HARVARD JOURNAL
on
LEGISLATION

VOLUME 35, NUMBER 1 WINTER 1998

CONGRESS ISSUE

POLICY ESSAYS

ARTICLES

STATUTES

NOTE

FOREWORD

SENATOR BOB DOLE*

In the early 1990s, I met with Vaclav Havel of the Czech Republic, Lech Walesa of Poland, and leaders of other newly emerging democracies. I recall that Havel and the others related moving stories of people who longed for a taste of freedom—people who had never seen a fraction of the liberties many of us take for granted every day. These leaders were looking to the United States as a role model, and what their stories and their thoughts expressed was that they wanted to be like us—to learn from our struggles with democracy and to understand how to create the many freedoms that are rooted in our constitutional foundation.

Today, many of the hopes and dreams of these leaders are becoming a reality. The break-up of the Soviet Union, the collapse of the Berlin Wall, and the defeat of communist ideas throughout most of Eastern Europe has transformed the political, economic, and cultural landscape of the world. Millions of people are now living under democratically reformed governments that did not exist a decade ago, and many more are witnessing reforms toward fair and free elections and recognition of economic, civil, and religious liberties.

In the wake of the Cold War, the balance of global power has shifted to the United States and in favor of democracy. Advances in technology, free trade, and emerging market economies are catalyzing these transitions to democracy throughout the world, and democracy is likewise creating expanded opportunities for technology, trade, and market economies. The result is a world order far smaller, faster, and more democratic than could have been imagined just a decade ago.

The world as we knew it has changed. It is imperative that the United States provide leadership for the new world, by exercising confidence in its democratic values; defending its interests when they are seriously threatened; protecting itself from those who undermine human rights and defy the will of the interna-

---

* Bob Dole is the former United States Senator from Kansas, United States Senate Majority Leader, and the 1996 Republican Presidential Nominee. He currently serves as Chairman of the International Commission on Missing Persons, National Chairman of the World War II Memorial Campaign, and Special Counsel at the Washington, D.C. law firm of Verner, Liipfert, Bernhard, McPherson and Hand.

tional community; and continuing its participation in the global economy.

The advance of technology, the universal access to information, and the relative shrinking of the globe through trade, communications, and military readiness complicate our interests. However, these developments also strengthen our interests through their contributions to economic progress, educational opportunities, health care, and military intelligence. Current debates over the future and expansion of NATO, the Asian financial instability and the International Monetary Fund, Middle East peace, United Nations reform, and fast-track trade authority are just a few of the developments indicative of the post-Cold War era.

From a legislative perspective, these issues will require a search for consensus, a willingness to take political risks, and an ability to compromise in the search of our high ideals. At times, these issues may also call for bipartisan leadership—putting aside differences for the sake of the common good. Adlai Stevenson, a Democrat noted for his partisan appeal, went so far as to label bipartisanship "the lifeblood of democracy." The need for leadership from both sides of the aisle applies not only to matters of national security, but also to economic, legal, and political reforms—many of which are discussed in this Congress Issue.

My proudest legislative accomplishment during my thirty-five years in Congress was the rescue of Social Security. In 1982–83, the work of the National Commission on Social Security Reform, of which I served as a member, became entrenched in politics and prospects for bipartisan consensus seemed remote. We were able to take the first step down the path of compromise due largely to a conversation Senator Moynihan and I had on the Senate Floor the day new members were being sworn in—January 3, 1983.

This conversation began a series of meetings among Commission members and eventually those meetings were enlarged to bring in representatives of the White House, the Speaker of the House, and other interests. We made every effort to keep in close contact with members of the Commission, and as we neared compromise, we consulted with all whom had a direct interest.

On January 15, the fifteen-member Commission accomplished what some had said was impossible, delivering a compromise package that was subsequently passed by Congress. On April 20, President Reagan signed the bill into law. Had we not acted,

more than thirty million Social Security recipients would have received reduced benefits beginning in July of 1983.

I believe that the bipartisan Commission was the cornerstone to our success. Ultimately, workable legislation required concessions from all of the parties who had a stake in the Social Security issue. While not everyone was happy with every specific recommendation, the important fact is that consensus was reached on how to save the system.

My point is not that the lowest common denominator is what should pass as policy. Rather, policy, good or bad, is what will gain approval of a majority, and what the President will ultimately sign. In fact, most political scientists who study Congress would probably say that this is the real definition of policy. Our leadership must understand the importance of compromise in addition to principle, and must recognize when an opportunity for compromise exists that will serve our values and priorities more effectively than no action at all.

From process and politics we get our methods, but not our goals. Our goals are an expression of our values and our priorities, and it is these values that give purpose to freedom, authority to power, and dignity and direction to our lives and our nation. Leadership will give meaning to those values time and time again.

The articles that follow, some written by my former colleagues, raise issues vital to our future and to the future of any democracy. Whether the media is debasing or strengthening our culture; whether government spending, entitlement programs, and our tax code undermine our goals and our market approach to solving our most important problems; whether our laws are distorting our markets through favoritism or improper incentives; or whether the Tenth Amendment as a principle of governing is respected by the current balance of powers within our system of federalism, are all essential problems for discussion and examination. These discussions and debates will take us a long way toward building the institutions required to lead into the next millennium.

This Congress Issue addresses part of what is at stake in our country and around the world: the development of democratic systems and democratically elected leaders—accountable first to the people and to their general welfare through the maintenance of economic liberties, equality of opportunity, equality under the law, decentralization of powers, and common values.

The dialogue provided herein moves us toward important answers to some of the difficult issues that confront policymakers and citizens alike. What we learn is that ideas continue to matter as they should—that the marketplace of ideas is as important a forum as the economic marketplaces emerging around the world. And, I remain optimistic that our elected leaders will ultimately do what is fair and what is right for and by the people.

POLICY ESSAY

THE INTERNET AND THE TELECOMMUNICATIONS ACT OF 1996

SENATOR TED STEVENS*

In this Essay, Senator Stevens discusses the Telecommunications Act of 1996 and how it has been interpreted by the Federal Communications Commission. Although the Senator argues that the FCC has improperly interpreted portions of the revised Act, leading to the preferential treatment of the Internet and other hybrid services, he believes that the FCC should not regulate the Internet. The Senator strongly believes that the Internet is a vibrant new communications medium that has the potential, among other things, to dramatically increase democratic participation in government. Universal service, by providing greater access to telecommunications, is one of the most important elements to furthering this democratic goal. The Senator posits that the FCC's interpretation of the revised Act will result in an unnatural migration of telecommunications traffic to those communications media that are preferentially treated. The Senator urges the FCC to look to the clear intent and plain meaning of the Act in determining its definitions, as well as the consequences on the market. Until the FCC reevaluates its interpretation of the Telecommunications Act, it will continue to thwart the two main goals of the 1996 revision: (1) to preserve and advance universal service, and (2) to promote competition in all sectors of the communications industry.

Congress designed the Telecommunications Act of 1996 ("1996 Act") to bring telecommunications regulation into the twenty-first century.[1] When the Act was passed, it was widely hailed as the most sweeping revision of communications law[2] since the

---

*Member, United States Senate (R-Alaska). B.A., University of California, Los Angeles, 1947; LL.B., Harvard Law School, 1950. Senator Stevens is chairman of the Senate Committee on Appropriations and a member of the Senate Committee on Commerce, Science, and Transportation. He also serves on the Senate Committee on Governmental Affairs and Committee on Rules and Administration. The Senator was a member of the House-Senate conference committee that drafted the final version of the Telecommunications Act of 1996.

The author thanks Earl Comstock and Anne Marie Murphy for their assistance in researching and preparing this article. Mr. Comstock (B.A., University of California, Santa Barbara, 1988; J.D., George Mason University School of Law, 1992) was the Senator's legislative director and chief telecommunications counsel from 1992 to 1997, and was one of the principal staff negotiators and drafters of the Telecommunications Act of 1996. Ms. Murphy (B.A., Vassar College, 1995; J.D. Candidate, Georgetown University Law Center, 1998) is the Senator's legislative assistant on Internet issues.

[1] Telecommunications Act of 1996, 47 U.S.C.A. § 151 (West Supp. 1997).

[2] *See* 142 CONG. REC. S686 (daily ed. Feb. 1, 1996) (statement of Sen. Larry Pressler (R-S.D.)) ("This is the first complete rewrite of the telecommunications laws of our country."); 142 CONG. REC. S703 (daily ed. Feb. 1, 1996) (statement of Sen. Wendell Ford (D-Ky.)) ("This bill is a balanced approach to the overhaul of our telecommunications laws. . . ."); *see also infra* notes 26–29 and accompanying text.

passage of the original Communications Act of 1934[3] ("1934 Act")—it sought to encompass existing technologies such as the Internet,[4] as well as technologies yet to come. The Federal Communications Commission ("FCC"), however, seems to believe that the 1996 Act largely does not apply to communications using the Internet.[5] As a result of its misreading of the law, the FCC continues to apply outdated, artificial regulatory, not statutory, distinctions and, accordingly, continues to privilege communications using the Internet over other forms of electronic communication.

It took Congress four years to enact the 1996 Act, and the changes the 1996 Act made to the 1934 Act were intended to guide communications policy in the United States well into the next century.[6] The revisions in the 1996 Act were not designed to justify continued preferential regulatory treatment of communications using the Internet. Indeed, the 1934 Act, as amended by the 1996 Act, generally bans preferential treatment.[7] The FCC's continued favoritism towards the Internet and other forms of hybrid services[8] threatens to undermine two of Congress's key

---

[3] 47 U.S.C. § 151 (1934) (amended 1996).

[4] The Internet is the worldwide network of networks that use Transfer Control Protocol/Internet Protocol ("TCP/IP") to communicate information. *See* PETER LOSHIN, TCP/IP CLEARLY EXPLAINED 399 (2d ed., 1997). The networks join computers using telephone lines. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 533 (8th ed. 1994).

[5] On April 10, 1998, as this Essay was going to press, the FCC issued a Report to Congress reviewing its interpretation regarding hybrid services and universal service, as required by Pub. L. No. 105-119. *See infra* note 25. The Report considered the regulatory status of "phone-to-phone" Internet telephony service and concluded "that certain of these services lack the characteristics that would render them 'information services.'" Despite this finding the FCC declined "to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." *See* In the Matter of Federal-State Joint Board on Universal Services ("Stevens Report"), FCC 98-67, at 3 (Apr. 10, 1998). *See* discussion *infra* Part II.

[6] *See infra* notes 26–29 and accompanying text.

[7] *See, e.g.*, 47 U.S.C. § 202(a) (stating that it is unlawful for any common carrier to give any preference to any person, class of persons, or locality); 47 U.S.C.A. § 252(e)(2)(A)(i) (West Supp. 1997) (stating that no State or local regulation may prohibit the ability of any entity to provide telecommunications service); 47 U.S.C.A. § 253 (West Supp. 1997) (stating that a State Commission may only reject an interconnection agreement if it discriminates against a third-party carrier); 47 U.S.C.A. § 332(c)(1)(A)(i) (West Supp. 1997) (stating that the Commission may not enforce a discriminatory provision against a commercial mobile service carrier).

[8] Hybrid services are neither defined in the 1934 Act, as amended by the 1996 Act, nor in the FCC's regulations. The author uses the term "hybrid services" to denote a subset of services that the FCC currently classifies as "enhanced services" because they employ computer protocols, but whose primary purpose is to transmit the user's information without change in the form or content of that information. This subset includes voice, video, and data transmission services (such as fax and e-mail) provided

objectives in passing the 1996 Act: (1) to preserve and advance universal service; and (2) to promote competition in all sectors of the communications industry.[9]

The FCC's disparate treatment of hybrid services and its flawed interpretation of the definitions in the 1996 Act will result in an unnatural migration of telecommunications[10] traffic to preferentially treated communications mediums, undermining the goal of universal service. For instance, the FCC's policy of exempting telecommunications over the Internet from the standard universal service contribution requirements that apply to all other interstate telecommunications services,[11] encourages telecommunications providers to shift traffic to the Internet.[12] As telecommunications providers take advantage of this loophole, they jeopardize one of Congress's central policy objectives: the preservation and advancement of universal service.

By dodging the universal service contribution requirement, telecommunications providers jeopardize the funding necessary to build and maintain the very physical infrastructure that provides access to telecommunications and information services[13] at affordable rates to all Americans.[14] In so doing, they also jeopardize their own long-term health. The facts are clear: most Americans use the same physical infrastructure to access their Internet service providers ("ISPs"), who offer hybrid services, and to access their traditional long distance phone service.[15] As

---

using the Internet protocols (TCP/IP). *See infra* notes 92–94 and accompanying text for discussion of enhanced services.

[9] *See* 142 CONG. REC. S687, S688 (daily ed. Feb. 1, 1996) (statement of Sen. Fritz Hollings, (D-S.C.)) ("This [Act is] intended to promote competition in every sector . . . [and] to protect and advance universal service . . . .").

[10] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C.A. § 153(43) (West Supp. 1997).

[11] "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C.A. § 153(46) (West Supp. 1997).

[12] *See* In the Matter of Usage of the Public Switched Network by Information and Internet Service Providers at 23, Dkt. No. 96-263, Mar. 24, 1997 (Comments of AT&T Corp.) [hereinafter AT&T Comments].

[13] "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C.A. § 153(20) (West. Supp. 1997).

[14] *See* 47 U.S.C. § 254(b)(1) (West Supp. 1997).

[15] As the FCC itself has frequently noted, enhanced service providers, which include Internet service providers under the FCC's current rules, use local telephone facilities in a manner similar to interexchange (long distance) carriers. *See* KEVIN WERBACH, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POL'Y 49–51 (FCC

the universal service funding pool shrinks because of the perverse incentives created by the FCC's flawed interpretation of the 1996 Telecommunications Act, it will no longer be possible to assure universal access to telecommunications services.

Congress also passed the 1996 Act to open local communications monopolies to competition. The FCC's current interpretation of the 1996 Act, however, removes one of the most powerful incentives for the construction of alternative facilities by perpetuating the below-cost pricing of Internet services over existing local telephone networks.[16] By treating all information service providers, including providers of Internet access and other hybrid services, as local end users instead of the interexchange carriers[17] that they really are, the FCC makes it less likely that the higher capacity, broadband[18] networks needed for greater Internet use will be extended to homes and small businesses. This means that while consumers will continue to see greater competition in long distance communications, they will still have to rely on a single provider and the existing narrowband network[19] for local access to that competition.[20]

The FCC's preferential treatment of the Internet completely disregards the clear intent Congress expressed in the 1996 Act for competitive neutrality.[21] This intent continued a trend Congress started in 1993 by enacting new rules to bring "regulatory parity" to providers of commercial mobile services like cellular and Personal Communications Service ("PCS").[22] Competitive neutrality both ensures that incumbents cannot rig the rules to their advantage against newcomers and that incumbents and their customers do not have to subsidize new entrants. Congress in-

---

Office of Plans and Policy Working Paper No. 29, 1997) (citing FCC notices and orders from 1983 through 1996).

[16] AT&T Comments, *supra* note 12, at 18.

[17] An "interexchange carrier" is a carrier authorized by the FCC to provide interstate long distance communications services. HERB KIRCHHOFF, TELECOM LINGO GUIDE (7th ed. 1994).

[18] "Broadband" refers to any digital line operating at a transmission speed in excess of 1.544 Mbps. *See id.*

[19] "Narrowband" refers to voice-grade analog facilities and to digital facilities operating at speeds of less than 1.544 Mbps. *See id.*

[20] *See* WERBACH, *supra* note 15, and accompanying text.

[21] *See* 47 U.S.C.A. § 251(e)(2) (West Supp. 1997) (stating that costs to be borne on a competitively neutral basis); 47 U.S.C.A. § 253(b) (State may impose universal service requirements on a competitively neutral basis); 47 U.S.C.A. § 254(h)(2) (establishing competitively neutral rules).

[22] *See* 47 U.S.C. § 332(c)(1) (1994); *see also* CONG. REC. S7856 (1993) (statement of Sen. Stevens concerning regulatory parity amendment during consideration on Senate floor of provision that became 47 U.S.C. § 332(c)(1)).

tended to level the playing field[23] so that incumbents and new entrants both pay their own way. In order to ensure that universal service obligations did not disadvantage incumbents or new entrants, Congress amended the 1934 Act to require not only that all telecommunications carriers contribute to universal service, but also that every telecommunications carrier (whether an incumbent or new entrant) providing universal service in specified areas be eligible for universal service support.[24]

The FCC's actions with respect to information service providers that offer hybrid services to the public, including many Internet services, are inconsistent both with the plain meaning of the key definitions in the 1996 Act and with the Act's goals. Congress has already moved to have the FCC review its interpretations regarding hybrid services and universal service.[25] It is the author's hope that the FCC will correct some of the problems highlighted in this Essay as part of that review process.

I. THE INTENDED IMPACT OF THE 1996 ACT

The 1996 Act expressed Congress's intent to forge a new regulatory framework from the Depression-era 1934 Act. First and foremost, Congress sought to overhaul the 1934 Act in order to create a new regulatory structure with sufficient flexibility to manage the transition from a local monopoly system to a dynamic competitive system. As envisioned, the new system would both allow and encourage different providers to compete for the many consumers who, in the modern communication era, desire hybrid services.

The definitions contained in the 1996 Act make it clear that this new act sweeps much more broadly than the 1934 Act. In fact, the very number and scope of the new definitions added to the 1934 Act by the 1996 Act signifies the changes in our system that are driven by telecommunications.[26]

---

[23] 142 CONG. REC. S691 (daily ed. Feb. 1, 1997) (statement of Sen. Stevens).

[24] *See* 47 U.S.C.A. § 254(d) (West Supp. 1997); 47 U.S.C.A. § 214(e) (West Supp. 1997).

[25] *See* Act of Nov. 26, 1997, Pub. L. No. 105-119, § 623, 1997 U.S.C.C.A.N. (111 Stat.) 2440, 2521 (requiring the FCC to conduct a review of its interpretation of, among other things, the application of the definitions, "telecommunications service" and "information service" to hybrid services and the impact of the Commission's interpretation on the future of universal service and who is required to contribute to universal service).

[26] *See* 142 CONG. REC. S690 (daily ed. Feb. 1, 1996) (statement of Sen. Stevens, made just hours before the passage of the 1996 Act).

That Congress intended the 1996 Act to change fundamentally the nation's approach to regulating telecommunications is evident not only in the language of the act but also in the statements made on the floor of both chambers. Senator Trent Lott (R-Miss.), the current Majority Leader and a conferee on the 1996 Act, noted before casting his vote "[w]e are changing 60 years of law with [the 1996 act]. It is going to have a tremendous impact."[27] Senator Wendell Ford (D-Ky.), another conferee, noted "it is clear that the reform of our communications law is long overdue. This conference report is a comprehensive and balanced approach to rewrite our National telecommunications policy for the 21st Century and beyond."[28] In fact, nearly every senator and representative who took the floor to comment on final passage of the 1996 Act remarked upon its monumental nature.[29] Despite this chorus of voices, clear evidence that Congress intended to fundamentally alter the nation's telecommunications law when it passed the 1996 Act, the FCC has consistently made the error of narrowly interpreting the 1996 Act's definitions, and thus mistakenly has significantly limited its scope.

A. *The New Definitions Added in the 1996 Act Recognize Technological Convergence in the Communications and Computer Industries*

Recognizing that the existing regulatory structure had evolved based on the monopoly model and the 1934 Act's definition of "common carrier,"[30] Congress chose not to use the term "com-

---

[27] *Id.* at S699 (statement of Sen. Lott).

[28] *Id.* at S705 (statement of Sen. Ford).

[29] *See* 142 CONG. REC. S686 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler); *see id.* at S703 (statement of Sen. Howell Heflin (D-Ala.)); *see id.* at S715 (statement by Sen. Dianne Feinstein (D-Cal.)); *see id.* at S717 (statement by Sen. James Exon (D-Neb.)); *see id.* at S718 (statement by Sen. Bob Dole (R-Kan.)); *see id.* at S720 (statement by Sen. Pressler); *see id.* at S720 (statement by Sen. John Chafee (R-R.I.)); *see id.* at H1146 (statement by Rep. John Linder (R-Ga.); *see id.* at H1147 (statement by Rep. David Dreier (R-La.)); *see id.* at H1149 (statement by Rep. Jack Fields (R-Tex.)); *see id.* at H1150 (statement by Rep. Porter Goss (R-Fla.)); *see id.* at H1157 (statement by Rep. Henry Hyde (R-Ill.)); *see id.* at H1161 (statement by Rep. Michael Oxley (R-Ohio)); *see id.* at H1166 (statement by Rep. Daniel Frisa (R-N.Y.)); *see id.* at H1168 (statement by Rep. Bob Goodlatte (R-Va.)); *see id.* at H1171 (statement by Rep. Thomas Bliley (R-Va.)); *see id.* at H1172 (statement by Rep. Lynn Woolsey (D-La.)); *see id.* at H1172 (statement by Rep. Bill Orton (D-Utah)); *see id.* at H1175 (statement by Rep. Wayne Gilchrest (R-Md.)); *see id.* at H1177 (statement by Rep. Michael Castle (R-Del.)); *see id.* at 1174 (statement by Rep. Steve Buyer (R-Ind.)).

[30] 47 U.S.C.A. § 153(10) (West Supp. 1997) was originally Section 153(h) of the 1934 Act. Section 153(h) reads:

mon carrier" to define the new rights and responsibilities of communications providers under the 1996 Act. Instead, Congress added new definitions to the 1934 Act to respond to the convergence of communications and computer technology and to provide the framework for the new competitive local communications world. "Information service"[31] was added to describe the many new computer-based services that are becoming increasingly important as a means of commerce and education. "Telecommunications service"[32] and "telecommunications carrier"[33] became the new keys to rights and responsibilities of communications providers in the post-monopoly world.

The new definitions are vital to the changes Congress effected by the 1996 Act. The most important of these new definitions are "telecommunications,"[34] "telecommunications service,"[35] and "telecommunications carrier."[36] In addition, the 1996 Act also amended the definition of "telephone exchange service,"[37] a term already defined by the 1934 Act,[38] to reflect the changes intended

---

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, interstate or foreign communication by wire or radio or in interstate or foreign radio transmission or energy, except where reference is made to common carriers not subject to this Chapter: but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(h). The 1996 Act renumbered the definition of "common carrier" but did not amend it.

[31] "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C.A. § 153(20) (West Supp. 1997).

[32] *See supra* note 11.

[33] "Telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C.A. § 153(44) (West Supp. 1997).

[34] *See supra* note 10.

[35] *See supra* note 11.

[36] *See supra* note 33.

[37] "Telephone exchange service" is defined as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C.A. § 153(47) (West Supp. 1997). The 1996 Act added clause (B). *See infra* note 38.

[38] Prior to amendment, the definition of "telephone exchange service" read as

to be encompassed by the other new definitions. All of the central provisions of the 1996 Act are applicable to "telecommunications carriers" and the provision of "telecommunications services."[39] If these new definitions are construed narrowly, as the recent decisions of the FCC indicate, then the major "overhaul"[40] of the 1934 Act that Congress expected from the 1996 Act will in fact be very limited.

Unfortunately, the FCC continues to apply concepts developed in an inflexible, monopoly environment to the flexible, post-local monopoly world that the 1996 Act was intended to create. The FCC's continued classification of services as "enhanced"[41] or "basic"[42] could seriously undermine the competitive regime Congress sought to create. Although some members of industry may support the FCC's approach in a shortsighted effort to obtain relief from access charges[43] and other outdated regulatory structures, they are likely to be disappointed with the long-term result. More to the point, the 1996 Act provided the FCC with the legal flexibility it previously lacked,[44] making it unnecessary for the FCC to continue applying its outdated "enhanced"/ "basic" regime.[45]

B. *Congress Intended "Telecommunications Carrier" to be a Broader Category than "Common Carrier"*

The 1934 Act defined the term "common carrier,"[46] and provided the rules to regulate them under Title II of that Act.[47] If Congress had intended the term "telecommunications carrier" to

---

follows: a "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 U.S.C. § 153(r) (1991).

[39] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, Title I, IV-VII, 110 Stat. 56, 61, 128 (1996).

[40] *See supra* note 2 (statement of Sen. Ford).

[41] 47 C.F.R. § 64.702 (1997).

[42] *See* In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *modified*, 84 F.C.C.2d 50 (1980), *further modified on reconsideration*, 88 F.C.C.2d 512 (1981) [hereinafter *Computer* II].

[43] *See, e.g.*, Steven Titch, *You Gotta Be in It to Win It*, TELEPHONY, Mar. 17, 1997 (interexchange carriers have joined the effort to keep ISPs exempt from access charges).

[44] *See* 47 U.S.C.A. § 160 (West Supp. 1997).

[45] *See Computer* II, *supra* note 42, 77 F.C.C.2d at 385 (defining "basic" and "enhanced" communications).

[46] *See supra* note 30.

[47] 47 U.S.C. §§ 201–220 (1934).

mean "common carrier," there would have been no need to add this new term. Congress, however, did intend "telecommunications carrier" to define a class—a class broader than the pre-1996 Act "common carrier" regime.[48] That intent is evident from the definition of a "telecommunications carrier" added by the 1996 Act.[49] A "telecommunications carrier" includes "any provider . . . [that offers the transmission] of information of the user's choosing . . . for a fee directly to the public . . . regardless of the facilities used."[50] Congress added this sweeping definition to account for the continued convergence of technology, to promote the removal of barriers to entry, and to achieve competitive neutrality.[51] Congress's intent is also evident from the expansive forbearance authority provided in new section 160 of the 1996 Act.[52]

Contrary to the FCC's position that the statutory definition of "telecommunications carrier" resembles the FCC's longstanding regulatory definition of "basic service," the term "telecommunications carrier" has no history or precedent, either in the FCC's rules, or in court decisions.[53] Instead, the definition of "telecommunications carrier" is based in part on a two-prong test outlined in *National Association of Regulatory Utility Commissioners v. FCC* ("NARUC II").[54] First, the court examined whether a service provider "holds [itself] out to serve indifferently all potential users" and noted that "it is the practice of such indifferent service that confers common carrier status."[55] Second, the court examined whether "the system be such that customers 'transmit intelligence of their own design and choosing'"[56] and determined that a use "in which the customer explicitly or implicitly deter-

---

[48] *See supra* note 30.

[49] A telecommunications carrier is only a common carrier to the extent that it provides telecommunications service. *See* 47 U.S.C.A. § 153(44) (West Supp. 1997).

[50] 47 U.S.C.A. § 153(43), (44), (46) (West Supp. 1997).

[51] The FCC took a step in the right direction when it concluded in the Universal Service Order that some non-common carrier communications providers, such as commercial mobile service providers and paging services, are in fact "telecommunications carriers." *See* In the Matter of Federal-State Joint Board on Universal Service, 12 F.C.C. REC. 8776, 9175 (May 8, 1997) (F.C.C. Report and Order) [hereinafter Universal Service Order].

[52] *See* 47 U.S.C. § 160 (Supp. 1997).

[53] *See* United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 229 (D.D.C. 1982) (defining the term "telecommunications" but not "telecommunications carrier").

[54] National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608–09 (D.C. Cir. 1976).

[55] *Id.* at 608.

[56] *Id.* (quoting Industrial Radiolocation Service, 5 F.C.C.2d 197, 202 (1966)).

mines the transmission or content" of the message satisfies this prong.[57]

The statutory term "telecommunications carrier" is even broader than the NARUC II court's conception. The phrases "any provider" and "regardless of the facilities used" make it clear that Congress intended the provision to include anyone engaged in the transmission of "information of the user's choosing."[58] The only conditions are: (1) the information must be of the user's choosing;[59] (2) the user's information must remain unchanged in form or content "as sent and received;"[60] (3) the transmission must be between or among points specified by the user;[61] and (4) the capability to transmit the information must be offered "for a fee directly to the public."[62] Changes to the information that occur during transmission, such as the addition of information regarding the message routing or protocol conversion to enable the message to be transmitted from one computer to another, are irrelevant if the information chosen by the user has the same form (e.g., typewritten English) and content (e.g., directions to Washington, D.C.) as "sent and received."[63] Unlike "enhanced services," where the inclusion of "computer processing applications that act on the format, content, code, protocol, or other similar aspects of the subscriber's information . . . ."[64] results in the transmission being classified as an "enhanced service," the statutory definition of "telecommunications" only requires that information of the user's choosing be transmitted without change in the form or content of the user's information.[65] The addition of information not requested by the user, such as a header showing the sender's name, has been excluded from the statutory definition.[66]

---

[57] *Id.* at 609.
[58] 47 U.S.C.A. § 153(43), (44), (46) (West Supp. 1997).
[59] *See* 47 U.S.C.A. § 153(43) (West Supp. 1997).
[60] *Id.*
[61] *See id.*
[62] 47 U.S.C.A. § 153(46) (West Supp. 1997).
[63] 47 U.S.C.A. § 153(43) (West Supp. 1997).
[64] 47 C.F.R. § 64.702 (1997).
[65] Congress was aware of the FCC's definition of enhanced services when it adopted the definition of "telecommunications." Since Congress only specified that the "form and content" must remain the same as sent and received, changes in the "code, protocol, or similar aspects" of the user's information do not affect the determination of whether the transmission constitutes "telecommunications" under the statutory definition. *See generally* 47 U.S.C.A. § 153(43) (West Supp. 1997);47 C.F.R. § 64.702 (1997).
[66] The addition of a header is often cited by ISPs as evidence that an e-mail is "enhanced." *See* Jamie N. Nafziger, *Time to Pay Up: Internet Service Providers'*

Most importantly, the definition does not say that the "telecommunications carrier" must be engaged *solely* in offering "telecommunications for a fee."[67] Indeed, the definition plainly contemplates that "telecommunications carrier[s]" will offer services other than "telecommunications services": "a telecommunications carrier shall be treated as a common carrier under [the 1934] Act only to the extent that it is engaged in providing telecommunications services . . . ."[68]

An information service provider that offers a hybrid service directly to the public for a fee is also offering "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[69] The relationship of the information services provider offering a hybrid service to the customer determines whether an information service provider is also a "telecommunications carrier." The type of facility[70] used by the information service provider to make the transmission is irrelevant; under the definition of "telecommunications carrier," a provider's status does not depend on the type of facilities used. As long as the information service provider is the entity offering the transmission, as part of its for-a-fee hybrid service, the statutory definitions do not prevent the information service provider from also being classified as a "telecommunications carrier" to the extent that it provides transmission services.[71]

Congress did not intend "information service" and "telecommunications service" to have the same meaning as the FCC's regulatory definitions of "enhanced" and "basic" services.[72] If this was Congress's intention, the conference committee would

---

Universal Service Obligations Under the Telecommunications Act of 1996, 16 J. MARSHALL J. COMPUTER INFO. L. 37, 67–68 (1997). This example is not relevant to the statutory definition, which focuses on the content and form of the information the user asked to be transmitted. The addition of a header is information not requested by the user, which Congress specifically excluded from consideration to prevent manipulation of the definition by carriers.

[67] *See supra* note 11.

[68] 47 U.S.C.A. § 153(44) (West Supp. 1997).

[69] 47 U.S.C.A. § 153(43) (West Supp. 1997).

[70] Such facilities include the ISP's own facilities, leased facilities, private lines, wireless facilities, cable facilities, broadcast facilities, and common carrier facilities.

[71] Congress's decision not to define "information service provider" reflects the fact that Congress did not intend to create a separate class of communications providers. Rather, Congress included the term "information service" in order to recognize certain services that have generally been treated as unregulated services, but which are provided by telecommunications carriers, common carriers, and other entities regulated under the 1934 Act.

[72] *See infra* notes 91–94 and accompanying text.

have adopted the Senate's definition of "information service" and the House's definition of "telecommunications service" and deleted "telecommunications carrier" entirely.[73] Instead Congress created an innovative new framework to provide rights and responsibilities in a competitive world. Those rights and responsibilities attach to "telecommunications carriers," not just to "common carriers"—the term Congress would have used had it merely intended to codify the FCC's prior practice.

C. *Congress Included Broad Forbearance Authority in the 1996 Act to Promote Regulatory Parity and Provide Flexibility for New Telecommunications Carriers*

A primary goal of the 1996 Act was to allow previously segregated sectors of the communications industry to compete directly with each other. The 1996 Act removed the statutory ban on common carriers offering cable services[74] and also prohibited state and local barriers to the "ability of any entity to provide interstate or intrastate telecommunications services."[75] Congress intended to level the playing field and ensure regulatory parity by allowing each sector to venture into other sectors and to take advantage of technology across the sectors.[76]

Congress began to implement regulatory parity in the Omnibus Budget Reconciliation Act of 1993 when it amended Section 332(c) of the 1934 Act regarding "commercial mobile services."[77]

---

[73] The FCC seems to have mistakenly adopted the wrong definition. In paragraph 785 of the Universal Service Order, the FCC states that "telecommunications services . . . [are] intended to encompass only telecommunications provided on a common carrier basis. This conclusion is based on the Joint Explanatory Statement . . . ." Universal Service Order, *supra* note 51, at ¶ 785. The referenced passage on page 115 is not the language adopted by the Conference Committee, rather it simply describes the definition of "telecommunication sevices" in the House amendment to S.652. On page later, the Joint Explanatory Statement describes the conference report, and states that the House recedes to the Senate definition of "telecommunication services." In ¶ 788 of the Universal Service Order, the FCC once again states that "the definition of enhanced services is substantially similar to the definition of information services," citing its earlier action in *Non-Accounting Safeguards First Report and Order*, ¶ 102. In the Matter of Federal-State Joint Board on Universal Service, 12 F.C.C. Rcd. 8776, Docket No. 96-45, FCC 97-157, ¶ 789 (1997).

[74] *See* § 302(b) of the 1996 Act, which repealed § 613(b) of the 1934 Act.

[75] 47 U.S.C.A. § 253(a) (West Supp. 1997).

[76] 142 CONG. REC. S687 (daily ed. Feb.1, 1996) (statement of Sen. Pressler) and 142 CONG. REC. (daily ed. Feb. 1, 1996) (statement of Sen. Stevens).

[77] "Commercial mobile services" are wireless radio services for which a license is issued under the Act. *See* 47 U.S.C.A. § 332(c) (West Supp. 1997). The Omnibus Budget Reconciliation Act of 1993, included Title VI, "Communications Licensing and

In Section 332(c), Congress declared that a commercial mobile service provider shall "be treated as a common carrier,"[78] but then gave the FCC authority to abstain from applying most of the common carrier provisions of Title II of the 1934 Act.[79] Three years later, in the 1996 Act, Congress improved upon the 1993 approach with respect to telecommunications carriers. A telecommunications carrier "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services . . . ."[80] Congress then *required,* however the FCC to refrain from applying "any provision" of the 1934 Act to "a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" if the FCC made three findings: (1) application of the provision was not required to ensure rates were "just and reasonable and . . . not unjustly or unreasonably discriminatory"; (2) consumer protection did not require application of the provision; and (3) forbearance was in the public interest.[81] Moreover, Congress specifically declared that promoting competition in the provision of telecommunications services sufficed to support a finding that forbearance is in the public interest.[82] Congress, recognizing that the new term "telecommunications carrier" would envelop many previously unregulated providers, thus mandated FCC forbearance in a broad range of situations to prevent excessive regulation.

There would be no reason to allow, much less require, the FCC to waive provisions in the non-common carrier titles of the 1934 Act unless Congress believed that "telecommunications carriers" might also be one of the following: cable operators subject to regulation under Title VI of the 1934 Act; broadcasters and mobile service providers (both commercial and private) sub-

---

Spectrum Allocation Improvement," which extensively amended the 1934 Act. *See* Omnibus Reconciliation Act of 1993, Pub. L. No., 103-66, 1993 U.S.C.C.A.N. (107 Stat.) 312. In particular, Section 332(c) was amended to achieve "regulatory parity" among providers of commercial mobile services by statutorily applying "common carrier" treatment to services the FCC had previously held were "private mobile services." *See id.* at 6002(6)(2)(A), 1993 U.S.C.C.A.N. (107 Stat.) 393; *see also* In the Matter of AT&T Submarine Systems, Inc., 11 F.C.C. REC. 14885 (1996). In this decision, the FCC's International Bureau agreed with AT&T Submarine Systems that Congress had taken "virtually identical" approaches defining "commercial mobile service" and "telecommunications service." *See id.* at 14891.

[78] 47 U.S.C.A. § 332(c)(1) (West Supp. 1997).

[79] *See id.*

[80] *Id.* at § 153(44).

[81] *Id.* at § 160(a).

[82] *Id.* at § 160(b).

ject to regulation under Title III of the 1934 Act; or even enhanced service providers otherwise subject to regulation only under Title I of the 1934 Act.[83] By providing broad forbearance authority as well as a specific mechanism permitting telecommunications carriers to petition the FCC to receive a decision in a timely fashion,[84] Congress intended to create a new regime that would prevent companies from using regulatory distinctions to gain a competitive advantage, while also ensuring that the minimum amount of regulation necessary to protect consumers would be applied.

II. THE FCC'S PAST EFFORTS TO ADDRESS TECHNOLOGY CONVERGENCE AND THE ARRIVAL OF INTERNET TELEPHONY ILLUSTRATE THE PROBLEM

Ever since the first *Computer* decision[85] in 1971, the FCC has struggled with how to determine which hybrid services should be subject to regulation and which should not. This struggle continues to the present day, and will become increasingly difficult—more likely impossible, if the FCC continues its current regime.

A. *Difficulties Presented by Continuing the FCC's Past Practice of Treating Hybrid Services Preferentially*

In *Computer I* the FCC announced that it would not regulate "a data processing hybrid offering"[86] if such offering contained only "incidental and peripheral communication elements,"[87] but it would regulate under Title II any such hybrid offering that was "essentially communications."[88]

---

[83] *See generally Computer* II, *supra* note 42, 77 F.C.C.2d at 432 ("Title II and Title III provide the principal regulatory forms of the Communication Act, but the Commission also has regulatory powers independent of Title II and Title III.")

[84] The FCC must act on a petition within a year, but it can grant an extension of 90 days. *See* 47 U.S.C.A. § 160(c) (West Supp. 1997).

[85] The FCC has conducted three *Computer* inquiries over the past 30 years that are collectively known as "the *Computer* decisions." Individually, they are commonly referred to as *Computer* I, *Computer* II, and *Computer* III. *See* In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 267 (1971) [hereinafter *Computer* I]; *Computer* II, *supra* note 42; In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986), *modified*, 2 F.C.C. REC. 3035 (1987), *further modified on reconsideration* 3 F.C.C. REC. 1135 (1988) [hereinafter *Computer* III].

[86] *See Computer* I, *supra* note 85, at 278.

[87] *See id.*

[88] *See id.*

The uncertainty surrounding the classification scheme promulgated by the FCC in *Computer I* led to a second set of hearings that resulted in the *Computer II*[89] decision in 1980. In a tentative decision in 1979, the FCC proposed a new three-tiered classification structure of "voice," "basic non-voice," and "enhanced non-voice,"[90] to alter the communications/data processing classification structure it had adopted in *Computer I*.[91]

Just two years later, in the 1982 *Computer II* final decision, the FCC abandoned the proposed three-tiered classification in favor of a two-tiered classification of "basic" and "enhanced." In general, "basic" service was characterized as limited "to the common carrier offering of transmission capacity for the movement of information."[92] "Enhanced" service was generally said to include a combination of basic service and computer processing applications "that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information."[93] Further, the FCC stated that it was not possible to distinguish between communications services and data processing services within the "enhanced" services category.[94]

The FCC opened a third *Computer* inquiry in 1985. In *Computer III*, the FCC upheld its dichotomous "basic"/"enhanced" definitions and decided that protocol conversion, with three exceptions, qualified as an "enhanced" service.[95]

Although the FCC never opened a fourth *Computer* inquiry in the years between *Computer III* and the passage of the 1996 Act, it continued to be confronted with the problem of how to draw the line between regulated and unregulated services.[96]

---

[89] *See Computer II*, *supra* note 42.

[90] *See id.*, *supra* note 42, 72 F.C.C.2d at 390 (Tentative Decision).

[91] *See Computer I*, *supra* note 85.

[92] *See Computer II*, *supra* note 42, 77 F.C.C.2d at 387.

[93] *Id.*

[94] *See id.*

[95] *See Computer III*, *supra* note 85, 104 F.C.C.2d at 966. The three exceptions were protocol conversions to permit communications between a subscriber and the network itself, the use of protocol conversion necessitated by the introduction of new technology in connection with the provisioning of "basic" service, and "internetworking protocol conversions," which are protocol conversions taking place solely within the network that result in no net conversion between users. *See id.* at 973–74; 2 F.C.C. REC. 3072, 3082 (1987) (Phase II Order).

[96] *See* In the Matter of Independent Data Communications Manufacturers Association, Inc., 10 F.C.C. REC. 13717 (1995). In this case the FCC concluded that "frame relay" services (a high speed packet switching network for transmitting data) used as

Notwithstanding the passage of the 1996 Act and the opportunity presented by the new definitions to recognize the growing dominance[97] of hybrid services in modern communications, the FCC continued on with its "basic"/"enhanced" distinction as if the 1996 Act did not exist. The FCC's convoluted efforts in the Universal Service Order to define basic "conduit"[98] access to the Internet highlight the difficulty of its rigid, mutually exclusive approach. The FCC states:

> in listing exceptions to the definition of "electronic publishing" in section 274 of the [1934] Act, Congress described certain services that are precisely the types of "conduit" services that we agree with the Joint Board should be available . . . at a discount . . . . We conclude that eligible schools and libraries will be permitted to apply their relevant discounts to information services provided by entities that consist of (i) the transmission of information as a common carrier; (ii) transmission of information as part of a gateway . . . [that] does not involve the . . . alteration of the content of information . . . and (iii) electronic mail services.[99]

The descriptions in clauses i and ii clearly fit the definition of "telecommunications service"[100] if offered to the public (or a class of the public such as schools or libraries) for a fee, yet the FCC refers to them as "information services."[101] E-mail, the subject of clause iii, generally involves the transmission and storage of information without changing the user's form or content as sent or received, so it appears to fit the definition of "telecommunications" as well as the definition of "information services."

The FCC offers no rationale for classifying these three services as "information services" rather than as "telecommunications services." The FCC's decision defies logic and the law

---

"the intermediary format for data traveling between different computer systems employing different communications protocols" is a basic service. *Id.* at 13717–18. The FCC explicitly rejected the argument that frame relay applications act on the content of the subscriber's transmitted information. *See id.* at 13718.

[97] The FCC itself stated that "the computer industry and communications industry are becoming more and more interwoven. We believe, and the record shows, that this trend will become even more pronounced in the future." *Computer II*, *supra* note 42, 77 F.C.C.2d at 422.

[98] Universal Service Order, *supra* note 51, at 9013.

[99] *Id.*

[100] *See supra* note 11.

[101] It is particularly hard to reconcile the classification of clauses (i) and (ii) as "information services" when they are compared to the FCC's definition of "basic" service ("the common carrier offering of transmission capacity for the movement of information"). *See supra* note 92 and accompanying text.

given that the provision of these services to the public is contingent upon payment of a fee—a key factor to the definition of "telecommunications services." Indeed, no rationale for the FCC's classification exists, other than the agency's clear desire to ensure that certain information service providers will be eligible for the discounts it declares. Nowhere in Congress's discussion of services excluded from the definition of "electronic publishing" (which falls under the definition of "information service") does it indicate any intent that the "transmission of information as a common carrier" meets the definition of "information service."[102]

B. *Internet Telephony Is Fast Becoming a Reality*

The difficulties presented by the FCC's present policies toward hybrid services are highlighted by reviewing the FCC's current treatment of voice communications—telephony—over the Internet. Voice communications provided by telephone companies have been regulated under Title II of the 1934 Act since it became law.[103] Now, however, a growing amount of voice traffic is finding its way onto systems not subject to Title II regulation under the FCC's rules. While not yet in widespread use, Internet telephony[104] is already available to many consumers.[105]

The technology supporting Internet telephony is improving rapidly as established companies discover the potential savings made possible by avoiding the access charges and universal service contributions that apply to traditional interexchange telephone service.[106] Although Internet telephony does not currently produce the sound quality that is typical of land-line calls, quality is quickly improving and delays are being minimized so that many applications now allow real time conversations.[107] As the

---

[102] *See* H.R. CONF. REP. No. 104-458, at 155–56 (1996), *reprinted in* 1996 U.S.C.C.A.N. 167–69 [hereinafter Joint Explanatory Statement].

[103] *See supra* note 31.

[104] "Telephony" is a generic term for voice telecommunications and the term "Internet telephony" simply describes telephone traffic that is sent using Internet protocol. *See* HERB KIRCHHOFF, TELECOM LINGO GUIDE (7th ed. 1994).

[105] *See* Nancy K. Herther, *Dishing out the Data: Is there a Satellite in your Future?*, ONLINE, May/June 1997, at 62, 64.

[106] *See* Michael Kennedy, *Internet Telephony for the Enterprise*, TELECOMMUNICATIONS, Oct. 1997, at 28; *see also* Robert Daly, *IP Calling*, PC MAG., Dec. 16, 1997, at 42, 42.

[107] *See RSL Communications: RSL Com Increases Ownership in Delta Three, World Leader in Internet Telephony*, M2 PRESSWIRE, Dec. 15, 1997, available in 1997 WL

cost of equipment needed to place Internet calls is reduced, more voice traffic will switch to the Internet. Several companies are currently developing gateway technologies that switch voice traffic to the Internet backbone without the need for computers on the initiating and receiving ends of the call.[108]

Given the short time Internet telephony has existed, it is quickly gaining market share. Kevin M. Moore, a financial analyst at Alex Brown & Sons, Inc., recently remarked, "this could be the story in telecommunications in 1998. It's been a sleeper, but this could rise to be the story."[109] The IPhone (Internet Phone), which was released by VocalTec Inc. in 1995, was the first commercially available Internet telephony software product.[110] Now VocalTec has joined forces with AT&T, forming a joint venture called ITXC, with the goal of providing interexchange services to Internet telephony companies.[111]

Some information service providers have already begun offering their customers Internet telephone service.[112] Because the calls are telephone to telephone, customers see a difference only in their phone bills.[113] For example, KIH Online, an information service provider in Kentucky, announced in August 1997 that it will begin offering state-wide long-distance service to both resi-

---

16295633; *see also Siemens Jumps on IP Telephony Bandwagon*, NETWORK WORLD, Oct. 6, 1997, at 45, 45; Chris Bucholtz, *Voice Over IP Takes Center Stage, VON Conference Focuses in New Technology*, TELEPHONY, Sept. 29, 1997, at 25, 25. Delays are caused because voice is broken into packets and sent in different directions through the Internet structure. *See* Fred Hapgood, *IPhone*, (visited Apr. 15, 1998), <http://www.wired.com/wired/3.10/features/iphone.html>. Occasionally packets get stuck and have to wait in line until a path clears. *See id.*

[108] *See* Nick Wingfield, *FCC Pressed on Net Phones*, CINET NEWS.COM (visited Apr. 15, 1998), <http://www.news.com/News/Item/0,4,7513,00.html>; *see also* Wayne Walley, *Internet Telephony Branches Out*, GLOBAL TELEPHONY, May 1, 1997, *available in* 1997 WL 10429776.

[109] *See AT&T's Evslin Resigns to Join Internet Telephony Venture*, COMM. BUS. & FIN., Aug. 4, 1997, *available in* 1997 WL 8806305.

[110] *See* Phil Britt, *Leaps and Bounds: Study Predicts Strong Growth in Internet Telephony*, TELEPHONY, Aug. 4, 1997, at 42, 42.

[111] *See* Stan Gibson, *Voice Over IP: Better Start Planning Now*, PC WEEK, Aug. 18, 1997, at 84, 84.

[112] *See* Mary E. Thyfault, *The Internet Speaks—Companies Find That Voice Over the Net Saves Them Money*, INFORMATIONWEEK, Oct. 20, 1997, *available in* 1997 WL 14148433.

[113] *See* Jonathan Marshall, *Internet Saves Callers $ $ / No PC, Just a Phone is Needed*, S.F. CHRON., Aug. 26, 1997, at C4 (comparing calling costs between traditional telephone companies and Internet based telephone companies). The FCC's recent Report to Congress indicated that such phone-to-telephone Internet telephony services may be required to contribute to the Universal Service Fund. The FCC also indicated, however, that it would review each provider's service on a case-by-case basis, and *only* a phone-to-phone configuration would be subject to contribution. *See* In the Matter of Federal-State Joint Board on Universal Services, *supra* note 5, at 43.

dential and business customers.[114] KIH plans to offer unlimited in-state long-distance service for a flat fee of twenty dollars per month to residential customers and at a rate of five cents per minute to business customers.[115]

Industry analysts see a bright future for Internet telephony. Frost and Sullivan placed Internet telephony revenues in 1996 at $19.8 million and estimate that revenues will grow at a compound rate of 149%, meaning that revenues will total $1.89 billion by the end of 2001.[116] And according to Forrester Research, revenues from Internet telephony could reach two billion dollars by 2007—or four percent of all domestic and foreign long-distance calling.[117] MCI's Internet telephony traffic increased at a rate of fifteen percent per month during 1996.[118] As a result, MCI spent sixty million dollars during the summer of 1996 to increase its Internet telephony network from 155 to 622 Mbps (megabits per second).[119] Probe Research estimates that by 2002, 120 billion long-distance minutes, out of a predicted total of 648.5 billion minutes, will be carried over the Internet.[120] Probe Research has also estimated that approximately 18.5% of all domestic phone traffic will travel over data lines by 2002—a phenomenal increase from 1997, when only 0.2% of traffic utilized data lines.[121]

Whether the movement of traffic to the Internet will really threaten the long-term survival of the large telecommunications carriers is yet to be seen. What is certain is that the migration of telecommunications traffic to the Internet and other hybrid service transmission methods poses serious obstacles to the achievement of the 1996 Act's goal of competitive neutrality.

---

[114] *See Internet Voice: KIH Online to Offer Voice on the Internet Services in Kentucky*, EDGE ON & ABOUT AT&T, Aug. 4, 1997, *available in* 1997 WL 12806640.

[115] *See id.*

[116] *See* Steve Gold, *Frost and Sullivan Reports on Internet Telephony*, NEWSBYTES NEWS NETWORK, Oct. 7, 1997, *available in* 1997 WL 13911637; *see also Greater Growth Expected for Internet, Intranet Demand*, TELECOMWORLDWIRE, Oct. 6, 1997, *available in* 1997 WL 13594975.

[117] *See* Michelle V. Rafter, *World is Shrinking—or at Least the Cost to Talk to It*, CHI. TRIB., Aug. 10, 1997, at C4.

[118] *See* Britt, *supra* note 109, at 42.

[119] *See id.*

[120] *See Where the Big Bucks Are for 1998*, VOICE TECH. & SERVICES NEWS, Sept. 30, 1997, *available in* 1997 WL 8134192.

[121] *See* Henry Goldblatt, *Your Next Phone Call May be Via the Net*, FORTUNE, June 23, 1997, at 139.

III. CONTINUED APPLICATION OF THE FCC'S "ENHANCED SERVICES" REGULATORY REGIME, WHICH PREDATES THE 1996 ACT, COULD SERIOUSLY UNDERMINE THE COMPETITIVE REGIME CONGRESS INTENDED TO FOSTER

The FCC's insistence on applying an outdated regulatory interpretation to the new statutory definitions not only results in a logical inconsistency that may provide fodder for conflict in both industry and the courts, but also could lead to tremendous regulatory imbalance, regulatory gaming, and a significant delay in bringing competition to the consumer for the provision of local telecommunications services.

A two-pronged regulatory imbalance stems from the favorable treatment information service providers providing hybrid services and their customers receive under the FCC's interpretations of the 1996 Act. First, to the extent that information service providers and their customers do not pay their fair share of the cost of using the local communications network, telecommunications carriers and their customers assume more than their fair share.[122] Second, the FCC's favorable treatment of hybrid services results in many regulatory advantages to information service providers that provide those services.[123] These inequities provide a tremendous financial and regulatory incentive for telecommunications carriers and their customers to modify their services and uses in order to have them classified as information services. Indeed, this type of technological manipulation is already occurring; for instance, some providers are offering Internet telephony and fax services at reduced rates because use of the Internet allows them to avoid charges that apply when the same telephony and fax services are offered using more traditional methods and protocols,[124] even though both forms of transmission use the same or similar physical networks.[125] Congress specifically sought to end such regulatory gaming by passing the 1996 Act.[126]

---

[122] *See* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 2 FCC Rcd 4305, 4306 (1987) (FCC Notice of Proposed Rulemaking).

[123] *See supra* note 33.

[124] *See* John J. Keller, *Qwest Communications To Offer Calls for 7.5 Cents Per Minute Around the Clock*, WALL ST. J., Dec. 15, 1997, at B8.

[125] *See supra* notes 4 and 14 and accompanying text.

[126] It is interesting to note that the FCC found that it is in the public interest to include private service providers in the universal service contribution pool in order to accomplish the 1996 Act's competitive neutrality goals and to prevent providers from having

A. *The 1996 Act Sought to Promote and Ensure Universal Service*

The term "universal service" was first introduced by Theodore Vail in 1907 when he was President of AT&T.[127] The term took on new meaning and importance when Congress passed the 1934 Act, which created the FCC and mandated that the new agency regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[128]

Today the universal service fund that supports this availability policy is maintained through a number of federal and state mechanisms, including access charges imposed on providers of interstate telecommunications services.

Without universal service, much of the nation would not have affordable telecommunications service. Phone companies have a strong incentive to serve areas where it is profitable to provide service—in essence, densely populated urban areas. Rural areas, where the cost of facilities outweighs potential revenues that could be collected from customers directly using those facilities, and impoverished inner cities, where low usage makes service unprofitable, would run the risk of losing service.

Aside from the benefits that flow to individual users, society benefits because a system exists that reaches nearly every citizen.[129] A ubiquitous network is what makes modern telecommunications valuable for commerce, communications, and public safety. It is this common benefit that is appropriately supported by all users of the network, regardless of their location. Universal service is a federal policy that requires telecommunications

---

an incentive to restructure their operations. *See* Universal Service Order, *supra* note 51, at 9183–84.

[127] Although credited with devising the term "universal service," Vail's use of the term is quite different from the present day definition of "universal service." Vail used the term to refer to a single monopoly network—AT&T—that would allow any user of the network to reach any other user of the network. *See* Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 320 n.83 (1996).

[128] 47 U.S.C. § 151 (1994).

[129] This idea is often referred to as Metcalfe's Law, which states that the value of a network grows exponentially as the number of users of the network increases: P (n) = n[squared]. This idea is named after Robert Metcalfe, who in 1973 invented the Ethernet. *See* Joshua Cooper Ramo, *The Networked Society*, TIME, Feb. 3, 1997 (Int'l ed.), at 30.

carriers to provide "an evolving level of telecommunications service . . . , taking into account advances in telecommunications and information technologies,"[130] to the entire country, and distributes the cost of providing that service among all users.[131] Congress sought to maintain and strengthen universal service when it drafted the 1996 Act. For the first time, the concept of universal service was codified.[132] The 1996 Act mandated that "[q]uality services should be available at just, reasonable, and affordable rates" and that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation."[133] In addition, Congress required that both rural and high-cost areas enjoy levels of service "reasonably comparable" to the service urban areas receive and that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."[134] As the Senate Committee Report[135] and the Joint Explanatory Statement[136] accompanying the 1996 Act make clear, Congress sought to give the FCC the authority to ensure that no entity could bypass the universal service contribution requirement.[137] Congress aimed to spread the cost of universal service as broadly as possible to minimize the incremental cost to each user.

B. *Impact on Competition*

The FCC's interpretations also have a significant detrimental impact on the competitive mechanisms Congress added in 1996 to section 251 of the 1934 Act. These mechanisms were designed to open the local telephone monopolies to competition.[138] Only

---

[130] 47 U.S.C.A. § 254(c)(1) (West Supp. 1997).

[131] *See id.* at § 254(d).

[132] *See id.* at § 254.

[133] *Id.* at § 254(b)(1)–(2).

[134] *Id.* at § 254(b)(3)–(4).

[135] "The Committee intends to preserve the FCC's authority over all telecommunications providers. In the event that the use of private telecommunications services or networks becomes a significant means of bypassing networks operated by telecommunications carriers, the bill retains the FCC's authority to preserve and advance universal service by requiring all telecommunications providers to contribute." S. REP. NO. 104-23, at 28 (1995).

[136] "[Section 254] preserves the [FCC's] authority to require all providers of [interstate] telecommunications to contribute, if the public interest requires it, to preserve and advance universal service." Joint Explanatory Statement, *supra* note 102 at 131.

[137] *See id.*

[138] 47 U.S.C. § 251(a) states that "Each telecommunications carrier has the duty—

a "telecommunications carrier" has the right to obtain access to unbundled elements of the incumbent Local Exchange Carrier's network or to obtain unrestricted resale of the Local Exchange Carrier's retail "telecommunications services." By choosing not to include Internet communications within the definition of "telecommunications," the FCC has withdrawn the rights afforded by section 251 from providers of Internet services.

A "telecommunications carrier" may only obtain access to network elements "for the provision of a telecommunications service."[139] Contrary to the FCC's interpretation in the Local Competition Order that telecommunications carriers "may offer information services [using unbundled network elements], so long as they are offering telecommunications services through the same arrangement as well,"[140] the statute is quite clear: unbundled network elements are available to a telecommunications carrier for "the provision of a telecommunications service."[141] section 251 does not say, as the FCC implies in its Local Competition Order, that unbundled network elements are available to a telecommunications carrier for the provision of information services offered along with telecommunications services.[142] Likewise, an incumbent Local Exchange Carrier is only obligated under section 251(c)(4) to provide unrestricted resale of "telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers . . . ."[143]

The courts may find it difficult to let the FCC have it both ways. If the FCC insists on defining "information services" and "telecommunications services" as mutually exclusive, then it will be difficult for a court to agree with the FCC's conclusion that provisions of the 1934 Act that facially only apply to "telecommunications services" should be interpreted to apply to "information services offered along with telecommunications services."[144] This is particularly true when one considers that section

---

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title." 47 U.S.C.A. § 251(a) (West Supp. 1997).

[139] 47 U.S.C.A. § 251 (c)(3) (Supp. 1997).

[140] In the Matter of The Local Competition Provisions of the Telecommunications Act of 1996, 11 F.C.C. Rec. 15499, 15499, 15990, 16202 (1997) (F.C.C. Report and Order) [hereinafter Local Competition Order].

[141] 47 U.S.C.A. § 251(c)(3) (West Supp. 1997).

[142] Local Competition Order, *supra* note 140, at 15990, 16170.

[143] 47 U.S.C.A. § 251(c)(4) (West Supp. 1997).

[144] *See supra* note 141 and accompanying text.

251 as ultimately enacted refers only to "telecommunications service,"[145] not to "telecommunications service and information service," language the House had previously inserted throughout the section.[146]

Incumbent Local Exchange Carriers will take advantage of the unnecessary regulatory dichotomy the FCC is perpetuating. Indeed, Pacific Bell has already denied competitors' requests for resale of voice mail service on the basis that the FCC classifies "voice mail" as an enhanced service and not as a telecommunications service.[147] Although voice mail does involve the storage of information, which is one of the elements listed in the definition of "information service,"[148] it also involves the transmission, between or among points specified by the user (the phone used and the voice mailbox), of information of the user's choosing (the voice message), without change in the form or content of the information as sent and received—the very definition of "telecommunications."[149] Because the customer would not likely pay to store the message without the ability to transmit it, it begs the question whether voice mail services are more properly classified as an information service or as a telecommunications service. Voice mail really meets both definitions, and classification of a hybrid service would not be inconsistent with the plain language of the amendments made by the 1996 Act.[150]

In addition to denying new entrants seeking to compete against them resale of many services that customers have come to expect

---

[145] 47 U.S.C.A. § 251 (West Supp. 1997)

[146] Compare proposed new sections 241, 242, and 243 of the 1934 Act in section 101(a) of H.R. REP. No. 104-204 (1995), with 47 U.S.C. § 251. The House provisions required all local exchange carriers to provide interconnection, unbundled network elements, and resale to any carrier or person seeking to provide a telecommunications *service or an information service.* The Senate provisions in proposed section 251 of the 1934 Act, as reported in section 101(a) of S. REP. No. 104-23, on March 30, 1995, applied only to local exchange carriers possessing "market power" and required them to provide interconnection with other "telecommunications carriers," unbundled network elements, and unrestricted resale for "telecommunications services." However, as reported, the Senate definition of "telecommunications services" included the "transmission of information services and cable services." *See* S. REP. No. 104-23 § 8(b) (1995). There is no indication in the statement of managers accompanying the conference report on S. 652 that section 251 of the 1934 Act as enacted in the 1996 Act was intended to apply to a narrower range of services than the House and Senate provisions from which it originated. *See* Joint Explanatory Statement, *supra* note 101, at 117–22, 1996 U.S.C.C.A.N. at 84–90.

[147] *See Computer II, supra* note 42, 77 F.C.C.2d at 421.

[148] *See* 47 U.S.C.A. § 153(20) (West Supp. 1997).

[149] 47 U.S.C.A. § 153(43) (West Supp. 1997).

[150] *See supra* notes 59–70 and accompanying text.

as part of their "phone" service, incumbents will have every incentive to deny their competitors access to unbundled network elements for anything other than the provision of a telecommunications service. At a minimum, incumbents will be in a good position under the FCC's current contamination theory approach[151] to demand that competitors demonstrate that they are providing each customer "telecommunications service." In addition, incumbents could require that competitors using unbundled network elements or resale charge the customer a separate and distinct "telecommunications service" fee in addition to any fee for information services. This will put competitors at a distinct disadvantage, because the incumbent will be able to offer the customer a package that includes both telecommunications services and information services for a single fee. The FCC will argue, as it apparently does in its Local Competition Order,[152] that bundled services offered to customers that include telecommunications services must also be offered for resale. That policy would seem to contradict the FCC's approach with respect to the mutually exclusive classification of information and telecommunications services. If the court accepts the FCC's contamination theory,[153] then bundled services should be considered information services and not telecommunications services. This could provide a tremendous opportunity for incumbents to slow the advent of competition by packaging the telecommunications services they currently provide to customers at retail with new information services: this strategy would limit a competitor's ability to enter the market using resale under section 251.

IV. The FCC Should Use the Plain Meaning of the 1996 Act to Establish the Flexible, Competitively Neutral Regime Congress Intended

Using the plain meaning of the statutory language to include in the definition of "telecommunications carrier" ISPs who offer to transmit their customers' messages would resolve the regula-

---

[151] The contamination theory was outlined by the FCC in *Computer III*. Under this theory, basic transmission that is provided in conjunction with an enhanced service is "contaminated" and is considered an enhanced service. *Computer III*, *supra* note 85, 2 F.C.C. Rec. at 3075.

[152] *See* Local Competition Order, *supra* note 140, at 15936.

[153] *See supra* note 151.

tory inequity between ISPs and interexchange carriers, who provide essentially the same services.[154] It is particularly important to fix this problem now, before the widespread use of Internet voice technology severely exacerbates the problem. It would also end the FCC's need to make convoluted and technologically unsupportable distinctions between "basic" and "enhanced" services and remove the current perverse incentives encouraging providers to engineer their networks in economically inefficient ways in order to take advantage of arbitrary regulatory distinctions. Inefficient engineering requirements, such as excluding voice transmissions in order to avoid being classified as a "telecommunications carrier," increase the cost consumers pay for the network and reduce incentives for providers to extend their network out to consumers. As long as the FCC mistakenly classifies information service providers as customers of the local network rather than interexchange carriers, then there is little financial incentive for information service provider's to reach the customer directly with their own facilities. Moreover, interexchange carriers will face a significant competitive disadvantage when Internet voice technology becomes practical reality.

The FCC's recently released Report to Congress did indicate a willingness on the FCC's part to review these issues. The Report concluded, however, that only phone-to-phone Internet telephony services should be subject to universal service contribution and only on a case-by-case basis. This leaves the door wide open for new configurations that can avoid the FCC's definition of phone-to-phone Internet telephony.[155]

The FCC's adoption of its "enhanced" and "basic" service dichotomy occurred in the context of having no forbearance authority and an inability to reach the vast majority of customers without a single common-carrier network.[156] In crafting the 1996 Act, Congress sought to transform the local monopoly into a competitive model. To do so, Congress provided broad new forbearance authority and then very deliberately did not adopt the regulatory definitions used by the FCC. The "information service" and "telecommunications service" definitions Congress adopted in the 1996 Act make no distinction between incumbents

---

[154] *See supra* note 15.

[155] *See supra* note 112 and accompanying text.

[156] A major purpose of the 1996 Act was to open the monopoly local exchange telephone markets to competition. *See* 142 CONG. REC. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings).

and competitors. They are technologically and competitively neutral, and focus solely on the service provided and the relationship to the customer.

Congress intended the 1996 Act to be an "overhaul"[157] of the 1934 Act. What the FCC has done to date is simply a continuation of the very regulatory regime Congress intended the 1996 Act to reform. Hybrid services have been a thorny problem in the past, and will only become more so in the future if the FCC insists on maintaining its outdated approach. The FCC is favoring hybrid services over other telecommunications services, thus undermining universal service and slowing the deployment of competition and services to consumers. The FCC needs to recognize the changes made by the 1996 Act, and use the new definitions and regulatory flexibility provided by that act to craft an appropriate competitively neutral communications regime that will promote competition and ensure universal service in the twenty-first century.

[157] *See supra* note 2.

POLICY ESSAY

PRACTICING WHAT WE PREACH: A LEGISLATIVE HISTORY OF CONGRESSIONAL ACCOUNTABILITY

SENATOR CHARLES GRASSLEY*
with JENNIFER SHAW SCHMIDT**

Senator Grassley was the author of the Congressional Accountability Act of 1995. This Act required Congress to abide by many of the labor and civil rights laws governing the country. In this Essay, the author chronicles his struggle in the 1990s to make Congress pass such legislation. In 1994, the Congressional Accountability Act became a tenet of the Republican "Contract with America" and was the first law enacted by the 104th Congress in January 1995. In 1996, Congress enacted the Presidential and Executive Office Accountability Act, thereby making two of the three branches of government "accountable." In conclusion, the author notes the continuing battles not only to implement the Congressional Accountability Act, but also to create similar legislation for the Judicial Branch.

> [Members of Congress] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples, but without which every government degenerates into tyranny. If it be asked, what is to restrain [Members of Congress] from making legal discrimination in favor of themselves and a particular class of society? I answer: the genius of the whole system; the nature of just and Constitutional laws; and above all, the vigilant and manly spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate anything but liberty.
>
> —James Madison, *Federalist 57*[1]

---

* Member, United States Senate (R-Iowa). B.A., University of Northern Iowa, 1955; M.A., University of Northern Iowa, 1956. Senator Grassley was a Member of the U.S. House of Representatives from 1975 to 1981. He is Chairman of the Senate Special Committee on Aging and serves on the Senate Budget, Finance, Agriculture, and Judiciary Committees.

** Senior Counsel to Senator Grassley. B.A., Texas Christian University, 1989; J.D., University of Kansas, 1994.

[1] THE FEDERALIST No. 57, at 291 (James Madison) (Buccaneer Books ed., 1992).

It is in this spirit that I worked for years to make Congress subject to the laws it passes. The major accomplishment on this front was the passage of the Congressional Accountability Act of 1995 ("CAA"),[2] the first law passed by the 104th Congress. This Act is undoubtedly one of Congress's greatest achievements during my tenure in Congress. It changed the practice of exempting us, in Congress, from the labor laws that govern the rest of the country. This Essay discusses my attempts to have Congress live by the laws it makes, and the challenges faced by the proponents of the CAA in securing passage of this landmark legislation.

I. My Philosophy

I hold a strong belief that we, in Congress, are merely representatives of the people. We are not better than the people we represent and we are not, by definition and determination, different than the people we represent. We are, as representative government intends, the people themselves. I hold this view in all votes that I cast and all legislation that I introduce. The United States government must be accountable to the people. This is the same belief that led me to investigate and criticize the Pentagon for its $1,800 toilet seat[3] and the FBI crime lab for its improper and incompetent work.[4] It is also what fuels my battle to make Congress more like the rest of America.

It is simply not fair, or good governance, for the Congress of the United States to enact laws for the American people, while exempting itself from compliance. As most Senators know, I pushed for the adoption of the original Congressional Accountability Act and similar legislation for many years before it was enacted. Finally, in the last Congress, with Senator Joseph Lieberman's (D-Conn.), Senator Don Nickles's (R-Okla.) and my sponsorship in the Senate, and Congressman Christopher Shays's (R-Conn.), Congressman William Goodling's (R-Pa.) and Congressman William Thomas's (R-Cal.) sponsorship in the House, Congress made the CAA law. With passage of this Act, we said that we in Congress are no better than the businessmen and

---

[2] Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified as amended in scattered sections of 2 U.S.C.).

[3] *See* 141 Cong. Rec. S16,106 (1995) (statement of Sen. Grassley).

[4] *See* 143 Cong. Rec. S6387 (1997) (statement of Sen. Grassley).

women in our states. We are not different and we, too, must live under the laws that we pass. We no longer sit in Washington and look down upon the people and tell them how to run their businesses. This is a democracy, and therefore, we make laws for the people, and we, too, must follow these laws.

The CAA was passed by the Senate on January 12, 1995 and signed by President Clinton on January 23, 1995. It applied eleven laws to all of Congress and its instrumentalities, such as the Library of Congress and the Capitol Hill Police. These laws include wage and hour laws, collective bargaining laws, as well as Occupational Safety and Health Act protections guaranteeing a safe workplace.[5]

The need for this legislation was clear. For example, in 1992, Congressman John Boehner (R-Ohio) asked the Occupational Safety and Health Administration ("OSHA") to inspect his office for violations, even though he could not be cited for violations because the Occupational Safety and Health Act did not apply to Congress. OSHA found violations that could have resulted in fines to any other employer of $1,500. Violations included ragged carpets, overloaded electrical outlets, ill-designed file cabinets, and the absence of a fire extinguisher.[6] In 1993, a *Washington Post* survey of Congressional staff revealed that one-third of the women questioned said they had been sexually harassed by other aides, Members, or lobbyists, the same percentage of women who report being sexually harassed at business offices.[7] Further, the Congressional Management Foundation reported that women working as chiefs of staff on Capitol Hill made less money than similarly qualified men.[8]

Moreover, constituents often tell me that government regulation makes it difficult for them to run their businesses. We can never really understand what they mean unless we, too, are subject to the laws. If we find a law that makes it difficult for us to do our jobs, chances are that American businesses have the same result. The CAA gives us an incentive to change the laws that we, based on firsthand experience, find unnecessary and burdensome. The Act also makes it more likely that Congress

---

[5] *See* 2 U.S.C. § 103(a) (1995) (listing all statutes the CAA makes applicable to the Legislative Branch of the federal government).

[6] *See* 138 CONG. REC. S15990 (1992) (statement of Rep. Boehner).

[7] *See* Richard Morin, *Female Aides on Hill: Still Outsiders in a Man's World*, WASH. POST, Feb. 21, 1993, at A1.

[8] *See id.*

will apply any future legislation to itself as well as to the rest of the country. This, hopefully, will give Congress pause before it passes legislation that may stifle business because we, too, will have to live with the consequences of our actions.

Yet, many arguments were raised by Members of Congress to justify Congressional exemption from labor laws. Two Constitutional arguments were among the most commonly heard. Some lawmakers argued that the Constitution's Speech and Debate Clause[9] precluded them from responsibility for their treatment of legislative staff. Others said that the Separation of Powers doctrine[10] prohibited the Legislative Branch from being subject to regulation by the Executive Branch. These critics prefer self-regulation. My opinion is that self-regulation, when not conducted by a disinterested and neutral third party, does not constitute credible regulation at all.

Other, more political arguments were also made in an attempt to exempt Congress from the laws affecting the rest of the country. Members were concerned that involvement in litigation and other dispute resolution proceedings that might result from such liability would detract from the time they had to spend on their public duties. In addition, they felt, and perhaps still feel, that Members of Congress are particularly vulnerable to baseless accusations for political purposes, and our careers can be hurt and even ended based on ill-timed charges.

II. A Long Road

> I agree that it is important to end any discrimination against individuals with disabilities—and to end discrimination nationwide . . . . But nationwide means just that it does not, or should not, exempt this little enclave up here in Capitol Hill . . . . Does this Chamber have any more right to make second-class citizens of certain people, while prescribing it if done by any other person, or business? . . . If it's too burdensome for the U.S. Senate to live by this bill's command, then why is it any less burdensome for a small business to comply with it?
>
> —Senator Grassley, 1989[11]

---

[9] U.S. Const. art. I, § 6, cl. 1.

[10] *See* The Federalist No. 47, at 143 (James Madison) (Buccaneer Books ed., 1992) (discussing separation of powers).

[11] *See* 135 Cong. Rec. S10,780 (1989).

Proponents worked for years before successfully gaining Congressional approval of legislation that requires Congress to live under the laws that apply to businesses. It took many Members of Congress a great deal of time and effort to attain this goal. One of my first attempts in this effort was to amend the Americans with Disabilities Act of 1990 ("ADA")[12] to expand its coverage to include Congress.

The ADA aims to end discrimination against people with disabilities by prohibiting discrimination in employment and public services and by requiring reasonable public accommodations. On September 7, 1989, the Senate adopted the Grassley amendment that made applicable the provisions of the bill to the Senate, House of Representatives and all of the instrumentalities of Congress.[13] I was joined in this effort by Senator Bob Dole (R-Kan.), Senator Arlen Specter (R-Pa.), and Senator Gordon Humphrey (R-N.H.). During discussion of my amendment, I highlighted Congress's practice of exempting itself from the laws that it applies to everyone else. I listed many of the laws that did not apply to Congress, and made the point that this exemption goes to a lack of public accountability. At its worst, it is raw hypocrisy. My amendment was accepted.

In negotiating the adoption of my amendment, I reached an agreement with the Senate sponsors of the ADA that my amendment would be carefully considered in the conference committee. In my opinion, it was not. The version of the amendment that made it into public law was significantly weakened. It pretended to guarantee the same rights as the legislation, but left it to Congress to self-regulate.[14] Without a neutral, third party to enforce the rights, the intention and purpose of my amendment was ignored and eviscerated.

In July 1990, I attempted to offer a Congressional coverage amendment to the 1990 Civil Rights Act.[15] As I said on the floor of the Senate,

---

[12] 42 U.S.C. §§ 12,101–12,213 (1995).

[13] S. 933, 101st Cong., amend. 720 (1989). The amendment read as follows:
Notwithstanding any other provision of this Act or of Law, the provisions of this Act shall apply in their entirety to the Senate, the House of Representatives, and all the instrumentalities of the Congress, or either House thereof.
135 CONG. REC. S10,780 (1989).

[14] *See* 42 U.S.C. § 12,209(7) (1990) (amended 1995).

[15] S. 2104, 101st Cong., amend. 2114 (1990). For coverage of the debate over the amendment, see 136 CONG. REC. S9342–72 (1990).

> If civil rights bills are alleged to be crucial in the fight against discrimination, why is Congress not joining in that fight other than in the capacity of saying it is good for everyone else, but it is not good for us?[16]

The amendment was tabled by a vote of 63-26, and the leadership instead supported an amendment by Senator Wendell Ford (D-Ky.) that provided the Senate Ethics Committee with jurisdiction over discrimination charges.[17] This arrangement is like having the fox guarding the chicken coop.

I found another opportunity to press my cause the following year. In October 1991, during consideration of the Family and Medical Leave Act,[18] I attempted to offer an amendment providing for Congressional coverage. The leadership asked me to withdraw the amendment,[19] and finally promised me consideration during the Civil Rights Act debate several weeks later. For this reason, and with reliance on the promise that the Senate leadership would finally turn to this issue, I withdrew my amendment.

In the following weeks, I held a press conference and made other efforts to gain support for an amendment that would make Congress live under the same laws as the rest of the country. At my press conference announcing that I would introduce an amendment to the upcoming Civil Rights Bill that would apply coverage to Congressional employees, I was joined by the National Federation of Independent Businesses, the National Taxpayers Union, the U.S. Business and Industrial Council, and the Citizens for Congressional Reform.[20] In addition, the *Wall Street Journal* and *USA Today* ran editorials supporting my efforts.[21]

The effort to have Congress comply with Federal law continued to gain steam. The Clarence Thomas-Anita Hill hearings and

---

[16] *See* 136 CONG. REC. S9361 (1990).

[17] S. 2104, 101st Cong., amend. 2112 (1990). For coverage of the debate over Senator Ford's amendment, see 136 CONG. REC. S9342–72 (1990).

[18] S. 5, 102d Cong. (1991). The President ultimately vetoed this bill. The House of Representatives sustained the veto.

[19] My amendment threatened to delay the vote on the Family and Medical Leave bill and interfere with the Senate's consideration of the nomination of Clarence Thomas to be an Associate Justice of the United States Supreme Court. The vote on the Thomas confirmation, however, was ultimately delayed by Anita Hill's allegations of sexual harassment. The subsequent hearings on Hill's allegations highlighted the Congressional exemption from anti-discrimination laws.

[20] For coverage of the press conference, see Carleton R. Bryant, *Bill Seeks to Curtail Congress' Exemptions*, WASH. TIMES, Oct. 9, 1991, at A4.

[21] *See Congress's Wild Ganders*, WALL ST. J., Oct. 10, 1991, at A14; *Our View*, USA TODAY, Oct. 10, 1991, at 12A.

the bounced-check scandal in the House of Representatives helped build momentum by highlighting the double standard. Had Anita Hill been a Congressional employee, she would have had no legal recourse to pursue her claims had she chosen to do so. It also became clear that members of the House of Representatives had access to bank terms and conditions which were unavailable to ordinary Americans. It seemed that the public was disenchanted with Congress and the actions of some of my colleagues in both bodies. This helped put pressure on members to support efforts to make Congress live under the laws it passes for others. The notion that Congress could self-regulate was not plausible to the public.

During consideration of the Civil Rights Act of 1991,[22] I was able to work out a compromise amendment with Senator George Mitchell (D-Me.), the Senate Majority Leader.[23] This compromise resulted in the application of law that is similar to that applied to the private sector, rather than identical. I had hoped to apply identical law, but some concessions were made to get the amendment passed and get on the road to full Congressional coverage. Although not perfect, the amendment was groundbreaking. For the first time, legislation covered Senate employees under the Civil Rights Act of 1964,[24] the Age Discrimination Act of 1967,[25] the Age Discrimination Act Amendments of 1975,[26] the Civil Rights Restoration Act of 1988,[27] and the ADA.[28] The Senate Office of Fair Employment Practices was to be the impartial enforcement body. The amendment was controversial and caused great debate, but in the end, it was agreed to by voice vote.[29]

---

[22] Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). The Civil Rights Act of 1991 was the successor to the Civil Rights Act of 1990. The latter was passed by both Houses of Congress, but vetoed by President Bush. Congress failed to override the veto. It was reintroduced in a slightly modified form in 1991 and enacted into law.

[23] S. 1745, 102d Cong., amend. 1287 (1991). For the full text of the bill, see 137 CONG. REC. S15,503 (1991).

[24] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[25] 29 U.S.C. §§ 621–634 (1985).

[26] Pub. L. No. 94-135, 89 Stat. 713 (codified as amended in scattered sections of 42 U.S.C.).

[27] Pub. L. No. 100-259, 102 Stat. 28 (codified in scattered sections of 20, 29, and 42 U.S.C.)

[28] 42 U.S.C. §§ 12,101–12,213 (1995).

[29] *See* 137 CONG. REC. S15,447–48 (1991) (coverage of voice vote).

The amendment established the Senate Office of Fair Employment Practice and prescribed procedures for the resolution of employee complaints. An employee would begin proceedings by filing a claim with the office. The office would then use mediation to attempt to settle the claim. If this was unsuccessful, the employee could request an administrative hearing. The hearing would take place before three independent hearing officers. The hearing and decision would both be on the record. Any decision by the panel was reviewable by the Senate Ethics Committee, who could reverse, uphold or remand the decision of the panel. A majority of the Committee was required to reverse or remand, so these decisions had to be bipartisan.[30] Further judicial review would be available by appealing to the U.S. Court of Appeals for the Federal Circuit. This process was available to all employees, from legislative staff to the restaurant and mail room workers.[31] There were no exemptions.

The amendment's opponents complained how difficult it would be for them to live by the civil rights laws. Some argued that key legislative employees should not be entitled to any court review.[32] They cited the Constitution's Speech and Debate Clause[33] as a source of immunity from employment laws.[34] But the Speech and Debate Clause is not implicated by a law that is as simple as prohibiting Senators from discriminating against their employees. It is not constitutionally protected speech or debate when the Senate office hires or fires on the basis of race or sex, or fails to put a stop to sexual harassment. In addition, Senators argued that the judicial review in the amendment violated the Separation of Powers doctrine.[35]

To assuage some opponents' concerns, the language in the compromise codified existing law and recognized that a Senator may consider an employee's party affiliation, state of residence, or political compatibility when making employment decisions.[36]

---

[30] The Senate Ethics Committee has an equal number of Republican and Democratic members.

[31] *See supra* note 23.

[32] For coverage of the debate over this issue, see 137 CONG. REC. S15,371 (1991).

[33] *See supra* note 9 and accompanying text.

[34] *See* 137 CONG. REC. S15,331, S15,353, S15,453 (debating the applicability of the Speech and Debate Clause) (1991).

[35] *Supra* note 10 and accompanying text. For coverage of the debate on this issue, see 137 CONG. REC. S15,331, S15,352, S15,461, S15,480 (1991).

[36] S. 1745, 102d Cong. § 316 (1991). *See* 137 CONG. REC. S15,511 (1991).

This was a giant leap forward in getting Senators to live by similar rules that we expect other people in the country to live by, a first step back to the vision of the founders that the very legitimacy of legislative rule in our democracy would be contingent upon congressional rulers following the rules we apply to all of society. President George Bush urged Congress to "submit to the laws it imposes on others . . . and do so by year's end."[37] He warned us that we are improperly treating ourselves as a "privileged class of rulers who stand above the law."[38]

My amendment did not provide the same enforcement procedures that are available to the private sector, but it was a good start. Senators' Separation of Powers concerns[39] led me to modify my original amendment. I knew that this amendment was a meaningful precedent, but not a complete solution. The momentum generated by debate and passage of my amendment was an important step that led to continued discussion of this issue, and ultimately, passage of the CAA. The Employment Policy Foundation called passage of this amendment "an especially significant law" in its 1994 study of the applicability of labor laws to Congress.[40] Some Senators said this amendment would ultimately be fought out in court with great legal fees. It was not.

Congress took further steps to address the issue of compliance with federal law. In 1992, the House and Senate established a bipartisan twenty-eight-member Joint Committee on the Organization of Congress.[41] The purpose of the commission was to present a legislative reorganization plan the following year.[42] A major issue for the commission was the legislative branch's compliance with federal laws.[43] The Joint Committee held hearings on May 27 and June 8, 1993.[44] I testified in the June 8 hearing to stress the importance of Congressional compliance with the laws.[45] Congressman Dick Swett (R-N.H.) and Congress-

---

[37] *Bush Reflects on Congress*, WALL ST. J., Oct. 28, 1991, at A16.

[38] *Id.*

[39] *See supra* note 10 and accompanying text.

[40] *See* THOMAS W. REED & BRADLEY J. CAMERON, EMPLOYMENT POLICY FOUNDATION, ABOVE THE LAW: CONGRESSIONAL COVERAGE UNDER FEDERAL EMPLOYMENT LAWS 9 (1994).

[41] *See* H.R. Con. Res. 192, 102d Cong. (1992).

[42] *See id.*

[43] *See id.*

[44] *See Hearings Before the Joint Comm. on the Org. of Congress*, 103d Cong. 23 (1993) (covering the Joint Committee's hearings).

[45] *See id.* (testimony of Sen. Grassley).

man Shays testified that they had 227 cosponsors of their legislation in the House.[46] Senator Nickles and Congressman Harris Fawell (R-Ill.) also testified in support.[47] Additionally, Senator William Cohen (R-Me.), a member of the Committee, expressed his support for my efforts.[48]

In December 1993, the Joint Committee issued a three-volume report.[49] The Senate Members of the Joint Committee did not propose specific legislation on coverage, but decided instead to defer specific legislative proposals until the bipartisan Task Force, created specifically for the purpose of studying Congressional compliance, completed its work and issued its recommendations.[50]

The Senate Task Force on Congressional Coverage was created in October 1992 at the close of the 102nd Congress.[51] I had considered offering an amendment to the Legislative Branch Appropriations bill that would apply the labor laws to Congressional employees. But in light of the Senate leaders serious attention to this issue, and their offer to create a Task Force to study the issue, I decided to defer until the Task Force made recommendations. A resolution introduced by the Senate leadership, which I cosponsored, established this bipartisan Senate Task Force.[52] I expressed hope that the Task Force would call for serious congressional coverage under the laws. The amendment passed by voice vote.[53]

Although I served on this bipartisan Task Force, I was not happy with its results. The Task Force held only one public meeting, in June 1993. In the end, the Task Force set up a separate process that was even weaker than current Senate rules. Dissatisfied with the Task Force's findings and report, Senator Nickles and I drafted a letter to the Senate leadership in January 1994.[54] In this letter, we stated that the group's proposal would

---

[46] *See id.* at 32, 36. (testimony of Rep. Swett and Rep. Shays).

[47] *See id.* at 24–26, 30. (testimony of Sen. Nickles and Rep. Fawell).

[48] *See id.* (statement of Sen. Cohen).

[49] *See* H.R. REP. No. 103-413 (vol. I) (1993) (final report of House members); H.R. REP. No. 103-413 (vol. II) (1993) (final report of Joint Committee), S. REP. No. 103-215 (vol. I) (1993) (final report of Senate members); S. REP. No. 103-215 (vol. II) (1993) (final report of Joint Committee).

[50] *See* H.R. REP. No. 103-413 (vol. II), at 131.

[51] *See* 138 CONG. REC. S15,974 (1992). The Task Force was chaired by Senator Ford and Senator Ted Stevens (R-Alaska). Other members were myself, Senator Nickles, Senator Daniel Akaka (D-Haw.) and Senator Harry Reid (D-Nev.).

[52] *See id.* at 116.

[53] *See id.* at 135.

[54] Letter from Senators Charles Grassley and Don Nickles to Senate Leadership (Jan. 1994) (on file with author).

simply "perpetuate the Senate's lack of accountability."[55] We offered an alternative to the Task Force's proposals for Congressional coverage and called for hearings on legislation that applies private sector laws to Congress and its instrumentalities.[56] I felt, and we stated in our letter, that the Task Force's work should have involved more openness and public involvement. We also disputed the Task Force's assertion that not all laws should be applied to Congress.[57]

Senate leaders refused to release the Task Force's report. Regardless, the press did obtain a copy and the public was made aware of its contents. *Roll Call*, a newspaper that primarily covers Congress and politics stated, "It fails to give Senate employees the right to sue, creates new Senate bodies to hear complaints instead of allowing employees to appeal to executive branch bodies, and fails to give Senate employees the right to bargain collectively."[58]

The Task Force findings and continued frustration led me to join Senator Lieberman in introducing legislation that would apply federal law to Congress. On May 4, 1994, we introduced S. 2071, the CAA.[59] It built on the Grassley-Mitchell amendment to the civil rights bill by expanding the coverage and strengthening the enforcement mechanism.

This bill was not everything that I wanted. It did not provide for the executive branch agencies to enforce the labor laws on Congress, as they do on the private sector. Instead, we created a separate Congressional agency to enforce the laws.[60] But I know that a majority of my colleagues would have said that the Constitution does not permit the executive branch to enforce the laws against Congress. I disagreed, but I was not, as the saying goes, going to let the perfect be the enemy of the good.

A great deal of work went into bringing attention to this new legislation. I testified in favor of Congressional coverage before

---

[55] *Id.*

[56] *See id.*

[57] *See id.*

[58] *See Stop Stalling Coverage*, ROLL CALL, Feb. 28, 1994.

[59] *See* S. 2071, 103d Cong. (1994); *see also* 140 CONG. REC. S5179 (1994). Other cosponsors were Senators Ben Nighthorse Campbell (R-Colo.), Barbara Boxer (D-Cal.), William Cohen (R-Me.), Dennis DeConcini (D-Ariz.), Dianne Feinstein (D-Cal.), Herb Kohl (D-Wis.), Howard Metzenbaum (D-Ohio), Barbara Mikulski (D-Md.), Carol Moseley-Braun (D-Ill.), Don Nickles (R-Okla.), Donald Riegle, Jr. (D-Mich.), Charles Robb (D-Va.), Harris Wofford (D-Pa.), Bob Kerrey (D-Mass.), and John Glenn (D-Ohio).

[60] *See id.*

the Senate Rules Committee on February 24, 1994, even before the bill was introduced. I said that I hoped that the CAA would be made part of the comprehensive congressional reform initiative.

Our next big break came in August, when *The New York Times* called on the Senate to pass this bill.[61] The House passed similar legislation, sponsored by Congressman Shays, by a vote of 427-4.[62] In September, American Enterprise Institute scholar and Congress-watcher Norman Ornstein endorsed our specific plan for congressional accountability.[63] We held a press conference to call for swift action in the Senate.

By this time, the movement to apply labor laws to Congress had gained real momentum. A non-partisan group calling itself the Congressional Coverage Coalition[64] sent letters to Senators urging that the Senate schedule a vote on the CAA.[65] Other groups that supported Lieberman-Grassley were Common Cause, Lead or Leave, and Working Assets.[66] Unfortunately, this legislation was never considered by the full Senate.

During the end of 1994, proponents kept working to secure consideration and passage of this legislation, hopefully at the beginning of the 104th Congress. We kept this issue in the public eye, especially by making it an election issue.[67] This resulted in the CAA securing a place as one of the first legislative items considered in 1995.

---

[61] *See Make Congress Obey Congress*, N.Y. TIMES, Aug. 18, 1994, at A22.

[62] *See* H.R. REP. No. 103-841 (Oct. 6, 1994) (House version of congressional accountability bill).

[63] *See* Norman J. Ornstein, *Let the End Games Begin: How the Closing Weeks of this Session Will Make or Break the 103rd Congress*, ROLL CALL, Sept. 9, 1994.

[64] *See* Senator Charles Grassley, Press Release (Sept. 9, 1994) (on file with author). The coalition contained the American Industrial Hygiene Association, the Council for Citizens Against Government Waste, the National Association of Manufactures, the National Federation of Independent Business, the National Restaurant Association, the Society for Human Resource Management, Truth in Government, United We Stand America, and the U.S. Chamber of Commerce.

[65] *See* Letter from Congressional Coverage Coalition to United States Senators (on file with author).

[66] *See supra* note 63.

[67] *See, e.g.*, NEWT GINGRICH ET AL., CONTRACT WITH AMERICA: THE BOLD PLAN 8 (Ed Gillespie & Bob Schellhas eds., 1994) ("On the first day of the 104th Congress, the new Republican majority will immediately pass the following major reforms, aimed at restoring the faith and trust of the American people in their government: *First*, require all laws that apply to the rest of the country also to apply equally to the Congress.").

III. VICTORY AT LAST

> It follows therefore that it is preferable that law should rule rather than any single one of the citizens. Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.
>
> —Aristotle, *Politics*, c. 322 B.C.[68]

In the 104th Congress, Senator Lieberman, Senator Nickles and I reintroduced the CAA, which was the second bill introduced in the Senate.[69] The House bill, H.R. 1, was sponsored by Congressman Shays, Congressman Goodling and Congressman Thomas. Neither bill was referred to committee in hopes of obtaining quick passage of the legislation. The House passed the legislation on January 5, and the Senate followed on January 12. The President signed the CAA into law on January 23, 1995, making it the first law passed by the 104th Congress.

As enacted into law, it applies eleven workplace laws to employees of the legislative branch of the Federal government. These laws are: the Fair Labor Standards Act of 1938,[70] Title VII of the Civil Rights Act of 1964,[71] the Americans with Disabilities Act of 1990,[72] the Age Discrimination in Employment Act of 1967,[73] the Family and Medical Leave Act of 1993,[74] the Occupational Safety and Health Act of 1970,[75] Chapter 71 (relating to federal service labor-management relations) of Title 5, the Employee Polygraph Protection Act of 1988,[76] the Worker Adjustment and Retraining Notification Act,[77] the Rehabilitation Act of 1973,[78] and Chapter 43 (relating to veterans' employment and reemployment) of Title 38.

The Act covers legislative branch employees.[79] These are employees of the U.S. Senate, the U.S. House of Representatives,

---

[68] ARISTOTLE, THE POLITICS 78 (Steven Everson ed. & Benjamin Jowett trans., Cambridge Univ. Press 1988).
[69] *See* S. 2, 104th Congress (1995).
[70] 29 U.S.C. §§ 201–219 (1978).
[71] 42 U.S.C. § 2000e to 2000e-17 (1994).
[72] 42 U.S.C. §§ 12,101–12,213 (1995).
[73] 29 U.S.C. §§ 621–634 (1985).
[74] Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 5 & 29 U.S.C.).
[75] 29 U.S.C. §§ 651–678 (1985).
[76] 29 U.S.C. §§ 2001–2009 (1997).
[77] 29 U.S.C. §§ 2101–2109 (1997).
[78] 29 U.S.C. §§ 701–797b (1997).
[79] *See* 2 U.S.C. § 1301(3).

the Capitol Guide Service, the Capitol Police,[80] the Congressional Budget Office, the Office of the Architect of the Capitol,[81] the Office of the Attending Physician, the Office of Compliance, and the former Office of Technology Assessment.[82]

A centerpiece of the Act is the creation of the Office of Compliance.[83] While I do not agree with the claims that Executive Branch enforcement of existing labor law regulations on the Legislative Branch violates the Separation of Powers,[84] the CAA makes accommodations for the critics that do believe this would be a violation. The Office of Compliance is an independent, nonpartisan office within the Legislative Branch set up to administer and enforce the laws applied by the Congressional Accountability Act.[85] This office has a Board of Directors of five individuals appointed jointly by the Majority and Minority Leader of the Senate, and the Speaker and Minority Leader of the House.[86] The Act requires that Board members have labor law experience.[87]

This Board adopts, through a rulemaking process set out in the Act, the regulations that Congress must live by. I favored using the Executive Branch regulations, but Separation of Powers concerns and political considerations made many of my colleagues reluctant, if not opposed, to living under the Executive Branch system. For these reasons, we created the Office of Compliance to enforce the law and draft the regulations. The Act established that regulations should be as similar to the Executive Branch regulations as possible.

The CAA establishes a special dispute resolution system.[88] An employee who alleges a violation of a statutory right begins a proceeding by making a request for counseling by the Office of Compliance within 180 days of the alleged violation.[89] This starts a 30-day counseling period.[90] For fifteen days following the end

---

[80] This includes any member or officer of the Capitol Hill Police. *See id.* § 1301(6).

[81] This includes any employee of the Office of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants. *See id.* § 1301(5).

[82] *See id.* § 1301(3). The Office of Technology Assessment was eliminated by Pub. L. No. 104-53, 109 Stat. 514 (1995). The Office of Compliance was created by the Congressional Accountability Act to administer and enforce the laws applied to Congress by the Act.

[83] *See id.* §§ 1381–1385.

[84] *See supra* note 10 and accompanying text.

[85] *See* 2 U.S.C. § 1381(a) (1997).

[86] *See id.* § 1381(b).

[87] *See id.* § 1381(d).

[88] *See* 2 U.S.C. § 1401 (1997).

[89] *See id.* § 1402.

[90] *See id.*

of the counseling period, an employee may file a request for mediation.[91] If the mediation is unsuccessful, then the employee has a choice of two paths, either an administrative proceeding or civil action.[92] The administrative proceeding involves the filing of a formal complaint with the Office of Compliance, an administrative hearing, and review by the Office of Compliance's Board of Directors.[93] The decision may also be reviewed by the Court of Appeals for the Federal Circuit.[94] The other avenue is to file a civil action in U.S. District Court.[95]

IV. CONTINUING EFFORTS

Since passage of the CAA, there have been continued efforts to make sure that we, in Congress, live under the laws that we make. When the Senate considered labor legislation earlier this year, I offered an amendment to apply its provisions to Congress.[96] This bill, S. 4, would allow businesses to let their employees work flexible schedules and give their employees compensatory time in lieu of overtime pay.[97] The Executive Branch currently allows employees these options. If we are going to change the law for the private sector, we must also change it for Congress. The best way to know how a law affects the private sector is to live under it ourselves. The bill and amendment are still pending, due to opposition by the labor leaders and opponents in the Senate.

V. CONTINUING BATTLES

There are two outstanding issues that remain. The first is finishing implementation of the CAA. All but one provision of the Act have been implemented. Section 220(e) of the Act, which requires regulations to execute portions of the Federal Service Labor-Management Relations Act,[98] has not been imple-

---

[91] *See id.* § 1403.
[92] *See id.* § 1404.
[93] *See id.* §§ 1405–1406.
[94] *See id.* § 1407.
[95] *See id.* § 1408.
[96] *See* 143 CONG. REC. S5221 (amend. 256) (1997).
[97] S. 4, 105th Cong. (1997).
[98] Pub. L. No. 95-454, 92 Stat. 1191 (1978) (codified in scattered sections of 5 U.S.C.).

mented. Many sections of the Act require the Office of Compliance to draft regulations that Congress then approves.[99] Most sections that require Congressional approval of regulations provide a fall-back. If Congress does not approve regulations by a certain date, then Executive Branch regulations go into effect, enforced by the Office of Compliance.[100] The exception is Section 220(e) which does not prescribe fall-back regulations. The Office of Compliance drafted regulations implementing this section, which concerns the unionization of legislative employees, but Congress has not approved them.[101]

This is a disgrace to the principles supporting the CAA. Congress has not approved these regulations because a number of powerful members disagree with their content. The regulations, as drafted, basically allow all legislative employees to unionize. The House Oversight Committee voted to send the regulations back to the Office of Compliance, citing questions about the method used to promulgate these regulations. The Office of Compliance claims that it does not have the authority to redraft the regulations. Whether it has the authority is unclear, but the point is that this issue is at a stalemate. All of us in Congress, as well as the Office of Compliance, are responsible for working out this stalemate. The result is that no regulations are in effect, and this section of the Act is not being implemented. Congressman Shays and I will continue to work together and with others on this effort.

Beyond implementing section 220(e), the last challenge is to bring the Judicial Branch of the federal government under the labor laws. Following the example of the CAA, last year Congress passed the Executive Branch Accountability Act.[102] This Act applies the labor laws to the administration.[103] This leaves the Judicial Branch as the so-called last plantation. The CAA contemplated this coverage. Just as we, in Congress, should live under the laws we make, the Judiciary should live under the laws it interprets. Section 505 of the CAA requires the Judicial Conference to complete a study and submit a report to Congress that

---

[99] *See* 2 U.S.C. § 1384 (1997).

[100] *See, e.g., id.* § 1312(d)(2) (regulations under the Family and Medical Leave Act of 1993).

[101] *See* 142 CONG. REC. S9835–9847 (1996) (text of regulations).

[102] Pub. L. No. 104-331, 110 Stat. 4053 (1996) (codified as amended in scattered sections of 3 & 28 U.S.C.).

[103] *See* 3 U.S.C. § 402 (1997).

"shall include any recommendations the Judicial Conference may have for legislation to provide to employees" the rights guaranteed to Congressional employees by the CAA.[104] During discussion about the CAA, we contemplated covering the Judiciary. The purpose of this study was to allow the Judiciary to decide how it could best be covered. Unfortunately, the Judiciary's completed study recommended that it not be covered and said that self-regulation is the best plan.[105] Not surprisingly, I am skeptical of this study's findings. If followed, these recommendations would make the Judiciary the only remaining branch of the federal government that is not required to live with this country's labor laws. In my opinion, this indicates that the Judiciary believes that its work is more important than the work of any other American business or branch of government. In addition, the arguments made in this study to justify its continued exemption are strikingly similar to the arguments made by Congressional opponents of the CAA. Some of these arguments made are the Judicial Branch's tradition of exemption, the necessity of independence, the risk of disrupting operations, and concern that application of the laws would affect "Constitutional responsibilities," and cause "a conflict or appearance of a conflict of interest."[106]

I believe that it is important that we finish what we started. It is only fair and just that we, in government, live under the same laws that we enact for the rest of the nation. We are not different. We are not special. We are the representatives of a great democracy and we should work and act accordingly.

---

[104] *See* 2 U.S.C. § 1434 (1997).

[105] *See* JUDICIAL CONFERENCE OF THE UNITED STATES, STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 (1996).

[106] *Id.* at 3.

POLICY ESSAY

"REVOLT OF THE REVOLTED" REVISITED: AMERICA'S VALUES VACUUM AND WHAT TO DO ABOUT IT

SENATOR JOSEPH I. LIEBERMAN*

In this Essay, Senator Lieberman argues that pervasive, graphic depictions of violence and sex in mainstream media have degraded the moral climate in which the nation's youth are growing up. Television, music, and advertising broadcast irresponsible, even reprehensible, messages, as they compete with family, school, and faith as transmitters of cultural values. The Senator notes the success of policy initiatives like V-chip legislation and the campaign for content-based TV ratings, but concludes that a grassroots response grounded in common values and faith is the surest means to counter depravity in the media culture.

The United States verges on a new American Revolution: the "Revolt of the Revolted", a battle to give voice to the disgust millions of Americans feel toward a growing culture of violence and perversity, and a struggle to bring the media to account for its complicity in facilitating the moral breakdown of our society.

The Revolt has led to the formation of some unusual alliances, including this Democrat with former Secretary of Education Bill Bennett, a Republican.[1] Our primary weapons: lungs and word processors. Our method: to coax, cajole, bully, and shame the people who run the electronic media. Our plea is to stop mainlining murder, mayhem, sex, and vulgarity into the minds of our children. We implore entertainment executives to draw some lines they will not cross in the kinds of television programs, music, and movies they peddle for profit.

Consider this a dispatch from the front of the culture wars. The news, I am afraid, is not good, although there is at least a silver lining to the clouds in America's gray moral skyline. Six years after Vice-President Dan Quayle delivered his infamous

---

* Member, United States Senate (R-Conn.). B.A., Yale College, 1964; LL.B., Yale Law School, 1967. Senator Lieberman presently sits on the Armed Services, Environment and Public Works, Governmental Affairs, and Small Business Committees. He is Chairman of the Democratic Leadership Council, and a Deputy Whip for his party in the Senate.

[1] *See, e.g.*, Jonathan Alter, *Next: "The Revolt of the Revolted,"* NEWSWEEK, Nov. 6, 1995, at 46; Bill Holland, *Anti-Rap Campaign to be Directed at 5 Major Record Labels*, BILLBOARD MAG., June 8, 1996, at 8; Howard Kurtz, *Bennett Renews Attack on Rap Lyrics*, WASH. POST, May 30, 1996, at C1.

Murphy Brown speech, pundits have regularly politicized, sensationalized, and trivialized the so-called "family values" debate, but we have made little progress in responding to the public's abiding concerns. In fact, the beat—and the beating our sensibilities take—goes on stronger than ever in most of the media culture.

To illustrate, Interscope Records, half-owned by the corporate giant Seagram Inc., released an album in 1996 by the group Marilyn Manson entitled "Antichrist Superstar,"[2] and heavily marketed it to adolescents. The inside of the CD cover features a pornographic picture of the lead singer. The songs, laced with obscenities, are nothing more than shrink-wrapped, pre-packaged nihilism, as summed up by the song "Irresponsible Hate Anthem" with its statement, "I wasn't born with enough middle fingers."[3] An earlier album by Manson featured one song entitled "Kiddie Grinder (Remix)," and another that glorified pedophilia.[4]

To take a second example, a software developer named Running with Scissors, in partnership with Panasonic Interactive, introduced a new computer game in August 1997 called "Postal." According to a computer trade magazine, Postal is an exceedingly violent shoot-'em-up game that features a deranged postal worker terrorizing a small city.[5] "The goal is straightforward: kill as many townsfolk as possible before being killed."[6] Deaths are recorded under the "Body Count" header. The game's marketing brochure boasts of "'chilling realism as victims actually beg for mercy, scream for their lives, and pile up on the streets.'"[7]

The messages these products convey are outrageous. It is incomprehensible that major corporations like Panasonic and Seagram sell and profit from them. More disturbing, however, society has not fully come to grips with what is at stake. The scandal is not that sensibilities are offended over Marilyn Manson's latest obscenities or Jerry Springer's daily new lows in tastelessness. The scandal is the cumulative effect of the "avalanche of crud"—as film critic David Denby describes the crush of violent,

---

[2] MARILYN MANSON, ANTICHRIST SUPERSTAR (Nothing/Interscope Records 1996).

[3] MARILYN MANSON, *Irresponsible Hate Anthem, on* ANTICHRIST SUPERSTAR, *supra* note 2.

[4] MARILYN MANSON, SMELLS LIKE CHILDREN (Nothing/Interscope Records 1995). The song about pedophilia was entitled *S***** Chicken Gang Bang.*

[5] Frank Catalano, *Take Aim at the Content of Software Games*, COMPUTER RETAIL WK., Aug. 4, 1997, at 19.

[6] *Id.*

[7] *Id.* (citing the marketing brochure produced by the game's publisher, Ripcord Games).

perverse, and puerile messages pervading the media marketplace[8]—on America's deepening moral crisis. The scandal is about the whirlwind that we now reap, having allowed an anything-goes media culture to define our values.

Media culture has not merely transgressed our sense of decency. It has seriously impacted on our attitudes and behaviors. Through its ubiquitous reach, it aggravates many of our most pressing problems: the explosion of violent juvenile crime, the teen pregnancy epidemic, the rapid rise in sexually transmitted diseases, and the rampant incivility in our daily life. Moreover, media culture defines our values down, undermining our ability to fix what ails our society, much like an antibody that attacks its own immune system. In this case, it is our moral health at risk. Reversing this dangerous trend presents one of the central challenges of our time.

My intent in this Essay is to explain the nexus between decisions made in Hollywood and New York and the gaping void of values in American life. In doing so, I hope to move the debate beyond Murphy Brown. Maybe we can even begin to answer the thorniest question at issue: about whose values are we talking?

This is not a new question. It usually follows any charge that a TV program is offensive or that some proposed legislation promotes a moral goal. The question stems from fears that one group endeavors to force its values on the rest of us.

I. THE ASSAULT OF MEDIA CULTURE ON OUR COMMON VALUES

For someone of my generation, the question "whose values" is itself alien. Consider myself and the founder of the Revolt, Bill Bennett: different religions, different ethnicities, different political ideologies. Same basic values. We both begin, like most Americans, with faith in God. We both respect the dignity of human life. We both cherish our families. We both swear by the freedom that only democracy can promise. And we both believe passionately in making the American Dream real for every citizen who seeks it.

These basic values do not belong to one generation, one religion, or one political party. They are every American's birth-

[8] David Denby, *Buried Alive*, NEW YORKER, July 15, 1996, at 48.

right. We as a nation may often have failed to live up to them, but that never stopped us from accepting them as universal or from aspiring toward them. In fact, our faith in those values has held together a people of diverse ethnic backgrounds and religious beliefs, ultimately uniting us in common purpose. That commonality has traditionally informed our laws and thereby set boundaries for acceptable behavior in a civil society. To many, these values have constituted a civic religion.

Over the last few decades, our common commitment to these values has eroded. We no longer even agree about whether it is wrong for a record company to profit from music that teaches kids to resolve disputes by putting bullets through the temples of rivals. The horror of such music prompted Bill Bennett and me initially to come together. We appealed to the corporate sponsors of gangsta rap and other deeply offensive music to recognize that their products helped to cheapen the value of human life. Time Warner did eventually sell its gangsta rap subsidiary.[9] We made the same plea to executives at Sony,[10] which is responsible for distributing a record by a metal band called Cannibal Corpse that describes in grisly detail the rape of a woman with a knife.[11] Sadly, the Sony executives hid behind the figleaf of creative freedom, and joined most of the music industry in attacking us as censors.[12]

Welcome to the values vacuum, where moral certainty fears to tread, where traditional notions of right and wrong disappear as if into a black hole, where bright line ethical standards get warped by the suction. The vacuum has expanded for two gen-

---

[9] *See, e.g., Time Warner to Sell "Gangsta Rap" Music Label*, CHI. TRIB., Sept. 28, 1995, at 3N; David Field, *Time Warner Quits "Gangsta Rap,"* WASH. TIMES, Sept. 28, 1995, at A11.

[10] *See* Letter from Sen. Joseph I. Lieberman, William J. Bennett, former Secretary of Education, and C. DeLores Tucker, Chair, National Political Congress of Black Women, to Thomas D. Mottola, President, Sony Music Entertainment (May 29, 1996) (on file with the office of Sen. Joseph I. Lieberman).

[11] CANNIBAL CORPSE, *F***ed with a Knife, on* THE BLEEDING (Metal Blade/Relativity 1994).

[12] *See* Letter from Alain M. Levy, President and CEO, PolyGram, to Sen. Joseph I. Lieberman (July 2, 1996) ("I will not be party to censorship of the heartfelt voices of the denizens of inner-city America.") (on file with the office of Sen. Joseph I. Lieberman). *See also* Don Jeffrey, *MCA, Seagram Assailed for Graphic Lyrics*, BILLBOARD MAG., Dec. 21, 1996, at 3, 85 (comments of Hilary Rosen, President and Chief Operating Officer, Recording Industry Association of America, stating "[a]ny time a company's hundreds of releases are filtered through the sensibilities of any one person, there's going to be something they disapprove of").

erations, with a proportional diminution in the role of family, faith, community, and school as transmitters of values.

The values vacuum is a notion akin to that of the "naked public square," denuded of religious values, that Father Richard Neuhaus has observed with alarm.[13] We have banished religion from public life, and excluded it from public policy deliberations. Instead, a "discomfort zone" surrounds any discussion of faith in public settings. Abjuring the public use of the best teachings on social and moral order available to us, however, will surely not elevate our public deliberations.

Consider, for example, the reaction to attempts at the state and national level to experiment with school choice programs. Such programs would give poor students trapped in failing public schools the opportunity to attend a private or faith-based school. It seems that to many, a morally grounded education is more dangerous than a schoolhouse with a higher complement of guns than computers. For proposing to give poor families this choice, we are routinely caricatured as religious zealots, on a crusade to destroy public education and proselytize millions of children against their will.[14]

Consider, as well, the recent experience of Genny LeDoux, a fourth-grader who wrote a term paper on the death and resurrection of Jesus. According to the Center for Jewish and Christian Values,[15] Genny's teacher returned the paper with every reference to "Jesus" and "God" crossed out and replaced with the words "Peter Rabbit." The teacher then told Genny that she would have to make these changes herself before the paper could be displayed.[16]

The absurd lengths to which we have gone to strip the public square bespeak a larger problem. We have untethered morality from its religious moorings. Without this grounding, we invite the values vacuum. Without a connection to a higher law, it is difficult to know why it is wrong to steal, to cheat, to lie, to settle conflicts with violence, or to treat women abusively. For too many, the Ten Commandments have become little more than

---

[13] RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE (1984).

[14] *See, e.g.*, Richard W. Riley, U.S. Secretary of Education, What Really Matters in Public Education, Address Before the National Press Club (Sept. 23, 1997) ("Vouchers undermine a 200 year American commitment to the common school."); 143 CONG. REC. S10186 (daily ed. Sept. 30, 1997) (statement of Sen. Edward M. Kennedy (D-Mass.).

[15] The author is an Honorary Co-Chair of the Center for Jewish and Christian Values.

[16] Religious Freedom Week Task Force, Press Release (Sept. 16, 1997).

another list of "dos and don'ts" over which people may argue and negotiate, or ignore outright. There are too few constants, too few fixed points; there is too little clarity about what is right and what is wrong.

This obviously affects the conduct of our daily lives, but the ramifications extend far beyond the personal, to the political. According to Harvard Professor Michael Sandel, the dissolution of our common morality and purpose has crippled government's ability to resolve our most complicated issues and to formulate public policy.[17] Sandel argues that the deprivation of a shared vocabulary of values often dooms our most important public debates from the start, because we lack even a framework for reaching agreement.[18]

Sandel even maintains that the attrition of common morality jeopardizes the entire American experiment in self-government. According to Sandel, a values-neutral polity abandons what Senator Pat Moynihan (D-N.Y.) calls society's central task: the inculcation of values and cultivation of virtue in its citizens, its children.[19] By shirking our duty, we limit the viability of democratic government in the future, for we bequeath to our children a public philosophy that "cannot secure the liberty it promises, because it cannot sustain the kind of political community and civic engagement that liberty requires."[20]

This is all the more troubling when we consider what has rushed to fill the void in this very secular century. Abroad, vacuums of values have been filled by Nazism, Communism, and fascism. Today, in this country, television producers, movie moguls, fashion advertisers, gangsta rappers, and other pillars of the media-cultural complex purvey corrosive messages to those most susceptible, our children, without acknowledging their responsibility to do otherwise.

When asked about the increasingly crude fare shown in the traditional family hour, a top executive of a major TV network stated, "It is not the role of network television to program for the children of America."[21] Yet tens of millions of our children

---

[17] *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 23 (1996).
[18] *See id.*
[19] *See id.* at 326.
[20] *Id.* at 24.
[21] Statement of Don Ohlmeyer, NBC West Coast President, *quoted in* Alex Strachan, *Please Do Adjust Your Sets: Morality Versus the Marketplace*, VANCOUVER SUN, Aug. 26, 1995, at H1.

watch and are shaped by what they see. A spokesman for Sega, the company that marketed the video game Primal Rage, similarly defended a scene in which the winning combatant lifts his leg to urinate on his dead opponent: "We are entertainment providers. It is our policy not to limit the product or censor the product."[22]

Judging from much of what is mass-marketed, Sega's policy is unfortunately common. On daytime TV talk shows, bizarre sex acts of whose existence I was ignorant while growing up are now discussed while millions of young children are viewing. In the genre of gangsta rap, Polygram Records felt no compunction about putting its money behind a song entitled "Slap-a-Ho," which promotes a machine that helps men beat their women into line.[23] Even in the world of publishing, the venerable American imprint Random House announced plans in 1996 to market a series of tabloid-like books on serial killers to young readers.[24]

It is small wonder, then, that millions of parents feel locked in competition with a media culture that counters the very values they try to instill. And these are the most attentive of parents. What of families in which parents are not similarly involved in their children's moral upbringing? In such families, the media culture molds children's priorities with little or no resistance.

Myriad public opinion polls reveal that concerns over the effect of the values vacuum on our children are widespread. One poll in particular deserves mention. A survey released in June 1997 by the Ronald McDonald House Charities and the Advertising Council found that an overwhelming majority of parents believe that today's children lack such basic values as honesty,

---

[22] Statement of Lee McEnnay, Group Director of Corporate Communications at Sega, *quoted in* Toni Marshall, *Angry Reactions to Primal Rage*, WASH. TIMES, Mar. 19, 1996, at C8.

[23] DOVE SHACK, *Slap-a-Ho*, *on* THIS IS THE SHACK (un-edited version) (Rush/Def Jam 1995).

[24] Other major publishers churn out similar materials. Reviewing books that garnered the John Newberry Medal, bestowed by the American Library Association for the most distinguished children's literature, one critic blasted the prevalence of sadism, child abuse, and murder in precisely those volumes considered the best that publishers had to offer our youth in 1996: "Sure, kids have to learn about the real world, but there is more to life on this planet than violence. Anyone titillated by the diabolical crimes of terrorists, serial killers and other psychopaths can turn on the tube . . . . Whatever happened to childhood? What are we doing to our children?" Among the publishers that the reviewer singles out for especial rebuke is Simon & Schuster. Muriel Koretz, *Cheers (and Some Jeers) for Top Award-Winners; Good Taste Lacking in Some Honorees*, SYRACUSE HERALD AM., Mar. 3, 1996, at B8.

self-discipline, and respect for others.[25] Only 37% of the adults surveyed believe that today's children will uplift the country once they become adults.[26]

II. The Causal Nexus Between the Media Culture and Social Degradation

Naturally, I do not contend that the media bear sole blame for gun violence and teen pregnancy. But the media culture makes a bad situation worse. The collective force of its messages coarsens our public life and lowers our standards.

For instance, one of today's most alarming trends is the increase in sexual activity among children at ever younger ages.[27] Earlier this year, several fourth-graders at a Washington, D.C. elementary school engaged in sexual activity behind a locked door.[28] In the wake of this incident, the Washington Post ran a stunning story in which several local child development experts, educators, and students said the incident at the D.C. school was not all that unusual.[29] A child psychologist at Virginia Tech proclaimed, "I have lost count of 12-year-old girls who are having sex."[30] One of those 12-year-olds, replying to a question about whether an 8-year-old child can have consensual sex, responded, "Yes! Yes! I know people younger than 8 who decide. I know five 8-year-olds who have had sex."[31]

To put this trend in its proper context, 43% of girls become pregnant at least once before the end of their teenage years.[32] On an annual basis, approximately 11.5% of all fifteen- to nineteen-year-olds become pregnant,[33] which is the highest teen pregnancy rate of any industrialized nation in the world, ten times higher

---

[25] *See* Megan Rosenfeld, *Showdown at the Generation Gap*, Wash. Post, June 26, 1997, at E1.

[26] *Id.* at E3.

[27] *See, e.g.*, Alexandra Marks, *TV and Toy Trend Affects Young Children*, Christian Sci. Monitor, May 7, 1996, at 1.

[28] *See* Debbi Wilgoren & Yolanda Woodlee, *Principal, Teacher Face Discipline*, Wash. Post, Apr. 15, 1997, at C1.

[29] DeNeen L. Brown, *Children and Sexual Behavior*, Wash. Post, Apr. 27, 1997, at B1.

[30] *Id.* at B8 (quoting Ronald S. Federici, child psychologist).

[31] *Id.*

[32] *See* Kathleen Sylvester, Democratic Leadership Council, Reducing Teenage Pregnancy: A Handbook for Action 7 (Progressive Policy Institute, 1996) [hereinafter Sylvester].

[33] *See* U.S. Dep't of Health & Human Servs., *YouthInfo* (last modified Jan. 29, 1998) <http://youth.os.dhhs.gov/youthinf.htm#profile>.

than that of Japan.[34] Seventy-two percent of teen mothers are unmarried at the time they givef birth,[35] and 80% go on welfare within five years.[36] In fact, it is estimated that families begun by teen births account for nearly half the total cost of AFDC, food stamps, and Medicaid.[37] One study put the cost at $29 billion for the single year of 1991.[38]

What drives this trend? The sheer omnipresence of television programs, movies, and music that celebrate casual sex mandates an inference that the media play a pivotal role. As early as 1982, the National Institute of Mental Health concluded that television in particular had become an "important sex educator";[39] more recent research, by Jane Brown of the University of North Carolina, suggests that the media indeed significantly determine the sexual attitudes and behaviors of children.[40]

Brown, a professor in the media studies field, presented her findings at a Senate hearing, where she was joined by leading psychiatric researchers and the executive director of the National Campaign to Prevent Teen Pregnancy.[41] Particularly striking was the research cited by Dr. Mary Anne Layden of the University of Pennsylvania's Center for Cognitive Therapy. Dr. Layden has spent more than ten years working with the victims of sexual abuse.[42] She testified that one survey showed that by the time girls reach the age of eighteen, 38% of them have been sexually molested in some way.[43] Layden then cited studies demonstrating that media depictions of sexual violence against women and children do, indeed, exacerbate predatory tendencies.[44]

---

[34] *See* NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY (last modified fall, 1997) <http:www.teenpregnancy.org/teen/story/factfig.html>.

[35] *See* SYLVESTER, *supra* note 32, at 25.

[36] *See id.* at 7.

[37] *See id.*

[38] *See id.*

[39] NATIONAL INST. OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES 56 (1982).

[40] *See* Jane D. Brown, *Sex and the Mass Media* (June 1995) *prepared for* The Henry J. Kaiser Foundation (on file with the office of Sen. Joseph I. Lieberman).

[41] *Government and Television: Improving Programming Without Censorship: Hearing Before the Subcomm. on Oversight of Government Management, Restructuring, and the District of Columbia of the Senate Comm. on Governmental Affairs*, 105th Cong. (May 8, 1997).

[42] *See id.* (statement of Mary Anne Layden, Ph.D., Director of Education, Center for Cognitive Therapy, Department of Psychiatry, University of Pennsylvania). The hearing was co-chaired by the author and Sen. Sam Brownback (R-Kan.).

[43] *See id.*

[44] *See id.*

To convey a sense of the kinds of messages our children receive, Layden cited a review of tabloid TV news shows that she conducted over a two-month period in 1997. Over the course of her study, shows like Hard Copy and Entertainment Tonight featured thirty segments on Playboy magazine and nineteen different pieces on the sex industry. These included Pamela Anderson demonstrating the sex positions she favors when in the back seat of a car, and a former prostitute discussing her book on sex advice.[45] Networks often air these shows between 5 p.m. and 8 p.m. in the evening, and 44% of the twelve-year-olds and 29% of the ten-year-olds in the audience at a given time watch them.[46]

III. Reply by the Repulsed: Adorning the Naked Public Square

Coupled with the extensive, definitive research on the deleterious influence of media portrayals of violence, this information should suffice to remove doubt about the gravity of the threat. The American public is by and large convinced. It was the public's revulsion over the cultural sludge that television dumps into our homes that spurred Congress to pass the V-chip law,[47] and that forced the television industry to agree, reluctantly, to develop a content-based ratings plan to enable parents to make more informed choices for their kids.[48]

I am optimistic that the V-chip will help parents exercise more control over what children view. Realistically, however, this little chip is no match for the entire media culture. It is no substitute for responsibility by media executives. We cannot suture the values void without the cooperation of media conglomerates that wield awesome power to fill the vacuum with trash.

At the outset, I alluded to a silver lining. The good news is that the Revolt of the Revolted has, indeed, elicited better corporate citizenship. Many of the most salacious talk shows have either been yanked off the air or have reduced their trash quotient. The overwhelming success of Rosie O'Donnell's sleaze-

---

[45] *See id.*

[46] *See id.*

[47] Telecommunications Act of 1996, Pub. L. No. 104-104, 551, 110 Stat. 56, 139 (1996) (to be codified at 47 U.S.C. § 303(w)). The author co-sponsored the law, along with Sen. Kent Conrad (D-N.D.) and Rep. Edward J. Markey (D-Mass.).

[48] *See, e.g.*, Lawrie Mifflin, *TV Ratings Accord Comes Under Fire from Both Flanks*, N.Y. Times, July 11, 1997, at A1.

free approach has had its own ripple effect. On primetime television, CBS's "Touched by an Angel" leapt into the ratings Top Ten in the 1996-97 television season,[49] and its drawing power persuaded other networks to take a chance on a few new programs in fall 1997 that reflect rather than reject our common values.[50] Thankfully, the gangsta rap genre appears moribund.[51]

This is only the beginning of a long, moral march. Individuals and communities must continue to pressure media giants to recognize that they bear certain responsibilities as members of a broader community, since they have power both to raise us up and to drag us down. In the meantime, parents and citizens must exercise more responsibility over what children watch, hear, and do. We must ourselves continue to fill the values vacuum with something better.

We can start by using our common sense to reaffirm our common values. Polls show that upwards of 90% of Americans agree on the importance of a set of specific fundamental values.[52] This should answer the "whose values" question. In fact, the values listed on that survey constitute the core of the Character Counts curriculum that public schools nationwide now use as they return to the task of making children good citizens as well as good learners.[53] We need more schools to help build the vocabulary of positive values that parents teach at home. And we need more civic organizations and community institutions to join them in this task.

That, in effect, means reinvigorating the traditional transmitters of values. This has already begun in the nascent civil society movement. One group, the National Fatherhood Initiative, devotes itself to fighting the problem of the disappearing

---

[49] *See, e.g.*, Frederic M. Biddle, *Peacock Preens Over No. 1 Season*, BOSTON GLOBE, May 22, 1997, at E8.

[50] *See, e.g.*, Bill Keveney, *Reaction Mixed as TV Gets Religion*, HARTFORD COURANT, Nov. 3, 1997, at A1.

[51] *See, e.g.*, Bruce Haring, *Beleaguered Death Row Records May Be Doomed*, USA TODAY, Aug. 25, 1997, at 4D.

[52] *See, e.g.*, Melanie Lewis, *C is For Character*, DALLAS MORNING NEWS, Dec. 26, 1993, at 1A, 33A ("A recent Gallup Poll found that nearly 9 out of 10 Americans want basic values such as honesty, patriotism, and respect taught in schools.").

[53] *See, e.g.*, Rebecca Simmons, *Teaching Children the True Value of Values*, KNOXVILLE NEWS-SENTINEL, Nov. 1, 1997, at B1; *Jarman Students to Honor Veterans*, TULSA WORLD, Nov. 5, 1997, at 7; *St. Lucie County School Digest*, STUART NEWS/PORT ST. LUCIE NEWS, Nov. 9, 1997, at D5. The Character Counts program focuses on "Six Pillars of Character": trustworthiness, respect, responsibility, fairness, caring, and citizenship. *Id.*

dad.[54] According to a study sponsored by the Casey Foundation last year, the number of children living without a father of any kind has quadrupled over the last two generations. Today, one in every four kids has no father.[55] The Fatherhood Initiative seeks to re-instill basic values that generations of men once took as givens, such as honoring the commitments in wedding vows and accepting the responsibility that comes with bringing a child into the world.[56]

Ultimately, the strongest response will be the one grounded first in faith. Nearly 95% of Americans believe in God, according to surveys.[57] Today, millions are carrying that belief back into churches, synagogues, and temples. Society can build on these countless individual commitments and fill the values void with faith and the life-affirming values that flow from it. The tens of millions of Americans who have not surrendered belief in a common moral code and purpose must use every opportunity to affirm what is right and reject what is wrong, in both the private and the public spaces of our lives.

---

[54] *See, e.g.*, Stephen Goode, *For Wade Horn, Fathers of Our Country Are Key to Its Survival*, WASH. TIMES, Aug. 18, 1997, at 18.

[55] *See* Barbara Vobejda, *For 19 Million, There's No Father Home*, WASH. POST, Apr. 24, 1995, at A5.

[56] 1997 NATIONAL FATHERHOOD INITIATIVE ANN. REP. 2.

[57] *See, e.g.*, Dan Pier, et al., *Solace, Unity Found in Tapestry of Religions*, BOSTON GLOBE, Aug. 15, 1993, at 1 (citing a 1993 Gallup Poll).

POLICY ESSAY

MOBILIZING THE MARKETPLACE TO RENEW AMERICAN PRODUCTIVITY: A PROGRAM FOR THE TWENTY-FIRST CENTURY

SENATOR JUDD GREGG*
CHARLES BLAHOUS**

In this Essay, Senator Judd Gregg (R-N.H.) and his policy director, Charles Blahous, argue that the current level of government spending on federal entitlement programs will cripple the ability of future generations to achieve security and prosperity unless something is done to reverse the trend. They examine the philosophical assumptions underlying entitlement programs as they have been constructed to date, and analyze the specific problems facing Social Security, Medicare, and the current tax code. Gregg and Blahous suggest that the solution to these policy challenges lies in restoring the primacy of the marketplace. Specifically, they propose that the federal government let private investment play a greater role in providing retirement income security, allow greater market competition in the federal health care system, and liberate the market by a radical simplification of the tax code.

The sun will set on the twentieth century with the United States in the singularly enviable position of possessing more economic and military power than any other nation in the world. When we consider the other twentieth-century aspirants to this distinction—from the Soviet Union to Nazi Germany—we are fully justified in believing that American preeminence is a boon to both Americans and all humankind. It is an appropriate time, therefore, to assess whether our institutions are prepared to strengthen America's position of leadership and to meet the challenges of the twenty-first century.

That America has emerged from the turbulent twentieth century as the world's most powerful nation is largely due to the

---

* Member, United States Senate (R-N.H.). A.B., Columbia University, 1969; J.D., Boston University Law School, 1972; LL.M. in Taxation Law, Boston University Law School, 1975. Senator Gregg serves on the Senate Appropriations, Budget, and Labor and Human Resources Committees. He is Chairman of the Senate Appropriations Subcommittee, which oversees the Departments of Commerce, State, and Justice. Senator Gregg was a member of the Bipartisan Commission on Entitlement and Tax Reform, and chaired the Leadership's Working Group on Non-Social Security Entitlement Reform in the 104th Congress. The Senator is also Chief Deputy Whip for his party.

** Policy Director for Senator Judd Gregg.

magnificent inheritance bequeathed by those who led the nation in its first century. The twentieth century was a battleground of ideas and theories, and it was our blessing to inherit from our founders a form of government that enabled us to prevail in these contests. The twenty-first century will pose equally stern tests to our institutions and philosophy. Unfortunately, the United States is strapped with certain national institutions that are ill-equipped to handle impending challenges. This Essay explores ways to reform these institutions.

I. Challenges Past and Future: The Case of Entitlement Spending

A. *Background*

At the close of the nineteenth century, free markets and free electorates were under siege by intellectuals. Troubled by the pace of change wrought by the Industrial Revolution, many thinkers questioned whether capitalism could produce a just and prosperous society in the industrial age. Prescriptions for alternative systems abounded, from socialism to communism to fascism, but they all shared the assumption that only the power of the state could marshal the resources for efficient economic growth and equitable distribution.

In the crises of the twentieth century that cost millions of lives, the institutions of freedom and of state coercion collided. The western allies defeated Nazi Germany and Imperial Japan largely because of our ability to outproduce expansionist dictatorships. This also marked a refutation of Adolf Hitler's belief that citizens of a democracy would not make personal sacrifices to vanquish a disciplined fascist power. Similarly, the Soviet Union's economy could not compete with that of the United States, in part because citizens of free-market democracies felt a greater personal stake in the survival of their governmental institutions.

It would be wrong to say, however, that the western democracies reacted to the challenge of statism with utter confidence in the ability of the free market to sustain prosperity and its equitable distribution. Many opted to introduce statist elements into their own free markets. America and its European allies set up enormous domestic programs to shield individuals, especially

the elderly, from poverty. In the U.S., Social Security, Medicare, unemployment compensation, welfare programs, and subsidized housing required individuals and businesses to funnel resources to the government to provide a floor of benefits and protections.

The irony is inescapable. On the one hand, the twentieth century has proved that individual initiative produces more wealth than a centralized economy. On the other hand, western democracies have redistributed sizable portions of their wealth, on the principle that free markets do not deliver the fruits of initiative widely enough.

B. *Mechanics of the Problem*

My purpose here is not to question the role of government in assuring a basic floor of economic protection for citizens. Rather, it is to call attention to the fundamental philosophical assumptions underlying entitlement programs as they have been constructed to date. Each program involves the collection of tax revenue by the government, which then determines how to spend, invest, or allocate that revenue.

Through Social Security, the government receives tax contributions, uses most of the contributions to pay benefits to current retirees, and then loans the surplus to itself, promising to repay the program at a future date in order to finance the benefits of future retirees. Through Medicare, the government collects tax revenues to finance a package of benefits of the government's own construction. The tax code, too, represents a series of decisions by the federal government as to which economic activities to encourage and which to penalize. Rather than permit the marketplace to determine the range of benefits produced under these systems, government has determined the tax burden and the benefit package by fiat, by extracting resources from the current economy.

Such policies currently represent the greatest government intrusion upon everyday life. Taxation is the single greatest impingement by which the government makes its presence felt. Corollarily, entitlement spending is by far the largest share of government spending,[1] and is also the fastest-growing.[2] The two

---

[1] BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, INTERIM REPORT TO THE PRESIDENT 11 (August 1994).

[2] *Id.*

largest government programs—Social Security and Medicare—will, under current practices, swell greatly upon the retirement of the baby boom generation. Social Security and Medicare Part A alone (the Hospital Insurance portion of Medicare) will absorb more than twenty-five percent of the national payroll tax base by the year 2030 under current law.[3] It is unconscionable to foist upon future generations a form of government that absorbs one-quarter of the citizenry's resources to fund a program and a half, and that requires taxpayers to finance every other function of the federal government, to support interest on the national debt, and to pay state and local income taxes. The imposition of such spending burdens on our progeny is an abdication of our responsibility as custodians of the state our children will inherit.

Why are our government institutions so ill-equipped for the twenty-first century? How different will the conditions of the twenty-first century be from conditions when these programs and tax policies were created? We cannot say for certain where technology and economic competition will take us, nor what impact they will have upon our system of governance. We can, however, anticipate demographic changes of such a magnitude as to pose a significant threat to our way of life if we do not fundamentally restructure government.

This Essay is not intended as an instruction in the operations of the federal budget process. To understand, however, "where we are, and whither we are tending,"[4] certain facts must be understood regarding the basic ways in which the federal government collects and distributes revenue. We have come a long way from the old stereotype of a Congress that doles out dollars primarily through an annual appropriations process. Today, approximately two-thirds of all governmental spending is not appropriated at all, but rather flows on a mandatory basis through entitlement programs or to pay off interest on the national debt.[5] Entitlement spending occurs automatically unless Congress acts to change the formulae that govern the outflow of funds. Because the federal government is required to spend on such programs

---

[3] BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, 1997 ANNUAL REPORT 172 (1997).

[4] President Lincoln delivered these words in his "House Divided" speech at the close of the Republican State Convention in Springfield, Illinois on June 17, 1858. ALBERT JEREMIAH BEVERIDGE, ABRAHAM LINCOLN, VOL. II 75 (1928).

[5] *See* BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, *supra* note 1, at 11.

as Social Security, Medicare, Medicaid, federal retirement benefits, and the refundable earned income tax credit every year, and because Congress is unlikely to slow the growth in such spending because of its billing as a "cut" in popular parlance, the share of national spending devoted to entitlements is expanding rapidly. In roughly fifteen years, entitlement spending is projected to absorb all federal tax revenue,[6] meaning that a deficit would have to be incurred in order to spend even one penny on such items as national defense, education, highways, or other programs of national concern. The entitlement system is essentially a forfeiture of the body politic's capacity to prioritize national spending.

The massive spending increases built into our largest entitlement programs are an inevitable byproduct of the way these programs are constructed. Individuals are entitled to certain benefits under Social Security and Medicare simply by reaching the requisite age of eligibility. If the American elderly population increases, or if health care costs rise—both of which are inevitable—then spending on these programs will swell far faster than the economy can keep pace.

II. A Demographic Revolution

To understand why the structure of the largest elements of government activity—Social Security and Medicare—are incompatible with the shape of twenty-first century American society, one must understand how the composition of that society will differ from today's. A glance at current patterns of life expectancy and birthrates over the last several years reveals a fairly clear picture of how American society will age in the decades to come. If these trends continue, even today's projections understate the extent of future population aging.

According to the 1997 Intermediate Estimates of the Social Security and Medicare Trustees, there are currently 3.3 workers paying payroll taxes for each beneficiary of Social Security, down from 5.1 in 1960, and from 16.5 in 1950.[7] That number will decrease to 3.0 by the year 2010, all the way down to 2.0 in the year 2030.[8] Bleak though these figures seem, the reality

---

[6] *See id.* at 6.

[7] *See* Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds, *supra* note 3, at 124.

[8] *See id.*

is likely significantly worse. Under the Trustees' High Cost estimates, the ratio will hit 3.0 by the year 2005,[9] and will be only 1.8 in 2030.[10] At some point early in the twenty-first century, American society will have significantly less than two individuals working to support the Social Security and Medicare benefits of every retiree.[11] This ratio will pose a tremendous and unacceptable burden upon the economy if nothing is done to anticipate and mitigate these demographic changes.

Some have attempted to wish away this burden by floating a statistic called the "dependency ratio."[12] The ratio represents the total number of children, the elderly, and other dependents on the working population: the total burden which workers must bear. This statistic conceals some basic realities, the most salient of which is society's expenditure of far fewer resources on children than on the elderly. In fact, the federal government currently spends $11 on the elderly for every $1 it spends on children.[13] Moreover, as lifespans lengthen, an individual may ultimately spend more years in retired adulthood than he or she spends in childhood. There is thus no refuge to be found in the concept of the "dependency ratio," as none of the enormous sums projected to be spent on both Social Security and Medicare vanish by virtue of its invocation.

Nonetheless, we should not abandon our commitment to facilitating retirement income and health care security for America's elderly. We must, however, look unflinchingly at our means of providing those benefits in order to design a structure that can cope with the coming demographic shifts. Very simply, a structure that effectively runs on a pay-as-you-go basis, as Social Security currently does, and thus simply shifts costs onto the next generation of workers, can only work if that generation of workers is sufficient in numbers and resources to provide the necessary benefits.

---

[9] *See id.* at 125.

[10] *See id.*

[11] ASSESSING SOCIAL SECURITY REFORM ALTERNATIVES 49 (Dallas Salisbury, ed.) (1997).

[12] *See, e.g.*, COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT TRANSMITTED TO THE CONGRESS (1997); *see also* BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, 1996 ANNUAL REPORT (1996).

[13] PETER PETERSON, FACING UP: HOW TO RESCUE THE ECONOMY FROM CRUSHING DEBT AND RESTORE THE AMERICAN DREAM chart 4.12 (1993).

I will describe and examine the three critical elements of national policy—Social Security, Medicare, and the tax code—to draw particular attention to those aspects that are incompatible with twenty-first-century needs. In describing these programs, my intention is not simply to lament their current and future condition. It is instead to propose solutions: solutions based on tapping the potential of the marketplace so as to enable these programs to function adequately in the next century.

III. Social Security: Pay-as-You-Go Insolvency

The myths surrounding Social Security abound. They contend capably in popular imagination with the realities of the program. To devise solutions to Social Security's problems, one must first deflate misconceptions that have gained such currency as to approach the status of fact.

Social Security is not, and has never been, a savings program. Individuals do not contribute into an individual Social Security "account" that they then draw down from upon retirement. Social Security benefits are paid not from past Social Security contributions, but by taxing current workers. Any surplus Social Security revenue is required, under the Social Security Act,[14] to be invested in government securities. Those securities are counted as assets to the Social Security Trust Fund. When redeemed, they are paid, both principal and interest, out of the general treasury of the U.S. government. Thus, the benefits paid under the current Social Security system are always borne by the economy at the time when those benefits are distributed.

If and when such a time comes that current payroll tax revenues are inadequate to fund current benefits, the balance is to be funded by redeeming trust fund assets with cash payments from the general treasury (until, that is, there are no more assets remaining, and the trust fund is rendered bankrupt). In any event, under Social Security's current structure, no saving is attempted, no "pre-funding" of tomorrow's benefits. All annualized costs of the enormous future benefits are to be borne by tomorrow's wage-earners. Any buildup of trust fund "assets" affects not the total size of that burden, but only its distribution between payroll tax and general tax revenues.

---

[14] 49 Stat. 622 (1935) (codified as amended in scattered sections of 42 U.S.C).

Social Security's pay-as-you-go structure was not built to cope with an enormous demographic shift. It was built not as a savings program, but as a means for the current working population to support a current retiree population, with the promise that the working population would one day be similarly supported by a future generation of workers. There is no concrete way in which an individual's own lifetime of Social Security taxes has "paid for" his or her own Social Security benefits. Rather, those taxes have simply purchased for that individual the right to see his or her benefits paid for by someone else when he or she reaches retirement.

Such a system has only been sustainable through a relentless increase in payroll taxes. At Social Security's inception, the tax on the individual employee was 1%.[15] The total payroll tax has already risen to 7.65% (or 15.3%, when the employer's share is considered).[16] Of this tax revenue, 12.4% is allocated to Social Security, and 2.9% to Medicare Hospital Insurance.[17] In order to meet benefit obligations that have been promised to future generations, these figures must rise considerably.

Because each succeeding generation of American workers has been faced with a higher payroll tax burden, the "rate of return" on each individual's investment in Social Security has varied mainly as a function of birth year. Individuals who entered the benefit system early on had paid little in payroll taxes and enjoyed benefits that far exceeded anything that they had contributed. Today's retirees for the most part enjoy benefits that are still larger than the interest-compounded value of what they themselves put into the system. But with each succeeding birth year, the picture gets markedly worse. Future retirees will actually see a negative return on their Social Security investment, measured in real dollars, even before any action is taken to restore Social Security to solvency. If, hypothetically, Congress were to "fix" Social Security through "traditional" solutions alone—for example, a combination of tax increases and benefit restraints—the deal for future workers would become far worse.

Social Security, therefore, would have serious problems even were it in a state of actuarial solvency as it heads into the

---

[15] *See* BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, *supra* note 3, at 34.

[16] *See id.* at 8.

[17] *See id.*

twenty-first century. However, the Social Security system is *not* in balance. It is projected to begin running annual operating deficits in the year 2012,[18] and to draw down on its current trust fund assets until it reaches total bankruptcy in the year 2029.[19] This trend means that, beginning in the year 2012, general government revenues will need to cover annual shortfalls in Social Security benefits, or else promised benefits will not be paid. This is an *optimistic* scenario, resulting from the Trustees' Intermediate Estimates, and it is likely that the true picture will be closer to that of the Trustees' High-Cost Estimates, under which Social Security reaches bankruptcy much earlier.

Neither can we overlook the peculiar shape of the solvency curve affecting Social Security. The Social Security system is roughly 2.2 payroll tax percentage points out of balance for the next seventy-five years.[20] This is a misleading figure unless it is understood that it represents the mutual offset of near-term surpluses and long-term deficits. In reality, the annual deficits within Social Security will approach 6 payroll tax percentage points near the end of the seventy-five-year valuation window.[21] The near-term surpluses, as we have seen, are unable under current practice to reduce the announced size of long-term burdens. Therefore, while the near-term surpluses reduce the size of the total measured actuarial deficit, they do not reduce the size of the actual long-term burden, which is far larger.

Unless we reconfigure Social Security to account for these long-term trends, we will bequeath to posterity a wholly unmanageable public retirement income scheme. Let us not minimize the impact of this burden. Recently, federal budget negotiators secured a balanced budget agreement[22] thanks to a burgeoning economy. It was solely the private economy's vibrancy and productivity that enabled the federal government to get its books in order and to stop the accumulation of runaway debt. If we permit our federal entitlement structure to swell to the point where it absorbs most of the resources currently available to the private economy, we will destroy its capacity to build a better standard of living for future Americans.

---

[18] *See id.* at 6.
[19] *See id.*
[20] *See id.* at 5.
[21] *See id.* at 172.
[22] Balanced Budget Agreement of 1997, Pub. L. No. 105-33 (1997).

IV. MEDICARE: ONE SIZE DOESN'T FIT ALL

The problems faced by Social Security pale in comparison to those facing Medicare. Social Security is threatened by the retirement of the baby boom generation. Under current law, Medicare will go bankrupt before the first baby boomer retires.[23] Medicare's cost growth far outpaces that of Social Security.[24] Whereas Social Security is threatened mostly by the growth of the elderly population, Medicare faces multiple threats in the form of health care hyperinflation and in the simple fact that the elderly use health care services far more than do individuals in other age groups.

Next to the traditional design of Medicare, Social Security is comparatively well-conceived. Social Security's political support resides largely in the fact that it covers virtually all Americans, and that, even in past generations, rich and poor alike could state that they received a fair deal from the program. The inequities in Social Security exist mostly between generations. In Medicare, such inequities are everywhere: among regions, among socioeconomic classes, and between generations as well.

Medicare exists in two components. Part A, or Hospital Insurance, is funded through a trust fund in a manner similar to Social Security. Part B, or Supplementary Medical Insurance, is a voluntary program, 75% of the benefits of which are subsidized directly from general revenue. Under Social Security, even the wealthiest retirees can say that they paid payroll taxes throughout their working lives to earn the right to benefits, even though those benefits may not bear a proper relationship to previous taxes paid. By contrast, the wealthiest individuals in the nation have only paid taxes to support Medicare Part B benefits in the same sense that they have paid to support welfare or food stamps, yet they are entitled to have seventy-five percent of their Part B benefits subsidized by working taxpayers, many of whom lack health insurance. Under Medicare, there is little or no attempt to correlate payroll tax contributions made and benefits received. The result is that the value of benefits paid out has far outstripped the actual value of past Medicare contributions. This

---

[23] BOARD OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE TRUST FUND, 1997 ANNUAL REPORT 2 (1997); *see also* CONGRESSIONAL BUDGET OFFICE, TRUST FUND SURPLUSES IN THE CBO SUMMER 1997 BASELINE (Sept. 3, 1997).

[24] *See* BOARD OF TRUSTEES, *supra* note 3, at 172.

has brought the program to the brink of bankruptcy time and again.

It would be wrong to say that Medicare's problems stem solely from the manner in which the program favors beneficiaries over taxpayers. Rather, Medicare has suffered from an additional problem stemming from lack of cost accountability.

All insurance programs suffer from a moral hazard. An insured individual, forced to pay a regular premium, and shielded from the cost of using a service beyond a minor deductible, has little or no incentive to be a cost-conscious consumer. All insurance markets, including the federal health care insurance market, suffer to a degree from this problem. But Medicare's traditional fee-for-service structure has served to maximize the costs of such health care purchasing, shielding both beneficiaries and providers from the incentive to limit costs, and simply passing on most of the resulting cost growth to the taxpayer.

Beneficiaries are not to blame for this inefficiency, as they have heretofore had little choice but to participate in an inefficient Medicare system. Managed care plans may contract with Medicare, but inefficiently. The federal government sets reimbursement rates for managed care plans at ninety-five percent of the local average per-capita cost in fee-for-service care.[25] These cost levels vary widely throughout the country, with little or no relationship to the local quality of care. Consequently, regions of the country that have succeeded in holding down health care costs are actually penalized for having done so in that they receive a lesser HMO reimbursement rate. Naturally, HMOs are reluctant to operate in such areas at all. By contrast, beneficiaries who live in areas where little attempt has been made to reduce fee-for-service cost growth are more likely to find an HMO that actually offers additional benefits. With such perverse systemic incentives, it is small wonder that Medicare expenses have grown so rapidly.

In recent years, runaway cost growth in private health care delivery has tailed off, as the private sector has retooled in order to deal with similar perverse incentives. Medicare, however, like other government programs shielded from free market competition, has not slowed its cost growth.

---

[25] STAFF OF HOUSE COMM. ON WAYS AND MEANS, 104TH CONG., 2D SESS., 1996 GREEN BOOK (1996).

Of course, Medicare is subject to the same demographic forces that threaten to undermine Social Security. In light of these forces and Medicare's unique flaws, the report of the Social Security and Medicare Trustees forecasts a far bleaker picture for Medicare than for Social Security. The recent budget agreement enacted by the Congress, and passed into law by the President, will postpone the projected bankruptcy of the Medicare Health Insurance Trust Fund from 2001 to 2007.[26] This postponement, however, was achieved with some sleight-of-hand. For instance, the agreement transfers the fast-growing home health program from Part A, where it was funded through the Trust Fund, to Part B, where it is funded from general revenues.[27] The long-term annual operating deficits for Medicare are projected to be even larger than those for Social Security. Together, they add up to fiscal crisis, unless significant reforms come soon.

V. The Tax Code: Micro-Managing the Private Market

Earlier this year, I was appointed chairman of a Senate Republican Task Force on Retirement Security. Part of our mission was to find ways to increase saving and funding in employer-provided retirement plans. In order to do this, we had to immerse ourselves in one of the most arcane areas of tax law, namely, the sections of the code pertaining to pension saving. Wading through the stipulations regarding 401(k) retirement plans, 403(b) non-profit retirement plans, section 415 limits, section 457 rules, and so many other quirky and obtuse sections of the law was a fresh reminder of how our tax code has become a monument to byzantine federal policy decisions. Every stipulation in the tax code—every loophole, every deduction, every credit, every penalty—is the result of a choice by government to punish or to reward some specific economic practice.

In an economy that draws its strength from the power of individuals and businesses to allocate resources free from the constraints of government, our tax code is perhaps the most comprehensive, far-reaching threat to that kind of freedom. The market does not, in fact, operate unfettered, because every economic actor checks how the complex federal tax law treats cer-

---

[26] *See* Congressional Budget Office, *supra* note 23.

[27] Technically, there is also a trust fund for Part B, but it is operated by law in such a fashion as to produce the requisite money annually from general funds.

tain actions. Indeed, this outcome is the goal of the complexity: to intervene in economic decisions and to bias them in accordance with policy choices of government. Though the tax code stops short of actual coercion regarding private economic activity, it establishes a good portion of the benefits and the costs of such decisions and thus exerts tremendous power.

Every preference in the tax code implies that government knows better than the marketplace. Experience shows that this is rarely true. Moreover, many policies enshrined in the tax code work counter to express government policy. For example, the Achilles heel of the U.S. economy is an inadequate rate of personal savings and investment. Policymakers in Washington know well that savings are insufficient to fund future federal debt service, business capital, and retirement income for an aging population. Yet our tax code discourages savings and, in many cases, encourages debt.

Individuals are taxed on income when earned; if they forego the opportunity to spend that money immediately, they are taxed on the interest, capital gains, or dividends from investment. On the other hand, if they spend that money immediately on a down payment for a home and take out a mortgage, they not only avoid the extra level of tax on savings, but also actually receive a tax deduction consequent to the interest on the debt that they accrued. In this manner, the distortion of economic choices by the tax code often defeats articulated national policy priorities.

It is worth emphasizing the results in the specific instance of inadequate national savings. Current national savings levels will sustain only a small fraction of the retirement income needs of the twenty-first century. Not only does this threaten the viability of Social Security in the medium term, but it also yields inadequate funding for employer-provided pensions. The multiple levels of taxation on savings and investment also encourage some forms of debt and defeat key policy objectives.

In order for the tax code to better serve national needs in this area, we must follow one of two routes. We could identify and pursue tax benefits designed to promote desired policy ends. Alternatively, we could adopt a new approach: simplify the tax code and minimize government interference with economic choices. Removing legislated impediments to savings, for instance, will enable the marketplace to create savings incentives that the federal government does not.

As between the two approaches, I would prefer to overhaul and simplify the tax code. On the other hand, as long as our tax code is rife with loopholes and preferences, we must do what we can to make them serve sensible policy objectives. Accordingly, I have sponsored numerous initiatives to boost national savings and employer funding of pensions, some of which were enacted into law in 1997.[28] Ultimately, however, our approach must not be piecemeal, but a fundamentally simplified taxation.

Indeed, the end result of the tax code's complexity is more severe than the simple interjection of government preferences into the free market. Interference with the market, along with undue complexity, creates an inefficient allocation of resources. The sheer number of targeted provisions results in a tax structure that is too unwieldy for an individual or business to negotiate with confidence. Endless man-hours are spent to comply with the tax code's idiosyncrasies. It takes little imagination to conceive of more productive uses of this time and labor, and it would certainly take the marketplace little time to redirect those resources more effectively.

I believe that the solution to all of these major policy challenges—Social Security, Medicare, and the tax code—lies in restoring the primacy of the marketplace. The free market is the mechanism most able to deliver on the promises of these programs and policies. In the next section of this Essay, I will describe legislative initiatives that I have advanced in these areas, their philosophical premises, and the manner in which they apply market forces to achieve stated policy objectives.

VI. Making Better Use of the Marketplace

A. *Proposals*

As we have seen, the common philosophical starting point of Social Security, Medicare, and the federal tax code is an essentially statist philosophy, holding that individuals will benefit if the federal government exerts its power to collect and distribute revenue to provide retirement income, to fund a government-designed health care package, or to influence economic activity in

[28] *See, e.g.*, S. 620, 105th Cong. (1997) and S.883, 105th Cong. (1997). Provisions of these bills were incorporated into the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, enacted into law on August 5, 1997.

the private marketplace. We have also seen that these policies will leave the nation in dire economic straits in less than half a century. These systems must undergo reform if they are to continue to serve their original policy objectives.

A glimpse at the mechanics of Social Security provides a key to the answer. Social Security, as currently structured, cannot generate retirement income in the twenty-first century without placing the entirety of that burden, an unacceptably large burden, upon the workers of that generation. As we have seen, this is because all such benefits are subsidized by a combination of current payroll taxes and current general taxation used to redeem trust fund assets. To lessen the onus on future generations, we must "pre-fund" some of this liability. We must transform Social Security, at least in part, into a genuine savings program.

Social Security currently enjoys the image, in the minds of many, of a savings program. Many believe that their lifetime of Social Security contributions were placed into a savings account, from which they draw in their retirement years. Ironically, in order to save Social Security, we must transform the reality into something closer to this fictitious image.[29]

One way to effect this change is to diversify the investment vehicles for Social Security assets, which are now wholly invested in government securities. This is necessary not because government securities are bad investments. They earn a conservative but reliable rate of return, and such investment does produce real assets for the Social Security system. The problem is that the investment vehicle can only be redeemed via future taxation. The money is effectively loaned to the government, which then uses it to finance current consumption, while it promises to pay it back when due.

Note that this pattern would be the case whether Social Security were counted as part of a balanced budget, or whether it were considered "off-budget," although recent debate on the balanced budget created confusion on this score. As long as the Social Security surplus remains in treasury securities, as mandated under the Social Security Act,[30] that surplus would be

---

[29] A further irony is that many of the advocacy groups that have done the most to perpetuate this erroneous picture of how the program works (by, for example, mass mailings to senior citizens of materials that misleadingly suggest that they have funded their own benefits in this way), are precisely those advocacy groups that now most strenuously resist an attempt to transform Social Security into a genuine savings program.

[30] *See supra* note 14.

"spent" in the same sense, and redeemed in the future via the same process. Thus, investment in government securities cannot "pre-fund" the future Social Security burden. This savings can only be accomplished if surplus Social Security tax revenue is invested in assets other than government securities.

Given this need for alternate investment vehicles, we must determine whether individuals or the government should decide on the investments. Several undesirable consequences follow from delegating these choices to the government. If the government were simply to invest a portion of Social Security in the private market, it would gain an enormous new influence over the behavior of the private financial markets. Not only might such government intervention distort the marketplace, but also the potential for politicization of such investment would be unacceptably high.

To communicate this point when I address audiences, I ask them to reflect on recent news stories involving American business, and the implications for them if the federal government were actively investing in the private market. If, for example, the government invested in a business faced with a discrimination lawsuit, a strike, or a controversy involving its products (e.g., tobacco), one readily envisions a profusion of amendments on the Senate floor demanding federal disinvestment.

By the same token, individual rather than government control over investment of Social Security contributions begs its own questions. How much would or should individuals be subject to investment risk? How much of the Social Security contribution should be subject to individual control? What kinds of restrictions should be placed on such investment?

These questions must be viewed against the risk of Social Security's insolvency. Enormous political repercussions follow from any approach to Social Security reform. Already, young Americans seem to have realized that Social Security is not a good investment for them. "Traditional" methods of balancing the program, such as raising payroll taxes, raising the age of eligibility, or restraining benefit growth, whether appropriate or not, will significantly worsen the rate of return for young Americans, possibly to the point where individuals in all income categories will get less than they gave. No program can survive politically if all classes of Americans conclude that it treats them unfairly. If Social Security is to survive, it must promise today's young contributors a better rate of return than now projected.

This conclusion would seem to argue for redirecting as large a component as possible of the current Social Security payroll tax into investment vehicles other than government securities. There are, however, boundary conditions in the other direction, most notably in the form of the millions of current Social Security beneficiaries whose benefits depend on almost all of the current payroll tax. Redirecting young Americans' Social Security taxes in alternate investment vehicles would not yield the near-term benefits already promised. In fact, even the "surplus" Social Security tax cannot be refunded to wage earners without creating a fiscal problem for the government, which would have to replace the approximately $30 billion no longer available to finance current spending.

In 1997, I introduced S. 321,[31] a bill that would refund one percentage point of the payroll tax into personal investment accounts and would solve more than three-quarters of the projected actuarial problems within Social Security. By refunding this amount into personal investment accounts, we would prevent the government from spending the surplus portion of Social Security taxes, thereby allowing the savings to be earmarked for future retirement needs. Simultaneously, by enabling individuals to invest in other vehicles, we would give younger individuals the chance to improve their rate of return on their Social Security investment.

The bill would also make additional changes in the interest of improving the outlook for Social Security solvency. The benefit formula "bend points" would be adjusted for individual recipients according to age, to account for the differing lengths of time that recipients can benefit from personal control over a portion of their Social Security taxes and to avoid any actuarial worsening as a result of the tax refund. Individuals over the age of 55 would not be affected by this change at all, and would remain wholly within the traditional Social Security structure. In addition, the bill would make a partial correction in the overstated Consumer Price Index of 0.5%[32] (the Boskin Commission recently estimated the error in the CPI to be 1.1% annually),[33] and would gradually shift the normal retirement age upward to sev-

---

[31] S. 321, 105th Cong. (1997).

[32] *See* S. 321, *supra* note 31.

[33] *See* ADVISORY COMMISSION TO STUDY THE CONSUMER PRICE INDEX, TOWARD A MORE ACCURATE MEASURE OF THE COST OF LIVING (Dec. 4, 1996).

enty by the year 2029,[34] a gradual change that would offset only a portion of the population aging patterns that threaten the Social Security program. Taken together, these overdue reforms would eliminate the vast majority of actuarial problems that beset Social Security.

I refer to this bill as a "toes in the water" approach to Social Security reform: its introduction of individual retirement accounts to the program is limited, and would not fully restore the program to solvency. In order to enable the Social Security system to provide meaningful retirement income to Americans in the mid-twenty-first century, a larger pre-funded component would be necessary, meaning a larger component placed into other investment vehicles.

There are ample reasons, however, why I offered this bill rather than a plan for complete privatization of Social Security. First, there exists the practical issue of how well the federal government can cope with the loss of roughly $30 billion annually that it has heretofore had to spend. Passing such a measure would require imposing restraints on spending beyond those of the 1997 budget deal. The larger the portion that we devote to Social Security, the more difficult it becomes to avoid expanding annual deficits.

Second, and perhaps more important, the size of the tax refund I have proposed is smaller than the current annual Social Security surplus. Therefore, the program would be immune to charges that benefit flows under the traditional system would be jeopardized. This small tax refund would simply earmark the current surplus for future retirement benefits without interfering with the cash flow to current beneficiaries. In fact, despite the tax refund created in my bill, annual operating deficits within Social Security would actually be postponed, meaning that traditional benefits would be more secure than before.

B. *Overcoming Statism*

This bill represents one way to tap the marketplace to meet the challenges of the coming century. The federal government, left to its own devices, has established a system of funding retirement benefits that leaves the entirety of an unacceptable

[34] *See* S. 321, *supra* note 31.

cost burden on the shoulders of future generations. Moreover, the government cannot promise a fair return on an individual's contributions to the system. By restoring individual control over a portion of the Social Security investment, we can determine whether market-based reform will improve the return on the Social Security investment and at the same time convert a massive contingent liability into a partially pre-funded liability.

Those who favor a statist approach to providing retirement income invariably cite the risk associated with individual control over investment decisions. To address this concern, I have determined how well individuals would need to invest under my plan in order to do better than they would if Social Security were "fixed" to an equal extent via traditional methods alone. For single males, the answer was a 3.0% rate of return.[35] In addition, for no category of individuals was there a likelihood of doing worse than would occur with a traditional Social Security fix.[36]

Participants in the federal employee retirement system currently can choose between three investment funds that have, for the past 10 years, averaged rates of return on the order of 16%, 8%, and 7% respectively.[37] Even by investing in a certificate of deposit, an individual would find it difficult to do worse under my plan than they would under Social Security. Moreover, let us not forget that under my plan, the vast majority of the traditional Social Security system remains (11.4 of 12.4 percentage points)[38] to provide a floor of protection even for the fictitious individual who loses every penny of his individual retirement investment. Individuals thus will not be at significantly greater risk if given the freedom to invest a portion of their Social Security investment as they can currently invest an IRA account. To the contrary, they will receive the virtual certainty of better performance and enhanced retirement income security.

We must not postpone reform. The current statist approach to retirement income policy means further spending the existing Social Security surplus on purposes extraneous to pre-funding future liabilities. In just one year, the efficacy of my proposal has dropped: it can now remove 78% of Social Security's pro-

---

[35] Letter from Steve Goss, Deputy Chief Actuary of Social Security, to Sen. Gregg 4 (Mar. 28, 1997) (on file with author).

[36] *Id.*

[37] *Thrift Savings Plans for Federal Employees* (visited Dec. 12, 1997) <http://www.tsp.gov>.

[38] *See* S.321, *supra* note 31.

jected deficit, rather than the 84% it could previously.[39] The longer we wait to pre-fund tomorrow's liabilities, the more difficult it becomes to generate the requisite funding. The longer we delay in using the marketplace to generate real savings, the more untenable our situation becomes.

Medicare faces similar problems. We must, therefore, incorporate analogous reforms, such as adjustments upward in the age of eligibility. Currently, the eligibility age is lower than that of Social Security, despite Medicare's more precarious fiscal condition. Medicare, too, needs market-based reforms to remain viable over the long haul.

During the last Congress and again in 1997, I introduced a plan entitled "Choice Care,"[40] designed to bring market dynamics to the Medicare system. Under this plan, seniors receive the same benefit guarantees as under traditional Medicare. The critical difference, however, is that seniors would achieve greater control over how those health care dollars are spent. Little incentive existed under past practice for seniors to be cost-conscious consumers of health care once they became beneficiaries. By giving seniors the opportunity to purchase their health care from a variety of providers, market competition enters the federal health care system.

With "Choice Care," seniors could buy from a range of competing health care plans, provided that those plans meet the standards of benefits and guarantees established under Medicare. If seniors purchased from a plan that provided services more efficiently and less expensively, they would pocket 75% of the savings, while 25% would go to shore up the Medicare Trust Fund. Market competition would directly strengthen Medicare's fiscal health. Seniors would retain previous benefit guarantees, but would enjoy the same market power as other consumers.

---

[39] Letter from Steve Goss, Deputy Chief Actuary of Social Security, to Sen. Gregg 4 (July 30, 1997) (on file with author).

[40] *See* S. 246, 105th Cong. (1997); *see also* S.1238, 104th Cong. (1995).

[41] President Clinton vetoed H.R. 2491, 105th Cong. (1995) on December 6, 1995.

[42] *See* Balanced Budget Agreement of 1997, *supra* note 22.

A version of "Choice Care" was passed by the previous Congress and included in the Balanced Budget Act vetoed by the President.[41] Much of "Choice Care" did find its way into the Balanced Budget Agreement of 1997, subsequently signed into law by the President.[42] I feel tremendous pride in the inclusion of this Medicare Choice program as the centerpiece of the Medicare reforms in the budget bill. In fact, Medicare Choice is the only fundamental structural reform that survived the conference negotiations.

Nonetheless, imperfect changes to Medicare Choice were added between its introduction and its eventual passage into law. Most important among these are certain restraints on market activity. These will, in my opinion, reduce efficiency. Specifically, cost incentives in my original Choice Care proposal were altered. Instead of creating a right for seniors to make cost-saving decisions when purchasing health care, the Medicare Choice program as passed into law simply mandates, whenever a competing program delivers benefits at a lower cost than Medicare, that the plan make up the difference with additional benefits, rather than pass the savings on to the customer.

Certainly, the opportunity to purchase a better package of benefits for the same price is an important consumer empowerment. It is my view, however, that a system making different packages of benefits available for the same price will provide inferior market incentives for giving seniors the opportunity to buy benefit packages for less money. Cost savings is perhaps the most effective means to induce consumers to exert their purchasing prerogatives. By eliminating the opportunity for price competition, and by restricting competition to that between equally priced packages of different benefits, the efficacy of market competition is reduced. It is my hope that we not mistake this reduced efficacy for an inability of market dynamics to transform Medicare. If this budget law fails to significantly diminish runaway Medicare cost growth, the proper answer is to permit more, not less, market-based reform.

Despite the flawed version passed by Congress, it still constitutes a critical step to save Medicare that has yet to be taken with Social Security: at least there is a recognition that market competition is the key to future program strength. Our prescriptions for tax reform must take similar account of the need to give market forces primacy over government fiat. Specifically, the tax code needs simplification in order to reduce the depend-

ence of economic activity upon government approval. Moreover, government-created disincentives to save must be reduced, and the principle of limited government intervention in this area should apply broadly to all types of incentives.

Tax reform proposals have proliferated rapidly. A number of senators, representatives, independent think tanks, and presidential candidates have proposed that we overhaul and simplify the tax code. This trend results from a confluence of three factors: public frustration with tax complexity, indignation that the tax burden on the public rises whenever a favored interest secures another tax loophole, and the frustration of important policies by the idiosyncrasies of the current system.

I believe that the tax code requires great simplification. This can be achieved in a fully progressive manner. In fact, it is not difficult to make a simplified tax as progressive as the current structure, riddled as it is with tax preferences that tend to favor people of means. The desired level of progressivity can be achieved by making the personal exemption or standard deduction much larger than it is now, and by applying an abbreviated scale of graduated rates to the remaining taxable income brackets. The more that we keep the tax code free of special deductions and tax breaks, the lower these rates can be and still maintain or even increase the current level of progressivity. Most important, the fewer specific deductions that we permit, the more that we will enable the private economy to allocate resources according to individual choice, not government prescription.

Even with a simplified tax system, we still need to make concrete policy decisions about how to tax. For instance, a flat tax proposal might tax wage and salary income, but not the interest or capital gains income derived from investment. Another simplified tax proposal might tax individuals on their investment income while still allowing deductions for that portion of annual income that goes toward saving. Both proposals represent a move to a consumption-based tax system to avoid double taxation of savings income, but achieve this result by different means. Although the means of collection of sales and value-added taxes (VAT) is very different from these income-based consumption tax systems, all of these proposals attempt to tax consumption in a similar manner.

I believe that Congress must invest more time in developing consensus proposals to simplify the tax code. We have already taken a major step forward on Medicare, although there is much

more work to do. Additionally, Social Security reform cannot be put off, for the simple reason that every Trustees' Report announces that crisis is nearer. Hand in hand with these efforts must be fundamental tax reform. Knowing that individuals in the twenty-first century will be less able to rely on statist approaches to income security than today, it is essential that we enable them to maximize resources on their own, and the tax code must serve this aim. Currently, the tax system is a substantial impediment to developing adequate retirement security.

It is therefore my intention to help create a plan for radical simplification of the tax code. Such a plan must include plausible methods of transition, meet standards of progressivity, and encourage savings. Specific provisions would increase personal exemptions, nearly eliminate tax loopholes, flatten and reduce the number of graduated rates, and avoid taxation on savings income to the extent that the aim of progressivity allows. Although some proposed plans exempt savings income completely from taxation, a superior alternate method would exempt only a given amount of savings income for each individual in order to ensure that the benefits of savings are spread among Americans of all income levels.

VII. Conclusion: Letting the Marketplace Lead

So often in American history, the exertions of individuals deliver strength and security to the nation as a whole. As early as the post-Civil War era of explosive economic growth, America's economic vigor exceeded that of the rest of the world. Government strategy had little to do with this achievement. Rather, success was the result of the technological revolution played out in the private sector. Society and government reaped the dividends.

Our own time provides a similar example. In 1997, Congress and the President negotiated an agreement to balance the budget by the year 2002. The opposing sides were on the brink of failure when the gap was bridged because of unexpected economic productivity in the private sector. The exertions of individual Americans, acting in a mostly free economy, provided the means to resolve our policy challenges.

If we are to cope similarly with the demands of the twenty-first century, whether they be war, economic competition, or

natural disaster, we cannot afford to allow the federal government to absorb the private economy's capacity to provide solutions. Instead, the marketplace must be free to function optimally, and the fruits of that activity must be channeled to resolve these great national issues.

We must permit private investment decisions to help provide for retirement income security. We must allow greater market competition in the federal health care system. And we must liberate the market from the caprices of government policy embedded in the tax code.

A free system of government is one that recognizes that government need not provide all answers to all questions and, indeed, that perhaps it is not even capable of doing so. Fortunately, we have access to forces for positive change that are more powerful than any that the government can devise. We must understand how current government policies handicap the proper functioning of the marketplace, so that we may instead facilitate the market. If we fail to do so, government spending will cripple the ability of future generations to achieve security and prosperity.

ARTICLE

LOCAL AND STATE REGULATION OF TOBACCO: THE EFFECTS OF THE PROPOSED NATIONAL SETTLEMENT

PETER D. ENRICH*
PATRICIA A. DAVIDSON**

Recently, attorneys general and negotiators representing the federal government, state governments, the tobacco industry, and various public interest groups have reached a "Proposed Settlement" that would resolve all potential criminal and civil liability of the industry and would set manufacturing, marketing, and packaging standards for tobacco products. This Article examines the ramifications for state and local efforts to regulate the tobacco industry if the proposal were enacted as national legislation. The authors argue that, as presented, the legislation would obstruct local tobacco control efforts and stifle the development of innovative regulation that historically has come from local and state government initiatives. They conclude that the proposal should be amended to preserve state and local authority with respect to tobacco regulation.

The Proposed Settlement between the major tobacco companies and the states and other plaintiffs, as outlined in the agreement of June 20, 1997,[1] addresses an extraordinarily wide range of issues.[2] The Proposed Settlement is presented, not as consensual agreements between the parties to the litigation, but as a description of the terms of proposed federal legislation, whose enactment the parties agree would resolve the issues in their pending litigation.[3] This Article focuses on a single aspect of the

---

* Professor of Law, Northeastern University School of Law.
** Staff Attorney, Tobacco Control Resource Center; Adjunct Professor, New England School of Law. This material is based on work supported by a National Institutes of Health/National Cancer Institute Award, Grant #1 R01 CA67805-01, titled "Legal Interventions to Reduce Tobacco Use." Any opinions, findings, and conclusions or recommendations expressed in this Article are those of the authors and do not necessarily reflect the views of the prime sponsor.

[1] The terms of the Proposed Settlement were negotiated by representatives of the tobacco companies, the states, and other plaintiffs involved in litigation against the tobacco companies. The Proposed Settlement is officially reported in a document entitled "Proposed Resolution," released on June 20, 1997 (last modified June 25, 1997) available at <http://www.usatoday.com/news/smoke/smoke01.htm> [hereinafter PROPOSED RESOLUTION].

[2] *See, e.g.*, John M. Broder, *The Tobacco Agreement: The Overview*, N.Y. TIMES, June 21, 1997, at A1 (summarizing major provisions of the proposed settlement).

[3] As this Article went to press, three bills were filed in the Senate, reflecting different approaches to the subject matter of the Proposed Settlement. *See* S. 1414, 105th Cong. (1997) (filed by Sen. McCain (R-Ariz.)); S. 1530, 105th Cong., (1997) (filed by Sen. Hatch (R-Utah)); S. 1492, 105th Cong., (1997) (filed by Sen. Kennedy (D-Mass.)) ("A

agreement, namely, its impact on the ability of local and state governments to pursue independent tobacco control strategies that supplement the national strategies contemplated in the Proposed Settlement.

The central premises of this Article are that local and state efforts have been of vital importance in addressing this critical public health issue, and that a satisfactory settlement of pending litigation must reinforce, not undermine, local and state governments' roles. While the Proposed Settlement includes some provisions that appear to share this perspective, the text is often neither clear nor consistent about its intended effects on local and state powers. Closer analysis indicates that, whether by design or inadvertence, the Proposed Settlement poses troubling obstacles at several key points to local and state initiatives.

We begin with a description of the principles that underlie our analysis of the Proposed Settlement, including a brief introduction to the role of local and state governments in national tobacco control efforts. We will then turn to an examination of the proposal's likely impacts in two areas: first, the ability of localities and states to establish statutory or regulatory restrictions additional to those imposed federally under the Settlement and, second, the ability of localities and states to undertake enforcement measures that ensure compliance with the established standards of conduct. In each area, we conclude that the Proposed Settlement is unacceptably restrictive of local and state authority. Thus, these aspects of the Proposed Settlement will require close scrutiny and substantial revision as Congress considers the proposals before it.[4]

I. GUIDING PRINCIPLES

Across the United States, local governments, including city councils, town meetings, county governments, and local health boards and programs, have led the way in adopting the most stringent and innovative tobacco control measures. The toughest youth access, environmental tobacco smoke ("ETS"), and point

---

Bill to amend the Public Health Service Act and the Federal Food, Drug and Cosmetic Act to prevent the use of tobacco products by minors . . . .") Texts of these bills became available too late to allow detailed analysis here of their treatment of the issues discussed in this Article.

[4] *See supra* note 3.

of sale restrictions have emerged from local communities mobilized to protect themselves and their vulnerable youth from the reach of the tobacco industry.[5] Moreover, many of the most aggressive and effective efforts to enforce such restrictions have been conducted by local public health officials. As one recent empirical study concluded, "local enforcement is a critical ingredient to the success of virtually any tobacco control effort."[6]

Recent history demonstrates why broad local authority to tackle the tobacco problem is so important. First, because of their greater responsiveness to grass roots activism and their relative insulation from the political and financial influence of the tobacco industry,[7] local governments have frequently proven ready to adopt far more aggressive approaches to tobacco control than the federal government, or even the states, have been willing to contemplate.[8] Second, in the process of trying to discover the most effective approaches for tackling the difficult challenges of tobacco control, it has proven invaluable to have numerous localities across the country serving as "laborator[ies] [for] social and economic experiments,"[9] devising and trying out a wide range of novel strategies, from which we all can learn. Indeed, many of the measures embodied in the Proposed Settlement first evolved as local initiatives.[10]

---

[5] *See, e.g.*, Russ Freyman, *Butting In*, GOVERNING, Nov. 1995 at 55 (observing that "[i]t is at the local level of government that the anti-tobacco lobby . . . has achieved its greatest gains in the past few years"); WORKING GROUP OF STATE ATTORNEYS GENERAL, NO SALE: YOUTH TOBACCO AND RESPONSIBLE RETAILING 36 (1994) ("In many states, initiatives for effective control of illegal tobacco sales have come primarily from the local level . . . .") (on file with authors) [hereinafter NO SALE].

[6] PETER D. JACOBSON & JEFFREY WASSERMAN, TOBACCO CONTROL LAWS: IMPLEMENTATION AND ENFORCEMENT 94 (1997).

[7] *See, e.g.*, Micheal Siegel et al., *Preemption in Tobacco Control: Review of an Emerging Public Health Problem*, 278 JAMA 858, 859–60 (1997) (describing local government's relative independence from the tobacco lobby). *See generally* Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 66–70 (1997) (discussing the scope of tobacco industry's influence over federal and state officials).

[8] *See, e.g.*, Peter D. Jacobson, Jeffrey Wasserman & John R. Anderson, *Historical Overview of Tobacco Legislation and Regulation*, 53 J. SOC. ISSUES 75, 86 (1997) (describing wide range of local initiatives); Carey Goldberg, *Massachusetts Man's Goal is to Rid Town of Tobacco*, N.Y. TIMES, Oct. 12 1997, at A1 (describing initiative in Winthrop, Mass. to ban all tobacco sales).

[9] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[10] For example, the Proposed Settlement's provisions restricting smoking in public facilities, *see* PROPOSED RESOLUTION, tit. IV at 30–31, reflect the widespread, and often considerably more far-reaching, restrictions embodied in hundreds of local ordinances. *See* Siegel et al., *supra* note 7, at 859. Another example is the Proposal's ban on billboard advertising. *Compare* PROPOSED RESOLUTION, tit. I-A at 9, *with* Baltimore

In addition, independent local and state authority over tobacco control provides an important "back-stop" for the significant regulatory advances at the federal level contemplated in the Proposed Settlement. The Proposed Settlement contains provisions that specifically authorize the new federal controls to be modified after five years.[11] It is, of course, entirely possible that either Congress or the Executive Branch (through the FDA) will, at some future point, choose to relax federal constraints on the tobacco industry. Assuring that local and state governments have full authority to pursue their own tobacco control measures is an important safeguard against such a possibility.

Given the proven value of local and state tobacco control authority, a commitment to preserving and enhancing local and state power is essential as Congress begins the task of examining the terms of the Proposed Settlement. The tobacco industry is well aware of the power of local action. Tobacco lobbyist Victor Crawford has conceded, "[a]s a lobbyist, I never stood a chance of arguing the industry's case before local bodies . . . . We could never win at the local level."[12]

Preemption is the industry's primary tool for thwarting state and local action.[13] In our federal structure, it is well established that Congress, when acting within the scope of its authority, can preempt state or local action that either conflicts directly with federal policy or intrudes into an area where federal law is meant to occupy the field fully.[14] It is similarly axiomatic that local governments have only those powers delegated to them by the

---

Ordinance 307 (discussed and approved in *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of the City of Baltimore*, 862 F. Supp. 1402 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *and cert. granted* and *judgment vacated*, 116 S. Ct. 2575 (1996), *and aff'd* on remand, 101 F.3d 332 (4th Cir. 1997), *and cert. denied*, 117 S. Ct. 1569 (1997)). The Proposal's ban on cigarette vending machines is a further example. *Compare* PROPOSED RESOLUTION, tit. I-C at 12, *with* the approved municipal ordinance banning cigarette vending machines discussed in *Take Five Vending, Ltd. v. Town of Provincetown*, 615 N.E.2d 576 (Mass. 1993). Similarly, the provisions relating to the disclosure of non-tobacco ingredients, *see* PROPOSED RESOLUTION, tit. I-F at 19–20, reflect the more ambitious state initiatives undertaken by Massachusetts, Minnesota, and Texas. *See* MASS. GEN. LAWS ch. 94, § 307B (1996); MINN. STAT. § 461.17 (1997); H.B. 119, 75th Leg., Reg. Sess. (Tex. 1997).

[11] *See* PROPOSED RESOLUTION, tit. I at 8.

[12] AMERICAN CANCER SOCIETY ET AL., ACTIONS SPEAK LOUDER THAN WORDS: THE TOBACCO INDUSTRY'S STEALTH STRATEGY IN STATE LEGISLATURES 1 (May 28, 1996) [hereinafter ACTIONS SPEAK LOUDER THAN WORDS].

[13] *See* Freyman, *supra* note 5, at 55 ("For the tobacco lobby, preemption is something of a Holy Grail.").

[14] *See, e.g.*, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738, 747–48 (1985) (discussing both express and implied preemption).

states,[15] and that the states (except where constrained by their state constitutions) can limit or preempt local authority in much the same ways that the federal government can constrain the states.[16]

Recent history reveals not only the importance of local and state power in effective tobacco control, but also the serious threats posed by preemptive legislation. The tobacco industry has made effective use of both federal and state preemption to rein in tobacco control activities in those fora where the industry's direct political influence is weaker.[17] At the federal level, the most prominent example of this tactic has been the Federal Cigarette Labeling and Advertising Act ("FCLAA" or the "Labeling Act").[18] This law required warnings on tobacco packages, but also expressly preempted the states from imposing additional requirements with respect to advertising or promotion that were "based on smoking and health."[19] This provision has been interpreted by the courts as reaching far beyond direct state and local regulation of tobacco advertising, even setting limits on the application of state tort law to smokers' lawsuits against tobacco companies.[20] The tobacco industry consistently raises the Labeling Act's preemption provision in challenging state regulatory efforts that have no discernible relationship to marketing or advertising, such as Massachusetts's[21] and Minnesota's[22] recently enacted statutes requiring disclosure of non-tobacco ingredients in cigarettes.

Similarly, the tobacco industry has deployed its influence at state houses around the country to seek passage of legislation forbidding local efforts to regulate tobacco sales and use. Such legislation, often sweetened by the inclusion of relatively tooth-

---

[15] *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907); Gerald Frug, *The City as Legal Concept*, 93 HARV. L. REV. 1057, 1062 (1980).

[16] *See, e.g.*, Jancyn Manufacturing. Corp. v. County of Suffolk, 518 N.E.2d 903, 905–906 (N.Y. 1987); People v. Llewellyn, 257 N.W.2d 902, 904–05 (Mich. 1977); U.S. Oil, Inc. v. City of Fond du Lac, 544 N.W.2d 589, 591 (Wis. Ct. App. 1996).

[17] *See* Siegel et al., *supra* note 7, at 859 (describing scope of industry efforts to enact preemption statutes).

[18] 15 U.S.C. §§ 1331–1341 (1994). For an instructive account of the politics behind the enactment of the FCLAA, see RICHARD KLUGER, ASHES TO ASHES 284–91 (1996).

[19] 15 U.S.C. § 1334(b) (1994), as amended by the 1969 Public Health Cigarette Smoking Act.

[20] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[21] *See* Philip Morris, Inc. v. Harshbarger, 122 F.3d 58 (1st Cir.. 1997) (rejecting preemption challenge to MASS. GEN. LAWS ch. 94, § 307B (1996)).

[22] *See infra* note 98 (discussing litigation raising a preemption challenge to MINN. STAT. § 461.17 (1997)).

less state-level tobacco control measures, has become a staple on state legislative calendars.[23] By August 1997, at least 29 states had enacted some type of preemptive legislation carving out a special immunity from local regulation for tobacco.[24] Even where preemptive legislation has not been enacted, the industry frequently challenges local tobacco control efforts on the ground that they overstep local powers and are implicitly preempted by existing state tobacco legislation.[25]

The threat of preemption by higher levels of government poses a major obstacle to tobacco control efforts at both the state and local levels. Hence, in analyzing the Proposed Settlement, it is critical to assess what preemptive effects it may have on state and local initiatives. Moreover, if the Proposed Settlement is to be evaluated in terms of its positive contributions to national tobacco control policy, one may reasonably ask what it does to free local and state tobacco control efforts from existing preemption hurdles, both federal and state. If it does nothing to help on these fronts, we suggest that one may rightly ask why not.

The text of the Proposed Settlement repeatedly expresses an intent to preserve state and, occasionally, local involvement in several important aspects of tobacco control, particularly regulation of youth access[26] and exposure to environmental tobacco smoke.[27] We will examine these portions of the Proposed Settlement in detail below, identifying a number of difficulties with the ways they address the key issues. Other portions of the proposal, also discussed in detail below, expressly create new obstacles to state and local action, particularly with regard to enforcement actions, penalties, and ingredient disclosure. The Proposed Settlement also would significantly restrict state judicial powers in

---

[23] *See* Siegel et al., *supra* note 7, at 860 (counting 26 preemption bills filed in 19 different states during the 1996 legislative session, often attached to "legitimate anti-tobacco bills"); *see also* Freyman, *supra* note 5, at 55 (reporting preemption bills in 28 states during 1995).

[24] *See* Siegel et al., *supra* note 7, at 860. The count of 29 states includes Maine, which repealed its preemption statute during 1997. *See id.*; *see also* ACTIONS SPEAK LOUDER THAN WORDS, *supra* note 12, at 5 (also reporting 29 states with preemption statutes, as of 1996).

[25] *See, e.g.*, Take Five Vending, Ltd. v. Town of Provincetown, 615 N.E.2d 576 (Mass. 1993).

[26] *See* PROPOSED RESOLUTION, tit. I-C at 11 ("Without preventing state and local governments from imposing stricter measures . . . .").

[27] *See* PROPOSED RESOLUTION, tit. IV at 31 ("The legislation would not preempt . . . any other state or local law or regulation that restricts smoking in public facilities in an equal or stricter manner.").

tobacco litigation, although these restrictions are largely beyond the scope of this Article.[28]

Perhaps the most troubling aspect of the Proposed Settlement from the viewpoint of state and local powers is its overall approach to preemption issues. Instead of asserting a general intention not to preempt state and local tobacco control efforts, the Proposed Settlement merely identifies particular topics where the anticipated legislation will not preempt state and/or local initiatives. Elsewhere, the Proposed Settlement largely leaves the question of preemptive effect unanswered. In the context of such comprehensive federal legislation,[29] this approach to the preemption issue raises a significant possibility that the Proposed Settlement would be deemed to have been intended to cover the field of tobacco control exhaustively and, thereby, preempt all local and state action, except where specifically countenanced in the legislation.

Such an interpretation might find additional support from several considerations. The Proposed Settlement describes in very broad terms the essentially interstate character of the tobacco business,[30] thereby suggesting the primacy of federal regulation. Moreover, the Proposed Settlement purports to reflect a careful and explicit compromise between the competing interests of the tobacco industry and the states concerning the appropriate scope of regulation.[31] In addition, the Proposed Settlement carves out explicit anti-preemption "exceptions" where the drafters saw fit to do so. One might infer that the absence of such language elsewhere was deliberate. Without prejudging how the courts would respond to these considerations, we can be confident that the tobacco industry would use these factors to construct pre-

---

[28] For a discussion of the provisions of the Proposed Settlement impinging on the scope of state judicial powers, see WENDY E. PARMET, JUDICIAL FEDERALISM AND THE PROPOSED TOBACCO SETTLEMENT (Tobacco Control Resource Center Working Paper 1997).

[29] The breadth of the proposal is underscored by the frequent descriptions of it as the "global" settlement of the tobacco litigation. *See, e.g.*, *Curbing Tobacco Globally*, CHRISTIAN SCI. MONITOR, June 24, 1997, at 20; Sheryl Gay Stolberg, *Kessler and Koop Urge Congress to Do Away With the Tobacco Settlement*, N.Y. TIMES, July 29, 1997, at B7 (quoting Sen. Wyden (D-Or.) referring to "a global settlement"); Kelder & Daynard, *supra* note 7, at 86–87.

[30] *See* PROPOSED RESOLUTION, Preamble at 3–4.

[31] *Cf.* Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 146 (1976) (emphasizing "the balance struck by Congress between . . . conflicting interests" in preempting state action potentially upsetting that balance).

emption arguments that would become staples of its attacks on all future state and local regulatory and enforcement efforts.

To avoid this pitfall, any legislation implementing a settlement must take the opposite approach. Instead of carving out specific topics to which anti-preemption provisions apply, the legislation should incorporate a broad, general anti-preemption provision declaring the express congressional intent to permit and encourage states and local governments to undertake their own tobacco control efforts independent of the requirements of federal law.[32] In those few cases where such state or local action would conflict with a clear and compelling need for uniform national standards or strategies, the legislation should contain narrowly drawn preemption provisions.[33] Outside such specifically enumerated areas, however, the legislation should express an explicit policy of non-preemption in order to achieve the full benefits of unimpeded state and local efforts.

In short, the Proposed Settlement, rather than creating new obstacles to local regulation and enforcement, should reinforce and enhance local and state authority, except in those specific contexts where uniform national standards or strategies are clearly required. It should do so in clear and direct terms that do not invite endless challenges to assertions of local and state authority.

With the foregoing principles in mind, we now turn to an assessment of the particular provisions of the Proposed Settlement.

II. Regulatory Powers

This section focuses on provisions of the Proposed Settlement that will affect areas of tobacco control traditionally regulated by the states and localities. Three themes emerge. First, the Proposed Settlement is flawed because it does not contain a clear expression of the overarching principle that state and local power to regulate tobacco products is preserved unless otherwise specified. Second, the express anti-preemption provisions sprinkled throughout the proposal, which apply to important areas such as youth access and ETS, are not crisply drafted or internally

---

[32] *Cf.* 15 U.S.C. § 2617 (1994) (stipulating the non-preemptive effect of a federal statute regulating toxic substances); 21 U.S.C. § 903 (1994) (similarly stipulating non-preemptive effect for federal drug abuse prevention statute).

[33] One example of an area in which such an approach might be appropriate is the regulation of advertisements in nationally distributed media, where disparate state or local requirements could prove unmanageable.

consistent. Third, some key provisions (e.g., advertising, marketing, and promotion) are silent on the question of state or local preemption.

The absence of an overarching anti-preemption provision, combined with inconsistent express treatment and omissions, raises significant questions about the scope and effectiveness of preemption protections in the Proposed Settlement. Specific sections of the Proposed Settlement that raise state and local regulatory preemption concerns are analyzed below.

A. *Youth Access*

States, and particularly localities, have been successful laboratories for the development of effective, innovative youth access restrictions, such as vending machine restrictions or bans.[34] Recognizing the importance of state and local regulation, the youth access sections of the Proposed Settlement explicitly protect state and local authority.

The Proposed Settlement includes ten specific youth access restrictions[35] with the following express anti-preemption provision: "*Without preventing state and local governments from imposing stricter measures*, the legislation would incorporate every access restriction of the FDA Rule, and more."[36]

When read together with the express youth access preemption protection provision set forth in Title V-B(1) (State Authority), the drafters' intent to permit states and localities to further regulate and possibly eliminate "the product's use by and accessibility to minors" is relatively clear.[37] The relevant provision of Title V-B(1) states: "While setting a federal 'floor' for tobacco control measures in many substantive areas, this legislation preserves, to the maximum extent, state and local government authority to take additional tobacco control measures that further restrict or eliminate the product's use by and accessibility to minors."[38]

---

[34] *See* JACOBSON & WASSERMAN, *supra* note 6, at 15.

[35] Eight of the restrictions mirror the FDA Rule (21 C.F.R. § 897.14(a)–(e) (1997); 21 C.F.R. § 897.16(b), (c)(2)(i), (d) (1997)) and two go further by banning "all sales of tobacco products through vending machines" and banning "self-service displays of tobacco products except in adult-only facilities. In all other retail outlets, tobacco products must be placed out of reach of consumers (i.e., behind the counter or under lock-and-key) or, if on the counter, not visible or accessible to consumers . . . ." PROPOSED RESOLUTION, tit. I-C at 11–12.

[36] PROPOSED RESOLUTION, tit. I-C at 11 (emphasis added).

[37] PROPOSED RESOLUTION, tit. V-B(1) at 32.

[38] *Id.*

By carving out youth access restrictions for preemption protection, however, the Proposed Settlement raises questions about the scope and applicability of preemption to related areas, such as point of sale restrictions and advertising prohibitions.[39]

For example, does the relatively broad anti-preemption language of Title V-B(1) recognize the rights of states and localities to ban tobacco product signs in retail establishments in order to reduce youth sales? If not, state and local power in this area arguably could be preempted by the detailed Appendix VII, setting forth point of sale restrictions, which is silent on the issue of preemption.[40] The prospect of preemption is probably unacceptable to many localities that may find that the point of sale restrictions do not go far enough.[41]

In short, despite the Proposed Settlement's recognition of the importance of local authority to regulate youth access to tobacco products, imprecise drafting and internal inconsistencies raise questions about the youth access anti-preemption language. A broad anti-preemption provision that applies to all provisions of the Proposed Settlement, unless otherwise specified, would be a more effective approach.

B. *Environmental Tobacco Smoke ("ETS")*

Regulating exposure to ETS has been another fertile area for state and local governments.[42] In a much-heralded section, the Proposed Settlement sets a national standard for restricting indoor smoking in "public facilities," defined as "any building regularly entered by 10 or more individuals at least one day per week."[43] Recognizing the importance of state and local authority in this area, the ETS section of the Proposed Settlement includes the following anti-preemption provision: "The legislation would not preempt or otherwise affect any other state or local law or regulation that *restricts smoking in public facilities in an equal or stricter manner*."[44]

Despite a clear intent to protect state and local authority to regulate ETS, however, the language in this section does not

---

[39] *See* discussion *infra* Part II.C and .D.
[40] *See* PROPOSED RESOLUTION, app. VII at 63.
[41] *See* discussion *infra* Part II.D.
[42] *See* Siegal et al., *supra* note 7, at 859.
[43] PROPOSED RESOLUTION, tit. IV at 30.
[44] PROPOSED RESOLUTION, tit. IV at 31 (emphasis added).

mirror the anti-preemption language pertaining to state and local ETS restrictions in Title V-B(2) which provides: "This legislation also permits state and local governments to enact measures that *further restrict or eliminate employee and general public exposure to smoking in workplaces and in other public and private places and facilities*."[45] Moreover, Title V-B(2)'s anti-preemption clause explicitly permits only the enactment of more stringent state and local measures. It does not mention enforcement.[46] These anti-preemption drafting inconsistencies should be revised to clarify that states and localities have the maximum authority to regulate ETS.

Critics of the Proposed Settlement's ETS section, including the Advocacy Institute and the Institute for Health Policy Studies at the University of California, question whether a federal ETS standard that excepts the hospitality industry will help or hurt state and local efforts to regulate ETS.[47] The Institute for Health Policy Studies Report concludes that, despite anti-preemption language protecting state and local authority, the ETS restrictions are "insufficient and unnecessary."[48]

Finally, unless expressly negated, preemption issues could be raised by Occupational Safety and Health Act regulations, which are required under Title IV.[49] It is also unclear whether or how ETS provisions of the Proposed Settlement could affect the applicability of the Americans with Disabilities Act ("ADA")[50] to ETS complaints.

C. *Advertising and Marketing*

While states and localities have not always been as successful with advertising restrictions as they have been with youth access and ETS measures, this area remains a high priority for many localities.[51] Tobacco industry challenges to state and local adver-

---

[45] PROPOSED RESOLUTION, tit. V-B(2) at 32 (emphasis added).

[46] *See* discussion *infra* Part III.

[47] *See* BRION J. FOX ET AL., INSTITUTE FOR HEALTH POLICY STUDIES, UNIVERSITY OF CALIFORNIA, ANALYSIS OF THE PROPOSED RESOLUTION OF THE UNITED STATES TOBACCO LITIGATION (draft) 43–45 (July 16, 1997); ADVOCACY INSTITUTE, THE PROPOSED SETTLEMENT, THE KOOP-KESSLER REPORT, AND THE STATUS QUO: A SIDE-BY-SIDE COMPARISON (draft) 27–78 (July 17, 1997).

[48] FOX, *supra* note 47, at 43.

[49] *See* PROPOSED RESOLUTION, tit. IV at 30–31.

[50] 42 U.S.C. §§ 12101–12213 (1994).

[51] *See, e.g.*, Penn Advertising of Baltimore, Inc. v. Mayor and City Council of the

tising regulations under the First Amendment and under the Labeling Act's preemption provision account for the difficulty states and localities have experienced.[52] Nevertheless, the United States Supreme Court's recent refusal to review a Fourth Circuit decision upholding a local ordinance banning tobacco billboards in areas frequented by children has encouraged many localities to consider adopting similar ordinances and to become more active in fighting youth-oriented tobacco advertising campaigns.[53]

The *Penn Advertising* decision provides clear guidelines for localities interested in adopting advertising restrictions designed to curtail illegal youth sales, without running afoul of the First Amendment or the Labeling Act's preemption clause. Preemption challenges under the Labeling Act have been particularly problematic for localities because the tobacco industry argues that virtually any restriction related to advertising or promotion is preempted as a "requirement . . . imposed under State law . . . based on smoking and health . . . with respect to advertising or promotion."[54] This argument, however, was rejected in *Penn Advertising*. Rather, the court found that because the billboard restriction was intended to curtail illegal youth sales, it was not preempted as a regulation based on smoking and health.[55] This legal analysis will assist states and localities in drafting legally defensible, effective advertising regulations intended to discourage youth sales. We believe that state and local power to do so should be preserved.

None of the express anti-preemption provisions of the Proposed Settlement, however, explicitly shields state and local power to adopt advertising or marketing restrictions on tobacco products. First, the long list of advertising and marketing restrictions set forth in Title I-A is silent on the issue of preemption.[56] This

---

City of Baltimore, 862 F. Supp. 1402 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *and cert. granted* and *judgment vacated*, 116 S. Ct. 2575 (1996), *and aff'd* on remand, 101 F.3d 332 (4th Cir. 1997), *and cert. denied*, 117 S. Ct. 1569 (1997); *see also* Vango Media, Inc. v. City of New York, 829 F. Supp. 572 (S.D.N.Y. 1993), *aff'd*, 34 F.3d 68 (2d Cir. 1994).

[52] *See, e.g.*, Vango Media, *supra* note 51.

[53] *See* Penn Advertising v. Schmoke, 101 F.3d 332 (4th Cir.), *cert. denied*, 117 S. Ct. 1569 (1997); *see also Efforts Grow to Curb Ads for Tobacco*, N.Y. TIMES, May 28, 1997, at A15 (reporting that city councils in Los Angeles, Harrisburg, PA, Warren, MI, and New York City have introduced ordinances modeled on the Baltimore billboard restriction: "The Court's decision not to hear a challenge of Baltimore's ordinance has been seen by cities around the country as a legal green light.").

[54] 15 U.S.C. § 1334(b) (1994); *see also* Vango Media, *supra* note 51, at 579.

[55] *See* Penn Advertising, *supra* note 51, at 1417.

[56] *See* PROPOSED RESOLUTION, tit. I-A at 8–9.

omission could be construed to deprive states and localities of existing authority to go beyond the advertising and marketing limits set by the Proposed Settlement, particularly since an express anti-preemption provision is attached to the youth access restrictions in Title I-C. Thus, even if the proposed restrictions appear impressive today (e.g., a total ban on billboard advertising), cities, towns, and states could be powerless to address any loosening of these limits or any new issues that may arise as the tobacco industry reconfigures its marketing and advertising strategies and practices.

Furthermore, some of the advertising-related restrictions, particularly the point of sale provisions (discussed in Part II.D, *infra*), probably do not go far enough for many localities seeking to reduce youth sales.

Concern about the absence of anti-preemption language in the Title I-A marketing and advertising restrictions section is heightened because the anti-preemption language in Title V-B(1) does not explicitly include advertising, marketing, and promotion. Arguably, the preemption protections for "state and local government authority to take additional tobacco control measures that further restrict or eliminate the product's use by and accessibility to minors,"[57] and for "the legal authority of a state or local government to further regulate, restrict or eliminate the sale or distribution of tobacco products"[58] could encompass advertising and marketing restrictions. Such an interpretation would be consistent with the introduction to Title V-B(1)'s youth access anti-preemption provision, which states: "While setting a federal 'floor' for tobacco control measures in many substantive areas, this legislation preserves, *to the maximum extent*, state and local authority . . . ."[59]

Nonetheless, silence on the subject of advertising and preemption does not bode well for states and localities, particularly in view of the express preservation of federal preemption as set forth in Title V-B(2):

> Current federal law providing for national uniformity of warning labels, packaging and labeling requirements, and advertising and promotion requirements *related to tobacco and health*, is preserved, except that this legislation gives the

---

[57] PROPOSED RESOLUTION, tit. V-B(1) at 32.
[58] *Id.*
[59] *Id.* (emphasis added).

> FDA express authority to require changes in the language of the warnings, subject to the standard requirement that it provide public notice and a hearing opportunity prior to making such changes.[60]

Furthermore, the Title I-B restrictions on warnings, labeling, and packaging are also silent on the issue of preemption.[61]

The Proposed Settlement provides a unique opportunity to clarify and contain the reach of preemption clauses in the FCLAA and Comprehensive Smokeless Tobacco Health Education Act[62] to their intended sphere. Specifically, we propose that federal preemption be explicitly limited to uniform warnings, labeling and packaging requirements, and related advertising which by its nature crosses state lines (e.g., magazines with national circulation that do not sell advertising on a statewide or local basis). Tobacco advertising in state and local media, such as billboards, signs, taxi-cab rooftops, as well as point of sale advertising, should be subject to state and local regulation, within constitutional bounds.

At a minimum, the Proposed Settlement should not expand the scope of federal preemption. For example, if the underlined language of Title V-B(2) of the Proposed Settlement were adopted verbatim, the scope of preemption could be broadened. "Advertising and promotion *related to tobacco and health*"[63] appears to be a more elastic version of the current FCLAA provision, which preempts "requirement[s] . . . *based on smoking and health* . . . imposed under State law with respect to the advertising or promotion . . . ."[64]

D. *Point of Sale Advertising, Marketing, and Promotion*

Localities interested in curtailing youth tobacco product sales have developed and enforced a variety of stringent, effective point of sale restrictions. Indeed, many of the youth access point of sale restrictions adopted by the FDA Rule and incorporated

---

[60] *Id.* at 33 (emphasis added).

[61] *See* PROPOSED RESOLUTION, tit. I-B at 10–11.

[62] 15 U.S.C. §§ 4401–4408 (1994).

[63] *See* PROPOSED RESOLUTION, tit. V-B(2) at 33.

[64] *See* 15 U.S.C. § 1334(b) (1994) (emphasis added); *see also* Philip Morris v. Harshbarger, 122 F.3d 58, 74 (1st Cir. 1997), *citing* Vango Media, Inc. v. City of New York, 34 F.3d 68, 70 (2d Cir. 1994) (for a brief discussion of whether the phrase "with respect to" is synonymous with "relating to").

into the Proposed Settlement, such as vending machine limits[65] and bans on self-service displays,[66] were first adopted and tested at the local level.[67]

The Proposed Settlement expresses an intent to allow states and localities to continue to develop innovative youth access measures that go beyond those included in the proposal.[68] Nonetheless, the point of sale advertising restrictions, an issue of great concern to localities, are not explicitly recognized as ripe for local action or specifically protected from the reach of federal preemption.

First, Title I-A, which delineates a series of advertising and marketing restrictions, is silent on the subject of state and local regulatory authority. With regard to point of sale advertising, the Proposed Settlement states that it would: "Establish nationwide restrictions in non-adult-only facilities on point of sale advertising *with a view toward minimizing the impact of such advertising on minors*.[69] These provisions, which are detailed in Appendix VII, restrict point of sale advertising that was otherwise permitted in retail establishments by the FDA rule."[70]

Similarly, Appendix VII, which delineates limits on point of sale advertising, does not contain any express anti-preemption language.[71] Considering the Proposed Settlement's highly detailed provisions on this topic, and in the absence of any express anti-preemption language, local efforts to regulate point of sale advertising are likely to be challenged by tobacco industry preemption claims.

The Proposed Settlement's point of sale advertising restrictions probably fall far short of the limits many communities would want in order to discourage youth sales. Specifically, although the point of sale advertising restrictions purport to allow signs only in adult-only stores, the exceptions are quite broad. First, each tobacco manufacturer is permitted to have "two separate point of sale advertisements in or at each location

---

[65] *See* 21 C.F.R. § 897.16(c) (1997); PROPOSED RESOLUTION, tit. I-C at 11.

[66] *See* 21 C.F.R. § 897.16(c) (1997); PROPOSED RESOLUTION, tit. I-C at 12. The self-service display limitation contained in the Proposed Resolution exceeds the requirements of the FDA Rule.

[67] *See, e.g.*, JACOBSON & WASSERMAN, *supra* note 6, at 15 (describing a wide array of local point of sale restrictions).

[68] *See* discussion of Title I-A and Title V-B(1) anti-preemption provisions in Part II.A, *supra*.

[69] PROPOSED RESOLUTION, tit. I-A at 9 (emphasis added).

[70] *See* PROPOSED RESOLUTION, app. VII at 63.

[71] *See id.*

at which tobacco products are offered for sale."[72] Second, a tobacco manufacturer with twenty-five percent of market share is allowed to have an additional point of sale advertising sign.[73] Third, a retailer "may have one sign for its own or its wholesaler's contracted house retailer or private label brand."[74] Thus, under the Settlement proposal, a retail establishment, regardless of its size or location, could have ten to twelve point of sale advertisements for tobacco products.[75]

Moreover, localities may not be satisfied with the specific size and location requirements for point of sale advertising under the Proposed Settlement. For example, individual signs as large as 576 square inches, or four square feet, are permitted.[76] In addition, although signs are not allowed "to be attached to nor located within two feet of any fixture on which candy is displayed for sale,"[77] there may be other store areas (e.g., school supplies, other snack food, toys and games) which localities would want to declare off-limits for tobacco advertising.

The Proposed Settlement's weak point of sale advertising restrictions and its lack of anti-preemption language are inconsistent with the expression of concern about youth sales in the Preamble and Title I-A[78] as well as with the clear intent to preserve state and local power to adopt more restrictive youth access regulations in Title I-C.[79] Surely, state and local power to further restrict point of sale advertising in retail establishments patronized by youth is an important tool for localities interested in adopting regulations to "restrict or eliminate the product's use by and accessibility to minors,"[80] or to "eliminate the sale or distribution of tobacco products,"[81] areas which receive anti-preemption protection under the Proposed Settlement.

The failure of the Proposed Settlement expressly to preserve state and local power to adopt more stringent point of sale advertising restrictions is a serious flaw. Although this omission is part of the larger problem of treating advertising and marketing

---

[72] *See id.*
[73] *See id.*
[74] *Id.*
[75] *See id.*
[76] *See id.*
[77] *Id.*
[78] *See* PROPOSED RESOLUTION, Preamble at 2–5; PROPOSED RESOLUTION, tit. I-A at 8–9.
[79] *See* PROPOSED RESOLUTION, tit. I-C at 11–13.
[80] PROPOSED RESOLUTION, tit. V-B(1) at 32.
[81] *Id.*

restrictions differently from youth access and ETS regulations, it is particularly troubling because it limits the ability of states and localities to adopt effective point of sale restrictions designed to curb youth access. These types of restrictions are especially ripe for local, as opposed to preemptive federal, action because they affect a neighborhood's character and reflect a community's commitment to its youth.

Arbitrary distinctions between advertising and youth access measures do not align with the Proposed Settlement's professed goal of setting a federal floor while permitting local communities to continue to exercise leadership in crafting their own tobacco control restrictions, particularly those intended to curtail youth sales.[82]

E. *State Ingredients Disclosure Laws*

Recognizing that the current federal requirements for reporting information about non-tobacco ingredients in tobacco products have been severely criticized, the Proposed Settlement includes a superseding section expanding those requirements.[83] Dissatisfaction with the federal reporting system has also sparked state activism. Massachusetts, Minnesota, and Texas recently enacted their own ingredients disclosure statutes,[84] and at least eight other states filed tobacco ingredients bills during the 1997 legislative session.[85]

Essentially, the new federal system would require manufacturers to supply the FDA with a list of ingredients, other than tobacco or water, "which are added by the manufacturer to the tobacco, paper or filter of the tobacco product by brand and by quantity in each brand."[86] For each such ingredient, the manufacturer would have to indicate whether it believes the ingredient is exempt from public disclosure under the legislation.[87] Under

---

[82] *See* PROPOSED RESOLUTION, tit. I-C at 11; PROPOSED RESOLUTION, tit. V-B(1) at 32.

[83] *See* PROPOSED RESOLUTION, tit. I-F at 19–20; *see also* 15 U.S.C. § 1335a (1994) (establishing ingredient reporting requirements).

[84] *See* MASS. GEN. LAWS ch. 94, § 307B (1996); MINN. STAT. § 461.17 (1997); H.B. 119, 75th Leg., Reg. Sess. (Tex. 1997).

[85] *See* H.B. 1091, 61st Leg., 1st Reg. Sess. (Colo. 1997); S.B. 40, 139th Leg. (Del. 1997); S.B. 11989 (Fla. 1997); H.B. 1043, 90th Leg. (Ill. 1997); H.B. 115, 77th Leg., 1st Sess. (Iowa 1997); H.B. 147, Reg. Sess. (N.H. 1997); S.B. 2622, 220th Leg. (N.Y. 1997); A.B. 5658, 220th Leg. (N.Y. 1997); H.B. 402, 52d Leg. (Utah 1997).

[86] PROPOSED RESOLUTION, tit. I-F at 19.

[87] *See id.*

the Proposed Settlement, manufacturers would have to "disclose ingredient information to the public under regulations comparable to what current federal law requires for food products, reflecting the intended conditions of use."[88]

Manufacturers, however, would have five years following the passage of federal ingredients legislation to submit safety assessments for each ingredient.[89] During that time the public would continue to bear unknown risks. The safety standard may also be problematic in practice. Safety assessments must document, "based on the best available evidence, that there is a reasonable certainty in the minds of competent scientists that the ingredient (up to a specified amount) *is not harmful under the intended conditions of use*."[90] The FDA would have to adopt applicable regulations within one year,[91] although debate about a meaningful definition of "intended conditions of use" is likely to be contentious and time consuming. Furthermore, the FDA would review the ingredients' safety assessments and decide whether to approve or disapprove of its safety within ninety days.[92] If the FDA does not take action, the ingredient is approved.[93]

In addition to the five-year wait for safety assessments, the Proposed Settlement provides, "[d]uring an initial 5-year period, each ingredient that would be exempt from disclosure under the food regime would be presumed not to be subject to disclosure unless FDA disproves its safety."[94] The Proposed Settlement also includes explicit protections, such as trade secret treatment and FOIA exempt status, for "ingredients information not otherwise subject to public disclosure."[95]

In short, while the new federal requirements may be an improvement over the current federal reporting system, the long delays, permissive substantive standards, burdens of proof, and procedures appear to afford the tobacco industry significant advantages. Furthermore, under the Proposed Settlement the states, which have recently been pursuing their own, more stringent tobacco ingredients laws, could not enforce them for a minimum

---

[88] *Id.*
[89] *See id.*
[90] *Id.* (emphasis added).
[91] *See id.*
[92] *See id.* at 19–20.
[93] *See id.* at 20.
[94] *Id.*
[95] *Id.*

of five years.[96] In discussing the ability of states to obtain exemptions from preemptions by FDA rules, the Proposed Settlement states, "Further, to ensure that FDA has an adequate opportunity to evaluate non-tobacco ingredients as described in Title I-F, *no exemption relating to ingredients may be applied for until the fifth anniversary of the effective date of the Act.*"[97]

Implementation of the Massachusetts and Minnesota ingredients disclosure laws has been delayed by lawsuits filed by the tobacco industry.[98] We believe that states dissatisfied with the current federal ingredients reporting requirements, or the new system envisaged by the Proposed Settlement, should not be preempted from adopting their own more stringent laws.

Furthermore, a provision of the Proposed Settlement's new federal ingredients requirements which appears to attempt to save existing state disclosure laws will probably have the opposite effect. The "savings provision" states:

> However, manufacturers would be required to disclose all ingredients which they *have been compelled to publicly disclose* with respect to a particular brand in order to comply with a statute or regulation (e.g., MA Ch 94 § 307B).[99]

To date, neither the 1996 Massachusetts law nor the 1997 Minnesota law has been enforced because the tobacco industry

---

[96] *See* PROPOSED RESOLUTION, tit. V-B(2) at 33.

[97] *Id.* (emphasis added).

[98] *See, e.g.*, Philip Morris Inc. v. Harshbarger, 122 F.3d 58 (1st Cir. 1997). The First Circuit affirmed the federal district court's ruling that the Massachusetts tobacco ingredients disclosure law is not preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331-1341 (1994)) or the Comprehensive Smokeless Tobacco Health Education Act (15 U.S.C. §§ 4401-4408 (1994)). *See id.* at 61. However, industry constitutional claims that the Massachusetts tobacco ingredients law violates the commerce clause, the full faith and credit clause, and the takings clause have not been decided. *See* Philip Morris v. Harshbarger, 957 F. Supp. 327 (D. Mass. 1997); *see also* Humphrey v. Philip Morris Incorporated, CA 97-1317 (D. Minn. 1997). The industry filed suit challenging the Minnesota statute hours after the governor signed the bill. OFFICE OF THE ATTORNEY GENERAL, STATE OF MINNESOTA, RECENT DEVELOPMENTS IN MINNESOTA'S TOBACCO WARS (Nov. 1997). The case, however, was dismissed at the industry's request on Oct. 27, 1997. *See id.* "RJR offered two explanations for their change of heart. According to their lawyers, Reynolds believes that under the June 20th bailout deal, Congress will resolve the issue of ingredients disclosure." *Id.* Reynolds also stated that its suit was premature because the Minnesota Health Department will not require ingredients disclosure reports until mid-1998. *See id.* The Minnesota Attorney General's office observed that there may have been other reasons for withdrawing the suit, including, inter alia, the recent First Circuit decision upholding the Massachusetts statute and industry concerns about negative media attention while the Minnesota Attorney General case proceeds to trial and Congress considers national settlement legislation. *See id.*

[99] PROPOSED RESOLUTION, tit. I-F at 20 (emphasis added).

has delayed implementation by challenging them on, *inter alia*, preemption grounds.[100] Furthermore, public disclosure is not automatic under either state statute.[101] The Massachusetts statute, for example, only permits public disclosure if the state department of public health "determines that there is a reasonable scientific basis for concluding that the availability of such information could reduce risks to public health" and after the department requests and receives advice from the state attorney general "that such disclosure would not constitute an unconstitutional taking."[102]

Thus, tobacco industry court challenges and protections built into state statutes to ensure that ingredients information is not improperly disclosed have and may continue to delay public release of ingredients information under state laws. As a result, no tobacco manufacturer may "have been compelled" to publicly disclose ingredients information under any state law before the Proposed Settlement is enacted as federal law.[103] In that case, the apparent effect of the supposed "savings" clause is to render even already enacted state statutes inoperative.

Trading off state authority to adopt and enforce ingredients reporting and disclosure laws intended to protect public health for a new federal system riddled with loopholes is another serious encroachment on state tobacco control power in an area where reform is needed.

F. *Product Development*

FDA authority to regulate tobacco product development and manufacturing is delineated in Title I-E, which categorizes tobacco products as a new subcategory of a Class II device under 21 U.S.C. § 360(c).[104] Although an analysis of the product development provisions of the Proposed Settlement is beyond the scope of this article, the agreement's anti-preemption provision purporting to permit states and localities "to adopt additional or different requirements relating to performance standards or good

---

[100] *See supra* note 98.

[101] *See* MASS. GEN. LAWS ch. 94, § 307B (1996); MINN. STAT. § 461.17 (1997).

[102] MASS. GEN. LAWS ch. 94, § 307B (1996).

[103] *See* PROPOSED RESOLUTION, tit. I-F at 20. The tobacco industry apparently assumes that such legislation will be enacted before ingredients disclosure reports are required in Minnesota. *See supra* note 98.

[104] *See* PROPOSED RESOLUTION, tit. I-E at 13–19.

manufacturing practices"[105] merits mention here. This extremely limited grant of authority is presented as an exemption for which states and localities may apply,[106] a process the FDA has relied on in the past to provide some preemption protection.[107]

The burden of proof, however, for states and localities applying for an exemption from preemption by FDA performance standards[108] or good manufacturing practice standards[109] is quite high, because exemptions "may only be granted if the requirement would not unduly burden interstate commerce."[110] Given the language in the Preamble declaring that "[t]he sale, distribution, marketing, advertising and use of tobacco products are activities substantially affecting interstate commerce,"[111] it may be impossible for states or localities to obtain such an exemption.

In short, this provision is unlikely to provide states and localities with an effective, meaningful opportunity to adopt their own performance standards or good manufacturing practices.

III. Enforcement Authority

The preceding section discussed the importance of preserving and enhancing the ability of local and state governments to craft their own provisions regulating tobacco products and their use. Perhaps even more important to the success of tobacco control efforts than such regulatory power is the ability of local and state governments to impose meaningful sanctions for the enforcement of standards of conduct relating to the sale and use of tobacco products.[112] Whether the operative standards of conduct are established by federal, state, or local law, no one expects—or desires—federal agents to take on the task of day-to-day enforcement of the applicable rules. That responsibility will inevi-

---

[105] Proposed Resolution, tit. V-B(2) at 33.

[106] *See id.*

[107] *See* 21 U.S.C. § 360k(b) (1994); 61 Fed. Reg. 57,685–57,687 (1996) ("Applications for Exemption from Preemption of State and Local Requirements Pertaining to the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents.").

[108] *See* Proposed Resolution, tit. I-E(5) at 15–18.

[109] *See* Proposed Resolution, tit. I-E(6) at 18.

[110] Proposed Resolution, tit. V-B(2) at 33.

[111] Proposed Resolution, Preamble at 3.

[112] *See* Jacobson & Wasserman, *supra* note 6, at 94 ("Local enforcement is a critical ingredient to the success of virtually any tobacco control effort.").

tably, and appropriately, fall in large part to local public health and public safety personnel and to state and local enforcement proceedings.

As with local and state regulatory powers, the Proposed Settlement generally reflects a recognition of the importance of local and state enforcement authority. In particular, Title II of the Proposed Settlement places central responsibility on the states to enforce constraints on youth access,[113] and Appendix II expressly recognizes the role of state and local penalties for retailer misconduct.[114] But as with local and state regulatory powers, the details of the Proposed Settlement raise a number of significant concerns about its overall impact on the ability of states and municipalities to play this critical role effectively. In the following subsections, we will address several specific concerns.

A. *Youth Access Enforcement Mandates*

Title II of the Proposed Settlement "goes well beyond"[115] the provisions of existing law—particularly the Synar Amendment[116]—in eliciting state enforcement of the proposal's youth access provisions. The Synar Amendment, enacted in 1992, requires that every state, as a condition for receiving federal substance abuse block grants, must have in place a law forbidding sales of tobacco products to anyone under the age of eighteen and must commit to a program for active enforcement of the prohibition, including random, unannounced compliance checks on retailers.[117]

The Proposed Settlement extends these requirements by stipulating that the state compliance checks, which would be funded with monies provided by the tobacco companies under the proposal, must occur at least monthly, that they must be geographically dispersed throughout the state, and that each state must conduct at least 250 checks annually for each million residents in the state.[118] In addition, the states would be required to meet performance targets, measured by the percentage of compliance

---

[113] *See* PROPOSED RESOLUTION, tit. II at 25; PROPOSED RESOLUTION, app. VI at 58–62.
[114] *See* PROPOSED RESOLUTION, app. II at 44–45.
[115] PROPOSED RESOLUTION, tit. II at 25.
[116] 42 U.S.C. § 300x-26 (1994).
[117] *See id.*; *see also* 45 C.F.R. § 96.130 (1996) (detailing regulatory requirements for state compliance with the Synar Amendment).
[118] *See* PROPOSED RESOLUTION, app. VI at 58.

checks in which retailers refused to sell to minors, rising from 75% by the fifth year after enactment of the proposal to 90% by the tenth year and thereafter.[119] A state's failure to meet these targets would result in the loss of a portion of the funds it was entitled to receive under the Settlement for state health care expenditures. Any withheld funds would be distributed to the states with the most successful youth-access track records.[120]

In general, these provisions of the Proposed Settlement offer constructive support for an important field of state and local enforcement activity. We note, however, two concerns. First, compliance checks are most commonly performed by local public health or public safety officials, not by state-level agencies or officers.[121] The Proposed Settlement's text, however, refers to state enforcement efforts. We assume that the Settlement provisions here, like the Synar Amendment on which they are modeled, rely on the fact that local entities can act as agents of the state and that compliance checks conducted by local officers will be counted as part of the state's compliance efforts when properly included in the state reporting called for by the Proposed Settlement. We note in this respect that the reporting requirements expressly encompass "enforcement activities undertaken by the state *and its political subdivisions* . . . ,"[122] although a more explicit acknowledgment of the primary local role in these enforcement efforts would be desirable.

Second, in contrast to the Synar Amendment which only imposes federal obligations on the states as a condition of their receipt of certain federal funds, the Proposed Settlement appears intended to impose absolute mandates on the states.[123] If this is indeed the proposal's intent, recent Supreme Court rulings raise serious doubts concerning the validity of such federal requirements which dictate the actions of state or local officials. In particular, in the recent case concerning the Brady Handgun Violence Prevention Act's requirements for local law enforcement officers to perform criminal record checks, the Court concluded that "[t]he Federal Government may neither issue direc-

---

[119] *See id.* at 59–60.

[120] *See id.* at 60.

[121] *See* NO SALE, *supra* note 5, at 12, 36.

[122] PROPOSED RESOLUTION, app. VI at 58 (emphasis added).

[123] *See, e.g.*, PROPOSED RESOLUTION, tit. II at 25 ("The proposed Act *requires* the several States . . . . These enforcement *obligations* . . . .") (emphasis added); PROPOSED RESOLUTION, app. VI at 58 ("the proposed Act *requires* the following . . . States *must* . . . ; States *must* . . . .") (emphasis added).

tives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[124]

To keep this element of the Proposed Settlement within constitutional bounds, it should instead follow the Synar Amendment's lead by setting the enforcement mandates, not as an absolute duty of the States, but rather as a condition for the receipt of funds which States are otherwise entitled to receive under the proposal for state health care expenditures.[125] We note that this may be the Proposed Settlement's intent, since the express sanction for failure to comply with the mandate is the withholding of such funds.[126] At the least, clarification of this point is needed.

B. *Licensing of Retailers*

Licensing of local retailers of tobacco products provides one of the most effective means for localities and states to monitor and enforce compliance with youth access provisions and other regulations affecting tobacco retailing. Licensing systems assist local enforcement officers in identifying the entire universe of retailers, and the threat of license suspension or revocation gives retailers a powerful economic incentive for scrupulous adherence to regulatory requirements.[127]

Licensing systems can be established and implemented by either states or localities, but experience has shown them to be particularly effective at the local level. As the Working Group of Attorneys General observed in their 1994 report on youth access issues:

> In some states it may be appropriate for this licensing system to be run by the state. However, where local ordinances are already in place, and where commitment to enforcement is greatest at the local level, it may be more appropriate for the state law to require local licensing systems instead and to specify the minimum essential elements of such a system,

---

[124] Printz v. United States, 117 S. Ct. 2365, 2384 (1997); *see also* New York v. United States, 505 U.S. 144 (1992).

[125] *See, e.g.*, New York v. United States, 505 U.S. at 166–67 (1992) (discussing Congress's power to impose requirements on states as conditions for receipt of related federal funds).

[126] *See* PROPOSED RESOLUTION, app. VI at 60 (detailing "Reduction of Money Allocated to State Not Meeting Performance Targets").

[127] *See* NO SALE, *supra* note 5, at 37.

> while allowing cities or counties to enact stronger protection.[128]

In a context in which local authorities commonly establish more stringent regulatory standards than those imposed at the state or federal level, and in which local officers have the primary responsibility for monitoring compliance, it is particularly important that localities retain the authority to suspend and revoke licenses for violations of local standards.

Title I-D of the Proposed Settlement provides for a licensing regime for tobacco retailers,[129] and Appendix II contains provisions relating to license revocations for retailer misconduct.[130] These provisions, however, are unclear about several key issues and leave significant questions about whether these portions of the Proposed Settlement adequately recognize local and state needs.

1. Division of Responsibilities

First, Title I-D is unclear about the responsibilities of the different levels of government in establishing the operative rules for license issuance, suspension, or revocation. The Preamble to the Settlement describes a "State-administered retail licensing system,"[131] and Title I-D states, "[t]he legislation would mandate minimum federal standards for a retail licensing program that the federal government and state and local authorities would enforce . . . ."[132] Appendix II refers to "any violation of the provisions of the State licensing laws regarding sales to minors."[133] But beyond these cryptic references, there is no clarification of the scope of federal, state, and local responsibility.

It appears that the drafters envisage a structure in which federal law establishes certain standards for licensing systems, but that the basic responsibility for the licensing system resides at the state level. These provisions need clarification, and they should be modified to accommodate an explicit and significant local role in the licensing process. We believe the most effective approach here is for the states to delegate primary authority for

---

[128] *Id.* at 37–38.
[129] *See* PROPOSED RESOLUTION, tit. I-D at 12–13.
[130] *See* PROPOSED RESOLUTION, app. II at 44–45.
[131] PROPOSED RESOLUTION, Preamble at 2.
[132] PROPOSED RESOLUTION, tit. I-D at 12.
[133] PROPOSED RESOLUTION, app. II at 44.

the licensing scheme to local governments, along with the authority to collect license fees to cover associated administrative costs.[134]

2. Grounds for Suspension

The second critical question concerns the terms for suspension or revocation of licenses. The Proposed Settlement expressly conditions licensing upon compliance with the provisions of the federal legislation contemplated by the proposal, and provides for suspension or revocation for "certain violations" detailed in Appendix II.[135] Appendix II, in turn, provides for suspensions or revocations for "any violation of the provisions of the State licensing laws regarding sales to minors."[136] Nowhere, however, does the Proposed Settlement appear to allow for license penalties for violations of local requirements, even though the proposal purports to allow for local youth access restrictions that are stricter than federal or state law. Nor does it appear to allow for license revocation or suspension for violations of state or local (or, for that matter, federal) laws concerning matters other than youth access, such as ETS rules or point of sale regulations.

From the language of the Preamble and Appendix II of the Proposed Settlement, it appears that the licensing scheme was envisioned as serving solely to buttress the proposal's youth-access restrictions, and that suspension and revocation were deliberately restricted to enforcement of the youth-access provisions.[137] Indeed, the Proposed Settlement appears to forbid states (and localities as well) from enacting broader penalty provisions under their licensing regimes than those specified in the proposed federal statute.[138] Such a restrictive approach to the range of conduct that can be penalized through the licensing system seriously limits the utility of the licensing system and also significantly undermines the authority of state and local substantive

---

[134] *Cf.* NO SALE, *supra* note 5, at 38 (recommending license fees "sufficient to support an effective compliance program").

[135] *See* PROPOSED RESOLUTION, tit. I-D at 12.

[136] PROPOSED RESOLUTION, app. II at 44.

[137] *See* PROPOSED RESOLUTION, Preamble at 2 ("an aggressive federal enforcement program, including a State-administered retail licensing system, to stop minors from obtaining tobacco products . . . ."); PROPOSED RESOLUTION, app. II at 44 ("civil sanctions . . . for any violation of the provisions of the State licensing laws regarding sales to minors").

[138] *See* PROPOSED RESOLUTION, app. II at 45 ("Each state must enact a statutory or regulatory enforcement scheme that provides *substantially similar penalties* to the minimum federal standards for a retail licensing program.") (emphasis added).

regulations by cutting them adrift from this fundamental enforcement mechanism.

3. Duration of Suspensions

Similarly, Appendix II provides a detailed schedule of the maximum duration of license suspensions or revocations that can be imposed for violations of those provisions that are enforceable through this mechanism. The sanction for a first offense "shall not exceed" a three-day suspension (plus a possible fine); for a second offense within two years, not more than a seven-day suspension (plus a possible fine); and so forth, up to a permanent license revocation for a tenth offense within two years.[139] In addition, the Proposed Settlement stipulates that any license suspensions or revocations be applied "on a site-by-site basis,"[140] thereby protecting multi-site operations from sanctions commensurate with the scale of their business activities. Considered together with the requirement that state enforcement schemes must provide penalties "substantially similar . . . to the minimum federal standards,"[141] these provisions appear to preempt states or localities from imposing more severe licensing sanctions. This flies in the face of the Proposed Settlement's claims to support more rigorous state and local regulation of youth access and of tobacco sale and distribution.[142]

4. Federal Mandates

Finally, as with the youth-access compliance check requirements discussed earlier, if the licensing scheme is designed as a federal mandate dictating state or local governmental activities, serious constitutional concerns arise.[143] This final concern, however, could be readily addressed by re-framing the federal standards either as conditions for the receipt of funding, or as a

---

[139] *See* PROPOSED RESOLUTION, app. II at 44.

[140] PROPOSED RESOLUTION, tit. I-D at 12; PROPOSED RESOLUTION app. II at 44.

[141] PROPOSED RESOLUTION, app. II at 45.

[142] *See* PROPOSED RESOLUTION, tit. V-B at 32 ("[T]his legislation preserves, to the maximum extent, state and local government authority [to restrict tobacco] use by and accessibility to minors . . . . The legal authority of a state or local government to further regulate, restrict or eliminate the sale or distribution of tobacco products . . . also remains unchanged.").

[143] *See supra* text accompanying notes 123–124.

federal licensing program that would operate in the absence of a state or local program satisfying federal criteria.[144]

C. *Criminal and Civil Penalties*

Aside from license suspensions and revocations, the enforcement of regulatory requirements—whether imposed by federal, state, or local law, and whether imposed on retailers, businesses subject to ETS rules, or others involved in the marketing and use of tobacco—depends on the availability of meaningful criminal and civil penalties for violators. The Proposed Settlement contains provisions that authorize state enforcement actions and define the scope of state-imposed criminal and civil penalties. Both sets of provisions, however, seem to apply only to narrowly circumscribed classes of situations, and the overall thrust of these provisions is more restrictive than permissive. The Proposed Settlement does not deal explicitly with the issue of local or state sanctions for activities outside the scope of these narrow provisions, but the implications of the text's silence are ominous.

1. Authorization of State Enforcement Actions

Title III of the Proposed Settlement contains two sets of provisions relating to state enforcement actions (although neither appears to make any allowance for local efforts). Title III-A, in addition to its provisions concerning federal enforcement and federal penalties for violations of the Settlement legislation, contains several provisions authorizing and defining limits upon "State enforcement actions."[145] Title III-B supplements these provisions with a procedure for state proceedings to enforce the consent decrees that the Settlement contemplates arising from state tobacco litigation.[146] But these consent decree provisions are carefully restricted to grant the states nothing more than the ability to seek injunctive relief to enforce consent decree terms that precisely mirror the terms of the Proposed Settlement.[147] Thus, our attention will focus on the provisions of Title III-A.

---

[144] *See* New York v. United States, 505 U.S. 144, 167–68 (1992) (discussing Congress's power to establish federal regulatory standards that apply in any state which fails to adopt its own regulatory regime satisfying federal criteria).

[145] PROPOSED RESOLUTION, tit. III-A at 26.

[146] *See* PROPOSED RESOLUTION, tit. III-B at 27–28.

[147] *See id.* ("Certain terms of the agreement will also be reiterated in consent decrees

The provisions of Title III-A concerning state enforcement actions seem pulled by two opposing forces. The primary focus is apparently to preclude the states from using their enforcement powers to impose on the parties to the Proposed Settlement any liabilities greater than those provided for in the proposed federal legislation. Thus, the text provides that "State enforcement actions . . . could not impose obligations or requirements beyond those imposed by the legislation . . . and would be limited to the civil and criminal penalties established by the legislation."[148] "[D]uplicative penalties" are expressly prohibited.[149] These provisions, designed to preserve the primacy of the federal legislation, are reinforced by a right to remove "State enforcement proceedings under the Act (or predicated on conduct violating the Act)" to federal court.[150]

At the same time, at certain points the language reflects an intent to preserve some autonomous authority for state enforcement efforts. The discussion of state enforcement actions ends with the assurance that "[n]othing in the Act precludes a State from enforcing its laws in the ordinary fashion as to *matters not covered by the Act* or Protocol."[151] The explicit bar on actions that seek to go beyond the requirements of the federal legislation does not apply "where the legislation does not specifically preempt additional state-law obligations."[152] Additionally, the right of removal to federal court is inapplicable where the proceeding is "exclusively local in nature."[153]

The practical effect of these rather convoluted provisions is far from self-evident. As an initial problem, the range of potential state enforcement actions intended to be covered by Title III-A is uncertain. Although the text is less than explicit, Title III-A's provisions, like those of Title III-B, appear intended to apply primarily to state enforcement actions directed against the tobacco companies and other defendants in the state suits who are parties to the Settlement.[154] But the scope of these provisions'

. . . . These consent decrees will be identical to, and will reiterate, the terms of the agreement with respect to [several listed topics] . . . . The consent decrees will provide that their terms are to be construed in conformity with the Act . . . . State proceedings to enforce the consent decrees may seek injunctive relief only . . . .").

[148] PROPOSED RESOLUTION, tit. III-A at 26.

[149] *See id.*

[150] *Id.*

[151] *Id.* (emphasis added).

[152] *Id.*

[153] *Id.*

[154] The uncertainties about the intended scope of the provisions limiting penalties and

potential application to state enforcement actions directed against, for instance, retailers or advertisers, or other violators of any of the numerous provisions of the Proposed Settlement, remains unclear and problematic.

The range of regulatory requirements that can be enforced through state enforcement actions is equally obscure. Much of the language used in Title III-A to permit state enforcement authority is disturbingly vague. Do "matters not covered by the Act"[155] refer only to state law provisions unrelated to the issues addressed in the Act (i.e., unrelated to tobacco control), or is it directed more broadly? Can a proceeding relating to tobacco marketing or use ever be "exclusively local in nature"[156] in light of the Proposed Settlement's express findings concerning the interstate character of the tobacco business?[157] The permission for state actions "where the legislation does not specifically preempt additional state-law obligations,"[158] by contrast, may seem relatively concrete, and would appear to authorize state enforcement actions to enforce stricter state or local provisions concerning, inter alia, youth access and ETS: topics that the agreement specifically asserts are not preempted.[159] But even this phrase's scope is far from clear in the context of a Settlement that nowhere states which additional state-law obligations are "specifically preempted." As a result, the upshot of Title III-A is to provide defendants in most state (or local) enforcement actions with valuable ammunition for challenges to the state's authority to bring the actions.

Finally, we note in passing that the provision for removal of enforcement proceedings to the federal courts marks a deep and extraordinary incursion on the ordinary authority of state courts to provide the venue for state enforcement actions.[160]

---

enforcement are among the many conceptual difficulties that result from the peculiarity of using broad federal legislation as the tool to settle litigation between a limited class of parties. Title III-C's separate provisions providing sanctions for "non-participating companies," PROPOSED RESOLUTION, tit. III-C at 28–29, reinforce the impression that the provisions of Title III-A are intended to apply only to "participating" companies.

[155] PROPOSED RESOLUTION, tit. III-A at 26.

[156] *Id.*

[157] *See* PROPOSED RESOLUTION, Preamble at 3 ("The sale, distribution, marketing, advertising and use of tobacco products are activities substantially affecting interstate commerce.").

[158] PROPOSED RESOLUTION, tit. III-A at 26.

[159] *See* PROPOSED RESOLUTION, tit. V-B at 32.

[160] The serious constitutional and comity concerns raised by this aspect of Title III-A are addressed in detail in PARMET, *supra* note 28.

2. Restrictions on Penalties

In those areas where state and local enforcement actions remain permissible, difficult questions arise about the range of criminal and civil penalties that can be applied, particularly in light of the stipulation that "State enforcement actions" are "limited to the civil and criminal penalties established by the legislation."[161] The Proposed Settlement expressly establishes a set of federal civil and criminal penalties for violations of the federal provisions to be included in the legislation.[162] Yet the proposal's explicit provisions for state penalties—while far from clear and apparently intended to apply only to a few narrow classes of situations—seem highly restrictive. Moreover, beyond the few limited contexts for which specific state penalties are identified, the Proposed Settlement makes no reference to state and local (or, for that matter, federal) penalties, either criminal or civil, for violations of state or local regulatory requirements that exceed the requirements of the federal legislation, which is an omission whose significance is uncertain but troubling.

As we discussed earlier, Appendix II sets forth a schedule of criminal and civil penalties for violations of certain provisions of the Settlement.[163] With regard to criminal penalties, however, the only conduct for which Appendix II provides criminal sanctions is "the sale of tobacco products to consumers by an unlicensed seller."[164] While Appendix II expressly authorizes states and localities to provide for more severe criminal penalties,[165] it appears that such penalties would likewise only apply to unlicensed sales. The Proposed Settlement seemingly makes no allowance for state or local criminal penalties for any other violations.

On the civil side, Appendix II sets forth a specific range of financial penalties, in addition to the license suspensions and revocations discussed above. Again, these sanctions apply only to violations of "State licensing laws regarding sales to minors."[166] As noted earlier, Appendix II requires that state law

---

[161] PROPOSED RESOLUTION, tit. III-A at 26.

[162] *See id.* (listing as applicable civil and criminal penalties under the Food, Drug and Cosmetic Act and under Title 18 of the U.S. Code, as well as civil penalties for violations of requirements for disclosures to the FDA).

[163] *See* PROPOSED RESOLUTION, app. II at 44–45.

[164] *Id.* at 44.

[165] *See id.* ("Any state or local jurisdiction may provide by Statute or code more severe penalties.")

[166] *Id.*

must provide for "substantially similar penalties,"[167] thereby apparently precluding more stringent state or local civil sanctions for the violations addressed in the Appendix, and leaving unclear the authority of states and localities to impose civil sanctions for violations other than those relating to sales to minors.

Finally, as noted above, Title III-A of the Settlement provides, in general terms, for civil and criminal penalties, modeled on the Federal Food, Drug and Cosmetic Act and Title 18 of the U.S. Code, for violations of the federal legislation. But it is less than clear whether these are intended to constitute additional penalties "established by the legislation" which could be imposed in state enforcement actions[168] or whether these sanctions, like most federal penalties, would be exclusively administered by the FDA and other federal agencies.

Our conclusion is that the present language of Title III-A will pose serious obstacles for state and local efforts to enforce state and local tobacco control provisions that extend beyond the specific terms of the Settlement, and for state and local efforts to impose criminal or civil penalties other than the narrow ones expressly authorized by Appendix II. These restrictions will sharply limit the capacity of state and local officials to initiate aggressive enforcement efforts, and will severely undermine the efficacy of any state or local regulations that attempt to provide protections greater than those afforded federally. The provisions of Title III-A and Appendix II must be substantially revised to ensure the ability of states and localities to impose meaningful civil and criminal penalties for violations of state and local tobacco control measures.

D. *State Consumer Protection Actions*

In addition to specific state and local regulation of tobacco marketing and use, state consumer protection legislation currently provides an important body of law that may be used to constrain the marketing and sale of tobacco products. Moreover, state consumer protection statutes commonly grant wide investigative, remedial, and enforcement powers to state officials: typically, state attorneys general.[169] For these reasons, consumer

---

[167] *Id.* at 45.

[168] *See* PROPOSED RESOLUTION, tit. III-A at 26 ("State enforcement actions . . . would be limited to the civil and criminal penalties established by the legislation . . . .").

[169] *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GEN-

protection laws have proven to be an effective tool in combating cigarette sales to minors and mail-order distribution of free tobacco product samples.[170]

At first glance, the Proposed Settlement appears to preserve the existing authority of states to use their consumer protection laws in tobacco control efforts. Title III-A stipulates, "If conduct is subject to a particular State's consumer protection law or similar statute, such state may proceed under that law."[171] Yet the next sentence of Title III-A sweeps such consumer protection proceedings within the scope of "State enforcement actions," and thereby subjects them to the puzzling and problematic set of restrictions analyzed in detail above. Based on that analysis, the net effect of the Proposed Settlement may well be that such consumer protection proceedings are only permitted to the extent that they seek to go no further—either in terms of the conduct they forbid or in terms of the sanctions they impose—than the Settlement itself. Such restrictions severely narrow the scope, and diminish the utility, of state consumer protection actions.[172]

E. *State Court Civil Suits*

A final way in which states enforce standards of conduct relating to tobacco products is through the adjudication of civil law suits seeking damages. Many of the issues raised by the Proposed Settlement's restrictions on such private litigation go beyond the scope of this Article.[173] Nevertheless, several aspects of the proposed restrictions directly constrict the authority of

---

ERAL POWERS AND RESPONSIBILITIES 208 (1990); Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 430, 466 (1984).

[170] *See, e.g.*, TOBACCO PRODUCTS LIABILITY PROJECT, STOP CIGARETTE SALES TO KIDS 10 (1996) (describing Massachusetts Attorney General's successful settlement of 1994 consumer protection action in which three supermarket chains agreed to measures to reduce youth access to tobacco products); Kyte v. Philip Morris, Inc., 556 N.E.2d 1025, 1026 (D. Mass. 1990) (allowing consumer protection suit against tobacco manufacturer and retailer for sales to underage smokers); Alix M. Freedman, *UST Faces a Lawsuit by Massachusetts Over Free Tobacco Samples to Minors*, WALL ST. J., July 26, 1995, at B7 (describing Attorney General's consumer protection action against tobacco company for distributing free smokeless tobacco samples to minors).

[171] PROPOSED RESOLUTION, tit. III-A at 26.

[172] The issues raised by apparent restrictions on consumer protection actions under the Proposed Settlement are discussed further in JOHN RUMPLER & LAURA MCGLASHAN, ATTORNEYS' GENERAL ENFORCEMENT POWERS UNDER THE PROPOSED TOBACCO SETTLEMENT 1–6 (Tobacco Control Resource Center Working Paper No. 2, 1997).

[173] *See, e.g.*, PROPOSED RESOLUTION, tit. VIII-B–C at 39–42 (establishing limitations on scope of civil liability of settling defendants in future litigation).

state courts to adjudicate private disputes in accordance with state-determined procedures. These provisions of the Proposed Settlement raise serious questions about the propriety and constitutionality of such federally imposed constraints on the workings of the state courts. Particularly problematic in this regard are the provisions of the Proposed Settlement that purport to require any civil actions to be brought as individual claims, without use of class actions, joinder, or other means of consolidating the claims of multiple injured plaintiffs, and the provisions that seek to enforce this restriction by allowing removal to federal court of any state court action in which such consolidation is proposed.[174]

CONCLUSION

The text of the Proposed Settlement expresses an intent to preserve state, and to some extent local, authority in several important areas of tobacco control, particularly regulation of youth access and exposure to ETS. Inconsistencies and ambiguities, however, also appear in those sections. Other sections of the Proposed Settlement create new obstacles to state and local action, particularly with regard to licensing, enforcement actions, penalties, and ingredients disclosure. These limits will make it more difficult for states and localities to continue to exercise effective leadership on tobacco control. Furthermore, in some key areas (e.g., advertising, marketing and promotion, and point of sale advertising restrictions), the Proposed Settlement is silent with regard to preemption. This silence does not bode well for states and localities, particularly in view of the absence of an overarching anti-preemption provision combined with the inclusion of strong interstate commerce language.

Concerns regarding the preemptive effects of the Proposed Settlement have also been raised in the recent Report of the Advisory Committee on Tobacco Policy and Public Health, co-chaired by former Surgeon General C. Everett Koop, M.D., and former FDA Commissioner, David A. Kessler, M.D. Among its recommendations, the Report states: "Any Federal or State regulation of tobacco products should contain unambiguous non-pre-

[174] *See* PROPOSED RESOLUTION, tit. VIII-B(2) at 39. The issues raised by the restrictions on state judicial processes are discussed in PARMET, *supra* note 28.

emption provisions, expressly clarifying that higher standards of public health protection imposed by State and local governments are preserved."[175]

The Advisory Committee Report identified particular areas where state and local control should be zealously guarded, including restrictions on youth access,[176] protections against ETS,[177] regulation of ingredients,[178] and licensing and enforcement.[179] Similarly, the American Medical Association Task Force charged with making recommendations pertaining to the proposed national Settlement has objected to preemptive aspects of the proposal affecting advertising, marketing and promotion, youth access restrictions, and enforcement.[180]

State and local regulatory and enforcement efforts have been vitally important in addressing tobacco control. A satisfactory settlement of pending litigation and any federal legislation addressing this critical public health issue must expressly support, not undermine, local and state governments' roles.

---

[175] DR. C. EVERETT KOOP & DR. DAVID A. KESSLER, ADVISORY COMMITTEE ON TOBACCO POLICY AND PUBLIC HEALTH, DRAFT FINAL REPORT at 16 (June 25, 1997) [hereinafter ADVISORY COMMITTEE REPORT].

[176] *See id.* at 7, app. 3 at B3.

[177] *See* ADVISORY COMMITTEE REPORT at 13, app. 3 at D2.

[178] *See* ADVISORY COMMITTEE REPORT, app. 3 at A3, D2.

[179] *See* ADVISORY COMMITTEE REPORT at 6, 13.

[180] *See* AMERICAN MEDICAL ASSOCIATION TASK FORCE, ANALYSIS, REPORT, AND RECOMMENDATIONS ON THE PROPOSED TOBACCO SETTLEMENT AGREEMENT 14, 16 (July 31, 1997).

ARTICLE

A ONE-TERM TORT REFORM TALE: VICTIMIZING THE VULNERABLE

ANDREW F. POPPER*

During its spring 1997 term, Congress passed the Volunteer Protection Act and considered but did not pass the Biomaterials Access Assurance Act of 1997. The Volunteer Protection Act provides a wide range of tort immunities to volunteers working for charitable organizations. The Biomaterials Access Assurance Act would have provided tort immunity to biomaterials producers. In this Article, the author examines the origins and possible implications of both these tort reform proposals from a class-based perspective and within the broader context of the ongoing tort reform debate. The author concludes that both of these proposals ultimately would harm individuals in vulnerable positions: those in need of volunteer services and those dependent on certain medical devices.

During the spring 1997 term of Congress, tort reformers once again pursued those elusive, sweeping legislative rewards available only at the federal level.[1] As has been the case each year since 1983,[2] comprehensive legislation regarding product liabil-

---

* Professor of Law, American University, Washington College of Law. During the spring 1997 term of Congress, the author testified before the House Committee on the Judiciary regarding tort immunity for volunteers, and before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce regarding immunity for suppliers of raw materials to the biomaterials industry. This Article is based on the author's testimony, observations, and reactions to those hearings. The views expressed are the author's, not those of American University or any other individual or organization.

[1] Proponents of tort reform attempted this without abandoning similar efforts in state legislatures. At least 25 states have, by legislation or judicial action, limited the capacity of injured plaintiffs to use the courts to secure redress. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1618–19 (1996). For examples of recent state tort reform, see H.B. 637, 1995 N.C. Sess. Laws 522; H.B. 18, 1996 La. Sess. Law Serv. 1 (West); and H.E.A. 1741, 1995 Ind. Legis. Serv. 278 (West); *see also* Beth Rodgers, *Legal Reform—At the Expense of Federalism?: House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act*, 21 U. DAYTON L. REV. 513, 522 (1996) ("All fifty states have enacted changes to the basic structure of tort law."). Further, the American Law Institute has finished a draft of the Restatement (Third) of Torts, that embodies numerous aspects of the tort reform agenda, such as the elimination of strict liability for design defects. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (Proposed First Draft 1997); *see also* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995).

[2] The first generic tort reform bill of consequence was S. 44, 98th Cong. (1983). This legislation would have rewritten the field in all areas, but most particularly with respect to punitive damages. Subsequent, comparable legislation includes S. 966, 105th Cong. (1997); S. 886, 105th Cong. (1997); S. 648, 105th Cong. (1997); S. 543, 105th Cong. (1997) (enacted); H.R. 872, 105th Cong. (1997); S. 364, 105th Cong. (1997); H.R. 956,

ity and tort law failed.[3] Of several narrow legislative initiatives, only one,[4] granting tort immunity to volunteers, was enacted. The passage of this one bill is significant, however, as it severely restricts the ability of injured consumers to pursue claims in various courts. Comment on the passage of this law, as well as on the near adoption of a second narrowly focused bill regarding biomaterials,[5] is thus timely.

This Article criticizes proposed changes in the system of civil liability. Part I examines the political and economic alignments behind tort reform, specifically with reference to the aforementioned legislative proposals. Part II analyzes the volunteer immunity legislation both in terms of the broad tort reform debate and from the vantage of the particular interests affected. Part III focuses on the legislative strategy employed in the failed attempt to immunize biomaterials producers, and evaluates their argument that the present tort system jeopardizes their industry's viability. The Article concludes that the reform proposals would significantly reduce legal protections for at-risk citizens whom the proposals purport to assist: the poor, the aged, the young, and the sick, who rely on the services and products offered by these sectors.

104th Cong. (1995); H.R. 911, 104th Cong. (1995); H.R. 10, 104th Cong. (1995); S. 687, 103d Cong. (1993).

[3] The Product Liability Reform Act of 1997, S. 648, 105th Cong., was a broad tort reform bill similar to prior proposals. Its provisions would have limited access to the courts, capped damages, weakened joint and several liability, and mandated other changes in state law to the detriment of injured plaintiffs. Section 108(b)(1), with some exceptions, would have limited the amount of punitive damages to the greater of two times the sum of the amount awarded to the claimant for economic loss and non-economic loss, or $250,000. Section 110(a) states that the liability of each defendant for non-economic loss shall be several but not joint. This bill did not pass during the spring 1997 term. The text of the bill has been debated and considered before and was referred to as The Common Sense Legal Standards Reform Act of 1995 (considered first as H.R. 956, 104th Cong. (1995)). The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C.A. § 77(a) *et seq.* (West Supp. 1996)), was Part I of the legislation and became law on December 22, 1995. *See generally* James Cahoy, *Tort Reform Legislation Since 1994*, W. LEGAL NEWS, Dec. 6, 1996, at 13,055, *available in* 1996 WL 699299.

[4] Volunteer Protection Act of 1997, 105 Pub. L. No. 19, 111 Stat. 218 (signed June 18, 1997).

[5] *See* Biomaterials Access Assurance Act of 1997, H.R. 872, 105th Cong. The Biomaterials Access Assurance Act was also a rider implanted in S. 648, the Product Liability Act of 1997, 105th Cong., Title II. *See infra* note 26. This bill has been referred to various committees for review as H.R. 872 (referred to the House Comm. on the Judiciary and Comm. on Commerce Feb. 27, 1997), S. 364 (referred to the Senate Comm. on Commerce, Science, and Transportation Feb. 26, 1997), S. 886, Subtitle B (referred to the Senate Comm. on Labor and Human Resources June 11, 1997), and S. 966 (referred to the Senate Comm. on Commerce, Science, and Transportation June 26, 1997).

I. TORT REFORM IN THE CONTEXT OF THE AMERICAN BUSINESS AGENDA

A. *Generalizing the Class-Based Critique*

The term "reform" suggests affirmative change that benefits society, such as strengthened consumer protection laws and heightened civil liability to improve the quality of goods and services. Consumer advocates, however, have long contended that tort reformers have little intention of pursuing these goals.[6] They argue that the tort reform agenda instead promotes the aims of insurers and manufacturers.[7] Indeed, tort reformers have tried to limit civil litigation options,[8] reduce exposure to civil liability,[9] and enact legislation that allows industry to calculate its exposure in advance and pass the cost on to the consumer in the prices of goods and services.[10] Proponents frame tort reform as

---

[6] *See* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673 (1996); *see also* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109 (1995) (remarks of Advisory Panel Member Larry S. Stewart, Esq., Stewart, Tilgham, Fox & Bianchi, P.A., Miami, Fla.: "The reformers were not, however, interested in true reform to improve consumer rights. Rather, the tort reform advocates have spent untold millions of dollars to promote ways to eliminate or control jury decisions and thereby to reduce their individual and collective responsibility."); Andrew F. Popper, *A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PROD. & TOXICS LIAB. 105 (1994).

[7] *See* Jerry J. Phillips, *Comments on the Report of the Governor's Commission on Tort and Liability Insurance Reform*, 53 TENN. L. REV. 679, 680 (1986) (criticizing state tort reform proposals as "more of an evisceration than a reform of the system"); Philip Shuchman, *It Isn't that the Tort Lawyers Are So Right, It's Just that the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 501 (1997) ("It is difficult to estimate the value of any provision in the tort reform bills to favored industries. Surely, in total they could be worth billions of dollars a year.").

[8] *See, e.g.*, H.B. 18, 1996 La. Sess. Law Serv. 1 (West) (repealing the judicially created strict liability doctrine exposing property owners to liability without proof of fault); H.B. 637, 1995 N.C. Sess. Laws 522 (expressly providing that there shall be no strict liability in tort for product liability actions); H.E.A. 1741, 1995 Ind. Legis. Serv. 278 (West) (restricting strict liability actions to the manufacturer of the product).

[9] *See, e.g.*, H.R. 956, 104th Cong., § 201(F)(1)(A) (1995) (versions 4 and 5) (precluding the awarding of punitive damages against a manufacturer or product seller of a drug that was subject to premarket approval by the FDA); OHIO REV. CODE ANN. § 2307.80(C) (Anderson 1995) (barring punitive damages against manufacturer of a drug manufactured and labeled in compliance with FDA requirements); OR. REV. STAT. § 30.927 (1995) (barring punitive damages in a pharmaceutical case in which drug and labeling was approved by the FDA); UTAH CODE ANN. § 78-18-2 (1989) (prohibiting the award of punitive damages if the drug that caused the claimant's harm received premarketing approval or licensure by the FDA).

[10] *See, e.g.*, Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 108(b) (limiting punitive damages to the greater of two times the sum of economic and non-economic loss or $250,000); H.B. 2210, 180th Gen. Assem., 1996

a matter of accountability; critics warn of its potential to marginalize yet further the most vulnerable members of society.[11]

Against the charge that tort reform would weaken consumer protection regimes,[12] insurance and industry interests counter that "reforms" will liberate research,[13] facilitate new entrants into markets of "excess liability,"[14] and restore sense to an "irrational" litigation system.[15] Such justifications are the polite stuff

---

Pa. Legis. Serv. 135 (West) (enacted Nov. 26, 1996) (limiting punitive damages in medical malpractice suits to two times the compensatory damages); H.B. 20, P.A. 89-7, 89th Gen. Assem., 1995 Ill. Legis Serv. 224 (West) (limiting punitive damages in cases other than healing art or legal malpractice to three times economic damages, and creating a $500,000 cap on non-economic damages in all negligence and product liability actions); *see also* Popper, *supra* note 6; Rustad, *supra* note 6. *See generally* Mark McLaughlin Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus On Warning Law Is Wrong*, 61 TENN. L. REV. 1125 (1994); Shapo, *supra* note 1.

[11] *See* Helen R. Burstin et al., *Do the Poor Sue More? A Case-Control Study of Malpractice Claims and Socioeconomic Status*, 270 JAMA 1697, 1701 (1993); *see also* Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443, 443 (1987) (stating that tort law "discriminates on the basis of class, race, and gender").

[12] See Rustad, *supra* note 6, at 758–59 ("The Common Sense Legal Reform Act blatantly attempts to reallocate power from consumers to corporations who market products with excessive preventable dangers.").

[13] *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("The threat of such enormous awards has a detrimental effect on the research and development of new products."); Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825, 869 n.215 (1996) ("Research and development in American industry are being halted or discouraged because of the threat of excessive punitive damage awards, thereby making American business less competitive in the international market. Consequently, the punitive damages problem is a direct threat to the economic stability of corporate America.").

[14] *See generally* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) (contending that there is a genuine crisis). To support their conclusions, tort reformers often employ anecdotal evidence to prove the existence of the "excess liability" crisis. For example, recent proponents of the crisis argument consistently refer to *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994), the infamous coffee spill case, without relying on hard data. Although sensationalized, the judge reduced the punitive damages award from $2.7 million to $480,000; *see also* Milo Geyelin, *Suits by Firms Exceed Those by Individuals*, WALL ST. J., Dec. 3, 1993, at B1 (reporting on a study conducted by the Rand institute for Civil Justice charting trends of 908 Fortune 1000 companies from 1971 to 1991, showing that product liability suits have actually dropped from a high of 3500 in 1985 to 1500 in 1991).

[15] *See* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 87 (1995) (debunking the "mythology of a deranged judicial system"). The common allegation that the punitive damages regime operates irrationally rests on thin empirical evidence. *See, e.g.*, Saundra Torry, *Juries in the 1990's Reluctant to Make Punitive Damage Awards*, WASH. POST, June 17, 1997, at A3 (citing a Rand Institute study finding that "[p]unitive damages are awarded in less than four percent of civil lawsuits that reach juries and are given most frequently in business cases in which the claimant has been harmed financially rather than physically").

of lobbying.[16] The bills proposed and the laws passed provide no protection for consumers, furnish no incentive for greater safety, and significantly constrict the rights of the powerless, arguments about promoting "market opportunity" notwithstanding.[17]

The class-based nature of the tort-reform battle[18] is evident in the breakdown of the groups supporting and opposing reform. The insurance and manufacturing sectors have pushed for these changes,[19] while groups acting on behalf of under-represented populations have opposed such measures. For example, health care and women's groups have protested changes that would leave victims of defective birth control devices without meaningful recourse.[20] Accident victims (and hastily formed victims' organizations) have routinely opposed attempts to limit access to the courts or cap damages.[21] Broad-based consumer groups

---

[16] Undoubtedly, politicians score points with members of the business community by supporting tort reform bills. When vulnerable segments of the populace with limited political power are the supposed beneficiaries of the legislation, the temptation to support these measures is nearly irresistible.

[17] *See* Rustad, *supra* note 6; *see generally supra* notes 3, 6, 10 and accompanying text.

[18] New laws that restrict the ability of injured consumers to secure redress in the courts will most impact low- to moderate-income claimants. Underinsured or uninsured, these individuals are at risk. Accordingly, "courts traditionally have had to look out for parties who lack the resources or the capacity to protect their own interests in the face of a better-funded or more-informed adversary." Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, OHIO ST. J. ON DISP. RESOL. 241, 259 (1996) (footnote omitted). *See generally* Abel, *supra* note 11; Burton D. Fretz & Ethel Zelenske, *Judicial Conference Weighs Cutbacks in Federal-Court Jurisdiction*, 28 CLEARINGHOUSE REV. 1261, 1265 (1995) ("Perfect justice inside the courtroom becomes meaningless if the courthouse doors are closed to the poor."); Rodgers, *supra* note 1, at 525 ("Proponents of tort reform, primarily Citizens Against Law Abuse (CALA), exploit the facts of numerous lawsuits in order to promote lawsuit abuse hysteria to rally support for their position.") (footnotes omitted); Rustad, *supra* note 6.

[19] *See supra* note 7 and accompanying text.

[20] *See* Robert V. Costello, *Poll Shows Majority Opposed to 'Contract With America,'* 23 MASS. LAW. WKLY. 1380 (1995) (describing a poll commissioned and paid for by Citizens Action, the NOW Legal Defense Fund, the Women's Health Coalition, the National Breast Implant Coalition, DES Action, and the Association of Trial Lawyers of America). Many of these bills would immunize manufacturers of federally approved products from punitive damages, regardless of the knowledge of risk the producer or seller may have acquired after regulatory approval.

[21] *See generally* Dana Coleman, *Coalition of Consumers Is Newest Entry In Fray*, N.J. LAW., May 21, 1994, at 1 ("Consumers for Civil Justice . . . was formed about three weeks ago to mount a concerted fight against proposed tort reform legislation . . . ."); Stephen Schafer, *Federal-Style Tort Reform Does Matter To You*, 23 MASS. L. WKLY. 1587 (1995) ("Representatives of consumer groups and victims' groups may still be the better spokespersons in the debate over tort reform . . . ."). These groups respond because of the overt negative effect that legislation like the Product Liability

resist most tort reform plans, as they lack consumer protection provisions,[22] yet shield manufacturers of dangerous and defective products.[23] During the spring 1997 term of Congress, clashes between consumer and victims' groups, on the one hand, and business interests, on the other, occurred once again.[24]

B. *Immunity for Volunteers and Biomaterials: Exemplars of the Class-Based Critique*

The two narrowly focused bills of interest are the Volunteer Protection Act[25] and the Biomaterials Access Assurance Act of 1997.[26] The first eliminates conventional tort liability[27] for volunteers acting on behalf of charities. Supporters of this proposal matched executives from tax-exempt organizations[28] with former

---

Reform Act of 1997 would have had on their members. That bill would have limited punitive damage awards to situations of proven and flagrant indifference to the rights or safety of others and would have capped the potential amount that plaintiffs could recover. *See supra* note 3.

[22] *See generally* Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567 (1997) (contending that the direct-loss/compensation model that restricts tort recovery, particularly for pain and suffering, lacks coherence and balance); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995) (arguing that tort reform legislative proposals, if adopted, would restrict the ability of women to secure redress for product failure).

[23] *See* Rustad, *supra* note 6, at 758; Gregory B. Westfall, *The Nature of This Debate: A Look at the Texas Foreign Corporation Venue Rule and a Method for Analyzing the Premises and Promises of Tort Reform*, 26 TEX. TECH L. REV. 903, 925 (1995) ("The tort reform debate really boils down to a simple policy question: Do we favor the interests of business over the interests of those harmed thereby, or vice versa.").

[24] *See supra* note 3 and accompanying text; *see generally* Pace, *supra* note 13, at 826–27 (taking the position that punitive damages, a target of the tort reformers, serve a vital function in deterring severe misconduct and should not be deductible as a business expense); William Powers, Jr., *Some Pitfalls of Federal Tort Reform Legislation*, 38 ARIZ. L. REV. 909 (1996) (discussing the difficulties of implementing tort reform through federal legislation); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 919 (1996) (discussing the problem of federalizing tort law: "It seems clear enough that in this recent tort reform debate, federalism arguments were deployed (and withheld) strategically. If for substantive reasons one favored the tort reforms Congress was considering, one simply ignored the federalism issue. Yet if for substantive reasons one opposed those tort reforms, one invoked the theme of states' rights.").

[25] Pub. L. No. 105-19, 111 Stat. 218 (1997).

[26] This Act was integrated into the Product Liability Reform Act of 1997, S. 648, 105th Cong., Title II.

[27] "Conventional" liability refers to misconduct short of intentional torts.

[28] *See The Volunteer Protection Act of 1997: Hearings on H.R. 911 and H.R. 1167 Before the House Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Rep. Newt Gingrich (R-Ga.); Sen. Paul Coverdell (R-Ga.); Sen. Mitch McConnell (R-Ky.); Sen. John Ashcroft (R-Mo.); Sen. Rick Santorum (R-Pa.); Rep. John Edward Porter (R-Ill.); Mr. Conrad Teitell, on behalf of the Am. Council on Gift Annuities; Mr. Robert

National Football League players[29] to lobby for new law.[30] At the signing ceremony,[31] President Clinton seemed implicitly to note the eclectic nature of the lobby: "Americans recognize that we are responsible for one another and that we are members of a *true community*."[32] Yet the celebrities and charity representatives fronting the lobbying effort distract attention from the deleterious ramifications for "true community." Individuals who need charitable or public services will have no recourse against negligent doctors, careless attorneys, and coaches who intimidate or negligently harm children.[33] A uniform expectation of due care now belongs exclusively to those with the resources to pay for such services.

The second tort reform proposal, the Biomaterials Access Assurance Act, would dramatically lower due care liability standards for producers of the raw materials used to manufacture certain medical devices and implants.[34] Proponents argued that such reform would encourage innovation and lower prices as new players competed in the market. The Act did not pass. As a result, several industry representatives informed the appropriate committee in the House that their companies might cease production.[35]

Goodwin, CEO of the Points of Lights Found.; Mr. John Graham, IV, CEO of the Am. Diabetes Ass'n; Dr. Thomas Jones, managing director of the Washington office of Habitat for Humanity; Mr. Fred Hanzalek, Prof'l Eng'r, Am. Soc'y of Mechanical Engineers; Mr. Charles Tremper, senior vice president of Am. Ass'n of Homes and Services for the Aging; and, in opposition, Prof. Andrew Popper, Washington College of Law at American University) [hereinafter *Volunteer Protection Act Hearings*].

[29] *See id.* (testimony of Mr. Lynn Swann, national spokesman for Big Brothers/Big Sisters of Am.; Mr. Terry Orr, the Orr Co.).

[30] Curiously, not one witness could identify a single "unjustified" lawsuit brought against his or her respective organization. *See id.* Instead, the needs of individual volunteers became the focus. For example, Mr. Lynn Swann testified, "It is [the] volunteers . . . who . . . should remain the focus." *Id.* This demonstrates the failure of the legislation to consider the issue from the perspective of those who receive volunteer services.

[31] The ceremony took place on June 18, 1997. *See* Jeffrey P. Altman & Joanne M. Kelly, *V-Day for Volunteers: A New Law Shields Volunteers from Liability Concerns, but It Doesn't Protect Their Organizations*, LEGAL TIMES, July 28, 1997, at S. 39.

[32] President's Statement on Signing the Volunteer Protection Act of 1997, 33 WKLY. COMP. PRES. DOC. 911 (June 19, 1997) (emphasis added); *see also Volunteers Get Immunity From Some Lawsuits*, ST. LOUIS POST-DISPATCH, June 22, 1997, at 14A.

[33] *See* Volunteer Protection Act § 4(a)(3) (stating that personal liability obtains only if the volunteer's misconduct constitutes willful, gross, or reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer).

[34] *See* S. 648, 105th Cong., Title II § 205 (1997) (articulating the specific liability limitations of raw material producers).

[35] *See The Biomaterials Access Assurance Act of 1997: Hearings on Product Liability Reform and Consumer Access To Life-Saving Products Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Com-*

II. THE VOLUNTEER PROTECTION ACT OF 1997: PROTECTING PROVIDERS AT THE EXPENSE OF THOSE SERVED

The Volunteer Protection Act immunizes those who voluntarily provide services under the auspices of any tax-exempt organization.[36] Without the risk of tort liability, so its premise goes, more people will volunteer, and the quality and volume of charitable work will increase. Backers of the proposal did not offer even a single study to support the claim that tort immunity would raise the number or quality of volunteers. More disturbing, this law erodes the right to expect others to exercise due care.[37] Further, while this law most affects recipients of charitable services, no representatives of these recipients testified in the hearings that culminated in the bill's adoption.[38]

A. *Immunizing Volunteers: Standard Tort Reform*

Like most tort reform proposals, the Volunteer Protection Act came packaged as a response to the "potential for [excess] li-

---

merce, 105th Cong. (1997) [hereinafter *Biomaterials Access Assurance Act Hearings*]. During his testimony, Jorge E. Ramirez, Ph.D. (Hoechst Group) suggested that the "continued availability of biomaterials and the continued participation of companies, such as Hoechst" depended on the adoption of the Biomaterials Access Assurance Act. Ronald W. Dollens (Guidant Corp.) delivered a similar message when he asserted that this legislation was necessary to "help ensure the continued availability of the biomaterials they need to make the products American patents require." *Id.* at 59.

[36] *See* Volunteer Protection Act § 4(a). The protection does not extend to groups that fall within the federal definition of "racist" or that engage in "hate crimes." *See id.* at § 4(f)(1)(B).

[37] From this point forward, conformity with due care, that "standard of conduct imposed by the law . . . based upon what society demands generally of its members," is more than can be expected of volunteers. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 & nn.6–8 (5th ed. 1984); *see also* H.R. 911, 105th Cong., § 4(a)(2) (1997) ("[A]ny volunteer of a nonprofit organization or governmental entity shall incur no personal financial liability for any tort claim alleging damage or injury from any act or omission of the volunteer on behalf of the organization entity . . . if such damage or injury was not caused by willful and wanton misconduct.").

[38] *See Volunteer Protection Act Hearings*, *supra* note 28. No tenants' organization, representative of those receiving public assistance, or other individual acting on behalf of those served by charities testified before any committee that studied this bill prior to recommending it to the Congress. In fact, only one or two opposition witnesses testified during the hearings discussing the bill. *See* H.R. REP. No. 105-101, pt. I (1997) (including the sole statement of congressional opposition signed by Rep. John Conyers, Jr. (D-Mich.), Rep. Jerrold Nadler (D-N.Y.), Rep. Robert C. Scott (D-Va.), and Rep. Zoe Lofgren (D-Cal.)); *see also* 143 CONG. REC. S3861 (1997); 143 CONG. REC. S4915 (1997). These reports on the Volunteer Protection Act discuss the legislation; yet, they

ability . . . and unwarranted litigation costs."[39] In the past, when the insurance and manufacturing sectors have claimed crises from excess exposure, independent research has proved such claims to be baseless.[40] Often, the research arms of Congress performed these studies.[41] This time, no study or statistical analysis was even proffered to support the claim that the volunteers immunized under the new law needed protection against rampant, unwarranted liability.[42]

B. *Core Components of the Volunteer Protection Act of 1997*

The preemption language of the Volunteer Protection Act differs significantly from that of the more comprehensive reform

---

contain no oppositional testimony by any group acting on behalf of persons foreseeably served by volunteers covered under the act.

[39] Volunteer Protection Act §§ 2(a)(1), (a)(5) ("The willingness of volunteers to offer their services is deterred by the potential for liability . . . . [and] . . . high liability costs and unwarranted litigation costs . . . .").

[40] *See supra* notes 6, 9, 11, and accompanying text. As to volunteer liability, "[n]o statistics were given during the debate over the bill on how widespread lawsuits against volunteers are, or how great a factor the fear of lawsuits is in discouraging charitable work. But proponents offered anecdotes." Marianne Lavelle, *Volunteers Now Have Tort Shield*, NAT'L L.J., July 14, 1997, at A10. *See* 143 CONG. REC. S3744-47 (1997) (statement of Sen. Coverdell (R-Ga.) in support of the Volunteer Protection Act); 143 CONG. REC. H3096-97 (1997) (statement of Rep. Bob Inglis (R-S.C.) in support of the Volunteer Protection Act); *see also Volunteer Liability: Hearing Before the House Comm. on the Judiciary*, FDCH CONG. TEST. (Apr. 23, 1997) (testimony of Rep. John Edward Porter) (citing a 1988 Gallup survey that concluded there is a great deal of concern for the risk of liability, though only "one in twenty organizations reported being sued on a directors and officers liability question" in the past five years).

[41] *See* OFFICE TECH. ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE, OTA-H-602 (1994); OFFICE TECH. ASSESSMENT, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS, OTA-BP-H-119 (1993); Rustad, *supra* note 6, at 702–03 ("All the empirical studies point to one conclusion: punitive damages are not out of control. Tort reformers continually inform journalists that the numbers are in dispute . . . [but] [t]he key finding of every empirical study of punitive damages is that the number and size of awards do not indicate a nationwide litigation crisis."); Shuchman, *supra* note 7; *see also* Andrew M. Moskowitz, *Meaning is in the Eye of the Beholder:* BMW v. Gore *and Its Potential Impact on Toxic Tort Actions Brought under State Common Law*, 8 FORDHAM ENVTL. L.J. 221, 229–30 (1996) ("[O]ne recent study that examined verdicts in forty-five of the . . . most populous counties . . . found that plaintiffs received punitive damage awards in only six percent of cases.").

[42] Rep. John Conyers, Jr. (D-Mich.), a member of the House committee responsible for reviewing the legislation, expressed doubt about the "reality" of a liability crisis with volunteers: "It looks like we are dealing more with myth than fact." *See* Ken Foskett, *GOP Pushes Law to Exempt Volunteers From Liability*, ATLANTA CONST., Apr. 24, 1997, at A10; *see generally Volunteer Protection Hearings*, *supra* note 28. The concerns of Rep. Conyers were set forth in the sole dissenting report accompanying the Volunteer Protection Act legislation. *See* H.R. REP. No. 105-101, pt. 1 (1997) (accompanying H.R. 911, 105th Cong. (1997)).

bills of the past.[43] Instead of overt preemption of state law, this legislation "preempts the laws of any State . . . except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers."[44] In addition, the statute permits a state to opt out.[45] The drafters thus neutralized states' rights opposition to tort reform. While it is hard to conceive that a state legislature would make the political blunder of re-imposing tort liability on volunteers, the presence of opting-out language presumably made it possible for states' rights legislators to back the new law.

The heart of the legislation involves a bar to liability for individual volunteers. The law provides, "no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization."[46] Immunity is not absolute; in the event that the harm is caused by "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer," the plaintiff may pursue a claim.[47] Further, immunity does not apply to injuries caused by the volunteer in the course of "operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires . . . [a] license."[48]

The new law does preserve the right of one injured by the negligence of a volunteer to pursue a claim against the organization that sponsors or supervises the volunteer.[49] Undoubtedly, retaining institutional liability enhanced the appeal of this legislation. Organizational liability minimizes the risk posed by the unaccountable volunteer. Such a notion, however, implies that a volunteer worker will proceed with the same level of caution and care as if personally responsible simply because a sponsoring organization ultimately could be civilly liable for misconduct. Again, no testimony or information was submitted to support an

---

[43] Preemption in prior tort reform bills is explicit. *See, e.g.*, H.R. 1167, 105th Cong. § 3 (1997) ("This Act preempts the laws of any State . . . ."); S. 648, 105th Cong. § 102(a) (1997) ("This Act governs any product liability action brought in any State or Federal court on any theory for harm caused by a product.").

[44] Volunteer Protection Act § 3(a).

[45] *See id.* at §§ 3(a), 3(b)(2) (permitting a state to "enact[ ] a statute . . . declaring the election of such State that this Act shall not apply").

[46] *Id.* at § 4(a).

[47] *Id.* at § 4(a)(3).

[48] *Id.* at § 4(a)(4)(A).

[49] *See id.* at § 4(c) ("Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity . . . .").

assumption that volunteers will exercise the same level of care regardless of personal accountability.[50]

The Act also retains liability for the volunteer if his or her action constitutes a federal crime, a hate crime, a sexual offense, a violation of a civil rights law, or a harm caused while the volunteer was under the influence of alcohol or drugs.[51] Despite this retention of liability, the Act restricts the amount of damages a plaintiff may receive. The law prohibits punitive damages "unless the claimant establishes by clear and convincing evidence that the harm" was caused by action "which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."[52] The law also limits the amount of damages by putting a restriction on non-economic loss, which effectively abolishes joint and several liability for pain and suffering.[53]

C. *Potential Consequences of the Volunteer Protection Act of 1997*

Assuming for a moment that tort immunity for volunteers will increase the population of those willing to serve,[54] it is important

---

[50] *See* Daniel L. Kurtz, *Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices in Not-For-Profit Organizations: The Challenge of Governance in an Era of Retrenchment*, 726 A.L.I.-A.B.A. 263 (1992) (reporting of insurance coverage for volunteers). Any analogy to granting immunity to prosecutors is inapposite. Personal immunity is a risky proposition, provided only when massive public policy goals are at stake, for example, providing immunity for prosecutors to ensure vigorous enforcement of the law without fear of personal liability. Unlike volunteers, however, a prosecutor can be disciplined, dismissed, or disbarred. Sanctions sufficient to relieve concerns about the lack of personal accountability are unavailable for activity involving the vast majority of volunteers.

[51] *See* Volunteer Protection Act § 4(f)(1).

[52] *Id.* at § 4(e). This provision is virtually identical to provisions found in earlier tort reform bills, *see supra* note 2, which propose the use of the "conscious flagrant disregard" standard (the functional equivalent of criminal intent) as a threshold for punitive damages, and a quantum of evidence standard of "clear and convincing evidence," which places a significantly higher burden on plaintiffs than does the "preponderance" test used in various states. State tort reform limits punitive damages in various ways. *See, e.g.*, H.B. 20, 1st Ex. Sess., 1996 La. Sess. Law Serv. 2 (West) (repealing the statute that authorized punitive damages to be awarded for wrongful handling of hazardous substances); H.E.A. 1741, 109th Gen. Assem., 1st Reg. Sess., 1995 Ind. Legis. Serv. 278-1995 (West) (limiting punitive damages to the greater of three times compensatory damages or $50,000); H.B. 20, P.A. 89-7, 89th Gen. Assem., 1995 Ill. Legis. Serv. 224 (West) (limiting punitive damages in certain cases to three times economic damages).

[53] *See* S. 543, 105th Cong. § 5(b)(1) (1997) (limiting recovery for non-economic loss and determining damages "in direct proportion to the percentage of responsibility of that defendant"). Thus, there is no joint and several liability for non-economic damages.

[54] Whether the legislation would accomplish its purported goal may not have been

to consider the individuals most affected by this law: those served by volunteers. They are victims of disasters, students assisted in public and private schools, children receiving day care or engaged in organized athletics, patients in hospice care, clients requiring counsel through charitably funded legal services programs, and countless others in need of the help, compassion, and diverse skills that volunteers can provide.[55] This is a highly vulnerable group, legally unsophisticated, often powerless to select the person who will assist them, and sometimes unable to discern inappropriate behavior. Unfortunately, the process by which the law was enacted took no account of the risks associated with volunteer service when the recipient is powerless.[56] It is worth asking why in this situation, involving those least able to bargain in the marketplace for assistance, Congress would eliminate the incentives of volunteers to act with due care. Not even the most extreme of the broader tort reform proposals attempted this. The debate over most of those bills concerned the virtues of strict liability or damages.

An underlying principle of tort law is that the threat of personal liability creates individual accountability and thereby enhances the quality of goods and services.[57] Accordingly, the com-

---

an overriding concern in passing this law. Rather, it seems likely that the bill's supporters may have been motivated by the positive publicity generated by the idea. The congressional process, including hearings and a variety of press conferences, for the Volunteer Protection Act took place during the week of the "Presidential Summit." President Clinton, past presidents, war heroes, and other dignitaries were invited to Philadelphia to share ideas on the topic of how to increase volunteerism. If media coverage is any indication of public reaction, public sentiment for volunteerism seemed to have been at an all-time high: "The media gushed all over it. Volunteerism got two thumbs up on the covers of all the major news weeklies." *The Volunteer State*, PROGRESSIVE, June 1997, at 8; *see also* BULLETIN'S FRONTRUNNER, Apr. 28, 1997 ("Most papers led with the volunteer summit."). In this setting, a vote against this legislation would have been perceived as a vote against hard-working volunteers, rather than a vote in favor of assuring that those who receive volunteer services have a right to expect delivery of those services in a reasonable manner.

[55] The hearings focused on volunteer virtuosity, not the needs of service recipients.

[56] In the hearings for this law, there was passing reference to a child abuse case involving a scout leader. Otherwise, there was no mention of the types of injuries inflicted on recipients. (Although there is no published transcript of this hearing as of the time of printing, the author was present at the hearing.)

[57] *See* Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 688 (1990) (reviewing PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988)) ("The business community provides some support for the argument that tort law has deterrent effects that encourage safe products . . . . Managers say products have become safer, managing procedures have been improved, and labels and use instructions have become more explicit."); *see also* Bogus, *supra* note 15, at 4 ("Even some scholars who view the product liability system with less than unqualified enthusiasm acknowledge it to be the principal mechanism protecting the public from dangerous products."). Bogus refers to George L. Priest's comment that, rather than

mon law imposes a minimum level of due care on people who choose to volunteer.[58] The Volunteer Protection Act changes that standard,[59] and in so doing, reduces the incentive to provide quality services. The potential liability of the sponsoring organization is simply an inadequate substitute for personal accountability. Thus, while increasing the number of volunteers is a legitimate government objective,[60] eliminating standards of due care to accomplish this end may adversely affect the quality of services provided.

In addition to threatening the quality of volunteer services, the Volunteer Protection Act immunizes too many people from personal liability. The law applies to anyone acting under the auspices of a 501(c)(3) entity, with the exception of those that fall within the Hate Crimes Statistics Act.[61] Due to this broad definition, the number of persons liberated from personal accountability is estimated to be 90 million.[62] While it might make sense to immunize trained Red Cross volunteers from liability, this law would have the same effect on numerous medical centers (where volunteers occasionally administer care and keep records), legal aid offices, day care providers, college sororities and fraternities, and countless social organizations.

Another option available to Congress, considered at the same time as the Volunteer Protection Act, was similarly flawed. That plan, H.R. 911, was a fiscal incentive measure designed to en-

---

regulatory agencies, "our society relies on liability actions to police the manufacturing process." *See* Bogus, *supra* note 15, at 5 n.13 (citing George L. Priest, *Product Liability Law and the Accident Rate*, *in* LIABLILITY: PERSPECTIVES AND POLICY 184, 190–91 (Robert E. Litan & Clifford Winston eds., 1988)).

[58] *See* Schulker v. Roberson, 676 So.2d 684 (La. App. 1996); Marsallis v. LaSalle, 94 So.2d 120, 124 (La. App. 1957) (involving the power to impose liability on one who volunteers to undertake a duty, in this instance, the oddly difficult task of watching a potentially rabid cat for two weeks).

[59] H.R. 1167, 105th Cong. § 4(a)(3) (1997) ("Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if . . . the harm was not caused by willful or criminal misconduct . . . or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.").

[60] While this is a legitimate objective, it is curious to note that no documentation of a "crisis" in volunteerism was offered during the political process leading to the enactment of this legislation. Perhaps no such documentation exists. "During the past five years alone, the average amount of time given by volunteer workers has more than doubled." Edward J. Rice, Jr., *Presidents Page: Community Service: It's Good for the Public, the Profession, Your Firm and You*, 62 DEF. COUNS. J. 489 (1995).

[61] S. 543, 105th Cong. §§ 5(4), 6(4)(A) (1997).

[62] *See National Service or Government Service?*, J. AM. CIT. POL'Y REV., Sept.-Oct. 1996, at 33.

courage the states to do what many of them (for better or worse) already did: modify internal state tort law.[63] Like the opt-out provision of the Volunteer Protection Act, such legislation would have provided an opportunity for states to consider the complex ramifications of granting immunity to volunteers. The bill responded to a perceived reduction in the number of volunteers by offering hard cash to any state willing to remove due care obligations from potential volunteers.[64] Although the bill failed, it is worth noting that, in this era of balanced budgets, no one offered an estimate of the program's cost.[65] Rather than immunize potentially negligent volunteers, there might have been greater value in providing the Red Cross and similar organizations a direct annual grant of millions of dollars.[66]

One can only speculate about the future impact of the Volunteer Protection Act.[67] The law could increase costs to organizations in at least two ways. First, liability for the negligence of the volunteers may impose direct costs on the organizations. Second, fear of this liability[68] may lead to indirect costs. For example, the increased prospect of organizational liability in lieu

---

[63] *See, e.g.*, Mark Thompson, *Letting The Air Out Of Tort Reform*, 83 A.B.A. J. 64, 65 (1997) ("Legislatures in 31 states had capped punitive damages or made them harder to win, and five states . . . have prohibited them outright in tort actions.").

[64] The incentive to the states would have been a one percent additur for social service funding. *See* H.R. 911, 105th Cong. § 5(a) (1997).

[65] The Act does not explain what is included in "social services." Assuming, however, that it refers, inter alia, to food stamps, a program that cost $24.4 billion in 1995, a one percent "benefit" for relieving volunteers of the duty to use due care could have cost up to $240 million. *See* Todd G. Cozenza, Note, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 FORDHAM L. REV. 2065, 2079 (1997).

[66] *But see* Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1298 n.80 (1993) (citing INST. OF THE NAT'L COUNCIL OF NONPROFIT ASS'NS, NONPROFITS' RISK MANAGEMENT AND INSURANCE, STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS 1 (1990)).

[67] There is no question about the immediate legal effect: volunteers are no longer personally responsible for harms caused through negligence, short of gross, wanton, or willful misconduct. Given this effect, one has to wonder if the services delivered today are sufficiently safe to *immunize 90 million people* who come into contact with those in need of assistance. "Service has a long and venerable history in the U.S., and it remains strong today . . . . About 90 million adults volunteer . . . ." *National Service or Government Service?*, J. AM. CIT. POL'Y REV., *supra* note 62, at 33.

[68] A fear of liability has motivated the actions of charitable organizations under the previous tort regime. Consider that, even before this legislation passed, there were "attempts by nonprofit organizations to shield themselves from suit by claiming to be a government agency." Francis Leazes, *Pay Now or Pay Later: Training and Torts in the Public Sector*, 24 PUB. PERS. MGMT. 167 (1995). This effort has failed because of the increasingly limited application of sovereign immunity. *Id.*

of individual accountability[69] might compel charitable organizations to train, control, and manage volunteers more carefully.[70] The burden imposed by these increased costs may force organizations *to limit the number of volunteers*,[71] and select only those who appear to pose the least risk.[72]

It is likely that the Volunteer Protection Act will adversely affect low- to moderate-income individuals, who are the primary recipients of volunteer services.[73] The message sent is clear: the underclass is not entitled to the same due care as those with resources.[74] Legislation of this type forgives malpractice by doctors[75] and lawyers when the victim receives charitable medical or legal services. It excuses harmful behavior (short of gross, wanton, or willful acts) toward children, so long as they are poor.

---

[69] In the world of public sector and non-profit organizations, concern about misconduct and harm by volunteers existed before this legislation passed. Commentators in the field often urge increased training to "minimize negligent, harmful actions." *Id.*

[70] "(F)ailing to train staff has emerged as an increasing area of legal concern for public and private organizations." *Id.* With the advent of the personally unaccountable volunteer, this concern may be heightened due to the retention of organizational liability, resulting in increased costs to charities.

[71] While there is no data available as yet to support this, it is only logical to assume that if charitable organizations become exclusively responsible for the tortious conduct of immunized volunteers, they will have to exercise greater care in selecting those who work on their behalf. The decrease in the number of volunteers as a result of screening would defeat the purported purpose of the act. Furthermore, no data was presented to support the proponents' view that the removal of the potential of liability would increase the number of volunteers.

[72] The costs imposed on these organizations may not seem quite so threatening when one considers the impressive financial support for the 90 million newly immunized volunteers. An Associated Press release published in 1996 indicates that "Americans donated 23.5 billion dollars to charities last year, which is a 5% increase in charitable giving." Amelia David, *The Benefits of Giving: Sharing the Gift of Yourself This Holiday*, BACK STAGE, Dec. 6, 1996, at 20. "Health charities number in the thousands, [and] receive billions of dollars annually in contributions." James T. Bennet & Thomas J. DiLorenzo, *What's Happening to Your Health Charity Donations*, CONSUMER RES., Dec. 1996, at 10.

[73] Although there are others who fall victim to natural disaster or catastrophe, they number far fewer than those who, due to economic circumstances, must rely on others.

[74] *See* Fretz & Zelenske, *supra* note 18, at 1265.

[75] Even before this legislation, doctors were often unaccountable for their treatment of the poor. *See* Burstin, *supra* note 11, at 1700 (discussing a recent study illustrating that not only do indigent victims lack adequate medical care and malpractice claim representation, but are also less likely to sue when injured).

III. THE BIOMATERIALS ACCESS ASSURANCE ACT OF 1997: THE STRATEGY OF CAPITALIZING ON FEAR[76]

As narrow in scope as the Volunteer Protection Act is, it nonetheless applies to multiple disciplines and interests, and is therefore broader in scope than other tort reform proposals that target specific industries. Over the past fifteen years, groups such as airline manufacturers and pharmaceutical producers have asked Congress for immunity or other forms of special treatment, claiming that their industries cannot survive if state tort law applies to the products they produce or the services they provide.[77] These requests often come accompanied with an even graver message: protection is needed to avert health and safety disasters. During the 1997 term, as well, tort reformers asserted that a failure to give immunity to biomaterials producers, which would force major manufacturers and researchers into bankruptcy, would leave biomaterials production to the unsuited, the foreign,[78] and the back alley.[79]

---

[76] Although most health and safety legislation is, in part, generated by fear of a discernible harm, the biomaterials debate was unusual in that it involved private citizens showcasing their illnesses and disbilities before Congress. *See infra* note 83 (involving the use of a three-year-old child in a formal congressional hearing by Rep. George Gekas (R-Pa.)).

[77] *See Statements of Introduced Bills and Joint Resolutions, Remarks of Senator McConnell in Support of S. 1979, the 'Lawsuit Reform Act,'* 137 CONG. REC. S16852-53 (Nov. 15, 1991) (contending that pharmaceutical companies have "stopped making vaccines" and exited the contraceptive market, and that the "general aviation industry" is "decimated": problems that federal tort reform would allegedly solve); *Hearings on the Civil Justice Fairness Act*, S. 672, 104th Cong. (1995) (opening statement of Sen. Orrin Hatch (R-Utah)) (reciting the plea of the pharmaceutical manufacturers for immunity from punitive damages, noting how "reform" has benefited the aviation industry); *see also* Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages vs. New Products*, 246 SCI. 1395, 1397 (1989) (correlating strict liability, huge jury awards, and punitive damages with declining production or development of contraceptives, vaccines, suit-case-size kidney dialysis units, and anesthesia machines).

[78] *See Biomaterials Access Assurance Act Hearings*, *supra* note 35 (prepared testimony of Mark A. Behrens, Esq.) ("Federal biomaterials legislation would help stop the needless exportation of jobs to foreign countries by allowing market needs to be met by sound U.S. companies.").

[79] *See, e.g.*, *supra* note 35 and accompanying text. The opening remarks in the Biomaterials hearing by Rep. George Gekas, a vocal supporter of immunity for biomaterials producers, were devoted to the fear that essential life-saving devices would be taken from those in need if the grant of immunity were not given to the raw materials suppliers. To underscore his point, he read a letter from a mother who feared the loss of such products: "'[w]ithout a shunt Nathan would suffer brain damage and die . . . . [It] would be a matter of hours or days and would be extremely painful.' A crisis exists and there are 7.5 million Americans who are depending on us to do something about it." *Biomaterials Access Assurance Act Hearings*, *supra* note 35.

A. *Pursuing Legislative Advantage by Threatening Market Abandonment*

The biomaterials legislative proposal came before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce in April 1997.[80] Virtually all who testified in favor of the bill suggested that, absent immunity, many life-saving resources and devices would become unavailable.[81] Producers insisted that tort immunity was simply indispensable.[82] Such fear-mongering has become standard in the tort reform debate.

This time, however, families terrified by the prospect of losing essential life-saving products echoed industry admonitions in their own testimony before Congress.[83] Undoubtedly, the families believed such legislation necessary.[84] Those who orchestrated their testimony, however, exploited their raw emotions. Lobbyists have the responsibility to inform—not to scare—Congress and the American public, even if this means waiving an easy means to bolster popularity for tort reform.[85] As with lob-

---

[80] *See Biomaterials Access Assurance Act Hearings*, *supra* note 35.

[81] *See supra* notes 35 and 79. On February 10, 1997, ten members of Congress sent a "Dear Colleagues" letter seeking to secure co-sponsors for the Biomaterials Assurance Act of 1997. The letter warned that a "looming crisis exists" in which providers of raw materials will "limit, or cease altogether, shipments of raw materials." *Activity of the Comm. on Governmental Affairs During the 103rd Congress*, S.R. 104-27 (1995). *See also* Victor Schwartz & Mark Behrens, *Liability 'Overkill' Threatens Lives and Wallets*, LAS VEGAS REV.-J., Mar. 30, 1997, at 1E ("Unfortunately for Tara, life saving medical devices like the shunt may not be available when they are needed because manufacturers can no longer obtain supplies of basic raw materials. This is due to product liability overkill.").

[82] *See Biomaterials Access Assurance Act Hearings*, *supra* note 35 (testimony of Ronald Dollens, Bd. of Dir., Health Indus. Mfr. Ass'n) ("The destructive impact of current liability laws on the medical device industry and the patients it serves is especially profound . . . . As Senator Joe Lieberman has accurately stated, 'biomaterials access is a public health time bomb.'").

[83] *See id.* Ms. Belinda Simonini testified eloquently before the subcommittee, expressing her fear for the well-being of her beautiful three-year-old son, Titus, who benefits from a shunt made from a biomaterial and who was present in the hearing room. *See id.* His presence was not lost on Rep. George Gekas. At the outset of the hearing, Titus was brought center stage. Rep. Gekas, who chaired the hearing, introduced Titus. The transcript of the hearing did not fully capture the emotional impact Titus had on those assembled. It reads, in part, as follows: "Mr. Gekas . . . . Titus, can you come up here for a minute? Put him on top of this chair here. Stand him on top. This is Titus. He has presented to me . . . a documented gift . . . [a note saying, *inter alia*] please support the Biomaterials Access Assurance Act, love Titus." *Id.* at 21.

[84] The author wishes to express that this commentary is not in any way directed at these families, who showed great courage and compassion, but rather at those who would capitalize on their suffering.

[85] In calling the April 10, 1997 hearings to order, Rep. Henry Hyde, Chairman of the

bying efforts for volunteer immunity, the responsibility to inform was taken lightly: no credible evidence corroborated claims of a biomaterials availability crisis.[86]

B. *If There Is a Problem with Biomaterials, It Has Little to Do with Tort Liability*

Admittedly, precedent exists for the type of relief sought by the biomaterials industry. For example, in a few cases involving vaccines, in which researchers could document the likelihood of severe crisis in the industry, narrow, carefully conceived legislation has been used.[87] The biomaterials industry, however, shows no signs of crisis. Rather, this is an industry that has prospered,[88] has sustained no substantive negative judicial decisions, has dozens of stable companies and many new market entrants,[89] and has enjoyed relative regulatory inaction by the FDA.

Tort liability remains essential because the FDA alone cannot ensure public health and safety. Three years ago, an oversight committee analyzing the FDA's effectiveness in regulating biomaterials and their downstream products gave the FDA low marks. It found, *inter alia*, that the FDA had allowed a product on the market "that actually killed patients . . . [and] may have been

---

House Comm. on the Judiciary, stated "[a]s poll after poll shows, the American public wants reform of our current, out-of-control legal system and they deserve it." *Biomaterials Access Assurance Act Hearings*, *supra* note 35.

[86] In fact, there was no testimony of a single case in which a supplier of biomaterials was held liable in tort. The absence of a demonstrable crisis has not prevented tort reformers from using the crisis theme. *See generally* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 4, 163–94 (1995) (stating that product liability cases accounted for only 4.2% of all of the jury verdicts in the 82 sites studied and that "a limited number of business entities were named as defendants in a substantial number of cases"). Moreover, it is difficult for reform advocates to base their generalized claims of a litigation explosion on increased federal filings when over one-half of the growth of filings from 1974 to 1985 involved only three products: asbestos, the Dalkon Shield, and Benedectin. *See id.*

[87] *See* The Vaccine Act, 42 U.S.C. § 300aa *et seq.* (1988).

[88] The *Wall Street Journal* and the *Journal of Medical Economics* both praised the economic and investment virtues of biomaterials and related companies in the months preceding the hearings on the legislation. *See* Elyse Tanouye, *Three Drug Companies Post Hefty Earnings Increases*, WALL ST. J., Jan. 29, 1997, at B4; Doreen Mangan, *Why Medical Device Stocks Belong in Your Portfolio*, J. MED. ECON., Jan. 13, 1997, at 55.

[89] For example, Baxter Int'l, Pfizer, Inc., Medtronic, DuPont, Dow, Sigma Aldrich, 3M, Abbott Labs, Hoechst Celanese, Cordis, Inc., Bio-Pace Tech., Cardiac Control Systems, Inc., Ela Med., Intermedics, Inc., Novocain, Siemens Pacesetter, Alcon, Inc., DGR, Inc., Hymedix Int'l, Inc., and others, are all relatively new to the industry.

ineffective in treating life-threatening diseases."[90] Other FDA-approved products later turned out to be similarly flawed, such as the Bjork-Shiley heart valve, certain types of implant materials, and the Copper-7 IUD.[91] The tort system, then, is a necessary complement to the FDA.[92]

The campaign for tort immunity in this area is particularly troubling given the barriers to civil liability that already exist.[93] Outside of clear and overt negligence, liability of a component-part producer is rare.[94] In 1986, a Massachusetts appellate court surveyed a number of states and rejected an implied duty to warn, finding, "the prevailing view is that a supplier of a component part . . . has no duty to warn . . . of any danger that may arise after the components are assembled."[95] Federal courts also follow the restrictive liability rules regarding component-part providers.[96] Even New Jersey, the state that birthed absolute

---

[90] SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 103RD CONG., LESS THAN THE SUM OF ITS PARTS: REFORMS NEEDED IN THE ORGANIZATION, MANAGEMENT, AND RESOURCES OF THE FDA'S CENTER FOR DEVICES AND RADIOLOGICAL HEALTH, (1993).

[91] *See, e.g.*, Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989); Corrigan v. Bjork Shiley Corp., 227 Cal. Rptr. 247 (Cal. Ct. App. 1986), *appeal dismissed for lack of jurisdiction*, 479 U.S. 1049 (1987), *and overruled by* Stangvik v. Shiley, Inc., 819 P.2d 14, 17 (Cal. 1991) (involving a wrongful death action against corporation for alleged defective heart valve); Waitek v. Dalkon Shield Claimants Trust, 908 F. Supp. 672 (N.D. Iowa 1995) (involving products liability action against manufacturer, asserting claims for negligence, strict liability, breach of warranties, fraud, and infliction of emotional distress in reference to the Dalkon Shield IUD).

[92] "Medical devices have not been subject to the same rigorous pre-market clearance procedures that govern the marketing of prescription drugs." Teresa Moran Schwartz, *Prescription Productions and the Proposed Restatement (Third)*, 61 TENN. L. REV. 1357, 1391 (1994) (footnote omitted).

[93] *See generally* Robert L. Haig & Stephen P. Caley, *Successfully Defending Products Liability Cases*, 4 Mealey's Litig. Rep.: Toxic Torts No. 15, at 23 (1985) (explaining that there are many ways to defend a raw materials provider, although all the defenses originate with the "bulk suppliers" defense); Gregory L. Harper, Comment, *An Analysis of the Potential Liabilities and Defenses of Bulk Suppliers of Titanium Biomaterials*, 32 GONZ. L. REV. 195 (1996) (discussing litigation options, strategies, and defenses in cases brought against raw materials suppliers).

[94] *See* Kealoha v. E.I. DuPont de Nemours & Co., 844 F. Supp. 590, 594 (D. Haw. 1994) ("A manufacturer of a nondefective component part has no duty to analyze the design and assembly of the completed product of an unrelated manufacturer to determine if the component is made dangerous by the integration into the finished product."). There is no case regarding biomaterials in which the raw products producer was found liable or in which the component part provider defenses failed, outside of those situations where the bio-product itself was defective. The defenses include the conventional bulk supplier defense, the learned intermediary or sophisticated user defense, and the doctrine of intervening cause. *See* Harper, *supra* note 93, at 222.

[95] Mitchell v. Sky Climber, Inc., 487 N.E.2d 1374, 1376 (Mass. 1986).

[96] *See, e.g.*, Sperry v. Bauermeister, 4 F.3d 596, 599 (8th Cir. 1993) (holding that manufacturer of component part was not liable for failure to warn of danger that

liability,[97] rejects component-part liability outside of negligence. The New Jersey Supreme Court recently found that, outside of negligence, "no public policy can be served by imposing tort liability on a manufacturer of specialized parts . . . when . . . the parts were created in accordance with . . . specifications of the owner and assembler of the unit."[98] Although the biomaterials industry already benefits from significant rules that reduce its exposure to liability, it seeks to operate outside of the tort system entirely.[99]

In the U.S. marketplace, the uniform use of contractual indemnification protects manufacturers of component parts, whether biomaterials or wooden wheel spokes. Indemnification is incomplete only in those situations in which the assembler of the component parts is bankrupt or otherwise unavailable for suit. Embracing a regime of immunity and unaccountability for biomaterials providers is thus unwarranted.

Part of the biomaterials industry's plea is that tort litigation costs (as distinguished from the payment of judgments) will overwhelm them.[100] This argument suffers from at least two flaws. First, if fear of litigation costs justify immunity, then it is hard

---

resulted from design defect of product that used the component part). *See also* Hager, *supra* note 10, at 1149, 1159, 1161.

[97] *See* Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 546–49 (N.J. 1982) (holding that a duty to warn of an unknowable risk exists); *see also* Feldman v. Lederle Lab., 479 A.2d 374, 388 (N.J. 1984) (limiting absolute liability to asbestos cases).

[98] Zaza v. Marquess, 675 A.2d 620, 633 (N.J. 1996).

[99] The purpose of the biomaterials legislation has been clear for some time. This legislation is designed to "allow raw materials suppliers to be dismissed from lawsuits against medical device manufacturers, without incurring extensive legal costs, where the raw materials used in a medical device met contract specifications and the supplier . . . [is not] a manufacturer or a seller . . . ." S. REP. No. 104-83, at 3 (1995). In other words, raw materials suppliers would have no generic due care obligations and no possible liability in a strict liability case.

[100] DuPont, the materials suppliers for the Vitek jaw implant, is a leading proponent of the argument that "excessive costs" destroy raw materials producers. DuPont's General Counsel Ross Schmucki contends, "the cost of . . . these cases teaches raw materials suppliers . . . that excessive and unrecoverable costs are associated with the sale of raw materials." Gary Taylor, *A Discovery by DuPont: Hidden Costs of Winning*, NAT'L. L.J., Mar. 27, 1995, at B1. Several factors limit sympathy, however. First, DuPont has won every case brought against it in its capacity as raw materials supplier. Second, when Vitek, the assembler of the TMJ implant, went bankrupt, thousands of victims of the fragmenting jaw implant were left without recourse. A court could have permitted recovery against downstream suppliers, just as courts permit redress against an otherwise protected or indemnified retailer when a manufacturer of a defectively designed product goes bankrupt. The courts, however, spared DuPont that responsibility. Finally, DuPont has successfully sought recovery of costs against injured plaintiffs. In one case, the company recovered $26,000. *See id.*; *see also* Ross F. Schmucki, *How To Manage Mass Tort Litigation Inside the Law Department*, CORP. LEGAL TIMES, Oct. 1996, at 13 (discussing the costs of avoiding tort liability).

to imagine an industry or profession that would not qualify. Second, the costs imposed on manufacturers by the product liability system serve an important deterrent function. Professor Carl T. Bogus notes that while "the common law has receded in importance," product liability "has become an essential participant in promoting public safety."[101] Professor Bogus observes generally that if the "common law has become underappreciated by legislators," then the viability of the product liability system is at extreme risk.[102] Adopting federal legislation undercutting state product liability law, such as the biomaterials proposals, would eviscerate consumer protections.

Others who have studied the tort and product liability system for decades share these concerns. Professor Michael J. Saks argues that the tort system "may be doing a better job as a deterrent than it usually receives credit for."[103] After completing a thorough empirical study of the tort system, Professor Saks drew several limited[104] conclusions: only a "tiny fraction" of accidental deaths and injuries actually become claims; large loss claims and negotiated settlements actually appear to be "under compensated" at the end of the process; and jury awards are "remarkably predictable."[105] For biomaterials producers, then, the risks of financial ruin are minimal.

---

[101] *Supra* note 15, at 87. Professor Bogus notes that, at present, the product liability system is functioning despite the general "war on the common law." *Id.* at 70 n.380. In conjunction with effective regulation, product liability law provides "an essential auxiliary." *Id.* at 87.

[102] *Id.* at 70.

[103] Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1286 (1992).

[104] Professor Saks determined that existing studies are insufficient to permit global characterizations about the way the system functions: "We canot draw rigorous or even reasonable conclusions about . . . the litigation system . . . ." *Id.* at 1288.

[105] *Id.* at 1287–89. Saks also concluded that the system as a whole is more "efficient and effective as a deterrent" than as a method of compensation, and that there is an unfortunate likelihood that some "reforms will produce effects contrary to the intentions of their makers"; indeed, some already have. *Id. See, e.g.*, Bruce Glassner, *An Affidavit With No Merit*, N.J. L.J., Sept. 2, 1996, at 27 (discussing the use of affidavits of merit as a malpractice tort limitation mechanism and finding "as with so many other recent tort reform measures, the affidavit of merit will fail to achieve its desired purpose . . . ."); Steven R. Berger, *The Medical Malpractice Crises: How One State Reacted*, 11 FORUM 64, 78–79 (1975) (finding that tort reform measures failed to limit increases in Florida medical malpractice premiums).

C. *Fear of the U.S. Legal System Is Not a Basis for Legislating Unaccountability*

In response to the claim that the actual risk of liability is small,[106] supporters of biomaterials immunity trotted out the ill-fated Vitek jaw implant as their star witness.[107] When the implant failed, allegedly fragmenting in the mouths of numerous patients, the victims sued not only Vitek, the producer of the implant, but also DuPont, the raw materials supplier.[108] In 1990, the FDA, in one of its better moments, ordered Vitek to inform oral surgeons that the implant had a tendency to fragment.[109] The FDA subsequently recalled the product. In his opening remarks to the Congressional hearings held thereafter, subcommittee chairman Ted Weiss said, "[t]here is evidence that the overwhelming majority of grafts and implants will fail if they haven't already."[110]

---

[106] Claims against raw materials providers often founder on the notion that raw materials are not inherently unreasonably dangerous, and that only after conversion for use in implants or similar products does risk appear. Given that raw materials producers know the uses to which their products are put (tolerances and specifications are spelled out in contracts) and also profit from the sale of the end product, some responsibility by them for product failure seems reasonable. Nevertheless, courts have been uniformly disinclined to impose such liability. "[T]here is little social utility in placing the burden on a manufacturer of component parts or supplier of raw materials of guarding against injuries caused by the final product when the component parts or raw materials themselves were not unreasonably dangerous." Bond v. E.I. DuPont de Nemours & Co., 868 P.2d 1114, 1120–21 (Colo. Ct. App. 1993). Based on this policy, raw materials suppliers do not have conventional duties, such as the duty to warn of a reasonably foreseeable risk. *See* Welsh v. Bowling Elec. Mach., Inc., 875 S.W.2d 569, 574 (Mo. Ct. App. 1994); Doll v. E.I. DuPont de Nemours & Co., No. 01-95-00375-CV, 1997 WL 69862 (Tex. App. Feb. 20, 1997); Zaza v. Marquess, 675 A.2d 620 (N.J. 1996). When the raw materials provider is also the manufacturer, standard negligence/due care obligations attach. *See* Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062 (Cal. Ct. App. 1970).

[107] *Supra* note 100 and accompanying text. *See* In re TMJ Implants Prod. Liab. Litig., 872 F. Supp. 1019 (D. Minn. 1995); Frederick D. Baker, *Effects of Product Liability on Bulk Suppliers of Biomaterials*, 50 FOOD & DRUG L.J., 455, 457 (1995) ("Vitek, Inc. produced temporomandibular jaw (TMJ) implants made of Proplast, a material developed by Vitek. Proplast contained a number of raw ingredients, including DuPont's Teflon. It was alleged that Proplast deteriorated after implantation, causing serious and painful injury, and that the deterioration occurred because Teflon is unsuitable for use in implants.").

[108] *See* Baker, *supra* note 107, at 457 ("Many lawsuits were filed [against Vitek], and Vitek rapidly ran out of both its assets and its insurance coverage. After Vitek filed for bankruptcy protection, plaintiffs' attention shifted to . . . DuPont").

[109] *See* Berry v. United States, No. 94-7173, 1995 WL 434831, at **1 (10th Cir. July 25, 1995) (pointing out the FDA "Safety Alert" issued Dec. 1990 with respect to TMJ implants manufactured by Vitek).

[110] *Are FDA and NIH Ignoring the Dangers of TMJ (Jaw) Implants? Hearings Before the Subcomm. on Hum. Resources and Intergovernmental Rel. of the House Comm. On Gov't Operations*, 102d Cong. (1992).

Nevertheless, on February 20, 1997 the Court of Appeals of Texas affirmed summary judgments that had been granted in favor of DuPont.[111]

From a consumer perspective, it is hard to see a string of victories by DuPont as grounds for a grant of federal immunity.[112] Further, DuPont's success is not surprising, given the preferential position that materials suppliers enjoy in the legal system. As is the case in many areas of torts, the case law and literature have shifted in favor of producers and manufacturers. Plaintiffs now face nearly insurmountable difficulties when seeking relief against biomaterials suppliers.[113]

As the capacity of the substantive law to redress the harms of injured persons erodes,[114] so too do plaintiffs' evidentiary options.[115] In *Daubert v. Merrell Dow Pharmaceuticals*,[116] the Supreme Court limited the plaintiff's ability to introduce expert testimony based on statistical and empirical evidence unless the plaintiff met fairly demanding guidelines regarding scientific reliability and validity. The Court promulgated factors that trial judges should consider in deciding whether to allow expert testimony, including whether the expert evidence is based on clear scientific knowledge, has been subject to peer review, is capable

---

[111] *See* Cason v. E.I. DuPont de Nemours & Co., No. 01-94-01191-CV, 1997 WL 69858, at *17 (Tex. App. Feb. 20, 1997); Doll v. E.I. DuPont de Nemours & Co., No. 01-95-00375 CV, 1997 WL 69862, at *18 (Tex. App. Feb. 20, 1997) (finding that DuPont "did not have a duty to warn").

[112] *See supra* notes 93–96, 108, and accompanying text.

[113] *See supra* notes 93, 94, and 112; *see also* Kealoha v. E.I. DuPont de Nemours & Co., 82 F.3d 894 (9th Cir. 1995), for a thorough treatment of the duty to warn in the Vitek situation. That case held that DuPont, as a raw products supplier, had no duty to warn TMJ recipients, and was entitled to assert raw materials supplier defenses to negligence and products liability claims. The court found that DuPont's awareness of the risk was easily documented, taking notice of a 1984 conference attended by DuPont staff in which the fragmentation potential of the Vitek implant was a central topic. The staff in attendance submitted a memorandum to the management of DuPont regarding the problems with the product. *See id.* at 895–98.

[114] For example, the Court of Appeals in Texas, a state with a history of forceful consumer-oriented product liability law, recently declared that a component part manufacturer producing a product that conforms with the purchaser's specifications cannot be held strictly liable, outside of a demonstrated defect in the component part. *See* Molina v. Kelco Tool & Die, Inc., 904 S.W.2d 857, 861 (Tex. App. 1995).

[115] *See* Michael H. Gottesman, *Should State Courts Impose a Reliability Threshold?*, TRIAL, Sept. 1997, at 20 (arguing that changes in the field of evidence at the federal level are harsh and that states should reject new rules that make it difficult, if not impossible, for plaintiffs to succeed in a product liability case involving scientific or technical data).

[116] 509 U.S. 579, 593–94 (1993) (holding that, under the Federal Rules of Evidence, a trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable).

of independent testing, and has an established error analysis pattern.[117]

Predictably, in a recent biomaterials case, *Cabrera v. Cordis*,[118] a federal court blocked the use of four expert witnesses proposed by the plaintiff, basing its decision on *Daubert*. As these measures mature at the state level, there is at least the hope that the states, the laboratories of tort law, will restore balance to the system.[119] If, however, federal legislators enact laws that preclude consumers from pursuing legitimate claims either in state or federal court, powerful and essential consumer protection options may be destroyed.

IV. CONCLUSION

All too often, courts, legislators, and scholars assess tort reform in purely economic terms, i.e., whether tort law promotes safety most efficiently, or whether market forces optimize safety without the external costs of the litigation process. While this debate is reasonable, its terms, unfortunately, have expanded too far. The entitlement to due care has become negotiable, and industry interests have capitalized on the fear of those whose well-being is in their hands.

While it is too early to track statistically the impact of the Volunteer Protection Act, millions of individuals entitled to due care from those who provided volunteer service prior to June 19, 1997, are now without that personally enforceable entitlement. Children, the homeless, victims of natural disasters, clients or patients in legal and medical clinics, and many others, have lost an expectation of consequence.

Beyond the rhetoric and natural inclination to assist charities, virtually no facts were placed before Congress to justify the deprivation of the entitlement to due care. The record, in both the House and Senate, lacks any showing that volunteers face undue tort liability, that the number of volunteers has declined,

---

[117] *See id.* at 593–94. *Daubert* expands the precautionary impact of Rule 702 of the Federal Rules of Evidence, compounding the challenges a plaintiff faces in biomaterials cases where there is a good chance that the totality of the plaintiff's case will rest on empirical data only available through expert opinion testimony.

[118] 945 F. Supp. 209 (D. Nev. 1996) (finding that four expert witnesses proposed by the plaintiff failed to satisfy the *Daubert* standard for reliability).

[119] If the Biomaterials Access Assurance Act of 1997, H.R. 872, 105th Cong., had become law, the ability of the states to evolve standards would have ended, since the bill was written to preempt state law in this field.

or that individual volunteers who seek protection from personal liability must cope with excessive insurance rates. Instead, the record contained the same slogans, tirades against trial lawyers, and anecdotes about egregious cases (that either never existed, were reversed on appeal, or settled) that have distorted the tort reform debate for two decades. This time around, the sleight-of-hand succeeded, perhaps because cynical lobbyists mustered the right combination of popular charities, media stars, and earnest families suffering personal loss.

It is now the task of the legal community to determine the reach of this law. Courts will have to decide whether volunteer physicians and pro bono attorneys who perform negligently will be liable for malpractice; they will have to decide whether coaches and teachers who are negligent and, as a result, harm children, will be held accountable. The plain language of the new law makes it unlikely that victims of this type of misconduct can hold miscreants personally accountable. This is not the type of legislative signal that inspires.

As to the matter of proposed immunity for the sellers of biomaterials, Congress resisted their plea, presumably unconvinced by their claims of a looming crisis. Just as it is too early to determine the consequences of volunteer immunity, it is also too early to discern the effect of denying immunity to biomaterials suppliers. Should providers of raw materials vanish, it would not be reasonable to ascribe causality to a tort system that consistently protects the interests of raw materials producers in every state and federal court.

If a future session of Congress sees fit to grant such immunity, consumers of biomaterials products will not find their position bettered. Persons injured when a company knowingly supplies materials unsuited for the contemplated medical use will not benefit from a deprivation of their right of redress against those who harmed them. Such a deprivation would constitute yet another "dark side of tort reform."[120]

---

[120] *See* Frank M. McClellan, *The Dark Side of Tort Reform: Searching For Racial Justice*, 48 RUTGERS L. REV. 761, 791 (1996) (coining the phrase "dark side of tort reform").

ARTICLE

SHOW ME THE MONEY: CONGRESSIONAL LIMITATIONS ON STATE TAX SOVEREIGNTY

TRACY A. KAYE*

Over the past few years, Congress has increasingly preempted the states' power to tax, and at the same time, has cut back funding for federally mandated programs. In this Article, Professor Kaye examines the growth of fiscal burdens placed on state and local governments in the form of unfunded mandates. She argues that this has grave policy implications for our federalist system. Ultimately, the Author recommends an amendment to the Unfunded Mandates Reform Act of 1995 that will erect a procedural hurdle in the path of any new legislation that prohibits state taxation regardless of the cost of the mandate to the state and local government.

The Constitution establishes the dual sovereignty of the states and the federal government. One of the core elements of sovereignty reserved to the states under the Constitution is the power of a state to define its own tax system.[1] Vital to the states' existence as independent entities, these taxes enable state governments to perform their various public duties. More eloquently stated, "[t]he power to tax is the power to govern."[2]

The Constitution creates a federal government of limited powers, which are enumerated in Article I. The Tenth Amendment

---

* Associate Professor of Law, Seton Hall University School of Law. B.S., University of Illinois, 1981; M.S.T., DePaul University, 1984; J.D., Georgetown University Law Center, 1991. From 1987 to 1991, Professor Kaye served as Tax and Budget Legislative Assistant to Senator John C. Danforth (R-Mo.), senior member of the Senate Finance Committee. The author is particularly grateful to Angela Carmella, John Coverdale, Charles Davenport, Elizabeth Garrett, Catherine McCauliff, and John Nagle for extensive discussions and comments. The author also received many useful observations and comments from colleagues at Seton Hall University Law School, in particular, Professors Dan Burk, John Wefing, Edward Hartnett, and Mike Zimmer. In addition, the author wishes to thank Charles Davenport for inspiring this Article. The author gratefully acknowledges the superb research assistance of Pat Burris while a student at Seton Hall University School of Law, and the summer research support provided by Seton Hall University School of Law. The author would also like to thank her research assistants Jennifer Jack and Jonathon O'Donnell for helping fine-tune the Article. Finally, the author expresses her warmest thanks to John for his constant support and encouragement.

[1] *See* PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 4 (1981) (arguing that the power to impose and collect taxes for the support of state government must not be unduly curtailed).

[2] Jeffrey L. Yablon, *As Certain As Death—Quotations About Taxes*, 69 TAX NOTES 1665, 1685 (1995) (quoting Maurice L. Duplessis, Canadian politician).

provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3] Fearing that a powerful national government "eventually would eliminate the States as viable political entities,"[4] the Framers of the Constitution afforded individual citizens more protection by dividing authority between federal and state governments.[5] Indeed, the Framers believed that state government would be more responsive to the diverse needs of the people.[6] The Supreme Court decisions discussed in Part II of this Article[7] illustrate the continuing tension between the enumerated powers of the federal government and the powers reserved to the states by the Tenth Amendment, as well as current trends in Commerce Clause analysis.[8]

Part I of this Article outlines the growth of the fiscal burdens placed on the state and local governments in the form of unfunded mandates.[9] "Show me the money" has been the resounding cry from state and local governments.[10] For example, Phila-

---

[3] U.S. CONST. amend. X.

[4] *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting) (citing Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1987) *reprinted in* ANTI-FEDERALISTS VERSUS FEDERALISTS 159 (J. Lewis ed., 1967)).

[5] *See New York v. United States*, 505 U.S. 144 (1992) (O'Connor, J.); *see also* THE FEDERALIST No. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987) ("The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").

[6] *See* THE FEDERALIST No. 17, at 157–58 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (O'Connor, J.):

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

[7] *See infra* notes 31–111; *see also* Chris Marks, U.S. Term Limits, Inc. v. Thornton *and* United States v. Lopez*: The Supreme Court Resuscitates the Tenth Amendment*, 68 U. COLO. L. REV. 541, 553 (1997) (stating that the dissent in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Thomas, J., dissenting), reiterates the majority's view in *United States v. Lopez*, 514 U.S. 549 (1995), that federal intrusion upon the states should be limited and some sort of state independence restored by honoring the principle of reserved powers enunciated in the Tenth Amendment).

[8] The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

[9] *See infra* notes 27–85 and accompanying text.

[10] *See, e.g.*, Spencer Rich, *Exemptions from 7 Federal Mandates Sought for Local, State Governments*, WASH. POST, Jan. 25, 1996, at A-23, (statement of Philadelphia Mayor Ed Rendell) ("[W]e must do curb cuts on rural streets where there are no sidewalks. If the federal government wants us to make 320,000 curb cuts in two years, they should pay for it . . . ."). The Advisory Commission on Intergovernmental

delphia was ordered to make 320,000 curb cuts for wheelchairs at 80,000 intersections to comply with the Americans with Disabilities Act at a cost of $180 million over a two-year period when its entire capital budget was only $125 million.[11] Adequate federal funding for the mandates Congress imposes is not politically viable in this era of ongoing deficit reduction. Instead, Congress enacted the Unfunded Mandates Reform Act ("UMRA") of 1995,[12] to ensure that it would no longer enact mandates without an estimate of the costs and a recorded vote on whether to impose an unfunded mandate.[13]

If devolution, or the redistribution of power to state and local governments, is to be successful, there must be adequate resources at the state and local level. Currently, however, there are enormous wealth and resource disparities among the fifty states,[14] and the fiscal resources and bureaucratic infrastructures of most state and local governments are inadequate.[15] State constitutional balanced budget requirements and difficulties in enacting tax increases at the state level will also substantially impede the funding of the devolution process.[16] Consequently, states must

---

Relations advocated the principle of "no money, no mandates." Advisory Comm'n on Intergovernmental Relations, Rep. No. A-129, FEDERAL MANDATE RELIEF FOR STATE, LOCAL, AND TRIBAL GOVERNMENTS 12 (1995) [hereinafter FEDERAL MANDATE RELIEF].

[11] *See* Rich, *supra* note 10.

[12] Pub. L. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C. (1995)).

[13] *See infra* notes 55–70 and accompanying text. Opinions on the efficacy of the Unfunded Mandates Reform Act vary greatly. For an excellent critique of the UMRA and state unfunded mandate reforms, see Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741 (1997) (stating that the mandate problem fundamentally remains unremedied at both the federal and state levels). *See also* Daniel H. Cole & Carol S. Comer, *Rhetoric, Reality, and the Law of Unfunded Federal Mandates*, 8 STAN. L. & POL'Y REV. 103 (1997) (offering a favorable analysis of the UMRA and asserting that the Act would increase the information available to legislators about the costs of the mandates they enact, enhance political accountability by requiring separate votes on many new mandates, and improve congressional oversight of administrative agency actions).

[14] See generally STATE RANKINGS 1997 (Kathleen O'Leary Morgan & Scott Morgan eds., 8th ed.) [hereinafter STATE RANKINGS 1997] for national and state per capita data relating to, *inter alia*, state government debt outstanding, local and state government expenditures, state and federal government tax revenues, and personal income.

[15] For a detailed analysis of the current fiscal condition of the states, see NATIONAL GOVERNORS' ASS'N & NATIONAL ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES (1997) [hereinafter THE FISCAL SURVEY OF STATES]. *See generally* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE (5th ed. 1989).

[16] State legislators have been under pressure to reduce personal income taxes. Recommended net tax and fee changes for fiscal 1998 would bring in $4.4 billion less than in fiscal 1997, and, if enacted, 1998 would be the fourth consecutive year in which

continue to look for new ways to raise revenue.[17] Ideally, the federal government should relinquish part of its tax base to state and local governments in a return to revenue sharing for devolution to be successful.[18] Instead, Congress is increasingly exercising its power to restrict state taxation of interstate activities, thereby limiting sources of revenue.

Part III sets forth the history of congressional preemption of state and local taxation and uses the State Taxation of Pension Income Act of 1995 ("Source Tax Act"), to illustrate the problems with congressional preemption in the state tax arena.[19] The Source Tax Act, together with proposed legislation prohibiting state taxation, such as the Internet Tax Freedom Act, is cause for alarm. Individually, the fiscal impact of each of these bills may seem small, but as Professor Laurence Tribe has noted, "[i]f there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[20]

This Article does not address state tax statutes that violate the substantive constraints imposed on the states by the Constitution.[21] Rather, it deals with congressional preemption of a legitimate, lawfully imposed state tax statute that clearly meets the parameters of Supreme Court constitutional analysis because it:

---

state actions resulted in a net reduction in state revenues. *See* THE FISCAL SURVEY OF STATES, *supra* note 15, at 9.

[17] State and local tax receipts have grown from $400 million in 1915 to $392 billion in 1995. *See* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 2 (6th ed. 1997). The general sales tax is the leading source of state tax revenue for 45 states and the District of Columbia, yielding $131.8 billion, or 33.6% of the total for 1995. Individual income taxes yielded $124.5 billion, or 31.7% of state tax revenues in 1995. *See id.* at 3.

[18] State and local governments participated in general revenue sharing beginning in 1972 with the enactment of Title I of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 6701–6724 and in scattered sections in 26 and 31 U.S.C. (repealed 1986). Financial assistance to state and local governments began to diminish in 1978; federal aid reductions were particularly dramatic in President Reagan's first year in office. States lost general revenue sharing in 1980, State and Local Fiscal Assistance Act Amendments of 1980, 31 U.S.C. §§ 6702, 6703, 6705-6715, 6722, 6724 (repealed 1986), and the program was completely eliminated in 1986 by Title XIV of the Consolidated Omnibus Budget Reconciliation Act of 1985, 31 U.S.C. §§ 6701–6724. *See* Steven D. Gold, *Changes in State and Local Tax Systems Over the Past 20 Years*, 57 TAX NOTES 893, 898 (1992).

[19] *See infra* notes 112–197 and accompanying text.

[20] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 381 (2d ed. 1988).

[21] The principal constitutional limitations on the state taxing power are found in: (1) the Commerce and Due Process Clauses; (2) the Equal Protection Clause; (3) the Import-Export Clause; (4) the Privileges and Immunity Clause; and (5) the implied constitutional immunity of the federal government from state taxes. *See generally* HARTMAN, *supra* note 1, at 6.

"(1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state."[22]

As long as Congress is acting within the powers granted it under the Constitution, it may impose its will on the states. Commerce Clause authority encompasses the ability of Congress to regulate cross-border transactions, including state taxation of interstate commerce.[23] Historically, Congress had shown great restraint with respect to such prohibitions, but now interference with the tax sovereignty of the states is increasing, just when state and local governments are looking for additional sources of income required for the increased responsibilities they now shoulder.[24]

At the same time it is devolving power to the states, Congress has limited, and is considering limiting further, the ability of the states to raise the revenues necessary to compensate for unfunded mandates and reduced federal aid. This seeming contradiction raises policy questions about the nature of federalism that is discussed in Part IV of the Article.[25] The states must be protected even further in the federal legislative process from congressional intrusions on their tax sovereignty. Therefore, this Article concludes by recommending an amendment to the Unfunded Mandates Reform Act that will erect a procedural hurdle in the path of any new legislation that prohibits state taxation, regardless of the cost of the mandate to the state and local government.[26]

I. DEVOLUTION AND UNFUNDED MANDATES

The debate over the proper balance of state and federal power (accompanied always by the debate over the optimal size of government as a whole) dates back to the beginnings of our

---

[22] TRIBE, *supra* note 20, at 442. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1976) sets forth this four-prong test to determine whether a state tax violates the dormant Commerce Clause.

[23] *See generally* Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination under the Commerce Clause*, 39 VAND. L. REV. 879 (1986).

[24] The author agrees with those scholars calling for a reevaluation of the Commerce Clause doctrine; however, this Article is limited to a proposed legislative solution.

[25] *See infra* notes 240–265 and accompanying text.

[26] *See infra* notes 260–261 and accompanying text.

nation.[27] The most vociferous advocates of states' rights insist that little besides national defense and conduct of foreign policy properly belongs to the federal government,[28] but most of the Founders themselves rejected this approach.[29] Power shifted toward the nation's capital almost from the beginning with specific developments accelerating the trend from time to time. The ratification of the 16th Amendment in 1913, which authorized the federal income tax, greatly enhanced the national government's power to raise revenue.[30] It is also notable that the federal income tax "created a direct link between each taxpayer and Washington—one 'that invited a whole new way of thinking about Washington's responsibility'."[31] Beginning about 1960, the number of grant programs as well as the number of the conditions attached to them increased until the states and cities depended upon the federal government for about one quarter of their revenue. This phenomenon "reinforced a tendency on the part of many state and local officials to allow Washington not only to influence policy but to make it."[32] But, as has happened in the past, legal, political, and social forces have once again converged to make the New Federalism, or devolution, the rallying cry for political change.[33]

Devolution describes the phenomenon of transferring power from the federal government to state and local governments.[34] This fundamental restructuring of state and federal relations is designed to allow more direct participation as well as a diversification of participants in the political process.[35] Other values

---

[27] *See generally* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC 1763–1789, at 145–57 (1956). *See also* JOHN D. DONAHUE, THE DISUNITED STATES 4 (1997).

[28] This is an extreme version of the territorial model of federalism, which recognizes a discernible boundary between spheres appropriate for national regulation and those reserved for state governance. *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1564 (1994).

[29] *See* DONAHUE, *supra* note 27, at 5.

[30] *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 28–29 (1995).

[31] Dan Cordtz, *Devolution Now! November's Landslide Republican Victory Means a Big Shift of Power to the States*, 164 FIN. WORLD, Apr. 11, 1995, at 22, 25.

[32] *Id.*

[33] *See* Richard C. Reuben, *The New Federalism*, 81 A.B.A. J. 76 (Apr. 1995).

[34] *See* Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 1986 (1996). Devolution can also describe the phenomenon of reducing the size of the government, a topic not discussed in this Article.

[35] *See* Merritt, *supra* note 28, at 1574. In 1997, 9% of United States Senators and 11.5% of Representatives are women. *See* Center for the American Woman and Politics, *Women in the U.S. Congress 1997* (visited October 20, 1997) <http://www-rci.rutgers.edu/~cawp/cong97.html>. In contrast, 21.6% of state legislators are women. *See* Center for the American Woman and Politics, *Women in State Legislatures 1997* (visited October 20, 1997) <http://www-rci.rutgers.edu/~cawp/stleg97.html>.

served by the continued existence of autonomous state governments include more governmental accountability and a check on the power of the federal government. If states are independent entities, they can lobby, litigate, and otherwise challenge national regulation.[36] States also provide choices in living conditions as money expended on education, health, and welfare varies greatly from state to state.[37] Finally, states serve as laboratories that may "try novel social and economic experiments without risk to the rest of the country."[38]

Devolution is a continuation of a process begun in the mid-1970s as a reaction to the Watergate scandals and reinforced by the "less federal government is better" attitude of the Reagan years. Since the 1970s, commentators like Professor Tribe have been writing about the national mood "of disenchantment with centralized power and a desire for local autonomy."[39] The goal of President Richard Nixon's New Federalism was to reverse the Great Society's trend toward centralizing power in Washington.[40]

Since the New Deal, and more particularly since the Great Society of the 1960s, the centralization of power in the federal government has coincided with the legislative and judicial expansion of individual rights and the increase in individual benefits and protections.[41] When Congress creates rights and entitlements, it also requires the states to provide programs, without itself adequately funding their implementation.[42] For example, the Education for All Handicapped Children Act of 1975[43] ("EAHCA"), requires approximately $40 billion yearly for state compliance,

---

[36] *See* Merritt, *supra* note 28, at 1573–74; *see also* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1500–03 (1987).

[37] *See* Merritt, *supra* note 28, at 1574.

[38] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[39] Laurence Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1068–69 (1977).

[40] *See* Lawrence Siskind, *You Say You Want a Devolution?*, RECORDER, Sept. 17, 1997, comment section, at 4.

[41] *See* R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POL'Y REV. 325, 326–27 (1996).

[42] *See id.* at 330; *see also* Reuben, *supra* note 33, at 77–78 (stating that a 1994 U.S. Conference of Mayors survey showed that an average of 11.7% of city budgets goes for just 10 of these unfunded mandates). From 1985 to 1992, state and local general expenditures increased 75%, from $658.1 billion to $1.15 trillion. While federal grants-in-aid provided $179 billion, the remaining 85% of the funds came from state and local governments' own resources. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 17, at 12.

[43] 20 U.S.C. §§ 1405–1406, 1415–20.

of which the federal government contributes about $3 billion.[44] Another example is the Asbestos Hazard Emergency Response Act of 1986[45] ("AHERA"), which requires that states develop asbestos control and removal plans, license contractors, and monitor compliance of their primary and secondary schools in the removal of asbestos. The Act provided $25 million annually for a project that the Environmental Protection Agency estimated would cost $3 billion to implement.[46] Similarly, the National Voter Registration Act of 1993,[47] known also as the "motor voter" law, requires state employees "on state time using state resources to administer a federal [voting rights] program."[48] Compliance costs for California alone are expected to reach at least $20 million per year.[49]

Congress has been asking states to pay for and administer federal programs at an alarming pace.[50] According to the U.S. Advisory Commission on Intergovernmental Relations, one count of conservatively defined statutory mandates indicated that Congress enacted one mandate each in 1931 and in 1940, none in the 1950s or the 1960s, 22 in the 1970s, and 27 in the 1980s.[51] Indeed, the same Commission identified more than 200 separate mandates contained in nearly 170 federal laws that govern state and local activities.[52] Twenty-seven years of increasing federal

---

[44] *See* Melnick, *supra* note 41, at 331.

[45] 15 U.S.C. §§ 2641–2656 and 20 U.S.C. § 4022.

[46] *See* JAMES EDWIN KEE & WILLIAM DIEHL, ASSESSING THE COSTS OF FEDERAL MANDATES ON STATE AND LOCAL GOVERNMENT 23 (1988) (report prepared for The Academy for State and Local Government); *see also Unfunded Mandates: Hearings on the Preliminary U.S. Advisory Comm'n on Intergovernmental Relations Rep. on the Role of Federal Mandates in Intergovernmental Relations Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 140 (1996) [hereinafter *Unfunded Mandates Hearing*] (George G. Balong, Chair, Urban Affairs Committee of the American Public Works Association, testified that Baltimore would need to spend $700 million—almost half the city's budget—in order to comply with AHERA.).

[47] 42 U.S.C. §§ 1973 gg-gg-10 (1993).

[48] Reuben, *supra* note 33, at 79.

[49] *See id.*

[50] *See* Melnick, *supra* note 41, at 341. *See generally* Timothy J. Conlan, *And the Beat Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation*, 21 PUBLIUS 43 (1991) (providing an historic account of increasing regulatory burdens imposed on states and localities).

[51] *See* FEDERAL MANDATE RELIEF, *supra* note 10, at 18.

[52] *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS 1 (Jan. 1996) [hereinafter ROLE OF FEDERAL MANDATES]. In this case, "federal mandate" was defined very broadly to include "any provision in statutes or regulations or any Federal court ruling that imposes an enforceable duty on State, local, or Tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program." *Id.* at B-2. These figures include programs that contain one of the

budget deficits, culminating in a federal debt that exceeds $4.5 trillion, drive the devolution bandwagon.[53] Huge federal budget deficits make the strategy of passing costs along to the states incredibly appealing to members of Congress.[54]

The Unfunded Mandates Reform Act of 1995[55] ("UMRA"), the Republican Congress's reaction to calls for devolution,[56] was intended "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding . . . ."[57] The UMRA amended the Congressional Budget and Impoundment Control Act of 1974,[58] establishing new procedures that Congress must follow when it considers legislation.[59] Under the UMRA, a point of order[60] lies against a reported bill with a federal mandate unless the reporting committee has published a Congressional Budget Office ("CBO") statement addressing the mandated costs.[61] A point of order also may be raised if the bill

---

following four mechanisms: (1) crosscutting requirements—across-the-board requirements applied to grants-in-aid to advance national social and economic policies; (2) crossover sanctions—grant conditions imposing fiscal sanctions on one program for failure to comply with federal requirements for another program; (3) partial preemptions—federal laws establishing minimum national regulatory standards; and (4) direct orders—direct legal requirements imposed upon states and localities. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT, AND REFORM 7–10 (1984); *see also id.* at 97 (Graph 3-3, The Growth of Major Programs of Intergovernmental Regulation, by Type of Instrument, by Decade, 1930–80).

[53] *See* John Kincaid, *The New Federalism Context of the Judicial Federalism*, 26 RUTGERS L.J. 913, 921 n.42 (1995).

[54] *See* Melnick, *supra* note 41, at 349.

[55] Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified as amended in scattered sections of 2 U.S.C. (1995)). *See generally* Daniel E. Troy, *The Unfunded Mandates Reform Act of 1995*, 49 ADMIN. L. REV. 139 (1997) (discussing the Act).

[56] *See, e.g.*, *House Advances Unfunded Mandates Bill by 360-74 Vote*, TULSA WORLD, Feb. 2, 1995, at N5 (citing House Speaker Newt Gingrich (R-Ga.) as saying the bill was a "very big step" toward preventing future burdensome and costly congressional regulations). *See generally* Timothy J. Conlan et al., *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, 25 PUBLIUS 23 (1995) (discussing the political developments that led to the passage of the UMRA).

[57] 2 U.S.C. § 1501(2).

[58] Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 297, 299 (1988) (codified at 2 U.S.C. § 622(3)).

[59] *See* CONGRESSIONAL BUDGET OFFICE, THE EXPERIENCE OF THE CONGRESSIONAL BUDGET OFFICE DURING THE FIRST YEAR OF THE UNFUNDED MANDATES REFORM ACT 1 (1997) [hereinafter CBO].

[60] A point of order is a parliamentary device that can lead to the nonconsideration of a piece of legislation. *See* HENRY M. ROBERT, ROBERT'S RULES OF ORDER 247–54 (9th ed. 1990); *see also* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 24–25 (1989) (explaining this parliamentary device).

[61] *See* 2 U.S.C. § 658d(a)(1). This procedure ensures that Congress has timely information about the direct costs of federal mandates. *See* Elizabeth Garrett, *Enhanc-*

imposes annual mandated costs exceeding $50 million (adjusted annually for inflation) on state and local governments, unless the legislation authorizes direct spending or appropriations adequate to cover its costs.[62] A member of either house must raise a point of order to invoke these new procedures.[63] However, points of order can be waived by a simple majority vote in the Senate.[64]

Although touted as the solution to the economic burdens imposed on the states by the federal government, the UMRA is not retroactive,[65] and it does not prevent future unfunded congressional mandates of up to $50 million on state governments.[66] Furthermore, the Act exempts nearly two-thirds of the largest unfunded mandates.[67] For example, the "motor voter" law, one of the catalysts for the passage of the UMRA, arguably is exempt from coverage because it enforces the constitutional right to vote.[68] Moreover, the UMRA can easily be skirted by the

---

ing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 U. KAN. L. REV. 1113, 1168 (1997).

[62] *See* 2 U.S.C. § 658d(a)(2). If the point of order is sustained, Congress is prohibited from further consideration of the legislation. *See id.* There is a higher threshold of $100 million for the costs of mandates on the private sector. *See* § 658c(b)(1).

[63] *See* § 658d.

[64] *See* Garrett, *supra* note 61, at 1162 (1997). For an excellent discussion of these enforcement provisions as political safeguards of federalism, see *id.* at 1163–68; *see also id.* at 1165 (stating that "[u]nlike other budget points of order, which can be arcane and confusing even to legislative experts, the meaning of a vote to waive an UMRA point of order is fairly straightforward—the member who votes to waive has voted to impose the costs of a federal program on states or localities"). See Zelinsky, *supra* note 13, at 774, for a discussion of the House procedure.

[65] Title I of the UMRA, which deals with the legislative process, is effective for legislation considered on or after January 1, 1996. *See* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 110, 109 Stat. 48, 64.

[66] *See* Reuben, *supra* note 33, at 80; *see also* Comm. on Fed. Legislation, *The Unfunded Mandates Reform Act of 1995*, 50 REC. ASS'N B. CITY N.Y. 669, 681 (1995).

[67] *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS STUDY, *cited in* CONG. Q. WKLY. REP., Mar. 4, 1995, at 683. The UMRA does not apply to any congressional provision that:

> (1) enforces constitutional rights of individuals; (2) establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability; (3) requires compliance with accounting and auditing procedures with respect to grants . . . provided by the Federal Government; (4) provides emergency assistance or relief at the request of any State, local, or tribal government . . . ; (5) is necessary for the national security or the ratification or implementation of the international treaty obligations; (6) the President designates as emergency legislation and that the Congress so designates in statute; or (7) relates to the old-age, survivors, and disability insurance program under title II of the Social Security Act . . . .

2 U.S.C. § 1503 (1995).

[68] *See* Comm. on Fed. Legislation, *supra* note 66, at 681; *see also supra* text accompanying notes 47–48.

simple exercise of internal congressional procedural rules.[69] Indeed, one commentator has described the resulting effect as such: "[b]ecause the restraints imposed by the UMRA are actually imposed only by the internal rules of each congressional chamber, the durability of those restraints is likely to be inversely related to their effectiveness."[70]

Conditional assistance to the states in the form of block grants is also a hallmark of devolution.[71] Congress sets standards and allows states to achieve them in their own ways. The states are to function as fifty laboratories, experimenting with new and inventive ways of governing.[72] The new welfare law, Block Grants for the Temporary Assistance for Needy Families,[73] is an example of such conditional assistance.[74] Instead of receiving matching federal Aid to Families with Dependent Children ("AFDC") support according to a formula as in the past,[75] each state now receives a fixed amount of money, a block grant, with no adjustments for changes in its number of recipients.[76] According to the Center on Budget and Policy Priorities, this law will reduce federal funding to the states by fifteen to twenty percent by the year 2002.[77]

The UMRA does not include, in its definition of intergovernmental mandates, the costs arising from the receipt of such conditional federal aid.[78] Rather, it defines a federal intergovern-

---

[69] *See* Garrett, *supra* note 61, at 1161 (stating that "[b]ecause UMRA's enforcement procedures are exercises of the bodies' rulemaking powers, one house can by majority vote alter or modify the rule as it applies to that chamber"); *see also* 2 U.S.C. § 1515 (Supp. I 1995).

[70] Nelson Lund, *The Mandate Hoax of 1995*, NAT'L REV., Nov. 27, 1995, at 52.

[71] *See* Melnick, *supra* note 41, at 349; *see also* Neal R. Peirce, *Are Block Grants Really a Better Idea?*, 27 NAT'L J. 1787 (1995); *see also* Ed Kilgore & Kathleen Sylvester, *"Blocking" Devolution, Why Block Grants are the Wrong Approach to Devolution—and Three Progressive Alternatives*, TAX NOTES TODAY, June 20, 1995, at 1 *available in* 1995 TNT LEXIS 6086 (criticizing the current use of block grants).

[72] *See* Alan R. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1043 (1988); *see also* Congressman Michael N. Castle, *The New Federalism and Delaware*, 13 DEL. LAW. 40, 40 (1995) (stating that the States want to be "laboratories of change," but federal rules and regulations have frustrated their efforts).

[73] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105.

[74] *See generally Clinton Signs Welfare Reform Measure; Says It Creates 'Second Chance' System*, 164 DAILY TAX REPORT (BNA), at D-8 (Aug. 23, 1996) (explaining the welfare reform bill (H.R. 3734) signed into law on August 22, 1996).

[75] *See* Melnick, *supra* note 41, at 345.

[76] *See id.* at 349.

[77] *See* Amy Hamilton, *Politics of Devolution Debated at NCSL Meeting*, STATE TAX NOTES, July 31, 1996, at 1, *available in* 1996 STN LEXIS 21509.

[78] *See* 2 U.S.C. § 658(5)(A)(i)(I) (Supp. I 1995).

mental mandate as a provision that "would impose an enforceable duty upon State, local, or tribal governments, except a condition of Federal assistance."[79] In 1996, the CBO identified more than seventy-five bills that would have resulted in significant additional costs to those state, local, and tribal governments that chose to accept these federal grants.[80] This trend of transforming existing federal programs into block grants will weaken the protections against funding reductions that the UMRA provides.[81]

The enormous resource disparities among the fifty states,[82] as well as the inadequate bureaucratic infrastructures of state and local governments, make devolution problematic.[83] Constitutional balanced budget requirements in many states as well as difficulties in enacting tax increases at the state level contribute to funding problems.[84] Consequently, states are looking for new ways to raise revenue.[85] Unfortunately, as discussed in Part III of this Article, Congress increasingly exercises its power to restrict state taxation of interstate activities.

II. THE NEW FEDERALISM AND THE JUDICIARY

The New Federalism is built upon three principles: (1) the states retain sovereignty;[86] (2) there are certain fundamental, or traditional, areas in which the states have exclusive control;[87] and

---

[79] *Id.*

[80] *See* CBO, *supra* note 59, at 7 ("For example, the Ryan White CARE Act Amendments (S. 641) required states to ensure that all newborns be tested for human immunodeficiency virus (HIV) as a condition for receiving Ryan White grant money.").

[81] *See* Iris J. Lav & James R. St. George, *Will Curbs on Unfunded Mandates Protect States from the Impact of a Federal Balanced Budget Amendment?*, 48 NAT'L TAX J. 337, 338 (1995).

[82] *See* Reuben, *supra* note 33, at 80. For a detailed analysis of the current fiscal condition of the states, see THE FISCAL SURVEY OF STATES, *supra* note 15. *See generally* STATE RANKINGS 1997, *supra* note 14.

[83] *See* MUSGRAVE & MUSGRAVE, *supra* note 15 at 473–95.

[84] State legislators have been under pressure to reduce personal income taxes. Recommended net tax and fee changes for fiscal 1998 would bring in $4.4 billion less than in fiscal 1997, and if enacted, 1998 would be the fourth consecutive year in which state actions resulted in a net reduction in state revenues. *See* THE FISCAL SURVEY OF STATES, *supra* note 15, at 9.

[85] *Cf.* HELLERSTEIN & HELLERSTEIN, *supra* note 17, at 2. See *infra* notes 240–265 for a discussion of the problems with states' traditional revenue bases.

[86] *See* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 625 (1995). The amount of sovereignty attributed to the states varies among experts. The strongest version holds that the sovereignty of the states is primary; a weaker version holds that state and federal sovereignty coexist. *See id.*

[87] *See id.* These spheres of control have been variously defined as the internal

(3) the states are a vital aspect of our constitutional system that must be protected.[88] Important Supreme Court decisions in the 1990s illustrate a judicial acceptance of these principles and have the effect of devolving power from the federal government to state and local governments.

Until recently, the Supreme Court interpreted federal power broadly. From 1937 until 1995, not a single federal law was declared unconstitutional as exceeding the scope of Congress's commerce power, and the Tenth Amendment had little life.[89] But in *New York v. United States*, the Court used the Tenth Amendment to invalidate a federal law requiring the states to take title of low level radioactive waste if they did not devise suitable disposal methods by a certain date.[90] In the majority opinion, Justice O'Connor asserted that Congress lacks the constitutional power to coerce state governments into requiring or prohibiting specific acts and thus elevated state sovereignty to new heights, at least in recent legal history.[91] Then, in a recent and surprising decision, *United States v. Lopez*,[92] the Supreme Court struck down the Gun-Free School Zones Act of 1990, and in so doing, the Court reminded Congress that it cannot use its Commerce Clause power to regulate every aspect of human activity.[93]

---

operation of the state government, all areas not specifically assigned to federal control, and all activities not pertaining to commerce which have been traditionally regulated by the states. *See id.* at 625–26.

[88] *See id.* New Federalists maintain that the Supreme Court must "maintain the balance of power between the states and the federal government" in order to preserve individual liberty. *Id.*

[89] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 174 (1997).

[90] 505 U.S. 144 (1992).

[91] *See id.* at 166. ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.") *Id.* New heights, of course, is a relative term.

[92] 514 U.S. 549 (1995).

[93] The latest outcry concerns the regulation of the maximum water use of toilets, which Congress mandated in the Energy Policy and Conservation Act of 1992, 42 U.S.C. § 6295(k)(1)(C). That law, *inter alia*, limited the capacity of all new toilets produced for home consumer use to 1.6 gallons per flush. A bill to repeal that provision, as well as shower head flow restrictions imposed at the same time, was introduced February 27, 1997, by Rep. Joe Knollenberg (R-Mich.). The Plumbing Standards Improvement Act of 1997, H.R. 105-859 (1997). Rep. Knollenberg noted:

> [I]t is apparent that the 1.6 gallon models are not as effective as their pre-restriction counterparts. Plumbers and plumbing supply stores have been overwhelmed with complaints from unsatisfied consumers, and black markets for the old 3.5 gallon models have popped up across the country . . . . But beware: if you or I buy a 3.5 gallon toilet off the black market . . . under current law we would be subject to Federal fines as high as $2,500. Simply put, this provision is making criminals out of normal, law-abiding citizens who only want . . . a toilet that needs to be flushed only once . . . . I think

Alfonso Lopez, a high school senior, was arrested under a Texas statute forbidding handguns in schools. Texas charges were dropped when the federal prosecutor indicted him for violating the Gun-Free School Zones Act, which made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[94] After conviction, Lopez challenged the Act as an impermissible exercise of congressional Commerce Clause power.[95]

In prior decisions, the Supreme Court had reasoned that to be a valid exercise of Congress's Commerce Clause power, a law must regulate the channels of commerce, protect people or items in commerce, or concern an activity which substantially affects interstate commerce.[96] The Court ruled that the Act in *Lopez* met none of these requirements.[97] In his opinion for the majority, Chief Justice Rehnquist alluded to education as a function traditionally reserved for state regulation.[98] Concurring opinions by Justices Thomas and Kennedy made reference to "the limited nature of federal power"[99] and to "a healthy balance of power between the States and the Federal Government."[100]

In the same term in which the Court decided *Lopez*, it also rendered opinions in *U.S. Term Limits, Inc. v. Thornton*[101] and *Missouri v. Jenkins*.[102] The decision in *Term Limits* invalidated state authority to limit the terms congressional representatives may serve. The dissent by four members of the Court, based on a doctrine of strong state powers, constitutes a voting bloc intent upon continuing the resuscitation of Tenth Amendment doctrine begun in *New York v. United States*.[103] In *Missouri v. Jenkins*, the

---

the bottom line is that the Federal Government should be out of the bathrooms. 143 CONG. REC. E345 (daily ed. Feb. 27, 1997) (extension of remarks of Rep. Knollenberg).

[94] 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A) [sic]).

[95] *See id.* at 552.

[96] *See id.* at 558. Commerce Clause jurisprudence divides mainly into "stream of interstate commerce" cases and "local activity affecting interstate commerce" cases. "*Lopez* is a local activity case, not one addressing the parameters of the stream of interstate commerce." *State Taxation of Nonresidents' Pension Income: Hearings on H.R. 371, H.R. 394 and H.R. 744 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. 24 (1995) (statement of Professor James C. Smith) [hereinafter *1995 Pension Hearings*].

[97] 514 U.S. at 559, 563.

[98] *See id.* at 564.

[99] *Id.* at 602.

[100] *Id.* at 576 (quoting *Gregory v. Ashcroft*, 501 U.S. 542, 458–59 (1991)).

[101] 514 U.S. 779 (1995).

[102] 515 U.S. 70 (1995).

[103] 514 U.S. 779 (1995) (Thomas J., joined by Rehnquist, C.J., O'Connor, J., and

Court instructed federal judges that they cannot retain power over local boards of education when issuing desegregation rulings, but must return control of education to local authorities.[104] The Court's recent ruling that the Brady Handgun Violence Prevention Act[105] violates the Tenth Amendment in requiring background checks by local law enforcement officials for handgun purchases, again evidences the renewed emphasis on the Tenth Amendment. As summarized by Justice O'Connor, "[t]he provisions invalidated here . . . which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme."[106]

These states' rights decisions led many commentators to conclude that the concept of federalism changed after the 1994 Supreme Court Term.[107] These commentators believed that federal courts would no longer automatically uphold congressional acts based on Commerce Clause powers and that power had begun to shift back to the states.[108] In the two years since *Lopez*, however, the Court's decisions have not indicated a reduction in

---

Scalia, J., dissenting); *see* Marks, *supra* note 7 (stating that the *Term Limits* dissent reiterates the *Lopez* majority's arguments on limiting federal intrusion and restoring some sort of state independence by honoring the principle of reserved powers enunciated in the Tenth Amendment).

[104] 515 U.S. at 89; *see* Charles Abernathy, *Foreword: Federalism and Anti-federalism as Civil Rights Tools*, 39 How. L.J. 615, 623–24 (1996) (arguing that the federal court's control of the Kansas City, Mo. school system to enforce desegregation had forced the city's taxpayers to pay over $1.4 billion in operating expenses including more than half a billion dollars in capital improvements without significant or quantifiable improvements in black educational achievement to show for it).

[105] 18 U.S.C. §§ 921–923 and 42 U.S.C. § 3759 (1993).

[106] *Printz v. United States*, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring) (1997). *See also Oklahoma v. United States*, 1997 U.S. Dist. LEXIS 14455 (W.D. Okla. Sept. 17, 1997) and *Condon v. Reno*, 1997 WL 580758 (D.S.C. Sept. 11, 1997), in which district courts found the Driver's Privacy Protection Act of 1994 (DPPA), Pub. L. No. 103-322, Title XXX, 108 Stat. 2099, unconstitutional on Tenth Amendment grounds. The DPPA, which went into effect on September 13, 1997, prohibits a "State department of motor vehicles, and any officer, employee, or contractor, thereof [from] knowingly [disclosing] or otherwise [making] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." *Oklahoma*, 1997 U.S. Dist. LEXIS 14455.

[107] *See* Jeffrey Rosen, NEW REPUBLIC, June 12, 1995, at 12 (describing four of the Justices as "[h]aving rejected the constitutional legacy of the New Deal"); *see also* Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (stating that "[i]t is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation"). *Id.* Greenhouse quotes Professor Tribe as saying, "[I]t is hard to overstate the importance of how close they [are] to something radically different from the modern understanding of the Constitution." *Id.*

[108] *See* Gregory W. O'Reilly & Robert Drizin, United States v. Lopez*: Reinvigorating the Federal Balance by Maintaining the States' Role as the "Immediate and Visible Guardians" of Security*, 22 J. LEGIS. 1, 2 (1996).

federal Commerce Clause powers.[109] Still, *Lopez* has led constitutional law scholars to call for a fundamental rethinking of the Commerce Clause doctrine. Academics such as Donald Regan advocate a theory of Commerce Clause power that is internally consistent and faithful to the general intention of the Framers, that reflects the text of the Commerce Clause at least as well as the current theory does, that justifies the results of the major Commerce Clause precedents, and that embodies an attractive conception of our federalism.[110]

While the Court's post-*Lopez* decisions do not necessarily indicate a full-scale shift of the Court to the New Federalism, the cases do reflect current political attitudes. *Lopez* came on the heels of the "Republican revolution" and the associated emphasis on devolving power to the states and eliminating unfunded mandates. It followed the Tenth Amendment discussions in *Term Limits* and *New York* and Chief Justice Rehnquist's growing alarm at the number of crimes being federalized. The Supreme Court sent a clear message to Congress: stop federalizing crimes that are better handled by the states. Summarizing the fears of many, one commentator has warned that "[a]n overambitious Congress, under the guise of regulating commerce, may altogether destroy the federalist structure created by the Framers, a result certainly not intended by the Framers."[111]

III. Congressional Preemption of State and Local Taxation

A. *History of State Tax Preemption*

Congress has the authority to regulate commerce among the states under the Commerce Clause.[112] This authority includes the power to regulate cross-border transactions, even to the extent of prohibiting cross-border activities.[113] Although state tax laws

---

[109] *See* Marks, *supra* note 7, at 568.

[110] Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich. L. Rev. 554, 555 (1995).

[111] David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 Tul. L. Rev. 1069, 1081 (1996).

[112] U.S. Const. art. I, § 8, cl. 3.

[113] *See Congressional Power to Proscribe Certain State Taxes, State Taxation of Nonresidents' Pension Income: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong. 99, 100 (1993) (legal memorandum by Johnny Killian, Senior Specialist, American constitutional law,

enjoy no immunity from Congress's Commerce Clause powers,[114] Congress historically has used these powers sparingly.[115] One of the first notable exercises of its power occurred in 1959, when Congress passed a law preventing states from taxing corporations when the corporation's only nexus with the state was personal property sales solicitations conducted in the state.[116]

Congress has since enacted legislation regulating state powers of taxation. This Article divides the state powers so regulated into three rough categories: (1) state taxation of federal employees; (2) state taxation of interstate transportation and their employees; and (3) state taxation of natural resources.[117] An example of a law in the first category is a 1942 amendment to the Soldiers and Sailors Civil Relief Act of 1940, in which Congress provided that members of the armed forces are subject to tax only in their respective states of residence, and not necessarily in the states in which they are stationed.[118] An example of a law

---

Cong. Res. Serv., Lib. of Cong.) (citing *Champion v. Ames*, 188 U.S. 321 (1903)). This memorandum [hereinafter *CRS Memo II*] provides a brief but comprehensive discussion of federal preemption in the area of state taxation. *See also* Kathryn Moore, *State and Local Taxation: When Will Congress Intervene?* , 23 NOTRE DAME J. LEGIS. 171 (1997) (reviewing the legislative history of various bills prohibiting state taxation).

[114] *CRS Memo II*, *supra* note 113, at 100. The Supreme Court has on occasion exercised "an extra dose of judicial sympathy for state taxing power." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 442 (2d ed. 1988). The Court grants greater deference to state and local taxation autonomy than to Commerce Clause cases involving regulation. *See id.*; *see also* Edmund W. Kitch, *Regulation and the American Common Market*, *in* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9, 31 (A. Dan Tarlock ed., 1981). Professor Shaviro notes:

> The Supreme Court may treat tax cases as meriting greater deference to state and local governments than regulation cases because it regards the power to tax as at the heart of a government's sovereignty. Another explanation is that the Court simply lacks confidence in its ability to understand tax cases and resolve them intelligently, and thus prefers to let most challenged taxes stand.

Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 942 (1992) (citing Richard Briffault and Henry Monaghan, respectively).

[115] *See* Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987); *see also* Moore, *supra* note 113, at 182.

[116] *See* Act of Sept. 14, 1959, Pub. L. No. 86-272, 73 Stat. 555–56 (codified as amended at 15 U.S.C. §§ 381–384 (1976)). Congress was responding to business concerns that mere solicitation within a state would establish a tax nexus following the Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (holding that net income from interstate operations of a foreign corporation is properly subject to nondiscriminatory state taxation if apportioned to local activities forming a sufficient nexus with that state). *See CRS Memo II*, *supra* note 113, at 103–04.

[117] *See generally* Moore *supra* note 113. *See also* HARTMAN, *supra* note 1, at 677 n.1 (1981).

[118] Act of Oct. 6, 1942, 56 Stat. 777 (codified at 50 U.S.C. App. § 574). Congress has also prohibited any state, other than the one the Member of Congress was elected to represent, from asserting residence jurisdiction or source jurisdiction with respect

in the second category is Section 7(a) of the Airport Development Acceleration Act of 1973, which preempts state and local gross receipts taxes on the sale of commercial air transportation.[119] This law passed after the Supreme Court validated airline passenger head taxes in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines.*[120] Finally, in the category of natural resource taxation, a conflict between New Mexico and Arizona led to increased restriction of state taxation by Congress. Arizona residents consumed a significant portion of energy produced in New Mexico.[121] Concerned with New Mexico's tax on electricity generated within the state, the senators from Arizona obtained a provision in the Tax Reform Act of 1976[122] forbidding states from imposing taxes on or with respect to the generation or transmission of electricity when such a tax would discriminate against out-of-state manufacturers, producers, wholesalers, retailers and consumers of that electricity.[123]

This sort of interference with the tax sovereignty of states has increased at the same time that state and local governments seek additional sources of income required for successful devolution. For example, following the Supreme Court decision in *Oklahoma Tax Comm'n v. Jefferson Lines,*[124] Congress prevented states and their political subdivisions from collecting or levying taxes on bus fares for interstate travel.[125] In addition, Congress introduced

---

to congressional pay over that Member of Congress for income tax purposes. *See* Act of July 19, 1977, Pub. L. No. 95-67, 91 Stat. 271 (codified at 4 U.S.C. § 113 (1994)). States have the power to tax the income of individuals based on either the residence of the taxpayer or the taxpayer's source of income. See *infra* notes 152–155 and accompanying text for a discussion of residence and source jurisdiction principles. Thus, Maryland, Virginia, and the District of Columbia, the jurisdictions in which members typically reside while serving in Congress, are prohibited from taxing the congressional pay of members elected by the other states. *See* Moore, *supra* note 113, at 176.

[119] Pub. L. No. 93-44, 87 Stat. 88 (codified in 49 U.S.C. App. § 1513 (1973)); *see also Congressional Power to Proscribe Certain State Taxes, Miscellaneous Tax Bills—1991: Hearings on S. 90, S. 150, S. 267, S. 284, S. 649 and S. 913 Before the Subcomm. on Taxation of the Senate Comm. on Finance,* 102d Cong. 289, 293 (1991) (legal memorandum by Johnny Killian, Senior Specialist, American constitutional law, Cong. Res. Serv., Lib. of Cong.) [hereinafter *CRS Memo I*].

[120] 405 U.S. 707 (1972). After studies showed that states taxed interstate carriers more than inter-city transportation carriers, Congress proscribed discriminatory rail taxation by the states in the Railroad Revitalization and Regulatory Reform Act of 1976. Later amended by Pub. L. No. 104-88 § 102(a), 109 Stat. 803, 843–45 (codified at 49 U.S.C. § 11501 (1995)).

[121] *CRS Memo I, supra* note 119, at 291.

[122] Pub. L. No. 94-455, 90 Stat. 1520 (codified at 15 U.S.C. § 391 (1976)).

[123] *See CRS Memo I, supra* note 119, at 291.

[124] 514 U.S. 175 (1995) (holding that a state could levy a sales tax on the full fare of bus tickets sold for interstate travel).

[125] *See* The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified

the Amtrak Reform and Privatization Act of 1995,[126] which would have preempted state sales taxes on interstate Amtrak rail tickets. The bill never passed, though a bill with a similar provision has been reintroduced in the 105th Congress.[127]

B. *State Taxation of Pension Income Act of 1995*

The State Taxation of Pension Income Act of 1995[128] ("Source Tax Act") is significant because it is a rare example of congressional intrusion on state tax sovereignty with respect to the income taxation of individuals. The Source Tax Act may be one of those decisions that Professor Tribe fears "will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[129] H.R. 394, signed by President Clinton in January 1996, prohibits any state from taxing the retirement income and pension distributions of individuals who moved from the state where they earned the income.[130] The law became effective for retirement income payments received after December 31, 1995.[131] The statute protects all distributions from qualified plans, including, but not limited to: individual retirement accounts, simplified employee pensions, annuity plans or contracts, eligible deferred compensation plans, and governmental plans.[132] Distributions from nonqualified plans are also covered, provided the distribution is paid out over at least ten years, or over the life expectancy of the recipient, or over the joint life expectancies of the recipient and the recipient's designated beneficiary.[133]

---

at 49 U.S.C. § 14505 (1995)). The decision in *Jefferson Lines* opened the door for states to impose sales taxes on the full price of interstate travel tickets as well as on the prices of other services. *See* Thomas H. McConnell, *Congress Gives Intercity Busing a Free Pass: A Comment on* Jefferson Lines v. Oklahoma Tax Commission, 23 TRANSP. L.J. 503, 518 (1996).

[126] H.R. 1788, 104th Cong. (1995).

[127] *See* S. 738, 105th Cong. (1997) (Amtrak Reform and Accountability Act of 1997); *see also* McConnell, *supra* note 125, at 518.

[128] Act of Jan. 10, 1996, Pub. L. No. 104-95, 109 Stat. 979 (codified at 4 U.S.C. § 114 (1996)).

[129] TRIBE, *supra* note 20, at 381.

[130] *See* Douglas L. Lindholm, Mary B. Hevener, & Carolyn Kelley, *State "Source" Taxation of Retirement Benefits—What's Barred, What's Left*, 84 J. TAX'N 299, 299 (1996); *see also* Brian J. Kopp, *New Federal Statute Bars States from Taxing Pension Income of Nonresidents*, 6 J. MULTISTATE TAX'N 68 (1996).

[131] Pub. L. No. 104-95, 109 Stat. 979 (codified at 4 U.S.C. § 114(c) (1996)).

[132] *See id. at* § 114(a),(b)(1)(A)–(G).

[133] *See id.* at § 114(a),(b)(H)(I)(i)(I)(II). This provision was very controversial because nonqualified plans are typically used by highly compensated executives to defer taxes on large sums of compensation. The compromise only protects payments received

Finally, protections extend to income from excess benefit plans established either because the employee contribution to a defined contribution plan, or because retirement benefits from a defined benefit plan, exceed statutory limits.[134]

This legislation has had varied fiscal impacts on the states, depending on their respective tax laws and collection procedures in place at the time the new law took effect. As of 1995, four states had statutes that permitted them to tax all types of non-resident pension income.[135] Two states allowed taxation of pension payments in excess of a *de minimis* amount,[136] and at least nine other states taxed only non-qualified or certain other types of deferred compensation.[137] Seven states do not impose a personal income tax.[138] The majority of the remaining states had no explicit rules with respect to this issue, although they had statutes which would have allowed taxation of nonresidents' pensions.[139] The Congressional Budget Office estimated that the revenue loss to the states which previously had taxed such income is $70 million annually.[140] California predicts revenue losses of

---

in a form that resembles a pension. *See* Kathleen Wright, *The Effects of P.L. 104-95: California and the New Federal Nonresident Pension Rules*, 10 STATE TAX NOTES 834, 834–35 (1996).

[134] *See* 4 U.S.C. § 114(b)(I)(ii) (1996).

[135] *See* H.R. Rep. No. 104-389, at 3–4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 1006 [hereinafter *Source Tax Report*]. These states were California, Kansas, Louisiana, and Oregon. *Id.*

[136] *Id.* at 4. States taxing nonresident income over a minimal amount were Colorado and New York. *Id.*

[137] *Id.* Among the states imposing a limited tax on non-qualified or certain types of deferred compensation were Connecticut, Delaware, Illinois, Massachusetts, Michigan, Minnesota, Pennsylvania, Vermont, and Wisconsin. *Id.*

[138] *Id.* States not imposing a personal income tax are Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. New Hampshire and Tennessee tax on income from certain types of interest, dividends and capital gains. *See also 1995 Pension Hearings*, *supra* note 96, at 55 n.4 (testimony of Harley T. Duncan, Executive Director, Federation of Tax Administrators).

[139] *See 1995 Pension Hearings*, *supra* note 96, at 51 (citing in part State Source Tax Fact Sheet, information provided in part by the Cong. Res. Serv. Report for Congress: *State Taxation of Nonresidents' Retirement Income*, Robert Burdette, Mar. 27, 1989).

[140] *See Source Tax Report*, *supra* note 135, at 9. The State and Local Government Cost Estimate Act of 1981 required that the CBO estimate the costs of all proposed federal legislation on state and local governments. 31 U.S.C. §§ 1301, 1353 (1981); *see also* Theresa A. Gullo, *Estimating the Impact of Federal Legislation on State and Local Governments*, *in* COPING WITH MANDATES: WHAT ARE THE ALTERNATIVES? 41 (Michael Fix & Daphne A. Kenyon eds., 1990). The CBO had adopted a policy of attempting to prepare such estimates for all reported bills regardless of the Act's $200 million threshold. *See id.* at 42. The CBO's estimate of the Source Tax Act clarified that:

> Revenue losses could be higher, however, because of the bill's impact on the taxation of certain types of deferred compensation . . . . States that offer their residents credit for taxes paid to other states on retirement income would

an estimated $25 million a year,[141] and New York estimates annual losses of $9 million.[142]

The significance of these revenue losses to the states will increase as the elderly population grows absolutely as well as in proportion to the rest of the population.[143] People aged sixty-five or older, constituting 12.6% of the population in 1990, will increase to 26% of the population by 2010.[144] One commentator has stated that "[t]he mobility of the elderly population is also a factor that has not gone unnoticed by demographers and tax collectors."[145] Furthermore, the number of retirees with pension income is increasing dramatically, with 76% of elderly families expected to receive pension income by the year 2018.[146]

> realize an increase in tax revenue . . . . The extent to which one state's revenue gain would offset another state's revenue loss depends on whether the taxed non-resident currently lives in a state that offers a tax credit . . . . The net overall cost of the bill to state governments would stem primarily from affected retirees who live in states that do not tax personal income tax or offer such tax credits. Many of these nontaxing states tend to be popular retirement destinations.

Source Tax Report, *supra* note 135, at 9–10. Note that this CBO estimate is for the bill as reported. The legislation that actually passed would be costlier. *See* Telephone Interview with Theresa A. Gullo, Chief, State and Local Government Cost Unit, Congressional Budget Office (CBO) (Aug. 12, 1997).

[141] *See* Wright, *supra* note 133, at 836.

[142] *See* David Cay Johnston, *Clinton Signs Law Barring Some State Tax on Retirees*, N.Y. TIMES, Jan. 11, 1996, at D4. The revenue loss in New York was lessened because the state already exempted from taxation government pensions and private pensions paid as annuities. *Id.*

[143] *See* Robert F. Messinger, *The Golden State v. The Silver State or State Taxation of Nonresidents' Pension Income*, 2 ELDER L.J. 97, 98 (1994). California's elderly population of 3 million will increase by 49.3% from 1990 to 2010. *Id.* at 99 (citing Margaret L. Usdansky, *"Nation of Youth" Growing Long in the Tooth*, U.S.A. TODAY, Nov. 10, 1992, at 10A).

[144] *See id.* (citing to Thomas Exter, *Roaming Retirees*, AM. DEMOGRAPHICS, Dec. 1991, at 59); *see also* Frank B. Hobbs, *The Elderly Population*, U.S. Census Bureau (http://www.census.gov/population/www/pop-profile/elderpop.html). The Census Bureau projects that by 2050, the number of persons 65 years old and over will more than double. Whereas one in eight Americans were 65 or older in 1995, one in five will be elderly in 2030. *See id.* at 1 (citing U.S. Bureau of the Census, Jennifer Cheeseman Day, *Population Projections of the United States, by Age, Sex, Race, and Hispanic Origin: 1993 to 2050*, Current Population Reports, P25-1104, U.S. Gov't Printing Office, 1993).

[145] Messinger, *supra* note 143, at 98. Florida's elderly population of 2.4 million will expand by 65.3% and Nevada's by 49.3% in the 20-year period from 1990 to 2010. *See id.* at 99 (citing Usdansky, *supra* note 143). Neither of these states currently has an individual income tax. *See 1995 Pension Hearings*, *supra* note 96, at 55 n.4 (testimony of Harley T. Duncan, Executive Director, Federation of Tax Administrators).

[146] *See* SCOTT MACKEY & KAREN CARTER, STATE TAX POLICY AND SENIOR CITIZENS 28, (2d ed. 1994) (citing Dallas L. Salisbury & Nora Super Jones eds., PENSION FUNDING AND TAXATION: IMPLICATIONS FOR TOMORROW 9–11, (Washington, D.C.: employee Benefits Research Institute, 1994)). 10.2 million (44%) of elderly households reported pension income in 1990, as compared to 5.4 million (31%) in 1976. *See id.*

Only 44% of elderly households reported pension income in 1990.[147]

There is also the danger that resident retirees will demand equal treatment.[148] In the case of California and New York, the two states that lost the most revenue from the passage of the Source Tax Act, the real concern is that nonresidents still subject to state taxation on other forms of income will lead a similar campaign in Congress to do away with all nonresident source taxing.[149] In 1992, California collected more than $500 million from nonresident taxpayers,[150] while New York received about $1 billion in nonresident income.[151] Thus, just at the time Congress is devolving power back to the states, Congress is limiting the ability of the states to raise the revenues necessary to compensate for reduced federal aid and increased responsibilities. This seeming contradiction raises troubling policy questions.

A state may constitutionally tax income of nonresidents as long as the source of that income is derived from within the taxing state.[152] The other basis for taxation is residency; states may impose tax on all income received by a resident regardless of source.[153] Furthermore, it is a firmly established principle, both internationally as well as domestically, that the jurisdiction in which income is earned has the primary right to tax that

---

[147] *See id.*

[148] *See* Kathy M. Kristof, *New Law Gives Ex-Residents a Break on Taxes*, L.A. TIMES, Jan. 11, 1996, at Pt. D., (stating that "in-state retirees could be reasonably expected to ask for the same relief" if federal restrictions were placed on source taxing the pensions of out-of-state retirees.) *See also 1995 Pension Hearings*, *supra* note 96, at 75 (statement of Gerald Goldberg, Executive Director, California Franchise Tax Board) ("If California were to provide tax-free retirement income to all former residents and to in-state retirees, the loss to the California treasury as a result would jump from an estimated $25 million attributable to former residents to a hefty $1.2 billion annually.")

[149] The State Taxation of Pension Income Act of 1995 "represents a significant expansion of congressional authority which will lead to innumerable pleas from other taxpayer groups." Linda S. Weindruck & David M. Repp, *Nonresident Pension Income: Whose Golden Years?*, J. ST. TAX'N, FALL 1992, at 38.

[150] *See* Kristof, *supra* note 148, at Pt. D.

[151] *See* Leslie A. Ringle, *State and Local Taxation of Nonresident Professional Athletes*, 2 SPORTS LAW. J. 169, 178 n.67 (1995).

[152] *See Shaffer v. Carter*, 252 U.S. 37, 52 (1920), stating,

> [W]e deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents . . . it may as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non residents from their property or business within the State, or their occupations carried on therein . . . .

[153] *See New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *see also Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932) (holding that the state has unrestricted power to tax citizens' net income even if activities are carried on outside of the state).

income.[154] It is for this reason that the state of residence usually provides a credit for taxes paid to other states.[155]

States that imposed a tax on nonresidents' pension income took the position that pension distributions represent a form of deferred compensation, relying on *Davis v. Michigan Dep't of Treasury*.[156] The holding in *Davis* required a finding that pension income is deferred income paid for services performed previously.[157] Thus, the states argued that they were still entitled to the postponed tax regardless of the fact that the recipient was no longer a resident of their state. Professors Hellerstein and Smith noted that "[s]tates plainly possess the power, under the Due Process Clause, to tax income derived from sources within the State, even if the income is recognized years later when the taxpayer no longer has any connection with the state . . . ."[158] States, for the most part, follow the federal practice of deferring income taxes on pension contributions and related investment earnings until actual receipt by the retired taxpayer.[159] The state's choice to defer taxation until actual receipt of the pension income does not abrogate the state's previous jurisdictional claim. As Hellerstein and Smith note, "the constitutionally sufficient nexus that the state has with the income when it was earned does not evaporate merely because the income earner has severed his ties with the state and the state has chosen to postpone taxation

---

[154] *See* MICHAEL J. MCINTYRE, THE INTERNATIONAL INCOME TAX RULES OF THE UNITED STATES 1–3 (2d ed. 1992).

[155] *See* State Tax Guide (CCH) at 15–110 (chart) (1997) (illustrating that nearly all states with a broad-based personal income tax have enacted tax credits for income taxes paid to other states). However, the Supreme Court has not held that multiple taxation of individual income is constitutionally banned. *See* DANIEL SHAVIRO, FEDERALISM IN TAXATION: THE CASE FOR GREATER UNIFORMITY 21 (1993); *see also* Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309, 1310 (1974); *see also Guaranty Trust v. Virginia*, 305 U.S. 19 (1938) (holding taxation of citizen of state upon income received from trust established in another state does not violate the due process clause).

[156] 489 U.S. 803 (1989) (holding that exemption of state but not federal retirement benefits from state income taxation violates federal law).

[157] *See 1995 Pension Hearings*, *supra* note 96, at 54 n.2 (statement of Harley T. Duncan, Executive Director, Federation of Tax Administrators).

[158] Walter Hellerstein & James C. Smith, *State Taxation of Nonresidents' Pension Income*, 56 TAX NOTES 221, 223 (1992).

[159] Predominately, all states that impose an individual income tax piggyback onto the Federal tax base. *See* State Tax Guide (CCH) at 15–110 (chart) (1997). Delaware, Kentucky, Massachusetts, New Jersey, and Pennsylvania do not conform to the federal tax treatment. *See* MACKEY & CARTER, *supra* note 146, at 27. Of the nine states that calculate tax expenditures, the revenue loss from the tax deferral of pension contributions ranges from 8% to 18% of state personal income tax collections. *See id.*; *see also id.* at 28 (Table 3.3) (State Tax Expenditures for the Deferral of Pension Contributions).

of the income for policy reasons."[160] It is ironic that states will now be penalized for accepting and endorsing federal pension policy.

The most vociferous proponents of the Source Tax Act were retirees who had moved to states that do not impose an income tax.[161] They argued that taxation by their former state was "taxation without representation."[162] In their view, nonresidents should not be taxed if they do not currently receive benefits from their tax payments.[163] Professor James Smith forcefully rebutted this argument, testifying that the "taxation without representation" argument focused on the wrong point in time. Instead, the appropriate focus should be on the time during which the income was earned, the time when the state provided the taxpayer with ample benefits.[164]

The Judiciary Committee Report stated that Congress, through its constitutionally enumerated power to regulate interstate commerce, had the clear authority to prohibit the source taxing of nonresident pension income because H.R. 394 was regulating the economic relationship between a state and its former resident.[165] Professor James Smith testified in hearings on the Source Tax Act that *Lopez* does not affect the constitutionality of Congress's prohibition of the pension source tax because "*Lopez* is a local

---

[160] Hellerstein & Smith, *supra* note 158, at 223.

[161] *See generally 1995 Pension Hearings*, *supra* note 96.

[162] *1995 Pension Hearings*, *supra* note 96, at 40 (prepared statement of William C. Hoffman, President, Retirees to Eliminate State Income Source Tax (RESIST)).

> How can a nation that was formed over the issue of "Taxation without representation" allow this to happen? *Because it was the best kept secret in America!* No one was told about this unfair tax that interferes with our right to travel across our country and live where we choose *without suffering a financial penalty.* It is *unthinkable* for an individual in the United States of America to be controlled by a taxing agency without recourse. More important, how can our great Nation allow Senior Citizens to be treated in this terrible manner.

Id. at 41.

[163] *See Source Tax Report*, *supra* note 135, at 4.

[164] *See 1995 Pension Hearings*, *supra* note 96, at 25 (prepared statement of James C. Smith, Professor of Law, Georgia University School of Law).

[165] *Source Tax Report*, *supra* note 135, at 5. The American Law Division of the Congressional Research Service (CRS) opined that the jurisdictional basis exists for the legislation, citing *Champion v. Ames*, 188 U.S. 321 (1903) (stating that under its Commerce Clause power, Congress has the authority to regulate or even to prohibit that which moves across state boundaries). *CRS Memo II*, *supra*, note 113, at 100. The CRS concluded that, based on *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), "Congress is not limited to legislating against state taxation or regulation that would be independently invalid under the negative commerce clause. It may proscribe state laws on its own views of policy, based on its own considered judgment of fairness and equity." *Id.* at 102.

activity case, not one addressing the parameters of the stream of interstate commerce."[166] Unlike *Lopez*, both the recipient and the pension payment move across state lines; the pension payment travels interstate either through the mail or some type of electronic transfer, as do the tax bills to collect the taxes owed.[167] Current Commerce Clause doctrine imposes few restraints on Congress's power when an activity clearly within the stream of interstate commerce is involved.[168] Smith acknowledges that, under *New York v. United States*[169] and in accordance with the Tenth Amendment, Congress must limit its exercise of the Commerce Clause to regulating individuals engaged in interstate commerce rather than regulating states.[170] However, Smith deems the success of this Tenth Amendment argument highly unlikely.[171] *New York* involved an affirmative order that the States regulate in accordance with federal specifications, which is more intrusive on state sovereignty than an outright denial of the states' authority to regulate as in the case of the Source Tax Act.[172] However, in light of *Printz v. United States* and the Tenth Amendment activity occurring in district courts across the nation,[173] Smith's

---

[166] *1995 Pension Hearings*, *supra* note 96, at 24. See *supra* note 7 and accompanying text for a discussion of the *Lopez* case.

[167] *See CRS Memo I*, *supra* note 119, at 290.

[168] *See* Regan, *supra* note 110, at 560 for a review of current Commerce Clause doctrine. Professor Regan summarizes the extent of the federal commerce power with propositions such as "Congress may prohibit the movement across state lines of anything it pleases" and "Congress may regulate behavior involving any object that has previously crossed a state line." *Id.* at 560–61 (citations omitted).

[169] For a discussion of *New York v. United States*, see *supra* notes 89–91.

[170] *See 1995 Pension Hearings*, *supra* note 96, at 24 (statement of James C. Smith, Professor of Law, University of Georgia School of Law). "Moreover, Tenth Amendment concerns may be heightened to the extent that Congress prohibits States from taxing the pension income of former State employees." *Id.* (citing *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985) (5-4 decision), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision)).

[171] *See 1995 Pension Hearings*, *supra* note 96, at 24 (statement of James C. Smith, Professor of Law, Univ. of Georgia School of Law):

> Despite some expansive language in the Court's opinion in *New York*, it seems doubtful that the Court intended to fashion a new limit on the well-established Congressional power to preempt State regulation or taxation of interstate commerce. Such a rule would necessitate the overruling or severe limitation of a good many Supreme Court precedents. E.g., *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) (sustaining federal preemption of State tax on gross receipts from sale of air transportation); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979) (sustaining federal preemption of State tax on generating electricity sold out of State, where tax discriminates against out-of-state market).

[172] *See id.*

[173] See *supra* notes 105–106 and accompanying text for a discussion of the latest Tenth Amendment jurisprudence.

conclusion should no longer be taken for granted. Nonetheless, as the Court today would most likely interpret the Commerce Clause as constitutionally permitting Congress to preempt the states' tax sovereignty, the debate is properly shifted to whether the federal government *should* exercise its authority to do so.

Thus, regardless of the federal government's apparent constitutional authority to do so, there is no theoretical justification for depriving states of the right to tax deferred income earned within their boundaries.[174] Tax policy considerations of horizontal equity require that a retiree who moves out of her state of employment and a retiree who continues to reside in that state be treated similarly for tax purposes.[175] The Federation of Tax Administrators, representing the states, argued that this legislation would allow highly compensated individuals to defer large amounts of compensation until retirement.[176] Then, upon moving to a state with no income tax, such as Florida, these individuals could receive payments free of state income tax.[177] This situation also implicates tax policy efficiency concerns because "the State income tax system causes retirees to alter their behavior with respect to their decision where to live."[178] Personal choices about retirement location should not have state tax implications with respect to income already earned; yet tax incentives develop whenever the retirement state taxes the pension income of the new resident at a different rate than the state of employment.[179]

Nevertheless, Hellerstein and Smith conclude that they are ambivalent about the passage of legislation barring states from taxing nonresidents' pension income because of administrative feasibility concerns.[180] States only have the constitutional author-

---

[174] *See* Hellerstein & Smith, *supra* note 158, at 221. Professors Hellerstein and Smith thoroughly analyze the tax policy considerations of equity, efficiency, and administrative feasibility. *Id.* at 225–27; *see also* Jean M. Klaiman, Note, *Take the Money and Run: State Source Taxation of Pension Plan*, 14 VA. TAX. REV. 645 (1995).

[175] *See* Hellerstein & Smith, *supra* note 158, at 225.

[176] *See 1995 Pension Hearings*, *supra* note 96, at 56–57 (statement of Harley T. Duncan, Executive Director, Federation of Tax Administrators); *see also* Terry L. Lantry, *Retirees' Pensions Insulated from State Income Tax*, 57 TAX'N FOR ACCT. 132, 133 (1996).

[177] *See 1995 Pension Hearings*, *supra* note 96, at 56–57.

[178] *Id.* at 26 (statement of James C. Smith, Professor of Law, Georgia University School of Law); *see also* Charles E. McLure, Jr., *The State Corporate Income Tax: Lambs in Wolves' Clothing*, *in* THE ECONOMICS OF TAXATION 327, 345 (Henry J. Aaron & Michael J. Boskins eds., 1980).

[179] For a discussion of locational neutrality, see Shaviro, *supra* note 114, at 899–907. *See id.* at 906 (stating that "[c]onceptually, a locationally efficient tax is one that does not affect people's decisions about where to live, travel, invest, and so forth").

[180] *See* Hellerstein & Smith, *supra* note 158, at 230.

ity to tax nonresidents on their deferred employment income and the investment income accumulated on this deferred compensation while they were residents of that state.[181] Difficulties in determining what proportion of each pension payment is properly attributable to services rendered in that state, or investment income earned while resident in that state, are further complicated in multistate situations.[182]

These issues, however, are no more complex than those raised by state taxation of multistate businesses.[183] As Professor Daniel Shaviro has noted, administrative feasibility concerns would justify total harmonization of state income tax laws[184] because the compliance costs of having multiple taxing jurisdictions constitute "a drag on interstate trade almost as debilitating as the border restrictions our federal system was originally designed to prevent."[185] However, passage of federal legislation mandating such uniformity in our state tax laws is unrealistic. After her study of congressional activity in the area of state and local taxation, Professor Kathryn Moore concludes "that Congress is unlikely to enact legislation mandating more uniformity unless and until states and taxpayers are willing and able to reach a compromise and that such a compromise is unlikely to occur in the near future."[186]

The passage of this legislation resulted in senior citizens receiving another tax benefit paid for by the foregone tax revenue of the states without the states' consent. All states already provide tax incentives and tax relief programs that benefit senior citizens.[187] The design of these programs depends on the individual state-local tax systems which vary greatly with respect to the

---

[181] *See id.* at 226.

[182] *See id.* at 227. The authors posit the example of an employee working in Illinois for 5 years, New York for 15 years, California for 10 years, and then retiring in Nevada. *Id.*

[183] *See* Shaviro, *supra* note 155, at 34–35.

[184] *See* Shaviro, *supra* note 114, at 919–22. ("Short of imposing uniform tax bases and coordination rules, we cannot expect state and local taxation never to harm any outsiders relative to any insiders.") *Id.* at 935.

[185] Gordon D. Henderson, *What We Can Do about What's Wrong with the Tax Law*, 49 TAX NOTES 1349, 1352 (1990).

[186] Moore, *supra* note 113, at 212. The author has previously written in favor of tax harmonization in the context of the European Union. Tracy A. Kaye, *European Tax Harmonization and Its Implications for U.S. Tax Policy*, 19 B.C. INT'L & COMP. L. REV. 109 (1996). But the U.S. context differs dramatically. Were the federal government shouldering an increasing burden of managing the nation, such harmonization and uniformity of state tax laws might be justified. But, at a time of devolution and decentralization of our government, this is not the case.

[187] *See, e.g.*, NEV. REV. STAT. § 361.803 (1995); 35 ILL. COMP. STAT. 200/15-170

mix of revenue sources and resident tax burdens.[188] Most of the forty-one states (and the District of Columbia) that levy a broad-based personal income tax provide preferential tax treatment for the elderly.[189] These preferences include special provisions such as exclusions for pension income and/or social security benefits, additional credits, personal exemptions or standard deductions, and exclusions of capital gains on home sales.[190] Forty-four states and the District of Columbia have at least one type of property tax relief program that gives the elderly preferential treatment.[191] And "[o]f the 46 states that impose a sales tax, 43 states do not tax prescription drugs, 26 states do not tax food purchased for home consumption, and 31 states do not tax consumer electric and gas utilities . . . ."[192] All of these exemptions are items on which the elderly arguably spend disproportionately more of their income.[193] Congress did not take into consideration any of the myriad special tax treatments the elderly receive when denying states the right to tax pension benefits of former residents. This action disturbs the distributional balance of each state's tax system.

The Source Tax Act constitutes an unfunded mandate on state governments, as defined by the Unfunded Mandates Reform Act of 1995. A "Federal intergovernmental mandate" includes "an enforceable duty" imposed on state and local governments.[194] Furthermore, direct costs are defined to include amounts that

---

(West 1997); MICH. COMP. LAWS ANN. § 206.522 (West 1997); ARK. CODE ANN. § 26-51-601 (1995).

[188] *See* MACKEY & CARTER, *supra* note 146, at 12. Alaska, Delaware, Montana, New Hampshire, and Oregon have no state sales tax, and Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming have no personal income tax. *Id.* at 11.

[189] *See id.* at 19. The 11 states that quantify preferential income tax treatment (tax expenditures) for the elderly lose revenues ranging between 3% of income tax collections in Idaho to 18% in Montana. *Id.* at 13; *see also id.* at 14 (Table 2.2) (State Tax Expenditures Due to Preferences for Senior Citizens).

[190] *See id.* at 21; *see also id.* at 20 (Table 3.1) (State Personal Income Tax Preferences). Some states use the personal income tax return to administer sales tax relief or property tax relief. *See id.* at 34. Nine states grant an income tax credit or refund to offset the cost of paying sales tax on food, prescription drugs, or both and nine states and the District of Columbia grant an income tax credit with respect to property taxes. *See id.* at 62.

[191] *See id.* at 58. Thirty-six states and the District of Columbia have homestead exemption or credit programs available either to senior citizens or to all homeowners. *See id.* at 40–41. Property tax relief is also being designed as circuit-breaker programs (states rebate property taxes that exceed a certain percentage of the taxpayers' income) which can apply to both homeowners and renters. *See id.* at 46.

[192] *Id.* at 60.

[193] William Duncombe, *Economic Change and the Evolving State Tax Structure: The Case of the Sales Tax*, 45 NAT'L TAX J. 299, 309 (1992).

[194] 2 U.S.C. § 658(5) (1996).

state and local governments "would be prohibited from raising in revenues in order to comply with the Federal intergovernmental mandate . . . ."[195] Unfortunately, when the Source Tax Act was considered in 1995, UMRA was not yet effective.[196] Representative John Conyers (D-Mich.) attempted to amend the legislation during full Committee markup, to provide that none of the provisions take effect unless UMRA was complied with. However, the Conyers amendment was defeated by a roll call vote of 12-17.[197]

C. *Future Congressional Action*

Despite the enactment of UMRA, it is unlikely that Congress will refrain from preempting the states' taxing authority.[198] The temptations are too great to enact legislation with no impact on the federal budget. Because these types of bills do not affect direct spending or receipts, the pay-as-you-go ("PAYGO") provisions enacted in the 1990 Budget Enforcement Act[199] ("BEA") do not apply. The PAYGO procedure requires that the net effect of enacted legislation dealing with revenues and mandatory spending must be to not increase the deficit in any fiscal year.[200] Revenue losses or increases in mandatory spending must be offset by legislation reducing spending or increasing revenues.[201]

---

[195] § 658(3). Direct costs must be reduced by any direct savings. *See id.* at § 658(4).

[196] Title I of UMRA—Legislative Accountability and Reform—is effective for legislation considered on or after January 1, 1996. 2 U.S.C. § 1511 (1997) (Effective Jan. 1, 1996). Harley T. Duncan, Executive Director of the Federation of Tax Administrators, Washington, was quoted as saying, "We're concerned that Congress placed an unfunded mandate on states just hours before the Unfunded Mandates Act became effective." *Tax Legislation: Bill Signed to Prohibit Taxing Pension Income of Former Residents*, 23 PENS. & BEN. REP.

[197] *See Source Tax Report*, *supra* note 135, at 7.

[198] *See* CBO, *supra* note 59, at 5. Of the 700 bills and legislative proposals analyzed by CBO in 1996, 69 (10%) contained intergovernmental mandates with 11 containing mandates above the $50 million threshold. The 11 bills dealt with the minimum wage, mental health parity in insurance plans, a preemption of state securities fees, state compliance with certain occupational health and safety rules, and state inclusion of Social Security numbers on driver's licenses and identification cards. *Id.* at 5–6. All but S. 1423, a bill that required state and local workplaces to comply with OSHA standards, were enacted before the 104th Congress adjourned. *See* Garrett, *supra* note 61, at 1155 n.176. See *id.* at 1168–83 for an excellent analysis of the effectiveness of UMRA's procedural framework as a political safeguard.

[199] 2 U.S.C. 632 § 13204 (codifying pay-as-you-go provisions of Pub. L. No. 101-508, 104 Stat. 1388 (1990)).

[200] *See* STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1998, at 29 (1997).

[201] *See id.* Mandatory spending is defined as, "Outlays for entitlement programs and

Federal tax tinkering thus requires Congress either to make up any revenue loss in a particular fiscal year by increased taxes or reduced mandatory spending, or to suffer sequestration of funds from certain mandatory spending programs to reconcile the difference.[202] Because federal tax expenditures are no longer "free," there is even greater incentive to provide constituents with tax giveaways in the form of prohibitions on state taxation.[203] If Congress can no longer painlessly reduce a constituent's federal tax bill, reduction of the state tax bill will do. Prohibitions on state taxation that exceed the $50 million threshold only trigger the UMRA, which has a less painful bite than the PAYGO procedures and their threat of sequestration.[204]

Currently under consideration in Congress is the perfect example of congressional largesse paid for by loss of state revenues. H.R. 1953 (which includes the provisions of H.R. 865 and H.R. 874) would prevent the states of Kentucky, Oregon, and Nebraska from taxing federal employees working at specific federal projects in those states unless the employees are also residents of the respective state.[205] Although touted as a bill to stop

---

certain nonentitlements that Congress controls by defining eligibility and payment rules rather than through appropriations." *Id.* at 211. Entitlement spending is the result of direct expenditure programs that have no spending limits and are available as entitlements to those who meet the statutory criteria established for the programs. *See* UNITED STATES CONGRESS JOINT COMMITTEE ON TAXATION, METHODOLOGY AND ISSUES IN MEASURING CHANGES IN THE DISTRIBUTION OF TAX BURDENS 2 (1993).

[202] *See* COLLENDER, *supra* note 200, at 81–85. The Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings), Pub. L. No. 99-177, 99 Stat. 1037, created a new budget procedure—sequestration, which has been substantially revised by the BEA. *See* COLLENDER, *supra* note 200, at 9. Sequestration results in eligible mandatory spending programs being cut by the same across-the-board percentage necessary to offset the deficit increase once other specified mandatory spending cuts have been made. *See id.* at 81, 83.

[203] Tax expenditures are revenue losses arising from provisions of the federal tax laws that allow a special exclusion, exemption, or deduction from gross income, or that provide a special credit, a preferential rate of tax, or a deferral of tax liability. *See* Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(3) (1988). These special provisions are not necessary to implement the income tax structure itself but are instead government expenditures made through the tax system, hence the name "tax expenditures." *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES vii (1973); *see, e.g.*, Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 872 (1993).

[204] See *supra* notes 60–64 and accompanying text for a discussion of UMRA's enforcement procedures.

[205] H.R. 1953, 105th Cong. (1997); *see also State Taxation of Employees at Certain Federal Facilities: Hearings on H.R. 865 and H.R. 874 Before the Subcommittee on Commercial and Admin. Law. of the Comm. on the Judiciary, House of Representative*, 105th Cong. 70 (1997) [hereinafter *State Taxation of Federal Employees*] (testimony of Harley T. Duncan, Executive Director, Federation of Tax Administrators, urging Congress to continue its "admirable pattern of restraint" in intervening in matters of state

double taxation, the federal employees affected are residents of states (Tennessee, Washington, and South Dakota) that do not tax earned income. Their complaint revolves around paying income tax to the states of Kentucky, Oregon, and Nebraska where these employees work.[206] The Source Tax Act is being cited as precedent for once again preempting a state's taxing authority.[207] If proponents of this bill are successful, the source tax jurisdiction of these three states will have been denied, and the floodgates may open for complaints by all employees who reside in one jurisdiction and work in another.[208] This legislation has already passed in the House[209] and will likely pass in the Senate. Although H.R. 1953 would impose an intergovernmental mandate because it limits certain states from collecting income taxes, the CBO's cost estimate of the mandate totaled less than $5 million annually.[210] This does not exceed the threshold established in UMRA, so no member will be able to raise a point of order.[211]

Proposals by Congress and President Clinton would prohibit state and local taxation of the Internet and related transactions.[212] Prompted by the growing efforts of state and local governments to tax Internet access and transactions,[213] Senator Ron Wyden (D-Or.) and Representative Christopher Cox (R-Cal.) introduced the Internet Tax Freedom Act in the U.S. Senate and U.S. House of Representatives on March 13, 1997.[214] The bill establishes,

---

individual income taxation "only where it felt the interests of the federal government were directly at stake or where the administrative and compliance issues posed for individual taxpayers overwhelmed the states' interests in defining their tax policies").

[206] *See* H.R. Rep. No. 105-203, at 1–3 (1997).

[207] *See State Taxation of Federal Employees*, *supra* note 205, at 20.

[208] *See id.* at 18–19.

[209] *See House Passes Bill to Stop Double Taxation by States*, 145 DAILY TAX REP. (BNA), at G-1 (July 29, 1997).

[210] *See* CONGRESSIONAL BUDGET OFFICE, INTERGOVERNMENTAL MANDATE STATEMENT: H.R. 1953 (July 24, 1997).

[211] *See* 2 U.S.C. § 658c(a) (1995).

[212] *See Clinton to Propose Tax-free Treatment for Commercial Transactions on Internet*, 125 DAILY TAX REPORT (BNA), at G-7 (June 30, 1997). However, various state and local taxing authorities oppose President Clinton's proposal. *See id.* Many states have considered or have attempted to apply their various sales and use taxes on goods and services to electronic commerce in order to compensate for loss of tax revenues from sales transacted on-line. *See* Kendall L. Houghton, *Imposing and Collecting Sales and Use Taxes on Electronic Commerce: How?*, 77 TAX NOTES 227, 229 (1997). For example, Texas, which does not impose a personal income tax, but instead relies on broad-based transaction taxes, has articulated some of the most aggressive tax policies in this area. *See id.* Lobbyists for municipal and state governments are "vowing to quash" the Internet Tax Freedom Act, and "many businesses expect them to succeed." Jon Swartz, *Clinton Advocates Net Self-Rule*, S.F. CHRON., July 2, 1997, at B1. According to Glenn Osaka, vice president of Hewlett-Packard's

through the exercise of Congress's Commerce Clause powers,[215] a national policy against state and local government interference with interstate commerce on the Internet or related services.[216] The bill also calls for a moratorium on new or discriminatory state and local taxes on electronic commerce, for an in-depth study of domestic and international taxation of electronic commerce, and for the development of tax policy recommendations by a multi-member consultative group.[217] On July 1, 1997, the Clinton Administration released its final report on electronic commerce, "A Framework for Global Electronic Commerce," which cautioned state and local governments against targeting on-line transactions for taxation.[218]

---

electronic business, "Taxation will eventually come. The questions are when, and how, without retarding this new form of commerce." *Id.*

[213] *See* Gary Chapman, *Should Internet Commerce Be Subject to Tax?*, L.A. TIMES, Feb. 17, 1997, at D4 (stating that Tacoma, Wash., was the first city to impose—and subsequently to withdraw—a tax on gross revenues of electronic transactions within its city limits). State governments have enacted cyberspace transaction-taxation laws. *See, e.g.*, CONN. GEN. STAT. § 12-407(2)(i)(A) (West 1997) (imposes a sales tax on computer and data processing services); TENN. CODE ANN. § 67-6-102(23)(F)(iii) (1996) (stating that "only those charges for interstate telecommunication which are originated or received in this state and which are billed or charges [sic] to service address in Tennessee shall be included in the tax base").

[214] S. 442, 105th Cong. (1997); H.R. 1054, 105th Cong. (1997). On November 4, 1997, the Senate Commerce Committee approved the latest version of the Senate bill by a vote of 14-5. *See Senate Commerce Committee Approves Internet Tax Freedom Act*, 214 DAILY TAX REPORT (BNA) at G-5 (Nov. 5, 1997). This version of the bill limits the moratorium to a maximum of six years, clarifies the list of state and local taxes exempt from the moratorium, and narrows the scope of the bill by tightening the definitions of Internet, on-line services, and Internet access service. *See id.* The House of Representatives version of the bill had been approved by two house subcommittees on October 9, 1997. *Id.* One opponent of the bill, Sen. Byron Dorgan (D-N.D.), promised a "long and thoughtful debate" on the Senate floor, with "lots of amendments." *Id.* Sen. Slade Gorton (R-Wash.), citing state and local government opposition in announcing his intent to oppose the bill, stated, "The easiest tax cuts for us are ones we don't have to pay for." *Id.* He further contended that state and local governments would suffer a significant revenue shortfall if the bill were made law. *See id.*

[215] *See* H.R. 1054 § 2(1), 105th Cong. (1997). Citing *Printz*, one commentator argues that the Internet Tax Freedom Act may be unconstitutional "because it purports to tell states what sort of tax laws they may have." Lee A. Sheppard, *What Does 'No New Internet Taxes' Mean?*, TAX NOTES TODAY, July 21, 1997, at 3, *available in* 1997 TNT LEXIS 20989.

[216] H.R. 1054 § 3(a), 105th Cong. (1997) ("Except as otherwise provided in this section, no State or local government (including any political subdivision) may impose, assess, or attempt to collect any tax or fee directly or indirectly on (1) the Internet or interactive computer services; or (2) the use of the Internet or interactive computer services").

[217] *See* Kendall L. Houghton & Jeffrey A. Friedman, *Lost in [Cyber]space*, TAX NOTES TODAY, Sept. 15, 1997, at 1483 n.1. The current position of the Clinton Administration and the Treasury is that of support for the goals and objectives of the Internet Tax Freedom Act; however, the administration has cautioned that the actual language in the bill needs revision. *Id.* at 1483.

[218] *See Clinton Unveils Report Advocating National, Global Harmony on Internet*

According to the CBO, S. 442 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act of 1995 because the bill would prohibit state and local governments from imposing direct or indirect taxes on the Internet or on interactive computer services.[219] The CBO estimates that the mandate imposed by S. 442 would prohibit state and local governments from collecting a variety of taxes, causing losses far exceeding the threshold established in UMRA ($50 million in 1996).[220] For example, the CBO identified fifteen states and at least one local government that tax information services provided by large database and information processing firms, currently raising between $35 million and $45 million annually. If telecommunications taxes fall within the prohibition of S. 442, states would suffer significant tax revenue losses.[221]

Congress seriously considered overall tax restructuring during the 104th Congress, holding hearings on the impact of replacing the federal income tax on various sectors of the economy, international competitiveness, etc.[222] Now that the President has signed the Taxpayer Relief Act of 1997[223] and the Balanced Budget Act of 1997[224] into law,[225] attention will return to tax reform.[226] Indeed, on July 21, 1997, Senator Richard C. Shelby (R-Ala.) reintroduced the Freedom and Fairness Restoration Act of 1997,[227] which would replace the current tax code with a flat tax. Shelby

---

Taxes, 127 DAILY TAX REP. (BNA), at GG-1 (July 2, 1997). The report recommended that any taxation of Internet sales should (1) not discriminate; (2) be simple with minimal recordkeeping; and (3) coincide with United States and its trading partners' tax systems. *See id.* at GG-1 to GG-2. President Clinton also announced "a one-year deadline for establishing a tax-free Internet with international standards and consumer protections." Julie Hirschfeld, *Clinton Takes Hands-off Internet Commerce Stance*, DALLAS MORNING NEWS, July 2, 1997, at 1D.

[219] *See* CONGRESSIONAL BUDGET OFFICE, INTERGOVERNMENTAL MANDATE STATEMENT: S. 442 (Internet Tax Freedom Act) (June 18, 1997) (on file with author).

[220] *See id.*

[221] *See id.* at 2. CBO reports that one large Midwestern state collected $300 million in telecommunications taxes in 1996. *See id.*

[222] *See, e.g.*, JOINT COMM. ON TAX'N, IMPACT ON SMALL BUSINESS OF REPLACING THE FEDERAL INCOME TAX, JCS-3-96 (Apr. 23, 1996); IMPACT ON INTERNATIONAL COMPETITIVENESS OF REPLACING THE FEDERAL INCOME TAX, JCS-5-96 (July 17, 1996); IMPACT ON MANUFACTURING, ENERGY, AND NATURAL RESOURCES OF REPLACING THE FEDERAL INCOME TAX, JCS-7-96 (July 31, 1996).

[223] Pub. L. No. 105-34, 111 Stat. 788 (1997).

[224] Pub, L. No. 105-33, 111 Stat. 251 (1997).

[225] *See Budget, Tax Agreement Reaches Balance, Ignores Future Deficit Problem, Experts Say*, 151 DAILY TAX REPORT (BNA), at G-7 (Aug. 6, 1997).

[226] *See* Congressional Budget Office, *The Economic Effects of Comprehensive Tax Reform, reprinted in* TAX NOTES TODAY, Aug. 12, 1997, at 1, *available in* 1997 TNT LEXIS 23210.

[227] S. 1040, 105th Cong. (1997).

declared, "[w]e must not forsake our broader agenda which is to seek comprehensive reform of our tax system. Piecemeal tax cuts are not a substitute for broad-based tax reform."[228]

A number of proposals repealing the income tax and instituting a national sales tax have been introduced in the first session of the 105th Congress.[229] On March 12, 1997, House Majority Leader Richard K. Armey (R-Tex.) reintroduced his flat tax proposal.[230] Senator Pete Domenici (R-N.M.) will most likely reintroduce a modified proposal in 1998.[231] Each of these federal tax restructuring proposals would have considerable corollary implications for the states. Dan Bucks, the executive director of the Multistate Tax Commission, testified that "[f]ederal tax restructuring could become the 'mother of all unfunded mandates' and could end federalism in this Nation, and with it limit the freedoms and flexibility that are nurtured and supported by federalism."[232]

It is unlikely that states would be able to replicate the legal and administrative infrastructure and international tax treaty network provided by the federal government to support the federal income tax.[233] Therefore, proposals to replace the federal income tax with a national sales tax could lead to a repeal of state and local income taxes. Logically, enactment of a national sales tax would cause businesses to demand that state and local governments conform their sales tax bases to the national tax base, further eroding state tax policy choices. In Canada, enactment of the general sales tax ("GST") led to business demands to harmonize the provincial sales tax system with the federal one. Canada enacted the GST without the full support and cooperation of all the provinces, and this has caused difficulties.[234]

---

[228] *Shelby: Flat Tax Plan Now Includes 'Progressive' Rate*, TAX NOTES TODAY, July 22, 1997, at 1, *available in* 1997 TNT LEXIS 21086.

[229] *See, e.g.*, S. 163, 105th Cong. (1997); H.R. 1541, 105th Cong. (1997); H.R. 1439, 105th Cong. (1997).

[230] *See* H.R. 1040, 105th Cong. (1997).

[231] *See* Telephone Interview with Denise Greenlaw Ramonas, Legislative Director for Senator Domenici, (Nov. 20, 1997).

[232] *See Impact on State and Local Governments and Tax-Exempt Entities of Replacing the Federal Income Tax: Hearings Before the House Comm. on Ways and Means*, 104th Cong. 217–18 (1996) [hereinafter *Impact on State and Local Hearings*] (testimony of Dan R. Bucks, Executive Director, Multistate Tax Commission).

[233] *See id.* at 218 ("[T]here appears to be a constitutional barrier to independent State income taxes because the due process clause likely prohibits States from requiring information reporting from certain out-of state businesses.").

[234] *See* Samuel Slutsky, *Liberals Escape GST Harmonization Hassle*, FIN. POST, Jun. 17, 1997, at 1, *available in* 1997 WL 4097528.

The flat tax proposals are essentially a wage tax—individuals would not be taxed on dividends, interest, and capital gains. For those states that piggyback onto the federal tax base (the majority), this change would eliminate taxes on the same items for the states.[235] This would result in state revenue losses, particularly to Tennessee and New Hampshire, which only tax individuals on investment income.[236]

The USA Tax Act would replace the individual income tax with a broad-based income tax that allows an unlimited deduction for new net savings.[237] Net savings are the taxpayer's additions to qualified savings assets minus taxable withdrawals from qualified savings assets during the year.[238] Such a tax system would exacerbate the problems caused by Congress's preemption of the states' authority to tax pension income and certain types of deferred compensation received by former residents. Taxpayers living in a state that chose to conform to the new federal tax base would receive a state deduction for additions to savings. If they retired to a state with lower rates or no income tax at all, they would avoid any state taxation on what would have previously been taxable withdrawals from savings. The incentive to relocate to a low tax or no tax state would be much greater because the exemption would apply to all savings vehicles.[239]

IV. STATE OF THE STATES' TAX SYSTEMS

Although there are enormous wealth and resource disparities among the fifty states,[240] most state and local governments do

---

[235] *See Impact on State and Local Hearings*, *supra* note 232, at 219.

[236] *See* State Tax Guide (CCH), *supra* note 155.

[237] *See* STAFF OF THE JOINT COMM. ON TAX'N, 104TH CONG., 2D SESS., IMPACT ON STATE AND LOCAL GOVERNMENTS AND TAX-EXEMPT ORGANIZATIONS OF REPLACING THE FEDERAL INCOME TAX 35 (Comm. Print 1996).

[238] *See id.* at 36. ("Qualified savings assets would include stocks, bonds, securities, certificates of deposits, interests in proprietorships and partnerships, mutual fund shares, life insurance policies, annuities, retirement accounts, and bank, money market, brokerage and other similar money accounts. Qualified savings assets would not include investments in land, collectibles, or cash on hand.") *Id.* at 37.

[239] *See Impact on State and Local Hearings*, *supra* note 232, at 224.

[240] *See* Reuben, *supra* note 33, at 80. For a detailed analysis of the current fiscal condition of the states, see THE FISCAL SURVEY OF STATES, *supra* note 15. *See generally* STATE RANKINGS 1997, *supra* note 14. California leads the nation in state government expenditures, state individual income tax revenues, state tax revenues, federal government expenditures, and projected gross state product; *see id.* at 96, 256, 281, 283, 308; but Alaska ranks highest in per capita state debt, per capita state and

not have the fiscal resources or bureaucratic infrastructures necessary for successful devolution.[241] Moreover, commentators fear that state constitutional balanced budget requirements and difficulties in enacting tax increases at the state level will cause major funding problems.[242] Consequently, states by necessity will continue to look for new sources of revenue.[243]

Unfortunately, our states' tax systems were designed in the 1930s for a predominately manufacturing driven economy.[244] State and local tax receipts have grown from $400 million in 1915 to $392 billion in 1995.[245] As the funding of responsibilities has shifted from the federal government to the states, state revenues have grown from 6% of GNP in 1970 to 7.5% in 1990.[246] The general sales tax is the leading source of state tax revenue, yielding $131.8 billion or 33.6% of total state tax revenue for 1995.[247] Individual income taxes yielded $124.5 billion or 31.7% of state tax revenues in 1995.[248] It is the second largest source of revenue for forty-one states.

These traditional revenue bases have been eroded by federal preemption of state tax laws and federal court decisions and

---

local government expenditures, and per capita state revenues. *See id.* at 279, 307, 315. Projected personal income in 2005 ranges from a high of $25,169 in Connecticut to a low of $13,575 in Mississippi. *See id.* at 110.

[241] Consider the statement of George Balong, Chair, Urban Affairs Committee of the American Public Works Association:

> I would be hard pressed to find a town, city or state in this country that is not faced with strong fiscal constraints . . . . In years past, national priorities were accompanied by federal dollars. Providing federal funds to achieve national goals was an acceptable trade-off for states and local governments at that time . . . the funds flowing to local governments have decreased, but the number of problems Congress is trying to resolve have not . . . .

Unfunded Mandates Hearing, *supra* note 46, at 143–45; *see generally* MUSGRAVE & MUSGRAVE, *supra* note 15, (providing textbook analysis of federalism's impact on state and local revenue streams).

[242] *See* Chapman, *supra* note 213, at D4 (stating that over the past 10 years, federal revenues to cities have "plummeted . . . making most communities increasingly dependent on property, business and sales taxes"). State legislators have been under pressure to reduce personal income taxes. Recommended net tax and fee changes for fiscal 1998 would bring in $4.4 billion less than in fiscal 1997, and, if enacted, 1998 would be the fourth consecutive year in which state actions resulted in a net reduction in state revenues. "The majority of proposed tax reductions focus on reducing the personal income tax." THE FISCAL SURVEY OF STATES, *supra* note 15, at 9.

[243] State and local tax receipts have grown from $400 million in 1915 to $392 billion in 1995. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 17, at 2.

[244] *See* NATIONAL CONF. OF STATE LEGISLATURES AND NATIONAL GOVERNORS' ASS'N, FINANCING STATE GOVERNMENTS IN THE 1990S at 5 (1993) [hereinafter FINANCING].

[245] *See* HELLERSTEIN & HELLERSTEIN, *supra* note 17, at 2.

[246] FINANCING, *supra* note 244, at 14–15.

[247] *See* HELLERSTEIN & HELLERSTEIN, *supra* note 17, at 3.

[248] *See id.*

undercut by the changes in the global economy and in information technologies. The economy has shifted from the production and consumption of goods to the production and consumption of services, many of which did not even exist sixty years ago.[249] Whereas the service sector accounted for one-third of the GNP in the 1930s, in 1990 it accounted for over 52% of the GNP.[250] As consumption shifts toward services, sales tax collections do not grow proportionately with the national economy. This is because the tax base of the general sales tax is predominately the purchase of tangible goods.[251] The shift also will affect individual income tax receipts, as many service industry jobs pay less than the manufacturing jobs they replace.[252]

As our population ages, sales tax collections will decrease because a large percentage of the elderly's consumption is nontaxable: most states exempt items such as medical care, groceries, and utilities from sales tax.[253] Individual income tax collections will also suffer because the elderly typically have reduced incomes and benefit greatly from favorable income tax treatment.[254] The property tax is no longer a promising revenue source due to its unpopularity among taxpayers and continued successful constitutional attacks on its use as the principal means of financing primary and secondary education.[255] As devolution generates more responsibilities for state governments, state revenue systems will be further strained.[256]

In order for devolution successfully to realign fiscal responsibilities among levels of government, as opposed to simply shrinking government, the federal government must relinquish part of its tax base to state and local governments.[257] Alice Rivlin, the

---

[249] FINANCING, *supra* note 244, at viii.

[250] *See id.* at 21.

[251] States have not been particularly successful at broadening their sales tax bases to include services. *See* William F. Fox & Matthew Murray, *Economic Aspects of Taxing Services*, 51 NAT'L. TAX J. 19–36 (1988).

[252] *See* FINANCING, *supra* note 244, at 23.

[253] *See* Duncombe, *supra* note 193.

[254] FINANCING, *supra* note 244, at 23. See *supra* notes 187–192 and accompanying text for a description of state tax policy with respect to the senior citizen.

[255] *See* William N. Evans et al., *Schoolhouses, Courthouses, and Statehouses After* Serrano, 16 J. POL'Y ANALYSIS & MGMT. 10, 10 (1997). *See generally* Glenn W. Fisher, THE WORST TAX? A HISTORY OF THE PROPERTY TAX IN AMERICA 187–205 (1996).

[256] *See* FINANCING, *supra* note 244, at 6. Additionally, experts predict a "demographic explosion that is expected to begin draining government resources around the year 2010." *Budget, Tax Agreement Reaches Balance, Ignores Future Deficit Problem, Experts Say*, *supra* note 225.

[257] To some extent, general revenue sharing previously accomplished this goal. The 1972 law enacting general revenue sharing, The State and Local Fiscal Assistance Act,

former director of the Congressional Budget Office, has proposed a plan that would require the federal government to share a nationally administered tax on retail sales or corporate profits with the states.[258] Another alternative, suggested by Professor Ray Whitman, is "general mandate compensation," a concept similar to general revenue sharing except that it would distribute aid to state and local governments according to a formula derived from a sample of state and local governments' mandate costs.[259] Realistically, any relinquishment of the federal tax base is not politically viable, given the demise of the general revenue sharing program in 1986.[260] As the impetus behind devolution is to reduce the financial commitments of the federal government, Congress is unlikely to adopt general mandate compensation. Therefore, at a minimum, Congress must forebear from prohibitions on the tax sovereignty of the states. But Congress increasingly is restricting the ability of the states to tax interstate activities. If funding responsibilities for domestic problems continue to be shifted downward, the states must be given wide latitude, subject of course to the substantive constraints imposed by the U.S. Constitution, to define their own tax policies.

Because of the inordinate temptation to enact legislation that prohibits states from taxing, usually for the benefit of a select constituency (such as in the case of the federal employees exempted from state tax by H.R. 1953), a structural change to the federal legislative process is necessary. The tax sovereignty of the states deserves heightened protections in the legislative process. Therefore, the $50 million threshold of UMRA should be eliminated with respect to any legislation that prohibits states from raising revenues. This will enable any member of Congress to raise a point of order against such a bill in either house.

Pub. L. No. 92-512, 86 Stat. 919 (1972), allocated $30.2 billion to be spent over five years. During its 13-year existence, the fiscal impact of federal revenue sharing, a program described by President Nixon as "the financial heart of the New Federalism," shrank dramatically. Due to high inflation rates in the late 1970s and early 1980s, the fixed amount allocated actually shrank as a significant resource for local and state governments. In 1980, Congress reduced its impact further when it limited funding solely to local governments. In that year, the $4.4 billion allocation to local governments was about 14% more than those governments collected in local taxes. However, by 1983, the same allocation amounted to only about 6% of local governments' tax collections. *See* Allen D. Manvel, *Federal 'Revenue-Sharing'—Anemic and Short-lived,* TAX NOTES TODAY, Oct. 28, 1985, at 430.

[258] *See* ALICE RIVLIN, REVIVING THE AMERICAN DREAM 142–47 (1992).

[259] KEE & DIEHL, *supra* note 46, at 51.

[260] *See* Gold, *supra* note 18.

This procedural change in the legislative process will not ensure that the legislation will fail; the UMRA only requires a separate vote on any unfunded mandate, and that vote can be waived by a simple majority.[261] But there is evidence that UMRA has heightened the sensitivity of members of Congress with respect to unfunded mandates. At a hearing on the one-year anniversary of UMRA, Representative Rob Portman (R-Ohio) credited the Act with removal of mandates from a Communications Act (Teleco Bill) before the bill reached the floor.[262]

The CBO is receiving requests for intergovernmental mandate cost statements during consideration of bills.[263] Legislation is being tweaked until it results in a cost statement that does not exceed the $50 million threshold of UMRA. For example, the CBO has prepared two additional mandate statements for the Internet Tax Freedom Act subsequent to its finding that S.442 would impose an intergovernmental mandate with direct costs in excess of the UMRA threshold. Senator Byron Dorgan's (D-N.D.) draft amendment replaces the prohibition in the bill with a two-year moratorium on state or local taxes on Internet transmissions measured by bandwidth or volume. Because CBO did not identify any current state or local taxes of this nature nor evidence that any states or localities were considering enacting such taxes, the CBO estimated that this amendment would not result in tax revenue losses exceeding the UMRA threshold.[264]

Senator Wyden, however, was unsuccessful in constructing an amendment that fell below the UMRA threshold. The CBO was unable to determine whether Senator Wyden's substitute amendment to prohibit the imposition of taxes on access to or communications occurring through the Internet or on-line services exceeded the UMRA threshold. Although this version specifically protects state and local taxes such as income taxes, property taxes, telecommunications taxes, and certain sales and use taxes, some taxes, such as those on Internet access charges, would still be preempted.[265] Eliminating the $50 million threshold of the UMRA for legislation that prohibits states from raising revenues

---

[261] See *supra* notes 60–64 and accompanying text for a discussion of UMRA's enforcement mechanisms.

[262] *See Unfunded Mandates Hearing*, *supra* note 46, at 28.

[263] *See id.* at 4; *see* Garrett, *supra* note 61, at 1154–55.

[264] *See* Letter from June O'Neill, Director, Congressional Budget Office, to Honorable Byron Dorgan, United States Senate 1 (June 19, 1997) (on file with author).

[265] *See* Letter from June O'Neill, Director, Congressional Budget Office, to Honorable Ron Wyden, United States Senate 1 (June 26, 1997) (on file with author).

will put an end to this game playing. This new procedural hurdle will ensure that the states receive heightened protection in the federal legislative process from congressional intrusion on state tax sovereignty. The threat of a recorded vote on whether to impose an unfunded mandate is a meaningful deterrent to such legislation.

CONCLUSION

It is inappropriate for Congress to limit the ability of the states to raise revenues at a time when Congress is also devolving power, and thus increased fiscal responsibilities, back to the states. The Source Tax Act has served to illustrate the policy issues raised by congressional limitations on state tax sovereignty. After examination of this and other examples, this Article argues that a structural change to the federal legislative process is necessary because of the temptation to enact legislation that benefits a select constituency at a cost to the states. There is evidence that the Unfunded Mandates Reform Act, while far from perfect, has heightened Congress's sensitivity to the imposition of unfunded mandates. Therefore, this Article advocates the removal of the $50 million threshold on intergovernmental mandates in the UMRA for any legislation that prohibits state taxation.

ARTICLE

TITLE II OF THE OLDER WORKERS BENEFIT PROTECTION ACT: A LICENSE FOR AGE DISCRIMINATION? THE PROBLEM IDENTIFIED AND PROPOSED SOLUTIONS

RICHARD J. LUSSIER*

In the present competitive economic environment, employers often offer severance packages to employees in exchange for a waiver of their rights to bring age discrimination claims. In response, in 1990, Congress amended the Age Discrimination in Emloyment Act of 1967, adding title II of the Older Workers Benefit Protection Act, to ensure that waivers in the individual and group termination contexts were both "knowing and voluntary" rather than attained through duress, coercion, or mistake. In this Article, the author asserts that the amendment, as structured and interpreted by the courts, provides ill-intentioned employers with a license to discriminate on the basis of age. The author argues that because the statutue does not require that employers furnish their employees with information regarding their replacements at the time of waiver, their waivers cnnot be considered knowing and voluntary. Moreover, requirements imposed by courts in some jurisdictions mandating that employees tender back severance benefits prior to filing suit for age discrimination inhibit emloyees from seeking redress for suspected discrimination. The author concludes by proposing an amendment that seeks to alleviate these problems, and offers employees and employers additional protections

INTRODUCTION

Facing intense economic competition, both foreign and domestic, thousands of American entities reorganized during the past decade in an effort to survive in an uncertain marketplace. Many entities, striving to be "leaner and meaner," included reductions in force ("RIFs") as part of their reorganization plan. Reorganizing employers commonly offered affected employees

---

* Attorney, National Labor Relations Board, Office of the General Counsel, Division of Advice, Washington, D.C.; Member, State Bars of New York and Connecticut. B.S., University of Connecticut, 1991; J.D., University of Bridgeport, Quinnipiac College School of Law, 1995; LL.M., Georgetown University Law Center, 1997. The views expressed herein represent the personal opinions of the author and do not represent the views of the National Labor Relations Board or any other United States governmental agency. The author thanks Aurel and Genevieve Lussier, Joseph Sadowski, Chris Maynard, C.P.A., and, posthumously, John and Anna Sadowski, for their unwavering support. The author also thanks his longtime friend and Harvard Law School alumnus Paul B. Taylor, Esq., for his insightful comments.

a severance package. In return for attractive severance benefits, however, many employers also required the execution of a general release. To ensure that older workers who released age discrimination claims did so in a "knowing and voluntary" manner, Congress amended the Age Discrimination in Employment Act of 1967 ("ADEA")[1] in 1990. The amendment, Title II of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C.A. § 626(f), set forth specific threshold requirements for procuring a valid waiver of ADEA rights. This Article will demonstrate that Title II provides ill-intentioned employers with a license to discriminate on the basis of age.[2]

---

[1] 29 U.S.C.A. §§ 621-34 (1997). The "protected class" for ADEA purposes comprises individuals of age 40 and over. 29 U.S.C.A. § 631 (1997). 29 U.S.C.A. § 623(a) (1997) renders it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C.A. § 621 (1997), sets forth the policy behind the ADEA:

> (a) The Congress hereby finds and declares that-(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their effots to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C.A. § 630(b) (1997), defines "employer" under the ADEA:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

[2] This Article *presumes* age discrimination, i.e., that an employer is terminating and replacing members of the protected class based solely upon their age, in violation of 29 U.S.C.A. § 623(a) (1997), and that discriminatory intent can be proven. Terminating protected employees solely to reduce salary costs is not age discrimination. *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125–26 (7th Cir. 1994) (following Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature

I. THE OLDER WORKERS BENEFIT PROTECTION ACT

Title II, 29 U.S.C.A. § 626(f), entitled "[w]aiver" provides:

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum-(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this chapter; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job

---

other than the employee's age.")). Of course, neither Congress nor the U.S. Supreme Court has spoken on the applicability of disparate impact theory to the ADEA. Ordinarily, to establish a prima facie case of disparate treatment under the ADEA via circumstantial evidence in non-RIF situations, plaintiffs must show they were: (1) in the protected age group, (2) discharged or demoted, (3) at the time of discharge or demotion, performing at a level that met their employers' legitimate expectations, and (4) following their discharge or demotion, replaced by someone of comparable qualifications who was substantially younger. *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1308, 1310 (1996). The prima facie case in RIF circumstances, where no subsequent hiring occurs, differs. *See* Raczak v. Ameritech Corp., No. CIV.A.93-72697, 1994 WL 780899, at *18–*19 (E.D. Mich. Aug. 1, 1994):

> classification or organizational unit who are not eligible or selected for the program.
> (2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum-(A) subparagraphs (A) through (E) of paragraph (1) have been met; and (B) the individual is given a reasonable period of time within which to consider the settlement agreement.
> (3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).
> (4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Significantly, Title II distinguishes between individual separation agreements and group termination programs, granting employees involved in the latter more time to consider the agreement[3] and certain types of information.[4] The Senate Committee on Labor and Human Resources[5] explained the distinction. Indi-

---

> [E]stablishing the fourth element is problematic . . . a terminated employee's duties are usually reallocated to other employees and the plaintiff's position is not filled by anyone, let alone someone outside the protected class. [[T]he plaintiff is] usually required to present evidence indicating that he or she was terminated as part of "a pattern of downsizing that could ultimately benefit a person not a member of the protected class."

See also Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). The prima facie case creates an inference of age discrimination which employers can then rebut by presenting legitimate, non-discriminatory reasons for the termination. *See* Tuck v. Henkel Corp., 973 F.2d 371, 375 (4th Cir. 1992), *cert. denied*, 507 U.S. 918 (1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). If an employer rebuts an employee's inference of age-based discrimination, the employee can still prevail by demonstrating by a preponderance of the evidence that the defendant's proffered reason was mere pretext and that the actual reason for the termination was unlawful discrimination. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507–08, 512 n.4 (1993). Throughout, the burden of persuasion remains with the plaintiff. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[3] *See* 29 U.S.C.A. § 626(f)(1)(F)(ii) (1997).

[4] *See* 29 U.S.C.A. § 626(f)(1)(H) (1997).

[5] The Senate bill passed in lieu of the House bill. *See* S. REP. No. 101-263, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1509.

vidual employees may engage in arm's-length negotiation, whereas, in the group context, affected employees have little or no basis to suspect that action is being taken based on their individual characteristics and the terms of the program are not subject to negotiation.[6] Thus, the need for information and advice in the group setting is especially acute.

Though not set out in Title II, the Senate Committee noted that employers must act in the absence of fraud, duress, coercion, or mistake of material fact and that Title II requires examination of the totality of circumstances when reviewing the "knowing and voluntary" issue.[7] Additionally, the Senate Committee intended "that the requirements of [T]itle II be strictly interpreted to protect those individuals covered by the Act."[8] Besides employees' private ADEA actions, employees may waive their right to recover in a lawsuit brought by the EEOC on their behalf.[9] Finally, the requirements of Title II apply only to the waiver of ADEA rights,[10] and failure to comply with OWBPA, standing alone, cannot form the basis of an ADEA claim.[11]

II. THE POLICY

The Senate Committee explicitly stated that the policy behind Title II is the prevention of unfair and abusive waiver practices.[12] The Committee specified what it meant by unfair and abusive

---

[6] *See id.* at 32, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537–38.

[7] *Id.* at 32, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537; *see also* Griffin v. Kraft Gen. Foods, 62 F.3d 368 (11th Cir. 1995) (stating that circumstances not explicitly mentioned, such as fraud, can still render a waiver invalid; these circumstances survived the enactment of Title II).

[8] S. REP. No. 101-263, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537.

[9] *See id.* at 35, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1541; *see also* EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987).

[10] *See* Williams v. Phillips Petroleum, 23 F.3d 930 (5th Cir. 1994), *cert. denied*, 513 U.S. 1019 (1994) (stating that OWBPA does not apply to the waiver of rights under the Worker Adjustment and Retraining Notification Act); Charley v. Shell Oil, No. CIV.A.94-4436, 1996 WL 182209 (S.D. Tex. Feb. 8, 1996) (stating that OWBPA does not apply to the waiver of Title VII rights); Keelan v. Bell Communications Research, 674 A.2d 603 (N.J. Super. Ct. App. Div. 1996) (stating that OWBPA does not govern validity of releases from state law claims).

[11] *See* EEOC v. Sears Roebuck & Co., 883 F. Supp. 211, 215 (N.D. Ill. 1995).

[12] *See* S. REP. No. 101-263, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1520. The Senate Committee set forth the need for legislation requiring minimum standards for the waiver of ADEA rights in S. REP. No. 101-79, at 2–17 (1989) (report on the unenacted Age Discrimination in Employment Waiver Protection Act of 1989). The Committee incorporated this portion of the 1989 report by reference into the 1990 report to the extent it was consistent with Title II. The language in the text is from S. REP. No. 101-79, at 9 (1989).

waiver practices: (1) manipulation and coercion of older workers, and (2) waiver of ADEA rights by older workers without information necessary to assess whether their terminations were based on age.[13] Regarding the second practice, the Committee noted:

> The preemptive waiver of rights occurs before a dispute has arisen and indeed *before* an employee is even *aware* of any *potential or actual pattern of discrimination.* Such a preemptive waiver also may preclude the employee from asserting claims that arise out of *subsequent discriminatory conduct* by the employer, e.g., *hiring younger workers to replace the terminated older workers.* These waivers are both unfair and inconsistent with the intent of the ADEA.[14]

III. THE PROBLEM

The Senate Committee stated that the legislation "ensures that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA."[15] Congress arguably addressed the first unfair and abusive waiver practice. In both the individual and group termination contexts, however, Congress missed its target regarding the second. After OWBPA, ill-intentioned employers can still obtain preemptive releases from members of the protected class and subsequently replace them with substantially younger workers, without fear of ADEA liability. Those who learn of their post-release replacement have waived their right to recover for age discrimination.[16] Thus, employers who comply with Title II receive a license to discriminate on the basis of age.

---

[13] *See* S. REP. NO. 101-79, at 9–12 (1989).

[14] *Id.* at 9 (emphasis added). The exact quotation also appears in H.R. REP. NO. 101-664, at 23 (1990). Congress also apparently presumed the existence of an ill-intentioned employer engaged in age discrimination. *See supra* note 2.

[15] S. REP. NO. 101-263, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1510.

[16] Employers who obtain ADEA waivers executed in compliance with OWBPA will prevail as a matter of law. *See* Murphy v. Int'l Bus. Mach. Corp., 810 F. Supp. 93, 96 (S.D.N.Y. 1992) (stating that employees who execute waiver agreements that meet the minimum statutory requirements of OWBPA have given up their right to bring suit under the ADEA, and the court will dismiss their claim).

A. *Individual Termination Context*

A hypothetical illustrates the problem in the individual termination context. This example is a modified version of a real life example set forth by the Senate Committee:[17]

> Kenneth Lancaster was a 53 year-old service manager for a car dealership in St. Paul, Minnesota. As of December 1983, he had served in that capacity for over 12 years with numerous favorable reviews and had received a $3,000 merit increase earlier in the year. [Lancaster's new boss believed that managers age 50 and older were inherently unproductive and incompetent.] On Friday afternoon, December 31, Lancaster was told without warning that he was being terminated effective that day, and was offered severance pay if he agreed to waive all claims against the company.[18] [After considering the agreement for the statutory time period and consulting his attorney, Lancaster signed the waiver agreement. Of course, the waiver agreement and the execution process appeared to comply with OWBPA.] Two months later, Lancaster learned that his replacement was a 28-year old with little managerial experience.

In the real pre-OWBPA scenario, Lancaster filed an ADEA lawsuit. The district court granted the employer's summary judgment motion based on the release, and the court of appeals affirmed.[19] Does Title II command a different result, that is to say, can Lancaster avoid the release and possibly recover for age discrimination after learning of his post-waiver replacement by a significantly younger worker?[20] Alternatively, after OWBPA,

---

[17] *See* S. REP. No. 101-79, at 11–12 (1989).

[18] The omitted portion of the example reads:

> He asked to take the termination agreement home over the New Year's weekend, but was told no. He asked for time to take the documents to an attorney, but was told he did not need to because "the dealership's lawyers had already gone over everything." Later that same afternoon, his supervisor told him that the severance amount was being raised, and that the papers would be redrafted over the weekend. The supervisor brought the revised agreement to Lancaster's home on Tuesday, January 4 (the first workday of the new year). Lancaster was told that if he did not sign immediately he would get no severance at all. He signed the waiver agreement.

Id. As noted above, Congress, given the time, clarity, and attorney provisions of OWBPA, arguably addressed the first unfair and abusive waiver practice: manipulative and coercive behavior on the part of employers. This Article will not address whether Title II is truly effective in this capacity.

[19] Lancaster v. Buerkle Buick Honda Co., No. CIV.4-84-1060, 1985 WL 4000 (D. Minn. Nov. 27, 1985), *aff'd*, 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 482 U.S. 928 (1987).

[20] Replacement by a significantly younger worker is only one of four elements of the

does the second unfair and abusive waiver practice recognized by Congress remain completely legitimate?

One OWBPA section and two provisions of the legislative history appear sufficient. Closer examination exposes these potential protections as illusory.

First, 29 U.S.C.A. § 626(f)(1)(C) provides that "the individual does not waive rights or claims that may *arise after* the date the waiver is executed" (emphasis added). The key question is, *when* does an ADEA claim arise: before, on, or after the execution date? More specifically, does an ADEA claim arise on the date ill-intentioned employers replace terminated older workers with

---

prima facie case and is insufficient, standing alone, to establish pretext. *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1308, 1310 (1996), and Monaco v. Fuddruckers, Inc., 1 F.3d 658, 661 (7th Cir. 1993), respectively; *see also* Futrell v. J.I. Case, 38 F.3d 342, 348 (7th Cir. 1994) ("Typically, younger workers will replace older ones; this is an unremarkable phenomenon that does not, in and of itself, prove discrimination (citations omitted). But such evidence does contribute to an age discrimination proof when combined with other factors."); Teresa A. Daniel, *Planning for Voluntary and Involuntary Workforce Reductions*, EMPLOYMENT REL. TODAY, Autumn 1995, at 59 ("Do *not* replace employees who are terminated during a RIF within one year. The employees will undoubtedly find out about such replacements, which will . . . enhance an employee's claim that the RIF was a pretext for unlawful discrimination."). This Article *does not* seek to elevate the evidentiary value of replacement or lessen a plaintiff's burden under the model of proof set out in *supra* note 2. This Article *does* advocate providing members of the protected class with the post-waiver information, legal advice, and time needed to assess better the circumstances of their termination and a potential opportunity to avoid their release. Replacement by a substantially younger worker is vital post-waiver information that *could* bear on the existence of *potential* age discrimination; this information could raise the *suspicions* of former employees, compel further *investigation*, and ultimately lead to the *discovery* of *sufficient evidence*. *See* Ode v. Omtvedt, 883 F. Supp. 1308, 1317 (D. Neb. 1995), *aff'd*, 81 F.3d 165 (8th Cir. 1996) ("[B]elated discovery that a younger worker has been employed to replace an older one may toll the charge-filing period under certain circumstances (such as where the employee reasonably does not suspect discrimination until the younger person is hired)."); Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 880–81 (5th Cir. 1991), *cert. denied*, 502 U.S. 868 (1991):

> Guiberson Oil by implication told Rhodes that he would not be replaced. The record shows that the company's misstatements lulled Rhodes into not approaching the EEOC sooner. Rhodes did not have enough facts to be sufficiently aware of a possible claim and thus place an EEOC charge . . . .

See also Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 267 (7th Cir. 1995) ("Thelen claims that it was not until he learned who his replacement was that he suspected that he may have been a victim of age discrimination"); Allen v. Diebold, Inc., 807 F. Supp. 1308, 1322 (N.D. Ohio 1992), *aff'd*, 33 F.3d 674 (6th Cir. 1994) ("The hiring of young workers, clearly not itself a discriminatory act, tends to prove the discriminatory act of age-based discharge"); *O'Connor*, 116 S. Ct. at 1310 ("[T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination."); ETHAN LIPSIG, DOWNSIZING LAW AND PRACTICE 62 (1996):

> [A] hiring freeze is not to reduce the work force; rather, it is to validate the layoff. When a laid-off employee's job is filled shortly after his or her layoff, it is relatively easy for the employee to allege that the "layoff" was a pretext for illegal discrimination or other improper conduct.

Thus, this Article seeks to foster truly "knowing and voluntary" release decisions. *See infra* pp. 39-58.

substantially younger workers or the date a terminated worker becomes or reasonably should have become aware of such replacement?[21]

The case law indicates that an ADEA claim arises on the earlier of the termination date or the date plaintiffs receive notice of the final termination decision, not the date ill-intentioned employers replace terminated older workers with substantially younger workers or the date a terminated worker becomes or reasonably should have become aware of such replacement. In *Thelen v. Marc's Big Boy Corp.*,[22] the court held that the plaintiff's cause of action accrued when he was notified of his termination, not when he learned of his replacement by a younger worker. The court noted:

> Thelen claims that it was not until he learned who his replacement was that he suspected that he may have been a victim of age discrimination. Thus, Thelen asserts that his claim did not begin to accrue until he suspected that his termination was wrongful . . . . A plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful . . . . Thelen's injury was his termination. He "discovered" his injury on November 9, 1987 when Kenneth MacKenzie, Marcus Corp.'s Controller, informed Thelen that he was to be terminated, effective December 15, 1987. Thus, the statute of limitations on Thelen's action began on November 9.[23]

---

[21] *See* Mary Elizabeth Metz, Comment, *Waivers Under The Age Discrimination In Employment Act*, 59 UMKC L. REV. 351, 376 (1991); N. Jansen Calamita, Note, *The Older Worker's Benefit Protection Act of 1990: The End of Ratification And Tender Back In ADEA Waiver Cases*, 73 B.U. L. REV. 639, 666–67 (1993) (noting the difficulty of determining when a claim "arises" under the ADEA and its potential significance under OWBPA).

[22] 64 F.3d 264 (7th Cir. 1995).

[23] *Id.* at 267. *See also* Seroka v. American Airlines, 834 F. Supp. 374, 377–78 (S.D. Ala. 1993) (stating that the third OWBPA requirement, "that rights or claims arising after the waiver is executed not be included in the release, has also been met. An age discrimination claim arises at the time of the alleged discrimination (here, termination of Mr. Seroka's employment)."). The *Seroka* court cited Pfister v. Allied Corp., 539 F. Supp. 224, 226–27 (S.D.N.Y. 1982) (holding that the ADEA statute of limitations begins to run on the date plaintiffs receive written notice of the final termination decision, not the date the termination actually takes effect). The *Pfister* court, in turn, cited Delaware State College v. Ricks, 449 U.S. 250 (1980) (holding that a plaintiff who was denied tenure but offered a terminal contract exceeded the statute of limitations because the cause of action accrued from the date of notification of the alleged unlawful act, the denial of tenure, not from the date of termination of employment) and Fernandez v. Chardon, 454 U.S. 6 (1981) (holding that even though plaintiff continued to work for a year after being notified of his termination, the statute of limitations ran from the date he was notified of his termination); *see also* Frumkin v. Int'l Bus. Mach. Corp., 801 F. Supp. 1029, 1043 (S.D.N.Y. 1992) ("Plaintiff's cause of action for age discrimination accrued, if at all, in October 1988 when the allegedly

Thus, an ADEA claim arises before or on the execution date of the waiver, not after. Indeed, the legislative history of OWBPA indicates that post-waiver replacement was not even Congress's focus when it drafted 29 U.S.C.A. § 626(f)(1)(C).[24] Hence, 29 U.S.C.A. § 626(f)(1)(C) does not give members of the protected class an opportunity to recover for age discrimination even though they may not learn of their replacement by a significantly younger worker until after they have signed a waiver.

Second, the Senate Committee stated that "[t]he individual also must have acted in the absence of fraud . . . . The Committee expects that courts reviewing the 'knowing and voluntary' issue will scrutinize carefully the complete circumstances in which the waiver was executed."[25] Does the employer's conduct in the hypothetical constitute fraud?

It is generally difficult for plaintiffs in these situations to prove that an employer's conduct constituted fraud. In *Joint Venture Asset Acquisition v. Zellner*,[26] a UCC case, the court set forth five distinct elements that plaintiffs must establish to set aside a release based on fraud: (1) that misrepresentation or active wrongful concealment of a material fact occurred, (2) that the representation was false and known to be false at the time the defendant made it or that the concealment was intentional, (3) that the defendant misrepresented the fact for the purpose of inducing the plaintiff to rely on it or concealed the fact in order to mislead the plaintiff, (4) that the plaintiff relied on the misrepresentation or would have acted differently had the concealed fact been known, and (5) that the plaintiff suffered injury as a proximate result of the misrepresentation or concealment.[27]

These elements have imposed a substantial burden on plaintiffs trying to invalidate their waivers. In *Skluth v. United Merchants and Manufacturers, Inc.*,[28] the plaintiff brought an age discrimination claim under the New York State Human Rights Law. The court explained:

---

discriminatory elimination of Travel Management Systems went into effect; the document signed by Plaintiff on January 5, 1989, could and did effectively release Defendant from liability to Plaintiff potentially arising out of that event.").

[24] *See* S. Rep. No. 101-263, at 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1538.

[25] *Id.* at 32, *reprinted in* 1990 U.S.C.C.A.N. at 1537.

[26] 808 F. Supp. 289 (S.D.N.Y. 1992).

[27] *See id.* at 302. The court noted, however, that once a plaintiff or counterclaimant has put into the record at least "some evidence" of fraud, the party asserting the validity of the release must come forward with "real evidence" to sustain its burden regarding the legality of the release.

[28] 163 A.D.2d 104 (N.Y. App. Div. 1990).

> [Plaintiff] insists that defendant placed in his former position a younger employee, a fact with which he became acquainted only after he had signed the disputed release . . . . A release may, of course, be attacked for being the product of fraud, duress or undue influence (citations omitted) but plaintiff's only challenge to the release in question is that he did not have a lawyer advising him to sign it, and he did not learn until after he had approved the release that he had been replaced by a younger employee.[29]

The court held the release executed by the plaintiff valid and granted the employer's summary judgment motion.[30] Similarly, in *Nicholas v. Nynex, Inc.*,[31] a Title VII case citing *Zellner*, the court explained that, to establish fraudulent inducement, a plaintiff must prove that the defendant misrepresented or actively concealed a material fact.[32] The court concluded, "Plaintiff's wholly conclusory assertions of fraudulent concealment—which consist of nothing more than plaintiff's contention that he did not know about the alleged discrimination so defendant must have concealed it from him—are not sufficient to create a question of fact on this issue."[33]

Thus, the fraud model of proof imposes a substantial burden on terminated older workers. In cases involving passive ill-intentioned employers, fraud does not help members of the protected class avoid their releases and possibly recover for age discrimination after learning of their post-waiver replacements by significantly younger workers.

---

[29] *Id.* at 105–06.

[30] *See id.* at 107.

[31] 929 F. Supp. 727 (S.D.N.Y. 1996).

[32] *See id.* at 732.

[33] *Id. But cf.* Forbus v. Sears Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992) (reversing summary judgment on a state law fraud claim where the employer informed the plaintiffs that restructuring would substantially reduce the number of jobs available, but post RIF/waiver changed its restructuring plan to require a work force in-between the pre-RIF level and the initial anticipated restructured level (when the plaintiffs asked for their jobs back, the employer informed them that no jobs were available)). Fraud, however, is difficult to prove with regard to future events. *See, e.g.*, Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994) ("The failure to fulfill a promise to perform future acts is not grounds for a fraud action unless there existed an intent not to perform at the time the promise was made. Similarly, statements will not form the basis of a fraud claim when they are mere 'puffery' or are opinions as to future events.") (citations omitted); Zanani v. Savad, 217 A.D.2d 696, 697 (N.Y. App. Div. 1995) ("In general, a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud. To constitute actionable fraud, the false representation relied upon must relate to a past or existing fact, or something equivalent thereto, as distinguished from a mere estimate or expression of opinion.").

Third, the Senate Committee stated that "[t]he individual also must have acted in the absence of . . . mistake of material fact."[34] In the hypothetical, can Lancaster successfully attack the release under the mistake of material fact theory?

Many courts inextricably intertwine the doctrine of unilateral mistake with the doctrine of fraud. In *Allen v. Westpoint-Pepperell, Inc.*,[35] for example, the court noted that "where, as here, the language of a release is 'clear and unambiguous on its face, the court may still . . . rescind that [release] where it finds either mutual mistake[36] or one party's unilateral mistake coupled with some fraud . . . of the other party.'"[37] An individual may rescind a contract on the basis of unilateral mistake, therefore, only when the mistake coincides with fraudulent concealment by the other party.[38] Moreover, plaintiffs bear "the burden of proving both [their] own mistake and fraudulent concealment by the other party."[39] In *Investors Insurance Co. of America v. Dorinco Reins Co.*,[40] the court dismissed the plaintiff's unilateral mistake challenge because the plaintiff failed to present specific allegations of fraud.[41] While under some circumstances a party can rescind a contract based on unilateral mistake by proving that the other party knew or should have known of the mistake,[42]

---

[34] S. REP. No. 101-263, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537.

[35] 945 F.2d 40 (2d Cir. 1991).

[36] To rescind based on mutual mistake, plaintiffs must establish that "both parties to the release shared the same erroneous belief as to a material fact, and their acts did not in fact accomplish their mutual intent." *Id.* at 46. This doctrine is not helpful in the present context.

[37] *Id.* at 44 (quoting National Fire Ins. Co. of Pittsburgh, Pa. v. Walton Ins. Ltd., 696 F.Supp. 897, 902 (S.D.N.Y. 1988)).

[38] *See* Sudul v. Computer Outsourcing Servs., Inc., 917 F. Supp. 1033, 1044 (S.D.N.Y. 1996) (citing Chimart Assocs. v. Paul, 489 N.E.2d 231, 234 (N.Y. 1986) to the effect that employer must know that employee is under a mistaken belief as to employment contract to sustain a defense of unilateral mistake).

[39] *Sudul*, 917 F. Supp. at 1044 (quoting Winmar Co. v. Teachers Ins. and Annuity Ass'n of America, 870 F. Supp. 524, 537 (S.D.N.Y. 1994)).

[40] 736 F. Supp. 1260 (S.D.N.Y. 1990), *aff'd on other grounds*, 917 F.2d 100 (2d Cir. 1990).

[41] *See id.* at 1264. *See also* Schmitt-Norton Ford, Inc. v. Ford Motor Co., 524 F. Supp. 1099, 1104 (D. Minn. 1981), *aff'd*, 685 F.2d 438 (8th Cir. 1982) ("Unilateral mistake concerning the effect of a release is not a basis for setting it aside unless there is evidence that the other party obtained the release by fraud, misrepresentation, or other inequitable conduct."); Fitzwater v. Lambert and Barr, Inc., 539 F. Supp. 282, 293 (W.D. Ark. 1982) (holding that unilateral mistake may be sufficient to avoid a release if accompanied by fraud or misrepresentation, but that proof of such fraud or misrepresentation must be "clear, unequivocal and convincing.").

[42] *See* Middle E. Banking Co. v. State St. Bank Int'l, 821 F.2d 897, 906 (2d Cir. 1987) ("While it is true that New York courts will, in some cases, rescind contracts and void releases even in the absence of fraud where unilateral mistake is established, the mistake must be 'one which is known or ought to have been known to the other

plaintiffs usually have to establish fraud or misrepresentation in addition to unilateral mistake. As a result, unilateral mistake doctrine is generally unavailable to members of the protected class seeking to rescind their releases and recover for age discrimination.

Unfortunately, members of the protected class in Kenneth Lancaster's position cannot use OWBPA to avoid their releases and recover for age discrimination when replaced by significantly younger workers. Although Congress recognized the danger of post-waiver replacement of older workers, OWBPA does not prevent employers from using such unfair and abusive waiver practices in the individual termination context.

B. *Group Termination Context*

Title II distinguishes between individual separation agreements and group termination programs. Federal law entitles employees involved in group termination programs to receive certain information. 29 U.S.C.A. § 626(f)(1)(H) provides:

---

party.'") (citations omitted); Sheridan Drive-In, Inc. v. State, 16 A.D.2d 400 (N.Y. App. Div. 1962) (allowing rescission of a settlement agreement). The *Sheridan* court explained:

> Rescission may be allowed even for a unilateral mistake, in order to prevent an unjust enrichment of the other party . . . . It is universally recognized that there is a right of rescission for a unilateral mistake if the mistake was known to the other party at the time of the negotiating of the contract and was not corrected by it.

Id. at 405 (citations omitted). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). The provision reads:

> WHEN MISTAKE OF ONE PARTY MAKES A CONTRACT VOIDABLE: Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

Id. But see RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981) (establishing that a party bears the risk of a mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient."). Comment c to this section reads as follows:

> Conscious ignorance. Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited. If he was not only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake. It is sometimes said in such a situation that, in a sense, there was not mistake but "conscious ignorance."

Id. at cmt. c.

> if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.[43]

The Senate Committee on Labor and Human Resources noted that "these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA."[44] In *EEOC v. Sears, Roebuck and Co.*,[45] the court noted that:

> This information is the sort of information an employee would need to assess whether the program discriminates against employees on the basis of age. The employee then would be able to determine whether he or she would be giving up potential ADEA claims or valuable ADEA rights in exchange for the proffered benefits. The employee would have the information necessary to make a "knowing" decision with regard to his or her rights.[46]

Congress failed to meet its objectives in the group termination context. A hypothetical illustrates the problem:

Johnson Manufacturing employed twenty engineers. Johnson believed that older engineers were inherently incompetent and wanted to eliminate them from its workforce. Johnson decided to terminate a group of five engineers simultaneously, including 55-year-old Tom Jones. The other terminated engineers were ages 50, 48, 35, and 39. Johnson privately considered Davis, the 35-year-old engineer, and Phillips, the 39-year-old engineer, to be among the least productive engineers. Johnson offered the five engineers a standardized nonnegotiable severance package

---

[43] 29 U.S.C.A. § 626(f)(1)(H) (1997).
[44] S. REP. No. 101-263, at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1539.
[45] 857 F. Supp. 1233 (N.D. Ill. 1994).
[46] *Id.* at 1237–38.

in exchange for their executing a general release. At the commencement of the review period, Jones received the following written information from Johnson Manufacturing pursuant to 29 U.S.C.A. § 626(f)(1)(H):

(i) the employment termination program covers a group consisting of engineers Jones, Smith, Thomas, Davis, and Phillips; only the listed individuals are eligible; the listed individuals may execute the release within the next 60 days, until _____, 199__
(ii) job titles and ages of all individuals selected for the program: Jones, engineer, age 55; Smith, engineer, age 50; Thomas, engineer, age 48; Davis, engineer, age 35; Phillips, engineer, age 39; individuals not selected for the program: A, age 42; B, age 30; C, age 27; D, age 40; E, age 28; F, age 35; G, age 47; H, age 29; I, age 45; J, age 41; K, age 42; L, age 33; M, age 26; N, age 22; O, age 49 (all 15 are engineers).

After reviewing the information, considering the release for the statutory time period and consulting his attorney, Jones executed the release. Of course, the information, the release and the execution process strictly complied with OWBPA. Three months later, ill-intentioned Johnson Manufacturing hired five new engineers. The oldest new hire was age 25.

Theoretically, the information employees receive under 29 U.S.C.A. § 626(f)(1)(H) helps identify ill-intentioned employers who *retain* substantially younger workers while disproportionately eliminating older employees under a termination program.[47] The data Jones received from ill-intentioned Johnson Manufacturing, however, gave little indication of age discrimination,[48] yet such discrimi-

---

[47] The information employees receive under 29 U.S.C.A. § 626(f)(1)(H) might be probative of age discrimination in the layoff context, but it lacks utility in the exit incentive context:

> Terminations under an exit incentive program are voluntary; age disclosures pertaining to ineligible workers normally prove nothing, especially because the ADEA specifically permits exit incentive programs to include minimum age requirements. Thus, although the required disclosures might reveal that a layoff disproportionately affected older workers, disproportionate eligibility of older workers for an exit incentive program would not be evidence of age discrimination. To the contrary, it would show that older workers were being favored . . . . [I]mposition of the disclosure requirement in connection with exit incentive programs appears to be almost wholly inappropriate.

ETHAN LIPSIG, DOWNSIZING LAW AND PRACTICE 126–27 (1996). The hypothetical involves the layoff context.

[48] Under the group program, Johnson Manufacturing terminated three of its ten engineers in the protected class and two of its ten engineers not in the protected class. Comparatively, this difference is insignificant.

nation was the sole reason behind his termination and replacement. The information employees receive under 29 U.S.C.A. § 626(f)(1)(H) sheds no light on ill-intentioned employers who *hire* substantially younger workers after eliminating older employees under a termination program.[49] Title II does not require ill-intentioned Johnson Manufacturing to disclose future hiring plans. Indeed, when Jones had to decide whether to sign the waiver or retain his ADEA rights, vital circumstantial evidence that could ultimately bear on the existence of potential age discrimination, namely, replacement by a significantly younger worker,[50] did not yet exist. At that point in time, Jones was unable to determine whether the program gave rise to a potential ADEA claim. Unfortunately, when probative circumstantial evidence[51] of Johnson Manufacturing's discriminatory intent came into existence three months later, Jones had already executed a "knowing" waiver of ADEA rights under Title II.

Additionally, since Johnson Manufacturing fully complied with Title II, including the information requirements of 29 U.S.C.A. § 626(f)(1)(H), Tom Jones cannot avoid his release and possibly recover for age discrimination after learning of his post-waiver

---

[49] Interestingly, the OWBPA information requirements resemble the evidence necessary to establish a circumstantial prima facie ADEA case in RIF circumstances, where no subsequent hiring occurs. In Raczak v. Ameritech Corp., No. CIV.A.93-72697, 1994 WL 780899, at *7–*8 (E.D. Mich. Aug. 1, 1994), the court noted the difference in the model of proof in RIF cases:

> [E]stablishing the fourth element is problematic because when an employer terminates employees in connection with a downsizing a terminated employee's duties are usually reallocated to other employees and the plaintiffs [sic] position is not filled by anyone, let alone someone outside the protected class . . . . [The plaintiff is] usually required to present evidence indicating that he or she was terminated as part of "a pattern of downsizing that could ultimately benefit a person not a member of the protected class." [citations omitted] One way to evaluate whether such a pattern exists is to look at the job titles and ages of all terminated employees and then compare that information with the ages of nonselected employees who perform similar or related work and are thus likely to take over the terminated employees duties or perform jobs that the plaintiff is likely to be qualified to perform (i.e., employees of the same job classification or organizational unit as the selected employees). If that information reveals that the employees selected for termination were consistently older employees within the selected employee's job classification or organizational unit, one might suspect that the employer engaged in age discrimination.

See also Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994) ("[I]n a RIF case, the plaintiff must show he was in the protected class, he was qualified, he was laid off and other unprotected workers were retained."). It is questionable whether RIFs occur where employers subsequently replace terminated members of the protected class with substantially younger workers.

[50] *See supra* note 20.

[51] *See supra* note 20.

replacement by a significantly younger worker.[52] Hence, after OWBPA, the second unfair and abusive waiver practice recognized by Congress remains completely permissible in the group termination context.

C. *The Ratification Doctrine and the Tender Back Requirement: Additional Obstacles Facing Members of the Protected Class in Certain Jurisdictions*

There is a clear split among the United States Courts of Appeals as to the applicability of the ratification doctrine and the tender back requirement in the OWBPA context.[53] Even if Lancaster and/or Jones had grounds to challenge their releases under Title II, these two principles could thwart their efforts in certain jurisdictions. The two leading cases, *Oberg v. Allied Van Lines, Inc.*[54] and *Wamsley v. Champlin Ref. and Chems., Inc.*,[55] set forth the opposing positions in the debate.

In *Oberg*, Allied Van Lines ("Allied") employed the plaintiffs.[56] As part of an RIF, Allied offered each eligible employee a choice between two severance benefit packages: the standard severance package or an enhanced package that provided extra compensation in return for the execution of a general release.[57]

The plaintiffs chose the latter option.[58] After the plaintiffs received their last severance disbursement, they filed charges with the EEOC and subsequently filed a class action lawsuit alleging that Allied violated the ADEA.[59] The plaintiffs neither returned nor offered to return any of the severance benefits received from Allied for executing the general release.[60] The defendants moved to dismiss the suit.[61] The district court denied

---

[52] The provisions applicable to the individual termination context, 29 U.S.C.A. § 626(f)(1)(C), fraud and mistake of material fact, are equally applicable in the group setting. These protections, however, have proven illusory. *See supra* Part III.A. There is no reason to believe that applying them in the group context, rather than the individual context, makes them any more effective.

[53] The U.S. Supreme Court has granted certiorari on this issue. *See* Oubre v. Entergy Operations, Inc., 102 F.3d 551 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1466 (1997). The Court heard oral argument on November 12, 1997.

[54] 11 F.3d 679 (7th Cir. 1993).

[55] 11 F.3d 534 (5th Cir. 1993).

[56] *See Oberg*, 11 F.3d at 680.

[57] *See id.* at 681.

[58] *See id.* at 680.

[59] *See id.* at 681.

[60] *See id.*

[61] *See id.*

the defendants' motions and certified the order to the Seventh Circuit for interlocutory review.[62]

Allied advanced four arguments before the Seventh Circuit.[63] First, Allied argued that the releases were valid under Title II: that the plaintiffs had waived their right to bring an ADEA claim and that Allied was entitled to judgment as a matter of law.[64] Second, Allied contended that, even if the releases were invalid under OWBPA, the plaintiffs subsequently ratified the releases by failing to tender back the severance benefits.[65] Third, Allied claimed that the plaintiffs were required to tender back the severance benefits before being allowed to maintain their ADEA suit.[66]

The Seventh Circuit concluded that the releases did not comply with Title II. The releases were not "knowing and voluntary" and were unenforceable from the time of execution.[67]

The Seventh Circuit also held that the common law contract ratification doctrine was inapplicable since Congress chose to occupy the field of ADEA waivers through the enactment of the OWBPA.[68] Using a plain meaning interpretation, the court found that the phrase "[a]n individual may not waive," contained in 29 U.S.C.A. § 626(f)(1), was unambiguous. The court concluded that, "unless a waiver contract takes the form required by the statute, an employer and an employee cannot contract to waive the ADEA provisions . . . . No matter how many times parties may try to ratify such a contract, the language of the OWBPA, '[a]n individual may not waive', [sic] forbids any waiver."[69] Thus, under *Oberg*, releases that fail to comply with OWBPA are *void* and unenforceable from the outset, and cannot be ratified and transformed into enforceable agreements by the plaintiffs' failure to tender back severance benefits.[70]

Finally, the Seventh Circuit held that the plaintiffs need not tender back their severance benefits as a prerequisite to maintaining their ADEA claim; the court would deduct the severance amount from any judgment rendered in the plaintiffs' favor.[71] In

---

[62] *See id.* at 680.

[63] The fourth argument, that the district court improperly granted plaintiffs' motion for summary judgment, is beyond the scope of this discussion.

[64] *See Oberg*, 11 F.3d at 681–82.

[65] *See id.*

[66] *See id.*

[67] *See id.* at 682.

[68] *See id.* at 683.

[69] *Id.*

[70] *See id.* at 685.

[71] *See id.*

reaching this conclusion, the court analogized the policy of the ADEA to that of the Federal Employers' Liability Act (FELA)[72] and, thus, examined precedent under the latter statute.[73] The court relied on *Hogue v. Southern Ry. Co.*,[74] in which the U.S. Supreme Court rejected a tender back requirement under the FELA. The Seventh Circuit affirmed the order of the district court and permitted the *Oberg* plaintiffs to proceed. Several courts have subscribed to the Seventh Circuit's rationale in *Oberg*.[75]

In contrast, in *Wamsley v. Champlin Ref. and Chems., Inc.*, the Fifth Circuit took a significantly different approach to the applicability of the ratification doctrine and the tender back requirement in the OWBPA context.[76] In that case, Champlin Refining & Chemicals employed the plaintiffs. Champlin subsequently became a wholly owned subsidiary of Citgo Petroleum Corporation and, as a result, several employees lost their jobs. Champlin initiated a "Termination Pay Plan" for the benefit of the employees terminated in the takeover, including the plaintiffs. The plaintiffs each executed a release and, in return, Champlin paid them severance benefits as consideration. Later that year, without returning or offering to return the severance benefits, the plaintiffs filed age discrimination charges with the EEOC and subsequently filed suit against Champlin. In addition to age discrimination, plaintiffs contended that Champlin failed to provide them with forty-five days to consider the release as required by Title II. Champlin moved to dismiss, arguing that the releases were valid under OWBPA and, in the alternative, that the plaintiffs had ratified the releases. The district court granted Champlin's motion to dismiss on alternate grounds. First, it held the releases valid under OWBPA. The court stated, however, that even if the releases were invalid, plaintiffs had ratified the agreements by failing to return their severance benefits after learning of the alleged invalidity.

The plaintiffs/appellants advanced two arguments before the Fifth Circuit. First, they argued that a factual issue existed re-

---

[72] 45 U.S.C.A. § 51 (1939).

[73] *See Oberg*, 11 F.3d at 684.

[74] 390 U.S. 516 (1968).

[75] *See, e.g.*, Soliman v. Digital Equip. Corp., 869 F. Supp. 65 (D. Mass. 1994); Long v. Sears Roebuck & Co., 105 F.3d 1529 (3d Cir. 1997); Raczak v. Ameritech Corp., 103 F.3d 1257 (6th Cir. 1997); Eye v. Fluor Corp., 952 F. Supp. 635 (E.D. Mo. 1997); Forbus v. Sears Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992).

[76] 11 F.3d 534 (5th Cir. 1993).

garding the validity of their releases.[77] Second, they contended that the ratification doctrine was inapplicable: tendering back severance benefits was not a prerequisite to the maintenance of an ADEA lawsuit.[78]

While the plaintiffs/appellants were successful on their first contention, the Fifth Circuit affirmed the district court on the ratification issue and upheld the dismissal.[79] The Fifth Circuit held that neither the language nor the purpose of Title II had indicated a congressional intent to deprive employees of the ability to ratify waivers that fail to meet the statutory requirements.[80] Although the plaintiffs/appellants, like the Seventh Circuit in *Oberg*, relied on the phrase "[a]n individual may not waive" in 29 U.S.C.A. § 626(f)(1) to interpret this language, the Fifth Circuit held that releases not knowingly and voluntarily executed under OWBPA are *voidable*[81] rather than *void.*[82] The court based its decisions on the following grounds: (i) 29 U.S.C.A. § 626(f)(1)(G), which expressly provides for a seven-day revocation period and provides that agreements are not enforceable until the expiration of the revocation period, would be unnecessary if non-compliance with the other subparts of section 626(f)(1) rendered an agreement void;[83] (ii) the Senate Committee, enumerating several of the traditional grounds[84] for contract avoidance,[85] intended OWBPA to prevent the same circumstances that support contract avoidance;[86] and (iii) neither the language of the statute nor the legislative history indicates that waivers executed in contravention of OWBPA are void and immune from ratification.[87] The court also stated that declaring waivers void would deter employers from finding "ways of meeting problems arising from the impact of age on employment," contrary to 29 U.S.C. § 621(b).[88]

---

[77] *See id.* at 537–38.
[78] *See id.* at 538.
[79] *See id.*
[80] *See id.* at 539–40.
[81] "Voidable" is used as meaning capable of being voided or ratified.
[82] *See id.* at 538–39.
[83] *See id.*
[84] The Senate Committee cited fraud, duress, coercion, and mistake of material fact as traditional grounds.
[85] *See id.* at 539 n.8.
[86] *See id.*
[87] *See id.*
[88] *Id.* at 539.

Finally, the Fifth Circuit held that plaintiffs must tender back their severance benefits[89] in a timely manner,[90] as a prerequisite to the maintenance of an ADEA lawsuit.[91]

Several courts have followed the Fifth Circuit's reasoning in *Wamsley*.[92] Even if Lancaster and/or Jones had grounds to challenge their release under OWBPA, the ratification doctrine and the tender back requirement could thwart their efforts in such jurisdictions.[93]

IV. SOLUTIONS[94]

A. *Precluding ADEA Waivers*

The Senate Committee on Labor and Human Resources incorporated the legislative history of the unenacted Age Discrimination in Employment Waiver Protection Act of 1989 ("ADEWPA")[95] into

---

[89] Plaintiffs must tender back their entire severance pay to rescind the waiver properly, not merely the amount they received for waiving their ADEA rights. *See* Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482, 485 n.2 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996):

> In this case, the release failed to meet the statutory requirements and was therefore voidable. The employees, however, did not exercise this option. Instead, they chose to keep the benefit of their bargain, the severance pay. Retaining the consideration after learning that the release is voidable constitutes a ratification of the release (citations omitted). To properly rescind the contract, the employees had to meet two burdens. Initially, they had to restore the status quo ante (citation omitted). Secondly, their rescission had to occur shortly after the discovery of the alleged deficiency (citation omitted). In this case, the employees did neither. They made only a belated tender, after suit was filed, to return that part of the severance pay that was attributable to age discrimination claims. This offer not only fails to return the status quo, but by any standard is untimely (citation omitted). As a result, the employees have ratified the release.

[90] *See id.* at 485.

[91] *See Wamsley*, 11 F.3d at 542.

[92] *See* Hodge v. The New York College of Podiatric Medicine, 940 F. Supp. 579 (S.D.N.Y. 1996); Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996); Wittorf v. Shell Oil Co., 37 F.3d 1151 (5th Cir. 1994); Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996); Bilton v. Monsanto Co., 947 F. Supp. 1344 (E.D. Mo. 1996).

[93] Of course, these principles are not an obstacle in jurisdictions that follow *Oberg*, or where plaintiffs tender back their severance benefits in accordance with *Blakeney*. Although employees may validly waive their rights to recover in a lawsuit brought by the EEOC on their behalf, Lancaster and/or Jones could still instigate and participate in EEOC proceedings. *See* S. Rep. No. 101-263, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1541; 29 U.S.C.A. § 626(f)(4) (1997).

[94] Though not the focus of this Article, current and proposed protective schemes covering ADEA releases could also prove useful in the contexts of race, color, religion, sex, national origin, and disability.

[95] *See* S. REP. NO. 101-79, at 2–17 (1989) (incorporated by reference into the 1990 report to the extent it was consistent with Title II).

the legislative history of OWBPA by reference.[96] ADEWPA prohibited pre-dispute ADEA waivers unless the EEOC or the courts supervised such waivers.[97] ADEWPA permitted unsupervised waivers, pursuant to certain standards, only where a bona fide age discrimination claim existed (i.e., after the filing of a specific written allegation with the employer, an EEOC charge, or a court action).[98] The Senate Committee specifically noted that this meant that "employers may *not* use waivers as a condition of participation in early retirement or other exit incentive programs offered to a group or class of employees, unless the waiver is supervised by the EEOC or by a court."[99] The Senate Committee also stated that:

> [W]here such waivers *are* sought, the Committee does not require or expect that the EEOC will supervise them in most instances . . . . [R]efusing to validate waivers obtained in non-adversarial circumstances . . . sends a strong message to employers not to ask for waivers in such circumstances, and informs employers that their best protection against lawsuits is to obey the law . . . .[100]

The Senate Committee apparently concluded that the most effective way to deal with ill-intentioned employers who obtain preemptive releases from members of the protected class and subsequently replace them with substantially younger workers[101] without fear of ADEA liability was to forbid unsupervised ADEA waivers in non-adversarial circumstances. Compounding this with the Committee's virtual directive to the EEOC and the courts not to supervise non-adversarial waivers, such waivers would have become extinct in both the individual and group termination settings, resulting in resolution of the problem.[102]

---

[96] *See* S. REP. No. 101-263, at 15–16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1521.

[97] *See* S. REP. No. 101-79, at 2 (1989). In drafting ADEWPA, Congress intended to nullify permanently a 1987 EEOC rule that permitted unsupervised waivers in a wide range of circumstances. *Id.* at 3. Of course, OWBPA allows unsupervised predispute waivers. *See* 29 U.S.C.A. § 626(f) (1997).

[98] *See* S. REP. No. 101-79, at 2 (1989).

[99] *Id.* at 3 (emphasis in original).

[100] *Id.* at 15–16 (emphasis added).

[101] *See supra* note 20.

[102] Title II, passed one year later, allows unsupervised waivers in both settings and, as noted above, the concerns raised by Congress remain unaddressed. Interestingly, the minority Senate Committee members (Senators Orrin Hatch (R-Utah), Thad Cochran (R-Miss.), Strom Thurmond (R-S.C.), Daniel Coats (R-Ind.), and Nancy Kassebaum (R-Kan.) felt that the requirements of Title II were so onerous that they would

B. *A Multifaceted Statutory Solution: 29 U.S.C. § 626(f)(1)(I)*

A single comprehensive OWBPA amendment that addresses and compromises competing interests would best resolve the myriad of problems raised. Therefore, I propose the following amendment, 29 U.S.C. § 626(f)(1)(I):

(I) In the individual or group termination context, the employer shall mail to former employees who executed an ADEA waiver and who were in the protected class on the date of execution, the following information within ten days after the one year anniversary of the expiration of the seven-day revocation period in 29 U.S.C.A. § 626(f)(1)(G) (the "effective date" of the ADEA waiver):

(i)(a) the individual job titles and ages of all current and former[103] employees hired or who had an effective starting date on or subsequent to the earlier of the termination date of the employee or the effective date of the ADEA waiver;[104]

(i)(b) the job descriptions and required qualifications for any new positions[105] created on or subsequent to the earlier of the termination date of the employee or the effective date of the ADEA waiver.[106]

---

effectively preclude employees from waiving their ADEA rights unless they had filed a charge with the EEOC or a lawsuit. *See* S. Rep. No. 101-263, at 62 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1567. The minority members wanted to maintain the status quo, allowing employees to waive their ADEA rights and leaving the courts to apply a "knowing and voluntary" standard without legislative direction, as opposed to the OWBPA or ADEWPA approaches. *See id.* The minority members felt that OWBPA would jeopardize the type and level of benefits offered to employees and promote litigation rather than informal settlement. *See id.* The majority was composed of Senators Edward Kennedy (D-Mass.), Claiborne Pell (D-R.I.), Howard Metzenbaum (D-Ohio), Spark Matsunaga (D-Haw.), Christopher Dodd (D-Conn.), Paul Simon (D-Ill.), Harkin (D-Iowa), Brock Adams (D-Wash.), Barbara Mikulski (D-Md.), James Jeffords (R-Vt.) and Dave Durenberger (R-Minn.).

[103] Employers would be required to provide information about employees not employed on the anniversary date who were "hired or who had an effective starting date on or subsequent to the earlier of the termination date of the employee or the effective date of the ADEA waiver."

[104] The language "on or subsequent to the earlier of the termination date of the employee or the effective date of the ADEA waiver" would cover the time period that could exist between termination and the effective date of the waiver. Employers would provide information covering this period.

[105] This provision would allow former employees to examine the job description and required qualifications for a newly created position to determine if that position were merely a disguised continuance of their prior job. For example, a terminated 50-year-old "janitor" may find it useful to examine the job description and required qualifications for the newly created "maintenance engineer" position occupied by a newly hired 25-year-old.

[106] *See supra* note 20; *infra* note 117; 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed) for the value of the information provided under (i)(a) and (i)(b).

The information provided under (i)(a) and (i)(b) shall be current through the anniversary date, be appropriate in scope,[107] and contain terminology presented in a format understandable to the individual, or to the average individual who participated.

(ii) The employer shall send the information, via certified mail, to former employees at their last known address. If the U.S. Postal Service is unable to complete delivery, then the employer shall send the information, along with the former employee's full legal name, last known address, and social security number, to the Equal Employment Opportunity Commission, via certified mail, within ten days of the date of receipt of the returned mailing. Within 120 days of receipt, the EEOC, via informational assistance from other federal agencies[108] and/or cooperating state and local entities, shall attempt to locate the former employee and forward the information via regular mail.

(iii) The applicable time period for filing an EEOC charge provided in 29 U.S.C. § 626(d)[109] shall begin to run on the

---

[107] Determining the appropriate scope would require case-by-case analysis. Provided information could be, for example, on a corporate-wide, multi-plant, plant-wide, division-wide, department-wide, reporting or job category basis. *See* Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA), 62 Fed. Reg. 10787, 10791 (1997) (to be codified at 29 C.F.R. pt. 86) (proposed Mar. 10, 1997). The proposed rule does not resolve the problems raised, although section (f)(3), entitled "The decisional unit," may provide guidance regarding scope. The scope provision has three purposes: (i) to provide former employees with sufficient information; (ii) to prevent the information requirement from imposing an undue burden on employers; and (iii) to prevent employers from providing so much information as to render the information useless.

[108] The Internal Revenue Service and the Social Security Administration are examples of such agencies.

[109] 29 U.S.C.A. § 626(d) (1997), entitled "Filing of charge with [c]ommission; timeliness; conciliation, conference, and persuasion" provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed- (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies [Limitation of Federal action upon commencement of State proceedings], within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

See Eye v. Fluor Corp., 952 F. Supp. 635, 642 (E.D. Mo. 1997) (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADEA, but rather is treated like a statute of limitations . . . . If a plaintiff fails to file a timely charge, his action is barred unless he can demonstrate that the limitations period is subject to equitable modification."). 29 U.S.C.A. § 626(e) (1997), entitled "Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice" provides:

> Section 259 of this title shall apply to actions under this chapter. If a charge filed

date of receipt of the information at the former employee's last known address or the expiration of the 120-day EEOC period.[110] The court *shall not toll* the time period, except as provided under sections (iii)(a)–(c) and (iv)(c) or due to governmental error, equitable estoppel or extreme circumstances beyond the former employee's control; once the time period *expires*, the former employee *ratifies* the release and *waives* his or her ADEA claim.

(a) if the former employee believes that the employer failed to provide the information required under (i)(a) and/or (i)(b),[111] the former employee shall file a limited EEOC charge alleging such prior to the expiration of the time period in (iii); the former employee need not offer to tender back, as would otherwise be required under (iv)(a), to file a limited EEOC charge alleging failure to provide the information required under (i)(a) and/or (i)(b); if conciliation efforts are successful, the employer shall mail the information, via certified mail, within 10 days of the date of the execution of the conciliation agreement and the time period provided in 29 U.S.C. § 626(d) shall begin to run on the date of receipt; if conciliation efforts fail, the EEOC shall authorize the former employee to seek declaratory relief under 28 U.S.C. § 2201 (the Declaratory Judgment Act)[112] regarding the former employee's entitlement to certain information under

---

with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

[110] As a matter of closure, the time period would begin to run even if the EEOC cannot locate the former employee.

[111] The former employee might, for example, challenge the information's content, scope, terminology, or format.

[112] 28 U.S.C.A. § 2201 (1997), entitled "Creation of remedy" provides:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

(i)(a) and/or (i)(b), and the EEOC may participate in the declaratory proceeding.
(b) if the court adjudges that (i)(a) and/or (i)(b) do not entitle the plaintiff to certain information, the former employee may file an ADEA charge with the EEOC prior to the expiration of the time period in (iii) or, if such period expired during the pendency of the declaratory action, within 20 days of the date of issuance of the declaratory judgment; in either case the former employee shall offer to tender back as required under (iv)(a).
(c) if the court adjudges that (i)(a) and/or (i)(b) do entitle the plaintiff to certain information, the employer shall mail the information, via certified mail, within 10 days of the date of issuance of the declaratory judgment and the time period provided in 29 U.S.C. § 626(d) shall begin to run on the date of receipt.
(d) to the extent that any inconsistency exists between this section and 29 U.S.C. § 626(d), this section shall control.
(iv) Former employees who executed an ADEA waiver, who subsequently wish to pursue legal and/or equitable relief under the ADEA, may file a charge with the EEOC prior to the expiration of the time period in (iii).
(a) prior to filing an ADEA charge, the former employee shall offer to *tender back* 50% of the dollar amount received as consideration for signing the release,[113] plus interest at a rate periodically established by the EEOC, compounded monthly, if the release also covers causes of action not arising under the ADEA; nothing in this section shall impact the validity of the release regarding causes of action not arising under the ADEA; if the release only covers causes of action arising under the ADEA, the former employee shall offer to tender back 100% of the dollar amount received as consideration for signing the release, plus interest at a rate periodically established by the EEOC, compounded monthly.

---

[113] Contrary to current practice, the amendment requires that consideration be itemized. *See* Long v. Sears Roebuck & Co., 105 F.3d 1529, 1543–44 (3d Cir. 1997) ("[T]ypically the employer does not specify how much of the consideration paid to the employee is for the retirement and how much is for the release."). An offer of tender made any time prior to the expiration of the time period in (iii) shall be timely. *Cf.* Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482, 485 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996) (holding that tender must occur shortly after the discovery of the alleged deficiency).

(b) if the employer accepts the former employee's proper offer of tender, the waiver shall not be plead as a defense by the employer to a cause of action arising under the ADEA; the former employee shall first make proper tender and then file an ADEA charge prior to the expiration of the time period in (iii).
(c) if the employer rejects the former employee's proper offer of tender, the former employee may file a timely ADEA charge without making any tender to the employer and the waiver may be plead as a defense by the employer; a proper offer of tender under (iv)(a) tolls the time period in (iii) from the date of the offer until the date of the employer's acceptance or rejection of the offer where such time period is longer than one day.
(d) neither party shall obtain declaratory relief under 28 U.S.C. § 2201 regarding the validity of the ADEA waiver prior to the ADEA proceeding;[114] at the ADEA proceeding, if a waiver defense was plead,[115] the court shall resolve the validity of the ADEA waiver as a preliminary matter;[116] ***an ADEA release shall not provide a defense to the employer, i.e., a waiver is not knowing and voluntary, where the former employee establishes that the information provided under (i)(a) and/or (i)(b), viewed in isolation or in combination with other evidence, could raise an inference of age discrimination in the mind of a reasonable person;***[117] **the employer may challenge**

---

[114] Where the ADEA waiver is plead as a defense, the amendment builds a declaratory stage into the ADEA proceeding. *See infra* note 116 and accompanying text. The reason for precluding declaratory relief prior to the ADEA proceeding is to prevent confusion regarding the former employee's tender back obligation. For example, if the employer, after rejecting the former employee's offer of tender and before an ADEA charge is brought, obtains a declaratory judgment deeming the waiver valid, must the former employee tender back, since the "former employee fail[ed] to defeat the employer's waiver defense," even though the former employee never intended to file an ADEA charge after the employer rejected tender? Of course, after the former employee offers tender, files an ADEA charge, and brings an age discrimination lawsuit, the employer may move for judgment as a matter of law at any time. The language of this section is not inconsistent with section (iii)(a)–(c), which provides for declaratory relief for challenges to the sufficiency of information provided under sections (i)(a) and/or (i)(b), since the *failure to provide the information required under (i)(a) and/or (i)(b) is not a ground for attacking the validity of the waiver. See infra* note 120.

[115] *See* FED. R. CIV. P. 8(c).

[116] This includes resolution of all legal and factual questions necessary to determine the validity of the ADEA waiver. If the employer is successful at this stage, the court shall dismiss the ADEA claim based on the waiver defense; if the plaintiff is successful, the waiver provides no defense to the employer and the court shall proceed to the merits of the ADEA claim.

[117] While post-waiver replacement by a significantly younger worker is insufficient,

such inference when defending on the merits of the ADEA claim, though a successful challenge shall not revive the waiver defense;[118] if the former employee fails to defeat the employer's waiver defense or is unsuccessful on the merits of the ADEA claim, the former employee shall tender back the amount he or she originally offered to tender back under (iv)(a), adjusted to include interest accrued since the date of the offer;[119] if the former employee defeats the employer's waiver defense[120] and is successful on the merits of the ADEA claim, the court shall offset the judgment by the amount that the former employee originally offered to tender back under (iv)(a), adjusted to include interest accrued since the date of the offer.

---

standing alone, to establish a prima facie ADEA case or pretext, *see supra* note 20, it *alone* would suffice under 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed) to defeat an employer's waiver defense. If, after offering tender as required under section (iv)(a), the former employee commences an ADEA action *prior* to the anniversary date, that employee would satisfy its burden under section (iv)(d), by presenting sufficient evidence of post-waiver replacement by a significantly younger worker. This is because she would have had the relevant replacement data within ten days of the anniversary date. If the former employee fails to present sufficient evidence of post-waiver replacement or other evidence of invalidity under the current provisions of OWBPA, the court would hold the action in abeyance until it received and considered the information ultimately provided under sections (i)(a) and (i)(b).

[118] Such a situation would arise if, at the preliminary stage, the plaintiff defeats the waiver by showing that the information provided under sections (i)(a) and/or (i)(b) could raise an inference of age discrimination in the mind of a reasonable person. Then, on the merits of the ADEA claim, *see supra* note 2, the plaintiff introduces A, B, and C as evidence of age discrimination, C being the information provided under sections (i)(a) and/or (i)(b) which could raise an inference of age discrimination in the mind of a reasonable person. Finally, the employer successfully rebuts the inference of age discrimination raised by C; however, the employer cannot reassert the waiver defense.

[119] Why would an employer accept tender under section (iv)(b) and relinquish the waiver defense when it appears that the employee will ultimately receive the same amount of money, adjusted to include interest accrued since the date of the offer, if it is successful on the waiver defense or the merits of the ADEA claim? There is a hidden financial incentive for the employer to accept tender under section (iv)(b) and abandon a weak waiver defense. Presumably, the employer will be able to generate a rate of return far greater than the interest rate periodically established by the EEOC, compounded monthly. Given the large sums of money that may be offered under section (iv)(b) and the substantial length of time required to adjudicate these matters, there may be cash flow advantages or a considerable financial incentive to accept tender.

[120] The former employee can attack the validity of the waiver only under the current provisions of OWBPA or on the grounds provided in the italicized portion of section (iv)(d). *Failure to provide the information required under sections (i)(a) and/or (i)(b) is not a ground for attacking the validity of the waiver.* Sections (iii)(a)–(c) provide procedures for challenging the sufficiency of the information provided under sections (i)(a) and/or (i)(b). The goal of sections (i)(a) and (i)(b) is to *provide* the proper information to the former employee *prior* to his or her decision to bring an ADEA claim, not to provide an additional technical ground to invalidate the waiver.

(v) The employer shall pay the attorney's fees[121] of those employees in the protected class asked to sign and/or who do sign an ADEA waiver, up to a maximum of $500, for services rendered in connection with the waiver. The employee may spread the $500 across one or more consultations made any time prior to the expiration of the time period in (iii).[122] The employer shall make payment within ten days of the date of receipt of an itemized bill. To the extent that section (v) is inconsistent with the attorney/client privilege, the privilege shall control. Payment disputes under section (v) shall not affect the validity of the waiver and the employee or the employee's counsel shall have standing under this section. If the employer's failure to pay was in bad faith, the employer shall pay the plaintiff's costs and reasonable attorney's fees.[123]

C. *The Benefits and Costs of the Proposed Amendment*

The proposed amendment is a comprehensive solution involving gains and tradeoffs by former employees and employers.

There are five primary reasons that the proposed amendment is more favorable to employees in both the individual and group context than the current statute. Employees would: (1) receive vital post-waiver information[124] that might reveal replacement by a substantially younger worker, information which could ultimately bear on the existence of potential age discrimination;[125]

---

[121] 29 U.S.C.A. § 626(f)(1)(E) (1997) provides that the individual must be "advised in writing to consult with an attorney prior to executing the agreement."

[122] Up to a maximum of $500, the employer would pay the employee's attorney's fees for advice as to whether to sign the ADEA waiver initially, and if the employee elected to sign, for advice upon subsequent receipt of the information provided under sections (i)(a) and (i)(b). Covered services would include: evaluating and challenging the information provided under sections (i)(a) and (i)(b); apprising members of the protected class of the limited evidentiary value of post-waiver replacement, see *supra* note 20; assisting their investigation, see *supra* note 20; analyzing and explaining the benefits and risks of offering tender; and evaluating the strengths and weaknesses of their potential ADEA claim.

[123] In order for the amendment to affect the current provisions of Title II, Congress should add the following language to 29 U.S.C.A. § 626(f)(1)(E) (1997): "and, except in situations arising under paragraph (2), the employer shall advise the individual in writing of entitlements under paragraph (1)(I)(v) (attorney's fees)." Certain of the current OWBPA provisions, however, need improvement. Mainly, Congress should require the employer to provide information, such as job titles and ages, regarding retained employees in the *individual* termination context, similar to the information currently provided in the group termination context. *See* 29 U.S.C.A. § 626(f)(1)(H)(ii) (1997).

[124] 29 U.S.C. §§ 626(f)(1)(I)(i)(a) & (i)(b) (proposed).

[125] *See supra* note 20.

(2) receive professional legal advice to help them decide whether to waive their ADEA rights, paid for by the employer up to a set limit;[126] (3) receive an extension of the ADEA statute of limitations to receive, consider, challenge, and act upon the information;[127] (4) receive an opportunity possibly to avoid their releases;[128] and (5) sever the ADEA portion of their releases and thus retain consideration received for waiving non-ADEA claims.[129] The first four of these benefits to employees would foster truly "knowing" release decisions, consistent with the policy of Title II, by allowing former employees to fully assess the circumstances of their termination. Former employees could examine the employer's post-release conduct and, with the advice of counsel, decide whether to attempt to avoid their release and pursue an ADEA claim, or accept the status quo. These four benefits would also operate to suspend ill-intentioned employers' license to discriminate on the basis of age because employers could be prejudiced by conduct prior to the expiration of the limitations period in section (iii).

It is acknowledged, however that the amendment would not *revoke* such license to discriminate. Ill-intentioned employers could replace protected former employees with substantially younger workers immediately after the limitations period in (iii) expires.[130] Currently, equitable tolling, though not liberally applied, can extend the limitations period during which employers replace former employees with significantly younger workers.[131]

---

[126] *See* 29 U.S.C. § 626(f)(1)(I)(v) (proposed).

[127] *See* 29 U.S.C. § 626(f)(1)(I)(iii) & (iii)(a)–(c) (proposed); *see also supra* note 20.

[128] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed); *supra* note 117; *supra* note 120.

[129] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(a) (proposed); *see also* Long v. Sears Roebuck & Co., 105 F.3d 1529, 1542 (3d Cir. 1997) ("Testimony before Congress established that older workers facing termination 'could not afford' to do without separation benefits.").

[130] While one might argue that ill-intentioned employers could replace former employees with substantially younger workers immediately after the anniversary date, it is unlikely that employers would have such license. Under section (iv)(d), former employees could challenge the release based on the information provided under sections (i)(a) and/or (i)(b) viewed in isolation *or in combination with other evidence.* Thus, post-anniversary date replacement prior to the expiration of the statute of limitations, if learned of by the former employee, could be the "other evidence" that defeats the ADEA waiver. *See supra* note 117.

[131] *See* Eye v. Fluor Corp., 952 F. Supp. 635, 642 (E.D. Mo. 1997); Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1327 (8th Cir. 1995); Ode v. Omtvedt, 883 F. Supp. 1308, 1317 (D. Neb. 1995), *aff'd*, 81 F.3d 165 (8th Cir. 1996) ("[B]elated discovery that a younger worker has been employed to replace an older one may toll the charge-filing period under certain circumstances (such as where the employee reasonably does not suspect discrimination until the younger person is hired.)").

In *Cada v. Baxter Healthcare Corp.*, Judge Posner addressed the context in which equitable tolling arises:

> [E]quitable tolling . . . permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim . . . . [I]t does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing . . . . [T]he plaintiff is assumed to know that he has been injured [by his termination notice], so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant.[132]

The proposed amendment precludes equitable tolling of the limitations period in section (iii) due to subsequent replacement. The limitations period could only[133] be tolled to challenge the information provided under sections (i)(a) and/or (i)(b)[134] to give employers time to consider the tender offer without prejudice to the former employee,[135] or due to governmental error,[136] equitable estoppel,[137] or extreme circumstances beyond the former employee's control.[138] The reason for precluding equitable tolling

---

[132] 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991).

[133] The discovery rule is inapplicable. *See* Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 267 (7th Cir. 1995). Also, the continuing violation theory is likely inapplicable and, in any event, should not be applied, since it is inconsistent with the stated policy favoring closure. *See* Allen v. Diebold, Inc., 807 F. Supp. 1308, 1320–23 (N.D. Ohio 1992), *aff'd*, 33 F.3d 674 (6th Cir. 1994).

[134] 29 U.S.C. § 626(f)(1)(I)(iii)(a)–(c) (proposed).

[135] 29 U.S.C. § 626(f)(1)(I)(iv)(c) (proposed).

[136] 29 U.S.C. § 626(f)(1)(I)(iii) (proposed); *see also* Black v. Fluor Corp., 959 F. Supp. 1135, 1139 (E.D. Mo. 1996) (citing Anderson v. Unisys Corp., 47 F.3d 302, 306–07 (8th Cir. 1995) ("Other circuits, as well as our own, have held that when an administrative agency misleads a complainant, particularly one who is without the benefit of counsel, equitable tolling may be justified.")).

[137] 29 U.S.C. § 626(f)(1)(I)(iii) (proposed). Equitable estoppel would continue to apply since employers must not benefit from affirmative wrongful conduct by, for example, providing fraudulent information under sections (i)(a) and/or (i)(b). As the court stated in Cada v. Baxter Healthcare Corp.:

> Equitable estoppel, which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time . . . is sometimes called fraudulent concealment . . . . Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time.

920 F.2d 446, 451–52 (7th Cir. 1990). *See also* Eye v. Fluor Corp., 952 F. Supp. 635, 642 (E.D. Mo. 1997) ("When a plaintiff is aware of the existence of a possible ADEA violation but is lulled or tricked into letting the EEOC filing deadline pass because of some employer misconduct above and beyond the wrongdoing upon which the plaintiff's claim is founded, the appropriate doctrine to invoke would be equitable estoppel."); Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 880–81 (5th Cir. 1991).

[138] 29 U.S.C. § 626(f)(1)(I)(iii) (proposed). Unexpected hospitalization and a natu-

in this context is that the amendment effectively incorporates the doctrine. The amendment, in addition to providing vital post-waiver information, legal advice, and a potential opportunity to avoid the release, provides a substantial extension of the ADEA statute of limitations period to receive, consider, challenge, and act upon the information. As a tradeoff, employers receive *closure*.[139] Once the limitations period provided in section (iii) expires without a former employee filing a charge, hiring activity commenced after the expiration date will not prejudice employers *except* in abnormal cases.[140]

Other limitations of the proposed amendment from the employee perspective include the requirements that employees: (1) offer to tender back;[141] (2) tender back if they fail to defeat their employer's waiver defense or are unsuccessful on the merits of the ADEA claim;[142] and (3) ratify the releases and waive their ADEA claims after the expiration of the statute of limitations period.[143] Thus, waivers that do not comply with OWBPA are voidable rather than void. Even if the releases did not comply with OWBPA, and the employer failed to provide the information required under sections (i)(a) and/or (i)(b), the information provided under (i)(a) and/or (i)(b) could raise an inference of age discrimination in the mind of a reasonable person; further investigation could lead to the discovery of sufficient evidence of age discrimination, and a former employee who had failed to act in a timely manner would be considered to have ratified the release and waived the claim.

---

ral disaster preventing the timely filing of a charge are examples that would fall under this exception.

[139] *See* Merrill v. Southern Methodist Univ., 806 F.2d 600, 605 (5th Cir. 1986) ("It might be years before a person apprehends that unpleasant events in the past were caused by illegal discrimination."). Required disclosure of information, and a substantial extension of the ADEA statute of limitations, in lieu of equitable tolling, could also be appropriate where employers did not offer waivers when terminating protected workers, or where protected workers elected to retain their ADEA rights.

[140] For example, if a former employee files a charge after the expiration of the limitations period, then governmental error, affirmative wrongful employer conduct during the limitations period sufficient to invoke the equitable estoppel doctrine, or extreme circumstances beyond the former employee's control, excuse the delay. In these limited contexts, post-limitations hiring could ultimately prejudice employers. *See also supra* note 20; *supra* note 117; 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed) ("other evidence"). If a former employee did not file a timely charge and the employer suspected that the individual would or could file a charge with the delay excused, the employer would be forced to be cautious regarding post-limitations hiring.

[141] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(a) (proposed).

[142] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed).

[143] *See* 29 U.S.C. § 626(f)(1)(I)(iii) (proposed).

Similarly, there are both advantages and disadvantages to the proposed amendment from the employer perspective. First, employers can retain the benefit of the bargain by: (1) accepting tender prior to litigation;[144] (2) rejecting tender and retaining the waiver defense,[145] thereby requiring former employees to show that the waiver does not comply with OWBPA or that the information provided under (i)(a) and/or (i)(b), viewed in isolation or in combination with other evidence, could raise an inference of age discrimination in the mind of a reasonable person, i.e., former employees are not free to avoid the release merely because they feel that they made a bad deal;[146] (3) receiving tender if former employees fail to defeat the waiver defense or are unsuccessful on the merits of the ADEA claim;[147] and (4) receiving an offset against any judgment.[148] Second, following ratification and release of the waiver and a tolling of the statute of limitations, the employer knows that there is closure with regard to the waiver.[149] Finally, employers retain waiver protection regarding non-ADEA claims due to severance.[150]

The most significant criticism of the proposed amendment is the cost imposed on employers. Critics could argue that the amendment is so onerous that solution (B) would operate like solution (A) by effectively precluding ADEA waivers, since employers would no longer seek such waivers. Employers would bear the financial and administrative costs of record-keeping and information compilation, preparation, production, and mailing. Furthermore, under the proposal, employers would bear the costs of defending information litigation[151] and pay for former employees' attorney's fees, up to a set limit.[152] Originally, in the group termination context, OWBPA contained a provision that obligated employers to pay eighty percent of the employees' attorney's fees, up to a maximum of eight hours, at the attorney's usual hourly rate.[153] The purpose of the provision was to prevent financial considerations from deterring employees from seeking

---

[144] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(b) (proposed).
[145] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(c) (proposed).
[146] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed).
[147] *Id.*
[148] *Id.*
[149] *See* 29 U.S.C. § 626(f)(1)(I)(iii) (proposed).
[150] *See* 29 U.S.C. § 626(f)(1)(I)(iv)(a) (proposed).
[151] 29 U.S.C. § 626(f)(1)(I)(iii)(a) (proposed).
[152] 29 U.S.C. § 626(f)(1)(I)(v) (proposed).
[153] *See* S. Rep. No. 101-263, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509.

legal counsel to determine whether a violation of the ADEA had occurred.[154] The Committee noted that legal counsel was "a practical necessity" due to the complexity of group termination programs.[155] This provision, however, was not in the final version of OWBPA because the minority thought that such a scheme was too costly and would ultimately lead to lower severance payments to employees.[156] Candid evaluation by legal counsel would benefit the judicial system, the former employee, and the employer, by deterring former employees with weak or highly speculative ADEA claims from offering tender. Additionally, employers must closely monitor hiring patterns,[157] and could be subject to increased ADEA litigation given the former employees' ability to avoid the ADEA waiver after making a sufficient showing to support avoidance.

CONCLUSION

Employers who comply with Title II, in its current form, have a license to discriminate on the basis of age. Even after OWBPA, the second abusive waiver practice recognized by Congress remains completely legitimate in both the individual and group termination contexts. Ill-intentioned employers can obtain preemptive releases from members of the protected class and can subsequently replace them with substantially younger workers without fear of ADEA liability. Those who learn of their post-release replacement have waived their right to recover for age discrimination. In these circumstances, fraud and mistake of material fact, under 29 U.S.C.A. § 626(f)(1)(C) or 29 U.S.C.A. § 626(f)(1)(H), do not help terminated older workers to avoid their releases and recover for age discrimination. Indeed, even if they had grounds to challenge their releases under OWBPA, the ratification doctrine and the tender back requirement could thwart their efforts in certain jurisdictions.

The first proposed solution, the ADEWPA approach, would resolve these problems by effectively precluding ADEA waivers in non-adversarial circumstances. The second proposed solution, the creation of 29 U.S.C. § 626(f)(1)(I), would facilitate truly

---

[154] *See id.*

[155] *See id.*

[156] *See id.* at *137–*138.

[157] *See supra* note 20; 29 U.S.C. § 626(f)(1)(I)(i)(a) (proposed); 29 U.S.C. § 626(f)(1)(I)(iv)(d) (proposed); *supra* note 117.

"knowing" release decisions and suspend ill-intentioned employers' license to discriminate on the basis of age. It would do so by providing former employees with vital post-waiver information, legal advice, and time, and by providing a potential opportunity to avoid their release. Further, it would resolve the ratification/tender back debate,[158] preserve the benefit of the bargain, and provide closure for employers.

The proposed solutions are consistent with the policies of OWBPA and the ADEA. They are fair and practical, and are beneficial to employers and members of the protected class in both the individual and group termination contexts.

---

[158] The U.S. Supreme Court's forthcoming decision in Oubre v. Entergy Operations, Inc., 102 F.3d 551 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1466 (1997), will merely impact the costs and benefits associated with 29 U.S.C. § 626 (f)(1)(I). For example, if the Court holds that the ratification doctrine and the tender back requirement are inapplicable in the OMBPA context, the amendment will effectively overrule an unfavorable U.S. Supreme Court precedent from the employers' perspective and a favorable precedent from the employees' perspective. The amendment would provide greater benefits to employers while former employees would sacrifice more to receive the amendment's benefits. Conversely, if the Court holds that the ratification doctrine and the tender back requirement are applicable in the OMBPA context, the amendment would simply codify *Oubre*. The amendment's benefits to employers and costs to former employees would be less significant. The employer in *Oubre* argued in the alternative that if the Court does not apply the tender back doctrine, it should recognize an employee-fraud exception whenever the employer can show that the employee accepted a severance payment while planning to sue, i.e., an employee who takes the money while intending to sue, and then does sue, would be required to return the money before proceeding. *See* Alison Barnes, *'Take the Money and Run—Please': Severance Payments and Waiver-of-Claim Clauses Under the Age Discrimination in Employment Act*, PREVIEW U.S. SUP. CT. CAS. 68, 71 (Oct. 20, 1997). The amendment would supersede such a holding and render the employee-fraud exception unnecessary.

STATUTE

REGULATING DISPUTE RESOLUTION PROVISIONS IN ADHESION CONTRACTS

PAUL D. CARRINGTON*

A number of recent Supreme Court decisions regarding the enforceability of forum selection and choice of law provisions have diluted the substantive rights of franchisees, employees, and consumers by precluding the litigation of their claims in the forum of their choice under laws designed to protect them. In this Statute, Professor Carrington proposes legislation to ensure that these claims are not diverted to inconvenient fora by judicial enforcement of dictated form contracts. The proposed Statute would limit the enforcement of forum selection and choice of law provisions to those contained in contracts conforming with standard contract and choice of law doctrine.

The problem addressed in this proposal stems from a series of Supreme Court decisions that interpret the Federal Arbitration Act of 1925 and other federal legislation bearing on contracts of adhesion made in interstate and international commerce.[1] In recent decades, the Court has disregarded principles of contract and conflicts law developed to protect weaker parties from predation at the hands of stronger parties positioned to dictate the terms of standard contracts.[2] Among the federal laws that have been materially weakened by the Court are the antitrust laws, employment discrimination laws, and laws protecting shippers and passengers. Among the state laws weakened or denied effect altogether are antitrust laws, franchise investment laws, and laws protecting consumers and workers. Legislation broadly restoring the enforceability of such rights is now needed.

The predatory strategy the Court has condoned depends on the use of standard contract provisions restricting either the choice of law determining the rights of vulnerable parties, or the choice of forum in which such rights can be asserted, or both. Such provisions share two features making them especially useful to

---

* Chadwick Professor of Law, Duke University. I am grateful to Ian Macneil for comments on an earlier draft, and to Shannon Clark for research and editorial assistance.

The Harvard Legislative Research Bureau assisted in editing this Statute.

[1] *See* Paul D. Carrington & Paul H. Haagan, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331.

[2] *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 445 (1993).

predators. The first is that they can serve materially to diminish the value of the statutory rights of parties by increasing their enforcement costs and the risks of non-enforcement. The second is that the effects of such clauses are more visible and important to "repeat players" positioned to insist on standardized provisions than they are to the "one-shot players" with whom they contract, for the latter, unlike the former, seldom make contracts at all if the prospect of a future dispute is in their minds. In other words, *ex ante*, a favorable dispute resolution clause is more highly valued by the "repeat player" who knows that disputes will ensue than by the "one-shot player" who discounts the prospect of a dispute. Because dispute resolution clauses in standardized contracts are chronically undervalued by "one-shot players," they are a means by which "repeat players" enrich themselves at the expense of those with whom they contract by systematically, impairing the enforceability of the latters' statutory rights.

Ironically, in 1889, the Court recognized the problem of dictated form contracts.[3] On its authority and that of many other courts, it is now black letter law, expressed in Restatement (Second) of Contracts Section 211 that provisions in such dictated contracts must be "reasonable and just." It is also the law in most states that unconscionable contract provisions are not enforced, at least if they appear in adhesion contracts for the sale of goods.[4] For the reasons stated, provisions bearing on the resolution of future disputes, such as choice of law, forum selection, and arbitration clauses, are superior candidates for the application of these elementary principles. It is neither "reasonable and just" nor "conscionable" for employers to require workers, as a condition of their employment, to agree to disable themselves in asserting rights created for their protection from just such overbearing contracts. The same principles apply to small, local franchisees for whom a national or international franchise is increasingly a precondition to a successful local business. These principles also apply to consumers of goods and services who are provided with printed form contracts such as tickets, bills of lading, package inserts, receipts, and other instruments that they cannot realistically be expected to read and consider.

---

[3] *See* Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889).
[4] *See, e.g.*, U.C.C. § 2-302 (1996).

Similar doctrine is expressed in Section 187 of the Restatement (Third) of Conflict of Laws that parties to a contract may not by a choice of law clause bind themselves to forego rights created by a state to protect one party from the other. Choice of law provisions are valid only to the extent that they do not foreclose enforcement of applicable regulatory laws. Likewise, Section 80 of the same Restatement provides that forum selection clauses are not enforceable if the forum selected is unfairly or unreasonably inconvenient. That doctrine was recognized by the Court as recently as 1972, when it created an exception to validate choice of forum clauses made in international commerce between sophisticated businessmen who contracted for a forum that was mutually inconvenient but located in a country of which neither was a citizen.[5]

The Court has disregarded these wise principles embedded in black letter law, and sometimes also expressed in applicable federal legislation. The Court has held that cruise line passengers were bound by the fine print in their ticket to assert a claim for personal injury across the continent from where the ticket was purchased or the alleged injury occurred.[6] It has held that a shipper of fruit from Morocco to Massachusetts is bound by a bill of lading to arbitrate a claim for spoilage in Tokyo.[7] It has held that an automobile dealer in Puerto Rico is bound by a clause in his franchise agreement to arbitrate in Tokyo a claim for alleged violation by the manufacturer-supplier of the antitrust laws of the United States.[8] It has held that a local franchisee asserting a state law antitrust claim against the franchisor is precluded by his franchise agreement from using the state's courts to enforce his state-created rights.[9]

It has held that a local franchisee in Montana, despite contrary state law, is bound by contract to pursue a claim against the franchisor in Connecticut.[10] It has held that a consumer of termite removal services is bound, by the standard form termite removal contract, to arbitrate a claim against the removal contractor.[11] This forum could have charged for its services about

---

[5] *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).
[6] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
[7] *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).
[8] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
[9] *See* Southland Corp. v. Keating, 465 U.S. 1 (1984).
[10] *See* Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996).
[11] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

as much as the termite contractor had charged to remove the termites.[12] The Court also held that an employee of a securities brokerage firm is bound by his submission to the governance of a securities exchange to arbitrate an age discrimination claim in a forum provided by the exchange.[13] The latter holding has led lower courts[14] to assume that the Court was questioning an earlier decision holding that race and gender discrimination claims cannot be subjected to binding arbitration.[15]

Employers, franchisors, and providers of goods and services who seek to deny others their rights may only recently have fully realized what the Court has done. It has hence become increasingly common for them to include in contracts provisions that virtually disable employees, franchisees, and consumers from enforcing rights, not only those rights created in the contract, but also those rights created by law to prevent the very predatory conduct shielded by dispute resolution provisions. In some places, for example, it is almost impossible to secure employment or health care without agreeing to waive or seriously impair one's rights in relation to the employer or health care provider.[16]

The securities industry has been especially aggressive in exploiting the invitation extended by the Court to impair the rights of its employees. The Court had earlier held that small investors are not bound by clauses in brokerage agreements to arbitrate statutory fraud claims in a forum provided by the securities industry.[17] That decision has been overruled,[18] the Court relying on the power conferred by Congress on securities exchanges to enforce the investment fraud laws. It is, however, unclear how the authority of the exchanges to self-regulate with respect to fraud can be extended to employment relations or other matters outside the compass of securities regulation laws.

The Statute proposed here seeks to correct these unjust outcomes by restoring the vigor of the Restatement provisions quoted above. It is narrowly drafted to avoid any adverse effects on legitimate arbitration practice. Thus, it would not impair freedom of contract among those engaged in interstate or interna-

---

[12] *See* Carrington & Haagan, *supra* note 1, at 385.

[13] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[14] *See, e.g.*, Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996); Nghiem v. NEC Electronics, 25 F.3d 1437, 1441 (9th Cir. 1994).

[15] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[16] *See* Olia Silea, *Arbitration for 21st Century*, Rec. N.N.J., June 20, 1997, at B1.

[17] *See* Wilko v. Swan, 346 U.S. 427 (1953).

[18] *See* Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989).

tional commerce to resolve disputes among businesspersons or others who are themselves sophisticated readers of contracts or likely to be well-advised by counsel and who have sufficient economic power to withstand predation.

Nor does it apply to collective bargaining agreements, or to agreements regarding the resolution of existing disputes, or to claims asserting rights explicitly created in the contract containing the dispute resolution provision, such as claims for breach of express warranties. Thus, the Statute's only effect is to prevent the use of dispute resolution clauses to diminish the value of statutory rights devised to protect "one-shot players" from economic predation by "repeat players." Indeed, the proposed Statute would permit enforcement of adhesive arbitration agreements to bar lawsuits enforcing state or federal law protecting employers, consumers, or franchisees if the agreement contains provisions assuring that the arbitral tribunal will impose no added costs on the parties and will be required to obey the substantive law applicable to disputes.

In its present form, the Statute is drafted for consideration by the Congress of the United States. In slightly varied form, it might also be suitable for enactment by a state legislature. As state legislation, it affords an alternative to efforts to revise state arbitration laws to avoid the effects of some of the Court's decisions interpreting the Federal Arbitration Act. The National Commissioners on Uniform State Laws is presently reconsidering its Uniform Arbitration Act in light of these developments.[19] A proposal is also presently under consideration by the California legislature.[20] These efforts seem unlikely to overcome the preemptive effects of the Court's decisions.

This Statute is drafted in recognition that states cannot modify the federal law and policy favoring arbitration. The states, however, retain the power to legislate in the field of contracts so long as they make arbitration clauses subject to no special restraints.[21] State legislatures are therefore well advised to leave their arbitration laws alone and direct their attention to adhesion contracts containing provisions impairing the rights of "one-shot players,"

---

[19] Timothy J. Heinsz, *The Uniform Arbitration Act: Changes in the Wind?*, 4 DISP. RESOL. MAG. 18 (Fall, 1997).

[20] *See* S.B. 19, 1997-1998 Reg. Sess. (Cal. 1996).

[21] *See Allied-Bruce*, 513 U.S. at 281.

for such laws are not yet preempted. The following Statute is written with that caution in mind.

APPENDIX

AN ACT PROVIDING FOR THE ENFORCEMENT OF STATE AND FEDERAL LAWS PROTECTING EMPLOYEES, LOCAL FRANCHISEES, AND CONSUMERS

Whereas, contracts of employers with employees, franchisors with local franchisees, and providers of goods or services with consumers, do not necessarily express the mutual and voluntary assent of both parties; and

Whereas such contracts are used with increasing frequency in interstate and international commerce by employers, franchisors, and providers of goods and services to impair the enforcement of rights conferred by state or federal law to protect employees, local franchisees, and consumers; and

Whereas the use of standard contracts thus to deny or impair protective rights is unjust and unconscionable;

Now, therefore, it is enacted that:

1. This Act shall be known as the Employee, Local Franchisee, and Consumer Rights Enforcement Act of 1998.

2. For the purposes of this Act,

(a) *commerce* includes all transactions or employments arising out of interstate or international commerce;

(b) an *employee* is a worker not subject to a collective bargaining agreement who is not an executive officer of a corporation, an attorney, a licensed investment broker, a medical doctor, a professional athlete, or an artistic performer;

(c) a *local franchisee* is a person engaged in retailing goods or services at not more than three locations in a single county or parish of a state who is authorized by contract to use the trade name or trademark of a franchisor engaged in commerce;

(d) a *consumer* is any person purchasing goods or services delivered for personal use in the United States, and includes passengers and shippers of goods on common carriers in commerce; and

(e) *the state* is the state of the principal place of employment of the employee, or the principal place of business of a

local franchisee, or the place of delivery of goods or services to a consumer.

3. Subject to the provisions of Section 4 of this Act, a contract between an employer and employee, or between a franchisor and franchisee, or between a consumer and a provider of goods or services is invalid to the extent that it:

(a) purports to preclude the application of federal law or law of the state enacted to protect the employee, local franchisee, or consumer; or

(b) purports to deny the employee, local franchisee or consumer access to courts located in the state that are otherwise available to the employee, local franchisee or consumer to enforce state or federal laws enacted to protect that employee, local franchisee, or consumer.

4. Notwithstanding the provisions of the foregoing Section 3 of this Act, this law shall not preclude:

(a) application of an otherwise valid choice of law, forum selection, or arbitration clause to proceedings brought to enforce rights created by the contract in which the clause appears; or

(b) enforcement of an arbitration agreement between an investor and an investment broker pursuant to regulation by a Self-Regulating Organization as authorized by Section 78(s) of Title 15; or

(c) enforcement of an arbitration agreement made with respect to a dispute existing between the parties at the time the agreement is made; or

(d) enforcement of an otherwise valid arbitration agreement if:

(i) the place of arbitration is located in the state;

(ii) the employee, local franchisee or consumer is required to pay no fees in excess of those required by courts in the state;

(iii) the arbitral tribunal is required by contract to enforce statutory rights; and

(iv) the arbitral award is subject to judicial review by courts in the state to assure that there are no errors of law or clear errors of fact resulting in non-enforcement of state or federal laws enacted to protect employees, franchisees, or consumers.

STATUTE

ENLARGING FEDERAL APPELLATE CAPACITY THROUGH DISTRICT LEVEL REVIEW

DANIEL J. MEADOR*

Over the last thirty years, the federal appellate court caseload has experienced unprecedented growth, presenting important challenges to the quality of appellate justice. In this Statute, Professor Meador proposes to meet those challenges through the establishment of a new, first level of limited review within the trial court structure.

During the last third of the twentieth century, the nation's appellate court system has been the subject of intense concern by judges, lawyers, and academicians worried about the effective administration of justice. The crux of this concern is the large, continuing, and unprecedented growth in the number of appeals. The impact has been greatest and most troublesome in the intermediate appellate courts, especially in the federal appellate system. Filings in the U.S. courts of appeals rose from 3899 in fiscal year 1960 to 50,072 in 1995, a more than twelvefold increase. In response, Congress has increased the number of appellate judgeships from 68 in fiscal year 1960 to 179 today, a less than threefold increase.[1] Each judge today must cope with a much greater caseload than did a judge three decades ago.[2]

---

* James Monroe Professor of Law Emeritus, University of Virginia. From 1977 to 1979, the author served as Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Department of Justice. That office developed the bill to create the U.S. Court of Appeals for the Federal Circuit. *See* Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992). From 1987 to 1990, he chaired the ABA Standing Committee on Federal Judicial Improvements, which published the report, THE UNITED STATES COURTS OF APPEALS: RE-EXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH (1989). He is co-author with Maurice Rosenberg and Paul Carrington of the casebook APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL (1994).

The Harvard Legislative Research Bureau assisted in editing this Statute.

[1] *See* 1960 DIRECTOR OF ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. 210 tbl.B1, 68; 1995 DIRECTOR OF ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. 86 tbl.B1, 42 tbl.12.

[2] The number of appeals filed per authorized judgeship has increased from 57.3 in 1960 to 298.0 in 1993. *See* Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211 app. A (1994); *see also* Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 n.47 (1994) (as measured by the ratio of cases per three-judge panel, the increase has been from 131 in 1950 to 787 in 1990); Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System:*

This steep rise in volume has affected everything the appellate courts do and is responsible for many significant changes that have taken place in those courts. Such changes include additional law clerks for judges, installation of central staffs of attorneys, and adoption of a variety of differentiated, truncated internal decisional processes. The benefits to be derived from those changes will soon reach their limits or have already been exhausted. Pressing those changes further risks permanent damage to the appellate process and the quality of appellate justice. Yet as volume continues to rise, attendant problems will only worsen.[3] Solutions must now be sought through restructure or reorganization at the intermediate appellate level.[4]

Without structural change of some sort, one or more of the following undesirable consequences will ensue at the federal intermediate tier. First, Congress will create more circuit judgeships, thereby eroding further the already strained collegiality within each court of appeals,[5] and diminishing intra-circuit uniformity in decisional law.[6] Increases in circuit judgeships will also likely lead to the creation of new geographical circuits, thus heightening the likelihood of inter-circuit conflict. Some ob-

---

Thinking the Unthinkable, 14 MISS. C. L. REV. 349, 350 (1994) (expressed as percentages of growth since 1960, appeals have increased by 1081%, while population during this period increased by approximately 35%).

[3] The Long Range Planning Office of the Administrative Office of the U.S. Courts has developed forecasts of appellate caseloads showing that the continuation of current trends will lead to 90,114 appeals filed in 2000, 198,147 in 2010, and 428,203 in 2020. *See* Nihan & Rishikof, *supra* note 2, at 389–94.

[4] A suggestion that is not structural is that the jurisdiction of the courts of appeals be made discretionary. *See* Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. REV. 573 (1997). That change could be made for cases going directly from the district courts to the courts of appeals, while at the same time creating appellate divisions for other cases. It is not clear, however, that such a discretionary procedure would in functional effect be any different from internal procedures already employed in the courts of appeals. *See* DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 168–71 (1974).

[5] *Cf.* Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253, 258 (1988) (stating that the present 17 judgeships on the Second Circuit preserve the collegiality of Judge Learned Hand's 6-member bench, but questioning whether such collegiality is sustainable in the face of the prospect of more judges).

[6] *Cf.* Ruth B. Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 11 (1983); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 762–65 (1983) (commenting that deliberation in a court of more than nine judges would more resemble that of a legislative than a judicial body).

servers also contend that the quality of appointments will decline.[7] Second, the courts of appeals will increasingly employ and rely upon para-judicial personnel—law clerks, staff attorneys, and magistrates or commissioners—thereby leading to ever more delegation of the decisional process and threatening the central judicial function. Third, pressures will grow, and will become nearly irresistible, to truncate decisional processes still further, lessening assurances that every appeal receives adequate judicial attention.[8] Fourth, delays in appellate adjudication will lengthen and backlogs in the courts of appeals will grow.

Numerous proposals have been put forward to avoid or ameliorate some or all of those consequences by restructuring the federal intermediate appellate tier.[9] Those proposals include creating a much larger number of circuits with fewer judges on each court; consolidating existing circuits into fewer and larger ("jumbo") circuits; eliminating circuit boundaries and establishing a single, nationwide court of appeals; requiring large courts of appeals to sit in gradually rotating subject-matter panels; establishing additional subject-matter appellate courts with nationwide jurisdiction; inserting a new tier of appellate review between the courts of appeals and the Supreme Court; and changing the federal courts' subject matter jurisdiction through removal of diversity cases.

Those proposals have been studied, written about, and discussed at a multitude of conferences, bar meetings, and Congressional hearings.[10] No consensus as to the best solution has emerged. Congress, the only authority that can actually do something about these problems and implement structural change, has shown little interest in the subject or inclination to act in recent years.[11]

One idea that has received less attention than others and less than it deserves is the establishment of a new, first level of

---

[7] *See, e.g.*, John O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 763–65 (1989).

[8] *See* Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 38–40.

[9] A comprehensive description of the federal appellate problems and proposed reforms is contained in THOMAS BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1995).

[10] The proposals are analyzed in detail in FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993).

[11] *Cf.* Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 918 (1994) (commenting that Congress may be making an informed decision by choosing not to take action).

review within the trial court structure. Review there would be primarily for the purpose of correcting prejudicial errors of fact and law in trial court decisions. Existing intermediate appellate courts would then provide discretionary review in those cases, primarily for the purpose of institutional supervision. Beyond that, the court of last resort would be available, in its discretion, to maintain uniformity among the intermediate courts and to settle the truly important questions of law.

Although this idea can be traced back to Roscoe Pound,[12] it was most prominently advanced by Seth and Shirley Hufstedler in the early 1970s as a remedy for the difficulties afflicting the California appellate system.[13] More recently, it has been advocated by Paul Carrington for the federal judiciary.[14] Martha Dragich has now urged it as the most promising means for dealing with the mounting difficulties in the current federal appellate structure.[15]

The purpose of the exercise I have undertaken here is to translate this idea into a workable statute that Congress could enact to allay the deleterious consequences listed above. Such consequences will ensue if Congress does nothing. Some proposals that sound promising when described in general and in the abstract turn out to resist implementation through a meaningful statute. That is not true of this proposal. The suggested Statute, set out as a proposed bill in the Appendix, provides for the practicable creation of a new reviewing entity at the federal district court level; moreover, all details necessary to its function are readily susceptible of legislation.

I have also drafted this bill with a view toward making its consideration as easy as possible for busy Members of Congress. To get the matter formally before them for consideration, they need only add a caption and an enacting clause and copy this

---

[12] *See* ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 390 (1941); *see also* Paul Carrington, *Thoughts for a Third Century: A Roscoe Pound Vision*, in THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 227 (Cynthia Harrison & Russell R. Wheeler, eds., 1989).

[13] *See* Shirley Hufstedler & Seth M. Hufstedler, *Improving the California Appellate Pyramid*, 46 L.A. BAR BULL. 275 (1971) [hereinafter Hufstedler & Hufstedler, *Improving*]; Seth M. Hufstedler, *California Appellate Court Reform—A Second Look*, 4 PACIFIC L.J. 725 (1973) [hereinafter Hufstedler, *California Appellate*].

[14] *See* Paul Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C. L. REV. 411 (1987).

[15] *See* Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11 (1996). The Dragich proposal differs in a number of aspects from the proposal advanced here, but the two are conceptually related.

draft. This explanatory note identifies key features and potential benefits. For details, the draft bill itself must be read.

Advantages of the proposal are at least fourfold: (1) It provides for a structure enabling the federal intermediate appellate tier to avoid the consequences listed above. (2) While avoiding those consequences, it would provide the federal judiciary with additional appellate capacity to handle present business more effectively and to keep pace with future appellate growth. (3) At the same time, it would better enable appellate judges to give cases individualized, careful attention. (4) It would alter or disrupt the existing judicial structure less than any other current proposal, and the proposed entity could be easily dismantled if unavailing.

The draft bill creates an Appellate Division in each federal district court, consisting of circuit and district judges, in either active or senior status, designated by the chief judge of the circuit. The Division would function through three-judge panels, each composed of one circuit judge and two district judges (not from the district whose cases are under review).[16] These three-judge panels would convene as business required, to consider and decide appeals in the specified categories of cases. Depending on the volume of work and the number of judges designated for the Appellate Division, those judges might spend their full time on that assignment, at least for a specified period, or they might simultaneously continue a substantial part of their regular judicial duties.

The use of trial judges in an appellate capacity is not novel. For several decades after the birth of the nation, judges in many states alternated in trial and appellate work, as did U.S. Supreme Court justices.[17] For many years, federal district judges have sat by designation with the courts of appeals.[18] In England, trial judges serve regularly on the Court of Appeal, Criminal Division.

---

[16] Staffing the Appellate Division panels with a circuit judge and district judges from different districts would address the concern that district judges from the same district are "presumably more reluctant to overrule a close colleague." Baker, *supra* note 12, at 949.

[17] *See* Dragich, *supra* note 16, at 18–22.

[18] *See* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REF. 351 (1995), for a thorough analysis of the use of district court judges in federal appellate proceedings.

The draft bill specifies categories of cases in which appeals would be taken to the Appellate Division instead of to the court of appeals. If Congress seriously addresses this proposal, the Appellate Division's jurisdiction will doubtless be the subject of political pulling and hauling, and the final provisions will emerge from debate and compromise. It would be prudent to begin with a relatively limited jurisdiction in order to determine how the scheme works. Jurisdiction can always be enlarged later. What is suggested here is a starting point for discussion.

One category for which this district level review makes sense consists of diversity of citizenship cases. As defined by the draft, these cases would involve no substantive federal issues and would therefore have the least claim on the attention of the courts of appeals, as those courts cannot make definitive pronouncements on state law. Also suggested for inclusion are social security cases, which are routine and fact-intensive and rarely involve significant substantive legal issues. Other promising prospects for Appellate Division jurisdiction would be prisoner litigation (Sec. 1983 and habeas corpus) and all criminal convictions and sentences. This list could, of course, be expanded.

If the Appellate Divisions work well, in time all appeals might be routed there, with none going directly to the courts of appeals. A similar development occurred after the Evarts Act established those courts in 1891. In that Act, the Supreme Court retained substantial direct appellate business but, after several years' experience with the new courts of appeals, almost all appellate business was channeled there. This left the Supreme Court with a largely institutional review role.

The Appellate Divisions would function under rules promulgated by the Supreme Court, pursuant to its rule-making authority. The draft bill authorizes rules that would permit the Divisions to operate flexibly and informally under expeditious and inexpensive procedures. The Hufstedlers analogized this review to that typically performed through the consideration of new trial motions, i.e., quick and informal.[19] The primary mission of this reviewing entity would be to provide scrutiny of claimed errors, either of fact or law, in district court decisions, which some critics claim the existing courts of appeals no longer can or will provide. The procedures must assure litigants that each case

[19] *See* Hufstedler & Hufstedler, *Improving*, *supra* note 14; Hufstedler, *California Appellate*, *supra* note 14.

receives personal attention from the three judges on the panel. Development of the law would be left to the courts of appeals and beyond them the Supreme Court.

Decisions of the Appellate Divisions would be reviewable by the court of appeals for the circuit in which the Division is located. This jurisdiction would be discretionary, invoked by the filing of a petition for leave to appeal. This discretion, however, would be unlike the Supreme Court's certiorari jurisdiction, in that it would not be a purely institutional review function. Rather, a court of appeals could see fit to grant review on the ground that the Appellate Division simply got it wrong. While such review would be unusual—two reviews on the merits in the interest of litigants are widely viewed as unnecessary and undesirable—it should be recognized as appropriate in at least some cases, in the discretion of the court of appeals. Decisions of the courts of appeals would be reviewable on certiorari by the Supreme Court, as they are now.

Additional district judgeships will probably be needed in order to operate this review scheme, because district judges assigned to Appellate Divisions will be drawn away from the trial work they would normally do. Estimates of the numbers of such new judges would be inexact. Much will depend on the scope of Appellate Division jurisdiction and on how expeditiously the divisions can function. Only experience can provide an answer.

In order to gain that experience, the draft bill provides for an initial experimental period of up to two and a half years. During that time, the review scheme would be in operation in only eleven districts, one in each geographical circuit (except the D.C. Circuit). At the end of that period, the Federal Judicial Center would submit a report on the experiences in those demonstration districts, thereby enabling Congress to make an informed judgment as to the number of new judgeships required and to proceed to authorize those positions before the plan takes effect in all districts a year later. The Federal Judicial Center will monitor the work of the pilot Divisions and could issue interim reports to give Congress still more lead time in making that determination. If those reports show that the scheme does not achieve the anticipated benefits, Congress can simply repeal the statute and abandon the idea with no disruption to the system.

No additional circuit judgeships should be required, as the circuit judges sitting on the Appellate Divisions do what they

would otherwise do on the courts of appeals if there were no Appellate Divisions. Obviating an increase in the number of appellate judges is a major advantage of this proposal. Increases in the federal judicial force are inevitable, given the volume of work and its future growth, but such increases can better be accommodated at the district level. Adding district judges does not threaten collegiality and decisional harmony in the way that adding judges to the courts of appeal would.

Some claim that problems besetting the federal appellate system are so large that we need bold, comprehensive measures. They are correct. I, myself, have advanced such proposals in past years.[20] But all such approaches have gotten nowhere. So far, there is no consensus inside or outside Congress for any of those more sweeping measures. The more limited, tentative approach embodied in the suggested bill might enlist sufficient support to make its enactment possible.

One of the attractive features of this proposal is that it would not preclude the adoption of any one or more of the "bolder" measures. Indeed, the difficulties afflicting the system are multidimensional, and it is likely that elements of various ideas will need eventually to be adopted. Not all of them are mutually exclusive. No proposal is a panacea, but setting in motion an experiment with Appellate Divisions could yield substantial benefits. It is the easiest structural step to take and the one with the fewest disadvantages.

---

[20] *See, e.g.*, Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989).

APPENDIX

DRAFT OF PROPOSED BILL TO ENLARGE FEDERAL APPELLATE CAPACITY BY REVIEW AT THE DISTRICT LEVEL

Section 1. Creation of Appellate Divisions of District Courts

Title 28 of the United States Code is amended by adding the following new sections:

Section 145. Appellate Divisions of District Courts

(a) There shall be within each judicial district an Appellate Division of the district court.

(b) Each Appellate Division shall consist of circuit and district judges of the circuit within which the district is located, as assigned by the chief judge of the circuit. Assignments to the Appellate Division shall be made for a term of at least one year and not more than three years, subject to renewal for like terms. A judge assigned to an Appellate Division may continue to perform all other judicial duties which that judge is authorized to perform. Judges in both active and senior status may be assigned to an Appellate Division.

(c) The chief judge of each Appellate Division shall be the circuit judge in active status assigned to the division who is senior in service. If no circuit judge in active status is assigned to the division, the chief judge shall be the circuit judge in senior status assigned to the division who is senior in service. The clerk of the district court shall also serve as clerk of the Appellate Division.

(d) An Appellate Division shall consider and decide cases and controversies through panels consisting of three judges, one of whom shall be a circuit judge and two of whom shall be district judges who are not judges of the district court whose decisions are being reviewed. The circuit judge shall be the presiding judge of the panel. Panels shall

sit at the times and places designated by the chief judge of the Appellate Division.

(e) The procedures and decisional processes of the Appellate Division shall be governed by rules promulgated by the Supreme Court pursuant to Section 2072 of this Title. Such rules shall provide for the just, speedy, and inexpensive disposition of cases and may provide for the consideration and disposition of cases through informal procedures, with or without full district court records and transcripts and may provide for the disposition of cases without written opinions.

(f) An Appellate Division shall have jurisdiction, exclusive of the courts of appeals, to review on appeal the final decisions of the district courts and those interlocutory orders of the district courts specified in Section 1292 of this Title, in the following cases, such jurisdiction to be exercised to correct prejudicial errors of fact or law in district court decisions:

(1) cases in which the jurisdiction of the district court rests in whole or in part on Section 1332 of this Title and in which the decision under review involves no question of federal law other than a question of jurisdiction over one or more defendants and questions involving interpretation of the Federal Rules of Civil Procedure;

(2) all cases brought under 42 U.S.C. Sec. 405(g).

(g) In cases within its jurisdiction, an Appellate Division shall have all the authority vested in the courts of appeals by Sections 1651 and 2106 of this Title.

Section 1297. Decisions of Appellate Divisions of District Courts

A court of appeals shall have jurisdiction in its discretion to review the decisions of the Appellate Divisions of the district courts within its circuit. The jurisdiction of the court of appeals shall be invoked by filing with that court a petition for leave to appeal, pursuant to rules promulgated under the

provisions of Section 2072 of this Title. Notwithstanding the provisions of Section 46(b) of this Title, those rules may authorize the courts of appeals to consider and dispose of such petitions through panels of more than or fewer than three judges, but not fewer than two judges.

Section 2. Technical and Conforming Amendments

(a) Section 1291 of Title 28, United States Code, is amended by adding the following words to the end of the first sentence: "or as otherwise provided for in Section 145 of this Title."

(b) Section 1292(a) of Title 28, United States Code, is amended by inserting after the words "Except as provided" the following words: "in Section 145 of this Title and".

(c) Section 1292(b) of Title 28, United States Code, is amended by inserting the words "or the Appellate Division" after the words "Court of Appeals" in the second sentence thereof.

(d) Section 1254 of Title 28, United States Code, is amended by adding the following sentence at the end of subsection 1: "If a writ of certiorari is granted in a case in which the court of appeals has denied leave to appeal a decision of an Appellate Division of a district court, or in which a motion for leave to appeal such decision is pending, the Supreme Court shall have jurisdiction to review all issues in the case as though the court of appeals had granted leave to appeal."

Section 3. Effective Date

The provisions of Section 145 of Title 28, United States Code, shall become effective six months after the date of enactment of this Act in one judicial district in each judicial circuit, except the District of Columbia Circuit and the Federal Circuit, as designated by the Judicial Conference of the United States. Such section shall become effective in all judicial districts four years after the date of enactment of this Act. On the effective date in each judicial district, the pro-

visions of Section 145 shall apply to all cases specified therein then pending in the district court and in which no appeal has been taken to the court of appeals.

Section 4. Reports by Federal Judicial Center

Not later than three years after the date of enactment of this Act, the Federal Judicial Center shall prepare and present to the Judicial Conference of the United States and to the Congress a report describing and evaluating the experiences of the Appellate Divisions in the judicial districts designated by the Judicial Conference pursuant to Section 3 of this Act. In its discretion, the Center may issue one or more interim reports on the then functioning Appellate Divisions before the expiration of the three year period. After consideration of the report or reports and the recommendations of the Judicial Conference, the Congress shall enact legislation to provide for the additional judgeships, if any, necessary for the effective functioning of the Appellate Divisions in all judicial districts.

NOTE

VIRTUAL.CHILD.PORN.COM: DEFENDING THE CONSTITUTIONALITY OF THE CRIMINALIZATION OF COMPUTER-GENERATED CHILD PORNOGRAPHY BY THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996—A REPLY TO PROFESSOR BURKE AND OTHER CRITICS

ADAM J. WASSERMAN*

In The Criminalization of Virtual Child Pornography: A Constitutional Question, 34 HARV. J. ON LEGIS. 439 (1997), *Professor Debra D. Burke contended that the Child Pornography Prevention Act (CPPA) of 1996 cannot survive strict scrutiny constitutional review because Congress's interests in enacting the restriction are neither sufficiently compelling nor narrowly tailored. Here, Mr. Wasserman counters that the CPPA should be assessed under a "less valuable speech" standard. Applying this approach, the author finds the Act constitutional, since the government's particular interests in regulating computer-generated pornography outweigh the minimal First Amendment value of the material.*

> How do you document real life when real life's getting more like fiction each day?
>
> —RENT, by Jonathan Larson[1]

Advances in technology have begun to blur the line between virtual and actual reality. Computer graphics technology created the amazingly life-like dinosaurs in the hit film *Jurassic Park.*[2] Movie moguls use synthetic actors to perform dangerous stunts that flesh-and-blood actors refuse to do.[3] One expert has pre-

---

* Law Clerk to the Honorable Franklin S. Van Antwerpen, Eastern District of Pennsylvania, 1997. B.A., Pomona College, 1994; J.D., Harvard Law School, 1997. The author wishes to thank Philip Heymann, Professor, Harvard Law School and Stephen Heymann, Deputy Chief, Criminal Division, U.S. Attorney's Office, Boston, Massachusetts, for their supervision and guidance. The author would also like to thank his co-clerk, Jason H. Miller, for his help in cutting the Note down to size. The opinions expressed herein are solely those of the author.

[1] Jonathan Larson, *Rent*, on RENT (DreamWorks Records 1996).

[2] *See* Charles Solomon, *"Electronic": Candy for the Eyes, Fun in Small Doses*, L.A. TIMES, Aug. 5, 1993, at F3.

[3] *See* David B. Johnson, Comment, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 315 (1994).

dicted that soon "computer-generated actors will revolutionize film and T.V."[4]

Computers have also led to a revolution in the underground world of child pornography. Technology has emancipated pedophiles from having to exploit and abuse real children in order to create kiddie-porn.

Through one technique called "morphing," child pornographers can transform scanned images of adult models into pornographic images of children.[5] Child pornographers can also use techniques such as 3-D modeling to design computer images that are almost indistinguishable from photographs.[6] While the best results are achieved using expensive programs and hardware (such as those used by motion picture studios), inexpensive personal computer programs allow for the creation of increasingly realistic virtual pornography.

Computer-savvy pedophiles can also scan innocent pictures of children into their home computers and use graphics software to remove the children's clothing and arrange the children into sexual positions.[7] Similarly, they can use this technology to superimpose the face of a child onto a sexually explicit photograph of an adult, making it appear that the child is engaged in sexual acts. While child pornography involving identifiable minors is computer-generated, it is not 100% virtual because it utilizes photographs of real children.

In an attempt to combat these new forms of child pornography, Congress enacted the Child Pornography Prevention Act ("CPPA") of 1996[8] to expand the traditional definition of child pornography. Before the CPPA, the federal child pornography statute criminalized only kiddie-porn created using a real child.[9] The CPPA bans both completely virtual child pornography and computer-generated child pornography involving an identifiable minor.[10]

---

[4] Stephen Porter, *Made for the Stage: Synthetic Actors Are Getting Better; Three Dimensional Computer Animation of Human or Human-Like Images*, COMPUTER GRAPHICS WORLD, Aug. 1990, at 60, 65.

[5] *See* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440–41 (1997).

[6] *See* Johnson, *supra* note 3, at 315; S. REP. No. 104-358, at 15 (1996).

[7] *See* S. REP. No. 104-358, at 15.

[8] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009.

[9] *See* 18 U.S.C. §§ 2252, 2256 (1994).

[10] *See* Pub. L. No. 104-208, § 121, 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009-28 to -29.

Critics of the CPPA have vigorously attacked the constitutionality of the criminalization of computer-generated child pornography.[11] Debra D. Burke, in "The Criminalization of Virtual Child Pornography: A Constitutional Question," published in the *Harvard Journal on Legislation*'s *Special Issue: Computer Legislation* last summer, asserts that the CPPA's ban on completely virtual child pornography cannot withstand constitutional challenge because Congress's reasons for passing the Act are neither sufficiently compelling nor narrowly tailored.[12] Other critics, such as Senator Russell Feingold (D-Wis.), have compared the CPPA to the Communications Decency Act ("CDA") of 1996,[13] stating that the legislation "marks the second occasion that this Congress has embarked upon an unconstitutional course in seeking to address activity which is being conducted via modern technology."[14] Harvard Law School Professor Alan Dershowitz, writing in *Penthouse*, criticized the CPPA for criminalizing "the imaginations and virtual realities of our citizens."[15]

This Note defends the CPPA's constitutionality against Burke and other critics. Part I begins by examining the text of the CPPA. Part II discusses the most important child pornography cases that have reached the Supreme Court, and Part III uses these cases to elaborate a First Amendment framework for assessing the CPPA's constitutionality. Part IV explains why Congress can constitutionally criminalize computer-generated child pornography that involves an identifiable minor, and Part V defends the CPPA's ban on completely virtual child pornography. The Note concludes by arguing that the CPPA is not only constitutional, but also necessary and desirable.

---

[11] *See, e.g.*, Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483 (1996); Burke, *supra* note 5; *Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) [hereinafter *Hearings*] (statement of Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University).

[12] *See* Burke, *supra* note 5, at 470–72.

[13] Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996). In enacting the CDA, Congress had attempted to prohibit the transmission of certain materials to minors over the Internet. The Supreme Court, in *Reno v. ACLU*, ruled that the provisions of the CDA protecting minors from "indecent" and "patently offensive" communications violated the First Amendment. Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997). The Court, however, upheld the provisions pertaining to the regulation of Internet obscenity and child pornography. *See id.* at 2340, 2350.

[14] S. REP. No. 104-358, at 38 (1996).

[15] Alan Dershowitz, *Federally Felonious Fantasies*, PENTHOUSE, Feb. 1996.

I. THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996

On September 30, 1996, Congress passed the Child Pornography Prevention Act of 1996 (CPPA)[16] to amend Chapter 110 of Title 18 of the United States Code, which criminalizes the sexual exploitation and other abuse of children. This Note concentrates on the subsections of the CPPA that broaden federal child pornography law.[17]

Before the CPPA, in order for a work to be considered child pornography, it had to depict a *real* child (under the age of eighteen) engaging in actual or simulated "sexually explicit conduct."[18] The CPPA amended the definition of child pornography to include both completely virtual child pornography and computer-generated child pornography involving an "identifiable minor."[19]

Subsection B of the CPPA added to the definition of child pornography visual depictions of what appear to be minors engaging in sexually explicit conduct. The "appears to be" language covers virtual child pornography that is created using a computer and portrays no actual living child. Subsection C expanded the definition of child pornography to include depictions of "identifiable minors." Congress defined an identifiable minor as a person "who was a minor at the time a visual depiction was created, adapted, or modified or whose image as a minor was

---

[16] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009.

[17] *See id.* The remaining subsections of this Act only deal tangentially with the subject of this Note. They increase penalties, amend the Privacy Protection Act to allow for expanded newsroom searches, redefine sexual abuse of a minor, and make the provisions of the act severable.

[18] 18 U.S.C. §§ 2252, 2256 (1994). Sexually explicit conduct includes sex, oral sex, anal sex, bestiality, masturbation, sadistic or masochistic abuse, and the lascivious exhibition of a person's genitals or pubic area. *See* 18 U.S.C.A. § 2256 (West Supp. 1997).

[19] 18 U.S.C.A. § 2256(8) (West Supp. 1997). The CPPA defines child pornography as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

used in creating, adapting, or modifying the visual depiction[. . . .]"[20] This section expanded the definition of child pornography to include, for example, a picture of an adult having sex that has been altered by replacing the adult's face with the face of a real child.

The final subsection of this portion of the CPPA brought under the definition of child pornography visual sexual depictions that are advertised, presented, or described in such a way that would make an observer think the depiction is of a minor engaging in sexually explicit conduct.[21] This might include a magazine picture of a woman having sex with a caption that reads, "See sixteen-year-old Suzi having fun," or possibly a movie like *Lolita*, which portrays a child engaged in sexual activity.[22]

In addition to altering the definition of child pornography, the CPPA created a new section of Title 18 that punishes the possession of "child pornography."[23] Prior to the CPPA, 18 U.S.C. § 2252 criminalized the transportation, sale, and possession of visual depictions of sexually explicit conduct that involved "the use of a minor engaging in sexually explicit conduct."[24] In other words, before the CPPA, federal law criminalized only materials created by exploiting a real child. By adding § 2252A, which parallels § 2252, but substitutes the words "child pornography"[25] for "visual depictions involv[ing] the use of a minor engaging in sexually explicit conduct,"[26] Congress explicitly criminalized the possession of virtual child pornography.

The CPPA also created an affirmative defense to the new child pornography statute. The Act explicitly exempted alleged child pornography created using adults that is not promoted as visually depicting minors engaged in sexually explicit conduct.[27] This defense, however, does not seem to apply to the possession of child pornography.

---

[20] 18 U.S.C.A. § 2256(9) (West Supp. 1997).

[21] *See id.*

[22] *See* John Blades, *The Trouble With 'Lolita': A New $40 Million Movie Version Of Nabokov's Novel Has Been Shunned By Distributors. The Filmmakers Apparently Picked The Wrong Time For A Film About Pedophilia*, CHI. TRIB., Apr. 13, 1997, § 7, at 1.

[23] 18 U.S.C.A. § 2252A (West Supp. 1997).

[24] 18 U.S.C. § 2252 (1994).

[25] 18 U.S.C.A. § 2252A (West Supp. 1997).

[26] 18 U.S.C. § 2252.

[27] 18 U.S.C.A. § 2252A(c) (West Supp. 1997) ("It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that—(1) the alleged child pornography was produced using an actual person or persons engaging

Congress also included in the text of the CPPA its justifications for changing the definition of child pornography.[28] It first focused on "real" child pornography: sexually explicit images of actual children. Congress found that using a child to create pornography can result in physical and psychological harm to the child involved, and creates a permanent record of that child's abuse.[29] Congress further found that pedophiles often use child pornography to seduce children into sexual activity, to whet their own sexual appetites, and to serve as a model for their own sexual activities with children.[30] It also noted that child pornography can "desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer."[31]

Congress next addressed virtual child pornography. Its findings recognized that new photographic and computer-imaging technologies make it possible to create "depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children . . . ."[32] The findings noted that computers make it possible to: (1) alter sexually explicit images to make it impossible to identify the subjects of the images and determine whether or not they are children; (2) produce visual depictions of child sexual activity designed to satisfy the specific preferences of the pedophile; and (3) alter innocent pictures of children to make it appear that those children are engaging in sexual activity.[33]

According to Congress's findings, the creation of computer-generated child pornography involving an identifiable minor violates that child's privacy and hurts his or her reputation.[34] In addition, Congress determined that virtual child pornography has the same effect as "real" child pornography "on a child molester or pedophile using that material to stimulate or whet his own

---

in sexually explicit conduct; (2) each such person was an adult at the time the material was produced; and (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.")

[28] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 1996 U.S.C.C.A.N. (100 Stat. 3009) 3009-26 to -27.

[29] *See id.* at § 121(1)(1)–(2), 3009-26.

[30] *See id.* at § 121(1)(3)–(4), 3009-26.

[31] *Id.* at § 121(1)(4), 3009-26.

[32] *Id.* at § 121(1)(5), 3009-26.

[33] *See id.* at § 121(1)(6), 3009-26.

[34] *See id.* at § 121(1)(7), 3009-26.

sexual appetites, [and] on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation . . . ."[35] Congress reasoned that child pornography, whether real or computer-generated, presents a "clear and present danger to all children."[36]

Congress concluded that prohibiting the possession of child pornography, real and virtual, would encourage people to destroy the material. This would help "protect the victims of child pornography and eliminate the market for the exploitation of children."[37] According to Congress, the government's compelling interest in eliminating child pornography and protecting children from exploitation allows it to prohibit the production, possession, distribution, and viewing of both real and virtual child pornography.[38]

II. Child Pornography Cases in the Supreme Court

The Supreme Court has decided three major child pornography cases. In *New York v. Ferber*,[39] the Court held that New York could constitutionally criminalize the distribution of child pornography created by using real children.[40] In *Osborne v. Ohio*,[41] the Court expanded its ruling in *Ferber*, holding constitutional a state's ban on the private possession of "real" child pornography.[42] Three years ago, the Court ruled in *United States v. X-Citement Video, Inc.*[43] that federal child pornography law be read as having a scienter requirement as to the age of the subject.[44]

A. New York v. Ferber

In *Ferber*, the owner of a Manhattan adult bookstore was convicted under a New York child pornography statute for selling two films depicting young boys masturbating.[45] The New York Court of Appeals struck down his conviction, holding that

---

[35] *Id.* at § 121(1)(8), 3009-26 to -27.
[36] *Id.* at § 121(1)(10)(A), 3009-27.
[37] *Id.* at § 121(1)(12), 3009-27.
[38] *See id.* at § 121(1)(13), 3009-27.
[39] 458 U.S. 747 (1982).
[40] *See id.* at 765–66.
[41] 495 U.S. 103 (1990).
[42] *See id.* at 111.
[43] 513 U.S. 64 (1994).
[44] *See id.* at 67.
[45] *See Ferber*, 458 U.S. at 751–52.

the law violated the First Amendment.[46] The Supreme Court reversed, holding that the First Amendment did not prohibit New York from criminalizing the distribution of child pornography and that New York's child pornography statute was not unconstitutionally overbroad.[47]

The Court began its analysis by asking whether a state has more freedom to proscribe child pornography than it does adult pornography.[48] Answering in the affirmative, the Court reasoned: (1) that the state has a compelling interest in safeguarding the physical and psychological interests of children;[49] (2) that the distribution of child pornography is intrinsically related to the sexual abuse of children, since it serves as a permanent record of the child's sexual abuse and because the distribution of child pornography encourages the production of these materials; (3) that selling and advertising child pornography provides an economic motive for the production of child pornography; (4) that child pornography has little or no value;[50] and (5) that classifying child pornography as outside the protection of the First Amendment is not incompatible with Supreme Court precedent.[51]

Nevertheless, the Court placed limits on governmental regulation of child pornography.[52] The Court required that child pornography statutes apply only to visual works involving children below a specified age, suitably describe what sexual conduct is proscribed, and contain a scienter requirement.[53] The Court em-

---

[46] *See id.* at 752 (discussing People v. Ferber, 422 N.E.2d 523 (N.Y. 1981)).

[47] *See id.* at 765–66, 773.

[48] *See id.* at 753.

[49] The Supreme Court refused to second-guess the New York legislature's judgment, which had been supported by psychological studies, that the use of children as subjects of pornography harms those child subjects physically, emotionally, and mentally. *See id.* at 758. The Court cited several psychological studies concluding that the use of children as subjects in child pornography is harmful to those children. *See id.* at 758–59 nn.9–10.

[50] The majority could not conceive of many situations where depictions of children performing sexual acts would constitute an important part of a literary, scientific, or educational work. Furthermore, the Court suggested that if a work needed to depict a child in order to preserve such value, a person above the statutory age who looked younger could be used. The Court also stressed that the statute could not be used to censor a literary theme or a portrayal of sexual activity. *See id.* at 762–63.

[51] The Court cited examples of content-based regulations of speech and held that such regulations are justified when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Id.* at 763–64. The Court stated that New York's child pornography law bore so pervasively on the welfare of the children engaged in its production that the balance of competing interests favored denying child pornography the protection of the First Amendment.

[52] *See id.*

[53] *See id.* at 764–65.

phasized that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve the live performance, or photographic or other visual reproduction of live performances, retains First Amendment protection."[54]

The Court next examined the issue of overbreadth. The defendant argued that New York's statute was unconstitutionally overbroad because it barred material with serious literary, scientific, and educational value, as well as material that does not exploit and abuse children.[55]

In response, the Court stated that the First Amendment overbreadth doctrine is "strong medicine" that should be applied as a "last resort"[56] to invalidate a statute when it is substantially overbroad.[57] The Court held that the New York statute's "legitimate reach dwarfs its arguably impermissible applications."[58] While some protected speech (e.g., medical textbooks and *National Geographic* photo spreads) might be subject to the law, these "arguably impermissible applications of the statute amount to no more than a tiny fraction of the materials within the statute's reach."[59] The Court held that whatever overbreadth might exist should be corrected on a case-by-case basis.[60]

B. Osborne v. Ohio

Eight years after *Ferber*, in *Osborne v. Ohio*,[61] the Court indicated that child pornography deserves even less First Amendment protection than obscenity in some respects. Despite its earlier decision in *Stanley v. Georgia*,[62] which ruled that a state cannot ban the possession of obscene materials,[63] the Court upheld a state law prohibiting the possession and viewing of child pornography.[64]

According to the Court, even if the defendant had a First Amendment interest in possessing child pornography, the case

---

[54] *Id.*
[55] *See id.* at 766.
[56] *Id.* at 769 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613) (1973).
[57] *See id.* at 769.
[58] *Id.* at 773.
[59] *Id.*
[60] *See id.* at 773–74.
[61] 495 U.S. 103 (1990).
[62] 394 U.S. 557 (1969).
[63] *See id.* at 568.
[64] *Osborne*, 495 U.S. at 111.

was distinguishable from *Stanley* because the "interests underlying [Ohio's statute] far exceed the interests justifying the Georgia law at issue in *Stanley*."[65] The *Osborne* Court accepted Ohio's three justifications for banning the possession of child pornography: (1) reducing the demand for child pornography, which in turn, would reduce the supply;[66] (2) encouraging the destruction of child pornography, the permanent record of a child's abuse;[67] and (3) eliminating material that evidence suggests is used by pedophiles "to seduce other children into sexual activity."[68]

It is significant that the Supreme Court recognized this third reason for supporting the validity of the Ohio statute. In *Ferber*, the Court justified a ban on the production and distribution of child pornography by focusing on the harm inflicted on the children exploited in the creation of the pornographic materials. *Osborne* went further, by focusing also on the harm caused to children who are not subjects of child pornography. Given Ohio's interest in protecting both children exploited through the creation of child pornography and children abused by pedophiles who use child pornography to seduce their victims, the Court held that Ohio could constitutionally criminalize the possession and viewing of kiddie-porn.[69]

As in *Ferber*, the petitioner further argued that the Ohio statute was overbroad because "it criminalizes an intolerable range of constitutionally protected conduct."[70] According to the petitioner, the statute, on its face, criminalized the possession of nude photographs of minors even though the Court had stated that "depictions of nudity, without more, constitute protected expression."[71]

The Supreme Court agreed that a state cannot prohibit mere nudity, even if that nudity involved a child. The Court, however, ruled that the statute was not overbroad because the Ohio Su-

---

[65] *Id.* at 108. The *Osborne* Court characterized the State's interest in *Stanley* as keeping obscenity from poisoning the minds of its citizens. *See id.* It is interesting to note that Justice White's opinion completely ignored one of the two other justifications provided by the Georgia legislature to support its statute: that obscenity led to sex crimes. *See id.* at 109.

[66] *See id.* at 109–10.

[67] *See id.* at 111.

[68] *Id.*; *see also* 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 649 (1986) [hereinafter AG REPORT] ("A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity.").

[69] *See Osborne*, 495 U.S. at 111.

[70] *Id.* at 112.

[71] *Id.*; *see also Ferber*, 458 U.S. at 765 n.18.

preme Court had interpreted the statute to apply to only materials where a child is in a state of nudity and that nudity "constitutes a lewd exhibition or involves a graphic focus on the genitals . . . ."[72] Furthermore, though the Ohio statute lacked a scienter requirement, the Ohio Supreme Court had ruled that the State must prove recklessness in such cases.[73] Thus, the Supreme Court held that the Ohio Supreme Court's interpretation of the statute cured the statute's facial overbreadth.[74]

C. United States v. X-Citement Video, Inc.

In *United States v. X-Citement Video, Inc.*,[75] the Supreme Court held that the Protection of Children Against Sexual Exploitation Act of 1977 (the precursor to the CPPA) should be read to require the government to prove that the defendant knew that a performer in a piece of child pornography was, in fact, a minor.[76]

The defendant in *X-Citement Video*, a video store retailer, was convicted of selling pornographic video tapes starring an underaged actress.[77] Although the government provided ample evidence that the defendant knew the actress was a minor when she made the films, the Ninth Circuit reversed the conviction, holding that the anti-child pornography statute was facially unconstitutional because it did not contain a scienter requirement.[78]

The Supreme Court reversed and reinstated the conviction.[79] While recognizing that the most natural and grammatical reading of the statute did not require the government to prove that the defendant knew the child was a minor,[80] the Court decided to read the statute as requiring a scienter requirement because: (1) to do otherwise would allow the statute to punish not only distributors of films who did not know that a film contained an underage actor, but also distributors who did not know that a film was pornographic;[81] (2) the Court will generally interpret

---

[72] *Osborne*, 495 U.S. at 113–14 (citing State v. Young, 525 N.E.2d 1363, 1368 (Ohio 1988)).
[73] *See Osborne*, 495 U.S. at 115.
[74] *Id.* at 115–22.
[75] 513 U.S. 64 (1994).
[76] *See id.* at 65–66.
[77] *See id.* at 66.
[78] *See id.* at 66–67.
[79] *See id.* at 67.
[80] *See id.* at 68.
[81] *Id.* at 68–69.

criminal statutes to include a scienter requirement, "even where the statute, by its terms does not contain . . . [one];"[82] (3) the legislative history does not preclude such an interpretation;[83] and (4) cases such as *Ferber* and *Osborne* suggest that a child pornography statute "completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."[84]

Despite the Court's suggestion that a child pornography statute completely bereft of a scienter requirement as to the age of the performer would likely be unconstitutional, the Court read the statute to avoid the constitutional question altogether.

III. The Supreme Court's Framework for Assessing the Constitutionality of Child Pornography Statutes

A. *The Paths toward Nonprotection Under the First Amendment*

Scholars have argued that the Supreme Court has tended to compartmentalize the First Amendment into separate categories with distinct tests.[85] Most content-based restrictions are subject to strict scrutiny, which requires the government to show that the questioned regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve its stated objective.[86] At the other end of the spectrum, however, categories of speech such as obscenity and perjury fall completely outside the bounds of the First Amendment.[87] Non-obscene sexually explicit materials, like adult pornography, lie somewhere between the two

---

[82] *Id.* at 70.

[83] *See id.* at 73–78.

[84] *Id.* at 78.

[85] *See, e.g.*, Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, Sup. Ct. Rev., 285, 287–88 (1982). *See generally* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. Colo. L. Rev. 293 (discussing the Supreme Court's use of both categorization and balancing approaches).

[86] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) ("the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.") (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

[87] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) ("[o]bscene material is unprotected by the First Amendment"); Roth v. United States, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press").

[88] *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

poles.[88] While the Court has not automatically deferred to government justifications, it has not generally subjected government regulation of sexually explicit materials to a strict scrutiny test. One scholar, Professor Frederick Schauer, claims that this spectrum of tests can be grouped into four different "paths" of nonprotection, which allow the Court to deny full or partial First Amendment protection to different categories of speech.[89]

Schauer's first path toward nonprotection deals with incidental restrictions on speech. Incidental limitations on speech are not subject to strict scrutiny because they are not content-based restrictions. Incidental speech restrictions are the "by-product" of a broader government regulation.[90] As long as the regulation furthers a more general state interest, any incidental limitation on communication is allowable, and the speech will be unprotected.[91]

The second path to nonprotection is non-coverage. Under this theory, certain speech is not protected because it is not "covered" by the First Amendment. As noted above, clear examples of "uncovered" speech are obscenity and perjury. When a category of speech is considered "uncovered," courts do not even look at the state's justifications for restricting the speech. The determination that speech is unprotected is based solely on the lack of any First Amendment value for the speech in the first place.[92]

Schauer's third path to nonprotection, the "outweighing the First Amendment" approach,[93] resembles a strict scrutiny test. As described by Schauer, this path proceeds from a presumption diametrically opposed to that of the second path. Whereas the speech under path two is not covered by the First Amendment, speech under path three is presumed to deserve "maximum First Amendment protection."[94] Under this theory, the speech is fully "covered" by the First Amendment and receives a "high but not absolute level of protection."[95] This "speech at the core of the

---

[89] *See* Schauer, *supra* note 85, at 299.

[90] *Id.*

[91] *See id.* at 299–300. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (prohibiting the burning of draft cards is only an incidental restriction on free speech when the government has an administrative interest in the continuing integrity of draft cards).

[92] *See* Schauer, *supra* note 85, at 303.

[93] *Id.* at 304.

[94] *Id.*

[95] *Id.* at 305.

[96] *Id.*

First Amendment,"[96] such as political speech, can only be regulated when the "state can demonstrate a sufficiently strong reason for restriction."[97]

Schauer's fourth and final path to nonprotection concerns speech considered "less valuable." Schauer argues there are two ways to determine that speech is unprotected under this path. The first branch determines, *"a priori*, without reference to potential justifications for restriction, that speech within a given category is entitled to a particular level of protection."[98] This "low-value" speech justification for nonprotection is elaborated in Justice Stevens's plurality opinion in *Young v. American Mini Theatres*.[99] Stevens wrote that "society's interest in protecting" non-obscene, sexually explicit materials "is of a wholly different, and lesser magnitude than the interest in untrammeled political debate" and that a state "may legitimately use the content of these materials as the basis for placing them in a different classification . . . ."[100]

The second branch "weighs speech value against the strength of a particular state justification."[101] Schauer argues that it is not accurate to say that the Court actually balances the state interest against the speech interest. Rather, under this path to nonprotection, "the Court attempts to accommodate worthy but conflicting interests in a way that both interests survive to some extent."[102] Nevertheless, despite Schauer's objection, this approach is properly characterized as a balancing approach, similar to the one described in Justice Powell's *American Mini Theatres* dissent.[103] Powell suggested that the Court consider the "competing concerns of the State and the interests protected by the guaranty of free expression."[104] This differs from the "outweighing the First Amendment" approach because it focuses on the low value of the speech at issue and does not require the government's interests to be as compelling as those needed to restrict core speech.

---

[97] *Id.* at 304. This path to nonprotection is exemplified by such cases as *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *Hess v. Indiana*, 414 U.S. 105 (1973), which respectively struck down laws that would have punished participants in a Ku Klux Klan rally and an anti-war demonstration without an adequate showing of direct incitement likely to produce imminent lawless action.

[98] Schauer, *supra* note 85, at 307. This branch has been used in commercial speech cases, such as *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563–66 (1980).

[99] 427 U.S. 50 (1976).

[100] *Id.* at 70–71.

[101] Schauer, *supra* note 85, at 307 (emphasis added).

[102] *Id.*

[103] *See American Mini Theatres*, 427 U.S. at 79–80.

[104] *Id.* at 76.

B. Ferber *and* Osborne*'s Use of the Paths Toward Nonprotection*

Some critics of the CPPA, like Burke, argue that the Act should be subject to a traditional strict scrutiny analysis, since it is a content-based restriction on speech.[105] An examination of *Ferber* and *Osborne*, however, clearly shows that strict scrutiny is not the means by which the Supreme Court evaluates the constitutionality of child pornography.

Under strict scrutiny, a statute must be the least restrictive means to achieve the government's goals. The New York statute examined by *Ferber* was not the least restrictive way to protect the subjects of child pornography from abuse. Indeed, although the *Ferber* Court expressly recognized that some protected speech, such as medical textbooks and *National Geographic* photo spreads, might fall under the statute's prohibition, it nevertheless upheld the statute's constitutionality.[106] The *Ferber* opinion therefore suggests that the Court does not subject child pornography laws to a strict scrutiny analysis.

Further, Burke argues that the CPPA is not narrowly tailored, a requirement under a strict scrutiny test. She noted that one of Congress's justifications for criminalizing virtual child pornography, protecting children from seduction by pedophiles, "is underinclusive and not carefully tailored since adult pornography can be used as well to seduce children."[107] Yet, this justification was one of the compelling reasons used by the Supreme Court to uphold Ohio's ban on the possession of child pornography in *Osborne*. *Osborne* thus indicates that the Court does not require child pornography statutes like the CPPA to be so narrowly tailored as to survive strict scrutiny analysis.

It follows that the Court does not apply strict scrutiny when assessing the constitutionality of child pornography statues. Instead, *Ferber* and *Osborne* draw from each of the paths toward nonprotection to declare child pornography unprotected by the First Amendment. *Ferber*'s third justification for upholding New York's child pornography law represents the first path, namely, incidental restrictions on speech. Under this theory, restrictions on child pornography memorializing a child's sexual exploita-

---

[105] Burke, *supra* note 5, at 461–62.
[106] New York v. Ferber, 458 U.S. 747, 773 (1982).
[107] Burke, *supra* note 5, at 468.

tion can be considered merely incidental to the laws prohibiting the sexual exploitation of children.

The second path toward nonprotection, a declaration that certain speech lies beyond First Amendment coverage, is also present in *Ferber*. The *Ferber* Court stated that "classifying child pornography as a category outside the protection of the First Amendment is not incompatible with our earlier decisions."[108] The Court's citation to obscenity cases suggests that child pornography is not covered by the First Amendment.[109]

This suggestion is deceiving. Courts in non-coverage cases typically do not examine a state's justification for restricting speech: if the speech is not covered by the First Amendment, then there is no reason to consider why the state desires to regulate it.[110] The *Ferber* Court, on the other hand, focused heavily on the reasons behind New York's child pornography statute. Thus, although the non-coverage path appears to be essential to *Ferber*'s analysis, it is not.[111]

The third path, in which core speech is outweighed by a strong governmental interest, also figures in *Ferber*'s analysis. The Court's first two justifications for outlawing child pornography rest on New York's substantial interest in protecting the physical and psychological well-being of children.[112] *Ferber*, however, also stresses the minimal value of child pornography,[113] and indicates that the materials do not deserve the "maximum" protection envisioned under Schauer's third path. The Court clearly did not view child pornography as "core speech" for the purposes of the First Amendment and most likely did not intend to utilize Schauer's third path to nonprotection.

The final path toward nonprotection, the "less valuable speech" approach, registers even more prominently in *Ferber*. The Court used both prongs of the "low-value" speech path to uphold the constitutionality of the New York statute. First, the Court declared that the "value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[114] As low-value

---

[108] *See Ferber*, 458 U.S. at 763.
[109] *See* Schauer, *supra* note 85, at 303.
[110] *See id.*
[111] *See id.* at 303–04.
[112] *See Ferber*, 458 U.S. at 756–61.
[113] *Id.* at 762–63.
[114] *Id.* at 762.

speech, child pornography is less deserving of First Amendment protection. The Justices, however, did not declare child pornography to be unprotected solely because of its low value.

Instead, they then weighed the interest in the low-value speech against the government's interests in banning it. After examining both interests, the Court concluded that since child pornography "bears so heavily and pervasively on the welfare of children engaged in its production . . . the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[115] Therefore, while strands of each path toward nonprotection appear in *Ferber*, path four, the less valuable speech approach, dominates the Court's analysis.

The *Osborne* holding further indicates that the Court primarily follows Schauer's less valuable speech approach. Although the *Osborne* court did suggest that child pornography might not warrant Constitutional coverage,[116] it decided *Osborne* under the assumption that the defendant had a First Amendment interest in possessing child pornography.[117] The Court analyzed *Osborne* by weighing this interest against the state's interests in banning the possession of child pornography. In the end, the *Osborne* court held that "[g]iven the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography."[118]

From the close examination of *Ferber* and *Osborne* that reveals the Court's principal reliance on the low-value speech path in the context of conventional child pornography, it follows that the constitutionality of the CPPA be assessed using the low-value speech approach as well. An application of this framework demonstrates that the CPPA's criminalization of both computer-generated child pornography involving an identifiable minor and completely virtual child pornography is constitutional.

---

[115] *Id.* at 764.

[116] *See Osborne*, 495 U.S. 103, 108 (1990) ("[t]he value of permitting child pornography has been characterized as 'exceedingly modest, if not *de minimis*'") (quoting New York v. Ferber, 458 U.S. 747, 762 (1982)).

[117] *Id.*

[118] *Id.* at 111.

IV. THE CONSTITUTIONALITY OF THE CPPA'S CRIMINALIZATION OF COMPUTER-GENERATED CHILD PORNOGRAPHY INVOLVING AN IDENTIFIABLE MINOR

The CPPA's expansion of the definition of child pornography in 18 U.S.C § 2256 to include visual depictions that have "been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," is constitutional under *Ferber* and *Osborne*. Even legislators and scholars who believe that the criminalization of completely virtual child pornography violates the First Amendment agree that Congress can criminalize child pornography involving an identifiable minor.[119] Indeed, Burke concedes that "virtual child pornography made with identifiable minors . . . would probably survive strict scrutiny review."[120] The *Ferber* and *Osborne* balancing approach readily leads to the conclusion that Congress can constitutionally criminalize computer-generated child pornography that involves an identifiable minor.

As the *Ferber* Court recognized, the value of child pornography is modest, if not *de minimis*.[121] On the other side of the balancing equation, the State has three compelling interests in criminalizing computer-generated child pornography involving identifiable minors. First, a state has an interest in preventing the creation of a permanent record of a child's abuse. There can be little doubt that a child who sees a computer-generated picture of herself engaged in sexually explicit activity would be psychologically harmed by both the viewing of the picture and the knowledge that the picture is circulating in her community.[122] Although the child did not actually participate in the sexual activity, the child pornography is recorded and the identifiable minor will have to deal with the anger, hurt, and indignity caused by this false portrayal.

Second, "[w]hen [sexually explicit] performances are recorded and distributed, the child's privacy interests are . . . invaded."[123]

---

[119] *See, e.g.*, Burke, *supra* note 5, at 470; *Hearings*, *supra* note 11 (statement of Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University); S. REP. No. 104-358, at 30 (1996).

[120] Burke, *supra* note 5, at 470.

[121] *Ferber*, 458 U.S. at 762–63.

[122] *See* S. REP. No. 104-358 at 14. *See also id.* at 30 ("These kinds of images cause significant harm to real children because . . . the image creates an apparent record of sexual abuse and thus causes the same psychological harm to children . . . .").

[123] *Ferber*, 458 U.S. at 758–59 nn.9–10.

Even if the pornographic pictures of identifiable minors are fictional, they have the appearance of reality and thus violate the minor's "'interest in avoiding disclosure of personal matters.'"[124]

Third, the state has an interest in banning child pornography because child molesters exploit it to seduce their victims.[125] A pedophile could use computer-generated images of a child's friends to convince him to engage in sexual activity since his friends are doing it as well.[126] A pedophile could also create computer-generated images of the child he wishes to seduce and use those images to blackmail the child into agreeing to submit to the pedophile's fantasies.[127]

Because all three of these interests are almost identical to the interests endorsed by the Court in *Ferber* and *Osborne* to justify criminalizing traditional child pornography, there can be little doubt that these interests are compelling enough to outweigh the minimal First Amendment interest in allowing computer-generated child pornography involving identifiable minors.

V. The Constitutionality of The CPPA's Criminalization of Completely Virtual Child Pornography

Whether the CPPA can constitutionally criminalize completely virtual child pornography is a more difficult question. Still, the less valuable speech approaches to the First Amendment adopted in *Ferber* and *Osborne* argue in favor of the CPPA's constitutionality. In addition, the CPPA is not overbroad and meets the scienter requirement suggested in *X-Citement Video, Inc.* The CPPA's criminalization of completely virtual child pornography should survive any First Amendment attack. Unfortunately, the only case that has considered the constitutionality of the CPPA thus far,[128] *The Free Speech Coalition v. Reno*,[129] comes to the right answer (that the CPPA is constitutional) for the wrong reasons.

---

[124] *Id.* at 759 n.10 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)).

[125] Osborne v. Ohio, 495 U.S. 103, 111 (1990).

[126] *See* Burke, *supra* note 5, at 466.

[127] *See id.*; *see also Hearings*, *supra* note 11 (statement of Kevin DiGregory, Deputy Assistant Att'y Gen., Dep't of Justice).

[128] As of November 8, 1997.

[129] No. C 97-0281VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997).

A. Ferber *and* Osborne*'s Less Valuable Speech Balancing Approach Supports the Constitutionality of the CPPA*

The second prong of Schauer's less valuable speech path, the balancing approach, which the Court used extensively in *Ferber* and *Osborne*, strongly supports the constitutionality of the CPPA's criminalization of virtual child pornography. On one side of the equation, there is a very limited First Amendment interest in viewing or distributing virtual child pornography. On the other side, Congress has several particular interests in completely banning such materials.

A large wrinkle appears, however, when elaborating those interests. The Supreme Court in *Ferber* focused entirely on New York's strong interest in protecting children who were sexually exploited through the creation of child pornography. No such interest exists where real children are not used in the pornography's production. This subsection begins by explaining why Congress's interests in banning child pornography extend beyond protecting the actual subjects of the pornography. This Note then explores the five compelling state interests that support Congress's ban of virtual child pornography and concludes by balancing those interests against a citizen's limited First Amendment interest in such material.

1. Congress's Particular Interests in Banning Child Pornography Are Not Limited to Protecting the Subjects Portrayed by the Pornography

Ferber's analysis of New York's child pornography law begins with an expression of the state's compelling interest in protecting the physical and psychological well-being of children.[130] Yet, when defining New York's interest in protecting children, the Court focuses solely on the effects of child pornography on those children exploited in the material's creation.[131] In fact, *Ferber* specifically states that only child pornography created by exploiting real children enjoys no First Amendment protection, while "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live

---

[130] *See Ferber*, 458 U.S. at 756–57.

[131] *See id.* at 759–65. *See supra* Part II.A.

performances or photographic or other visual reproduction of live performances, retains First Amendment protection."[132]

Opponents of the CPPA cite *Ferber* as support that prohibitions on virtual child pornography are unconstitutional because virtual kiddie-porn does not involve real children.[133] Although *Ferber*'s language seems to proscribe the CPPA's ban on virtual child pornography, this is not the case.

First, the *Ferber* court was limited to considering only those justifications for New York's child pornography laws that New York presented, all of which relied on the harm to the subjects of child pornography. It is well settled that Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases and controversies. Two of the "cardinal rules governing the federal courts"[134] are "'never to anticipate a question of constitutional law in advance of the necessity of deciding it,'" and "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[135] The facts before the *Ferber* court involved only real child pornography.[136] New York justified its statute only with reference to the protection of the child pornography subject.

Indeed, the Supreme Court granted New York's petition for certiorari to answer the following question:

> To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?[137]

Consequently, the limits of *Ferber*'s holding to real child pornography cannot be used to declare either that the CPPA's prohibition of virtual child pornography violates the First Amend-

---

[132] *Ferber*, 458 U.S. at 764–65.

[133] *See* Adelman, *supra* note 11, at 486–87; *Hearings*, *supra* note 11 (statement of Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University); S. REP. No. 104-358, at 37 (1996).

[134] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501–02 (1985).

[135] *Ferber*, 458 U.S. at 768 n.20 ((quoting United States v. Raines, 362 U.S. 17, 21 (1960) (quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885))); *see also Brockett*, 472 U.S. at 501–02 (1985) (citations omitted); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citations omitted).

[136] In fact, since the technology did not yet exist, virtual child pornography could not have even been contemplated by the Court in 1982 when *Ferber* was decided.

[137] *Ferber*, 458 U.S. at 753.

ment or that Congress can only justify its child pornography laws through a desire to protect the subjects of child pornography.[138]

Second, *Osborne*, a later case, signals the Court's willingness to accept states' justifications for child pornography statutes that do not involve protecting the children exploited in the pornography's creation. Ohio justified its statute by relying both on the effects of child pornography on its subjects and on the effects of child pornography on all child abuse victims.[139] Agreeing with Ohio, the Supreme Court cited how "pedophiles use child pornography to seduce other children into sexual activity"[140] as a justification for Ohio's ban on the possession of child pornography. It stands to reason that Congress, too, can advocate the constitutionality of the CPPA by detailing the harms of child pornography not only to its subjects, but also to all child sexual abuse victims.

2. Congress's Five Particular Interests in Banning Virtual Child Pornography

The *Ferber* court recognized that "[i]t is evident beyond the need for elaboration" that the state has a compelling interest in "'safeguarding the physical and psychological well-being of a minor.'"[141] Indeed, "'[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.'"[142] For this reason, the Supreme Court has repeatedly upheld legislation aimed at protecting the physical and psychological well-being of children, "even when the laws have operated in the sensitive area of constitutionally protected rights."[143]

The CPPA's prohibition on virtual child pornography is necessary to protect the physical and psychological well-being of America's children. In her attack on the CPPA, Burke identified and dismissed three interests used to justify the CPPA.[144] Con-

---

[138] *Hearings*, *supra* note 11 (statement of Bruce Taylor, President and Chief Counsel, Nat'l Law Center for Children and Families).

[139] *See* Osborne v. Ohio, 495 U.S. 103, 109–11 (1990).

[140] *Id.* at 111.

[141] *Ferber*, 458 U.S. at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

[142] *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

[143] *Id.*

[144] Burke, *supra* note 5, at 464–470. The three interests identified by Burke are:

gress, however, has five compelling interests in prohibiting virtual child pornography: (a) to prevent pedophiles from using virtual child pornography to seduce their victims; (b) to prevent the existence of virtual child pornography from allowing owners and distributors of "real" child pornography to escape prosecution; (c) to encourage owners of all child pornography (both real and virtual) to destroy those materials; (d) to prevent virtual child pornography from inciting pedophiles into abusing children; and (e) to prevent the sexualization of minors.

a. *Virtual child pornography can be used to seduce children.* Congress has a compelling interest in preventing pedophiles from using virtual child pornography to seduce children into submitting to sexual abuse.[145] Congress concluded that "child pornography is often used as a part of a method of seducing other children into sexual activity,"[146] and that virtual child pornography, because it is indistinguishable from real child pornography, can have the same effect on a pedophile's victims as real child pornography.[147]

In its findings, Congress relied on ample scientific evidence supporting the proposition that pedophiles use child pornography to seduce their victims. Dr. Victor Cline, a clinical psychologist specializing in the treatment of sexual compulsions and addictions, testified before the Senate Judiciary Committee that pedophiles use child pornography to seduce children into engaging in sexual acts with them.[148] This proposition is supported by the Final Report of the Attorney General's Commission on Pornography.[149] In addition, the Senate Judiciary Committee's Report on the CPPA cited a study that explains this "cycle" of child pornography. According to psychologist Dr. Shirley O'Brien, child pornography is first shown to the pedophile's victim for educational purposes. The pedophile attempts to convince the child that sexual conduct is desirable. The victim is convinced

---

(1) the correlation between the consumption of child pornography and the abuse of children; (2) the use of child pornography by pedophiles to seduce children; and (3) the sexualization of children by child pornography.

[145] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121(1)(3), 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009-27.

[146] *Id.* at § 121(1)(3), 3009-26.

[147] *Id.* at § 121(1)(8), 3009-27.

[148] *See Hearings*, *supra* note 11 (statement of Dr. Victor Cline, Emeritus Professor of Psychology, University of Utah).

[149] AG REPORT, *supra* note 68, at 649.

by the child pornography that other children are sexually active and that it is therefore permissible to engage in sexual conduct. The child pornography desensitizes the child and lowers his inhibitions. In time, the pedophile may engage in sexual activity with the child, some of which is photographed and used to seduce more child victims.[150] Though persons who use virtual child pornography to seduce their victims may be less likely to document the sexual abuse as real child pornography (otherwise, why would the pedophile be using virtual porn in the first place?), the fact remains that virtual child pornography can be used to convince a child to engage in sex acts.

Critics of the CPPA argue that there is "currently an extremely weak empirical showing that computer-generated child pornography will be used to induce participation by children in sexual conduct."[151] The author of one article asserts that reliance on the Attorney General's Report is misplaced because: (1) the Final Report "gives little space and weight to [this] issue;" (2) the Final Report also found that adult pornography is used for the same purpose; and (3) the Final Report considered "sexually explicit fictional depictions of children" to be outside the category of child pornography.[152]

This attack on the Attorney General's Report ignores the Supreme Court's reliance on the Report in *Osborne* to support the proposition that pedophiles use child pornography to seduce their victims.[153] The Court explicitly recognized in *Osborne* that the State has a valid interest in preventing pedophiles from using child pornography to seduce children. Furthermore, Congress does not rely solely on the Attorney General's Report to support its conclusion that child pornography is a tool of seduction. The Senate Judiciary Committee heard the testimony of Dr. Cline to the same effect, and the CPPA's legislative history also cites Dr. O'Brien's study linking child pornography to the seduction of children—a study cited favorably by the Supreme Court in *Osborne*.[154]

Burke, in particular, attacks the seduction argument because adult pornography can also be used to seduce children.[155] Yet,

---

[150] S. REP. No. 104-358, at 14 (1996) (discussing SHIRLEY O'BRIEN, CHILD PORNOGRAPHY 89 (1983)).

[151] Adelman, *supra* note 11, at 491.

[152] *Id.* at 490–91.

[153] *See* Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990).

[154] *See id.*

[155] Burke, *supra* note 5, at 466.

again, this argument ignores the *Osborne* Court's express recognition of the seduction justification. Moreover, as Burke herself indicates, child pornography can much more easily be used to seduce children than adult pornography.[156] Just because the seduction argument does not allow for the prohibition of adult pornography does not mean that it cannot be used to justify the criminalization of child pornography—speech of arguably even less value than adult pornography. Thus, despite the opinions of some commentators,[157] Congress has abundant support for its conclusion that virtual child pornography warrants prohibition in order to prevent the sexual abuse of children.

b. *New technology allows child pornographers to evade prosecution.* The CPPA's ban on virtual child pornography is necessary to enable the government to continue to prosecute all child pornographers, even those whose child pornography is "real."[158]

Before the passage of the CPPA, the government, in child pornography cases, was required to prove that the pornographic material at issue involved a real child engaging in sexually explicit activity.[159] Computer-generated child pornography, however, supplies "a built-in reasonable doubt standard in every child exploitation/pornography prosecution."[160] Before Congress passed the CPPA, a child pornography defendant could argue to the jury that the government could not prove that the child pornography at issue was real (as opposed to virtual) and that the jury must therefore acquit.[161]

---

[156] *Id.*

[157] *See* Adelman, *supra* note 11, at 491; Burke, *supra* note 5, at 464–65.

[158] This justification for the CPPA's criminalization of virtual child pornography is not discussed in the Act itself. This compelling reason is, however, discussed extensively in the CPPA's legislative history. *See* S. REP. No. 104-358.

[159] *See* 18 U.S.C. §§ 2252, 2256 (1995); *see also Hearings*, *supra* note 11 (statement of Bruce Taylor, President and Chief Counsel, Nat'l Law Center for Children and Families).

[160] *See Hearings*, *supra* note 11 (statement of Bruce Taylor, President and Chief Counsel, Nat'l Law Center for Children and Families).

[161] This defense was asserted in a child pornography case brought prior to the passage of the CPPA. In *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), the defendant argued that "the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor." *See* Burke, *supra* note 5, at 441 n.8. The district court so instructed the jury. The government was able to defeat Kimbrough's defense "through a carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned." *Hearings*, *supra* note 11 (statement of Kevin DiGregory, Deputy Assistant Att'y Gen., Dep't of Justice). Kimbrough, however, was tried in 1993, when computer-imaging technology was in its infancy and the defense was not as potent as it would be today. Furthermore, since virtual child pornography can be created now

The Senate Judiciary Committee's Majority Report recognizes that without the CPPA, "[s]tatutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children [would] go free from punishment."[162] Without the CPPA, pedophiles who exploit real children to create child pornography would have a reduced risk of punishment which would likely increase the "sexually abusive and exploitative use of children to produce child pornography."[163]

Congress's use of the impossibility of proving whether an image is of a real child in order to justify banning virtual child pornography is similar to the *Ferber* Court's use of the impossibility of proving where child pornography was produced in order to justify New York's ability to prohibit the distribution of child pornography produced outside the state.[164] The *Ferber* Court ratified New York's ban on foreign child pornography by finding that "[i]t is often impossible to determine where such material is produced."[165] Similarly, today it is almost impossible to determine whether virtual child pornography is real or fake.

The *Ferber* Court further condoned New York's ban on foreign child pornography by acknowledging that states need not limit their child pornography laws to materials created within their borders "because the maintenance of the market itself 'leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured.'"[166] Likewise, the sale and possession of virtual child pornography would help maintain the child pornography market, which would leave open the financial conduit by which the creation of all child pornography is funded and would lead to an increased risk that real children would be violated. Thus, Congress should be allowed to ban virtual child pornography for the same reasons that *Ferber* allowed New York to ban foreign child pornography.

---

without scanning a child pornography magazine into the computer, prosecutors can no longer rely on being able to show the jury the original magazine. *See id.* Thus, the techniques used by the government to overcome Kimbrough's virtual pornography argument in 1993 are much less likely to succeed at present.

[162] S. REP. No. 104-358, at 20 (1996).

[163] *Id.*

[164] *See* New York v. Ferber 458 U.S. 747, 766 n.19 (1982).

[165] *Id.* at 766.

[166] *Id.* (quoting People v. Ferber, 422 N.E.2d 523, 531 (N.Y. 1981)).

Opponents of the CPPA might counter that Congress did not have to criminalize virtual child pornography in order to preserve the government's ability to convict real child pornographers. Instead, Congress could have amended 18 U.S.C. § 2252 to allow defendants to prove, as an affirmative defense, that the child pornography is virtual and does not involve a real child.[167] While this approach would be required to withstand strict scrutiny, the Supreme Court has not required the State to take the least burdensome approach when prohibiting child pornography. *Ferber* did not require New York to provide defendants an affirmative defense for foreign child pornography; instead, the Court allowed New York to ban such materials outright. Similarly, Congress should not be required to provide an affirmative defense for defendants who possess or distribute virtual child pornography. Today's computer-imaging technology requires the CPPA's prohibition against virtual child pornography in order to maintain the government's ability to prosecute real child pornographers under the federal anti-child pornography statute.

c. *Banning virtual child pornography will encourage pedophiles to destroy all child pornography and help close the child pornography market.* Congress further justifies the CPPA by asserting that prohibiting the possession of child pornography "will encourage the possessors of such material to . . . destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children."[168]

If virtual child pornography were legal, pedophiles who did not know whether or not their child pornography was real or virtual could rationalize keeping the material because it might be virtual. Furthermore, if the government has the burden of proving that the pornography is real, then many pedophiles will think that they have a valid defense to any prosecution because they did not know their child pornography actually involved real children. By eliminating the virtual defense to, or rationalization for, possessing child pornography, the CPPA encourages destruction of all child pornography—both real and virtual—simultaneously decreasing both the demand for and the supply of child

---

[167] *See* Burke, *supra* note 5, at 470.

[168] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121(1)(12), 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009-27.

pornography. In *Osborne*, the Supreme Court accepted this exact rationale for banning child pornography.[169]

d. *Virtual child pornography incites pedophiles to abuse children.* Congress's fourth compelling interest in banning virtual child pornography is the prohibition of material that incites pedophiles to abuse children. Congress found that both real and virtual "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse . . . ."[170]

Congress's above stated findings are elaborated in the CPPA's legislative history and in testimony before Congress. Testifying before the Senate Judiciary Committee, Dee Jepsen, President of Enough is Enough!, described child pornography as "'an addiction that escalates, requiring more graphic or violent material for arousal . . . .'"[171] It leads pedophiles to view the children pictured in the materials as objects, devoid of rights, personality, dignity, or feelings.[172] The final stage in the child pornography pathology is "'acting out,' doing what has been viewed in the pornography. This leads to crimes of sexual exploitation and violence."[173]

This view receives further support in the testimony of Dr. Cline. According to Dr. Cline, almost all sexual deviations are learned behavior. The great majority of pedophiles use child pornography "'to stimulate and whet their sexual appetites which they masturbate to [and] then later use as a model for their own sexual acting out with children.'"[174] Child pornography "'can act as an incitement to imitate it in real life with someone they have access to and can intimidate not to tell.'"[175]

Furthermore, there is evidence that virtual child pornography would have the same incitement effect on pedophiles as real

---

[169] *Osborne*, 495 U.S. at 109–10.

[170] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121(1)(4), 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009-26.

[171] *Hearings*, *supra* note 11 (statement of Dee Jepsen, President of Enough is Enough!); *see also* S. REP. No. 104-358, at 13 (1996).

[172] *See id.*

[173] *Id.*

[174] *Hearings*, *supra* note 11 (statement of Dr. Victor Cline, Emeritus Professor of Psychology, University of Utah).

[175] *Id.*; *see also* S. REP. No. 104-358, at 13 (1996).

child pornography. According to written testimony by Dr. Cline, the difference between real and virtual child pornography "'is irrelevant because [the virtual subjects] are *perceived* as minors by the psyche.'"[176]

Critics of the CPPA's ban on virtual child pornography, however, criticize the strength of the link between child pornography and the sexual abuse of children. They point out that just because child molesters tend to own child pornography does not establish a causal relationship between the possession of child pornography and the abuse of children.[177] Detractors of the CPPA also note that a correlation exists between crime and adult pornography, but that the courts have not been willing to deem this correlation sufficiently compelling to support legislation expanding the category of obscene speech or the criminalization of the private possession of obscenity.[178]

The attacks on the incitement justification for the CPPA have some merit. But while non-obscene pornography cannot be criminalized for the harm it may pose to women, the State has a greater interest in protecting children than it does in protecting women.[179] Further, though critics are right in questioning a causal link between possession of child pornography and actual abuse of children, this doubt does not diminish evidence that child abuse is learned behavior. Though the incitement argument is not as compelling a justification for the CPPA as the seduction argument, empirical evidence does lend this justification fairly strong support.

e. *Virtual child pornography leads to the sexualization of minors.* Congress's final rationale for banning virtual child pornography is that it leads to the sexualization of minors.[180] According to the CPPA, the eroticization of children through any child pornography, virtual or real, "has a deleterious effect on all children by encouraging a societal perception of children as

---

[176] *Hearings*, *supra* note 11 (statement of Dr. Victor Cline, Emeritus Professor of Psychology, University of Utah); S. REP. No. 104-358, at 17.

[177] *See, e.g.*, Burke, *supra* note 5, at 464.

[178] *See id.* at 465; *see also* Stanley v. Georgia, 394 U.S. 557 (1969) (declaring the criminalization of the private possession of obscenity unconstitutional); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (ruling unconstitutional a city ordinance defining as obscene materials that presented women in positions of sexual subordination).

[179] *See* Johnson, *supra* note 3, at 328.

[180] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121(11)(A), 1996 U.S.C.C.A.N. (110 Stat. 3009) 3009-27.

sexual objects and leading to further sexual abuse and exploitation of them."[181] The sexualization of minors creates an unwholesome environment that negatively impacts juvenile development and threatens parental efforts to ensure the sound mental and moral growth of children.[182]

The CPPA's legislative history, however, does not focus on the preceding justification. In fact, the best argument that has been made in favor of this sexualization rationale appears in Burke's article declaring the CPPA's criminalization of virtual child pornography unconstitutional.[183]

Arguably, the Third Circuit used the sexualization rationale in *United States v. Knox*[184] to uphold the conviction of a defendant who possessed a video tape of young girls in bikinis that focused on the children's covered genitals. While the videotaped children were not victimized in a physical sense, they were victimized in the sense that the photographer intended for them to be viewed as sexual objects.[185] Although courts have rejected similar arguments with respect to the objectification of women in pornography,[186] "children are members of society, whose welfare the state has a compelling interest to protect."[187]

Still, the sexualization rationale finds no support in *Ferber*, *Osborne*, or the CPPA's legislative history.[188] Even without this last justification, however, the state has a number of solid rationales supporting its compelling interest in banning virtual child pornography.

3. Congress's Particular Interests in Outlawing Virtual Child Pornography Outweigh Any First Amendment Interest in the Material

Congress's interest in protecting child welfare by banning virtual child pornography rests on the five rationales discussed above. Whether or not Congress's justifications are compelling enough to outweigh the limited First Amendment interest re-

---

[181] *Id.*
[182] *See id.* at §121(11)(B), 3009-27.
[183] *See* Burke, *supra* note 5, at 466–67.
[184] 32 F.3d 733 (3d Cir. 1994).
[185] *See* Burke, *supra* note 5, at 467.
[186] *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).
[187] Burke, *supra* note 5, at 467.
[188] *See id.* at 468.

tained by virtual child pornography remains unanswered, however.

When reviewing the constitutionality of a statute, the Supreme Court will generally accord extreme deference to the legislature when considering essentially factual assessments made with respect to the statute's enactment.[189] Judicial review of First Amendment claims has traditionally been an exception to that rule.[190] Yet, the Court has been unclear as to the extent to which it will second-guess legislative findings in First Amendment cases.[191]

In a recent First Amendment case, *Turner Broadcasting System v. FCC* [hereinafter *Turner II*],[192] the Supreme Court stated that "courts must accord substantial deference to the predictive judgments of Congress."[193] The Court owes deference to Congress's findings "out of respect for its authority to exercise the legislative power"[194] and because the latter institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon legislative questions."[195] Thus, "[e]ven in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end . . . ."[196]

Despite the Supreme Court's deference to Congress on such matters, the *Turner II* Court conducted a searching analysis of Congress's justifications for the must-carry provisions.[197] Ultimately, the Court did defer to findings by Congress that were based on tens of thousands of pages of evidence.[198] If the CPPA faced as searching an analysis as that performed in *Turner II*,

---

[189] *See* Adelman, *supra* note 11, at 489; *see also* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.2 (1985) ("When Congress makes findings on essentially factual issues . . ., those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.")

[190] *See* Adelman, *supra* note 11, at 489.

[191] *Id. Compare* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) (noting in dicta that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"), *with* Turner Broad. Sys. v. FCC, 512 U.S. 622, 665 (1994) [hereinafter *Turner I*] (noting in dicta that in the First Amendment context, "courts must accord substantial deference to the predictive judgment of Congress").

[192] 117 S. Ct. 1174 (1997).

[193] *Id.* at 1189 (quoting *Turner I*, 512 U.S. at 665).

[194] *Id.* (quoting *Turner I*, 512 U.S. at 665–66).

[195] *Id.*

[196] *Id.*

[197] *See id.* at 1190.

[198] *See id.* at 1185.

perhaps none of Congress's justifications for the CPPA would emerge as compelling justifications for the Act. It is, however, highly unlikely that the Court would conduct such an analysis in a virtual child pornography case.

The Court has suggested that pornography does not enjoy full First Amendment protection.[199] Since virtual child pornography would be considered low value speech, the "compelling interests advanced to suppress it may not need to be that compelling."[200] Indeed, the Supreme Court conducted a much less vigorous review of Congress's justifications for criminalizing child pornography in *Ferber* and *Osborne* than it did in *Turner II*. Whereas the *Turner II* Court relied on thousands of pages of evidence to support Congress's justifications for its must-carry provisions, the *Osborne* Court relied on the Final Report on the Attorney General's Commission On Pornography, Dr. O'Brien's book on child pornography, and one other book to support Ohio's proposition that pedophiles use child pornography to seduce their victims.[201]

Examined in this light, Congress's justifications for the CPPA pass muster. In *Osborne*, the Supreme Court already accepted two of Congress's justifications for the CPPA: preventing the seduction of minors and encouraging the destruction of child pornography. Furthermore, Congress has presented strong evidence that advances in computer-imaging technology require the CPPA's ban on virtual child pornography in order to enable the government to continue to prosecute all pornographers. While evidence that virtual child pornography incites pedophiles to molest children is inconclusive, and Congress has provided little support for its justification of the CPPA based on the sexualization of children, Congress still has three very compelling interests for criminalizing virtual child pornography. These three rationales outweigh the minimal First Amendment interest that may exist in possessing or distributing virtual child pornography.

---

[199] *See* Burke, *supra* note 5, at 443–45. *See, e.g.*, Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976) ("[I]t is manifest that society's interest in protecting [erotic materials with some artistic value] is of a wholly different, and lesser magnitude than the interest in untrammeled political debate."); FCC v. Pacifica Found., 438 U.S. 726, 743 ("While some of these references [to sexual organs and activities] may be protected, they surely lie at the periphery of First Amendment concern."); Barnes v. Glen Theatre, 501 U.S. 560, 566 (1991) (nude dancing is "within the outer perimeters of the First Amendment . . . [and] only marginally so").

[200] Burke, *supra* note 5, at 463.

[201] *See Osborne*, 495 U.S. at 111 n.7.

Consequently, the *Ferber* and *Osborne* balancing approach sustains the constitutionality of the CPPA's criminalization of virtual child pornography.

B. *Virtual Child Pornography Is Lesser-Value Speech Undeserving of the Protections of the First Amendment*

The first prong of Schauer's less valued speech path to nonprotection, the *a priori* approach, also argues in favor of the constitutionality of the CPPA's criminalization of virtual child pornography. In *American Mini Theatres*,[202] the Supreme Court in a plurality opinion used the lesser-value speech approach to uphold a city ordinance prohibiting adult theaters from locating within 1,000 feet of other adult establishments. The plurality stated that "society's interest in protecting [erotic materials that have some artistic value] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."[203] The pornographic movies shown by the theaters in *American Mini* Theatres were so close to obscenity, a category of speech not protected by the First Amendment, that the city's interest in preserving the character of its neighborhoods justified the law.[204]

Similarly, virtual child pornography, like "real" child pornography, has little, if any, social value. Today, virtual child pornography can be indistinguishable from "real" child pornography, a category of material that is not protected by the First Amendment. Just as the movies in *American Mini Theatres* so approximated obscenity as to justify their regulation, virtual child pornography so resembles traditional child pornography as to justify its suppression. Thus, the *a priori* prong, like the balancing approach, supports the constitutionality of the CPPA's ban on virtual child pornography.

C. *The CPPA Is Not Overbroad*

Like the New York statute in *Ferber*, the CPPA's "legitimate reach dwarfs its arguably impermissible applications."[205] Again, while some protected speech may fall under the law's prohibi-

---

[202] 427 U.S. 50 (1976).
[203] *Id.* at 70.
[204] *See id.* at 71.
[205] *Ferber*, 458 U.S. at 773.

tion, these "arguably impermissible applications of the statute amount to no more than a tiny fraction of the materials within the statute's reach."[206] Indeed,

> [a]s long as a work does not depict children . . . engaged in sexually explicit conduct . . . and the work is not marketed as child pornography or in such a way that exploits its sexual nature as child pornography, then there is no likelihood that the work will be prohibited by the CPPA.[207]

Congress has stated that the CPPA would criminalize neither innocuous depictions of a minor nor "the proverbial parental picture of a child in the bathtub."[208] The CPPA's affirmative defense helps ensure that adaptations of *Romeo and Juliet* will not be treated as criminal contraband (so long as an adult double is used in sexual scenes).[209] If any overbreadth does exist, it can, as in *Ferber*, be corrected on a case-by-case basis.[210]

D. *The CPPA's Prohibition against Virtual Child Pornography Is Consistent with* X-Citement Video*'s Scienter Requirement*

Although *X-Citement Video, Inc.* does not explicitly require child pornography statutes to have an intent requirement, it strongly suggests that any child pornography statute bereft of a scienter requirement would be unconstitutional.[211] Thus, in order for the CPPA's ban on virtual child pornography to survive constitutional attack, it is likely that the statute would have to be read to contain a scienter requirement. Critics of the CPPA's ban on virtual pornography, including Burke, question how a virtual child pornography statute can contain a scienter requirement.[212] Burke argues that since there are no underage participants, there can be no scienter, and that the "technology of virtual child pornography arguably has turned the statute's prohibition into a constitutionally impermissible strict liability offense."[213] Convincing on its face, this argument unravels upon examination of

---

[206] *Id.*

[207] Free Speech Coalition v. Reno, No. C 97-0281VSC, 1997 WL 487758, at *6 (N.D. Cal. Aug. 12, 1997).

[208] S. Rep. No. 104-358, at 21.

[209] *See Free Speech Coalition*, 1997 WL 487758, at *6.

[210] *Ferber*, 458 U.S. at 773–74.

[211] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

[212] *See, e.g.*, Burke, *supra* note 5, at 453–54.

[213] *Id.* at 454.

the traditional means by which the government proves scienter in "real" child pornography cases.

In most child pornography prosecutions, the government is not so lucky as to have a pornographic picture of a child labeled: "Here is a pornographic picture of a fourteen-year-old girl." Instead, most federal courts construe the child pornography statute merely to require the government to prove the general nature and character of the child pornography.[214] Typically, the prosecution asserts that the subject of the pornography is a minor. The child pornography is then introduced as evidence, and the jury is asked to conclude that the subject of the pornography is below the statutory age. Sometimes, pediatricians testify as experts and estimate the age of the child in the pornography. Other times, "[b]owing to the difficulty of prosecution if strict proof requirements were imposed, the courts have allowed the trier of fact to determine the age of the person depicted by simply viewing the photograph."[215]

The same method lends itself to virtual child pornography cases. The government would have to prove that the virtual subject *appears* to be a child below the age of eighteen. The trier of fact would look at the pornography and then decide if the virtual child appeared to be under the statutory age. Both sides could call upon experts to prove or disprove the apparent age of the virtual subject. Because most jurisdictions do not require the prosecution to prove the actual age of the child depicted in the pornography in the first place, virtual child pornography does not pose a difficult scienter problem.

Since the CPPA's ban on virtual child pornography is not a strict liability offense, and since the CPPA's ban on virtual child pornography does not violate the First Amendment, Congress's efforts to protect children against the evils of completely virtual child pornography are constitutional.

---

[214] *See* Burke, *supra* note 5, at 453.

[215] John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 391–92 (1991).

E. *Although* Free Speech Coalition v. Reno *Upholds the Constitutionality of the CPPA, It Does So for the Wrong Reasons*

In the first case to decide the issue, a California district court recently ruled the CPPA constitutional. In *Free Speech Coalition v. Reno*, a trade association that defends First Amendment rights against censorship filed a pre-enforcement action attacking the constitutionality of the CPPA in the Northern District of California.[216] Although the Court granted summary judgment against the plaintiffs and correctly ruled that the CPPA was constitutional, it did so on erroneous grounds.

The court held that the CPPA was constitutional because it was a content-neutral regulation specifically tailored to attack the secondary effects of child pornography, such as the molestation of real children.[217] The district court relied on the Supreme Court's precedent in *Ward v. Rock Against Racism*,[218] which held that "'[t]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulation speech . . . .'"[219]

Unfortunately, the *Ward* framework does not apply to the CPPA. The CPPA is not a time, place, or manner restriction on speech. The CPPA criminalizes the distribution and possession of child pornography outright; it does not merely restrict when, where, or how kiddie-porn can be produced or possessed. The CPPA is a classic content-based restriction on speech: it declares a distinct category of speech to be illegal.

The district court did not find the CPPA content-specific because it viewed the Act as intended "to counteract the effect that such materials has on its viewers, on children, and on society as a whole, and is not intended to regulate or outlaw the ideas themselves."[220] Congress indeed meant to protect children, but its chosen means was to ban a class of speech based on its content. The statute would have been better served by a holding

---

[216] Free Speech Coalition v. Reno, No. C 97-0281VSC, 1997 WL 487758 at *1 (N.D. Cal. Aug. 12, 1997).

[217] *Id.* at *3–*5.

[218] 491 U.S. 781 (1989).

[219] *Free Speech Coalition*, 1997 WL 487758, at *3 (quoting *Ward*, 491 U.S. at 791 (1989)).

[220] *Free Speech Coalition*, 1997 WL 487758, at *4.

that the CPPA is constitutional because virtual child pornography is low-value speech, and that many of the legitimate interests in banning child pornography articulated in *Ferber* and *Osborne* apply to the CPPA as well.

VI. Conclusion

Despite the assertions of Burke and other critics, the CPPA's criminalization of computer-generated child pornography passes muster under the First Amendment. The question remains whether such legislation is desirable or, as Burke suggests, ominously "open[s] the door to the punishment of virtual crimes, based upon a fear that actual crimes will occur, or that society as a whole will degenerate."[221]

Existing legislation capably handles many of the legal issues posed by new computer technology;[222] "we must be deeply suspicious that any new legislation directed at 'computer crime' is really a guise for promoting a moral or economic agenda unrelated to the advent of computer technology . . . ."[223] Scholars have suggested, for example, that Congress's companion piece of high-tech pornography legislation, the Communications Decency Act, might be "merely a Trojan horse . . . [levied by] legislators who would more closely restrict the access of people of all ages to pornography . . . ."[224]

The CPPA, however, is not an attempt to legislate morality. It is veritably impossible to prove whether computer-generated child pornography involves a live child or not. The CPPA is necessary to ensure that the state can effectively prosecute "real" as well as virtual child pornographers. Technology has rendered the old federal child pornography laws obsolete. The CPPA merely closes a "'computer generated loophole'"[225] and updates the statute so that it can continue to protect children.

Furthermore, Congress passed the CPPA to combat a very real harm: the well-documented use of virtual child pornography by pedophiles to seduce their victims. Over two and a half million

---

[221] Burke, *supra* note 5, at 468–69.

[222] Stephen Heymann, *Legislating Computer Crime*, 34 Harv. J. on Legis. 373, 374 (1997).

[223] *Id.*

[224] *Id.*

[225] *Hearings*, *supra* note 11 (statement of Kevin DiGregory, Deputy Assistant Att'y Gen., Dep't of Justice) (on file with the *Harvard Journal on Legislation*).

cases of child sexual abuse occur in America each year.[226] Experts estimate that one in every six Americans has been sexually molested as a child.[227] The CPPA is not merely a mechanism to protect minds from corruption. Rather, it is a major weapon in the fight against child abuse. Though the images created by computer-generated child pornography are virtual, the harms they cause are real. The Constitution does not require that law obsolesce in the face of evolving technology. The Child Pornography Prevention Act of 1996 is both constitutional and necessary.

[226] U.S. Department of Justice, NATIONAL SYMPOSIUM ON CHILD MOLESTATION (1984) 19.

[227] Kohn, *Shattered Innocence, Child Sexual Abuse is Yielding its Dark Secrets to the Cold Effects of Research*, PSYCHOL. TODAY, Feb. 1987, at 54.

BOOK REVIEWS

TURF WARS. By *David C. King*.[1] Chicago: University of Chicago Press, 1997. Pp. 199, acknowledgments, introduction, bibliography. $10.00 paper.

David King's *Turf Wars* examines the dynamics of legislative committee jurisdictions and presents a theory about how these jurisdictions change. King challenges "conventional theories" that suggest that House committee jurisdictions are bound by rigid walls, subject to change only with salvos of statutory reform. *Turf Wars* explains why these committee jurisdictions are more fluid than these theories suggest. King urges us to think of jurisdictional infighting not as a battle between committee "castle walls," but rather as a race toward unclaimed legislative territory (p. 13). King offers historical examples of committees scurrying to policy-rich frontiers, with particularly adventurous types—such as the Commerce Committee—becoming the largest and most powerful. King concedes that formal rule changes occur infrequently (only four times in the past half-century), but contends that these changes merely codify institutional changes that happen more gradually, as the parliamentarian initially refers a new legislative issue to a particular committee.

King's book lacks some of the gusto a reader might expect from an argument that allegedly contradicts conventional theories. He does not explain sufficiently why conventional theories characterize jurisdictional boundaries as more rigid than he suggests. One should not, however, mistake *Turf Wars*' lack of counter-argument for a thesis with little innovation. King's new book is an important contribution to congressional scholarship, showing us that shifting committee boundaries are less the *result* of statutory reforms, and more their *cause*. Moreover, *Turf Wars* is a readable narrative, demonstrating how watershed policy might never have made it to the House floor had jurisdictional sleight of hand not occurred. *Turf Wars* makes good use of these close calls, revealing the elasticity of jurisdictional boundaries and how their changes continue to shape American policy.

The maneuvering of jurisdictionally ambitious committee members—or "policy entrepreneurs," as King calls them—is the first step in King's two-step account of jurisdictional change. First,

---

[1] David C. King is assistant professor at the John F. Kennedy School of Government, Harvard University.

a committee member introduces a bill outside his committee's borders. King suggests that the member's interest in the bill may stem from constituent interests or personal expertise. The issues of the bill may be tangential to the vying committee's jurisdiction, or they may not have a referral precedent at all. Either way, the property rights to the bill's jurisdiction are somewhat uncertain and this leads the policy entrepreneur to adopt one or more of the following strategies: establishing expertise in relevant issues by writing editorials or holding investigatory hearings; citing referral precedents (the common law regime of bill referrals often follows where similar bills have gone before); and/or massaging a bill's language to make it an amendment to a public law already within committee boundaries. King uses compelling examples, such as the Civil Rights Act of 1964, to animate these strategies, fleshing out exactly how policy entrepreneurs maneuver for bill referrals.

The second step is the parliamentarian's referral of the bill. According to King, to decide a bill referral, the parliamentarian considers member expertise and the jurisdictional proximity of competing committees. The decisions by the parliamentarian are referral precedents, and under the House's common law regime of jurisdictional rules, they embody a jurisdictional grant for future bills on that particular issue. For the most part, King's account suggests that the parliamentarian decides the victory and the surrender is often unconditional: not only is a jurisdictional buffer-zone lost, but other policy issues are now on the frontline.

King argues that a close eye to these steps will show the frequency with which committee boundaries shift between official legislative reforms. Statutory rule reforms often just institutionalize unwritten jurisdictional changes. King argues that these periods of statutory change codify changes that have been occurring gradually. In large part, they merely reinforce the jurisdictional status quo (p. 77). Committee boundaries move regularly, albeit glacially; legal "reforms" put those changes in writing.

King's theory assumes that common law referral decisions are responsible for much of the boundary shifting among committees. His point would not be that interesting if common law jurisdictional changes moved regularly, but were only an insignificant fraction of the changes that occur. King is meticulous to show just the opposite. He canvasses the major reforms of the

twentieth century, showing where weighty jurisdictional issues altered committee boundaries between statutory reforms.

The 1946 Legislative Reorganization Act ("LRA") provides compelling support for King's theory of gradual jurisdictional change. King argues that the committees to be combined were chosen mostly on the basis of pre-reform intercommittee memberships; that is, the more members that shared seats on both committees, the more likely the committees were to be collapsed.

However, King's suspicion that "politically pragmatic deals . . . drove the consolidation of committees" (p. 60) seems to go a bit far. It is not clear why King sees political pragmatism and efficient reform as incongruent here. Perhaps the combined committees share similar membership because they share similar issues. If King's earlier assumption—that members try to satisfy constituent interests by staying close to the issues of their district—is right, it is no surprise that related committees share the same clientele. For intuitive reasons of convenience and expertise, they seem the best candidates to be combined. King tells us that the correlation between a high degree of shared memberships and being combined was stronger than random chance allowed, but that seems to have nothing to do with political savvy. It is right that the Irrigation Committee had less than a random chance of being paired up with the Patents Committee; they had virtually no overlap. On this point, King may be too quick to conclude that political pragmatism does not square with good policy sense.

Even so, the LRA proves King's point. Pre-reform intercommittee memberships were a script for the rearrangement; post-reform committees were a mere codification of the gradual changes of issue management by committees with overlapping interests. In other words, the statutory changes of the LRA merely put previous common law changes in writing.

The territories over which the Commerce Committee gained statutory jurisdiction in the 1974 jurisdictional reform also support King's theory. King takes consumer protection as an example. By the mid-1950s, the Commerce Committee was inspecting agricultural products shipped by air, claiming jurisdiction by way of its rights over aviation. By 1959, the Committee had gained jurisdiction over fraudulent automobile stickers. It regulated cigarette advertising by the mid-1960s, and investigated the safety of children's toys soon after (p. 64). So when the bill

for the Consumer Protection Safety Act was up for grabs in 1971, King points out that it quite predictably went to the Commerce Committee. He is quite right to suggest that the 1974 reform bill did not *grant* Commerce jurisdiction over consumer protection, it *recognized* it. Commerce also lost statutory jurisdiction in the 1974 reform; its policy territory overrun because—as King's theory predicts—it was left untilled, or at least unguarded. Although mass transit was a casualty, Commerce held on to railroad issues in order to protect constituent interests. King notes, however, that Commerce finally gave up railroad issues during the 1995 reforms.

These and other jurisdictional stories support King's claim that common law jurisdiction has informed major statutory reforms of the twentieth century. However, King seems to exaggerate the tension between this claim and what he calls "conventional theories." He does not explicate precisely what these conventional "theories" are, or why they might resist his analysis. He suggests that Gary Cox and Mathew McCubbins buy into the fixity of committee boundaries in their *Legislative Leviathan*,[2] but does not explain their argument about jurisdictional change.[3] King also offers Nelson Polsby as a conventional theorist.[4] Unfortunately, Polbsy's view does not bring the tension a reader may be looking for either.

King might have chosen a more modern piece that had to reconcile the 1974 reform. It would have been more revealing to see how Polsby's view—that "jurisdictions are fixed in the rules"—could explain how the parliamentarian referred the Consumer Protection Act to Commerce in 1971, though the "rules" would not grant Commerce control over consumer issues until 1974 (Nolsby, p. 156; King, p. 64). King's book might have explained further why more recent works still argue that committee jurisdictions are more rigid than he thinks.[5]

---

[2] GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 12–13, 250–56 (1993).

[3] In King's defense, perhaps he had no choice: Cox and McCubbins give little argument for the rigidity of committee jurisdiction. They dsclaim early on that their analysis of committee autonomy is "leaving aside the issue of jurisdictional fixity." COX & MCCUBBINS, *supra* note 2, at 18.

[4] Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 156 (1968).

[5] This criticism may be only expositional; that is, if King had more contemporary conventional theories in mind, he should have shared them. Still, King's explication of only pre-1974 conventional theories suggests that he really is challenging only lingering assumptions about jurisdictional rigidity.

King puts the second step of his jurisdictional theory, the parliamentarian's referral, in a historical context as well. King's sketch of the expansion of the parliamentarian's role—from Speaker's clerk to impartial arbiter of jurisdictional infighting—supports an important point for his discussion. The person who now makes bill referrals does not hear jurisdictional arguments gratuitously; bill referrals are no longer just party favors. For committees vying for bill referrals, this means employing the argumentative strategies King presents upfront—citing referrals, amending bills, and showing expertise.

King spells out these jurisdictional strategies toward the book's end, and without them, his imagery of turf wars as a land rush toward the open plains of the nineteenth century is incomplete. At first, jurisdictional competitiveness may seem like a race—committees hurrying to stake unclaimed jurisdictional territories. However, the role of these strategies (demonstrating expertise, referring to precedent, and amending a public law) modifies the picture. King's historical narrative shows how policy entrepreneurs use these three strategies to convince the parliamentarian that the race is run, and that there has merely been confusion in the dust of the committee's wagons careening toward unchartered legislation. Committee members must convince the parliamentarian that the bill's jurisdictional territory has always been theirs; disputes have arisen only because the minerals of policy-rich bills have been found upon it. King's imagery of a race to describe turf conflicts may be misleading to his analysis; staking a jurisdictional claim is not only about timing, it is also about convincing the parliamentarian that the jurisdictional territory is the committee's birthright.

King adds that one casualty of turf warfare may be jurisdictional fragmentation. A single committee's jurisdiction may have territory in one policy area, more in another, and no property rights to the war-torn turf in-between. Although the reader is left to spell out the connection between jurisdictional fragmentation and turf war spoils, King provides an excellent context in which to do this. His historical narrative shows why referral precedents provide ammunition for jurisdictional infighting. These turf wars, in turn, result in jurisdiction gained and lost between committees in a more dynamic way than would suggest a theory that holds jurisdiction to change only in times of statutory reform. The upshot is committees with fragmented jurisdiction, often governing piecemeal with the cooperation of other committees (p. 144).

King's theory about the dynamics of jurisdictional change suggests that fragmentation will endure.

King's book does more than describe committees' political interests to control the full legislature in general. He shows how they do this by grasping for the control of bill referrals in particular. Although King cautions the reader that he means not to say statutory reforms are "an empty show," he gives their jurisdictional impact mixed reviews (p. 90). For King, real turf change happens between statutory reforms, and his historical examples show why Speaker Thomas Reed (R-Me.) and John Dingle (D-Mich.) are war heroes on jurisdictional battlegrounds for knowing this. In a colorful treatment of jurisdictional change, King reminds us that the stakes are high, and that disagreement about the jurisdiction upon which a bill lies causes more than border skirmishes. King is quite right to call them turf wars.

—Daniel J. Levin

VOTING RIGHTS AND DEMOCRACY: THE LAW AND POLITICS OF DISTRICTING. By *Richard K. Scher, Jon L. Mills, & John J. Hotaling*. Chicago, Ill.: Nelson-Hall Publishers, 1996. Pp. 331, introduction, case index. $22.95 paper.

As the nation approaches the year 2000 and preparations for the decennial census proceed, the United States continues to wrestle with the legacy of the redistricting process that followed the 1990 census. The willingness of federal courts in the 1990s to strike down districts drawn to elect minorities has sparked a national controversy about the appropriate role of race in the districting process. This debate has generated no legal or political consensus, strained traditional political alliances, and produced no clear sense of how to handle redistricting following the 2000 census.

Against this background, the authors of *Voting Rights and Democracy* provide a general introduction to districting by examining the intricacies of redistricting and tracing the history of affirmative protection of minority voting rights. Drawing on their practical experience and academic and legal expertise,[1] the authors describe the historical context of the 1990 districting cycle and the public and judicial reaction against it, attempting thereby to clarify the somewhat cloudy state of the law of districting. Overall, *Voting Rights and Democracy* makes an important contribution to the discourse over the role of race in districting; unfortunately, the authors seem so cautious about weighing in with a substantive position that it emerges fully only in the footnotes. Although the authors offer a useful and thorough overview of the issue, they ultimately provide little guidance on how to draw districts after the 2000 census.

The authors begin by tracing the political and legal history of the protection of voting rights, culminating in the Voting Rights Act of 1965. They then turn to a discussion of the factors legislators are obligated to consider when attempting to redistrict or reapportion.[2] The principle of one-person, one-vote remains

---

[1] Richard K. Scher is a political scientist at the University of Florida who has written about politics in that state and the South. Jon L. Mills, professor of law at the Holland Law Center at the University of Florida, served as speaker of the Florida House of Representatives. John J. Hotaling is a Florida-based freelance journalist and political consultant.

[2] Redistricting refers to the redrawing of political boundaries and is thus distinct from reapportionment, which leads to a change in the number of legislative seats as a result of shifts in population (p. 4).

the decisive constitutuional standard against which all districting plans must be judged. However, the authors suggest that lawmakers also consider the following eight factors: racial fairness, partisan fairness, contiguity, compactness, preservation of communities of interest (communities that share a particular trait, such as a religion or ethnicity), continuity of representation, avoidance of putting two incumbents into one new district, and respect for topographical features (p. 40).

The authors first explore the most complex and controversial factor, racial fairness. Given a history of systematic disenfranchisement of minorities in general—and African Americans in particular—the authors recast the present debate as a conflict between the ideals of equality and fairness, which compete in a system in which the majority rules, but minority rights are sought to be protected. While it may seem fair to protect minority voting rights, fairness in this context necessarily involves treating minorities differentially from non-minority members of the population (pp. 42–43). This conflict reflects two competing interpretations of the Constitution: a color-blind approach that guarantees equality and a race-conscious one that promotes fairness (p. 44). This dimension of the districting debate illustrates why the issue has captured the public's attention.

In exploring the evolution of this debate over the past thirty-five years, the authors look to the application and interpretation of the Voting Rights Act. First, section five of the Act requires state and local governments in targeted areas to obtain prior approval from the Department of Justice ("DOJ") for changes in voting procedures or election laws. Following the 1980 and 1990 censuses, section five became an important tool because, rather than requiring plaintiffs to show that they had suffered discrimination, it compelled jurisdictions to demonstrate that their changes did not discriminate against minorities (p. 51). This standard has been interpreted by courts and implemented by lawmakers as a prohibition against retrogression of minority representation (pp. 53–56). Based on their involvement in redistricting in Florida, the authors approve of the effect section five has had in making legislators consider whether districting changes promote racial fairness (p. 52).

In the wake of *Miller v. Johnson*,[3] in which the Supreme Court struck down Georgia's eleventh congressional district, the authors

[3] 515 U.S. 900 (1995).

address whether section five can continue to be employed as a non-retrogression standard. The authors read *Miller* primarily as a criticism of DOJ's interpretation of section five during the most recent redistricting cycle (pp. 56–60). They argue that the Court affirmed the non-retrogression standard of section five, but was concerned primarily that DOJ had required Georgia to implement the districting plan that *maximized* the number of minority-access seats (p. 57).[4] The existence of another districting plan that did not violate the non-retrogression standard suggested to the Court that the racial fairness standard unconstitutionally crowded out other standards in the districting process (p. 57). This decision raises serious questions about the future use of section five, and leads the authors to speculate that in the next redistricting cycle, DOJ will be less assertive—with uncertain results for racial fairness (pp. 59–60).

In contrast to the focus in section five on federal oversight of redistricting, section two of the Voting Rights Act allows for private suits alleging racial discrimination in redistricting (pp. 60–69). In such actions, plaintiffs bear the burden of proof. They do not have to demonstrate that the discrimination was intentional, rather they must prove that the *results* of the districting plan are discriminatory (p. 61). In 1980, the Supreme Court ruled that plaintiffs also had to prove intent.[5] When the Voting Rights Act came up for reauthorization in 1982, Congress restored the outcome-based focus of section two, effectively overriding the Court's objection (p. 62). As part of the reauthorization, Congress established a "totality of the circumstances" test that plaintiffs must meet in order to demonstrate discrimination. From a Senate Judiciary Committee report and subsequent Court cases, a nine-part test has emerged, which includes the following factors: history of official discrimination, racial appeals made in campaigns, the extent to which minorities have won elections, and the lingering effects of discrimination in housing, education, and employment (pp. 64–65).

The authors spend considerable time discussing the elements of this test and its application by the Court in *Thornburg v.*

---

[4] "Minority access" districts, also known as "majority minority" districts, are drawn in such a way as to give members of a minority group a majority of the voting-age population in a district so that under normal circumstances they can elect their candidate of choice, presumably a member of the minority group.

[5] *See* City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that plaintiffs suing under section two must prove intent to discriminate in order to prevail).

Gingles[6] (pp. 64–69 and 76–85). The *Gingles* court articulated a three-pronged test for determining when multi-member districts discriminate against minority voters. Plaintiffs must demonstrate that (1) the minority group is sufficiently large and geographically compact to form a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the majority group votes as a bloc so that minority candidates usually are defeated (p. 78). Because of the timing of this decision and the flood of litigation that followed, the authors point out that *Gingles* had a profound impact on the 1990 districting cycle (pp. 85–86). Many commentators have interpreted the first prong of the three-pronged *Gingles* test as establishing an affirmative duty to create minority-access districts, while the third-prong disapproves of minority-influence districts (pp. 88–90). The authors' discussion of *Gingles* explains why legislators and DOJ approached the 1990 districting cycle intent on maximizing the number of minority-access districts. The authors note that, ironically, had *Gingles* been allowed to run its course, the creation of minority-access districts in 1990 would have rendered fulfillment of the three-pronged test impossible in 2000 (p. 114).

The authors turn next to a discussion of three subsequent cases—*Shaw v. Reno*,[7] *Hays v. Louisiana*,[8] and *Miller v. Johnson*[9]—that followed the 1990 districting cycle and raised an even more fundamental question: can race even be used as a factor when drawing district lines (pp. 93–111)? The Court struggled with this question, ultimately holding in *Miller* that the use of race automatically triggers strict scrutiny and that even if strict scrutiny is satisfied, race cannot be a predominant or overriding concern during the districting process (p. 100). The authors argue that *Miller* has the practical effect of bringing to a halt "thirty-five years of attempting to enhance minority representation in legislatures through giving special attention to race during the districting process" (p. 101). Another, more practical concern is that the courts have given no affirmative guidance to legislators about how to proceed during the next redistricting (p. 103).

Despite such grave concerns, the authors argue for a moderate interpretation of these cases. The authors note that the *Miller*

---

[6] 478 U.S. 30 (1986).
[7] 509 U.S. 630 (1993).
[8] 839 F. Supp. 1188 (W.D. La. 1993).
[9] 515 U.S. 900 (1995).

court affirmed the aims of the Voting Rights Act (p. 112). Although they view the courts as straying from the Act, which requires that race be a factor in the districting process (p. 109), the authors express hope that these cases will allow legislators to use race as a factor in the redistricting following the 2000 census, though in a way that does not override other districting standards (p. 308). Nevertheless, the authors are only able to offer two conclusions regarding the next redistricting cycle: first, that equal population remain the constitutional touchstone; and second, that the role of race in districting will remain unresolved for the near future (pp. 281–82).

Following this unsatisfying assessment, the authors consider alternatives that might strike a balance between competing color-blind and race-conscious interpretations of the Constitution (pp. 290–308). They advocate for a remedial standard to justify the use of minority-access districts, which they find preferable to minority-influence districts, although the authors themselves have a difficult time distinguishing their remedial-access districts from those struck down in the 1990s (pp. 308–09). If minority-access districts become legally indefensible, the authors suggest increasing the size of legislative bodies in order to produce smaller districts and larger numbers of minority officeholders (p. 323, n.56). Were this idea politically feasible, more minorities indeed might be elected, but their relative strength actually could be compromised.

Voting Rights and Democracy succeeds as a solid introduction to the districting process. The authors would have better served their readers, however, by restructuring the book so that the basic concepts and actors of redistricting were discussed *before* the complex and controversial standard of racial fairness. This approach would provide a better grounding for the audience and place the concluding discussion, where the authors situate most of their proposals and arguments, closer to the chapters that they reference. Conspicuously absent from a work that provides such a comprehensive overview is discussion of the census itself, especially given the ongoing controversy over the use of sampling to achieve a more accurate count. The sampling debate has considerable consequences for minority voting rights that the authors should have addressed.

The authors also omit consideration of the effects of proliferating minority-access districts in the 1990s. Beyond the symbolism of more representative legislative bodies, are minorities bet-

ter served by minority representatives, or are they able to leverage a greater impact on the system through diffuse influence districts? One can make a strong argument that the racial appeals underlying welfare and immigration reform in the 1990s could have occurred only after sizable numbers of minority voters were drawn into minority-access districts. Greater attention to this issue, supported by relevant scholarship, would provide a more complete picture for readers attempting to clarify their views on redistricting. Despite these shortcomings, the authors have made a significant contribution to advancing public discourse of a complex issue that goes to the heart of American notions of fairness and equality.

—*J. Philip Calabrese*