U.S. (21 How.) 366 (1858).

[34] 72 U.S. (5 Wall.) 761 (1866).

on this or any other statutes of the State, but upon treaties, which are the supreme law of the land."[35]

State authority over the reservations continued to erode after an 1870 New York Supreme Court decision invalidated State-ratified leases made between Seneca landlords and non-Indian settlers in the City of Salamanca on the grounds that the leases had been granted absent federal authorization and were thus void.[36] The State legislature, conceding that "the Congress of the United States alone possess[ed] power to deal with and for the Indians . . . ,"[37] successfully lobbied for a federal law ratifying the leases.[38]

The Salamanca lease controversy demonstrated that the State recognized its lack of authority over Iroquois land transactions. However, in 1888, a special committee of the New York legislature was commissioned for the purpose of formulating proposals to deal with the State's "Indian Problem."[39] The *Whipple Report* blamed the continued existence of "tribal relations" for the lack of Indian assimilation, believing that the best that could be done for the Indian would be to "[e]xterminate the tribe and preserve the individual; make citizens of them and divide their lands in severalty."[40] The Committee concluded that only by "the extension of the laws of the State over them, and their absorption into the citizenry" could the "Indian Problem" ultimately be resolved.[41]

Although the *Whipple Report* recommendations were not adopted, the State continued its efforts to change the State law and constitution. To the extent these attempts sought to weaken tribal existence, the ultimate impact, had the State been completely successful, would have been far less extreme than "dividing lands in severalty."[42] The State's lack of success was largely due to the fact that it was not united in these endeavors.

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[35] *Id.* at 768; *see also* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866), a companion case in which the Court also rejected the authority of a state to tax Indian lands.

[36] *See* United States v. Forness, 125 F.2d 928, 930–31 (2d Cir. 1942), *cert. denied sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942).

[37] 1875 N.Y. LAWS 819; *see* Gunther, *supra* note 14, at 10.

[38] Act of Feb. 19, 1875, 18 Stat. 330, ch. 90, pt. 3, *amended by* Act of Sept. 30, 1890, 26 Stat. 558, ch. 1132 (extending the renewal term from 12 years to 99 years).

[39] *See* WHIPPLE REPORT, *supra* note 22, at 3.

[40] *Id.* at 68.

[41] *Id.* at 78. The aggressiveness of the Whipple Report was undoubtedly due to a similar policy preference of the United States expressed in the General Allotment Act of 1887. *See* F. COHEN (1982 ed.), *supra* note 20, at 127–36.

[42] Gunther, *supra* note 14, at 12.

The New York Attorney General repeatedly maintained that the federal government's power over Indian affairs was exclusive.[43] In addition, the New York courts alternated between legitimating State power by upholding previous legislative enactments[44] and recognizing the supremacy of federal authority in Indian affairs.[45] Much of this confusion on the part of the New York courts was likely due to the ambiguous signals emanating from the United States Supreme Court.[46] Thus, during this period, the only clear conclusion that could be drawn was that: "[t]he general question of power of the state to legislate for the tribal Indians living on reservations [is] full of doubt and confusion."[47]

Much of the confusion was eliminated by the Second Circuit in the 1942 case of *United States v. Forness*,[48] which involved an attempt by the Seneca Nation to cancel a lease in the City of Salamanca for nonpayment of $44, representing eleven years of back rent. In a suit filed by the United States, the leaseholder argued that the action was barred by a State law requiring dismissal of an ejectment action if rent was tendered prior to

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[43] *Id.* at 13–14; 1915 Op. N.Y. Att'y Gen. (II 1915 Report N.Y. Att'y Gen) 492.

[44] *See* Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123, 124 (1921) (With regard to "tribal reservation Indians," New York law operates to "define the powers and rights of such Indians in order to promote peace and good order and provide for the rule of law where Congress is inert and the Indians are incompetent or indifferent."); Johnson v. Long Island R.R., 162 N.Y. 462, 467–68, 56 N.E. 992, 993 (1900) ("[Indians] are regarded as wards of the state, and, generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute."); Seneca Nation of Indians v. Christy, 126 N.Y. 122, 27 N.E. 275 (1891), *appeal dismissed* 162 U.S. 283 (1896).

[45] *See* Patterson v. Council of Seneca Nation, 245 N.Y. 433, 157 N.E. 734, 738 (1927) ("[I]n its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of the courts of New York State . . . ."); *Mulkins*, 133 N.E. at 124 ("The contention has been made with some force that where Congress does not act, no law runs on an Indian reservation save the Indian tribal law and custom."); People *ex rel.* Cusick v. Daly, 212 N.Y. 183, 105 N.E. 1048, 1049 (1914) (rejecting the argument that the state had more control over the New York Indians than the federal government had over the Indians in the west: "[T]ribes [are] wards of the nation and not of the states.").

[46] *See* New York *ex rel.* Kennedy v. Becker, 241 U.S. 556 (1916), a case involving the state regulation of off-reservation hunting and fishing. Relying on The New York Indians, 72 U.S. (5 Wall.) 761 (1866), the Court held that although the Indians are wards of the United States, "this fact does not derogate from the authority of the state, in a case like the present, to enforce its laws at the *locus in quo*." 241 U.S. at 564. In dicta, the Court expressed its view that concurrent jurisdiction on the reservations, "instead of maintaining in each the essential powers of preservation, would in fact deny it to both." *Id.* at 563; *cf.* United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13 (1925) (state court jurisdiction legitimate over lands and members of the Seneca Nation); *cf.* Seneca Nation v. Christy, 162 U.S. 283 (1896) (Senecas barred by New York statute of limitations from suing to invalidate conveyances of land to private individuals).

[47] *Mulkins*, 133 N.E. at 124.

[48] 125 F.2d 928 (2d Cir. 1942).

judgment, as had been done in this instance. However, the court rejected this reasoning and held that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because . . . state law does not apply to the Indians except so far as the United States has given its consent."[49]

The clarity of the *Forness* decision greatly distressed State officials, who believed that New York had some jurisdictional control over Iroquois territory.[50] In response to the fear that it had absolutely no authority, the State legislature created the Joint Legislative Committee on Indian Affairs to investigate the situation.[51] The Committee's agenda was clear. Two years later, in 1945, the Committee recommended bills for congressional enactment that would grant general criminal and civil jurisdiction over the reservations to New York.[52] Following extensive Senate hearings in 1948, almost complete criminal jurisdiction was granted to the State later that year in 25 U.S.C. § 232, and, in 1950, partial civil jurisdiction was granted in 25 U.S.C. § 233.[53]

II. Federal Law and Policy Governing Relations Between Indian Nations and States

In the last thirty years, the United States has dramatically altered its policy with regard to Indians and Indian nations. The current policy of self-determination[54] is both in purpose and effect diametrically opposed to the assimilation policy that directly preceded it. The objective of self-determination is to develop Indian self-government and promote economic self-sufficiency to the point that Indians are dependent only upon themselves for basic human needs.[55] Although Congressional initiative has been responsible for much of this shift in policy,

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[49] *Id.* at 932. The Court allowed the Seneca Nation to cancel the lease but made cancellation contingent upon a new lease being held open for 60 days. *Id.* at 942.

[50] Gunther, *supra* note 14, at 14.

[51] *Id.* at 14–15.

[52] *Id.* at 15.

[53] *See supra* note 6. For a detailed account of this history, see L. Hauptman, The Iroquois Struggle for Survival: World War II to Red Power 15–43 (1986).

[54] *See infra* notes 55–62 and accompanying text.

[55] *See, e.g.*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 25 U.S.C. §§ 2701–2721 (1988); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–450n (1988); Indian Financing Act of 1974, 25 U.S.C. §§ 1451–1543 (1988); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1341 (1988); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–492 (1988).

the Supreme Court, while emerging as the final expositor of Indian governmental rights and powers, has placed itself at the center of the campaign for self-determination.

Since its decision in *Williams v. Lee*,[56] the Court has attempted vigorously to formulate a coherent and consistent doctrine of federal Indian law that could, *inter alia*, serve to guide the lower courts in resolving Indian-state conflicts.[57] Several factors have made this task particularly difficult: the large number of different Indian nations throughout the United States, the wide variety of treaties that often serve as the determinant of tribal rights, the non-uniform body of federal statutory law applying to Indian territory existing as far back as the early years of American history, and the disparity of state treatment of Indians and Indian nations within state borders. Despite these formidable obstacles, the Court has managed to delineate some basic principles that define the authority of, and relationship between, the federal, state, and Indian governments.

Very few of these recent Supreme Court decisions have involved New York or the Six Nations. In the two decisions that have, the focus was primarily on land claims issues.[58] Although the cases shed some light on the current jurisdictional relationship existing between the New York and Iroquois governments, they are valuable primarily for their historical insight into the early relationship between the two governments.

From the perspective of Indian sovereignty, perhaps the greatest significance of the post-*Williams* cases has been the clarification of Indian governmental authority within Indian territory. The Court has recognized consistently that Indian governmental power is derived not from any grant of authority by Congress but from the retained sovereignty never relinquished to the United States by treaty.[59] Although recognizing that Indian nations no longer retain full sovereign powers, the Court has observed that the Nations "are a good deal more than 'private, voluntary organizations'" and retain "attributes of sovereignty

[56] 358 U.S. 217 (1959) (denying jurisdiction of the state court over a civil action brought by a non-Indian against an Indian, where the cause of action arose on the reservation and Congress had not explictly given jurisdiction over the reservation to the state court).

[57] C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

[58] *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

[59] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); *Williams*, 358 U.S. at 269, 271; United States v. Kagama, 118 U.S. 375, 381–382 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832).

over both their members and their territory."[60] As such, they remain the primary governing authority on the reservation, "dependent on, and subordinate to, only the Federal Government, not the States."[61] Accordingly, Indian governments retain, among many other vestiges of sovereignty, the power to determine a form of government, the power to define membership, the power to legislate, the power to administer justice, and the power to exclude persons from Indian territory.[62]

Nonetheless, despite the fairly extensive scope of Indian governmental authority, limits on the exercise of this authority have been imposed by the federal government, the Indian governments themselves, and, in rare instances, the states. For example, through treaties entered into with the United States, Indian nations relinquished claims to vast areas of land and placed themselves under the protection of the United States.[63] In exchange, the federal government agreed to guarantee this protection, an agreement commonly referred to as the "trust doctrine."[64] Accordingly, the necessary result of this dependent relationship is that Indian governments remain subject to the overriding authority of the United States. By virtue of the Indian Commerce Clause[65] and the Supremacy Clause,[66] Congress, as against the states, retains plenary authority over Indian affairs[67] and has often acted explicitly to curb or to divest the jurisdiction of Indian governments. In addition to this restriction, the Supreme Court has determined that limitations exist on the inherent sovereign powers of Indian nations as the result of their dependence on the United States. Consequently, Indian governments have been restricted from freely alienating reservation land,[68] legally entering into direct commercial or governmental

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[60] United States v. Mazurie, 419 U.S. 544, 557 (1975).

[61] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

[62] F. COHEN (1982 ed.), *supra* note 20, at 232–52.

[63] *Oneida Indian Nation*, 414 U.S. at 672.

[64] *See* United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). *See also* F. COHEN (1982 ed.), *supra* note 20, at 220–21.

[65] U.S. CONST. art. I, § 8, cl. 3.

[66] U.S. CONST. art. VI, cl. 2.

[67] *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83–84 (1977); F. COHEN (1982 ed.), *supra* note 20, at 207–216; *but see* Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 509–56 (1987).

[68] *Oneida Indian Nation*, 414 U.S. at 667–68.

relations with foreign nations,[69] and exercising criminal jurisdiction over non-Indians.[70]

Although encroachments by the federal government into the affairs of Indians generally have come to be expected, if not in some cases welcomed, the exercise of state power over reservation activity has long been a major source of contention. In recent years, as individual Indians and Indian governments have begun exerting their economic rights, state governments have been under great domestic political pressure to curb the influence of reservation activity on off-reservation businesses.[71] Congress under its plenary authority can provide expressly that state laws be applied to Indians on their reservations.[72] But even in the absence of explicit congressional consent, the Supreme Court has defined circumstances in which it will allow states to exercise some authority over Indian territory.

Originally, states had absolutely no authority over Indian affairs or Indian territory. In *Worcester*, the Supreme Court repudiated Georgia's attempt to ban the entry of non-Indians into Cherokee territory without the tribe's consent. In doing so, the Court established the conceptual underpinnings of modern-day tribal-state relations:

> [T]he Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.[73]

Although the Court has continued to recognize the inherent sovereignty of Indian nations in the years following *Worcester*, it has applied less rigidly the bright-line rule that relies on Indian sovereignty to preclude state jurisdiction.[74]

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[69] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831).

[70] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

[71] *See* Cotton Petroleum v. New Mexico, 109 S. Ct. 1698 (1989).

[72] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987). *See, e.g.*, Indian Gaming Regulatory Act of 1988, *supra* note 55.

[73] *Worcester*, 31 U.S. (6 Pet.) at 561.

[74] *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

Instead, the Court has established two separate barriers to the exercise of state jurisdiction over Indian territory.[75] The first barrier is that states may not act to influence reservation activity if such action "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[76] Thus, when on-reservation conduct involves only Indians, "state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[77] Nonetheless, outside the unique area of state taxation of Indian governments and individual Indians, the Court has "not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent."[78]

The second barrier to state jurisdiction is a "balancing" or "pre-emption" test that precludes a state from exercising jurisdiction over reservation activity where such an exercise is "pre-empted" by federal law.[79] "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[80] Nonetheless, although pre-emption analysis has replaced strict reliance on inherent Indian sovereignty

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[75] *See* Three Affiliated Tribes Of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 147 (1984); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

[76] Williams v. Lee, 358 U.S. 217, 220 (1959).

[77] *Bracker*, 448 U.S. at 144.

[78] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214–15 (1987) (citing Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976), and Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). In both *Moe* and *Colville*, the Court found that the state could require tribal smokeshops on Indian reservations to collect sales tax from non-Indian customers enjoying the off-reservation services of the state.) *See also* Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977), where a treaty provision requiring that Indian fishing rights be exercised "in common with all citizens" and the fact that all but 22 of the 18,000 acres of reservation land were held by individuals in fee simple combined to authorize state regulation of on-reservation fishing by tribal members.

[79] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."); *see also* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965); *see generally* F. COHEN (1982 ed.), *supra* note 20, at 270–79. Pre-emption analysis in the Indian law context is unlike other kinds of pre-emption. "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." *Bracker*, 448 U.S. at 143.

[80] *Cabazon*, 480 U.S. at 216 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)).

as a bar on the exercise of state jurisdiction, the "Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read."[81] Accordingly, the "balancing" test is a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law."[82]

The Court has defined a set of principles to guide the "particularized inquiry" associated with pre-emption analysis. Several considerations weigh heavily in favor of Indian governments. In addition to the "backdrop" of inherent sovereignty, the Court reads tribal interests and federal interests as inextricably linked.[83] The wide range of federal legislation designed to improve and strengthen Indian communities is direct evidence of the federal commitment to the protection and development of Indian self-government.[84] In addition, the Court reads these federal statutes broadly and has refused to require that a federal law explictly pre-empt state law in order for pre-emption to be found.[85] In light of these considerations, the Court has developed several canons of construction to assist in fulfilling the intent of federal policies toward Indians:

> Treaties and other bilateral agreements with Indians are interpreted as the Indians would have understood them. Treaties and federal Indian statutes are interpreted in favor of retained tribal self-government and property rights as against competing claims under state law. Doubts or ambiguities in treaties or statutes are resolved in the Indian's favor. Federal Indian laws are to be interpreted liberally toward carrying out their protective purposes.[86]

With regard to state interests, the Court has found them to be "particularly substantial if the State can point to off-reservation effects that necessitate state intervention."[87] However, an exercise of state authority that imposes additional burdens on a tribal enterprise is justified only when there is some service or function performed by the state on behalf of non-Indians in

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[81] *McClanahan*, 411 U.S. at 172.

[82] *Bracker*, 448 U.S. at 144–45; *see also* Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1707 (1989).

[83] *See* F. COHEN (1982 ed.), *supra* note 20, at 207–16.

[84] *See supra* note 55.

[85] *Bracker*, 448 U.S. at 143–44.

[86] F. COHEN (1982 ed.), *supra* note 20, at 274.

[87] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983); *see also* Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977).

connection with the on-reservation activity.[88] The involvement of non-Indians in reservation activities is critical. When non-Indians engage in activity on reservations, the Court has indicated that a state's interest will increase in a challenge to the exercise of Indian governmental authority.[89] Notwithstanding the elevation of a state interest when non-Indians are involved, Indian governmental power over reservation activities is extensive and potentially limitless.

III. Sources of New York State Jurisdiction Over Iroquois Territory

The foregoing general federal law principles defining the jurisdictional relationship between federal, state, and Indian authority serve as the foundation for understanding the current jurisdictional scheme that exists between the Six Nations and New York. The following sections discuss the three primary sources on which New York relies for its jurisdictional authority over Iroquois territory: the 1859 United States Supreme Court opinion, *New York ex rel. Cutler v. Dibble*,[90] and the statutes transferring partial criminal and civil jurisdiction to the State, 25 U.S.C. §§ 232 and 233.

A. *Pre-existing Jurisdiction:* New York *ex rel.* Cutler v. Dibble

The *Dibble* case was the earliest recognition by a federal court of an exercise of state jurisdiction over Indian territory.[91] The case arose out of an attempt by a Genesee County judge to remove three non-Indians who had claimed land held by the

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[88] *Mescalero Apache Tribe*, 462 U.S. at 336 (1983) ("[A] state seeking to impose a tax on a transaction between Indians and nonmembers [of the tribe] must point to more than its general interest in raising revenues."); *but see* Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989).

[89] *Cabazon*, 480 U.S. at 215–16; *Mescalero Apache Tribe*, 462 U.S. at 333.

[90] 62 U.S. (21 How.) 366 (1859).

[91] *See* John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 133 (1988), in which the Court noted that the exercise of State authority upheld in *Dibble* "presaged" the state jurisdiction recognized in United States v. McBratney, 104 U.S. 621 (1882) (state jurisdiction exists over non-Indians who committed crimes against other non-Indians on the reservation).

Tonawanda Band of Senecas.[92] Prior to these events, on March 31, 1821, New York passed "[a]n act respecting the intrusion on Indian lands" which "made it unlawful for any persons other than Indians to settle and reside on lands belonging to or occupied by any tribe of Indians . . . ."[93] This law imposed a duty on the county judge, upon a complaint made to him[94] and with a finding that non-Indians were living on "such lands," to issue a warrant directing the sheriff to remove the intruders.[95] The issues before the Court were whether the statute violated the Constitution, treaties, or laws of the United States, and whether the non-Indians were denied their "property or rights" arising out of any treaty or federal law.

The Court upheld the statute, finding that there was nothing in the Constitution, laws, or Indian treaties of the United States that prevented the State from exercising its police power over the reservation to protect the "Indians from the intrusion of the white people, and to preserve the peace."[96] In so deciding, the Court expressed its opinion that

> Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of

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[92] *Dibble*, 62 U.S. (21 How.) at 369. It appears that the claims of the non-Indians were obtained from Ogden and Fellows, who had secured title to the Tonawanda reservation in the Treaty with the Seneca, May 20, 1842, 7 Stat. 586, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 537 (1904). The Treaty of 1842 rescinded the Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 502 (1904), which had divested the Seneca Nation of all lands in western New York, and gave the Cattaraugus and Allegany Reservations back to the Senecas in exchange for their relinquishing possession of the Tonawanda and Buffalo Creek Reservations. The Senecas residing on the Tonawanda Reservation refused to vacate the reservation. *See* United States v. National Gypsum Co., 141 F.2d 859 (2d Cir. 1944). However, their possession was secured by the Treaty with the Seneca, Tonawanda Band, Nov. 5, 1857, 11 Stat. 735, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 767 (1904).

[93] *Dibble*, 62 U.S. (21 How.) at 368.

[94] The complaint in *Dibble* was filed by the Tonawandas themselves. *Id.* at 371.

[95] *Id.* This law was the precursor to the current removal statute, N.Y. INDIAN LAW § 8 (McKinney Supp. 1989).

[96] *Dibble*, 62 U.S. (21 How.) at 370. The Court highlighted the fact that, although the Treaty of 1942 divested the Tonawanda Senecas of ownership, the failure of the United States to remove them meant that the New York statute was applicable, since all it required was that the Indians "occupy" the land. Thus, the rights of the relators were not violated because the Treaty did not provide for a right of entry. *Id.* at 371.

> the community is absolute, and has never been surrendered.[97]

The Court went on to state that until the United States took affirmative action to remove the Indians from the reservation, the laws of New York would remain applicable to protect their possession of the land.[98]

The decision, including the broad dicta recognizing an absolute "sovereign" authority of New York over the reservations, has continued to serve to this day as a justification for State authority over the reservations. As recently as 1988, the Second Circuit cited the case to justify the application of municipal laws to Indians living within the city of Salamanca (a city located almost entirely on the Allegany Reservation of the Seneca Nation) as necessary "to preserve the peace of the commonwealth."[99] In addition, according to the leading treatise on federal Indian law, *Dibble* indicates that state laws enacted to benefit Indians are probably not pre-empted, and are otherwise valid unless "they infringe on the purposes of treaties and federal statutes."[100] Nevertheless, despite the conviction with which the *Dibble* Court articulated the absoluteness of State power over the reservations, subsequent decisions holding to the contrary[101] have undermined the scope of the decision, making it questionable precedent.

At the outset, the factual similarity and disparate treatment between *Dibble* and *Worcester* indicate that, in light of the latter's revitalization in *Williams* and subsequent cases, the reasoning supporting *Dibble* has been implicitly rejected. In *Worcester*, the Court rejected the power of Georgia to prohibit non-Indians from entering and residing on the reservation without permission from the governor, an allegedly "protective law," on the grounds that the Cherokees were a "distinct community . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity

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[97] *Id.* at 370.

[98] *Id.* at 371.

[99] John v. City of Salamanca, 845 F.2d 37, 41 (2d Cir. 1988), *cert. denied* 109 S. Ct. 133 (1988).

[100] F. COHEN (1982 ed.), *supra* note 20, at 278–79, 528, 658–59; *see also* Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857) (rejecting an attempt by non-Indians to take forcible possession of Tonawanda land by utilizing the State removal procedure and upholding the superior authority of the United States to deal with the Indians).

[101] *See supra* notes 75–79 and accompanying text.

with treaties, and with the acts of Congress."[102] However, this fundamental principle of *Worcester* is not discussed, or even mentioned, in the *Dibble* opinion. Although the Court could not have known that the *Worcester* reasoning would eventually serve as the theoretical basis for denying state authority in Indian territory,[103] it is surprising that the decision was not even mentioned, given the factual similarities between the two cases and the mere twenty-six years that separate them.

The disparate treatment of the two cases might have been due to the arguments that were presented to the Court. In *Dibble*, New York made several arguments supporting its authority to remove the non-Indians from the reservation based upon New York's unique historical circumstances. Each of these arguments, however, has been rejected either explictly or implictly by subsequent Supreme Court decisions. New York claimed that the Non-intercourse Act of 1802 was not applicable to its actions. That is, since the pre-emptive right to purchase Indian lands was never ceded by New York to the United States pursuant to the ratification of the Constitution, the power of Congress established through the Commerce Clause was not applicable. This argument, resting on the notion that New York was somehow exempt from federal law as the result of its status as one of the thirteen original colonies, was supported by allegations that the Iroquois had been under the protection of New York's laws "from the time of the Revolution."[104] New York has continued to rely on this argument over the years, achieving some measure of success in extending its authority over the reservation.[105] However, in recent years, the federal courts have been particularly hostile to the argument and have thoroughly repudiated it.[106]

In the alternative, the State argued that the consent of the United States to the sale of Iroquois lands in New York indicated that the "small and detached bands or reservations . . . were necessarily placed under the police regulations of the

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[102] Worcester v. Georgia 31 U.S. (6 Pet.) 515, 561 (1832).

[103] Williams v. Lee, 358 U.S. 217, 223 (1959).

[104] *Dibble*, 62 U.S. (21 How.) at 367, 368.

[105] *See* People v. Martin, 326 U.S. 496 (1946); Seneca Nation of Indians v. Christie, 126 N.Y. 122, 27 N.E. 275 (1891), *appeal dismissed* 162 U.S. 283 (1896).

[106] *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 672–74 (1974); Tuscarora Nation of Indians v. Power Authority of New York, 257 F.2d, 885, 888 (2d Cir. 1958); Seneca Nation of Indians v. New York, 397 F. Supp. 685, 687 (W.D.N.Y. 1975); *see also* People *ex rel.* Cusick v. Daly, 212 N.Y. 183, 196–197, 105 N.E. 1048, 1052 (1914).

State."[107] However, with regard to the divestment of tribal power pursuant to treaty, the Court has maintained consistently that Indian nations only relinquished those rights that were specifically enumerated in the language of the treaties, and then only to the United States.[108] The Court has also indicated that regardless of any inaction or lack of supervision by the federal government over a particular tribe, such inaction does not serve to diminish the federal interest in that tribe.[109] Finally, the State challenged the authority of Congress to deny the Tonawandas title to their land, also an argument that has been thoroughly repudiated by the Supreme Court.[110]

In addition to these inherent weaknesses in the *Dibble* reasoning, the decision in *The New York Indians*[111] eight years later severely restricted any authority that might have been given to the State in *Dibble*. The case involved an attempt by New York to construct highways on the Allegany and Cattaraugus Reservations and to impose taxes on the land to finance their construction.[112] In an opinion analyzing the treaties made between the Six Nations and the United States since 1784, the Court held that the statute is "illegal, and void as in conflict with the tribal rights of the Seneca nation as guaranteed to it by treaties with the United States."[113] The Court declared that "these reservations a[re] wholly exempt from State taxation, and . . . the exercise of this authority over them is an unwarrantable inter-

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[107] *Dibble*, 62 U.S. (21 How.) at 368.

[108] *See supra* note 59.

[109] United States v. John, 437 U.S. 634, 652–53 (1978) ("[T]here have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged . . . [but] neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.").

[110] *See Oneida Indian Nation*, 414 U.S. at 667; Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587–88 (1823).

[111] 72 U.S. (5 Wall.) 761 (1866).

[112] Section 8 of the Act of May 4, 1841 provided that the taxes

> may be imposed, assessed, levied, and collected as directed by this act, *notwithstanding the occupation of the said lands, or parts or portions thereof, by the Indians*, or by any other person or persons; and *the failure to extinguish the right of the Indians, or to remove them from the possession thereof, shall not impair the validity of said taxes, or prevent the collection thereof.*

Id. at 764 (emphasis by Court).

The legislature, in passing the statute, relied on the Treaty of 1838, which divested the Seneca Nation of its lands in western New York and granted title to Ogden and Fellows. *See supra* note 92.

[113] *The New York Indians*, 72 U.S. (5 Wall.) at 771–72.

ference, inconsistent with the original title of the Indians, and offensive to their tribal relations."[114]

To the extent that the Court's conclusion in *The New York Indians* differed significantly from that in *Dibble*, it is conceivable that the holding in *The New York Indians* should be interpreted narrowly as simply barring the State from taxing Indians or Indian property. However, the general principles formulated by the Court in defining the rights of Indian governments in general, and state-Indian relations in particular,[115] counsels against such a narrow interpretation. For example, even though the Court at the time believed that title to Seneca land had been divested from the Senecas, the Court recognized that it was a "mistake" to think that "the State, notwithstanding the possession of the Indians, might enter upon the reservations in the exercise of its internal police powers, and deal with them as with any other portion of its territory."[116] In rejecting the State's argument that the statute did "not disturb or affect the right of the Indians in their occupation of the reservations," the Court declared that "the rights of the Indians do not depend on this or any other statutes of the State, but upon treaties, which are the supreme law of the land."[117] Thus, by its use of such broad and conclusive language, the Court gave every indication that any attempt by New York to exercise its authority over the reservations, including its police power, would be unacceptable, and contrary to federal law.

Nonetheless, there exists a legitimate argument that *Dibble* is distinguishable from *The New York Indians* on the ground that the exercise of State authority in the former case was not nearly as invasive as the direct taxation of Indian lands that was rejected in the latter. However, it is highly unlikely that *The New York Indians* does not limit *Dibble*. The Court directly addressed the same question put to the *Dibble* Court; that is, whether N.Y. Indian Law § 8 is a legitimate exercise of State power. The Court concluded that section 8 is "a very free, if not extraordinary, exercise of power over these reservations and the rights of the Indians, so long possessed and so frequently guaranteed by treaties."[118]

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[114] *Id.* at 771.
[115] *See supra* note 86 and accompanying text.
[116] *The New York Indians*, 72 U.S. (5 Wall.) at 767.
[117] *Id.* at 768.
[118] *Id.* at 766.

In addition, a more recent Court, while not formally deciding the issue, expressed its view that although *Dibble* was not overruled by *The New York Indians*, the latter case limited *Dibble* to its holding: "It is apparent that by the later decision in *The New York Indians* . . . the Court did not consider the potential implication of the dictum expressed in *Dibble* applicable in situations where the State's power was exercised other than for the protection of the Indians on their tribal lands."[119]

The foregoing analysis demonstrates that the impact of *Dibble* on current State-Iroquois relations is significantly limited and that pronouncements suggesting that the State has "the power of a sovereign" over the Iroquois are irreconcilable with the fundamental principles of federal Indian law that have been promulgated since *Worcester v. Georgia*. Accordingly, there is no basis for relying on *Dibble* as indicative of a broad based State authority over the reservations.[120] *New York ex rel. Cutler v. Dibble* remains, at best, a severely restricted grant of jurisdiction to New York State in light of the questionable legal basis for its reasoning and the decisions in *Worcester v. Georgia* and *The New York Indians*.

B. *25 U.S.C. § 232*

The enactment of 25 U.S.C. § 232 in 1948 was a monumental event in the history of the relationship between the Iroquois and New York State. By granting almost total criminal jurisdiction over the reservations to New York State, the United States officially granted much of the authority over the Iroquois that New York had previously sought with vigor. But more significantly, the enactment of section 232 was indicative of the national sentiment at the time that the Iroquois, and Indians in general, were incapable of self-governance without assistance from outside sources.

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[119] Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 672 n.7 (1974).

[120] But see John v. City of Salamanca, 845 F.2d 37, 41, *cert. denied*, 109 S. Ct. 133 (1988), where the Second Circuit suggested such broad authority does exist. For a discussion of *John*, see *infra* note 245 and accompanying text.

The general effect of the statute was to grant New York criminal jurisdiction over Iroquois territory to the same extent that State courts had jurisdiction over the rest of the State.[121]

Although section 232 is a clear grant of jurisdiction to the State, the statute is relatively silent in defining the nature of the relationship between the State's criminal jurisdiction and the jurisdiction held by the federal and Indian governments. However, the official language and legislative history of the statute provide some evidence of how Congress intended section 232 to operate vis-à-vis the other governments.[122]

The legislative history indicates that there were two primary reasons for enacting section 232.[123] First, "in certain instances," the Indian governments did not "enforce the laws covering offenses committed by Indians."[124] Second, "the State ha[d] no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians."[125] Thus, Congress enacted the statute intending that "law and order should be established on the reservations when tribal laws for the discipline of its members have broken down."[126] This legislative history, albeit sparce, must necessarily inform any interpretation of the statute as it relates to the definition of jurisdictional authority existing between the federal, Iroquois, and State governments.

In analyzing how the grant of jurisdiction to New York affected the criminal jurisdiction previously held by the federal government, a comparision between an analogous statute, Public Law Number 83-280,[127] and section 232 is particularly instruc-

[121] The statute, 25 U.S.C. § 232 (1988), provides:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State:
>
> *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, [of] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

Act of July 2, 1948, ch. 809, 62 Stat. 1224.

[122] H.R. REP. No. 2355, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. CODE CONG. SERV. 2284.

[123] *See supra* notes 50–53 and accompanying text for the suggestion that the State was also seeking to recoup authority that it had previously exercised.

[124] H.R. REP. No. 2355, *supra* note 122.

[125] *Id.*

[126] *Id.*

[127] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588–90 (codified as amended in various sections of 18, 28 U.S.C.; main provisions at 18 U.S.C. § 1162 (1988) (criminal) and 28 U.S.C. § 1360 (1982 & Supp. V 1987) (civil)).

tive. Section 232 was the fourth time that Congress had acted to allow a state to exercise criminal and/or civil jurisdiction within Indian territory.[128] Rather than continuing the trend of piecemeal grants of jurisdiction to particular states, Congress enacted Public Law 280. In addition to explicitly conferring total criminal and partial civil jurisdiction to six states, Public Law 280 provided a mechanism whereby any state that desired jurisdiction over the Indian territory within its borders could obtain it simply through unilateral legislative action.[129]

Given the similarity of the language and purpose of section 232 and Public Law 280, courts have often assumed that they should be read as granting the same measure of jurisdictional authority to the states affected.[130] However, the text of both statutes and their legislative histories clearly indicate that the grant of jurisdiction under the criminal section of Public Law 280, 18 U.S.C. § 1162, is more expansive than the grant of

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[128] *See* Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243 (1988)) (transfer of partial criminal jurisdiction over all reservations in Kansas); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (transfer of criminal jurisdiction over the Sac and Fox reservations in Iowa); Act of May 31, 1946, ch. 279, 60 Stat. 229 (transfer of criminal jurisdiction over Devils Lake Reservation in North Dakota).

[129] Section 1162 of Public Law 280 provides:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> [Alaska (with exceptions), California, Minnesota (with exception), Nebraska, Oregon (with exception), and Wisconsin]
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.
>
> (c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

This scheme was amended by the Act of April 11, 1968, Pub. L. No. 90-284, tit. IV, §§ 401–403, 82 Stat. 78 (codifed as amended at 25 U.S.C. §§ 1321–1326 (1988)), which, *inter alia*, imposed the requirement of Indian consent prior to any future assertions of jurisdiction. 25 U.S.C. § 1321(a) (1988).

[130] *See, e.g., infra* note 152.

jurisdiction under section 232. Based on this distinction, the conclusion can be drawn that Congress did not intend to grant New York exclusive criminal jurisdiction over Iroquois territory, but rather anticipated, or at least provided for, a role for the federal and tribal governments in reservation law enforcement.

The fundamental distinction between the two statutes lies in the fact that section 1162 of Public Law 280 explictly rescinds the jurisdiction of the United States under the Indian Major Crimes Act[131] and the General Crimes Act.[132] Section 232 contains no such explicit divestment, and, accordingly, it must be presumed that federal jurisdiction is not divested under this statute.[133] This distinction is critical, because the retention of federal criminal jurisdiction demonstrates the existence of a federal role in reservation law enforcement, a proposition that has been questioned to some degree. To the extent that this may lead to a legal obligation on the part of the federal government to assist in the development of Indian justice systems, or even to coordinate law enforcement efforts with the State, the Six Nations are in a significantly stronger jurisdictional position than those Indian nations subject to Public Law 280. Although the language of Public Law 280 indicates that Congress intended to supplant the federal obligation for criminal law enforcement in Indian territory with state obligation, the statutory language of section 232 clearly indicates that Congress did not intend the same result with regard to the State obligation to the Iroquois.

The legislative history of section 232 not only supports this conclusion but makes explicit that State criminal jurisdiction was only intended to "fill the gap." To wit, the grant of criminal jurisdiction to the State

> contains no mandatory provisions whereby the State is bound to enforce the criminal laws in all instances of crime, but is permissory [sic] in nature and will establish a uniformity of jurisdiction in the State of New York which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory.[134]

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[131] 18 U.S.C. §§ 1153, 3242 (1988).
[132] 18 U.S.C. § 1152 (1988); 18 U.S.C. § 1162(c); *see supra* note 129.
[133] For a detailed examination of this question, see *infra* notes 170–190 and accompanying text.
[134] H.R. REP. No. 2355, *supra* note 122.

By describing the jurisdictional grant under section 232 as "permissory" [sic], the language indicates that Congress intended to create a system of concurrent criminal jurisdiction among the New York, federal, and Iroquois governments over some matters. Although the absence of such an intent in Public Law 280 should not be construed to deny the ability of the Indian nations located in those states to exercise criminal jurisdiction, the legislative history of section 232 clearly supports the proposition that Congress did not intend to grant exclusive criminal jurisdiction over Iroquois territory to the State.[135]

This conclusion is supported by the only federal court decision to date that has dealt with the question. *United States v. Burns*[136] involved an attempt by several Mohawks, alleged to have conducted gambling operations in Mohawk territory in violation of State and federal laws, to bar federal subject matter jurisdiction. The defendants argued that section 232 constituted an exclusive grant of general criminal jurisdiction to the State. The court rejected this argument, finding that the statute did not explicitly mandate the extent of jurisdiction to be assumed by New York. In addition, the court found that the statutory language intended that "the laws of the state apply in Indian country just as they do in any other part of the state," which "certainly does not preclude federal jurisdiction."[137] Finally, since any repeal of federal jurisdiction would have to be implied, rather than clearly stated,[138] the court refused to find that federal jurisdiction was in any way diminished by the granting of jurisdiction to New York.[139]

Another issue pertaining to the scope of authority granted to New York is based on the distinction between section 1162 and section 232. Section 1162 granted jurisdiction over the reservations to the "States and Territories" in which they were located "to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory."[140] In contrast, section 232 granted jurisidiction to the "State of New York . . . to the same exent as *the courts* of the State have jurisdiction over offenses committed elsewhere

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[135] *Id.*
[136] 725 F. Supp. 116 (N.D.N.Y. 1989).
[137] *Id.* at 121.
[138] *Id.* at 122.
[139] *Id.* at 121–22.
[140] 18 U.S.C. § 1162(a) (1988).

within the State."[141] Although subtle, this distinction is significant in light of the difference between the full police power of the State and the power held by the State courts. To the extent that full police powers were not granted to New York under section 232, there is a substantive limitation on the grant of jurisdiction to the State. The language of the statute indicates that the State is not empowered to, *inter alia*, conduct on-going investigations, routine patrols, or engage in other preventive criminal justice which does not require judicial involvement. And in light of the canon of construction that requires interpretation in favor of retained tribal rights,[142] section 232 mandates that the State limit its on-reservation conduct to responding to specific instances of crime.[143]

Questions may also be raised as to whether the enactment of section 232 was an unconstitutional abrogation of rights guaranteed by treaty. Even though Congress has plenary authority over Indian affairs,[144] the Supreme Court has determined that "plenary" does not mean "absolute" in the sense that Congress may act without constitutional restriction or judicial review.[145] Thus, in order to protect the inherent sovereignty of Indian nations which has not been relinquished to the United States by treaty, the Court has required that Congress demonstrate a "clear and plain" intent to abrogate Indian treaty rights.[146] The

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[141] 25 U.S.C. § 232 (1988) (emphasis added).

[142] *See supra* note 86.

[143] The legislative history indicates that the Undersecretary of the Interior recommended that "the words 'the courts of' . . . be omitted [from the draft bill] so as to confer jurisdiction on the State of New York instead of limiting it to the courts." H.R. REP. No. 2355, *supra* note 122, at 2287. There is some evidence that the committee deliberately failed to accommodate the suggestion since the bill was eventually changed to include other recommendations of the Undersecretary that followed in the same sentence of his letter.

[144] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[145] F.COHEN (1982 ed.), *supra* note 20, at 217–20 (citing Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83–85 (1977), and Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899)).

[146] *Id.* at 222–24 (citing as recent examples, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979); Menominee Tribe v. United States, 391 U.S. 404 (1968)); *but see* Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 478 n.22 (1979), where the Court rejected respondent's argument that a treaty right to self-government could not be abrogated by the enactment of Pub. L. No. 83-280 absent the specific intent of Congress to do so:

> To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect . . . . The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280.

rights at issue here pertain to the jurisdictional agreement made between the Six Nations and the United States in the Treaties of 1789 and 1794.

Prior to *Burns*, two lower New York courts passed upon the constitutionality of section 232. In *People v. Cook*,[147] the Onondaga Council of Chiefs, pursuant to its own duly promulgated tribal law,[148] attempted to remove non-Indians who had been living on Onondaga territory.[149] In upholding the constitutionality of the statute, the court relied upon the classic federal cases[150] legitimating the plenary power of Congress to, in this case, "lawfully delegate[] a portion of its control over the New York Indians to the State of New York"[151] by statute rather than through bilateral treaty.[152] The court concluded that section 232 was not intended to destroy self-government, but to "put to rest the conflict between the Federal and state government by a clear-cut delineation of state and Federal power with respect to a specific area of the law."[153]

However, to the extent that the court held that section 232 was a "delegation" of "a portion" of the federal government's jurisdiction over the Iroquois reservations to New York, it is incorrect, since nothing in the language of the statute suggests

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[147] 81 Misc. 2d 235, 365 N.Y.S.2d 611 (Onon. Co. Ct. 1975).

[148] Use of the term "tribal law" will refer to the domestic law of Indian nations. In contrast, use of the term "Indian law" will refer to the federal or State law applicable to Indians.

[149] In March 1974, the Council of Chiefs enacted a law barring all non-Indians from living on the reservation, regardless of their tenure or family affiliations. The Chiefs had initially petitioned the United States Justice Department to remove the non-Indians, which deferred the matter to the Onondaga County District Attorney's Office for proceedings pursuant to N.Y. INDIAN LAW § 8 (McKinney 1950 & Supp. 1990). Refusing to petition the District Attorney directly, the Chiefs and their supporters attempted to remove the non-Indians themselves, which ultimately led to the indictment at issue. *Cook*, 365 N.Y.S.2d at 615.

[150] *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); United States v. Kagama, 118 U.S. 375 (1886).

[151] *Cook*, 365 N.Y.S.2d at 618–19.

[152] The court also relied on a case upholding the application of a county gambling ordinance over a reservation in a Public Law 280 state. *Id.* at 619 (quoting Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), *aff'd*, 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974)).

The *Cook* court was relying upon a slightly misguided understanding of the tribal-state relationship expressed in *Rincon*: "There is no doubt that a residual sovereignty remains in Indian tribes even in those states where Public Law 280 operates. There is nothing in policy or law, however, which indicates that this limited self government inherent in the Indian tribes may rise to challenge State law . . . ." *Id.* (citing *Rincon*, 324 F. Supp. at 378). However, it is now settled law that Public Law 280 did not authorize general regulatory authority to states and localities. *See infra* Part III(C)(2).

[153] *Cook*, 365 N.Y.S.2d at 619.

that federal jurisdiction was to be divested.[154] In addition, by focusing on the authority of Congress to regulate Indian affairs, the court failed to recognize the jurisdictional relationship provided for in the treaties between the Six Nations and the United States. Failure to consider these treaties is fatal to a conclusive determination that section 232 is a constitutional enactment, since any jurisdictional relationship provided for in the treaties can only be abrogated if Congress acts with a "clear and plain" intent to do so.[155]

In *People v. Boots*,[156] the defendants moved to dismiss criminal charges on the grounds that section 232 was unconstitutional because Congress did not specifically abrogate their pre-existing treaty rights. However, the court summarily dispensed with the argument by citing a footnote in *Washington v. Yakima Indian Nation*,[157] to the effect that if Public Law 280 was a valid exercise of congressional power in the face of federal treaties with the Yakimas, then section 232 must also be valid since two major treaties with the Iroquois existed when it was enacted. In *Burns*, the defendants argued that the jurisdictional provisions of the 1789 Treaty served as the limit on the authority ceded to the United States, and also New York, with regard to criminal

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[154] *Accord* United States v. Burns, 725 F. Supp. 116 (1989); *see supra* notes 133–135 and accompanying text.

[155] *See, e.g.*, United States v. Dion, 476 U.S. 734, 738 (1986); Menominee Tribe v. United States, 391 U.S. 404, 412 (1968); United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 353 (1941).

To demonstrate the point, the Treaty of 1789, Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 23 (1904), provides that state courts will have jurisdiction over robbery and murder cases involving both Indians and non-Indians, where the offense occurs within a particular state. *Id.* at 25. In addition, the Six Nations agreed to extradite any of its citizens who committed a robbery or murder in a state and later returned to Indian territory. *Id.* Since the Treaty provides that jurisidiction is based on geography, *id.* at 23–24, the implication is that the Iroquois nations retain exclusive jurisdiction over all offenses committed within their territory, regardless of whether the crime was committed by an Indian or a non-Indian.

A more comprehensive jurisdictional relationship was outlined in the Treaty of 1794, Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 34 (1904), which provides a mechanism whereby the party injured by a citizen of one government can petition the government of the perpetrator for redress. *Id.* at 36 (Article VII). However, a significant clause in Article VII specifies that such an arrangement would be maintained "until the legislature (or great council) of the United States shall make other equitable provision for the purpose." *Id.* Notwithstanding the provision in Article VII of the 1794 Treaty reserving the right of Congress to alter the jurisdictional arrangement, it remains an open question whether granting jurisdiction over the Six Nations to New York State was equitable.

[156] 106 Misc. 2d 522, 434 N.Y.S.2d 850, 852 (Frank. Co. Ct. 1980).

[157] *Boots*, 434 N.Y.S.2d 850, 852 (citing *Yakima*, 439 U.S. 463, 478 n.22 (1979)); *supra* note 146.

offenses. The district court reached the same result as the *Boots* court. That is, the court dismissed defendants' constitutional argument, citing the same footnote of *Yakima*.[158]

The State court in *Boots* and the federal court in *Burns*, however, failed to consider that the *Yakima* Court was dealing with a "jurisdictional law of *general* applicability,"[159] in which Congress could not fully anticipate all of the possible treaty obstacles that could arise in a particular state's assumption of jurisdiction. In section 232, on the other hand, Congress was dealing with only one state, New York. In addition, the treaties made with the Six Nations were distinctive and arguably more favorable to the Six Nations, since the United States entered into them not as an act of conquest but more as an act necessary for the survival of the foundling nation. To this extent, the requirement that Congress be explicit in abrogating the jurisdictional relationship provided for in the Treaties of 1789 and 1794 is not unreasonable.[160] Given these previous decisions, it is probable that section 232 is constitutional.[161] Such a conclusion, however, is not invulnerable to attack, given the foregoing analysis and the fact that the Supreme Court has never ruled on the issue.

As has already been discussed,[162] the language and legislative history of section 232 do not indicate a congressional intent to relinquish federal criminal jurisdiction over Iroquois territory. The United States obtains criminal jurisdiction over Indian territory through the Indian Major Crimes Act (IMCA),[163] a statute which confers jurisdiction to the federal courts over fourteen specifically enumerated offenses, the General Crimes Act

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[158] *Burns*, 725 F. Supp. at 120 (citing *Yakima*, 439 U.S. at 478 n.22).

[159] *Yakima*, 439 U.S. at 478 n.22 (emphasis added).

[160] Congress did, however, explicitly provide for the protection of hunting and fishing rights. *See* H.R. REP. No. 2355, *supra* note 122.

[161] *But see* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 501 (1946) ("Neither the 1794 Treaty nor any other requires a holding that offenses by non-Indians against non-Indians disturbing the peace and order of Salamanca are beyond New York's power to punish.").

[162] *See supra* note 133 and accompanying text.

[163] 18 U.S.C. §§ 1153, 3242 (1988) (covering murder, manslaughter, kidnapping, maiming, rape, adultery with a female under 16, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larcency).

There is no indication that the IMCA was intended to serve as the exclusive basis for federal criminal jurisdiction. *See generally* F.COHEN (1982 ed.), *supra* note 20, at 302–04. For a listing of a number of federal laws conferring criminal jurisdiction over Indians, see *id.* at 286 n.46.

(GCA),[164] a statute that applies "federal enclave" criminal laws to Indian territory,[165] and specific laws addressed to offenses in Indian Country.[166] The IMCA covers offenses committed by Indians in Indian country, as well as offenses committed by non-Indians against Indians. However, the Supreme Court has determined that offenses committed by non-Indians against other non-Indians in Indian territory are outside the jurisdiction of both the federal[167] and Indian governments.[168] In addition, since the IMCA relates exclusively to the authority of the federal government, it is likely that the IMCA does not pre-empt criminal jurisdiction exercised by Indian governments over their own citizens.[169]

Generally, absent a contrary indication from Congress, the existence of federal criminal legislation such as the IMCA entirely pre-empts state jurisdiction over similar offenses occurring on the reservation.[170] However, such is not the case when the object of the federal legislation is to grant jurisdictional authority to a state. Unlike Public Law 280, which explicitly withdrew federal jurisdiction, section 232 implicitly provides for the retention of federal jurisdiction. The question arises as to what degree, if any, federal criminal jurisdiction was affected by the grant of authority to the State.

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[164] 18 U.S.C. § 1152 (1988). The statute contains a significant exemption for crimes committed "by one Indian against the person or property of another Indian" and for crimes committed by an Indian which have been punished in accordance with tribal law. *See generally* F.COHEN (1982 ed.), *supra* note 20, at 287–300.

[165] *See* United States v. Blue, 722 F.2d 383 (8th Cir. 1983) which stated that

> 18 U.S.C. § 1152 is not a predicate for general federal jurisdiction in Indian country. Rather the scope of section 1152 is limited to the applicability or nonapplicability of federal enclave laws, those laws passed by the federal government in exercise of its police powers over federal property and now defined in the United States Code in terms of "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7.

Id. at 385 (quoting United States v. White, 508 F.2d 453, 454–55 (8th Cir. 1974)).

[166] *See, e.g.*, 18 U.S.C. § 1166 (1988) (prohibiting advancing or profiting from gambling activity); 18 U.S.C. § 1955 (1988) (conducting an illegal gambling business); *see* liquor laws, such as 18 U.S.C. §§ 1154, 1156, 1161, 3055, 3113, 3488, 3618–3619) (1988).

[167] New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Donnelly v. United States, 228 U.S. 243 (1913), *reh'g denied*, 228 U.S. 708 (1913) (limiting United States v. McBratney, 104 U.S. 621 (1882) (exception to the GCA for crimes by non-Indians against other non-Indians)); *see also* F.COHEN (1982 ed.), *supra* note 20, at 298.

[168] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[169] The Supreme Court has not decided this issue. *See* United States v. John, 437 U.S. 634, 651 n.21 (1978). For the argument that the IMCA probably does not affect tribal criminal jurisdiction, see F.COHEN (1982 ed.), *supra* note 20, at 337–41.

[170] *John*, 437 U.S. at 651 (IMCA pre-empts state jurisdiction). The Supreme Court has intimated, but not decided, that state jurisdiction is pre-empted by the IMCA. *See* F.COHEN (1982 ed.), *supra* note 20, at 353 n.42 (citing Williams v. Lee, 358 U.S. 217, 220 n.5 (1959)).

This issue was discussed in *People v. Edwards*,[171] where the court focused on whether section 232 completely divested the federal government of criminal jurisdiction over the New York reservations under the IMCA. The case involved the prosecution by the Onondaga District Attorney of an Indian who was charged with the murder of a non-Indian on the Onondaga Reservation. The defendant argued that New York did not have jurisdiction to prosecute Indians for a murder committed on the reservation because jurisdiction for that crime was exclusively retained by the United States under the IMCA.

In a careful analysis focusing on the legislative history of section 232, the court first concluded that the United States had not been divested of IMCA jurisdiction by the enactment of section 232.[172] Relying on basic canons of statutory construction, the court held that it was required to give effect to both statutes, since both dealt with the same subject matter and because of the presumption that subsequent legislation generally does not effectuate an implicit repeal of prior law.[173] The court relied on the legislative intent behind section 232 as the "primary and all-important factor in construing its true meaning."[174] However, the court concluded that Congress intended to give New York criminal jurisdiction only in areas "*not expressly claimed by the Federal Government*."[175]

The court cited several reasons for its decision. One was that in its memorial to Congress requesting the legislation, the New York legislature specifically requested jurisdiction only over "those matters" which were not already under the jurisdiction of the federal government.[176] Another was that the Undersecretary of the Interior had made a recommendation on the proposed legislation to the same effect.[177] And finally, the court viewed as dispositive the fact that Congress had had two opportunities to repeal explicitly section 1153 jurisiction, but had declined to do so: the first, at the time of passage, and the

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[171] 104 Misc. 2d 305, 428 N.Y.S.2d 406 (Onon. Co. Ct.), *rev'd*, 78 A.D.2d 582, 432 N.Y.S.2d 567 (4th Dep't 1980).

[172] *Edwards*, 428 N.Y.S.2d at 410.

[173] *Id.* at 409–10.

[174] *Id.* at 410; *see also* United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 55 (1942) ("Where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole,' we may follow the purpose of the statute rather than the literal words.") (citation omitted).

[175] *Edwards*, 428 N.Y.S.2d at 410 (emphasis in original).

[176] *Id.*; H.R. REP. No. 2355, *supra* note 122, at 2285.

[177] *Edwards*, 428 N.Y.S.2d at 411; H.R. REP. No. 2355, *supra* note 122, at 2287.

second, five years later, when Public Law 280 was enacted.[178] In addition, it found unpersuasive as dicta the argument that previous Supreme Court decisions mentioning section 232 had acknowledged an exclusive transfer of federal jurisdiction.[179] Although the court highlighted the fact that Congress viewed section 232 as similar to the legislation which granted jurisdiction to Kansas eight years earlier, it minimized the fact that the Kansas bill had explicitly reserved IMCA jurisdiction.[180] Based on this analysis, the court concluded that the IMCA pre-empted state jurisdiction over a murder on the reservation, and that the indictment should be dismissed.[181]

The decision of the court was reversed on appeal.[182] The appeals court held that it was "clear" that the lower court had erred in dismissing the indictment, since "the power to assert jurisdiction in such cases was granted to New York in 1948 by the enactment of section 232 of title 25 of the United States Code."[183] The court relied on several cases purporting to recognize an absolute grant of criminal jurisdiction to New York under section 232, although each of the cases was merely summarizing the effect of the statutes.[184] However, in narrowly ruling on the issue of whether New York was able to prosecute the case, the court expressed no opinion as to what extent, if any, the criminal jurisdiction of the federal government was affected.

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[178] *Edwards*, 428 N.Y.S.2d at 411; Public Law 280 originally contained an explicit waiver of federal criminal jurisdiction under the GCA and IMCA. *See* 18 U.S.C. § 1162(c) (1988).

[179] *Edwards*, 428 N.Y.S.2d at 411 (citing Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 679 (1974)); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 471 n.8 (1979).

[180] *Edwards*, 428 N.Y.S.2d at 411; H.R. REP. No. 2355, *supra* note 122.

[181] *Edwards*, 428 N.Y.S.2d at 411–12.

[182] People v. Edwards, 78 A.D.2d 582, 432 N.Y.S.2d 567 (4th Dep't 1980).

[183] *Id.* at 568.

[184] *Id.* (citing *Yakima Indian Nation*, 439 U.S. at 471; *Oneida Indian Nation*, 414 U.S. at 679; Organized Village of Kake v. Egan, 369 U.S. 60, 73–74 (1962) (highlighting §§ 232 and 233 as instances where "States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as well"); Williams v. Lee, 358 U.S. 217, 221 (1959) (§§ 232 and 233 as "granting broad civil and criminal jurisdiction to New York"); United States v. Devonian Gas & Oil Co., 424 F.2d. 464, 468 (2d Cir. 1970) (where enactment of §§ 232 and 233 "relinquished the criminal and civil jurisdiction of the United States over New York Indians"); Anderson v. Gladden, 188 F. Supp. 666, 677 (D. Oregon 1960) ("Congress surrendered to the state of New York complete jurisdiction over all crimes committed on Indian Reservations"), *aff'd* 293 F.2d 463 (9th Cir. 1961); and People v. Cook, 81 Misc. 2d 235, 240–41, 365 N.Y.S.2d 611, 617–18 (Onon. Co. Ct. 1975) ("Congress . . . granted to the State of New York criminal jurisdiction over New York Indian Reservations.").

In light of the decision in *United States v. Burns* and the text and legislative history of section 232 and Public Law 280, there is little question that the United States retains full criminal jurisdiction over Iroquois lands pursuant to the IMCA, the GCA, and any other specific federal provision barring criminal activity in Indian country.[185]

Two additional considerations support the conclusion that the United States retains criminal jurisdiction over the Iroquois reservations. First, since these two statutes deal specifically with Indian affairs, any doubts concerning their interpretation must be liberally construed in favor of the Indians,[186] which in this case favors retention of federal jurisdiction. Second, in the absence of explicit language repealing the application of federal law over Iroquois territory, section 232 must be interpreted to give effect to federal jurisdiction, while still preserving the "sense and purpose" of both statutes.[187]

Such an interpretation is both possible and logically required, since the two statutes, read together, create a system of concurrent state-federal-tribal jurisdiction over Iroquois territory.[188]

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[185] However, there is some evidence that Congress may have intended to alter federal criminal jurisdiction over Iroquois territory to the extent it failed explicitly to retain jurisdiction as it previously had done in granting jurisdiction to Kansas, Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (1988)), North Dakota, Act of May 31, 1946, ch. 279, 60 Stat. 229 (criminal jurisdiction over the Devils Lake Reservation only), and Iowa, Act of June 30, 1948, ch. 759, 62 Stat. 1161 (criminal jurisdiction over the Sac and Fox Indian Reservation only, "Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."). Congress considered amending section 232 to include a provision that would have explicitly preserved such jurisdiction. In a memorial apparently ignored by Congress, New York sought to limit its assumption of criminal jurisdiction to those areas not already subject to federal jurisdiction. H.R. REP. No. 2355, *supra* note 122, at 2285. Similarly, in enacting the bill, Congress also considered, but did not follow, the advice of the Undersecretary of the Interior to include a proviso to that effect in the bill. *Id.* at 2286–87 (report of Mar. 1, 1948 from Oscar Chapman, Undersecretary of the Interior). The Undersecretary recommended several amendments, none of which were enacted except for two technical changes. Finally, it is not irrelevant that the Iowa jurisdiction bill, which contained a proviso explicitly retaining federal jurisdiction, was enacted only two days prior to section 232. Although not dispositive, these facts tend to support the conclusion that Congress may have sought to relinquish some measure of federal jurisdiction over Iroquois territory.

[186] Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Antoine v. Washington, 420 U.S. 194, 199–200 (1975); *see supra* note 86 and accompanying text.

[187] Watt v. Alaska, 451 U.S. 259, 267 (1981) (where two statutes are not in irreconcilable conflict, "'repeals by implication are not favored,' Morton v. Mancari, 417 U.S. 535, 549 (1974) . . . . The intention of the legislature to repeal must be 'clear and manifest.' [citation omitted] We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.").

[188] *But see* United States v. John, 437 U.S. 634, 651 (1978) ("Section 1153 ordinarily is pre-emptive of state jurisdiction when it applies."). *John* can be distinguished on the

Under such a scheme, the federal government retains jurisdiction concurrent with that of the State over all federally defined criminal offenses, such as those enumerated in the IMCA and the GCA, including all of the offenses that are defined by State law.[189] Accordingly, the nonenumerated crimes under the IMCA committed by an Indian against another Indian, which would normally be reserved exclusively to tribal authorities under the GCA, would be subject to concurrent jurisdiction with New York State where such offenses are governed by State law. An interpretation creating a system of concurrent state-federal-tribal jurisdiction is certainly consistent with the legislative purpose of section 232, since such a scheme allows the State "to protect the Indians from crimes perpetrated by or against Indians" to the extent that the "tribes do not enforce the laws covering offenses committed by Indians."[190] A final question arising out of the enactment of section 232 is to what extent, if any, the grant of jurisdiction to New York divested the Iroquois governments of jurisdiction to enforce tribal laws and punish tribal members. The Conference Committee Report explicitly addressed this question by providing that it is not mandatory for the State to enforce the criminal law, but only to exercise jurisdiction "when deemed necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory."[191] Such language, combined with the presumption in favor of retained tribal rights absent explicit Congressional divestiture, suggests that the Six Nations retain complete inherent criminal jurisdiction over offenses committed on the reservation by Indians.[192] Although New York retains the power to determine when tribal process is "unsatisfactory," the Committee language does seem to limit the impact of this determination. Thus, it is unlikely that an affirmative State attempt to bar an exercise of criminal jurisdiction by an Iroquois government over its own

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grounds that, unlike *John*, sections 1153 and 232 are *in pari materia* in New York and should be construed together. The issue does not exist in Public Law 280 jurisdictions, since section 1153 jurisdiction was explicitly withdrawn.

[189] *See, e.g.*, Assimilative Crimes Act, 18 U.S.C. § 13 (1988), and the crimes of burglary and incest under the IMCA.

[190] H.R. REP. NO. 2355, *supra* note 122.

[191] *Id.*

[192] Limits on the criminal jurisdiction of an Indian government over its own citizens were imposed by Congress in the 1968 Indian Civil Rights Act. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (codified at 25 U.S.C. §§ 1301–1303 (1988)).

However, all remedies except for habeas corpus review are available only from tribal forums. *See also* F. COHEN (1982 ed.), *supra* note 20, at 666–70.

citizens would be upheld since lawful State action in such an instance depends upon sufficient evidence of ineffective tribal law enforcement.

Although it can be concluded that concurrent criminal jurisdiction exists between both the State and Iroquois governments and between the State and federal governments, as a practical matter, New York exercises complete control over law enforcement in Iroquois territory. While New York recognizes the political ramifications associated with its exercise of jurisdiction,[193] it nonetheless dictates the terms by which its laws are enforced.[194] However, there does appear to be a major impediment to the exercise of section 232 jurisdiction by local law enforcement since the statutory language only grants jurisdiction to the "State of New York," and not to any of its political subdivisions. Although the statute provides that "New York shall have jurisdiction . . . to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State,"[195] it likely refers only to those State laws defining criminal activity and not to the general laws of the State that define delegations of police power to local officials.[196] Accordingly, under section 232, and in light of the canons of construction favoring retained tribal rights, the exercise of criminal jurisdiction in Iroquois territory by any official other than State law enforcement officials is an unauthorized

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[193] *See supra* note 1, at 25 ("The traditional governments claim that this Act [§ 232] is a violation of the 1794 Treaty of Canandaigua and, therefore, of no force and effect. In recent years, the elective governments have generally supported State law enforcement efforts on their reservations.").

[194] *Id.* at 25–26. As described by the State, its "system" of law enforcement on the reservations consists of:

> Ad hoc arrangements [that] have been made with traditional tribal governments with respect to keeping the peace and arresting persons accused of crimes who reside on the reservations. Generally, police notify a designated chief before entering a reservation. In some cases, the chiefs have made an accused criminal available to authorities for arrest.
>
> The State Police seek to cooperate with tribal officials in conducting activities on reservations. However, there have been instances of State Police, county sheriffs or local police entering reservations without prior consultation. This occurs, for example, when circumstances require immediate action. This situation has arisen several times on the Tuscarora Reservation located in Niagara County . . . .

[195] 25 U.S.C. § 232 (1988).

[196] 25 N.Y. JUR. 2D *Counties, Towns, and Municipal Corporations* § 218 (1982) ("The residual 'police power' reposes in the state, not in its political subdivisions, and in presuming to exercise such power, a municipality must first show a delegation of such power from the state."); *see also* 20 N.Y. JUR 2D *Constitutional Law* § 200 (1982 & Supp. 1989).

intrusion into the sovereign authority retained by the Iroquois governments.[197]

C. *25 U.S.C. § 233*[198]

Whereas section 232 was enacted primarily to combat lawlessness on the reservations, the primary motivation for allowing

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[197] However, contrary to the statutory language, the New York Attorney General has concluded that "[a] sheriff may provide routine road patrol service within Indian reservations for the purpose of enforcing the State's criminal law as authorized by the United States." 82 Op. Att'y Gen. 91 (1982). The rationale for this decision was that

> [s]ince the United States has granted jurisdiction over offenses committed on an Indian reservation, it follows that the agency charged with enforcing the criminal law of the State in a geographical area which includes the Indian reservation has the power to police the area in the same manner that the agency polices the rest of the geographical area.

Id. at 92.

Such an interpretation is incorrect in light of the foregoing analysis. In addition, history indicates that such a situation is not always deniable, since exercises of authority by local governments over Indian territory have often been quite damaging to Indian communities. This is so not only because Indian self-governance is undermined by creating a situation of dependency, but also because the potential for discriminatory treatment increases significantly. Moreover, the fact that section 232 only granted jurisdiction to the State "to the same extent as the *courts* of the State have jurisdiction over offenses committed elsewhere within the State" (emphasis added) necessarily implies that the State may not delegate its general police power to local officals even if such a delegation is contemplated under the jurisdictional grant to the State. Rather, it would appear that the power of the courts, *i.e.*, the power to prosecute specific instances of misconduct, is delegable.

[198] 25 U.S.C. § 233 (1988) Section 233 provides:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State:
>
> *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts:
>
> *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom:
>
> *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal

civil suits involving Indians to be heard in New York courts was to "lead to the gradual assimilation of the Indian population into the American way of life" by "the gradual but final complete removal of governmental supervision and control."[199] On its face, section 233 purports to make a simple change in the jurisdictional structure by allowing reservation Indians both to sue and be sued in State court. However, save for the rather explicit provisos, the statute does not clearly delineate the scope of the grant of civil jurisdiction to New York State. This Part attempts to define the scope of the statute and the boundaries of federal, Iroquois, and State jurisdiction based upon the federal Indian law principles developed by the Supreme Court in recent years and in light of the current federal policy strongly disfavoring the assimilation of Indians.[200]

1. Access to the New York State Courts

Although section 233 was enacted to hasten the assimilation of the Iroquois,[201] the language of the statute and the legislative intent indicate that Congress merely intended to open up the New York State courts to the Iroquois and to create a system of concurrent civil jurisdiction between the New York and Indian courts over claims brought by and against Indians. To this extent, it cannot be overlooked that the State was also attempt-

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> or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land:
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> *And provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands, within any Indian reservation in the State of New York:
>
> *Provided further,* That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

[199] H.R. REP. No. 2720, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. CODE CONG. SERV. 3731, 3732. The statute certainly has the protective effect of providing an adequate forum for the redress of wrongs, particularly those committed by non-Indians who later flee the reservation.

[200] *See supra* note 54. Since the statute does not interfere with the ability of Indians or Indian governments to bring suit in federal court, issues pertaining to federal jurisdiction need not be discussed.

[201] H.R. REP. No. 2720, *supra* note 199.

ing to recoup authority which it once exercised prior to the decision in *United States v. Forness*.[202]

The terms of the statute indicate such a limited transfer of jurisdiction:

> The *courts* of the State of New York under the laws of such State *shall have jurisdiction in civil actions* and proceedings between Indians or between one or more Indians and any other persons *to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings*, as now or hereafter defined by the laws of such State . . . .[203]

Under the established canons of statutory construction, it is preferable, when possible, to read the language of a statute as effecting the legislature's intent in passing the law.[204] In comparison with section 232's transfer of criminal jurisdiction to the "State of New York," it is not insignificant that civil jurisdiction was granted only to the New York State "courts." Had Congress intended to do more than open up the State courts to Indians, it likely would have done so by broadening the scope of the language as it did in section 232. In addition, the legislative history is replete with indications that the only change that Congress intended by the enactment of section 233 was simply to allow Indians access to State courts.

As might be concluded by focusing exclusively on the text of the statute, the enumeration of certain rights to be afforded protection does not imply that Congress authorized State jurisdiction in areas not explicitly mentioned in the statute.[205] A close reading of the statute indicates that Congress did not directly intend to impede Indian self-government by allowing Indians access to State courts—a conceivable objective given the statute's professed purpose of facilitating assimilation. For exam-

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[202] 125 F.2d 928 (2d Cir. 1942). *See supra* notes 50–53 and accompanying text.

[203] 25 U.S.C. § 233 (1988) (emphasis added).

[204] American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' [citation omitted] and we must assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' [citation omitted] Thus, 'absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"); *see also* Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning.").

[205] In Bryan v. Itasca County, 426 U.S. 373, 378–79 (1976), where the Court interpreted the analogous Public Law 280, the Court rejected the argument that the exceptions to state jurisdiction listed in the statute would have no meaning unless the statute conferred through silence a general right to tax. *See infra* note 217. Such a reading would also be inconsistent with the canon of construction favoring retained tribal rights. *See supra* note 86.

ple, the first proviso, authorizing the retention of "tribal laws and customs," was originally drafted to limit the time period in which those laws could be preserved to one year after enactment.[206] The Conference Committee that approved the final bill not only agreed to extend this period to two years,[207] it also provided that tribal laws and customs were to be recognized and given effect even after this period, so long as they were proven to the satisfaction of the court.[208] The third and fourth provisos, barring the taxation and alienation of tribal lands by the State,[209] also demonstrate congressional intent to maintain the integrity of Iroquois self-government by placing an explicit limit on State authority. Thus, despite its assimilationist underpinning, the statute indicates little intention by Congress to undermine directly the internal operation of Iroquois governance or threaten tribal existence.

However, since there is no federal court decision to support this textual reading of the statute, the interpretation of an analogous statute, Public Law 280, provides a valuable guide for measuring the grant of civil authority to the State. As was mentioned earlier,[210] 25 U.S.C. §§ 232 and 233 were among the legislation precedent to Public Law 280.[211] Although the laws dealing with criminal jurisdiction were more concerned with establishing law and order on the reservations, they, and the civil jurisdiction statutes in particular, all served to effectuate the assimilation of Indian people into American society by granting jurisdiction over the reservations and reservation Indians to the states.[212] Even though the authority granted to the states under Public Law 280 was more pervasive, given that the statutes were enacted for the same purpose and to fulfill the same policies, they should be construed *in pari materia*.[213] Thus, the

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[206] H.R. REP. No. 2720, *supra* note 199, at 3733.

[207] *Id.*

[208] *Id.* at 3732.

[209] *Id.*

[210] *See supra* note 129 and accompanying text.

[211] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588–90 (codified as amended in various sections of 18, 28 U.S.C.; main provisions at 18 U.S.C. § 1162 (1988) (criminal) and 28 U.S.C. § 1360 (1982 & Supp. V 1987) (civil)).

[212] *See* S. REP. No. 699, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 2409, 2409–14; H.R. REP. No. 2720, *supra* note 199, at 3731–32.

[213] *See* Brief Amicus Curiae of the Seneca Nation of Indians at 13–15, John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988), *cert. denied* 109 S. Ct. 133 (1988) (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 411–12 (1968) (Public Law 280 to be construed *in pari materia* with the Menominee Indian Termination Act of 1954, 68 Stat. 250, 25 U.S.C. §§ 891–902 (1988) (later repealed by Menominee Restoration Act, 87 Stat. 770, 25 U.S.C. §§ 903–903f) (1988))).

decision of the Supreme Court in *Bryan v. Itasca County*,[214] which defined the scope of Public Law 280's grant of civil jurisdiction, is dispositive of at least the upper limit on the State's authority under section 233.[215]

At issue in *Bryan* was an attempt by a county official to assess a personal property tax on the motor home of a Chippewa Indian living on the Leech Lake Reservation. The Court concluded that the language in Public Law 280 granting to the state "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action,"[216] was "intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes."[217] Although the language and legislative history of section 233 indicate that Congress intended to assimilate the Iroquois,[218] the language also reveals that there was a perception of inadequate tribal process, due to the weakness of the Anglo-American style courts and the ineffectiveness of traditional methods of dispute resolution.[219] Accordingly, the congressional

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[214] 426 U.S. 373 (1976).

[215] The New York State Attorney General agrees that *Bryan* is vital to an understanding of section 233, concluding that section 233 does "not [appear] to provide the State with the authority to regulate substance abuse programs on Indian reservations," 87 Op. Att'y Gen. 35 (1987), and also that section 233 does not confer general power to tax a reservation Indian earning income on the reservation. 77 Op. Att'y Gen. 76 (1977).

[216] 28 U.S.C. § 1360(a) (1982 & Supp. V 1987). Note the nearly identical language in the first section of section 233, quoted *supra* note 198.

[217] *Bryan*, 426 U.S. at 383. The Court also excerpted the "sparse" legislative history of section 1360(a) for support for this conclusion. *Id.* at 381–83.

[218] H.R. REP. No. 2720, *supra* note 199, at 3732:

> The Indians of New York have been classified by the Indian Bureau as among the most advanced in the Nation, and the Bureau has stated that they are in no further need of governmental supervision or control. The committee therefore believes that, in view of the fact that the Indians have the right to preserve the customs and laws they want to prevail in civil cases, and that the State of New York has expressed its willingness and desire that its courts assume jurisdiction over the civil actions and proceedings as provided for in this bill, this is fair and equitable legislation for the Indians and the State of New York.
>
> The enactment of this legislation into law would be in line with the established policy of the Public Lands Committee in its dealings with Indians; i.e., this committee is especially interested in passing legislation which will lead to the gradual assimilation of the Indian population into the American way of life, and the gradual but final complete removal of governmental supervision and control. This bill seems to be a real step in this direction.

[219] *See Hearings before a Subcomm. of the Comm. on Interior and Insular Affairs on S.683, S.1686, S.1687* 80th Cong., 2d Sess. 3–4, 7–8, 114–15, 138 (1948) [hereinafter

response, not unlike congressional action in Public Law 280, was to open up the New York courts to Indians in order to provide an "adequate" legal forum for the resolution of civil matters.

There has been no decision by a federal court on whether section 233 establishes a system of concurrent subject matter jurisdiction between the State and tribal courts. However, there is no indication in the statute that such a scheme is precluded, and given the presumption in favor of retained tribal rights, it must be concluded that Congress intended Iroquois judicial systems to continue exercising jurisdiction over matters involving Iroquois citizens. Subsequent actions of the State also support the conclusion that section 233 established a system of concurrent jurisdiction. Shortly after section 233 was enacted, New York amended its law explicitly to assume the grant of jurisdiction from the United States:

> Any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings.[220]

In addition, New York rescinded the exclusive jurisdiction of the Seneca Nation Peacemaker's Court, which purportedly had been granted by the State's own Indian law.[221]

The State courts have consistently interpreted sections 5 and 233 as establishing a system of jurisdiction concurrent with tribal forums. The scope of section 5 was discussed in *Application of Jimerson*,[222] a case involving a boundary dispute between two Senecas on the Cattaraugus Reservation. The Seneca Nation Council had previously issued a ruling on the matter presented to the court, but the judgment was rescinded in order to allow

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1948 Hearings]; *but see id.* at 58–59, 161 (questioning the need for and propriety of New York State's jurisdiction over Indian affairs).

The Peacemaker's and Surrogate's Courts of the Seneca Nation are the only Anglo-American style courts currently in operation among the Six Nations. The traditional governments rely on Chiefs to fulfill the judicial function. However, there is no reason to believe that such a system should be afforded any less deference than the Seneca Nation courts simply because it is not analogous to the United States legal system.

[220] N.Y. INDIAN LAW § 5 (McKinney 1950 & Supp. 1990). The amendment was apparently to comply with the language of section 233, which limits State court jurisdiction in "civil actions and proceedings, as now or hereinafter defined by the laws of such State."

[221] *Id.* § 46.

[222] 44 Misc. 2d 1028, 255 N.Y.S.2d 627 (Albany Co. Ct. 1963), *aff'd sub nom. In re* Jimerson, 22 A.D.2d 417, 255 N.Y.S.2d 959 (3d Dep't 1965).

the parties to take the case to State court. The New York Supreme Court recognized that section 233, read in conjunction with section 5, established a system of concurrent jurisdiction over the reservations which allowed it authority to decide the case in dispute.[223]

The appellate court was even more definitive, and elaborated that

> "[t]he statute is permissive and nothing in its legislative history indicates that it was intended to do more than open the State courts to Indians, if they should choose to use them . . . [T]he amendment to section 5 of the Indian law conferred upon the State courts no more than concurrent jurisdiction."[224]

The court concluded by adding that "there exists no provision of law providing for review of decisions of the Indian courts by any State court."[225]

The New York State courts have consistently followed this construction of section 233. As section 233 has been applied to section 5, the State courts have exercised civil jurisdiction over a wide variety of matters, including distribution of judgment funds,[226] probate proceedings,[227] worker's compensation claims,[228] torts,[229] and suits initiated by Indian

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[223] Application of Jimerson, 255 N.Y.S.2d at 630 ("Prior to 1953 the Peacemaker's Court had exclusive jurisdiction of questions involving title to real property claimed by the Indians living on a Seneca Reservation. By the enactment of [§ 5], exclusive jurisdiction was rescinded and concurrent jurisdiction of such actions was placed in the state courts.").

[224] *In re* Jimerson, 255 N.Y.S.2d at 961.

[225] *Id.*

[226] Application of Jimerson, 255 N.Y.S.2d at 631 (in action under sections 22 and 23 of Court of Claims Act, and where the Seneca Nation Council transferred boundary dispute to State courts for final disposition, the court would not disturb final judgment of Council).

[227] *In re* Jimerson's Will, 68 Misc. 2d 945, 328 N.Y.S.2d 466, 468 (Erie Co. Ct. 1972) (in action under Indian Law § 5, State court had concurrent jurisdiction with Seneca Nation Surrogate's Court for probate of a will under section 233).

[228] Anichinapeo v. L.W. Bennett & Sons, 65 A.D.2d 105, 411 N.Y.S.2d 414 (3d Dep't 1978) (in action under Worker's Compensation Law, Indian Law § 5 allowed jurisdiction where Congress did not pre-empt all matters involving Indians, as demonstrated by enactment of section 233).

[229] People by Abrams v. Anderson, 187 A.D.2d 259, 529 N.Y.S.2d 917, 923–24 (4th Dep't 1988) (in motion for preliminary injunction, where legitimate law enforcement effort of the Tuscarora Nation was not yet established, §§ 233 and 5 conferred subject matter jurisdiction to State court over alleged claim of tortious interference of business since dispute was merely a private civil claim by Indians against other Indians); John v. Hoag, 131 Misc. 2d 458, 500 N.Y.S.2d 950, 956–57 (Catt. Co. Ct. 1986) (tortious interference of contract claim brought by one Seneca against another Seneca was properly before State court where plaintiff did not properly exercise the jurisdiction of the Peacemaker's Court and properly filed in State court first).

governments.[230] However, the State courts have declined to exercise jurisdiction in cases involving judicial review of Peacemaker's Courts,[231] determination of tribal membership,[232] determination of title to reservation lands,[233] challenges to the validity of Indian leadership,[234] suits against Indian governments,[235] suits against Indian leadership acting within authorized official capacity,[236] and actions initiated by the State Attorney General to enforce tribal law.[237]

A remaining issue concerns the choice of law to be applied by a State court in a case involving Indians. There is strong indication that Congress intended New York courts to apply tribal law where it exists and can be discerned. The language of section 233 suggests that the Indian nations "preserve" those laws which they wanted to "govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue."[238] However, the statute also provides that State courts should recognize "tribal law or custom which may be proven to the satisfaction of such

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[230] Oneida Indian Nation v. Burr, 132 A.D.2d 402, 522 N.Y.S.2d 742 (3d Dep't 1987) (Section 233 interpreted to allow Indian governments to bring suit in State courts under Indian Law § 5).

[231] Application of Jimerson, 255 N.Y.S.2d at 630.

[232] Bennett v. Fink Construction Co., 47 Misc. 2d 283, 262 N.Y.S.2d 331, 333–34 (Erie Co. Ct. 1965) (in action by plaintiff pursuant to N.Y. C.P.L.R. § 6301 to enjoin defendant from erecting building on reservation, section 233 clause providing for recognition of tribal law bars exercise of jurisdiction where Surrogate's court determined that the daughter of a Seneca father and a Cayuga mother was not a Seneca and thus could not inherit tribal lands).

[233] Velez v. Huff, 48 Misc. 2d 10, 263 N.Y.S.2d 967, 968 (Chaut. Co. Ct. 1965) (in action by plaintiff pursuant to Article 15 of the Real Property Actions and Proceedings Law to clear title to certain reservation lands, court declined jurisdiction where Peacemaker's Court interpreted to have exclusive jurisdiction); *but see* Mohawk v. Longfinger, 1 Misc. 2d 509, 149 N.Y.S.2d 36, (Catt. Co. Ct. 1955) (where the court relied on sections 233 and 5, but also on Public Law 280 as superseding section 233 and lifting the proviso barring State court jurisdiction over actions involving Indian lands).

[234] Holcombe v. Dimmler, 55 A.D.2d 808, 390 N.Y.S.2d 274 (Onon. Co. Ct. 1976) (where the trial court declined to intervene in the internal political affairs of the Onondaga Nation).

[235] John v. Hoag, 131 Misc. 2d 458, 500 N.Y.S.2d 950, 952–54 (Catt. Co. Ct. 1986) (where sovereign immunity not waived by the Seneca Nation or the federal government contract claim against an Indian government barred).

[236] *Id.* at 954–56 (failure to show that Indian officials acted outside official capacity or in manner forbidden by the sovereign bars suit).

[237] People by Abrams v. Anderson, 137 A.D.2d 259, 529 N.Y.S.2d 917, 921–22 (4th Dep't 1988) (Executive Law § 63(12) did not provide Attorney General standing to enforce tribal law prohibiting bingo, since the state's obligation to enforce federal law is "quite distinct" from an assertion of power "to enforce the laws of a separate sovereign or quasi-sovereign.").

[238] 25 U.S.C. § 233 (1988).

courts."[239] The fact that none of the Six Nations recorded their laws for the benefit of State courts should not detract from the obvious intent of Congress to have tribal law apply where it is applicable.

By contrast, although Public Law 280 requires that "any tribal ordinance or custom . . . be given full force and effect in the determination of civil causes of action" in state courts, the statute ultimately limits self-government because the requirement applies only "if [the tribal law is] not inconsistent with any applicable civil law of the State."[240] Such a limitation severely restricts the ability of Indian governments to exercise traditional governing methods by setting a state's public policy as a limit on tribal lawmaking. The policy rationale for enacting Public Law 280 was assimilation, and undermining the impact of traditional, non-Anglo-American methods of adjudicating Indian disputes accomplishes this objective. However, similar language limiting Indian governmental action is noticeably absent from section 233. Rather, the language of the first proviso in section 233 recognizes, if not actually encourages, the continued existence and use of law uniquely promulgated by the Iroquois governments in order to regulate the conduct of Iroquois people.[241]

This difference in scope is especially important in areas outside the judicial realm, in instances where an Indian government chooses to exercise authority regulating reservation conduct in a manner that is well within its inherent sovereign powers of governance but is counter to the established public policy of the State.[242] Section 233 indicates that in such cases tribal law should govern and be enforced by the State court.[243] In contrast,

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[239] *Id.*

[240] 28 U.S.C. § 1360(c) (1982).

[241] 25 U.S.C. § 233 (1988). In addition, section 233 confers jurisdiction on the courts of the State of New York, rather than to the "States or Territories," as provided in Public Law 280. Although this distinction certainly is not conclusive of a greater transfer of jurisdiction to the states under Public Law 280, it does support it. *See* H.R. REP. No 2355, *supra* note 122, at 2286–87 (letter from the Undersecretary of the Interior to the Senate Committee on Public Lands).

[242] For example, affirmative governmental action pertaining to family law, taxation, and gaming differs from that of the State. However, there are many more instances where an Indian government has not acted or regulated, leading to significant, but nonetheless legitimate, differences from State policy that necessarily increase pressure for affirmative "remedial" action by the State.

[243] The statutory language implicitly *requires* that state courts apply "tribal laws and customs . . . which may be proven to the satisfaction of the courts." 25 U.S.C. § 233. This clause was added by the Conference Committee. H.R. CONF. REP. No. 3040, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. CODE CONG. SERV. 3731, 3733–34. The original

section 1360(a) of Public Law 280 expressly requires that state law apply over Indian territory, a provision conspicuously absent from section 233.[244] Accordingly, not only is a New York State court deciding a case involving Indians obligated to consider and apply tribal law, but it must also enforce tribal laws to the extent that they directly regulate the conduct of individual Indians. State law is applicable only in those areas where tribal law clearly does not exist.

Even though it may be concluded that the enactment of section 233 established a jurisdictional system that would allow suits involving Indians to be brought in either state or tribal courts, the question remains whether section 233 was intended to confer general regulatory authority over the Iroquois territory to the State.

2. General Regulatory Authority

In *John v. City of Salamanca*,[245] a Seneca residing on the Allegany Reservation challenged the applicability of a municipal building code that required him to obtain a building permit to make renovations on his leasehold property, which was located

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bill only allowed one year in which to record all tribal laws and customs to be preserved for state court proceedings. *Id.* That limit would have been unduly burdensome and inequitable. However, the amended version more adequately fulfills the sponsor's intent that written law guide State court determinations involving Indians.

Note that Public Law 280 requires tribal law to be applied only when not contrary to state public policy. With regard to section 233, there is some indication that the sponsors intended full faith and credit for tribal court decisions. A full faith and credit amendment, ultimately rejected, was believed to "do the same thing" as the language eventually enacted:

> Mr. Miller: [If] there are some conflicts [between the treaty now in existence and the state laws], do the customs and unwritten laws and those things under the treaty have first priority over the laws of the State of New York, or are they superseded by the State of New York?
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> Mr. Morris: The treaty rights will have first priority and will supersede the laws of the State of New York . . . .

96 CONG. REC. H12459 (daily ed. Aug. 14, 1950).

[244] 28 U.S.C. § 1360(a) requires that "those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."

[245] CIV-86-621C (W.D.N.Y. Order of Apr. 16, 1987), *aff'd*, 845 F.2d 37 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 133 (1988), *reprinted in* Petition for a Writ of *Certiorari* at 13a, John v. City of Salamanca (No. 88-84) [hereinafter Petition for *Certiorari*].

on the reservation, but within the City of Salamanca.[246] This unique issue arose due to the fact that the State-chartered City of Salamanca is located almost entirely on property leased from the Seneca Nation. The plaintiff claimed that the Salamanca municipal laws and zoning rules were generally inapplicable on lands of the Seneca Nation and to members of the Seneca Nation residing within the City. In response, the City argued that it had obtained explicit congressional authority to impose its building code within city boundaries and on Seneca land from both the 1875 Act of Congress and 25 U.S.C. § 233.[247]

In granting the City's motion for summary judgment, the district court cited section 8 of the 1875 Act, which provides that "all municipal laws and regulations of said State may extend over and be in force in said villages,"[248] but did not find the 1875 Act dispositive of the issue. The court recognized that the *Forness* court had interpreted the section 8 reference to "municipal laws" as meaning local municipal law and not the general State law applicable to municipalities.[249] However, the court reasoned that the congressional response to this decision by the enactment of sections 232 and 233 effectively overruled *Forness* and "g[a]ve the State of New York general jurisdiction over Indian reservations."[250] Thus, the court held that the City was properly acting to enforce its building code on the reservation by requiring the compliance of a Seneca residing within city limits.

On appeal, the Second Circuit affirmed the district court decision, but decided the case on more narrow grounds, focusing

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[246] The Act of February 19, 1875, ch. 90, 18 Stat. 330 [hereinafter 1875 Act], ratified leases made to non-Indians by the Seneca Nation, establishing six villages on the Allegany Reservation.

In United States v. Forness, 125 F.2d 928, 930–31 (2d Cir. 1942), the Second Circuit held that the words "municipal laws" as used in the 1875 Act referred to the local laws of the City of Salamanca, and not to the laws of the State that applied to municipalities, barring the application of a State procedural rule that would have denied the ability of the Seneca Nation to cancel leases for non-payment of rent.

[247] Defendants say that the City of Salamanca is charged by general law of the State of New York with the enforcement of a general law of the State of New York . . . [and that] plaintiff does not qualify for the exempting provisos of 25 U.S.C. § 233. They say no tribal law or custom stands in the way of a state law requirement to obtain a building permit.

Petition for *Certiorari*, *supra* note 245, at 17a–18a.

[248] The 1875 Act, *supra* note 246, at ch. 90, § 8. *See also* 1 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 155, 156 (1904).

[249] Petition for *Certiorari*, *supra* note 245, at 18a.

[250] Petition for *Certiorari*, *supra* note 245, at 19a. In arriving at this conclusion, the court relied on two dubious premises: (1) that the 1875 Act, which is very specific, was superseded by sections 232 and 233, and (2) that section 233 conferred general regulatory authority on the State.

exclusively on the 1875 statute as the basis for the City's authority to apply its building code.[251] In so doing, the court did not affirm the district court's intepretation of section 233 or decide whether the statute provided for general state regulatory authority over Iroquois territory.[252]

Despite the fact that the Second Circuit decided the case on more limited grounds, the district court decision stands as the first instance in which a federal court attempted to define the general regulatory scope of section 233. As it has already been established that section 233 was at least intended to open up the State courts to suits involving Indians,[253] the question remains whether the statute was designed to grant New York State general regulatory authority over Iroquois territory.

Bryan v. Itasca County[254] addresses this precise question. The case involved an analogous statute[255] and established general principles for construing statutes that grant jurisdiction to a state over Indian territory. Thus, *Bryan* should control the issue of whether section 233 authorizes general regulatory jurisdiction to New York State.[256] The Supreme Court concluded that the enactment of Public Law 280 did not grant general civil regulatory authority over Indian territory to the affected states, but instead only granted the power to adjudicate civil disputes involving Indians.[257] The Minnesota Supreme Court held that the enumerated exceptions to state jurisdiction in Public Law 280 negatively implied a general power of state taxation over the reservation.[258] Relying on the legislative history and the applicable canons of construction, the Court reversed that decision.

Examining the legislative history, the Court found that the enactment of Public Law 280 was primarily motivated by con-

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[251] John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 133 (1988).

[252] *Id.* at 43. "[W]e need not reach the issue whether section 233 expanded the state's regulatory jurisdiction over the Seneca Nation. Thus, we do not adopt Judge Curtin's reasoning, but nevertheless agree with the result he reached." *Id.*

[253] *See supra* note 202 and accompanying text.

[254] 426 U.S. 373 (1976).

[255] *See supra* note 205 and accompanying text.

[256] *See* Brief Amicus Curiae for the Seneca Nation, *supra* note 213, at 15–24.

[257] *Bryan*, 426 U.S. at 391–92. *See also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987) ("We recognized [in *Bryan*] that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values.").

[258] *See infra* note 205 and accompanying text.

cern over the lack of law enforcement on the reservations.[259] It concluded that there was a "total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations"[260] and "the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations."[261]

Similarly, the legislative history of section 233 demonstrates a lack of congressional intent to grant general regulatory jurisdiction to New York. The statute originated from the same 1948 Senate hearings that led to the enactment of section 232; the primary focus of Congress in those hearings was on reservation lawlessness.[262] Although there is some indication that Indians should be allowed access to the state courts,[263] there is absolutely no indication that Congress intended to confer general civil regulatory authority to the State. Thus, the bill that Congress enacted in 1950 was only "to confer jurisdiction on the courts of the state of New York with respect to civil actions between Indians or to which Indians are parties."[264] Based on the similarity of the language and legislative history between the two statutes, *Bryan* instructs that section 233, like Public Law 280, merely authorized the State courts to adjudicate civil cases involving Indians.

Although cognizant of the assimilationist motivation behind the enactment of Public Law 280, the *Bryan* Court suggested that Congress's intent in limiting state jurisdiction to the resolution of cases involving Indians was indicative of the fact that

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[259] *Bryan*, 426 U.S. at 379 ("The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.").

[260] *Id.* at 381.

[261] *Id.* at 384.

[262] *See supra* note 122 and accompanying text.

[263] *See 1948 Hearings*, *supra* note 219, at 2, 7, 8, 213.

[264] H.R. REP. No. 2720, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S. CODE CONG. & ADMIN. NEWS 3731. One of the sponsors of the legislation, Rep. Daniel Reed (R-N.Y.), the representative of the district containing part of the Seneca Nation, stated:

> The educated Indians, who are the majority in the tribe, of course, are anxious to have this privilege of going into the State courts. Under S. 192 they can go into the supreme court, which would be comparable to the circuit court of appeals in most states, and they could take an appeal to the appellate court at Rochester, N.Y., and from the appellate court to the court of appeals, if dissatisfied. The Indians want this right and the state of New York now wishes to give it to them.

96 CONG. REC. H12,456 (1950).

Congress had no intention of fully assimilating Indians into "American society."[265] The Court concluded that establishing general state civil regulatory authority over the reservations would have had the unintended effect of destroying tribal self-government.[266] Not only does the legislative history of section 233 favor a similar conclusion, but the language of the statute implies that Congress anticipated the continued operation of Iroquois government.[267]

Finally, to eliminate any doubt as to its conclusion, the *Bryan* Court relied on the basic canon of statutory interpretation that "'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"[268] Thus, in light of the strong policy and legal similarities between Public Law 280 and section 233 that favor their being interpreted in the same manner, the *Bryan* decision should control the interpretation of section 233, at least to the extent that *Bryan* denies the State general regu-

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[265] *Bryan*, 426 U.S. at 387 ("Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub.L. 280 was plainly not meant to effect total assimilation.").

[266] *Id.* at 388–89:

> And nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than "'private, voluntary organizations,'" *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 718, 42 L. Ed. 2d 706 (1975)—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State," contemplates the continuing vitality of tribal government.

[267] The provisos contained in section 233 are nearly identical to those in section 1360(c), except for language in the latter statute that "[n]othing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made thereto." As the Court in *Bryan* decided, the presence of this language should not negatively imply that New York can regulate tribal lands, etc. *Bryan* well establishes the fact that the provisos excepting state conduct

> may be read simply as a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians. [The court agreed] with the Court of Appeals for the Ninth Circuit that § 4(b) "is entirely consistent with, and in effect is a reaffirmation of, the law as it stood prior to its enactment."

426 U.S. at 391 (citation omitted).

[268] *Bryan*, 426 U.S. at 392 (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)). *See also supra* note 86 and accompanying text.

latory authority over the reservations.[269] The explicit language and legislative history of section 233, read in the context of *Bryan*, clearly indicate that New York was not granted general regulatory jurisdiction and that, consequently, the district court opinion in *John* was incorrect.

Although section 233 did not grant general regulatory jurisdiction to New York, the State has nonetheless unilaterally attempted to apply its regulatory law in Iroquois territory. In *People v. Redeye*,[270] Seneca defendants had been convicted by a town justice for violation of the hunting provisions of the State Environmental Conservation Law. The appellate court reversed the decision of the town justice and dismissed the suit on the grounds, *inter alia*,[271] that the hunting and fishing proviso of section 232 was intended to protect the hunting and fishing rights of the Seneca Nation that had been secured by the Treaty of 1794.[272] The court concluded that New York lacked the authority to apply the State conservation law to Seneca citizens engaged in on-reservation conduct.[273]

A similar result was reached in *Seneca Nation of Indians v. State*,[274] where the State attempted to invoke the New York Highway Law in order to condemn a portion of the Allegany Reservation to clear title for an expressway. The State explicitly argued that section 233 made its highway law applicable to the reservation.[275] However, the court rejected the State's argument by citing the proviso that bars "alienation" of any Indian lands[276]

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[269] *See also United States v. Burns*, 725 F. Supp. at 125. (In light of *Bryan*, the similarities between section 233 and Public Law 280 necessitate that New York does not have general regulatory authority over Iroquois territory.).

[270] 78 Misc. 2d 834, 358 N.Y.S.2d 632 (Catt. Co. Ct. 1974).

[271] The court also relied on the Act of August 31, 1964, Pub. L. No. 88-533, § 9, 78 Stat. 738, 741 (reaffirming the right of Seneca citizens to hunt and fish on the Allegany reservation and to regulate hunting and fishing by non-members) to find that the Act of January 5, 1927, Pub. L. No. 69-537, ch. 22, 44 Stat. 932 (State hunting and fishing laws applicable on the Seneca reservations, but not if discriminatory against Indians) was applicable only to non-Indians. *Redeye*, 358 N.Y.S.2d at 635.

[272] *Redeye*, 358 N.Y.S.2d at 634–35.

[273] *Id.* at 635.

[274] 397 F. Supp. 685 (W.D.N.Y. 1975).

[275] The State filed this claim in spite of the fact that a previous attempt to take Tuscarora lands relying on the same statute was flatly rejected by the Second Circuit Court of Appeals. Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885 (1958). The court also rejected the State's argument that the Non-intercourse Acts did not apply to New York because it was one of the original thirteen colonies. *Seneca Nation*, 397 F. Supp. at 687.

[276] 25 U.S.C. § 233 (1982) ("[N]othing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands, within any Indian reservation in the State of New York.").

and did not address the issue of whether section 233 conferred general regulatory authority on the State.

In *People by Abrams v. Anderson*,[277] the court reached the same result, with regard to an attempt by the New York Attorney General to enforce a tribal law outlawing gambling on the reservation. The court dismissed the Attorney General's motion on two grounds. First, the court rejected the Attorney General's contention that "his standing to enforce Federal law [was] no different from his standing to enforce tribal law."[278] The court explained that "[t]he State's power, indeed its obligation, to enforce Federal law under the Supremacy Clause is quite distinct from its assertion of power to enforce the laws of a separate sovereign or quasi-sovereign."[279] Second, the court rejected the motion on the grounds that the State was pre-empted from interfering in the dispute since Indian bingo was "a subject which the Supreme Court has determined is not a legitimate focus of State power."[280]

The aforementioned cases demonstrate the manner in which the State has attempted to exercise regulatory authority over Indians on Indian territory absent any express authority to do so. The reaffirmance of the *Bryan* principles in *California v. Cabazon Band of Mission Indians*[281] indicates that the Supreme Court is not receptive to any state attempts to regulate reservation conduct.[282] However, there is as yet no case that explicitly rejects the incorrect notion of the *John* court, that State or local officials are free to regulate the activities of Iroquois on Iroquois territory.

Even though New York has been unsuccessful in its unilateral attempts to apply its regulatory law in Iroquois territory, it nonetheless has succeeded where an Iroquois government has requested or allowed the State to so act.[283] The areas in which the State currently exercises authority over Iroquois territory are delineated in the New York Indian Law,[284] and in other provisions of the State law generally applicable to state citizens.

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[277] 137 A.D.2d 259, 529 N.Y.S.2d 917 (4th Dept. 1988).

[278] *Anderson*, 529 N.Y.S.2d at 922.

[279] *Id.* (citation omitted).

[280] *Id.* (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)).

[281] 480 U.S. 202 (1987).

[282] New York has acknowledged the Supreme Court's unwillingness to uphold State attempts to regulate reservation activities. 87 Op. Att'y Gen. F11 (1987).

[283] *See, e.g.*, Barnes v. White, *infra* note 294; note 327.

[284] N.Y. INDIAN LAW (McKinney 1950 & Supp. 1989). *See infra* note 288 and accompanying text.

The State Indian Law is for the most part a remnant of the era prior to the *Forness* decision when it was thought that the State not only had significant jurisdictional authority to regulate reservation affairs, but also authority to control the internal operations of the Six Nations.[285] Most of the provisions originated in the 1800's, as early as 1813, and little has been done substantively to revise them. Although the commitment of the United States to the Iroquois was reaffirmed by *Forness* and by the subsequent enactment of sections 232 and 233, the major provisions of the old State Indian law not only remain intact, but also continue to be relied upon by both State and Iroquois officials.

There is a significant problem in such reliance, primarily because most of the law's provisions purport to regulate the internal operation of the Iroquois governments. Based on the general principle set forth in *Williams v. Lee*,[286] state action of this sort is barred since it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[287] Thus, most provisions of the State Indian Law are on their face invalid since they provide for State interference with Iroquois self-government.[288] Even to the extent that these State laws are subject to a balancing or pre-emption analysis, a substantial number cannot be legitimated.

There exist, however, two factors that arguably justify the exercise of this authority. One legitimating factor is the *Dibble*

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[285] *See supra* Part I.

[286] 358 U.S. 217 (1959).

[287] *Id.* at 220.

[288] *See, e.g.*, N.Y. INDIAN LAW §§ 5-a ("Surrender of tribal records"), 9 ("Residence of other Indians on tribal lands"), 17 ("Disqualification of women from voting"), 23 ("Consent of agent to certain contracts"), 24 ("Leases"), 27 ("Custody of wampums"), 41 ("Enumeration of [Seneca Nation "SNI"] officers"], 42 ("Time and place of [SNI] annual election"), 43 ("Qualifications of [SNI] voters and eligibility for [SNI] office"), 44 ("The [duties of SNI] treasurer"), 45 ("The [duties of SNI] clerk"), 46 ("[operation and jurisdiction of] peacemakers' courts"), 47 ("Record of peacemakers"), 48 ("Costs and fees"), 49 ("Incompetency of peacemakers"), 50 ("Appeals to council of Seneca Nation"), 51 ("Appeals from peacemakers' court of Tonawanda nation"), 52 ("Enforcement of judgments"), 53 ("[duties of] The marshal"), 55, 95, 102 ("Allotment of lands"), 57 ("Offering or giving bribes prohibited"), 58 ("Acceptance of bribes prohibited"), 59 ("Conveying bribes prohibited"), 70 ("Confirmation of nationality"), 72 ("The [duties of SNI] president"), 73, 80 ("General powers and duties of the council"), 75, 82 ("Vacancies in elective offices"), 88 ("Encroachment by Indians on occupied lands"), 89 ("Court of impeachment"), 96 ("Consent of [Tuscarora] chiefs to sales of timber"), 101 ("[duties of St. Regis Mohawk (SRM)] clerk"), 103 ("Consent of [SRM] Chiefs to sale of timber"), 106 ("Jurisdiction of [SRM] council to determine disputes"), 107 ("General powers of [SRM] council"), 108 ("Qualifications of [SRM] voters"), 109 ("Officers of [SRM] tribes"), 110 ("Election of [SRM] officers"), 111 ("Conduct of [SRM] elections"), 112 ("Canvass of votes"), 113 ("Vacancies") (McKinney 1950 & Supp. 1989).

decision, which has been cited for the proposition that "beneficial" state legislation favoring Indians is not pre-empted by the principles of federal Indian law.[289] But, as has been discussed,[290] *Dibble* is a restricted decision, at most authorizing the State to remove "intruders," that is, non-Indians, from the reservation.[291] Even to the extent *Dibble* is applicable, it certainly does not grant authority to the State generally to regulate activities on the Reservation.

The second argument favoring application of the State Indian Law is that Indian governments in their sovereign capacity to self-govern may freely choose to rely on the State and its law where such reliance is perceived to further their governmental objectives. Certainly there are numerous instances in which Indian officials have not only relied upon, but aggressively sought to execute provisions of the State Indian Law.[292] Not-

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[289] *See supra* note 33 and accompanying text.

[290] *Id.*

[291] *See* N.Y. INDIAN LAW § 8 (McKinney 1950 & Supp. 1989).

In Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering Co., 467 U.S. 138 (1984), the Court defined the circumstances under which jurisdiction preexisting Public Law 280 jurisdiction would be valid: "Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing jurisdiction and otherwise lawfully assumed jurisdiction." *Id.* at 150. The Court stated that "lawfully assumed jurisdiction" is that jurisdiction which does not violate the *Williams* test and is not "pre-empted by incompatible law." *Id.* at 147. Thus, the standard applied in this Article to reject most of the N.Y. Indian Law as a possible source of "pre-existing jurisdiction" is the same standard that the Court applied in *Wold Engineering*.

[292] *See, e.g.*, Oneida Indian Nation of New York v. Burr, 132 A.D.2d 402, 522 N.Y.S.2d 742 (3d Dept. 1987) (recognizing right of an Indian government to bring an action in State court under Indian Law § 5); Tuscarora Nation of Indians v. Swanson, 108 Misc. 2d 429, 437 N.Y.S.2d 603 (S. Ct. Niag. Co. 1981) (Tuscarora Nation brought suit under N.Y. Indian Law § 5 to enjoin non-Tuscarora defendants from continuing with construction of a permanent home upon the reservation and also to have them ejected as intruders under N.Y. Indian Law § 8).

In addition, although the New York Attorney General concluded that the State had no authority to regulate a State substance abuse program on the reservations based on his reading of *California v. Cabazon Band of Mission Indians* and sections 232 and 233, he nonetheless authorized the Director of Substance Abuse Services to proceed:

> Here the State is not seeking to impose unilaterally its regulatory authority with respect to an Indian substance abuse program. Rather the St. Regis Mohawk Tribe has, through its tribal government, voluntarily applied for approval and funding of its substance abuse program. Clearly this request for discretionary funding is consistent with notions of tribal sovereignty and congressional goals of encouraging tribal self-sufficiency and economic development (*California v. Cabazon Band*, 107 S. Ct. at 1092).
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> . . .
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> We believe that the voluntary application of a native American substance abuse program to the Division of funding and the regulation of the funded program by the Division is consistent with Federal law governing tribal sovereignty . . . . This limited assertion of jurisdiction by the Division, founded as it is upon the consent of the contracting parties, would in my opinion neither

withstanding the consistency of this latter argument with the federal policy of self-determination, there is support for the proposition that Indian nations cannot relinquish tribal rights under the guise of self-determination by subjecting themselves to state law when such an action would violate federal law.[293] Such a limitation on the ability of the State to influence on-reservation activity comports with the trust responsibility of the federal government to the Iroquois. For example, reliance on the State law providing for the election of Mohawk chiefs would be a violation of federal law to the extent that the exercise of such a law would interfere with the manner in which the Mohawks may otherwise self-govern.[294]

The foregoing analysis indicates that Indian governments are not subject to the general regulatory authority of the State unless they willingly, and not in contravention of federal law, subject themselves to it. Certainly much of the reliance on the State is due to the overwhelming need for some mechanism to alleviate the distressful lack of developed institutions that can address modern problems.[295] However, repeated efforts to invoke State law raise the question whether Iroquois governments that rely on State assistance realize that they do so at the expense of sovereignty and governmental rights.

C. *Special Jurisdictional Situations*

The analysis thus far has focused on the general jurisdictional interrelationship between the federal, State, and Indian governments over the territory of the Six Nations. There remain, how-

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interfere with nor be incompatible with federal and tribal interests reflected in federal law (*id.* at 1092).

87 Op. Att'y Gen. 35, 36 (1987).

[293] *See, e.g.*, Kennerly v. District Court, 400 U.S. 423, 428–30 (1971) (per curiam) (rejecting affirmative legislative action of an Indian government to subject itself to Public Law 280 jurisdiction where such action violated federal law, since the statute required a majority vote of all enrolled members in order to assume state jurisdiction).

[294] *See* Williams v. Lee, 358 U.S. 217 (1959). For another instance in which a state court automatically deferred to an invasive state law, see Barnes v. White, 494 F. Supp. 194 (N.D.N.Y. 1980), where suit was filed against Mohawk chiefs who refused to step down after a recall vote. The parties did not challenge the fact that "each [chief] was elected to office by the Tribal membership pursuant to the New York State Indian Law § 110." *Id.* at 195.

[295] *See, e.g.*, Hannagan, *A tangle of laws, rights and tempers: Mohawks and troopers face each other at St. Regis Reservation*, Syracuse Herald Am., July 23, 1989, at A11, col. 2 (discussing the hostilities between private Mohawk entrepreneurs and the State police over State attempts to close illegal gambling operations).

ever, two circumstances in which the broad grants of jurisdiction under sections 232 and 233 require individual attention in their application. The first situation involves the City of Salamanca, which is located almost entirely upon the Allegany Reservation. The second concerns the Tonawanda Reservation, where title to the land is held in trust by New York State.

As has already been briefly discussed,[296] the City of Salamanca ("the City") is located almost entirely upon the Allegany Reservation of the Seneca Nation of Indians. As the result of expansion westward and the rise of the railroad in southwestern New York beginning in the mid-1800's, the Seneca Nation entered into several thousand leases with non-Indians for reservation land, which eventually led to the establishment of several villages on the reservation.[297] However, the New York State Court of Appeals invalidated these leases on the grounds that they had been made in violation of the federal Trade and Intercourse Act.[298] The State then successfully petitioned Congress for ratification of the leases,[299] which allowed for the creation of the City of Salamanca. The jurisdictional maze that currently exists in the City is directly attributable to the provisions of the 1875 Act and the grant of criminal and civil jurisdiction to the State by sections 232 and 233.

The interrelationship of these statutes led to the dispute presented in *John v. City of Salamanca*,[300] which addressed the question of whether a Seneca living within the City was subject to City regulatory laws.[301] The district court held that under the 1875 Act and section 233, City laws applied to all individuals living within the City whether they were Indian or not.[302] On appeal, the Court of Appeals for the Second Circuit affirmed

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[296] *See supra* Part II.

[297] *See* L. HAUPTMAN, THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER, *supra* note 53, at 17.

[298] *See supra* note 36.

[299] *See supra* note 38.

[300] 845 F.2d 37 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 133 (1988).

[301] The case involved an Indian living within the City who refused to comply with the city building code. The plaintiff challenged the ordinance on the grounds that Congress had not conferred general regulatory power to the states and localities. *Id.* at 39. He also claimed that he was exempt from the ordinance because he was an Indian living within the confines of the reservation and Congress in the 1875 Act had not *explicitly* provided that local law should apply to Indians on the reservation. *See* Petition for *Certiorari*, supra note 245, at 16a–17a. Plaintiff also claimed that the ordinance violated the Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44, which set aside lands for the Seneca Nation and guaranteed their "free use and enjoyment." *John*, 845 F.2d at 39.

[302] *See supra* Part II(C)(2).

the decision of the district court, but declined to adopt the district court's interpretation of section 233.[303] Instead, the court of appeals restricted its reasoning to an analysis of the 1875 statute. In so doing, it implicitly rejected the lower court's holding that section 233 provided the State with general regulatory authority over the reservations.[304]

The *John* court found that although the City of Salamanca had elected to adopt the state building code, it was nonetheless enforcing its own law and not State law.[305] Accordingly, the ordinance was held applicable to all individuals living within the City, whether Senecas or not. The court rejected the argument that the City ordinance could not apply to a Seneca living within the City on the grounds that Congress had anticipated Seneca residence within the City by barring the taxation of Seneca property, but had nonetheless not made any special provision or exemption of Senecas from City laws in general.[306]

The court briefly considered what authority the Seneca Nation retained over the leased land within the city boundaries. It found that in passing the 1875 Act, "Congress limited the sovereignty of the Seneca Nation over the reservation land within the City of Salamanca."[307] The basis for the court's conclusion was that within the language of the statute, Congress had also provided for the application of State highway law over the reservation, but only upon the consent of the Seneca Nation Council. In contrast, with regard to the applicability of "municipal law" within the villages, no consent of the Council was required. Since "[t]he 1875 Act distinguishes between the villages and the

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[303] *John*, 845 F.2d at 43.

[304] The narrower decision was basically a reaffirmance of United States v. Forness, 125 F.2d 928 (2d Cir. 1942). *See supra* note 202. Section 8 of the 1875 Act provides:

> That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to and be in force beyond, said villages in said reservations, or in either of them; *and all municipal laws and regulations of said State may extend over and be in force within said villages*:
>
> Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or property of any Indian not a citizen of the United States. (emphasis added).

[305] *John*, 845 F.2d at 40–41.

[306] *Id.* at 42. The reasoning of the court on this point is apparently contrary to the established principle of federal Indian law that states (and localities) obtain jurisdiction over the reservation and reservation Indians only where Congress has expressly so provided. *See supra* Part II. Admittedly this is an ambiguous circumstance, but the canon of construction that all ambiguities in federal law must be resolved in favor of the Indians should be dispositive.

[307] *John*, 845 F.2d at 42.

remainder of the reservation," the court concluded that the Seneca Nation "retained authority over the latter, but not the former."[308] However, such a conclusion is non-binding since the court's discussion of the Seneca Nation's authority in the City is dicta. Such a qualification of the court's discussion is critical to the rights of the Senecas because the court did not completely explore the property interests of the Seneca Nation within the City.

Even though *John* suggests that the Seneca Nation is totally divested of authority within the City, the court's language was overbroad, since the non-Indians living within the City only lease the land and do not hold it in fee.[309] Although the degree to which the Seneca Nation is divested of authority over the leased land is an open question, at the very least, *John* indicates that the Seneca Nation is only divested of authority over *leased* land, and not land retained by it in fee. The court elaborated on the effect of the 1875 Act on the ownership interest of the Senecas:

> The 1875 Act did not disturb the Seneca Nation's rights to free use and enjoyment of the leased land. Congress merely ratified leases executed by members of the tribe. These leases were voluntary conveyances of rights to present use and possession. Therefore, by their own actions the Indians diminished their enjoyment of the leased land. *Under the leases, future rights of occupancy, granted in the 1794 Treaty, remain secure, subject only to the expiration of the lease terms.* However, in the interim, the Indians cannot treat the leaseholds as they would other portions of the reservation. Their "free use" necessarily is limited by the rights of those in possession.[310]

Put simply, when the land is leased, City laws govern; when the land is not leased, Seneca Nation laws govern.[311]

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[308] *Id.*

[309] *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994, 3012–15 (1989) (Indian tribe had authority to zone property owned in fee in those areas of its reservation that were closed to the general public).

[310] *John*, 845 F.2d at 42 (emphasis added).

[311] There is nothing in the opinion to suggest that the Seneca Nation is divested of any authority over Seneca citizens who choose to reside within the City. Accordingly, such authority must be presumed to exist as over Senecas living on the reservation, but not within the City limits.

In addition, it remains an open question to what extent the Seneca Nation may exercise civil regulatory jurisdiction over non-Indians living in the City, in order to further public policy initiatives designed to protect Seneca citizens or its residuary interests in the leased land. *See* Montana v. United States, 450 U.S. 544, 565–66 (1980),

However, having clarified the rights of the City over the leaseholds, the court did not adequately address the fact that the plaintiff, as a Seneca, differed from a non-Indian leaseholder. The court mistakenly believed that the City as an entire entity, rather than individual tracts of land, was being leased from the Senecas.[312] Thus, when the 1875 Act "diminished" the Seneca Nation's 1794 Treaty rights, the court held that it diminished the plaintiff's Treaty rights as well.[313] The problem arises because when the plaintiff purchased his "lease" from the previous non-Indian owner, he did not assume the same lessee obligations as a non-Indian. Plaintiff was not obligated to pay rent or taxes to the City and was treated by both the City and the Seneca Nation as obtaining the equivalent of an "assignment" of possessory and occupancy interests in accordance with Seneca Nation tribal law and custom.[314] Thus, if it was truly the "leased" nature of the land that divested the rights of the Seneca Nation, the decision was wrongly decided, since the plaintiff obtained his rights in the land not as a non-Indian would obtain a lease from the Seneca landlords, but as a Seneca citizen would through the traditional law of occupancy of the Seneca Nation.

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where the court set forth two circumstances that justified civil authority of an Indian nation over non-Indians:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. [citations omitted] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic serenity, or the health or welfare of the tribe.

[312] *Id.* at 43 ("John, a member of the tribe, now possesses rights in the leased land as an individual.").

Section 1 of the Act of August 14, 1950, 64 Stat. 442, clarified the fact that the Seneca Nation was the ultimate lessor and that the individual residents of the City, and not the City itself, were the ultimate lessees:

> [T]he city of Salamanca may . . . pay to the treasurer of the Seneca Nation all moneys payable on leases within the city of Salamanca on behalf of the owners of such leases: *Provided further*, That nothing herein contained shall be construed to authorize the city of Salamanca to grant new leases, or to modify, change, or alter existing leases, except with the consent of the Seneca Nation and upon terms agreeable to the Seneca Nation . . . .

[313] *Id.* at 42.

[314] *See* Petition for *Certiorari*, *supra* note 245, at 2 n.1. *See also* F. COHEN (1942 ed.), *supra* note 1, at 189. Plaintiff's assignment was similar to that obtained by other Senecas over other parts of the reservation.

Not suprisingly, in combination with the 1875 Act, the application of sections 232 and 233 results in a different jurisdictional scheme in the City than in other Iroquois territory. The *John* decision reaffirmed the fact that the general laws of the State do not apply within the City of Salamanca.[315] Accordingly, only City municipal laws apply over leasehold property, regardless of whether the lessee is an Indian or a non-Indian. It follows that City laws do not apply over property held by the Seneca Nation, since that property is not leased and is controlled by the Seneca Nation like any other part of Seneca territory.

Reading the 1875 Act and section 232 in a way that would give meaning to both,[316] the State courts have criminal jurisdiction over all lands within the City of Salamanca, whether or not the land is leased by the Seneca Nation. Although section 232 does not explicitly address this specific situation, the statute certainly allows the State to enforce its criminal law over the entire reservation since Congress expressly granted it such authority.[317]

On the other hand, since section 233 only provided for Indian access to the state courts, the inapplicability of State civil law to leased land within the City remains undisturbed. In his petition for *certiorari*, the plaintiff in *John* argued that the enactment of section 233 superseded any regulatory authority that might have been granted to the City under the 1875 Act.[318] However,

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[315] *John*, 845 F.2d at 41. The court stated:

> Referring to our determination in *Forness* that the laws of New York State did not extend to the leased land, John suggests that, under our interpretation of the 1875 Act, Congress provided for the enforcement of village laws, but not state laws, on the leased land. In fact, in *Forness*, we held that Congress had created just such a jurisdictional scheme; the *Forness* court concluded that only the laws of New York's municipalities extended to the leaseholds, to the exclusion of state laws governing the relations of lessors and lessees. *Forness*, 125 F.2d at 932 (footnote omitted).

See also N.Y. INDIAN LAW § 71, *as amended by* L.1969, ch. 893; L.1892, ch. 679; L.1881, §§ 1, 3 (McKinney 1950 & Supp. 1989) ("Exclusion of villages from reservations; lease of lands therein; certification of copies of leases by the Seneca Nation of Indians and recording thereof"). Section 71 provides that, with regard to the six villages established by the 1875 Act, "all the general laws of the state are extended over and apply to the same." However, to the extent that section 71 is a State law, *John* reaffirms the congressional intent behind the 1875 Leasing Act that State law is inapplicable within the City and that accordingly section 71 cannot be used to apply general State laws within the City.

[316] *See* Watt v. Alaska, 451 U.S. 259, 267 (1981), as discussed *supra* note 187.

[317] It is conceivable that the City of Salamanca could exercise criminal jurisdiction over this land if it were delegated this authority by the State. *See supra* note 196.

[318] *See* Petition for *Certiorari, supra* note 245, at 18–20. Relying on Montana v. Blackfeet, 471 U.S. 759 (1985) (Congressional failure to reaffirm previous authorization for state taxation of royalty interests in minerals on Indian lands in a later act served

to the extent that section 233 was not a grant of general regulatory jurisdiction to the State, it could not logically be said to alter the previously existing regulatory scheme. The explicit acknowledgment by the Second Circuit that section 233 was not germane to the question presented in *John* supports this conclusion.

The Reservation of the Tonawanda Band of Senecas presents another jurisdictional anomaly with regard to the application of sections 232 and 233, because title to the reservation is held "in trust" by New York State.[319] The situation arose as the result of the Treaty of 1842, in which the Seneca Chiefs agreed to relinquish claim to the Buffalo Creek and Tonawanda Reservations in exchange for return of the Allegany and Cattaraugus Reservations, which they had previously sold.[320] In 1857, the Tonawanda Reservation Senecas, who had refused to relocate to the west as was provided for in an 1838 Treaty, agreed to relinquish their claim to the lands in Kansas that had been set aside for them in exchange for $256,000, which was to be used to purchase their old reservation in New York.[321] They did so, acquiring 7549 acres for $165,000.[322]

However, the 1857 Treaty made provision for the State to hold title to the Tonawanda Reservation in trust.[323] In *United States v. National Gypsum Co.*,[324] the Second Circuit Court of Appeals addressed the issue of whether the State, as titleholder, had the authority to allow the leasing of Tonawanda lands to

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to withdraw consent where a clear statement of congressional consent was necessary to uphold state taxation of Indians), the plaintiff argued that congressional failure to reaffirm in section 233 the grant of regulatory authority provided in the 1875 Act served implicitly to withdraw congressional consent to exercise local regulatory authority over Indians.

[319] United States v. National Gypsum Co., 141 F.2d 859, 860 (2d Cir. 1944).

[320] *See supra* note 29 and accompanying text.

[321] Treaty of Nov. 5, 1857, ratified June 4, 1858, 11 Stat. 735, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 767, 768 (1904).

[322] *National Gypsum*, 141 F.2d at 860.

[323] Acticle III of the Treaty provided that title to the lands was

> to be held by [the Secretary of the Interior] in trust for the said Tonawanda Band of Indians and their exclusive use, occupation and enjoyment, until the legislature of the State of New York shall pass an act designating some persons, or public officer of that State, to take and hold said land upon a similar trust for said Indians; whereupon they shall be granted by the said Secretary to such persons or public officer.

The Secretary conveyed the lands to the New York State Comptroller on February 14, 1862, "in trust, for the said Tonawanda Band of Indians and for their exclusive use, occupation and enjoyment, in the manner particularly defined in said Treaty." *National Gypsum Co.*, 141 F.2d at 860.

[324] 141 F.2d 859 (2d Cir. 1944), *rev'ing* 49 F. Supp. 206 (W.D.N.Y. 1942).

non-Indians for mining purposes. The court determined that by agreeing to allow the State to hold title to their lands, the Tonawandas "preferred to arrange for protection by the State of New York on their old reservation rather than to remain under the immediate control of the United States[,] with which they had had some friction."[325] The court was convinced that the United States could have assumed exclusive authority if it had "thought best."[326] But in allowing the State to assume title, "it deliberately left a large measure of control in respect to the reservation to the State of New York."[327]

Although *National Gypsum* apparently confers great authority on the State with regard to the Tonawandas, there are several considerations that favor a narrow reading of the decision.[328] First, it is clear from the court's opinion that it is the reservation, and not the Tonawanda people, that is within the authority of the State.[329] Thus, it is likely that the State's power over the

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[325] *Id.* at 862.

[326] *Id.*

[327] *Id.* at 862. The court was clear in its decision that New York had great authority over the Tonawanda Reservation:

> There can be no other explanation of the arrangement for transferring the Tonawanda Reservation from the Secretary of the Interior to the Comptroller of the State of New York, or of the continued recognition by the Federal authorities of the exercise of State supervision over that reservation. Ever since 1862 there have been statutory enactments by the State regarding the administration of the Reservation of the Indians and for some seventy years there have been provisions relating to sales of gypsum from that Reservation.

Id.

However, the district court viewed the transfer of reservation title to New York differently:

> The purpose was to put the title in trust in New York State in order that the experience it had had, as hereinbefore set forth, could not be repeated. Under this trust there was no right to convey any real estate. The gypsum in the mines is a part of the real estate, and the State as trustee had no authority to deplete the real estate by permitting the removal of the gypsum. The making of these leases purports to create an interest in land.

National Gypsum, 49 F. Supp. at 211.

[328] The district court opinion presents several arguments to invalidate the State's attempt to lease Tonawanda lands. The basis for the court's decision is that federal law had pre-empted the leasing of Indian lands under state law. *See id.* at 210. The court also held that Congress had not explicitly provided for State control over the reservation, but only for holding the land in trust, and thus the State had no authority to control leasing. *Id.* at 212–14.

[329] *See National Gypsum*, 141 F.2d at 862:

> While there can be no question but that the United States could have controlled the Tonawandas if it had thought best, we are inclined to think that it deliberately left a large measure of control in respect to the reservation to the State of New York. There can be no other explanation . . . of the continued recognition by the Federal authorities of the exercise of State supervision over that reservation.

reservation, if any, is limited to regulating land use and does not encompass interference with other on-reservation activity.

However, to suggest that the State is authorized to regulate reservation land use is remarkably inconsistent with the general policy on Indian lands that was expressed in the provisos to section 233. Although the provisos do not explictly bar "leasing" of the reservations by the State, they do bar taxation and alienation of Indian lands.[330] In addition, even though the Court of Appeals rejected the argument, current federal law still bars the leasing of Indian lands absent congressional authorization.[331] Thus, in the future event that New York seeks unilaterally to lease or otherwise regulate the Tonawanda Reservation, there would be sufficient justification to challenge the holding of *National Gypsum*.

Apart from the effect of section 233 already mentioned, the enactment of sections 232 and 233 probably had no impact on the Tonawanda jurisdictional scheme, even if *National Gypsum* allowed the State to lease reservation lands. If anything, the enactment of the statutes with such strong language prohibiting State alienation, taxation, or attachment of Iroquois territory only serves to undermine any rights that the State might have. In any event, even if Congress did intend to leave a "large measure of control" over the Tonawanda Reservation to New York, it is virtually impossible to determine the scope of such a right absent further judicial interpretation in light of the principles of self-governance articulated by the Supreme Court in recent years.[332]

IV. THE EFFECT OF 25 U.S.C. §§ 232 AND 233 ON INDIAN SELF-GOVERNMENT

The foregoing account of how sections 232 and 233 have operated during the last forty years details some of the legal issues that have arisen as the result of granting partial criminal and civil jurisdiction over Iroquois territory to New York State. However, notwithstanding the importance of analyzing the legal significance of these laws, the political, economic, and social

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[330] 25 U.S.C. § 233 (1988).

[331] 25 U.S.C. § 177 (1988). Such is not the case with the Seneca Nation, which may lease lands at its discretion. *See* Act of Aug. 14, 1950, 64 Stat. 442.

[332] *See supra* Part II.

effect of the statutes on the Indian communities that they were designed to assist must not remain unexamined. Although the statutes have aided in clarifying the scope of state power on the reservations, they have nonetheless failed to satisfactorily accommodate the changes in federal Indian policy that have occurred since they were enacted.

It is currently the policy of the United States to promote the self-determination of Indian people through the strengthening of Indian political institutions and reservation economies.[333] The policy is not only *different* from the policy of assimilation that was the background of sections 232 and 233,[334] it is diametrically opposed to it. The Supreme Court has recognized this shift in policy, not only in its approach to deciding cases dealing with the powers of Indian governments, but also in the way it treats Indian tribal courts.[335] However, these legal and political changes at the federal level have not significantly affected the relationship that exists between the Six Nations and New York. The State cases that apply sections 232 and 233 demonstrate that these statutes have successfully contributed to the assimilation of Indian people by virtue of their undermining effect on the development of Indian communities, and, notwithstanding the current federal policy, they will continue to do so for as long as they remain applicable law.

There are three significant effects on reservation life that have resulted from the system of jurisdiction established by sections 232 and 233.[336] The first effect is the crippling and stagnation of tribal judicial process due to the establishment of a system of concurrent jurisdiction between Indian judicial systems and state courts. A second and related effect of such a jurisdictional system is that State courts routinely review Indian governmental

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[333] *See supra* Part II.

[334] *See supra* note 199 and accompanying text.

[335] *See* Iowa Mutual Ins. Co. v. LaPlante 107 S. Ct. 971, 977 (1987) ("The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts."); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge . . . . Exhaustion of tribal remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.").

[336] The assessments throughout this section are the author's, who is a citizen of the Seneca Nation and was raised on the Allegany Reservation.

action, which invades the political functioning of Indian governments. And finally, when Iroquois communities perpetually rely on the State to provide essential governmental functions of law enforcement and judicial redress, a psychological dependence is created.

As described earlier,[337] section 233 established a limited system of concurrent jurisdiction on the reservations.[338] The necessary result of such a system of jurisdiction is that access to the state courts has stagnated the development of tribal judicial process.[339] In any system where an individual has the opportunity to avail herself of a judicial system that not only maintains the appearance of greater integrity, but also is better able to enforce its judgments, the rational individual will opt for the stronger system. Naturally, over time, the stronger system continues to develop and grow even stronger by virtue of the greater deference to it, while the weaker system declines, eventually ceasing to exist.

The Supreme Court is not unaware that allowing Indians access to state courts has this effect on tribal judiciaries. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*[340] involved an attempt by North Dakota to disclaim pre-existing civil jurisdiction that would have allowed an Indian government to sue a non-Indian business in state court.[341] The primary concern of the Court was whether any exercise of state jurisdiction over a cause of action arising on the reservation would undermine the tribe's rights of self-governance.[342] In

[337] *See supra* Part III(C).

[338] Unless otherwise indicated, the emphasis in this section will be on section 233 rather than on section 232 since there are many more cases that focus on section 233. The theoretical effect of doing so is neglible since both statutes constitute significant intrusions into the self-governing processes of the Six Nations.

[339] Terms referencing "judicial process," "judiciaries," and so forth are defined broadly to include the formal judicial systems of the Seneca Nation Peacemaker's Courts and the Chieftain-based methods of adjudication of the Iroquois Confederacy. However, the analysis in this section is most directly applicable to the courts of the Seneca Nation, which are the only Iroquois judicial systems interacting with the State courts.

[340] 467 U.S. 138 (1984).

[341] *Id.* at 144. In Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957), which was an expansive decision allowing state court jurisdiction over all matters involving Indians arising in Indian country, except for cases involving Indian lands. The main issue in *Wold Engineering* was whether the Indian government could sue a non-Indian in state court under the *Vermillion* grant of jurisdiction. The state, however, argued that assumption by a state of Public Law 280 jurisdiction worked to disclaim any such preexisting jurisdiction. However, the Court concluded that the State's ultimate motivation was to induce the tribe to waive its sovereign immunity from suit by consenting to the state law that would have implemented Public Law 280 jurisdiction in North Dakota.

[342] *Wold*, 467 U.S. at 148. *See also* Williams v. Lee, 358 U.S. 217, 220 (1959).

explaining the effect of the *Vermillion* decision, which allowed individual Indians to bring suit in state court, the Court explained:

> [T]he full breadth of state-court jurisdiction recognized in *Vermillion* cannot be squared with principles of tribal autonomy; to the extent that *Vermillion* permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians or over claims between Indians, it intruded impermissibly on tribal self-governance . . . . As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country.[343]

By approving a framework that allows suits by Indians in state court but not vice versa, the Court recognized the importance of maintaining a jurisdictional environment that fulfills the general mandate of federal law to protect and foster the development of Indian governments and judicial process.[344]

The enactment of section 233 and the opening of the New York State courts to *any* suit involving Indians necessarily accomplished the intrusion into Iroquois self-government that the *Wold* Court so strenuously guarded against. In fact, the intrusion resulting from section 233 was far worse than the scheme presented to the Court in *Wold*. The *Wold* Court believed that there was no effect on Indian self-governance when Indians were allowed to sue non-Indians in state court, based on the fact that the Fort Berthold tribal court did not have subject-matter jurisdiction over the claim that the plaintiffs sought to bring.[345] However, where an Indian court has subject-matter jurisdiction to hear a case brought by an Indian against a non-Indian for a cause of action arising on the reservation, deciding the case in

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[343] *Wold*, 467 U.S. at 148–49. The Court added:

> The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted.

Id. at 149.

[344] *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 106 S. Ct. 2305, 2314 (1986), where the Court stated that

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.

[345] *Id.* at 2308.

state court necessarily contributes to the erosion of tribal self-governance, since bypassing the Indian court interferes with "the right of reservation Indians to make their own laws and be ruled by them."[346]

The negative effect on tribal judicial process can be seen in the cases brought before the New York State courts. One example is *Application of Jimerson*,[347] a case involving a boundary dispute between two Senecas on the Cattaraugus Reservation. The plaintiff originally brought her claim before the Seneca Nation Peacemaker's Courts, which "have exclusive jurisdiction in all civil cases arising between individual Indians residing on [the Allegany and Cattaraugus] Reservations, except those over which the Surrogate's Courts have jurisdiction."[348] The Seneca Nation Council, on appeal, affirmed the decision of the Peacemaker's Court, giving a partial interest in the land to both parties.[349] However, seventeen months later, the Council vacated this decision in order to allow the parties to present their claim in State court.[350]

It is not entirely clear why the Council chose to vacate its earlier decision. Perhaps it felt pressure by the litigants to "do justice" and implicitly affirm their "right" to have their case decided in the State courts. Or perhaps the Council feared re-

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[346] The effect, though subtle, is undoubtedly significant. The ability to sue non-Indians for civil law violations in tribal court for misconduct on the reservation is vital to achieving the legitimacy necessary for maximum effectiveness both within the Indian community and in the non-Indian community. *See* Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971, 978 (1987) ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union* [citation omitted], and would be contrary to the congressional policy promoting the development of tribal courts."); *see also* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S. Ct. 2447, 2452–54 (1985) (upholding the power of tribal courts to exercise civil subject-matter jurisdiction over non-Indians).

[347] 4 Misc. 2d 1028, 255 N.Y.S.2d 627 (Albany Co. Ct. 1963).

[348] SENECA NATION OF INDIANS CONST., 1898, § IV, cl. 2, *as amended* Sept. 12, 1978.

[349] *See* Application of Jimerson, 255 N.Y.S.2d at 629. *See also* SENECA NATION OF INDIANS CONST., 1898, § IV, cl. 5 ("All determinations and decisions of the [Peacemaker's] Court shall be subject to the Council, . . . and the decision of the Council shall be final between the parties.").

[350] The October 20, 1956 Resolution of the Seneca Nation Council read in part:

> Whereas, since said date of May 21, 1955 both parties, of necessity, have their claims before the New York State Court of Claims, and additional party or parties claimants have likewise filed claims to said lands before the New York State Court of Claims, giving to that Court jurisdiction over said 3rd party claims;
>
> Be It Resolved, That the decision of this Council entered on May 21, 1955 be set aside and held for naught, and all parties claimants make proof of their claims before the New York State Court of Claims.

255 N.Y.S.2d at 629.

versal by the State courts because it was not aware that the State courts generally decline to interfere in cases pending, and decided by, the Peacemaker's Courts.[351]

Moreover, the Seneca Council was aware that the Seneca people quite rationally did not trust the tribal judiciary, which has often been politicized and unreliable.[352] Even in cases where the judicial process has been legitimate, judgments have been difficult to enforce.[353] Indeed, it may have been a conscious effort to allow the parties to obtain a State judgment that might conceivably be recognized and enforced rather than having a Peacemaker's Court judgment that would be ignored. Although these circumstances have improved in recent years,[354] these variables help to explain why an Iroquois citizen would opt to bring their claims in the State courts.[355] In any event, by vacating its decision, the Council not only violated the Seneca Nation Constitution by not upholding the exclusive jurisdiction of the Peacemaker's Courts, but it also unintentionally undermined its own integrity and ability to adjudicate decisively the disputes brought before it by its citizens.

The system of concurrent jurisdiction established by section 233 does nothing to alleviate this problem. Rather than providing the opportunity for tribal judiciaries to gain expertise and integrity, the statute perpetuates the erosion of tribal courts by con-

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[351] Application of Jimerson, 255 N.Y.S.2d at 630; *see* Patterson v. Council of Seneca Nation, 245 N.Y. 433, 157 N.E. 734 (1927); Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123 (1921).

However, the State courts have not always responded with such deference to tribal law. In *In re* Jimerson's Will, a probate case, the court acknowledged the exclusive jurisdiction of the Seneca Nation Surrogate's Court over such matters, but nonetheless held that N.Y. INDIAN LAW § 5 and § 233 conferred concurrent jurisdiction on the State courts. See also Mohawk v. Longfinger, 149 N.Y.S. 36 (Catt. Co. Ct. 1955) where the court failed to dismiss an action for partition of lands between two Senecas on the Cattaraugus Reservation on the grounds that section 233 and Public Law 280 conferred jurisdiction to the State to hear cases involving Indian lands; but see Velez v. Huff, 263 N.Y.S.2d 967 (S. Ct. Chau. Co.1965) (denying plaintiff's motion to stay proceedings before the Peacemaker's Court on claim to land title), where the court distinguished *Longfinger* on the grounds that there was no action pending in the Peacemaker's Court when the case was filed in State court.

[352] *1948 Hearings*, *supra* note 219, at 7–8, 107–08.

[353] *Id.*

[354] The Seneca Nation has recently codified a number of laws in an attempt to improve the role of the Peacemaker's Court. *See, e.g.*, SENECA NATION PEACEMAKER'S AND SURROGATE'S COURT RULES OF CIVIL PROCEDURE (1985).

[355] *See, e.g.*, John v. Hoag, 131 Misc. 2d 458, 500 N.Y.S.2d 950 (S. Ct. Catt.Co. 1986) (where plaintiff bypassed the formal procedure of the Seneca Nation Peacemaker's Court in favor of filing in state court); Velez v. Huff, 48 Misc. 2d 10, 263 N.Y.S.2d 967 (Chau. Co. Ct. 1965) (where the State court declined plaintiff's motion to enjoin similar proceedings before the Peacemaker's Court).

tinuing to allow State courts to decide disputes involving citizens of the Six Nations. The fact that State courts have an obligation to apply tribal law is of only minimal significance in the context of the integrity of tribal judiciaries, since this obligation does nothing affirmatively to develop tribal processes. Notwithstanding the authority conferred by sections 232 and 233, only if tribal courts can obtain from the State courts the deference that the United States Supreme Court currently gives them will Indian judiciaries be able to achieve the credibility and stability necessary to fully actuate internal and autonomous methods of dispute resolution.

Another drastic consequence of allowing Indians into State courts is that in deciding cases involving individual Indians, the State courts often exercise judicial review over Iroquois governmental actions and thereby deny the opportunity for that government to resolve domestic matters among its citizens. Generally, there are several bases for denying the authority of State courts to exercise any judicial review. Primarily, State court review violates the *Williams* principle, by "infring[ing] on the right of reservation Indians to make their own laws and be ruled by them."[356] In addition, as a matter of federal law, only federal courts have the right to review tribal court actions, and then only when exercising federal question or diversity jurisdiction.[357] And finally, state court review is potentially damaging because of the possibility of invoking the New York State Indian Law in contradiction of federal or tribal law.

The negative consequences of State court review can be seen in *Hennessy v. Dimmler*,[358] a case involving an attempt by the Onondaga Council of Chiefs, pursuant to tribal law, to remove non-Indians living on the Onondaga Reservation. The Chiefs, pursuant to the jurisdictional provisions of the Treaty of 1794,[359] requested the assistance of federal officials, who delegated the task to the Onondaga County District Attorney, authorizing him—with the Chiefs' approval[360]—to invoke

[356] Williams v. Lee, 358 U.S. 217, 220 (1959).

[357] Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971, 976 (1987).

[358] 90 Misc. 2d 523, 394 N.Y.S.2d 786 (Onon. Co. Ct. 1977).

[359] Treaty with the Six Nations, Nov. 11, 1794, art. VII, 7 Stat. 44, *reprinted in* 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 34, 36 (1904).

[360] The court understood "that the Indians were jealously guarding their rights under various treaties with the United States of America, and in particular the Treaty of Canandaigua (Nov. 11, 1794) and they were not about to take any action on their own in the Courts of New York which could possibly jeopardize any of their treaty relations." *Hennessy*, 394 N.Y.S.2d at 788.

N.Y. Indian Law § 8, the procedure for State removal of intruders.[361]

After determining that the section 8 petition was properly before it, the court proceeded to evaluate the legitimacy of the Chief's decision to remove the non-Indians with regard to the Indian Civil Rights Act (ICRA).[362] The court found that the Chief's action constituted, "in effect, a taking of private property without compensation; a denial of due process and the application of an *ex post facto* law," as well as "a denial of equal protection under the law."[363] The court concluded that "[s]uch serious deprivations of constitutional rights far outweigh any claims of tribal custom or principle which could be made under this particular set of facts."[364] The court's decision was extraordinary not only because a State court was reviewing the conduct of an Iroquois government, but also because it was incorrect in its assumptions concerning the status of Indian governments generally. With regard to the ICRA claim, the court relied on the United States court of appeals decision in *Martinez v. Santa Clara Pueblo*,[365] a decision later reversed by the Supreme Court.[366] In reversing the decision, the Supreme Court recognized the congressional respect for non-Anglo-American—but nonetheless legitimate—traditional objectives and methods of justice found in Indian communities.[367] The State court's language in *Hennessey* indicates that it was imparting notions of fairness and procedure perfectly applicable to Anglo-American courts.[368] However, in doing so, it disregarded the fact that Indian governments may govern both differently and legitimately, as a matter of federal law.[369] And, in doing so, it

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[361] *See id.* at 787–88.

[362] *See id.* at 789–90; 25 U.S.C. 1302 (1988).

[363] *Hennessy*, 394 N.Y.S.2d at 791.

[364] *Id.*

[365] Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

[366] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Supreme Court decision clarified the fact that Indian governments are not subject to judicial review of their official conduct under the ICRA, except through habeas corpus petitions, which are reviewable by the federal courts.

[367] *Id.* at 62–63.

[368] *See Hennessey*, 394 N.Y.S.2d at 791.

[369] *Santa Clara Pueblo*, 436 U.S. at 56–57, 72. People v. Cook, 81 Misc. 2d 235, 365 N.Y.S.2d 611 (Onon. Co. Ct. 1975) was an earlier attempt by the Onondaga Chiefs to remove non-Indians from their reservation. As in *Boots*, they petitioned federal officals for assistance, who referred the matter to the Onondaga County district attorney. *Cook*, 365 N.Y.S.2d at 615. Not understanding why the Onondagas refused to invoke § 8 directly, the court only saw that "the warriors, chiefs, clanmothers and supporters

completely frustrated the operating political process of the Onondaga Nation.

Another instance of State court review of Indian governmental action is *People by Abrams v. Anderson.*[370] Individual Indian operators of a bingo hall on the Tuscarora Reservation sought a preliminary injunction to prevent Indian protesters from interfering with the bingo hall operation. A central issue in the case was whether the anti-bingo protesters had been "deputized" by the Tuscarora Council of Chiefs in order to execute an anti-gambling ordinance and were thus operating under the shield of sovereign immunity. However, both the trial court and the appellate court characterized the dispute as a "private civil claim" between the bingo operators and individual protesters and not as an action "against the tribe or its duly authorized law enforcement officials."[371]

Contrary to the court's presentation of the issue,[372] ordering the preliminary injunction subjected the actions of the Tuscarora Nation to the review of the State courts and consequently undermined its ability to self-govern. Under the volatile circum-

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moved from one home to another physically removing families of non-Indians, resulting in the alleged threats and forceful entries that produced the indictment." *Id.* at 615.

In its decision, the court recognized the Onondaga's right to self-government, but held that the defendant Chief's conduct went "beyond the concept of self-government and into the area that both Congress and the Legislature of the State of New York ha[d] pre-empted in order to avoid injury to both property and person." *Id.* at 627. To the court, N.Y. INDIAN LAW § 8 provided the only legal procedure for removal, and not to follow that procedure was unacceptable for any Indian government:

> The concept of self-government as in any concept of a free society has its restrictions, and where the Congress *or the local state legislatures* have enacted legislation in an area upon the basis that injury to person or property may be avoided, *the rights of any individual or group must yield to the welfare of the public as a whole.*

Id. (emphasis added).

[370] 137 A.D.2d 239, 529 N.Y.S.2d 917 (4th Dept. 1988).

[371] *Anderson,* 529 N.Y.S.2d at 923. The court relied exclusively on the plaintiff's pleading of the case and found that the "[d]efendants have not yet established that the tribe has a validly enacted anti-gambling law, that the Council of Chiefs is the proper legislative body of the tribe, that defendants are duly designated law enforcement officials, or that defendants were acting in that capacity in interfering with the bingo operation." *Id.*

In so finding, the court ignored evidence that the Tuscarora Chiefs were recognized by the United States and the State of New York as the legitimate governing authority on the reservation, that it had reaffirmed an 1885 anti-gambling ordinance on April 1 and June 10, 1987, and that it had legitimately empowered the defendants to enforce that law. *Id.* at 918.

[372] "'(T)he issuance of an injunction in this case should not be construed to diminish or impair the rights of self-government of the Tuscarora tribe, nor . . . (to circumscribe) the conduct of Tuscarora government officials.' Since the preliminary injunction issued to plaintiffs was not obtained against the sovereign [citations omitted], the relief is not barred by the doctrine of sovereign immunity." *Id.* at 923–24.

stances that surrounded the bingo demonstrations,[373] the court undoubtedly felt great pressure to alleviate the tension as expediently as possible. Unfortunately, in its attempt to stabilize the situation, the court failed to recognize the legitimacy of the Tuscarora Chiefs' attempt to enforce Tuscarora law against Tuscarora people by characterizing the dispute as a "private civil action."[374] If the State court had found that the action was cloaked in the sovereignty of the Tuscarora Nation, it would have been powerless to intervene. Certainly the court acted appropriately if this dispute had involved non-Indians and had been off the reservation. But to the extent that the real dispute was between the Tuscarora government and Tuscarora citizens, the State court was acting far beyond its authority and improperly interfered with the otherwise properly functioning political process of the Tuscarora Nation.

Another more subtle example of State court review of Indian governmental action is demonstrated by *John v. Hoag*.[375] At issue in the case was a resolution passed by the Seneca Nation Council purportedly granting the plaintiff, an individual Seneca, an exclusive distributorship for the sale of cigarettes on the reservation. The plaintiff alleged that the Seneca Nation had breached a "contract" by not prohibiting the sales activity of the defendant Hoag, who had also obtained the right to sell cigarettes by resolution of the Seneca Council.[376] The State court, however, after reviewing the procedures of the Seneca Nation Peacemaker's Court, concluded that the plaintiff "never opted to commence an action" in that court and invoked its concurrent jurisdiction to sustain an interference of contract claim against the defendants.[377]

Although the court recognized that the Seneca Nation itself could not be sued, it nonetheless benignly decided to review the effect of Seneca Nation legislation by sustaining jurisdiction over the "contract" claim against the defendants. The court did understand the interests of the Seneca Nation: "To whom and on what conditions the right of sale of cigarettes on the lands of the Seneca is without question an internal legislative deter-

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[373] Preliminary Report, *supra* note 1, at 8.
[374] *Anderson*, 529 N.Y.S.2d at 923.
[375] 131 Misc. 2d 458, 500 N.Y.S.2d 950 (S. Ct. Catt. Co. 1986).
[376] *Id.* at 951.
[377] *Id.* at 956–57. The court dismissed the case against the Seneca Nation and its officers on the basis of its sovereign immunity from suit. *Id.* at 951–56.

mination reserved to the Seneca Nation."[378] However, the court failed to perceive that determining whether the plaintiff did indeed have an exclusive right to sell cigarettes and whether the defendant did in fact interfere with that right turned on the language and legislative intent of a Seneca Nation law.[379] Under these circumstances, exercising State jurisdiction over the dispute between these two Senecas impermissibly interfered with the right of the Seneca people, through their elected representatives, "to make their own laws and be ruled by them."[380] The only legitimate forum for adjudicating a dispute between two Senecas over the scope of Seneca Nation legislation was the Peacemaker's Court of the Seneca Nation, and not a New York State court.

The conclusion to be drawn from these cases is that it is virtually impossible under the system of jurisdiction established by sections 232 and 233 for the Iroquois governments to exercise their rightful sovereign authority over political matters in a system that provides for oversight by the State courts, even though, as demonstrated by the *Anderson* and *Hoag* cases, State courts have become more concerned about infringing upon the sovereignty of Indian nations. But the same cases demonstrate the ways, both consciously and unconsciously, that state courts can effectively undermine the political and legal processes of Indian governments. This threat to tribal self-government will continue to exist as long as individual Indians are capable of taking disputes among themselves into the state courts.

The final significant effect of sections 232 and 233 on Iroquois self-government is that the statutes perpetuate an attitude of dependence on New York State and inhibit the community initiative necessary for improving tribal political and legal institutions. Although this effect is somewhat related to the previous discussion concerning the effect of concurrent jurisdiction on the development of tribal courts, the emphasis here is more on the continuing psychological impact of having the State, rather than the Iroquois governments themselves, fulfilling traditional governmental functions.

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[378] *Id.* at 955.

[379] Although the court acknowledged it was legislation, it analyzed the case in terms of a contract dispute. *See, e.g.*, *id.* at 951, 955, 957–58.

[380] Williams v. Lee, 358 U.S. 217, 220 (1959).

The problem can best be demonstrated by analyzing the law enforcement situation of the Seneca Nation.[381] Currently, the Seneca Nation operates its own police force, the only government of the Six Nations to do so.[382] In addition, the State police and the sheriffs' departments of Cattaraugus and Erie Counties maintain a working relationship with Seneca Nation law enforcement officers to provide relatively uniform criminal law enforcement on the Allegany and Cattaraugus Reservations. The problem is that the existence of such an arrangement created by section 232 undermines the community incentive necessary to establish exclusive tribal law enforcement. By augmenting the police services provided by the Seneca Nation, State participation apparently satisfies the remaining community need for law enforcement, as evidenced by the lack of initiative to alter the status quo.

One could argue that because the Seneca community is satisfied with the current level of law enforcement provided by the mix of State and Indian police, the Senecas must be truly "self-governing." Otherwise, they would alter the mix of Indian and non-Indian law enforcement to obtain a combination of police services that better reflects the community preference. However, the complacency associated with the provision of State police services is evidence of the gradual assimilation of the Seneca people into the fabric of the New York State political community. If a desire for complete autonomy over the provision of law enforcement indicates a pure commitment to self-government, then to the extent that *any* level of non-Indian police services completely satisfies the law enforcement needs of the Seneca people, the self-governing motivation of the Seneca people must be partially destroyed. Since section 232 permits the State to enforce its laws on the reservation, the statute has over time gradually eroded the self-governing motivation of the Seneca people to provide, by their own efforts, this integral function of government.

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[381] The grant of jurisdiction to the State, and thus the effect of dependency, is far more extensive under section 232 than under section 233.

[382] Preliminary Report, *supra* note 1, at 26. The Mohawks temporarily operated a police force during the late 1970's, but it was disbanded due to internal conflicts over its administration. The existence of some Seneca law enforcement indicates that a desire for governmental autonomy exists in this area. However, the existence of the Seneca Nation police is conceivably due to the fact that law enforcement was previously inadequate or non-existent when left solely in the hands of the State. Thus, the Seneca Nation police force may have arisen simply to fill a gap in law enforcement, an admittedly easier task than assuming jurisdiction in an area in which the State is active.

The real problem for self-governance will arise if the government of the Senecas ever attempts to exercise criminal jurisdiction in areas where the State is currently enforcing the law and is unwilling to relinquish its exclusive power.[383] Ideally, there should be a continuum of jurisdiction, with the State withdrawing primary support contingent upon the ability of the Iroquois government to assume the added responsibility. Arguably, Congress intended to create such a situation by enacting section 232. But suppose the State does not withdraw its exercise of jurisdiction: would the State defer to an Indian legal system empowered to prosecute charges of theft, assault, or even murder? Would it welcome the assistance? Or resent the loss of control? It certainly seems that cooperative agreements, such as the one that exists between the Cattaragus Reservation law enforcement and the county sheriff's department, are the key to any smooth transition. Ultimately, if New York State is not a willing partner to the assumption of law enforcement responsibility by the Iroquois nations, then these governments will never be totally succesful in their efforts to change the current system. Such a situation would only lead to further dependence as Iroquois people would be forever subject to the assimilative effect of section 233.

Certainly the exercise of criminal jurisdiction by the State is not bad in all cases. The effect is negative only where an Iroquois government is structurally and financially able to provide police services, but does not do so due to a lack of community initiative. In fact, the exercise of State jurisdiction is not only positive, but imperative, when dealing with Iroquois governments that are ill-equipped to exercise a traditional governmental function, such as law enforcement. In these situations, the provision of police services by the State is beneficial only until the Iroquois government itself is developed enough to sustain its own police force. Unfortunately, this event may never occur because the community initiative to govern exclusively in this area could, if not already, be totally depleted due to the years of dependence on the State.

These three different effects of sections 232 and 233 on Iroquois tribal courts and self-determination demonstrate that the

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[383] Given a lack of grass roots initiative to alter the status quo, it is likely that any change in the provision of police services will arise solely due to the leadership of Iroquois governmental officials.

presence of these laws undermines the ability to self-govern every time an Iroquois government or individual relies on the State for protective or adjudicative services.[384] Such consequences were predictable effects of the statutes. Although the Congress that enacted the statutes must have had a genuine desire to improve the quality of life for Iroquois people on the reservations, the assimilationist policy reflected in the statutes has perpetuated a dependency on the majority society. If self-determination is truly the objective of the Iroquois people and the United States, it will not be achieved while sections 232 and 233 remain applicable law.

V. Recommendations for Reform and Conclusion

The grant of criminal and civil jurisdiction over Iroquois territory to New York State under sections 232 and 233 has, for the most part, fulfilled the objectives of the Congress that enacted those statutes. Although lawlessness has not disappeared from the reservations, section 232 has provided a mechanism that at least allows for a mimimum level of law enforcement. However, the exercise of State law enforcement on the reservations appears linked to the working relationship that exists between Iroquois officials and State and local law enforcement officials responsible for implementation.[385] Naturally, the possibility exists that police services could arbitrarily be denied since the exercise of criminal jurisdiction is not mandatory, but occurs only "when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed

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[384] This statement is not true for governments that are not yet capable of exercising self-government, as that term is defined by the fulfillment of traditional governmental functions. More concretely, these external standards of self-government entail: protection and strengthening of sovereignty and culture; provision of police protection; stabilization and regulation of economic activity; provision for health, education, and welfare; maintainance of borders, lands, and highways; and establishment of relations with other governments. To the extent that assistance from the State or federal governments is limited to facilitating development of these functions, such reliance does not threaten self-government if no other means to eventual independence is feasibly attainable.

By relying on these definitions, the author is imparting standards of governmental performance that may or may not reflect how the citizens of those governments define "successful government." But since the level of functional sovereignty is dependent upon the extent to which a government can independently fulfill the survival needs of itself and its people, the degree to which these standards are satisfied is an accurate measure of both sovereignty and self-determination.

[385] *See supra* note 194.

unsatisfactory."[386] Although civil rights violations remain possible,[387] the discretion available within section 232 ultimately holds the key to any future assumption of law enforcement duties by the Iroquois governments themselves while section 232 remains current law.

Even though section 233 does not grant as much authority to the State as section 232, its effects on self-government are no less significant. By allowing individual Indians and Indian nations to file suit in State court, the enacting Congress may have done more to undermine self-governance than by simply allowing the State to assume responsibility for law enforcement. As has been discussed, opening up the State courts to reservation Indians has had the effect of opening up the internal affairs of the Iroquois governments to the scrutiny and authority of a much more powerful sovereign, as well as subordinating tribal judicial process to a seemingly more equitable judicial system. The potential result is that the negative long-term effects of section 233 on self-determination far outweigh the threat posed to the Six Nations from allowing the State to exercise criminal jurisdiction over the reservations.

In light of these effects and the fact that the United States no longer pursues a policy of assimilating American Indians, the current jurisdictional scheme must be altered. One solution, although fairly drastic, would be to repeal sections 232 and 233 immediately. The effect of repealing section 233 would be simply to deny reservation Indians access to the State courts and would leave them with no alternative but to turn to tribal forums for resolution of their disputes. It is certain that such a change would be difficult in the short run, since only the Seneca Nation has a now-familiar style judicial system. But the change would reestablish a normally functioning political process in which the citizenry would *demand* that some form of equitable judicial process be implemented. By reestablishing the incentive to improve internal judicial systems, any discomfort due to the elimination of State courts as a viable option for resolving disputes would be offset by the real, long-term possibility that credible and equitable judicial processes could be reconstructed within tribal government. Arguably, the past forty years of access to

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[386] H.R. REP. No. 2355, *supra* note 122.

[387] *See* Thompson v. State of New York, 487 F. Supp. 212 (N.D.N.Y. 1979) (where a civil rights action was sustained against local officials who withdrew police and fire protection from the reservation).

State courts could serve as a standard of fairness that Iroquois people could demand from their own judicial systems.

Despite the feasibility of immediately repealing section 233, the immediate repeal of section 232 would likely do more harm than good to Iroquois communities. This is so for two reasons. First, the Iroquois governments of today are not sufficiently developed to supplant completely State law enforcement. Second, because of this inadequacy, the immediate repeal of State criminal jurisidiction would have a much more severe and damaging effect on Indian communities than simply denying reservation Indians access to State courts. Thus, only a gradual and managed repeal of section 232 will allow Iroquois governments to assume control over the governmental function of law enforcement currently being administered by New York State.

The most natural and effective legislative revision would establish a mechanism that would allow for the piecemeal retrocession of jurisdiction by New York State, as determined by the affirmative action of the individual Iroquois nations. Such a scheme would allow the Indian communities themselves, each having a range of abilities to assume governmental responsibilities, to determine the scope of State authority over their territory. For example, a referendum, a vote of the tribal council, or a decision of the Chiefs could serve as a sufficient indicator of whether a particular community desired assistance from New York in fulfilling the basic governmental function of law enforcement. Perhaps more importantly, reform of this type would create the right to choose the relationship that exists between an Iroquois nation and the State.

To allow for an Indian nation to determine the degree of state involvement in its territory is not without legislative precedent. The 1968 amendments to Public Law 280, which were codified in various sections of the U.S. Code, have worked a substantial change in the way states exercise both criminal and civil jurisdiction in Indian country. First, 25 U.S.C. §§ 1321 and 1322 allow for any state to assume criminal and civil jurisdiction over particular Indian territory located within its boundaries, but only with the consent of the particular Indian nation involved.[388] In addition, 25 U.S.C. § 1323 allows for the retrocession of "all or any measure of criminal or civil jurisdiction, or both," acquired by a state pursuant to Public Law 280, dependent upon the

[388] 25 U.S.C. § 1326 (1988).

unilateral action of that state.[389] By altering the mechanism by which states obtain, or retain, jurisdiction over Indian territory, Congress explicitly recognized that the previous grants of jurisdiction to states were improper absent the consent of the people to be subject to state control. A scheme to allow the Six Nations themselves to determine the amount of State involvement would accomodate this view. Although the jurisdictional relationship with the State would be different with regard to each Iroquois community or nation, such a change would not place undue administrative burdens on the State, given the decentralization of the State police. Ultimately, this proposal for change in New York would provide greater responsiveness and legitimacy, since the Six Nations themselves would determine whether there would be a retrocession of State jurisdiction and to what extent such retrocession would take place.[390]

Another possible mechanism for protecting and strengthening Iroquois self-government would be to provide for formal federal oversight of the State's exercise of jurisdiction over Iroquois territory and people. Because the existence of State jurisdiction does not allow for the unimpeded development of Iroquois political and legal systems, monitoring by the federal government might provide the only alternative under the current scheme that could eventually lead to self-governance, completely free from State involvement. Accordingly, a pledge of federal financial assistance and training to develop Indian law enforcement and judicial capabilities not only would result in short-time local improvements but also would serve to put the State on notice that it is merely fulfilling a caretaker role until the Iroquois nations themselves can provide law enforcement and judicial services.

Aside from any immediate alteration in the current jurisdictional scheme, several changes must be made by New York State in order for it to be in full compliance with federal law. With regard to the exercise of criminal jurisdiction, the State must establish a formal and coherent policy governing the circumstances in which it will enforce its laws or otherwise take action in Iroquois territory. To the extent that the State should

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[389] 25 U.S.C. § 1323 (1988).

[390] Such a proposal assumes that the tribal government would not retrocede jurisdiction for its own sake and would only do so when the capability of the tribal government was commensurate with the challenge of assuming those duties previously exercised by the State.

exercise criminal authority only where tribal law enforcement is inadequate, the continued lack of a policy can only lead to continued confusion and instability between Indian officals and the State officials charged with implementing reservation law enforcement.

In addition, the State must substantially revise its own Indian Law to eliminate those provisions that conflict with federal and tribal law. In the absence of any change, the State will continue illegally to usurp authority that properly belongs either to the Iroquois nations or to the United States. Until this body of outdated law is revised, there will continue to exist a mechanism to justify ultra vires State action. Revision will directly serve to enhance the authority of Indian governments to control their internal matters by eliminating the possibility of an outside influence, such as the State or State law, from misdirecting local energies away from internal problems.

Finally, with regard to the exercise of section 233 civil jurisdiction, State judges must be acutely aware that allowing Indians to bring their claims in State court does not mean that federal law and policy are inapplicable. Although section 233 undermines the ability of tribal courts to exercise their exclusive jurisdiction in Peacemaker's Courts,[391] State courts cannot contribute to this erosion of self-government. Ultimately, the rights of individual Indians to bring their claims in State court must be balanced against the sovereign rights of Indian communities to self-govern. State courts must apply tribal law where it exists and can be discerned. And given the federal policy and law currently favoring the right of Indian nations to decide for themselves what judicial process will exist in their territory, the only type of case involving an Indian that should be heard in State court, while section 233 remains the current law, is one where the cause of action arises off the reservation. In all other circumstances, notwithstanding the language of the statute, the exercise of jurisdiction will "infringe[] on the right of reservation Indians to make their own laws and be ruled by them,"[392] and such concerns should be considered when determining subject matter jurisdiction to decide a case involving Indians.

Although much of the current quandry in pursuing self-government is derived from what the federal and State governments

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[391] SENECA NATION OF INDIANS CONST., 1898, § IV, cl. 2, *as amended* Sept. 12, 1978.
[392] Williams v. Lee, 358 U.S. 217, 220 (1959).

have done, there remains a significant remedy that can minimize the effects of sections 232 and 233. It takes the form of unilaterally prohibiting the conduct that sections 232 and 233 explicitly allow. That is, an Iroquois government could create negative incentives to prevent its citizens from affirmatively involving State law enforcement or taking a dispute to a State court. Certainly the nuances of such disincentives and their consequences could be left to the particular government, but the overall effect would be to virtually eliminate the effect of section 232 or section 233. Of course, much of the problem in this remedy is whether section 232 and section 233 will even allow such political initiative to exist.

Ultimately, the Six Nations can never genuinely achieve autonomous self-government unless they themselves desire it, since any hope of legislative revision is necessarily contingent upon their involvement. A major impediment to such real reform is no doubt linked to the damaging conception of sovereignty that is held by many Iroquois people and leaders. The current age, much like the age that existed two hundred years ago, is not one that respects hollow protestations that sovereignty is being infringed. True sovereignty is much more than a declaration; it is an affirmative and substantive exercise of political power that is based on the will of the people. Real self-determination for the Iroquois Nations will only be realized when the governments can substantively fulfill all of the political, economic, social, and in some cases, spiritual, needs of their people. In light of the threat that sections 232 and 233 pose to the psychology of self-governance, Iroquois leaders have a moral obligation to carry the burden of revitalizing a community spirit that is intolerant of any jurisdictional scheme that allows the State of New York to interfere with the right of self-determination.

RECENT DEVELOPMENTS

INTERPRETING 18 U.S.C. § 2331 UNDER U.S. AND INTERNATIONAL LAW

During 1985, the United States witnessed a series of dramatic terrorist attacks abroad, which resulted in the death of several American citizens.[1] On June 14, gunmen commandeered TWA flight 847 with 104 Americans aboard, and forced the pilot to land the jet in Beirut.[2] Once on the ground, the hijackers shot and killed American Navy diver Robert Stethem.[3] Less than four months later, on October 7, 1985, several heavily armed men hijacked the Italian cruise ship Achille Lauro, and killed wheelchair-bound American Leon Klinghoffer.[4] Finally, just five days short of the year's end, terrorists opened fire with automatic weapons near the El Al terminals in the Rome and Vienna airports, killing twenty persons, including five American citizens.[5]

Congress responded quickly: on July 11, 1985, Senator Arlen Specter (R-Pa.) introduced S. 1429, a bill to authorize the prosecution of terrorist attacks on U.S. nationals abroad.[6] Senator Specter's intent was to "establish jurisdiction in the courts of the United States of America to protect U.S. interests around the world when they are attacked by terrorism . . . ."[7] Ultimately, S. 1429 merged with a counterpart bill introduced in the House of Representatives, H.R. 4151, and was signed into law by President Reagan on August 27, 1986.[8]

The law now appears as 18 U.S.C. § 2331 [hereinafter section 2331 or the Act], and it establishes "Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals."[9] As of January, 1990, there have been no prosecutions under section 2331. However, the F.B.I. is currently considering the investigation of at least one case which may yield an indictment

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[1] N.Y. Times, Dec. 28, 1985, at 6, col. 1.
[2] N.Y. Times, June 15, 1985, at 1, col. 6.
[3] N.Y. Times, June 18, 1985, at 9, col. 6.
[4] N.Y. Times, Oct. 8, 1985, at 1, col. 4.
[5] N.Y. Times, Dec. 28, 1985, at 1, col. 6.
[6] S. 1429, 99th Cong., 1st Sess. (1985).
[7] *Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S. 1373, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 40–42 (1985) (statement of Sen. Specter) [hereinafter *Senate Hearings*].
[8] Cong. Index. (CCH) 21,027, 35,072 (1986).
[9] 18 U.S.C. § 2331 (1988).

and trial.[10] Prosecution of this or a later case under the Act will necessitate judicial resolution of the gaps, conflicts, and ambiguities existing in the Act's statutory scheme.

Yet at least two provisions of the Act promise to raise issues of statutory interpretation which can be addressed ex ante. Accordingly, this Recent Development provides an exegesis of section 2331. Part I clarifies the meaning of two noteworthy prerequisites to prosecution under the Act: first, that an attack on a U.S. national cause or be intended to cause "serious bodily injury"; and second, that the Attorney General certify prosecutions under the Act.[11] Part II considers the international legal issues implicated by the Act, particularly the limits of United States extraterritorial jurisdiction to prescribe and to enforce federal law.

I. Provisions of Section 2331

Section 2331 establishes jurisdiction over violent, terrorist crimes against U.S. nationals who are attacked outside the United States.[12] Such crimes include murder, voluntary man-

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[10] Letter from Oliver B. Revell, F.B.I. Associate Deputy Director for Investigations, to Professor Philip B. Heymann (Jan. 17, 1990) (discussing possible F.B.I. investigation of attack on American citizen Diana Ortiz in Guatemala) (on file with author).

[11] 18 U.S.C. § 2331 (1988). Other provisions of the Act refer to federal statutes which have already been interpreted by the courts (*see, e.g.*, 18 U.S.C. §§ 2331(a)(1)–(3) (1988), referring to "section 1112(a) of this title"; § 2331(d), incorporating 8 U.S.C. § 1101(a)(22) (1988)). *See, e.g.*, United States v. Browner, 889 F.2d 549 (5th Cir. 1989) (interpreting 18 U.S.C. § 1112(a) (1988)); United States v. Bercier, 848 F.2d 917 (8th Cir. 1988) (same); Castaneda-Gonzales v. Immigration and Naturalization Service, 564 F.2d 417 (D.C. Cir. 1977) (interpreting 8 U.S.C. § 1101(a)(22) (1988)); Cartier v. Secretary of State, 506 F.2d 191 (D.C. Cir. 1974) (same).

[12] Section 2331 provides:

> (a) Homicide.—Whoever kills a national of the United States, while such national is outside the United States, shall—
>
> (1) if the killing is murder as defined in section 1111(a) of this title, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned;
>
> (2) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and
>
> (3) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.
>
> (b) Attempt or conspiracy with respect to homicide.—Whoever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States shall—
>
> (1) in the case of an attempt to commit a killing that is a murder as defined in this chapter, be fined under this title or imprisoned not more than 20 years, or both; and

slaughter, involuntary manslaughter, attempted murder, and conspiracy to commit murder.[13] The Act also allows prosecution for attacks which cause, or are intended to cause, serious bodily injury.[14] The Act restricts prosecution by requiring certification from the Attorney General (or her highest ranking subordinate with responsibility for criminal investigations) that the attack was "intended to coerce, intimidate, or retaliate against a government or civilian population."[15]

A. *"Serious Bodily Injury"*

Section 2331(c) requires that in cases of assault, the perpetrator inflict or intend to inflict on the victim "serious bodily injury" in order to be prosecuted under the Act. Absent overt physical injuries easily viewed by a trial court or jury, conflicting evaluations of what constitutes sufficiently serious injury are inevitable.[16] In resolving these conflicts, one may consult such fre-

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(2) in the case of a conspiracy by two or more persons to commit a killing that is a murder as defined in section 1111(a) of this title, if one or more of such persons do any overt act to effect the object of the conspiracy, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.

(c) Other conduct.—Whoever outside the United States engages in physical violence—

(1) with intent to cause serious bodily injury to a national of the United States; or

(2) with the result that serious bodily injury is caused to a national of the United States; shall be fined under this title or imprisoned not more than five years, or both.

(d) Definition.—As used in this section the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

(e) Limitation on prosecution.—No prosecution for any offense described in this section shall be undertaken by the United States except on written certification from the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgement of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

18 U.S.C. § 2331 (1988).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, United States v. Webster, 620 F.2d 640, 641 (7th Cir. 1980) (defendant claimed victim did not suffer serious bodily injury even though victim was "kicked and stomped . . . into seeming unconsciousness . . . [and] suffered severe bruises, lacerations, loss of teeth and fractures"); United States v. Johnson, 637 F.2d 1224, 1234 (9th Cir. 1980) (defendant claimed victim did not suffer serious bodily injury even though victim allegedly "suffered . . . extensive and widespread bruises, several lacerations, at least two broken bones, possible momentary loss of consciousness, and severe pain as a result of being beaten . . . with an ax").

quently-used sources of interpretation as the Model Penal Code [hereinafter MPC], federal case law, and other federal statutes which contain the same language. Although the MPC and one federal statute articulate relatively narrow definitions of serious bodily injury, two cases and one statute give broad, inclusive definitions. The legislative history of section 2331 supports the broader interpretation.[17]

1. Definitions of "Serious Bodily Injury"

In the MPC Commentaries, serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[18] Elsewhere in the MPC, serious bodily injury is described as "[p]hysical harm of special gravity . . . [and] extreme gravity of injury," and is contrasted with the "very broad coverage" of ordinary injury resulting from simple assault.[19]

Likewise, the Controlled Substances Act of 1987,[20] which provides for criminal prosecution of certain drug-related crimes which result in "serious bodily injury" to innocents, narrowly defines that phrase: "The term 'serious bodily injury' means bodily injury which involves: (A) a substantial risk of death; (B) protracted and obvious disfigurement; or (C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[21]

In contrast, the leading federal cases which define serious bodily injury, *United States v. Webster*,[22] and *United States v. Johnson*,[23] provide broad definitions of the term by weighing the

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[17] *See infra* notes 28–34 and accompanying text.

[18] MODEL PENAL CODE § 210.0(3) (Official Draft and Revised Comments) (1980).

[19] *Id.* § 211.1(3).

[20] 21 U.S.C. § 802(25) (1988).

[21] *Id.*

[22] 620 F.2d 640 (7th Cir. 1980). In *Webster*, although the defendant argued that "there [was] no 'serious bodily injury' . . . unless there [was] a high probability of death," the court disagreed. *Id.* at 641. "There is no mystery to the words 'serious bodily injury.' Those are words in general use by laymen in their everyday affairs. There is no indication that Congress in adopting such commonly used terms intended to include only the very highest degree of serious bodily injury." *Id.* at 642.

[23] 637 F.2d 1224 (9th Cir. 1980). In *Johnson*, the court devoted part IV of its opinion to defining "serious bodily injury" and describing the appropriate jury instructions on the term. "[A] jury should be instructed to use its common sense in deciding whether the injuries constitute serious bodily injury." *Id.* at 1246. The jury should consider whether the victim suffered "extreme physical pain . . . disfigurement, loss or impairment of the function of a bodily member, organ, or mental faculty, protracted unconsciousness

totality of the factors involved in the injury.[24] Neither case absolutely requires that there have existed a substantial risk of death. Rather, the cases endorse a "common sense" approach to determining serious bodily injury.[25]

The 1986 amendments to the Marine Protection, Research and Sanctuaries Act of 1972[26] also provide a broad definition of serious bodily injury. The statute's definition is virtually identical to that in the Controlled Substances Act, but includes two more categories which render it quite expansive. "The term 'serious bodily injury' means—(A) bodily injury which involves a substantial risk of death; *(B) unconsciousness; (C) extreme physical pain*; (D) protracted or obvious disfigurement; or (E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[27]

2. Legislative History of "Serious Bodily Injury" in Section 2331

An adherence to the narrower definitions of "serious bodily injury" in future prosecutions brought under section 2331 would conflict with the legislative intent behind the Act. Judging from the Act's legislative history, a source which will necessarily be accorded great weight by a court first encountering section 2331, Congress was more interested in differentiating between political and apolitical attacks, rather than differentiating between critical and moderate bodily injury.[28] In Senator Specter's words, "[t]he basic thrust of this legislation is to establish juris-

. . . ." *Id.* Ultimately, however, "[t]he presence or absence of any of these factors is not to be determinative, since the jury must use its own judgement to assess the severity of the injuries." *Id.*

[24] These two cases have been widely followed. *See, e.g.*, United States v. Fitzgerald, 882 F.2d 397, 399 n.2 (9th Cir. 1989); United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988); United States v. Bernard S., 795 F.2d 749, 755 n.10 (9th Cir. 1986).

[25] *Johnson, supra* note 16, at 1246.

[26] 42 U.S.C. § 6928(f)(6) (1983).

[27] *Id.* (emphasis added). At least one court has held that in construing "serious bodily injury," in a case involving a statute from title 18, courts should avoid the narrow definition articulated in 21 U.S.C. § 802(25) because "section 802 [of 21 U.S.C.] limits the application of the definitions contained therein to offenses within 'this subchapter.' Accordingly, [the] argument that the definition should extend to . . . Title 18 prosecutions is without merit." United States v. Woodson, 838 F.2d 468 (4th Cir. 1988) (No. 87-5087) (WESTLAW, CTA library).

[28] *See, e.g.*, *Senate Hearings*, *supra* note 7, at 68 (a need to exclude simple "barroom brawls" from the Act's coverage); *Antiterrorism Act of 1986: Hearing Before the House Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 21 (not covering ordinary robbery of American businessman in Paris), 22 (barroom brawls), 24 (same), 56 (same) (1986) [hereinafter *House Hearings*].

diction in the courts of the United States of America to protect U.S. interests abroad when they are attacked by terrorism . . . ."[29] Dr. Ray Cline, a senior advisor at the Center for Strategic and International Studies at Georgetown University, testified that the intent of the bill was to close "every legal loophole . . . that would prevent the lawful prosecution of terrorists committing an international . . . crime . . . ."[30]

Abraham Sofaer, Legal Adviser to the State Department, similarly viewed the intent of S. 1429, asserting that "the bill fills a remaining gap in our current structure of criminal jurisdiction over acts of terrorism by making criminal violent acts committed against U.S. nationals."[31] In his prepared statement to the Senate Subcommittee on Security and Terrorism, Judge Sofaer stated that the bill would cover "murder, assault, or kidnapping,"[32] and "assaults and other violent attacks,"[33] as long as they were politically motivated.[34]

Thus it appears that Congress intended "serious bodily injury" under section 2331(c) to encompass a wide range of violent activities against U.S. nationals, as distinct from the more restrictive usage of that phrase in other criminal statutes.

B. *The Certification Requirement*

Another noteworthy aspect of section 2331 is subsection (e), which provides that "[n]o prosecution for any offense described in this section shall be undertaken except on written certification . . . that . . . such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population."[35] This certification requirement raises two questions. First, why did Congress authorize an Executive branch official to make a finding which would ordinarily lie within the province of a judge

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[29] *Senate Hearings*, *supra* note 7, at 40.
[30] *Id.* at 87.
[31] *Id.* at 62.
[32] *Id.* at 66.
[33] *Id.* at 73.
[34] On the other hand, the definitions of serious bodily injury which should control in section 2331 are narrow enough to exclude minor assaults. While the arguments for punishing assault resulting in serious bodily injury might extend to simple assault, foreign policy concerns support the latter's exclusion from the Act's coverage. Laws such as section 2331, which assert extraterritorial jurisdiction, involve proscribing certain behavior in the territory of another country. Enforcement of such laws may involve serious violations of another state's sovereignty. *See infra* notes 47–97 and accompanying text.
[35] 18 U.S.C. § 2331(e) (1988).

or jury, during the course of a trial?[36] Second, must the intimidated population be American in order to invoke the Act?

1. Why Congress Created the Certification Provision

When first introduced in the Senate as S. 1429, section 2331 lacked a certification requirement, and simply borrowed the definition of terrorism from the Foreign Intelligence Surveillance Act (FISA).[37] That statute defined terrorism as actions which "appear to be intended—(A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping . . . ." However, concerns soon surfaced that the inclusion of "terrorism" as an element of the offense and defined within section 2331[38] would raise difficult and complicated issues at trial, which could be avoided through certification. Therefore the final version of H.R. 4151 (after incorporating much of S. 1429) included a requirement that the offense be certified by the Attorney General.[39]

Certification was intended to avoid the necessity of defining terrorism in the Act itself, and thereby to avoid thorny questions of terrorist intent. Judge Sofaer stated several objections to including a definition of terrorism in section 2331. "Terrorism cannot be defined in any manner that is generally acceptable for a criminal statute, where precision is required. Prior attempts have led to tortured results . . . ."[40] Victoria Toensing, a Deputy Assistant Attorney General in the Justice Department, summarized that Department's concerns over including a definition of terrorism in the Act.

> [W]e d[o] not want to have to prove as an element of the crime, someone's political beliefs.
>
> . . . First of all, there are first amendment problems that bothered us. But second, what you are going to have is a

[36] Most other federal criminal law eschews certification requirements. *See* 18 U.S.C. §§ 1–6005 (1988) (codifying federal crimes and criminal procedure).

[37] S. 1429, 99th Cong., 1st Sess. (1985); *see* 50 U.S.C. § 1801(c)(1) (1988) (Foreign Intelligence Surveillance Act).

[38] *Senate Hearings*, *supra* note 7, at 68 (statement of Abraham Sofaer, Legal Advisor to the Department of State).

[39] 18 U.S.C. § 2331(e) (1988).

[40] *House Hearings*, *supra* note 28, at 42. The difficulty in defining terrorism, which makes certification such an attractive option for purposes of domestic law enforcement, seriously undermines the Act's validity under international law. *See infra* notes 70–93 and accompanying text.

> circus in the courtroom. The terrorist then has a display at taxpayer's expense about what all the reasons were for the motives behind committing the heinous act. We felt that only the elements of the violent crime should be in the bill and that Congress could make known its intent of when this kind of jurisdiction would be applied.[41]

The certification provision effectively addressed concerns over defining terrorism in the Act itself. The result of the certification clause in section 2331(e) is completely to remove the issue of terrorism from the courts. Once the Attorney General certifies the case, the limitations on prosecution articulated in section 2331(e), that the attack to be prosecuted be intended to "coerce . . . a . . . population," vanish. The Conference Committee reported that "[t]he determination of the certifying official [in section 2331(e)] is final and not subject to judicial review."[42] Congress's clear statement of intent regarding the finality of certification should be honored by the courts in future prosecutions under the Act.[43]

2. The Nationality of the "Intimidate[d]" Population

While the Attorney General unquestionably has discretion under section 2331(e) to certify the offense if she finds it was "intended to coerce, intimidate, or retaliate against a government or a civilian population,"[44] may she do so if the population so intimidated is not American (*e.g.*, native to the country in which the terrorism takes place)? Attacks on American human rights workers abroad might well be intended to intimidate the local population being helped by the Americans, rather than the

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[41] *House Hearings*, *supra* note 28, at 29; *see id.* at 27, 29, 35, 42, 44, 45, 49, 50.

[42] H.R. Rep. No. 99-783, 99th Cong., 2d Sess. 87 (1986); *see House Hearings*, *supra* note 28, at 16, 45.

[43] Briscoe v. Bell, 432 U.S. 404 (1977). *Briscoe* involved a challenge to the Attorney General's power to certify that the Voting Rights Act applied to states. The Court held that "judicial review of . . . [certifications] by the Attorney General . . . is absolutely barred," *id.* at 412, basing its finding upon the language of the statute, as well as the House Report, which stated that the statute "requires certain factual determinations [by the Attorney General] which are final when made and not reviewable in court." *Id.* at 410 (quoting 42 U.S.C. § 1973b(b) (1988)). The courts of appeal have followed and extended the reasoning of *Briscoe*. *See, e.g.*, Wallace v. Christensen, 802 F.2d 1539 (9th Cir. 1986) (en banc) (holding that circuit courts lacked jurisdiction to entertain prisoner's claim that U.S. Parole Commission abused its discretion in classifying offense of which he had been convicted, for purpose of setting presumptive parole date).

[44] 18 U.S.C. § 2331(e) (1988). This language comes from 50 U.S.C. § 1801(c)(2)(A)–(C) (1988). *See House Hearings*, *supra* note 28, at 52–54.

Americans themselves.[45] In such a case, could the Attorney General in good faith certify the offense?

Section 2331's legislative history provides evidence that Congress contemplated prosecution even when the intimidated population was not American. The House Conference Report accompanying H.R. 4151 states: "[n]either the targeted government nor civilian population, or segment thereof, has to be that of the United States."[46] Although the victims of the actual violence must be Americans, the target population need not be.

Statutory language is inherently somewhat vague and requires judicial interpretation to lend it meaning. Section 2331 is no exception, and awaits authoritative interpretation from the courts as cases are brought under its provisions. Until then, interested parties (including prosecutors) can look to the Act's legislative history and the other materials discussed above as guidance in construing provisions of the Act which are unclear on their face.

II. Section 2331 and International Legal Issues

In addition to questions of interpretation and legislative intent, a prosecution under section 2331 necessarily will involve analysis of international law. While the Act may appear to be much like a domestic criminal law,[47] section 2331 exports U.S. criminal justice by extending the jurisdiction of American courts to acts performed by nonnationals, beyond our national borders. Accordingly, it raises questions about the limits of U.S. power both to prescribe and to enforce our law in places where other domestic and international legal regimes exist.

As a threshold matter, it is important to note that international law may be superseded by an Act of Congress. It is true that "courts have treated international law as incorporated" into domestic law.[48] Where possible, courts will construe domestic

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[45] *See, e.g.*, N.Y. Times, Jan. 3, 1990, at 1, col. 1.

[46] H.R. Rep. No. 99-783, 99th Cong., 2d Sess. 88 (1986).

[47] *Cf.* 18 U.S.C. § 113 (1988) (criminalizing assault resulting in serious bodily injury, occurring within the special maritime and territorial jurisdiction of the United States).

[48] Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1556 (1984). *See* The Paquette Habana, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law").

federal laws to comport with existing international law.[49] However, when an inconsistency between international law and domestic federal law is inevitable, a domestic law promulgated after the international law supersedes the international law.[50] United States courts will not strike down a federal law simply because it violates prior international law.

Nonetheless, consideration of international legal norms by courts is important for several reasons. First, those norms often frame the rhetoric, if not the substance, of foreign relations.[51] Furthermore, violations of international law may damage U.S. credibility with our negotiating partners abroad,[52] particularly since the United States plays such a large role in formulating that law. Thus sound policy and moral consistency may dictate that America adhere to international law.

While the assertion of jurisdiction in section 2331 by the United States may comport with international law, enforcement efforts apparently contemplated by some members of Congress clearly would not.[53] This Section considers the limits imposed by international law on U.S. extraterritorial jurisdiction to prescribe and enforce U.S. federal law.

A. *International Jurisdiction to Prescribe Laws*

International law recognizes five main bases of jurisdiction for any nation's legislature to prescribe laws, one of which is controversial. The territorial principle allows a state to prescribe laws dealing with conduct which takes place within its territory (or conduct which occurs outside its territory and which has or is intended to have a substantial effect in the territory, such as shooting across a national border).[54] The nationality principle allows a state to regulate its own nationals, within and without the state's boundaries.[55] The protective principle authorizes proscription of conduct (such as espionage) by foreign nationals

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[49] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 114 (1987) [hereinafter RESTATEMENT]. Moreover, international law, as incorporated into domestic federal law, comprises part of the Constitution's "supreme Law of the Land" and therefore preempts conflicting state law. U.S. CONST. art. VI; *see* Henkin, *supra* note 48, at 1559–60.

[50] RESTATEMENT, *supra* note 49, at § 115(1)(a); Henkin, *supra* note 48, at 1566, 1568.

[51] *See, e.g.*, N.Y. Times, Jan. 22, 1982, at 1, col. 3.

[52] *See, e.g.*, N.Y. Times, Oct. 7, 1985, at 1, col. 6.

[53] *See infra* notes 94–104 and accompanying text.

[54] RESTATEMENT, *supra* note 49, at § 402(1)(a), (c).

[55] *Id.* § 402(2).

which threatens a narrow class of state interests (such as military secrets).[56] The universality principle allows proscription of offenses which are recognized universally as crimes.[57] The passive personality principle permits a state to prescribe with respect to conduct which has an effect on its nationals abroad;[58] however, the passive personality principle historically has been rejected as a valid basis for prescriptive jurisdiction.[59]

Section 2331 penalizes conduct outside the United States and therefore must rely upon a provision of international law other than territoriality. This Recent Development briefly considers the Act under the protective, nationality, and passive personality principles, and then provides a more detailed discussion of the Act under the universality principle.

Section 2331 sweeps too broadly to be supported by the protective principle. The protective principle covers only "a limited class of offenses . . . directed against the security of the state or other offenses threatening the integrity of governmental functions . . . *e.g.*, espionage, counterfeiting of the state's seal or currency, falsification of official documents . . . ."[60] Yet section 2331 covers the extraterritorial assault, murder, and manslaughter of any American national. While the American people may be shocked and outraged by such incidents, unless these crimes are directed at key diplomatic personnel, they do not threaten the security of the United States as construed under international law.

Nor is the Act fully supported by the nationality principle, which allows extraterritorial regulation of American citizens. The Act restricts its coverage to American victims, but not to American perpetrators. Section 2331 extends its jurisdiction to terrorists who attack Americans regardless of the terrorists' nationality; thus the Act extends well beyond the permissible range of prescription under the nationality principle.

Because the Act is specifically designed to protect American nationals, it may be supported by the passive personality principle. Commentators on section 2331 have stated that the Act "is justifiable under the passive personality principle,"[61] and that

[56] *Id.* § 402(3).
[57] *Id.* § 404.
[58] *Id.* § 402 comment g.
[59] *Id.*
[60] *Id.* § 402 comment f.
[61] Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 613

in passing the Act, Congress "embraced for the first time the passive personality theory of jurisdiction."[62] However, as noted above, the passive personality principle has been criticized and is not accepted generally among nations.[63] This Recent Development will consider section 2331 in terms of the universality principle.

1. The Act Under the Universality Principle

The legislative history of section 2331 indicates that in considering and passing the Act, Congress credited the universality principle of international law. On June 26, 1985, two weeks before he first introduced S. 1429, Senator Specter introduced Senate Resolution 190, "[a] resolution designed to encourage an international declaration that terrorism is a universal crime."[64] Senator Specter included the text of S. Res. 190 in his testimony on S. 1429 before the Senate Subcommittee on Security and Terrorism.[65] Furthermore, a report from the Congressional Research Service indicated that the Congress intended to base S. 1429 on the "universality principle of [international law] juris-

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(1987); *see also* RESTATEMENT, *supra* note 49, at § 402, reporter's note 3; Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 313 (1987).

[62] Kane, *supra* note 61, at 313.

[63] *See, e.g.*, RESTATEMENT, *supra* note 49, at § 402 comment g; The Draft Convention on Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 579–80 (Supp. 1935) ("[j]urisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence . . . . [I]t is the most difficult to justify in theory."); Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 717; J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 297 (1977) ("a State which does not admit the passive [personality] principle is not bound to acquiesce in proceedings on this basis . . . ."); T. BUERGENTHAL & H. MAIER, PUBLIC INTERNATIONAL LAW 162 (1990) (passive personality "generally disfavored"); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 839–40 (2d ed. 1987) (reviewing literature on passive personality); M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1385–86 (1981) ("the nationality of a victim *without more* has not been widely accepted by international decision") (emphasis in original); M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 255–56 (1974).

[64] S. Res. 190, 99th Cong., 1st Sess., *reprinted in Senate Hearings*, *supra* note 7, at 34. Other House and Senate Resolutions—some which have passed one or the other house, and others which have not—have called for international definitions of terrorism. *See, e.g.*, S. Res. 186, 99th Cong., 1st Sess. (1985) (expressing the sense of the Senate that the President should call for a treaty "to prevent and respond to terrorist attacks") (failed Senate); H. Res. 547, 99th Cong., 2d Sess. (1985) (expressing the sense of the House of Representatives that the President "should convene a summit meeting of world leaders to adopt a unified, effective program against international terrorism") (passed House on Sept. 30, 1986). Cong. Index (CCH) ¶ 35,118 (1986).

[65] *Senate Hearings*, *supra* note 7.

diction,"[66] though some testimony before both houses of Congress did focus on other jurisdictional bases.[67]

Universality jurisdiction permits states to address[68] conduct which is universally condemned. Recent authorities have added terrorism to the list of universal crimes. The Restatement (Third) of Foreign Relations observes: "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ."[69] Section 2331 explicitly targets "Terrorist Acts" and thus may fall within the current scope of universality jurisdiction.

However, justifying section 2331 under this principle would seem to require choosing an appropriate, widely agreed-upon definition of terrorism with which to judge national assertions of prescriptive jurisdiction. This will be difficult. In general, international efforts to combat terrorism have focused on prohibiting specific criminal acts, rather than on defining terrorism in general, and have often avoided using the term "terrorism" altogether.[70] Currently, international treaties address a broad range of conduct;[71] notable international accords prohibit airline hijacking,[72] attacks on diplomats,[73] and hostage taking.[74] Those

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[66] *Id.* at 23.

[67] *Id.* at 33 (statement of Senator Specter, invoking protective principle); *see House Hearings*, *supra* note 28, at 54 (statement of Abraham Sofaer, Legal Adviser to the State Department, invoking passive personality principle). *Id.* at 117 (statement of Christopher L. Blakesley, Professor of Law, University of the Pacific, McGeorge School of Law, invoking protective and passive personality principles).

[68] Under the universality principle, the offense is already defined by "universal" acknowledgment; hence universality jurisdiction is in some sense really jurisdiction to enforce, rather than to prescribe. *See* Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FISA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 211 (1983); *see infra* notes 94–104 and accompanying text.

[69] RESTATEMENT, *supra* note 49, at § 404; *see id.* § 404 comment a.

[70] G. LEVITT, DEMOCRACIES AGAINST TERROR 7 (1988).

[71] *See* RESTATEMENT, *supra* note 49, at Introductory Note to Part VII (treaties addressing slavery, genocide, prostitution, forced labor, racial discrimination, war crimes, apartheid, discrimination against women, torture, and other cruel or degrading punishment). Not all states have signed all treaties, but many treaties have nearly 100 signatories. *See id.*

[72] Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, 22 U.S.T. 1641, T.I.A.S. 7192.

[73] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, Feb. 20, 1977, 28 U.S.T. 1975, T.I.A.S. 8532, 1035 U.N.T.S. 167.

[74] International Convention Against the Taking of Hostages, June 3, 1983, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL 624, U.N. Doc. ST/LEG/SER.E/5 (1988).

treaties which call the behavior they prohibit "terrorism," have been confined to the protection of diplomats. For example, the Organization of American States has signed a "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance."[75] The Convention states in Article I: "The contracting states undertake to cooperate among themselves by taking all measures which they consider effective, under their own laws . . . to prevent and punish acts of terrorism . . . [against] those persons to whom the state has the duty according to international law to give special protection . . . ."[76]

As a result of (and contribution to) the international focus on combatting specific crimes, rather than "terrorism" in any broad sense, no generally accepted definition of terrorism has emerged in the international political arena. Academic efforts to define the term have fared no better.[77] A universal definition of terrorism does not yet exist.

Section 2331's assertion of jurisdiction over "terrorist acts" under universality doctrine is therefore suspect. Although the Restatement (Third) of Foreign Relations gives states some power to define the universal crime of terrorism,[78] that power cannot be unlimited without vitiating the requirement of universality altogether. The Act's certification provision, while facilitating prosecution, substantially undermines the Act's validity under international law by assuming that a determination of the U.S. Attorney General should control as the universal definition of terrorism.

Current trends provide some hope that an international consensus on the definition of terrorism may emerge. In 1985, the United Nations General Assembly adopted a resolution condemning terrorism as a criminal act.[79] The resolution does take notice of past international initiatives against terrorism,[80] which focused upon prohibiting specific acts; but it also declares that the General Assembly is "[*d*]*eeply concerned* about the world-wide escalation of acts of terrorism in all its forms, which en-

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[75] Oct. 20, 1976, 27 U.S.T. 3949, T.I.A.S. 8413.

[76] *Id.* at Article I. Although it is not entirely clear who the protected persons are, they are probably diplomats and other government personnel. J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 12 (1985).

[77] *See* A. SCHMID & A. JONGMAN, POLITICAL TERRORISM 1–38 (1988).

[78] RESTATEMENT, *supra* note 49, at § 404 comment a.

[79] G.A. Res. 61, U.N. GAOR Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1985).

[80] *Id.*

danger or take innocent human lives . . . ."[81] The resolution "[*u*]*nequivocally condemns*, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed . . . ."[82] The resolution was hailed by U.N. representatives as a landmark event.[83]

On December 7, 1987, the U.N. General Assembly adopted a resolution further condemning international terrorism.[84] Like its predecessor from 1985, the resolution recalls past international efforts to fight terrorism, "[*o*]*nce again unequivocally condemns*, as criminal, all acts . . . of terrorism,"[85] and urges "all States to take effective measures, in accordance with established principles of international law," to bring terrorism to an end.[86]

Departing from past U.N. practices regarding terrorism,[87] however, the resolution "[*r*]*ecogniz*[*es*] that the effectiveness of the struggle against terrorism could be enhanced by establishing a generally agreed definition of international terrorism . . . ."[88] The resolution was adopted by a vote of 153-2, with one abstention,[89] indicating a growing international consensus that the fight against terrorism will require a definition of the term.

Unfortunately for the international legal validity of section 2331, one of the two votes against the 1987 resolution was cast by the United States.[90] The U.S. apparently voted against the resolution in solidarity with Israel due to certain language in the resolution pertaining to Israel's occupation of the West Bank and Gaza Strip.[91] Nonetheless, the U.S. vote against the resolution detracts from the international legal credibility of section

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[81] *Id.* (emphasis in original).

[82] *Id.* (emphasis in original).

[83] N.Y. Times, Dec. 10, 1985, at 8, col. 3.

[84] G.A. Res. 159, U.N. GAOR Supp. (No. 49) at 299, 300, U.N. Doc. A/42/49 (1987).

[85] *Id.* (emphasis in original).

[86] *Id.*

[87] *See, e.g.*, G.A. Res. 3034, 27 U.N. GAOR Supp. (No. 30) at 119, U.N. Doc. A/8730 (1972); G.A. Res. 102, 31 U.N. GAOR Supp. (No. 39) at 113, U.N. Doc. A/31/39 (1976); G.A. Res. 145, 34 U.N. GAOR Supp. (No. 46) at 112, U.N. Doc. A/34/46 (1979); G.A. Res. 109, 36 U.N. GAOR Supp. (No. 51) at 241, U.N. Doc. A/36/51 (1981); G.A. Res. 130, 38 U.N. GAOR Supp. (No. 47) at 266, U.N. Doc. A/38/47 (1983); G.A. Res. 61, 40 U.N. GAOR Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1985).

[88] G.A. Res. 159, U.N. GAOR Supp. (No. 49) at 299, 300, U.N. Doc. A/42/49 (1987) (emphasis in original).

[89] *Id.*

[90] *Id.* The other vote against the resolution was cast by Israel. *Id.*

[91] The resolution "[*r*]*eaffirm*[*s*] . . . the inalienable right to self-determination and independence of all peoples under colonial . . . regimes and other forms of alien domination . . . ." *Id.*

2331 because it appears to articulate a lack of faith in the international community's ability to formulate a definition of terorism, which is necessary to the international legal validity of laws like section 2331.

Recently, the U.N. General Assembly decided, without voting, to include in the agenda for its 1991 session a resolution substantially similar to the 1987 resolution on terrorism.[92] Like its 1987 predecessor, the resolution recognizes the need for an international definition of terrorism.[93] Time will tell if the requisite political initiative and will exist in the international community (and particularly, concerning section 2331, in the U.S.) to produce an acceptable, universal definition of terrorism.

B. *International Enforcement*

International law addresses efforts at extraterritorial enforcement, as well as prescription, of law. The Restatement (Third) of Foreign Relations section 432(2) states: "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."[94] This principle flows directly from a state's sovereignty over its own territory.[95] Sending U.S. law enforcement officials to another country without that country's permission could be tantamount to invading it.

Under international law, if a state sends its law enforcement officials into another country without permission, it may incur serious international legal penalties. First, it may owe the aggrieved country reparations.[96] Second, if law enforcement officials abduct a suspect from another country, that country is legally entitled to have the suspect returned. (If the country does not demand the suspect's return, "under the prevailing view the abducting state may proceed to prosecute him.")[97]

Under U.S. law, however, abduction of a suspect from a foreign country will not trigger a due process violation "unless his apprehension or delivery was carried out in such a reprehensible manner as to shock the conscience of a civilized soci-

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[92] G.A. Res. 29, U.N. GAOR Supp. (No. 49) at 580, U.N. Doc. A/44/49 (1989).
[93] *Id.*
[94] RESTATEMENT, *supra* note 49, at § 432(2).
[95] *Id.* § 432 comment b.
[96] *Id.* § 432 comment c.
[97] *Id.*

ety."[98] This embodies the famous *Ker-Frisbie* rule articulated by the cases of *Ker v. Illinois*[99] and *Frisbie v. Collins.*[100] These cases involved international and interstate abduction of suspects, respectively, with both cases upholding convictions despite the abductions. In *Frisbie*, the Court made the following statement:

> [t]his Court has never departed from the rule announced in *Ker v. Illinois*, that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction" . . . . There is nothing in the Constitution that requires a court to permit a guilty person rightly convicted to escape justice because he was brought to trial against his will.[101]

The *Ker-Frisbie* rule places domestic due process jurisprudence directly in conflict with international legal doctrine regarding jurisdiction to enforce U.S. criminal laws abroad. While Congress almost certainly intended to adhere to the former,[102] statements before both the House and the Senate indicate that some members of Congress (including the Act's original authors in both houses) had either drastically misunderstood or ignored international law when they contemplated enforcement of the Act. The legislative history of section 2331 suggests that Congress contemplated enforcement of the Act by U.S. officials regardless of permission from the country in which the terrorism takes place.

> [A]bsent our ability to accomplish [the] return [of suspected terrorists to the United States] through international extradition, it is my firm view that we should give serious consideration to using reasonable force to place those terrorists into custody and to bring them back to the United States for trial in a U.S. Federal court . . . .
>
> A report in the New York Times last Thursday noted that Federal authorities have not ruled out the possibility of abduction [of suspected terrorists from other countries into the United States] . . . . I prefer to call the procedure interna-

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[98] *Id.* § 433(2).
[99] 119 U.S. 436 (1886).
[100] 342 U.S. 519 (1952).
[101] *Id.* at 522 (citations omitted).
[102] *Senate Hearings, supra* note 7, at 40.

> tional arrest, but I would not shy away from the term "abduction."[103]

Thus some members of Congress appear ready to violate international law if necessary to enforce section 2331. And with virtually no enforcement mechanisms available to international law,[104] it seems likely that the United States can get away with extraterritorial enforcement of section 2331 whenever foreign policy considerations, particularly concerning the state in which the suspects reside, are amenable. Absent consent from that state, however, international law will not support such prosecutions. Although the United States should forcefully oppose terrorism, it should do so in harmony rather than in conflict with international law. By developing corresponding international agreements to facilitate its application, section 2331 can be an effective tool in the fight against terrorism.

—David Kris

IMPOSING THE DEATH PENALTY UPON DRUG KINGPINS

> The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[1]

There exists almost universal acceptance that the drug problem is "the worst disease that plagues our nation today,"[2] but no one is sure how to eradicate that disease. President George Bush unveiled his blueprint for a "War on Drugs" in September 1989, which resembled proposals by former President Ronald Reagan, calling for increased education, treatment, and enforcement of the drug laws. Congress is considering a much different

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[103] *Id.* (statement of Senator Specter); *see House Hearings*, *supra* note 28, at 20 ("The best way to implement this bill, obviously, would be to have the cooperation of the involved country. Even if a host country would not comply, however, current constitutional doctrine would allow our law enforcement officials to seize these suspected criminals and return them to the U.S. for trial . . . .") (statement of Representative Wyden (D-Or.)).

[104] *See, e.g.*, N.Y. Times, Oct. 7, 1985, at 1, col. 6 (United States intends to reject jurisdiction of the International Court of Justice, or World Court, in "political" cases).

[1] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The eighth amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII.

[2] "Congressman Traficant Reports to the People," press statement issued by Representative James A. Traficant (D-Ohio) Dec. 20, 1989 (on file with author). A stark symbol of this disease was the arrest on January 18, 1990, of Washington, D.C. Mayor Marion Barry for use of crack cocaine. *See* Ayres, *For Mayor Barry, Hope and Promise Crumble Under Weight of Charges*, N.Y. Times, Jan. 20, 1990, § 1, at 11, col. 1.

measure: imposing the death penalty for certain drug-related crimes,[3] some of which do not entail killing.

Capital punishment has been practiced in the United States since its founding, and always has excited passionate debate. That debate has led to certain reforms; for example, in 1972, the United States Supreme Court declared capital punishment unconstitutional as applied in two rape cases and one murder case then before it. The Court found that a Georgia statute which allowed untrammelled discretion of trial courts and juries in sentencing led to arbitrary and discriminatory sentencing practices, in violation of the eighth and fourteenth amendments.[4] Georgia revised its statutory scheme to decrease the number of capital crimes and to provide greater guidance to juries in sentencing, and the Court in 1976 upheld a capital sentence imposed under the new guidelines.[5]

Since then, nearly 200 executions have taken place nationwide,[6] predominantly in Florida, Georgia, Texas, and Louisiana. Moreover, a 1986 poll indicated that approximately seventy percent of Americans favor the death penalty as punishment for murder.[7] As the drug crisis ravages the country, many perceive that participation in the drug trade is "as horrendous as . . first-degree murder."[8] Several bills recently introduced in Congress respond to this sentiment by imposing the death penalty for serious drug trafficking crimes, despite the death penalty's traditional restriction to the most violent and aggravated crimes usually murder.[9]

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[3] *See infra* notes 11, 15.

[4] Furman v. Georgia, 408 U.S. 238 (1972) (capital sentences imposed under statute affording juries "untrammelled discretion" to impose or withhold death penalty violated the eighth and fourteenth amendments).

[5] Gregg v. Georgia, 428 U.S. 153 (1976) (capital sentence imposed for murder and armed robbery under statute sentencing guidelines did not violate eighth or fourteenth amendment). The Supreme Court is unlikely to reverse its position, announced in *Gregg* that the death penalty is not cruel and unusual punishment per se; the debate continues to focus upon whether capital punishment is applied in a racially discriminatory fashion *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987), *reh'g denied* 482 U.S. 920 (1987).

[6] Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1038 (1989) (citing NAACP LEGAL DEFENSE AND EDUC. FUND, DEATH ROW U.S.A. I (1988)).

[7] *American Survey: Capital Punishment*, THE ECONOMIST, Mar. 19, 1988, at 23 [hereinafter *American Survey*].

[8] 135 CONG. REC. S16,692 (daily ed. Nov. 21, 1989) (statement of Sen. Robert C. Byrd (D.-W.Va.)).

[9] *See* McElvaine v. Brush, 142 U.S. 155 (1891). *See also* Powell, *supra* note 6, at 1038 (discussing the number of "convicted murderers" on death row); Gregg v. Georgia, 428 U.S. at 185–86 (plurality opinion).

I. Proposed Legislation

Congress first authorized the death penalty for drug-related killings with the Anti-Drug Abuse Act of 1988.[10] On November 21, 1989, Senator Alfonse "Gus" D'Amato (R-N.Y.), with thirty-four co-sponsors, introduced a bill entitled "Drug Kingpin Death Penalty Act."[11] The bill, S. 1955, essentially provides the death penalty for the organizer of a "continuing criminal enterprise whose crime involves the manufacture or distribution of huge quantities of drugs,"[12] and who meets five criteria relating to the scope of the enterprise.[13] Senator D'Amato believes this is the logical follow-up to prior law.

> [T]his bill sends a message. It says that if you are going to be involved in the business of death, in the sale and distribution of large quantities of cocaine, heroin, or other drugs, if you are going to be involved in a criminal enterprise that takes in $10 million a year, understand what you are doing because you are killing, and you are participating in the death of innocents throughout the country—those who die of overdoses, and those who die because of the criminal activity of others.[14]

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[10] Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988).

[11] S. 1955, 101st Cong., 1st Sess., 135 Cong. Rec. S16,682-02 (1989). The Bill was submitted to the Committee on the Judiciary.

[12] Senator D'Amato's bill borrows this language from the Controlled Substances Act, 21 U.S.C. §§ 801–904 (1988), at § 848(b). Large quantities include 30 kilograms of heroin or 150 kilograms of cocaine. *Id.*

[13] S. 1955 amends Section 848(b) of the Controlled Substances Act, to provide that an individual who is found to be "a principal administrator, organizer, or leader," of a continuing criminal enterprise whose crime involves the manufacture or distribution of huge quantities of drugs, generally 300 times the basic felony amounts described in section 841(b)(1)(B) of title 21 of the U.S. Code, as being subject to the penalty of death. A continuing criminal enterprise has five elements.

> First. The defendant's conduct must constitute a felony violation of Federal narcotics law;
>
> Second. That conduct must take place as part of a continuing series of violations. Federal courts have held this means at least 3 drug felonies;
>
> Third. The defendant must undertake this activity in concert with five or more persons;
>
> Fourth. The defendant must act as the organizer, supervisor, or manager—"kingpin" of this criminal enterprise.
>
> Fifth. The defendant must obtain substantial income or resources from the enterprise.
>
> A major drug trafficker is also one whose enterprise receives $10 million in gross receipts during any 12-month period for the manufacture, importation, or distribution of drugs.

135 Cong. Rec. S16,691 (daily ed. Nov. 21, 1989) (statement of Sen. Byrd). The current punishment for such crimes is life imprisonment. 21 U.S.C. § 848(b) (1988).

[14] 135 Cong. Rec. S16,690 (daily ed. Nov. 21, 1989) (statement of Sen. D'Amato).

Similarly, on May 18, 1989, Representative James A. Traficant (D-Ohio) introduced a bill[15] amending section 848 of the Controlled Substances Act,[16] to provide the death penalty for certain drug offenses. This bill provides that anyone who commits a drug violation involving ten or more kilograms of a preparation containing a detectable amount of heroin, cocaine, phenocyclidine, or a controlled substance analogue shall be sentenced to death or life imprisonment.[17]

As suggested above and discussed further below, the authorization of capital punishment for drug crimes represents a serious departure from prior legislative designations of crimes warranting this penalty and a backsliding in the moral evolution of our society.

II. CAPITAL PUNISHMENT IN THE U.S.

In 1636, capital offenses in America included "idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion."[18] The continued and common practice during the eighteenth century of imposing capital punishment has led to a general belief that the Framers of the United

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[15] H.R. 2433, 101st Cong., 1st Sess., 135 CONG. REC. H2,046-07 (1989) [hereinafter Traficant bill]. The bill was submitted jointly to the Committees on the Judiciary and Energy and Commerce.

Part D of the Controlled Substances Act would be amended by adding at the end the following:

> Death Penalty for Major Drug Traffickers
>
> Sec. 841. (a) Whoever—
>
> (1) commits a violation of this title or title III involving 10 or more kilograms of a mixture, preparation, or compound containing a detectable amount of heroin, cocaine (including freebase cocaine), phencyclidine [sic], or a controlled substance analogue; or
>
> (2) commits a second or subsequent violation of this title or title III involving one or more kilograms of a mixture, preparation, or compound containing a detectable amount of heroin, cocaine (including freebase cocaine), phencyclidine [sic], or a controlled substance analogue;
>
> shall be sentenced to death or life imprisonment.
>
> (b) The procedures applicable to an offense for which the penalty of death may be imposed under section 408(e) shall, as nearly as practicable, apply to an offense for which the penalty of death may be imposed under this section. The requirement that an aggravating factor under subsection (n)(1) be found before the death penalty is imposed does not apply to an offense under this section.

Id.

[16] 21 U.S.C. §§ 801–904 (1988).

[17] Traficant bill, *supra* note 15.

[18] *See* Furman v. Georgia, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

States Constitution found the practice acceptable. Moreover, both the fifth and fourteenth amendments provide that a person shall not be deprived of "life, liberty, or property, without due process of law,"[19] suggesting that life could be deprived as long as due process was afforded. However, a "rising tide of sentiment against capital punishment" in the 1830's led Michigan to abolish it in 1846.[20] Other states followed Michigan's lead, and by 1917, twelve states had abolished capital punishment. The "nervous tension of World War I"[21] reversed the trend, however, and by 1935 the number of executions peaked at almost four per week.[22] This rate declined during the 1940's, and continued to decline after World War II.[23] An abolition movement arose in the 1950's and 1960's, followed by an unofficial moratorium on execution beginning in 1967.[24]

Between 1930 and 1982, 3340 prisoners were executed for murder, 455 for rape, and 70 for various other crimes, including armed robbery, burglary, espionage, sabotage, and kidnapping.[25] However, since 1977 virtually all capital sentencing has been reserved for murder. This phenomenon probably reflects in part the Supreme Court's holding, in the 1977 case of *Coker v. Georgia*, that capital punishment is an excessive penalty for the rape of an adult woman.[26] The Court's opinion created doubt as to whether capital punishment is constitutionally permissible for any crime other than murder. Therefore, while capital punishment survives, society's definition of the types of crimes that merit a death sentence has narrowed.[27]

In *Furman*, the Court declared that the Georgia death penalty scheme violated the cruel and unusual punishments clause of the eighth amendment,[28] because the absence of standards to

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[19] U.S. CONST. amend. V; U.S. CONST. amend. XIV. *See* Gregg v. Georgia, 428 U.S. 153, 177 (1976) (plurality opinion).

[20] Furman, 408 U.S. at 337–38.

[21] *Id.* at 339–40.

[22] *America's 14,000 Executions*, 71 A.B.A. J. 53 (April 1985).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 433 U.S. 584 (1977). *See infra* notes 37–43 and accompanying text.

[27] Between 1968 and 1976, the Supreme Court began to voice doubts about the constitutional validity of capital punishment per se; from 1976 to 1983, however, the Court attempted to cure any equal protection or excessive punishment infirmities by requiring states to rationalize and routinize the administration of the death penalty. Since 1983, the Court has eschewed further constitutional scrutiny of the death penalty, on either a per se or equal protection basis. *See* Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987).

[28] 408 U.S. at 240 (1972).

guide jury discretion in sentencing tended to result in the arbitrary and capricious (and often racially discriminatory) imposition of the death penalty. However, only Justices Marshall and Brennan believed that the death penalty was per se cruel and unusual punishment.[29] Only four years later, in *Gregg v. Georgia*,[30] the Supreme Court again considered the constitutionality of capital punishment, and found Georgia's revised capital sentencing guidelines to cure the eighth and fourteenth amendment problems.

Justice Stewart, writing for the plurality, stated that a criminal sanction punishment must "accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"[31] To do so, the Court held, required at a minimum that capital punishment not be excessive, in the sense that (1) "the punishment must not involve the unnecessary and wanton infliction of pain"[32] and (2) "the punishment must not be grossly out of proportion to the severity of the crime."[33] Justice Stewart emphasized that punishment must comport with contemporary values, determined not according to a judge's subjective preferences, but rather according to objective indicia. In particular, the legislature's judgment in prescribing penalties for certain acts,[34] as well as a jury's findings within that legislative framework,[35] are afforded great weight. He concluded that, "in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."[36]

Nonetheless, the courts have since that time affirmed the imposition of the death penalty only for the most aggravated crimes. It is permissible in cases involving certain forms of

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[29] *Id.* at 314 (Marshall, J., concurring). The current conservative makeup of the Court suggests that the numbers would not likely be different today.

[30] 428 U.S. 153 (1976).

[31] *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

[32] *Id.* at 173. This Recent Development will not address whether the death penalty per se involves unnecessary pain, but the answer certainly is not obvious. It took 19 minutes and two jolts of electricity to execute Horace Franklin Dunkins, Jr., a mildly retarded murderer, in July 1989. Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. Times, July 15, 1989, § 1, at 6, col. 1.

[33] *Id.*

[34] *Id.* at 180.

[35] *Id.* at 181.

[36] *Id.* at 183.

murder;[37] for instance, where the accused intended to inflict great bodily harm and death resulted,[38] or where the accused substantially participated in a felony and was recklessly indifferent to the value of human life.[39] However, the death penalty has been found to constitute cruel and unusual punishment where the accused aided and abetted a felony during the course of which murder was committed by others, but he did not kill or attempt to kill;[40] and where the accused did not kill or intend that killing take place or lethal force be used.[41] Moreover, capital punishment has been found to be a "grossly disproportionate" punishment for rape by prevailing societal standards,[42] and hence cruel and unusual.[43]

The apparent judicial and societal sense that capital punishment is warranted only for murder and aggravated circumstances is echoed by philosophy professor Burton Leiser, a retentionist who has written extensively on law and morality: "If the claim that life is sacred has any meaning at all, it must be that no man may deliberately cause another to lose his life without some compelling justification."[44] Thus, he believes that capital punishment is justified only for genocide, crimes against peace, crimes against humanity, terrorism, murder by a life prisoner, murder committed in a particularly wanton manner, murder of state officers, and kidnapping and hijacking (crimes in which the threat of murder is inherent).[45]

The few crimes which do not involve killing but for which federal law authorizes the death penalty are crimes which pose "broad threats to the security of the Nation and the people's welfare," such as treason, espionage, or airline hijackings.[46] The enactment of these statutes is significant in that Congress passed them in response to a new awareness of threats to public safety,

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[37] *See* Thomas v. State, 456 So. 2d 454 (Fla. 1984).

[38] *See* Kirkpatrick v. Blackburn, 777 F.2d 272 (5th Cir. 1985), *cert. denied* 476 U.S. 1178 (1986), *appeal after remand* 870 F.2d 276 (5th Cir. 1987).

[39] *See* Tison v. Arizona, 481 U.S. 137 (1987), *reh'g denied* 482 U.S. 921 (1987).

[40] *See* Cabana v. Bullock, 474 U.S. 376 (1986).

[41] *See* Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), *cert. denied* 485 U.S. 1015 (1988).

[42] Coker v. Georgia, 433 U.S. 584 (1977). *See supra* text accompanying note 26.

[43] *See* McCleskey v. Kemp, 481 U.S. 279 (1987), *reh'g denied* 482 U.S. 920 (1987).

[44] Leiser, *Retribution and the Limits of Capital Punishment*, in SOCIAL ETHICS: MORALITY AND SOCIAL POLICY 118 (T. Mappes & J. Zembaty 3d ed. 1987).

[45] *Id.* at 118–19.

[46] *See* 135 CONG. REC. S1,367 (daily ed. Oct. 18, 1989) (statement of Assistant Attorney General Edward S.G. Dennis, Jr.). However, there have been no executions for these crimes recently. *See supra* text accompanying notes 25–26.

such as airplane piracy in the 1960's.[47] Similarly, the awareness and outrage over the damage inflicted on our society by drugs and the drug trade has risen dramatically over the past decade.

III. Philosophical Justifications for Capital Punishment

The *Gregg* Court stated that the principal reasons justifying capital punishment are retribution and deterrence,[48] with incapacitation as a secondary purpose.[49] "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."[50]

Those in favor of the death penalty ("retentionists") make arguments alternatively on grounds of justice and social utility.[51] Justice requires that a criminal receive a punishment commensurate with his crime, one that he "deserves"—the concept of retribution. For many, "[w]hen the moral order is upset by commission of some offense, it is only right that the disorder be rectified by punishment equal in intensity to the seriousness of the offense."[52] Put another way, an offender "loses just those of his rights which are the counterparts of the rights of another which he has violated."[53] Therefore, "when the offense is murder, *only* capital punishment is sufficient to equalize it."[54] Philosophers such as Immanuel Kant forcefully defended such retaliation, but the concept has existed since Biblical times.[55]

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[47] *See id.*

[48] 428 U.S. 153, 183 n.28 (1976). For a discussion of the theoretical justifications of punishment generally, see Brandt, *The Utilitarian Theory of Criminal Punishment*, and Nozick, *Retributive Punishment*, in READINGS IN PHILOSOPHY OF LAW (J. Arthur & W. Shaw eds. 1984).

[49] A majority of Americans believes that the death penalty does not deter murder any more than does imprisonment. *American Survey*, *supra* note 7, at 26.

[50] *Gregg*, 428 U.S. at 183 (quoting *Furman*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

[51] SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 100. These categories are similar to those referred to by the *Gregg* Court, *supra* text accompanying notes 48–49.

[52] *Id.*

[53] Honderich, *Punishment, the New Retributivism, and Political Philosophy*, in PHILOSOPHY AND PRACTICE 125 (A. Griffiths ed. 1985).

[54] *See* SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 100.

[55] *See, e.g.*, Matthew 5:38. *But see* Bedau, *Capital Punishment and Retributive Justice*, in SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 123 (arguing that the concept of "a life for a life" really plays no role in our justice system).

Retentionists who perform a utilitarian, cost-benefit analysis argue that the death penalty is justified if its use results in future social benefits, such as the incapacitation of criminals and deterrence of future crimes, which outweigh future social harms. Many believe incapacitation through capital punishment to be the "only effective way to protect society from certain *violence-prone and irreformable* criminals," who might harm fellow inmates and guards or who might escape from prison.[56] They espouse capital punishment as a uniquely effective deterrent, largely through the intuition that most people fear death sufficiently to refrain from criminal behavior that will lead to death. Statistics have not proven this conclusively, nor have they demonstrated that the death penalty is a more effective deterrent than life imprisonment.[57] Yet some retentionists argue that, notwithstanding this uncertainty, it is worth risking the lives of convicted criminals in the hope of deterring future crimes against unquestionably innocent victims. Ernest van den Haag, former Professor of Jurisprudence and Public Policy at Fordham University and a vocal death penalty proponent, believes "we have no right to risk additional future victims of murder for the sake of sparing convicted murderers."[58] His, and many other retentionists', conclusion is that a convicted murderer's life is less worthy of preservation than an innocent victim's life.

Those opposed to the death penalty ("abolitionists") cite the sanctity of human life, the fundamental injustice involved in the state's deprivation of one's life, and the potential loss of innocent lives due to erroneous convictions.[59] They argue that because retentionists have not advanced substantial reasons for the death penalty, it is unacceptable so to take human life. Abolitionists claim that capital punishment is merely a "mask for barbarous vengeance."[60] Moreover, they claim, utilitarian goals may be equally served by less drastic and more humane punishments. Hugo Adam Bedau, a prominent abolitionist, be-

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[56] SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 100 (emphasis added).

[57] In 1975, the year before *Gregg* was decided, 20,510 murders were committed in the United States. In 1986, 20,613 were committed; in 1987, 20,096. FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 8 (1987).

[58] van den Haag, *Deterrence and Uncertainty,* in SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 130. *But see* Conway's response to this argument, *infra* notes 72–73 and accompanying text.

[59] SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 101–02.

[60] *Id.* at 101.

lieves that an accurate cost-benefit analysis may actually favor abolition.[61] In fact, Justice Marshall argues in his dissent in *Gregg*, as he did in his concurrence in *Furman*, that "the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and . . . if they were better informed they would consider it shocking, unjust, and unacceptable."[62] Another abolitionist explains that traditional cost-benefit analysis does not consider all the relevant factors. "[T]hose who think that the suffering of the murderer himself matters less than that of an innocent victim will perhaps not be prepared to extend this view to the suffering of the murderer's parents, wife and chidren,"[63] not to mention the effect on those professionally involved with executions such as judges and executioners, for whom the task "must be highly disturbing."[64] Abolitionists argue that the premise that a criminal's life is less worthy of preservation than that of an innocent victim's is flawed, and that execution is a particularly cruel method of killing because the victim knows exactly when, where, and how he will die, and must endure the "special horror" of waiting.[65]

Abolitionists also challenge the premise that capital punishment will deter murder. The more cautious among them cite to the lack of proof that capital punishment *does* deter murder.[66] Under either formulation, the death penalty emerges as unacceptable; to justify the punishment would require a "deterrent effect not obtainable by less awful means, and one which is quite substantial rather than marginal."[67] Statistics aside, intuition suggests that the time lapse between the commission of the crime and execution, combined with the low probability of actually being executed, provides little deterrent effect. In addition, if people did not consciously engage in life-threatening behaviors, "no one would smoke or take on such high-risk jobs as diving in the North Sea."[68]

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[61] *See* Bedau, *Capital Punishment and Social Defense*, in SOCIAL ETHICS: MORALITY AND SOCIAL POLICY, *supra* note 44, at 133–36.
[62] Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting).
[63] Glover, *Execution*, in READINGS IN PHILOSOPHY OF LAW, *supra* note 48, at 254.
[64] *Id.* at 255.
[65] *Id.* at 253–54.
[66] *Id.* at 256.
[67] *Id.* at 255.
[68] *Id.* at 256. *See also* Conway, *Capital Punishment and Deterrence: Some Considerations in Dialogue Form*, in READINGS IN PHILOSOPHY OF LAW, *supra* note 48, at 259 (difference not that great because "only a slight chance of either occurring").

Another version of this intuition against deterrence is that "the man irrational enough not to be deterred by life imprisonment wouldn't be deterred by anything."[69] Besides, capital punishment "can never *deter* the executed person from committing further crimes. At most, it can *prevent* him or her from committing them."[70]

David Conway takes issue with van den Haag's willingness to risk the lives of murderers to save innocents,[71] stating that "the very notion of gambling with human lives seems morally repugnant,"[72] particularly since van den Haag "isn't *risking* the lives of criminals; he is taking their lives and risking that some further good will come of this."[73] An accurate ex ante analysis of these benefits would require, impossibly, a knowledge of crimes which would otherwise have been committed.[74]

IV. Analysis of the Proposed Legislation

A. *Constitutional Analysis*

Does the legislation proposing the death penalty for serious drug trafficking crimes comport with contemporary values, objectively determined, and with "the dignity of man"? Is the death penalty for drug trafficking an excessive penalty? The Supreme Court has explicitly declined to address whether the death penalty is "a proportionate sanction where no victim has been deprived of life."[75] The proposed death penalty statutes, if enacted, would require the courts to decide whether the general justifications for the death penalty discussed above apply equally well to drug crimes that do not involve killing.

A 1989 survey conducted by the National Law Journal revealed that sixty-two percent of Americans do favor capital punishment for drug criminals.[76] Yet surely constitutional rights cannot be determined by a mere counting of hands. To objectively evaluate a punishment's constitutionality under the eighth

[69] Conway, *supra* note 68, at 259.
[70] Bedau, *supra* note 61, at 131 (emphasis added).
[71] *See supra* note 58 and accompanying text.
[72] Conway, *supra* note 68, at 261.
[73] *Id.*
[74] Bedau, *supra* note 61, at 131–32.
[75] *Gregg*, 428 U.S. 153, 187 n.35 (1976).
[76] Strasser, *One Nation Under Siege*, Nat'l L.J., Aug. 7, 1989, at S2.

amendment,[77] the Supreme Court stated last Term that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[78]

There is evidence that many legislators today believe the death penalty is the only weapon which will make an appreciable inroad into the drug problem. Representative Traficant, for instance, urges that America follow the lead of Malaysia and begin to execute drug traffickers.[79]

Senator D'Amato argues that the death penalty for drug kingpins is constitutional because "[a]s much as—if not more than—any murderer, [the drug traffickers] are guilty of a reckless disregard for human life."[80] He contends that this recklessness is evidenced by the widespread damage inflicted by drugs, citing that over a one-year period in Miami, "573 narcotics users were responsible for 6000 robberies and assaults, 6700 burglaries, nearly 900 vehicle thefts, and more than 26,000 prostitution offenses."[81] His diagnosis that the situation is grave is clearly correct; his conclusions about the constitutionality of his proposed remedy are less obvious.

Assistant Attorney General Edward S.G. Dennis, Jr., supports Senator D'Amato's bill and considers it constitutional. Judicial assessment of its constitutionality will ultimately rest upon the proportionality of capital punishment to the drug crimes perpetrated. The Supreme Court recognized in *Coker v. Georgia*,[82] and has repeatedly reaffirmed, that such proportionality is required by the eighth and fourteenth amendments.[83] In *Coker*, the Court announced a two-prong test for excessiveness

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[77] *See supra* note 1.

[78] Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989). The Court also stated that it looked to "data concerning the actions of sentencing juries." *Id. See also* Coker v. Georgia, 433 U.S. 584 (1977).

[79] 135 CONG. REC. H4,045 (daily ed. July 21, 1989) (statement of Rep. Traficant). Ed Koch agrees. *See Former NYC Mayor Ed Koch Gives Spirited Talk*, Harvard Law Record, Mar. 16, 1990, at 3, col. 1. Although Rep. Traficant's motives are admirable, his further suggestion that the death penalty will reduce our tax bill, by avoiding the $50,000 per year that it costs to keep drug offenders in jail, is naive. *See* 135 CONG. REC. H5,681-04 (daily ed. Sept. 14, 1989) (statement of Rep. Traficant). In fact, the cost of administering the death penalty is outrageous due to the many appeals taken by defendants. "In Florida, the cost per execution has been estimated at $3.2 million, while the cost of a prisoner serving a life sentence totals about $516,000." Lineweaver, *Death Penalty Statistics*, Newsday, June 3, 1989, at 18.

[80] 135 CONG. REC. S16,691 (daily ed. Nov. 21, 1989) (statement of Sen. D'Amato).

[81] *See id.*

[82] 433 U.S. 584 (1977).

[83] *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (holding the death penalty excessive for the crime of robbery where the defendant did not take human life).

of capital punishment in the individual case: the punishment is excessive if it (1) does not contribute to an acceptable goal of punishment or (2) is grossly disproportionate to the crime. In the 1983 case of *Solem v. Helm*,[84] the Court elaborated on the definition of "grossly disproportionate."

> [A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[85]

The second prong incorporates public and legislative attitudes, history, and precedent. Many argue that congressional judgment in prescribing criminal penalties deserves even greater deference than that afforded to state legislatures.

> Congress has significantly more latitude than any individual State in determining the necessary punishment for federal crimes that affect the security of the Nation as a whole. The Supreme Court has repeatedly recognized that "[t]he Constitution gives Congress broad comprehensive power '[t]o regulate commerce with foreign Nations,'" and that "[h]istorically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry." . . . Federal legislation, passed by the Congress and signed by the President, represents the views of the representatives of all the people, and should be entitled to great weight in making the determination whether American society as a whole regards a particular penalty for a particular crime as disproportionate.[86]

In *Tison v. Arizona*,[87] the Supreme Court assessed proportionality by the gravity of the injury as well as the culpability of the offender's state of mind. Moreover, the Court acknowledged that reckless indifference to human life may be as morally culpable as murder. Thus Assistant Attorney General Dennis has inferred that imposing the death penalty on drug kingpins is "constitutionally permissible because of the enormous magnitude of the public harm they cause and the depraved state of mind—the reckless disregard for human life—involved in man-

[84] 463 U.S. 277 (1983).
[85] *Id.* at 292.
[86] *Id.* (citations omitted).
[87] 481 U.S. 148 (1987).

aging these death-dealing enterprises."[88] He notes that the Supreme Court has not ruled that capital punishment is disproportionate to drug crimes, and draws support from the availability of capital sentencing for other crimes which do not involve killing but which threaten to destabilize society, such as treason and espionage.

Even if Assistant Attorney General Dennis's analogies to other crimes, which do not entail murder but which are punishable by death, do not persuade, many argue that the lack of an appropriate analogue to the crimes perpetrated during the present drug crisis argues in favor of the constitutionality of imposing capital punishment. Basically, because large drug enterprises are a relatively recent phenomenon, "[t]he constitutionality of imposing the death penalty for the use of such a weapon could not be measured by past practices of the States."[89]

Some recent cases seem to accord with the idea that drug trafficking poses an unprecedented threat to society and should be met accordingly through severe punishment for drug distribution. An Arizona Court held that a sentence of life imprisonment for the sale of cocaine valued at $20 did not violate the eighth amendment.[90] Furthermore, the Fifth Circuit affirmed the imposition of a life sentence without possibility of parole for the sale of twenty-two packets of individual doses of heroin.[91] The court stated that this was not disproportionate because "the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its own evil image."[92] The Sixth Circuit similarly affirmed a life sentence without possibility of parole, for possession with intent to deliver 650 grams of heroin.[93]

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[88] *See* 135 CONG. REC. S13,685 (daily ed. Oct. 18, 1989) (statement of Assistant Attorney General Dennis).

[89] *Id.*

[90] State v. Waits, 786 P.2d 1067 (Ariz. App. 1989).

[91] Terrebonne v. Butler, 848 F.2d 500, 501 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1140 (1989) ("We do not view heroin dealing in any amount—however small—as a minor offense . . . . We cannot say of Terrebonne's heroin dealing . . . that such dealing in any amount whatever is a far less serious crime than those with which the Louisiana legislature brigaded it: second degree murder, aggravated rape or aggravated kidnapping.")

[92] *Id.* at 504 (citing Terrebone v. Butler, 820 F.2d 156, 157 (1987)) (affirming denial of habeas corpus).

[93] Young v. Miller, 883 F.2d 1276 (6th Cir. 1989). *See also* Lavigne v. State, 782 S.W.2d 253 (Tex. App. 1989) (affirming 25-year sentence for possession of less than 28 grams of cocaine); People v. Anderson, 448 N.W.2d 361 (Mich. App. 1989) (affirming sentence of 20 to 30 years for possession with intent to deliver more than 225 grams but less than 650 grams of cocaine).

That such stringent punishments have been meted out for relatively minor drug-related transactions suggests that courts may indeed find that the imposition of the death sentence for "kingpins," with large drug distribution networks, is not excessive and hence constitutional. The courts, however, should gauge the extension of capital punishment to drug-related crimes not merely relatively but in terms of its absolute justice and wisdom.

B. *Policy Analysis*

Most general arguments in favor of and in opposition to capital punishment may be made with respect to the proposed drug legislation.[94] The balance struck, however, should reflect the significant distinctions between the drug crimes contemplated by the new legislation and current capital crimes. Deterrence theory would argue that no rational person would risk his life to engage in a behavior that one could easily avoid or which provides no commensurate benefit. If we imposed the death penalty for jaywalking, certainly nobody would jaywalk. Yet, our society has purposely minimized the number of crimes which may be punished by death, reserving capital punishment for the most severely aberrant behaviors. This suggests that effectiveness yields to discomfort over the justice of imposing so harsh a penalty upon minor infractions.

In the drug context, deterrence is a particularly unconvincing rationale for the death penalty because drug trafficking is extremely lucrative and may be well worth the gamble, especially for the economically disenfranchised members of our society. Also, given how violent the internal drug scene is, the criminal justice system's penalties are unlikely to be a more effective deterrent than the violence to which one exposes himself upon entering the trade.

Because of the uncertain deterrence value of capital punishment,[95] the debate usually shifts to retribution, which inherently contains the concept of proportionality. As discussed above,[96] although imposing the death penalty on drug kingpins may pass constitutional muster, it would unquestionably stand at the outer

[94] *See supra* text accompanying notes 48–74.
[95] *See supra* notes 56–57.
[96] *See supra* text accompanying notes 82–93.

limits of permissible punishment. Even if it is *permissible*, Congress has often recognized that it may not be *wise* to legislate to the Constitutional limits of its authority.

In the first place, the extension of capital punishment to drug kingpins raises a "slippery slope" problem. Once Congress departs from the bright-line prerequisite of a victim's death in imposing capital punishment, it will be hard pressed to establish a new bright line. State legislatures might authorize the death sentence for lesser and lesser crimes, with the nexus between the "crime" and the abhorrent social effects becoming more and more attenuated. For example, President Bush's "Drug Czar" William Bennett recently proposed that "something analogous" to the death penalty be applied to "the high-level banker" who launders money for the drug trade.[97] A just punishment?

Furthermore, many continue to question whether the United States should fight a war on drugs at all.[98] They draw the now-familiar analogies to the Prohibition Era[99] and propose the legalization of drugs, in the hope of eradicating at least the violence associated with the drug trade. However, this supply-side solution does nothing to curtail the remaining demand for drugs, which brings its own plethora of social ills. The legalization of alcohol did not remove the social ills accompanying the trade. Legalization shares this fatal flaw with the extension of capital punishment to drug kingpins: both measures attempt to eradicate the drug problem from the supply side.[100] The real problems of drug use and abuse, of destruction of lives, arise on the demand side. Curtailing the importation of drugs and punishing the pushers cannot substitute for drug treatment,[101] for the restoration of family values, or for the provision of employment; all of which may offer alternatives to the user's reliance upon drugs for both recreation and self-worth.[102] "Thus it appears that

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[97] *Bennett Takes Stern Stand on Money Laundering*, L.A. Times, Feb. 19, 1990, part A, at 34, col. 1.

[98] *See, e.g.*, France, *Should We Fight or Switch?*, 76 A.B.A. J. 43 (Feb. 1990). The American Bar Association dedicated the bulk of its February 1990 edition to issues related to the drug crisis.

[99] *See* U.S. CONST. amends. XVIII & XXI.

[100] *Cf.* Kaplan, *Taking Drugs Seriously*, 3 DRUGS & SOCIETY 187, 201–03 (1989).

[101] President Bush's most recent proposal would allocate "about 70 percent of the overall anti-drug budget on law enforcement and interdiction, and about 30 percent on treatment and prevention." *President Unveils New Drug Efforts*, N.Y. Times, Jan. 26, 1990, § A, at 16, col. 3.

[102] *See* Cahalan, *Public Policy on Alcohol and Illicit Drugs*, 3 DRUGS & SOCIETY 169, 171 (1989).

the programs most likely to result in diminished drug use through all segments of the population would have to hold forth the promise of fairly immediate reinforcement of drug-free behavior through access to training and apprenticeships in decent jobs, as well as *realistic* avenues to better health and better family life."[103]

V. Conclusion

The eighth amendment, as interpreted by the Supreme Court, must find its meaning in the evolving standards of decency of a maturing society.[104] Many, if not most, Americans may favor the death penalty for drug kingpins, believing it to be the only effective solution to a drug crisis which might destroy our society. The flaws in this causal analysis have been ignored or adopted by legislators who encourage the false hopes of their constituents by proposing supply-side solutions to a demand-side problem. The courts should not mistake this reactionary behavior for the reflective and progressive restrictions on the use of capital punishment which have characterized our criminal justice system for centuries, and which provide the true standards by which the constitutionality of the proposed legislation should be measured.

—Sandra R. Acosta

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[103] *Id.* at 173.
[104] *See supra* note 1.

RECENT PUBLICATIONS

THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE. By *Lawrence M. Friedman*. Cambridge, Mass.: Harvard University Press, 1990. Pp. 206, appendices, index. $27.50 cloth.

Movements to demystify the law have shaped twentieth-century legal scholarship. As the vision of law as a collection of autonomous principles cast in stone has dimmed in today's legal imagination, legal scholars have done more than scratch the surface of the law. They have dug deeply into the law's cultural foundations, exposing its bricks and mortar: society's assumptions, aspirations, and biases. As part of this excavation, modern legal inquiry has looked to many other intellectual disciplines to identify the sources of law in our society. Literature, the natural sciences, and psychology, to name but a few, have been drawn into the province of the law by today's legal commentators. This trend reflects both a new image of the relationship between law and society, and perhaps a dose of modern cynicism. Lawrence Friedman's *The Republic of Choice* lends a distinctive new voice to modern jurisprudence by examining the social and popular underpinnings of Western legal systems.

Friedman's central argument in *The Republic of Choice* is that Western legal systems are shaped by a new form of individualism that pervades twentieth-century Western society. He terms this "expressive individualism," and traces its development since the nineteenth century, examining its distinctive effect on our legal system and the structure of authority in Western society. Unique to the twentieth century, expressive individualism focuses on the development of the self. It "stresses self-expression, that is, cultivating the inner human being, expanding the self, developing the special qualities and uniqueness of each person" (p. 35). Free, unrestrained choice is the vehicle for this individual development (p. 5). This motivating force in society is not necessarily the reality of choice for every person but simply the idea of choice (p. 74). Inextricably mixed, expressive individualism and choice, Friedman says, saturate our society's legal culture: people's ideas, attitudes, and expectations about law and its processes. Expressive individualism, expectations of justice, and the multiplication of laws are interconnected and deeply embedded in the public consciousness.

Friedman opens with a powerful image of expressive individualism in action. A homeless man, during a below-freezing winter day, protested New York City's order to bring the homeless into municipal shelters by force. The homeless man argued on the television news that night, "They can't do that to us . . . . We've got rights" (p. 1). Friedman begins by asking how our society has advanced to the point where people, even those we associate with being the least able and self-sufficient, now expect, assume, and demand rights of choice and self-expression.

In answering this question, Friedman first contrasts today's culture of expressive individualism with the individualism of earlier periods and other cultures. Friedman narrows his inquiry by tracing the rise of modern individualism from its roots in nineteenth-century concepts of individualism. In the nineteenth century, Western societies broke the public bonds of status that had defined and limited people's position in life. The resulting individualism, Friedman argues, centered around political and economic behavior (p. 27). Personal life, however, was still dominated by a code of traditional values. People accepted social hierarchies; self-control, not free expression, ruled people's private lives (pp. 30–31). Society's social institutions sent a clear message: discipline in personal life. Nineteenth-century Western legal systems reflected society's values of self-control and conformity with codes of personal conduct. A strict penitentiary system developed, poor laws were enforced, and laws controlled personal excesses in sexuality, alcohol, and other vices (pp. 32–34).

As Western societies entered the twentieth century, the nature of individualism changed. Twentieth-century individualism, Friedman says, encompasses people's personal lives and stresses self-expression (p. 35). "In every area of social life institutional behavior has been reconstituted, gradually or rapidly, to reflect the new culture, the new versions of choice and individualism" (p. 36). Friedman offers persuasive examples of the reflective shift in our legal system: laws on sexuality (pp. 153–61), marriage, divorce, family (pp. 175–79), and privacy (pp. 179–85) now foster greater personal choice. According to Friedman, technology has been a driving force behind the liberation of individual choice (pp. 57, 61).[1]

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[1] Technological advances increase people's mobility and choice. By making travel, communication, medicine, and wealth more accessible, technology creates greater pos-

The core of Friedman's argument is the relationship between expressive individualism and the modern legal culture. To begin, Friedman focuses on a perceived paradox in the republic of choice. People commonly believe that their choices are limited by the explosion of laws associated with the modern welfare state, which has invaded every aspect of their lives. It seems inconceivable that the growth of choice coexists with this expansion of laws. In Friedman's view, the apparent contradiction between his republic of choice and today's welfare state simply does not exist. Because Friedman views law as the vehicle by which society guarantees maximum choice to its members, laws provide order to society's endless complexity and thereby enhance free choice (p. 62). The welfare state's multitude of rules ensure, in advance, that minimum standards of protection exist in order to allow people to develop their personal lives free of the burdens of necessity (p. 67).

After noting the relationship between choice and the expansion of laws, Friedman discusses the normative effects of a culture based upon expressive individualism on our legal system. The republic of choice, he contends, rests upon several essential principles. First, choice depends upon people's having rights to choose things that touch upon the personal. This creates a general expectation of justice in our society (p. 99). Second, Friedman argues that the republic of choice requires that people's choices not be impaired by individual characteristics over which they had no control. In response, the legal system removes the disadvantages and the punishment of diminished choice for immutable qualities such as race, gender, and disability (p. 100). Third, choice is protected by treating irreversible choices as suspect and providing people with second chances (pp. 101–04). Fourth, the republic of choice provides "loser's justice" (p. 104). Law protects people who choose to challenge its institutions by not allowing them to be punished simply because they failed to sway enough people to create social change. Fifth, Friedman notes that our laws protect long-term relationships chosen by people (p. 106). The legal system, according to Friedman, has assimilated these basic principles of the republic of choice.

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sibilities for choice and therefore for personal growth previously beyond the reach of most people.

This assimilation is evidenced by the effects of expressive individualism on our society's substantive laws. Friedman focuses on legal developments in what he views as society's major areas of personal choice: crime, sexuality, religion, aging, family, privacy, and gender. Friedman addresses the view that increased crime is the price society pays for its emphasis on choice and expressive individualism. Modern individualism should not solely bear the blame for today's high rates of crime, he says. Friedman notes the roles of economics, the criminal justice system, parents, and peer groups as potential contributors to crime in the republic of choice (p. 137). Our legal system, in Friedman's eyes, is caught between the pressures of expectations of individualized justice and the overwhelming numbers of people it must process. Friedman notes that society's solution to the tension between crime control and due process is couched in terms that resonate the idea of choice. The plea bargain, though arguably a charade, uses choice and consent as its rhetoric (p. 139). The legal culture of choice also has influenced the very definition of crime and its punishment. So-called victimless crimes like adultery and fornication, now inconsistent with society's values of expressive individualism and choice, have been widely decriminalized (pp. 141–42).

Expressive individualism, says Friedman, is also reflected in a trend of sexual permissiveness. The modern movement to decriminalize sexuality is central to a culture of choice (pp. 153–54). The idea of "sexual preference" carries the rhetoric of rights to choose lifestyles; it makes sexuality a matter of personal choice (pp. 155–56). Friedman claims that the gay rights movement followed civil rights on a road paved with the ideas of choice and self-expression that had come to dominate society. These movements used the rhetoric and vision of modern individualism to gain the rights of choice enjoyed by society's majority groups (pp. 159–61).

Similarly, the republic of choice strives to treat religion, aging, and family life as purely matters of preference, as it has done with sexuality. Friedman traces an increased mobility in these forms of self-expression. The ideas of religious affiliation by voluntary association (p. 165), greater choices in careers and lifestyles for older people (p. 173), and acceptance of rights to divorce and cohabitation (pp. 157, 177) highlight Friedman's argument. Family law, like laws on sexuality, religion, and aging, now reflects the central themes of the republic of choice

through personal control of marriage, divorce, and reproduction (p. 178). Friedman also notes the related trend in rights of privacy. He argues that today privacy "means protection of life-choices from public control and social disgrace" (p. 184). He illustrates his message with the legal development of a constitutional right to privacy in such landmark cases as *Griswold v. Connecticut*[2] and *Roe v. Wade*.[3]

Laws relating to gender, Friedman argues, have also changed through the impact of modern individualism. Although gender is not a chosen trait, the republic of choice maintains that women and men "should be able to decide what conclusions follow from the basic premise [of gender]" (p. 163). The legal system has responded to the changing social culture. Women have earned legal rights to equal pay, equal access, and freedom from discrimination in education and jobs (p. 163). Friedman argues that the strength and gains of modern women's movements are due in part to modern individualism. Even before the twentieth-century emphasis on gender equality, women had formal rights to hold public office and to freely choose careers, he says. It was not until expressive individualism prevailed in Western societies, however, that women pursued these opportunities in significant numbers (p. 164).

The Republic of Choice brings a broad array of sociological sources to bear on its study of modern legal culture and its relationship to a new individualism. Friedman's narrow goal is to describe, not evaluate, a social phenomenon he sees as dominating modern Western cultures. The socio-legal sources Friedman uses provide a social and historical context for his arguments.

A major strength of Friedman's work is its sensitivity to its limitations of source and theme. Friedman uses his sources thoroughly, not only to support his description of the republic of choice, but to address countertrends and perspectives that weigh against his thesis. For example, he recognizes that the welfare state and its multitude of laws could be seen as symbolizing a republic of security, not a republic of choice (p. 74). The inherent problem with his sources, as Friedman admits, is that sociological research rests upon slippery foundations (p. 44). Evidence of people's attitudes and expections—the pop-

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[2] 381 U.S. 479 (1965).
[3] 410 U.S. 113 (1973).

ular culture—is difficult to quantify, and often inconsistent. He is equally forthright about the limitations of his thesis. Friedman recognizes that his notion of a unitary "Western" culture masks a rich pluralism and many cultural differences (p. 199), although he argues that Western societies, while beginning from different points and moving at different paces, "are ships sailing in one general direction" (p. 201). Friedman also concedes that a gap exists between the aspirations of expressive individualism and the often depressing realities of people's lives (p. 195).

The difficulties in *The Republic of Choice* stem from Friedman's thematic reliance upon the inherent weaknesses of his sources and the human gaps in his account. Despite his recognition of the shadowy nature of sociological sources, Friedman on several occasions answers rival viewpoints and dismisses institutions counter to choice with unpersuasive appeals to popular sentiments and common assumptions (pp. 45, 86, 109). "[T]hese institutions simply do not *feel* that way," he insists in response to arguments that the welfare state limits choice through such institutional requirements as compulsory education, forced savings, pensions, and other social programs (p. 109). Such an amorphous argument is unsatisfying, particularly when Friedman wrestles with a key issue of any sociological study. What governs how people act? Is it choice, environment, economics, or some other model of human behavior (pp. 44–45)?

Friedman's appeals to what people think and feel also reflect his bias toward middle-class values. While Friedman notes this perspective and concedes failures in his arguments, his responses still do not account for the feelings and attitudes of large segments of our society. Most notably, he omits the voices of society's disadvantaged social and economic groups, who may share neither Friedman's middle-class values nor his positive outlook on our culture of choice. Do the members of such groups enjoy, or even see, the increased mobility created by modern individualism and reflected in the legal system today?

Despite its limitations, *The Republic of Choice* provides a rich, well-researched examination of the Western legal culture and its relationship to our modern legal order. Unfortunately, once he begins his study, Friedman never recaptures the powerful and very real image he delivered at the opening of his discussion. The message conveyed by the homeless man asserting his right to sleep where he chose even on a fatally bitter

izens to act unrestricted by stringent government regulations may be prized more highly. How society deals with speech that may threaten or undermine deeply rooted ideas or beliefs is a powerful example of how the courts, legislatures, and society must somehow balance competing values that they cherish.

The New Politics of Pornography examines the latest series of balancing acts and responses that society has concocted to deal with the recurring threats and problems posed by pornography. Focusing on the history and debates surrounding the passage of a controversial 1983 Minneapolis ordinance aimed at eliminating many forms of pornography and a 1984 Indianapolis ordinance based on the Minneapolis model, Donald Downs critically assesses both the political and philosophical rationales justifying the ordinances. While the Minneapolis ordinance was vetoed by the city's mayor and the Indianapolis ordinance was struck down as unconstitutional by a federal district court judge,[2] issues raised in debates over the passage of the ordinances help clarify potential new models for current and future challenges to the acceptability of pornography and the limits of free speech.

In contrast to the ideas governing modern obscenity law, the new ordinances, the first of which was introduced in Minneapolis by feminist activists Andrea Dworkin and Catharine MacKinnon, proposed to target pornographic materials not on the basis of moral indecency, but on the basis of the discriminatory, disempowering effect that pornography has upon women. Instead of banning pornography through the threat of criminal sanctions, the Minneapolis ordinance provided for a civil cause of action against the producers and distributors of pornography. This civil-based attack on the legitimacy of pornography as a constitutionally protected form of speech emphasized pornography's pernicious role in systematically oppressing women and likened pornography to a form of "group libel" against women (pp. xi–xii). Thus, the ordinance's aim was to redress perceived harms against all women caused by pornography's demeaning depiction of women and the resultant perpetuation of a male-dominated status quo.

By focusing on harms to a particular class rather than on a belief in the inherently immoral nature of pornography as a whole, the Minneapolis ordinance reflected an entirely new basis

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[2] American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *reh'g denied*, 475 U.S. 1132 (1986).

night is lost in Friedman's sociological jurisprudence. Ironically, in a work dedicated to tracing the rise of the individual, Friedman allows his conceptual arguments to obscure the stark individualism that leads a man to prefer choosing a cold street to being forced to a warm bed. Still, its persuasive socio-legal voice raises challenging issues on the relationship between law and society. One of the book's great strengths is its timeliness. As events in Eastern Europe and the Soviet Union unfold, we have the rare opportunity to see the thesis and themes of *The Republic of Choice* played out before our very eyes. Friedman's work is highly recommended for anyone with an interest in the social personality of law in Western societies.

—Jeffrey A. Kaplan

THE NEW POLITICS OF PORNOGRAPHY. By *Donald Alexander Downs*. Chicago, Ill.: The University of Chicago Press, 1989. Pp. xi, 198, notes, index. $42.00 cloth; $14.95 paper.

Competing political and philosophical visions of how much the government can and should control the actions of its citizens have traditionally fueled an intense debate over what forms of expression deserve protection under the first amendment's guarantee of free speech. Passionate, conflicting responses to individual expressions of offensive speech—whether the burning of flags or the dissemination of obscene pornographic materials—crystallize the tensions between liberal and conservative notions of what role, if any, the government should play in fostering or mandating a particular vision of social good.[1] The often uneasy political and legal compromises that society makes to accommodate such varied views reflect the prevailing values and fears of a particular era. In times of national insecurity or perceived political or moral decline, society may be willing to accept greater normative prescriptions from the government as to how its citizens must behave. In periods of greater national confidence and vitality, however, the freedom and autonomy of cit-

[1] This Recent Publication will use the label "liberal" in a strictly limited sense to refer to those who emphasize the state's obligation to remain neutral in permitting virtually all forms of non-dangerous, controversial expression. The term "conservative" will also convey a limited meaning to describe those who advocate increased government regulation of activity to promote and preserve a certain set of social values and beliefs.

for censorship. As Downs explains, according to this new feminist understanding, "[p]ornography eroticizes violence and subordination of women. It is the literal expresssion of male sexual domination" (p. 38). The feminist critics framed the issue as primarily political rather than moral. The Minneapolis ordinance thus defined pornography as "the sexually explicit subordination of women, graphically or in words" in ways that included any one of nine different categories of degradation focusing primarily on objectification or violence aimed at women (p. 44). The Indianapolis ordinance, which provided substantially similar remedies to those of the Minneapolis ordinance, was more focused in its classification of what constituted actionable pornography, incorporating only five of the nine criteria of the Minneapolis ordinance.

Despite the radical underpinnings of the proposed ordinances, conservatives supported them in both cities because they believed that any additional limitation of pornography was beneficial to society, regardless of the philosophical justification for such censorship. As Downs points out, the actors in the debate over passage of the ordinance in Minneapolis clearly understood the radical feminist origins of the ordinance. In the predominantly conservative city of Indianapolis, however, the radical implications of the ordinance were somewhat muted by design in order to gain greater conservative support. In a chapter titled "Strange Bedfellows," Downs highlights the ironic unity of conservatives, often the same people who had defeated the Equal Rights Amendment and who opposed abortion in Indiana, and radical feminists on this one issue of promoting a stronger anti-pornography ordinance (p. 109). For quite different reasons, both groups sought to take the lead in broadening the area of prohibited expression beyond that established by contemporary obscenity law. In opposition to these anti-pornography innovators, the American Civil Liberties Union chapters of each city asserted a more philosophically unified denunciation of the new ordinances as unconstitutional interferences by the government in the realm of free speech.

To evaluate the merits of such competing claims, Downs examines the Supreme Court decisions that compose what he terms the "modern doctrine of speech" (p. 3). Primarily, he asserts, American jurisprudence has adopted the liberal notion that state neutrality towards various forms of speech is the best means of protecting individual rights. Downs explains this lib-

eral philosophy with a quote from the decision of the Seventh Circuit Court of Appeals affirming the district court's ruling that the Indianapolis ordinance was unconstitutional: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (p. 138).[3] The Supreme Court has maintained, beginning with *Roth v. United States*,[4] that pornographic material is protected by the first amendment except when it "appeals to the prurient interest in sex," "has no serious literary, artistic, political, or social value," and is "offensive to the average person under contemporary community standards" (p. 14). This three-pronged test was substantially retained in *Miller v. California*.[5]

Contrary to this body of established law, Downs asserts, the ordinances make no inquiry into whether pornography has some arguably higher aesthetic or literary merit that may redeem it from the realm of the obscene. With their sole focus upon harms caused by the unequal and degrading depictions of women, the ordinances represent a startling and novel departure from traditional first amendment doctrine. The constitutional difficulties inherent in any legislative attempt to take the lead in changing the way a fundamental right such as speech is regulated were largely ignored or undervalued by the proponents of the ordinances in their excitement over the novelty of their legislation. Quoting witnesses at the Minneapolis council hearing where MacKinnon and Dworkin first presented the proposal for the ordinance, Downs highlights the extent to which the new feminist attack on pornography caught the council members off guard and inspired instant interest and support among many of them (pp. 59–60). Downs emphasizes that "an atmosphere of moral urgency" surrounded the proceedings in both cities (p. 124). He seems to imply that this atmosphere blinded supporters to the difficult questions regarding the ordinances' constitutionality. Although the city of Indianapolis's legal department tried to modify the Minneapolis model ordinance and narrow its scope in order to give it a better chance of passing constitutional muster, Downs shows that these efforts were

[3] *Hudnut*, 771 F.2d at 327–28 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
[4] 354 U.S. 476 (1957).
[5] 413 U.S. 15 (1973).

largely undermined by political pressures to "forestall any substantial alterations" (p. 113). Thus, in the excitement over a new political approach to a pressing problem, council members in both cities disregarded the constitutional limits on legislative power.

Downs provides an abundance of personal interviews with the central actors involved in the debates on both sides of the issue to support his account of the council ratification processes as being rash and ill-considered. *The New Politics of Pornography* is packed with interesting accounts of the proceedings from a myriad of different viewpoints. This wealth of primary information about the similarities and differences between the legislative processes in the two cities makes the book unique and enjoyable. Colorful accounts of power politics, subtle pressures, and sly manipulations of hearings provide a tangible framework for the more theoretical discussions of social and philosophical justifications for the ordinances. Downs shows how the feminist activists and initial drafters of the ordinance, MacKinnon and Dworkin, were able to transform the public hearings in Minneapolis into a showcase for the radical feminist case against pornography. In Minneapolis, MacKinnon was allowed to cross-examine witnesses and guide their testimony in order to create a public record of the harms caused by pornography (p. 84). Similarly, conservative activists dominated the debate in Indianapolis. Opposition to the ordinances in both cities was effectively drowned out by packed galleries of anti-pornography interest groups who booed and hissed whenever witnesses or council members in either city expressed reservations about the ordinances. Opponents were not given sufficient notice of the public hearings in Minneapolis (p. 82). Moreover, Downs argues, the small groups of organized opposition that did exist, primarily in the local Civil Liberties Unions, were just as shrill and uncompromising in their opposition to the ordinances as supporters were in favor of them. Consequently, no real dialogue about the pitfalls and merits of the ordinances ever took place.

This failure of the legislative process to generate genuine, reasoned deliberation about issues of such importance is Downs's most consistent theme in *The New Politics of Pornography*. Emphasizing the complexities and ambiguities inherent in pornography and its regulation, Downs maintains that the simplistic "us versus them" mentality, which ultimately gov-

erned the debate over the ordinances, obscured the possibilities for compromise that might have achieved the same feminist goals within the current constitutional framework of free speech. Downs acknowledges that the political process necessarily involves some degree of partisanship, but claims that the extreme positions "have demeaned the quality of public discourse on this issue and have jeopardized the quality of democratic debate in general" (p. xvii). Ironically, Downs notes, neither the tolerance for other viewpoints that the Civil Liberties Unions praised so highly in their opposition to any and all forms of censorship, nor the respect for alternate, disempowered viewpoints that the feminists claimed as their primary goal, existed in the debate over the ordinances (pp. xviii–xix). Instead, feminists defended the one-sided silencing of anti-ordinance viewpoints during the hearings as a justified response to the one-sided suppression of female perspectives in the world at large (p. 83). Likewise, the Minneapolis Civil Liberties Union heaped lavish praise on the virtues of tolerance, yet it boycotted the hearings on the new ordinance because of its threat to the ACLU's absolute value of free speech. Thus, neither side adhered to the beliefs that it so loudly proclaimed to be true and valuable.

In response to the appearance of a new politics of pornography, Downs urges caution before making any rash moves. Downs's tone throughout is one of disdain for the political polarization that characterized the ordinance debate. While he recognizes that discouraging representations of women as degraded objects of male desire is a legitimate and worthwhile concern, Downs is loath to abandon the well-established *Miller* test for obscenity. However, based on extensive studies showing that violence in pornography encourages aggressive male behavior and increases the incidence of violence against women in society as a whole, Downs proposes the addition of a fourth part to the *Miller* test, removing "violent obscene depictions" from the field of protected speech (p. 195). In this way, he believes, legitimate feminist concerns may be addressed effectively within the currently existing framework of constitutional free speech without the need for a potentially dangerous creation of an entire area of unprotected speech.

This compromise approach that Downs offers is consistent with the overall tone of *The New Politics of Pornography*. It reflects Downs's belief in the pressing need for synthesis between opposing poles in the political dialectic, something that

he demonstrates was sorely lacking in the debate over the anti-pornography ordinances in both Minneapolis and Indianapolis. Downs's critique of the extremism of the two sides of the ordinance debates points to a harsh reality of politics in general: the political process, including gathering supporters and lobbying for a particular issue, often exhausts the participants and blinds them to the merits of alternative viewpoints. Downs suggests that much of the time spent lobbying and forging alliances could have been more profitably spent engaging in reasoned deliberation over the issues. His point seems reasonable and well-taken, but he offers few suggestions as to how this general desire for deliberation could have been practically achieved. Without tangible guidelines for reform, the emotions aroused by highly-charged issues of this sort will most likely continue to produce extremist debate and political polarization, despite clear illustrations from scholars such as Downs that such situations often obscure reasonable political solutions.

Donald Downs has given us a well-documented and apparently logical and judicious description of the dynamics controlling the debates over the Minneapolis and Indianapolis ordinances. For this contribution alone, *The New Politics of Pornography* merits serious attention; however, his final recommendations, which so neatly and persuasively synthesize the primary concerns of the competing parties in the debates, are suspect because they seem too easily achieved. It is possible that in his desire to forge consensus, he has ignored some of the inherently unsolvable tensions between liberal notions of free speech and the egalitarian agenda of the modern feminist movement. Nevertheless, despite such potential flaws, *The New Politics of Pornography* is well worth reading for its admirable attempt to clarify dimensions of the new debate over the censorship of pornography.

—Charles Scarborough

SHATTERED MIRRORS: OUR SEARCH FOR IDENTITY AND COMMUNITY IN THE AIDS ERA. By *Monroe E. Price*. Cambridge, Mass.: Harvard University Press, 1989. Pp. 159, notes, index. $19.95 cloth.

For Monroe Price, the "mirrors" shattered by the AIDS epidemic include free expression, equal treatment under the law, and faith in modern science to postpone death through impressive medical technology. These cultural mirrors reflect an image of an American society that has promoted and maximized the rights and value of the individual in three different contexts. First, freedom of expression, including sexual expression, has advanced the right to personal opinion and choice. Second, the idea of equal treatment under the law has tried to guarantee fairness for those individuals of minority status, whether that status be based upon race, gender, religion, sexual orientation, or economic class. And third, the trust in modern medicine to delay death while improving the quality of life reveals the high value we place on the life of the individual (p. 123). Our reactions to the AIDS crisis have shown these images of ourselves to be at worst deceptive and at best distorted, splintering our most cherished notions of American society.

The title, "Shattered Mirrors," is an evocative phrase, but because Price never fully develops its various connotations the metaphor can confuse the reader. A shattered mirror reflects a shattered image, but Price concentrates more on our images of ourselves than on the means by which they are reflected. Calling our commitment to equal protection a mirror that reflects our society strains the metaphor to such an extent that it almost loses the reader. Price also fails to recognize the mirror as a symbol of vanity, a reflection of America's obsession with the individual. By neglecting the mirror's symbolic meanings of vanity and selfishness, Price does a disservice to his central theme, which concerns the acquisitive and egoistic "Me" generation, a generation now facing AIDS's crushing blows to its most basic conceptions of individuality.

As the disease enters its second decade with no cure in sight, Price predicts that the individuality reflected in ideas of free expression and equal protection will become secondary to the larger interests of the community, sacrificed to ensure public health. AIDS also challenges our faith in science, which has vanquished the plagues of earlier eras. Protected by modern

vaccines from the threats of whooping cough, smallpox, and polio, Americans now embrace the notion that an individual can control his or her health, if not lifespan, through strict diets and vigorous exercise. AIDS, a disease whose victims have been mostly the young, challenges that notion of control. Premature death has become a constant once again, revealing the ephemeral nature of life.

Price's book does not deal specifically with the history of AIDS, nor does he propose what AIDS policy should be. Instead, he comments upon what he perceives as today's judgment-free culture, where autonomy reigns and a moral vacuum arises. With no solid sense of community or absolute values, he says, the individual by default surrenders much freedom to the government to fill this gap through social policy (p. 57). Price examines the various ways in which the government could wield this power of policy in a future haunted by AIDS, but his commentary stays broad, skirting numerous issues and possibilities and muddling the important distinction between community pressures and state regulations. Preferring anecdotes to statistics, Price cites examples only as a starting point to launch into a more generalized discussion of the individual's rights and responsibilities during a larger community crisis.

Free expression, especially sexual expression, is the first area of individualism that Price feels may fall prey to the communitarian imperative to combat the spread of AIDS (pp. 10, 22). Already, he notes, AIDS awareness seems to have induced some self-censorship and change within the mass media. Unfortunately, Price bases this social trend merely on his own observations of the popular culture, not solid, empirical analysis. He offers several anecdotal examples of current films, advertisements, and lyrics as evidence of a return to the values of abstinence and monogamy, rejecting the unfettered sexuality and promiscuity reflected in the media of the 1960's and 1970's (pp. 16–18, 21). However, Price fears that such self-censorship may not be enough to prevent insidious governmental interference in the media. He views as plausible the possibility that AIDS and the need to safeguard the public health could spark greater governmental meddling to change the media's representations of sexuality.

Even if the government felt thus compelled to shape the media's messages, Price believes that the first amendment would prevent direct abridgement of speech (p. 38). Far more likely is

a scenario in which the government will flood the media with its own messages of responsible sexuality and AIDS prevention. While avoiding the more blatant constitutional violation of direct censorship, this market-participant approach nevertheless carries significant first amendment dangers.[1] The government could "crowd out other speakers if it were so inclined . . . [and] even unintentionally, [establish] policies that would harm nongovernment competitors," Price says (p. 48).

While AIDS's threat to free expression is somewhat hypothetical and limited by first amendment jurisprudence, Price believes that AIDS has already shown our commitment to equal protection to be a delusion. Despite the image of equality so treasured by American society, AIDS has stripped away our democratic mask and revealed a sadly different visage. AIDS came to national attention as a disease confined mainly to gay men, a group outside the mainstream of American society. The disease's association with a minority group that was already subject to tremendous prejudice and injustice resulted in a slow and inadequate governmental response to the crisis. It was not until 1986, some five years and 27,000 deaths after the first reported cases, that Surgeon General C. Everett Koop released his report on AIDS and not until 1988 that the President's Commission on Human Immunodeficiency Syndrome unveiled its policy suggestions (p. 114).[2] At least one commentator has wondered how quickly the government would have acted had the disease been seen as an immediate threat to the mainstream population, as in the case of Legionnaire's Disease.[3]

The gloomy scenarios of government inaction and neglect may continue as AIDS spreads rapidly among others on the margin of society: intravenous drug users, often black or Hispanic, and their babies. AIDS may develop as "simply another affirmation of the existence of an underclass . . . and [the] concern of government will be to control the virus so as to limit its spread to the more generalized population, rather than to defeat the disease within the underclass itself," Price says (p. 65).

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[1] Price cites public television as an example of the government's participation in the marketplace of ideas. The government created public television to provide the quality educational programming it felt was missing on the private networks, he says (p. 47).

[2] *See* R. SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE AND THE AIDS EPIDEMIC 588 (1987).

[3] *See id.* at 143–44.

Once he has demonstrated that our belief in equal protection falters when confronted with such a terrifying threat, Price opens a Pandora's box of possibilities. Discrimination against those with AIDS in matters of insurance and health care already exists; can the idea of quarantines be far behind (pp. 95, 134)? He likens society's reactions to plague to its responses to war, and sees the specter of the all-powerful state that sacrifices individual rights in times of crisis. The internment of Japanese-Americans stands as an ignominious example of the fragility of constitutional safeguards in the face of national paranoia (p. 82). Price fears that the urgency of the AIDS epidemic may lead to the same grave injustices against populations that we so conveniently relegate to the outskirts of American society.

In the latter part of his book, Price turns to AIDS's final blow to modern American individuality: the reintroduction of a terrifying, unpredictable disease that continues to claim its victims despite the best efforts of modern science. Because of advances in technology, control over death had begun to seem within the human grasp, but the illusion of perpetual youth and health, with death postponed to the most distant, waning years, has proven to be a false reflection of reality as redefined by AIDS. A vaccine or cure may be years away and until then, the horrible deaths will continue unabated. Not since polio has an epidemic in the recent history of this country struck down so many of the young, so quickly. Centers for Disease Control experts estimate that at least 100,000 Americans were suffering from AIDS in 1989 and expect a cumulative total of 365,000 confirmed AIDS cases by 1992.[4] Though he touches very briefly on medical and ethical issues concerning AIDS patients, such as greater access to new, untested drugs or the right of terminal AIDS patients to die with dignity (p. 113), Price prefers to dwell on the reintroduction into modern American society the idea of death as a constant and immediate threat to life because it fits more easily into his main theme of AIDS as a threat to individuality (p. 110).

Price bases his discourse on the potential ramifications of AIDS policy, but instead of grappling with statistical evidence to refute or support a particular approach, he pontificates about the moral implications of balancing the rights of the individual with the responsibility owed to the community and the possibility of state encroachment on the individual to serve the com-

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[4] L.A. Times, July 24, 1989, at 2, col. 5.

munity's ends. At times, the lack of solid, factual material can be frustrating if one has more interest in policy than philosophy. Policies such as clean-needle programs, mandatory testing, or explicit sex education receive the barest of treatment.

Price's writing, however, remains clean and neat, offering enough tangible examples to light the way for the layman, while never condescending to the more informed reader. The reader can use *Shattered Mirrors* as an excellent springboard from which to ponder the possible consequences of AIDS and AIDS policy. The book, though at times too broad, provides many kernels of truth about modern American times: the tremendous influence of media, the overestimated ability of modern science, and the exalted position of the individual, which until now has managed to coexist with the growing power of the state.

At its close, *Shattered Mirrors* imparts a sense of the tenuousness of the human individual in comparison with the strength of the state. Here, once again, Price fails to make explicit the tantalizing possiblities of his title. A plausible reading is that the broken mirrors represent the sudden diminution of the "Me" generation of the past thirty years. Its belief in pure self-interest lies smashed, amid the shards of egoism. With the onslaught of AIDS, private acts have public consequences, and the individual can no longer live vainly isolated, complacently cocooned from the outside community. AIDS has shown the fragility of human beings and their interdependence, demanding, in a terrible voice, that Americans rethink the individualism that has obliterated the moral duty to ensure that personal conduct benefits the entire community. Without such an overriding principle of public good, Price fears, the state may feel compelled to subordinate the individual to community interests, thereby creating not only a new "mirror," but an entirely different image of American society.

—Jennifer Tsay