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CONGRESSIONAL ACCOUNTABILITY AND DENIAL: SPEECH OR DEBATE CLAUSE AND CONFLICT OF INTEREST CHALLENGES TO UNIONIZATION OF CONGRESSIONAL EMPLOYEES

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In 1995, Congress passed the Congressional Accountability Act, which applied federal workplace and anti-discrimination laws to Congress. Under the terms of the Act, Congress can prevent legislative staff from unionizing if the presence of organized employees would raise constitutional problems or present a conflict of interest. In this Article, Professor Brudney argues that these constitutional conflicts and issues do not pose sufficient concern to outweigh the workplace rights of congressional staff. Rather, he maintains that Congress, should either fulfill its obligations under the Act and allow legislative staff to unionize, or else enact a statute and explain the need for such an exception.

The Congressional Accountability Act ("CAA"),[1] which extended the protections of eleven major workplace statutes to congressional employees,[2] was the first law passed in 1995 by the newly elected 104th Congress. Republicans hailed it as the master stroke of their freshly minted Contract with America.[3] Sponsors from both parties lauded the long overdue restoration of the Framers' intent that Congress should apply to itself the laws it

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[1] Pub. L. No. 104-1, 109 Stat. 3 (1995) (codified at 2 U.S.C. §§ 1301–1438 (Supp. II 1996)).

[2] *See id.* at §§ 201–220, 109 Stat. 7–22 (identifying 11 statutes and extending their rights and protections to congressional employees).

[3] *See* David S. Cloud & Richard Sammon, *House Votes Overwhelmingly to End Exemptions*, CONG. Q., Jan. 7, 1995, at 16 (describing House approval of the bill on the first day of Congress as "a vivid symbol of the new era on Capitol Hill"); Robert Pear, *House Set to Make Members Subject to the Rights Laws*, N.Y. TIMES, Jan. 4, 1995, at A14 (reporting statements of Sen. Charles Grassley (R-Iowa) and Rep. Christopher Shays (R-Conn.)).

prescribes for the people.[4] CAA supporters also anticipated that Congress would be more restrained in its future legislative efforts once it experienced the burdens of compliance, litigation, and liability that it had imposed for decades on businesses and other employers.[5] Viewed as a rare triumph of bipartisanship, the bill received unanimous approval in the House[6] and passed the Senate with a lone dissenting vote.[7]

Tucked away in the new law was little noticed language allowing for differential treatment of legislative aides regarding union representation. The CAA established an Office of Compliance ("OOC") within the Legislative Branch to implement and enforce the rights provided pursuant to the eleven workplace statutes.[8] One of these eleven laws, the Federal Labor Relations Act ("FLRA"),[9] accords to Executive Branch employees the right to seek union representation and engage in collective bargaining. Yet before FLRA rights may be extended to individuals who work directly for members or congressional committees, the CAA provides that the OOC must promulgate, and Congress must approve, regulations determining whether conferral of such rights would give rise to constitutional or conflict of interest problems.[10] If Congress does not act, its legislative employees remain unable to organize.

Nearly four years after the CAA became law, Congress has quietly but effectively thwarted the availability of collective bar-

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[4] *See, e.g.*, 141 CONG. REC. S440–41 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley, quoting THE FEDERALIST No. 57 (James Madison) and observing that "[i]n November, the American people demanded that Congress be affected by the laws it passes"); *id.* at S700–01 (daily ed. Jan. 10, 1995) (statement of Sen. Joseph Lieberman (D-Conn.) quoting THE FEDERALIST No. 57 (James Madison)).

[5] *See, e.g.*, 141 CONG. REC. S441 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley); *id.* at H95 (daily ed. Jan. 4, 1995) (statement of Rep. Lee Hamilton (D-Ind.)); *id.* at H96 (daily ed. Jan. 4, 1995) (statement of Rep. Jay Dickey (R-Ark.)); *id.* at H263–64 (daily ed. Jan. 17, 1995) (statement of Rep. Bill Goodling (R-Pa.)).

[6] The House first approved its own version of the CAA, H.R. 1, by a vote of 429 - 0. *See* 141 CONG. REC. H104 (daily ed. Jan. 4, 1995). It then approved the version passed by the Senate, S. 2, by a vote of 390–0. *See id.* at H286 (daily ed. Jan. 17, 1995).

[7] The bill's lone opponent, Senator Robert Byrd (D-W. Va.), stated his opposition on the floor. *See* 141 CONG. REC. S635–38 (daily ed. Jan. 9, 1995). The Senate version, S. 2, was ultimately approved by the House and signed by the President; it passed the Senate by a vote of 98–1. *See id.* at S767 (daily ed. Jan. 11, 1995).

[8] Pub. L. No. 104-1, §§ 301–305, 109 Stat. 24–32 (1995) (codified at 2 U.S.C. §§ 1381–1385) (Supp. II 1996) (establishing, empowering, and authorizing funds for the Office of Compliance).

[9] Pub. L. No. 95-454, §§ 701–35, 92 Stat. 1192 (1978) (codified at 5 U.S.C. § 7101–7135 (1994)). The FLRA provides rights and protections for federal employees analogous to those accorded to private employees under the National Labor Relations Act, with some modifications to account for the governmental context. *See infra* Part III.

[10] *See infra* Part I.

gaining protections for its own personal and committee staff. The OOC issued regulations in 1996 concluding that access to union representation for legislative staff posed no special constitutional or conflict of interest problems.[11] The House Republican leadership, however, rejected this conclusion,[12] and there has been no Democratic effort to support or defend the OOC position. Neither the House nor the Senate has scheduled any legislative action to consider approving the OOC determination.

Lurking behind the controversy between Congress and the quasi-independent agency it created is a broad constitutional question: does the Speech or Debate Clause[13] immunize members of Congress when they select, retain, or establish working conditions for their key legislative aides? If such immunity applies, congressional efforts to subject members to statutes assuring employees overtime pay and family or medical leave, as well as statutes prohibiting workplace discrimination based on age, disability, gender, or race, would also falter. The Supreme Court has recognized the importance of this question but has never resolved it.[14] Lower courts and commentators are divided as to what shelter, if any, is provided by the Speech or Debate Clause when senators and representatives speak or act as employers.[15]

After setting out the background of the CAA, this Article uses that statute to examine in depth the Speech or Debate Clause protection accorded to members' personnel decisions affecting legislative staff. Because the Speech or Debate Clause issue received no attention from the OOC or Congress when each addressed the matter of unionization,[16] the Article analyzes arguments both for and against a constitutional immunity. With respect to top legislative aides—a circle considerably smaller than those listed in the CAA—the immunity issue is a close one. The

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[11] The OOC adopted final regulations and submitted them to Congress for approval on August 19, 1996. The regulations, along with OOC analysis and comment, appeared in the Congressional Record. *See* 141 CONG. REC. H10,019–30 (daily ed. Sept. 4, 1996).

[12] *See* Letter from Rep. Bill Thomas (R-Cal.), Chairman of Committee on House Oversight, to Glen Nager, Chairman of OOC Board of Directors (Sept. 19, 1996) (criticizing OOC determination on constitutional and conflict of interest issues, and returning regulations to OOC requesting further consideration) (on file with author).

[13] The Speech or Debate Clause, U.S. CONST. art. 1, § 6, cl. 1, provides that "Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other place."

[14] *See infra* Part I.

[15] *See infra* Part II.

[16] *See infra* Part I for a discussion of the political realities and prudential concerns underlying this remarkable silence in the rulemaking record.

Supreme Court's jurisprudence on key aides or alter egos, along with the realities of the legislative process, point toward a plausible rationale for granting immunity as well as a possible standard to be applied. The Article concludes, however, that there should be no constitutional immunity for members of Congress when they engage in employment-related speech or conduct, even with respect to their key legislative advisors. By protecting only speech or conduct that is part of the actual legislative process, the Supreme Court's precedents since 1970 have created a somewhat arbitrary but ultimately defensible distinction between legislating and important predicates or accompaniments to legislating. A member's employment-related communications with a legislative alter ego fall on the unimmunized side of the line.

Having established that Congress may constitutionally authorize all its employees to unionize, as well as grant them other workplace rights enforceable against members, the Article explores whether unionization among key legislative staff raises any special conflict of interest issues. Apart from the traditional risk of conflict between public job responsibilities and private financial interests of organized government employees, there also is the possibility that a union may use its unique status as an exclusive bargaining representative to gain undue advantage as an interest group in the legislative arena. In addressing this potential policy-related conflict, congressional participants in the OOC rulemaking failed to acknowledge how their expressed concerns echo those raised in earlier decades by commentators advocating that public sector collective bargaining laws follow a different path from the private sector model. The prior legislative response—restricting the range of subjects on which government employers must bargain and the types of concerted economic pressure that government workers may apply—has enabled employees to engage in limited collective bargaining without distorting or subverting the policymaking process. The Article analyzes this special conflict of interest concern with the broader, historical vantage point in mind.

The constitutional and conflict of interest issues illustrate in different ways how Congress in the CAA was at once seeking to promote the principle of accountability while hoping to avoid some of its consequences. In addition to denying access to collective bargaining for its personal and committee staff, Congress since enacting the CAA has effectively denied the presence of a broader

Speech or Debate Clause question and has ignored the lessons of history regarding the advent of public sector unions. Consideration of these matters therefore carries larger implications for the constitutional protections available to congressional employees and also for the role of collective bargaining in the public sector. Further, resolution of the constitutional and conflict of interest issues may affect the employment status of top aides in the White House[17] as well as the federal judiciary.[18]

I. THE CAA AND THE EXCEPTION FOR UNIONS

A. *Employee Protections Prior to the CAA*

For more than 100 years, Congress exempted itself from coverage when enacting laws that created rights enforceable against private and public employers. The Civil Service Act of 1883 restricted patronage in the Executive Branch, but not in Congress.[19] Major workplace protection statutes enacted during the 1930s and 1960s similarly excluded congressional employees while covering private employers, local governments, and executive agencies.[20] In more recent times, outside observers as well as individ-

[17] Congress recently passed the Presidential and Executive Office Accountability Act ("1996 Act"). Pub. L. No. 104-331, 110 Stat. 4053 (codified at 3 U.S.C. §§ 401–471 (Supp. II 1996)). The 1996 Act closely parallels the CAA in extending the protections of the same eleven federal workplace statutes to employees of the White House and the Executive Office of the President. The 1996 Act authorizes the Federal Labor Relations Authority to extend union representation rights to White House employees *unless* the Authority determines that exclusion from coverage is required because of "conflict of interest" or "constitutional" problems. Pub. L. No. 104-331, § 2, 110 Stat. 4065 (codified at 3 U.S.C. § 431 (Supp. II 1996)). The issue of the President's constitutional immunity from personal damages liability is addressed in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), discussed *infra* Part II.

[18] The CAA directed the Judicial Conference of the United States to prepare and submit to Congress a report considering the possibility that Judicial Branch employees should be covered under the eleven federal workplace statutes now applied to congressional employees. Pub. L. No. 104-1, § 505, 109 Stat. 41–42 (1995) (codified at 2 U.S.C. § 1434 (Supp. II 1996)). The Judicial Conference Study resisted any extension of FLRA rights to Judicial Branch employees, relying expressly on the "constitutional and conflict of interest" language from the CAA. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 18–19 (1996). The issue of judges' common law immunity from personal damages liability is addressed in *Forrester v. White*, 484 U.S. 219 (1988), discussed *infra* Part II.

[19] *See* Civil Service Act, ch. 27, §§ 2, 13, 14, 22 Stat. 403, 404, 407 (1883).

[20] For example, the Fair Labor Standards Act covered private employers when enacted in 1938; it was amended to apply to state and local governments and federal executive agencies in 1966, but not to employees of Congress. *See* 29 U.S.C. § 203(d), (e) (1994). Title VII of the 1964 Civil Rights Act initially covered private employers; it was amended to include state and local government employers and federal executive agen-

ual legislators have criticized Congress's unwillingness to submit to the laws it imposed on others.[21]

Congressional reluctance to extend existing laws as written reflected in part a concern that Executive Branch enforcement and judicial review raised serious separation of powers problems. Article I of the Constitution bestows upon each chamber the power to regulate and discipline its members,[22] and upon each member privileges from outside arrest or questioning.[23] Scholarly commentators and members of Congress expressed concern that exposing the official conduct of legislators in dealing with their employees to investigation and prosecution by executive officials, and to compulsory process and ultimate judgment by federal courts, might amount to an unconstitutional impairment of Legislative Branch authority or independence.[24]

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cies in 1972. *See* 42 U.S.C. §§ 2000e(b), (f); 2000e-16 (1994). The Age Discrimination in Employment Act of 1967 originally applied to private employers; it was extended to state and local governments and the Executive Branch in 1974. *See* 29 U.S.C. §§ 630(b), 633a (1994).

[21] *See, e.g.*, THOMAS W. REED & BRADLEY T. CAMERON, ABOVE THE LAW: GOVERNING CONGRESS UNDER FEDERAL EMPLOYMENT LAWS 2–4, 8–9, 11–12, 17, 19–20 (1994) (quoting numerous members of the Senate and House expressing opposition to the double standard created by Congress); Editorial, *Make Congress Obey Itself*, N.Y. TIMES, Apr. 12, 1993, at A16; Daniel Rapoport, *The Imperial Congress: Living Above the Law*, NAT'L. J., June 2, 1979, at 911–15. In the early 1970s, members of Congress began questioning in relatively measured terms their failure to hold themselves accountable. *See, e.g.*, REPORT OF THE JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, S. Rep. No. 93-896, at 38–39, 53 (2d Sess. 1974) [hereinafter CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS.] This self-criticism had become more pointed and persistent by the early 1990s. *See, e.g.*, 137 CONG. REC. S15,384 (daily ed. Oct. 29, 1991) (statement of Sen. John Seymour (R-Cal.)) (describing congressional immunity from civil rights laws as "a cancer of unaccountability"); 136 CONG. REC. S9369 (daily ed. July 10, 1990) (statement of Sen. Orrin Hatch (R-Utah)) (claiming as a "moral question" that the Senate should not be above the law); Representatives Bill Goodling & Harris Fawell (R-Ind.), *Congressional Coverage—The Time Has Come*, 44 LAB. L.J. 259, 259 (1993) (decrying "the hypocrisy of Congress exempting itself from the laws it applies to others"). *See also* 125 CONG. REC. 10,589, 10,591 (1979) (statement of Sen. John Glenn (D-Ohio)) (referring to Congress as "the last plantation").

[22] U.S. Const. art. I, § 5, cl. 1, 2.

[23] *Id.* art. I, § 6, cl. 1.

[24] For recent examples of concern expressed by commentators, *see, e.g.*, *Legislative Reorganization Act of 1994: Hearings Before the Subcommittee on Rules of the House of the Committee on Rules*, 103d Cong. 425, 440–41 (1994) [hereinafter *1994 House Committee Hearings*] (statement of Professor Harold H. Bruff); *Congressional Coverage Legislation: Applying Laws to Congress, Hearing Before the Senate Committee on Governmental Affairs*, 103d Cong. 27–78 (1994) [hereinafter *1994 Senate Committee Hearings*] (statement of Norman J. Ornstein). For similar reservations voiced recently by members of Congress, see, for example, *Application of Laws and Administration of the Hill: Hearings Before the Joint Committee on the Organization of Congress*, 103d Cong. 1 (1993) [hereinafter *1993 Joint Committee Hearings*] (statement of Rep. Hamilton, Joint Committee Chairman); *id.* at 16 (statement of Sen. Harry Reid (D-Nev.)). Members of Congress wrestled with these constitutional doubts in earlier years as well.

Burdened and perhaps fortified with such reservations, Congress in its initial efforts at self-regulation produced unenforceable or inadequate internal requirements, promulgated either through one-house rules or resolutions[25] or through statutory provisions applicable to one chamber's employees.[26]

There are ample grounds to believe that entrusting congressional self-regulation directly to legislators, or to a process that includes significant participation by legislators, is unworkable. Given the realities of partisan politics, members inevitably will be tempted to depart from a neutral disciplinary approach. Further, regular member recourse to such disciplinary procedures would likely threaten even the modest comity among members that is needed to conduct the legislative process.[27] Yet, to the extent that such factors incline members to curtail or impair the use of disciplinary authority, congressional employees understandably will feel chilled in the exercise of their putative rights.[28] Indeed, employees' diffident assertion of those rights

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See, e.g., 136 CONG. REC. S9362–63 (daily ed. July 10, 1990) (statement of Sen. Warren Rudman (R-N.H.)); *id.* at S9365–66 (statement of Sen. Wendell Ford (D-Ky.)).

The constitutional arguments also may have served as a smokescreen enabling members to avoid confronting their personal distaste at having their traditional absolute freedom and discretion challenged. *See generally* REED & CAMERON, *supra* note 21, at 87–90, 110–12 (setting forth examples of unfair, unsafe, or discriminatory working conditions allegedly implemented or accepted by congressional employers).

[25] *See, e.g.*, H.R. Res. 5, 94th Cong., 121 CONG. REC. 20, 22 (1975) (enacted) (House Rule prohibiting members from discriminating in employment because of race, color, religion, sex, or national origin; no provision for enforcement); H.R. Res. 558, 100th Cong., 134 CONG. REC. 27,840 (1988) (enacted) (prohibiting discrimination in House of Representatives employment; establishing Office of Fair Employment Practices to offer counseling and mediation and to adjudicate formal complaints; and providing for exclusive review of Office decisions by panel of House members and House employees); S. Res. 534, 94th Cong., 122 CONG. REC. 29,282 (1976) (enacted) (providing for equal employment opportunities in the Senate with no reference to enforcement).

[26] *See, e.g.*, Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 8, 103 Stat. 938, 944 (codified at 2 U.S.C. § 60k (1994)) (applying minimum wage but not overtime provisions of Fair Labor Standards Act to House employees, provision to be administered by Office of Fair Employment Practices based on H.R. Res. 558, *supra* note 25); Government Employee Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1088 (codified as amended at 2 U.S.C. §§ 1201 – 24 (1994)) (protecting Senate employees against discrimination on basis of race, color, religion, sex, national origin, age, disability; establishing Office of Senate Fair Employment Practices to enforce protections; providing for review of Office decisions by Senate Select Committee on Ethics and for further review upon petition before U.S. Court of Appeals for Federal Circuit).

[27] *Cf.* ROBERT S. GETZ, CONGRESSIONAL ETHICS: THE CONFLICT OF INTEREST ISSUE 84–113 (1966) (discussing similar concerns regarding congressional self-regulation in ethical matters).

[28] *See, e.g.*, *1993 Joint Committee Hearings*, *supra* note 24, at 125 (statement of Nancy Kingsbury, U.S. General Accounting Office) (reporting that House employees filed a relatively small number of complaints between 1989 and 1993, and that the Office of Fair Employment Practices Director attributed the small number to high employee turnover and employees' concerns about their employing office becoming aware

prior to the CAA[29] may well reflect fear of being ignored or retaliated against due to a lack of confidence in the effectiveness or independence of member-controlled enforcement practices.[30]

B. *Key Aspects of the CAA as Enacted*

The Republican Party made enactment of comprehensive congressional accountability legislation a prominent feature of its 1994 campaign effort to gain control of both houses of Congress.[31] After sweeping into office, the new Republican majority arranged for a series of staff and member meetings to develop a consensus version of the legislation based on bills considered in the previous Congress.[32] The CAA was introduced, debated, approved, and sent to the President within the first two weeks of the 104th Congress.[33] It made applicable to the Legislative Branch

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of the complaint); REED & CAMERON, *supra* note 21, at 37–38 (reporting results of a survey commissioned in the early 1990s by the Joint Committee on Organization of Congress: up to 70% of Senate staff surveyed had reservations about contacting Senate Fair Employment Practices Office to make inquiry or file complaint).

[29] *See 1993 Joint Committee Hearings*, *supra* note 24, at 124 (noting that seven House employees filed formal complaints regarding employment discrimination between 1989 and 1993); CUMULATIVE REPORT OF THE OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES, JUNE 1, 1992 THROUGH SEPT. 30, 1994, at 14 (reporting that 28 employees filed formal complaints during the 28-month period). During the early 1990s, there were some 18,000 employees working for the House or Senate as personal staff, committee staff, leadership staff, or staff to Officers of the House or Senate. In addition, nearly 10,000 individuals were employed by Congress's support agencies, including the General Accounting Office, the Congressional Research Service, the Architect of the Capitol, and the Capitol Police. *See* NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 1993–94, 126–27 (1994).

[30] *See 1994 House Committee Hearings*, *supra* note 24, at 429 (statement of Harold H. Bruff); REED & CAMERON, *supra* note 21, at 37–38. *See also* Richard Morrin, *Female Aides on Hill: Still Outsiders in Man's World*, WASH. POST, Feb. 21, 1993, at A1 (reporting that 80% of female congressional employees would be reluctant to file sexual harassment complaints against members of Congress due to perceived ineffectiveness of current procedures or fear of retaliation).

[31] *See, e.g.*, Dan Harrie, *GOP's Georgia Bulldog Visits S.L. to Hound Demos, Hype the Election*, SALT LAKE TRIB., Oct. 27, 1994, at A1; Paul West, *Republicans Plot Coup in Congress*, BALTIMORE SUN, Aug. 28, 1994, at 1A; Joe Klein, *The House That Newt Will Build*, NEWSWEEK, Apr. 25, 1994, at 31.

[32] *See* James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 GEO. MASON L. REV. 1, 3–4 (1995); Richard Sammon, *No Instant End to Exemptions*, CONG. Q., Dec. 31, 1994, at 3594; Kenneth Pins, *Grassley Will Lead Task Force*, DES MOINES REG., Dec. 3, 1994, at 2.

[33] Congress convened on January 4, 1995, and sent the CAA to President Clinton on January 18; House Speaker Newt Gingrich (R-Ga.) described this as "the fastest that a new Congress has sent legislation to the White House since March 1933." Kenneth J. Cooper, *House Sends Congressional Compliance Bill to Clinton*, WASH. POST, Jan. 18, 1995, at A4 (reporting comments by Speaker Gingrich).

all major federal anti-discrimination laws[34] as well as federal laws establishing minimum workplace protections or standards.[35] As previously noted, CAA supporters appealed both to the basic principle that Congress should no longer be "above the law" and to the instrumental purpose that Congress by "feeling employers' pain" would be less likely to augment the scope and burden of such laws in the future.[36]

A central component of the new law was the creation of the OOC as an internal yet independent agency with investigative, adjudicatory, and rulemaking powers. The OOC's five-person Board of Directors enjoys more meaningful autonomy than prior in-house congressional entities. Board members are appointed on a bipartisan basis for fixed five-year terms,[37] are accorded substantial resource support in the form of staff positions and a budget,[38] and are protected against arbitrary or partisan removal.[39] In addition to promulgating rules for implementation of the eleven statutes,[40] the OOC oversees a complaint procedure that provides for counseling, mediation, formal hearings and decisions by a hearing officer, and appeal to the Board of Directors.[41] The CAA also provides for judicial review of Board decisions involving any of the eleven workplace statutes,[42] and it allows covered employees complaining under nine of the statutes to opt

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[34] *See* Pub. L. No. 104-1, § 102, 109 Stat. 5–6 (1995) (codified at 2 U.S.C. § 1302 (Supp. II 1996)) (applying Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994); Rehabilitation Act of 1973, 29 U.S.C. § 701 (1994); veterans' employment and reemployment provisions codified in scattered sections of 38 U.S.C.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); and Americans With Disabilities Act of 1990, 42 U.S.C. § 12,101 (1994)).

[35] *See* Pub. L. No. 104-1, § 102, 109 Stat. 5–6 (applying Federal Labor Relations Act of 1978, 5 U.S.C. § 7101 (1994); Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1994); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1994); Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (1994); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2101 (1994); and Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 (1994)).

[36] *See supra* text accompanying notes 4–5; 141 CONG. REC. H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays); *id.* at H95 (statement of Rep. Hamilton); 141 CONG. REC. S447 (daily ed. Jan. 5, 1995) (statement of Sen. Glenn).

[37] *See* Pub. L. No. 104-1, § 301, 109 Stat. 24–25 (1995) (codified at 2 U.S.C. § 1381 (Supp. II 1996)).

[38] See *id.* at §§ 302, 305, 109 Stat. 26–28, 31–32 (1995) (codified at 2 U.S.C. §§ 1382, 1385 (Supp. II 1996)).

[39] *See id.* at § 301(f), 109 Stat. 25 (1995) (codified at 2 U.S.C. § 1381(f) (Supp. II 1996)).

[40] *See id.* at § 304, 109 Stat. 29–31 (1995) (codified at 2 U.S.C. § 1384 (Supp. II 1996)).

[41] *See id.* at §§ 401–406, 109 Stat. 32–35 (1995) (codified at 2 U.S.C. §§ 1401–1406 (Supp. II 1996)).

[42] *See id.* at § 407, 109 Stat. 35–37 (1995) (codified at 2 U.S.C. § 1407 (Supp. II 1996)) (providing for petitions to the U.S. Court of Appeals for the Federal Circuit).

out of Board procedures after mediation and file a civil action in federal district court.[43] Given the absence of Executive Branch involvement and the relatively limited nature of judicial review, a number of commentators have expressed guarded optimism that the general enforcement structure of the CAA does not present separation of powers difficulties.[44]

A second important factor is the extent to which the CAA shields members themselves from litigation even while making Congress accountable as an institution. Employee complaints may be brought only against the employing office, not the member individually.[45] Accordingly, in a court or other formal proceeding the respondent employing office is likely to receive representation from counsel employed by the Senate or House rather than from a private attorney hired and compensated by the member.[46] In addition, Congress pays all monetary damages awarded as a result of misconduct by individual members.[47] The deci-

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[43] *See id.* at §§ 404, 408, 109 Stat. 33, 37 (1995) (codified at 2 U.S.C. §§ 1404, 1408 (Supp. II 1996)). The district court option does not apply with respect to the Occupational Safety and Health Act ("OSHA") or the Federal Labor Relations Act ("FLRA"). Congressional employees alleging violations pursuant to these two statutes must rely on the OOC General Counsel to seek enforcement of Board decisions in the Federal Circuit. *See id.* at § 407(a)(1)(C), (D), 109 Stat. 35–36 (1995) (codified at 2 U.S.C. § 1407(a)(1)(C), (D) (Supp. II 1996)). This exclusive reliance on the General Counsel to pursue relief up to and including initiation of judicial enforcement corresponds to the enforcement mechanisms provided by Congress with regard to OSHA for the private sector and FLRA for the Executive Branch. *See* 141 CONG. REC. S442 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley).

[44] *See, e.g.*, Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 157–59 (1995); O'Reilly, *supra* note 32, at 8; 1994 *Senate Committee Hearings*, *supra* note 24, at 242 (statement of Professor Nelson Lund). This Article analyzes the constitutionality of the CAA under the Speech or Debate Clause and also discusses constitutional concerns related to the presence of unions. It does not evaluate any general separation of powers concerns raised by the Act's basic approach of congressional self-policing.

[45] *See* Pub. L. No. 104-1, §§ 405(a), 408(b), 109 Stat. 33, 37 (1995) (codified at 2 U.S.C. §§ 1405(a), 1408(b) (Supp. II 1996)).

[46] Acting pursuant to the House Employees Position Classification Act, 2 U.S.C. §§ 294(d)(7), 300 (1994), the Committee on House Oversight established a new Office of House Employment Counsel in late 1995. The Office was authorized *inter alia* to represent House employing offices in actions brought under the CAA. *See* Letter from Rep. Bill Thomas, Chairman of Committee on House Oversight, to Robin H. Carle, Clerk of the House (Dec. 22, 1995) (on file with author); Dear Colleague Letter from Chairman Thomas and Ranking Minority Member Rep. Vic Fazio (D-Cal.) (Apr. 30, 1996) (on file with author). The Senate Chief Counsel for Employment performs a similar representational function for Senate employing offices. *See* 142 CONG. REC. H10,026 (daily ed. Sept. 4, 1996). It was established in 1993 at the direction of Senate leaders from both parties, and was formerly called the Office of Senate Legal Counsel, Employee/Management Relations. *See* 140 CONG. REC. S1391 (daily ed. Feb. 10, 1994).

[47] *See* Pub. L. No. 104-1, § 415, 109 Stat. 38 (1995) (codified at 2 U.S.C. § 1415 (Supp. II 1996)).

sion to immunize members from personal liability represented a departure from Congress's stance in prior legislation,[48] and it generated some internal dissent.[49] Supporters pointed in general terms to the Act's goal of compensating employees rather than punishing individual members of Congress;[50] they may also have feared that personal financial pressure would lead less well-off members to settle false or meritless claims.

A final significant CAA component is the special procedure adopted regarding employee access to union representation. The Act's basic approach directed the OOC to follow existing Executive Branch regulations for each of the eleven workplace statutes unless it determined that modification was needed to strengthen employee protections.[51] In order to ensure prompt access to these protections, the CAA also specified as a general matter that a failure by Congress to approve the OOC's regulatory product would trigger statutory coverage based on "the most relevant substantive executive agency regulation."[52] The notable exception to this approach involved employees' rights to join a union and engage in collective bargaining pursuant to the FLRA. The CAA at section 220(e) directed that anyone employed on a legislator's personal staff, on the staff of a congressional committee, or on the staff of House or Senate leadership, was to be excluded from exercising those rights if the OOC determined by

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[48] *See* Government Employee Rights Act of 1991, Pub. L. No. 102-166, § 323, 105 Stat. 1071, 1098 (1991) (codified at 2 U.S.C. § 1222 (1994)) (requiring senators to reimburse federal treasury within sixty days for any damage payments made on their behalf). Congress quietly repealed this reimbursement requirement the following year as part of its annual Legislative Branch Appropriations Act. *See* Pub. L. No. 102-392, § 316(b), 106 Stat. 1703, 1724 (1992).

[49] *See, e.g.*, S. 29, 103d Cong., § 2(a)(4) (1993) (bill introduced by Senator John McCain (R-Ariz.) requiring members to reimburse the federal government within sixty days for any damage payments made on their behalf); Richard Sammon & Phil Kuntz, *House Strongly Backs Bill to End Hill's Exemptions*, CONG. Q., Aug. 13, 1994, at 2313–14 (reporting that Rep. Goodling unsuccessfully sought to amend House bill to make members fully liable for punitive damages up to $50,000).

[50] *See, e.g.*, 140 CONG. REC. H7350 (daily ed. Aug. 10, 1994) (statement of Rep. Stephen Buyer (R-Ind.)); *id.* at H7335 (daily ed. Aug. 10, 1994) (statement of Rep. Fawell).

[51] *See, e.g.*, Pub. L. No. 104-1, § 202(d) (regarding Family and Medical Leave Act) (codified at 2 U.S.C. § 1312 (Supp. II 1996)); *id.* at § 204(c) (regarding Employee Polygraph Protection Act) (codified at 2 U.S.C. § 1314 (Supp. II 1996)); *id.* at § 205(c) (regarding Worker Adjustment and Retraining Notification Act) (codified at 2 U.S.C. § 1315 (Supp. II 1996)); *id.* at § 206(c) (regarding Veterans' Employment and Reemployment) (codified at 2 U.S.C. § 1316 (Supp. II 1996)); *id.* at § 210(e) (regarding public services and accommodations under Americans with Disabilities Act) (codified at 2 U.S.C. § 1331 (Supp. II 1996)); *id.* at § 215(d) (regarding Occupational Safety and Health Act) (codified at 2 U.S.C. § 1341 (Supp. II 1996)).

[52] *Id.* at § 411, 109 Stat. 37 (1995) (codified at 2 U.S.C. § 1411 (Supp. II 1996)).

regulation that "such exclusion is required because of . . . a conflict of interest or . . . Congress's constitutional responsibilities."[53] Further, should Congress fail to approve the OOC rule regarding the constitutional and conflict of interest issues, the result would be not an extension of FLRA protections based on analogous Executive Branch rules but a denial of such protections for these legislative employees.[54]

The language of section 220(e) neither states nor implies that the OOC should conclude constitutional or conflict of interest problems actually exist. Rather, the special rulemaking requirement was added "as an extra measure of precaution" in response to concerns about collective bargaining among legislative staff that apparently were voiced by a number of members during the enactment process.[55] Still, there can be no union representation rights for legislative staff until the OOC has completed its rulemaking effort and Congress has approved the results.

C. *Disagreement Between the OOC and Congress*

The OOC, through its five-person Board of Directors, conducted notice and comment rulemaking pursuant to section 220(e) between March and September 1996.[56] In response to the advance notice of proposed rulemaking,[57] and subsequent notice

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[53] *Id.* at § 220(e)(1)(B), 109 Stat. 21 (1995) (codified at 2 U.S.C. § 1351 (Supp. II 1996)). In addition to identifying personal, committee, and leadership staff as candidates for categorical exclusion, § 220(e) also directed the OOC to apply the same "conflict of interest or . . . constitutional responsibilities" standard to other institutional employees involved in the legislative process, including employees of the Senate and House Legislative Counsel, the Senate and House Parliamentarians, the Senate and House Official Reporters of Debate, and the Congressional Budget Office. This Article focuses only on the rights and protections available to personal, committee, and leadership staff. The analysis and conclusions apply, however, to all other § 220(e) employees.

[54] *See id.* at § 411, 109 Stat. 37.

[55] S. REP. No. 103-397, at 8 (1994); 141 CONG. REC. S444 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley); *see also id.* at S626 (daily ed. Jan. 9, 1995) (analysis by Sens. Lieberman and Grassley, suggesting that special rulemaking authority was to be cautiously applied).

[56] The CAA requires that substantive regulations be promulgated in accordance with the principles of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), but adds that notices and adopted regulations are to be transmitted to the House and Senate leadership and published in the Congressional Record rather than the Federal Register. *See* Pub. L. No. 104-1, § 304(b), 109 Stat. 29 (1995) (codified at 2 U.S.C. § 1384(b) (Supp. II 1996)). The notice and comment rulemaking here covered both general regulations implementing the FLRA under section 220(d) and the special "conflict of interest or . . . constitutional responsibilities" regulation under section 220(e).

[57] *See* 142 CONG. REC. S1547–50 (daily ed. Mar. 6, 1996).

of proposed rulemaking,[58] the OOC received written comments from two key House committee chairmen, an additional House member, the Inspector General of the House, the Secretary of the Senate, and representatives of three labor organizations.[59] Each of the five congressional commenters contended that broad exclusions from FLRA coverage were warranted.[60] Each of the three labor organizations maintained that the OOC should create no categorical exclusions but rather adjudicate employee eligibility for FLRA protection on a case-by-case basis.[61]

The congressional commenters' most pertinent and detailed analysis came from Secretary of the Senate Kelly D. Johnston and Chairman of the Committee on House Oversight Representative Bill Thomas (R-Cal.). Focusing their constitutional attention on Congress's Article I status as sovereign lawmaker, they argued that legislative staff access to collective bargaining would chill uninhibited deliberations between members and their aides and would give unions undue influence over member decisionmaking.[62] These constitutionally framed concerns blended into conflict of interest arguments that unions would create a unique

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[58] *See* 142 CONG. REC. S5552–56 (daily ed. May 23, 1996).

[59] Following the notice of proposed rulemaking in May 1996, Rep. Thomas submitted lengthy comments and Rep. Goodling, Chairman of the House Committee on Economic and Educational Opportunities, submitted shorter comments jointly with Rep. Fawell who chairs the committee's Subcommittee on Employer-Employee Relations. Rep. George Radanovich (R-Cal.) also submitted comments at that time, as did House Inspector General John W. Lainhart IV. In addition, the Secretary of the Senate submitted lengthy comments at both the advance notice and notice stages. Finally, representatives from three labor organizations submitted comments at the advance notice stage; they were Jonathan P. Hiatt on behalf of the AFL-CIO, Alice L. Bodley on behalf of AFSCME Council 26, and Peter Winch on behalf of AFGE. Mr. Hiatt also submitted shorter comments at the notice stage (all on file with author).

[60] The Secretary of the Senate contended that the OOC should exclude from FLRA coverage all employees in each senator's personal office and all employees of Senate leadership and committee offices. *See* Comments submitted by Kelly D. Johnston, Apr. 11, 1996, at 12–15. Rep. Thomas maintained that the OOC should issue a rule excluding all House personal, committee, and leadership staff from FLRA coverage. *See* Comments submitted by Rep. Thomas, July 1, 1996, at 6, 13, 17–18. Reps. Goodling, Fawell, and Radanovich argued in more abbreviated fashion that the OOC should issue rules excluding categories of employees because to proceed by adjudication would result in "chaos and uncertainty" for congressional offices. Comments submitted by Reps. Goodling and Fawell, July 2, 1996, at 2; Comments submitted by Rep. Radanovich, July 2, 1996, at 2. The House Inspector General contended that his entire office should be excluded pursuant to the FLRA's existing statutory exemptions for "investigation or audit functions." 5 U.S.C. § 7211(b)(7). *See* Comments submitted by John W. Lainhart IV, July 1, 1996, at 1.

[61] *See* Comments submitted by Jonathan P. Hiatt, Apr. 11, 1996, at 3, 6–7; Comments submitted by Alice L. Bodley, Apr. 5, 1996, at 3–4; Comments submitted by Peter Winch, Apr. 9, 1996, at 3.

[62] *See* Comments by Kelly D. Johnston, *supra* note 60, at 13; Comments by Rep. Thomas, *supra* note 60, at 17–20.

risk of divided loyalty. A conflict would arise because—in contrast to other private associations—a union would have a statutory right to represent a member's staff and to compel certain bargaining-related interactions with that member even if the union expressly opposed the member's legislative policies. Given that unions often pursue broad legislative agendas, the argument continued, there was a distinct possibility that unions would organize the very staff they were attempting to influence on various legislative matters. Unions could then use their unique statutory position to affect a member's legislative acts, by taking advantage of staff access to confidential legislative information or by exchanging key collective bargaining concessions for a member's commitment on particular legislative issues.[63]

The OOC Board in its final rule was not persuaded by these arguments and declined to make special rulemaking provisions for personal, committee, or leadership staff.[64] The Board found that the FLRA, itself "designed to meet the special requirements and needs of government,"[65] was amply protective of legislative prerogatives.[66] It further concluded that the CAA directive to adopt existing FLRA protections "to the greatest extent practicable"[67] militated against the wholesale exclusion of categories of employees.[68] The Board also determined that nothing about unions' broad legislative agendas or their potential for exercising legislative influence qualified as a special constitutional or conflict of interest concern.[69]

Significantly, none of the congressional commenters ever mentioned the Speech or Debate Clause when raising questions about the impact of FLRA coverage on Congress's constitutional responsibilities. The OOC also did not refer to the Clause when examining and rejecting constitutional concerns during the rulemaking process. The disagreement was framed solely in terms of

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[63] *See* Comments by Kelly D. Johnston, *supra* note 60, at 13; Comments by Rep. Thomas, *supra* note 60, at 13–16.

[64] *See* 142 CONG. REC. H10,019–30 (daily ed. Sept. 4, 1996).

[65] 5 U.S.C. § 7101(b).

[66] *See* 142 CONG. REC. H10,021–22 (daily ed. Sept. 4, 1996).

[67] 2 U.S.C. § 1351(e)(1) (Supp. II 1996).

[68] *See* 142 CONG. REC. H10,023 (daily ed. Sept. 4, 1996).

[69] *See id.* at H10,022–25. Two of the five Board members dissented from the final rule. They urged that the Board devote further attention to the special status of the Legislative Branch in relation to union representation of congressional staff. The two dissenting Board members did not contend that constitutional or conflict of interest problems compelled certain exclusions; rather, they argued that these concerns had not been given sufficient attention, and that further hearings and factfinding proceedings were needed. *See id.* at H10,027–30.

a union's assertedly special institutional role in engendering conflicts of interest or divided loyalties that then would undermine Congress's sovereign lawmaking authority. That approach differs in important respects from the Speech or Debate Clause's more general concern of insulating individual members from being questioned in a forum outside of Congress.

The House Republican leadership was not satisfied with the OOC rulemaking determination. Rep. Bill Thomas advised the Board that the Committee would not report the regulation to the House for approval and suggested that the Board undertake additional "investigatory" rulemaking to include consultation or testimony from members in both parties and both chambers of Congress.[70] The OOC declined to accept a remand of its regulation, contending that while the Committee on Oversight could postpone or prevent a House vote to approve the regulation, the CAA did not authorize remands.[71] Early in 1997, the House committee conducted a hearing at which committee members invoked their oversight authority under the Act to question the process and substance of OOC's rulemaking effort.[72] Subsequently, eighteen legal academics and practicing attorneys, each of whom had served in Republican administrations or with Republican members of Congress, wrote a letter to House leaders criticizing as unjustified and heavy-handed the Committee's attempted remand of the OOC regulation.[73] Committee Republi-

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[70] *See* Letter from Rep. Bill Thomas, Chairman of the Committee on House Oversight, to Glen Nager, Chairman of the OOC Board of Directors 3 (Sept. 19, 1996) (on file with author).

[71] *See* Letter from Glen Nager, Chairman of the OOC Board of Directors to Rep. Bill Thomas, Chairman of the Committee on House Oversight 1–2 (Sept. 25, 1996) (on file with author).

[72] *See Oversight Hearing: Office of Compliance: Hearing Before the Committee on House Oversight*, 105th Cong. 13 (statement of Chairman Thomas) (relying on Committee's oversight authority under CAA § 301(i)); *id.* at 15 (statement of Rep. Sam Gejdensen (D-Conn.)) (questioning OOC's failure to keep minutes or transcripts of Board meetings when deliberating about regulation); *id.* at 29 (statement of Rep. Vernon Ehlers (R-Mich.)) (criticizing Board's split decision rejecting the views of knowledgeable congressional commenters).

[73] *See* Letter from eighteen leading Republican lawyers (including Charles J. Cooper who served in the Justice Department during the Reagan administration, C. Boyden Gray who served in the White House during the Bush administration, and John C. Yoo who served under Chairman Hatch on the Senate Judiciary Committee) to Chairman Thomas at 1, 5–8 (May 27, 1997) (on file with author). The letter's authors sent copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey (R-Tex.), House Minority Leader Richard Gephardt (D-Mo.), and other leaders in the House. *See id.* at 9.

cans responded with a letter to the OOC reiterating the suggestion that the Board reconsider its rule.[74]

During this contretemps, Senator Charles Grassley (R-Iowa), co-author and floor manager of the CAA in the Senate, expressed publicly his fear that the section 220(e) rule would never be approved, adding that the consequent failure to implement the CAA fully would be "dishonest."[75] Twenty-one months later, the legislative stalemate persists, notwithstanding Senator Grassley's recently restated desire to resolve the matter.[76] If the House leadership response suggests hostility to the OOC regulatory determination, the Senate position more closely resembles indifference. Although Senator Grassley's statements have not been matched by a legislative initiative, his expressions of concern do stand in marked contrast to the absolute silence emanating from the Republican leadership as well as the entire Democratic contingent. Given the predictable pressure of other congressional business and the strained relations between key House members and the OOC, there is little reason to expect that either party will make FLRA coverage of legislative staff a priority in the near future.

D. *Practical Realities and a Concealed Constitutional Concern*

In considering the ongoing disagreement between Congress and its own internal agency, one might well ask what accounts for the intense and prolonged nature of the controversy. Applying the FLRA to legislative staff would provide rights to a very limited number of employees. Like its private sector counterpart, the National Labor Relations Act,[77] the FLRA exempts a range

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[74] *See* Letter from Rep. Thomas, Rep. Robert Ney (R-Ohio), Rep. John Boehner (R-Ohio), Rep. Ehlers, Rep. Kay Granger (R-Tex.), and Rep. John Mica (R-Fla.) to OOC Board Chairman Glen Nager (June 11, 1997) (on file with author).

[75] *See* A.B. Stoddard, *Impact of Labor Law on the Hill is Minimal*, HILL, Mar. 19, 1997, at 25 (quoting Senator Grassley).

[76] *See* Charles Grassley with Jennifer Shaw Schmidt, *Practicing What We Preach: A Legislative History of Congressional Accountability*, 75 HARV. J. ON LEGIS. 33, 48 (1998) (calling Congress's refusal to approve the § 220 (e) rule "a disgrace to the principles supporting the CAA," and vowing to work toward a resolution). Other substantive regulations promulgated by the OOC have been approved by Congress. *See, e.g.*, 142 CONG. REC. H3339–41 (daily ed. Apr. 15, 1996) (H.R. Res. 500 and S. Con. Res. 51 approving separate OOC regulations implementing coverage under Fair Labor Standards Act, WARN Act, Family and Medical Leave Act, and Employee Polygraph Protection Act).

[77] Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (1994)).

of confidential, managerial, and supervisory workers.[78] Accordingly, the instant dispute probably affects only a small percentage of the fourteen thousand legislative staffers who work for Congress.[79] Moreover, even if some of these employees brought charges against their legislative employers, members of Congress are well-insulated from personal responsibility or financial risk.[80] Finally, unlike employees' obvious interest in being free from race or gender discrimination, or in making use of family or medical leave, it is far from clear how many legislative staff will seek union representation, assuming they are entitled to do so. The typical employee in a personal or committee office is strongly actuated by a desire to contribute to public policy development or to provide assistance to constituents.[81] There are, of course, economic and quality of life aspects to the job as well, but staffers imbued with the mission of political service may less readily grasp the value of a collective voice in improving their terms and conditions of employment. While the short-term nature of employment need not be a barrier to union success,[82] rapid legislative staff turnover—driven both by career ambitions and by the election returns—is also likely to dampen widespread continuing interest in unionization.[83] It therefore is not surprising

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

[79] *See* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 201 (5th ed. 1996) (identifying some 9200 House legislative staff and 5000 Senate legislative staff); ORNSTEIN ET AL., *supra* note 29 (identifying some 9600 House personal and committee staff and 5400 Senate personal and committee staff as of 1991; also noting 3000 other House and Senate employees plus some 10,000 support agency employees).

[80] *See supra* text accompanying notes 45–50 (discussing CAA provisions limiting members' personal exposure).

[81] *See* EDWARD V. SCHNEIER & BERTRAM GROSS, CONGRESS TODAY 147 (1993) (observing that "[w]hat keeps the juices flowing [for congressional staff] is the sense of having an impact, of knowing that your idea is embodied in law"); Michael J. Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in THE NEW CONGRESS 134, 150 (Thomas E. Mann & Norman J. Ornstein eds., 1981) (discussing the exhilaration felt by staff at having even a vicarious effect on important events and policies).

[82] Construction workers are one example of employees engaged in relatively short-term work who often seek unionization. *See, e.g.*, David G. Savage & Stuart Silverstein, *High Court Extends Job Protections to Organizers*, L.A. TIMES, Nov. 29, 1995, at D1 (citing federal figures indicating that 19% of construction workers belonged to unions in 1994); Patrick Barry, *Congress's Deconstruction Theory*, WASH. MONTHLY, Jan. 1990, at 10, 16 (reporting that among top four hundred construction firms over half are union shops as opposed to open shops).

[83] *See* Malbin, *supra* note 81, at 149–50 (describing personal and committee staffs being dominated by individuals who view their jobs in Congress as stepping stones to other positions); Gareth G. Cook, *Carnage on the Hill*, U.S. NEWS & WORLD REP., Nov. 28, 1994, at 26 (reporting that more than two thousand Democratic employees on Capitol Hill will be terminated as result of 1994 congressional elections); Cindy Loose,

that a recent survey of congressional staffers revealed little enthusiasm for joining a union.[84]

Yet even with the odds distinctly in their favor, members may be wary of the reputational damage that unions appear able to inflict. Labor organizations generally have more resources and greater sophistication than does an individual employee who alleges member misconduct. Union presentations critical of a member's former or current employment practices may be taken up by the media or by an opposition candidate.[85] A union engaged in collective bargaining also has broad rights to request documents or information within a member's control.[86] Either acceding to or defying such requests may exacerbate adverse effects on the member's reputation.

Assuming some wariness about unions exists, it is relatively easy for members of Congress to indulge their fears. In political terms, there appears to be little cost involved in opposing staff access to unions. By contrast, had House leaders blocked extension of Title VII or the Family and Medical Leave Act to legislative staff less than two years after enacting the CAA, one would hardly anticipate the same lack of partisan debate within Congress or the same absence of participation from interest groups and the public at large.[87]

Anxiety on the Hill: GOP Victory Brings on the Pink-Slip Blues, WASH. POST, Nov. 20, 1994, at A1 (describing bewilderment, depression, and fear among thousands of congressional employees who expect to be unemployed or already are because of the 1994 elections).

[84] *See* Stoddard, *supra* note 75, at 25 (reporting that only nine of eighty legislative staff responding to a survey conducted by THE HILL in early 1997 stated they would be interested in joining a staff union).

[85] In recent years, organized labor has shown its willingness to target individual members over particular issues of public policy. *See, e.g.*, Kent Jenkins, Jr., *Labor's Love Lost By Moran, Not Hoyer*, WASH. POST, Dec. 22, 1993, at B1; *Saving Lawmaker on Labor Hit List*, N.Y. TIMES, Mar. 15, 1994, at A18.

[86] *See generally* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (holding that an employer's refusal to disclose information relevant to its claim of economic inability to pay increased wages supports a finding of a failure to bargain in good faith); U.S. Dept. of Health and Human Servs. v. FLRA, 833 F.2d 1129 (4th Cir. 1987) (holding that a federal employer's obligation to furnish information requested by a union extends to information needed for administering and policing the contract as well as for contract negotiation).

[87] *See generally* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 22–25 (1990) (claiming that Congress today is far less willing to rely on labor-management negotiations as a mechanism for ordering employment relations and redistributing economic resources); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1568–72, 1596 (1996) (contrasting the decline in popular and legal support for collective bargaining with a renewed faith in individual rights statutes).

In light of Congress's resistance to unionization, one might have expected a constitutional defense predicated on the Speech or Debate Clause. Surprisingly, however, that Clause was never raised during the rulemaking process. Congressional commenters did assert a different type of Article I concern stemming from union representation in the employment relationship.[88] Yet, the Supreme Court has stated quite clearly that the Speech or Debate Clause is *the* appropriate source for determining whether members of Congress merit constitutional protection against employment-related challenges to their activities. In *Davis v. Passman*,[89] the Court was confronted with the decision of Representative Otto Passman (D-La.) to discharge his female deputy administrative assistant on the express grounds that he needed a man for the job. The Court held that petitioner Davis could bring a Fifth Amendment cause of action against the Congressman, concluding that "judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause of the Constitution."[90] Thus, the Court views the Framers as having fully addressed their constitutional concerns about members' official conduct toward Legislative Branch employees through the inclusion of the Speech or Debate Clause; it finds no justification for expanding immunity based on more general Article I or separation of powers concerns.[91]

By the same token, the applicability of Speech or Debate Clause immunity to a member's employment relationship with legislative aides such as those listed in section 220(e)—an issue left unresolved by the Court in *Passman*[92]—cannot be confined to

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[88] *See supra* text in paragraph preceding note 70 (discussing the argument that union-inspired divided loyalties would undermine congressional sovereignty).

[89] 442 U.S. 228, 230 (1979).

[90] *Id.* at 235 n.11. The Court explained that "[s]ince the Speech or Debate Clause speaks so directly to the separation-of-powers concerns raised by" a member of Congress charged with unconstitutional sex discrimination against his legislative aide, if the member is not shielded by the Clause, there are no other separation of powers barriers to the cause of action. "[W]e apply the principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.'" *Id.* at 235 n.11, 246 (quoting Gravel v. United States, 408 U.S. 606, 615 (1972)).

[91] *See* United States v. Stanley, 483 U.S. 669, 685 (1987) (reasoning that Framers, by creating Speech or Debate Clause immunity, meant to limit constitutional protection for members' legislative activity to the terms of that Clause); *Passman*, 442 U.S. at 249–51 (Burger, C.J., dissenting) (objecting to the Court's unwillingness to hold respondent member of Congress immune on general separation of powers grounds).

[92] The Court in *Passman* expressly declined to decide whether Rep. Passman's conduct in discharging his deputy administrative assistant was shielded by the Speech or Debate Clause because the en banc Court of Appeals had not decided it. *See* 442 U.S. at 236 n.11. In that regard, the briefs indicate that the parties did not agree on whether petitioner Davis was a key policymaking aide or a low-level assistant, and the transcript

challenges brought pursuant to just one of the eleven employee protection laws included in the CAA. Whether a member is accused of discriminating against a staffer based on age, medical condition, or support for a union, the member's constitutional defense rests on the Speech or Debate Clause. Similarly, whether a member refuses to share information requested by a union during the collective bargaining process or by an individual employee prior to the hearing on her complaint, the Speech or Debate Clause will determine if that refusal is constitutionally justified.[93]

Upon reflection, it is understandable why both members of Congress in requesting an FLRA exemption and the OOC in considering their request might wish to avoid the broader Speech or Debate Clause implications. The CAA received near-unanimous approval from Congress, and most members have a sincere interest in subjecting themselves to the rule of law. Even if some do secretly hope the CAA fails, they would have no desire to appear hypocritical to the American public; their interest would be in framing constitutional objections in the narrowest terms. The OOC, too, is in a delicate position as it seeks to cultivate professional respect and establish enough independence to earn the confidence of Congress's employees. Having been directed to respond to constitutional concerns that affect coverage under one law, the OOC would hardly be inclined to reach out and discuss possible constitutional concerns involving ten others. Instead, it has in essence embraced the passive virtue of ignoring larger constitutional concerns that were not raised.

In short, the question of Speech or Debate Clause applicability that was left unanswered by the Supreme Court in *Passman* remained unasked by congressional commenters and the OOC. I now proceed to consider that question.

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of oral argument discloses that this area of uncertainty was troubling to some of the Justices. *See* Brief for Petitioner at 58–60 (arguing that petitioner was a low-level office worker, and Court need not reach the issue of speech or debate protection for high-level policymaking aides); Brief for Respondent at 3, 28–29 (arguing that petitioner was deputy administrative assistant, a role in which she was closely involved in the legislative process); Transcript of Oral Argument at 2, 12–13 (reflecting concern from Justices Blackmun and Rehnquist as to whether it should matter in constitutional terms if respondent is a secretary or a policymaking aide), *reprinted in* 107 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 415–17; 436, 461–62; 554, 564–65 (Philip B. Kurland & Gerhard Casper eds., 1980) [hereinafter LANDMARK BRIEFS AND ARGUMNENTS].

[93] In each instance, of course, the member may have statutory defenses to the charges of discrimination or unlawful refusal to provide information.

II. THE CAA AND SPEECH OR DEBATE CLAUSE IMMUNITY

In analyzing the relationship between the CAA and the Speech or Debate Clause, it is important to identify with some precision the subset of employees whose rights are at issue. The CAA covers a broad array of Legislative Branch workers, including thousands employed by congressional support agencies.[94] The possible extension of Speech or Debate Clause immunity affects only the status of legislative aides employed directly by the House or Senate—roughly the universe referred to in section 220(e). Moreover, the universe of legislative staff embraced by section 220(e) includes employees who perform routine constituent casework, open and sort mail, or answer telephones, in addition to those who serve as committee counsel, legislative investigators, or personal office chiefs of staff. For employees whose job functions are primarily ministerial and in no way integral to the legislative process, it is difficult to argue that Speech or Debate Clause immunity should apply.[95] There are, however, many employees whose job responsibilities give them significant input into legislative decisionmaking: examples include a senator's legislative aide who advises her on policy matters outside of her committee jurisdictions,[96] or a House committee chairman's assistant counsel who provides guidance on particular portions of the committee's legislative agenda.[97] These employ-

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[94] *See* Pub. L. No. 104-1, § 101(3), 109 Stat. 3, 4 (1995) (codified at 2 U.S.C. § 1301(3) (Supp. II 1996)) (defining covered employees to include employees of the Capitol Police, Office of the Architect of the Capitol, and the Congressional Budget Office, as well as employees of the House and Senate); ORNSTEIN ET AL., *supra* note 29, at 126–27 (identifying those three support agencies as employing over 3500 individuals).

[95] *See infra* Part IIA, setting forth a standard for what qualifies as protected activity under the Speech or Debate Clause. It is doubtful that the Supreme Court in *Passman* would have recognized a cause of action against members on behalf of legislative employees if the Court had believed that the Speech or Debate Clause precluded all such actions. *See also supra* note 92 (discussing the Justices' interest in a member's immunity status on employment decisions affecting key legislative aides); LANDMARK BRIEFS AND ARGUMENTS, *supra* note 92, at 560–62 (indicating concerns from Justices Powell and Burger that discharge of key policy staff in White House or Congress presents special constitutional immunity issue).

[96] For instance, a senator may wish to be a "player" on proposed legislation involving telecommunications or the environment even though she is not a member of the Commerce Committee or the Environment Committee. A legislative aide on her personal office staff would be responsible for monitoring developments in those areas and helping the senator position herself to offer bills or amendments, or to participate in key legislative negotiations.

[97] Some legislative staff with policy-related responsibilities may be excluded from joining unions under the FLRA because they qualify as confidential, supervisory, or managerial employees under that Act. *See infra* text accompanying notes 241–246.

ees are the focus of my analysis; for them, the issue of Speech or Debate Clause immunity deserves close attention.

A. *Speech or Debate Clause Origins and Scope*

The provision in Article I of the Constitution that "Senators and Representatives shall . . . be privileged . . . for any Speech or Debate in either House"[98] stems from more than 200 years of developments in England and its colonies. Parliament asserted a privilege of free speech and debate as early as 1512, in response to a private criminal complaint brought against a member of the House of Commons.[99] The legislature established that a member of Parliament ("MP") could not be indicted in a lower court for actions taken in Parliament, which was itself the highest court.[100] Over time, as Parliament exercised increasing legislative initiative that included criticisms of Crown policies and conduct, the privilege came to be invoked primarily to protect MPs against punitive measures taken by the executive.[101] In this context, the privilege was transformed from a simple request for free speech that was part of the traditional speaker's petition presented to the King or Queen at the commencement of Parliament to a strong

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Employees such as an individual member's legislative aide or a committee's assistant counsel, however, do not automatically or even obviously qualify as exempt under any of those three statutory exemptions. *See infra* text accompanying notes 249–251.

[98] U.S. CONST. art. I, § 6, cl. 1.

[99] In Strode's Case, 4 Henry VIII c. 8 (1512), MP Strode was prosecuted, fined, and imprisoned by a local court because he had voted in favor of a bill regulating working conditions in tin mines. Strode petitioned Parliament, which enacted a law annulling the judgment and declaring void any future proceedings against MPs arising from parliamentary matters.

[100] For thoughtful discussion on the origins and evolution of the privilege, see Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120–44 (1973); Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N. CAR. L. REV. 197, 199–214 (1979).

[101] English monarchs, including Elizabeth I, Charles I, and James II, prosecuted and imprisoned MPs for critical words spoken in parliamentary debate and for republication of parliamentary committee reports alleging misconduct by the Crown. Parliament responded by protesting against unwarranted Crown interference and by passing statutes that voided particular judgments against its members. In addition, following the execution of Charles I, Parliament in 1667 declared that the special statute enacted for Strode's case was a general law affirming parliamentary rights and privileges against the Crown. *See* ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 77–80 (Sir Charles Gordon ed., 20th ed., 1983) [hereinafter MAY'S TREATISE]; Reinstein & Silverglate, *supra* note 100, at 1123–33; Bradley, *supra* note 100, at 201–08.

statement of principle that became part of the 1689 English Bill of Rights.[102]

In the century leading up to the American Revolution, colonial assemblies also asserted parliamentary privileges against their royal governors.[103] Freedom of speech generally was included among the privileges presented in a speaker's petition, and occasionally was invoked as a right during a conflict between assembly and governor.[104] While ample evidence exists that legislators in England and the colonies exploited other parliamentary privileges,[105] the privilege of free speech and debate appears not to have generated any real controversy in this country during the period preceding the Constitutional Convention.[106] The freedom of speech language from the English Bill of Rights was incorpo-

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[102] The Bill of Rights provides "[t]hat the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." 1 W. & M. sess. 2, c. 2 (1689) (quoted in MAY'S TREATISE, *supra* note 101, at 81). Other privileges claimed by Parliament during this time period include freedom from arrest or molestation, freedom of access to the Crown, freedom to determine the qualifications of its members, freedom to control the publication of debates and proceedings, and that a favorable construction should be placed on House of Commons proceedings. *See* MAY'S TREATISE, *supra* note 101, at 73, 83, 97–101, 119–21; CARL WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 21–23 (1921).

[103] *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 79–82 (1943); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 863 (1st ed. 1833).

[104] CLARKE, *supra* note 103, at 61–92 (describing the earliest uses of the speaker's petition in Jamaica (1677), Maryland (1682), Virginia (1684), New York (1691), South Carolina (1702), New Jersey (1703), Pennsylvania (1707), Georgia (1755), Nova Scotia (1759) and North Carolina (1760); and reporting that such petitions generally demanded freedom from arrest, freedom from molestation, freedom of speech, access to the governor, and that a favorable construction be put on actions of the house); *id.* at 93–97 (observing that freedom of speech was seldom cited by legislators as the basis of a dispute, but identifying "a few occasions" on which a colonial assembly invoked the right of free speech in its conflict with the governor).

[105] For example, MPs stretched the privilege of freedom from arrest to include not only members themselves but also their servants, families, and estates, regardless of what crimes might be involved; MPs also sold "protections" to outsiders giving them freedom from arrest for common law violations. *See* WITTKE, *supra* note 102, at 41–43; Reinstein & Silverglate, *supra* note 100, at 1137 n.128; Bradley, *supra* note 100, at 210. Legislative abuse of the privileges from arrest and molestation was widely reported in the colonies as well. *See* CLARKE, *supra* note 103, at 98, 108–17, 130. The record of legislative abuses received attention from the American public and also from the Framers of the Constitution. *See* Powell v. McCormack, 395 U.S. 486, 527–31 (1969) (describing the American public's reaction to Wilkes case in early 1780s in which the House of Commons expelled an MP who exposed corruption in Parliament, and explaining how Wilkes was viewed as a popular hero for standing up to parliamentary overreaching). *See generally* THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (expressing concern that "[T]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex").

[106] *See* CLARKE, *supra* note 103, at 93–97; Reinstein & Silverglate, *supra* note 100, at 1136–39.

rated in closely comparable form in the Articles of Confederation[107] and also in a number of early state constitutions.[108]

At the Convention, the Speech or Debate Clause was included as part of Article I without opposition and with little substantive discussion.[109] Unlike other English parliamentary privileges that the Framers chose to preserve in more limited terms or to omit altogether,[110] the privilege for speech or debate remained intact. Charles Pinckney at one point proposed that each House should be the judge of its own privileges, and James Madison at another point suggested that the scope of the privilege should be specified; the Convention declined to adopt either proposal.[111]

One of the Framers, James Wilson, offered an early and succinct justification for the insertion of the Speech or Debate Clause in Article I:

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[107] Article V of the Articles of Confederation provided that "Freedom of speech or debate in Congress shall not be impeded or questioned in any court or place out of Congress . . . ." ARTICLES OF CONFEDERATION art. v.

[108] *See, e.g.*, MD. DECL. OF RIGHTS art. x (1776); MASS. CONST. part I, art. xxi (1780); N.H. CONST. part 1, art. xxx (1784); S.C. CONST. art. vii (1776); N.J. CONST. art. xxii (1776). *See generally,* Tenney v. Brandhove, 341 U.S. 367, 373–74 (1951).

[109] The Committee of Detail produced various draft versions of the Constitution between July 26 and August 6, 1787. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 129–92 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. A draft in the handwriting of Committee member James Wilson included language that closely resembles the final Speech or Debate Clause. *See id.* at 166. This language was presented to and accepted by the Convention. *See id.* at 180, 254. *See generally* ELLIOTT'S DEBATES, BOOK II, VOL. V at 406 (2d ed. 1836) (1941); Reinstein & Silverglate, *supra* note 100, at 1136. The ratification debates reveal even less substantive consideration. *See, e.g.*, ELLIOTT'S DEBATES, *supra*, Book I, Vol. II at 52–54 (Mass.), 325, 329 (N.Y.); Book I, Vol. III at 368–75 (Va.). At the Convention there is at least a record of proposed changes. *See infra* note 111.

[110] *See* Powell v. McCormack, 395 U.S. at 532–41 (concluding that the Framers in Article I limited legislative privilege to determine qualifications of members of Congress); STORY, *supra* note 103, at §§ 856–59, at 325–27 (observing that the Framers in Article I limited legislative privilege to be free from arrest); Reinstein & Silverglate, *supra* note 100, at 1132–38 (reporting that the Framers in Article I rejected the legislative privilege to control the publication of debates and proceedings).

[111] Pinckney unsuccessfully proposed that "[E]ach House should be the Judge of the privileges of its own members." RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 502. Madison opposed this approach, adverting to the risk of giving too much discretion to each House. *See id.* at 503; 3 THE PAPERS OF JAMES MADISON 1493 (Langley ed., 1841). Madison himself advocated to the Convention that the Constitution could "make provision for ascertaining by *law,* the privileges of each House." 3 THE PAPERS OF JAMES MADISON at 1493–94 (emphasis in original); RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 503 (emphasis in original). This suggestion too was not accepted. *See* JANE BUTZNER, CONSTITUTIONAL CHAFF: REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 47 (1941). Subsequently, Madison adopted a more open-ended view, concluding that "[when applying the] privilege to emerging cases, difficulties and differences of opinion may arise [hence] the reason and necessity of the privilege must be the guide." Letter from James Madison to Phillip Doddridge (June 6, 1832), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221 (1865).

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.[112]

Two centuries later, the rationale for conferring absolute and total immunity upon senators and representatives reflects two distinct dimensions of the policy concern set forth by Wilson. From a substantive perspective, absolute immunity protects against possible distortion in the exercise or expression of legislative judgment. By ensuring that members need not answer for their performance except to the voters at election time, the Clause encourages legislators to fulfill their Article I responsibilities in a manner that is at once deliberative and robust. From an accompanying time management perspective, absolute immunity guards against the risk that members will be distracted from their legislative duties. It does so by minimizing the predictably diverting impact of litigation or interrogation upon members' finite energies and resources.[113] This rationale of protecting against distorted judgment and diverted energies applies to Speech or Debate Clause claims asserted in private civil actions as well as in criminal prosecutions brought by the executive.[114]

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[112] 1 JAMES WILSON, WORKS OF JAMES WILSON 421 (Robert G. McCloskey ed., 1967). The justification was offered as part of a series of lectures on the Constitution that Wilson presented in 1791 and 1792. *See id.* at 59.

[113] *See* United States v. Brewster, 408 U.S. 501, 507 (1972) (invoking need to insure independent legislative judgment); Powell v. McCormack, 395 U.S. at 505 (invoking need to avoid distraction from performance of legislative tasks); *Cf.* Clinton v. Jones, 117 S. Ct. 1636, 1643–44 (1997) (justifying President's constitutional immunity from damages for official actions in similar terms); Forrester v. White, 484 U.S. 219, 223 (1988) (justifying judges' common law immunity from damages in similar terms).

[114] It is true that the privilege of free speech and debate blossomed in England and the colonies in response to legislative perceptions of an overreaching executive. *See supra* text accompanying notes 98–106 (discussing English and colonial experience). The Supreme Court has acknowledged on more than one occasion the historic role played by executive intimidation. *See* United States v. Helstoski, 442 U.S. 477, 491 (1979) (noting that the Clause's purpose was "to preserve the constitutional structure of separate, coequal, and independent branches of government" in light of the English and colonial experience of executive power); United States v. Johnson, 383 U.S. 169, 182 (1966) (interpreting fear of indictment by the executive as motivating the parliamentary struggle for privilege). The Court, however, with good reason has never adopted a two-tier approach to the Speech or Debate Clause. The language of the Clause itself makes no distinction between civil actions pursued by private individuals and criminal prosecutions brought by the executive. An early and celebrated state court decision appears to embody the contemporary understanding that the legislative privilege applied equally in civil and criminal proceedings. *See* Coffin v. Coffin, 4 Mass. 1, 27 (1808) (concluding that analogous privilege in the Massachusetts Constitution was meant to "enabl[e] representatives to execute the functions of their office without fear of prosecutions, civil

Although the language of the Clause refers only to "Speech or Debate in either House," the Supreme Court has made clear that the immunity extends to many types of legislative conduct undertaken by members of Congress. Thus, the protections of the Clause encompass speeches made on the House floor[115] but also votes cast on bills,[116] participation in committee hearings and proceedings,[117] circulation of information to other members of Congress,[118] and issuance of investigatory subpoenas.[119] At the same time, the Court has held that the Clause does not apply to all official responsibilities assumed by members. Important congressional functions have been deemed unprotected, notably dissemination of legislative materials to the public[120] and communication with administrative agencies on behalf of constituents.[121]

In determining how far the Clause extends to matters beyond speech or debate in either House, the Court's test is whether the matters in question are "an integral part of the deliberative and communicative process by which members participate" in their constitutionally prescribed lawmaking activity.[122] This test is not a model of clarity. Reference to "an integral part" signifies that the challenged conduct must be more than merely "related to" the lawmaking process if it is to merit such extraordinary pro-

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or criminal."). *Coffin* involved a civil action for slander; the Massachusetts court's conclusion was quoted and relied on by the Supreme Court in Kilbourn v. Thompson, 103 U.S. 168, 203 (1880). Moreover, while the Clause reflects a desire to avoid intrusion by the executive in a system of separation of powers, it serves the additional purpose of protecting legislative independence by screening out all lawsuits that would interfere with the legislative process. *See* United States v. Gillock, 445 U.S. 360, 369 (1980) (discussing two underlying rationales for Speech or Debate Clause immunity: avoiding intrusion by the executive or judiciary into the affairs of a coequal branch and protecting legislative independence); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975) (interpreting the Clause as ensuring the independence of the Legislative Branch).

[115] *See Johnson*, 383 U.S. at 176–77 (1966).

[116] *See Kilbourn*, 103 U.S. at 204.

[117] *See* Gravel v. United States, 408 U.S. 606, 628–29 (1972); Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967).

[118] *See* Doe v. McMillan, 412 U.S. 306, 311–13 (1973).

[119] *See Eastland*, 421 U.S. at 503–05.

[120] *See* Hutchinson v. Proxmire, 443 U.S. 111, 123–33 (1979) (clause does not protect communication through press releases or constituent newsletters); *Doe*, 412 U.S. at 313–15 (clause does not protect distribution to the public of otherwise protected legislative materials).

[121] *See* United States v. Brewster, 408 U.S. 501, 512 (1972) (clause does not protect a legislator's efforts to intervene with administrative agencies on behalf of constituents); *Johnson*, 383 U.S. at 172 (same); Sam J. Ervin Jr., *The* "Gravel" *and* "Brewster" *Cases: An Assault on Congressional Independence*, 59 U. VA. L. REV. 175 (1973) (criticizing Court's decisions limiting congressional immunity).

[122] *Gravel*, 408 U.S. at 625.

tection.[123] At the same time, the privilege may extend to conduct other than participation in floor or committee proceedings so long as constitutional immunity is necessary "to prevent *indirect* impairment of [legislative] deliberations."[124]

Lower courts have struggled with the Supreme Court standard. Tensions have surfaced between and within circuits as to when—if at all—legislators' personnel decisions should be accorded absolute immunity.[125] Two judges who adopted divergent positions on this question have since become Supreme Court Justices.[126] Legal commentators similarly are not resolved as to whether absolute immunity should ever extend to a member of Congress's employment-related conduct.[127]

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[123] *Brewster*, 408 U.S. at 513–14.

[124] *Gravel*, 408 U.S. at 625 (quoting *United States v. Doe*, 455 F.2d at 760) (emphasis added).

[125] *Compare* Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1986) (dismissing on Speech or Debate Clause grounds official reporter's race discrimination action against Clerk of House and Speaker of House) *and* Agromayor v. Colberg, 738 F.2d 55 (1st Cir. 1984) (relying on *Gravel* test to confer absolute legislative immunity on President of the Puerto Rico House of Representatives in a discrimination action brought by an unsuccessful applicant for a position as a House press officer) *and* Hudson v. Burke, 617 F. Supp. 1501 (N.D. Ill. 1985) (according absolute legislative immunity to city council committee chairman for his decision to terminate committee investigators) *with* Davis v. Passman, 544 F.2d 865, 877–81 (1973), *rev'd on other grounds* 442 U.S. 228 (1979) (holding that Speech or Debate Clause never extends to member decisions to dismiss staff) *and* Gross v. Winter, 876 F.2d 165 (D.C. Cir. 1989) (holding that city council member is not entitled to absolute immunity for her decision to terminate her legislative aide). *Browning* and *Passman* represent a direct conflict on the Speech or Debate Clause issue. *Agromayor*, *Hudson*, and *Gross* involved parallel claims of common law immunity asserted by state and local legislators with respect to civil rights actions brought under 42 U.S.C. § 1983 (1994). The First Circuit in *Agromayor* applied *Gravel's* "integral part of the [lawmaking] processes" test to decide in favor of legislative immunity. 738 F.2d at 59. The D.C. Circuit in *Gross* found its own circuit's analysis in *Browning* less persuasive than the Supreme Court's more recent decision in Forrester v. White, 484 U.S. 219 (1988) (holding that a state judge's personnel decision was not entitled to judicial immunity at common law), but declined to consider whether special constitutional considerations applicable to members of Congress should support the approach taken in *Browning*. 876 F.2d at 172; *see also* United States v. Rostenkowski, 59 F.3d 1291, 1302–03 (D.C. Cir. 1995) (recognizing that *Browning* remains controlling law within D.C. Circuit, and declining to reexamine the *Browning* approach notwithstanding Supreme Court's subsequent decision in *Forrester*).

[126] Justice Breyer, then a member of the First Circuit, participated in the unanimous panel decision granting legislative immunity in *Agromayor*. Justice Ginsburg, then a member of the D.C. Circuit, joined the unanimous panel decision refusing to grant legislative immunity in *Gross*.

[127] *Compare* Bruff, *supra* note 44, at 137 (contending that Speech or Debate Clause should shield some congressional employment decisions based on an employee's proximity to legislative functions, and that *Browning* was correctly decided) *and* Richard D. Batchelder, Jr., Note, Chastain v. Sundquist: *A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384, 405–09 (1990) (arguing that Congress should act to ensure a broader scope of absolute legislative immunity) *with* 1993 *Joint Committee Hearings*, *supra* note 24, at 251–55, 260–264 (statement of Professor

B. *The CAA Does Not Constitute a Relinquishment of the Privilege*

Before exploring the arguments for and against extending Speech or Debate Clause immunity to certain employment-related activity by members of Congress, it is worth considering whether enactment of the CAA has effectively averted any need to resolve the constitutional issue. The CAA's application of eleven workplace protection laws to Congress as an employer might be viewed as a waiver of whatever constitutional protection is conferred by the Speech or Debate Clause with respect to matters affected by the eleven laws. Alternatively, the CAA's insulation of members from personal liability or monetary exposure might be seen as according protections comparable if not equivalent to those the speech or debate privilege would provide.

First, with respect to the possibility of a waiver, the Supreme Court has declined to decide whether Congress has the power to cede the speech or debate privilege of individual members.[128] Several Justices have suggested that Congress does have such power when legislating employment standards for its own staff,[129] and more than one commentator has contended that the privilege belongs to the institution as a whole rather than to individual legislators.[130]

Notwithstanding these arguments, a number of factors combine to counsel strongly against permitting a congressional majority to waive the privilege for all members. The structure of Article I indicates that the first clause in Section Six was meant

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Nelson Lund) (contending that employment decisions are never part of the legislative process and that *Browning* was wrongly decided) *and* Sharon A. Rudnick, Comment, *Speech or Debate Clause Immunity For Congressional Hiring Practices: Its Necessity and Its Implications*, 28 UCLA L. REV. 217, 248–51 (1980) (arguing that Speech or Debate Clause immunity should be denied to all employment-related decisions).

[128] *See* United States v. Helstoski, 442 U.S. 477, 493 (1979) (holding that even if Congress could constitutionally waive Speech or Debate Clause protection for individual members, it did not do so in explicit and unequivocal terms in enacting federal bribery statute); United States v. Brewster, 408 U.S. 501, 529 n.18 (1972) (refusing to decide waiver issue).

[129] *See* Davis v. Passman, 442 U.S. 228, 250 (1979) (Burger, C.J., joined by Powell and Rehnquist, JJ., dissenting on other grounds).

[130] *See* Bradley, *supra* note 100, at 223–25 (relying primarily on the history of the privilege in England to argue for legitimacy of waiver by Congress); Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 434–36 (1994) (relying on the Clause's purpose of protecting the integrity of the legislative process to argue that privilege should be waivable by Congress). *But see* Reinstein & Silverglate, *supra* note 100, at 1166–71 (arguing that privilege is individual and only individual members may waive it).

to confer rights on individual members. While Section Five provides for "each House" to have certain specified powers and privileges relating to institutional governance, Section Six is addressed to "Senators and Representatives" as individual actors.[131] Justice Story stressed this distinction in his 1833 Commentaries on the Constitution,[132] and the earliest case to address the matter also viewed the privilege as belonging to each individual member.[133]

A contrary stance would in effect authorize Congress, rather than the Court, to determine the scope of the constitutional privilege. The proposition that Congress as an institution should be the judge of its own privileges is, however, one that the Framers themselves considered and rejected at the Convention.[134] That proposition also assigns to Congress the role of giving ultimate meaning to constitutional provisions that define its own institutional prerogatives, a role normally reserved to the courts.[135] Further, allowing Congress to waive the privilege of its members would enable a legislative majority to suppress dissent simply by criminalizing conduct otherwise thought of as legislative. While Article I authorizes Congress to inflict its own forms of disci-

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[131] The powers and privileges vested in each House under Article I, Section Five, include the powers to judge the elections and qualifications of its members, to compel attendance of absent members to help make a quorum, to determine internal rules of operation, to discipline its members, and to maintain and publish a journal of its proceedings. The rights and privileges accorded to individual members under Article I, Section Six, include the right to compensation and the privileges from arrest and for speech or debate. In addition, section 6 establishes limitations on holding other federal offices that apply to members individually.

[132] STORY, *supra* note 103, at § 847 ("The sixth section of the first article contains an enumeration of the rights, privileges, and disabilities of the members of each house in their personal and individual characters, as contradistinguished from the rights, privileges, and disabilities of the body, of which they are members.")

[133] *See* Coffin v. Coffin, 4 Mass. 1, 27 (1808) ("[T]he privilege secured by it is not so much the privilege of the House, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature .... Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house or by an act of the legislature."). The U.S. Supreme Court has accorded particular respect to the *Coffin* case because of its proximity to the founding, *see* Kilbourn v. Thompson, 103 U.S. 168, 204 (1880), and has cited with approval the discussion quoted above. *See Helstoski* 442 U.S. at 493.

[134] *See supra* text accompanying note 111.

[135] *See* United States v. Munoz-Flores, 495 U.S. 385, 390–93 (1990) (rejecting argument that Congress should decide scope and application of Origination Clause in Article I, Section Seven); Powell v. McCormack, 395 U.S. 486, 547–49 (1969) (rejecting argument that Congress should decide scope and application of its power to exclude duly elected members under Article I, Sections Two and Five).

pline upon members it deems recalcitrant, that is a far cry from exposing members to prosecution and punishment from the two other branches for floor statements criticizing a treaty or supporting an unpopular cause. Even if such a repressive legislative scenario may be unlikely to occur in practice,[136] the conclusion that each member controls her own privilege precludes it from happening at all. Finally, assuming *arguendo* that a waiver were constitutionally permissible, the Court has made clear that "such waiver could be shown only by an explicit and unequivocal expression."[137] The CAA never mentions the Speech or Debate Clause in text, and its legislative history contains only a few inconclusive references. This record hardly qualifies as a waiver.[138]

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[136] Unlikely does not mean inconceivable. Federal law makes it a felony to "willfully communicate[] . . . to any person not entitled to receive it" information related to the national defense which the communicating individual "has reason to believe could be used to the injury of the United States or to the advantage of a foreign nation." 18 U.S.C. § 793(d) (1994). *Cf.* Abrams v. United States, 250 U.S. 616 (1919) *and* Frohwerk v. United States, 249 U.S. 204 (1919) (upholding convictions for publication of leaflets or newspapers under related provisions originally enacted as part of 1917 Espionage Act). If Congress were to enact a statute prohibiting members from communicating classified national security information, one might imagine a member's televised floor speech disclosing such information—perhaps out of a sincere belief that the residents of a certain city or state should know they are a prime target for nuclear attack by a foreign country—and the member then being subjected to criminal prosecution by the Executive Branch.

[137] *Helstoski*, 442 U.S. at 493.

[138] If a member of Congress could waive his own constitutional privilege by voting in favor of a specific statute, the CAA might be a particularly attractive candidate because only one member of Congress voted against it. *See supra* notes 6–7. Still, new members enter Congress every two years, and they presumably would have to vote to waive as well. While practical concerns about biennial waiver votes could be overcome (e.g., the waiver could be included as part of House and Senate Rules to be approved at the start of each session), the risk of a majority suppressing dissent is probably increased given new members' likely reluctance to break with colleagues over what is framed as essentially a housekeeping matter.

None of this is meant to suggest that Congress lacks the power to waive any nonconstitutional immunity it may possess with respect to violations committed within the scope of official legislative duties. This Article does not address the question of whether members of Congress are entitled to federal common law immunity for the discharge of official responsibilities beyond what is conferred by the Speech or Debate Clause. *Compare* Chastain v. Sundquist, 833 F.2d 311, 314–28 (D.C. Cir. 1987) (holding that members are not entitled to the same federal common law immunity that has been extended to state legislators, judges, and high executive officials) *with id.* at 328–35 (Mikva, J., dissenting) (arguing that members should have such immunity for noncore legislative activities). Even if members are entitled to a federal common law privilege similar to that enjoyed by other high-ranking government officials, such nonconstitutional immunities may be supplanted by federal legislation. *See generally* Batchelder, *supra* note 127, at 407–09 (arguing that Congress should act to override the holding in *Chastain*). The CAA could qualify as such a legislative supplanting if the test is less "explicit and unequivocal" than for waiver of Speech or Debate Clause protection.

Second, with respect to the possibility that the CAA provides protection to members comparable to what they enjoy under the Speech or Debate Clause, it should be emphasized that the latter immunity entails absolute protection from all forms of judicially controlled inquiry.[139] The CAA has immunized members from personal liability,[140] and protection against monetary exposure surely reduces the risks of distortion and distraction at which the Clause is aimed. The CAA does not eliminate such risks, however, because complaints challenging individual member conduct may still proceed.

The mere existence and processing of a complaint brought by a member's legislative aide can become the focus of potentially debilitating public or political attention. While the Act does provide for confidentiality in the complaint procedure, it also allows for discretionary and even mandatory disclosure in a number of circumstances.[141] Especially at election time, such disclosures can be used by the media or political opponents to inflict possibly irreparable discredit upon a member even if the employee's complaint ultimately fails.[142]

Other CAA provisions that structure the litigation process may also expose members to heightened public awareness and political vulnerability. For instance, the Act exempts from liability employment decisions affecting legislative staff that are based

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[139] A legislator asserting Speech or Debate Clause immunity must file a motion to dismiss in order to extinguish the judicial proceeding, but—assuming the Clause applies—that is the member's only responsibility. *See Powell*, 395 U.S. at 505 n.25.

[140] *See supra* Part I.B.

[141] While all counseling and mediation are strictly confidential, proceedings before the Board and its hearing officers may be made public for judicial review purposes, they may be disclosed to congressional ethics committees after consultation with the complaining employee or individual, and they may be disclosed as a general matter at the Board's discretion. Further, a decision by a hearing officer (if not appealed to the Board) or the Board must be made public if the decision favors the employee or if it is a Board decision reversing a hearing officer determination that had favored the employee. *See* Pub. L. No. 104-1, § 416, 109 Stat. 38–39 (1995) (codified at 2 U.S.C. § 1416 (Supp. II 1996)).

[142] For example, section 416(f) of the Act requires public disclosure of a Board decision discussing an employee's complaint if that decision reversed a hearing officer's judgment favoring the employee. *See* 2 U.S.C. § 1416(f) (Supp. II 1996). Even strong supporters of the CAA have expressed misgivings about the election-related damage that can be caused by unsuccessful legal suits. *See, e.g.*, 141 CONG. REC. S476 (daily ed. Jan. 5, 1995) (statement of Sen. William Roth (R-Del.)); 1993 *Joint Committee Hearings*, *supra* note 24, at 30 (statement of Sen. Don Nickles (R-Okla.)); *id.* at 101 (statement of Sen. Richard Lugar (R-Ind.)); 124 CONG. REC. 35,545–46 (1978) (statement of Sen. Glenn). *See generally* Nixon v. Fitzgerald, 457 U.S. 731, 762–63 (1982) (Burger, C.J., concurring) (observing that members must be "totally free from judicial scrutiny" for their legislative acts, and stressing that "[u]ltimate vindication on the merits does not repair the damage" of lawsuits held to be without merit).

on political incompatibility with the employing office.[143] Yet, assuming *arguendo* the complaining individual alleges that political incompatibility is a pretext for age, race, or disability-based animus, the resulting Board or judicial inquiry will likely delve into internal office operations.[144] The member who wishes to defend her personnel decision on political compatibility grounds will find her energies diverted and perhaps her legislative judgment impaired as well.

Further, the CAA provisions shielding members from personal litigation exposure[145] raise the prospect of a Hobson's choice. Because respondents are employing offices as opposed to individual legislators, and damage awards are to be paid through the OOC's Treasury account, members may discover that their principled assertions of blamelessness do not prevent the OOC from finding a violation or agreeing to a settlement that brings them unfavorable publicity. Members who wish to exert more direct influence on these outcomes may choose to participate in Board proceedings or to intervene at the judicial review stage.[146] Such initiatives, however, will in turn heighten the member's personal and political visibility in the litigation process. For all of these reasons, the threat to a legislator's independence of judgment and allocation of energies that results from employment-related proceedings remains substantial despite the CAA's insulating effect.[147]

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[143] *See* Pub. L. No. 104-1, § 502, 109 Stat. 39–40 (1995) (codified at 2 U.S.C. § 1432 (Supp. II 1996)).

[144] The political compatibility exemption applies to nine of the eleven workplace statutes included in the CAA, but not to the Federal Labor Relations Act. For further discussion of this exemption, *see infra* Part II.D.3.

[145] *See supra* text accompanying notes 45–50.

[146] *See* Pub. L. No. 104-1, § 407(a)(2), 109 Stat. 36 (1995) (codified at 2 U.S.C. § 1407(a)(2) (Supp. II 1996)) (authorizing intervention as of right in the court of appeals and contemplating that members may participate before the Board). *See generally* O'Reilly, *supra* note 32, at 29 (suggesting that members' "enlightened self-interest" is likely to stimulate intervention).

[147] It is difficult to assess the magnitude of this threat. The obvious dearth of employment-related actions brought against members in the past is not relevant because of the legal and practical barriers that until recently existed to discourage such actions. *See supra* text accompanying notes 19–30. Citizen actions alleging unlawful professional conduct by members of Congress have been perceived as problematic at least since the 1970s. *See* Richard E. Cohen, *When Congress Goes to Court*, NAT'L. J., Feb. 12, 1977, at 254 (discussing renewed interest on Capitol Hill in creating a special office to represent members of Congress named as defendants in civil lawsuits, and reporting at least a dozen such cases filed each year). While precise figures on such actions are not readily available, there is no reason to believe the number of actions brought is likely to decline. *Cf.* Clinton v. Jones, 117 S. Ct. 1636, 1658 (1997) (Breyer, J., concurring) (suggesting that in an increasingly litigious society, a sitting President may become a target for civil damages actions).

C. *Arguments Favoring Speech or Debate Clause Coverage for Certain Employment-Related Matters*

The case for extending Speech or Debate Clause immunity into the employment-related domain has not been sufficiently developed by courts or commentators. Accordingly, I adopt here the somewhat unconventional approach of first presenting a position that I will ultimately reject in order to demonstrate why it deserves to be taken seriously. The following two scenarios provide useful reference points for formulating the strongest arguments in favor of extending absolute immunity to members in their employment dealings with key legislative aides. In the first, an assistant counsel employed by the Senate Labor and Human Resources Committee seeks to organize those professional committee staff who are not subject to the relevant statutory exemptions.[148] The committee chairman, an implacable foe of unions from a right-to-work state, learns of the employee's effort and fires him. Alternatively, the assistant counsel does not attempt to organize employees, but is a middle-aged man. The chairman replaces him with a comparably aged woman, based on the chairman's stated desire for more diversity in committee policymaking positions. In both of these examples, there is a strong argument that the chairman's conduct merits protection under the Speech or Debate Clause.

The justification for extending Speech or Debate Clause immunity to certain employment-related matters begins with the fact that members of Congress are the only federal officials other than the President who are directly accountable to voters. Senators and representatives are elected as representatives of the people, presumably based on their articulation of and support for various legislative policies or proposals.[149] They will be judged

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[148] The FLRA provides, for example, that managers, supervisors, and confidential employees are not to be included in a bargaining unit. 5 U.S.C. § 7112(b) (1994). These exemptions and other specific aspects of FLRA application are discussed *infra* Part III.

[149] This policy-related bond exists between members of Congress and those they represent regardless of whether one views representative theory from the perspective of the legislator as an agent for those who elected her or as a trustee for the broader public good. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–58 (1988) (discussing republican theories of politics). *See generally* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (discussing interest group or pluralist theories of politics). Although the practical realities of congressional politics are far more complicated than political theory can describe, recent studies suggest that voters' policy-related preferences play a substantial role in shaping congressional election outcomes. *See, e.g.*, Suzanna De Boef & James A. Stimson, *The Dynamic Structure of Congressional Elections*, 57 J. POLITICS 630, 646 (1995) (concluding that change in

and perhaps rejected because of public perceptions as to their relative success in advancing these policies or proposals through the legislative process.[150] Given the institutional, political, and societal complexities that are part of the process, members cannot devise and implement legislative policy without considerable assistance from an inner circle of aides and advisors.[151]

In this setting, the goals of representative government require that each member of Congress be given broad control with respect to an inner circle of legislative staff. A senator or representative ought to have some individuals to whom she can talk without ever being held accountable by them for the things she says or the way she deals with them in verbal terms.[152] By exerting absolute—even arbitrary—direction over these indispensable aides, a member can more effectively advance her own legislative priorities. Conversely, her agenda may flounder because key aides can challenge and delay—or subvert—her decisions to reward what she deems initiative or to punish what she regards as disloyalty. If this occurs, her ability to deliver on her legislative proposals, and voters' ability to assess her legislative performance, will become clouded by her need to explain and justify her conduct as an employer.[153]

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citizen preferences on public policy affects the turnover rate among House members and also causes members to adapt their voting patterns at the margins); Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 AM. POL. SCI. REV. 385, 386–87, 392 (1988) (concluding that voters' ideological preferences influence their voting decisions in Senate elections); George Rabinowitz & Stuart E. MacDonald, *A Directional Theory of Issue Voting*, 83 AM. POL. SCI. REV. 93, 110 (1989) (contending that when a majority supports a particular policy position, the candidate who aggressively favors that policy is likely to have the advantage over a centrist opponent).

[150] *See, e.g.*, De Boef & Stimson, *supra* note 149, at 646; Abramowitz, *supra* note 149, at 387; Rabinowitz & MacDonald, *supra* note 149, at 115.

[151] For discussions of the substantial policy-related role played by congressional staff, *see, e.g.*, BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING 72–73 (1995); C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE 27–33 (1991); CHARLES R. WISE, THE DYNAMICS OF LEGISLATION 35–37 (1991); GLENN R. PARKER, CHARACTERISTICS OF CONGRESS 146 (1989).

[152] This lack of accountability does not extend to physical restraint or harm inflicted on a close aide or advisor. Elected officials should have an unchallenged zone in which to articulate and develop policies and ideas. Subjecting aides to involuntary servitude or assault, however, bears at best an attenuated relationship to this goal, and is incompatible with general norms of criminal conduct in our society.

[153] The argument here is that a member's inability to promote a legislative agenda in the manner the member would have chosen (i.e., through key aides) curtails opportunities to accomplish what the voters elected the member to do and impedes the electorate's capacity to hold the member fairly accountable based on her actions as a legislator. This is not to suggest that a member's arbitrary or discriminatory conduct as an employer should be off limits to voters. The media and the political opposition are still capable of discovering and publicizing personnel actions involving key aides that are assertedly violative of individual rights, and such developments may lead voters to turn

The Supreme Court has recognized the compelling nature of promoting effective and accountable representative government. In a series of cases pertaining to elected state executive officials and their top policymaking aides,[154] the Court has held that the general practice of patronage dismissal and hiring unconstitutionally restricts First Amendment rights of political belief and association. In each instance, however, the Court has reserved a limited number of policymaking positions as to which the need for political loyalty and responsiveness justifies infringing upon individual employee rights.[155] An elected sheriff or governor may exercise this degree of control over top aides, including those "who help [the governor] write speeches, explain his views to the press, or communicate with the legislature."[156] He is allowed to do so because "representative government [should] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate."[157] While the obstruction in traditional patronage settings stems from partisan or ideological factors, a governor's need for absolute discretion regarding his selection of high-level aides should not be limited by reference to such factors.[158] As

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on an otherwise popular senator or representative. *See* Foster Church, *Packwood's Future Divides Voters*, PORTLAND OREGONIAN, Dec. 16, 1992, at A1 (reporting that in light of allegations of sexual misconduct by Senator Robert Packwood (R-Or.) that were disclosed in the *Washington Post*, one-third of those who voted for Packwood on November 3, 1992, would now vote against him); *Protest Urges Barring of Packwood*, PORTLAND OREGONIAN, Jan. 5, 1993, at B1 (reporting that the National Organization of Women demonstrated at Packwood's Senate office in Washington urging that he not be sworn in for his new term, and that five petitions filed with the Senate by Oregon residents also urged that Packwood not be seated). Still, the voters' assessment of a member's conduct as an employer would be separable from their assessment of how that member functions as a legislator utilizing the essential instruments she selected for herself.

[154] *See* Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980); Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

[155] *See Elrod*, 427 U.S. at 367–68 (recognizing exception for patronage dismissals in policymaking positions); *Branti*, 445 U.S. at 518 (preserving patronage dismissal exception for certain high-level assistants); *Rutan*, 497 U.S. at 74 (applying same exception to patronage decisions affecting promotion, transfer, recall, and hiring).

[156] *Branti*, 445 U.S. at 518.

[157] *Elrod*, 427 U.S. at 367 (Brennan, J., plurality).

[158] In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), the Court extended the *Elrod-Branti-Rutan* line of authority to prohibit adverse employment actions taken by rival factions of the same political party even if the factional differences are non-ideological. Because "politics . . . has the undeniable potential to be an ideological activity," the court concluded that even employment practices that only potentially threaten political association are highly suspect. *Id.* at 1552–53. By the same token, even non-ideological employment decisions affecting an inner circle of aides may be protected precisely because they implement the political preferences of a directly accountable elected official.

Professor Alexander Bickel observed in an analogous context when advocating the President's need for arbitrary authority over the tenure of his key assistants, "[h]is whim should rule, because it is desirable to enlarge as much as possible his personal political responsibility, and this demands a special kind of loyalty and responsiveness of his immediate subordinates."[159]

The Court has laid the foundation for according this same type of protection or authority to members of Congress. In *Gravel v. United States*,[160] the Court acknowledged that staff play an essential role in enabling members to fulfill the legislative tasks for which they were elected.[161] The extension of the speech or debate privilege to cover activities of key staff may well exceed what was contemplated by the Framers.[162] Nonetheless, the expansion is responsive to a modern legislative process in which certain staff regularly draft statutory language, advocate policy positions, and negotiate legislative compromises on behalf of their members.[163] As the Court in *Gravel* observed, "the day-to-day work of such aides is so critical to the [m]embers' performance that they must be treated as the latter's alter egos; and if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated."[164] For a number of employees who serve on a member's personal, committee, or leadership staff, job performance regularly requires meaningful discretionary input into the lawmaking process. Because these employees are substantially and continuously identified with their principal's legislative activities, a member's

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[159] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 186 (1962).

[160] 408 U.S. 606 (1972).

[161] *See id.* at 613–22.

[162] Some Justices have wondered aloud about the Court's evolutionary approach to interpreting the Speech or Debate Clause. During oral argument in *Davis v. Passman*, 442 U.S. 228 (1979), which took place nearly seven years after *Gravel* was decided, the following exchange occurred between one of the Justices and counsel for respondent:

> QUESTION: I know it's water over the dam, but it has always worried me. Just frankly, when the Speech or Debate Clause was adopted, how many people do you think our founding fathers intended that to apply to, numerically?
> MR. GEAR: Numerically, at that time the legislators did not have the immense staffs that they have today.
> QUESTION: They didn't have any staff, did they?
> MR. GEAR: I would assume that is correct. They rode on a horse to Congress. But the Constitution does develop—
> QUESTION: From that day up until now there has been quite a lot of water—

LANDMARK BRIEFS AND ARGUMENTS, *supra* note 92, at 572.

[163] *See, e.g.*, PARKER, *supra* note 151, at 146; EVANS, *supra* note 151, at 27–28; Malbin, *supra* note 81, at 154–60.

[164] *Gravel*, 408 U.S. at 616–17.

determinations regarding the selection and retention of aides become an integral component of the member's participation in the legislative process.[165]

The fact that senators and representatives consistently delegate decisionmaking authority to their top aides as part of the lawmaking enterprise may also justify extending broader employment-related immunity to members of Congress than to judges. The Supreme Court in *Forrester v. White*[166] considered whether a state judge should have absolute immunity from a damages action brought under 42 U.S.C. § 1983 for his decision to demote and dismiss a court probation officer. The Court held that a judge should not enjoy such absolute immunity under federal common law because the employment decision was administrative rather than judicial in nature.[167] At the same time, the Court in *Forrester* observed that judges have very little freedom to delegate the performance of judicial acts to their subordinates, and consequently judicial independence will not be unduly threatened if these subordinates are permitted to challenge demotion or termination decisions.[168] By contrast, legislative deliberations may suffer significant, albeit "indirect[,] impairment"[169] from such a challenge, because it could trigger wide-ranging inquiry into a member's judgment regarding the optimal preferred means of promoting the member's legislative agenda. Indeed, if the se-

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[165] Consistent with this line of analysis, an employee's occasional or infrequent exercise of substantial legislative judgment should not trigger absolute immunity regarding decisions affecting that employee's job status. If employment-related litigation implicates such a discrete event, the legislative privilege may apply to limit discovery or otherwise restrict the outside inquiry. For discussion of how to decide whether an employee's exercise of legislative authority is an "occasional" or a "regular" component of his job, *see infra* text accompanying notes 172–175. The standard articulated here refers to delegated decisionmaking authority involving the exercise of discretion and judgment. *Cf.* Agromayor v. Colberg, 738 F.2d 55, 60 (1st Cir. 1984). By contrast, the D.C. Circuit in *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986), concluded that the decision to terminate an official House reporter was protected by the Speech or Debate Clause because the reporter's duties "were directly related to the due functioning of the legislative process." *Id.* at 929 (emphasis omitted). This approach is too formal and mechanical: personnel decisions for employees whose ministerial performance is a "cog in the legislative machine" do not warrant a constitutional immunity that is based on respect for political accountability.

[166] 484 U.S. 219 (1988).

[167] *See id.* at 229–30.

[168] *See id.* at 230. Specifically, the Court stated that "to the extent that a judge is less free than most Executive Branch officials to delegate decisionmaking authority to subordinates, there may be somewhat less reason to cloak judges with absolute immunity from such suits than there would be to protect such other officials." *Id.* Members of Congress also are considerably more free than judges to delegate decisionmaking authority, and in fact do so on a regular basis.

[169] *Gravel,* 408 U.S. at 625.

lection or retention of key aides becomes the object of protracted litigation, members are likely to shift their attention and energies to other portions of their agenda, with a resultant loss of legislative opportunities.[170]

A return to the hypothetical scenarios set forth at the start of this section may help illustrate the latter point. In the first scenario, the Senate Labor and Human Resources Committee chairman terminates his union-organizing committee counsel, replacing him with a qualified attorney who has been working for a militantly anti-union coalition. The decision may result from the chairman's desire to restore aggressive thinking among top staff in the hope of generating new anti-union legislative proposals. Alternatively, the decision may best be understood as a clear statement that the chairman speaks with one voice regarding the role of unions in society, thereby removing any uncertainty among his colleagues on the committee or in the Senate at large. Either purpose—to strengthen an internal policy priority or to solidify an ideological reputation with other senators—reflects conduct designed to promote a legislative agenda, conduct that arguably qualifies as core privileged activity. Under the second scenario, in which the committee chairman replaces his male counsel with a female, there may be a related but distinct legislative motivation at work. The chairman's selection of a woman may be due to a desire to diversify the committee's heavily male professional staff and thereby promote a cross-section of perspectives among his top legislative advisors. In this regard, a member's personnel judgments regarding key legislative aides may represent a decision to reaffirm or to depart from prior policy positions.

The chairman may, of course, hope to further other objectives that are not integrally related to the legislative process.[171] In

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[170] *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 109–10, 176–78 (1984) (discussing how legislative opportunities are lost when key players shift their attention to other problems that have greater chances for success); James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 26 (1994) (discussing how Congress abandons legislative efforts, sometimes in short order, if it becomes counterproductive to invest more time in the matter).

[171] For example, a chairman might aim to demonstrate for interest groups and other constituents his deep opposition to unions or his support for women. This effort to inform members of the public is an important official function, but it would not be one essential to the deliberative legislative process, at least according to the Supreme Court. *See* Doe v. McMillan, 412 U.S. 306, 314–315 (1973); Gravel v. United States, 408 U.S. 606, 625 (1972); United States v. Brewster, 408 U.S. 501, 528 (1972). Other goals might be to express personal discomfort or dislike toward unions and to satisfy a per-

practical terms, the decision at issue here is likely to reflect a subtle combination of legislative and non-legislative purposes or motives. Allowing the dismissed committee counsel to file an action under the CAA would produce efforts to identify the primary or determining motivation in order to assess whether that primary motivation was impermissibly discriminatory under the FLRA or Title VII. Such efforts ultimately would challenge the chairman to explain or to justify these legislative judgments in court. Even assuming that the chairman prevails in this action, his legislative effort to generate new anti-union legislation or to include issues of concern to women is likely to flounder while the litigation process has both a chilling effect on his new aide's performance and a diverting impact on the chairman's own time and energies. Such a temporary setback might well be fatal in the context of an always-crowded legislative calendar.

There will doubtless be linedrawing problems concerning which aides are so substantially and continuously identified with a member's legislative activity that decisions addressing their job status or tenure should receive absolute immunity.[172] These problems, though, do not differ in kind from the problems of proof facing a governor who seeks to establish that certain policymaking aides may be dismissed based on their political beliefs or affiliations.[173] Indeed, the competitive and professionalized nature of congressional employment means that patterns of delegated authority will be at least broadly analogous between one member's personal office and another's, or from one committee staff to another.[174] Accordingly, it should not be unduly difficult or time-consuming to decide which staff positions are dominated

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sonal desire for increased female companionship. These goals too would be non-legislative in nature.

[172] *See supra* note 165, discussing aides with occasional alter ego status.

[173] *See* Elrod v. Burns, 427 U.S. 347, 367–68 (1976) (stating that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions," and that the "political loyalty 'justification is a matter of proof [by the government employer], or at least argument, directed at particular kinds of jobs'" (quoting Illinois State Employees Union v. Lewis, 473 F.2d 561, 574 (7th Cir. 1972)); Branti v. Finkel, 445 U.S. 507, 518 (1980) (reiterating that "it is not always easy to determine whether a position is one in which political affiliation is a [constitutionally] legitimate factor to be considered").

[174] *See generally* Malbin, *supra* note 81, at 136–60 (discussing allocations of job responsibility within personal staff, committee staff, and leadership staff); REPORT OF THE SECRETARY OF THE SENATE FROM OCT. 1, 1996 TO MAR. 31, 1997, D19–D23 (listing job titles and semiannual salaries for various job classifications within Senate majority and minority leadership staff); *id.* at D25 to D126 (same for senators' personal staffs); *id.* at D129 to D152 (same for Senate committee staffs).

by responsibilities and activities that implicate the decisions of the member as a legislator.[175]

D. *The Speech or Debate Clause Should Never Apply in the Employment Setting*

Despite the force of the arguments presented above, Speech or Debate Clause immunity should not be extended to any employment-related activities, including those that involve the hiring or retention of a member's closest legislative advisors. Ultimately, claims made in favor of applying the constitutional privilege are unpersuasive.

The uncompromising language of the Speech or Debate Clause posits total immunity for members outside the chamber if their legislative activities cause injury or offense. Even if the constitutional rights of others are being abridged, the Court has relied on the need to preserve legislative independence as expressly precluding any judicial effort to vindicate those rights.[176] Moreover, unlike other privileged actors whose speech-related activity can inflict serious harm on individuals, members of Congress are vested with an absolute and unqualified privilege that is not subject to balancing tests based on their alleged bad faith or malicious intent.[177] It is the very nature of this Speech or Debate Clause protection—absolute and not susceptible to any balancing of competing interests[178]—that gives rise to concern. The Constitution was conceived as a series of checks and balances,

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[175] For example, one can distinguish between personal office staff, who act on a member's behalf in the legislative process by drafting and negotiating floor amendments, and employees who perform liaison work with a member's home district or engage in casework-related services for constituents. This is an area in which the OOC could play a constructive role, either by promulgating a rule for offices to apply or by developing a series of advisory opinions in response to individual office requests for clarification and assistance. Of course, the OOC plays no such role now because review of the CAA's constitutionality has not confronted the Speech or Debate Clause issue.

[176] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509–10 (1975) (finding that the Clause provides absolute immunity against judicial interference with legitimate legislative activity even if judicial intervention would vindicate First Amendment rights); Doe v. McMillan, 412 U.S. 306, 312–13 (1973) (holding that members of Congress and their aides are immune from liability for legislative actions even though their conduct, if performed in another context, would be unconstitutional or otherwise violative of criminal or civil statutes).

[177] *Cf., e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (allowing public officials to recover damages from the press if defamatory falsehood was published with actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (allowing private individuals to recover damages for false publication on lesser fault-based standard).

[178] *See Eastland*, 421 U.S. at 509 & n.16.

and no provision should be understood or applied in isolation from all others.[179] When the absolute protection of the Clause is integrated into the larger constitutional scheme, a persuasive argument can be made that the Clause should not cover the employment area at all. Both the Supreme Court's decisions applying the privilege and the Clause's underlying rationale are best understood from this perspective.

1. Supreme Court Ambivalence Regarding Coverage

In its first decision construing the Speech or Debate Clause, the Court in *Kilbourn v. Thompson*[180] expressed some discomfort over the potential sweep of the legislative privilege. While *Kilbourn* held that members were protected for legislative acts other than mere speech,[181] the Court recognized a possibility that even speech might lose its absolute privilege if it amounted to an "utter perversion of [legislative] powers to a criminal purpose."[182] The Court subsequently narrowed this possibility, though in doing so it reaffirmed a willingness to articulate potential limits on the seemingly unqualified freedom of legislative conduct.[183]

Moreover, in a series of decisions beginning with *Kilbourn*, the Court repeatedly has determined that legislative employees may be held liable for conduct undertaken at members' direction to implement members' privileged legislative acts. Thus, the House Doorkeeper, Clerk, and Sergeant at Arms were held accountable for carrying out a privileged resolution to exclude Representative

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[179] *See generally* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (observing that "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (cautioning against "judicial definitions of the power of any of [the] branches [of government] based on isolated clauses or even single Articles torn from context").

[180] 103 U.S. 168 (1880).

[181] *See id.* at 200–04. The case involved an alleged false imprisonment carried out by the House Sergeant at Arms after petitioner had failed to comply with a subpoena voted by House committee members. The Court held that the House members were absolutely privileged for their votes. *See id.*

[182] *Id.* at 205. The Court cited the Long Parliament's role in ordering the execution of Charles I, and the French Assembly's similar exercise of the function of overseeing capital punishment. *See id.*

[183] *See* United States v. Johnson, 383 U.S. 169, 184–85 (1966) (stating that the claim of an unworthy or even a criminal purpose cannot interfere with absolute privilege); *accord* Tenney v. Brandhove, 341 U.S. 367, 377 (1951). The Court in *Johnson* expressly left open the possibility that a narrowly drawn criminal statute, enacted by Congress pursuant to its authority to regulate member conduct, might justify inquiry into the motives behind legislative speech. *See Johnson*, 383 U.S. at 185.

Adam Clayton Powell (D-N.Y.);[184] a Senate committee counsel was held answerable for information-gathering activity that was part of a privileged committee hearing;[185] and the Public Printer and Superintendent of Documents were held accountable for printing at Congress's direction more than the usual number of copies of a privileged House committee report.[186] The Court has explained these determinations by distinguishing between the privileged performance of a legislative act and the unlawful implementation of that act as it affects the rights of others.[187]

But an illegal implementation rationale begs the key question of whether the essentially ministerial actions of these employees should be seen as part of the legislative process. If the act of implementation is the natural extension of a legislative vote, and it is necessary to give effect to that vote, one could reasonably infer that protection should attach to the agents of Congress whose duty it is to perform the act. The Court's unwillingness to accept that conclusion reflects an abiding concern over the potential for conflict between protecting legislative independence and preserving legal redress for persons victimized by the exercise of that independence.[188]

The tension between these two constitutional imperatives—legislative independence and judicial review—is a useful way to approach the Court's post-1970 decisions restricting the scope of immunity for conduct that appears closely related to the legislative process. In several cases the Court has held that efforts by members or aides to republish a legislative speech or report, or otherwise to disseminate information about activities occurring within the Congress, do not qualify for speech or debate immunity.[189] Similarly, the Court has concluded that efforts by com-

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[184] *See* Powell v. McCormack, 395 U.S. 486, 504–06 (1969); *see also Kilbourn,* 103 U.S. at 204 (holding Sergeant at Arms accountable for false imprisonment for executing a House-approved arrest warrant).

[185] *See* Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

[186] *See* Doe v. McMillan, 412 U.S. 306, 320–24 (1973).

[187] *See* Gravel v. United States, 408 U.S. 606, 620 (1972) ("None of these . . . cases adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection.").

[188] *See id.* at 621 (recognizing that in *Kilbourn, Powell,* and *Dombrowski,* "protecting the rights of others may have to some extent frustrated a planned or completed legislative act").

[189] *See* Hutchinson v. Proxmire, 443 U.S. 111, 115–16, 127–33 (1979) (refusing to extend privilege to a senator's allegedly defamatory press release reprinting a speech that appeared in the Congressional Record); *Doe,* 412 U.S. at 313–18 (refusing to extend privilege to committee staff for publicly disseminating copies of a committee re-

mittee staff to acquire information through informal processes and sources (i.e., without relying on subpoena authority) as part of an investigation or hearing are not protected by the privilege.[190] Informing the public and gathering information are important, arguably critical, elements of an effective lawmaking operation.[191] The Court, however, has opted for a more canonical and restrictive approach to Congress's constitutionally prescribed functions.[192] In order to qualify for immunity as an "integral part" of the legislative enterprise, the challenged speech or conduct must be an actual component in the formal processes of investigating, formulating, advocating, and voting that culminate in approval or rejection of a proposed law.[193] All other official activities undertaken by members and their staffs are subject to judicial review.

Consistent with this approach, employment-related decisions should be unprotected. Admittedly, a legislator's dealings with personal or committee staff are internal to the Congress, in contrast to her dealings with constituents, Executive Branch agencies, and the public at large. Yet, the same distinction applies between what is a constitutive part of the decisionmaking process and what is a valuable or even essential precondition for sound legislative decisionmaking. In establishing terms and conditions of employment for top aides, a member decides what is necessary to enable her to participate as an effective legislator, but that decision is not itself a form of legislative participation.[194]

Before concluding that prior Supreme Court decisions debar use of the privilege in the employment setting, it is worth pondering whether the Court ought to reconsider its conception of the legislative process. The Court's vision of how laws come to be enacted can surely be criticized as both incomplete and unrealis-

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port that allegedly invaded privacy interests); *Gravel*, 408 U.S. at 622–26 (refusing to extend privilege to efforts by a senator and staff to arrange for private republication of documents introduced and made public at a committee hearing).

[190] *See Gravel*, 408 U.S. at 627–29.

[191] *See* Reinstein & Silverglate, *supra* note 100, at 1148–55; Ervin, *supra* note 121, at 184–88.

[192] In this regard, the Court earlier had stated in dicta that the Speech or Debate Clause would not apply to members' contacts with administrative agencies or executive officials regarding the administration of federal statutes. *See* United States v. Johnson, 383 U.S. 169, 172 (1966).

[193] *Gravel*, 408 U.S. at 625.

[194] *Cf.* Forrester v. White, 484 U.S. 219, 229 (1988) (analyzing scope of immunity with respect to judicial decisionmaking and concluding that dismissal of a judge's probation officer, while perhaps "crucial to the efficient operation" of the court, is not an adjudicative function).

tic.[195] Legislators regularly use staff to gather information on controversial or sensitive subjects so that they can identify the magnitude of a problem and decide whether it is susceptible to a legislative solution. Hearings and subpoena authority are important means to this end, but preliminary and less formal methods of information gathering are often needed as well if Congress is to develop and maintain an adequate knowledge base. Similarly, members and their staffs frequently contact executive agencies as part of an effort to assess the burdens of compliance with a given statute or the extent of noncompliance with that law. While the contacts may be triggered by constituent requests or protests, the resulting assessment may well produce an amendment to the existing legislative scheme. Finally, disseminating information to the public can be a central part of members' attempts to generate broad support on a pending legislative matter. In an era when public opinion survey results help set the priorities for Congress's legislative agenda, members may seek to influence scheduling determinations through aggressive efforts to elevate public awareness of their issues.

Each of these activities—gathering information, contacting agencies, and publicizing positions—is part of the business of legislating. At the same time, each also has other purposes such as providing service to constituents, exerting control over agency performance, or increasing name recognition among potential voters. The Court was at best oversimplifying when it referred to such activities in categorical terms as "political in nature rather than legislative."[196]

Still, unless the Court imposes well-defined limits on the term "legislative process," the Speech or Debate Clause privilege could cover almost everything members do in their quest for legislative success. Neither the language of the Clause nor its under-

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[195] For criticism from members of Congress, see, for example, CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, *supra* note 21, at 45–48. *See also* 134 CONG. REC. H3188–93 (daily ed. May 12, 1988) (criticizing D.C. Circuit decision in Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987), discussed at *supra* note 138). For criticisms by commentators, see, for example, *Hearings on Constitutional Immunity of Members of Congress Before the Joint Committee on Congressional Operations*, 93d Cong. 54–58 (1973) (statement of former Supreme Court Justice Arthur J. Goldberg); Reinstein & Silverglate, *supra* note 100, at 1148–63. Congress in 1974 failed to enact a proposed statute providing a broader non-constitutional definition of legislative activity. Failure was attributable in part to members' general fear of voter backlash and in part to the particular circumstances of Congress seeking to broaden legislative privilege at a time when it was battling with President Nixon over the scope of executive privilege. *See* Batchelder, *supra* note 127, at 407–10.

[196] United States v. Brewster, 408 U.S. 501, 512 (1972).

lying purpose suggests that members are meant to enjoy such breadth of absolute protection from the rule of law. By characterizing the legislative process as basically inward-looking, the Court has fudged reality in order to accommodate competing rights and interests in our legal system. Members of Congress possess considerable authority under Article I, and they have on occasion shown themselves capable of abusing that authority.[197] When a legislator's abuse is tantamount to criminal misconduct, a broad refusal to allow prosecution may undermine the public's right to honest representation as well as their interest in the fair administration of criminal justice.[198] When a member's mistreatment harms the civil rights of private individuals, those adversely affected cannot seek vindication through the prosecutorial powers of the executive. If the judiciary is unable to protect these individuals as a matter of principle, they may well be vulnerable to the authority of the Legislative Branch.[199] Thus, even

[197] The Court in *United States v. Rumely*, 345 U.S. 41, 44 (1953), recognized that the Bill of Rights imposes restraints on congressional investigations. In *Watkins v. United States*, 354 U.S. 178, 215 (1957), the Court invalidated on Fifth Amendment due process grounds a conviction for refusing to answer questions propounded as part of an investigation undertaken by the House Committee on UnAmerican Activities (HUAC). Notwithstanding these decisions, Congress in the 15 years following World War II authorized wide-ranging inquiry into the lives and affairs of private citizens, which led to numerous convictions for refusal to answer questions or produce documents requested by HUAC and other congressional committees asserting national security interests. *See, e.g.*, Wilkinson v. United States, 365 U.S. 890 (1961); United States v. Fleischman, 339 U.S. 991 (1950); United States v. Yellin, 287 F.2d 242 (7th Cir. 1961); Liveright v. United States, 280 F.2d 708 (D.C. Cir. 1960); Braden v. United States, 272 F.2d 653 (5th Cir. 1960); Bart v. United States, 203 F.2d 45 (D.C. Cir. 1952); *see also* United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1264–68 (D.C. Cir. 1973) (holding that subpoena for bank records authorized by a Senate committee chairman violated the First Amendment rights of a non-profit corporation), *rev'd on other grounds*, 421 U.S. 491 (1975).

[198] *See Brewster*, 408 U.S. at 524–25 (discussing right to honest representation); *cf.* United States v. Nixon, 418 U.S. 683, 707–13 (1974) (discussing due process demands in criminal law context).

[199] Congressional committees possess powers of investigation and inquiry that can inflict enormous burdens and penalties on private individuals. *See Watkins*, 354 U.S. at 187 (holding that Congress lacks general authority to expose private activities and associations of individuals without a legitimate legislative purpose); Hentoff v. Ichord, 318 F. Supp. 1175, 1181–83 (D.D.C. 1970) (enjoining publication, except through Congressional Record, of a report by House Committee on Internal Security, on grounds that it amounted to little more than an effort to blacklist individuals whose views differed from those of committee members); Amy Keller, *Groups Join Together to Fight Senate Subpoenas*, ROLL CALL, Sept. 4, 1997, at 26 (describing recent efforts by diverse groups—including the Christian Coalition, the National Right to Life Committee, the International Brotherhood of Teamsters, and the Association of Trial Lawyers—to resist allegedly unconstitutional subpoena requests from the Senate Governmental Affairs Committee investigating campaign finance abuses). *See generally* George F. Kennan, *Persecution Left and Right*, *in* MCCARTHYISM 87–97 (Thomas C. Reeves ed., 3d ed. 1989); Ellen W. Schrecker, *The Two Stages of McCarthyism*, *in* MCCARTHYISM at 98–101.

if there are objections to particular aspects of its linedrawing, the Court's underlying ambivalence reflects a sensible determination that lines must be drawn to balance the importance of legislative independence against the need to protect the rights of other constitutional actors.

Congressional employees, of course, are also vulnerable to misuse of authority by members of the Legislative Branch. If anything, they would seem less able to assert their rights than members of the public at large.[200] Further, there are additional policy and practical reasons why the legislative privilege is peculiarly inapt with respect to employment-related matters.

2. Considerations of Policy and Practice

The rationale supporting speech or debate immunity, as discussed earlier,[201] is that senators and representatives can more capably fulfill their Article I legislative responsibilities if their judgments are neither distorted nor their energies diverted by the risk that they will be questioned outside of Congress for their legislative activities. This rationale is best understood as focused on the distinctive position of persons affected by the lawmaking enterprise, namely the public. Members of Congress are uniquely responsible to the public in their special capacity as legislators. The Speech or Debate Clause recognizes a risk of excessive reaction from that public: organized groups or individual constituents may be disappointed or offended by what senators and representatives have said or done as legislators. The Clause guards against the possibility that the groups or individuals frustrated by legislative performance will seek to vent their frustrations in court rather than the voting booth.

Individuals employed by a member or committee office are not similarly situated. A member's responsibility to them is not specially defined under Article I of the Constitution. Moreover, their frustrations are not materially different from the frustrations expressed by the employees of any other employer.[202] A dismissed legislative committee aide who seeks vindication in

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[200] *See supra* text accompanying notes 28–30 (discussing employees' fear of asserting their rights); *supra* text accompanying notes 82–84 (discussing employees' lack of interest in asserting certain rights).

[201] *See supra* text accompanying notes 112–114.

[202] *Cf.* Forrester v. White, 792 F.2d 647, 667 (7th Cir. 1986) (Posner, J., dissenting), *rev'd on other grounds,* 484 U.S. 219 (1988) (observing that a judge sued for employment discrimination is comparably situated to other public or private employers).

court is challenging the committee chairman's conduct as an administrator rather than the chairman's performance as a legislator.[203]

To be sure, the chairman may well contend that a judicial challenge to his personnel judgment will end up diminishing his legislative capacities as well, and that if allowed such challenges will proliferate for ideological or partisan reasons. The concern that senators and representatives will have their energies diverted by litigation is not, standing alone, of constitutional importance. Members of Congress may be sued for anything from child support to default on a car loan without making the consequent diversion of their energies worthy of Article I attention.[204] Moreover, it is far from clear why individuals or groups ideologically opposed to a member's legislative positions would prefer to advance their opposition through litigation rather than through other means. Members of Congress may be weakened or toppled for their official non-legislative activities through concerted criticism from interest groups or political opponents, or through the persistent attention of the media.[205] While litigation does add the potential for discovering new inculpatory information, it can be a two-edged sword. Discovery provides senators and representatives with an opportunity to question and perhaps intimidate their

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[203] *See 1993 Joint Committee Hearings*, *supra* note 24, at 255 (statement of Nelson Lund); *1994 House Committee Hearings*, *supra* note 24, at 443 (statement of Harold Bruff). An aide may on occasion be motivated to bring such a challenge out of disappointment or anger over his inability to influence the member's legislative performance. The survival and success of such a legal claim, however, will require a focus on the distinct issue of the member's performance as an employer. The aide's success in inflicting political damage will be a function of whether his frustrations are embraced by interest groups or partisan opponents, or publicized by the media. Litigation is not necessary, and may not even be helpful, to achieve such ends. *See infra* text accompanying note 205.

[204] *Cf.* Clinton v. Jones, 117 S. Ct. 1636, 1650 (1997) (concluding that burdens on the President's time and energy from litigation unconnected to official performance do not require federal courts to stay private actions against the President while in office).

[205] Recent examples include the demise of Senator Bob Packwood's legislative career following media disclosure of his alleged sexual misconduct, *see supra* note 153, and also the serious damage done to both Speaker Newt Gingrich following his $4.5 million book advance and Senator Carol Mosley-Braun (D-Ill.) as a result of several controversial actions she had taken. *See, e.g.*, Janet Hook, *Hard Fight Led to a Hard Fall*, L.A. TIMES, Sept. 9, 1995, at A1 (detailing events leading to Sen. Packwood's resignation nearly three years after the Washington Post first published allegations against him); Katherine Q. Seelye, *House Speaker Says Democrats Are Trying to Destroy Him*, N.Y. TIMES, Jan. 20, 1995, at A24 (reporting on intensity of political criticism aimed at Speaker Gingrich); John Kass, *Mosley-Braun Loses Power Base—Senator Hurt By Controversy*, CHI. TRIB., June 22, 1997, at 1 (reporting that Sen. Mosley-Braun's high negative ratings are closely tied to character issues stemming from official non-legislative conduct).

accusers. Further, access to a neutral forum offers the chance to reshape the public's perception of the alleged misconduct, if not to obtain total vindication. In short, the congressional employment relationship is not within the zone of interest contemplated under the basic policy rationale that justifies speech or debate immunity.

At the same time, personal or committee aides are especially susceptible to mistreatment if members of Congress are accorded immunity in their employment relationships. When outside individuals or groups complain about official congressional conduct, the existence of a public record will likely provide an accessible and adequate basis for resolving legal claims.[206] Such claims often challenge institutional action taken by a house or committee, in which case injunctive or declaratory relief may be secured against the institution rather than individual members.[207] By contrast, when current or former legislative aides complain about the actions of their employers, they are alleging wrongful speech or conduct by an individual member in charge of a personal or committee staff. In many instances, it is likely that such speech or conduct was observed only by the legislator and the prospective plaintiffs. If the privilege applies, the affected employees would have no other means by which to challenge or even question the legislator's actions in an effort to vindicate their rights. Such a result is especially troubling if the asserted violation implicates the constitutional rights of these individuals.[208]

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[206] *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 115–17 (1979) (relying on press release); Watkins v. United States, 354 U.S. 178, 209–14 (1957) (relying on transcript of committee hearing).

[207] *See, e.g.*, *Watkins*, 354 U.S. at 216 (reversing criminal conviction); Bergman v. Senate Special Comm. on Aging, 389 F. Supp. 1127 (S.D.N.Y. 1975) (enjoining in part compliance with committee subpoena); Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) (enjoining republication of committee report).

[208] Examples would be discriminatory job actions taken on the basis of an employee's race, gender, or protected associational rights. Under the *Elrod-Rutan* line of authority, *see supra* text accompanying notes 154–155, the government official asserting absolute control over conditions of employment must prove a compelling interest in having a particular job depend on loyalty and responsiveness, *and* that this was the official's true motive (e.g., not masking animus toward protected expression or association). Under the Speech and Debate Clause, however, the only inquiry would be whether the job position itself was integral to the legislative process; if so, the issue of unconstitutional motive would never be reached.

3. Pro-Immunity Contentions Addressed

The argument favoring constitutional immunity with respect to certain staff relied on the important interest in promoting effective and accountable representative government. Members of Congress have a strong interest in the fulfillment of their role as accountable representatives, and they—like elected executive officials[209]—should be accorded broad discretion when deciding on the selection or retention of key aides. One can agree, however, that there is a vital interest in granting legislators such broad discretion without relying on the Speech or Debate Clause at all.

Protection for dealing with subordinates who function as alter egos—a protection established by the *Elrod* line of cases—is not itself a constitutional right or immunity. Rather, it is a public policy interest in being surrounded with politically or ideologically compatible key aides that is compelling enough to outweigh the First Amendment rights of the affected individual employees.[210] Members of Congress can assert a comparably compelling interest in the exercise of broad employment-related discretion regarding key legislative advisors so as to advance or defend their individual legislative priorities. Moreover, Congress collectively is able to establish such discretion for its individual members, though it is not required to do so under the Speech or Debate Clause or any other provision of Article I. If members' employment-related discretion is not a function of Speech or Debate Clause immunity, it does not assume the absolute and unqualified status that would be accorded such immunity. One consequence is that Congress can more readily waive its strong interest in promoting loyalty and political compatibility from top aides by enacting a statute that in its view recognizes an even

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[209] *See supra* text accompanying notes 154–159.

[210] *See* Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990) (referring to the "government's interest in securing employees who will loyally implement its policies"); Branti v. Finkel, 445 U.S. 507, 517 (1980) (referring to the "State's vital interest in maintaining governmental effectiveness and efficiency"); Elrod v. Burns, 427 U.S. 347, 367 (1976) (referring to "the need for political loyalty of employees . . . to the end that representative government not be undercut."). This type of balancing approach may also allow the compelling interest in promoting effective and accountable representative government to outweigh employees' rights to equal protection under the Fifth Amendment. *Cf.* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (holding that a state university's use of race in its admissions process can survive strict scrutiny); Califano v. Webster, 430 U.S. 313 (1977) (holding that the federal social security retirement benefits statute according higher payments to women than to similarly situated men served a compelling governmental interest).

stronger public policy consideration—namely, assuring that Congress adheres to the same rule of law it prescribes for the nation as a whole.[211]

The text of the CAA indicates that Congress recognized the special importance to members of politically compatible employees in a legislative setting. Yet in creating an exemption from liability for personnel judgments that rely on political compatibility with the employing office,[212] the CAA is unlikely to be the last word on this matter. By allowing members to invoke political compatibility with respect to *all* employees on their personal and committee staff, the exemption appears substantially overinclusive. The teaching of *Elrod* and its progeny is that, outside of a limited number of policymaking positions, the government's interest in political loyalty of employees is not sufficient to outweigh those employees' constitutional rights. For reasons already explained, the limited circle in the congressional setting is far smaller than a member's entire personal or committee staff.[213] The CAA approach is also strangely underinclusive in that the political compatibility exemption does not apply to the FLRA. While the omission probably results from an inadvertent oversight in the CAA drafting process,[214] the statute as written apparently would not allow a member to terminate a committee counsel on the basis that the counsel's efforts to organize a union are incompatible with the member's legislative agenda. Still, Congress remains able to address both the overinclusive and underinclusive features of the exemption without appealing to speech or debate immunity. An appropriately crafted CAA amendment

[211] Another consequence is that a member seeking to establish a compelling interest in the exercise of employment-related discretion must satisfy a more rigorous burden of proof than would be required under the Speech or Debate Clause. *See supra* note 208.

[212] *See supra* text accompanying notes 143–144 (discussing Pub. L. No. 104-1, § 502, 109 Stat. 39–40 (1995) (codified at 2 U.S.C. § 1432 (Supp. II 1996)), which established a political compatibility exemption for employment-related decisions affecting personal staff, committee staff, and leadership staff under nine of the eleven workplace statutes included in the CAA).

[213] *See supra* text accompanying notes 94–97.

[214] The House and Senate bills most seriously considered in the 103d Congress differed with respect to FLRA coverage. The House version, H.R. 4822, extended FLRA protection and included the political compatibility exemption. *See* H.R. REP. No. 103-650, pt. 2, at 2–3, 9, 26–27 (1994). The Senate version, S. 1824, did not include the FLRA at all. *See* S. REP. No. 103-297, at 22–23 (1994). FLRA coverage was included in the CAA, but the political compatibility exemption language was not picked up. The fact that FLRA enforcement is addressed separately from enforcement of the other nine statutes for unrelated reasons, *see supra* note 43, may explain the failure to mention political compatibility. Given that Congress had special reservations about extending FLRA coverage to its legislative staff at all, it seems highly unlikely that Congress would knowingly have deprived itself of this exemption.

would entitle members of Congress to the same employment-related discretion that elected executive officials enjoy under applicable Supreme Court precedent.

4. Presidential Parallels

A final factor that warrants discussion is the Supreme Court's recognition of constitutional immunity for the President. In *Nixon v. Fitzgerald*,[215] respondent alleged that top federal officials including President Nixon had terminated his employment in violation of his statutory and constitutional rights.[216] The Court rejected this claim and in the process distinguished the President from governors, cabinet officers, and other Executive Branch officials by holding that a president has absolute immunity from damages liability extending to all acts within the "outer perimeter" of his duties of office.[217] Emphasizing the President's singular position in the constitutional scheme, the Court reasoned that the special dangers of judicial intrusion on the authority and functions of the Executive Branch warranted foreclosing private damage actions seeking to vindicate individual rights.[218]

The President's unique status of being elected by the nation as a whole and responsible for the actions of the entire Executive Branch distinguishes him from the 535 members of Congress.[219] Still, senators and representatives, like the President, are directly accountable to the national electorate. Collectively, their mandate is to serve or at least consider the interests of the nation as a whole, and they are responsible for the actions of an entire political branch of the government. One could argue, therefore, that members of Congress should be viewed as special constitutional actors analogous to the President.

In light of the Court's holding in *Nixon v. Fitzgerald*, a failure to immunize *any* employment-related decisions by members of Congress would yield a curious result. The text of the Constitution is explicit in conferring upon senators and representatives

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[215] 457 U.S. 731 (1982).

[216] *See id.* at 733–35, 740. Specifically, Fitzgerald alleged that he had been fired in retaliation for his congressional testimony about military cost overruns. *See id.* at 785–88 (White, J., dissenting) (detailing the causes of action).

[217] *Id.* at 750, 755–57.

[218] See *id.* at 749–54. The Court reaffirmed this conclusion in Clinton v. Jones, 117 S. Ct. 1636 (1997), while declining to extend such absolute constitutional immunity to conduct engaged in by the President before assuming office.

[219] *See* Clinton v. Jones, 117 S. Ct. at 1653 (Breyer, J., concurring).

absolute immunity from the judicial process, and is silent regarding the availability of such immunity for the President. The historical record suggests that this silence was not inadvertent; there are indications of an understanding that the President was not to enjoy privileges beyond those available to any other citizen.[220] The Court in *Fitzgerald* reasoned that the absence of a specific textual basis did not foreclose subsequent recognition of constitutional immunity based on general separation of powers considerations.[221] It need hardly follow from *Fitzgerald*, however, that textual silence authorizes a far broader scope of immunity for the President than is available for members of Congress who were accorded express privileges in Article I.

The conclusion that the Framers in effect sanctioned less demanding protection by being explicit than they did by their silence is possible but unlikely in view of contemporaneous references and the express language used. Yet, that would appear to be the current state of the law if speech or debate immunity is deemed inapplicable to the employment area. The President can discriminate against any Executive Branch employee for whatever vindictive or invidious reason and remain personally immune based on respect for the separation of powers. By contrast, senators and representatives are denied parallel structural protection even with regard to their closest advisors or aides because the Speech or Debate Clause accords narrower immunity.[222] There is a certain irony in determining that the Constitution gives members of Congress no protection at all in employment-related matters after conferring so much protection upon the President. At a minimum, it results in a strangely uneven ap-

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[220] *See, e.g., An American Citizen* [Tench Coxe] I, INDEP. GAZETTEER (Philadelphia), Sept. 26, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 20, 24 (Bernard Bailyn ed., 1993) (observing that under proposed Constitution "[The President's] person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law."); 10 ANNALS OF CONG. 71 (1800) (statement of Sen. Charles Pinckney of South Carolina) (contrasting privileges extended to members of Congress under Constitution with the absence of such privileges for all others including the President); United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.) (observing "that the President of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted.").

[221] *See Fitzgerald*, 457 U.S. at 750 n.31, 753–54.

[222] *See* United States v. Stanley, 483 U.S. 669, 685 (1987) (stating that the Framers addressed their full range of legislative immunity concerns in Speech or Debate Clause, and speculating that "had they believed further protection was necessary they would have expanded that immunity provision.").

proach to constitutional immunity for heads of the two politically accountable branches.

This is not to say that the existence of unequal constitutional consequences cannot be explained and indeed justified. Accepting *arguendo* that the Court's approach to the President provides a suitable analogy, a number of factors help account for the Court's divergent constitutional treatment of the two political branches. First, presidential immunity under *Nixon v. Fitzgerald* applies only with respect to private damages actions. The chief executive has long been held subject to the judicial process in other circumstances.[223] The Court in *Clinton v. Jones* reaffirmed that a sitting President may be required to answer questions or provide other information in the course of judicial proceedings.[224] Speech or Debate Clause immunity, on the other hand, affords more comprehensive protection. By preempting compulsory interrogation "in any other place,"[225] the Clause ensures that members need not be subject to judicial process of any kind. Given a level of protection that may impair or preclude the administration of civil and criminal proceedings, including those involving third parties, the domain of protected legislative conduct merits a different and more circumscribed approach.

Further, Congress has the power to confer upon its members the same protection that the Court in *Nixon* granted to the President. The CAA has done just that, according senators and representatives in the employment setting an equivalent immunity from personal liability for monetary damages. Congress was able to accomplish this politically risky result by subsuming it in a statute creating new rights for Legislative Branch employees, including the right to monetary relief against the institution. The

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[223] *See* United States v. Nixon, 418 U.S. 683, 707–13 (1974) (holding that President must submit tapes to court as part of criminal trial proceedings); United States v. Burr, 25 Fed. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692) and 25 Fed. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14, 694) (holding that a subpoena can be directed at the President); *cf.* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1705–09 (1997) (contending that despite the Supreme Court's recent decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), exempting the President from suit under the Administrative Procedure Act, the President should be subject to suits concerning his official conduct). *See generally* Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 809–13 (1992) (discussing lower court approaches to suits against the President in the years since Watergate).

[224] *See* Clinton v. Jones, 117 S. Ct. 1636, 1649–51 (1997) (observing that Presidents have often responded to court orders, and that case management techniques can avoid any undue interference with Executive Branch functions).

[225] U.S. CONST. art. I, § 6, cl. 1.

fact that Presidents already had such personal immunity may have helped make the issue of damages liability more amenable to this type of statutory response, thereby averting the need for a constitutionally based approach.[226]

The express protection provided by the Speech or Debate Clause also means that once the privilege applies there can be no statutory supplanting of absolute immunity for members of Congress.[227] The Court in *Nixon v. Fitzgerald* apparently refrained from going this far. Instead, the Court stated that it was dealing only with implied causes of action for damages, and it reserved the question of whether Congress by statute could create an explicit damages action against the President.[228] Thus, assuming that Congress were to enact such a statute for the employment setting,[229] the Court would have to decide whether immunity from personal monetary liability for actions at the "outer perimeter of [a President's] official responsibility"[230] should continue to apply. The Court's analysis would presumably balance the dangers of intrusion upon Executive Branch functions against the interests served in allowing actions to enforce the civil rights laws enacted by Congress.[231] Regardless of the outcome, this type of balancing approach would not be available under the Speech or Debate Clause if that clause is held to cover particular employment decisions by members of Congress. Once again the absolute nature of the legislative privilege may help justify a more circumspect approach to the scope of protected activity.

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[226] Congress also has the power to grant the President immunity from personal liability. *Cf.* Soldiers and Sailors Civil Relief Act of 1940 (codified as amended at 50 U.S.C. App. §§ 501–525 (1994)) (providing for a stay of civil claims by or against military personnel during the course of active duty). Whereas Congress controls its own fate in this regard, the President would have to depend on a co-equal political branch, creating a more uneasy state of affairs.

[227] *See supra* text accompanying notes 131–136.

[228] *See Fitzgerald*, 457 U.S. at 748–49 & n.27; Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (intimating that an explicit statement from Congress might permissibly create a damages action against the President). *But cf.* Nixon v. Fitzgerald, 457 U.S. at 792 (White J., dissenting) (questioning whether the majority's separation of powers analysis permits a different result if Congress creates such a statutory cause of action). The Court in *Clinton v. Jones*, 117 S. Ct. 1636 (1997), reaffirmed the President's absolute immunity from damages for official conduct without adverting to the matter of implied versus explicit causes of action.

[229] The Presidential and Executive Office Accountability Act, *supra* note 17, does not qualify as such a statute. It creates damages liability for "employing offices," but the definition of an "employing office" fails to include the President. *See* Pub. L. No. 104-331, § 2, 110 Stat. 4053, 4054–56 (codified at 3 U.S.C. §§ 401, 402, 411 (Supp. II 1996)).

[230] *Fitzgerald*, 457 U.S. at 756.

[231] *See id.* at 754.

Each of these distinctions supports dealing with members of Congress under the Speech or Debate Clause differently from the way the Court dealt with the President in *Nixon v. Fitzgerald.* Even in separation of powers terms, the President's unique status in the constitutional scheme merits special recognition when compared with the Legislative Branch. The President's role as Commander-in-Chief[232] and his ultimate responsibility to see that the laws are faithfully executed[233] impose greater obligations and pressures than those shared among 535 members of Congress. The danger that a lawsuit for damages—or the prospect of such a suit—will inhibit the President's performance is thus of larger consequence to the country than the hazards associated with litigation against an individual member of Congress or a group of members. Admittedly, the Court's language in *Nixon v. Fitzgerald* is very strong, and one may fairly question or criticize the apparent reach of its holding.[234] Yet, however expansively the Court's separation of powers analysis is applied to the President, there is good reason not to apply the same analysis to members of Congress. In any event, the contours of that analysis cannot be developed because of the Court's anomalous judgment that the Speech or Debate Clause forecloses any more general immunity based on separation of powers concerns.[235]

In the end, no sound basis exists for extending Speech or Debate Clause protections to members of Congress for any employment-related matters. The Speech or Debate Clause rationale of removing pressures that would distort *legislative* decisionmaking is appropriately a response to the potential litigation directed at members by other *legislative* players, such as voters, interest groups, or the Executive Branch. That rationale lacks equivalent constitutional resonance when applied to litigation generated as part of the employer-employee relationship. While

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[232] *See* U.S. CONST. art. II, § 2, cl. 1.

[233] *See* U.S. CONST. art. II, § 3, cl. 1.

[234] *See supra* text accompanying note 228 (identifying disagreement as to whether Congress can create statutory cause of action for damages against President after *Fitzgerald*); Thomas M. Cunningham, Comment, *Nixon v. Fitzgerald: A Justifiable Separation of Powers Argument for Absolute Presidential Civil Damages Immunity?*, 68 IOWA L. REV. 557, 577–80 (1983) (arguing that the Court failed to justify why the President's need for absolute immunity should automatically outweigh individuals' right to judicial review of their constitutional claims); Aviva A. Orenstein, Note, *Presidential Immunity From Civil Liability: Nixon v. Fitzgerald*, 68 CORNELL L. REV. 236, 255 (1983) (arguing that the Court went too far, and that the President should be held liable for monetary damages when he knowingly violates an individual's constitutional rights).

[235] *See supra* text accompanying notes 90–91.

there is a vital interest in granting legislators broad discretion in employment-related dealings with their inner circle of advisors, that interest can and should be met without relying on the Speech or Debate Clause at all. Such an approach enables a reviewing court to balance the competing rights of affected employees in a manner consistent with the larger constitutional design. Finally, the President's different constitutional immunity status under *Fitzgerald* does not raise serious problems of unequal treatment between the two branches.

III. THE CAA, UNIONS, AND CONFLICTS OF INTEREST

Apart from concern about Congress's constitutional responsibilities, the CAA also provides in section 220(e) that legislative aides should be denied access to union representation as a class if such a denial is necessary because of "a conflict of interest or appearance of a conflict of interest."[236] The conflict of interest issue may be analyzed from a traditional economic standpoint or in a special legislative and policy-oriented context.[237]

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[236] Pub. L. No. 104-1, § 220(e)(1)(B), 109 Stat. 21 (1995) (codified at 2 U.S.C. § 1351(e)(1)(B) (Supp. II 1996)).

[237] It is possible to assert as a constitutional matter that allowing collective bargaining at all among legislative aides would compromise or undermine Congress's non-delegable power to enact laws and otherwise to exercise its sovereign legislative authority under Article I. *See supra* text accompanying note 62 (discussing comments submitted to the OOC by the Secretary of the Senate and the Chairman of the Committee on House Oversight). For several reasons, I have chosen not to engage this constitutional argument here. First, it is unlikely that an Article I challenge to the presence of unions among legislative staff may be brought outside the Speech or Debate Clause. *See supra* text accompanying notes 88–91. Second, assuming *arguendo* that such a challenge may be brought, the claim that collective bargaining among public employees with policymaking responsibilities would *per se* violate notions of sovereignty or illegal delegation has been persuasively rebutted by others. *See, e.g.*, Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 735–36 (1983) (rejecting sovereignty and illegal delegation arguments against public employee strikes); Harry T. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359–61 (1972) (rejecting sovereignty arguments against public sector collective bargaining); WILLEM B. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES CIVIL SERVICE 17–20, 24–26 (1966) (rejecting sovereignty and illegal delegation arguments against public employee unions). Finally, the claim that a union presence in congressional offices might compromise the ability of personal staff or committee staff to fulfill their policymaking responsibilities is better understood as a non-constitutional conflict of interest concern. *See* discussion *infra* Part III.B.

A. *Traditional Conflicts of Interest*

Because the CAA does not define "conflict of interest," the phrase may be interpreted in accordance with its ordinary or common usage.[238] Standard dictionary definitions and various federal statutes refer to the conflict between performance of official responsibilities and advancement of private or personal economic interests.[239] Similarly, under general House and Senate ethics rules, the term conflict of interest "is limited in meaning; it denotes a situation in which an official's conduct of his office conflicts with his private economic affairs."[240] As applied to the issue of unionization, the concern is that a conflict will arise between organized employees' official job responsibilities and the union's promotion of their private financial interests. This could occur, for instance, when employees who share responsibility for personnel-related matters, or who have access to personnel-related information, also stand to benefit individually if the union prevails in various negotiating positions.

The FLRA squarely addresses the potential for such traditional conflicts through its treatment of certain types of employees. Confidential employees, those who work closely and share relevant information with an individual who "formulates or effectuates management policies in the field of labor-management relations,"[241] may not belong to a union at all.[242] Supervisors—employees who regularly use their independent judgment to reward, discipline, or otherwise participate in personnel matters[243]—

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[238] *See, e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993).

[239] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 477 (1981) (defining conflict of interest as "a conflict between the private interests and the official responsibilities of a person in a position of trust (such as a government official)"); BLACK'S LAW DICTIONARY 299 (6th ed. 1990) (defining conflict of interest as "refer[ing] to a clash between public interest and the private pecuniary interest of the [public official] concerned"). *See generally* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 63–70 (1992) (providing overview of federal conflict of interest regulation). The OOC invoked both dictionary definitions and Senate and House ethics rules to support its conclusion that a special conflict of interest provision was unnecessary in this setting. *See* 142 CONG. REC. H10,023 (daily ed. Sept. 4, 1996).

[240] COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, 102D CONG., 2D SESS., ETHICS MANUAL FOR MEMBERS, OFFICERS, AND EMPLOYEES OF THE UNITED STATES HOUSE OF REPRESENTATIVES 87 (1992); *accord* STANDING RULES OF THE SENATE, S. DOC. NO. 104-8, Rule XXXVII (2) (1995) (prohibiting "outside business or professional activity or employment for compensation which is inconsistent with or in conflict with the conscientious performance of official duties.").

[241] 5 U.S.C. § 7103(a)(13) (1994).

[242] *See id.* at § 7112(b)(2).

[243] *See id.* at § 7103(a)(10).

may not belong to a bargaining unit that includes any non-supervisory employees.[244] Management officials, defined as individuals with policymaking duties or responsibilities,[245] are likewise excluded from units that include non-managerial employees.[246] In addition to the exclusions for confidential, supervisory, and management employees, the statute prohibits any other employee from partici-pating in the management or representation of a union if such activity "would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee."[247] Finally, employees engaged in administering any law that involves labor-management relations may not be represented by a union that also represents individuals covered by such a law.[248]

The Federal Labor Relations Authority ("Authority") has applied these classifications to Executive Branch employees on a case-by-case basis, focusing on the nature of the work performed in each instance. The Authority has declined to exclude entire categories of employees based on their job classifications or titles.[249] For that reason, the Authority has refused to treat attorneys automatically either as confidential employees[250] or as mana-

[244] *See id.* at § 7112(b)(1); *see also id.* at § 7135(a)(2) (authorizing bargaining units of supervisors in limited circumstances).

[245] *See id.* at § 7103(a)(11).

[246] *See id.* at § 7112(b)(1); *see also id.* at § 7135(a)(2) (authorizing bargaining units of management officials in limited circumstances).

[247] *Id.* at § 7120(e).

[248] *See id.* at § 7112(c)(1). Nor can these employees be represented by a union affiliated directly or indirectly with a different union that represents individuals to whom the identified labor-management relations law applies. *See id.* at § 7112(c)(2).

[249] *Compare, e.g.*, Defense Logistics Agency Defense Distribution Region, W. Stockton, California, and American Fed'n of Gov't Employees AFL-CIO Local 916, DA-CA-50226, 1996 WL 560245 (F.L.R.A. June 28, 1996) (holding that a secretary to the chief of support division was a confidential employee because she attended staff meetings and because labor-management conversations were held in front of her) *with* Department of Veterans Affairs Med. Ctr. Denver, Colorado and American Fed. of Gov't Employees, AFL-CIO Local 2241, DE-CA-50140, 1996 WL 665512 (F.L.R.A. Sept. 27, 1996) (holding that a secretary to the chief of chaplain service was not a confidential employee despite the chief's labor-related supervisory role, because she did not have a confidential relationship with him); *see also* Department of the Navy, Naval Underwater Sys. Ctr., Newport, R.I., and Federal Union of Scientists and Eng'r, Nat'l Ass'n of Gov't Employees, Local RI-144, 9 F.L.R.A. 30 (1982) (holding that some engineers were supervisors while others were not, depending on whether they exercised independent judgment in personnel matters).

[250] *Compare, e.g.*, U.S. Department of Labor, Office of Solicitor, Arlington Field Office and American Fed'n of Gov't Employees, Local 12, 37 F.L.R.A. 1371, 1383 (1990) (holding attorneys confidential employees because they represented management in internal labor relations matters) *with* U.S. Dept. of the Treasury, Office of the Chief Counsel, Internal Revenue Serv., Nat'l Office and Nat'l Treasury Employees Union, 41 F.L.R.A. 402 (1991) (holding an attorney not a confidential employee because he had no labor-related functions).

gerial officials.[251]

It is probable that in the congressional context, a number of high-level personal and committee aides would be excluded from coverage as confidential, supervisory, or managerial employees. It is also possible that certain committee staffs may be restricted as to their choice of unions if their committee's authorization, appropriation, or oversight responsibilities over public or private sector labor-management laws are deemed functionally equivalent to "administering [a law] relating to labor-management relations."[252] These applications, however, constitute limited exceptions to the FLRA's general purpose of permitting and even approving unionization among federal workers.[253] Congress in the CAA chose to extend FLRA protections to Legislative Branch employees, and it directed the OOC to follow "to the greatest extent practicable" the provisions and purposes of the FLRA when contemplating possible conflict of interest concerns involving personal or committee aides.[254] Given this legislative commitment, and the case-by-case approach to traditional conflicts of interest adopted for the Executive Branch, there is ample reason to conclude that categorical or systemic exclusion of personal and committee staff is not warranted unless legislative employment presents special problems.[255]

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[251] *See, e.g.*, U.S. Dept. of Energy Headquarters Washington DC, and Nat'l Treasury Employees Union, 40 F.L.R.A. 264, 269–73 (1991) (holding that certain attorneys in the office of general counsel were management officials because they established or effectively influenced courses of action for the agency, but also that other attorneys in the same office were not management officials because they simply provided advice or applied technical expertise in specific legal areas). *See generally Arlington Field Office*, *supra* note 250, at 1381 (concluding that "Congress intended attorneys, like other professionals, to have the same right to be represented by a union that Congress conveyed to other federal employees," and that "[m]embership in a labor organization is in itself not incompatible with the obligations of fidelity owed to [a government] employer by its [attorney] employees.").

[252] 5 U.S.C. § 7112(c) (1994). Such committees might include Senate Governmental Affairs, Senate Labor and Human Resources, House Education and the Workforce, and House Government Reform and Oversight.

[253] *See* 5 U.S.C. § 7101(a)(1) (1994) (concluding that statutory protection for employees' rights to organize and to bargain collectively "(A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . . .").

[254] Pub. L. No. 104-1, § 220(e)(1), 109 Stat. 21 (1995) (codified at 2 U.S.C. § 1351(e)(1) (Supp. II 1996)).

[255] Campaign contributions from unions representing legislative staff may be viewed as giving rise to a traditional conflict of interest, analogous to the conflict generated by campaign contributions from any interest group that has a policy agenda. For example, a union's contribution to a representative's re-election effort could in theory become a *quid pro quo* for acceding to the union's collective bargaining requests on behalf of the legislator's employees. This *quid pro quo*, however, would hardly be a function of the

B. *Legislative or Policy-Related Conflicts of Interest*

1. Dual Access and Divided Loyalties

In addition to the traditional conflict between public duties and private interests, unions may be viewed as posing a risk that derives from their status as exclusive bargaining representatives. Simply stated, the concern is that a union may take advantage of the special access it has gained through collective bargaining to enhance unfairly its role as an interest group in the legislative process. To be sure, all interest groups rely on their economic resources or their numerical strength in seeking to maximize influence over issues of legislative policy. Unions compete in this conventional manner, but they also are able to participate on a second level. Unlike other outside groups or individuals with whom a member of Congress may refuse to meet, the union that represents a member's employees has a statutory right to interact with that representative or senator as their employer.[256] Moreover, the legislator's duty to bargain in good faith[257] means that the union is entitled to more than a mere *pro forma* encounter.

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union's presence. Interest groups regularly hope that their financial support for a legislator will be followed by the legislator's official support for their policy priorities. Such direct exchanges may be relatively rare; far more frequent is the scenario in which a private contributor (an individual or interest group) receives privileged access to the legislator following the contribution. *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826–28 (1985). *Cf.* Jill Abramson, *Money Buys a Lot More Than Access*, N.Y. TIMES, Nov. 9, 1997, § 4, at 4. (reporting on the distinction between buying access to Executive Branch officials and purchasing specific policy favors, and on the difficulty of proving that the latter transactions have occurred in practice). Because unions representing congressional employees are already entitled to privileged access by virtue of their status as exclusive bargaining representative, campaign contributions may be less important to them in instrumental terms.

Alternatively, insofar as campaign contributions are viewed as enhancing the special status already accorded to these unions, that status is addressed as part of the discussion in *infra* Part III.B.

[256] I assume that for present purposes the representative or senator is deemed the employer of her personal office staff and—if she is committee chairman—of her committee staff as well. She may choose to designate a management official (e.g., the administrative aide in her personal office or the staff director in her committee office) to coordinate negotiations with the union. Still, any collective bargaining agreement that emerges will affect the day-to-day operations of her employees; accordingly, it seems likely that she will participate in at least some aspects of the bargaining process.

[257] *See* 5 U.S.C. § 7102(2) (1994) (granting federal employees the right to engage in collective bargaining through their chosen representatives); *id.* at § 7103(a)(12) (defining "collective bargaining" as the mutual obligation of union and federal employer "to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting [the] employees.").

There will be a series of meetings and discussions between labor and management at which the legislator must present her positions, give supporting reasons, supply relevant information, and respond to proposals or arguments offered by the union.[258] These dealings between legislator and union will be protracted in length, they will be at times intense in nature, and they will be conducted in private, outside the regular channels of interest group participation.

When selected as the exclusive bargaining representative, a union will thus have a special kind of continuous access, a forum in which to develop a richer and more complex relationship with the member of Congress and key staff. Because unions, and the organized labor movement, have broad legislative agendas that extend beyond conventional workplace issues,[259] they may seek to take advantage of their unique position in numerous ways. A union may informally glean information about the issues or bills that comprise a member's legislative agenda—both as to areas of possible compromise and intensity of personal commitment.[260] Such information may assist the union in formulating legislative strategies. On a more direct level, the union may lobby a committee aide regarding a specific legislative issue when that aide's status as a member of the bargaining unit makes him more sus-

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[258] *See generally NLRB v. Katz*, 369 U.S. 736 (1962) (holding that, as part of the duty to bargain in good faith, an employer may not institute unilateral changes in terms or conditions of employment until it has first bargained to impasse with the union); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that, as part of the duty to bargain in good faith, an employer that claims it cannot afford to pay higher wages must comply with the union's request to provide substantiating information).

[259] A review of recent semi-annual lobbying reports filed by various labor organizations reveals lobbying activity on issues affecting immigration, health care, defense, taxation, transportation, nuclear waste, campaign finance reform, food labeling, environmental concerns, criminal law enforcement, and international trade. *See, e.g.*, Lobbying Reports of American Fed'n of State, County, and Mun. Employees; International Bhd. of Teamsters; Service Employees Int'l Union (all for period January 1–June 30, 1997) (on file with author). Each of these labor organizations has been active or may be expected to become active in efforts to unionize Legislative Branch employees. *See, e.g.*, Juliet Eilperin, *Architect Workers Vote "Yes" on Joining Union*, ROLL CALL, Aug. 4, 1997, at 26 (describing AFSCME's success in organizing 622 employees of the Architect of the Capitol's workforce); John Mercurio, *Fraternal Order of Police Beats Out Teamsters in Capitol Union Election*, ROLL CALL, June 16, 1997, at 1, 28 (describing how more than 700 employees of the Capitol Police Force selected the Fraternal Order of Police to represent them, despite vigorous efforts by Teamsters).

[260] Informal means of access could include learning about invitations received by the legislator and about which ones are accepted, noticing areas in which constituent correspondence is heaviest and how the legislator responds, and becoming aware of who is in regular or frequent communication with the legislator. *See* Comments submitted by Kelly D. Johnston, *supra* note 60, at 13.

ceptible to being influenced on the policy matter.[261] Employees who belong to a union that opposes many of the legislator's policy positions may feel pressured to place their union's interests above the interests of constituents, or they may decide on their own to pursue their legislator's positions less energetically or resourcefully.[262] There is even the possibility that a union will signal its preparedness to exchange collective bargaining concessions for a member of Congress's commitment to support or oppose a particular legislative measure.[263] If the legislator balks at following the union's lead on a pending bill or amendment, the union has a special ability to inflict damage from its position as prospective or current exclusive bargaining representative. Organizing materials officially disseminated to encourage employee membership may include harsh criticisms of a legislative employer's current or past practices. Such criticisms would likely be recirculated—if not embellished—by local media, an electoral opponent, or the opposition political party. A recognized union that has not yet secured a collective bargaining agreement might file a series of unfair labor practice charges against the legislator. If appropriately timed—say September of an election year—these too could become grist for partisan political mills.

2. The Risk Overstated

It is true that a union representing congressional employees is empowered to operate at a second level that distinguishes it from other constituents or interest groups competing in the legislative arena. For several reasons, however, neither the union's special position as a dual participant nor the concerns about consequent dilution of loyalty among legislative employees supports a wholesale prohibition of personal and committee staffs from participating in collective bargaining activities.

At the outset, it is easy to exaggerate the special nature of divided loyalty problems involving unionized employees. Legislative aides are not prohibited as a general matter from belonging to ideologically oriented interest groups.[264] Committee and per-

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[261] *See* Comments submitted by Rep. Thomas, *supra* note 60, at 15.

[262] *See* Comments submitted by Kelly D. Johnston, *supra* note 60, at 13.

[263] *See id.*

[264] Indeed, prohibitions on freedom of association for governmental employees would raise serious First Amendment concerns. *See, e.g.*, Smith v. Arkansas State Highway

sonal staff may become members or supporters of politically active associations such as the National Right to Life Committee, the Wilderness Society, or the American Farm Bureau. Such participation raises the potential for conflict between a key employee's policy preferences—as promoted by the outside group—and the positions or priorities of that employee's legislative employer. But the mere potential for such conflict does not justify barring union membership for legislative aides any more than it would justify barring membership in these other legislatively active groups.

Moreover, personal staff and committee aides are especially unlikely to be diverted from the obligation of fidelity to their legislative principal. In contrast to the vast majority of Executive Branch employees, these are political appointees recruited and hired to work for particular legislators or committees. Loyalty and congruence of ideological perspective are prime selection criteria for individuals whose major responsibility is to promote the legislative values and policies of a certain member or committee chairman.[265] Once hired, these legislative aides are also closely monitored in their performance of policy-related functions. Members of Congress may be expected to react swiftly to official conduct by an aide that is at odds with the member's stated goals or policy objectives.[266]

To the extent that employees do act in a subversive or disloyal manner by elevating the union's interest above their legislator's, alternative remedies are available that are less restrictive than blanket exclusions from statutory coverage. The Supreme Court

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Employees, 441 U.S. 463, 464–65 (1979); Boddie v. City of Columbus, Mississippi, 989 F.2d 745, 748 (5th Cir. 1993).

[265] *See* HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS 148, 153 (1977) (arguing that staff are hired for loyalty, expertise, and judgment and that most staff reflect or even reinforce the legislator's views and values); SCHNEIER & GROSS, *supra* note 81, at 147 (contending that staff's apparent autonomy is largely a function of their ability to anticipate and serve member preferences); David E. Price, *Professionals and Entrepreneurs: Staff Orientations and Policy Making on Three Senate Committees*, 30 J. POL. 316, 320–25 (1971) (presenting an example of an aggressively pro-consumer committee staff that reflected the chairman's desire to be known as a strong consumer advocate).

[266] *See* SINCLAIR, *supra* note 151, at 73 (discussing how congressional leaders receive feedback on staff behavior from various sources, and this feedback system assures that staff will perform as faithful agents). Brudney, *supra* note 170, at 50 (discussing political incentives to engage in close monitoring, including the intensifying effect of publicity or media exposure). The presence of a union able to file a grievance on behalf of the aide may reduce or delay the speed with which disciplinary action is implemented. In the end, however, an employee who violates neutral employment standards or personnel rules is likely to be disciplined even in a unionized setting. *See infra* text accompanying note 267.

recently reaffirmed that employees protected by labor-management relations laws remain subject to discipline or discharge for violating non-discriminatory work rules or employment standards.[267] Thus, rules prohibiting the misuse of confidential information, or requiring that job duties be discharged solely in the interest of the legislator, could be enforced against overly zealous union supporters—provided that the enforcement is not a pretext for anti-union animus and that the same enforcement occurs with respect to overly zealous employees who promote other ideological causes.

While the union retains its special ability to inflict political harm based on its official status as exclusive representative, that power will be tempered by practical realities. If a senator is generally supportive of organized labor's positions in the legislative arena, the union will probably be cautious if not reluctant in its critiques of that senator's actions as an employer.[268] On the other hand, if a senator is regularly hostile to organized labor's agenda, then even sharply worded criticism from a union will cause little or no political damage—it may even be welcomed as further evidence of ideological consistency. In short, because organized labor and its political opponents will tend to view a legislator's policy positions as more significant than his management practices, union reaction to the legislator's conduct as an employer is unlikely to affect his performance on legislative matters.

A final perspective is that policy-related conflicts of interest are in certain respects endemic to politically accountable government. Legislators are elected at least in part because voters perceive that they share various communities of interest with some or all of the legislator's constituents.[269] A member who supports

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[267] *See* NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 457 (1996).

[268] Reluctance should not be equated with silence. A union's duty of fair representation requires that it avoid arbitrary, discriminatory, or bad faith conduct toward members of the bargaining unit. *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967). Accordingly, unions in appropriate circumstances are likely to file and pursue grievances alleging misconduct even against senators friendly to organized labor's policy positions. Still, the duty of fair representation allows unions to operate with considerable discretion in determining how to process grievances and to formulate a collective bargaining strategy. *See Vaca*, 386 U.S. at 191–95; Ford Motor Co. v. Huffman, 345 U.S. 330, 337–38 (1953).

[269] *See* GETZ, *supra* note 27, at 81 (arguing that a legislator's role as broker and his membership in communities of interest justify a different approach to conflicts); FINAL REPORT AND RECOMMENDATIONS OF HOUSE BIPARTISAN TASK FORCE ON ETHICS, 135 CONG. REC. H9253, 9259 (daily ed. Nov. 21, 1989, Part II) [hereinafter BIPARTISAN TASK FORCE] (maintaining that some merger of economic interests between members of

and promotes organized labor's legislative priorities after meeting with a union is comparable in this respect to a member who promotes oil or farm interests after private meetings with oil industry or farm lobbyists.[270] If the union has used its exclusive representative status as a means to conduct lobbying for its legislative positions, mandatory disclosure of these lobbying contacts provides a further means of monitoring potential conflicts of interest.[271] The very nature of the representative function suggests that legislative staff—like legislators—will at times support bills or provisions that inure publicly to the benefit of groups with which those staff identify or to which they belong. That congruence of commitment cannot alone be enough to serve as a disqualifying conflict of interest.

3. The Risk Addressed

To conclude that a concern is overstated in practical terms is not to say that the concern is illusory or trivial. Collective bargaining by government employers raises special issues that do not arise in the private sector. Government's frequent separation of operating authority from funding responsibility allows for and may even encourage negotiated agreements that are unconstrained by current budgets.[272] Further, as already referred to, unions may achieve public policy objectives through bilateral negotiations while other groups struggle with less success in the multilateral political process.[273] Congress, however, has not been insensitive to these and other distinguishing features of unionization among government employees. When it enacted the FLRA in 1978,[274]

Congress and their constituents is the nature of representative government).

[270] *Cf.* GETZ, *supra* note 27, at 58 (paraphrasing an Oklahoma senator who said that if he could not vote for the things that Oklahoma residents depend on, he would establish a conflict of interest that would eliminate him from Congress).

[271] *See* Pub. L. No. 104-65, § 5(b)(2), 109 Stat. 691, 697–98 (1995) (codified at 2 U.S.C. § 1604(b)(2) (Supp. II 1996)) (requiring semiannual reports on lobbying activities that include lists of specific issues lobbied); *see also* HOUSE BIPARTISAN TASK FORCE, *supra* note 269, at H9259 (recommending disclosure plus the discipline of the electoral process as appropriate safeguards).

[272] *See generally* DONALD WOLLETT ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 3 (4th ed. 1993); Edwards, *supra* note 237, at 362.

[273] *See supra* text accompanying notes 256–258; Edwards, *supra* note 237, at 363; Harry H. Wellington & Ralph K. Winter, Jr., *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 807–08 (1970).

[274] The FLRA was included as Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 701–704, 92 Stat. 1111, 1191–1218 (codified at 5 U.S.C. §§ 7101–7135 (1994)). Prior to 1978, federal employees had certain rights to organize and engage in collective bargaining pursuant to a series of Executive Orders. *See, e.g.*, Exec. Order No. 10,988, 3 C.F.R. 521 (1962) (Pres. Kennedy); Exec. Order No. 11,491, 3

Congress responded to concerns about collective bargaining among Executive Branch employees principally by codifying two sets of limits on the power of federal employee unions.

First, the FLRA substantially restricts the subjects on which unions may negotiate when compared with the scope of bargaining in private sector labor relations. Employee rates of pay and fringe benefits are already fixed pursuant to various federal statutory provisions.[275] The FLRA leaves those wage and benefit arrangements off limits to collective bargaining.[276] Further, federal agencies under the FLRA are expressly given a wide range of substantive management rights. These include the right to hire, remove, or reduce pay consistent with other laws;[277] the right to determine the agency's mission and the organization necessary to further that mission;[278] the right to establish budget and number of employees, thereby controlling the nature and extent of reductions in workforce;[279] and the right to determine whether agency work will be contracted out.[280] Even with respect to agency officials' procedural implementation of these broad management rights—such as making arrangements for adversely affected employees—the FLRA permits, but does *not* require, negotiation with the union.[281] Thus, although federal employers must bargain in good faith over "conditions of employment," the definition of these conditions excludes many economic issues and policy-related judgments that are bargainable in the private sector.[282] For legislative employers, the exclusion of policy-related

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No. 10,988, 3 C.F.R. 521 (1962) (Pres. Kennedy); Exec. Order No. 11,491, 3 C.F.R. 861 (1969) (Pres. Nixon); Exec. Order No. 11,838, 3 C.F.R. 957 (1975) (Pres. Ford).

[275] *See, e.g.*, 5 U.S.C. §§ 5101–5392 (1994) (establishing job classification and pay comparability system for federal employees); *id.* at §§ 6301–6327 (establishing system for annual leave, sick leave, and other paid leave); *id.* at §§ 8307–8479 (establishing federal employees' retirement system).

[276] *See* 5 U.S.C. § 7103(14) (defining "conditions of employment" on which parties must bargain collectively so as to exclude policies, practices, and matters provided for by federal statute); *id.* at § 7117(a)(2) (excluding from domain of collective bargaining any agency rule or regulation unless the Authority determines that there is no compelling need for the rule or regulation).

[277] *See id.* at § 7106(a)(2)(A).

[278] *See id.* at § 7106(a)(1).

[279] *See id.*

[280] *See id.* at § 7106(a)(2)(B).

[281] *See id.* at § 7106(b)(2), (3).

[282] *See, e.g.*, 29 U.S.C. § 158(d) (1994) (requiring private parties to bargain collectively on wages and other economic terms of employment); Fibreboard Paper Prods. v. NLRB, 379 U.S. 203 (1964) (requiring private employer to bargain about decision to contract out work); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681–82 (1981) (requiring private employer to bargain over effects on employees from decision to close part of a business).

judgments seems to remove categorically from the bargaining table a member's legislative positions and priorities.[283]

Second, the FLRA significantly curtails federal employees' ability to use concerted economic pressure as part of the collective bargaining process. The Act makes it unlawful for a union to participate in or condone a strike or work slowdown, or to engage in labor-related picketing that interferes with a federal agency's operations.[284] Unions that engage in such unlawful conduct may be decertified.[285] Individual employees who participate in a strike or assert the right to strike are barred from federal employment;[286] they also may be prosecuted for criminal misconduct.[287] This strong stance against group action by employees minimizes unions' capacity to impede the policymaking functions of the federal government. In the Legislative Branch context, it further reduces unions' ability to disrupt Congress's lawmaking activities.

In enacting these two sets of restraints on the power of unions in federal employment, Congress deliberately departed from private sector models as part of its stated goal "to meet the special requirements and needs of the government."[288] The express reservation of broad management rights originated in the 1960s when a series of executive orders for the first time authorized collective bargaining by federal employees.[289] The prohibition on federal employee strikes dates from an even earlier period.[290]

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[283] The CAA in effect makes each committee or member office into a federal employer for FLRA purposes. *See supra* text accompanying note 45. Under the FLRA, management retains the unilateral authority "to determine the mission, budget, organization, number of employees, and internal security practices of the agency." 5 U.S.C. § 7106(a)(1). Management's retained right to determine its own mission and organization seems directly applicable to matters of legislative policy and strategy. *See* United States Customs Serv. v. FLRA, 854 F.2d 1414, 1418–19 (D.C. Cir. 1988) (holding that a Customs Service decision on timing for implementation of its program to streamline inspection of vessels is part of management's reserved right to determine means by which the agency's mission will be conducted); *see also American Fed'n of Gov't Employees v. FLRA*, 802 F.2d 1159, 1162 (9th Cir. 1986) (holding that a naval weapon station's policy of expeditious suspension of driving privileges is an internal security practice free from bargaining under § 7106(a)(1)).

[284] *See* 5 U.S.C. § 7116(b)(7).

[285] *See id.* at § 7120(f).

[286] *See id.* at § 7311.

[287] *See* 18 U.S.C. § 1918 (1994) (making violations of 5 U.S.C. § 7311 a felony); *id.* at § 2 (making it unlawful to aid or abet the violation of a federal statute).

[288] 5 U.S.C. § 7101(b).

[289] *See, e.g.*, Exec. Order No. 10,988, §§ 6(b), 7, 3 C.F.R. 521, 524–25 (1962); Exec. Order No. 11,491, § 12, 3 C.F.R. 861, 869–70 (1969); Exec. Order No. 11,636, § 8, 3 C.F.R. 634, 641–42 (1971).

[290] *See* Meltzer & Sunstein, *supra* note 237, at 773–75 (describing initial 1946 antistrike provision and its amplification between 1947 and 1955).

During congressional consideration of the FLRA, serious efforts were made to expand the scope of bargaining so that it would resemble more closely the private sector model.[291] Some members of Congress also expressed support for binding arbitration, and testimony from federal union leaders advocated legalization of strikes.[292] The final version of the statute, enacted in 1978, reaffirmed both the restricted domain for collective bargaining and the strong antistrike policy.[293]

The CAA appears to embrace the judgments made by this earlier Congress when it states that implementing regulations should be as consistent as practicable with the FLRA approach.[294] Congress in 1995 could thus be seen as signaling its recognition that collective bargaining can be accommodated to the special realities of the legislative process. Yet, the more recent record of expressed reservations by certain members of Congress and passive resistance by others belies such a conclusion. Instead, congressional opposition may be better understood as reflecting an inability or unwillingness to accept conclusions already reached about the legitimacy of public sector unions.

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[291] *See* H.R. 13, 95th Cong. § 7103(11), (13) (1978), *reprinted in* SUBCOMM. ON POSTAL PERSONNEL AND MODERNIZATION OF THE COMM. ON POST OFFICE AND CIVIL SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 121, 127–28 [hereinafter LEG. HIST.] (defining "conditions of employment" to include pay practices, disciplinary procedures, and reduction in force practices, and defining "collective bargaining" to include good faith negotiations over these matters); H.R. 1589, 95th Cong. § 3(m), (p) (1978), *reprinted in* LEG. HIST. 183, 189–90 (similarly expanding the subjects amenable to collective bargaining); H.R. 9094, 95th Cong. § 7103(14), (16) (1978), *reprinted in* LEG. HIST. 235, 243–44 (same). *See* S. Rep. No. 95-1403, at 12 (1978), *reprinted in* LEG. HIST. 682 (reporting that Title VII on labor-management relations does not go as far as H.R. 9094 in expanding the scope of bargaining); 124 CONG. REC. H9637–38 (daily ed. Sept. 13, 1978), *reprinted in* LEG. HIST. 932 (statement of Rep. Bill Clay (D-Mo.)) (observing that explicit management rights clause was included in Title VII despite arguments by him and others that courts should protect such rights under a case-by-case approach as they do in the private sector).

[292] *See, e.g.*, H.R. 9094, 95th Cong. § 7119 (1978), *reprinted in* LEG. HIST., *supra* note 291, at 285–87 (authorizing parties to agree to binding arbitration procedure, and authorizing Federal Services Impasse Panel to "take whatever action is necessary" in resolving disputes); *Improved Labor-Management Relations in the Federal Service: Hearings on H.R. 13 and H.R. 1589 Before the Subcomm. on Civil Serv. of the House Comm. on Post Office and Civil Serv.* 14–15 (95th Cong. 1977) (statement of Kenneth Meiklejohn, AFL-CIO) (supporting provisions that require final and binding arbitration, while expressing interest in having the right to strike); *id.* at 140–41 (statement of John Leyden, PATCO) (stating willingness to accept binding arbitration "although we would like the right to strike").

[293] *See generally* Christine Godsil Cooper & Sharon Bauer, *Federal Sector Labor Relations Reform*, 56 CHI.-KENT L. REV. 509, 526–27 (1980); Meltzer & Sunstein, *supra* note 237, at 777.

[294] Pub. L. No. 104-1, § 220(e)(1), 109 Stat. 3, 20–22 (1995) (codified at 2 U.S.C. § 1351(e)(1) (Supp. II 1996)).

4. History Revisited

For the first half of this century, union activity among government employees lacked both the statutory protections and the numerical successes achieved by private sector workers. With respect to the federal government, presidents from Theodore Roosevelt and Taft to Franklin Roosevelt and Eisenhower voiced grave reservations about allowing unions to seek improved working conditions on behalf of Executive Branch employees.[295] Much of the opposition reflected a fear that federal employees and their unions would disrupt or undermine Executive Branch personnel management that was assertedly neutral, rule-based, and sensitive to political and fiscal realities.[296] More broadly, scholarly concern about allowing collective bargaining in government focused in part on formal constitutional claims that the government's sovereign authority must not be shared with or delegated to unions.[297] Commentators also suggested that in practical

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[295] *See, e.g.*, MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 6–7 (1976) (describing Theodore Roosevelt's view that lobbying or electoral activity by the postal workers' union undermined the executive's authority to manage the government, and his 1902 Executive Order prohibiting federal employees, individually or in associations, from attempting to influence legislation except through their agency or department directors); *id.* at 7 (describing President Taft's 1909 Executive Order extending the earlier order to bar federal employees from responding to any congressional request except as authorized by the head of their department); EUGENE C. HAGBURG & MARVIN J. LEVINE, LABOR RELATIONS: AN INTEGRATED PERSPECTIVE 166 (1978) (quoting from President Franklin Roosevelt's 1937 letter to the National Federation of Federal Employees, in which he warned that "the process of collective bargaining, as usually understood, cannot be transplanted into the public service" principally because "[t]he very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations"); WILSON R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 26 (1961) (quoting from President Eisenhower's 1960 message vetoing a federal employee pay raise bill, in which he remarked "That public servants might be so unmindful of the national good" as to have sought to make Congress accede to their demands "is, to say the least, shocking.").

[296] Congress in 1912 had passed the Lloyd-LaFollette Act, nullifying the Taft and Theodore Roosevelt executive orders by establishing federal employees' right to petition Congress regarding working conditions and other matters. *See* Pub. L. No. 62- 336, 37 Stat. 539, 555 (1912). Over the ensuing fifty years, however, little progress was made in establishing meaningful collective bargaining protections for federal employees. The 1937 statement from Franklin Roosevelt—a recognized supporter of organized labor in the private sector—was viewed as a key official pronouncement against extending collective bargaining to the federal government. Numerous bills proposing protections were introduced in Congress between 1949 and 1961; all were opposed by the Executive Branch as unnecessary if not unduly restrictive, and none of the bills passed. For general discussion of developments in this area, *see* NESBITT, *supra* note 295, at 8–19; HAGBURG & LEVINE, *supra* note 295, at 166–67; HART, *supra* note 295, at 19–26, 33–37.

[297] *See* Edwards, *supra* note 237, at 359; Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1108–09 (1969); Meltzer & Sunstein, *supra* note 237, at 735–36. These claims have been ad-

terms, unions representing government workers might amass excessive power because market forces are less effective at restraining union demands in the public sector, especially when voters perceive the government services at issue to be essential to their welfare.[298]

By the 1960s, however, there was widespread support for the idea that public employees should have the opportunity to seek union representation and engage in collective bargaining. As two leading commentators observed, government workers—like their private sector counterparts—were experiencing a depersonalized and bureaucratic workplace that "has encouraged [them] to look to collective action for a sense of control over their employment destiny."[299] The peaceful democratic mechanisms for securing and maintaining union representation were perceived as compatible with our larger political system.[300] Moreover, the voters and taxpayers who consume and fund government services tend to identify with the asserted economic interests of public employers. Accordingly, proponents maintained that for government workers seeking to improve their conditions of employment, access to union representation was justified in order to offset their relatively isolated status in the budgetary process.[301]

Over the past four decades, state and local governments as well as the federal government have developed extensive legal frameworks allowing public employees to form, join, and sup-

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9 (1969); Meltzer & Sunstein, *supra* note 237, at 735–36. These claims have been addressed. *See supra* note 237.

[298] *See* Wellington & Winter, *supra* note 297, at 1119–25; Wellington & Winter, *supra* note 273, at 806–08, 817–22; Meltzer & Sunstein, *supra* note 237, at 738–41; Edwards, *supra* note 237, at 362.

[299] Wellington & Winter, *supra* note 297, at 1115.

[300] *See* Wellington & Winter, *supra* note 273, at 810 (contending that while public employee strikes pose a threat to the "normal American political process," establishment of collective bargaining through traditional mandatory recognition procedure does not).

[301] *See, e.g.*, Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1159–60, 1165–68 (1974); Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 675 (1975). There was considerable debate among commentators as to whether public sector unions would exercise disproportionate power in budgetmaking and other government processes if granted traditional collective bargaining related powers. *See, e.g.*, R. Theodore Clark, Jr., *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. CIN. L. REV. 680, 683 (1975) (rejecting Summers's contention that the political process operates to the general disadvantage of organized public employees); John F. Burton, Jr. & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 424–28 (1970) (criticizing Wellington and Winter's thesis that economic constraints on unions do not meaningfully exist in the public sector).

port labor organizations.[302] Public employee membership in unions has grown at a steady rate even as private sector union strength has declined.[303] At the present time, nearly 45% of state and local government workers are covered by a collective bargaining agreement while some 40% of federal sector employees are represented by labor organizations.[304]

In the context of the section 220(e) rulemaking proceeding, neither the OOC nor the congressional commenters who expressed their reservations relied on or referred to this sweep of historical events.[305] While the rulemaking record might not be expected to include such historical perspective, it is fair to assume that Congress was aware of the dynamic developments legitimating union representation in public employment. Congress in the CAA made the deliberate choice to be bound by the same set of labor-management rules that apply to the Executive Branch under the FLRA. This choice reflects at least tacit recognition that the limits imposed on unions by existing federal law—restricting the scope of collective bargaining and prohibiting group economic pressures—were sufficient to protect the business of government in the Legislative Branch just as they have been in the Executive Branch.

The only remaining question is whether unionization of congressional employees who are responsible for helping to shape legislative policy raises novel concerns not anticipated in the Executive Branch setting. The answer to that question is no. Many if not most federal departments or agencies have legislative affairs offices, with employees whose activities are in key respects comparable to those of a House or Senate legislative aide

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[302] The authorization for federal employees came through a series of executive orders and then the FLRA. *See supra* note 289 and accompanying text. Since 1960, collective bargaining statutes have been enacted by more than twenty states and scores of local governments. *See* GORDON E. JACKSON, LABOR AND EMPLOYMENT LAW DESK BOOK, Part VI (2d ed. 1993 & 1997 Supp.) (discussing labor relations laws for all fifty states).

[303] *See* U.S. DEPT. OF LABOR, HANDBOOK OF LABOR STATISTICS 201, 403, tbls. 100, 162 (1980) (indicating that in 1962 approximately 13% of individuals employed by federal, state, and local governments were union members); UNION MEMBERSHIP AND EARNINGS DATA BOOK 10, tbl. 1 (BNA 1995) (reporting that between 1973 and 1995, the percentage of public sector wage and salary workers who are union members, increased from 23.0% to 37.7% while the percentage of private sector wage and salary workers belonging to unions declined from 24.2% to 10.3%).

[304] *See* UNION MEMBERSHIP AND EARNINGS DATA BOOK, *supra* note 303, at 12, tbl. 3.

[305] One labor union commenter that supported broad FLRA coverage did invoke the historical events whereby federal employees were granted rights to petition Congress and to organize and bargain collectively. *See* Letter from Peter Winch, National Organizer, AFGE, to Glen Nager, Chairman of the OOC Board of Directors 1–2 (Apr. 9, 1996) (on file with author).

or committee counsel. These Executive Branch employees must directly or indirectly advise their agency head on whether proposed legislation merits agency support. In order best to render such advice, they must interact with and respond to private interest groups. They also may be called upon to help draft proposed statutory amendments, committee testimony, or other legislative history. Notwithstanding their obvious legislative policy responsibilities, the FLRA does not exclude this group of employees from access to union representation.[306]

Similarly, the fact that congressional employees are political rather than career appointees does not present special problems with respect to collective bargaining status. Federal agencies regularly are authorized to fill positions of a policymaking nature with so-called "Schedule C" appointees hired outside the career or competitive civil service.[307] These Schedule C appointees are not excluded from coverage under the FLRA.[308]

Finally, the risk that unions will distort the policymaking process through their dual access[309] is no more serious than the similar risk associated with unions that represent Executive Branch employees. If anything, the chances of distortion would seem to be less in the congressional setting. Certain issues that Executive Branch employees may characterize as affecting conditions of employment will also have a substantial public dimension. Examples include the development of merit pay standards for teachers in Department of Defense schools, or the requirement of internal monitoring procedures for FBI agents. Employee unions in this setting might attempt to pressure their agency to determine the policy issue in their favor as part of the collec-

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[306] They may, of course, be excluded on an individual basis as managerial, supervisory, or confidential employees.

[307] *See* 5 C.F.R. § 213.3301 (1994) (providing in pertinent part that "agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. Positions filled under this authority are excepted from the competitive service and constitute Schedule C . . . .").

[308] *See* U.S. Dep't of Housing and Urban Dev. Headquarters and American Fed'n of Gov't Employees, Local 476, 41 F.L.R.A. 1226, 1236–37 (1991) (observing that Schedule C employees are not expressly excluded from FLRA coverage, and that even if an employee has the "close and confidential working relationship" referred to in the applicable regulation [5 C.F.R. § 213.3301], this does not compel a conclusion that the employee is "confidential" as defined in the FLRA). Schedule C employees may, however, have a sufficiently distinct community of interest to require that they not belong to the same bargaining unit as career appointees. *See id.* at 1238–39. Of course, in a congressional office, where everyone is a political appointee, the latter distinction may not be terribly important.

[309] *See supra* text accompanying notes 256–263.

tive bargaining process. By contrast, congressional employees do not offer these types of services to a broader group of consumers. Accordingly, their unions at most will try and use their own conditions of employment as leverage to influence resolution of unrelated policy issues that do implicate public interests. That type of indirect distortion is less likely to be effective, both because the leverage itself is weak and because the injection of unrelated policy matters into bargaining is prohibited.[310]

C. *Experience in Other Countries*

Although Congress is just now confronting the question of whether—and to what extent—to allow collective bargaining within its walls, it is far from the first national legislature to address the matter. A number of other industrialized nations have authorized parliamentary employees—including professional staff who work for members or committees—to form or participate in unions. There are, of course, differences in legal culture and socioeconomic conditions between those countries and the United States. Still, the existence of collective bargaining relationships among professional employees in the Legislative Branch has been deemed acceptable in societies not substantially dissimilar from our own.

In England, unions have a statutory right of access to House of Commons employees under a 1978 law.[311] Legislative staff employed by the House of Commons belong to unions and benefit from collectively bargained agreements or dispute resolution procedures that apply directly to the legislature.[312] In Australia, parliamentary employees have the right to unionize under a 1988

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[310] *See supra* text accompanying note 283.

[311] House of Commons (Administration) Act, 1978, ch. 36, § 5(5), sched. 1 (Eng.); *see also* 5 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS §§ 376–377, Gr. Brit. (R. Blanpain ed., 1997) [hereinafter INTERNATIONAL ENCYCLCLOPAEDIA] (describing legislation that establishes a general right to unionization for employees in Britain, including private employees of members of Parliament).

[312] *See* Letter from Dr. C.C. Pond, President, House of Commons Trade Union Side, to Jennifer Larraguibel, Foreign and International Law Librarian, The Ohio State University College of Law 1 (Nov. 5, 1996) (describing how both House of Commons staff and personal staff employed by members belong to unions) (on file with author); Letter from Dr. C.C. Pond to Jennifer Larraguibel (Nov. 5, 1997) (amplifying the state of affairs described in earlier letter) (on file with author); House of Commons Whitley Committee Constitution (1994) (setting forth negotiated agreement between House of Commons management and coalition of eleven trade unions) (on file with author); House of Commons Dispute Procedure Agreement (1994) (setting forth agreed procedure for resolving work-related disputes) (on file with author).

law.[313] Many staff employed by members of Parliament, either to handle constituent business or to assist in management of legislative matters, are represented by a union.[314] In Canada, some legislative staff are expressly excluded from collective bargaining protection under a 1986 law, though other parliamentary employees are permitted to join unions and have chosen to do so.[315] While in each of these instances professional staff belong to unions of parliamentary employees, legislative employees in other countries may be members of broader interprofessional trade unions.[316] In short, not every country accords parliamentary employees the right to organize and engage in collective bargaining, but there is ample evidence that legislative staff are represented by unions—including staff who serve the policy-related needs of their parliamentary principal or of the institution as a whole.

CONCLUSION

Congress's decision to extend labor relations protections to its own legislative aides deserves to be implemented. The argument for exclusion of key committee and personal staff on constitutional grounds presents a close question, one that is not limited to the availability of statutory protection for unionization. In the final analysis, however, the immunity of the Speech or Debate Clause should not be extended to the realm of employment-related conduct by members of Congress. The conflict of interest

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[313] Industrial Relations Act, 1988, ch. 86 (Austl.), Part VIB, § 170.

[314] *See* Letter from Graeme Thomson, Officer for Community and Public Sector Union, to Jennifer Larraguibel (Oct. 24, 1996) (explaining how electorate officers, employed by individual members of Parliament and senators, especially those belonging to Australian Labor Party, are unionized) (on file with author); Electorate Officers Agreement, 1995–96 (collectively bargained agreement governing terms and conditions of employment for electorate officers) (on file with author).

[315] *See* Parliamentary Employment and Staff Relations Act, ch. 41, § 4(2) (1986) (Can.) (specifying that provisions establishing collective bargaining rights and implementation procedures do not apply to leadership staff or to "the staff of any other individual Member of Parliament"); E-Mail Letter from Lloyd Fucile, Public Service Alliance of Canada, to Kim Clarke, Reference Librarian, The Ohio State University College of Law (Oct. 22, 1997) (explaining that some professional committee staff are unionized) (on file with author).

[316] *See* Letter from Xavier Roques, Director of Personnel Bureau, Assemblee Nationale, to Jennifer Larraguibel (Nov. 20, 1996) (explaining that staff members employed by individual deputies are guaranteed the exercise of trade union rights, and that some of them probably belong to inter-professional trade unions given the absence of a union dedicated to parliamentary employees) (French original and English translation on file with author); *see also* 5 INTERNATIONAL ENCYCLOPAEDIA, *supra* note 311, at §§ 308–11, 314–17, (Fr.) (describing legislation that establishes general right to unionize).

arguments favoring exclusion also are unpersuasive. Concerns about special union access and divided employee loyalties are not materially different than those expressed with regard to federal employees in the Executive Branch or indeed public employees in state and local government. The FLRA's accommodation of those concerns—through specific exemptions based on job functions, restrictions imposed on the scope of bargaining, and limitations on the use of group pressure—represents a fully adequate response for the Legislative Branch setting.

In considering its next move, Congress must decide whether to proceed with its previously announced intention to apply the FLRA. Congress could follow the English approach and provide access to union representation for legislative staff. It also could follow the example of Canada and decide explicitly to exclude certain legislative aides from coverage under the labor relations laws. In the CAA Congress chose neither option, instead enacting an inconclusive provision that assigns key policymaking choices to an administrative agency while subtly reserving to itself the power to reject the agency's conclusions.[317] Although the strategy of delegating tough policy judgments to an agency has been deemed characteristic of Congress's legislative approach in other areas,[318] its application in the instant setting is peculiarly ironic. The Congressional Accountability Act drew high praise not for its quite modest practical impact but rather for its considerable symbolic implications. Yet, Congress has effectively hidden the fact that with respect to unions and collective bargaining it remains beyond the reach of the laws it has imposed on all other employers.

It is time for Congress to make a choice. By applying the same workplace protection laws to itself that are experienced elsewhere in government or society at large, Congress keeps faith with the public and develops a first-hand appreciation for the costs and benefits associated with such regulation. Alternatively, by expressly exempting certain parts of its operation from statutory coverage, Congress can explain to that same public why special arrangements are appropriate or necessary from a policy

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[317] *See supra* text accompanying notes 51–55.

[318] *See generally* MICHAEL HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 154 (1981) (arguing that Congress regularly deals with conflictual demands from outside groups by enacting ambiguous statutes delegating policy responsibility to agencies).

standpoint. In either instance, Congress would be opting for accountability rather than denial.

POLICY ESSAY

RETIRING IN AMERICA: WHY THE UNITED STATES NEEDS A NEW KIND OF SOCIAL SECURITY FOR THE NEW MILLENNIUM

SENATOR DON NICKLES*

Proposals to reform the ailing Social Security system abound. In this Essay, Senator Nickles puts the Social Security debate in context by discussing the history of the program and past efforts at reform. Senator Nickles argues that minor adjustments to the system have proven ineffectual and urges Congress to act quickly to implement a new, fully-funded system through the use of private markets.

No government program impacts as many lives as America's federal retirement security system, Social Security.[1] More than ninety-five percent of the workforce is covered under Social Security.[2] The system provides half of all retirement benefits in America,[3] with trends indicating more and more seniors depend on Social Security as their sole source of income.[4] Social Secu-

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[1] Social Security Act, Pub. L. No. 74-271, 531 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397f (1994)).

[2] *See* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1998 GREEN BOOK, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 6–7 (Comm. Print 1998) [hereinafter GREEN BOOK] (finding that in 1997, of a total work force of approximately 151.9 million workers, about 145.3 million workers and an estimated 96% of all jobs in the United States were covered under Social Security).

[3] *See* JOSH WESTON ET AL., COMMITTEE FOR ECONOMIC DEVELOPMENT, WHO WILL PAY FOR YOUR RETIREMENT? 27 fig. 15 (1995).

[4] *See, e.g.*, ADVISORY COUNCIL ON SOCIAL SECURITY, 2 REPORT OF THE 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY 38 (1997) (finding that growth in pension

rity has been a highly successful program, helping to significantly reduce the percentage of seniors living in poverty during the past twenty-five years.[5] It is therefore immensely popular.[6]

Social Security, however, is on the brink of a serious financial predicament. Although some disagree about the severity of the problem,[7] most analysts agree that Social Security faces a shortfall. The program is a pay-as-you-go system, meaning today's workers pay for the benefits of today's retirees. Each year, the Social Security Board of Trustees examines the financial health of the system, and makes projections for the next seventy-five years.[8] These projections indicate that the cost of benefits will exceed the income from taxation by 2013.[9] This phenomenon will be driven by demographic, economic, and social factors—all beyond the control of legislators.

Therefore, policymakers must begin looking for options that preserve the system for future generations. There are two basic approaches for saving Social Security: (1) adjusting various factors within the system's existing structure to lengthen its

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coverage has stagnated since the early 1970s and that, given current policies, growth in the proportion of the labor force participating in employer-sponsored pensions in unlikely to occur). *See also* FRANK B. HOBBS & BONNIE L. DAMON, U.S. BUREAU OF THE CENSUS, 65+ IN THE UNITED STATES 4–14 (1996) (finding that since the 1940s, there has been a marked increase in reliance on Social Security). In 1992, Social Security benefits were the primary source of income for 63% of beneficiaries. *See id.*

[5] *See* HOBBS & DAMON, *supra* note 4, at vi (finding that the percentage of elderly people living in poverty declined from 24.6% in 1970 to 12.9% in 1992).

[6] *See* Michael Tanner, *Public Opinion and Social Security Privatization*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), Aug. 6, 1996, at 2 fig. 1 (finding that 68% of Americans have a favorable opinion of Social Security, as compared to 28% and 25% who look favorably upon the federal income tax system and welfare, respectively).

[7] *See, e.g.*, Richard Leone, *What Crisis?*, N.Y. TIMES, Jan. 15, 1997 at A19; Leone, *A Fright-Free Social Security Screenplay*, Sept. 6, 1998, N.Y. TIMES, § 4, at 11. *See also* Robert L. Borosage, *The Great "Con" of Social Security Reform* (last modified Aug. 8, 1998) <http://www.ourfuture.org/tpoint/con%5Fss.asp>; The Century Foundation's Social Security Network, *10 Myths About Social Security* (visited Dec. 10, 1998) <http://www.socsec.org/facts/Issue_Briefs/myths.htm>.

[8] The Board of Trustees is established under the Social Security Act to oversee the financial operations of the Federal Old-Age, Survivors, and Disability ("OASDI") Trust Funds. The Board is composed of six members, four of whom serve automatically by virtue of their position in the Federal Government: the Secretary of the Treasury, the Secretary of Labor, the Secretary of Health and Human Services, and the Commissioner of Social Security. The other two members are appointed by the President and confirmed by the Senate to serve as public representatives: Stephen G. Kellison and Marilyn Moon are currently serving four-year terms that began on July 20, 1995. *See* BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, 1998 ANNUAL REP., H.R. DOC. NO. 105-243, at 1, 11 (1998) [hereinafter BOARD OF TRUSTEES].

[9] *See id.* at 108, tbl. II.F13 (based on the Board's intermediate economic assumptions).

financial solvency, or (2) creating an entirely different kind of system to assist individuals with their retirement. When Social Security was faced with financial ruin in the past, lawmakers opted for the former solution.[10] Although successful in averting immediate financial disaster, the measures failed to create a permanently self-sustaining program, such that Social Security is now approaching yet another crisis. The latest estimates put the system's unfunded retirement promises at $9 trillion.[11]

Social Security's problems have not gone unnoticed. There are volumes of published material, including books, studies, research papers, historical documents, and polling data already addressing the crisis. During 1997 and 1998, the program was the focus of widespread media coverage[12] following the release of a report and recommendations by the Advisory Council on Social Security[13] and public debate surrounding the Balanced Budget Act of 1997.[14] The debate focuses on the severity of the problem, the window of opportunity for fixing it, and the level of reform that will be necessary.

This Essay generally concurs with the lawmakers, economists, and Social Security experts advocating a new idea: utilizing the

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[10] *See, e.g.*, Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 4155 (1977) (changing benefit formula, increasing tax rates, and increasing the earnings base); Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) (Title II, sec. 201, increasing retirement age and Title I, Part C, sec. 123, accelerating scheduled tax increases). *See generally* GEOFFREY KOLLMANN, CONGRESSIONAL RESEARCH SERVICE, SUMMARY OF MAJOR CHANGE IN THE SOCIAL SECURITY CASH BENEFITS PROGRAM: 1935–1996 (1996).

[11] The Social Security Administration's Office of the Actuary estimates unfunded promised benefits under the "closed-group model" (if no further payments were made by individuals age 15 and under) at $8.9 trillion as of October 1, 1996. (on file with the author).

[12] By the author's count, the Wall Street Journal published 35 articles about Social Security's solvency from 1991 to 1997, and 29 so far in 1998 as of November 19. The *Washington Post* published 71 articles pertaining to Social Security solvency from 1991 to 1997 and, as of November 16, had published 26 articles in 1998. The *New York Times* published 48 articles pertaining to Social Security over a two-week period in the spring of 1998 (Apr. 8-22).

[13] The Advisory Council is a panel of experts appointed by the President to conduct a comprehensive examination of the program and make recommendations. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464. Section 706 of the Social Security Act (repealed), required the President to appoint an Advisory Council every four years to examine issues affecting the OASDI program, as well as the Medicare program. The 1994-96 council was the last to be appointed. The Council's report was issued in January 1997 and outlined the financial situation of the system and provided three alternatives for reforming the system, all of which involve some utilization of private markets. *See* ADVISORY COUNCIL ON SOCIAL SECURITY, REPORT OF THE 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4.

[14] Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

private marketplace to create a new, fully funded system that gets the government out from under its staggering unfunded liabilities, while providing individuals the opportunity for greater wealth in their retirement.[15] Although this Essay does not advocate any one specific proposal, now is the time for legislators to begin what will surely be a lengthy process of discussion, education, and problem-solving as we tackle a problem that will affect every American. Delay in beginning the process will only limit options.

This Essay is intended to be an educational document for all parties concerned. Part I will discuss the history of the current Social Security system, give a thumbnail sketch of how the system works, and describe the problems facing Social Security today. Part II lays out the options for addressing this problem. Guided by a set of basic principles, Congress should adopt a new system, whereby workers could privately invest for themselves, and thereby secure their own futures. Finally, in light of the limited opportunity for action, Part III urges lawmakers to act now, while a broad range of acceptable options is still available.

I. SOCIAL SECURITY FROM 1935 TO TODAY

A. *Why Social Security?*

Social Security was created in response to the nation's financial panic during the Great Depression.[16] President Franklin D. Roosevelt addressed Congress during the summer of 1934, promising legislation to restore the "security of the citizen and his family through social insurance."[17] One year later, the Social Secu-

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[15] *See, e.g., Privatizing Social Security: The $10 Trillion Opportunity,* THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION, (Cato, Inst., Wash., D.C.), Jan. 31, 1997, at 1–5; ADVISORY COUNCIL ON SOCIAL SECURITY , 1 REPORT OF THE 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY 30–33 (describing Option III as a "a two-tiered system with privately held individual accounts").

[16] *See generally* KOLLMANN, SUMMARY OF MAJOR CHANGE IN THE SOCIAL SECURITY CASH BENEFITS PROGRAM: 1935–1996, *supra* note 10. The economic crisis overwhelmed traditional sources of aid for the jobless, aged, widowed, orphaned, and disabled. To help deal with the crisis, a Committee on Economic Security appointed by President Roosevelt recommended that the federal government create a national program that would establish a system of unemployment and old-age benefits. *See id.*

[17] Franklin D. Roosevelt, *Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration* (June 8, 1934), in 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 287, 291 (Samuel I. Rosenman ed., Random House 1938).

rity Act was signed into law.[18] At that time, the intention was for Social Security to provide a minimum, sustaining level of income in instances of depression or other economic crises.[19] Only retired workers aged sixty-five and over qualified for benefits.[20] A lump-sum benefit was provided to workers' estates upon death.[21] Monthly benefit payments were to begin January 1, 1942.[22]

In 1939, Social Security was amended to provide benefits to dependents of retired workers and survivors of deceased workers beginning the following year.[23] The 1939 amendments were the first in a nearly forty-year series of program expansions. When the system was first created, it applied only to individuals working in commerce and industry,[24] about 60% of the work force.[25] Over the years, numerous other categories of workers have been brought into the system.[26] By 1996, 142 million workers out of a total workforce of 148.8 million were covered under Social Security and 96% of all jobs in the United States were covered.[27]

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[18] *See* Social Security Act, Pub. L. No. 74-271, 531 Stat. 620 (1935).

[19] President Roosevelt, when signing the Social Security Act on August 14, 1935, stated, "We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen . . . ." Social Security Administration, *FDR's Statements on Social Security* (visited Dec. 11, 1998) <http://www.ssa.gov/history/fdrstmts.html>. In a radio address marking the third anniversary of the Social Security Act on August 15, 1938, Roosevelt said, "The Act does not offer anyone, either individually or collectively, an easy life—nor was it ever intended so to do. None of the sums of money paid out to individuals in assistance or in insurance will spell anything approaching abundance. But they will furnish that minimum necessity to keep a foothold . . . ." *Id.*

[20] *See* GREEN BOOK, *supra* note 2, at 6.

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See, e.g.*, Social Security Act Amendments of 1939, Pub. L. No. 76-379 (amendment to Social Security Act providing benefits for "dependants" of insured workers); Social Security Act Amendments of 1950, Pub. L. No. 81-734 (extending coverage to about 10 million additional workers such as regularly employed farm and domestic workers, self-employed workers (except farmers and professions), federal civilian employees not under a federal civil retirement system; Social Security Act Amendments of 1954, Pub. L. No. 83-761 (extending coverage to self-employed farmers, most professional self-employed workers, and most homeowners. *See generally* KOLLMANN, *supra* note 10.

[27] *See* GREEN BOOK, *supra* note 2, at 6–7.

B. *How Social Security Works*

Social Security is the term generally used to refer to the Old Age, Survivor and Disability Insurance ("OASDI") program—which contains two components, Old-Age and Survivors Insurance ("OASI") and Disability Insurance ("DI").[28] The system is a pay-as-you-go, tax-and-spend program. Employees and employers are taxed to finance the Social Security system.[29] Money is deducted directly from paychecks.[30] All taxes collected from current workers are spent each year to provide benefits for current retirees[31]—only a fictional trust fund for investment exists.[32]

The system is financed primarily by taxing payroll. Employees and employers are each taxed 6.2% on their paychecks up to $68,400 per year.[33] Thus, for every employee earning, for example, $30,000 per year, the federal government collects $1,860 from the individual and $1,860 from the employer for a total of $3,720 toward OASDI.[34] Revenue from the taxation of benefits (calculated by income level)[35] and interest collected on the Social Security trust fund's invested assets also partially support the program.[36] In 1997, OASI's income included $349.9 billion from payroll taxes, $7.4 billion from taxation of benefits, and $39.8 billion in interest.[37] That year, the Social Security Administration ("SSA") distributed $316.3 billion in benefits to retirees.[38]

To calculate monthly benefits, the SSA first determines the individual's Average Indexed Monthly Earnings ("AIME"). The AIME represents a worker's lifetime average monthly income,

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[28] *See* BOARD OF TRUSTEES, *supra* note 8, at 1.

[29] *See* Social Security Act of 1935, Pub. L. No. 74-271, Title VIII, 531 Stat. 620 (1935).

[30] *See id.*

[31] *See generally* DAVID KOITZ, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY TAXES: WHERE DO SURPLUS TAXES GO AND HOW ARE THEY USED? (1998) ("Social Security taxes become part of the Government's operating cash pool. This cash pool is the U.S. Treasury. In effect, once these taxes are received, they become indistinguishable from other monies the Government takes in.").

[32] *See id.*

[33] *See* Social Security Amendments of 1977, Pub. L. No. 95-216 (increasing the earnings base and providing that the base would be adjusted automatically to keep up with average wages. *See* BOARD OF TRUSTEES, *supra* note 8, at 6.

[34] Of the 12.4% of earnings collected, 1.7 percentage points finance benefits to disabled Americans. *See* BOARD OF TRUSTEES, *supra* note 8, at 6 tbl. I.C2. The remainder finances benefits for retirees and their survivors. *See id.*

[35] See BOARD OF TRUSTEES, *supra* note 8, at 6–7.

[36] *See id* at 7–8.

[37] *See id.* at 6 tbl. I.C1.

[38] *See id.*

adjusted for inflation, during the block of years the earnings were highest.[39] The SSA uses the AIME to calculate monthly benefits by adding 90% of the first $437 of the AIME, 32% of the next $2,198 of the AIME, and 15% of the remaining AIME up to the maximum wage base, currently $68,400.[40] The resulting figure, known as the Primary Insurance Amount ("PIA"), is the amount retired persons receive each month from Social Security. The maximum monthly benefit for a retiree age 65 or older in 1997 was $1,326.[41]

Private pension systems are required by law to maintain funds sufficient to pay their liabilities.[42] The Pension Benefit Guaranty Corporation ("PBGC"), the Department of Labor, and the Internal Revenue Service share responsibility for enforcing this law.[43] Failure to satisfy the minimum standard for a year can subject the private pension system to an excise tax and other penalties.[44] Social Security, however, is not run like a private pension system. It is a pay-as-you-go plan. The surplus OASI receipts are accumulated in a government "trust fund." The trust must, by law, invest in a special class of U.S. Treasury securities.[45] In turn, these securities finance the government's deficit spending.[46] Like all U.S. government instruments, the U.S. Treasury securities are secured only by the government's power to tax future wealth generated by the private economy.[47]

Simply put, every penny collected in Social Security taxes is spent. The budget system uses all cash receipts to meet current expenditures, and any "excess" revenue (including excess revenue from Social Security) in effect masks a portion of the federal

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[39] *See* GREEN BOOK, *supra* note 2, at 23.

[40] For example, under this formula, a worker whose AIME is $400 would get $360 per month ($400 x .9), or 90% of his earnings. A worker whose AIME is $2,500 would get $1,053.46 per month ($437 x .9 + $2,063 x .32), or 42% of his earnings ($1,053.46/$2,500 = .42). A worker whose AIME is $3,500 would get $1,226.41 per month ($437 x .9 + $2,198 x .32 + $865 x. 15), or 35% of his earnings ($1,226.41/$3,500 = .35).

[41] *See* GREEN BOOK, *supra* note 2, at 4.

[42] *See* The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406.

[43] *See id.*

[44] *See id.* The Code imposes on the employer an annual excise tax of 5% of the amount of the accumulated funding deficiency of a multi-employer plan, and 10% in the case of any other plan. Other penalties may include the requirement of notice to the PBGC and enforcement actions by the PBGC or the Labor Department. *See* EMPLOYEE BENEFITS COMMITTEE, BUREAU OF NATIONAL AFFAIRS, EMPLOYEE BENEFITS LAW 136–39 (1996).

[45] *See* Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65.

[46] *Id.*

[47] *Id.*

spending deficit.[48] In this regard, the Social Security "trust fund" is merely an accounting tool.

C. *Why the System Is in Trouble*

As long as Social Security receives more taxes from workers than it pays in benefits to retirees, the system will be able to meet its obligations. Beginning in 2013, however, payments to beneficiaries will exceed the sum of payroll taxes and revenue from benefit taxation.[49] This will occur as a result of a combination of demographic, economic, and social changes that legislators and experts over the years have failed to foresee.[50] Taken together, the changes are burdening the system beyond the control of legislators.

1. The Demographic Factor

The ratio of workers to pensioners has been declining. In 1950, the ratio of workers to retirees was 16.5 to 1.[51] This means that the taxes of 16.5 workers were paying the Social Security benefits of one retiree. Currently, about 3.4 workers support each retiree.[52] By 2030, just 2 workers will have to support each retiree.[53]

The population as a whole is aging because the average life expectancy for Americans has been increasing steadily and the post-World War II "baby boom" generation is nearing retire-

[48] *See* KOITZ, *supra* note 31.

[49] *See* BOARD OF TRUSTEES, *supra* note 8, at 108 tbl. II.F13 (assuming the Board's intermediate economic assumptions).

[50] For example, Congress enacted big benefit increases in the late 1960s and early 1970s, including a 20% across the board increase in 1972 and automatic benefit increases beginning in 1975. *See* David Stuart Koitz, Checks and Balances on Social Security, American College Symposium in Bryn Mawr (1982) (on file with author). At the time of enactment, financial projection assumed that average wages would grow 24% more than prices over the period from 1972-81. *See id.* Wages actually grew by 9% less than prices in that period. *See id.* Generally, when changes were last made to Social Security in 1983, the prognosis was that it would be solvent for seventy-five years. *See* DAVID STUART KOITZ, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY FINANCING REFORM: LESSONS FROM THE 1983 AMENDMENTS 1 (1997). Since that time, actuarial deficits have re-emerged and grown worse. *See id.* Regarding demographic changes, the end of the "Baby Boom" first became evident with analysis of the 1970 Census. *See* Interview with David Stuart Koitz, Congressional Research Service, in Washington, D.C. (Oct. 10, 1998). Because the Social Security Trustees operate using historical trends rather than radical shifts from year to year, data and projections in the Trustees' reports did not begin reflecting the decline until 1973 and 1974. *See id.*

[51] *See* BOARD OF TRUSTEES, *supra* note 8, at 122 tbl II.F19.

[52] *See id.*

[53] *See id.* (assuming the Board's intermediate economic assumptions).

ment. When Social Security began paying monthly benefits to retired persons aged sixty-five and older in the early 1940s, the average life expectancy for a male was about sixty-one years.[54] The average male born today lives until age seventy-three, and the average female born today lives until age seventy-nine.[55] The population of Americans aged sixty-five and over increased elevenfold from 1900 to 1994, compared with only a threefold increase of those under age sixty-five.[56] The population of those eighty-five and older will more than double between 1994 and 2020 to 7 million, and reach 19 million by 2050.[57]

In addition to increased life expectancy, the drop in the ratio of retirees to workers will be exacerbated as the "baby boomers" near retirement beginning in about 2010. The average family had more than two children during the twenty years following World War II.[58] In the 1970s and 1980s, the average family had less than two children.[59] The Cato Institute's Project on Social Security Privatization contends that in 2030 the entire United States will have a demographic profile similar to that of Florida's demography in 1991.[60]

Social Security depends on today's workers to pay for today's retirees. The future of the system and the benefits due today's workers in their retirement depends heavily on the government's ability to tax future generations. Thus, understanding these changing demographics is key to understanding why the system is in trouble.

2. The Economic Factor

Two economic factors also impact Social Security's future solvency—the growth of wages and a reduction in the size of the labor force. Social Security payments are adjusted each year by a Cost of Living Adjustment ("COLA").[61] As the name implies, this adjustment is intended to reflect changes in economic con-

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[54] *See id.* at 60.
[55] *See id.*
[56] *See* HOBBS & DAMON, *supra* note 4, at 2–9.
[57] *See id.*
[58] *See* BOARD OF TRUSTEES, *supra* note 8, at 60 tbl II.D2.
[59] *See id.* at 63.
[60] *See* Mark Weinberger, *Social Security: Facing the Facts*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), Apr. 1996, at 5. In 1991, 18.4% of the population of Florida was over the age of 65. *See id.*
[61] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 75.

ditions that cause increases in the price of necessities.[62] This adjustment is based on formulas measuring changes in prices and wages.[63] In their intermediate projections for the trust fund, the Social Security trustees estimate that wage growth will exceed inflation by one percent.[64] As benefit levels increase for each successive generation, the amount of money obligated to those benefits grows.

Additionally, growth in the labor force is projected to slow to almost zero beginning in 2020, shortly after the bulk of the baby boomers begins to retire.[65] The President's Advisory Council on Social Security asserts that the impact of this trend is substantial and that the depletion of the funded status of the system is accelerated by about four years due to the resulting income loss.[66]

3. The Social Factor

Finally, and most importantly, employment trends have changed dramatically, along with patterns of savings. Social Security was never intended to replace one hundred percent of a worker's income.[67] Rather it was meant to provide a minimum, sustaining level of income in instances of depression or other economic crises.[68] But trends reveal that fewer and fewer retirees can rely on additional sources of income.[69]

Traditional defined-benefit pension plans are also less beneficial in the long run for today's younger workers, who tend to change jobs more often due to current workplace trends.[70] According to the Advisory Council, such workers suffer reductions in pension benefits relative to individuals who remain with the same em-

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[62] *See id.*; *see also* CAROLYN L. MERCK, CONGRESSIONAL RESEARCH SERVICE, BENEFIT AND PAY INCREASES IN SELECTED FEDERAL PROGRAMS, 1969-1995, at 3 (1994).

[63] *See* Social Security Act Amendments of 1972, Pub. L. No. 92-336, 86 Stat. 406, *reprinted in* 1972 U.S.C.C.A.N. 485, 493–503.

[64] *See* BOARD OF TRUSTEES, *supra* note 8, at 57 tbl. II.D1.

[65] *See id.*

[66] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 243-44.

[67] *See supra* text accompanying note 19.

[68] *See id.*

[69] *See, e.g.*, ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 38 (finding that growth in pension coverage has stagnated since the early 1970s and that, given current policies, growth in the proportion of the labor force participating in employer sponsored programs is unlikely to occur); *see also*, HOBBS & DAMON, *supra* note 4, at vi (noting that, in 1992, Social Security benefits were the primary source of income for 63% of beneficiaries).

[70] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 38.

ployer for a longer period of time.[71] The Advisory Counsel report states:

> This loss in pension wealth occurs even if the worker finds immediate employment at identical earnings with another firm operating with an identical pension. The loss occurs because benefits are based on earnings up to or at the time of the separation, and are fixed in nominal terms at that time. Thus, a worker who switches employers will have lower total pension benefits than one who remains with a single firm, even if they have the same earnings profile.[72]

The Council concludes that "current trends do not suggest any expansion of pension or health coverage on the horizon. Quite the opposite, current levels of pension and health coverage and benefits are threatened by government regulations and policies aimed at reducing the federal deficit."[73]

The Council also found that the primary savings of most individuals are low compared to historical American trends and to international standards.[74] According to the Council's findings, "many Americans reach retirement age with relatively little savings, and what they do have is concentrated in the form of housing equity, anticipated pension benefits, . . . and anticipated Social Security benefits."[75] These combined factors have elevated the expectations on the Social Security system to an unrealistic and unsustainable level. In the next century, fewer workers will be expected to finance the retirement of more retirees, who will be more dependent on Social Security as their sole retirement income.

D. *Social Security Today*

The Social Security system cannot meet its financial obligations in its current form. The program's unfunded liabilities today are estimated at $9 trillion.[76] Therefore, if the system were dissolved today—no more taxes collected and no more promises of benefits made to new workers—the United States government would be liable for existing promises totaling at least $9 trillion.

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[71] *See id.* at 36.
[72] *Id.*
[73] *Id.* at 41.
[74] *See id.*
[75] *Id.* at 44.
[76] *See supra* note 11.

In 1997, Congress passed legislation for the first time in thirty years that balanced the unified federal budget, that is, the general budget plus Social Security receipts and disbursements.[77] This achievement was significant because it stopped the growth of the $3.7 trillion debt held by the public.[78] Albeit substantial, this debt pales in comparison to what the federal government owes American workers in Social Security benefits.

The Social Security system will take in less money from taxation than it pays out beginning in 2013,[79] at which point the government will begin to spend the so-called surplus in the trust fund to make up the difference.[80] Because the surplus has been used to fund the government's spending deficit, however, the government will simply issue more debt to make up for the loss of revenue.[81] Moreover, the Social Security Board of Trustees estimates that this surplus will be depleted by 2032[82], at which point receipts are projected to cover only 75% of projected outlays.[83]

Understandably there are more young Americans today who believe in UFOs than there are young Americans who believe they will receive Social Security benefits.[84] Such skepticism is justified. Although 76% of today's workers already pay more Social Security taxes than federal income taxes[85], the Social Security Board of Trustees predicts that, by 2040, a combined employer-employee payroll tax increase of almost fifty percent could be required to pay benefits.[86] In addition, workers will be less likely to have a private pension on which to rely. Further-

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[77] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251. The term "unified federal budget" refers to government's on-budget accounts plus off-budget accounts for Social Security and the Postal Service.

[78] However, the gross national debt, the debt held by the public combined with the debt the government owes itself, will continue to grow beyond its current $5.5 trillion total. *See* Dep't of Treasury, Bureau of Public Debt, *The Public Debt on the Net* (visited Dec. 11, 1998) <http://www.publicdebt.treas.gov/opd/opdpenny.htm>. Without Social Security's current surpluses, the general fund would not be balanced. The government's debt to itself will continue to grow as long as the government continues to borrow from itself via the Social Security Trust Fund to pay for other spending.

[79] *See* BOARD OF TRUSTEES, *supra* note 8, at 29, 108.

[80] *See id.* at 7–8 .

[81] *See supra* text accompanying notes 45–48.

[82] *See* BOARD OF TRUSTEES, *supra* note 8, at 28.

[83] *See id.*

[84] *See* Anne Willette, *Social Security Reform*, USA TODAY, Feb. 18, 1997, at 1B (discussing poll).

[85] *See* William G. Shipman, *Retiring with Dignity: Social Security vs. Private Markets*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION, (Cato Inst., Wash., D.C.), Aug. 14, 1995, at 2 (1995).

[86] *See* BOARD OF TRUSTEES, *supra* note 8, at 108 tbl. II.F13.

more, with nearly half of their paycheck consumed by payroll taxes alone, employees would doubtfully have resources available to save and invest on their own.

Therefore, the challenge facing Congress is to ensure financial solvency of the Social Security program for younger and future workers without taxing them at unprecedented rates, while simultaneously providing Social Security's promised benefits to current retirees and those nearing retirement.

II. Approaches for Addressing the Problem

Clearly, helping Americans reach the highest possible standard of living in retirement is a goal worth achieving. Any disagreement will revolve around how best to achieve this goal. There are two broad approaches for addressing Social Security's financial problems: (1) adjusting the existing system in a way that extends its financial solvency or (2) developing a new system altogether. In other words, should lawmakers maintain the current system as it is, or should Congress try to design something better? If the government opts for the second alternative, how should this system be restructured?

A. *Principles*

Policy makers must enter this debate with principles that help focus the discussion—a set of ground rules. Adjustments to the current Social Security program, or any alternative federal retirement plan, should meet the following standards:

1. Guarantee that any alternative retirement system is voluntary.

The popularity of the current system was dependent on trust built over the years. The success of reform will depend on any alternative possessing a voluntary component. American workers who have paid their hard-earned dollars into Social Security should have the option of remaining in the current system, or choosing to participate in any reform-based system.

2. Provide the highest possible return on investment for all workers.

Long-term savings should yield a retirement account larger than the actual amount invested adjusted for inflation, so as to reward saving. There are many investment opportunities that provide a reasonable rate of return. In engineering retirement security for America's future generation, lawmakers must make sure to give workers the opportunity to earn as much as they can on their investment.

3. Get the federal government out from under staggering unfunded liabilities.

The federal government has never defaulted on its promises. But the unfunded liabilities stockpiled on the government over the past six decades limit the options required to avoid default. Debt is expensive and paying for it drains dollars away from more tangible things like national defense, national highway upkeep, and popular federal programs like Medicare. Any new retirement system should alleviate debt burdens on the federal government, or at least not exacerbate these burdens.

4. Make the system self-sustaining.

The existing Social Security system was intended to be self-supporting.[87] But various unforeseen factors have left the program on the brink of a very serious financial situation. Any proposed reform must be forward-thinking, ensuring secured retirement for many generations to come.

5. Require no increase in taxes to fund reform.

Despite eighteen payroll tax (OASI) increases since 1935, Social Security still faces insolvency.[88] Clearly, tax increases are not the solution, since 76% of today's workers already pay more for Social Security than federal income taxes,[89] and the Social

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[87] *See* Edward D. Berkowitz, *The Historical Development of Social Security in the United States*, *in* SOCIAL SECURITY IN THE 21ST CENTURY 22, 26 (Eric R. Kingston & James H. Schulz, eds., 1997). *See also supra* text accompanying note 19.

[88] *See* GREEN BOOK, *supra* note 2, at 59-60.

[89] *See* Shipman, *supra* note 85.

Security Board of Trustees predict that a payroll tax increase of almost 50% would be required to pay benefits by 2040.[90] Any serious reform proposal should recognize that further tax increases will only reduce private saving and increase public spending.

B. *Maintaining Solvency of the System in its Current Form*

Social Security remains one of the most popular government programs, enjoying an overwhelmingly favorable image among all ages, political ideologies, and income levels.[91] This popularity makes it a politically difficult program to alter. Although the system has been on the brink of financial crisis in the past, policymakers have only tinkered with the program through some combination of modifications to eligibility, tax rates, and benefit levels.[92] This has proven unsuccessful in ensuring long-term solvency and, in one instance, created a severe inequity, which has never been rectified, for a specific segment retirees.[93] Projections of Social Security's future financial straits illustrate that such reforms will have to be drastic to keep the system solvent in the long term.

1. Past Efforts at Reform

This is not the first time the Social Security system has been in trouble financially.[94] The alternatives for maintaining the solvency of the system as it currently exists boil down to some

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[90] *See* BOARD OF TRUSTEES, *supra* note 8, at 108 tbl. II.F13.

[91] *See, e.g.*, Tanner, *supra* note 6, at 2–3. (presenting a study by Public Opinion Strategies indicating that 64% of "Generation Xers" and 59% of Baby Boomers have a "favorable" image of Social Security, despite a belief that Social Security will not be there for them when they retire (70% and 69%, respectively)); *see also* Jennifer Baggette et al., *Poll Trends: Social Security, in* 59 PUBLIC OPINION QUARTERLY 420 (1995).

[92] *See e.g.*, Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 4155 (changing benefit formula, increasing tax rates, and increasing the earnings base); Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (Title II, § 201, increasing retirement age and Title I, Part C, § 123, accelerating scheduled tax increases).

[93] *See infra* text accompanying notes 100–104 (discussing the "notch babies").

[94] In 1973, the Social Security Board of Trustees began to project financial problems, both short-term and long-term. *See* KOLLMANN, *supra* note 10, at 15. The short-term problem was caused primarily by adverse economics. The long-term problem was caused in part by demographic changes. *See id.* In 1981, budgetary pressures led to the adoption of amendments eliminating benefits for certain categories of beneficiaries. *See id.* Additionally, in 1983 the OASDI's financial problems led to the creation of the National Commission on Social Security Reform and subsequent amendments of 1983. *See id.* at 16.

combination of two choices: reducing benefits or raising taxes.[95] These options have been implemented since the system's creation.[96] Payroll taxes, for example, have risen dramatically. In 1950, the OASI tax rate was 3% of earnings, up to $3,000, for a maximum tax of $90 per year.[97] The rate in 1997 is 10.7% of $65,400.[98] Even adjusting for inflation, that is a twelvefold increase.[99]

Legislation passed in 1977 and 1983 brought landmark changes to Social Security. But, Congress committed an error when writing a 1972 bill to implement Cost of Living Adjustments.[100] This error created a windfall for individuals born between 1912 and 1916.[101] Left uncorrected, this error would have cost the government substantially in benefit over-payments.[102] By 1977, the error was hurtling the system toward imminent bankruptcy. That year, Congress responded by legislating a "correction" that created significant inequity among retirees born just a few years apart. Congress fixed the mistake on a phased-in basis, hoping to minimize the impact on individuals who were only a few years from retirement.[103] The correction created a "notch" of retirees, often referred to as the "notch babies," born between 1917 and 1921 who retired during the phase-in correction period and therefore received lower benefits than the windfall retirees born between 1912 and 1916.[104]

Although Congress enacted further changes in 1980 and 1981,[105] the system's outlook worsened.[106] In the spring of 1981, the Reagan Administration proposed a controversial set of changes, mostly benefit reductions, to address the system's financial prob-

[95] Social Security is a tax and spend, pay-go system. If spending begins to exceed receipts, the government must either cut spending (reduce benefits) or raise more money (increase taxes). Options for reducing benefits include, but are not limited to: raising the retirement age, delaying cost of living increases, means testing, eliminating certain categories of beneficiaries. Options for increasing taxes include, but are not limited to: taxation of benefits and increased taxation of benefits, increasing the earnings base, and raising payroll taxes.

[96] *See supra* note 92.

[97] *See* BOARD OF TRUSTEES, *supra* note 8, at 34, Table. II.B.1.

[98] *See id.*

[99] *See id.*

[100] *See* THE COMMISSION ON THE SOCIAL SECURITY "NOTCH" ISSUE, FINAL REPORT ON THE SOCIAL SECURITY "NOTCH" ISSUE 6 (1994).

[101] *See id.* at 11.

[102] *See id.* at 8.

[103] *See id.* at 9.

[104] *See id.* at 13.

[105] *See* KOITZ, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY FINANCING REFORM: LESSONS FROM THE 1983 AMENDMENTS 2 (1997).

[106] *See* Berkowitz, *supra* note 87, at 37.

lems.[107] In September 1981, after a summer of partisan debate over the necessity of changing the system, President Reagan suggested the creation of a commission to study the problem.[108] After bipartisan consultations with congressional leaders, the National Commission on Social Security Reform was established by executive order in December 1981.[109] It was composed of fifteen members, seven of whom were then sitting members of the House or Senate.[110] Alan Greenspan, currently chairman of the Board of Governors of the Federal Reserve System, served as its chairman.[111]

Under reforms promulgated by the Commission in 1983, the retirement age will rise from sixty-five to sixty-seven over a twenty-three-year period. Specifically, the retirement age will gradually rise from sixty-five to sixty-six for those born in 1938 through 1943, remain at sixty-six for those born in 1944 through 1954, and then gradually rise to sixty-seven for those born after 1954.[112] In addition, the Commission's reforms included changes in methods for computing benefit amounts and acceleration of planned tax increases.[113]

When the 1983 changes were enacted, the expectation was that they would keep the system solvent for seventy-five years. Yet Congress has raised payroll taxes many times since then and the system still lacks financial stability. Both the 1977 and 1983 endeavors were crucial to preventing financial disaster in the immediate future. But clearly, neither effort provided a permanent resolution to the system's long-term solvency problems.

2. Tinkering with the Existing System: Requirements for Solvency

Haphazardly changing the current system can lead to disastrous consequences. The "notch babies" affair is a good illustration of how tinkering within a complicated system can cause

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[107] *See* KOITZ, *supra* note 105, at 2.

[108] *See* Berkowitz, *supra* note 87, at 37.

[109] *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (1981).

[110] *See id.*

[111] *See* KOITZ, *supra* note 105, at 2.

[112] *See* Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 107-08 (codified as amended at 42 U.S.C. § 416). Indirectly, retirees' benefits have also been reduced over time. Merely increasing the retirement age is equivalent to reducing benefits, since recipients will be denied benefits during those years they would have received them prior to reform.

[113] *See id.*

more harm than good, more inequality than fairness, more distrust of federal government than confidence in the system.[114]

According to projections of the Social Security Board of Trustees, funding all promised benefits would require that the combined employer-employee OASDI portion of the payroll tax be increased from the current 12.4% to more than 18%.[115] Moreover, the so-called pessimistic assumptions, which assume slightly higher unemployment and inflation rates and an increase in life expectancy at retirement much closer to actual experience as illustrated by the 1983 effort, indicate that payroll taxes could reach almost 27%.[116] On the other hand, substantial benefit cuts would jeopardize the living standards of a sizable fraction of those already retired or close to retirement—those with little time or ability left for amassing adequate retirement savings on their own.

C. *A Fresh Approach: The Case for Utilizing Private Markets*

The outlook for success is bleak if tinkering with the existing system is our only course of action. Accordingly, many economists and Social Security experts advocate other avenues for providing Americans with the opportunity for a secure retirement.[117] Almost universally, the alternative embraced by advocates of a new system has involved utilizing private markets. In very general terms, this would mean payroll taxes would, to some degree, be invested in the private market rather than in government securities.

While there are countless ways of implementing such a plan, the basic idea that the use of private markets is the solution to Social Security's looming bankruptcy has been accepted in one

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[114] For example, since I was first elected to the U.S. Senate in 1980, I have responded to more than 6500 letters concerning the "notch baby" issue. Seniors impacted by that change have written to me that they feel "cheated" and that they have been penalized by the system.

[115] *See* BOARD OF TRUSTEES, *supra* note 8, at 108 tbl. II.F13. The percentage difference between the income rate and the cost rate ((19.79-13.36)/13.36 = .481) is approximately 48%. A 48% increase in tax rates from the current rate of 12.4% of taxable payroll yields a rate of almost 18%.

[116] *See id.* The percentage difference between the income rate and the cost rate ((29.92-13.87)/13.87 = 1.15) is approximately 116%. A 116% increase in tax rates from the current rate of 12.4% of taxable payroll yields a rate of almost 27%.

[117] *See, e.g.*, BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, FINAL REPORT TO THE PRESIDENT (1995). *See also* Advisory Council on Social Security, *supra* note 3.

form or another by individuals of all political persuasions and educational backgrounds. For example, Harvard University Economics Professor Martin Feldstein,[118] at least three economics Nobel Prize winners,[119] and the President of the American Economics Association, Arnold Harberger,[120] have all endorsed privatizing Social Security. Sam Beard, a former staffer for Senator Robert Kennedy and chairman of economic development programs for the Nixon, Ford, Carter, and Reagan administrations, outlines his plan for making 100 million millionaires through private investment accounts in his book *Restoring Hope in America.*[121]

The notion of privatizing Social Security emerged in the mid-1970s when changing demographic and economic circumstances made it apparent that the existing system would not be financially sustainable in its present form.[122] The best of the "privatization" ideas sets up a system of personal retirement accounts. Individuals would be able to invest for themselves a portion of what they currently pay into the Social Security system in payroll taxes. Workers would be able to invest at a minimum 2%—and Congress should consider as much as 5.35%[123]—of their income in an account they would control. Workers would have a full menu of options for investment, ranging from mutual funds, stocks and bonds both to government securities and international markets. Most proposals would require a lengthy phase-in period to ensure there would be regular Social Security benefits for those too close to retirement to benefit from the new system.[124] Transition to the private market system would be voluntary, though most proposals provide some combination of incentives to encourage workers to take advantage of the opportu-

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[118] *See, e.g.*, Martin Feldstein, *Privatizing Social Security: The $10 Trillion Opportunity*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), Jan. 31, 1997, at 1.

[119] *See* Peter Ferrara, *Power to the People: A Private Option for Social Security, Americans for Tax Reform* (visited Mar. 1, 1998) <http://www.townhall.com/atr/socialsecurity.html> (Economics Nobel Prize Winners Gary Becker, James Buchanan, and Milton Friedman).

[120] *See id.*

[121] Beard advocates a two-tiered system, with a Tier 1 "safety net" and Tier 2 allowing individuals to invest money they are currently paying into the Social Security system. *See* SAM BEARD, RESTORING HOPE IN AMERICA, 1996.

[122] *See* DAVID STUART KOITZ, CONGRESSIONAL RESEARCH SERVICE, IDEAS FOR PRIVATIZING SOCIAL SECURITY (1997).

[123] This percentage represents the percentage of pay up to $68,400 an individual employee currently pays into the OASI fund.

[124] *See* KOITZ, IDEAS FOR PRIVATIZING SOCIAL SECURITY, *supra* note 122.

nity.[125] These plans recognize the need for maintaining a minimum safety net for low-income workers and the need to make allowances for survivor and disability benefits.[126]

Various forms of the personal retirement account idea have been promoted by a number of respected economists,[127] the Cato Institute,[128] and five members of the President's Advisory Council on Social Security.[129] A number of legislators have proposed legislation to enact some variation of the idea.[130]

This Essay does not promote any specific plan because these proposals raise many questions that require further investigation. For purposes of discussing the potential benefits of personal savings accounts, this Essay utilizes the proposal endorsed by five of the twelve members of Advisory Council on Social Security in their January 1997 report.[131] Though I do not agree with all the details of the proposal, it is the most widely known and represents a good starting point to begin debate.

1. Benefits of the Personal Savings Account

a. *Higher rates of return on retirement investments.* The benefit of long-term savings and investment is compounded interest. Researchers have analyzed both historical data and projections for the future with results that are staggering in terms of the rate of return of Social Security versus private markets.[132] One commentator notes: "[T]he rate of return on Social Security taxes will increasingly leave retirees relatively worse off than they should be."[133]

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[125] *See id.*

[126] *See id.*

[127] *See, e.g.*, Feldstein, *supra* note 118; Ferrara, *supra* note 119; David Altig & Jagadeesh Gokhale, *Social Security Privatization: One Proposal,* THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), No. 9 (1997), at 1.

[128] *See, e.g.*, Krzysztof M. Ostaszewski, *Privatizing the Social Security Trust Fund? Don't Let the Government Invest,* THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), Jan. 14, 1997, at 1.

[129] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 30–33.

[130] *See, e.g.*, Individual Social Security Retirement Accounts Act of 1997, H.R. 2929, 105th Cong.; Strengthening Social Security Act of 1997, S.321, 105th Cong.; Retirement Security Act of 1997, H.R. 1611, 105th Cong.; Personal Retirement Accounts Act of 1997, H.R. 2768, 105th Cong.

[131] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 30–33.

[132] *See id.*

[133] J.T. Young, U.S. Senate Republican Policy Comm., *Could Congress' Retirement Plan Serve as a Model to Reform Social Security?*, Republican Party Committee (visited Mar. 10, 1998) <http://www.senate.gov/~rpc/releases/1998/tsp-jt.htm>.

Social Security's real rates of return are diminishing rapidly.[134] The average worker retiring in 1997 will recover the value of her own and her employer's contributions in 13.9 years; however, it will take almost twice as long for the average worker retiring in 2025 to recover those contributions—26.2 years.[135]

In addition to diminishing rates of return, the government bonds that Social Security funds are invested in have a much lower rate of return than private equities are expected to have.[136] The Advisory Council Report states that the average long-term rate of return on government bonds is 2.3%, compared to expected rates of return on equities of between 6.8% and 7.3%.[137] This percentage disparity translates into thousands of lost dollars to taxpayers.[138]

Consider how just one percent of a worker's income could be put to much better use: a study released in March of 1998 by the Congressional Research Service illustrates the power of compounding interest over a worker's lifetime.[139] An average wage earner retiring in 2045[140] who was allowed to privately invest only one percent of his income would have a nest egg of $180,880 if he retired at age seventy, assuming a 7.29% rate of return.[141] Obviously, the return is directly proportional to the investment, such that investing three percent of income, the worker would have a nest egg worth more than half a million dollars—$542,640.[142]

The Social Security Advisory Council examined rates of return and found that during this century, the average rate of return on U.S. Treasury securities has been 2.3%.[143] This compares with an average rate of return on investment in U.S. corporations of 7%.[144]

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[134] *See id.*

[135] *See id.*

[136] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 40.

[137] *See id.*

[138] *See id.*

[139] See DAVID STUART KOITZ, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY REFORM: HOW MUCH OF A ROLE COULD PRIVATE RETIREMENT ACCOUNTS PLAY? 23–25 (1998).

[140] The year 2045 represents the earliest year that would reflect a full career's worth of investing. *See id.*

[141] *See id.*, at appendix tbl. 13. Average wages are those comprising the average-wage indexing series used by the Social Security trustees in making the intermediate projections in their 1997 report. *See id.*

[142] *See id.*, at appendix tbl. 15.

[143] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 26.

[144] *See id.*

b. Reduces federal government unfunded liability and creates a self-sustaining system. When President Roosevelt spoke to Congress in January 1935 to present the findings and recommendations of his Committee on Economic Security, one of the three principles he laid out in designing a federal retirement system was that it should be self-sustaining.[145] Thus far, the system, with various modifications, has paid for itself, taking in more money than it is paying out.[146] But that will change beginning in 2013,[147] despite numerous tax increases implemented over the life of the program.[148] Already the system owes Americans $9 trillion in unfunded promises.[149]

By cutting the payroll tax and transforming a portion of our federal retirement plan into a system of personal savings accounts, the federal government's future involvement and liabilities are reduced because the government would be taken out of the equation. Rather than paying money to the government, then getting benefits from the government, individuals would keep more of their earnings to control and invest themselves. Thus, the government's Social Security debt in the future would be much lower.

The benefits of reducing the government's debt have been discussed at length as Congress argued during the 1990s for a balanced budget. The cost to taxpayers of the national debt is typically one of the most compelling arguments, as it affects the pocketbooks of every taxpayer in America. In 1998, for example, the government paid $244 billion in interest on the national debt.[150] The current U.S. population is at 270 million,[151] which calculates out to $903 paid by every man, woman and child in America to cover the interest on the national debt this year.

c. *Benefits disconnected from length of life.* Unlike Social Security, a system of personal retirement accounts would give individuals ownership and property rights over their nest eggs. The current system ties benefits to the length of life after retirement.

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[145] *See supra* text accompanying note 17.
[146] *See* BOARD OF TRUSTEES, *supra* note 8, at 96–97 tbl. II.F8.
[147] *See id.* at 28–29.
[148] *See id.* at 33, tbl. II.B1.
[149] *See supra* note 11.
[150] *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK, at xvi (1998).
[151] *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 9 (1997).

Beneficiaries have no claim to the full amount of accrued contributions into the system, nor to their anticipated benefits, according to a U.S. Supreme Court ruling in 1960.[152] Beneficiaries are paid retirement benefits as long as they live; but should they die before they have received benefits equal to their contributions, that money is lost. By way of contrast, in a personalized system, individuals' contributions to their accounts belong to them. If they pass away, those benefits and their earnings can be left to family members, so that workers' earnings are not lost.

d. *Better deal for lower-income workers.* The Social Security system's original intent was to provide a safety net for individuals in their retirement, of particular benefit to lower income workers who were unable to save throughout their lifetime.[153] The system's benefit formula, as described previously, replaces a higher proportion of income for low-wage earners than for high-wage earners.[154] For example, for an average wage earner retiring at age sixty-five in 1997, Social Security was projected to replace 43.6% of the worker's income.[155] A low-wage worker would get about 58.8% and a high-wage earner about 25.4%.[156]

However, two factors indicate that the Social Security system is not necessarily as progressive as it seems. First, lower-income workers tend to enter the workforce earlier and therefore contribute payroll taxes to the system for a longer period of time.[157] Second, poorer workers tend to die earlier, therefore receiving benefits for fewer years.[158] A system of personal savings accounts eliminates this inequity. Those who start work earlier are rewarded by a system that depends on compounded investment and returns. Furthermore, because benefits would no longer be tied to life expectancy, retirement money would belong to the

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[152] *See* Flemming v. Nestor, 363 U.S. 603, 608 (1960) (holding that deported immigrant does not have an accrued property interest in future Social Security benefits).

[153] *See* Michael Tanner, *Privatizing Social Security: A Big Boost for the Poor*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), No. 4 (1996), at 2. ("[I]n addition to simply providing retirement benefits, Social Security attempts to redistribute income from wealthy retirees to poorer ones.")

[154] Low wage earners are defined as workers earning 45% of the projected SSA average wage index; high earners earn the amount of the projected OASDI contribution and benefit base. *See* BOARD OF TRUSTEES, *supra* note 8, at 184.

[155] *See id.* at 183–85 tbl. III.B5. Average wage earners are those earning the amount of the projected SSA average wage index. *See id.* at 182.

[156] *See id.* at 183–87.

[157] *See* Tanner, *supra* note 153, at 5 (commenting that the poor start contributing to Social Security at an earlier age).

[158] *See id.* at 1.

workers, whether they lived five years past retirement or twenty. Consequently, low-wage earners could pass along their remaining benefits to children or grandchildren, thereby increasing future generations' opportunity for a higher standard of living.

2. Benefits of Personal Savings Accounts vs. Government-Controlled Private Investment

The personal savings account plan should not be confused with the less preferable alternative plan to utilize private markets that calls for government-controlled investment in the stock market. This alternative plan has been discussed in varying forms, including a proposal called the Maintenance of Benefits Plan, advocated by another segment of the President's Advisory Council on Social Security.[159] The alternative Advisory Council plan would maintain the basic system in its current form but increase the combined employer-employee tax by 1.6%. The additional money would then be invested in the private market by the federal government.[160]

While the alternative Advisory Council plan admirably recognizes the need for substantial reform through the use of the private market to improve returns on investment, such a plan would create two problems: it would invite governmental interference in private business decisions and it would leave Americans' retirement security vulnerable to investment based on political influence.

As a result, this alternative plan is troublesome. Consider, for example, what would happen if a company whose stock is purchased by the Social Security trust fund decided to move its operations overseas.[161] One scholar asks,

> Should the administrators of the investments of the trust fund remain indifferent to the plight of the company's workers, who after all will be future beneficiaries of the system? Shouldn't the trustees at least attempt to convince the company to retain its American operations? And if the company moves, wouldn't the ownership of shares represent an indirect subsidy to foreign employees extended by the American workers who are losing their jobs to them? What if the com-

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[159] *See* ADVISORY COUNCIL ON SOCIAL SECURITY, *supra* note 4, at 25–27.

[160] *See id.* at 25.

[161] *See* Krzysztof M. Ostaszewski, *Privatizing the Social Security Trust Fund? Don't Let the Government Invest*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION (Cato Inst., Wash., D.C.), Jan. 14, 1997, at 1.

> pany is convinced by the authorities to keep its operations in the United States and this leads to a consistent stream of losses and sub-par share performance?[162]

One could imagine an endless stream of political boondoggles that would effectively stifle investment opportunities. Should the government trustees invest in tobacco companies? What about companies that have a track record of unsafe environmental practices? Or companies with foreign subsidiaries that are found to be violating child labor laws? Such a list would be "virtually endless."[163] If trustees were forced to limit potential investment for political rather than economic reasons, such a system would be doomed to failure.

3. Private Markets for Retirement Programs Have Worked Around the World

Using private markets to generate retirement security is neither a new nor untested approach.[164] Nor are the demographic problems threatening Social Security unique to the United States.[165] With very few exceptions, life expectancy is increasing throughout the world.[166] Other countries that have addressed similar financial problems in their retirement systems have implemented a system of personal retirement accounts with success.[167]

a. *Chilean example.* In 1981, Chile began to phase out its state-run, pay-as-you-go Social Security system financed by employees and their employers in favor of mandatory individual private accounts.[168] The old system had several major problems: it had too many rates and programs, leading to high administrative costs; it faced a financial shortfall; and it was viewed as in-

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[162] *Id.*

[163] *See id.* at 4.

[164] Chile and the United Kingdom, for example, utilize such an approach. *See* GEOFFREY KOLLMANN, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY: WORLDWIDE TRENDS, 5 (1996). Argentina, Colombia, Mexico and Peru are also in the process of replacing or supplementing public pensions with mandatory or voluntary competitive private savings plans. To a lesser degree, Australia, France, India, Japan, and Switzerland have also increased the involvement of the private sector in providing retirement income. *See id.*

[165] *See id.* at 1.

[166] *See id.* The World Bank estimates the number of people age 60 and older will triple between 1990 and 2030. *See id.* at 1–2.

[167] *See supra* note 164.

[168] *See* GEOFFREY KOLLMAN, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY: THE CHILEAN EXAMPLE 1 (1997).

equitable by the general public.[169] Additionally, Chile was facing the same demographic trends as the United States faces—decreasing fertility rates and medical advances lengthening life, which were forcing the system toward bankruptcy as fewer and fewer workers supported more and more retirees.[170]

Chile thus enacted a law providing that, beginning in 1983, wage earners and salaried employees entering the workforce were no longer covered by the old system.[171] Instead, workers were required to pay a proportion of their earnings to a private pension fund of their choice.[172] Coverage for the self-employed was made voluntary.[173] Workers already paying into the old system were given the choice of joining the new system or remaining in the old one.[174] Under Chile's new system, individuals can select from a menu of investment options, including both public securities and private options such as stocks and bonds.[175] The funds are administered and invested by individual pension fund management companies under government guidelines and oversight.[176]

Wages were redefined to include the employer's contribution to the old pension system.[177] The worker's contribution, 10% of payroll, is deducted automatically.[178] Because contributions to the new system are lower than the combined employee/employer contributions to the old system, most workers also saw an increase in pay of about 5%.[179] In addition, workers who switched from the old system to the new one were given "recognition bonds," to be redeemed at retirement, that represented the value of their rights accrued under the old system.[180]

The Chilean system has been overwhelmingly popular. More than ninety percent of workers formerly in the old system have opted to move into the new system.[181] Recently, other Latin American countries such as Argentina, Colombia, Mexico, and

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[169] *See id.*

[170] *See* José Piñera, EMPOWERING WORKERS: THE PRIVATIZATION OF SOCIAL SECURITY IN CHILE (Cato Institute: Cato's Letters No. 10, 1996).

[171] *See* KOLLMAN, THE CHILEAN EXAMPLE, *supra* note 168, at 2.

[172] *See id.*

[173] *See id.*

[174] *See* Piñera, *supra* note 170, at 9–10.

[175] *See id.* at 4, 14.

[176] *See id.*

[177] *See id.* at 11.

[178] *See id.* at 3.

[179] *See id.* at 11.

[180] *See id.* at 9–10.

[181] *See id.* at 16.

Peru have begun replacing or supplementing their public pension systems with mandatory or voluntary private savings plans.[182]

b. *British example.* When Great Britain recognized similar problems with its public retirement system in the aftermath of World War II, it began a gradual shift toward a two-tiered system that utilizes private markets.[183] The bottom tier pays a flat-rate benefit based on years of work.[184] The upper tier pays benefits based on earnings while in the workforce.[185] All eligible employees are entitled to the bottom tier safety net, the Basic State Pension.[186] The upper tier (available to all except low-income people covered by the basic state pension or means-tested programs) provides a choice: remain in an American-style government pension program called the State Earnings Related Pension Scheme ("SERPS") or divert a specified portion of payroll taxes (known as "national insurance contributions") into a private company-based plan or personal pension plan.[187] Individuals are encouraged to opt out of the government-run upper tier and into a private fund through a series of incentives, including a lower payroll tax rate and a reduction in the benefit rate provided by the government option.[188]

By restructuring their state pension system and allowing consumer choice and competition among private pension plans, the British have managed to amass huge retirement savings while controlling entitlement spending.[189] In Britain today, about three-fourths of all workers are enrolled in private pension plans.[190]

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[182] *See* KOLLMANN, *supra* note 167.

[183] *See Social Security Revision Lessons from Other Nations: Hearings Before the Subcomm. On Social Security of the House Comm. on Ways and Means*, 105th Cong., 1997 WL 580656 (1997) [hereinafter *Hearings*] (testimony of Daniel Finkelstein, Director of the Conservative Research Dep't., the British Conservative Party's policy development and briefing unit).

[184] *See* Louis D. Enoff and Robert E. Moffit, Social Security Privatization in Britain: Key Lessons for America's Reformers, 1133 THE HERITAGE FOUNDATION BACKGROUNDER 1-2 (1997) (personal communication from Sharon White, First Secretary of Econ. Affairs, British Embassy, Apr. 13, 1997).

[185] *See id.*

[186] *See id.*

[187] *See id.* at 2–3.

[188] *See id.* at 2.

[189] *See Hearings*, *supra* note 183. Private-sector pension funds in the United Kingdom have almost $1 trillion worth of investments, more than the rest of the European Union combined. *See id.* Meanwhile, the net present value of unfunded liabilities of the public pension program is 4.6% of GDP as compared to unfunded liabilities in neighboring countries such as Germany (110%), France (113.6%) and Italy (75.5%). See 147 INT'L MONETARY FUND OCC. PAPER (1997).

[190] ANDREW DILNOT ET AL., PENSIONS POLICY IN THE UK: AN ECONOMIC ANALYSIS

Over the past decade, incomes of retirees have risen by fifty percent, and pensioners are no longer at the bottom of the population income distribution.[191] Although the ratio of retirees is expected to rise from 30% to 38%,[192] the ratio of public expenditure on retirement benefits to GDP will fall from 4.2% to 3.3%.[193] By comparison, the ratio of benefit expenditures to GDP in countries such as Germany, France, and Italy with systems similar to Social Security are 110.7%, 113.6%, and 75.5%, respectively.[194]

4. Non-Believers: Common Arguments Against a Private-Market Based System

The ideas of a privatized system and personal retirement accounts are not new. Advocates of the existing system have already begun a drumbeat of opposition. Some of the most common arguments employed are that the transition to a system of personal retirement accounts would be too costly; that the market is too risky to guarantee retirement security; and that Americans are not smart enough to invest their own money.[195]

a. *Transition would be too costly.* Current retirees' benefits are paid from the payroll taxes collected from today's workers. If younger workers are given the option of investing a portion of that tax in their own personal savings accounts, that revenue will be unavailable to pay benefits. This shortfall will occur throughout the years of transition from the current system to the new system. The Advisory Council plan, for example, projects a seventy-two year transition period at a cost of around $1.9 trillion.[196] This is the "transition cost" and is thought to be too expensive.

This argument is flawed because it assumes that maintaining the current system would not "cost" the government anything in benefits. However, the government is liable for this money,

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9 (1994).

[191] *See Hearings*, supra note 183.

[192] *See id.*

[193] *See id.*

[194] *See* Enoff & Moffi, *supra* note 184.

[195] *See, e.g.*, Richard Leone, *What Crisis?*, N.Y. TIMES, Jan. 15, 1997 at A19; Leone, *A Fright-Free Social Security Screenplay*, Sept. 6, 1998, N.Y. TIMES, § 4, at 11. *See also* Melissa Hieger & William Shipman, *Common Objections to a Market Based Social Security System: A Response*, THE CATO PROJECT ON SOCIAL SECURITY PRIVATIZATION, (Cato Inst., Wash., D.C.) July 22, 1997, at 1.

[196] See Jackie Calmes, *Social Security Opens Debate: Panel Divides on Remedy*, WALL ST. J., Jan. 7, 1997, at A1.

whether the benefits are paid under the current system or under a new system. The benefit of switching to a personal retirement account system is that, by the end of the transition period, the government would be out of debt. Staying in the current system results in continued federal liabilities.

b. *Private markets are too risky.* Another common argument against shifting to a private market-based system is that Wall Street is too risky and unpredictable for retirement income.[197] Social Security has worked well for sixty years and is virtually risk free. Everyone who qualifies can rely on receiving benefits from the government from a tax-based system, whereas with private accounts, there is no guarantee the stock market will go up.[198]

However, in order to sustain the tax-based system, future generations will face unrealistic, unsustainable levels of taxation. Beyond that, this argument assumes that government is in some way shielded from dramatic market fluctuations and economic downturns and ignores historical market data. Economic recessions increase government deficits for several reasons. A slower economy generates less federal receipts and increases federal outlays for welfare and unemployment programs.Studies show that the market is generally reliable. Economists Melissa Hieger and William Shipman compiled data from the "Stocks, Bonds, Bills and Inflation 1997 Yearbook, "showing the worst and best 20, 25, 30, 46, and 63 consecutive years from 1926 through 1996."[199] Their report illustrates that, even during periods of war, depression, political scandal and market crashes, the market trends upward.[200]

Both the current pay-as-you-go Social Security system and a privatized system involve a degree of risk. However, the current system promises a far smaller return on employees' investments and the workers are therefore forced to pay higher and higher taxes to support the system. Clearly, the incremental benefits associated with the privatized system outweigh any added marginal risk.

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[197] See Hieger & Shipman, *supra* note 195.

[198] *See id.*

[199] *See id.* Forty-six years was chosen to represent the length of a working career starting at age 21 and ending at 67, the normal retirement age for workers born since 1960. *See id.* at 7. Sixty-three years was chosen to represent the period from age 21 to 84, the normal life expectancy. *See id.*

[200] *See id.*

c. *Workers are not savvy enough to invest for themselves.* Today, Americans are increasingly aware of the need for long-term financial planning and are capable of handling their own investments. Indeed, surveys show that Americans are already investing in the private market and becoming better educated about how it works. According to a study by Peter D. Hart Research Associates, consultants to the NASDAQ Stock Market, about forty-three percent of adult Americans already own stock today.[201] The frequency of stock ownership doubled from 10.4% to 21.1% of Americans between 1965 and 1990.[202] From 1990 to 1997, it doubled again.[203]

Further, these stockholders represent a wide demographic and economic range.[204] The Hart study found that 47% of investors are women;[205] 55% of investors are under the age of fifty;[206] and 50% are not college graduates.[207] Alfred R. Berkeley, president of the NASDAQ Stock Market, said,

> To me, the encouraging news in this [Hart] survey is the degree to which Americans are realizing that they hold the key, and bear the responsibility, for their own financial futures. Given that the old model of relying on government or an employer probably won't suffice in the future, this awareness of the need to be self-reliant is heartening.[208]

In 1992, Oppenheimer Funds Inc., a U.S. mutual fund company, began tracking trends in women's attitudes and behavior regarding money management compared to men.[209] According to Bridget A. Macaskill, president and CEO of Oppenheimer Funds,

> Investing has moved into the mainstream in the 1990s. It's as common a topic of conversation as health, sports, or food. Five years ago, women still believed their financial future was going to be secured by the government, a corporation, or, most typically, a spouse, preferably armor-plated and riding a white steed. There is the growing realization among

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[201] Peter D. Hart Research Associates, *A National Survey among Stock Investors*, (visited Feb. 21, 1997) <http://www.nasdaq.com/reference/survey_execsummary.stm>.
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] Peter D. Hart Research Associates, *Number of Investors has Doubled to 43 Percent in Past Seven Years Finds Comprehensive Shareholder Survey*, (visited Feb. 21, 1997) <http://www.nasdaq.com/reference/survey.stm>.
[209] *When It Comes to Investing, Women Are Paying More Attention, Press Release,* (Oppenheimer Funds, Inc., New York, N.Y.), Jan. 14, 1998.

> men and women that no one is going to secure their future for them. This heightened sense of personal accountability is translating into a will to learn, plan, and act.[210]

In a separate study, the Federal Reserve Board's 1995 Survey of Consumer Finance reports that roughly 55% of America's shareholders have family incomes below $50,000.[211] According to the 1995 Survey, 48% of households with incomes between $25,000 and $50,000, own stock.[212] Ownership of stock by individuals earning $25,000 or less is also increasing, with stock ownership accounting for twice the share of this income group's assets as in 1989.[213]

Investors have more and more sources from which to glean information. The World Wide Web provides a wealth of information on every conceivable topic, including financial planning and investing.[214] Investors can find general investment advice or direct links to such advice.[215] In addition, many sites include online quotes and information on current market news, with some sites updating their news information up to three times per day.[216]

Individuals are taking advantage of these opportunities. Results of the Oppenheimer Fund survey indicate, for example, that 36% of women surveyed and 46% of men surveyed said they had read a book or article about investing or personal finance in the last month.[217]

Americans have proven themselves quite capable of investing for themselves. To assert that Americans are not smart enough to invest for themselves and to build retirement security independently of the federal government's assistance insults the American people and ignores reality. The statistics show that Ameri-

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[210] *Id.*

[211] Arthur B. Kennidell et al., *Family Finances in the US: Recent Evidence from the Survey of Consumer Finances*, 83 FEDERAL RESERVE BULL. 1 (1997).

[212] *See id.* at 12 tbl 6.

[213] *See id.*

[214] The search engine Yahoo!, for example, lists 93 categories and 34 sites under "Finance and Investment," 9 categories and 343 sites under a search for "mutual funds," and 3 categories and 307 sites under a search for "investing." Last visited on Apr. 19, 1998.

[215] *See, e.g.*, *NASDAQ* <http://www.nasdaq.com>, *NYSE* <http://www.nyse.com>, *Reuters* <http://www.reuters.com>, *Reuters MoneyNet* <http://www.moneynet.com>, *CNNfn* <http://www.cnnfn.com>, *Microsoft Money Insider* <http://www. moneyinsider.msn.com>, *Salomon Smith Barney* <http://www.smithbarney.com>, *Amex* <http://www.amex.com>, *Merrill Lynch* <http://www.ml.com>.

[216] *See id.*

[217] *See When It Comes to Investing, Women Are Paying More Attention, supra* note 209.

cans are indeed smart enough to invest for themselves. Moreover, they want to have ownership over their own futures.

III. Opportunity for Action

President Franklin D. Roosevelt made his first inaugural address in the midst of the Great Depression. Intending to restore confidence to the nation,[218] Roosevelt said, "There are many ways in which [the economy] can be helped, but it can never be helped merely by talking about it."[219] Lawmakers should heed President Roosevelt's words and reevaluate the retirement system he created. The problem is clear and the time to act is now.

Social Security has been referred to as the "third rail" of politics, meaning that lawmakers fear modifying it, reforming it, or even talking about it because of the political risks they associate with such action. But policy makers should not turn their backs on this challenge out of political fear for many good reasons. First, recent polling suggests fear is unwarranted. Most Americans understand that Social Security is in trouble.[220] Moreover, most Americans support the idea of personal retirement accounts as an alternative to the current system.[221] In a poll conducted by Public Opinion Strategies, for example, more than two-thirds of Americans believe that Social Security will require "major" or "radical" change within the next twenty years, but they reject most reforms such as raising the retirement age, raising payroll taxes, or reducing benefits.[222] However, two-thirds of all Americans and more than three-quarters of younger Americans in the same survey would support transforming the program into a mandatory personal savings account program.[223]

More importantly, the window of opportunity is small if today's young workers are to avoid exorbitant tax rates. Congress has historically waited until a crisis is at hand before acting. Witness the recent problems in reaching agreement on much-

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[218] According to William Safire, Roosevelt "saw the need for a dramatic infusion of confidence with a ringing speech, followed by a great show of government activity, to shake the nation out of its mental as well as economic depression." Lend Me Your Ears: Great Speeches in History 778 (William Safire, ed., 2d ed. 1997)

[219] *Id.* at 781.

[220] *See* Willette *supra* note 84, at 1B; Tanner, *Public Opinion and Social Security Privatization*, *supra* note 6, at 1.

[221] *See* Tanner, *Public Opinion and Social Security Privatization*, *supra* note 6, at 7–8.

[222] *See id.* at 5.

[223] *See id.* at 5–8.

needed measures to prevent bankruptcy of the Medicare program. Now is not the time for Legislators to shy away from the responsibility imputed in them as elected officials. Now is the time to embrace an opportunity for lasting change that will benefit every American.

A. *Public Opinion Supports Action*

The Cato Project on Social Security Privatization commissioned a poll by Public Opinion Strategies in 1996 to find out what Americans think about the state of Social Security.[224] The results undeniably suggest that there is support for congressional action.[225] More than 88% of Americans believe that Social Security either is in trouble today or will be in trouble within the next twenty years.[226] Sixty percent of all Americans under age sixty-five believe Social Security will not be there for them when they retire.[227] As a result, 69% believe that Social Security will require "major" or "radical" change in ten to fifteen years.[228]

Voters in the same survey reject most traditional Social Security reforms such as raising the retirement age, raising payroll taxes, or reducing benefits.[229] Sixty-nine percent of voters would support privatization of Social Security, transforming the program into a privatized mandatory savings program.[230] Eighty percent of younger voters support privatization.[231]

B. *Window of Opportunity Is Small*

Accumulating wealth sufficient for retirement in a private market account depends on three factors: the rate of return, the amount of money invested, and the length of time that the accounts have in which to grow. This last factor necessitates action sooner rather than later. An average wage earner retiring in 2010, allowed to invest just three percent of her pay could po-

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[224] *See id.* at 1.
[225] *See id.*
[226] *See id.*
[227] *See id.* at 4.
[228] *See id.* at 5.
[229] *See id.* at 5–6.
[230] *See id.* at 7–8.
[231] *See id.*

tentially accrue assets totaling $15,808.[232] The same worker retiring in 2050 could potentially accrue $643,278.[233] For every year that passes, the opportunity to reduce government liability is lost, sacrificing the retirement wealth of American workers.

C. *Medicare Example*

Understandably, Congress is often hesitant to act on issues that are considered politically sensitive. In today's political structure, politicians often exploit controversial issues to mislead the public about political opponents. Congress recently grappled with the looming insolvency of Medicare, the nation's health care insurance program for America's seniors.

In 1997, the Medicare trustees issued a report indicating that the system was facing insolvency more rapidly than previously projected.[234] Medicare is funded by a payroll tax akin to Social Security: Americans pay 2.9% of all payroll into the Medicare fund.[235] The trustees' report revealed that the fund, which is also a pay-as-you-go system, would reach bankruptcy by 2001.[236]

Congress was faced with hard choices. For largely the same demographic reasons that threaten Social Security, the Medicare system is unsustainable in its current form. Since the program began, payroll taxes have increased from a maximum tax of $46.20 to an unlimited amount, based on income;[237] yet the system is still failing. In response, Republicans offered some modest changes to modify the way the system operated and proposed that the rate of growth of the program be slowed from current law.

Opponents reacted strongly, alleging that Republicans wanted to "cut" Medicare, thereby scaring seniors and causing a massive outcry from groups who claim to have seniors' best interests at heart. As a result, Congress only delayed action. Finally, in 1997, Congress enacted legislation that makes the system appear solvent, but really has no substantive effect.

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[232] Assuming a 7.29% rate of return and retirement at age 65. *See* DAVID STUART KOITZ, CONGRESSIONAL RESEARCH SERVICE, SOCIAL SECURITY REFORM: HOW MUCH OF A ROLE COULD PRIVATE RETIREMENT ACCOUNTS PLAY 22 tbl. 12 (1998).

[233] *See id.*

[234] *See* THE 1997 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE TRUST FUND, H.R. DOC. NO. 105-73 (1997).

[235] *See id.* at 18 tbl. II.B1.

[236] *See id.* at 9.

[237] *See id.* at 18 tbl. II.B1. Current tax is 2.9% on all payroll. *See id.*

The Medicare debate is a perfect example of politics overrunning policy. The debate is among the most irresponsible episodes of dodging and fabrication that the author has experienced in almost eighteen years as a Senator. Accordingly, Medicare is no safer today than it was in 1995.

Members of Congress must not use Social Security as a political football. At stake is the retirement security of millions of Americans. Congress and the President must act responsibly and with a unified purpose. Certainly, there will be many different ideas about what should be done, as is productive for solving any problem of such monumental importance. However, members of Congress should not gamble Americans' long-term retirement security for perceived short-term political gains.

D. *Calls to Action and Early Response*

Each Social Security trustees' report in the past few years has proclaimed the fiscal imbalance of the program, urging action by the Administration and Congress to address the problem sooner rather than later.[238] The trustees' recommendations from the most recent report state, "In view of the size of the financial shortfall in the OASDI program over the next 75 years, we again urge that the long-range deficits of both the OASI and DI Trust Funds be addressed in a timely way."[239]

The Bipartisan Commission on Entitlement and Tax Reform, composed of twelve senators and ten representatives from both parties, as well as leaders from state and local government and private industry who were appointed by the President, painted a very unsettling picture of the health of entitlement programs, including Social Security, if action is not taken.[240] The Commission found that current trends are not sustainable.[241] In their letter to the President, the commissioners eloquently point out, "We acquire false optimism when we look only five years ahead, as we do with our traditional budgeting process. Only when we look at the next 30 years—the horizon of our children—does the problem and its size come into full view."[242]

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[238] *See* BOARD OF TRUSTEES, *supra* note 8, at 28–29.

[239] *See id.* at 29.

[240] *See* BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, FINAL REPORT TO THE PRESIDENT 1 (1995).

[241] *See id.*

[242] *Id.*

The worst thing that could happen to America's retirement security is for policymakers to sit on their hands for another decade. Work should begin during the 106th Congress and should include education of the public through a series of nationwide forums, education of Congress through hearings, and analysis of all proposals for restructuring so the best options will rise to the top.

Early in 1998, press reports indicated President Clinton wants action no later than 1999 to ensure Social Security's long-term stability.[243] Unfortunately the very day the report surfaced, the President's budget director, Franklin Raines, flatly rejected the suggestion that privatizing the system was necessary or even worth considering.[244]

The response from Congress has been more realistic and responsible. In 1997, the Senate unanimously passed an amendment that will begin the public education effort.[245] Personal Earnings and Benefit Estimate Statements ("PEBES") forms provide retirees with the total amount they have paid in payroll taxes during their working life, and estimates what their monthly benefits will be.[246] These forms are now sent to all individuals when they reach age sixty. In October 1999, the federal government must begin sending these forms annually to each eligible worker over the age of twenty-five for whom a mailing address can be determined.[247] The amendment requires the Social Security Administration to also report employer contributions, thus painting a more complete picture of the total taxes paid into the system for the employee.[248] Without the employer contribution,

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[243] *See* John F. Harris, *Clinton Plan: Push Social Security Fix*, WASH. POST, Jan. 4, 1998, at A1.

[244] *See Meet the Press: Budget Director Discusses Possible Budget Surplus* (NBC Television Broadcast Jan. 4, 1998).

[245] Attached to the Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-78, 111 Stat. 1467, was an amendment by Senator Nickles requiring the Social Security Administration to provide more complete information on individuals' Personal Earnings and Benefit Statements ("PEBES"). Previously, PEBES forms reported only the employee contributions to Social Security (7.65% of earnings). This is an incomplete picture because their employers also contribute 7.65%. Nickles' amendment requires the employers' contributions to be reported on the forms also.

[246] *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106.

[247] *See id.*

[248] *See* Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-78, 111 Stat. 1467.

many taxpayers infer their tax investments in Social Security are providing a much better return than is actually the case.[249]

A number of forward-thinking legislators have introduced bills addressing a spectrum of issues. Some proposals address further education of the public.[250] Others would require experts to provide Congress with additional information about the program's future.[251] Most significantly, numerous proposals would, to some degree, allow individuals the opportunity to establish personal retirement accounts.[252] All of these proposals deserve debate and hearings in the appropriate congressional committees. The fact that so many legislators appear willing to take on the challenge of introducing new proposals is an encouraging sign for American workers.

CONCLUSION

Social Security is a well-intentioned system that, for a number of reasons beyond lawmakers' control, has been stretched beyond its capacity. When the program was in financial jeopardy in the past, lawmakers made tough decisions to keep the program alive, and retirees are able to rely on Social Security today as a result of these actions. However, these history lessons, coupled with projections made by professional caretakers of the program, are convincing indicators that tinkering with the current system is not enough to guarantee long-term security.

Lawmakers have the opportunity now, before the looming problem becomes an immediate crisis, to search out a better method of ensuring retirement security for all Americans. Scholars and experts have advised an alternative that has been tried elsewhere and proven effective. Lawmakers must now begin to investigate the details in order to perfect a new kind of system that allows individuals the opportunity to amass greater wealth, control their own futures, and maintain a higher standard of living after their working years. Over time, such a system—cor-

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[249] *See supra* note 245.

[250] *See, e.g.*, H.R. 3078, 105th Cong. (1997); H.R. 2682, 105th Cong. (1997); S. 1145 and H.R. 2669, 105th Cong. (1997).

[251] *See, e.g.*, S.221 and H.R. 2781, 105th Cong. (1997).

[252] *See, e.g.*, Individual Social Security Retirement Accounts Act of 1997, H.R. 2929, 105th Cong.; Personal Retirement Accounts Act of 1997, H.R. 2768, 105th Cong.; Retirement Security Act of 1997, H.R. 1611, 105th Cong.; and Strengthening Social Security Act of 1997, S.321, 105th Cong.

rectly designed—could also put the federal government back on the path toward fiscal solvency by eliminating an unfathomable debt.

Elected officials must move forward while the greatest number of options and opportunities for success remain available. Policymakers must not let the Social Security program be exhausted before taking action to ensure the retirement security of future generations of Americans.

COMMENT

LEGAL PHILOSOPHY AND JUDICIAL REVIEW OF AGENCY STATUTORY INTERPRETATION

JOHN G. OSBORN*

In response to the increasing complexity of our federal government, Congress has shifted much of its authority for policy development and implementation to administrative agencies. In 1984, the Supreme Court defined the constraints surrounding the power of these agencies to interpret and implement statutes when it handed down its decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.. *Thus, a complete analysis of* Chevron *is essential in understanding the balance of power within the federal system. In this Comment, John Osborn argues that previous attempts have failed to fully explain the motivations behind this landmark decision. Osborn approaches* Chevron *from a legal philosophical perspective and concludes that while past decisions concerning agency statutory interpretation reflected the legal community's vacillation between legal positivism and natural law,* Chevron *signals a judicial move toward positivism.*

INTRODUCTION

The fifteen years since the Supreme Court handed down its ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] have seen a torrent of scholarship about the case, much of it suggesting or directly stating that the decision was one of the most noteworthy in the recent history of administrative law. Legal scholars have written articles both denigrating and applauding the decision, offering a variety of reasons for its utility and efficacy, or lack thereof.[2] Very few commentators,

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[1] 467 U.S. 837 (1984).

[2] *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995) (discussing the apparent breakdown of the *Chevron* rule in the face of judicial incentives and proposing a statutory solution); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Stat-*

however, have attempted or succeeded in explaining why the decision occurred, or why the Court chose that particular moment to resolve a forty-year-old inconsistency surrounding agency statutory interpretation and judicial review. This Comment broaches that issue in an effort to explain, in part, the substance and timing of *Chevron*. Along the way, the Comment offers a different approach to legal analysis, one that considers legal philosophical inputs, such as positivist and natural law perspectives, in explaining judicial opinions, particularly in the realm of administrative law.

The Supreme Court first established a test for judicial review of agency statutory interpretation in *National Labor Relations Board v. Hearst Publications, Inc.*,[3] holding that courts must defer to agency applications of "a broad statutory term in a proceeding in which the agency administering the statute must determine it."[4] In theory, *Hearst*'s holding that courts must defer to agency statutory interpretation presaged a severe truncation of the federal judiciary's ability to review agency activity in any substantive manner.[5] In reality, however, this was not the case. Three years later, the Court decided *Packard Motor Car Co. v. National Labor Relations Board*,[6] holding that agency statutory interpretation merits no deference from a reviewing court.[7] Thus began a forty-year period of vacillation between a laissez-faire

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utes, 73 TEX. L. REV. 83 (1994) (arguing *Chevron* was based on a flawed pluralistic democracy model and propounding a test based on deliberative democracy that forces agencies to explain policy decisions); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (arguing the Court has failed to follow the *Chevron* rule due to separation of powers implications of the decision); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990) (applauding the decision as properly constraining the Court in matters of policy); Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071 (1990) (arguing *Chevron* well directs the administration of contemporary statutes, but investigating supplemental methods by which to control agencies); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (1989) (applauding *Chevron* as a legitimate effort to focus on congressional intent when allocating interpretive authority); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (denouncing *Chevron* as being based on flawed notions of separation of powers).

[3] 322 U.S. 111 (1944).

[4] *Id.* at 131. *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 292 (1986).

[5] *See Hearst*, 322 U.S. at 131. *See also* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1279 (1991); Starr, *supra* note 4, at 292.

[6] 330 U.S. 485 (1947).

[7] *See id.* at 492–93. *See also* Callahan, *supra* note 5, at 1279–80.

approach and strict oversight, culminating in *Chevron*'s establishment of a new rule for judicial review of agency interpretations of ambiguous statutes.[8] In *Chevron*, the Court finally decided on the former approach, holding that ambiguous statutes should be interpreted by agencies, and that these interpretations would be upheld unless unreasonable.[9] Fifteen years later, this opinion remains one of the most influential instances of modern Supreme Court jurisprudence, and yet one of the most difficult to explain in any satisfactory manner.[10]

Chevron's abrupt resolution of a longstanding judicial inconsistency and promulgation of an arguably clear rule raises some important questions. Why, after forty years of vacillation did the Court accede interpretational authority to agencies? Why was there such a long period of judicial inconsistency on the matter? That such inconsistency existed for so long is beyond dispute. In 1976, eight years before *Chevron*, Judge Henry Friendly argued that:

> [T]here are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis .... However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.[11]

The fundamental issue in Judge Friendly's dichotomy revolved around who, courts or agencies, should determine the meaning of an ambiguous statute. Depending on one's legal philosophical approach, one can argue that the body interpreting an ambiguous statute, whether it be court or agency, is performing one of two possible tasks. The interpreting body could be viewed as making new law as a function of its delegated power

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[8] *See Chevron*, 467 U.S. 837 (1984).

[9] *See id.* at 843. In establishing its new rule, the Court overruled the D.C. Circuit's use of the *Hearst* approach. *See id.* at 841.

[10] *See* Scalia, *supra* note 2, at 512 (discussing the importance of the decision); Sunstein, *supra* note 2, at 2074 (same); Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 67 (Spring 1994) (arguing that scholars have failed to explain why the Court adopted the *Chevron* doctrine).

[11] Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (1976), *cited in* Scalia, *supra* note 2, at 513.

to do so, the view suggested by legal positivists. Conversely, it could be viewed from the perspective of natural law as adopting existing, underlying principles in order to fill in the gaps among clearer sections of the statute.

This Comment approaches the *Chevron* question from the perspective of legal philosophy, notably legal positivist and natural law theories, in an effort to obtain some insight into the Court's inconsistent approach to agency statutory interpretation. As an introduction to the difficulties involved in explaining *Chevron*, the Comment begins with a survey of existing theories concerning the case, highlighting their differing perspectives and their combined failure to explain fully the decision. Briefly entering the realm of legal philosophy, the Comment then discusses the basic tenets of natural law and legal positivism. The Comment then investigates the rules and language of *Hearst*, *Packard*, and *Chevron*, concluding that *Hearst* and *Packard* indicate a judicial approach to agency interpretation of ambiguous statutes that mirrors the larger legal community's vacillation between positivism and natural law during the mid-twentieth century, whereas *Chevron* quite clearly suggests a shift in favor of legal positivism and its underlying preoccupation with legal authority.

A proper understanding of *Chevron* is vital to any analysis of the Court's function and the balance of power in our government. To effectuate the policy goals of our administrative state most efficiently, our federal structure allows agencies to interpret and implement the multitude of statutes enacted by Congress. This development has shifted an increasing share of authority from Congress to federal agencies and has solidified their central role in policy development and implementation. An understanding of the constraints surrounding agency statutory interpretation is thus essential to any effort to paint a workable, comprehensive picture of the federal government. The continued application of legal philosophy as an analytical tool for explaining court decisions is one way to improve this understanding.

I. Existing Theories of *Chevron*

Although the great bulk of the scholarship relating to *Chevron* and judicial review of agency statutory interpretation analyzes the wisdom and effect of that decision, a few scholars have en-

deavored to understand *Chevron*'s doctrinal underpinnings.[12] Most of these attempts have been successful, inasmuch as they have put forth plausible explanations as to why *Chevron* came about, but none are intrinsically complete. The puzzle behind the substance and timing of *Chevron* is complex, and although commentators have completed much of it with their various theories, a good deal remains unsolved. An analysis of the rationale and timing of *Chevron* from the standpoint of legal philosophy fills in much of the remaining space, allowing for a more complete picture of the decision.

During the initial period after *Chevron*, many commentators argued that a separation of powers analysis best explained the decision.[13] This explanation rests on two related aspects of the separation of powers principle: an acknowledgment of the propriety of placing regulatory functions in the hands of the Executive Branch, and a concern over the improper practice of judicial policy-making.[14] Professor Kmiec, for example, argues that *Chevron* comports with separation of powers principles both in its delegation of policy-making latitude to entities that are accountable, at least indirectly, to the electorate, and in its introduction of greater incentives for Congress to write specific laws when it has a particular policy goal in mind.[15] Judge Kenneth Starr similarly views *Chevron* as making a broad statement about the relationship between the federal judiciary and administrative agencies, arguing that the proper role of the judiciary should be as a check against agency abuses of power rather than as a micromanaging supervisor.[16] Although immediately attractive as a de-

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[12] *See* Cohen & Spitzer, *supra* note 10; Callahan, *supra* note 5; Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); Starr, *supra* note 4; Steven J. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

[13] *See* Farina, *supra* note 2; Kmiec, *supra* note 12; Starr, *supra* note 4.

[14] *See* Callahan, *supra* note 5.

[15] *See* Kmiec, *supra* note 12, at 281–82. Although Professor Kmiec mentions various other rationales for *Chevron* that might fit under a separation of powers umbrella, he focuses on electoral responsibility and incentives for congressional precision. *See id.*

[16] *See* Starr, *supra* note 4, at 300–01. At the time he authored his article, Judge Starr was a member of the United States Court of Appeals for the District of Columbia Circuit, which has been widely recognized as the expert administrative law circuit. Other commentators, however, while attributing the decision to the same grounds as Starr and Kmiec, are not so sanguine regarding the propriety of the particular separation of powers principles invoked and assert that the decision is based on a perception of separation of powers that is both novel and disturbing. *See* Farina, *supra* note 2, at 466–67, 498, 518–25.

fault rationale for any decision attempting to balance power among the three branches, the separation of powers argument has been attacked by a number of commentators. Detractions range from the claim that the argument actually contravenes established separation of powers principles[17] to the claim that no inconsistency exists between judicial policy-making and democratic principles.[18]

Another popular rationale underlying *Chevron* focuses on assumptions regarding the relationship between statutory ambiguity and congressional intent, and dovetails to a certain degree with the legal positivist conclusions of this Comment. Justice Scalia, perhaps the most vociferous proponent of this view, argues that "the theoretical justification for *Chevron* is no different from the theoretical justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations."[19] He reads *Chevron* as creating an across-the-board presumption that statutory ambiguity means that Congress intended to grant discretion to the implementing agency, whereas pre-*Chevron* decisions approached the issue on a statute-by-statute basis.[20] Cass Sunstein adopts a similar deference model when explaining *Chevron*:

> Chevron is best understood and defended as a frank recognition that sometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented. Chevron reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges.[21]

Sunstein recognizes the dangers inherent in the bright-line assumption of deference accompanying the rule, but argues that the presumption is likely to be more accurate than other bright-line rules.[22] Unlike Scalia, however, Sunstein lists a number of circumstances under which an ambiguous statute should not be read as a statement of congressional deference, and he relies heavily on the second step of the *Chevron* test[23] to circumscribe

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[17] *See* Callahan, *supra* note 5.
[18] *See* Scalia, *supra* note 2, at 515.
[19] *Id.* at 516.
[20] *See id.*; *see also* Callahan, *supra* note 5, at 1283–84.
[21] Sunstein, *supra* note 2, at 2087–88.
[22] *See id.* at 2090–91.
[23] For a discussion of the two-step inquiry outlined by the *Chevron* test, see *infra* notes 97–99 and accompanying text.

opportunities for inappropriate agency activity even further.[24] Read from a legal philosophical perspective, Scalia's interpretation of the case is clearly positivist, whereas Sunstein, although adopting Scalia's positivist approach to congressional intent, tempers it with a natural law reading of the second prong of the *Chevron* test.

Maureen Callahan offers another explanation of *Chevron*.[25] Callahan asserts that the most traditional explanations for the case—the separation of powers argument propounded by Farina, Kmiec, and Starr, and the legislative intent theory of Scalia—are flawed both in their underlying assumptions and in their logical requirements that judicial adherence to the *Chevron* rule is mandatory.[26] She argues, rather, that the rule is a "self-generated principle imposed by the Supreme Court on the federal judiciary" that operates in a manner similar to justiciability doctrines.[27] As such, the Court's implementation of the *Chevron* rule is prudential, employed only when the facts of a particular case indicate an implicit delegation by Congress to the agency to fill the gaps of ambiguous legislation.[28] Callahan supports her claim by reference to the Court's discussion of the federal judiciary's duty to respect the policy authority of the political branches and states that such a prudential approach reconciles the Court's inconsistent applications of the *Chevron* rule.[29]

Offering another perspective, Peter Strauss examines *Chevron* in light of the increased management demands on the Supreme Court resulting from the explosion of judicial activity both at the federal circuit level and at the state appellate level.[30] Strauss argues that the Court, faced with thousands of cases from which to choose, can no longer concern itself with the individual justice concerns of each case, but must gauge the opportunity cost of choosing one particular case over another.[31] In other words, each

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[24] *See* Sunstein, *supra* note 2, at 2093–2119.

[25] *See* Callahan, *supra* note 5.

[26] *See id.* at 1284–89. Callahan argues that Scalia's intent theory contains various logical flaws and that the separation of powers argument is fundamentally inconsistent with actual separation of powers principles. *See id.* Because my concern is not to undermine existing arguments, but rather to add an additional piece to the puzzle, I will not comment on the purported weaknesses of each explanation beyond demonstrating the incompleteness of the existing descriptive scene.

[27] *See id.* at 1289–91.

[28] *See id.* at 1292–93.

[29] *See id.* at 1293–94.

[30] *See* Strauss, *supra* note 12.

[31] *See id.* at 1102. Strauss indicates that the Court has gone from reviewing about

potential decision cannot be viewed individually, but must be evaluated for its role in refining the legal system as a whole, thereby greatly increasing the value of decisions whose ramifications extend beyond the boundaries of the immediate case. Another result of the increased pressure on the Court, however, and one far less salutary, is a greater propensity of the Court to leave traditional, and perhaps constitutionally required, functions of the judiciary to other entities.[32] Strauss argues that it is this propensity, and a desire to manage the courts of appeals so as to limit the need for the Court to review their decisions for accuracy, that motivated the extreme deference found in *Chevron*.[33]

Linda Cohen and Matthew Spitzer propound one of the most recent explanations for the Court's ruling in *Chevron*, one that minimizes any jurisprudential rationale.[34] Cohen and Spitzer employ rational choice theory to describe Supreme Court review of agency statutory interpretation, incorporating both game theory and political economics into the Court's decision-making structure.[35] Constructing a two-dimensional political-economic model,[36] Cohen and Spitzer estimate the political situation facing the Court in 1984, the general policy preferences of the Justices at the time, and the preferred level of deference for each Justice.[37] Plugging the various values into their model, Cohen and Spitzer arrive at a policy equilibrium approximating the *Chevron* deci-

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10% of the decisions of the federal courts of appeals in 1924 to .56% in 1984. This statistic does not incorporate the increased activity of state supreme courts. *See id.* at 1098–99.

[32] *See id.* at 1120.

[33] *See id.* at 1120–21.

[34] *See* Cohen & Spitzer, *supra* note 10.

[35] Cohen and Spitzer base their analysis on work by William Eskridge and John Ferejohn, which constructs a political-scientific model of the relationships among the Court, administrative agencies, the President, and Congress. *See id.* at 66; *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992); Peter Strauss & Andrew Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 205 (1992).

[36] *See* Cohen & Spitzer, *supra* note 10, at 71–80. Cohen and Spitzer's model utilizes a traditional two-dimensional space with deference levels on the y axis and policy outcomes on the x axis. Points along the x axis represent the policy preferences of various actors, including that of the agency and a hypothetical "Best Statutory Interpretation." The reviewing court has a range of acceptable choices within a zone of discretion around the Best Statutory Interpretation. The level of deference afforded the agency's decision and the policy goals of the reviewing court (as determined by interactions among the judges) combine to establish a policy equilibrium. *See id.* As such, both institutional preferences concerning deference and substantive policy preferences play central roles in the decision.

[37] *See id.* at 77–78.

sion.[38] The strength of their model, they argue, is that it recognizes and accounts for the centrality of both policy preferences and institutional preferences, and approximates the complex interactions between the two and among the various members of the Court.[39] Cohen and Spitzer, like Strauss, should be applauded for realistically rejecting the traditional, atomistic view of Supreme Court jurisprudence that separates such jurisprudence from the pressures of politics, policy, and management. At the same time, however, neither caseload management nor rational choice theory offers the jurisprudential sophistication necessary to explain fully a decision as complicated as *Chevron*.

In sum, the scholarly commentary explaining *Chevron* is incomplete. While many authors, like Strauss, and Cohen and Spitzer, offer clues to the practical pressures that might have compelled the Court to decide *Chevron* as it did and construct persuasive models for the Court's behavior, they fail to account adequately for the role of doctrinal and jurisprudential proclivities. At the same time, other hypotheses, like Justice Scalia's legislative delegation theory, offer persuasive jurisprudential arguments, but fail to account for the particular timing of *Chevron*. Certainly, the Court had encountered innumerable opportunities prior to *Chevron* to resolve the forty-year-old *Hearst/Packard* debate. Only by unearthing legitimate jurisprudential rationales and placing such rationales within a larger historical context can both the motivations behind and the timing of the decision be adequately explained.

II. Basic Tenets of Natural Law and Legal Positivism

Why use legal positivism and natural law rather than more contemporary legal philosophical theories? Every jurisprudential philosophical theory characterizes various moments in a continuing effort to understand the contours of our legal system, and each one must acknowledge its debts to the others, even if only as points of departure. Legal realism, economic analysis of the law, critical race theory, and feminist legal theory, to name a few of the more dominant recent theories, all depart from natural law and legal positivism in fundamental ways. All of these new theo-

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[38] *See id.*
[39] *See id.* at 71, 77.

ries are nevertheless actively concerned with the central concepts of power and morality upon which legal positivism and natural law, respectively, are built. Thus, although natural law and legal positivism as discrete jurisprudential approaches share the field with various newcomers, they retain their vitality as the twin conceptual bases upon which, or against which, more contemporary theories develop.

Before discussing either philosophical concept, a quick disclaimer is in order. The historical development of natural law and legal positivism has two characteristics that merit recognition. First, the proponents of each perspective have employed the other philosophy as both an adversary and a foil.[40] This oppositional dialogue, however, rather than furthering the initial polemics between the two, has led to a continual, if incremental, readjustment of the two theories toward a common ground.[41] Consequently, contemporary iterations of the two theories do not hold the same binary stances as earlier versions, although they generally hold true to the basic foundations of the philosophies. Second, like any frequently revisited philosophical field, neither theory has remained static or monolithic. For purposes of this Comment, however, only those elements of natural law and legal positivism that are particularly relevant to the issue of agency interpretation of ambiguous statutes will be discussed.

A. *Natural Law*

Natural law theory has been traced back at least as far as Plato and serves as the foundation for the ontological and epistemological theories of some of the western world's most influential philosophers, such as Saint Thomas Aquinas, Immanuel Kant, and John Locke.[42] The basic tenet of all natural law theories since

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[40] *Compare* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–21 (1958) *with* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644–53 (1958). These articles describe the outcome of post-World War II criminal prosecutions and their legal philosophical implications. *See infra* note 120 and accompanying text.

[41] *See, e.g.*, Jules Coleman, *Authority and Reason, in* THE AUTONOMY OF LAW 287 (Robert P. George ed., 1996) (attempting to develop a theory of legal positivism known as inclusive positivism, which allows "that substantive moral principles can count as part of a community's binding law in virtue of their status as moral principles"). *Id.* at 287.

[42] *See* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Lewis W. Beck trans., 1949); Saint Thomas Aquinas, *On Natural Law, in* READINGS IN THE PHILOSOPHY OF LAW 69 (John Arthur & William H. Shaw eds., 1993). Locke's vision of higher law as

Aquinas' time is that some necessary link must exist between any valid law and higher moral principles.[43] Although earlier iterations of natural law, such as that of Aquinas, insisted that no unjust law can be valid,[44] later versions, while maintaining some form of connection between law and morality, have softened their approach and given credit for good intentions.[45] In essence, though, natural law theory can be reduced to one central argument: morality is the watermark against which to assess any system of positive law.

The Equal Protection Clause of the Fourteenth Amendment provides one example of an application of natural law principles.[46] When the Court employs strict scrutiny review to question government action, it privileges essential moral standards over otherwise valid legal processes in our government. For example, the legislature of a particular state might enact a law prohibiting racial minorities from utilizing certain public services. If the law passed through the proper channels in the state legislature, it would be valid from a strictly procedural point of view. Under the Equal Protection Clause, however, such a law would be considered worthless because our cultural agreement that racial discrimination is morally reprehensible, as articulated in the Constitution, overrides virtually any efforts to the contrary. Hence, an otherwise valid law, because immoral, is rendered invalid.

One leading contemporary version of natural law is Ronald Dworkin's "law as integrity" theory, which focuses on, among other topics, judicial use of fundamental principles to interpret statutory and common law.[47] Dworkin places judges in a position

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the moral foundation of government proved to be of great influence on the drafters of the Constitution. *See* Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 715–16 (1975).

[43] *See* JEFFRIE G. MURPHY & JULES L. COLEMAN, *The Nature of Law*, *in* PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE (1990).

[44] *See* Aquinas, *supra* note 42.

[45] *See* PHILIP SOPER, A THEORY OF LAW 79–80 (1984) (arguing that a moral obligation on the part of citizens to obey the law arises so long as the lawmakers maintain a good faith belief that they are legislating for the common good, even if the common good is not furthered). *But see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351–60 (1980) (asserting that any inconsistency between a law and the common good relieves the populace's obligation to obey the law, irrespective of the lawmakers' beliefs).

[46] U.S. CONST. amend. XIV, § 1.

[47] *See* RONALD DWORKIN, LAW'S EMPIRE 95–96, 313–54 (1986) (discussing statutory interpretation in light of his "law and integrity" theory). Note that the term "natural law" can denominate any number of related, yet distinct, legal philosophies. These various perspectives toward law all hold to the basic natural law tenet that a necessary overlap must exist between law and morality. Dworkin's theory is a leading contempo-

to act in concert with legislatures to make law by interpreting statutes in accord with larger societal principles.[48] He claims that:

> A community of principle does not see legislation the way a rulebook community does, as negotiated compromises that carry no more or deeper meaning than the text of the statute declares; it treats legislation as flowing from the community's present commitment to a background scheme of political morality.[49]

As a result, a judge's interpretation of a statute is informed by a number of different impulses: respect for textual integrity,[50] fairness to the larger concerns driving the enactment of the statute,[51] recognition of the political climate at the time of review,[52] and larger principles of justice.[53]

Dworkin's theory does not allow for unfettered judicial activism, however. Judges are not to substitute their beliefs about substantive justice for the language of each statute.[54] Rather, each judge must consider the aforementioned impulses to derive the true purpose for the legislative event of enacting each particular statute. In the end, Dworkin espouses a holistic approach to statutory interpretation:

> [A judge's] interpretation must be sensitive, that is, not only to his convictions about justice and wise . . . policy, though these will play a part, but also to his convictions about the ideals of political integrity and fairness and procedural due process as these apply specifically to legislation in a democracy.[55]

The application of Dworkin's version of natural law to judicial review of agency interpretation of ambiguous statutes compels various conclusions. The judge or court will look to the overall "justness" of the agency's interpretation and will do so in light

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rary manifestation of this relationship.

[48] *See id.* at 345; Michael Freeman, *Positivism and Statutory Construction: An Essay in the Retrieval of Democracy, in* POSITIVISM TODAY 13–14 (Steven Guest ed., 1996) (discussing the basic elements of Dworkin's partnership between courts and legislatures in lawmaking and Dworkin's adherence to the natural law focus on the moral element of law).

[49] Dworkin, *supra* note 47, at 345–46.

[50] *See id.* at 342.

[51] *See id.* at 343–45.

[52] *See id.* at 348–50.

[53] *See id.* at 345–46.

[54] *See id.* at 338.

[55] *Id.*

of its own interpretation of the statute. In the context of a *Chevron* problem, because of the court's focus on fair application of the statute, the procedural concerns of the agency's legal authority to make its interpretations are subordinated to the substantive concerns of the actual meaning of the statute. As a result, although the issue of an agency's authority to interpret a statute and act in a particlar manner is relevant, larger concerns of substantive justice become the baseline against which an agency's action is judged.

Dworkin is not alone in positing cultural principles of morality as the lens through which the legitimacy of a law, or interpretation of a law, is judged. John Finnis, another leading natural law theorist, has recently published an inquiry into the relationship between natural law theory and limited government that scrutinizes the constraints of moral principles and norms on the legitimacy of laws.[56] Finnis argues that government "is rationally limited not only by constitutional law and by the moral norms which limit every decent person's deliberation and choice, but also by the inherent limits of its general justifying aim, purpose, or rationale."[57] Finnis asserts that these are determined by employing as guides the principles upon which Aquinas built his natural law: basic human physical and emotional goods that constitute human fulfillment.[58] Finnis' argument further refines Dworkin's loose natural law equation for statutory interpretation, invoking the central natural law theory of larger, meta-constitutional principles that dictate the legitimacy of government action.

Michael Moore, perhaps the most outspoken contemporary proponent of natural law theory, proposes an approach to statutory interpretation that more closely follows the transcendental morality of Aquinas than does Dworkin's theory.[59] Dworkin articulates his overriding value constraints as those defined by conventional morality rather than immutable moral codes of society. Moore, on the other hand, argues that the conventionalism of Dworkin subordinates real moral values to those that are cur-

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[56] *See* John Finnis, *Is Natural Law Theory Compatible with Limited Government?, in* NATURAL LAW, LIBERALISM, AND MORALITY 1 (Robert P. George ed., 1996).

[57] *Id.* at 4.

[58] *See id.* at 4–5.

[59] *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) (discussing the role of objectively moral truths in natural law theory).

rently popular, falling prey to the tyranny-of-the-majority threat that led to the construction of the Bill of Rights.[60] In essence, Moore takes issue with Dworkin's retreat from the essentialist, transcendentalist approach to natural law that derives from Aquinas. Nevertheless, both Moore and Dworkin agree that to judge the legitimacy of a law or its interpretation is to focus on its substantive justice, whether by real or conventional morality.

Philip Soper recognizes this conflict between the application of conventional and real moral values as the primary internal dilemma faced by natural law theorists in their review of judicial decision-making.[61] As stated by Soper:

> The dilemma of natural law is that, though it insists that the "higher law" of morality be used to test the claims of human institutions to determine obligations through law, the theory does not offer any advice about how to implement this "higher law" test in an actual legal system.[62]

Soper's articulation of the internal conflicts of natural law theory also, however, clarifies the great distinction between legal positivism and his theory, the assumption that any legitimate law must also be a moral law. Natural law theory's "higher law" test, whether it be the real higher law of Moore or the culturally determined higher law of Dworkin, minces no words about a judge's ultimate concern when interpreting a law, or reviewing another's interpretation of it.

B. *Legal Positivism*

Classical positivism, as developed by John Austin and Jeremy Bentham, has a negative and a positive thesis.[63] The positivists' reaction against the moral essentialism of natural law is articulated by the notion of separability—the negative thesis that law

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[60] *See* Moore, *A Natural Law Theory of Interpretation*, *supra* note 59, at 389–91. Although Moore does not explicitly invoke the tyranny-of-the-majority analogy, his argument for a natural law theory of "real" values as opposed to conventional values mirrors the Lockean "transcendental rights" foundation upon which the Constitution was built.

[61] *See* Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2413 (1992).

[62] *Id.*

[63] The two theses of classical positivism have retained their vitality throughout the turbulent history of legal positivism. *See* Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1082–84 (1997) (splitting positivism into two separate concepts: a normative concept precisely corresponding to the separability thesis and an empirical concept embodying an approximation of the rule of recognition).

does not equal morality and that there is no connection between the two.[64] The reasons behind such a separation were twofold: not only was the moral ground of natural law an imaginary construct, but it also allowed judges to abuse their power by injecting personal moral views into the law.[65] Although positivists initially employed the separability thesis to argue more polemically that there can be no connection whatsoever between law and morality,[66] the thesis now merely encapsulates the proposition that law and morality have no necessary connection.[67]

The positive thesis of classical positivism, the rule of recognition and its focus on a law's pedigree, more closely relates to the concerns of this Comment. Initially, scholars like Austin and Bentham separated this principle into two prongs: the command theory of law, which defined law as an expression of human will and power, and the "sources thesis," which judged the validity of a law by its authenticity (connection to sovereign authority) rather than by its content.[68] Refinement of these two prongs, particularly by H.L.A. Hart in the mid-twentieth century,[69] led to the rule of recognition, which states that "wherever there is law there exists a normative social practice among relevant officials that specifies the conditions that must be satisfied in order for a

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[64] *See id.*

[65] *See id.*

[66] *See* John Austin, *The Province of Jurisprudence Determined, in* READINGS IN THE PHILOSOPHY OF LAW (John Arthur & William H. Shaw eds., 1993). This negative thesis of legal positivism responds directly to the natural law claim that morality is a necessary factor in legality. As natural law positions on the matter have become less polemic, so has the legal positivist response. For an example of this collapse of binaries, see *supra* note 40.

[67] *See* Coleman, *supra* note 41, at 287.

[68] *See* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2065 (1995). This rule has evolved from early, now discredited, arguments of legal positivists such as John Austin that legal authority is merely a function of power. *See* Austin, *supra* note 66.

[69] *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961). In this seminal work, Hart attacks Austin's command rule as little more than a gunman theory in which orders are followed simply due to coercion by the ordering party or fear on the part of the ordered party. *See id.* at 18–20. Rather, argues Hart, law is a set of primary and secondary rules that are followed because they are viewed by the majority of citizens as standards of criticism and justification. *See id.* at 84–88. Primary rules are rules of behavior that individuals in a society are expected to follow. *See id.* Secondary rules, however, are rules concerning the primary rules and they "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." *Id.* at 92. Of the three forms of secondary rules, most important for the purposes of this Comment are rules of recognition, which allow one to recognize exactly what rules are the actual rules of one's society. *See id.* In other words, a rule of recognition indicates the characteristics, such as the source, of rules that validly may be followed as primary rules of conduct.

norm to count as part of the community's law."[70] In other words, a law's legitimacy as a valid rule of conduct is determined by its authenticity under the existing legal system, as derived from its source, rather than by its content or effect.[71] Unlike natural law, which focuses on the *moral* requirements for the legitimacy of a government mandate, legal positivism focuses on the accepted *legal* authority of valid legislative activities.

Precisely because of legal positivism's evolution beyond Austinian coercion-based approaches to law, justifiable legal authority under the rule of recognition has become the focal point of positivist inquiries into the legitimacy of any government mandate. Legislative power wielded by an entity only achieves legitimacy if the affected political community has granted to the entity the authority to wield such power through procedures culturally agreed upon.[72] If so, the exercise is legitimate. If not, it is invalid. Separation of powers doctrine offers innumerable examples of this approach. For instance, irrespective of the sincerity or accuracy of her belief, if the President felt that all welfare recipients should be forced to work, she would not be able to validly pass a law to that effect because she has not been given legislative power by the Federal Constitution under the rule of recognition. As pointed out by Neil MacCormick, "[i]n sharing a common view about the rules which have to be applied by legal decision-makers in their official capacity, members of a legal community evince their support for or acceptance of a rule stipulating criteria of validity of legal rules."[73] Under legal positivism, the secondary rule of properly delegated authority both determines the legitimacy of various primary rules and functions as a rule of recognition, thereby allowing individuals to ascertain which primary rules are valid. Although a moral, normative element exists in the modern formulation of legal positivism in that only rules following the rule of recogni-

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[70] Coleman, *supra* note 41, at 287.

[71] *See* Stewart J. Schwab, *Limited-Domain Positivism as an Empirical Proposition*, 82 CORNELL L. REV. 1111, 1116 (1997).

[72] Following H.L.A. Hart's discussion of rules of recognition, *see supra* note 69, the culturally agreed upon authority, whether manifested in a constitutional requirement or a more vaguely established authority, such as common law powers of judges, becomes a rule of recognition that sets the boundaries of primary rules.

[73] Neil MacCormick, *THE CONCEPT OF LAW in the Concept of Law, in* THE AUTONOMY OF LAW 163, 179 (Robert P. George ed., 1996). MacCormick's "criteria of validity of legal rules" are normative, culturally determined requirements that distinguish laws from simple Austinian commands. Legitimately derived authority is probably the dominant example of these secondary rules, as defined by Hart.

tion ought to be obeyed, the philosophy still subordinates questions of morality to questions of authority in deciding the legitimacy of a law or an action by the government.

With respect to an inquiry into judicial review of agency statutory interpretation, a legal positivist approach would focus on the authority delegated to a particular agency by Congress. Joseph Raz has identified a relationship between positivism and statutory interpretation that strongly implicates the Court's approach in *Chevron*.[74] Relying on the authority requirements of legal positivism, Raz argues that the interpretation of a statute should reflect the intentions of the lawmaker and that failure to do so would not be interpretation, but rather would be a form of lawmaking unsupported by legitimate authority.[75] In terms of *Chevron*'s concerns, this translates into a determination as to whether Congress intended to delegate interpretational authority to the agency at issue. If Congress granted the proper authority to an agency (a rule of recognition—delegated authority from a law-making body), the agency's interpretation would then fit the contours of a primary rule and the Supreme Court would recognize it as a valid primary rule.

III. Textual Analysis of the Case Law from a Legal Philosophical Perspective

When *National Labor Relations Board v. Hearst Publications* was decided in 1944, it appeared that the Court had propounded a permanent rule as to the deference required by courts reviewing agency legal interpretations.[76] Three years later, however, the Court seemingly reversed itself in *Packard Motor Car Co. v. National Labor Relations Board*,[77] setting up the forty-year period of inconsistency that preceded *Chevron*. The inconsistency between *Hearst* and *Packard* has engendered heavy academic interest, and a number of scholars have introduced theories that attempt to reconcile the two cases.[78] This Section scrutinizes the

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[74] *See* Joseph Raz, *Intention in Interpretation*, *in* The Autonomy of Law 249 (Robert P. George ed., 1996).

[75] *See id.* at 257–59.

[76] *See Hearst*, 322 U.S. at 131. *See also infra* note 80 and accompanying text.

[77] 330 U.S. 485 (1947). *See also infra* notes 89–90 and accompanying text.

[78] *See* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 Admin. L.J. 255, 265–66 (1988); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 24 (1985); Henry

language of *Hearst*, *Packard*, and *Chevron* in an effort to ascertain legal philosophical influences on the decisions. As will be demonstrated, the language of *Hearst* and *Packard* invokes both natural law and legal positivist concerns, while that of *Chevron* is overwhelmingly positivist.

A. Hearst: *Its Rule and its Text*

The Supreme Court first addressed the issue of the propriety of agency interpretations of ambiguous statutory mandates in 1944, in *Hearst*.[79] In that case, Hearst challenged the NLRB's determination that the term "employee" in the National Labor Relations Act ("NLRA") included newsboys. In deferring to the NLRB's determination, the Court indicated that an agency's "specific application of a broad statutory term"[80] merits deference from the reviewing court. The actual scope of required deference was poorly explained, as was the Court's rationale for extending such consideration. For example, although the Court characterized the NLRB decision as one of judgment, it proceeded to review exhaustively the NLRA and the conditions surrounding the NLRB's decision as if the Court were engaging in *de novo* review of the meaning of the term "employee."[81] Despite the decision's ambiguity, however, it has been almost uniformly interpreted as a mandate for deference to agency statutory interpretation.[82]

The language of the decision demonstrates a tension between the substantive concerns of natural law (what does the NLRA mean and was the NLRB's interpretation just?) and pedigree concerns of legal positivism (did the NLRB's decision fall within the authority allocated to it by Congress via the NLRA?). The terminology of the Court's rule concerning statutory interpretation by agencies directly invokes legal positivism's focus on authority; "[u]ndoubtedly questions of statutory interpreta-

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P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235–36 (1985).

[79] 322 U.S. 111 (1944).

[80] *Id.* at 131.

[81] *See id.* at 120–30. *See also* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 764–66 (1991) (discussing the Court's inadequate explanation for its required deference).

[82] *See* Callahan, *supra* note 5, at 1279; Starr, *supra* note 4, at 292. *But see* Sunstein, *supra* note 2, at 2081 (concluding that the decision retained courts as the final interpreter of statutes).

tion, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special *duty* is to administer the questioned statute."[83] Moreover, the language surrounding this pronouncement closely follows legal positivist thought, as the Court discussed the NLRB's ability to make factual and judgment determinations as offshoots of authority "*assigned* primarily to the agency created by Congress . . . ,"[84] and argued that "Congress *entrusted* to [the NLRB] primarily the decision whether the evidence establishes the material facts."[85] This language suggests at least tacit approval of the rule-of-recognition approach propounded by legal positivism, and a privileging of the agency's legal authority to interpret "employee" over the substance of the agency's interpretation.

The Court's detailed discussion of the possible meaning of "employee" under the NLRA, however, invokes the broad principles and underlying statutory purposes found in Dworkin's discussions of natural law, particularly considering that the Court ostensibly had already chosen to defer to the NLRB. The Court initially injected moral principles into its explanation of Congress's aims in enacting the NLRA, stating that "[Congress] rather sought to find a broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife that prevails where these rights are not effectively established."[86] Both the Court's oblique refusal to blindly defer to the NLRB's interpretation and its focus on larger principles of justice suggest a distinct natural law influence. Furthermore, although traditional legal distinctions militated against the Court's agreement that newsboys were employees,[87] the Court subordinated those distinctions under the "avowed and interrelated purposes of the Act"[88] in order to reach

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[83] *Hearst*, 322 U.S. at 130–31 (emphasis added).
[84] *Id.* at 130 (emphasis added).
[85] *Id.* (emphasis added).
[86] *Id.* at 125.
[87] *See id.* at 125–27. The respondent in the case argued that the definition of "employee" should turn on the traditional common law distinction between employee and independent contractor. The Court rejected that argument on the grounds that, among other things, Congress was not concerned with technical legal relationships, but rather with "substituting, so far as its power could reach, the rights of workers to self organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established." *Id.* at 125.
[88] *Id.* at 126.

the just conclusion. Thus, although these principles of natural law did not arise when the Court specifically discussed its new rule, their importance manifests itself throughout the Court's analysis of the NLRA.

In sum, whether intentionally or not, the Court drew on principles from both legal positivism and natural law in reaching its conclusion in *Hearst* that the NLRB's definition of "employee" deserved deference. The Court's preoccupation with questions of institutional authority, particularly as a rationale for its ostensible deference to the NLRB's interpretation strongly implicates legal positivist concepts. On the other hand, both the Court's practical disinclination to defer to the agency's reading of the NLRA and the Court's explicit privileging of substantive justice in its conclusion demonstrate the influence of natural law concerns. The Court's wavering between the two philosophical approaches is duplicated in *Packard* and exemplifies the philosophical tension in the larger legal community at the time.

B. Packard: *Its Rule and Text*

Decided just three years after *Hearst*, *Packard* appeared at first blush to be a direct repudiation of the deference its predecessor had purportedly extended to agencies, a repudiation that looked to be particularly pointed considering the similarity of actors and issues. In *Packard*, the Court was once again required to review the NLRB's definition of "employee," this time in reference to the right of facility foremen to bargain collectively.[89] In essence, the Court held that questions of law, broad statutory interpretations rather than the specific application of statutory mandates found in questions of judgment, did not compel judicial deference to agency interpretations.[90] Although the Court attempted neither to distinguish nor to reconcile its earlier decision, never mentioning *Hearst*, its language demonstrates a similar tension between natural law and legal positivism.

The Court's inclination toward a legal positivist approach is manifested by its focus on authority, both that of the NLRB in applying or interpreting the NLRA and that of the Court in reviewing an agency's interpretation. For example, in reaching its

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[89] *See* Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485, 486–88 (1947).

[90] *See id.* at 491.

conclusion, the Court explicitly refused to address the wisdom of Packard's policy arguments or the substance of the NLRB's interpretation:

> It is also urged upon us most seriously that unionization of foremen is from many points bad industrial policy, that it puts the union foreman in the position of serving two masters, divides his loyalty and makes generally for bad relations between management and labor. However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions.[91]

One can view such a proclamation, with its concern with authority and its refusal to address substantive policy, as an express refutation of any natural law approach to judicial review of agency activity and an implicit endorsement of a legal positivist approach. Earlier in the decision, the Court invoked legal positivist principles even more directly by focusing entirely on the NLRB's authority. Specifically, the Court stated that "[w]hile we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end."[92] This indicates a preoccupation with the rule of recognition analysis discussed earlier; if the NLRB's interpretation of the NLRA comports with a legitimate delegation of authority from a legitimate lawmaking body, the interpretation is valid.

Packard's overall language, however, like that of *Hearst*, demonstrates an ambivalence between legal positivist and natural law tendencies. Although the decision relies more on positivist inquiries concerning the NLRB's authority than does *Hearst*, both the majority and the dissent in *Packard* rely on arguments and language closely associated with natural law. For example, in discussing the effect of the NLRB's definition of "employee" on the foreman at issue, the Court states "[h]e does not lose his *right* to serve himself in these respects because he serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective inter-

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[91] *Id.* at 493.
[92] *Id.* at 491–92.

ests."[93] The Court's invocation of foremen's rights to economic protection through collective bargaining injects a substantial "justice" factor into the decision. Moreover, the dissent relies almost entirely on natural law concepts in its opinion, arguing that Congress would not have left such important national policy matters to the NLRB.[94] Specifically, the dissent states:

> I mention these matters to indicate what tremendously important policy questions are involved in the present decision. My purpose is to suggest that if Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none.[95]

The dissent's analysis is driven by policy concerns; allowing foremen to form unions and collectively bargain was important enough, and perhaps the dissent thought dangerous enough, that it should only be allowed if Congress explicitly permitted it in the NLRA.

Granted, *Packard* exhibits less internal inconsistency, from a legal philosophical perspective, than *Hearst*, but the tension between a natural law focus on substance and fairness and a positivist focus on authority and power clearly exists. Moreover, when the two cases are taken together, their language indicates that the apparent inconsistency between the two holdings might be attributed to philosophical ambivalence.

C. Chevron *and its Progeny*

After forty years of conflicting approaches to agency statutory interpretation, the Court in *Chevron* finally settled the matter and held that deference to agency construction was appropriate when a statute was silent or ambiguous on a particular legal issue.[96] The Court articulated its new rule in the form of a now famous two-step inquiry. The reviewing court first must ascertain whether the statute directly and unambiguously addresses the question at issue in the agency's interpretation.[97] If so, that clearly expressed

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[93] *Id.* at 489–90 (emphasis added).
[94] *See id.* at 500.
[95] *Id.* at 495.
[96] *See Chevron*, 467 U.S. at 843.
[97] *See id.* at 842–43.

intent of Congress must be followed.[98] If the statute "is silent or ambiguous with respect to the specific issue," however, the agency's interpretation need only be "permissible."[99] More importantly, the ruling indicated that an agency's interpretation of an ambiguous statute may still be valid despite contravening the reading a court would have adopted had it interpreted the statute *de novo*,[100] a level of deference clearly incompatible with the judicial supremacy put forth in *Packard*.

On its own, this deference may seem to suggest neither legal positivist nor natural law undertones, inasmuch as such deference might be based either on the legal positivist ground that Congress has delegated such authority to the agency or on the natural law ground that an agency's expertise allows it to interpret more accurately the statute in a just manner. The language surrounding the new rule in *Chevron*, however, indicates quite clearly that the Court adopted a fundamentally and uniformly positivist approach to its rule, eschewing the natural law concerns that had partially driven *Hearst* and *Packard*. Particularly revealing is the Court's discussion, directly following its articulation of the new rule, of congressional delegation of authority:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[101]

Undoubtedly, this language implicates the foundations of legal positivism, both the positive claim that authority determines a law's legitimacy and the negative claim that law is not necessarily dependent on morality. In other words, the Court was more concerned with finding the properly authorized interpreter of a statute than with finding the "just" interpretation of a statute.

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[98] *See id.*

[99] *Id.* at 843. Subsequent Supreme Court decisions have established that "permissible" can actually be read as "reasonable."

[100] *See id.* at 843 n.11.

[101] *Id.* at 843–44 (citations omitted).

Justice Stevens, the author of the decision, appears to go to great pains to rest his repudiation of the *Packard* line of cases on positivist grounds. In his final articulation of the opinion's underlying rationale, Justice Stevens again invokes the authority concerns inherent in legal positivism:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.[102]

Simply put, the Court was concerned with an agency's authority to make a particular decision under the relevant statute and perceived its inquiry into the substance of the decision to be particularly limited. In fact, despite the existence of the second prong of the rule, statements such as the aforementioned presaged it to be the paper tiger that it has become.[103] Clearly, *Chevron*'s privileging of proper authority over just result mirrors Joseph Raz's positivist focus on legislative intent and its role in legitimate agency interpretation.[104]

In many opinions concerning agency statutory interpretation that have followed *Chevron*, the Court has taken similar recourse to legal positivist concepts of authority. In *Young v. Community Nutrition Institute*,[105] the Court employed the *Chevron* rule in a particularly positivist manner to accept an agency's statutory interpretation, in fact partially subsuming the second prong of the test under the first prong.[106] The Court held that the FDA's interpretation of the Federal Food, Drug, and Cosmetic Act (giving it discretion whether to promulgate tolerance levels for certain added harmful substances) was reasonable enough to re-

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[102] *Id.* at 866.

[103] *See* Merrill, *supra* note 2, at 999–1003; *cf.* Richard J. Pierce, *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1123–27 (1995) (discussing decisions employing the *Chevron* doctrine as if the first step was the only inquiry of practical importance); Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133, 1135–37 (1995) (same).

[104] *See* Schwab, *supra* note 71.

[105] 476 U.S. 974 (1986).

[106] *See id.* at 981–83.

quire deference by the Court.[107] The Court, however, paid only lip service to the second prong of the *Chevron* test, focusing primarily on the legal authority of the FDA to exercise such discretion:

> To read § 346 as does the FDA is hardly to endorse an absurd result. Like any other administrative agency, the FDA has been delegated broad discretion by Congress in any number of areas. To interpret Congress'[s] statutory language to give the FDA discretion to decide whether tolerance levels are necessary to protect the public health is therefore sensible.[108]

In essence, the Court bootstrapped its resolution of the second prong of the *Chevron* test, the reasonableness of agency action, to its resolution of the first prong by casting it as merely a rearticulation of the legal authority inquiry. Under the rationale of *Young*, if an agency has been delegated the proper discretion by Congress (presumed in the presence of an ambiguous statute), its interpretation must therefore be reasonable.[109]

The language of the four cases discussed above is neither simple nor definitive with respect to the legal philosophical impulses behind the decisions. Upon close scrutiny, however, certain patterns emerge. The texts of both *Hearst* and *Packard* are replete with explicit, often conflicting, references to the legal concepts underlying both natural law and legal positivism. Conversely, the texts of both *Chevron* and *Young* tell markedly different stories, indicating either that natural law concerns no longer played a serious role in the review of agency statutory interpretation or that the Court felt compelled to understate that role.

IV. THE CULTURAL SHIFT FROM AMBIVALENCE TO LEGAL POSITIVISM

The cultural backdrop of legal philosophy helps clarify the seeming inconsistency in the *Hearst*, *Packard*, and *Chevron* de-

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[107] *See id.*

[108] *Id.* at 981.

[109] *See, e.g.*, Smiley v. Citibank (S.D.) N.A., 517 U.S. 735, 739–44 (1996) (choosing to defer to the Comptroller of the Currency's inclusion of credit card late fees as "interest" under regulations authorized by the National Bank Act of 1864 despite the fact that the regulations were promulgated more than 100 years after passage of the Act and despite an arguable inconsistency between the inclusion of late fees as interest and earlier decisions of the Comptroller). *See also* Sprandell v. Secretary of Health and Human Services, 838 F.2d 23 (1st Cir. 1988).

cisions. Specifically, the cases mirror the philosophical debate that occurred between legal positivism and natural law in the twentieth century and the shift within the legal community from an ambivalence between the two theories toward a relative dominance of legal positivism.

Natural law and its adherence to transcendental, or at least culturally entrenched, moral principles played a prominent role in the establishment of the American legal tradition. From its very inception, the American nation considered its destiny to be central to "God's eternal plan"[110] and to hold a favored place in the eyes of nature.[111] This fundamental, essentialist self-perspective inevitably manifested itself in the country's legal and political personae. The Declaration of Independence, the Preamble, and the Constitution itself demonstrate the centrality of natural law to our legal system and the parallel manner in which early American legal thinkers perceived law and morality.[112] The Declaration of Independence can be interpreted as a subordination of legal positivist thought, as represented by loyalists who recognized seemingly unfair British laws as legitimate exercises of sovereign power, to natural law theory, as represented by the supporters of the Revolution.[113] American Constitutionalism is based on the natural law belief in the existence of certain fundamental principles that are immutable and uncompromising, and by which the activities of Government are circumscribed.[114] Moreover, the drafters of the Constitution were strongly influenced by political manifestations of natural law theory, such as those of Locke and John Stuart Mill.[115]

Although natural law enjoyed a philosophical monopoly during the eighteenth century, the nineteenth century saw the establishment of legal positivism as a potential challenger to natural

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[110] DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 26 (1991).

[111] *See id.* at 26; Daniel C.K. Chow, *A Pragmatic Model of the Law*, 67 WASH. L. REV. 755, 825 n.18 and accompanying text (1992) (discussing the relationship between America's self-image as specifically chosen by God and the centrality of natural law to the nation's early legal traditions).

[112] For example, the purpose of the Bill of Rights was to ensure that certain fundamental rights would not be compromised no matter what legal authority the government might possess.

[113] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[114] *See* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 101–04 (3d ed. 1995).

[115] *See* Grey, *supra* note 42, at 715–16 (connecting natural law theory to the political and philosophical motivations of the drafters of the Constitution); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 24–28, 30 (1978) (discussing the influence of natural law on the drafters).

law.[116] Despite the fact that American jurisprudential scholars did not use the term "legal positivism" until well after the beginning of the twentieth century,[117] the theory began to receive attention and support within the American legal community under various other monikers beginning in the latter half of the nineteenth century.[118] Natural law maintained its dominance throughout most of the 1800s, but the emerging view of law as a legitimate manifestation of human will eroded the purity of the natural law foundations of our legal structure and introduced positivist investigations into political and legal authority well before H.L.A. Hart threw down the gauntlet in 1958.[119]

The twentieth-century transition from natural law theory to legal positivism was qualified by the recognition that the two theories were both undergoing internal modifications and shifting toward a common ground.[120] Nevertheless, as the debate between the two theories played out in a number of fora, particularly legal academia and the federal judiciary, the popularity of legal positivism steadily grew. The past twenty years have witnessed the emergence of positivism over natural law as the dominant theory.[121] Even the most forceful adherents of natural law recog-

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[116] *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1768 TO 1860, at 9–16 (1977) (discussing the gradual shift from a legal system dominated by natural law theory to one in which legal positivist concerns were recognized as valid).

[117] *See* Sebok, *supra* note 68.

[118] *See id.* at 2061–90. Confusing terminology has obscured much of the rising impact of legal positivist theory in the early and mid-20th century. Legal theories such as formalism and analytical jurisprudence were based on the same principles as positivism, and operated as analogues to it. As a result, the direct clash between legal positivism and natural law did not become easily recognizable until the famous Hart/Fuller debate in 1958, although the central concepts underlying the two theories had been in conflict since at least 1916, when Joseph Beale published a distinctly positivist approach to conflict of laws concerns. *See id.* at 2087–89.

[119] *See id.* at 2054; Chow, *supra* note 111, at 762 n.19 and accompanying text.

[120] *See supra* note 40. For example, with the Nuremberg Tribunal proceedings after World War II, natural law briefly reasserted itself over legal positivism. In essence, Nazi defendants argued that their actions, however inhumane, were justified under the legally valid law of the Third Reich, and thus could not be a basis for criminal convictions. The Tribunal flatly rejected this positivist defense, and natural law proponents used the defense and its rejection to argue for the moral inferiority of positivism when compared to natural law. *See* David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2350–52 (1992); Stanley L. Paulson, *Classical Legal Positivism at Nuremberg*, 4 PHIL. & PUB. AFF. 132 (1975). It was in this context that H.L.A. Hart and Lon Fuller engaged in their famous exchange, and it was in response to the natural law argument about the moral deficiencies of positivism that Hart was compelled to further refine his version of legal positivism. *See* Hart, *supra* note 40; Fuller, *supra* note 40.

[121] *See* Schauer & Wise, *supra* note 63, at 1080–81, 1086–87; Sebok, *supra* note 68, at 2055. *See also* 1 HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE & POLICY 8 (1992). *But see* Soper, *supra* note 61, at 2393 (arguing that the work of scholars such as Dworkin, and the

nize that its role is, at best, one of "challenger to the reigning orthodoxy,"[122] and that natural law theorists are a small enclave in a vast sea of skepticism.[123] The legal culture's twentieth-century vacillation between these two theories explains, at least in part, the odd dynamic between *Hearst* and *Packard*, whereas the recent dominance of legal positivism explains *Chevron*'s abrupt resolution of the issue of judicial review of administrative statutory interpretation.

Legal philosopher Kent Greenawalt argues that, although certain late eighteenth- and early nineteenth-century cases adopted natural law stances by invalidating state laws that the Court found to be immoral but constitutional, the twentieth century saw the Court repudiate this practice.[124] Greenawalt's examples serve as additional evidence of the shift of favor within the legal and philosophical communities from the principles of natural law upon which the country was founded to a more utilitarian legal positivism.[125] This trend is mirrored by an early and mid-twentieth-century ambivalence on the part of the Court as to how strongly it should adhere to natural law concepts, as indicated by *Hearst* and *Packard*, and an eventual acceptance by the Court of legal positivism, as seen in *Chevron*.

One area in which this reorientation manifests itself is the Court's shift from the apparently inconsistent *Hearst* and *Packard* approaches to the more coherent *Chevron* rule concerning agency interpretation of ambiguous statutes. In 1941, three years before *Hearst* was decided, the Attorney General's Committee on Administrative Procedure helped usher in the period of ambivalence preceding the shift in *Chevron*. In a report that eventu-

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testimony of Justice Clarence Thomas at his confirmation hearings indicate a resurgence in natural law as both a moral and legal theory).

[122] Soper, *supra* note 61, at 2393–94.

[123] *See id.*; *cf.* Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 302–13 (1985) (discussing various forms of skepticism concerning meaning and the interpretation of statutory language).

[124] *See* Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, *in* THE AUTONOMY OF LAW 1, 3 (Robert P. George ed., 1996).

[125] *See id.* By way of example, Greenawalt states that:

> in a revealing 1951 case in which Black J. condemned the Court's "shock-the-conscience" test for whether evidence acquired by "pumping" a suspect's stomach should be admitted, Frankfurter J., for the Court, said that its approach to due process "was not to be derided as a resort to a revival of 'natural law.'"

Id. (citations omitted). Although this may not suffice to prove a shift in the Court's approach, it certainly does indicate a level of discomfort with any overt adherence to natural law tenets.

ally led to the Administrative Procedure Act, the Committee stated that:

> Even on questions of law, [independent judicial] judgment seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support. Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it.[126]

Although no mention of legal philosophy is made in the Committee report, the oppositional framework elucidated by the report re-articulates the dispute between legal positivism and natural law.

It was probably unavoidable that the New Deal, with its reliance on agency activism, would bring the conflict between natural law and legal positivism to the fore. The New Deal's framing of the conflict is discussed by Cass Sunstein:

> [T]he new framework called into question the original understanding that individual rights lay principally in immunity from governmental constraints. For the New Dealers, individual rights were in fact a product of legal decisions; they were hardly prepolitical or even "negative." Having rejected the view that the common law system was part of the state of nature, the New Deal reformers saw government action as a necessary guarantor of economic productivity, distributive equity, and even right, properly understood.[127]

Clearly, then, it was inevitable that the administrative state would engender a new outlet for the conflict between natural law and legal positivism. Issues fundamental to the very character of the nation were implicated in the ongoing debate about the relationship between the federal government and its citizens in the administrative state. Did we need courts to judge independently

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[126] S. Doc. No. 8, at 90–91 (1941), *cited in* Scalia, *supra* note 2, at 513.
[127] Sunstein, *supra* note 2, at 2079–80 (citations omitted).

the substance and focus of administrative activity? Many thought so, including the enactors of the Administrative Procedure Act.[128] At the same time, however, the rejection of the non-delegation doctrine by the courts, along with other administrative law decisions, indicated that legal authority, not substantive result, justified agency actions.[129] Since the New Deal, this debate has continued, although dormant at times and increasingly favoring positivism. Yet rarely has it been clearly articulated from a legal philosophical perspective.

How closely can this twentieth-century shift from natural law to legal positivism be tied, from a causal perspective, to *Chevron*? The effect on Supreme Court decisions of the sort of cultural shift documented in this Comment has been developed extensively, if generally, by Lawrence Lessig.[130] Lessig analyzes the Court's holding in *Erie Railroad Co. v. Tompkins*,[131] in which the Supreme Court overturned a ninety-six-year tradition of federal common law established by *Swift v. Tyson*[132] in 1842.[133] Lessig employs the jurisprudential dynamic of *Erie*, among other examples, to document a model for change among practices within legal institutions.[134] Applying a general sort of issue-evolution model to specific legal institutional practices, Lessig scrutinizes the factors that might act in concert to bring about legitimate, yet fundamental, changes within those practices.[135] By focusing on seemingly abrupt Supreme Court decisions that bring about cultural and institutional changes, Lessig highlights the importance of contextuality in interpretation.[136] In other

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[128] *See id.* at 2080.

[129] *Cf. id.* (discussing the debate as to whether federal courts should concern themselves with the substance of agency decisions or the authority underlying those decisions).

[130] *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–38 (1995) [hereinafter Lessig, *Fidelity and Theory*]; *see also* Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1795 (1997) [hereinafter Lessig, *Erie-Effects*].

[131] 304 U.S. 64 (1938).

[132] 41 U.S. 1 (1842).

[133] *See* Lessig, *Fidelity and Theory*, *supra* note 130.

[134] *See id.*

[135] *See id.* For a thorough discussion of issue evolution in a political or cultural context, rather than in Lessig's more narrow legal approach, see EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989) (discussing the emergence of race as the central political issue in American politics and using it as a vehicle to model the existence and effect of issue evolution).

[136] *See* Lessig, *Erie-Effects*, *supra* note 130, at 1785–86. In his own words:

> The key is an attention less on the foreground of interpretive practice, and more on the background; a turn away from a practice of interpretive theory

words, Lessig views Supreme Court decisions as culturally specific events that, given the proper circumstances and antecedents, can respond to cultural pressures by effecting distinct institutional change. When such a change-inducing decision is rendered, it may be instructive to look beyond immediate variables such as precedent and to focus instead on the cultural background and institutional context leading up to the decision.[137]

Although detractors of Lessig's theory might question him for adopting too linear and reactive a model, his program is useful in explaining seemingly abrupt institutional changes. As Lessig describes the model:

> The pattern has two steps: the first, the emergence of a kind of contestability about a practice within a legal institution (brought about by either a change in that practice, a change in the understandings about that practice, or a change in both); the second, a restructuring of that practice to avoid the rhetorical costs of that contestability. In *Erie*, the contestability was about the judicial role in the articulation of federal general common law. The response [as seen in the *Erie* decision] was to transfer the practice to another institution—the states. In other cases, the contestability will differ, and so will the response. But it is the conjunction of contestability and a response that I mean by the *Erie-Effect*.[138]

In other words, Lessig's model is simply one of an eventual institutional shift that precipitates an element of conflict concerning relevant practices within that institution, resolved by an authoritative adaptation among those practices. Lessig develops each element of his model in great detail, focusing, for example, on the importance of the cultural timing of the contested issue and on the methods by which actors can move those conflicts into the foreground so that sufficient public attention falls upon them.[139] For the purposes of this Comment, however, the *Erie-Effect* is important, not in its details, but rather in the general

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> that emphasizes the significance of text and political change, and toward a practice that reflects an understanding of how changes behind these foreground objects matter. This is the place for context theory: for an understanding of how changes in context matter to institutional practice, and how they might justify significant interpretive change.

Id. (footnotes omitted).

[137] *See id.*

[138] *Id.* at 1795.

[139] *See id.* at 1802–06 (constructing a matrix of contestability possibilities and discussing the ripeness of each scenario).

paradigm of how institutional changes arise from general cultural or legal shifts which introduce or resolve conflicts.

The shifting and intertwined fortunes of natural law and legal positivism, and the effect of that dynamic on judicial review of agency statutory interpretation, can be placed loosely within the contours of the *Erie-Effect*. This Comment does not attempt simply to plug the historical debate between positivism and natural law into Lessig's equation and reach *Chevron*—such a fit would be strained at best. For example, the shift from *Hearst/Packard* to *Chevron* suggests a move out of contestability between natural law and legal positivism toward the relative dominance of positivism, a movement counter to that in Lessig's model. Moreover, Lessig's concerns about the importance of public attention do not enter the situation described in this Comment, unless, of course, one views the general legal community as the relevant public. Perhaps most important, decisions like *Hearst* and *Chevron* better represent judicial reactions to general philosophical shifts rather than judicial resolutions of moments of contestability.

Nevertheless, the cases addressed in this Comment make sense as responses, at least to a certain degree, to the larger legal philosophical dialogue of the time in the same way that Lessig set up *Erie* as a reaction to the legal community's changing views on federal common law. *Hearst* and *Packard* represent the Court's efforts to come to grips with the rise of legal positivist concerns about authority and the tension that such a shift created between positivism and natural law, or authority and substance, in respect to agency statutory interpretation. *Chevron* mirrors the recent dominance of legal positivism and the Court's concomitant recognition of the subordination of the "fairness" concept to concerns of power and authority. Similar to the dynamic between institutional cultural shifts and the resulting practical adaptations that underlies the *Erie-Effect*, the twentieth-century struggle between natural law and legal positivism manifested itself in the Court's approach to review of agency statutory interpretation. Whether it be in terms of legal philosophy or not, context is important.

V. The Case Law Redux

Although interpreters of *Hearst/Packard* and *Chevron* have not addressed the effect of legal philosophical trends on the Court's approach to the review of agency statutory interpretation, commentators discussing the cases, whether they are aware of it or not, invoke positivist or natural law concepts.[140] Such invocations help demonstrate that an approach that considers relevant legal philosophical trends is essential to a full understanding of the Court's efforts to define a workable rule for agencies' interpretation of their statutory mandates.

A. Hearst *and* Packard

Much of the legal scholarship concerning *Hearst* and *Packard* mirrors the ambivalence between legal positivism and natural law seen in the language of the cases. The Supreme Court inconsistently followed both *Hearst* and *Packard* approaches to agency interpretation cases during the 1940s, rejecting agency interpretations as often as it accepted them.[141] Professor Henry Monaghan, among others, argues that these cases are fundamentally inconsistent, not only reaching different conclusions, but sometimes extending deference to agency interpretations and sometimes declining to do so irrespective of whether the Court eventually agreed with the interpretation.[142] In his discussion, Monaghan defines deference as agency displacement of judicial statutory interpretation[143] and argues that the growth of the administrative state and its impact on private fundamental rights engendered judicial concern that agencies not tread heavily on due process rights.[144] As a result, argues Monaghan, the early to mid-twentieth century experienced increasing tension between the protection of individual rights by the federal courts and agencies' exercise of congressionally delegated authority in or-

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[140] *See, e.g.*, Merrill, *supra* note 2 (discussing the pre-*Chevron* "multiple factors regime" for reviewing agency statutory interpretation in the context of both natural law and legal positivism); Scalia, *supra* note 2 (discussing *Chevron* as focusing primarily on concerns of authority).

[141] *See, e.g.*, Skidmore v. Swift, 323 U.S. 134 (1944); Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947).

[142] *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 3–4 (1983). *See also* Byse, *supra* note 78; Levin, *supra* note 78.

[143] *See* Monaghan, *supra* note 142, at 5.

[144] *See id.* at 17–18.

der to further the goals of the Great Society.[145] Although Monaghan's article adopts a positivist approach to the Court's determination in *Hearst*, his very discussion invokes an ambivalence concerning the concepts of legal positivism and natural law by recognizing the philosophical tension between protecting fundamental rights and delineating agency interpretational authority.

Agency interpretation cases decided soon after *Hearst* bear out Monaghan's claims of inconsistency. For example, in 1944, in *Skidmore v. Swift & Co.*,[146] the Court was asked to pass judgment on an interpretive rule by the administrator of the Fair Labor Standards Act ("FLSA") under the Secretary of Labor. The administrator had interpreted a vague section of the FLSA to require ad hoc determinations of whether an employee's waiting time was working time within the Act's overtime compensation provisions.[147] The Court, in a fit of philosophical schizophrenia, invoked legal positivist principles to hold that the administrator's decision was not binding while employing natural law rationales to hold that his decision was persuasive:

> [The decisions] do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case .... We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.[148]

In other words, because the administrator did not have the legal authority to interpret the statute, his decision would not be binding, but because the decision was more likely to be just, it was persuasive, to the degree of being nearly binding.

Thomas Merrill, in an article questioning both the efficacy and the wisdom of *Chevron*'s rule, characterizes the Court's apparently ad hoc approach to review of agency statutory interpreta-

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[145] *See id.*
[146] 323 U.S. 134 (1944).
[147] *See id.* at 138.
[148] *Id.* at 139–40.

tions prior to 1984 as a "multiple factors regime."[149] Merrill argues that the Court approached deference issues from a sliding scale perspective that relied on three primary categories of factors to determine just how much deference was due an agency's interpretation.[150] Although his article makes no mention of legal positivism or natural law, or of the tension between the two during the mid-twentieth century, his three factor categories fit into the legal philosophical paradigm.

Merrill's first factor addresses congressional intent as to the interpretational authority given to the agency in question, constructing a distinction between "legislative rules" and "interpretative rules" promulgated by an agency.[151] According to Merrill, legislative rules arose from authority specifically delegated to an agency to interpret statutory terms whereas interpretative rules were not supported by such authority.[152] The Court would be inclined to defer to legislative rules while adopting a more exacting review of interpretative rules. Obviously, this category is little more than a legal positivist argument that legitimate agency action can only occur when it is authorized under a rule of recognition.[153]

Merrill's second group of factors falls squarely into the natural law camp. In his own words, this second group "focused not on the agency's authority, but rather on various attributes of its decision."[154] Within this group, Merrill invokes factors such as agency expertise over the issue, longstanding or consistent agency interpretation, and the extent of reasoned analysis shown by the agency.[155] All of these factors speak toward one thing—the wisdom (or justice) of the agency's interpretation and implementation of the statute at issue. This focus on the substance of the agency's interpretation, particularly from the perspective of its practical effects, addresses the concerns deemed to be paramount by natural law proponents such as Dworkin or Moore.

The third category described by Merrill relates to the conformity between the agency's decision and the substantive intent of

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[149] *See* Merrill, *supra* note 2, at 972–74.
[150] *See id.*
[151] *See id.* at 973.
[152] *See id.*
[153] For a discussion of legal positivism's rule of recognition, *see supra* notes 69–71 and accompanying text.
[154] Merrill, *supra* note 2, at 973.
[155] *See id.* at 973–74.

Congress, or the Court's best approximation of it.[156] Although the third category does not fall squarely into either natural law or positivism, when Merrill's categories are viewed in full, the eclecticism and lack of coherence he encounters during his analysis are resolved by placing the decisions in a legal philosophical framework. Simply put, the Court's vacillation between concerns of authority and those of substantial justice, rather than being the result of any ad hoc jurisprudence, simply mirrors the tension between natural law and legal positivism that endured through the mid-twentieth century.

Other commentators have relied implicitly on the distinction between natural law and legal positivism to reconcile the *Hearst* and *Packard* lines of cases.[157] Justice Breyer, writing directly after *Chevron* was decided, adopted this stance when asking why "a court should *ever* 'defer' to an agency's interpretation of the law."[158] Breyer argues that answering this question could eviscerate any apparent inconsistency between the two lines of cases and puts forth two rationales for deference, which he claims explain the Supreme Court's early approach.[159] Falling squarely on either side of the legal philosophical isle, his two reasons are: (1) the agency's superior understanding of the relevant statute and its proper administration;[160] and (2) Congress's delegation of interpretative authority to the agency.[161] Thus, the conceptual distinctions underlying the roles of natural law and legal positivism have been employed to clarify the Court's pre-*Chevron*

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[156] *See id.* at 974.

[157] Two basic efforts at reconciling *Hearst* and *Packard* have arisen. The first focuses on the particular question at issue—forging a distinction between questions of law (meriting no deference) and questions of judgment (meriting deference). *See* Shapiro & Levy, *supra* note 2, at 1068–69. The law/judgment distinction has proven to be too vague to constrain effectively result-oriented manipulation by judges and is thus an unsatisfactory explanation. *See id.* The second effort at reconciliation, most persuasively argued by Justice Breyer, presents the cases as simply following two equally important concerns: legal authority and substantive outcome. *See* Breyer, *supra* note 12, at 368–69. *But see* Caust-Ellenbogen, *supra* note 81, at 764–70 (discussing the failure of various efforts to reconcile *Hearst* and *Packard*).

[158] Breyer, *supra* note 12, at 368 (emphasis in original).

[159] *See id.* at 368–72.

[160] *See id.* at 368–69. Justice Breyer's discussion of this rationale invokes the same factors as Merrill's, including a recognition of the agency's expertise, but also suggests that a substantially unjust interpretation, irrespective of expertise, will not merit deference. *See id.*

[161] *See id.* at 369–70. *See also* Carl McGowan, *A Reply to Judicialization,* 1986 DUKE L.J. 217, 221 (1986) ("We may say generally, however, that the divisions of the sliding scale follow from the spheres of expertise of courts and agencies and the clarity of the directions given by Congress.").

approach to agency statutory interpretation, but have been employed out of their philosophical context.

B. Chevron

Various federal judges and academics have discussed the rationale behind *Chevron* in legal positivist terms, although none have explicitly invoked the theory to bolster their discussions. Judge Silberman of the U.S. Court of Appeals for the D.C. Circuit has argued that the *Chevron* rule focuses on the authority an entity holds to interpret an ambiguous statute under the assumption that ambiguous legislation requires policy decisions in interpretation.[162] Silberman claims that:

> Chevron's rule—that the federal judiciary must defer to an agency's reasonable construction of a statute it is charged with enforcing, if Congress has not directly addressed the question at issue—is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary. Therefore *Congress is presumed to delegate, to the Executive, authority* to make those choices within certain bounds.[163]

Silberman's defense of *Chevron*'s deference to Executive Branch policy-making does not implicate concepts of justice and fairness, but rather focuses on the legislative intent to delegate authority when promulgating vague statutes.[164] Agencies receive deference from federal courts under *Chevron* not because of the outcomes of their decision-making, but because of the agencies' imputed authority.

A similar legal positivist approach to *Chevron* has been taken by Justice Scalia in an attempt both to aggrandize and to clarify the decision.[165] As discussed earlier,[166] Scalia begins by asking what the justification can be for judicial deference to reasonable agency interpretations of ambiguous statutes.[167] He rejects the expertise rationale as contravening the universally accepted

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[162] *See* Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990).

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

[164] *See id.* at 823–24.

[165] *See* Scalia, *supra* note 2 (clarifying the proper rationales for the decision in *Chevron* and chastising the Court for backing off its rule of deference in cases decided after *Chevron*). *See also supra* notes 18–20 and accompanying text.

[166] *See supra* notes 19–24 and accompanying text.

[167] *See* Scalia, *supra* note 2, at 514.

proclamation that it remains the constitutional responsibility of the judiciary to articulate what the law is and rejects any separation of powers rationale as blind to the fact that courts engage in acceptable policy evaluation all the time.[168]

After dismissing alternate theories, Scalia delineates the judicial deference rationale as an offshoot of congressional intent by arguing that ambiguity in a statute directing agency action can mean one of two things: either Congress meant to leave the resolution of the statute to the agency, or Congress had a particular resolution in mind, but failed to articulate it clearly.[169] Scalia claims that *Chevron* created an across-the-board presumption that statutory ambiguity indicates a congressional delegation of authority to the agency.[170] Scalia's explication of *Chevron* thus exudes positivist vernacular.

Perhaps Judge McGowan said it best when he claimed that administrative law "has undergone a large transition. Administrative law is no longer simply about property rights. It is, instead, a system for allocating power."[171] As courts become more aware of this shift, the privileging of authority over substance will become more pronounced in areas of administrative law beyond that of judicial review of agency statutory interpretation.

Even *Chevron*'s critics recognize the legal positivist underpinnings of the decision. For example, Merrill, in arguing that the Supreme Court has failed to adhere to the logic of *Chevron*, notes that the Court has consistently followed *Chevron*'s logic in one set of circumstances: it has applied the test only to "agency decisions that are an exercise of delegated authority."[172] In other words, despite all the various infidelities the Court has levied upon *Chevron*, it has remained faithful to the underlying legal positivist logic of the decision. Other detractors adopt similar positivist approaches when questioning the decision or its application.[173] Arguably this is because it is easier to attack a decision or rule on grounds of authority or power than on substantive natural law grounds. However, this very distinction is merely one

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[168] *See id.* at 514–15.
[169] *See id.* at 516.
[170] *See id.*
[171] McGowan, *supra* note 161, at 236.
[172] Merrill, *supra* note 2, at 987.
[173] *See, e.g.*, Farina, *supra* note 2 (questioning *Chevron* on separation of powers principles).

more indication of the relative supremacy of positivism over natural law in administrative law today.

What then occurs when a conflict arises under *Chevron* such that an agency interprets an ambiguous statute so as to conflict with substantive principles of natural law as espoused by those like Dworkin? In such a case lies the true measure of just how far legal positivism has supplanted natural law. It can be argued that the second prong of the *Chevron* test, the query as to the reasonableness of the agency's interpretation, allows courts to trump the authority of an agency with natural law principles. This implies that interpretations are per se unreasonable if they violate natural law. From this perspective, the basic principles underlying a natural law approach would hold a privileged position to the rule of authority, perhaps by way of a procedural or substantive due process analogy. This argument begs the question, however, why contravention of natural law principles must be necessarily unreasonable.

Professor Cass Sunstein has adopted the above argument in an effort to define the reasonableness requirement of *Chevron*.[174] In his investigation, Sunstein lists various substantive and interpretive principles with which reasonable agency interpretations may or may not conflict.[175] According to Sunstein, most of the principles whose contravention would make an agency's interpretation unreasonable parallel Dworkin's natural law principles.[176] Sunstein advocates persuasively for this natural law safety valve, but his argument is based primarily on the natural law assumption that legal authority is bounded by certain principles. Such an approach would translate into a *Chevron* rule that privileges a legal positivist approach at the outset, but reserves a natural law safety net. Cases like *Young*, however, which effectively subsume the safety net under the positivist first prong, call into question the strength of Sunstein's claim.[177] Whether Sunstein's attempt to reconcile positivism and natural law will play out with the Court

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[174] *See* Sunstein, *supra* note 2 (attempting to limit the rule of *Chevron* at both prongs by invoking legal principles that should be privileged over any grant of authority or claim of reasonableness).

[175] *See id.* at 2105–19.

[176] *See id.* at 2107–08, 2112 (citing such principles as the prohibition against the retroactive application of statutes and the right to travel). For example, Sunstein invokes *Kent v. Dulles*, 357 U.S. 116 (1958), to argue that the Court will reject a general grant of authority which, although otherwise constitutional, restricts the right to travel. *See id.*

[177] *See supra* notes 105–108 and accompanying text.

remains to be seen.[178] Such a result, however, might compel the conclusion that the battle of agency interpretative authority has not been won by the legal positivists after all, but rather that a workable truce has emerged.

VI. Potential Problems for Legal Philosophical Analysis of *Chevron*

Despite the textual and philosophical evidence that the evolution from *Hearst* to *Chevron* can be explained in part by legal philosophical trends, critical observers of the judiciary, and the Supreme Court in particular, might pronounce both tests to be meaningless *post hoc* justifications for value laden opinions, thereby casting doubt on the point of any jurisprudential analysis. Proponents of more pragmatic legal theories, such as critical legal studies or critical race theory, might well argue that the two prongs of the *Chevron* test are so easily manipulated as to be nothing more than poorly constructed verbal shell games for the judiciary's own agenda. Less cynical observers of the Court might assert that, short of any ideological conspiracy, the two prongs of the test are too vague and too subjective to offer any predictions or explanations as to the direction of the federal judiciary. These claims deserve some attention.

The latter problem is that the test is too vague to be valuable in any realistic sense and, therefore, not worth continued analysis. One piece of evidence for this claim can be found in *Chemical Manufacturers Association v. Natural Resources Defense Council*,[179] a case with distinct similarities to *Chevron*. In the

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[178] Although no trend supporting Sunstein's proposition has emerged, there are individual cases which appear to follow a legal positivist paradigm with a natural law safety net. For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Court declined to extend *Chevron* deference to a Health and Human Services ("HHS") interpretation of the Medicare Act that would result in a retroactive rule. This follows Sunstein's argument that certain principles, such as the principle against legislative retroactivity, would trump any grant of authority inferred from a vague statute. *See also* Young v. Community Nutrition Inst., 476 U.S. 974 (1986) (Stevens, J., dissenting). In *Young*, ironically, the sole dissenter was *Chevron*'s author, Justice Stevens, who argued that the extension of deference, even if proper, "is not to say that the singularly judicial role of marking the boundaries of agency choice is at an end." *Id.* at 988. Justice Stevens appears to approach *Chevron* from the same perspective as Professor Sunstein in that adequate authority does not impart carte blanche on the part of the relevant agency, but is limited by certain principles. In fact, Justice Stevens's dissent invoked Dworkin and his philosophy of statutory interpretation in questioning the majority's overwhelmingly positivist opinion. *See id.*

[179] 470 U.S. 116 (1985).

case, the Natural Resources Defense Council sued the Environmental Protection Agency under the Clean Water Act, alleging that its use of "fundamentally different factor" variances to effluent limits violated the Act.[180] The NRDC argued that the EPA could not allow variances for toxic pollutants because of an amendment to the Act that stated: "[t]he Administrator may not modify any requirement of this Section as it applies to any specific pollutant which is on the toxic pollutant list."[181] Although the Court agreed that a reading of the term "modify" in its broadest sense would clearly prohibit the variance at issue, it claimed that, within the context of other Clean Water Act provisions, "modify" had no plain meaning and is "the proper subject of construction by EPA and the courts."[182] The Court went on to note that the wording and legislative history of the statute indicated that Congress was ambiguous as to the application of the toxic pollutant restriction to "fundamentally different factor" variances, and thus, *Chevron* deference to EPA's interpretation was appropriate.[183] The four justices in the dissent, on the other hand, reached a distinctly different result as to congressional intent on the subject of the applicability of the toxic pollutant restriction to EPA variances.[184] The dissent persuasively argued that the plain meaning of the statute and its legislative history indicates that Congress clearly intended all modifications to be banned by the toxic pollutant restriction.[185] Who was correct? As is the case in many Supreme Court decisions, both majority and dissent applications of the test were arguably valid, but the two sides simply reached fundamentally different answers to the fairly routine question of whether the statute clearly spoke to the issue at hand. If reasonable minds can differ so greatly about such a seemingly transparent question, one might wonder how much value the *Chevron* test possesses.

The Supreme Court's 1994 decision in *MCI Telecommunications Corporation v. American Telephone & Telegraph Company*[186] exemplifies the other problem with the *Chevron* test: it can be so questionably employed as to compel the reader to

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[180] *See id.* at 118.
[181] *Id.* at 123–24. *See also* 33 U.S.C. § 1311(l) (1977).
[182] *Chemical Manufacturers Ass'n.*, 470 U.S. at 126.
[183] *See id.* at 129.
[184] *See id.* at 134–35.
[185] *See id.* at 139–46.
[186] 512 U.S. 218 (1994).

wonder if indeed it is anything but a *post hoc* justification. Ironically, in drafting the majority opinion, Justice Scalia undermined the very test that he so forcefully attempted to extend in his scholarly writing. In the case, AT&T sued the Federal Communications Commission over a regulatory change which had led to optional tariff filing for all non-dominant long distance carriers (excepting AT&T) and asserted that the FCC's interpretation of the Federal Communications Act as authorizing it to make such a change was invalid.[187] The section of the Act invoked by the FCC to change its tariff requirement allowed that:

> (2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions . . . .[188]

The FCC claimed that the term "modify" was vague enough to allow the agency to interpret the term so long as it met the reasonableness requirement of *Chevron*'s second prong.[189]

Justice Scalia, in a particularly unpersuasive argument, rejected the FCC's claim and demonstrated, employing labyrinthine arguments spanning several pages, that "'[m]odify,' in our view, connotes moderate change."[190] Despite his repeated invocation of conflicting dictionary definitions, and apparently forgetting the Court's holding in *Chemical Manufacturers Association*,[191] Scalia concluded that "modify" had a clear meaning that was easily ascertained by the Court. Thus, the FCC failed the first prong of the *Chevron* test and lost the case.[192] Now, it does not take a semiotician to conclude that a term such as "modify" is by definition a vague term. Moreover, the construction of the relevant statutory section creates the ideal situation for the presumption of delegated authority that *Chevron* introduced. Decisions like *MCI*, which so strongly contravene the apparent rationale of *Chevron*, suggest that the test may be just another one of the Court's shell games.

On their own, neither of the preceding two case discussions offers a stunning indictment of *Chevron* or its application. What

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[187] *See id.* at 222–23.
[188] 47 U.S.C. § 203 (1988 and Supp. IV 1992), *cited in MCI*, 512 U.S. at 224.
[189] *See MCI*, 512 U.S. at 225–26.
[190] *Id.* at 228.
[191] 470 U.S. 116 (1985). *See also supra* notes 179–183 and accompanying text.
[192] *See MCI*, 512 U.S. at 228–29, 234.

they do accomplish, however, is to cast the *Chevron* test in such an improvisational and indeterminate light as to undermine its legitimacy. Moreover, some scholars argue that the Court has followed *Chevron* infrequently enough to cast doubt on its efficacy, even if it were employed correctly.[193] It is against this backdrop that pragmatic theories such as critical legal studies, critical race theory, and feminist theory raise questions about the real motivations of the Court. If, as has been argued by various pragmatic theorists, the Court's decisions are more a product of smoke and mirrors than of any valid jurisprudential formula,[194] then the *Chevron* test is just a facade.

These theories highlight both the ideological and political elements and the indeterminacy of legal decisions. Such jurisprudential impurities should not be trivialized, but they do not render futile the efforts of this and other attempts at doctrinal explanation of judicial decisions. Granted, few would now seriously claim that courts publish decisions entirely uninfluenced by factors such as ideological proclivities, case management concerns, or hegemonic impulses. The power analysis of theories such as critical race theory and the public choice analysis of scholars such as Cohen and Spitzer should suffice to disabuse all but the most naive of the misconception that objective interpretation is the sole engine behind judicial decisions. At the same time, however, the presence of less legitimate impulses such as political inclination does not necessitate the absence of other, more legitimate constraints such as legal philosophical beliefs. Although the impact of ideology is lamentable, the better we understand the full range of motivational factors, the better we can predict and understand the decisions themselves.

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[193] *See, e.g.*, Zeppos, *supra* note 103, at 1135–41 (arguing that the *Chevron* test was doomed to be subordinated to ideological concerns from its birth); Shapiro & Levy, *supra* note 2, at 1069–72 (arguing that the *Chevron* test has not brought about greater determinacy in judicial review of agency statutory interpretation).

[194] *See* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); *cf.* Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1988) (arguing that legal theory cannot predict the likely winner of any particular decision because it is incapable of constraining judicial practice).

CONCLUSION

So what remains after the post-modern onslaught? Viewing *Hearst*, *Packard*, and *Chevron* from the perspective of the twentieth-century struggle for philosophical dominance between natural law and legal positivism is not an explanatory panacea, but it does fill some gaps left by other theories addressing *Chevron*. Both the legal history of our Nation and the Court's historic approach to agency interpretation indicate a tension between natural law and legal positivism in our legal culture. Juxtaposition of the language behind the rules of *Chevron* and *Hearst* suggests a shift toward legal positivism, mirroring the historical dynamic between the two philosophies. Although scholars have failed to invoke either philosophy in their discussions of *Chevron* and *Hearst*, their arguments consistently implicate the conceptual foundations of positivism and natural law. Whether as evidence that positivism has supplanted natural law or, as Sunstein claims, that the two have reached a marriage of sorts, legal philosophical analysis can serve as one more piece to the *Chevron* puzzle.

Scholars like Kmiec and Starr develop institutional explanations with their discussions of separation of powers, but, even assuming that their conclusions are correct, they fail to account for any theoretical or cultural forces behind those institutional constraints.[195] Callahan's prudential analysis of *Chevron* explains the Court's decisions from a realistic and flexible perspective, whereas Strauss, and Cohen and Spitzer, puncture the image of an objective, rarified Court by illuminating the ideological and political economic motivations of the Court.[196] In doing so, however, these scholars neglect the role of institutional and philosophical constraints on the Court. Finally, Cass Sunstein and Justice Scalia offer an approach that approximates a positivist analysis but fail to tie their arguments to relevant philosophical grounds,[197] thereby offering no method to explain why *Chevron* occurred *when* it did and no cultural context for the decision. This Comment fills many of these gaps, while leaving others to be explained elsewhere. Nevertheless, the resulting mosaic brings *Chevron* another step closer to full explication.

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[195] *See supra* notes 12–16 and accompanying text.
[196] *See supra* notes 25–39 and accompanying text.
[197] *See supra* notes 165–170, 174–178 and accompanying text.

Pragmatic legal theorists suggest that the explanation for the Court's decisions can more easily be found by tracing the ideological and political influences on the Justices. However, the offerings of such theorists would undermine the ultimate ends of this Comment only if it were propounding a theory that legal philosophy alone drives administrative law decisions or that legal philosophy will always perfectly explain and predict judicial decisions. In truth, the goal of this Comment is much less ambitious: an offer of legal philosophical analysis as one more tool in coming to grips with administrative law decisions and trends. With the cornucopia of justifications that the Court can, and does, invoke to support its decisions, explication of as many of these as possible allows for more intelligent predictions about, and explanations of, the Court's decision in any particular case. Moreover, the legal philosophical implications of the Court's rulings more firmly entrench the decisions and rationale of the Court in larger legal society and in society itself.

COMMENT

UNANIMOUSLY WEAVING A TANGLED WEB: *WALTERS*, *ROBINSON*, TITLE VII, AND THE NEED FOR HOLISTIC STATUTORY INTERPRETATION

DAVID A. FORKNER*
KENT M. KOSTKA**

In this Comment, David A. Forkner and Kent M. Kostka demonstrate that dramatic changes in the American labor market since the passage of Title VII in 1964 require a new approach to statutory interpretation. Forkner and Kostka criticize the various interpretive methodologies that courts and scholars have used, focusing on two recent Supreme Court Title VII decisions. They conclude that a "holistic" approach, drawing on the strengths of other canons of interpretation, is a better method of interpreting the statutory language of Title VII in a continually evolving labor market.

He that will not apply new remedies must expect new evils.
—SIR FRANCIS BACON[1]

Although the American labor market has changed tremendously during the last thirty-five years, many courts continue to apply outmoded and rigid statutory interpretation principles forged in times of mercurial change and adamantine jurisprudence. During its last term, the Supreme Court ruled unanimously on two seemingly straightforward cases construing federal jurisdiction under Title VII of the Civil Rights Act of 1964,[2] one from the Fourth Circuit and one from the Seventh Circuit. In both, *Walters v. Metropolitan Educational Enterprises, Inc.*[3] and *Robinson*

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[1] ESSAYS OF FRANCIS BACON 109 (M. Scott, ed. 1908).

[2] 42 U.S.C. § 2000e to 2000e-17 (1994).

[3] 117 S. Ct. 660 (1997).

v. Shell Oil,[4] the Court applied traditional interpretative methodologies to Title VII. While the opinions correctly extended the Title VII jurisdiction, the Court relied more upon an inconsistent application of canonical statutory interpretation methodology and intuition than a logical confluence of means and ends. While the specifics of the two cases differ, each illustrates a common yet vexing problem: finding the proper methodology to interpret the complexities of Title VII in the context of a highly dynamic American labor market unforeseen by Title VII's enacting legislature.[5]

This Comment presents evidence of the dramatic changes in the American labor market that contravene traditional forms of statutory interpretation, discusses the problems that confront courts when applying traditional interpretive methods to evolving labor market conditions, and examines *Robinson* and *Walters* in the context of current statutory interpretation methodology and discourse. Finally, this Comment develops and proposes a holistic approach to statutory interpretation that preserves the limiting principles embodied in the traditional canons while taking into account the rapidly changing conditions of the American labor market.

In developing and applying this new system, we analyze traditional and nontraditional statutory interpretation methods in order to ascertain the limiting principles and values each methodology presents. We then examine these values in the context of current labor market conditions, and recognize them as either conjunctive or disjunctive with each other. After considering the principles and values involved, and their interactions, we develop an interpretive, or hermeneutic principle of limitation, under which courts can more effectively apply dated or ambiguous legislation in a complex and changing environment.

I. CHANGING CONDITIONS: THE NEED FOR REFORM

Since the drafting of Title VII in the early 1960s, the American labor market has undergone substantial demographic, eco-

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[4] 117 S. Ct. 843 (1997).

[5] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1494 (1987) (noting the difficulties in applying statutory language to situations where "societal conditions change in ways not anticipated by Congress," and stating that the more difficult question is how to interpret statutes in such conditions even "in the face of more determinate statutory language").

nomic, organizational, and workplace change.[6] As the United States continues to adapt to competition in a global, automated labor market, the chasm between the thirty-five-year-old legislative regime and the labor markets it is intended to regulate continues to widen.

Contingent workers, workers who do not have permanent full-time positions, now make up between twenty-five and thirty percent of the American workforce.[7] The large increase in the number of contingent workers during the past three decades threatens the effectiveness and applicability of workplace protections crafted in the 1960s.[8] In particular, the exceptions written into Title VII to protect a relatively small group of employers from excessive burdens erroneously exclude millions of workers from antidiscrimination protection.[9]

Part-time workers constitute the largest component of the contingent workforce.[10] In 1990 nearly eighteen percent of the total U.S. civilian work force worked fewer than thirty-five hours per week,[11] compared with only fourteen percent in 1968.[12] Economists predict that by 2000, nearly forty percent of all available jobs will be part-time.[13]

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[6] *See* Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863 (1995) (discussing the massive changes affecting the American workforce in the 1990s).

[7] *See id.* at 867. *See also* Scott F. Cooper, *The Expanding Use of the Contingent Workforce In the American Economy: New Opportunities and Dangers for Employers*, 20 EMPLOYEE REL. L.J. 525, 526–30 (1995); H.R. REP. NO. 103-57, at 55 (1993) ("Richard Belous, economist at the National Planning Association, estimates 30 million to 37 million people are contingent workers, roughly 25% of the labor force. If current trends continue, he predicts that 35% of the U.S. work force will be contingent by 2000."). This is an increase from the 25 to 28 million contingent workers in 1980. *See* Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 564 (1996).

[8] *See* James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27, 33–35 (1994) (describing employers' incentives to avoid legal obligations by employing contingent workers).

[9] *See* Middleton, *supra* note 7, at 558. With Title VII jurisdictional limits for small employers excluding businesses with fewer than 15 employees from antidiscrimination protections, nearly 800,000 employers, employing more than ten million workers, report a payroll size of between 10 and 19 workers and are therefore exempt, or nearly exempt. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., COUNTY BUSINESS PATTERNS 1993, tbl. 1b (1995).

[10] *See* Middleton, *supra* note 7, at 558.

[11] *See* Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates And Policy Issues*, 52 WASH. & LEE L. REV. 771, 772 (1995).

[12] *See* Unpublished data from Bureau of Labor Statistics Current Population Survey (on file with author).

[13] *See* Lance Morrow, *The Temping of America*, TIME, Mar. 29, 1993, at 40.

Temporary workers also make up a growing segment of the contingent workforce.[14] Temporary employment is one of the fastest-growing sectors in the U.S. economy.[15] In 1994 alone, temporary workers filled approximately sixteen percent of all newly created jobs.[16] Indeed, the largest employer in the country is currently Manpower, Inc., a temporary service agency.[17]

In a domestic economy increasingly reliant upon service and technical jobs,[18] the demand for semi-professional service employees and part-time workers will continue to increase.[19] In contrast to the relative security and stability of the industrial and manufacturing-based economy of the 1960s, the average worker today changes jobs at least once every five years and makes a career change nearly as often.[20] Large employers, which have merged and downsized at increased rates over the last decade, are less committed to their employees than they once were.[21] Employee turnover and attrition rates are at an all-time high and continue to rise, and the rapid growth of small businesses and high-tech service industries has created a highly competitive, entrepreneurial corporate culture.[22] Further, the rise of the global labor market and multilateral trade arrangements such as the North American Free Trade Agreement ("NAFTA") has highlighted the emergence of a new, transient labor market that draws

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[14] Researchers estimate that temporary workers have grown in number from 400,000 in 1980 to 1,400,000 in 1992, a 250% increase. Temporary workers make up about 4% of total contingent workers and 1.5% of the total workforce. *See* RICHARD S. BELOUS, THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE 20 (1989).

[15] *See* Barnaby J. Feder, *Bigger Roles for Suppliers of Temporary Workers*, N.Y. TIMES, Apr. 1, 1995, at 37.

[16] *See* Janice Castro, *Disposable Workers*, TIME, Mar. 29, 1993, at 43.

[17] *See id.* at 44.

[18] *See* Selma Lussenberg, *Implications of NAFTA on Human Resources Utilization and Development: North American Agreement on Labor Cooperation*, 22 CAN.-U.S. L.J. 201 (1996).

[19] By 2005, the Bureau of Labor Statistics predicts temporary employment will increase by an additional 56% and will continue to outpace gains in actual employment. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OUTLOOK 1990–2005 (1992).

[20] *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (1993).

[21] *See, e.g.*, *Financial Executives Say Downsizing Will Continue*, WALL ST. J., Feb. 26, 1993, at A16. As technological improvements continue, still more jobs will be eliminated.

[22] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 41 EMPLOYMENT AND EARNINGS 22 (1994). *See generally*, GIFFORD PINOCHOT III, INTRAPRENEURING: WHY YOU DON'T HAVE TO LEAVE THE CORPORATION TO BECOME AN ENTREPRENEUR (1985).

business to inexpensive labor and eliminates the traditional security formerly enjoyed by American industrial workers.[23]

These changes are altering the face of American employment in every sector. Employers increasingly turn to flex-time scheduling,[24] compensatory time,[25] and other means to avoid expensive and inefficient overtime pay. The recent movement to adopt these concepts in the public sector[26] illustrates the extent to which these changes have permeated the economy. More than half of American workers are now paid on an hourly basis,[27] in part so that employers can schedule work hours commensurate with changing production or service needs. Workers are being asked or permitted to work forty hours over three or four days, rather than the traditional five day week. In the service industry in particular, workers find themselves with inconsistent schedules, split shifts, and part-time workweeks at multiple jobs. Large employers increasingly outsource[28] their operations to avoid hiring full-time, permanent workers.

Contingent status alone accounts for an array of difficulties. Contingent workers often do not receive employee benefits and they do not fall within the ambit of federal antidiscrimination protections. As changing conditions alter the face of the labor market, labor and employment law must adapt in order to remain effective and relevant, especially since the increase in the number of contingent workers has affected groups such as women for whom Title VII protections were designed.[29] As these groups

[23] *See* BELOUS, *supra* note 14 (discussing the complexities of the changing labor market in the United States and corporate shifts away from strong affiliations with workers).

[24] *See* BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 647 (1995) (demonstrating a significant increase in the number of employers offering work–at–home and flexible scheduling options between 1990 and 1995).

[25] Although public sector employees and employers have long had the freedom to substitute compensatory time in lieu of overtime pay, private sector businesses and employees have not. Recent pending legislation would grant private employers the ability to avoid costly overtime pay by granting employees time-and-a-half compensatory time for hours worked over the overtime limits of the Fair Labor Standards Act. *See* Court Gifford, *White House Draws Line on Comp Time; Won't Negotiate with GOP over Flextime*, DAILY LAB. REP. (BNA) No. 110, June 9, 1997, at D-18.

[26] While compensatory time has long been available for public sector employees, other schemes, such as flex-time, three-day weekends with forty hour weeks, off-peak work schedules, and split shifts are now being introduced for government workers to help cut costs. *See* Joseph A. Dailing, *Is Flex-Time Right for Your Firm?*, 86 ILL. B.J. 43, 43 (1998) (noting that government has been quicker to adopt flex-time than other areas of business such as law).

[27] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 42 EMPLOYMENT AND EARNINGS 21 (1995).

[28] *See, e.g.*, Middleton, *supra* note 7 at 567.

[29] Approximately 65% of part-time employees in 1994 were women. *See* BUREAU OF

enjoy more employment opportunities and make up a growing proportion of the workplace,[30] it is essential that antidiscrimination laws continue to protect them.[31] In a political environment that makes broad compromise legislation such as Title VII difficult to enact or amend, the courts must walk a line between fidelity to Congress's will and attention to the conditions in the market the law must regulate.

II. CURRENT METHODOLOGY

A. *History and Background of Title VII*

According the Supreme Court of the United States, Title VII's purpose is "to achieve equality of employment opportunities" by removing "artificial, arbitrary and unnecessary barriers to employment when those barriers operate invidiously to discriminate on the basis of . . . [an] impermissible classification."[32] Title VII forbids employers from discriminating on the basis of their employees' race, color, religion, sex, or national origin[33] and further prohibits an employer from retaliating against an employee who opposes such unlawful employment practices.[34]

Title VII was enacted to achieve a complex amalgam of competing legislative goals: the elimination of race as a factor in employment decisions;[35] the improvement of the economic status

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LABOR STATISTICS, U.S. DEP'T OF LABOR, 42 EMPLOYMENT AND EARNINGS 21 (1995).

[30] The number of women in the civilian labor force has increased by about one million workers per year. The BLS also predicted that the number of females in the work force will reach approximately 66% of the total work force by the year 2005. *See* Mona L. Schuchmann, *The Family And Medical Leave Act Of 1993: A Comparative Analysis With Germany*, 20 J. CORP. L. 331, 340 (1995) (citing H.R. REP. 103-8, at 23 (1993)).

[31] Almost two-thirds of the new entrants into the labor force by 2000 will be women, and they are more likely than men to hold part-time and temporary jobs. *See* Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 386 (1996); *see also* John M. True III, *Contingency Workers' Frayed Safety Net*, LEGAL TIMES, Dec. 13, 1993, at 7 (noting that the status of temporary workers as non-employees may facilitate workplace abuses such as sexual and racial harassment and discrimination, as well as unsafe working conditions); BELOUS, *supra* note 14 (noting that temporary workers are still predominantly female and clerical, and that although temporary agencies increasingly supply workers with a variety of specialized skills, 80% are women).

[32] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (discussing the goals of Title VII).

[33] *See* 42 U.S.C. § 2000e-2(a)(1) (1994).

[34] *See* 42 U.S.C. § 2000e-3(a) (1994).

[35] *See, e.g., Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong. 461 (1964) [hereinafter *Hearings*] (statement of Rep. James Roosevelt (D-Cal.)).

of African-Americans and other minority groups;[36] and the minimization of government interference in management's traditional prerogatives.[37] The primary political impetus for Title VII stemmed from the civil rights crisis that erupted in Birmingham, Alabama in the early 1960s when the city's unapologetic police chief unleashed fire hoses and police dogs to quash a peaceful antidiscrimination protest.[38] Three weeks of television coverage created the necessary public support for a major civil rights initiative.[39] Literally overnight, the Kennedy Administration developed a federal civil rights bill.[40] Drafters completed the initial proposal in two days and spent less than two months refining its provisions prior to congressional consideration.[41] The terms of the proposal were rewritten and diluted for the purpose of gaining congressional acceptance and ensuring assignment of the bill to a supportive congressional committee.[42]

The bill proposed by the Kennedy Administration bore little resemblance to the enacted form of Title VII.[43] The language and provisions of the legislation changed as conservative opponents proposed liberal amendments in a strategic attempt to kill the bill.[44] For example, opponents attempted to guarantee the bill's defeat by adding sex as a prohibited reason for discrimination.[45] Supporters of Title VII further diluted the text and documentary history by proposing numerous amendments meant not to refine the text, but to persuade the public that Congress had attempted to minimize the costs to employers.[46] The intense congressional debates that accompanied the bill's passage[47] illustrate the competing interests, bitter battles and various values that undergird the legislation.[48]

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[36] *See* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 202–03 (1979) (quoting remarks of Sen. Hubert Humphrey (D-Minn.), 110 CONG. REC. 6,548 (1964), and Sen. Joseph Clark (D-Pa.), 110 CONG. REC. 7,220 (1964)).

[37] *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 520 (1986) (holding that a principal purpose of the last sentence of § 706(g) was to protect managerial prerogatives of employers and unions).

[38] *See* Norbert A. Schlei, *Foreword* to BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vii, viii (2d ed. 1983).

[39] *See id.* at viii.

[40] *See id.* at viii–ix.

[41] *See id.*

[42] *See id.* at ix.

[43] *See id.* at xi–xii.

[44] *See id.* at xii.

[45] *See id.*

[46] *See id.*

[47] *See id.* at xi–xii.

[48] *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLA-

Unfortunately, the embattled legislative compromises and the rapid enactment of the mammoth Civil Rights Act have created epistemological interstices and generated an often incoherent documentary record. The statutory provisions interpreted in *Walters* and *Robinson*, which involve two different jurisdictional problems regarding employers and employees covered by the Act, illustrate this problem.

1. Small Business Jurisdiction: A Convoluted Documentary History

Congress limited Title VII's coverage to employers "who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[49] This jurisdictional threshold emerged from a congressional compromise intended to subordinate civil rights protection in favor of exempting small businesses from the economic burden of eradicating discrimination.[50] The compromise, however, failed to specify the proper method for counting "working day[s]."[51] A determination of legislative intent in this area has proven onerous, and the difficulty is exacerbated by a lack of conclusive documentary history. This conflict and the competing interests involved were highlighted in *Walters*.

The limited legislative history pertaining to the "working day" coverage provision provides little insight. The phrase "for each working day" originated in the Senate's consideration of H.R. 7152, an earlier version of Title VII approved by the House of Representatives.[52] The House version of the bill defined "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees . . . ."[53] The House did not include the phrase "for each working day" in the definition of employer.[54] Accordingly, H.R. 7152 did not require employees

TIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

[49] 42 U.S.C. § 2000e(b) (1994).

[50] *See* Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). The exemption also may be based upon a prudential desire to "reliev[e] the administrative body of the burden of enforcement where few job opportunities are available, and . . . keep[ ] the agency out of situations in which discrimination is too subtle or too personal to make effective solutions possible." Robinson v. Fair Employment & Hous. Comm'n, 825 P.2d 767, 774 (Cal. 1992) (interpreting an analogous provision of California's Fair Employment and Housing Act).

[51] *See infra* notes 138–139 and accompanying text.

[52] H.R. 7152, 88th Cong. (1964) (enacted).

[53] *Id.*

[54] *Id. See also* 110 CONG. REC. 12,811–12 (1964) (reflecting the fact that the phrase

to be physically present or on paid leave to count towards the jurisdictional minimum.

Nothing in either the House hearings or floor debates suggests that supporters or opponents of the bill intended for the coverage provision to require any particular counting methodology.[55] Upon reaching the Senate, H.R. 7152 sparked an eighty-three-day Senate debate.[56] The debates included attempts to modify the definition of employer.[57] A Senate bipartisan leadership bill ultimately resolved the legislative stalemate in favor of the addition of the phrase "*for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.*"[58] The language included in the Dirksen-Mansfield amendment became, with minor alterations,[59] the version of H.R. 7152 passed by the Senate 73-27.[60] Ultimately, the Dirksen-Mansfield definition of "employer" became law.[61]

The legislative history of Title VII does not contain committee reports or conference reports reconciling the incongruity between H.R. 7152 and the Dirksen-Mansfield substitute amendment. The only meaningful indicia of legislative intent are found in the isolated remarks of Senator Evrett Dirksen (R-Ill.).[62] Senator Dirksen contended that H.R. 7152 failed to provide adequate certainty concerning the coverage of employees, where the number of employees fluctuated above and below the figure re-

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"for each working day" was contained in the version of H.R. 7152 that was reported out of the Committee on the Judiciary of the House of Representatives, debated and amended on the floor of the House, passed by the House, and then referred to the Senate).

[55] *See, e.g.*, 110 CONG. REC. 1620 (1964) (remarks of Rep. Thomas Abernethy (D-Miss.)) (opposing Title VII because it would permit government to object to hiring practices by a store that "employed as many as 25 persons full or part time"); H.R. REP. No. 88-914, at 109 (1963) (separate minority views of Rep. Richard Poff (R-Va.) and Rep. William Cramer (R-Fla.)) (criticizing Title VII because it would cover any retail service, trade, or professional establishment "which employs 25 or more full- or part-time employees"); *Hearings*, *supra* note 35, at 461 (statement of Rep. Basil Whitener (D-N.C.)).

[56] *See* Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioners, 1996 WL 284700, at *9, *Walters* (Nos. 95-259, 925-779).

[57] *See id.*

[58] 110 CONG. REC. 12,812 (1964).

[59] *See* 110 CONG. REC. 2716–17 (1964). The only relevant amendment made on the floor of the House to the employer definition in the bill that had been reported by the Judiciary Committee changed the length of time over which to phase in coverage.

[60] *See* 110 CONG. REC. 14,511 (1964).

[61] *See* Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964) (current version at 42 U.S.C. § 2000e(b) (1994)).

[62] *See* 110 CONG. REC. 13,087 (1964).

quired for Title VII to apply.[63] The primary impetus for the coverage limitation was a concern for seasonal agricultural workers and resort employers who annually employ a substantial number of employees for a limited duration.[64] Senator Dirksen explained:

> [T]he house bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to 25 or more who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year.[65]

Proponents of counting all employees on the payroll toward the jurisdictional minimum argue that Senator Dirksen's remarks pertaining to Title VII's modeling of the Unemployment Compensation Act's ("UCA") phraseology for "each working day" implied approval of the payroll method. Opponents, however, argue that Senator Dirksen's extrapolation from the UCA is problematic.

The UCA provides that the term "employer" does not include any person unless "on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who are employed . . . for some portion of the day . . . was four or more."[66] The phrase "for each working day in twenty or more calendar weeks" is conspicuously absent from the UCA. Proponents of the payroll method respond to this absence by pointing out that nine years prior to Senator Dirksen's "incorporation" of the UCA's definition, the Internal Revenue Service issued a revenue ruling pertaining to the methodology of counting employees under the UCA.[67] This ruling held that the statute permits the counting of all persons in an existing employment relationship on a particular day without regard to part-time status, physical presence, or the basis of compensation.[68] The Supreme Court has recognized, however,

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[63] *See id.*
[64] *See id.*
[65] *Id.*
[66] 26 U.S.C. § 3306(a) (1958). In 1970, the pertinent part of the definition was amended into its current, slightly different, reconfigured form in which the number of employees was also reduced to one. *See* Employment Security Amendments of 1970, 26 U.S.C. § 3306(a)(2) (1994). Therefore the employment relationship exists, regardless of whether the employee reports to work each day. *See* Rev. Rul. 55-19, 1955-1 C.B. 496.
[67] *See* Rev. Rul. 55-19, 1955-1 C.B. 496-99.
[68] *See id.*

that revenue rulings are not legally binding interpretations.[69] This convoluted history does little to enhance the clarity of the coverage provision.

2. Protection for Former Employees: A Profound Lack of Documentary History

The dispute highlighted in *Robinson* involves the statutory gaps surrounding the definition of employee as applied to Section 704(a) of Title VII (the anti-retaliation provision). Whereas § 2000e(f) defines an "employee" as "an individual employed by an employer,"[70] the statute is silent on whether the Act's protections apply to former employees. This silence, taken with the ambiguity of the term 'employee' as used in the statute,[71] has perpetuated judicial confusion and speculation about the meaning of "employee" within the context of the anti-retaliation provision.

Unfortunately, the political reality of large compromise legislation is that many issues remain intentionally unresolved at the legislative level.[72] The competing interests embodied in the text, the legislative history, the broad purpose, and the contemporary political and social environment are all legitimate bases for legislation, yet rarely are all reflected in the statute itself. While Congress often successfully articulates a broad statutory purpose, it often cannot define terms in either a consistent or specific manner. Conversely, Congress often manages to enact specific legislative provisions without stating a broad framework in which they should be applied. Furthermore, significant social changes often render once appropriate legislative language obsolete. The inconsistent judicial interpretations that result indicate a need for a consistent statutory interpretation methodology that reflects the competing interests embodied in the legislation while adapting to changing societal, economic, and political considerations.

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[69] *See* Bartels v. Birmingham, 332 U.S. 126, 132 (1947).

[70] 42 U.S.C. § 2000e(f) (1994).

[71] *See Robinson*, 117 S. Ct. 843 at 847.

[72] In order to effectuate the broad policy goals of Title VII, Congress "set forth general policy and has left courts substantial freedom to adapt the general language to changed circumstances." Eskridge, *supra* note 5, at 1517.

3. The Supreme Court's Misunderstanding of Civil Rights Legislation: Forcing a Congressional Reprimand

Congress has frequently acted to overturn the Supreme Court's mistaken interpretations of civil rights statutes.[73] During its 1989 term, the Court handed down a series of restrictive employment discrimination decisions that eviscerated numerous civil rights protections.[74] The severity and scope of these decisions was so great as to draw comparisons with Bull Conner's use of attack dogs against civil rights demonstrators in the 1960s.[75] Critics of the Court decried the decisions as a return to the racist and discriminatory times that existed before the enactment of Title VII.

In response to the Supreme Court's retreat from civil rights protections, Congress passed the Civil Rights Act of 1990.[76] This bill was aimed at amending the decisions that threatened to dismantle the protective provisions of Title VII, and explicitly reversed at least six of the Supreme Court's restrictive decisions.[77]

President Bush vetoed the bill,[78] sparking a congressional override attempt.[79] The Senate's override attempt failed by a single vote.[80] On the first day of the 1991 congressional session, Congress introduced a modified version of the legislation.[81] The new bill was specifically aimed at overturning conservative Supreme Court decisions that failed to adequately effectuate congressional intent.[82] On October 31, 1991, Congress reached a

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[73] *See, e.g.*, Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (overturning Mobile v. Bolden, 446 U.S. 55 (1980)); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994) (overturning Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982) (overturning General Electric Co. v. Gilbert, 429 U.S. 125 (1976)).

[74] *See* 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990) (statement of Sen. Edward Kennedy (D-Mass.)); *See also* H.R. REP. No. 102-40, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630.

[75] *See* Bruce Fein, *Civil Rights Duplicity?*, WASH. TIMES, Aug. 1, 1989, at F3 (reporting the Executive Director of the NAACP's comparison of the decisions to Conner's use of attack dogs and to cross burnings by the Ku Klux Klan).

[76] H.R. 4000, 101st Cong. (1990); S. 2104, 101st Cong. (1990).

[77] *See* 136 CONG. REC. S1019 (daily ed. Feb. 7, 1990); 136 CONG. REC. S1019 (daily ed. Feb. 7, 1990); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 37, n.11 (1991).

[78] President Bush refused to sign the 1990 legislation, stating that he wanted an "anti-quota" provision, which was ultimately added to the 1991 version of the bill. *See* 136 Cong. Rec. S16,457–58 (daily ed. Oct. 22, 1990).

[79] *See* 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990).

[80] *See id.*; Helen Dewar, *Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990*, WASH. POST, Oct. 25, 1990, at A15.

[81] *See* H.R. 1, 102d Cong. (1991).

[82] *See* Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994) (overturning, among other

compromise and passed the final version of the Civil Rights Act of 1991.[83] President Bush signed the bill into law on November 21, 1991.[84]

This direct congressional reprimand of the Court's narrow interpretation methodology highlights two critical issues: how to consistently interpret statutory language so as to effectuate legislative will, and how to resolve the intentional and unintentional ambiguities in the text of the statute.[85] The mere existence of repeated congressional overrides of Supreme Court decisions shows both that the Court's current statutory interpretation methodology is inadequate and that the Court has been unable to further the legislative purpose behind the civil rights laws in a complex and changing society.

Inadequate legislative cures often compound the disease. The Civil Rights Act of 1991 provides a good example. When passing the Act, Congress lacked the political consensus necessary to resolve important lingering questions: the meaning of "business necessity" and the retroactivity of the statute.[86] Additionally the 1991 Act was itself both intentionally and unintentionally indeterminate.[87] This ambiguity, taken with the convoluted historical documentary record, resulted in inconsistent judicial interpretations.[88]

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decisions, Evans v. Jeff D., 475 U.S. 717 (1986), and Marek v. Chesny, 473 U.S. 1 (1985)).

[83] *See White House Announces Civil Rights Compromise Ending Two-Year Long Dispute*, DAILY LAB. REP. (BNA) No. 208, Oct. 28, 1991, at A-11.

[84] *See* Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994).

[85] *See* Harry H. Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 328 (1983) (reviewing Michael J. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982)); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123 (1992); Richard J. Pierce Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988).

[86] *See* Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 950–51 (1993) (discussing how Congress was unwilling to address these two issues because Congress could not reach an agreement on the proper clarifying language).

[87] *See* Donald R. Livingston, *Open Questions Abound on the 1991 Act*, NAT'L L.J., August 23, 1993, at 19 (arguing that the 1991 Act reflects Congress's style favoring statutory ambiguity, the result of politicians' desire to please various constituencies).

[88] *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 925 (1993) (discussing the numerous ambiguities and unresolved issues in the Civil Rights Act of 1991 that have important consequences for determining the future contours of the unfinished civil rights agenda).

B. *The Failed Traditional Approaches and Iatrogenic Effects*

The failure to develop a cogent statutory interpretation methodology has stymied courts and generated a torrent of critical scholarship and commentary.[89] Although legal scholars and judges have developed countless variations and supposedly unique schemes for interpreting statutes, these traditional approaches can generally be categorized into two schools of thought: textualism and intentionalism.[90] Textualism generally seeks to discern the meaning of the statute from only the statutory text itself,[91] and intentionalist theories generally attempt to use extrinsic evidence to ascertain the legislature's intent.[92]

When interpreting statutes, courts attempt to effectuate the intent of the enacting legislature.[93] While the determination of "intent" is often arduous or unattainable,[94] courts generally regard the plain meaning of the inscribed words of the statute as the primary indicia of intent.[95] When the plain meaning of the statute is indiscernible, however, courts, in a seemingly mechanical fashion, consider the structure of the statute, the various canons of statutory interpretation,[96] and the overall policy goals

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[89] *See* Eskridge, *supra* note 5, at 1482 (stating that "[t]he static vision of statutory interpretation prescribed by traditional doctrine is strikingly outdated").

[90] This Comment recognizes that the tremendously diverse spectrum of approaches and methodologies proposed by scholars and commentators could not be analyzed in a single paper, nor is it fair to simplify all approaches into a monolithic analysis. Nonetheless, almost all traditional approaches used by courts today can be grouped generally into either a textualist or intentionalist framework.

[91] *See* Eskridge, *supra* note 5, at 1483 (defining traditional interpretive methodologies).

[92] *See* Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125, 1126 (1983) (discussing the benefits and problems associated with the use of legislative history in statutory interpretation).

[93] *See id.* at 1125 (stating that "[t]he concept of legislative intent is a hardy one and, however fictional, it is basic to maintaining an appropriately deferential judicial attitude").

[94] *See id.*

[95] Eskridge divides textualism into two strands: strict textualism, which "posits the statutory text as . . . the sole legitimate interpretive source," and a less rigid form of textualism that "uses statutory language not in place of, but rather as the best guide to, legislative intent or purpose." William N. Eskridge, Jr., *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340–41 (1990). Because both suffer from the same fundamental flaws, and because "strict" textualism is rarely used by itself, "textualism," for the purposes of this analysis, includes both of Eskridge's strands.

[96] In Appendix 3 of DYNAMIC STATUTORY INTERPRETATION, Eskridge provides a complete table of the canons used by the Rehnquist Court for statutory interpretation. These are organized into Textualist Canons (Linguistic Inferences, Grammar and Syntax, and Structural), Extrinsic Source Canons (Agency Interpretation, Continuity in Law, and Extrinsic Legislative Sources), Substantive Policy Canons, Constitution-Based Canons (Separation of Powers, Federalism, Due Process), Statute-based Canons (Meta-Canons and Specific Statutory Schemes), and Common-Law-Based Canons.

of the legislature. Finally, if the meaning of the statute remains elusive, courts rely upon legislative documentary materials, history, and other secondary and tertiary sources to determine the "intent" of the legislature. The inherent flaw in this supposedly ideal approach is the courts' inability to holistically consider the evolutive environment in which the statute is interpreted along with the principles embodied in the traditional canons. This conflict renders interpretive discord both endemic and insuperable.

1. Textualism

Textualism, although embodying countless variations, is generally divisible into two primary strains. The first, often called "pure" or "four-corners" textualism,[97] demands that judicial inquiry be limited to the textual language of the statute. "Four-corners" textualism denounces attempts to derive congressional intent from statutory language.[98] This methodology relies heavily upon the presumption that a true determination of the collective legislative will is impossible, and that attempts to do so in the absence of clear legislative language constitute impermissible judicial activism and a violation of the separation of powers principle.[99] Underlying this approach is the notion that judges are not omniscient agents able to discern legislative will; in fact, attempts to do so result in fictive legislative intent, unworthy of judicial credence.

The second strain of textualist jurisprudence is textualist-intentionalism.[100] Textualist-intentionalism posits that collective legislative intent is discernible but demands that the search for legislative intent be limited solely to the inscribed words of the statutory text.[101] Inherent in this approach is the belief that pars-

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WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323–28 (1994).

[97] *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (discussing the distinctions among textualist theories).

[98] *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

[99] *See* Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911 (1996) (presenting and advocating a separation of powers argument against judicial activism).

[100] *See, e.g.*, Crooks v. Harrelson, 282 U.S. 55, 60 (1930) (admonishing courts that "exercis[e] a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship").

[101] *See, e.g.*, Russello v. United States, 464 U.S. 16 (1983); United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give

ing through selective portions of the historical documentary record fails to render accurate insight into intentions of the enacting legislature. Textualist-intentionalism correctly directs the judiciary to inquire into the intentions of the Congress, but entirely discounts the examination of extrinsic sources of documentary history and legislative intent originating in the bicameral passage and presentment process.

By relying exclusively on statutory language, textualists hope to preclude judicial activism while encouraging legislatures to draft statutes with clear and unambiguous language subject to predictable and consistent interpretation.[102] This preclusion erroneously assumes that the "plain meaning" of a statute is no less a subjective interpretation than any other, and fails to note that strict textualism rigidly denies courts the freedom to "fill in the gaps" where legislatures have been unable to draft concise and unambiguous language due to political or other concerns. Textualist approaches also fail to note the significant evidence indicating that the Framers of the Constitution intended the courts to be somewhat more than powerless administrators of legislative will.[103]

While these approaches appropriately presume that true legislative "intent" is often impossible to ascertain, they often also unfortunately mark the limits of inquiry for conservative courts. In many cases the subtleties of the statutory text will not provide determinant answers, no matter how deep the search. Finally, strict textualism fails to consider the important role courts must play when Congress intentionally drafts legislation with ambiguous or unclear language; in their independence from traditional political pressures, courts can make informed, reasonable interpretations within the parameters intentionally set by Congress.

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expression to its wishes").

[102] This approach has a fundamental contradiction of values; while it correctly assumes that true legislative intent cannot be determined from the text, it incorrectly assumes that the plain meaning of statutory language is more indicative of the "correct" intent than any extrinsic evidence or sources. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 596–603 (1996).

[103] Alexander Hamilton, for example, wrote in the Federalist papers a vision of the courts as a mitigator of unjust laws. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As Hamilton put it, the judiciary guards "the Constitution and the rights of individuals from the effects of those ill humors which . . . have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." *Id.* at 469.

When courts are unable to use the "plain text" or broad legislative intent to determine a statute's meaning, they often turn to legislative history. This approach demands a scrutiny into the actual discussions, debates, conferences, and committee meetings that accompanied the passage of the statute being interpreted. This inquiry, unfortunately, involves materials that are neither the collective product of the legislative body, nor an official representation of any policy or legislative goal.[104]

The Supreme Court has minimized the ambiguity of legislative materials by stating

> [l]egislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent. . . .[105]

The uncertain accuracy of legislative history further muddles the interpretive picture by "disrupting the associated language game,"[106] and in cases where legislative language is unclear, often sends mixed messages to the court, allowing for interpretations of a statute that reflect the casual language of one legislator in debate, or the voices of a vocal special interest minority.[107] Legislation is a "compromise between . . . competing interests,"[108] and as such cannot be accurately judged by the state-

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[104] *See* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987) (discussing the problems courts face when utilizing legislative history materials and stating that such use effectively makes the debates leading up to passage of a statute part of the statute itself, and arguing that such evidence is "inferior" evidence of the legislature's real intent).

[105] United States v. Dickerson, 310 U.S. 554, 562 (1940). *See also* American Trucking, 310 U.S. at 543–44 (stating that when there is available to the court any "aid to [the statute's] construction," then the court is permitted to use it, regardless of any lack of ambiguity in the statutory language at issue). This discretionary rule is frighteningly broad, allowing courts to delve into legislative history when it serves the court's interests, and permitting the court to ignore such extrinsic evidence when the court determines that the plain meaning of the text is "clear." While this Comment advocates a holistic approach to statutory interpretation that considers both legislative history and other extrinsic sources, it *mandates* consideration of such factors rather than leaving the choice to judicial fiat. Thus, by demanding consideration of *all* factors, a holistic approach avoids the flaw of using legislative history only when it suits the needs of outcome-based jurists, and is therefore *more* likely to reflect legislative intent than traditional approaches.

[106] William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 116 (1992).

[107] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing the effect of special interest minorities on the legislative process).

[108] Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs, 449 U.S. 268, 282 (1980); THE FEDERALIST No. 10 (James Madison) (Jacob E. Cooke ed.,

ments of one legislator or even the voices of one committee.[109] Furthermore, legislative history can often be used by an interpreting court to "nudge" a law "off center," allowing for an interpretation that actually defies the plain text meaning, and in delicate and complex compromise legislation such as Title VII, such changes, no matter how subtle, ultimately weaken the legislation by undermining the intent of Congress. As one federal judge stated, "legislative history can be cited to support almost any proposition, and frequently is."[110]

2. Intentionalism

Broader in scope is the intentionalist theory of statutory interpretation. Intentionalism obligates courts to interpret statutes with the goal of effectuating the collective intent of the enacting legislature.[111] Although numerous schools of intentionalism exist, intentionalism itself fundamentally embodies the unifying philosophy that courts must, when appropriate, look beyond the statutory text to ascertain legislative intent.

In order to determine legislative intent accurately, intentionalists advocate the examination of extrinsic sources.[112] The primary extrinsic sources used by intentionalists are statutory language, legislative history,[113] absence of repeal or modification, executive or agency determinations, and legislative purpose statements.[114]

1961); THE FEDERALIST No. 56, at 381 (James Madison) (Jacob E. Cooke ed., 1961); Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819 (1983).

[109] Even the voices of lobbyists can influence the language of a committee with "contrived language." Mayton, *supra* note 106, at 136.

[110] Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986).

[111] *See, e.g.*, Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 843, n.9 (1984) (suggesting that the clear legislative intent of Congress, rather than the statutory text, is controlling). *See also* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) (noting that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning").

[112] While textual-intentionalism views the words of the statute as the primary or sole source of congressional intent, intentionalism views statutory text as one of many admissible pieces of congressional intent. Intentionalists also rely upon legislative history, the congressional record, post-enactment words, presidential understanding, and previous judicial interpretations of legislative intent.

[113] The examination of legislative history demands a scrutiny into the actual discussions, debates, conferences, and committee reports that accompany the passage of a particular statute. This inquiry, unfortunately, involves materials that are neither the collective product of the legislative body, nor an official representation of any policy or legislative goal.

[114] In many cases, Congress explicitly states a broad purpose for the legislation, and

The purest form of intentionalism regards statutory language as a conduit for legislative intent.[115] When the plain meaning of the statute is indiscernible, however, the courts consider extrinsic evidence of intent.[116] While statutory text remains an important manifestation of intent, intentionalism authoritatively supersedes the text, and on occasion, courts are free to generate an interpretation of the textual language at odds with the plain meaning.[117]

Reconstructive intentionalism responds to the lack of discernible legislative intent by advocating the "reasonable legislator" paradigm.[118] This paradigm obligates the judge to assume the role of a reasonable enacting legislator in reconstructing congressional intent. The reconstructive intentionalist first conducts "a scrupulous search for the legislative will."[119] If this search is unavailing, the judge imagines the intent of the enacting legislature when faced with the issue under consideration. Indeterminacy at this stage requires the judge to attribute the most reasonable interpretation to the statute.[120] In determining reasonableness, the judge must consider the conception of reasonableness held by the enacting legislature. This process enables the reconstructive intentionalist to contemplate a role for both the actual and imagined intents of the enacting Congress.[121]

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courts that use an intent approach hope to derive a larger purpose behind the legislation embodied in the specific provisions of the text. *See* González, *supra* note 102, at 605–06.

[115] Although this methodology appears to be much like textualism because it first demands a look to the text, the two differ significantly. Whereas textualism looks to the text only for the plain meaning, intentionalism considers the text itself a manifestation of the legislature's intent rather than the sole source of interpretative evidence.

[116] *See* Eskridge, *supra* note 5, at 1479–81.

[117] The canons of statutory interpretation provide two useful exceptions to the plain language approach to statutory interpretation. The first is when a literal application of a statute produces an "absurd result." The second is where such an approach would produce a result considerably at odds with the intent of Congress when enacting the statute.

[118] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958) (discussing the paradigm of the "reasonable legislator").

[119] Posner, *supra* note 108, at 820. *See also* Standard Office Bldg. Corp. v. United States, 819 F.2d. 1371, 1379 (7th Cir. 1987).

[120] *See* Posner, *supra* note 108, at 820 ("[W]hat if the Judge's scrupulous search for the legislative will turns up nothing? . . . It is inevitable, and therefore legitimate, for the judge in such a case to be moved by considerations that cannot be referred back to legislative purpose. These might be considerations of judicial administrability . . . or considerations drawn from some broadly based conception of the public interest").

[121] Contrast this approach with Judge Frank H. Easterbrook's textualism, in which courts have no interstitial law-creating powers. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 552 (1983).

Reconstructive intentionalism is also premised upon the theory that using a reasonability paradigm to reconstruct probable legislative intent best enables the court to effectuate true congressional purpose.

While intentionalism provides a more flexible and useful method with which courts can interpret badly written or ambiguous language, it also lends itself to criticisms of unfettered and irresponsible judicial activism. In addition, by limiting itself to "purposes" that are explicitly, implicitly or hypothetically expressed by the *enacting* Congress, intentionalism precludes the court from making interpretations that reflect changing conditions, current societal values, and current political considerations.

3. Nontraditional Approaches

While courts continue to apply the traditional canons of interpretation to statutes, there has been a recent growth of scholarship and discourse about the need for reform in hermeneutic methodology.[122] Many scholars have suggested a comprehensive methodology that recognizes the various factors that influence judicial interpretation.[123] Many well-respected scholars, including Guido Calebresi,[124] Daniel Farber,[125] Shep Melnick,[126] and Cass Sunstein,[127] have proposed various theories about the importance of a new interpretive methodology, and over the last fifteen years the movement has become one of the most powerful in legal scholarship. In a sharp departure from the venerated and

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[122] *See* Eskridge, *supra* note 5, at 1479–82.

[123] Eskridge is generally viewed as the preeminent scholar on the subject of dynamic statutory interpretation, and his theories incorporate most of the concepts suggested by this Comment. Countless political and philosophical arguments have been presented that are relevant to this subject. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Frank I. Michelman, *Traces of Self Government*, 100 HARV. L. REV. 4 (1986).

[124] *See generally* CALABRESI, *supra* note 107 (discussing the need for an adaptive methodology that allows courts to update statutes and interpret them flexibly).

[125] *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546 (1996); Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513 (1996); Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

[126] *See* R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L. J. 91 (1995).

[127] *See, e.g.*, Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 955 (1995); Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247 (1990); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989).

stable jurisprudence of the past, these writers have sought to establish "novel and sophisticated theories of interpretation"[128] that utilize traditional legal analyses along with theoretical and philosophical writings.[129]

At the forefront of this movement is William Eskridge, whose "Dynamic Statutory Interpretation" theories brought into focus many criticisms of textualism and traditional interpretive methodologies. Stating that statutory interpretation has been a relatively ignored legal discipline, Eskridge argues that while traditional statutory interpretation methodologies bear some legitimacy and merit, courts always have used a variety of tools for constitutional and common-law interpretation, and similar criteria should be integrated into statutory interpretation.[130] Recognizing this subjective process, and allowing these various factors to come into play when a court reads statutes is essential to progressive statutory interpretation that best serves the interests of democracy and the people.[131] Even more important, Eskridge recognizes the tremendous influence of changing conditions and how they must be part of the hermeneutic process.[132]

Along with proposing the value of a dynamic approach, Eskridge also notes the limitations of the methodology and the inherent boundaries over which dynamic interpretation should not transgress. Drawing on various jurisprudential theories and scholars, Eskridge argues that the basic nature of interpretation is such that the reader of a statute does not "discover" the meaning so much as she "constructs" the statute.[133] He then presents evidence that demonstrates the need for flexible decisionmaking in a complex, bureaucratic system and argues that the complex nature of our society and laws is such that as conditions change, statutes must be adapted to reflect the world in which they operate.

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[128] GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 80 (1995).

[129] *See* González, *supra* note 102 (discussing and analyzing the various theories behind contemporary statutory interpretation discourse).

[130] *See* Eskridge, *supra* note 5, at 1479–81.

[131] *See id.* at 1479–81.

[132] *See id.* at 1480 (stating that "[a]s society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate," and arguing that those who interpret statutes should consider what the statute "mean[s] in terms of the needs and goals of our present day society").

[133] *Id.* at 1485 (arguing that traditional interpretations often rely upon case law that can be interpreted many ways, and that "the battle of the string citations is indeterminate because there are plenty of cases to support either point of view").

In actually applying such a system, however, scholars begin to encounter myriad difficulties. Eskridge himself relies upon various legal theories, each in tension with the other, yet he does not adequately propose a solution to these tensions. While Eskridge celebrates and recognizes these conflicts, he also posits their collective importance within the context of a scheme that avoids the rigidity of intentionalism,[134] textualism, purposivism,[135] and other paradigms of interpretation. In proposing such a model, however, Eskridge is countermajoritarian; he places the primary responsibility for statutory interpretation upon the judiciary, in what many critics call an open defiance of the balanced, tripartite government articulated in the Constitution.

Overall, many legal scholars and critics have accurately and comprehensively identified and defined the problems of traditional interpretive methodologies, illustrating the numerous interests and tensions between various models and noting their internal inconsistencies. Unfortunately, this recent surge of scholarship has as yet failed to make the leap from academia to the courtroom; courts continue to apply those same methods with a seemingly unyielding determination.

4. Problems, Inconsistencies, and Mixed Messages

Despite a recent surge of discussion and commentary about statutory interpretation, and numerous calls for serious jurisprudential reform, courts continue to apply outmoded methods when reading statutes. Conservative, textualist courts continue to read large, complex statutes with a plain-meaning approach that often ignores the broader purpose of the statute. Intentionalist courts correctly recognize the need for extrinsic evidence to support a reasonable interpretation, but often fail to develop limiting principles and rules with which to appropriately weigh such evidence. Nontraditional approaches, although much more compre-

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[134] Intentionalism, as it relies upon historical analysis, Eskridge argues, "supports . . . the wrong interpretation." A historical perspective is flawed because it fails to consider and reflect changes in society, public opinion, and social values. *See* Eskridge, *supra* note 5, at 1486.

[135] *See* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy, and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 267–78 (1997) (defining and discussing purposivism in the context of contemporary statutory interpretation discourse); *see also* Donna D. Adler, *A Conversational Approach to Statutory Analysis: Say What You Mean & Mean What You Say*, 66 MISS. L.J. 37, 57–60 (suggesting that the "purpose" of a statute is merely a "useful tool" for determining statutory meaning).

hensive and flexible, have yet to make their way from the pages of journals, textbooks and classrooms into the courtroom.

By failing to develop and adhere to a consistent and effective statutory interpretation methodology, courts perpetuate and often worsen the problems of the approaches discussed above. Lower courts often cannot distinguish between the "ends" of a decision and the "means," thus allowing for multiple interpretations of what the higher court undoubtedly intended as a clarifying determination of a statute. Furthermore, as the Supreme Court continues to interpret our growing statutory and regulatory legal system in a complex and changing society, it must send a clear message to lower courts that responsible statutory interpretation demands a careful and holistic consideration of many complex factors.

C. *Perpetuating the Problem:* Walters *and* Robinson

1. The Walters Case: *Metropolitan v. EEOC*

Title VII 42 U.S.C. § 2000e(b)[136] delineates an exclusive categorization of employers that fall within the statutory ambit of Title VII. It states that an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[137] Applying this statutory categorization in a consistent and predictable way has confounded courts. The incertitude in the application of Title VII's definition of employer has its genesis in the coverage provision "for each working day." Judicial decisions concerning the phrase "for each working day" have spawned two conflicting

[136] *See generally* 42 U.S.C. §§ 1971–2000 (1994) (establishing laws against discrimination in areas of voting, public accommodations, public facilities, public education, federally assisted programs, and employment). Section 2000e-2(a) reads:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Section 2000e-2 also regulates employment agency practices, labor organization practices, and training programs. *See* 42 U.S.C. § 2000e-2(b) to (d).

[137] 42 U.S.C. § 2000e(b) (1994).

methodological approaches to discern the requisite number of employees within the confines of Title VII, 42 U.S.C. § 2000e(b): The "day-by-day" method[138] and the "payroll" method.[139]

a. *The "day-by-day" method: an exercise in strict statutory interpretation.* The "day-by-day" method counts hourly-paid employees for each working day in which they are either physically present at work or on paid leave.[140] Hourly employees who work only four days in a five-day work week are not counted as employees on the fifth day regardless of the number of hours worked during the previous four days and regardless of whether they are a permanent employee expected to return in subsequent work weeks. Salaried employees are counted as employees for each day of the workweek whether or not they are actually at work on a particular day.

Zimmerman v North American Signal Co.[141] is the seminal acknowledgment of the day-by-day method. North American employed the requisite number of employees on Monday through Thursday and employed less than the requisite number of employees on Friday.[142] The Seventh Circuit determined that North American did not have enough employees to invoke anti-discrimination protections.[143] The court premised its conclusion upon canonical statutory construction principles that prohibit a court from construing a statute in a way that renders words or phrases "meaningless, redundant or superfluous."[144] The court opined that allowing hourly employees who work only a few hours on a single day of the week would render the phrase "for each working day of the week" meaningless.[145]

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[138] *See, e.g.*, EEOC v. Metropolitan Educ. Enter. Inc., 60 F.3d 1225 (7th Cir. 1995); McGraw v. Warren County Oil Co., 707 F.2d 990 (8th Cir. 1983).

[139] *See, e.g.*, Vera-Lozano v. Int'l Broad., 50 F.3d 67 (1st Cir. 1995); Dumas v. Mt. Vernon, 612 F.2d 974, 979 n.7 (5th Cir. 1980) (approving in dicta).

[140] *See Policy Guidance: Whether Part-time Employees are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, II EEOC COMPL. MAN. (BNA) No. 139, Apr. 20, 1990, at N-3315.

[141] 704 F.2d 347 (7th Cir. 1983).

[142] *See Zimmerman*, 704 F.2d at 353 (noting that North American satisfied the jurisdictional minimum for each working day for 15 weeks in 1978 and 10 weeks in 1979). North American had 20 employees on Monday through Thursday, but only 19 employees on Friday. Since the Friday count fell below the jurisdictional minimum, the week was not included in the jurisdictional count. *See id.*

[143] *See id.*

[144] *Id.* (citing Conway County Farmers Ass'n v. United States, 588 F.2d 592, 598 (8th Cir. 1978); *see also* United States v. Marubeni America Corp., 611 F.2d 763, 767 (9th Cir. 1980); Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976)).

[145] *Zimmerman*, 704 F.2d at 353. The court determined that the same jurisdictional count would exist if the phrase "in each working day" were omitted. *Id.*

b. *The "payroll" method: attempting to apply legislative intent.* The "payroll" method counts salaried and hourly employees for each working day they are on the payroll, regardless of their physical presence, paid leave status, or number of hours worked.[146] The payroll method is premised upon the existence of an ongoing employment relationship.[147] Prior to the Supreme Court's ruling in *Walters*, *Thurber v. Jack Reilly's, Inc.*[148] best encapsulated the proposition favoring the payroll method. Reilly employed Thurber as a waitress in a neighborhood bar and grill.[149] Thurber applied for and was denied a bartending position on the basis of her sex.[150] Thurber filed suit against Reilly alleging that a "men only" bartending policy violated Title VII's prohibitions against sexual discrimination.[151] Reilly challenged the suit *inter alia* on the grounds that the requisite number of employees did not exist to satisfy Title VII's jurisdictional threshold.[152] Reilly had more than fifteen employees on the payroll for more than twenty weeks during the calendar year, although no more than eleven employees reported to work on any single day.[153]

The First Circuit began its analysis by examining the legislative history of Title VII.[154] The court concluded that the legislative history "weigh[ed] heavily" against the day-by-day method.[155] In formulating this opinion, the First Circuit relied upon Senator Dirksen's incorporation of the Unemployment Compensation's Act ("UCA") definition of employer into Title VII[156] and the subsequent revenue rulings interpreting the relevant UCA provisions.[157] In addition to examining the legislative history, the court

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[146] *See Vera-Lozano*, 50 F.3d at 69–70 (1st Cir. 1995); Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634–35 (1st Cir. 1983). The payroll method "looks at the number of employees maintained on an employer's payroll within a given week: if this number is at least fifteen for at least twenty calendar weeks the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar week." EEOC v. Metropolitan Educ. Enters., Inc., 60 F.3d 1225, 1227 (7th Cir. 1995), *overruled by* Walters v. Metropolitan Educ. Enters., Inc., 117 S. Ct. 660 (1997).

[147] *See Vera-Lozano*, 50 F.3d at 69–70; *Thurber*, 717 F.2d at 634–35.

[148] 717 F.2d 633, 634–35 (1st Cir. 1983).

[149] *See id.* at 633.

[150] *See id.* at 633–34.

[151] *See id.* at 634.

[152] *See id.*

[153] *See id.*

[154] *See id.*

[155] *Id.*

[156] *See supra* notes 62–65 and accompanying text.

[157] Nine years prior to Senator Dirksen's incorporation of the UCA's definition, the Internal Revenue Service issued a revenue ruling pertaining to the methodology of counting employees under the UCA. *See* Rev. Rul. 55-19, 1955-1 C.B. 496–99. Pursuant to this ruling, the statute permits the counting of all persons in an existing employ-

opined that the inclusion of such businesses within the confines of Title VII does less to offend the policy's conventional underpinnings than does the exclusion of part-time employers.[158]

c. Walters v. Metropolitan Educational Enterprises*: the Supreme Court adopts a textualist-intentionalist approach.* In *Walters v. Metropolitan Educational Enterprises, Inc.*,[159] Darlene Walters filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that Metropolitan Educational Enterprises, Inc. had discriminated against her by failing to promote her on the basis of her sex.[160] Soon after she filed her discrimination claim, Metropolitan discharged Walters.[161] The EEOC filed suit against Metropolitan on her behalf.[162] Metropolitan challenged the suit by arguing that it was not an employer within the jurisdictional confines of Title VII.[163] Metropolitan had fifteen or more employees on its payroll during forty-seven calendar weeks, but had fifteen or more employees physically present or on paid leave on each working day in only nine calendar weeks.[164]

The District Court, relying upon the day-by-day method for determining Title VII's jurisdictional threshold, first enunciated in *Zimmerman*, dismissed the suit for lack of subject matter jurisdiction.[165] The Seventh Circuit affirmed.[166] Writing for the panel, Judge Cummings reviewed the district court's reasons for adhering to the narrowly construed definition.[167] These reasons were twofold: first, applying the payroll method "would render the words 'for each working day' superfluous";[168] and second, if Congress had wanted courts to use the payroll method, it could

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ment relationship on a particular day without regard to part-time status, physical presence, or the basis of compensation. *See id.*

[158] *Thurber*, 717 F.2d at 635. In adopting Title VII, Congress was concerned with the over-regulation of small businesses. The court, however, acknowledged that the attendant broad remedial purpose of Title VII could be effectuated only by sweeping within its ambit small businesses having a payroll of 15 or more employees. Small businesses incur a relatively modest encumbrance of the forbearance from employment discrimination. *See id.*

[159] 117 S. Ct. 660 (1997).

[160] *See id.* at 662.

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See id.* at 663.

[165] *See* E.E.O.C. v. Metropolitan Educational Enterprises, Inc., 864 F. Supp. 71, 73 (N.D. Ill. 1994).

[166] *See* E.E.O.C. v. Metropolitan Educational Enterprises, Inc., 60 F.3d 1225, 1230 (7th Cir. 1995).

[167] *See id.* at 1227.

[168] *Id.*

have so specified.[169] The Seventh Circuit also relied upon the principle of *stare decisis* in asserting that "compelling reasons are required to overturn [c]ircuit precedent."[170] The panel concluded that it would uphold *Zimmerman's*[171] "natural interpretation" of the "plain text" found in Title VII.[172]

The Supreme Court reversed the Seventh Circuit's decision and resolved the circuit conflict in favor of the payroll method.[173] Writing for a unanimous Court, Justice Scalia reasoned that the payroll method represents a fair reading of the phrase "for each working day."[174] Justice Scalia initially framed the issue by defining the term employee.[175] An employee is an individual with whom an employer has an employment relationship on any particular day.[176] The subordinate ensuing question arises over whether the jurisdictional phrase "has an employee" is consonant with defining an employee as an individual engaged in an employment relationship with an employer.

In answering this question, the Court relied on a textualist statutory interpretation methodology.[177] Pursuant to this methodology, the statutory text is assumed to bear its "ordinary, contemporary, common meaning" in the "absence of an indication to the contrary."[178] Relying on several dictionaries, Justice Scalia determined that an existing employment relationship represented the contemporary meaning of the phrase "has an employee" for each working day.[179] Consistent with this opinion is the EEOC's interpretation of the jurisdictional phrase[180] along with the De-

[169] *See id.*

[170] *Id.* at 1228–29 (stating that "it is enough to note the large number of recent cases on both sides of the issue; that some courts have disagreed with our analysis while others have adopted it hardly presents a pressing reason to overturn settled precedent.").

[171] *See id.* at 1228 (relying upon *Zimmerman* for the proposition that "the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week").

[172] *Id.* Concurring, Judge Ripple questioned the correctness of *Zimmerman* but nevertheless joined the majority in choosing not to overrule "established precedent of long standing." Although the obligation to observe stare decisis was not absolute, the contrary opinions of other courts had not cast a sufficient "shadow" on *Zimmerman* to warrant overruling that decision. *Id.* at 1230.

[173] Walters v. Metropolitan Educ. Enters., 117 S. Ct. 660, 664 (1997).

[174] *See id.*

[175] *See id.* at 663.

[176] *See id.*

[177] *See id.*

[178] *Id.* at 664 (citing Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993)).

[179] *See id.* at 664.

[180] Justice Scalia acknowledged the fact that the EEOC lacks rulemaking authority over the issue. *See id.* at 664 (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991)).

partment of Labor's interoperation of similar statutory language embodied in the Family and Medical Leave Act of 1993.[181]

The Seventh Circuit, however, when confronted with the problem of determining the number of employees employed on a particular day, had reasoned that an employer would likely include only those employees actually performing work on that day.[182] Justice Scalia acknowledged that the subtleties of the statutory language itself could conceivably convey a requirement that the employee actually be working on the relevant day.[183] However, neither the day-by-day method nor the payroll method requires the physical presence of all employees.[184]

The day-by-day method is a compensation-based counting methodology whereby salaried employees receiving compensation for non-working days are always counted and non-salaried employees receiving compensation only on working days are counted only when physically present.[185] Scalia responded that such a disposition renders administratively improbable and impossible consequences because few employers keep sufficiently detailed records to invoke the day-by-day counting system.[186] Assuming sufficient records exist, the day-by-day system entails a "complex and expensive factual inquiry."[187] Over a two-year period, an employer with fifteen employees and a five-day work week must examine 7800 daily working histories to determine the number of employees physically present, on paid sick leave, on paid vacation time, and receiving salary.[188] This inquiry becomes more complex if the employer permits the accumulation of seniority rights or the employer distributes bonuses when a non-salaried employee is absent from work.[189] Justice Scalia opined that Congress could only have intended such a result if the statutory language "could bear no other meaning."[190]

Unfortunately, this analysis overlooks the fact that many federal and state laws require employers to keep records of "hours worked each workday."[191] Because payroll records typically

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[181] *See Walters*, 117 S. Ct. at 664.
[182] *See id.* at 663–64.
[183] *See id.* at 664.
[184] *See id.*
[185] *See id.*
[186] *See id.*
[187] *Id.* at 665.
[188] *See id.*
[189] *See id.*
[190] *Id.* at 664.
[191] 29 C.F.R. § 516.2(a)(7) (1998).

show only total hours worked, the employer must still look at each daily time record to determine if a particular employee's name appears. The same inquiry would enable the employer to determine whether an employee was physically present on any particular day. Thus, both counting methods impose a similar burden upon employers.

The Seventh Circuit concluded that the payroll method rendered the phrase for "each working day" meaningless: an identical jurisdictional count would occur if the jurisdictional phrase omitted the phrase "for each working day" and simply read "fifteen or more employees in each of twenty or more calendar weeks."[192] Justice Scalia dismissed the Seventh Circuit's argument that the payroll method rendered the phrase "for each working day" superfluous by relying upon the existence of mid-week employment changes to give the phrase operative effect.[193] Mid-week employment changes occur when an employee departs either in the middle of the workweek or at the end of the workweek, but prior to the end of the calendar week.[194] Reliance on mid-week employment changes to give the phrase meaning is problematic. The legislative history of Title VII is completely devoid of any Congressional concern over the phenomenon. Justice Scalia, however, reasoned that the "mere elimination of evident ambiguity is ample—indeed, admirable—justification for the inclusion of a statutory phrase; and that purpose alone is enough to merit enactment of the phrase . . . ."[195] Despite a dearth of congressional concern, the subtleties of language, and the controvertible results of each counting methodology, Justice Scalia referred to the coverage provision as "straightforward" and thereby consonant with the textualist approach.[196] The court concluded that the "touchstone under § 2000e(b) is whether an employer has employment relationships with 15 or more individuals for each working day."[197]

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[192] *See Walters*, 117 S. Ct. at 664.

[193] *See id.* at 664–65. The Seventh Circuit opined that instances where employees begin work on Wednesdays or depart on Thursdays "are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *Metropolitan*, 60 F.3d at 1228.

[194] *Walters*, 117 S. Ct. at 664–65.

[195] *Id.* at 665.

[196] *Id.* at 664.

[197] *Id.* at 666.

2. *Robinson v. Shell Oil*

Section 704(a) of Title VII (the antiretaliation provision) makes it illegal for an "employer to discriminate against any of his employees or applicants for employment" who have made a Title VII claim against the employer or who have helped another person do so.[198] Section 2000e(f) defines an "employee" as "an individual employed by an employer."[199] Unspecified by the statute is whether these protections apply to former employees. This question has spawned a wide array of judicial interpretations about the applicability of Title VII's antiretaliation protections to former employees.[200]

There are two major lines of reasoning interpreting "employee" for purposes of Title VII retaliation claims. One line of reasoning narrowly interprets the term to include only those persons employed by the employer.[201] Using a textualist approach, these courts argue that the plain meaning of "employee" is clearly set forth by Congress in the statutory language, and is therefore unambiguous. A second line of reasoning interprets the provision broadly, holding that the remedial purpose of Title VII and Congress's intent to prevent discrimination in the workplace demand an interpretation that defines an employee as a person whose interaction or connection with an employer arises out of the employer-employee relationship, regardless of whether or not the person is still employed.[202]

a. *Textualism—defining "employee" narrowly.* Courts applying a "four-corners" textualist approach read Title VII literally, and hold that the Section 2000e(f) language provides a clear and unambiguous definition of "employee" for all Title VII provi-

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[198] 42 U.S.C. §2000e-3(a) (1988). The relevant statutory language provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. This section is commonly known as the antiretaliation provision. *See* Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *rev'd* 117 S. Ct. 843 (1997).

[199] 42 U.S.C. § 2000e(f) (1988).

[200] *See infra* notes 204 & 217 and accompanying text.

[201] *See* Reed v. Shepard, 939 F.2d 484, 492–93 (7th Cir. 1991) (affirming directed verdict for defendants because the alleged discriminatory actions occurred after the plaintiff had been terminated).

[202] *See, e.g.*, EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1331 (5th Cir. 1991) (involving former employer withholding retirement and profit-sharing benefits from former employee to prospective employers).

sions lacking specific language to the contrary. In concluding that this term is not ambiguous, courts have therefore applied the plain meaning of the words. In addition, because Congress, in section 704(a), explicitly extended protection to applicants for employment by distinguishing them from regular employees, courts employing the textualist argue that Congress must have concurrently intended to exclude former employees from antiretaliation protection. Because the language is apparently unambiguous, these courts conclude that a plain meaning approach is appropriate. For example, the Seventh Circuit has held that former employees could not receive antiretaliation protection because Congress explicitly stated otherwise.[203]

Textualist-intentionalist courts frequently look to other provisions of the statute and the language used therein to determine if there is a guiding principle behind the use of language.[204] Because the types of practices explicitly prohibited in section 703(a)(1) are limited to those that could be used against a current employee, some argue that this precludes former employees from protection. This interpretation states that the protection of Title VII extends only to those acts that occurred during the *formal* employer-employee relationship, and not after termination or resignation.

Another Title VII provision used by textualists to justify a literal interpretation is the "adverse employment action" clause. In order to prove a Title VII prima facie case, a plaintiff must show that: (1) they were engaged in a protected activity; (2) that they suffered an "adverse employment action;" and (3) that the adverse action was causally connected to the protected activity.[205] Textualists therefore insist that an adverse action must occur while the employee is actually employed, and that former employees are not covered by antiretaliation prohibitions.

Finally, narrow interpretations of section 704(a) note that Title VII originally only provided for equitable remedies, which do not include compensatory damages, back and front pay, or punitive damages. While the 1991 Civil Rights Act changed this policy to include provisions for compensatory retaliation claims, textualists suggest that the fact that it was originally precluded indicates that Congress intended protection only in those situa-

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[203] *See Reed*, 939 F.2d at 492–93 (involving allegations that employer made late-night phone calls and threatened former employee).

[204] *See* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[205] *See* Jennings v. Tinley Park Comm., 864 F.2d 1368, 1371 (7th Cir. 1988).

tions where equitable relief was possible. Because Title VII originally precluded relief for those discharged voluntarily, it has been argued that Congress did not intend to include former employees.

Many who argue for narrow interpretations of Title VII insist that the speculative nature of "future pay" claims creates an unfair burden upon employers. In such a scenario, businesses would be liable for the acts of supervisors or managers long since gone, and for acts committed years ago. In limiting claims to those who are actually employed at the time of the alleged retaliation, textualists insist that Congress meant to preclude a slippery-slope of stale claims, a court-clogging flood of litigation, and massively unfair burdens upon small employers. Many courts also suggest that alternative remedies are more appropriate, such as state civil rights statutes, state civil claims, and criminal laws.

b. *Intentionalism: attempting to determine congressional purpose.* In contrast to a textualist interpretation of the phrase "employee," an intentionalist approach looks to extrinsic sources[206] and the broader purpose of Title VII as an antidiscrimination statute, and thus defines "employee" broadly. In doing so, many courts have found the term "employee" to be ambiguously defined, and that an examination of the statute must therefore go beyond the literal language.[207] Congress's stated intent in both Title VII and subsequent employment civil rights legislation indicates that the statute was designed as a broad, remedial measure, and courts have consistently held it as such. In contrast to textualist courts, intentionalist interpretations have found that a literal application of section 704(a) produces absurd results, allowing an employer to freely discriminate against former employees for filing Title VII claims, and thus chilling future former employees from doing the same.

Finding that Congress intended Title VII as a broad, remedial statute designed to bring about an end to many kinds of discrimination in the workplace, intentionalist courts have allowed

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[206] The conspicuous absence of legislative history in this area effectively prevents a legislative history interpretation of the statutory provision. Although there are considerable legislative materials defining the debates and discussions of other provisions of Title VII, the complete lack of applicable legislative history indicates that Congress was either unable to foresee the situation or unwilling to define it explicitly.

[207] In cases where the language is ambiguous, further inquiry is required, and courts must look to the overarching purpose of Title VII in determining the specific provisions therein. *See* Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 292 (2d Cir. 1986).

deference to broad interpretations.[208] Courts have also indicated that often a broad stated purpose of the statute is the best guide to interpretation: "There is no surer guide in the interpretation of a statute than its purpose."[209] Furthermore, even when the language appears to be unambiguous, if the result clearly contradicts the "manifest purpose of the statute as a whole" then many courts state that it should not be interpreted literally.[210]

Finally, and most importantly, intentionalist jurisprudence states that a statute that can be read in more than one manner must be interpreted "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen."[211] Such legislation must also be read so that it works "logically and comfortably into the body of both previously and subsequently enacted law."[212] As a whole, Title VII has consistently been interpreted broadly as a remedial statute with a congressional purpose transcending mere language and allowing broad interpretations.[213] Such findings have allowed courts to interpret Title VII in a manner consistent with its general purpose and remedial nature[214] while resolving ambiguities "in favor of those whom the legislation was designed to protect."[215]

Circuits using intentionalism to evaluate section 704(a) have interpreted "employee" to include a former employee as long as the alleged discrimination arises from the "employer-employee" relationship.[216] The leading cases supporting this broad interpre-

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[208] *See* NLRB v. Scrivener, 405 U.S. 117, 122 (1972); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198 (3d Cir. 1994).

[209] Pantchenko v. C. B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (citing FDIC v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943)).

[210] Watt v. State of Alaska, 451 U.S. 259, 266 (1981).

[211] Schultz v. Louisiana Trailer Sales, Inc., 428 F.2d 61, 65 (5th Cir. 1970).

[212] Shapiro v. United States, 335 U.S. 1, 31 (1948); *Schultz*, 428 F.2d at 64–65.

[213] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 200–04 (1979); Coles v. Penny, 531 F.2d 609, 614–15 (D.C. Cir. 1976).

[214] *See, e.g.*, Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977).

[215] *Bell*, 557 F.2d 849 at 853 (citing Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)). This approach prevents absurd results inconsistent with Congress's intent. Such an inquiry involves a look at Title VII's framework, the purpose of the act, and subsequent legislation if applicable. Textualism, on the other hand, argues that such expansive, judge-made law is dangerous: "[E]xtending Title VII to cover former employees is tantalizing fruit." *Robinson*, 70 F.3d at 332.

[216] *See* Passer v. American Chem. Soc'y, 935 F.2d 322, 330 (D.C. Cir. 1991), (stating that a textualist interpretation of §704(a) is dangerous and circumvents the remedial and antidiscriminatory purpose of Title VII); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088 (5th Cir. 1987) (holding that the "employer-employee" relationship is the appropriate method of determining if the discrimination is proscribed by Title VII).

tation, *Rutherford v. American Bank of Commerce*[217] and *Passer v. American Chemical Society,*[218] derive their reasoning from the theory that discriminatory acts that arise out of the employment relationship are inherently part of what Congress intended to eradicate when passing Title VII.

c. Robinson v. Shell Oil: *The Supreme Court adopts a textualist-intentionalist approach.* The Shell Oil Corporation terminated Charles Robinson in 1991, and shortly thereafter, Robinson filed an employment discrimination charge with the EEOC claiming a violation of Title VII, alleging racial discrimination.[219] While the charge awaited disposition, Robinson applied for employment at another company, which contacted Shell Oil for a reference.[220] Shell Oil gave the new employer a negative reference, and Robinson alleged retaliation for his EEOC claim.[221] The District Court dismissed the claim upon summary judgment on the grounds that Robinson's status as a former employee precluded a Title VII retaliation claim.[222] The Fourth Circuit reversed, and on a rehearing en banc, affirmed.[223]

The court held that the term "employee" as used in Title VII's antiretaliation provision, did not provide a cause of action for a former employee.[224] According to the court, this interpretation neither compromises the language or the meaning of "employee" for other purposes, nor does it ignore any possible ambiguity.[225] The phrase at issue is explicitly defined by the statute, thus avoiding the exceptions to a literal interpretive method. Thus, the Fourth Circuit reasoned, there was no "adverse" action by the employer against an employee because Robinson was not an employee.[226] Had Congress intended a broader meaning, accord-

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[217] 565 F.2d 1162, 1165 (10th Cir. 1977) (holding that Title VII's antiretaliation provision extends to former employees due to the complex nature of the employer-employee relationship).

[218] 935 F.2d 322, 331 (D.C. Cir. 1991) (finding that the term "employee" under the ADEA encompasses former employees as long as the discriminatory act arises out of the employer-employee relationship). *See also Charlton*, 25 F.3d at 198–200.

[219] *See* Robinson v. Shell Oil, 70 F.3d 325, 327 (4th Cir. 1995), *rev'd* 117 S. Ct. 743 (1997).

[220] *See id.*

[221] *See id.*

[222] *See id.*

[223] *See id.*

[224] *See id.* at 328.

[225] *See id.* at 330.

[226] *See id.* at 331.

ing to the Court, it would have explicitly indicated so in the text.[227]

The Supreme Court reversed the Fourth Circuit.[228] Writing for a unanimous Court, Justice Thomas held that while the definition of "employee" might appear to be limited to those who have an existing employment relationship with the employer in question, a deeper inquiry within the context of section 704(a) reveals that "the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts."[229] Furthermore, the Court concluded that the term "employees" in section 704(a) is ambiguous as to whether it excludes former employees.[230]

Justice Thomas began his analysis by stating that the first step in interpreting statutory language is to determine if the text is plain and unambiguous.[231] In order to make such a determination, however, the Court must examine the text itself, the specific context in which it is used, and then the broader context of the statute as a whole.[232] Justice Thomas noted the absence of a "temporal qualifier" in section 704(a) that would indicate the intended scope of "employee," as well as a lack of a temporal qualifier in the general definition of "employee" in section 701(f).[233] He then dismissed other sections of Title VII that define "employee" unambiguously to mean "current employee" as indications that the phrase has different meanings within different contexts.[234] Thus, Justice Thomas concluded that "employee," as used in section 704(a), is unquestionably ambiguous.[235]

Justice Thomas then stated that the ambiguity of the phrase "employee" mandated a closer examination of the specific context in which it is used to determine its meaning.[236] A broad interpretation, he wrote, is more harmonious with the overall purpose of Title VII and the need for "[m]aintaining unfettered ac-

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[227] *See id.* at 342.
[228] *See Robinson*, 117 S. Ct. 843.
[229] *Id.* at 847.
[230] *See id.* at 844.
[231] *See id.* at 846–48.
[232] *See id.*
[233] *Id.*
[234] *See id.* at 847
[235] *See id.*
[236] *See id.* at 847 (noting different definitions of "employee" within Title VII and other civil rights legislation).

cess to statutory remedial mechanisms."[237] Furthermore, he opined, a narrow holding would be inconsistent with other provisions of Title VII that protect employees from discrimination, such as section 703(a).[238]

He then noted that a narrow holding would "effectively vitiate much of the protection afforded by section 704(a)."[239] Justice Thomas stated that a narrow interpretation of section 704(a) would "provide a perverse incentive for employers to fire employees who might bring Title VII claims."[240]

3. *Robinson* and *Walters:* Interpretive Incongruity and the Impetus for Change

The *Robinson* and *Walters* interpretations of the employer-employee relationship illustrate the interpretive incongruity that has plagued courts. The Court held in *Walters* that the term employee encompassed only those individuals with whom an employer maintained an existing employment relationship.[241] In contrast, two months later the *Robinson* Court determined that the definition of employee extended beyond the existing employer-employee relationship to include a former employee. In a cursory footnote, the *Robinson* Court attempted to explain the inconsistency.[242] *Walters* examined the definition of employee pursuant to section 701(b), which specified a time frame in which the employment relationship must exist in order to trigger Title VII coverage. Because section 704(a) did not similarly include the language "for each working day in twenty or more calendar weeks," the statutory text allowed for the inclusion of former employees.[243] The *Robinson* Court's explanation is premised upon the presumption that the term employee, unaccompanied by a specified temporal limitation, renders the term ripe for judicial interpretation.[244]

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[237] *Id.*
[238] *See id.* at 848.
[239] *Id.* at 847.
[240] *Id.*
[241] 117 S. Ct. at 665.
[242] *Robinson*, 117 S. Ct. at 846 n.2 ("[Walters] held that the term 'employees' . . . referred to those persons with whom the employer has an existing employment relationship").
[243] *Id.* at 846 (noting that the definition of "employee" given in Title VII's statutory language "lacks any temporal qualifier.").
[244] *See id.*

Various provisions of Title VII are replete with use of the term employee unaccompanied by cumbersome temporal limiters.[245] In *Robinson*, Justice Thomas discussed several of these statutory subsections,[246] and in a circular fashion, opined that the "ambiguity" resulting from non-existent time frames in other subsections of Title VII necessitated a finding of ambiguity in section 704(a).[247] Before concluding that this ambiguity permitted the inclusion of former employees, Justice Thomas took issue with the common interpretation of the term employee embodied in section 701(f).[248] In sharp contrast, Justice Scalia, in *Walters*, determined that the term employee must bear its common meaning: an individual who maintains an employment relationship with an employer.[249] An individual maintaining this relationship would thus be defined as "employed."[250] Justice Thomas concluded that the common understanding of the term employed "begs the question by implicitly reading the word 'employed' to mean 'is employed.'"[251] The flaw, according to Justice Thomas, is that the term "employed" could also mean, "was employed."[252]

This analysis, taken to its logical extreme, invalidates Justice Scalia's analysis pertaining to midweek employment changes. In *Walters*, Justice Scalia opined that midweek employment changes gave meaning to the phrase "for each working day" by excluding employees who terminated their employment relationship midweek.[253] If the employment relationship extends to former employees, an employee who quits on the third day of a five-day workweek would still be "employed."[254] Thus, the former employee would still count toward the jurisdictional minimum, rendering the phrase "for each working day" superfluous.[255] A statutory interpretation methodology that renders such inconsistent results evidences the need for a congruent statutory inter-

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[245] *See id.*

[246] *See id.*

[247] *Id.* at 846–48. Justice Thomas notes that "[a]t first blush" the term would appear to be unambiguous, but derives a finding of ambiguity only after further examination. Thus, the unambiguous nature of the term is irrelevant, because ultimately Justice Thomas conducts further inquiry despite the apparent clarity of the language. *See id.* at 846.

[248] *See id.* at 847.

[249] *See Walters*, 117 S. Ct. at 665.

[250] *See id.*

[251] *Robinson*, 117 S. Ct. at 847.

[252] *Id.*

[253] *See Walters*, 117 S. Ct. at 664.

[254] *See id.* at 665.

[255] *See id.* at 664.

pretation methodology. This scheme must be a consistent set of rules with which to adequately evaluate dated statutory language in the context of changing conditions and complex competing interests.

III. Solving the Problem: A Proposal for the Future

A. *The Need for a Holistic Model*

The inconsistent hermeneutic methodologies used by courts, along with the schizophrenic hierarchy in the Supreme Court's statutory interpretation paradigm, have engendered numerous criticisms of statutory interpretation and calls for reform.[256] The capricious use of textualism, intentionalism, and other methodologies has created an incongruous array of incompatible Supreme Court rulings, split circuits, and lower court interpretations completely at odds with both congressional intent and judicial precedent. The *Robinson* and *Walters* decisions illustrate this incongruity: while the Supreme Court has recognized the importance of a broad interpretation of Title VII in a changing labor market, it has failed to develop a consonant set of rules and canons with which to adequately evaluate its dated statutory language.

B. *The Benefits of Dynamic Statutory Interpretation*

One of the most enlightening and useful critiques of current statutory interpretation methodologies is Eskridge's Dynamic model, which posits that statutes must be interpreted "in light of their present societal, political, and legal context."[257] Eskridge argues that common-law and Constitutional questions are already examined in such a context, and statutes should be interpreted dynamically as well.[258] He also correctly notes the inability of traditional static methodologies to "extract textual meaning that makes sense in the present from historical materials whose sense it is often impossible to recreate faithfully."[259]

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[256] *See supra* notes 122–129 and accompanying text.

[257] Eskridge, *supra* note 5, at 1479.

[258] *See id.* at 1481. "The static vision of statutory interpretation prescribed by traditional doctrine is strikingly outdated." *Id.* at 1482.

[259] *Id.* at 1482. Eskridge also notes that "original legislative expectations should not always control" the interpretive process when "the statute is old and generally phrased and the societal and legal context of the statute has changed in material ways." *Id.* at 1481.

This approach recognizes the importance of differing perspectives, which Eskridge identifies as textual, historical, and evolutive.[260] Stating that none of these perspectives will control the interpretive process, he identifies the problem of "understanding a text created in the past and applying it to a present problem."[261] Dynamic interpretation, Eskridge argues, is able to reflect "changes in society and law" that are incongruous with the original statutory text and legislative intent.[262] Essentially, Eskridge deconstructs the hermeneutic process into his three major perspectives and develops a "continuum" that gives the interpreter the flexibility to weigh each perspective in order to reach an appropriate interpretation of statutory language.[263]

C. *Problems with Dynamicism*

Successfully bridging the gap between traditional methodologies and theoretical scholarship has proven tremendously difficult, however. Eskridge's Dynamic Statutory Interpretation model correctly identifies the value of traditional methodologies while attempting to develop a workable model. Textualism, with its rigid reliance upon conservative hermeneutics, sacrifices flexibility and reason for judicial restraint and the benefits of citizens having "reasonable notice" of the "rule of law." Intentionalism, which is embodied in the historical perspective, permits judicial discretion to adapt to changing conditions, but fails to develop a consistent and binding set of limiting principles with which the judiciary can operate without fear of violating their limited role within our tripartite government. Even newer "hybrid" models of interpretation, such as textual-intentionalism and reconstructive intentionalism, are merely facially-altered traditional methodologies.

A holistic[264] or dynamic model of statutory interpretation[265] recognizes not only the values and workable limiting principles

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[260] *See id.* at 1483.

[261] *Id.* Although Eskridge does not directly address the effect that changing conditions has upon these perspectives, he does note that the "'best' interpretation of a statute is typically the one that is most consonant with our current 'web of beliefs' and policies surrounding the statute." *Id.*

[262] *Id.* at 1484.

[263] *Id.* at 1496.

[264] A holistic model, unlike dynamicism, attempts to derive the fundamental interests and limiting principles from the traditional methodologies while recognizing the important role changing conditions play as both a factor in and of themselves, and as a modifier of other factors.

[265] Although this Comment posits a theory similar in many respects to Dynamic In-

employed by courts, but also the understanding that no single model can adequately serve the interests of all involved. Eskridge's Dynamic model, despite its correct recognition that a "multi-perspective approach" better reflects changes, cautiously[266] limits judicial perspective to the three viewpoints he sets forth. In doing so, Eskridge successfully transcends the simplistic "purpose of the statute" approach of Henry Hart, Jr. and Albert Sacks,[267] but fails to fully accept Ronald Dworkin's conclusion that law is not an eclectic collection of incongruous statutes, but a "coherent set of principles"[268] that were all created by society as a whole.[269] Thus, in defining his paradigmatic framework in terms of only three perspectives, Eskridge effectively limits the interpreter's ability to utilize all of the potentially useful principles and theories available.

Similarly, Eskridge errs by creating a hierarchy within which his three perspectives are utilized. Stating that the textualist perspective governs first, followed by the historical perspective, and finally the evolutive perspective, he essentially mirrors the traditional canons of interpretation. Only in the event that the text is unclear and legislative expectations no longer comport with social or legal changes does the evolutive perspective come into play.[270] This approach, while preserving the predictability and stability of law, appears to pay mere lip service to the notion of dynamic interpretation while functioning as a somewhat glorified version of textualist-intentionalism.

Finally, Eskridge's model, while addressing the importance of changing conditions, incorrectly states that changes in public values often weigh more heavily than factual changes in society.[271] Such an approach fails to consider the unforeseen effects of large–scale societal changes upon massive, compromise legislation that may be difficult to forge or amend. Under Esk-

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terpretation, it argues that Dynamism fails to consider all of the appropriate factors. A holistic approach that develops a consistent set of limiting principles presents a far more practical and principled methodology.

[266] *Id.* at 1482 (acknowledging Dynamicism's difficulty in interpreting what he calls "[t]he hardest cases, . . . in which a clear text or strong historical evidence or both, are inconsistent with compelling current values and policies").

[267] HART & SACKS, *supra* note 118.

[268] RONALD M. DWORKIN, LAW'S EMPIRE 147 (1977).

[269] *See id.* at 217.

[270] *See id.*

[271] *See* Eskridge, *supra* note 5 at 1496. Eskridge's model also focuses more upon the "needs and values of society" than actual structural or physical changes in society itself or the area of society governed by the legislation at issue. *Id.* at 1488.

ridge's model, text that does not specifically address an issue must be evaluated under the evolutive perspective, yet in cases where conditions have changed to directly contradict textual language, Dynamicism appears to defer humbly to the textualist approach thus preserving the static interpretation that Eskridge decries as inappropriate.[272]

D. *Operationalizing the Holistic Model*

The development of a functional holistic model requires the deconstruction of existing traditional and nontraditional methodologies in order to extrapolate the advantages and limiting principles embodied therein. Such a distillation provides a hermeneutic limiter for the holistic method: a parameter of weighted values and principles acceptable in functional statutory interpretation.

Once this parameter is established, the court must identify and examine the various competing interests embodied within each principle of functional statutory interpretation to determine if on balance, the conjunctivity exists among all of the variables. It is within this step that the most important elements of this Comment's hermeneutic model come into play. By examining each of the myriad interests inherent in the statute in the context of how well they comport with the others, a balancing test of sorts can be conducted.

If conjunctivity exists, then the court's interpretation is facile. For example, if the "plain meaning" of the text is entirely consonant with enacting legislative intent, enacting legislative purpose, judicial precedent, policy goals, prior judicial interpretations, and current conditions, courts will have little difficulty rendering the proper, functional interpretation.[273]

Unfortunately, a multitude of statutory interpretation disputes arise within this context. Often, the "plain meaning" of the text is not so plain, legislative intent and purpose are frustratingly elusive, courts are in staunch disagreement, and conditions have changed in ways not contemplated by the enacting legislature. In these circumstances, the court must determine and assign weight

[272] *See id.* (arguing that traditional methodologies are inappropriate in a world of changing conditions).

[273] Such an example is purely hypothetical; the nature of judicial review is such that statutory language is rarely challenged without the presence of some disjunctivity among the competing interests.

to each of the competing variables and holistically balance them against one another to derive the proper hermeneutic limiter.

For example, suppose the statutory text supports several plausible interpretations, the documentary history is entirely silent, and the enacting legislature articulated a relatively clear statement of a liberal legislative purpose. As a result, greater weight attaches to the legislative purpose and the plausible textual meaning, thus rendering a more expansive interpretation.

Within this system, each traditional interpretive element is first evaluated and noted for its particular value.[274] Textualism, and its adherence to textual limitations is critical to preserve stare decisis and predictable legal rules. Legislative intent, when discernible, also carries significant weight; while the legislative text may appear conclusive, a strict interpretation that fails to comport with a clear legislative history defies legislative will. Similarly, overall legislative purpose constitutes an integral factor; Congress often articulates a clear legislative purpose despite failing to develop specific, functional statutory language. While legislative purpose is not dispositive, it is required to effectuate congressional enactments. Finally, courts must factor changing conditions into any statutory analysis. Although the text may continue to adhere to a constant dictionary definition at the statute's inception, conditions in society and law may mandate an interpretive approach that recognizes the changes and adapts the statutory language accordingly.

Nontraditional approaches not only establish a set of principles, which collectively comprise the set of statutory interpretation principles properly subject to holistic consideration, but also recognize the need to look beyond the existing antiquated monolithic statutory interpretation methodologies. Because these approaches embody expansive notions, they require consideration. For example, Eskridge's Dynamic Statutory Interpretation model correctly assumes the need for recognizing multiple factors in statutory interpretation[275] while simultaneously limiting judicial activism.[276] In addition, legal-process scholars have long

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[274] Traditional textualism, intentionalism, and the numerous permutations of each reflect political values as well as judicial interpretive methodologies. While a discussion of the political and philosophical roots of the canons and different interpretive methodologies is beyond the scope of this paper, the holistic process serves to protect the values represented by each while allowing courts to utilize a broader array of interpretive resources.

[275] *See* Eskridge, *supra* note 5, at 1484.

[276] *See* Farber, *Statutory Interpretation and the Idea of Progress*, *supra* note 132 at

recognized the tension between traditional interpretive methods and reality; Alexander Bickel's "Lincolnian Tension"[277] best illustrates the need for courts to consider political and moral practicalities in their decision-making process. Other scholars seek a "metademocratic" approach that goes "beyond the deadening discourse of restraint and activism" in seeking an interpretive model that recognizes and promotes particular visions of democracy.[278] While these theoretical constructs accurately demonstrate the need to exceed the boundaries imposed by traditional methodologies, they are often devoid of the proper methodology to effectively operationalize their views of statutory constructionism.

In addition to articulating the notion that statutory interpretation must rest upon a broad array of considerations, contemporary scholarship responds to traditional criticisms regarding the subjective nature of a holistic approach by accurately noting the presence of subjectivity in any interpretive methodology. Just as textualists vehemently object to the policy choices made by intentionalist courts, many writers note the ironic subjectivity of textualism, and suggest that any interpretive scheme is inherently prone to judicial fiat.[279] From this scholarship comes the important premise that statutory interpretation is inherently subjective; therefore, the real critique of a holistic model of statutory interpretation is its degree of subjectivity. Consistent with this criticism, any practical methodology must include grounded parameters for judicial restraint. As previously discussed, by deconstructing traditional approaches and recognizing the inherent limitations on judicial activism embodied therein, a statutory methodology that seeks their incorporation engenders the necessary limitations.

Additional factors and their accompanying limitations on judicial activism also merit consideration in a holistic interpretive scheme. Prior case law provides a historical perspective and supports the principles of stare decisis and consistent, predictable jurisprudence. Public opinion and policy goals, while not usually the concern of the judiciary, lend support for interpreta-

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1559 (evaluating Eskridge's Dynamic model and noting that it attempts to reconcile the tensions of traditionalism and judicial activism).

[277] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 68 (1962).

[278] Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 660–63 (1995).

[279] *See* Eskridge, *supra* note 5, at 1480–96.

tions that are somewhat incongruous with either the text or the legislative history. In cases where Congress has, intentionally or otherwise, created ambiguous statutory provisions, public policy concerns must be included in the interpretive process.

Finally, changing conditions themselves must play an important role. As society and its environment change, statutory language[280] may no longer comport with practical reality. Societal changes, more than any other factor, affect the interpretive process; if conditions remained consonant with those at the time of the inception of the statute, the only legitimate interpretive issues would be those that the legislature had left intentionally ambiguous. Additionally, the consideration of changing conditions is necessary to effectuate legislative goals. For instance, Title VII's enacting legislature sought to eliminate discrimination in the workplace.[281] As society changed, so did the nature and type of discriminatory practices that occurred within the employment context. These changes perpetuated a statutory interpretation dispute over the proper method to extend Title VII's proscriptions to new forms of discriminatory conduct without eviscerating the statutory text. This example evidences the ways in which changing conditions alter not only the meanings of words, but also perceptions of reasonableness, the setting in which the statute is applied, judicial precedent, and notions of legislative intent and purpose. Thus, changing conditions must be recognized as an essential element in any workable holistic model, both as a modifier of other factors and as a variable in and of themselves.

After these factors have been analyzed and their essential values identified, they must be recombined into a parameter for interpretation, called the "hermeneutic limiter." This limiter essentially represents an amalgamation of the various interests embodied in traditional methodologies, but with each weighed appropriately. Much like Eskridge's linear continuum, this limi-

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[280] "Statutory language" in this context refers to the mythical "static interpretation" which textualist courts attempt to apply. This Comment argues that such an interpretation is as subjective as any other because as conditions and word meanings evolve, continued adherence to a particular interpretation is as divergent from the "appropriate" meaning as any judicial activism.

[281] In a powerful and unambiguous opinion, Justice Scalia wrote, for a unanimous Court, that Title VII represents more than an attempt to prevent discrimination with regard to the "terms and conditions" of employment, but rather "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." Oncale v. Sundowner Offshore Services Inc., 118 S. Ct. 998, 1001 (1998) (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986)).

ter acts as an average.[282] Unlike Eskridge's model, however, a holistic system uses a multi-dimensional approach, with each consideration "pulling" the limiter towards its respective interests with a strength proportionate to its importance in the interpretive issue. Further, the holistic model allows for the consideration of additional factors, such as prior case law, current political and social values, parallel or similar statutes, and agency interpretations.[283] Thus, the holistic method is an accurate limiting principle that courts can use to preclude overexpansive interpretations while allowing flexibility and a more appropriate interpretation.[284]

The most appropriate analogy of the holistic method is an analysis of component vectors in physics.[285] Vectors represent a quantity of both force *and* direction, and unlike numerical averages, a vector analysis is multidimensional. For example, the forces at work upon an object rolling down an incline include a downward component that pulls towards the center of the earth, a sideways component that moves the object down the slope, and the resulting vector that represents the speed and direction of the object as it rolls down the slope. Similarly, the multitude of factors that may be "pulling" upon a court in its statutory interpretation can come from many directions, and those pulling in opposite directions can mitigate each other's importance. In addition, much like in physics, the ultimate "pull" may be in a completely different direction than any of the singular component vectors.[286]

Essentially, the hermeneutic limiter serves to act as the limiting principle in the interpretive process. By allowing the limiter to reflect the various interests in the statute as well as changing

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[282] *See* Eskridge, *supra* note 5, at 1496.

[283] Despite a recent surge in writings advocating the increased or primary consideration of agency findings and opinions in statutory interpretation, this Comment merely suggests that, when appropriate, agency findings should be another factor for courts to consider, balance, and apply in development of the hermeneutic limiter.

[284] Justice Scalia, while discussing Title VII in the historic *Oncale* decision, stated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 118 S. Ct. at 1002. This striking sentence, in apparent defiance of Justice Scalia's previous adherence to strict Textualism, strongly supports the use of a dynamic or holistic hermeneutic methodology.

[285] *See* PAUL G. HEWITT, CONCEPTUAL PHYSICS 699–704 (7th ed. 1993) (presenting a complete introduction to elementary vector analysis).

[286] This approach allows for compromise interpretations that may not completely comport with any one interest, but best represent a reasonable interpretation that considers *all* interests.

conditions, courts will have the flexibility to read statutes in a manner consistent with the essential elements of interpretation. In cases where massive, compromise legislation requires clarification of ambiguity unforeseen by its drafters, a holistic methodology serves to provide grounded policy within reasonable, structured parameters. Furthermore, the limiter acts to restrain judicial discretion by preventing interpretations to exceed the boundaries of conjunctive hermeneutics; when conditions no longer comport with plausible interpretations of the text, courts cannot further stretch the meaning of the text, thus mandating legislative reform.

It is important to note, however, that the derivation of the hermeneutic limiter requires the inclusion of the appropriate paradigm for assigning weight to each variable. The "imaginative reconstruction" variation of intentionalism[287] provides this paradigm. While contemporary reconstructive intentionalism attempts to interpret language in the context of the reasonable contemporary legislator, the legislative process itself is inherently dynamic. Current legislatures cannot reasonably be assumed to have an understanding of the intent behind legislation written by a different body in a different society, nor could they have the foresight to accurately draft legislation that would be timeless in its applicability. A holistic statutory interpretation methodology preserves the limiting principles represented by both approaches[288] while allowing a principled yet flexible paradigm; the perspective from which language is evaluated must reflect these interests.[289] This viewpoint, which also recognizes

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[287] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 707–08 (1987).

[288] Textualism attempts to view legislative intent through the eyes of the original legislature while considering the evidence and knowledge available to them at the time of the enactment. Reconstructive Intentionalism attempts to analyze language from the viewpoint of a contemporary legislator aware of current conditions and values.

[289] Justice Scalia has explicitly stated that determination of sexual harassment prohibitions enunciated by Title VII rely upon "a constellation of surrounding circumstances, expectations, and relationships." Oncale, 118 S. Ct. at 1003. It seems only logical to extend this insightful perspective into other areas of statutory interpretation; while Justice Scalia clearly meant this language to apply only to sexual harassment law, a common-sense approach to Title VII statutory interpretation would undoubtedly recognize the complex array of factors affecting judicial interpretation of legislative language. Likewise, while Justice Scalia so aptly noted that "male-on-male sexual harassment in the workplace was assuredly not the principle evil Congress was concerned with when it enacted Title VII," a court using holistic interpretive methods will consider the broader considerations of policy unforeseen by the enacting legislator. *Id.* at 1002. Thus, ironically, Justice Scalia himself has unequivocally acknowledged the benefits of a broader, more holistic hermeneutic system.

the importance of changing conditions,[290] is of a reasonable enacting legislator aware of contemporary conditions.[291]

Finally, the hermeneutic limiter must be applied to the language at issue. If the questionable interpretation falls within the boundaries of the limiter, it is acceptable. If it falls outside the limiter, it exceeds the boundaries of reasonability, and cannot stand. Ideally, courts would always interpret statutes in direct conjunction with changing conditions, yet such situations will rarely occur. Instead, courts must be allowed a range of interpretations that fall between an originalist interpretation and the limiter. If conditions change so much as to transcend the boundaries of the limiter, legislative reform is necessary.

E. *Applying the Test:* Walters *and* Robinson *from a Holistic Perspective*

1. *Walters*

A court applying a holistic hermeneutic model to determine the proper counting methodology for categorizing employers that fall within the statutory ambit of Title VII begins with an analysis of the statutory text.[292] An interpreting judge must employ the reasonable enacting legislative paradigm to determine whether an enacting legislator could fairly construe the phrase "for each working day in each of twenty or more calendar weeks" to accommodate the changing American labor market.[293]

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[290] This counterfactual approach is both affected by and responsive to changing conditions while attempting to preserve the interests and limiting principles of both the enacting legislature and contemporary society.

[291] The authors acknowledge the subjective nature of the phrase "reasonable," but note that such a standard has been used successfully as a limiting principle throughout our common law heritage.

[292] Beginning with the statutory text does not necessarily suggest a heightened degree of importance of the statutory text, rather it represents a starting point in the holistic model.

[293] The phrase "for each working day" appears in three additional congressionally enacted anti-discrimination statutes. *See* Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1994); The Family Medical Leave Act, ("FMLA"), 29 U.S.C. § 2611(4)(A)(i) (1994); and the Americans With Disabilities Act, 42 U.S.C. § 12111(5)(A) (1994). When enacting the FMLA, Congress explicitly declared its intention to construe the phrase "for each working day" pursuant to the payroll method. Both the House and Senate Committee Reports explain that the phrase "for each working day" is intended to mean "'employ' in the sense of maintain on the payroll." H.R. REP. No. 103-8, pt. 1, at 33 (1993); and S. REP. 103-3, at 21–22 (1993) *reprinted in* 1993 U.S.C.C.A.N. 23–24. Additionally, the Department of Labor explicitly included the payroll method in its regulations implementing the FMLA: "Any employee whose name appears on the employer's payroll will be considered employed each working day

The conjunctivity between changing conditions and a reasonable extension of the text is well supported. Justice Scalia's opinion recognizes that the text reasonably supports the payroll counting methodology by relying upon midweek employment changes to give the phrase operative effect.[294] The EEOC reached this same conclusion in its policy and procedures manual.[295] Additionally, subsequent civil rights enactments employing the phrase "for each working day" specifically require the payroll counting methodology to account for midweek employment changes.[296]

The legislative history also lends itself to an expansive reading of the coverage provision. The documentary history suggests that Senator Dirksen's incorporation of the phrase "for each working day" was derived in part from the UCA's definition of employer into Title VII and the subsequent revenue rulings that interpreted the phrase in accordance with a payroll approach. Although this history is certainly not dispositive of the issue, nothing in the legislative history suggests that Congress ever intended contrary results. Despite the paucity of determinative clues provided by the documentary history and the fallacies inherent in arguing in the negative, an enacting legislator could reasonably interpret the legislative history as evincing a more expansive approach.

The purpose underlying Title VII additionally supports a liberal reading of the jurisdictional phrase. The drafters of Title VII clearly intended to eradicate discrimination in the workplace. The payroll method best effectuates this purpose. The day-by-day method categorically excludes several types of hourly paid employees from antidiscrimination protection including: (1) employees who take unpaid leave on a particular day; and (2) employees who are not physically present on a particular day due to flextime, compressed workweeks, or illness. The day-by-day method, while excluding the part-time hourly paid employees discussed above, simultaneously includes all part-time hourly workers who are physically present if only for one hour per day. Thus, courts

of the calendar week, and must be counted whether or not any compensation is received for the week." Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. Part 825, § 825.105(b)).

[294] *See Walters*, 117 S. Ct. at 665.

[295] *See Policy Guidance: Whether Part-time Employees are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, II EEOC COMPL. MAN. (Bna) No. 139, Apr. 20, 1990, at N:3311–16. *See also*, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 2 (1966) (citing General Counsel Opinion dated May 11, 1966).

[296] *See supra* note 293.

that use the day-by-day method count employees who work one hour for five days of a working week (a total of five hours) while ignoring employees who work eight hours a day for four days of a five day work week (a total of thirty-two hours). A person working four ten-hour days would not count as an employee, whereas an employee working one hour a day for five days in a workweek would count toward the jurisdictional minimum. This distinction seems illogical and carries significant practical consequences.

The day-by-day approach generates yet another set of inconsistent results in its distinction between hourly workers on paid and unpaid leave. Hourly workers on paid leave would be counted under the day-by-day approach, while hourly workers on unpaid leave—such as for bereavement, jury duty, or family or medical leaves are not counted. The day-by-day method, therefore, enables employers to discriminate at will against unsuspecting part-time workers who take a day of unpaid leave. Although employment applicants would still enjoy Title VII protections, hourly workers who take a day off would, ironically, be deprived of the same protections. Even a strained reading of the documentary history of Title VII does not support such irrational categorical exclusions.

An examination of the competing interests that underlie the jurisdictional provision supports an expansive reading of the phrase "for each working day." The limiting of Title VII's protections to employers with less than fifteen employees was designed to protect small businesses from the burgeoning costs of eliminating discrimination.[297] The payroll method places a relatively modest encumbrance of the forbearance from employment discrimination upon the small business employer. The payroll method requires an employer to examine payroll records to determine which employees were on the payroll for a particular week. In contrast, the day-by-day method requires an incredibly complex and expensive factual inquiry. A small employer must incur the costs of examining payroll registers, time cards, tax records, work diaries, pay-stubs and other documents for each working day of each year subject to dispute in order to determine the number of employees at work on each day, the method

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[297] Congress retained a limited small business exemption out of a continued concern "with the impact of additional federal regulations on smaller businessmen." 118 CONG. REC. 4907 (1972) (Statement of Sen. Harrison Williams (D-N.J.)

of pay received by each employee, and the number of employees on paid and unpaid sick leave. This inquiry becomes more complex and burdensome on employers that provide non-traditional forms of compensation for non-working days.

Additionally, financial burdens placed upon the small employer from the payroll method are necessitated by the changing American labor market. Nearly 1.3 million employers, accounting for approximately 25 million workers, annually employ between ten and forty-nine workers.[298] The day-by-day methodology enables these employers to evade Title VII by manipulating the length of the workweek, weekly employment schedules, and the form of compensation paid.[299] Evading heightened Title VII requirements, does not, however entirely exempt small employers from the burden of eliminating employment discrimination. Numerous state antidiscrimination laws and federal civil rights protections currently apply to small employers.[300] However, some states have a fifteen employee jurisdictional requirement.[301] Consistency among state laws and policy principles suggests the imposition of the payroll method.

Furthermore, changing conditions themselves mandate careful consideration in determining the proper counting methodology for Title VII jurisdiction. Whereas the average employee worked a traditional schedule with traditional hours in 1964, many workers today endure an eclectic mix of part-time jobs, nontraditional workweeks, and irregular scheduling. Combined with the development of flex-time, new variations in overtime laws, and other factors, these changes have created an environment substantially at odds with the day-by-day method. Few, if any, legal scholars would argue that Congress intended Title VII to become less and less applicable in the face of such changes.

Finally, the day-by-day approach is inconsistent with prior Supreme Court precedent pertaining to the definition of employee. The Supreme Court "ha[s] said on several occasions that when Congress uses the term 'employee' in a statute that does

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[298] BUREAU OF CENSUS, DEP'T OF COMM., COUNTY BUSINESS PATTERNS 1993 tbl. 1b (1995).

[299] For example, under the day-by-day approach, an employer could implement a compressed workweek of ten hours a day, four days a week. Employees within this system would not be counted despite working the same number of hours as an employee working five eight-hour days.

[300] *See, e.g.*, CAL. GOV'T CODE § 12926(d) (West Supp. 1996) (five employees); COLO. REV. STAT. § 24-34-401 (1988) (one employee); CONN. GEN. STAT. ANN. § 46a-51(10) (West 1995) (three employees).

[301] *See, e.g.*, ILL. COMP. STAT. ANN. ch. 775 para. 5/2-101(B)(1)(a) (1993).

not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m] . . . . In the past, when Congress has used the term "employee" without defining it, [the Court has] concluded that Congress intended to describe the conventional master-servant relationship understood by common-law agency doctrine.'"[302] It is not possible to read the day-by-day method's categorical exclusion of numerous types of hourly paid employees as consistent with the common-law agency doctrine.

A holistic consideration of the above factors from the relevant paradigm generates a single conjunctive approach: recognition of the payroll method. The hermeneutic limiter formed by holistically considering the text, documentary history, legislative purpose, legislative intent, policy concerns, competing underlying interests, and prior Supreme Court precedent does not prohibit the reasonable extension of Title VII's jurisdictional provision in accordance with the changing American labor market by invoking the payroll counting methodology.

2. *Robinson*

Again, the application of the holistic model to determine whether former employees are protected against the antiretaliation provisions of section 704(a) begins with an examination of the textual language of the statute. An interpreting judge must employ the reasonable enacting legislative paradigm to determine whether the text of section 704(a) pertains to former employees.[303] In contrast to the *Walters* decision, an examination of the text reveals an obvious disjunctivity between the plain meaning and the extension of the text to cover former employees. This disjunctivity becomes the focus of the analysis. Ultimately, changing conditions mandate an interpretation that no

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[302] NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 94 (1995) (citations omitted).

[303] Eskridge has written about Title VII textual ambiguities, stating that Congress left many phrases or words undefined, including "discrimination," a word that is an integral element of Title VII's overall purpose. Given the importance of such a word, it can hardly be deemed a legislative oversight, but rather a delegation of interpretative authority. Such intentional ambiguities can be explained by alternative theories, but Eskridge suggests that Congress intentionally left these decisions to the courts. *See* Eskridge, *supra* note 5, at 1490–92.

longer is in congruence with the plain text in order to effectuate congressional intent or another compelling interest.[304]

Deconstruction of the various principles involved reveals strong values embedded in both the textualist and intentionalist approaches. Textualist interpretations insist that "employee" is unambiguous and clearly set forth by Congress to encompass only those persons currently employed by an employer.[305] This principle serves to protect employers against expansive and costly overinterpretations of the text that would leave them liable for acts of discrimination that may have occurred years before or under the management of supervisors long gone. Further, a narrow textualist interpretation leaves retaliatory acts against former employees to the state civil rights agencies and common law remedies, an approach favored by many conservatives.[306] This approach, while preserving valuable limiting principles, does not comport with either congressional intent or broad policy principles. Clearly, a textualist interpretive methodology is disjunctive with the expansion of section 704(a) to former employees.

Despite the tension between a strict and liberal interpretation of section 704(a), intentionalist principles dictate a broad holding.[307] Although legislative history does not conclusively support either an expansive or narrow view,[308] the fundamental purpose

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[304] Justice Scalia himself acknowledged the importance of conditions unforeseen by Title VII's enacting legislators, stating that some Title VII provisions extend to prohibit actions that are "not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 118 S. Ct. at 1002.

[305] The strict textual interpretation of the word "employee" offered in the Fourth Circuit's *Robinson* opinion was supported by little more than a judicial finding that the word "employee" was unambiguous. *Robinson*, 70 F.3d 325. In a stark reminder of the capricious nature of even textualist cononical methodology, a unanimous Court found that Congress used the term in numerous contexts and with varied meanings within the statutory language of Title VII. In an attempt to preserve the facade of textualist interpretive authority, Justice Thomas' opinion states that "those examples . . . demonstrate that the term 'employees' may have a *plain meaning* in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts"). *Robinson v. Shell Oil*, 117 S. Ct. 843, 846–48 (1997) (emphasis added). Justice Thomas failed to explain why a phrase that appears to be so unambiguous "at first blush" could require such further inquiry that discovers definitions that vary from statutory section to section. *Id.* at 846.

[306] *See generally Robinson*, 70 F.3d 325 (arguing that such remedies provide adequate protections against retaliation by former employers).

[307] *See* United States v. Ron Pair Enters. Inc., 489 U.S. 235, 242 (1989) (holding that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [when] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls.") (citations omitted).

[308] *See* Interpretive Memorandum on Title VII (1964), *reprinted in* U.S. Equal Employment Opportunity Comm'n, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 3040 (1969); *see also* Patricia A. Moore, *Parting is Such Sweet*

of Title VII calls for the inclusion of former employees within section 704(a). Courts have consistently upheld the broad remedial purpose of Title VII,[309] which is to eradicate workplace discrimination.[310] Such a purpose clearly comports with a liberal application of section 704(a).[311]

Indeed, a narrow holding in *Robinson* would virtually sanction post-termination retaliation by employers against workers, and given today's dynamic labor market, would thereby undermine the very purpose of Title VII. In an economy more and more reliant upon temporary workers, today's average worker changes jobs several times in a career and has become increasingly reliant on fair references and otherwise equitable treatment by former employers.[312] Finally, preclusion of Title VII retaliation claims by former employees permits employers to indiscriminately harass former employees who have filed discrimination claims.[313] Such an outcome runs counter to both Congress's 1964 intent and the realities of today's labor market.

For Title VII to remain true to its purpose in today's changing labor market, the concept of the employee needs to encompass

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Sorrow: The Application of Title VII to Post-Employment Retaliation, 62 FORDHAM L. REV. 205, 210 (1993) ("the legislative history provides no guidance as to whether Congress intended post-employment retaliation to be covered under Title VII.").

[309] *See* Rutherford v. American Bank, 565 F.2d 1162, 1165 (10th Cir. 1977); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977) (stating that courts have historically resolved ambiguities in remedial statutes like Title VII "in favor of those whom the legislation was designed to protect").

[310] *See, e.g.*, Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (stating that Title VII is a Congressional mandate that racial discrimination in the workplace will not be tolerated and reaffirming that courts should interpret Title VII language liberally).

[311] While correct in its decision, Justice Thomas' stretched interpretation of "employee" is an inadequate attempt to feign intentionalist jurisprudence, and it is this incongruity that makes the Robinson decision so enigmatic. The Court rightly concludes that former employees should receive section 704(a) protections. However, it does so without recognizing the important public policy and intentionalist considerations that should go into such an analysis. Furthermore, Justice Thomas' finding that the term "employee" is inherently ambiguous defies logic; instead of acknowledging that other concerns must play a role *even when the text seems clear*, the Court preserves the facade of traditional statutory interpretation by claiming ambiguity in the simple word "employee."

[312] *See* Sandra Tafuri, *Title VII's Antiretaliation Provision: Are Employees Protected After the Employment Relationship Has Ended?*, 71 N.Y.U. L. REV. 797, 799–800 (1996) (stating that a narrow interpretation of section 704(a) would give former employers "enormous power to derail former employees' subsequent careers" and further noting that former employers have the "unique power to control the favorableness of recommendations, and in some industries, even have the power to blacklist employees").

[313] *See* Bilka v. Pepe's Inc., 601 F. Supp. 1254, 1259 (N.D. Ill. 1985) (stating that a narrow interpretation of section 704(a) would allow employers to "easily retaliate against former employees against whom they have discriminated").

the nexus of the employer-employee relationship. A literal interpretation serves only to minimize stale claims, whereas the inclusion of former employees advances the antidiscrimination principles upon which Title VII was founded.[314] Such an interpretation also comports with several pre-*Robinson* Circuit Court decisions.

A broad interpretation of section 704(a) both advances broad-based policy concerns and preserves statutory consistency. While state law and other common-law protections could conceivably cover some of the harsh results of a narrow interpretation, a broad holding is more consistent with general public opinion regarding employer discrimination. This approach is also consistent with prior court constructions of similar antidiscrimination provisions, like the EEOC's,[315] which have held that the critical factor for former employee protections is the necessary nexus between the discriminatory act and the employer-employee relationship.

Prior case law also supports a broad reading. The Supreme Court has held that if the employer-employee relationship is linked to a retaliatory act, then former employees are covered. Furthermore, seven Circuit Courts have held that section 704(a) covers former employees,[316] while only two Circuit Courts have dissented.[317] In cases of textual incongruity, the Supreme Court has articulated support for inquiry into extrinsic sources for determination of Title VII language.[318]

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[314] *See, e.g.*, 100 Cong. Rec. 13, 169 (1964), *reprinted in* U.S. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3119 (1969) (stating that Title VII was to serve as a "national policy of nondiscrimination" that would "forbid [d]iscrimination by those who control employment").

[315] *See, e.g.*, EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) (applying anti-retaliation protections for former employees covered under the Age Discrimination in Employment Act, despite statutory language nearly identical to § 704(a)); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972) (holding that Fair Labor Standards Act protections extend to former employees).

[316] *See* Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198–200 (3d Cir. 1994), *cert denied*, 117 S. Ct. 1087 (1997); EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1331 (5th Cir. 1991); Bailey v. USX Corp., 850 F.2d 1506, 1509–10 (11th Cir. 1988); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other grounds by* Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1481–82 (9th Cir. 1987); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977). *See also* EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) (implicitly validating findings of other courts that § 704(a) applies to former employees); Passer v. American Chem. Soc'y, 935 F.2d 322, 330–31 (D.C. Cir. 1991) (holding that ADEA's antiretaliation provision is applicable to former employees covered under the ADEA).

[317] Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *rev'd* 519 U.S. 337 (1997) (holding the term "employees" as used in § 704(a) includes former employees); Reed v. Shepard, 939 F.2d 484, 492–93 (7th Cir. 1991).

[318] Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 205–06 (1991)

Finally, any reading of Title VII must take into account current labor conditions. Unlike the workers of the 1960s, many of today's workers move from job to job—and in the growing high-tech sector, among a shrinking number of employers. As a result, workers are increasingly dependent upon former employers for career-changing references. In this context, permitting retaliation and discrimination against former employees would undercut Congress's goal of ending workplace discrimination.

In combining these interests to form the hermeneutic limiter, greater weight must be placed on those interests that are most affected. For example, the textualist interest in protecting businesses against stale claims and claims made against supervisors long since departed from the company is minimal in comparison to Congress's stated intent that Title VII is to serve as a broad antidiscrimination statute, yet protecting against false or stale claims nonetheless remains important in defining the limiting principle. Likewise, the increasing numbers of workers who move frequently between jobs dictates a heavy weight be attached to changing conditions as a constructive element of the limiter, while conservative policy concerns about preserving statutory predictability are lessened in light of the need to provide access to the remedial mechanisms of Title VII and discourage employers from retaliating against employees who file EEOC discrimination claims.

By excluding claims that fall outside this nexus, textualist interests can still be preserved. For example, the hermeneutic limiter would prohibit a person from suing a former employer for non-job related racist comments made after termination, as well as prevent Title VII claims for retaliatory harassment when neither the supervisor nor the employee remained employed with the original employer. Such cases fall outside the employer-employee relationship and are thus precluded by the hermeneutic limiter from being included in section 704(a) protections.

Overall, the hermeneutic limiter created by balancing the interests and principles embodied in the statutory text, legislative history, congressional intent, policy objectives, case-law precedent, and changing conditions can support only one interpreta-

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(drawing upon legislative history, congressional "intent," and other extrinsic sources to broadly interpret and apply Title VII); United Steelworkers of Am. v. Weber, 443 U.S. 193, 200–04 (1979) (using congressional intent to find affirmative-action plans permissible under Title VII, despite a possible liberal reading of contradictory statutory language).

tion: that "employee" as defined in section 704(a) includes former employees to the extent that the discriminatory or retaliatory act arose from the employer-employee relationship. A holistic examination of these factors, from the perspective of an enacting legislator aware of the complex and variable changing circumstances, therefore lends itself to a broad interpretation of "employee" in section 704(a) that includes former workers to this extent.

CONCLUSION

Despite the overwhelming changes in the American labor market since 1964, courts continue to interpret Title VII in a manner inconsistent with contemporary conditions. Growing reliance on part-time labor, flex-time, nontraditional schedules, and contingent workers have together made an originalist interpretation of Title VII unworkable. While this growing problem has sparked calls for reform, a comprehensive plan for adaptive interpretation has remained elusive.

Traditional canons of interpretation provide some assistance in the construction of a new model, but the Supreme Court's current jurisprudence attempts to reassert the authority of a Byzantine array of interpretive methodologies. Textualism, intentionalism, and nontraditional approaches to statutory hermeneutics all fail to meet the needs of a changing world. Instead, the use of incompatible methods has created a conglomeration of mixed messages and incoherent jurisprudence that begs for a new interpretive scheme.

By combining the important limiting principles of traditional methods with an acceptance of the ever-changing world in which statutes operate, a holistic approach can help solve the aforementioned problems. Integrating the values of dynamic statutory interpretation with a holistic hermeneutic analysis allows courts to insure the viability of large compromise statutes in a rapidly changing society. Such an approach is both jurisprudentially sound and unquestionably responsible; were Title VII to be restricted to a narrow 1964 interpretation, society would be left without the essential protections and values envisioned by its framers and necessary for the preservation of basic civil rights.

Title VII remains the twentieth century's most comprehensive and valuable piece of civil rights legislation. Its basic principles

of workplace equality stand as a cornerstone of American civil rights. While Title VII's framers could scarcely have envisioned the demographic and workplace changes that render much of its "plain text" obsolete, it also seems unlikely that they intended such a monument to become useless over the next half century. Discrimination remains an unfortunate reality in today's labor market, and if Title VII is to preserve its usefulness into the twenty-first century, a holistic method of statutory interpretation is essential. Only by recognizing the dynamic world in which we live and allowing the law to accommodate these changes can courts continue Title VII's legacy of nondiscrimination and equality.

RECENT LEGISLATION

CAMPAIGN FINANCE REFORM

In the face of congressional gridlock over federal campaign finance reform,[1] the state of Vermont has embarked on "the nation's most comprehensive overhaul of campaign finance laws"[2] in an ambitious effort to clean up state politics. Enacted as Act 64,[3] the Vermont statute represented a bold policy move that assaults Supreme Court precedent on multiple fronts. Critics immediately attacked the Act, and one group brought a suit in federal district court raising First Amendment challenges to the Act's disclosure and reporting requirements. The challenged provisions, however, which aim to inform Vermonters about who funds electioneering advertisements, do not impermissibly abridge freedom of speech because they are narrowly tailored to further Vermont's compelling interest in curbing the abuses that plague both the federal campaign finance system and its own.

In 1997, Vermont's legislature passed Act 64 to curtail the rising costs of state and local campaigns and the pervasive use of "soft money" in elections.[4] This first state legislative enactment

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[1] On September 10, 1998, the Senate voted 52 to 48 to end debate on the Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997) (popularly known as the McCain-Feingold bill), killing the bill just one month after the House of Representatives voted overwhelmingly (252 to 159, despite opposition from Republican leadership) in favor of the Bipartisan Campaign Integrity Act of 1997, H.R. 2183, 105th Cong. (1997) (popularly known as the Shays-Meehan bill). *See* Helen Dewar, *Campaign Finance Buried for Year; GOP Senators Sustain Filibuster*, WASH. POST, Sept. 11, 1998, at A4. The Senate's filibuster reaffirmed the perception that Congress will not fix a system that nine out of ten Americans believe is broken. *See* Michael Lewis, *The Subversive*, N.Y. TIMES, May 25, 1997, at F58 (citing a New York Times/CBS News poll showing that "while almost 90 percent of the electorate say that money is corrupting politics, only 23 percent expect Congress to do anything about it."); *see also* Scott Shepard, *Pioneering Campaign Reform, States Keeping Eye on Success of Taxpayer-Financed Elections in Maine*, AUSTIN AM.-STATESMAN, Apr. 26, 1997, at A1, *available in* 1997 WL 2821259 (citing a Fox News poll finding that more Americans (48%) thought they would see Elvis before real campaign finance reform from the 105th Congress (31%)).

[2] Bob Hohler, *States Taking Initiative On Voting Reform: Vermont Backs Public Financing*, BOSTON GLOBE, June 9, 1997, at A3.

[3] An Act Relating to the Public Financing of Election Campaigns, Disclosure Requirements and Limits on Campaign Contributions and Expenditures, No. 64 (June 26, 1997) (on file with author).

[4] *See* Vermont Right to Life Comm. v. Sorrell, No. 2:97-CV-286, 1998 WL 601346 at *2 (D. Vt. Sept. 9, 1998). Under federal law, "hard money" is subject to contribution limits and source prohibitions while "soft money" is unregulated. *See* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1324–25 (1998). As long as a political party does not coordinate its activities with a particular

of comprehensive "clean money" campaign finance reform consists of three main elements.[5] First, it allows candidates for governor and lieutenant governor to qualify for full public funding if they raise a sufficient number of small "qualifying contributions" in a specified time period[6] and agree not to take any other private money.[7] Second, it requires that *all* statewide candidates adhere to strict contribution and spending limits regardless of whether the candidate opts for public financing,[8] making Vermont the first state directly to challenge *Buckley v. Valeo*,[9] the Supreme Court's landmark 1976 decision striking down mandatory candidate spending limits.[10] Finally, Act 64 includes disclosure and reporting requirements for "political advertisements" and "mass media activities."[11]

The second and third elements of Act 64 work in tandem to circumscribe the ability of political parties and independent advocacy groups to influence elections through so-called "issue ads." Issue advocacy has wreaked havoc on the federal campaign finance system.[12] During the 1996 election cycle, the national

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candidate, the current system allows the party to use exclusively soft money to fund activities, including political advertisements, which indirectly benefit a particular candidate. *See id.*

[5] Vermont's law was modeled after the Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A, §§ 1121–1128 (West Supp. 1997). The Maine Act, however, was not legislatively promulgated; rather, it was approved by voter referendum in November, 1996. *See* Michael E. Campion, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L. REV. 2391, 2394–95 (1998). Similar referenda were passed during the 1998 elections in Massachusetts and Arizona. *See* Julia Malone, *Election '98 Issues: Special Interest Groups' Donations Fueled Races Nationwide*, ATLANTA CONST., Nov. 5, 1998, at K4.

[6] *See* VT. STAT. ANN. tit. 17, §§ 2854–2855 (LEXIS Supp. 1998). The qualification period begins on February 15 of each even-numbered year and ends on the date on which primary petitions must be filed. *See id.* at § 2851(4).

[7] *See id.* at § 2853(b).

[8] *See* VT. STAT. ANN. tit. 17, §§ 2805, 2805a (LEXIS Supp. 1998). Act 64 also assists challengers in overcoming an incumbent's name recognition advantage by permitting challengers to spend 15% more than incumbents. *See id.* at § 2805a.

[9] 424 U.S. 1 (1976) (*per curiam*).

[10] *See id.* at 44–60. Other states, most notably Maine, have sought to circumvent *Buckley* rather than attack it by conditioning public funding on candidates' voluntary acceptance of spending limits. *See* Campion, *supra* note 5, at 2394. By choosing the path of less resistance, Maine's law stands a better chance of being upheld. In fact, the Sixth Circuit struck down a Cincinnati ordinance similar to Act 64 which limited campaign expenditures for city council candidates. *See* Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 1998 WL 651027 (U.S. Nov. 16, 1998) (No. 98-454). The Supreme Court denied certiorari amidst speculation, fueled by Justice Kennedy's characterization of *Buckley* as "a case that ought to be looked at again," that the Court was ready to reevaluate the 1976 decision. *See Re-forming Reform? Justice Kennedy Signals Interest in Revisiting Issue*, SACRAMENTO BEE, Sept. 10, 1998, at B8.

[11] VT. STAT. ANN. tit. 17, §§ 2881–2883 (LEXIS Supp. 1998).

[12] *See* David A. Pepper, *Recasting the Issue Ad: The Failure of the Court's Issue Ad-*

political parties circumvented federal limits on contributions to candidates by using much of the $250 million they raised in soft money[13] to produce thinly-veiled candidate campaign ads.[14] These so-called "issue ads" could be funded with soft money simply because the ads did not exhort voters to vote for or against a particular candidate.[15] Individuals, corporations, and unions thus had a direct impact on the election in a way that the Supreme Court previously deemed corrupting.[16]

By essentially defining soft money out of existence, Act 64 prevents political parties and political action committees ("PACs") from funneling large contributions to candidates. Act 64 classifies "soft money" as a direct contribution subject to strict limits and also places a ceiling on the amount a party or PAC can raise from a single source.[17] Moreover, "related campaign expenditures made on a candidate's behalf" (i.e., those made with a candidate's approval or cooperation) are attributed to the candidate and are subject to the Act's expenditure limitations.[18]

The political parties, however, were not alone on the issue advocacy bandwagon in 1996. Independent groups such as the AFL-CIO, the National Rifle Association, the Sierra Club, and the Christian Action Network climbed aboard to collectively

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vocacy Standard, 100 W. VA. L. REV. 141, 167–70 (1997) (chronicling the problems caused by soft money financed issue ads at the federal level).

[13] This represented a thirteenfold increase from the $19.1 million in soft money expended during the 1980 election cycle and was attributable in large part to increased issue advertising. *See* ANTHONY CORRADO ET AL., CAMPAIGN FINANCE REFORM: A SOURCEBOOK 173, 175 (1997).

[14] *See, e.g.*, Jill Abramson & Leslie Wayne, *Democrats Used the State Parties to Bypass Limits*, N.Y. TIMES, Oct. 2, 1997, at A1.

[15] *See id.*

[16] *See* Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 655 (1990) (upholding Michigan's ban on independent expenditures by corporations); *Buckley* 424 U.S. at 25–30 (upholding federal limits on direct contributions to candidates).

[17] *See* VT. STAT. ANN. tit. 17, § 2805(a), (b) (LEXIS Supp. 1998) (imposing a $300 limit on political party and political committee contributions to a candidate during any two-year election cycle and a $2,000 limit on contributions from a single source to a political party or political committee). Act 64 also stems the flow of out-of-state contributions by forbidding candidates, parties, and political committees from accepting more than 25% of their total contributions from non-residents or from political committees or parties not organized in Vermont. *See id.* at § 2805(c).

[18] *Id.* at § 2809. This section also presumes that "an expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are associated with the political party or political committee making the expenditure" is a "related campaign expenditure made on a candidate's behalf." *Id.* at § 2809(d). Act 64's attempt to eradicate soft money may run afoul of Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (striking down federal limits on political party's independent expenditures on ads attacking a candidate of the opposing party).

spend an estimated $2.2 billion without having to report a dime under federal law.[19] In response, Act 64 broadens disclosure requirements, embracing the overarching principle that "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best disinfectant; electric light the most efficient policeman."[20] Act 64 defines "political advertisement" as "any communication . . . which expressly or *implicitly* advocates the success or defeat of a candidate"[21] and requires inclusion of the name and address of the person paying for the ad and the name of the candidate, party, or political committee by or on whose behalf it is published.[22] Act 64 also contains an innovative reporting provision. Any person who, during the thirty days before an election, spends $500 or more on specified "'mass media activities' . . . which include the name or likeness of a candidate for office,"[23] must report any such expenditures to the candidate whose name or likeness is included and to the secretary of state within twenty-four hours of making the expenditure.[24]

One of Act 64's critics, the Vermont Right to Life Committee ("VRLC")[25] filed suit in Vermont District Court, claiming Act 64's disclosure and reporting requirements were unconstitutionally vague and overbroad.[26] Vermont Attorney General William H. Sorrell countered by contending that the challenged requirements were narrowly tailored to promote the State's compelling interests in: "1) providing the electorate with information about the origin and use of campaign funds; 2) deterring actual corruption and the appearance of corruption by publicizing large contributions and expenditures; and 3) gathering information necessary to detect violations of contribution limitations."[27] In response, VRLC bombarded Judge William K. Sessions, III with

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[19] *See* Thomas Fleming, *The Long, Stormy Marriage of Money and Politics . . . or Why in America Campaign-Finance Reform Never Succeeds*, AM. HERITAGE, Nov. 1998, at 53 (citing a study by the Center for Responsive Politics).

[20] Louis Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

[21] VT. STAT. ANN. tit. 17, § 2881 (LEXIS Supp. 1998) (emphasis added).

[22] *Id.* at § 2882.

[23] These activities include television commercials, radio commercials, mass mailings, literature drops, and central telephone banks. *See id.* at § 2883.

[24] *See id.* The McCain-Feingold bill contains a similar reporting requirement. *See* S. 25, 105th Cong. § 241 (1997).

[25] The VRLC is a non-profit group that, among other things, distributes publications stating candidates' positions on abortion issues.

[26] *See* Vermont Right to Life Comm. v. Sorrell, No. 2:97-CV-286, 1998 WL 601346 at *2–*3 (D. Vt. Sept. 9, 1998).

[27] *Id.* at *7 (citing *Buckley*, 424 U.S. at 66–68).

a blizzard of dictionary definitions for the word "implicitly," arguing that Act 64's language was impermissibly vague and thereby chilled constitutionally protected issue advocacy.[28]

Judge Sessions "[sought] to give force to the equally weighty First Amendment principles on both sides of the controversy."[29] He employed a maneuver used by the *Buckley* Court itself to salvage the Federal Election Campaign Act's ("FECA") disclosure provisions. In *Buckley*, the Supreme Court narrowly construed FECA's limits on expenditures made "for the purpose of . . . influencing" the nomination or election of candidates for federal office as reaching "only funds used for communications that *expressly* advocate the election or defeat of a clearly identified candidate."[30] In a frequently cited footnote, the Court defined "express advocacy" as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[31] The Court reasoned that this bright-line rule was necessary because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[32]

Manipulating the *Buckley* approach, Judge Sessions held that Act 64's disclosure and reporting requirements could reach only "communication that in express terms advocates the election or defeat of a clearly identified candidate."[33] In so holding, Judge Sessions first narrowly construed the word "implicitly" in section 2881 to mean "unambiguously" rather than "impliedly."[34] He then grafted an express advocacy requirement onto section 2883, despite the fact that section 2883 is unambiguous on its face and makes no reference to candidate advocacy.[35] Under Act 64 as construed, Judge Sessions was able to reject VRLC's constitutional challenge because "[n]either the voter guides nor any

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[28] *See id.* at *9; *see also* Ross Sneyd, *Lawyers Argue Whether Campaign Finance Law is Constitutional*, AP, July 6, 1998, *available in* 1998 WL 7428148.
[29] *See Sorrell*, 1998 WL 601346, at *11.
[30] *Buckley*, 424 U.S. at 80 (emphasis added).
[31] *Id.* at 44 n.52, 80 n.108.
[32] *Id.* at 42.
[33] *Sorrell*, 1998 WL 601346, at *10.
[34] *See id.*
[35] *See id.*

other VRLC-sponsored document . . . expressly call for a candidate's election or defeat."[36]

Judge Sessions's ruling raises as many issues as it settles. As a threshold matter, it is unclear that Judge Sessions possessed the authority as a federal judge to narrowly construe provisions of Act 64 that Vermont courts have yet to interpret.[37] Assuming such authority exists, however, Judge Sessions's incorporation of an express advocacy requirement into section 2883 to cure its overbreadth appears ill-conceived. Though section 2883 technically may apply to non-campaign related ads,[38] it is well settled that a statute is not impermissibly overbroad when the burden it places on protected speech is minimal when compared to the law's legitimate applications.[39] Requiring advocacy groups to report expenditures on mass media activities employing the name or likeness of a candidate in the period immediately before an election unquestionably assists candidates in responding to last-minute negative attack ads by "provid[ing] a greater likelihood that distortions and falsehoods in such ads can be exposed for what they are."[40] Section 2883 thus promotes speech by enabling candidates to respond to attacks which might otherwise go unrebutted.[41] This speech promoting effect substantially outweighs any incidental impact on non-campaign related ads, thereby mitigating section 2883's purported overbreadth.

Despite misconstruing section 2883, Judge Sessions stopped short of completely eviscerating Act 64's disclosure and reporting requirements by rejecting the so-called "magic words" test

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[36] *Id.* at *12.

[37] *See* Virginia Soc'y for Human Life, Inc. v. Caldwell, 152 F.3d 268 (4th Cir. 1998) (rejecting district court's authority to narrowly construe Virginia's recently amended campaign finance laws).

[38] *See Sorrell*, 1998 WL 601346 at *10 (noting that § 2883 would require that product or event advertisements employing the name or likeness of a candidate would have to be reported). Two Michigan courts recently struck down provisions similar to § 2883 as facially overbroad. *See* Planned Parenthood Affiliates of Mich., Inc. v. Miller, No. 98-73301-DT, 1998 WL 682940 (E.D. Mich. Sept. 21, 1998); Right to Life of Mich., Inc. v. Miller, No. 1:98-CV-567, 1998 WL 743712 (W.D. Mich. Sept. 16, 1998).

[39] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 773 (1982) (holding that a statute prohibiting distribution of depictions of sexual acts by minors was not overbroad despite the fact that "some protected expression ranging from medical textbooks to pictorials in the National Geographic" could come within the statute's purview).

[40] Decl. of Cheryl Rivers (Senate sponsor of Act 64 (D-Windsor)), App. 7 in Support of Defendant Intervenor's Motion for Summary Judgment, at 2, VRLC v. Sorrell, 1998 WL 601346 (D. Vt. Sept. 9, 1998) (No. 2:97-CV-286) (on file with author).

[41] *See* Campion, *supra* note 5, at 2426–28 (arguing that statutes promoting responsive speech do not unconstitutionally "chill" speech).

adopted by other courts in similar cases. In *Faucher v. FEC*,[42] for example, the First Circuit read the eight listed words and phrases in the *Buckley* footnote as talismanic language[43] even though the Supreme Court's use of the qualifier "such as" suggested that the list was merely exemplary. The Fourth Circuit relied on *Faucher* to hold that a commercial aired before the 1992 presidential election assailing the Clinton/Gore ticket's "militant homosexual agenda" did not constitute express advocacy.[44] Though the commercial employed sinister imagery, music, and voice-overs to paint the candidates' support of homosexual rights as a threat to traditional family values, the fact that the ad was "devoid of any language that directly exhorted the public to vote" proved dispositive.[45]

In contrast, both the Ninth Circuit and the Federal Election Commission ("FEC") have enunciated a more flexible standard. In *FEC v. Furgatch*,[46] the Ninth Circuit ruled that an ad entitled "Don't let him do it" (the "him" being President Carter), which was published in the *New York Times* one week before the 1980 presidential election, constituted express advocacy.[47] The court reasoned that "[a] test requiring the magic words 'elect,' 'support,' etc., or their perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the [FECA]."[48] Accordingly, the court held that a communication constituted express advocacy when "read as a whole, and with limited reference to external events, [it is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[49]

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[42] 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991).

[43] *See id.* at 470; *see also* Maine Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8, 12 (D. Me.) (noting that this "rigid approach" mitigates the chilling effect on speech by "permit[ting] a speaker or writer to know from the outset exactly what is permitted and what is prohibited."), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997).

[44] FEC v. Christian Action Network, 894 F. Supp. 946, 948 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996).

[45] *Id.* at 953. The Fourth Circuit later awarded the Christian Action Network attorneys fees and costs, finding that the FEC's position "if not assumed in bad faith, was at least not 'substantially justified.'" FEC v. Christian Action Network, 110 F.3d 1049, 1050 (4th Cir. 1997).

[46] 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987).

[47] *See id.* at 864-65.

[48] *Id.* at 863.

[49] *Id.* at 864. Under this contextual standard, subsequently codified by the FEC, *see* 11 C.F.R. § 100.22(b) (1998), an ad constitutes express advocacy only if it is "unmistakable and unambiguous, suggestive of only one plausible meaning," contains a "clear

Judge Sessions initially oscillated between *Furgatch* and *Faucher's* polar approaches, but then staked out a middle ground by relying heavily on *FEC v. Massachusetts Citizens for Life* ("*MCFL*"),[50] the lone Supreme Court case to revisit *Buckley*'s express advocacy standard. In *MCFL*, decided ten years after *Buckley*, the Court ruled that a pro-life newsletter crossed the line between "issue advocacy" and "express electoral advocacy" even though the message "was marginally less direct than 'Vote for Smith.'"[51] Repudiating the magic words test, Judge Sessions concluded (a lá *Furgatch*) that *MCFL* "made clear that a message of express advocacy could be conveyed even in the absence of the specific words the Court used for illustrative purposes in *Buckley*."[52] Two sentences later, however, Judge Sessions rejected the *Furgatch* test's reference to external events, stating (a lá *Faucher*) that the Supreme Court had "adopted a bright-line rule limiting the statute's reach to communications containing *explicit words* of advocacy of election or defeat of a candidate" even though such a strict interpretation "left a loophole for ingenious and resourceful persons and groups who . . . could circumvent the reporting and disclosure requirements." [53] Attempting to justify this middle path and reconcile the conflict amongst the circuits, Judge Sessions noted that even *Furgatch* defined express advocacy as containing an unambiguous exhortation to vote for or against a candidate.[54] He thus concluded, "If the Vermont legislature intended to regulate communications that not only expressly, but unquestionably advocate for or against a candidate, it is perhaps guilty of redundancy, but not of violating the First Amendment."[55]

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plea for action," is not "merely informative," and makes "clear what action is advocated." *Furgatch*, 807 F.2d at 864.

[50] 479 U.S. 238 (1986).

[51] *Id.* at 249. The newsletter was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," profiled candidates' positions on abortion issues, and stated "[n]o pro-life candidate can win in November without your vote in September" and "VOTE PRO-LIFE." *Id.* at 243.

[52] *Sorrell*, 1998 WL 601346, at *7.

[53] *Id.* at *8 (emphasis added).

[54] *See id.*

[55] *Id.* at *9. VRLC is contending on appeal that this sentence establishes an "unquestionably advocating" test similar to the *Furgatch* standard, arguing that it is possible to "unquestionably" advocate for a candidate's election or defeat without communicating that advocacy with explicit words. *See* VRLC, Memorandum In Support of Motion for Injunction Pending Appeal at 6–7, VRLC v. Sorrell, 1998 WL 601346 (D. Vt. Sept. 9, 1998) (No. 2:97-CV-286) (on file with author).

The Second Circuit, which will hear the case on appeal, has yet to side with either the Ninth or First Circuit's interpretation of *Buckley's* express advocacy standard.[56]

Should the Second Circuit fully embrace *Faucher*, it will render Act 64's disclosure and reporting requirements completely impotent. It takes neither an "ingenious" nor a "resourceful" person to evade those requirements under a magic words regime. Indeed, the stringent test "bars meaningful regulation of any political advertisements . . . so long as the sponsor of a political advertisement has access to a thesaurus providing substitutes for the words in the *Buckley* footnote."[57] As Judge Sessions himself acknowledged, even under his intermediate standard, advocacy groups can purposely eschew explicit words, opting for equally effective imagery and sound effects, to circumvent disclosure requirements just as the Christian Action Network did in attacking the Clinton/Gore "militant homosexual agenda."[58] Only the *Furgatch* reasonable man standard, which views the ad in its entire context, strikes the appropriate balance between regulating express advocacy and leaving room for legitimate issue advocacy.

In fact, the Supreme Court has never held that discussion of issues intrinsically merits greater First Amendment protection than discussion of candidates. Rather, *Buckley*'s distinction between independent and express advocacy was based largely on the proposition that the latter threatened to enhance actual and perceived corruption while the former did not.[59] Though *Buckley* struck down limits on independent expenditures,[60] the Court

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[56] The Second Circuit bypassed the issue in FEC v. Survival Educ. Fund, Inc., 65 F.3d 285, 290 (2d Cir. 1995). However, in FEC v. Central Long Island Tax Reform Immediately Comm. ("CLITRIM"), 616 F.2d 45 (2d Cir. 1980) (*per curiam*) (*en banc*), the Second Circuit adopted an intermediate approach reconcilable with Judge Session's holding. The *CLITRIM* court held, as Judge Sessions did, that disclosure requirements cannot reach implied advocacy. *See id.* at 53. However, in coming to that result, the *CLITRIM* court, like Judge Sessions, did not limit itself to a search for magic words, but rather sought an "*unambiguous statement* in favor of or against the election" of a candidate. *Id.* (emphasis added).

[57] *See* Vermont Public Interest Research Group ("VPIRG") et al., Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment at 12, VRLC v. Sorrell, 1998 WL 601346 (D. Vt. Sept. 9, 1998) (No. 2:97-CV-286) (on file with author) (VPIRG led a group of intervenors in defense of Act 64).

[58] *See supra* text accompanying notes 43–44, 53.

[59] *See Buckley*, 424 U.S. at 67, 80–81.

[60] *See id.* at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.")

carefully couched its analysis in the political environment of 1976, noting that "independent advocacy . . . does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[61] The Court thus left open the possibility that "unforeseen developments in the financing of campaigns might make the need for restrictions on 'independent expenditures' more compelling."[62]

Twenty years after *Buckley*, the magic words test has been exposed as playing a central role in widespread evasion of federal disclosure laws.[63] Judge Sessions agreed that such evasion indisputably "contributes to public cynicism about the integrity of the electoral system,"[64] and accordingly held that Vermont has "a crucial interest in curbing the excesses of soft money spending."[65] Judge Sessions properly recognized that the magic words test creates a distinction without a difference in political advertising because it undercuts the fundamental premise that voters

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[61] *Id.* at 46 (emphasis added); *see also* Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 617–18 (1996) (striking down FECA limits on political party expenditures made on behalf of candidates "absent convincing evidence" in the record or legislative findings suggesting such expenditures create "any special corruption problem.")

[62] FEC v. National Conservative Political Action Comm., 470 U.S. 480, 511 n.7 (1985) (White, J., dissenting).

[63] *See, e.g.*, Pepper, *supra* note 12, at 153–58; Abramson & Wayne, *supra* note 14, at A1; Michael D. Leffel, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 MICH. L. REV. 686, 688 (1996).

[64] *Sorrell*, 1998 WL 601346, at *11. The public is not alone in its cynicism. As one state politician colorfully put it:

> Independent expenditures is [sic] the biggest disaster in campaign finance. If it's for you, but doesn't fit your message, voters get confused. And that's the positive side. If it's negative, you're screwed. What remedy do you have? No one is accountable—not even your opponent.

Genevieve Anton, *Campaigning by Loophole: Confusing Law Gives Independent Organizations Free Rein*, COL. SPRINGS GAZETTE TELEGRAPH, July 26, 1998, *available in* 1998 WL 7990373 (quoting Colorado Rep. Russell George (R-Rifle)).

[65] *Sorrell*, 1998 WL 601346, at *11. Survey research conducted in April 1998 convincingly supports the proposition that independent issue advocacy undermines the integrity of Vermont's political system. *See* Decl. of Celinda Lake, Joint App. G in Support of Defendant's and Defendant Intervenor's Motion for Summary Judgment at 8, VRLC v. Sorrell, 1998 WL 601346 (D. Vt. Sept. 9, 1998) (No. 2:97-CV-286) (on file with author). Seventy-one percent of surveyed Vermont voters agree that "people and groups who pay for advertisements that favor or oppose candidates in an election often get special treatment from the candidates once they are in office." *Id.* Despite rampant public cynicism and disengagement, a majority of Vermonters also believe that Act 64's disclosure and reporting requirements will diminish the possibility of corruption. *See id.* at 10–11. Sixty-one percent believe Act 64 will enhance the integrity of Vermont's electoral process, and make elected officials more responsive to the concerns of average citizens as opposed to sponsors of political ads. *See id.* at 11. More than eight in ten voters believe they will make more informed voting decisions based on the information provided by Act 64's disclosure and reporting requirements. *See id.*

should know who pays for campaigns, inevitably undermining voters' confidence in the electoral system.

Tainted issue advocacy raises the specter of corruption, real and perceived, which the *Buckley* Court acknowledged justified regulation impinging on otherwise protected speech.[66] By explicitly renouncing the magic words test, Judge Sessions took a positive step in exposing the efforts of theoretically independent groups that pour millions of dollars into attack ads to assure there will be attentive ears to their causes in the state house. The struggle to draw a tenable express advocacy line in light of the realities of modern political advertising highlights the need for the Supreme Court to revisit this hotly contested area of law. For their part, Vermont's lawmakers have boldly sought to reinvigorate that state's democracy without trampling on its citizens' freedom of speech.

—*Andrew B. Kratenstein*

[66] *See Buckley*, 424 U.S. at 26–27; *see also* Pepper, *supra* note 12, at 170.

REGULATING THE INTERNET

On October 21, 1998, President Clinton signed into law the Child Online Protection Act ("COPA")[1] as part of the Omnibus Appropriations Act. The successor to the Communications Decency Act of 1996 ("CDA"),[2] COPA prohibits the knowing transmission "in interstate or foreign commerce by means of the World Wide Web [of] any communication for commercial purposes that is available to any minor and . . . is harmful to minors."[3] Like its predecessor, the COPA will soon be subject to intense judicial scrutiny.[4] Unlike the CDA, however, the COPA's narrowed scope of application and more precise definition of prohibited content are likely to withstand constitutional scrutiny.

The COPA is best analyzed by contrasting it to the Act that it replaced. Six provisions distinguish the COPA from the CDA. First, the COPA replaces the CDA's vague and undefined standard for prohibited transmission content,[5] with a prohibition on material that is "harmful to minors."[6]

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[1] H.R. 4328, 105th Cong., §§ 1401–1406 (1998) (to be codified at 47 U.S.C. § 230-1 (1998)).

[2] The CDA was struck down by the Supreme Court in *Reno v. American Civil Liberties Union,* 117 S. Ct. 2329 (1997). Congress responded quickly to the Court's invalidation of the CDA because the number of Internet users is growing exponentially, *see* H.R. REP. No. 105-775, at 7, 11 (1998) (number of Internet hosts has tripled since 1996 to more than 29.6 million, and number of Internet users is now at 70.2 million) and many Internet users are children. *See id.* at 11. Congress apparently fears that the Internet is becoming saturated with pornography, *see* H.R. REP. No. 105-775, at 9 (1998) ("there are approximately 28,000 adult Web sites promoting pornography on the Internet and these sites generate close to $925 million in annual revenues."); 144 CONG. REC. 9902-01, 9906 (1998) (statement of Rep. Billy Tauzin (R-La.)) ("virtually all the sites contain teasers that display sexual behavior, in an attempt to lure us into that site, us or our children"), and that contrary to the *Reno* Court's finding that "users seldom encounter [adult] content accidentally," children are very much at risk of "enter[ing] a sexually explicit site by accident." *Reno,* 117 S. Ct. at 2336; H.R. REP. No. 105-775, at 12. This is because Web sites that offer pornographic material often use "copycat" addresses that make use of only slight changes in addresses for sites that do not offer erotic content, *see* H.R. REP. No. 105-775, at 11 (1998) (citing examples of "copycat URLs" such as <www.whitehouse.com>, <www.betscape.com>, and <www.shareware.com>), and because even adult sites that contain a warning as to content will often have "sexually explicit material on the same page as the warning." H.R. REP. No. 10-775, at 12.

[3] 47 U.S.C. § 231(a)(1).

[4] Less than 24 hours after President Clinton signed the COPA, a coalition of civil liberties groups, Internet providers, publishers, and gay and lesbian activists filed a challenge to the COPA in the U.S. District Court for the Eastern District of Pennsylvania. *See* Complaint for Declatory [sic] and Injunctive Relief, *ACLU v. Reno,* (visited Nov. 20, 1998) <http://www.aclu.org/court/aclurenoII_complaint.html>.

[5] The CDA prohibited Internet transmissions that were "obscene or indecent" or "patently offensive." 47 U.S.C. § 223(a)(1)(B)(2) and (d)(1)(B).

[6] 47 U.S.C. § 231(a)(1). Paraphrasing language from various Supreme Court cases, Congress defined material that is "harmful to minors" as either "obscene" material or

Second, COPA's prohibition applies only to transmissions "by means of the World Wide Web," meaning "placement of material in a computer server–based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol."[7] This is an important distinction from the CDA, which applied to any transmission on "an interactive computer service."[8] As the House Report accompanying the bill makes clear, the COPA "does not apply to content distributed through other aspects of the Internet" such as e-mail, list-serv, USENET groups, Internet relay chat, telnet, or remote information retrieval using ftp or gopher.[9]

Third, the COPA only applies to communications made "for commercial purposes,"[10] meaning that "as a regular course of such person's trade or business, [the communication is made] with the objective of earning a profit."[11] The CDA had no such limitation in scope.

Fourth, unlike the CDA, the COPA specifically exempts carriers providing telecommunications services, businesses providing Internet access services or information location tools, and those "engaged in the transmission, storage, retrieval, hosting, format-

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material that—

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). The "harmful to minors" standard is part of a new congressional strategy to focus only on the area of *children's welfare* when dealing with obscenity on the Internet, rather than regulating obscene and indecent speech for everyone. The House Report accompanying the COPA makes frequent reference to "the dangers of exposing minors to harmful material." H.R. REP. NO. 105-775, at 11–12 (1998); *see* 144 CONG. REC. 9902-11, 9909 (statement of Rep. Sheila Jackson-Lee (D-Tex.)) ("My real concern is the children of America.").

[7] 47 U.S.C. § 231(a)(1) and (e)(1).

[8] 47 U.S.C. § 223(d)(1)(A).

[9] H.R. REP. No. 105-775, at 12 (1998). As the court noted in *Reno*, the "World Wide Web" is only one of many components (including e-mail, mail explorers, newsgroups, and chat rooms) that together comprise "cyberspace." *Reno*, 117 S. Ct. at 2334–35. "The 'Web' contains a vast number of Web 'pages,' each with its own address. Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or the 'site''s) author. They generally also contain 'links' to other documents created by that site's author or to other (generally) related sites." *Id.* at 2335.

[10] 47 U.S.C. § 231(a)(1).

[11] 47 U.S.C. § 231(e)(2)(B). It is not necessary, however, that the communications be the person's sole or principal source of income. *Id.*

ting, or translation . . . of a communication made by another person, without selection or alteration of the content of the communication . . . ."[12]

Fifth, in direct response to the Court's criticism of the CDA in *Reno*, Congress removed the "effective" requirement from the good faith defense in the COPA, providing that a host may escape prosecution by using "reasonable measures that are feasible under available technology" to restrict access by minors.[13] The COPA maintains an adult verification defense that parallels the CDA, excusing from liability hosts who restrict access by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."[14] The COPA also adds an additional defense: a site host may protect herself "by accepting a digital certificate that verifies age."[15]

Finally, the COPA establishes a temporary "Commission on Online Child Protection . . . for the purpose of conducting a study . . . to help reduce access by minors to material that is harmful."[16] The Commission's purpose is to recommend modifications in legislation affecting future Internet access by minors.

Though Congress carefully crafted the COPA to respond to the Supreme Court's opinion in *Reno*, critics claim that the Act still has serious constitutional flaws. As the COPA makes its way through the federal courts, the two most constitutionally troublesome provisions are likely to be: (1) the standard of prohibited content, and (2) the burden on adult speech. However, because the COPA's standard of prohibited content is no longer unconstitutionally vague, and because its requirements probably do not create an undue burden on adult speech, the COPA should survive constitutional scrutiny.

In *Reno*, the Supreme Court struck down the CDA in part because its prohibition on "indecent" and "patently offensive"

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[12] 47 U.S.C. § 231(b). These exemptions are specifically defined at 47 U.S.C. § 231(e)(4)–(5); *see also* H.R. REP. No. 105-775, at 26 (1998).

[13] 47 U.S.C. § 231(c)(1)(C). The CDA required that the "good faith" means of restricting access by minors had to be "effective." 47 U.S.C. § 223(e)(5). In *Reno*, in response to the government's argument that under this provision, a site host could escape prosecution by using means other than "gateway" adult verification technology that would for instance require users to submit a credit card number in order to verify adult status, the Court wrote it is "the requirement that the good faith action must be 'effective' that makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist." *Reno*, 117 S. Ct. at 2349.

[14] 47 U.S.C. § 231(c)(1)(A).

[15] 47 U.S.C. § 231(c)(1)(B).

[16] H.R. CONF. REP. 105-825 (1998).

transmissions rendered the statute so vague that it would have had an "obvious chilling effect on free speech."[17] In contrast, the COPA's "harmful to minors" standard fuses the standard for obscenity announced by the Supreme Court in *Miller v. California*[18] with the principle of variable obscenity approved by the Court in *Ginsberg v. New York*.[19] In other words, the COPA prohibits the transmission of material that is obscene with regard to minors, but not obscene for adults.[20] Although this amounts to a restriction on materials that are less than obscene under *Miller*, the Court expressly held in *Ginsberg* that such regulation was permissible.[21] Thus, because the COPA's "harmful to minors" standard incorporates variable obscenity into the Court's own definition of obscenity, it is unlikely that the Court will find this aspect of the statute unconstitutionally vague.[22]

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[17] *Reno*, 117 S. Ct. at 2344. The Court questioned whether "a speaker [could] confidently assume that a serious discussion about birth control practices, homosexuality . . . or the consequences of prison rape would not violate the CDA[.] This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials." *Id.*

[18] 413 U.S. 15 (1973). The *Miller* test for obscenity is

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

Id. at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

[19] 390 U.S. 629 (1968). The principle of "variable obscenity" refers to the Court's approval, in *Ginsberg*, of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults.

[20] The House Committee on Commerce, reviewing H.R. 3783, wrote that, "[t]he Committee intends for the definition of material harmful to minors to parallel the *Ginsberg* and *Miller* definitions of obscenity and harmful to minors . . . ." H.R. REP. NO. 105-775, at 28 (1998).

[21] *See Ginsberg v. New York*, 390 U.S. 629 (1968). Additionally, the Court has recognized "a compelling interest in protecting the physical and psychological well-being of minors" and "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable Communications v. Federal Communications Commission, 492 U.S. 115, 126 (1989); *see also* New York v. Ferber, 458 U.S. 747 (1982).

[22] Five Federal Circuits have approved of state laws incorporating the "harmful to minors" standard in banning the sale and display to minors of materials that are not obscene under *Miller*, but would be obscene for minors. *See* Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996); American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990); American Booksellers Ass'n v. Virginia, 882 F.2d 125 (4th Cir. 1989); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1986); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983). Also, in *Reno*, the Supreme Court implicitly suggested that the CDA would have fared better if Congress has provided "whether the 'patently offensive' and 'indecent' determinations should be made with respect to minors or the population as a whole." *Reno*, 117 S. Ct. at 2344, n.37. The fact that the "harmful to minors" standard is national in scope raises the question of what "community" will supply the "contemporary community standards" by which a

The second potential problem for the COPA is that because the Act imposes a content-based restriction on speech, it will have to survive strict scrutiny.[23] The Court has recognized "a compelling interest in protecting the physical and psychological well-being of children" and has stated that "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards."[24] However, legislation aimed at protecting minors must not "unduly restrict" adult access to the material.[25]

In *Reno*, the Court found that the adult verification defense[26] would not "significantly reduce the burden on adult speech," mainly because "it is not economically feasible for most non-commercial speakers to employ such verification."[27] Of the three statutory defenses provided in the COPA, instituting an adult verification device is the only defense that is effective, technologically feasible, and widely available.[28] Therefore, one must

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work will be found to appeal to the prurient interest. First, the Supreme Court will read the "contemporary community standards" element of the "harmful to minors" standard to mean that the community standards of each locality into which Internet communications flow are applicable, within those localities. *See Sable Communications*, 492 U.S. at 124–25. This does not appear constitutionally troublesome. *Id.* at 125 (*quoting* Hamling v. U.S., 418 U.S. 87, 106 (1974)). Second, the third prong of the *Miller* test is a national standard that "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." *Reno* at 2345.

[23] In *Reno*, the Court held that "the vast democratic fora of the Internet" are entitled to the highest protection under the First Amendment. *Reno*, 117 S. Ct. at 2343–44.

[24] *Sable Communications*, 492 U.S. at 126.

[25] The "unduly restrict" phrase, used by Justice O'Connor in her separate opinion in *Reno* at 2353 (O'Connor, J., concurring and dissenting in part), seems more applicable to a time, place, and manner restriction. The majority in *Reno* used the more traditional formulation: the burden on adult speech is "unacceptable if less restrictive alternatives would be at least as effective . . . ." *Reno* at 2346. But as applied in *Reno*, the two tests appear to be equivalent. *See* 144 CONG. REC. S12,741-04, S12,797 (1998) (letter from the Department of Justice to Rep. Thomas Bliley (R-Va.)) ("The decision in *ACLU* suggests that the constitutionality of an Internet-based 'harmful-to-minors' statute likely would depend, principally, on how difficult and expensive it would be for persons to comply with the statute without sacrificing their ability to convey protected expression to adults and minors").

[26] Under this defense, a site host is not subject to prosecution if she "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 223(e)(5)(B).

[27] *Reno*, 117 S. Ct. at 2349–50.

[28] The House Committee on Commerce reviewing H.R. 3783 considered a number of alternatives to adult verification devices, finding that none were both effective and technologically feasible at present. *See* H.R. REP. No. 105-775, at 17-21 (1998). However, one of the reasons that it is so difficult to determine whether an adult verification requirement poses an undue burden is because access and identification technology is constantly evolving, so that what may be the least restrictive means today may not be tomorrow. However, the Court will "evaluate the constitutionality of [a regulation] as it applies to the Internet as it exists today," and as of today, Congress has found that adult

determine whether the requirement that a site request a credit card or adult access code before allowing a visitor to view material "harmful to minors" is unduly restrictive, keeping in mind the changes that Congress has made in the COPA.

One might think about permissible government regulation in this area along a spectrum. At one end, the government clearly cannot ban all citizens, children and adults, from gaining access to materials that are potentially harmful to minors.[29] This would place an undue burden on the rights of adults to gain access to materials that are not obscene as to them, thereby "reduc[ing] the adult population . . . to reading only what is fit for children."[30] However, in between banning everyone and not banning anyone at all, there is a wide space of permissible regulation where the government may seek to restrict access by minors without placing an undue burden on adults. In *Ginsberg*, for instance, the Court found that a state may prevent a vendor from selling material to minors that is obscene as to them, but not obscene for adults.[31] Five Circuits have extended *Ginsberg* to allow states to regulate the *display* of materials "harmful to minors," where the burden on adult access only requires that a vendor shelve books in "blinder racks," cover them with adult-only tags, put them in a sealed wrapper, or provide for adult verification procedures for vending machines selling erotica.[32]

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verification is the most effective and least restrictive means of regulation. *Reno*, 117 S. Ct. at 2354 (O'Connor, J., concurring and dissenting in part). In a letter to Sen. John McCain (R-Ariz.), Professor Lawrence Lessig of Harvard Law School suggests that "kid Ids—digital certificates that would be bound to a user's browser [and] would identify the user as a minor," would constitute a less restrictive regulation under the First Amendment. 144 CONG. REC. S12,741-04, S12,798 (1998). The House Committee clearly did not think that "digital certificates, tags, [and] student identifiers" were technologically feasible at present, calling them "new age" technologies that might eventually "evolve." H.R. REP. No. 105-775, at 27 (1998). However, obviously in response to Professor Lessig's analysis, the final conference bill eventually passed by Congress and signed by President Clinton did contain the specific defense of "accepting a digital certificate that verifies age." 47 U.S.C. § 231(c)(1)(B). Therefore, even if the Kid ID is technologically feasible, this should not affect the conclusions of this piece because a Web host is free to use a Kid ID if the host finds that defense less burdensome than an adult verification device.

[29] *See Sable Communications*, 492 U.S. at 115 (invalidating federal law banning all indecent commercial telephone messages); Butler v. Michigan, 352 U.S. 380, 383 (1957) (striking down a Michigan criminal law banning sale of offensive books to minors or adults).

[30] *Butler*, 352 U.S. at 383.

[31] 390 U.S. 629 (1968).

[32] *See supra* note 22. The congressional rhetoric surrounding the passage of the COPA attempts to cast the Act as nothing more than a similar display restriction in cyberspace, just like requiring "pornography to be sold behind the counter at a drug store, [or] on blinder racks at a convenient store." H.R. REP. No. 105-775, at 13 (1998); *see*

The regulations at issue in *Reno* were too close to a complete ban, in part because it would only be economically feasible for a small group of commercial Web providers to use adult verification devices. The Court therefore worried that "burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers."[33]

In contrast to the CDA, the COPA only applies to "commercial" Web sites. This would seem to move the COPA closer to an acceptable government regulation, but critics charge that the statutory definition of "commercial purposes" is so ambiguous that the Act actually applies to almost all Web sites.[34]

To illustrate the indeterminacy of the definition of "commercial purposes" in the Act, consider the following examples:

(1) A for-profit business, selling erotica, that charges for access to its Web site. This would be the typical pornographic Web page that is, itself, the product that is being sold, and that displays material "harmful to minors".
(2) A for-profit business, selling erotica, that does not charge for access to its Web site, but does sell products through its site. An example would be a distributor of pornographic movies who enables browsers to place orders on-line.
(3) A for-profit business, selling erotica, that does not charge for access or sell products through its Web site, but does use the site for advertising. Here, visitors cannot place orders through the site, but the site displays illustrative (but arguably "harmful") text and images and says, "Come on down to our nearest location and buy some of our tantalizing products."

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144 CONG. REC. 9907 (statement by Rep. Michael Oxley (R-Ohio)).

[33] *Reno*, 117 S. Ct. at 2337.

[34] The *Reno* Court made it clear that the fact the CDA applied to both commercial and non-commercial communications was one of the Act's fatal flaws. *Reno*, 117 S. Ct. at 2341, 2347. Congress responded in the COPA by explicitly providing that the Act only applies to communications made "for commercial purposes." 47 U.S.C. § 231(a)(1). However, the current definition was scrutinized harshly within Congress. *See* 144 CONG. REC. S12,741-04, S12,794 (statement of Sen. Patrick Leahy (D-Vt.)) ("Does the CDA-II apply to a business that merely advertises on the Web? Does CDA-II apply to public service postings sponsored by business on the Web?"). From a constitutional standpoint, the statutory definition of "commercial" is one of the weakest points of the Act, and though it is *likely* that the commercial limitation will mean that the adult verification requirement constitutes an acceptable burden, it is far from certain. *See* 144 CONG. REC. S12,741-04, S12,795 (statement of Sen. Leahy) (arguing that the Court will find an adult verification requirement within the context of the COPA's definition of "commercial" just as burdensome as in the CDA).

(4) A for-profit business, not engaged in selling erotica, that does not charge for access or sell products through its Web site, but posts material that is arguably "harmful to minors." An example might be a discotheque that hopes to convince viewers of its avant-garde status by posting Robert Mapplethorpe's nude photographs.[35]
(5) The same as number four, except than an *individual*, instead of a for-profit business, owns the site. For example, an independent computer consultant with a personal Web page on which she posts: (a) her resume; and (b) her personal collection of soft-core pornography.
(6) A non-profit business that does not charge for access to its Web site, but does post material that is arguably "harmful to minors." An example might be a museum that plans to host a "Mapplethorpe Retrospective" posting nude photos on its site to stimulate community interest.
(7) An individual who does not charge for access to the Web site does not sell products or advertise through the site, but does post material that is "harmful to minors." This differs from number five in that the consultant has retired and no longer posts her resume.

Under the "commercial" limitation in the COPA, which of these site operators could be threatened with criminal prosecution if they fail to erect a costly adult verification cyberwall around their sites? Number one would clearly be subject to prosecution. Even though number two is not marketing the Web site itself, the business is selling products through the site and would therefore probably be found to have devoted "labor" to maintaining the site "as a regular course of [its] trade or business, with the objective of earning a profit as a result of such activities."[36]

Number three is a little trickier because now the business uses the Web site only for *advertising*—the visitor cannot purchase

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[35] The Mapplethorpe photographs have become a staple example used by critics of restrictions on pornographic material. The example had its genesis in the right-wing's 1994 bashing of the National Endowment for the Art's support for Mapplethorpe's homoerotic work. This episode culminated in possibly one of the most embarrassing House funding debates in U.S. history, during the course of which Rep. Robert Dornan (R-Cal.) actually exclaimed on the House floor, "I can't comprehend . . . how these porno freaks keep getting this money." *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY 102 (1995).

[36] 47 U.S.C. § 231(e)(2)(B).

either the site itself, or any products through the site. But attention to the statutory language would seem to indicate that if the business posted material that is "harmful to minors," then it could be subject to prosecution. Advertising is the very definition of "labor" exercised in the "regular course of . . . trade or business, with the objective of earning a profit . . . ."[37]

Number four is trickier still because like number three, the business is no longer selling anything directly through the site, but in addition, the discotheque is not in the business of selling any kind of erotica. However, if number three is deemed to be sufficiently "commercial" under the COPA, then the fact that the club has posted material on its site that might be "harmful to minors" would also subject it to prosecution.

It might seem that number five should easily escape the COPA's reach. But consider that this consultant might post her resume on the site as part of the "regular course" of trying to find new, short-term contractual positions. And remember, also, that use of the site does not have to "be the person's sole or principal business or source of income," in order to subject the operator to criminal prosecution.[38] It is therefore unclear why the consultant in number five would not be engaged in the same kind of "advertising" activity as numbers three and four.

The museum in number six would be at risk under the same "advertising" rationale as numbers three through five. However, under the COPA, the site host must have "the objective of earning a profit" in mind when devoting time and labor to maintaining a site.[39] If the museum, like most, charges an admission fee to its visitors, and sells museum-related products in order to pay for maintenance and salary costs, then it is possible that this could be considered a "commercial" activity under the COPA. However, the for-profit requirement is a likely indication that the Act does not apply to nonprofit Web hosts.[40]

The only one who is clearly out of harm's way is number seven, the retired contractor who can post all the pornography she wants.

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Consider how the analysis might change if a for-profit firm, Coca-Cola for instance, donated its time and energy to maintaining the museum Web site in return for the museum's permission to advertise on the site. Might Coca-Cola then be subject to prosecution for the Mapplethorpe photographs?

One might think that this analysis demonstrates that the potential reach of the COPA is dramatically out of step with what the Supreme Court meant by "commercial providers of sexually explicit material" in *Reno*.[41] However, the commercial limitation as it exists in the COPA probably will be found to "significantly narrow the statute's burden on noncommercial speech" because it does address the *Reno* Court's worst fear: that speech by completely noncommercial actors and by nonprofit organizations will be censored.[42] As the discussion of numbers six and seven indicates, these speakers probably will not be subject to prosecution under the COPA. This means that only those speakers who are in some way using their site for a commercial purpose, however attenuated, will have to comply with the adult verification requirements. On the spectrum, the commercial limitation thus moves the COPA away from *Reno* and an absolute ban, and closer to an acceptable restriction on the sale and display of offensive material.[43]

The burden on adult speech is further mitigated by the COPA's applicability only to specific parts of the Internet. The *Reno* Court suggested that a "less restrictive provision" would "regulat[e] some portions of the Internet—such as commercial Web sites—differently than others, such as chat rooms."[44] Again, Congress has taken the hint and provided that the only communications subject to the COPA are those made "by means of the World Wide Web."[45] As discussed above, this means that the COPA does not regulate e-mail, USENET groups, chat rooms, telnet, or other remote information retrieval. Almost every one of the examples that the *Reno* Court gave to support its contention that "[t]he breadth of the CDA's coverage is wholly unprecedented," involved one of the now exempted methods of

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[41] *Reno*, 117 S. Ct. at 2349.

[42] The Court seemed particularly worried, for example, that "non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project" would be unable to comply with the adult verification defense because these organizations would not have the resources to verify adult status. *Reno*, 117 S. Ct. at 2337 n.23.

[43] But notice that the restriction in the COPA is still more restrictive than the state laws regulating display in the physical world, because those laws only regulate the display of materials that are, themselves, for sale. The laws at issue, *see supra* note 22, would not seem to forbid a vendor from hanging a photograph of a nude model in the vendor's store, if the photograph was not for sale, and there was no access fee charged to get in the store. As numbers four and five demonstrate, the COPA does restrict the analogous parallel—the Web vendor who "hangs" a picture in an advertising-only site that is offensive but not for sale.

[44] *Reno*, 117 S. Ct. at 2348.

[45] 47 U.S.C. § 231(a)(1).

Internet communication.[46] Because there is "no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms,"[47] the CDA would have prohibited almost all indecent speech using non-Web formats. Commercial Web hosts can, however, determine the age of visitors through use of an adult verification procedure. Therefore, the narrowing of the COPA's scope to affect only Web communications moves the COPA towards an acceptable sale and display regulation and away from *Reno*.

The adult verification requirement will, in practice, mean that adults trying to access material "harmful to minors" on commercial Web sites will have to use a credit card to verify adult status.[48] However, the *Reno* Court noted that if an adult verification device required a credit card number, then "adults who do not have a credit card and lack the resources to obtain one [would be barred] from accessing any blocked material."[49] As the verification defense in the COPA mimics that found in the CDA, this *Reno* criticism is still valid. Nevertheless, this may not prove fatal because visitors lacking resources did not seem to be the *Reno* Court's primary concern with the adult verification requirement.[50] Instead, the Court appeared much more concerned

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[46] *Reno*, 117 S. Ct. at 2347. The Court worried, for example, that "one of more members of a 100-person chat group will be minor—and therefore it would be a crime to send an indecent message," and "a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated . . . ." *Id.* at 2347–48.

[47] *Id.* at 2347.

[48] A Web host is not *required* to request a credit card number from a visitor in order to verify adult status, because "adult access codes and adult personal identification numbers could be issued by mail or fax after reasonably ascertaining that the applicant is not a minor." H.R. REP. NO. 105-775, at 27 (1998). Therefore, a visitor without a credit card could mail or fax a copy of her driver's license or birth certificate to the Web host, who could then assign the visitor an adult personal identification number. However, notice that unlike the regulations involved in the state sale and display restriction laws, this process is a much heavier burden on the adult (and the site host, making it unlikely that the host will provide verification procedures that do not require use of a credit card) because of the *physical space* between the visitor and the Web host (i.e., the visitor must send verifying materials to the host, and then wait to receive confirmation, as opposed to a customer in the physical world who can just give the vendor her driver's license). The ambiguities of geography and identity on the Internet, and the fact that up until now the Court has only considered laws that operate in the physical world where identity is easier to ascertain, will have a serious effect on the Court's Internet jurisprudence in the future. *See* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 886 (1996).

[49] *Reno*, 117 S. Ct. at 2337.

[50] Correspondingly, the COPA House Report described at length the availability of adult verification devices for commercial Internet providers, explaining why alternative means of restricting access by minors would be either more restrictive or completely ineffective. *See* H.R. REP. NO. 105-775, at 15–21 (1998). Alternative techniques considered by the House Committee on Commerce reviewing H.R. 3783 included market-

with the "significant burdens" that a verification requirement would impose on "noncommercial *sites*."[51]

Further, the requirement that the Web site be "commercial" in nature, ambiguous as it is, means that everyone, regardless of economic status, will still have access to material available on sites that are either completely unrelated to commercial activity, or are run by non-profit organizations.

Overall, regardless of one's view of the propriety of Internet content restrictions, it appears that Congress has enacted a substitute for the discarded CDA that cures many of the constitutional infirmities that the Court identified in *Reno*. A more carefully drafted statute would have limited "commercial" Web sites to adult sites that are either sold, themselves, as products, or that sell adult products than can be bought directly through the Web page.[52] The ambiguous nature of the "commercial" limitation in the COPA indicates that Congress was trying to extend its reach as far as constitutionally permissible. The COPA's enforcement, however, lies not with the Congress but with the federal courts, which will doubtless find that regulating the Internet is neither as simple, nor as glorious, as Congress believed.

—*Matthew Baughman*

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based solutions; zoning techniques—including tagging, ratings, and domain name zoning; and blocking and filtering techniques.

[51] *Reno*, 117 S. Ct. at 2337 (emphasis added), 2347–2348. However, in part I of its opinion, the Court also noted that many potential site visitors would be discouraged from accessing information on a site if they had to provide *any* information at all. *See Reno*, 117 S. Ct. at 2337 n.23. Therefore, once again, because of the extremely ambiguous definition of what constitutes a "commercial" Web site under the COPA, the fact that many users may find it difficult to access what seem to be non-commercial sites is, from a constitutional perspective, one of the weakest points of the Act. If Congress had restricted the definition of "commercial" to only those sites that are, themselves, sold as products, or sites that sell products that can be bought through the site, then this would have presented less of a constitutional difficulty, because information-only sites (including sites that only advertise) would still be available to those who did not have a credit card.

[52] More careful attention to the "commercial" nature of the site would also have addressed the concerns of commentators who fear the commodifying effects of a market in sex, but who still value wide dispersal of sexually related information. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 154–56 (1993).

ADOPTION AND FOSTER CARE

The Clinton administration, in public if not in private, has consistently worked to address issues that impact our nation's families and children.[1] Last year, in reaction to the well-publicized shortcomings of the child welfare system,[2] a bi-partisan super-majority of Congress passed the Adoption and Safe Families Act of 1997 ("ASFA") to promote the adoption of children in foster care.[3] The new legislation reflects a shift in child welfare policy, elevating "the child's health and safety" to a position of "paramount concern."[4] Although the ASFA will certainly benefit some children in the foster care system, the Act's failure to mandate specific services for families in crisis and to allocate the necessary resources for those services means that many children will continue to be neglected.

The ASFA, signed into law by President Clinton on November 19, 1997, was originally introduced in the House Ways and Means Committee by Representatives Dave Camp (R-Mich.), Barbara B. Kennelly (D-Conn.), and E. Clay Shaw (R-Fla.) as the Adoption Promotion Act of 1997.[5] The final version of the Act passed by an overwhelming vote in both the House and the Senate.[6] Representative Shaw hailed the bill as a "great achievement" in "moving children towards adoption with dispatch" as safely as possible.[7]

The ASFA represents a comprehensive overhaul of the federal child welfare system, last addressed by Congress in the Adop-

[1] *See, e.g.*, Family and Medical Leave Act of 1997, 29 U.S.C. §§ 2611–2619, 2631–2635, 2651–2654 (1993) (granting family and temporary medical leave under certain circumstances); Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1378(B) (1994) (prohibiting state court modification of other states' child support orders); HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1996). Most recently, President Clinton celebrated the one-year anniversary of the Adoption and Safe Families Act by announcing a plan for an internet site to facilitate adoptions. *See* Barbara Vobejda, *Web Site to List Foster Children For Adoption*, WASH. POST, Nov. 25, 1998, at A5.

[2] *See, e.g.*, JENNIFER TOTH, ORPHANS OF THE LIVING: STORIES OF AMERICA'S CHILDREN IN FOSTER CARE (1997); Sally B. Donnelly, *Mothers and Killers*, TIME, July 20, 1998; *LaShawn A. v. Dixon*, 762 F. Supp. 959, 998 (D.D.C. 1991) ("The District's dereliction of its responsibilities to the children in its custody was a travesty."), *remanded on other grounds*, 144 F.3d 847 (D.C. Cir. 1998).

[3] 42 U.S.C. §§ 603, 622, 629, 671, 675 (1997).

[4] 42 U.S.C. § 671(a)(15) (1997). *See also* Marian Wright Edelman, *We Can Do Better*, 34 TRIAL 20, 24 (1998).

[5] *See* H.R. 867, 105th Cong. (1997).

[6] The House bill passed by a count of 406 to 7; the Senate bill by a large margin in a voice vote. *See* 143 CONG. REC. H10776 (daily ed. Nov. 13, 1997); 143 CONG. REC. S12675 (daily ed. Nov. 13, 1997).

[7] 143 CONG. REC. H10782 (daily ed. Nov. 13, 1997) (statement of Rep. Shaw).

tion Assistance and Child Welfare Act of 1980 ("1980 Act").[8] While both the ASFA and the 1980 Act address concerns about children adrift in foster care "limbo,"[9] the guiding philosophies behind the two pieces of legislation differ. The 1980 Act was based on the premise that the removal of a child from his or her home was so harmful to his or her psyche that it was virtually never in the child's best interests to be removed. Accordingly, the Act mandated that "reasonable efforts" be made "to prevent or eliminate the need for removal of the child from his home" and "to make it possible for the child to return to his home."[10]

Since the passage of the 1980 Act, however, there has been a great deal of debate over the meaning of the phrase "reasonable efforts," which was not defined in the statute or in any federal regulations.[11] The 1980 Act seemed to require that states provide some services to the family, in keeping with the federal government's expansion of the definition of "child welfare services" to include family preservation and reunification services.[12] Such services might include homemaker assistance, transportation, family and individual therapy, emergency counseling, and various transition and follow-up services.[13] This provision was designed to prevent the needless removal of children from their homes and to reunite them with their families whenever possible,[14] in part to correct what was perceived by some as "an anti-family bias" pervasive in the child placement system.[15]

The 1980 legislation, however, left it up to each state to determine what "reasonable efforts" would entail.[16] Although the U.S. Department of Health and Human Services promulgated a list of *suggested* services that states could consider in developing their state plans, it failed to specify what it considered "reason-

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[8] *See* Bill Grimm, *ASFA Brings Big Changes,* YOUTH LAW NEWS, November/December 1997, at 1–2.

[9] *See* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 836 (1977) (citing Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 273 (1975)).

[10] 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1997).

[11] *See* Grimm, *supra* note 8, at 2.

[12] 42 U.S.C. § 625(a)(1) (1997); H.R. REP. No. 96-136, at 43 (1979).

[13] H.R. REP. No. 96-136, at 46–47, 49 (1979).

[14] H.R. REP. No. 96-136, at 13 (1979).

[15] *Proposals Related to Social and Child Welfare Services, Adoption Assistance and Foster Care: Hearings before the Subcomm. on Public Assistance of the Comm. on Finance*, 96th Cong., at 181 (1980) (statement of Lisle Carter, Chairman of the Board, Children's Defense Fund).

[16] *See* Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children From the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 453 (1997).

able."[17] Under such a system, as the Supreme Court noted, reasonable efforts would "obviously vary with the circumstances of each individual case," as the phrase leaves "a great deal of discretion" in implementation to the States.[18]

In practice, the amount and quality of services provided to any parent was usually determined by limits in funding or program availability, not by what would best serve the family.[19] Families in crisis received widely varying levels of support because states were not mandated to provide any specific services, but rather only what they individually defined to be "reasonable."[20] As many child advocates noted, adherence to the "reasonable efforts" requirement often encouraged states to return children to dangerous homes in their attempts to comply with the law.[21]

Some states addressed this concern with further legislation of their own, clarifying times when efforts at family preservation or reunification do not need to be made. For example, California included in its law thirteen paragraphs describing specific circumstances under which "reunification services need not be provided to a parent or guardian."[22] However, because many states made no such specific provisions, a child's protection was far too dependent on the state in which he or she lived. Thus, in 1993, an ABA Working Group recommended that regulations "define a set of services that every state should make available, as needed, to families that qualify for those services."[23]

In passing the ASFA, however, Congress chose not to respond directly to criticism directed at a lack of funding for family preservation. Rather, the ASFA fundamentally rejected the idea that

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[17] 45 C.F.R. § 1357.15(e)(2) (1986) (revised 1997).

[18] Suter v. Artist M., 112 S. Ct. 1360, 1368 (1992) (holding that the "reasonable efforts" directive was too vague to create a right enforceable under 42 U.S.C. § 1983). *See also* Martha Matthews, *Supreme Court Denies Children's Right to Sue for "Reasonable Efforts,"* YOUTH LAW NEWS, March/April 1992, at 15, 17.

[19] *See* Braveman & Ramsey, *supra* note 16 at 453–59. The failure of states to fund specific services, citing "budget constraints," was extremely egregious in many circumstances. *See id.*; *see also LaShawn A.*, 762 F. Supp. at 998.

[20] *See* Alice G. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 225 (1990); *see also* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care: An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 132–34 (1995).

[21] Grimm, *supra* note 8, at 2; *see also LaShawn A.*, 762 F. Supp. at 988 (rebuking the District of Columbia for such a practice).

[22] CAL. WELF. & INST. CODE § 361.5(b).

[23] ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 48 (1993) [hereinafter AMERICA'S CHILDREN AT RISK].

family reunification is always desirable, putting the child's *immediate safety*, not his or her long-term mental health, at the forefront. Reflecting concern for children who have been left in or returned to unsafe homes, or who have drifted for years in the foster care system, the ASFA lists circumstances under which "reasonable efforts" at reunification need not be made.[24] The law, similar to the California provisions, rejects efforts at reunification: (1) if the parent has subjected the child to "aggravated circumstances," as defined by state law; (2) if the parent has committed or aided in, conspired in, or attempted the commission of murder or voluntary manslaughter of another of that parent's children, or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; and (3) if the parent's rights have been terminated with regard to a sibling of the child whose case is proceeding.[25]

Unfortunately, the new exceptions may in some cases go too far, and in others not far enough. For example, the murder, manslaughter, and serious bodily injury provisions extend only to cases where the victim was the child in question or another child of the parent.[26] Thus, "parents who are perpetrators of domestic violence—who have assaulted or even killed the other parent or an unrelated child—still may be entitled to reasonable efforts, even if convicted."[27] This loophole may still subject some children to unacceptable risks.

On the other hand, a uniform exception for parents whose rights have been terminated with respect to a sibling may in some circumstances be overly broad. As one child advocate noted, "[a] parent whose rights to another child were terminated when the parent was a teenager, for example, would be deprived of services even though, when the parent was older and more mature, reunification efforts might be appropriate."[28] States, of course, *may* still provide family preservation and reunification in such cases if they so choose, as the statute simply clarifies that such services "shall not be required" under the described circumstances.[29] However, this exception could produce injustice for many as a result of vague statutory language.

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[24] 42 U.S.C. § 671(a)(15)(D) (1997).
[25] *Id.*
[26] *Id.*
[27] Grimm, *supra* note 8, at 3.
[28] *Id.*
[29] 42 U.S.C. § 671(a)(15)(D) (1997).

Apart from the family reunification provisions, one of the most concrete, and controversial, changes brought about by the ASFA are time limits designed to move children more swiftly out of foster care "legal limbo."[30] Limiting the time from when a child enters foster care to the beginning of proceedings to terminate a parent's rights involves a difficult balance between a child's right to be free from danger and his or her right to a loving and stable family.[31] Representative Kennelly described such balancing as "a central dilemma in the field of child protection."[32]

As introduced, the Kennelly-Camp bill would have *required* states to begin termination of parental rights proceedings, a necessary precursor to adoption, for any child that had been in foster care for eighteen months.[33] After some debate, including the introduction of a proposed amendment urging the House to shorten the time frame to twelve months,[34] Congress eventually "split the difference" at fifteen months.[35] As enacted, the ASFA mandates that states file a petition to terminate the parental rights of the parent(s) of any child who has been in foster care for fifteen of the most recent twenty-two months.[36] In addition, the ASFA shortened the time frame within which states must schedule a permanency hearing, previously known as "dispositional" hearings, from eighteen to twelve months from the time a child enters foster care.[37]

The new time limits can be easily criticized. Whereas the ABA's Working Group recommended guarantees that families *begin* to receive services within a reasonable time frame,[38] the new limits instead seek to put an *end* to the period of time during which a family will receive services. By specifying the point at which efforts should end instead of requiring specific services, the new time limits may in some circumstances split up families who would have had a chance.[39]

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[30] *Hearings on H.R. 867 Before the Human Resources Subcomm. of the House Ways and Means Comm.*, 98th Cong. (1997) (statement of Senator Mike DeWine (R-Ohio)).

[31] *Id.* (statement of Mary Lee Allen, Children's Defense Fund).

[32] 143 CONG. REC. H2014 (daily ed. Apr. 30, 1997).

[33] *Id.* at 2016 (statement of Rep. Shaw).

[34] *Id.* at 2027 (statement of Rep. Todd Tiahrt (R-Kan.)).

[35] Grimm, *supra* note 8, at 4.

[36] 42 U.S.C. § 675(5)(E) (1997).

[37] 42 U.S.C. § 675(5)(C) (1997).

[38] AMERICA'S CHILDREN AT RISK, *supra* note 23 at 47; *see also* Edelman, *supra* note 4 at 24 (advocating that services "be provided to children and their parents from the first day the children enter the foster care system").

[39] *See* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66

Despite this criticism, the ASFA still offers some hope that more children will secure permanent homes more quickly. As one judge commented, "the type of drift we [currently] see . . . will not be tolerated . . . under the new legislation."[40] Such confidence, however, may not be warranted. The new time limits include a large loophole—an exception for parents who have been denied services required by the reasonable efforts clause.[41] This exception could be found to apply in virtually any case where whatever services the family received are deemed by a court to fall short of reasonable efforts. Furthermore, the ASFA only addresses the *start* of the termination process, which in and of itself can take months to complete.[42] The children who will be helped most quickly are those whose parents are not entitled to reasonable efforts. For them, the permanency hearing deadline has been cut to an expeditious thirty days.[43]

The ASFA also implements a range of changes designed to move children already freed for adoption who still remain in foster care more quickly and more successfully into permanent homes. First, the Act created an incentive program by which states will receive $4,000 to $6,000 per child for any increase in the annual number of adoptions over a "baseline" year.[44] Second, the ASFA required states to provide for health insurance coverage for children with special medical or mental health needs under a provision that creates, in effect, an adoption assistance agreement between the state and the adoptive parents of such special needs children.[45] Third, Congress took steps toward increasing

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FORDHAM L. REV. 2285, 2293 (1998).

[40] *In the Interest of Carl Lilley*, 719 A.2d 327 (Pa. Super. Ct. 1998) (terminating biological mother's parental rights, thereby freeing for adoption child who had been in foster care for 14 years). *See also In the Interest of Galen B.F.*, 1998 WL 123018 at *6 (Conn. Super. Ct., Mar. 10, 1998) (terminating rights to child born drug-addicted and in foster care for two and a half years since birth); *In the Interest of Savanna M.* 1998 WL 263371 at *6 (Conn. Super. Ct., May 15, 1998) (child in foster care four of her six years).

[41] *See* Grimm, *supra* note 8 at 4–5.

[42] *Id.* at 5.

[43] 42 U.S.C. § 671(a)(15)(E) (1997).

[44] *Id.*

[45] 42 U.S.C. § 671(21) (1997); *see also* 42 U.S.C. 675(E)(3) (1997) (defining "adoption assistance agreement"). This sensible measure fills in the gaps between various existing insurance programs so that an inability to pay medical costs will not deter "the most suitable families—ones who are committed to meeting [their adoptive children's] needs" from adopting children with physical and mental health needs. *See Federal Adoption Policy: Hearings before the Subcomm. On Human Resources of the Comm. On Ways and Means*, 105th Cong., at 4 (statement of Jean S. Price, Child Welfare League of America).

the available pool of potential adoptive families for children in foster care.[46]

Nevertheless, on balance the ASFA will probably produce more orphans, rather than decrease their numbers. Terminating the rights of more parents does not necessarily lead to more adoptions.[47] Consequently, this legislation may not do much to address the "legal limbo"[48] of those children who are not eventually adopted. In addition, the ASFA provides little for children whose parents are still entitled to "reasonable efforts" at reunification.[49] As one advocate noted, "[t]o intensify the time lines for permanence, without also intensifying services, seems a prescription for disaster."[50]

Overall, the ASFA may indeed make an enormous difference in the lives of some children by giving them an opportunity to be a part of safe, loving, and stable families.[51] However, the ASFA's effects will depend not on the language of the statute but on what action states take in implementing (or neglecting) the Act's provisions.[52] While states are given financial incentives to comply with the ASFA, this does not guarantee that they will fundamentally alter their child welfare systems in the manner Congress described. As with the 1980 Act, the primary difficulty with ASFA will be funding, which will be an issue despite Fed-

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[46] *See* 42 U.S.C. §§ 622(b), 674(e) (1997); *see also* Vobejda, *supra* note 1, at A5 (describing a new internet site designed to increase adoptions).

[47] *See* Guggenheim, *supra* note 20.

[48] *Hearings on H.R. 867 Before the Human Resources Subcomm. of the House Ways and Means Comm.*, 98th Cong. (1997) (statement of Sen. DeWine).

[49] Despite ASFA's desire to put children's safety first, regardless of the circumstances, family reunification is thought of as the most likely way to accomplish that goal in the great majority of circumstances. *See* Edelman, *supra* note 4, at 20.

[50] *Hearings on H.R. 867 Before the Human Resources Subcomm. of the House Ways and Means Comm.*, 98th Cong. (1997) (statement of Mary Lee Allen, Children's Defense Fund).

[51] *See, e.g., Hearing on H.R. 867 Before the Human Resources Subcomm. of the House Ways and Means Comm.*, 98th Cong. (1997) (statement of Mary Lee Allen, Children's Defense Fund).

[52] Many states have or are in the process of passing legislation to comply with ASFA. *See, e.g.*, Ellen J. Silberman & Maggie Mulvihill, *House Bill Would Speed Up Adoption Process*, BOSTON HERALD, Dec. 1, 1998, at 1, 20 (Massachusetts); Catherine D. Munster, *Child Maltreatment in West Virginia: The Comprehensive State Remediation Model and the Court Improvement Project*, 12 W. VA. LAW 22, 23 n.36 (1998) (West Virginia); Roya Hough, *Juvenile Law: A Year in Review*, 63 MO. L. REV. 459, 468 (1998) (Missouri); Perry Owen, *State to Speed Parental Termination, Adoption Processes*, SUNDAY OKLAHOMAN, Oct. 11, 1998 (Oklahoma). However, some states have deliberately neglected ASFA and have done nothing since its enactment. *See, e.g.*, Mary McGrory, *At The Expense Of Children*, WASH. POST, July 12, 1998, at C1 ("New York obviously did not get the message.").

eral incentives.[53] Truly improving services in any significant manner would require significant additional funding,[54] which likely would have severely deflated the upbeat, bipartisan support for this Act.

Like the prior child welfare statute, and despite the new financial incentives for increased adoptions, the impact of the ASFA on families in crisis will depend almost wholly on state-funded programs and support services. Consequently, to the extent states are unwilling or unable to address families' needs in a timely manner, the future of America's youth rests in uncertain hands.

—*Celeste Pagano*

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[53] It is beyond dispute that compliance with AFSA will produce thousands of petitions for parental rights termination in a short period of time. *See* Edelman, *supra* note 4, at 20. As one concerned state journalist described, "[e]ven if all the cases were cut and dried, and they are not, the state's welfare and judicial systems lack the capacity to process that many cases . . . the state is planning to spend more money on lawyers and for overtime for case workers, . . . [b]ut just obtaining the lawyers and courtroom time to conduct hundreds of termination trials will be an overwhelming challenge." *A Legal Nightmare*, INDIANAPOLIS STAR, Nov. 29, 1998. *See also* Bryan Hay, *Reform Law Designed to Increase Adoptions May Add to Court Time*, ALLENTOWN MORNING CALL, Nov. 24, 1998, at B4.

[54] *See* Braveman & Ramsey, *supra* note 16; *see also* Guggenheim, *supra* note 20.

ANTI-PAPARAZZI LEGISLATION

Since the death of Princess Diana, virtually everyone has joined in the hue and cry against the paparazzi. As part of this uproar, Senators Orrin Hatch (R-Utah) and Dianne Feinstein (D–Cal.) have introduced legislation intended to fight overly enthusiastic paparazzi who stalk celebrities and seek out those involved in scandal.[1] Senate Bill 2103 would make it a federal crime to attempt to photograph or record a person in a way that risks bodily harm. It would also make the use of a telephoto lens to take photographs of a subject inside her apartment cognizable as a tort.[2] While superficially attractive, the Feinstein-Hatch proposal contributes to an impulse to demonize the media that ultimately compromises the civic-republican notion of an informed, self-governing public. Further, the proposal affords the rich and famous scant more protection than state tort law, which, contrary to celebrity rhetoric, adequately protects Americans from these "parasites."

The fact that the unlikely team of Hatch and Feinstein are championing this legislation indicates that the bill goes beyond partisan politics. The paparazzi are easy to hate. They are poorly behaved, and even despicable in their total disregard for the privacy of their subjects. In 1972, Ronald Galella, a photographer, was tried for stalking Jackie Onassis and her children. He jumped out of bushes in Central Park, hid in a coat rack at a Chinese restaurant, nearly knocked the Onassis children off their bicycles in an effort to snap a photo of John Kennedy, Jr., and bribed a classmate of John Jr.'s to take pictures of the family at a school pageant.[3] The judge had little patience with this paparazzo, whom he described as a pest and a "gadfly."[4] Galella was found

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[1] *See* Personal Privacy Protection Act, S. 2103, 105th Cong. (1998); 144 Cong. Rec. S5462 (daily ed. May 22, 1998) (statements of Sen. Hatch). The bill is currently stalled in the Senate. *See also* Todd S. Purdum, *Two Senators Propose Anti-Paparazzi Law*, N.Y. TIMES, Feb. 18, 1998, at A16. Tom Hayden, a California state senator, recently pushed a similar bill through the California legislature. *See generally* Christian Berthelsen, *California Law Will Allow Celebrities to Sue Paparazzi*, N.Y. TIMES, Oct. 5, 1998, at C11; Gayle Fee & Laura Raposa, *Whiny Stars Get Anti-Paparazzi Bill Passed in a Snap*, BOSTON HERALD, Oct. 13, 1998, at 8.

[2] *See* S. 2103.

[3] *See* Galella v. Onassis, 353 F. Supp. 196, 207–09 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973). More recently, two photographers were convicted of pursuing Arnold Schwarzenegger and his wife Maria Shriver shortly after Schwarzenegger received heart surgery. *See Photographers Jailed for Pursuit*, L.A. TIMES, Mar. 2, 1998, at B4.

[4] *Galella*, 487 F. 2d at 991–92.

guilty of an array of offenses including harassment, intentional infliction of emotional distress, assault and battery, and invasion of privacy.[5]

This sort of unprincipled behavior lends any act punishing the paparazzi a popular appeal. Before enacting this legislation, however, it is critical to recognize the ideological costs involved. The right to privacy, the central principle upon on which this act is based, reflects a liberal-individualist emphasis on autonomy and freedom from both government and public scrutiny. The First Amendment, on the other hand, embodies the civic-republican conviction that in a democratic polity, freedom, defined as the right to govern oneself, depends on an informed public.[6] The Anti-Paparazzi Act is just one example of the inherent tension between the right to privacy and the First Amendment guarantee of a free press. While it is important to balance these two forms of liberty, the Feinstein–Hatch bill threatens to overwhelm the civic value of informed political participation with a liberal-individualist emphasis on personal privacy.

Historians have argued that, at the turn of the century, the republican values of civic virtue, independence, and informed participation in the public arena gave way to new ideas about individuality and personality. The focus on self-government was displaced by a Lockean notion of individual pursuit of happiness and freedom from governmental interference. The concept of the public good was replaced by a new emphasis on self-fulfillment and self-realization.[7] It was during this period that Louis Brandeis and Samuel Warren conceptualized the right to privacy. In 1890, they wrote, "[t]he press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery."[8] The

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[5] *See id.* at 994.

[6] *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263 (1992) ("[t]he First Amendment is fundamentally aimed at protecting democratic self-government"); Owen Fiss, *Why the State*, 100 HARV. L. REV. 781 (1987) (arguing that the First Amendment protects collective self-determination). Recently scholars have used civic republicanism to argue that free speech should be limited. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540–42 (1988).

[7] *See, e.g.*, T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920 3–59 (1994); WARREN I. SUSMAN, THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 271–87 (1984).

[8] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

authors argued that older forms of social ostracization and community condemnation would no longer suffice. The law itself had to protect what Warren and Brandeis referred to as "public morality" and the "inviolate personality."[9] The Supreme Court has since recognized a constitutional right to privacy, and the sharp distinction between the public and the private realm continues to play an important role in twentieth-century American legal and political discourse.[10] It is important, however, to balance this right to privacy with the persistent value of civic republicanism by preserving the potency of the freedom of the press clause of the First Amendment.

Last year, the late Congressman Sonny Bono (R-Cal.) introduced legislation similar to the Feinstein-Hatch bill.[11] In promoting House Bill 2448, Bono made a gesture toward freedom of the press, but quickly added that "it is without doubt that the activities of the bounty-hunting paparazzi go beyond the robust public discourse envisioned by the Founders."[12] At the Congressional hearings for the Feinstein-Hatch bill, actor Paul Reiser similarly rejected the notion that the paparazzi should be afforded First Amendment protection. Reiser echoed the late-nineteenth-century concern for lost morals, giving moving testimony about the ruthless coverage of his son's premature birth and concluding that "[t]he code of civility and common decency we all aspire to seems to be vanishing."[13]

Despite the conviction of these celebrities, it is impossible to draw the line between valid news reporters and paparazzi. In 1798, James Madison argued that "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in the press."[14] As editor and reporter Paul McMasters commented in his testimony at the congressional hearings:

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[9] *See id.* at 210–11.

[10] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[11] *See* Protection From Personal Intrusion Act of 1997, H.R. 2448, 105th Cong.

[12] 143 CONG. REC. E1709-01 (daily ed. Sept. 10, 1997) (Statement of Rep. Bono). This testimony echoed sentiments of former President Nixon, who during Watergate, excoriated the press for its unscrupulous behavior. *See* THEODORE WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 154 (1975).

[13] *Privacy Protection: Hearings on H.R. 3224 Before the House Comm. on the Judiciary, 105th Cong.* (1998) (testimony of Paul Reiser).

[14] 4 ELLIOT'S DEBATE ON THE FEDERAL CONSTITUTION 571 (1876), cited in New York Times v. Sullivan, 376 U.S. 254 (1964).

> News photography has the capacity to chill our senses, inflame our passions, awaken us to the need for action, connect us to our own communities, to inform us, and to entertain us. It is possible for good writers to tell credible stories from a distance, but photographers must be there, must have access to the people and events that make the news.[15]

In our culture, the line between the paparazzi and legitimate news photographers is not easy to draw. If we abolish one, we might destroy the other.

Further, in the current economy, serious freelance photographers often rely on revenue from celebrity photographs to support their more political and intellectual work. For example, shortly after Princess Diana's death, *The New York Times* published a confession of a freelance photographer to his bereaved and outraged mother. The photographer wrote, "I couldn't tell her that the story on homeless drug addicts I worked on for a year earned me a tenth of what the photos of Jackie O.'s funeral did, nor that the three months' work in Russia I did in 1991 earned less than the few frames I took of John Jr."[16]

It is thus critical to balance the profound ideological costs of this legislation with the benefits the Act would purportedly provide. Feinstein and Hatch fashioned a modest bill to increase the chances that it would pass constitutional muster. In its current form, however, the bill does not offer much greater protection than state tort law.[17]

In their seminal article *The Right to Privacy*, Brandeis and Warren conceptualized the tort of invasion of privacy and defined privacy as the "right to be let alone."[18] They asserted that this fundamental human right was increasingly threatened by technology and the press: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet

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[15] *Privacy Protection: Hearings on H.R. 3224 Before the House Comm. on the Judiciary, 105th Cong.* (1998) (testimony of Paul K. McMasters, president of the Society of Professional Journalists). For a similar argument about the power of photographs in American history, *see* VICKI GOLDBERG, THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES 7–8 (1991).

[16] Porter Gifford, *Mom, I'm Not a Paparazzo*, N.Y. TIMES, Sept. 6, 1997, at A23.

[17] Opponents of the bill, including the American Civil Liberties Union, claim that the behavior it is designed to punish is already covered by existing state law. Senator Feinstein, however, argues that state laws are inconsistent and uneven. *See* Purdum, *supra* note 1.

[18] Brandeis and Warren, *supra* note 8, at 195.

shall be proclaimed from the house-tops.'"[19] William L. Prosser more broadly defined the invasion of privacy as the intrusion upon seclusion or solitude, public disclosure of private facts, publicity which places the plaintiff in false light, or the appropriation of name or likeness.[20] The Restatement of Torts has adopted Prosser's definition of invasion of privacy, and most jurisdictions have integrated some version of this definition into their common law.[21]

The tort of invasion of privacy, recognized in some form by all but ten states, can adequately protect the victims of the paparazzi.[22] When a photographer takes a picture in a place in which the subject has a reasonable expectation of privacy, courts generally find that the photographer has intruded on the plaintiff's privacy.[23] Following this rationale, the Ninth Circuit held that magazine reporters invaded a healer's privacy when they gained entrance to her house by lying, photographed her, and used a hidden radio transmitter to record the conversation.[24] Another court held that a news picture syndicate was guilty of invasion of privacy for taking a photograph of a patient in her hospital bed when the only newsworthy quality about the patient was her obesity.[25] The Fifth Circuit similarly affirmed an award of $150,000 against Hustler magazine for publishing a stolen photograph depicting the plaintiff in the nude.[26]

In his congressional testimony, Professor Lawrence Lessig contended that it is important to extend our legal conceptions to cover offenses made possible by modern technology. Therefore, Lessig argued that the bill's "expansion" of trespass doctrine to include photographs taken with a telephoto lens was desirable.[27]

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[19] *Id.*

[20] *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[21] *See* Restatement (Second) of Torts §§ 652A–652E (1977).

[22] Colorado, Massachusetts, North Dakota, and Washington have avoided recognizing or rejecting the right to privacy. Nebraska, Rhode Island, and Wisconsin have refused to recognize the right, while Maine, Vermont, and Wyoming have not addressed the issue. The remaining states have recognized some statutory or common law right to privacy. *Id.*

[23] *See* Phillip E. Hassman, Annotation, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374 (1998). Notably, there is no indication that the proposed legislation would change the rule of *New York Times v. Sullivan*, and celebrities would still have to prove "actual malice" to recover on "false light privacy" claims. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

[24] *See* A.A. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (interpreting California law).

[25] *See* Barber v. Time, Inc., 348 Mo. 1199 (1942).

[26] *See* Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1085 (5th Cir. 1984).

[27] *Privacy Protection: Hearings on H.R. 3224 Before the House Comm. on the Judici-*

Lessig's argument, however, ignores the fact that the tort of invasion of privacy already includes non-physical invasions made possible by modern technology.[28] Thus, the Louisiana Court of Appeals has held that a police officer who looked through a suspect's bedroom window and took pictures with a telescopic lens had invaded the plaintiff's privacy.[29]

The common law right to privacy does not protect individuals when they are in public view, but the torts of intentional infliction of emotional distress and assault and battery can warrant recovery for behavior that is particularly egregious, even if the photographer only pursued the subject in public places. For example, in one case, a court acquitted a photographer who had harassed a cruise ship passenger of invasion of privacy because the harassment did not occur in an area of private seclusion, but nevertheless still held that the photographer's conduct constituted intentional infliction of emotional distress.[30] When Galella was tried in the case discussed above, New York law did not explicitly recognize a common law right to privacy; it did, however, have an harassment statute that made it a crime to follow a person into a public place, initiate physical contact, or engage in annoying conduct with the intent to harass. New York law also recognized a freedom from emotional distress that was used liberally to protect privacy interests.[31] It was these state laws, common in some form to every state, that protected the Kennedys from paparazzi.

Courts and academics continue to debate whether the constitutional guarantee of freedom of the press offers any special privileges to the news media, or whether it is simply subsumed under the category of free speech. Although this dilemma has not been resolved, most courts do not allow members of the

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ary, 105th Cong. (1998) (testimony of Lawrence Lessig, Harvard Law School professor).

[28] The Restatement (Second) of Torts defines this intrusion as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability . . . for invasion of his privacy, if . . . offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977).

[29] *See* Souder v. Pendleton Detectives, 88 So.2d 716 (La. App. 1956). Similarly, courts have held that wire tapping can constitute an invasion of personal privacy. *See, e.g.*, Rhodes v. Graham, 238 Ky. 225 (1931) (holding it was an invasion of privacy to listen to plaintiff's telephone conversations by using a wire tap); Hamberger v. Eastman, 106 N.H. 107 (1964) (holding a landlord invaded his tenants' privacy when he installed a listening and recording device in their bedroom).

[30] *See* Muratore v. M/S Scotia Prince, 656 F. Supp. 471, 482 (D. Me. 1987), *aff'd in part and vacated in part*, 845 F.2d 347 (1st Cir. 1988).

[31] *See Galella*, 487 F.2d at 994–95.

press any special privileges based on their role as newsgatherers.[32] At most, courts weigh the interests of public access to the information with the privacy and property interests of the alleged victim.[33] Therefore, a photographer or journalist would not be immune from civil or criminal prosecution simply because she committed the wrongful act in pursuit of a story.

When the interest of the public is minimal, courts do not hesitate to use state law to convict the press for illegal conduct. After a scathing criticism of the photographer who stalked Jackie Onassis and her family, the *Galella* Court concluded that the First Amendment "does not immunize all conduct designed to gather information about or photographs of a public figure," and added, "there is no constitutional right to assault, harass, or unceasingly shadow or distress public figures."[34]

Senator Feinstein is right that states are not completely consistent in their application of laws against overly-aggressive media. State common law rules of trespass, invasion of privacy, harassment, intentional infliction of emotional distress, and assault and battery, however, cover most unseemly behavior, and no court grants the press immunity based on the First Amendment protection of the press. Overall, the paparazzi whom this legislation is aimed at could likely be held liable or guilty under current state law.

The Feinstein-Hatch bill does not substantively change state tort and/or criminal law. The legislation does, however, serve another purpose. It allows these senators, and the government itself, to stand squarely against the inappropriate longing to pry into the lives of the Hollywood and political elite. As the public

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[32] *See* David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property,* 84 COLUM. L. REV. 1298, 1299 (1984); *see also* LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1960). The Supreme Court has held "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991). Following this reasoning, the Ninth Circuit has similarly asserted that the first amendment does not exempt the media from torts or crimes committed while gathering news. *See Dietemann,* 449 F.2d at 249. Lower courts frequently offer a similar rationale. *See* Miller v. NBC, 187 Cal. App. 3d 1463, 1492 (1986); *see also* Wolfson v. Lewis, 924 F. Supp. 1413, 1418 (E.D. Pa. 1996).

[33] *See, e.g.*, Freedman, *supra* note 32, at 1307–12; Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. Sup. Ct. 1976); *Miller,* 187 Cal. App. at 1463 (holding NBC liable for trespass when a news crew entered a woman's home without her consent to film the paramedics' rescue attempt.); *Dietmann,* 449 F.2d at 249 ("First Amendment is not a license to trespass, to steal, or to intrude by electronic means in the precincts of another's home or office."); *Galella,* 353 F. Supp. at 223–24.

[34] *Galella,* 353 F. Supp. at 223.

is learning more and more about the indiscretions on Capitol Hill, this legislation would allow the government to assume a dignified pose while playing into the public's desire to transfer blame to the indiscreet media.

The public response to the O.J. Simpson case, Princess Diana's death, and President Clinton's sexual affairs illustrates the fact that the media serves as a perfect scapegoat. The media gives us someone to blame, not only for tragedies like Princess Diana's untimely death, but also for our own voyeuristic and prurient interests. The Anti-Paparazzi Act would allow us to transfer blame for these recent events to the media while exonerating ourselves from our own ceaseless curiosity. Rather than face the shame that accompanies our fascination with O.J.'s excesses, Diana's final date, and President Clinton's indiscretions, we blame the messenger.

The Monica Lewinsky scandal is an example of the profound ambivalence Americans have toward gossip. This social and cultural confusion gives meaning to the debate over freedom of speech and rights to privacy. Americans in general are disgusted by the media coverage of Clinton's affair. President Clinton's approval ratings, however, remain stable while the media bears the blame for the melodrama. Warren and Brandeis wrote that "[s]upply creates the demand" which results in "a lowering of social standard and of morality."[35] The moral and economic universe, however, works in the opposite direction. It is the public who buys the papers, watches the news, and turns the channel to get the latest developments. While Americans want the gossip, however, they yearn for a time when we kept secrets to ourselves and the President's semen was not a proper topic at a cocktail party. The proposed anti-paparazzi law functions as a public, national condemnation of the press. By blaming the media, we get to have it both ways. We will still hear stories about Ms. Lewinsky, and we will still see pictures of Princess Diana and Arnold Schwarzenegger, but we can look at them in horror, with a sense of moral superiority rather than having to admit our base desire see into the private lives of public figures.

Photographers can be insensitive and intrusive, but celebrity itself is created and perpetuated by this same media. Tom Cruise has dedicated himself to a public mission of criminalizing pho-

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[35] Warren and Brandeis, *supra* note 8, at 196.

tographers who follow him and his family as they try to lead a "normal life."[36] While it is possible to feel sympathetic for Mr. Cruise in his somewhat disingenuous pursuit of privacy, these same "gadflies" have helped Cruise capitalize on his boy-next-door good looks to sell movie tickets. Actors like Cruise too easily assume that they can and should be able to benefit from the media while controlling it at the same time.

The effort to impose a code of ethics on the media will necessarily fail unless we allow the interests of privacy to obscure our First Amendment rights. It is possible that no critical news would be lost if we outlawed chasing celebrities to take pictures for tabloid papers. The distinction, however, between valid and essential newsgatherers and gossip hunters is not always so clear. The press infuriates figures like Richard Nixon, Paul Reiser, and Tom Cruise because it refuses to be controlled, but this refusal to submit is also the source of its power. Public figures will continue to paint the press as evil and mercenary, but until history unfolds, it can be hard to tell a paparazzo from an investigative news journalist. In order to inform the public, the press needs to be able to behave in a way that is contrary to the wishes of its subjects. However unpalatable their actions, the paparazzi are an inevitable underside of the legitimate use of newsgathering to inform the people, a value which is fundamental to the republican notion of a public's ability and duty to govern itself.

—Rebecca Roiphe

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[36] *See, e.g.*, Robert Welkos, *Two Photographers Sentenced to Jail*, L.A. TIMES, Feb. 24, 1998, at B3.

BOOK REVIEW

A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW. By *Antonin Scalia.* Commentary by *Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon,* and *Ronald Dworkin.* Edited with an Introduction by *Amy Gutmann.* Princeton, N.J.: Princeton University Press, 1997. Pp. xiii, 149, index. $19.95 cloth.

In an oft-cited parable, Learned Hand and Oliver Wendell Holmes met for lunch and a chat. Afterwards, as Holmes drove off in his carriage, Hand ran after him, crying, "Do justice, sir, do justice!" Holmes, however, stopped the carriage and rebuked Hand, asserting, "[T]hat is not my job. My job is to apply the law."[1]

Had he thought about it, Hand might then have asked Justice Holmes, "And how, exactly, should one do that?" Holmes has largely won the argument over judges' proper role. What remains to debate is the appropriate means by which judges are to fulfill that role, interpreting constitutional and statutory text in a manner consistent with the separation of powers. The statutory interpretation debate, more critical today than ever, continues in Justice Antonin Scalia's *A Matter of Interpretation.*

The volume contains a brief presentation by Justice Scalia, followed by commentaries from colonial historian Gordon Wood and law professors Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin, closing with a rebuttal from Scalia. While providing an excellent introduction to the statutory interpretation debate, this volume adds surprisingly little. Justice Scalia remains the only one of the group willing to articulate a general theory under which judicial decision-making should occur; the others criticize from the sidelines, but fail to add their own ideas. While the discussion is insightful, readers invest in this volume to hear alternatives, not just critique. Therefore, while perhaps worthwhile for a beginning law student, the debate as presented is of little value to those seeking answers to difficult questions.

Justice Scalia presents only a general discussion of his judicial philosophy. He briefly explains that a textualist approach to statutory interpretation means looking only to the reasonable

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[1] *See* ROBERT BORK, THE TEMPTING OF AMERICA 6 (1990) (citing E. Sargent, *Justice Touched With Fire,* in MR. JUSTICE HOLMES 206–07 (Felix Frankfurter ed., 1931)).

meaning of statutes—the letter of the law, not legislators' "unexpressed intentions," should govern judges. Any reference, therefore, to legislative intent is undemocratic.[2] Further, statutory text should be read irrespective of legislative history, even if that history expresses ideas completely contradictory to the statute's plain meaning. Since legislative history has not been "voted" into law, utilizing it to interpret statutes is countermajoritarian.

While neglecting many of textualism's details, the Justice takes pains to distinguish his philosophy from its portrayal in liberal scholarship. Textualism is not, he claims, a "simple-minded . . . wooden, unimaginative, [or] pedestrian" (p. 23) literal reading of text that operates ignorant of law's broader social purpose; textualism frequently involves substantial historical or linguistic analysis. Scalia's textualist is not a machine, but rather Lady Justice, blindly applying the law.

Scalia also struggles mightily to distinguish his textualism from Robert Bork's strict constructionism,[3] which Scalia calls "a degraded form of textualism that brings the whole philosophy into disrepute" (p. 23). Scalia uses the Court's recent decision in *Smith v. United States*[4] to illustrate the difference between these two philosophies. In *Smith*, the Court held that a statute providing an increased jail term in cases where defendants "use" firearms "during and in relation to . . . [a] drug trafficking crime"[5] applied to a defendant who used a firearm as barter for cocaine.[6] Justice Scalia, dissenting, argued that the phrase "uses a gun" "fairly connote[s] use of a gun for what guns are normally used for . . . a weapon."[7] Logically speaking, however, Scalia's interpretation is a far stricter construction of the statute than the Court's—he limits the meaning of the term "use" to "normal use," while the court would allow "use" to extend to

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[2] A "democratic" result is one responsive to the public weal, and not necessarily the consequence of liberal decision-making. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 25–28 (1996) (describing America as a "procedural republic").

[3] Justice Scalia's stated reason for his attempt to separate himself from Robert Bork is a philosophical difference. However, this reader senses an altogether different motive: desire to separate himself from Bork, whose judicial philosophy provoked such public outrage that he was rejected for a position on the Supreme Court. *See* BORK, *supra* note 1. If the two philosophies are distinguishable, they are only marginally distinct, and for that reason it is somewhat odd for Scalia to focus his energies on discrediting strict constructionism.

[4] 508 U.S. 223 (1993).

[5] 18 U.S.C. § 924(c)(1) (1997).

[6] *Smith*, 508 U.S. at 230.

[7] *Id.* at 241 (Scalia, J., dissenting).

"foreseeable use." Thus, if *Smith* represents strict constructionism (as Scalia asserts), then Scalia must desire construction even stricter than that advocated by Bork.

Justice Scalia's difficulty articulating his own position is further highlighted by the panelists' responses. Professor Wood views Scalia's position from a historical perspective. He details the emergence, beginning in the 1780s, of a powerful, independent judiciary. While the nation initially sought to curtail judges' power, a self-serving Congress quickly became "the main source of tyranny and injustice in . . . society . . . and more Americans began looking to the once-feared judiciary as a principal means of restraining these popular legislatures" (p. 52). Given this historical perspective, Professor Wood concludes that the last half-century's statutory interpretation fiasco represents "a change in degree, not one of kind" (p. 58).

Justice Scalia vigorously disputes this point, asserting that "[t]here has been a change in kind . . . when it is publicly proclaimed, and taught in the law schools, that judges *ought* to make the statutes and the Constitution say what they think best" (p. 132). The current law school curriculum, Scalia argues, exacerbates the problem of activism. Legal education consists not of determining the proper way to interpret law but of "playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind" (p. 7). Newly-minted law school graduates believe that a great judge is one who is intelligent enough to determine the best rule of law for the case and crafty enough to navigate their way around precedent to achieve that outcome. The consequence of such an education is a judiciary (made up, eventually, of these graduates) filled with activists, who move us slowly but surely away from democracy.

Professor Mary Ann Glendon's eloquent contribution to the debate stresses the implications of American lawyers' poor training in textual interpretation. She begins with a more detailed analysis of the problem, summarized acutely in her observation that "con law classes have long had the same relation to the Constitution as the Elgin Marbles have to the Parthenon" (p. 111). Glendon is not timid in describing the dire potential consequences of continuing on our current path. Democracy may erode as individuals take over; undisciplined interpretation might produce hermeneutic tyranny. Before long, we "will barely no-

tice when we become one of those countries where there are no citizens but only subjects" (pp. 113–14).

Professor Glendon suggests, however, that changing legal education to incorporate Justice Scalia's concerns may not solve our problems, "[f]or if textualism . . . and originalism advance[,] . . . selective deployment of . . . [them] will advance as well" (p. 112). A critical consideration, Glendon believes, is that American legal culture lacks an ethos compatible with a civil law system;[8] we lack the perception that all players have responsibilities that must be placed above individual interests.

Unfortunately, Professor Glendon fails to articulate how America can avoid this fate—if textualism cannot help us, what can? How can America develop an ethic of restraint which, combined with textualism, will avert these dire consequences? As a result of her failure to propose a solution, the reader is left with a fear of impending tyranny, without hope for salvation.

Professor Tribe contrasts his evolutionism with Justice Scalia's originalism, asserting that the Framers intended the Constitution to be elastic and it should be interpreted as such. He argues that it is impossible for anyone to "discover" the original meaning of constitutional provisions. Tribe asserts that Scalia and Dworkin, in claiming this ability, both "fail[] to adhere to these canons of candor and of self-conscious humility in the face of a task about which none of us is entitled to feel too self-assured" (p. 72).

Professor Tribe observes further that even if judges could ascertain the original meaning of constitutional provisions, limiting text to its 1791 meaning produces irrational gaps in constitutional protections. Tribe claims that it would be foolish to limit the Constitution's protections to the document's explicit text "simply because the document's authors *happened* to describe a form of abuse by reference of a historically tangible subcategory of what they might best be understood to have prohibited" (p.

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[8] Attorneys and judges in Germany and France, by contrast, "share a set of habits and practices inherited from a time when the civil code was the heart of the legal system" (p. 101). Thus, they know little of "activism."

70).[9] He further contends that Scalia, despite his rhetoric, has allowed the Constitution to evolve in his decisions.[10]

Justice Scalia rebuts Tribe on grounds of democratic principle. Even if Tribe is correct that the Constitution's meaning should evolve, Scalia maintains that "[j]udges are not . . . naturally appropriate expositors of the aspirations of a particular age; that task can be better done by legislature or by plebiscite" (p. 136).[11] While persuasive, this argument does not address the impracticability of using legislatures and referenda to resolve all the issues that come before courts. Legislatures, though competent, are not omniscient; courts inevitably will have to address issues that legislatures have neglected.

In spite of his poignant and insightful criticisms, Professor Tribe declines to propose another mode of textual interpretation, for he is "doubtful that any defensible set of ultimate rules exists" (p. 73). Scalia notes that Tribe's criticisms "are of little use to the judge who must determine whether and whither the Constitution has wandered" (p. 137). The result is that even if Scalia's textualism is not the panacea we seek, it is unclear if a better theory exists. Tribe's contribution to the debate, therefore, is eloquent and provocative, but, as a whole, unsatisfactory.

Professor Dworkin criticizes Scalia from an entirely different angle. He argues that it is impossible to discern what words mean simply by "translating" them, as the intent of the speaker is undeniably important in discerning the meaning of her words. Statutory translation, furthermore, is especially difficult, as a collective body uttered the language needing interpretation. Judges, therefore, should consider legislative intent when inter-

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[9] For example, Tribe asserts that: (1) Article I's grant of power to support an army and navy should not restrict Congress from supporting an air force; (2) the Third Amendment's prohibition against the quartering of soldiers is nonsensical without an underlying right to privacy in one's home; and (3) the First Amendment's protection of free speech from Congress's violation should also apply to violations by the Executive and Judicial Branches (pp. 81–83).

[10] Professor Tribe uses the First Amendment as an example of an area where Scalia has strayed from his stated position. According to Tribe, in striking down laws that are considered violations of the First Amendment today but would not have been so in 1791, Scalia is in implicit agreement with evolutionists. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (striking down laws against flag burning); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 557 (1993) (striking down laws giving special punishment to cross burners whose expression is of specific racial views).

[11] *But see* THE FEDERALIST No. 78, at 504–05 (E. Earle ed.) (A. Hamilton); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 23–28 (1962) (asserting that it makes sense to give some say on many issues to "the least dangerous branch"—the one possessing neither purse nor sword) cited in Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 714 (1975).

preting statutes in order to achieve the true outcome that the legislature desires.

Dworkin then claims that courts should interpret Constitutional provisions differently based on whether they are concrete rules (i.e., the Third Amendment) or abstract principles (i.e., the First and Eighth Amendments).[12] The essence of Dworkin's argument is that the Framers assumed that these abstract provisions would evolve over time. Thus, Dworkin holds something of a middle ground between Tribe and Scalia. His position is that, in some circumstances, the Constitution should evolve, but only because the Framers' original understanding of the Constitution was open-ended.

Dworkin's analysis hints at an alternative, and he may be unique among the panelists in actually taking an affirmative position, rather than merely criticizing Justice Scalia. Dworkin, however, fails to rebut any of the other panelists' criticisms of textualism, which would apply equally to his brand. He may be suggesting an answer to the statutory interpretation conundrum, but his analysis is not explicit enough for the reader to make that assumption.[13]

Overall, each panelist exposes a significant flaw in Scalia's method. Scalia has no ready defense against Professors Glendon's and Wood's assertions that textualism "appears to . . . be as permissive and as open to arbitrary judicial discretion and expansion as . . . other interpretative methods, if the text-minded judge is so inclined" (p. 63). Scalia weakly counters that textualism "is some protection" against activism, while the schools of legislative intent and history "positively invite[] the judge to impose his will" (p. 132). He does not, however, demonstrate how textualism safeguards against a similar straying; judges can apply any statute as they see fit not only in spite of, but even in the name of textualism. Only the ethic of the individual judge, not her theory of statutory interpretation, determines if she will stay within her defined role.

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[12] This is the case because "[t]here was no generally accepted understanding of the [First Amendment] on which the framers could have based a dated clause even if they had wanted to write one" (p. 124), and "it is near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary language, would have used 'cruel' as shorthand for 'what we now think cruel'" (p. 121). On the other hand, the prohibition of soldier-quartering mandates has a relatively unchangeable meaning.

[13] For a more complete explanation of Professor Dworkin's position, see Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997).

Professor Tribe and Justice Scalia spar enthusiastically about the role of *stare decisis* in textualist jurisprudence. Tribe asserts that, in accepting the force of precedent, Scalia implicitly accepts that constitutional provisions were not fixed in meaning when enacted. Scalia concedes his acceptance of *stare decisis* in cases where long-standing rules have been developed. He disagrees, however that this contradicts originalism, claiming that "[w]here originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones" (p. 139). All statutory interpretation philosophies, he observes, accept *stare decisis*, and the doctrine is integral to stabilizing the legal system.[14]

Scalia's assertion that forswearing *stare decisis* is "useful only as an academic exercise and not as a workable prescription for judicial governance" (p. 139) fails to remedy the fact that *stare decisis* is completely irreconcilable with textualism. Scalia does not dispute Tribe's claim that precedent and originalism are in some cases inconsistent; he simply argues that, notwithstanding that fact, abandoning *stare decisis* is impossible.[15] The dichotomy is problematic. If textualism (as Scalia claims) is the only interpretive method that can save us from tyranny of the judiciary, the value of *stare decisis* should not outweigh the benefits of textualism's wholesale endorsement.

Professor Dworkin's most persuasive criticism is that, in excluding legislative intent in all situations, textualism often fails to produce democratic outcomes. Since (as Scalia admits) democracy is paramount, "legislation should reflect what those who have been elected by the people actually think best for the country" (p. 118). Accordingly, when interpreting statutes, inquiring into the purposes and thoughts of the enacting body is necessary; only by performing this task can we be sure that the outcome the people want is the one that courts derive.

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[14] Some legal realists do not accept *stare decisis* on its face. Judge Frank, for example, once claimed that although "a court should never change a rule, retroactively, in its application to any person when the court has reason to believe that he actually relied on that rule[,] . . .the court [should] be free to change an unjust rule as to other persons, both retroactively and prospectively." *See* JEROME FRANK, COURTS ON TRIAL 270 (1963).

[15] Frank agreed, commenting that although he believed the theory of precedent needed reexamination, "no sensible person suggests that *stare decisis* be abandoned." *Id.* at 286. Justice Thomas, Scalia's textualist colleague on the Court, is closer to abandoning *stare decisis* than his mentor. Although it is thus far unclear how strong his feelings are, Thomas clearly believes that "[*s*]*tare decisis* is not an inexorable command." Holder v. Hall, 512 U.S. 874, 936 (1994) (Thomas, J., concurring).

This is the most powerful criticism presented in the debate, and can be illustrated further with reference to two recent Circuit Court cases, *Stromberg Metal Works v. Press Mechanical*[16] and *In re Abbott Labs.*[17] Both cases interpreted the 1990 amendment to the supplemental jurisdiction statute.[18] A pre-amendment case, *Zahn v. International Paper*, held that in class actions brought to federal court, each individual plaintiff had to satisfy the minimum jurisdictional amount in controversy requirement.[19] The amendment seemed on its face to overrule *Zahn*.[20] The legislative history explicitly stated, however, that the amendment was not intended to do so.[21]

The Fifth and Seventh Circuits both held that § 1367 overruled *Zahn*.[22] Regardless of whether they were "correct," these decisions accurately illustrate Dworkin's criticism of textualist doctrine. Can we say with conviction that Congress, presumably representative of the views of the nation, desired the result obtained by these cases? Certainly not. While these courts applied a reasonable interpretation of the statute, it is unclear whether the populace would endorse the decisions. Thus, since textualism is premised on democratic underpinnings, this criticism may completely overwhelm the doctrine.

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[16] 77 F. 3d 928 (7th Cir. 1996).

[17] 51 F. 3d 524 (5th Cir. 1995).

[18] 28 U.S.C. § 1367 (1997). This is not the most exciting example of where Dworkin's analysis elucidates a clear problem with textualism, but this fact should not detract from the problem's significance. Underlying textualism is democratic theory; if textualism does not produce democratic outcomes, its base will collapse.

[19] 414 U.S. 291, 294–95 (1973).

[20] The statute, as amended, states that district courts have supplemental jurisdiction over plaintiffs made parties under Rules 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, only if such parties independently satisfy the amount in controversy requirement of 28 U.S.C. § 1332. *See* 28 U.S.C. § 1367(b) (1997). The contrapositive, inferred by the *Stromberg* and *Abbott Labs* courts, is that courts have supplemental jurisdiction over those made a party under Rule 23, regardless of their independent jurisdictional insufficiency. *See Stromberg*, 77 F.3d at 930–31; *Abbott Labs*, 51 F. 3d at 527. *But see* Leonhardt v. Western Sugar Co., 1998 WL 789494 at *8–10 (10th Cir. Nov. 13, 1998).

[21] *See* H.R. REP. NO. 734, at 78 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860 ("This section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity class actions.") (citing *Zahn*); *see also* Mark Hutcheson, Comment, *Unintended Consequences: 28 U.S.C. § 1367's Effect on Diversity's Amount-In-Controversy Requirement*, 48 BAYLOR L. REV. 247 (1996) (discussing the unintended results of § 1367).

[22] *Stromberg*, 77 F.3d at 930; *Abbott Labs*, 51 F.3d at 527. Before these circuits dealt with the issue, however, "the vast majority of cases . . . ha[d] reached a contrary result." Riverside Transp. v. Bellsouth Telecommunications, 847 F. Supp. 453, 455–56 (M.D. La. 1994) (citing cases).

Overall, Justice Scalia's performance in this debate does not do him justice: he has, on many prior occasions, tamed his opponents more thoroughly then on this one.[23] However, in some ways Justice Scalia's weak defense of textualism proves that the doctrine is too extreme to dominate the diversity of legal minds in this country. Regardless of the merits of Scalia's position, his arguments must be considered in any comprehensive statutory interpretation debate.

Today, this debate is public and political. In responding to claims of playing politics in failing to confirm judges nominated by President Clinton, Senate Judiciary Committee Chairman Orrin Hatch (R-Utah) recently commented that "[t]he No. 1 problem happens to be activist judges who continue to find laws that aren't there and expand the law beyond the intent of Congress."[24] Indeed, as judicial appointments have become increasingly political, statutory interpretation has become a divisive and contentious political issue.

However, we are far beyond the point where mere criticism is sufficient; solutions are necessary. Justice Scalia's methods have been challenged before,[25] but criticism has not produced alternatives. This volume's scholars and politicians on Capitol Hill seem to agree that a continuation of current judicial policy is potentially catastrophic. But until judges and scholars cease discussing the problem and set out to solve it, our fate rests in unsteady hands.

—*Michael Slade*

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[23] Justice Scalia has responded to his critics more persuasively on other occasions. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–65 (1989); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 48 CASE W. RES. L. REV. 581 (1990). Further, Scalia's dissents in recent cases prove that he has not lost his willingness to castigate his opponents. When Scalia dissents, the majority opinions often spend more time rebutting his arguments than developing their own. *See, e.g.*, Casperini v. Center For Humanities, Inc., 116 S. Ct. 2211, 2230 (1997) (Scalia, J., dissenting) ("It is not for us . . . to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness"); Schenck v. Pro-Choice Network of Western New York, 117 S. Ct. 855, 871 (1997) (Scalia, J., concurring in part and dissenting in part) ("The Court's opinion . . . claims for the judiciary a prerogative I have never heard of.").

[24] *Key Senator's Verdict on Vacant U.S. Judgeships: Blame Clinton*, L.A. TIMES, Jan. 3, 1998, at A16. *See also* Editorial, *The Chief Justice Speaks*, WASH. POST, Jan. 3, 1998, at A20.

[25] *See, e.g.*, George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L. REV. 1297 (1990) (discussing Scalia's judicial philosophy and criticisms of it); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1715 (1991) (asserting that Scalia's jurisprudence produces antiegalitarianism).