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ESSAY

THE CIVIL RIGHTS REMEDY OF THE VIOLENCE AGAINST WOMEN ACT: A DEFENSE

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In 1994, Congress enacted the Violence Against Women Act (VAWA) to combat inadequacies in the judicial system's protection of women. In a 1998 decision, the Fourth Circuit held unconstitutional VAWA's Section 13981, which creates a civil rights remedy allowing victims of gender-motivated violence to sue their attackers in federal or state court. The Supreme Court recently granted certiorari to consider the constitutionality of this remedy. In this Essay, Senator Biden, the chief sponsor of the Violence Against Women Act, defends the civil rights remedy as a valid exercise of Congress's authority under the Commerce and Equal Protection Clauses of the Constitution.

In 1990, I first introduced the Violence Against Women Act "in response to the escalating problem of violence against women"[1]—a "national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street."[2] On September 13, 1994, the President signed the bill into law.[3] That signing marked the end of years of careful consideration and long hearings, fact-finding, and revisions in support of this important legislation. A vital subtitle of the Act, the Civil Rights Remedies for Gender-Motivated Violence Act, creates a new federal civil cause of action that allows a victim of gender-motivated violence to sue her attacker.[4] This provision was recently held unconstitutional by the United States Court of Appeals for the Fourth Circuit, and the Supreme Court has

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[1] S. REP. No. 103-138, at 37 (1993).

[2] S. REP. No. 102-197, at 39 (1991).

[3] Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.). The Violence Against Women Act was passed as part of the Violent Crime Control and Law Enforcement Act of 1994, popularly known as the "1994 Crime Bill." For its legislative history, see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

[4] 42 U.S.C. § 13981 (1999).

granted certiorari to decide this provision's constitutionality.[5] I take this opportunity, as the Act's chief sponsor, to explain the need for the remedy and its constitutional basis.

I. THE SCOPE OF VIOLENCE AGAINST WOMEN

A. *The National Scourge of Violence Against Women*

During its four-year inquiry, Congress generated a massive record, including testimony from law enforcement officials, judges, social scientists, professors, physicians, and victims. This legislative record demonstrated that violence against women is a national problem of the highest order—a problem that Congress found seriously impeded women from participating fully in the commercial life of the nation and one that state legal systems had proven unable and unwilling to remedy.[6] The evidence reflected that violence is the leading cause of injury to women ages fifteen to forty-four.[7] While women often are subject to violence for the same reasons as men (such as for robbery, burglary, larceny, and motor vehicle theft), Congress learned that "women also are victims of violence simply because

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[5] *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted sub nom.* United States v. Morrison, 68 U.S.L.W. 3175, 3177 (U.S. Sept. 28, 1999) (No. 99-5), and *cert. granted sub nom.* Brzonkala v. Morrison, 68 U.S.L.W. 3175, 3177 (U.S. Sept. 28, 1999) (No. 99-29).

[6] *See, e.g., Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 103d Cong. (1994) [hereinafter *1994 H.R. Hrg.*]; *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 103d Cong. (1993) [hereinafter *1993 H.R. Hrg.*]; *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) [hereinafter *Nov. 1993 S. Hrg.*]; *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) [hereinafter Apr. *1993 S. Hrg.*]; *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) [hereinafter *Feb. 1993 S. Hrg.*]; *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 102d Cong. (1992) [hereinafter *1992 H.R. Hrg.*]; *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary,* 102d Cong. (1991) [hereinafter *1991 S. Hrg.*]; *Women and Violence: Hearings Before the Senate Comm. on the Judiciary,* 101st Cong. (1990) [hereinafter *1990 S. Hrg.*]; *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources,* 101st Cong. (1990) [hereinafter *1990 S. Labor Hrg.*].

[7] *See* S. REP. NO. 103-138, at 38 (1993) (citing Antonio C. Novello, *From the Surgeon General, U.S. Public Health Service,* 267 JAMA 3132, 3132 (1992)). The following statistics were gathered when the Violence Against Women Act was considered by Congress.

they are women."[8] Every fifteen seconds, a woman in the United States is battered by her husband or boyfriend; every six minutes, a woman is raped.[9] According to studies, three out of four women will be victims of at least one violent crime during their lifetimes,[10] and one in every eight adult women, or at least 12.1 million American women, has been a victim of forcible rape at some point in her lifetime.[11] The rates of sexual assault on college campuses is even higher. One out of every four female college students has been the victim of a sexual assault, and one in seven of rape.[12]

Congress found violence against women in the home to be especially pervasive. An estimated four million American women are battered each year by their husbands or partners, and approximately ninety-five percent of all domestic violence victims are women.[13] Fully one-third of all women murdered die at the hands of a husband or boyfriend.[14] The sad fact, as Congress recognized, is that "[v]iolent attacks by men now tops the list of dangers to an American woman's health."[15]

These statistics are sobering, and the problem was only growing worse. In the early 1990s, when Congress began holding hearings on violence against women, the rate of assaults against women was rising twice as fast as that of assaults against men.[16] Over the prior decade, the rape rate soared four times as fast as the total crime rate.[17]

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[8] *1991 S. Hrg.*, *supra* note 6, at 262 (statement of Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies); *see also 1993 H. Hrg.*, *supra* note 6, at 5 (statement of Sally Goldfarb, Senior Staff Attorney, NOW) ("[W]omen must fear not only the crimes that confront all members of our society, but also those that are inflicted exclusively or overwhelmingly on the female half of our population."). I will refer to crimes that single out women, not because they happened to be at the wrong place at the wrong time, but *because they are women*, as "gender-based."

[9] *See* S. REP. No. 102-197, at 36 (1991); S. REP. No. 101-545, at 27 (1990).

[10] H.R. REP. No. 103-395, at 25 (1993); S. REP. No. 103-138, at 38 (1993); *1990 S. Hrg.*, *supra* note 6, pt. 1, at 12 (Ten Facts About Violence Against Women).

[11] *See* NATIONAL VICTIM CENTER ON CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION, 2 (1992).

[12] *See 1991 S. Hrg.*, *supra* note 6, at 29 (statement of Bonnie J. Campbell, Attorney General of Iowa); *1990 S. Hrg.*, *supra* note 6, pt. 2, at 77 (Statistics on Sexual Violence Against Women).

[13] *See* S. REP. No. 103-138, at 38 (1993); H.R. REP. No. 103-395 (1993), at 26; *1990 S. Hrg.*, *supra* note 6, pt. 2, at 117 (statement of Dr. Angela Browne).

[14] S. REP. No. 103-138, at 41 (1993) (citing U.S. DEP'T OF JUSTICE, FBI CRIME IN THE UNITED STATES 1991: UNIFORM CRIME REPORTS 19 (1992)).

[15] S. REP. No. 102-197, at 36 (1991).

[16] *See 1991 S. Hrg.*, *supra* note 6, at 25.

[17] S. REP. No. 101-545, at 27–28 (1990); *see also 1993 H. Hrg.*, *supra* note 6, at 5 (statement of Sally Goldfarb); *1990 S. Hrg.*, *supra* note 6, pt. 1, at 12 (Ten Facts About

Such gender-based violence exacts a staggering toll. "Partial estimates show that violent crime against women costs this country at least 3 billion . . . dollars a year."[18] Medical costs related to domestic abuse alone were estimated to top $100 million a year.[19] Gender-based violence deprives women of the opportunity to secure and maintain employment on an equal footing with men.[20] Domestic abuse drives women to the streets, with as many as fifty percent of homeless women having lost their housing as a result of fleeing from violence.[21] And the destructive cycle continues, as boys who have witnessed violence at home are ten times more likely to batter their female partners later in life than those boys who have not.[22]

Thus, the legislative record amassed over four years demonstrates that "the threat of violence permeates every aspect of women's lives. It alters where women live, work, and study, as they try to be safe by staying within certain prescribed bounds."[23] In short, gender-based violence (and the threat of such violence) relegates women to "a form of second-class citizenship."[24]

Historically, crimes against women have been perceived as anything *but* crime. Instead, they have been viewed "as a 'family' problem, as a 'private' matter, as sexual 'miscommunication.'"[25] Regrettably, Congress learned that states had not escaped this myth—an unfortunate legacy of the common-law "rule of thumb."[26] "From the initial report to the police through prosecution, trial, and sentencing," Congress recognized, "crimes against women are often treated differently and less se-

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Violence Against Women).

[18] S. REP. No. 101-545, at 33 (1990).

[19] *See 1991 S. Hrg.*, *supra* note 6, at 240 (statement of National Federation of Business and Professional Women, Inc.); *1990 S. Hrg.*, *supra* note 6, pt. 1, at 58 (statement of Helen R. Neuborne).

[20] *See infra* notes 124–134 and accompanying text.

[21] *See* S. REP. No. 101-545, at 37 (1990); *1993 H. Hrg.*, *supra* note 6, at 13 (statement of Sally Goldfarb); *1990 S. Hrg.*, *supra* note 6, pt. 2, at 79 (Ten Facts About Violence Against Women).

[22] *1990 S. Hrg.*, *supra* note 6, pt.2, at 89 (statement of Charlotte Fedders).

[23] *1991 S. Hrg.*, *supra* note 6, at 253 (statement of Dr. Leslie R. Wolfe).

[24] *1990 S. Hrg.*, *supra* note 6, pt. 1, at 57 (statement of Helen Neuborne).

[25] S. REP. No. 102-197, at 37 (1991); *see also 1991 S. Hrg.*, *supra* note 6, at 253 (statement of Dr. Leslie R. Wolfe) (Myths suggest that "woman battering and rape are 'crimes of passion,' that wife abuse is a 'private, family affair,' and that women who are battered, raped, or killed 'had it coming' because of some fault or error of their own").

[26] *See* S. REP. No. 103-138, at 41 (1993) ("Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the 'rule of thumb,' which barred a husband from 'restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb.'"). *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy,* 105 YALE L.J. 2117 (1996).

riously than other crimes."[27] Congress determined that because of widespread gender bias, state legal systems institutionalized the historic prejudices against victims of rape or domestic violence by erecting "barriers of law, of practice, and of prejudice not suffered by other victims of discrimination."[28] Congress determined that this systemic bias in state systems deprived victims of gender-based violence "of equal protection of the laws and the redress to which they are entitled,"[29] subjecting them to "double victimization"—first at the hands of the offender and then of the legal system. Congress reached that conclusion after hearing from state officials, evaluating state laws, and reviewing reports issued by state task forces which themselves concluded that their state justice systems were rife with gender bias in addressing domestic violence, rape, and sexual assault. In fact, state officials *invited* Congress to pass the Violence Against Women Act.[30]

Sadly, society had come to accept gender-based violence "as somehow 'normal,'" its devastating effects on our economy and commerce so routine as to become almost invisible.[31] Because, however, violence against women obstructs interstate commerce and threatens principles of equality, Congress had the constitutional power and the duty to intervene. And that is exactly what Congress did.

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[27] S. REP. No. 103-138, at 42 (1993); *see also* S. REP. No. 102-197, at 33 (1991) (remarking on "the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously").

[28] S. REP. No. 103-138, at 49 (1993); *see also* S. REP. No. 102-197, at 33 (1991).

[29] H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853; *see also* S. REP. No. 103-138, at 29 (1993).

[30] *See 1993 H. Hrg.*, *supra* note 6, at 34–36 (letter from 41 Attorneys General urging Congress to pass the Violence Against Women Act because "the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds"); *see also 1993 H.R. Hrg.*, *supra* note 6, at 30–32 (statement of the National Association of Women Judges supporting the civil rights provision); *1991 S. Hrg.*, *supra* note 6, at 37–39 (resolution from the National Association of Attorneys General urging passage of the Violence Against Women Act).

[31] S. REP. No. 102-197, at 36 (1991); *1991 S. Hrg.*, *supra* note 6, at 92 (statement of Prof. Burt Neuborne). As one commentator observed, with respect to violence against women: "[I]ts very commonness, its ubiquity, seemed to counsel against the idea that violence discriminated." Nourse, *supra* note 3, at 4.

B. *The Violence Against Women Act of 1994*

Congress responded with the Violence Against Women Act of 1994, which addresses violence against women through "different complementary strategies."[32] The Act:

- penalizes interstate domestic violence and interstate violation of protection orders;[33]
- mandates that a protective order issued in one state be given "full faith and credit" in other states;[34]
- amends the Federal Rules of Evidence to adopt a federal rape shield provision excluding evidence of a victim's prior sexual conduct from use in federal proceedings involving sexual misconduct;[35] and
- installs new federal grant programs enlisting federal, state, and local governments; domestic violence agencies; law enforcement; and courts as partners in the fight against gender-motivated crimes.[36]

One piece of this legislative scheme is the civil rights remedy, codified in 42 U.S.C. § 13981, which creates a federal right "to be free from crimes of violence motivated by gender"[37] and a federal civil rights cause of action to enforce that right. Modeled after other federal civil rights statutes, § 13981 defines a "crime of violence" as an act against a person or property that would constitute a federal or state felony and that would satisfy the definition set out in 18 U.S.C. § 16, "whether or not those acts have actually resulted in criminal charges, prosecution or conviction."[38] For the crime of violence to be "motivated by gender," the crime must have been committed "because of gender or on the basis of gender and due, at least in part, to an animus based on the victim's gender."[39] A person who commits a crime of violence motivated by gender is subject to liability to the victim for damages, injunctive relief, and attorneys' fees in either fed-

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[32] S. REP. No. 102-197, at 34 (1991).
[33] *See* 18 U.S.C. § 2261, § 2262.
[34] *See* 18 U.S.C. § 2265.
[35] *See* Fed. R. Evid. 412.
[36] These programs authorized $1.6 billion in federal spending over six years to enhance efforts to reduce violence against women, including assistance to local law enforcement; grants encouraging the adoption of mandatory arrest policies; rape prevention and education programs; victim services programs; battered women's shelters; a national domestic violence hotline; improved security; and training for judges and court personnel. *See, e.g.*, 42 U.S.C. §§ 300w-10, 3796gg, 10409(a), 13981.
[37] 42 U.S.C. § 13981(b).
[38] *See* § 13981(d)(2)(A).
[39] § 13981(d)(1).

eral or state court. The statute states explicitly that no cause of action is authorized for "random acts of violence unrelated to gender."[40] Finally, the provision prohibits a federal court from exercising supplemental jurisdiction over any state law claims regarding divorce, alimony, the distribution of marital property, or child-custody decrees,[41] and bars the removal to federal court of any state court action asserting claims under § 13981.[42]

The civil rights remedy was among the most closely considered provisions of the Violence Against Women Act. The remedy represents a critical facet of the Violence Against Women Act because it empowers the survivor to secure "legal vindication that the survivor, not the State, controls."[43] After years of expert testimony and careful deliberation, Congress concluded that the provision was necessary, and as it expressed in the statutory text and committee findings, it had the power to enact the provision pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment.[44] As discussed in Parts II and III, below, that determination was correct.

C. Brzonkala v. Virginia Polytechnic Institute & State University

In *Brzonkala v. Virginia Polytechnic Institute & State University*,[45] an en banc United States Court of Appeals for the Fourth Circuit held that in enacting the Violence Against Women Act civil rights remedy, Congress had exceeded its authority under the Commerce Clause and § 5 of the Fourteenth Amendment, rendering the provision unconstitutional.[46] This ruling stands in

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[40] § 13981(e)(1).

[41] *See* § 13981(e)(4).

[42] *See* 28 U.S.C. § 1445(d).

[43] S. REP. No. 101-545, at 42 (1990).

[44] *See* § 13981(a); *see also* S. REP. No. 103-138, at 54–55 (1993) (explaining the provision's constitutional underpinnings).

[45] 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted sub nom.* United States v. Morrison, 68 U.S.L.W. 3175, 3177 (U.S. Sept. 28, 1999) (No. 99-5), and *cert. granted sub nom.* Brzonkala v. Morrison, 68 U.S.L.W. 3175, 3177 (U.S. Sept. 28, 1999) (No. 99-29).

[46] Note, however, that the criminal provisions of the Act have been uniformly upheld against challenge by the courts of appeals, including the Fourth Circuit. *See, e.g.*, United States v. Gluzman, 154 F.3d 49 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1257 (1999); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 522 U.S. 896 (1997).

conflict with those of sixteen district courts that to date have upheld the statute.[47]

In an opinion by Judge Luttig, the Fourth Circuit agreed that Brzonkala had stated a cause of action under § 13981, the civil rights remedy of the Violence Against Women Act.[48] The majority concluded, however, that Congress did not possess the authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact the remedy. With respect to the Commerce Clause, the court acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy."[49] The Fourth Circuit also agreed that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce . . . depict the manner in which such violence affects interstate commerce."[50] Nonetheless, relying on *United States v. Lopez*,[51] the court held that § 13981 could not be sustained as a valid enactment under Congress's Commerce Clause power to regulate activities substantially affecting interstate commerce. The court interpreted *Lopez* to hold that Congress cannot regulate an activity as affecting interstate com-

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[47] *See* Williams v. Board of County Comm'rs, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, No. 98 C2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 14, 1999); Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); Ericson v. Syracuse Univ., 95 F. Supp. 2d 344 (S.D.N.Y. 1999); Culberson v. Doan, No. C-1-97-965 (S.D. Ohio Apr. 8, 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); C.R.K. v. Martin, No. Civ. 96-1431MLB (D. Kan. July 10, 1998); Timm v. DeLong, No. 8:98-CV-43 (D. Neb. June 22, 1998); Mattison v. Click Corp., No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). *But see* Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999) (holding that § 13981 is unconstitutional).

[48] *See Brzonkala*, 169 F.3d at 829. Plaintiff Christy Brzonkala alleges that in September 1994, when she was a freshman at Virginia Polytechnic Institute, two student football players, Antonio Morrison and James Crawford, forcibly raped her in her dormitory. Immediately afterwards, Morrison allegedly told Brzonkala, "You better not have any f***ing diseases." Subsequently, Morrison allegedly announced publicly in the dining hall, "I like to get girls drunk and f*** the s*** out of them." *Id.* at 827. Brzonkala claims that Morrison and Crawford violated her right under § 13981 to be free from crimes of violence motivated by gender animus.

[49] *Id.* at 851.

[50] *Id.*

[51] 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act, which criminalized the possession of a firearm within 1000 feet of a school, as exceeding congressional authority under the Commerce Clause).

merce unless (1) the regulated activity is commercial or economic or (2) the statute contains an express jurisdictional element ensuring an effect on interstate commerce in each individual case.[52] "Because § 13981 neither regulates an economic activity nor includes a jurisdictional element," the Fourth Circuit determined, the statute "cannot be upheld on the authority of *Lopez* or any other Supreme Court holding marking the limits of Congress' power under the substantially affects test."[53]

The court of appeals also reasoned that even if congressional power were not so rigidly confined to these categories, the remedy still exceeded Congress's commerce authority. Citing the *Lopez* Court's admonition that the scope of the commerce power cannot be construed so as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government,"[54] the majority concluded that § 13981 presented the same federalism concerns that had convinced the Supreme Court to invalidate the statute in *Lopez*.[55]

Nor, according to the majority, could § 13981 be justified as a valid exercise of Congress's authority to enforce the Fourteenth Amendment. Relying heavily on the Reconstruction-era precedents of *United States v. Harris*[56] and the *Civil Rights Cases*,[57] the Fourth Circuit concluded that § 13981 is invalid "regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct."[58]

The court further held that Congress failed to satisfy the requirement of *City of Boerne v. Flores*[59] that there exist "a congruence and proportionality between the [constitutional] injury to be prevented . . . and the means adopted to that end."[60] Dismissing out of hand the congressional findings that bias in state justice systems had deprived victims of equal protection of the laws,[61] the Fourth Circuit decided that § 13981 could not be considered a remedy for state action violating the Constitution.[62]

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[52] *See Brzonkala*, 169 F.3d at 830–36.
[53] *Id.* at 836; *see also id.* at 833.
[54] *Id.* at 837 (quoting *Lopez*, 514 U.S. 549, 557 (1995)).
[55] *See id.* at 837–44.
[56] 106 U.S. 629 (1883).
[57] 109 U.S. 3 (1883).
[58] *Brzonkala*, 169 F.3d at 873.
[59] 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993).
[60] *Id.* at 520.
[61] *See Brzonkala*, 169 F.3d at 883–84.
[62] *See id.* at 884.

While acknowledging that the legislative history of the Violence Against Women Act "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims . . . from obtaining vindication," the court doubted that such conduct amounted to "the type of *purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation."[63]

Finally, the court of appeals concluded that even if it were intended to remedy unconstitutional state discrimination, the civil rights remedy, like the Religious Freedom Restoration Act, "[was] so out of proportion to any possible unconstitutional state action at which it might conceivably be aimed as to exceed congressional power to 'enforce' the Fourteenth Amendment."[64] The court pointed to the fact that the statute reaches "all victims of gender-motivated violent felonies, all defendants who commit such crimes, all States and jurisdictions without regard to the adequacy of their enforcement efforts, substantive laws, or evidentiary rules and procedures."[65]

The dissent, authored by Judge Motz, chastised the majority for failing to accord due deference to congressional findings.[66] In light of the "detailed and extensive" congressional findings and testimony,[67] the dissent wrote, "Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce."[68] "Further," according to the dissent, "even when subjected to the most searching examination, it is clear that this carefully drawn statute neither interferes with state regulation nor legislates in an area of traditional state concern."[69]

The dissent was correct. As explained in Part II, the majority opinion in *Brzonkala* reflects a misunderstanding both of *Lopez* and of congressional power to regulate intrastate activity that substantially affects interstate commerce. Section 13981 contin-

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[63] *Id.*

[64] *Id.* at 886–87.

[65] *Id.* at 887.

[66] "Proper judicial review of the massive congressional record inexorably leads to the conclusion that Congress had a rational basis for finding that gender-motivated violence substantially affects interstate commerce." *Id.* at 906 (Motz, J., dissenting); *see also id.* at 916 ("Proper application of the mandated rational basis standard of judicial review simply does not permit the result reached by the majority.") (Motz, J., dissenting).

[67] *Id.* at 913 (Motz, J., dissenting).

[68] *Id.* at 916 (Motz, J., dissenting).

[69] *Id.* at 906 (Motz, J., dissenting). Because the dissent would have upheld the statute as a valid exercise of Congress's Commerce Clause authority, it did not reach the alternative Fourteenth Amendment basis of authority. *Id.* at 911 n.1 (Motz, J. dissenting).

ues, and is in keeping with, a venerable tradition of federal civil rights laws validly enacted under the Commerce Clause. Part III describes the Fourteenth Amendment rationale for the statute and explains why the Fourth Circuit was wrong to conclude that Congress is without power to regulate private activity, even as a means of redressing unconstitutional state conduct.

II. CONGRESS'S AUTHORITY TO ENACT THE CIVIL RIGHTS REMEDY UNDER THE COMMERCE CLAUSE

The Fourth Circuit held in *Brzonkala* that after *Lopez,* federal regulation of noncommercial, intrastate activity is impermissible absent a jurisdictional element. That reading of *Lopez* is inconsistent with prior Supreme Court precedent construing the Commerce Clause and a proper conception of the judicial role in reviewing acts of Congress. In the wake of *Lopez,* Congress retains its authority to regulate activities that substantially affect commerce.

In this instance, after careful study, Congress determined that gender-based violence directly and substantially affects interstate commerce. Congress found that such violence limits the participation of women in the economy, inhibits their production and consumption of goods, and obstructs their ability to work and travel freely. That determination was correct and entitled to judicial deference. To find that Congress exceeded its Commerce Clause authority in enacting the remedy, a court would have to substitute its own judgement for that of Congress and set aside *an express congressional finding* that gender-based violence had the requisite relation to interstate commerce.[70]

Equally important, the civil rights remedy was carefully crafted in the very best spirit of cooperative federalism. Congress did not preempt, invalidate, or duplicate state laws; create an intrusive remedy directly against offending states; or legislate in areas traditionally reserved to states such as divorce, child custody, or alimony. Instead, Congress provided a *supplemental* remedy for victims that minimally interferes with state prerogatives.

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[70] *See infra* text accompanying notes 140–149 (discussing the historic norm of judicial deference).

A. *Congress May Regulate Intrastate Activity, Such as Violence Against Women, Which Has a Substantial Effect on Interstate Commerce*

As the Supreme Court reiterated in *United States v. Lopez*,[71] Congress's authority under the Commerce Clause includes the power to regulate those activities having a substantial relation to interstate commerce. It is undeniable that many individual instances of gender-based violence covered by § 13981 involve purely local, intrastate conduct and that the statute imposes no "jurisdictional element" requiring a nexus to interstate commerce in every case. Before *Lopez*, however, there was no question that Congress could regulate conduct which, as a class, substantially affected interstate commerce.[72] In other words, Congress may regulate individual acts of sexual violence or domestic abuse, not all of which affect interstate commerce, if such acts of gender-based violence, when considered cumulatively, exert a substantial effect on interstate commerce.

Nowhere has this Court been more sensitive to Congress's discretion in exercising its Commerce Clause authority then when, as here, Congress has determined that a particular class of conduct obstructs a discrete group's participation in commercial intercourse and thus warrants a federal response. In *Katzenbach v. McClung*,[73] for example, the Court approved the application of Title II of the Civil Rights Act of 1964 to Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama, which served a local clientele. The Court relied on evidence before Congress establishing that discrimination on the basis of race had "a direct and highly restrictive effect" upon interstate travel and impeded interstate commerce by affecting the volume of interstate goods

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[71] 514 U.S. 549 (1995).

[72] *See, e.g.*, Fry v. United States, 421 U.S. 542, 547 (1975) (noting, in sustaining the Economic Stabilization Act, that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations"); Perez v. United States, 402 U.S. 146, 154 (1971) (affirming a criminal conviction for "loan sharking" by use or threat of violence as applied to intrastate individual acts because so long as a "class of activities" affects interstate commerce, Congress has the power to regulate it); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (sustaining the wheat quotas imposed by the Agricultural Adjustment Act, as applied to a dairy farmer who produced wheat solely for home consumption because the farmer's "contribution [to the demand for wheat], taken together with that of many others, similarly situated, is far from trivial").

[73] 379 U.S. 294 (1964).

sold and the success of local businesses.[74] Because Congress could find that race discrimination by restaurants adversely affected interstate commerce, the Court rejected the argument that Congress was required to include a provision in the statute requiring a case-by-case determination of the impact of race discrimination on interstate commerce.[75]

Similarly, in upholding the extension of the Age Discrimination in Employment Act to state employers, the Supreme Court relied on the damaging economic impact of age discrimination, which "deprived the national economy of the productive labor of millions of individuals" and "inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations."[76] As the *McClung* Court had put it: "this type of discrimination imposed 'an artificial restriction on the market' and interfered with the flow of merchandise."[77]

The same holds equally true for gender-based violence. Such violence, as documented below,[78] "deprive[s] the national economy of the productive labor of millions" of women and inflicts on women severe and dislocating "economy injury" because of the loss of opportunity for women to engage fully in the activities that are the lifeblood of our national economy. The singling out of *women* to bear the brunt of many crimes of violence imposes an "artificial restriction on the market"—one that impedes travel and the flow of goods and services in interstate commerce, and one that like race discrimination in public accommodations, calls for a federal response.[79] Indeed, as Justice Kennedy recog-

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[74] *Id.* at 300.

[75] *See id.* at 303; *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (upholding application of Title II to race discrimination in hotel with a "purely local character" because "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce").

[76] EEOC v. Wyoming, 460 U.S. 226, 231 (1983).

[77] *McClung*, 379 U.S. at 299–300 (citations omitted); *see also* Daniel v. Paul, 395 U.S. 298, 307 n.10 (1969) (recognizing that if "establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less") (quoting 110 Cong. Rec. 7402 (1964)).

[78] *See* Part II.(D)(1), *infra*.

[79] *See 1991 S. Hrg.*, *supra* note 6, at 116 (statement of Prof. Cass Sunstein) ("Congress could reasonably find . . . that the existence of sex-related violence 'overhangs the market,' in the sense that it discourages women from working in jobs and travelling to places in which sex-related violence occurs."); *see also id.* at 88 (statement of Prof. Burt Neuborne).

nized in his concurrence in *Lopez,* Congress can regulate "in the commercial sphere" on the assumption that "we have a single market and a unified purpose to build a stable national economy."[80]

B. United States v. Lopez

The key question is whether *Lopez* changed all that. The decision in *Lopez*, in which the Supreme Court held that the Gun-Free School Zones Act of 1990[81] exceeded Congress's authority under the Commerce Clause, marked the first occasion in nearly sixty years that the Court invalidated an act of Congress passed pursuant to its power to regulate interstate commerce.[82] The statute in question made it a federal crime to possess a gun in a school zone and imposed no requirement that the gun have moved in interstate commerce or that the particular possession have affected interstate commerce.

In holding that § 922(q) was not a valid application of Congress's authority to regulate interstate commerce, the Court stated that the statute "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[83] First, distinguishing the statutes at issue in earlier cases such as *Wickard v. Filburn*, which, the Court claimed, "involved economic activity in a way that the possession of a gun in a school zone does not,"[84] the Court concluded that § 922(q) "has nothing to do with 'commerce' or any sort of economic enterprise."[85] Second, the Court pointed out that §922(q) "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[86]

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[80] United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

[81] 18 U.S.C. § 922(q) (1994).

[82] The last such occasion was Carter v. Carter Coal Co., 298 U.S. 238, 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935).

[83] *Lopez*, 514 U.S. at 551.

[84] *Id.* at 560.

[85] *Id.* at 561.

[86] *Id.* A jurisdictional element is one that would require *in every case* that the prohibited activity affect or have some connection to interstate commerce. After the Supreme Court invalidated the Gun-Free School Zones Act, Congress amended § 922(q) to make it unlawful for anyone "knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." *See* Pub. L. No. 104-208, § 657 (1996).

Remarking on the absence of congressional findings that would have enabled the Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce,"[87] the Court turned to the government's "cost of crime" rationale. According to the government's theory, "the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment."[88] An impaired educational process, in turn, "will result in a less productive citizenry," which then will have "an adverse effect on the Nation's economic well-being."[89]

In the Court's view, the "national productivity" rationale was farfetched.[90] To uphold it without the benefit of any record, the Court would have "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a police power of the sort retained by the States."[91] The Court refused to find the requisite effect on interstate commerce based on such an attenuated chain of inferences.[92] The Court was also troubled by the absence of any limiting principle. Under the government's theory, it feared, Congress could regulate any activity, including family law, that it found affected "the economic productivity of individual citizens . . . ."[93] Indeed, under that theory, "it [was] difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[94] The Court found no indication that the problem could not be adequately handled by the states. Justice Kennedy's concurrence expressed similar concerns about federal encroachment into state spheres of authority.[95]

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[87] *Lopez*, 514 U.S. at 563.
[88] *Id.* at 564.
[89] *Id.* at 564.
[90] *Id.*
[91] *Id.* at 567.
[92] *See id.*
[93] *Id.* at 564.
[94] *Id.*
[95] *See id.* at 580–83 (Kennedy, J., concurring).

C. *Congress's Authority to Regulate Noneconomic Activity After* Lopez

In *Brzonkala*, the Fourth Circuit held that after *Lopez*, it was impermissible for Congress to regulate noneconomic intrastate activity absent a jurisdictional element.[96] According to the court of appeals, the cumulative effects principle exemplified by *Wickard v. Filburn* now applies only to economic or commercial activity.[97] Although the Court's opinion in *Lopez* is not free from ambiguity, a careful reading of that decision, Supreme Court precedents, and the decisions of lower courts confirm that Congress's power has not been so narrowed.

First, the decision in *Lopez* itself undermines the conclusion that in the absence of a jurisdictional element, Commerce Clause legislation must regulate activities that are themselves economic or commercial in nature. Not only did the Court not overrule precedents that lacked such a restriction, but the Court *approved* several of its earlier cases, including *Wickard,* which recognized that "[e]ven if . . . activity be local and *though it may not be regarded as commerce*, it may still *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."[98] Accordingly, the Court proceeded to evaluate the government's proffered rationale for the statute, rather than simply end its opinion after determining that the statute did not regulate commercial activity or contain a jurisdictional element.[99]

Certainly the concurring justices did not intend to confine congressional power to the regulation of commercial activities. The concurring opinion of Justices Kennedy and O'Connor emphasized that "mathematical or rigid formulas . . . are not provided by the great concepts of the Constitution,"[100] thereby es-

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[96] *See Brzonkala*, 169 F.3d at 830–33.

[97] *Id.* at 839 (reasoning that "while the Supreme Court has, in cases such as *Wickard*, relied on relatively sweeping and permissive reasoning . . . to find that intrastate *economic* activity substantially affects interstate commerce, *Lopez* clearly forecloses either reliance upon such authority or application of such analysis to sustain congressional regulation of *noneconomic* activities").

[98] *Lopez*, 514 U.S. at 556 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)) (emphasis added).

[99] See *id.* at 562–68.

[100] *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring); *see also id.* at 572 (Kennedy, J., concurring) (emphasizing "the importance of a practical conception of the commerce power"); *id.* at 574 (Kennedy, J., concurring) (recognizing "the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause").

chewing the rigid categorization approach that characterized the New Deal era.[101] In fact, the concurring Justices specifically contemplated that Congress may regulate noncommercial activities. The concurrence simply urged that in the absence of a commercial nexus, a court should "inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."[102]

Nor would a judicially created line between commercial and noncommercial activity be appropriate, in this case or any other. Section 13981 is a straightforward application of the principle that "the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'"[103] That power, "if it is to exist, must include the authority to deal with obstructions to interstate commerce."[104] It does not matter whether the *source* of the obstruction to interstate commerce is itself economic, so long as the *effect* of that obstruction is substantial.[105] Nor does it matter that Congress was motivated to redress a social and moral wrong.[106]

A bright line between commercial and noncommercial activities not only would elevate form over substance, but would prove no more workable than the old distinctions between "direct" and

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[101] *See id.* at 554–56 (describing the Court's pre-1937 jurisprudence, which "artificially had constrained" congressional authority by basing decisions as to the constitutionality of commerce regulation on a formal distinction between "direct" and "indirect" effects of intrastate transactions on interstate commerce). By acknowledging that violence against women affects the national economy and interstate commerce, but holding, nonetheless, that the Violence Against Women Act civil rights remedy is unconstitutional because the effects of such violence on commerce are too "indirect," the Fourth Circuit majority in *Brzonkala* attempts to resurrect this outmoded distinction. *See, e.g.*, *Brzonkala*, 169 F.3d at 851.

[102] *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

[103] National Labor Relations Bd. v. Jones & McLaughlin Steel Corp., 301 U.S. 1, 36–37 (1937) (citation omitted).

[104] Stafford v. Wallace, 258 U.S. 495, 521 (1922) (quoting United States v. Ferger, 250 U.S. 199, 203 (1919)).

[105] *See, e.g.*, United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."); North American Co. v. SEC, 327 U.S. 686, 705 (1946) ("Congress is not bound by technical legal conceptions" in using its commerce power, which "permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce"); *Jones*, 301 U.S. at 37 (Congress's authority to protect interstate commerce is "plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it'") (citations omitted); *see also id.* at 32 ("It is the effect upon commerce, not the source of the injury, which is the criterion.").

[106] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964) ("That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid.").

"indirect" effects, or between "manufacturing," "production," or "mining," on the one hand, and "commerce," on the other.[107] For example, the Fourth Circuit majority in *Brzonkala* maintained that some violent crimes, such as robbery, may be economically motivated and thereby arguably fall within Congress's allegedly newly restricted Commerce Clause power, but that the Violence Against Women Act remedy was not directed at such "economic" crimes.[108] Thus, a $5 mugging, in the court's view, might have a greater impact on interstate commerce and be more readily subject to federal regulation than violence against women, which costs the economy billions annually and inhibits the flow of goods and services across state lines. Taking that reasoning to its logical extreme, the court would hold Congress powerless to respond if men prevented their wives from working outside the home. Yet surely Congress would have the power to protect and remove such an obstruction to interstate commerce, despite the fact that the offending conduct itself would not be commercial.[109]

Supreme Court precedents also demonstrate that a rigid distinction between "economic" and "noneconomic" activity would not be informative in any event because whether the regulated activity is deemed to be economic depends mainly on how one frames the activity to be regulated. While the growing of wheat for home consumption in *Wickard*, for example, does not appear to be a commercial enterprise, the *Lopez* Court characterized it as an "economic activity" because of the Agricultural Adjustment Act's purpose of regulating the price of wheat moving in interstate commerce.[110] The Court permitted Congress to bar race discrimination in restaurants or hotels,[111] notwithstanding the

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[107] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) ("Mining brings commerce into existence. Commerce disposes of it."); United States v. E.C. Knight Co. 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); *see also* Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1397 (1996) ("[T]he commercial-noncommercial distinction is reminiscent of the content-based or subject matter distinctions that the Court used in an earlier era and abandoned as unworkable. It is unlikely that the new distinction will work any better than the old distinctions between commerce and manufacturing, production, or mining.")

[108] *Brzonkala*, 169 F.3d at 834.

[109] As Justice Breyer pointed out in his *Lopez* dissent, it would be peculiar for a court to "distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is 'commercial' in nature." United States v. Lopez, 514 U.S. 549, 627 (Breyer, J., dissenting).

[110] *Lopez*, 514 U.S. at 560; *see also Brzonkala*, 169 F.3d at 902 (Niemeyer, J., concurring) ("In order to regulate the national wheat market, it was therefore necessary to regulate its important components.").

[111] *See supra* notes 73–75 and accompanying text.

fact that all the victim wanted to do was to "eat" or "sleep."[112] The Court has held one who is raped by a supervisor may sue under Title VII,[113] yet never has indicated that Congress lacked power to enact Title VII because in certain circumstances, it provides a civil cause of action for rape—one of the very crimes embraced within § 13981 once that statute's requirements are met.[114] It is evident that gender-based violence strips women of the ability to participate in the national marketplace and to move within the channels of commerce on an equal footing with men. Much like loan sharking or discrimination in accommodations, public facilities, or employment, such violent conduct has a considerable nexus to and impact on interstate commerce.

In the final analysis, "[t]he pertinent inquiry . . . is not *how much commerce is involved* but whether Congress could rationally conclude that the regulated activity affects interstate commerce."[115] In the aftermath of *Lopez,* the lower courts have agreed, sustaining federal laws that regulate a wide range of activities, from protecting endangered species to prohibiting the obstruction of abortion clinics.[116] As one court put it, "the activity itself need not be economic or commercial in nature, but its impact must be."[117]

D. *Key Distinctions Between the Civil Rights Remedy and the Gun-Free Schools Zones Act*

According to the Fourth Circuit in *Brzonkala,*[118] even if Congress were free to regulate noneconomic activity, the remedy

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[112] Nourse, *supra* note 3, at 20.

[113] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[114] *See* Nourse, *supra* note 3, at 20 n.112.

[115] Hodel v. Indiana, 452 U.S. 314, 324 (1981) (upholding the Surface Mining Control and Reclamation Act).

[116] *See, e.g.*, United States v. Wilson, 73 F.3d 675 (7th Cir. 1995) (upholding the Freedom of Access to Clinic Entrances Act); United States v. Weslin, 156 F.3d 292 (2d Cir. 1998) (per curiam) (same), *cert. denied,* 119 S. Ct. 804 (1999); National Ass'n. of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (sustaining the Endangered Species Act), *cert. denied,* 118 S. Ct. 2340 (1998); United States v. Bramble, 103 F.3d 1475 (9th Cir. 1997) (upholding the Eagle Protection Act); United States v. Parker, 108 F.3d 28 (3d Cir.) (sustaining the Child Support Recovery Act), *cert denied,* 118 S. Ct. 111 (1997). For a discussion of lower court applications of *Lopez,* see Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act,* 106 YALE L.J. 1849, 1857–58, 1865–66 (1997).

[117] United States v. Ganaposki, 930 F. Supp. 1076, 1082 (M.D. Pa. 1996) (upholding the Child Support Recovery Act).

[118] 169 F.3d 820.

would still fail under the Commerce Clause. The court of appeals held, first, that like the Gun-Free School Zones Act struck down in *Lopez*, the nexus between the regulated activity (here, gender-based violence) and interstate commerce is too attenuated, and second, that § 13981 fails to heed principles of federalism.[119] Neither of these conclusions is correct. As explained below, § 13981 stands on firmer Commerce Clause ground, and is drafted in a manner more mindful of federalism concerns, than the statute invalidated in *Lopez*.

1. Congressional Findings and the Importance of Judicial Deference to Such Findings

In sharp contrast to the Gun-Free School Zones Act, where Congress made no findings and the effect of the criminalized conduct on interstate commerce was comparatively trivial, § 13981 was the subject of numerous hearings and extensive congressional findings. These findings are entitled to judicial deference.

a. *Congressional findings and the supporting legislative record.* Congress explicitly found that gender-based violence substantially affects interstate commerce. As the Conference Report stated:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; [as well as] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .[120]

Similar findings were made in Senate Judiciary Committee reports.[121] The Committee found:

> Gender-based crimes and the fear of gender-based crimes restricts [sic] movement, reduces employment opportunities,

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[119] *Id.* at 837–44.

[120] H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. These findings were intended to be included in the statute, *see* S. 11, § 302(a), 103d Cong. (1993); S. REP. No. 103-138, at 29 (1993), but were removed from the text to avoid cluttering the U.S. Code. *See* Nourse, *supra* note 3, at 36.

[121] The Supreme Court considers congressional committee findings in evaluating the constitutionality of federal statutes under the Commerce Clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 562 (1995); Preseault v. ICC, 494 U.S. 1, 17 (1990).

> increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy.[122]

Such findings are important for the Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce," where the link between an activity and interstate commerce may not be "visible to the naked eye."[123]

While the Supreme Court in *Lopez* perceived the relationship between gun possession near schools and interstate commerce to be unduly attenuated, the link between gender-based violence and interstate commerce is direct and confirmed by a massive legislative record. After hearing testimony from dozens of victims and experts, Congress determined that gender-based violence denies women an equal opportunity to compete in the job market, imposing a heavy burden on the economy and on interstate commerce. The Senate Judiciary Committee recognized that "almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime."[124] Those victims of gender-based violence who remain employed still face a period of decreased productivity,[125] with many missing work because they "either cannot leave their homes or are afraid to show the physical effects of the violence."[126] Domestic violence was thus estimated to cost employers $3–$5 billion annually as a result of

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[122] S. REP. No. 103-138, at 54 (1993); *accord* S. REP. No. 102-197, at 53 (1991); S. REP. 101-545, at 43 (1990).

[123] *Lopez*, 514 U.S. at 563.

[124] S. REP. No. 103-138, at 54 (1993). *See, e.g.*, *1994 H.R. Hrg.*, *supra* note 6, at 15 (statement of Pegi Shriver) (abusive husband caused her to lose her job); *1991 S. Hrg.*, *supra* note 6, at 132–33 (statement of Amy Kaylor) (rape led to loss of victim's job because of time missed from work); *id.* at 292–93 (statement of Dawn Bosshard) (employer fired victim after she took medical leave following gang rape).

[125] *See* S. REP. No. 101-545, at 33 (1990).

[126] *Id.* at 37. As the National Federation of Business and Professional Women, Inc. testified: "Women who either cannot leave their homes or are afraid to show the physical effects of the violence will either forego employment opportunities available or jeopardize their current employment by absenteeism and poor work performance." *1991 S. Hrg.*, *supra* note 6, at 241; *see, e.g.*, *1994 H.R. Hrg.*, *supra* note 6, at 17 (statement of Karla M. Digirolamo) (recounting how she "began missing more and more work" because her husband "kept [her] home or [she] was unable to leave because of the visible injuries [she] had sustained"). As a therapist at Polaroid Corp. testified, the battered women in the company's support group "identified a clear relationship between spousal abuse and such bottom-line issues as tardiness, poor job performance, increased medical claims, interpersonal conflicts in the workplace, stress, and substance abuse." *Feb. 1993 S. Hrg.*, *supra* note 6, at 16 (statement of James Hardeman).

absenteeism in the workplace.[127] Moreover, Congress found, gender-motivated violence had an enormous impact on the consumption of medical services,[128] and the resulting heightened medical benefit costs "increase[d] the cost of doing business, especially for the small minority employer."[129]

Even the threat of gender-based violence, Congress learned, adversely affects interstate commerce by deterring women from taking jobs in places or at hours that pose a risk of violence.[130] For example, as the Judiciary Committee noted, women often refuse higher-paying night jobs in service/retail industries because of the fear of attack—a fear the Committee deemed justified, given the fact that the number one reason that women die on the job is homicide, and the highest concentration of these women is in service/retail industries.[131] As one legal scholar put it, "the reality of pervasive gender based violence forces millions of women to forego employment opportunities because of the dangers associated with working at certain hours or certain locations."[132] Those women who do enter the work force "tend to choose their jobs with one eye looking over their shoulder about their safety . . . their employment opportunities have a ceiling placed upon them that you don't read in Title VII."[133] For these

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[127] *1991 S. Hrg., supra* note 6, at 240 (statement of National Federation of Business and Professional Women, Inc.); *see also 1994 H.R. Hrg., supra* note 6, at 9 (statement of Vicki Coffey, Executive Director, Chicago Abused Women Coalition) ("Businesses lose billions of dollars annually due to absenteeism and loss of productivity because employees are abused.").

[128] Congress learned that one million women a year seek medical attention for injuries sustained as a result of domestic violence, with about one-third of all hospital emergency visits by women attributable to domestic abuse. S. REP. No. 103-138, at 41 (1993); H.R. REP. No. 103-395, at 26 (1993); *1990 S. Hrg., supra* note 6, pt. 1, at 12 (Ten Facts About Violence Against Women). Medical costs related to domestic abuse were estimated to exceed $100 million a year. *See 1991 S. Hrg., supra* note 6, at 240 (statement of National Federation of Business and Professional Women, Inc.); *1990 S. Hrg., supra* note 6, pt. 1, at 58 (statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund).

[129] *1991 S. Hrg., supra* note 6, at 239 (statement of National Federation of Business and Professional Women, Inc.).

[130] *See* S. REP. No. 103-138, at 54 (1993).

[131] *See id.* at 54 n.70. Indeed, 42% of trauma deaths in the workplace for women were homicides, as compared to 12% of occupational fatalities for men. *See id.* (citing 39 MORBIDITY & MORTALITY WKLY, No. 32, at 544–45 (1990)).

[132] *1991 S. Hrg., supra* note 6, at 92 (statement of Professor Burt Neuborne); *see also 1990 S. Hrg., supra* note 6, pt. 1, at 69 (statement of NOW Legal Defense and Education Fund); *see, e.g., id.* at 22–23 (statement of Nancy Ziegenmeyer) (rape victim gave up plans of becoming a real estate agent because "[t]he prospect of going into an unoccupied building with a stranger is [now] terrifying to me").

[133] *1991 S. Hrg., supra* note 6, at 86 (statement of Professor Burt Neuborne); *see also id.* at 240–41 ("Deprived of the ability to be safe in their own homes, to walk freely on the streets, and to travel alone without fear of attac[k], women find their employment

reasons, "[i]n pure economic terms, the sheer loss of productivity attributable to violent gender-based assault is staggering."[134]

The evidence before Congress illustrates countless other ways in which gender-based violence obstructs women's participation in economic life. Congress heard from women who saw the most basic privileges of commercial existence—the ability to go grocery shopping, frequent shopping malls, and walk the streets—severely restricted by gender-based violence.[135] Gender-based violence and the threat of such violence significantly impair women's freedom of movement and economic opportunities by deterring them from using public accommodations, sidewalks, streets, parking lots, and transportation—the very channels and instrumentalities of interstate commerce.[136] As the legislative record also reflects, gender-based violence often denies women the basic right to travel from state to state, as spouses or boyfriends hunt them down or drive them from one jurisdiction to the next.[137] Congress found that because "fear of rape is central to the day-to-day concerns of about a third of women," it "takes a substantial toll on the lives of all women, in lost work, social, an[d] even leisure opportunities."[138] As the Department of Justice

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options in life sharply reduced.") (statement of National Federation of Business and Professional Women, Inc.).

[134] *Id.* at 95 (statement of Prof. Burt Neuborne).

[135] *See, e.g., 1994 H.R. Hrg., supra* note 6, at 17 (statement of Karla M. Digirolamo) (husband deprived her of money, forcing her to beg for food and money); *1992 H.R. Hrg., supra* note 6, at 57 (statement of Jane Doe) (husband allowed her "only to go to [her] job and come home and nowhere else"); 139 Cong. Rec. 31,292 (1993) (Rep. Olver) (submitting letter from abused woman prohibited by husband from going places, even grocery stores).

[136] "The threat of violence has made many women understandably afraid to walk our streets or use public transportation." *1990 S. Hrg., supra* note 6, pt. 2, at 80 (statement of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW). Women know that they cannot frequent places men can go without fear of attack. "Campuses, parking lots, libraries, shopping centers, parks, jogging trails—all are possible danger zones." *1991 S. Hrg., supra* note 6, at 253 (statement of Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies); *see, e.g., Nov. 1993 S. Hrg., supra* note 6, at 41 (statement of Jennifer Tescher) (after rape, could not bring herself to go out in public after dark).

[137] *See, e.g., Apr. 1993 S. Hrg., supra* note 6, at 75 (statement of Dr. John Nelson) (telling story of abused woman who had fled across seven states with her 18-month-old child when her husband tracked her down and shot the child in the head, killing him); *1992 H.R. Hrg., supra* note 6, at 55 (statement of Jane Doe) (battered in four different states and seven different cities); *1990 S. Labor Hrg., supra* note 6, at 32 (statement of Sarah M. Buel) (fled from New York to New Hampshire, and after husband hunted her down, moved virtually every year of son's 15 years of life).

[138] S. REP. No. 102-197, at 38 (1991); *see also 1990 S. Hrg., supra* note 6, pt. 1, at 57 (statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund) (describing self-imposed restrictions by female law school students who "routinely take precautions to protect themselves from the omnipresent threat of sex-

stated in support of the remedy: "Fear of gender-motivated violence restricts the hours during which women can engage in a variety of activities and seriously curtails their participation in the commerce of our nation."[139]

Thus, unlike the vague multi-step "cost of crime" theory that the Court rejected in *Lopez*, the connection between gender-motivated violence and interstate commerce is substantial and direct.

b. *The need for judicial deference.* Ultimately, the issue is not whether the courts are satisfied that gender-based violence exerts these effects on interstate commerce, but instead, *whether Congress's legislative judgment that it does*, was rational.[140] While courts are not expected to display "prostrate deference to congressional pronouncements,"[141] a proper conception of the judicial role in supervising legislative judgments leads to the conclusion that the civil rights remedy passes muster.

The Commerce Clause jurisprudence of the last two decades confirms that this judicial role is a fairly narrow one. The *Lopez* majority reaffirmed that federal statutes enacted pursuant to the Commerce Clause remain subject to rational basis review;[142] the concurring justices counseled reviewing courts to exercise "great restraint."[143] Accordingly, in reviewing congressional legislation under the Commerce Clause, a "court must defer to a congressional finding that a regulated activity [substantially] affects interstate commerce, if there is *any rational basis* for such a finding."[144] The Supreme Court's analysis in *Lopez* did not alter this fundamental standard. Such deference is particularly appropriate where, as here, the legislative judgment is "based in part

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based violence"); Staff of Senate Comm. on Judiciary, *Violence Against Women: A Week in the Life of America* 9 (Oct. 1992) ("Violence against women affects everyday lives, imperils jobs, infects the workplace, ruins leisure time and educational opportunities.").

[139] *1993 H.R. Hrg.*, *supra* note 6, at 109 (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice). The Justice Department originally had opposed the civil rights remedy, but after key changes were made narrowing its scope, the Department supported the provision. *See* Nourse, *supra* note 3, at 11–15 (describing major changes to the provision made in response to critics).

[140] *See Lopez*, 514 U.S. at 563 (Court evaluates "the legislative judgment" that a particular activity substantially affected interstate commerce).

[141] *Brzonkala*, 169 F.3d at 847.

[142] *See Lopez*, 514 U.S. at 557.

[143] *See id.* at 568 (Kennedy, J., concurring).

[144] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (emphasis added); *accord* Preseault v. ICC, 494 U.S. 1, 17 (1990).

on empirical determinations,"[145] and where, as here, the challenged provision makes up only one piece of a comprehensive statutory scheme.[146]

Once it is established that Congress rationally found the requisite substantial effect on interstate commerce, then under the traditional rational basis standard of review, "the only remaining question for judicial inquiry is whether 'the means chosen by [Congress] [are] reasonably adapted to the end permitted by the Constitution.'"[147] Modeled after other traditional civil rights legislation providing a private right of action for victims of discrimination,[148] § 13981 meets that modest standard. Congress found that the states could not or would not respond adequately to gender-based crimes of violence, and acted accordingly to fill the breach.[149]

2. Federalism Concerns

The Supreme Court struck down the legislation in *Lopez* not only because of a perceived weakness in the link between gun possession near a school and commerce, but also because of concerns about the statute's intrusion into state prerogatives. The Violence Against Women Act civil rights remedy, by contrast, was narrowly drafted with the goals of minimizing any such intrusion and maximizing cooperation between the federal and state governments.

First, while the *Brzonkala* majority repeatedly referred to the civil rights remedy as a statute which "criminalize[s]" conduct,[150] that characterization is plainly incorrect. Section 13981 is a civil rights statute that authorizes a civil cause of action; unlike the Gun-Free School Zones Act, it is *not* a criminal statute. Whereas, in the Supreme Court's view, the Gun-Free School Zones Act upset the federal-state balance by duplicating the criminal laws of more than forty states that outlawed the possession of firearms on or near school grounds, and by undermining

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[145] Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990).

[146] *See Hodel*, 452 U.S. at 329 n.17; *accord* Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 757–58 n.22 (1982).

[147] *Hodel*, 452 U.S. at 276; Preseault v. ICC, 494 U.S. 1, 17 (1990).

[148] *See, e.g.*, 42 U.S.C. §§ 1981, 1983, 1985(3), 2000e (1994).

[149] The rationale for Congress's precise choice of remedy is discussed in greater depth in connection with the Fourteenth Amendment justification for the statute, in Part III, *infra*.

[150] *See, e.g., Brzonkala*, 169 F.3d at 873.

state programs designed to encourage the voluntary surrender of firearms,[151] § 13981 does no such thing. Unlike the gun possession statute, which added a "redundant layer of federal regulation" where most states had already acted,[152] § 13981 responds to the states' self-described needs without preempting or interfering with state prosecutions in any way.

Equally important, in contrast to the Gun-Free School Zones Act, § 13981 is carefully drafted to harmonize federal and state policies. In 1991, the federal and state judiciaries voiced concerns that the civil rights remedy would federalize domestic relations law and unduly burden both federal and state courts.[153] Based on this same assumption that the provision would federalize many domestic disputes, the Administrative Office of the U.S. Courts predicted that the civil rights remedy would "significantly affect the courts and their administration" by generating as many as 53,800 civil tort cases annually, with a projected 13,450 annual case filings expected in the federal courts.[154]

Congress responded to these concerns. In the spring of 1993, Senator Orrin Hatch (R-Utah) and I, then-chairman of the Senate Judiciary Committee, took the lead in negotiating modifications to the civil rights remedy to narrow its scope, preserve state spheres of authority, and minimize the statute's effect on domestic relations law. These bipartisan revisions are incorporated in the version of S.11 reported favorably out of the Senate Judiciary Committee later that year.[155] First, the Judiciary Committee strove to preserve the states' voice in enforcing the new right to be free from gender-based violence by giving state courts concurrent jurisdiction to enforce the statute and by barring the removal to federal court of any state court action asserting claims under § 13981.[156]

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[151] *See id.* at 581 (Kennedy, J., concurring).

[152] *Brzonkala*, 169 F.3d at 931 (Motz, J., dissenting).

[153] *See, e.g.*, *1993 H.R. Hrg.*, *supra* note 6, at 74–76 (1991 Report from the Judicial Conference of the United States); *1991 S. Hrg.*, *supra* note 6, at 314–17 (Conference of Chief Justices).

[154] *1991 S. Hrg.*, *supra* note 6, at 15–16.

[155] See S. REP. No. 103-138, at 1–37 (1993) (reporting S.11, 103d Cong. (1993) as amended).

[156] 42 U.S.C. § 13981(e)(3); 28 U.S.C. § 1445(d); *compare* S. 11, 103d Cong. (1993) (as introduced), *with* S. REP. No. 103-138, at 30 (1993) (S. 11 as amended). In addition, § 13981 complements state policies by incorporating by reference state criminal laws defining the conduct that constitutes a "crime of violence." § 13981(d)(2). That aspect of the proposal had been in place since 1991. *See* S. 15, 102d Cong. (1991).

Second, the Committee carefully avoided supplanting state tort law by clarifying that to be "motivated by gender" within the meaning of the provision, a crime of violence not only had to be committed "because of gender or on the basis of gender," but it *also* had to be "due, at least in part, to an animus based on the victim's gender."[157] Congress drafted the statute specifically to target the gender bias that it found motivates many violent attacks against women; by enacting a civil rights statute that requires invidious discriminatory motivation, Congress also avoided creating a "general federal tort law."[158]

Third, the Committee limited the statute so that it did not reach even all violent crimes motivated by gender animus. Only the most serious offenses, felonies, now qualify as a "crime of violence" under the statute.[159] Finally and most importantly, the Committee narrowed the remedy so as to deny federal courts supplemental jurisdiction over state law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."[160]

After these significant changes were made to the civil rights remedy narrowing its reach, the Judicial Conference dropped its opposition, taking no position on the civil rights remedy.[161] State officials, moreover, far from worrying about any supposed federal intrusion into state affairs, actively urged Congress to pass the Violence Against Women Act, including the civil rights remedy.[162] Significantly, the judiciary's concern about the potential impact of the statute on federal and state court case loads has not come to fruition. Although the precise number of cases filed is not known, there have been well under one hundred reported

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[157] 42 U.S.C. § 13981(d)(1); *compare* S. 11 (as introduced), *with* S. REP. No. 103-138, at 30 (1993) (S. 11 as amended).

[158] S. REP. No. 103-138, at 51 (1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

[159] 42 U.S.C. § 13981(d)(2)(A); *compare* S. 11 (as introduced), *with* S. REP. No. 103-138, at 30 (1993) (S. 11 as amended).

[160] 42 U.S.C. § 13981(e)(4); *see also* S. REP. No. 103-138, at 51 (1993) (the civil rights remedy "does not involve the Federal courts in divorce cases or domestic relations disputes"); S. REP. No. 102-197, at 48 (1991). Perversely, the Fourth Circuit took this exclusion of federal jurisdiction over state family law to imply that § 13981 *does* federalize state family law. *See Brzonkala*, 169 F.3d at 842. It is difficult to see how § 13981 arrogates jurisdiction to the federal courts over family law matters when the statute explicitly precludes such jurisdiction.

[161] *See 1993 H.R. Hrg.*, *supra* note 6, at 70–71 (Letter from Judge Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence).

[162] *See supra* note 30 and accompanying text. *But see 1993 H.R. Hrg.*, *supra* note 6, at 77–84 (statement of the Conference of Chief Justices expressing continued opposition to the civil rights remedy).

cases asserting claims under § 13981 in federal court, and only a handful of reported cases in state court, since the statute's enactment in 1994.

Nor, despite the Fourth Circuit's fears in *Brzonkala*, does § 13981 herald a new era of federal regulation of all crime, all domestic relations, and the like.[163] The statute simply represents an exercise of Congress's established power to remove obstructions to interstate commerce, whatever their source. As the vast majority of states have agreed, the problem of gender-based violence is national and interstate in nature, and accordingly "transcend[s] the abilities of State law enforcement agencies."[164] When the states fail to solve a national problem with a substantial impact on interstate commerce, Congress is free and duty-bound to act.

III. CONGRESS'S AUTHORITY TO ENACT THE CIVIL RIGHTS REMEDY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Congress also enacted the Violence Against Women Act civil rights remedy as a means of redressing formal and informal biases against the victims of gender-based violence that prevailed in state legal systems across the country. Congress's determination that such a remedy is appropriate to enforce the Equal Protection Clause is also entitled to great weight. As the Supreme Court recognized in *City of Boerne v. Flores*, "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."[165]

The chief charge leveled against Congress's invocation of this source of power is that the Fourteenth Amendment does not permit Congress to regulate purely private conduct, but rather is "limited to remedial action against States and state actors."[166] This criticism of the statute is misplaced. The civil rights remedy *is* remedial. In holding that Congress lacks power to enact such a

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[163] *See Brzonkala*, 169 F.3d at 859.

[164] S. REP. No. 103-138, at 62 (1993).

[165] 521 U.S. 507, 536 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

[166] *Brzonkala*, 169 F.3d at 863; *see also id.* (contending that "remedial" legislation "'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'—unconstitutional action by the States.") (quoting *City of Boerne*, 521 U.S. at 532).

remedy, the Fourth Circuit misread the Supreme Court's Reconstruction-era decisions, which do not bar Congress from regulating private conduct as a means of remedying unconstitutional state conduct, even if not as an end in itself.

A. *The Scope of Congress's Authority To Enforce the Fourteenth Amendment*

In denying Congress power to design a remedy that reaches private conduct, the Fourth Circuit in *Brzonkala* mistakenly conflated the scope of § 1 of the Fourteenth Amendment, which concededly governs only state action, with that of § 5. Section 5 gives Congress the power "to enforce, by appropriate legislation," the provisions of the Fourteenth Amendment. In *City of Boerne*, the Supreme Court recognized that § 5 is a "positive grant of legislative power" to Congress, one that worked a fundamental shift in the federal-state balance.[167]

City of Boerne reaffirmed that in exercising its broad power under § 5, Congress can do more than merely prohibit violations of the Constitution. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[168] Consistent with this important precept, this Court has upheld federal invalidations of state literacy tests as appropriate exercises of Congress's power to enforce the Fourteenth and Fifteenth Amendments, notwithstanding the fact that the Court previously upheld such tests as facially valid.[169]

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[167] 521 U.S. at 517 (quoting *Morgan*, 384 U.S. at 651); *see also* Saenz v. Roe, 119 S. Ct. 1518, 1529 (1999) ("Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the amendment . . . .") (citations omitted); Metro Broadcasting, Inc. v. Federal Communications Comm'n., 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting) ("Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers . . . under § 5 of the Fourteenth Amendment' . . . .") (citation omitted); *Ex parte* Virginia, 100 U.S. 339, 345–46 (1880).

[168] *City of Boerne*, 521 U.S. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)); *accord* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2206 (1999).

[169] *Compare* Oregon v. Mitchell, 400 U.S. 112 (1970), *and* Katzenbach v. Morgan, 384 U.S. 641 (1966), *and* South Carolina v. Katzenbach, 383 U.S. 301 (1966), *with* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Similarly, in *City of Rome v. United States*, the Court held that Congress could bar federal clearance of election changes in covered jurisdictions unless the changes were free of both discrimi-

Section 13981 likewise is prophylactic legislation—designed to reach private conduct as a means of compensating for the states' denial of equal protection. While the Supreme Court has not squarely addressed Congress's authority to regulate private conduct in the course of remedying offending state action, the Court's precedents suggest no constitutional obstacle to the exercise of that authority. As Congress explained: "While the 14th amendment itself only covers actions by the States, Congress' power to enforce the amendment includes the power to create a private remedy as the most effective means to fight public discrimination."[170]

B. *Discrimination in State Legal Systems*

As it did with respect to the Commerce Clause basis for the provision, Congress made specific findings justifying its enactment of § 13981 to enforce the Fourteenth Amendment. The Conference Report stated:

> State and Federal criminal laws do not . . . adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled . . . .[171]

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natory purpose *and* effects, 446 U.S. 156, 177 (1980), despite the fact that on the same day, the Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion), that electoral schemes with discriminatory effects do not violate the Fourteenth or Fifteenth Amendments, absent a discriminatory purpose. Congress's power to enforce the Thirteenth Amendment is equally expansive. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) ("Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.").

[170] S. REP. No. 103-138, at 55 n.72 (1993) (citing *Morgan*, 384 U.S. 641; District of Columbia v. Carter, 409 U.S. 418, 423, 424 n.8 (1973) ("[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct' . . . is not to say . . . that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment.")); *see also* United States v. Guest, 383 U.S. 745, 761–62 (1966) (Clark, J., concurring, joined by Black and Fortas, JJ.); *id.* at 782 (Brennan, J., concurring, joined by Warren, C.J., and Douglas, J.). Because Congress found that the states and the state actors had violated the Equal Protection Clause, § 13981 does not present the more controversial question whether Congress possesses a general power to regulate private conduct under the Fourteenth Amendment in the absence of official discrimination.

[171] H.R. CONF. REP. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853; *accord* S. REP. No. 103-138, at 29 (1993) (same findings originally intended for the statutory text).

This carefully considered congressional judgment, which the Fourth Circuit in *Brzonkala* dismissed out of hand as "legal boilerplate,"[172] was based on years of hearings and a massive record documenting gender bias and self-described systemic failures by the states to treat gender-based violent attacks with the same seriousness accorded other major crimes.

Although over the last few decades, states began to correct this disparity, biases against victims of gender-based violence remained. Congress found that "[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination."[173] In reaching that conclusion, Congress relied, in part, on two dozen studies by state task forces on gender bias.[174] "[C]ollectively," Congress concluded, "these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims."[175]

1. Barriers of Law

As Congress found when it enacted the Violence Against Women Act, many victims of rape and other sexual assaults enjoyed no legal recourse at all under state law. For example, in 1990, when the bill was first introduced, married women still faced formal barriers that other victims of crime did not. The majority of states either did not make marital rape a prosecutable offense or downgraded it by allowing the crime to be charged only when aggravating factors, not required in other cases of rape, were present.[176] Even sexual assaults by former husbands or boyfriends were immunized in some states from prosecution.[177]

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[172] *Brzonkala*, 169 F.3d at 884.

[173] S. REP. No. 103-138, at 49 (1993).

[174] *See id.* at 49 n.52 (citing state task force reports); *see also* H.R. REP. No. 103-395, at 27–28 (1993); S. REP. No. 102-197, at 34, 43–44, & n.40 (1991).

[175] S. REP. No. 103-138, at 49 (1993) (quoting Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 8); S. REP. No. 102-197, at 43–44 (1991).

[176] *See* S. REP. No. 103-138, at 47 & nn.42–44, 55 (1993); S. REP. No. 102-197 at 45 & nn.49–50 (1991); *see also, e.g.*, UTAH TASK FORCE on GENDER and JUSTICE, REPORT TO THE UTAH JUDICIAL COUNCIL 28 (1990) ("In Utah, sexual crimes such as rape, forcible sodomy, and aggravated sexual assault are not offenses unless the parties are living apart pursuant to a court order.").

[177] *See* S. REP. No. 102-197, at 45 n.50 (1991) (noting that some states had extended marital rape exemptions to "cohabitants and formerly married persons"); 139 Cong. Rec. 27,178 & 30,112 (1993) (Sen. Biden) (protesting Delaware law that "voluntary social companions" could not be convicted of first-degree rape).

The marital rape exemption rests on "archaic notions about the consent and property rights incident to marriage" that "are simply unable to withstand even the slightest scrutiny."[178] The premise of the exemption is that "a woman was the property of her husband and that the legal existence of the woman was 'incorporated and consolidated into that of the husband.'"[179] This premise reflects nothing but gender bias in one of its worst forms, as the Supreme Court has recognized in other contexts.[180] "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."[181] For this reason, many—but not all—courts have invalidated their states' exemptions or "downgrades" for marital rape or sexual assault as in violation of the Equal Protection Clause.[182]

State interspousal tort immunity doctrines further perpetuated archaic stereotypes about the intrinsic "unity" of husband and wife. At the time of the hearings on the Violence Against Women Act, these doctrines barred a woman in ten states from suing her spouse under state tort law after an attack.[183] The Senate Judiciary Committee found that interspousal tort immunity erected yet another formal barrier to justice, this time in state civil legal systems.[184] Not surprisingly, these immunity doctrines frequently met the same fate as their criminal counterparts, with many courts declaring them to be in violation of the Equal Protection Clause.[185]

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[178] People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (holding that the marital rape exemption violates the Equal Protection Clause).

[179] *Id.* (citation omitted).

[180] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) ("[C]lassifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.") (citation omitted); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.").

[181] Trammel v. United States, 445 U.S. 40, 52 (1980) (rejecting an absolute privilege against adverse spousal testimony).

[182] *See, e.g.*, Merton v. State, 500 So.2d 1301, 1305 (Ala. Crim. App. 1986); Williams v. State, 494 So.2d 819, 830 (Ala. Crim. App. 1986); Warren v. State, 336 S.E.2d 221, 226 n.11 (Ga. 1985); State v. M.D., 595 N.E.2d 702, 713 (Ill. App. Ct. 1992); Shunn v. State, 742 P.2d 775, 778 (Wyo. 1987).

[183] *See 1990 S. Hrg.*, *supra* note 6, pt. 1, at 64 (statement of NOW Legal Defense and Education Fund).

[184] *See, e.g.*, S. REP. No. 103-138, at 55 (1993); S. REP. No. 102-197, at 45 (1991).

[185] *See, e.g.*, Moran v. Beyer, 734 F.2d 1245, 1248 (7th Cir. 1984); Jones v. Jones, 376 S.E.2d 674, 675 (Ga. 1989); Burns v. Burns, 518 So.2d 1205, 1211 (Miss. 1988); Price v. Price, 732 S.W.2d 316, 320 (Tex. 1987); Hack v. Hack, 433 A.2d 859, 868 (Pa. 1981).

That some states have reformed these laws, either by statute or judicial abolition, does not mean that all states have done so. A victim hardly should be forced to wait until an appropriate case comes along to present a state court with an opportunity to strike down an offending law[186] or until her state legislature is motivated to act—assuming such action is even effective.[187]

2. Barriers of Practice

Many of the task forces appointed to study gender bias in their state legal systems candidly admitted that gender bias was pervasive.[188] The studies documented "'pervasive suspicion of rape victims' credibility,' infecting the criminal justice system at every step of the way":[189]

- The Texas task force noted "a pervasive attitude throughout the legal system that women lie about their experience."[190]
- The Georgia task force found that "rape victims are instantly viewed as suspect and as 'damaged goods.' Their credibility is significantly diminished from the outset *only because* of their status as the female victim of rape."[191]

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[186] Ironically, because of the requirement of Article III standing, *see* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), court challenges to marital rape exemptions have been beyond the victim's control. The validity of these exemptions generally reached the courts when a defendant who could not claim the benefit of a state marital exemption challenged the exemption as denying *him* equal protection. *See, e.g.*, *Liberta*, 474 N.E.2d at 569.

[187] Regrettably, Congress found that even when state legislatures have acted, implementation of victims' new statutory rights has faltered. *See* S. REP. NO. 102-197, at 46 (1991); *see, e.g.*, MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE CTS., FINAL REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 875 (1989) ("We have a good Domestic Abuse statute, but it is not being enforced by police and sheriff's departments, city and county attorneys or the courts.") (quoting a state judge).

[188] *See, e.g.*, *1991 S. Hrg.*, *supra* note 6, at 135 (statement of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission) ("The commission did find gender bias throughout the system."); ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS JUDICIAL COUNCIL, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS 5 (1990) ("The committee found that gender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence.").

[189] S. REP. NO. 102-197, at 46–47 (1991).

[190] TEXAS GENDER BIAS TASK FORCE, FINAL REPORT 72 (1994).

[191] SUPREME COURT OF GEORGIA, REPORT ON GENDER AND JUSTICE IN THE JUDICIAL SYSTEM 93 (1991).

- A 1990 Colorado Supreme Court study showed that forty-one percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims.[192]

Because of this "spotlight of suspicion on the victim,"[193] courts, prosecutors, and law enforcement frequently required additional corroboration of victims' testimony, such as a prompt complaint, physical injuries, and a polygraph exam.[194]

The victims of domestic violence were regarded with equal skepticism, leading Congress to conclude that "[g]ender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence":[195]

- The Michigan task force reported that "the courts raise unwarranted questions about the credibility of the victim." It cited a woman's testimony that she had suffered physical and mental abuse during twenty-three years of marriage and that the judge in her divorce case "told her that he thought she was lying and that he could not believe that her husband, an upstanding citizen, would beat her unless she 'had it coming.'"[196]

The legal system's predilection toward stereotyping, belittling, and blaming victims resonates throughout the state task force reports:

- The New York task force noted: "Victim blaming is common. . . . Judges say to a woman when she walks in the courtroom, what did you do to provoke him?"[197]
- Unbelievably, the Vermont task force reported: "[A] male probation officer asked if a 9 year old female victim of sexual abuse was a 'true victim!' When asked what he meant, he said he heard she was quite a tramp and asked for it."[198]

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[192] S. REP. No. 102-197, at 47 (1991) (citing COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE CTS., GENDER & JUSTICE IN THE COLORADO COURTS 91 (1990)).

[193] S. REP. No. 102-197, at 44 (1991).

[194] *See id.* at 45–46; S. REP. No. 103-138, at 44–47 (1993).

[195] S. REP. No. 103-138, at 46 (1993).

[196] MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE CTS., FINAL REPORT 24 (1989).

[197] NEW YORK TASK FORCE ON WOMEN IN THE CTS, REPORT 32 (1986), *reprinted in* FORDHAM URB. L.J. 1 (1996).

[198] VERMONT SUPREME COURT AND VERMONT BAR ASSOCIATION, GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 140 (1991), *cited in* S. REP. No. 102-197, at 34 (1991).

- The Minnesota task force found the "nagging female" stereotype, that the woman asks for abuse, to be particularly prevalent. This was evidenced by a police officer's comment that "the problem with battered women is that their alligator mouths can't keep up with their hummingbird brains."[199]

The Senate Judiciary Committee pointed to "the widespread belief that people who are raped precipitate [the attack] in some way, whether it be by dress, having a drink in a bar, accepting a ride in a car or accepting a date."[200] This entrenched "she must have asked for it" mentality is unique to gender-based violence.[201] The notion that *women* cannot frequent bars, accept a car ride or a date, or go out late at night without assuming the risk of a violent sexual assault is gender bias, plain and simple. This assumption that women invite their attacks boded particularly poorly for the victims of acquaintance rape, which, Congress learned, prosecutors routinely refused to prosecute.[202]

Remarkably, even state judges were not immune to the biases pervading the system:

- In Florida, a judge refused to sentence a confessed rapist to jail time "because he felt sorry for him being involved with such a pathetic woman." Still another judge commented to a rapist at sentencing that the lesson he had to learn was that he had to "take the women out to dinner first, like the rest of us."[203]

- In Georgia, a judge was reported to have "mocked," "humiliated," and "ridiculed," a victim of domestic violence and "led the courtroom in laughter as the woman left." "Subsequently the woman was killed by her estranged husband."[204]

Given such double victimization, then, it should come as no surprise that sexual assault was the least reported of all major

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[199] MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE CTS., FINAL REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 875–76 (1989).

[200] S. REP. No. 102-197, at 47 (1991) (citation omitted).

[201] *See Nov. 1993 S. Hrg.*, *supra* note 6, at 48 (statement of Julia Vigue, Rape Crisis Center, Augusta, Maine) ("A double standard is very, very clear. Sex crime is the one area of criminality where we judge the offense not by the perpetrator but by the victim."); *1990 S. Hrg.*, *supra* note 6, pt. 2, at 20 (statement of Sen. Biden).

[202] *See* S. REP. No. 102-197, at 47 (1991); S. REP. No. 101-545, at 31 (1990).

[203] *1991 S. Hrg.*, *supra* note 6, at 136 (statement of Gill Freeman).

[204] S. REP. No. 102-197, at 34 (1991) (quoting SUPREME COURT OF GEORGIA, REPORT ON GENDER AND JUSTICE IN THE JUDICIAL SYSTEM 235 (1991)).

crimes[205]—with estimates of the reporting rate ranging from fifty percent to a mere seven percent.[206] Even when victims came forward, over sixty percent of reported rapes did not lead to arrests.[207] As a result, Congress found, a rape survivor "may have as little as a 5 percent chance of having her rapist convicted."[208] And of the small number of offenders actually convicted, many received de minimis sentences.[209]

Victims fared no better in state civil justice systems. Although sexual assault is a tort in every state, one study found that only 255 state civil jury trials in sexual assault cases had been conducted *over a ten-year period* and that fewer than one percent of all victims had collected compensatory damages.[210] And, as rape shield laws did not apply to state civil cases, any victim who braved the courts to seek recompense for her injuries risked facing "embarrassing and harassing questions about the intimate details of her sex life."[211]

3. Denial of Equal Protection by the States

As a result of the overwhelming evidence of bias in state legal systems, Congress was compelled to conclude: "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes."[212] Such systemic disregard for the victims of gender-based violence can hardly be dismissed as negligent or inadvertent.

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[205] *See 1990 S. Hrg.*, *supra* note 6, pt. 1, at 45–46 (statement of Linda Fairstein, Chief, Sex Crimes Prosecution Unit, New York County District Attorney's Office, New York, NY).

[206] *See* H.R. REP. No. 103-395, at 25–26 (1993) (citing the Bureau of Justice Statistics for a 50% reporting rate); VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 1990, A MAJORITY STAFF REPORT PREPARED FOR THE USE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 102d Cong. 7 (1991), *reprinted in 1991 S. Hrg.*, *supra* note 6, at 194 (noting a rape reporting rate of 7%); S. REP. No. 101-545, at 31 (1990) (citing testimony that "official rape rates may be as much as 10–15 times too low").

[207] S. REP. No. 103-138, at 42 (1993); *1993 H. Hrg.*, *supra* note 6, at 94 (statement of Rep. Schroeder).

[208] S. REP. No. 102-197, at 44 (1991).

[209] *See* S. REP. No. 103-138, at 42 (1993) (noting that over half of all convicted rapists serve an average of only one year or less in prison).

[210] *See* S. REP. No. 102-197, at 44 & n.43 (1991).

[211] *See id.* at 46; S. REP. No. 103-138, at 55 (1993).

[212] S. REP. No. 103-138, at 42 (1993).

While a state may have no affirmative constitutional duty to protect its citizens absent some special relationship,[213] a state may not "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[214] It is clear that "[d]iscrimination in providing protection against private violence [can] violate the equal protection clause of the Fourteenth Amendment."[215] Thus, § 13981 "takes aim at gender discrimination of the type for which the 14th Amendment provides heightened scrutiny."[216]

Nothing in *City of Boerne v. Flores*[217] undermines Congress's power to "provide a necessary remedy to fill the gaps and rectify the biases of existing state law."[218] In *City of Boerne,* the Court held that Congress cannot "enforce a constitutional right by changing what the right is."[219] The Violence Against Women Act civil rights remedy, however, does not "attempt a substantive change in constitutional protections,"[220] such as by altering the

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[213] *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989).

[214] *Id.* at 197 n.3.

[215] Bowers v. Devito, 686 F.2d 616, 618 (7th Cir. 1982); *accord* Lowers v. City of Streator, 627 F. Supp. 244, 246 (N.D. Ill. 1985); *see also* McIntosh v. City & County of Denver, No. 95-1346, 1996 U.S. App. LEXIS 4431, at *5 (10th Cir. Feb. 29, 1996) ("[T]he state violates the equal protection clause if it provides less protection for domestic violence victims than it does for other assault victims."); Sherrell v. City of Longview, 683 F. Supp. 1108, 1112 (E.D. Tex. 1987) ("Acts of omission in providing police protection, as well as acts of commission may be discriminatory under the Fourteenth Amendment.").

[216] S. REP. No. 103-138, at 55 (1993). For a sampling of decisions ruling that allegations of police department or governmental bias in responding to domestic violence or sexual assault state an equal protection claim, see Navarro v. Block, 72 F.3d 712, 717 (9th Cir. 1995); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990); Watson v. City of Kansas City, 857 F.2d 690, 696 (10th Cir. 1988); Didzerekis v. Stewart, 41 F. Supp. 2d 840, 846–48 (N.D. Ill. 1999); Williams v. City of Montgomery, 21 F. Supp. 2d 1360, 1365 (M.D. Ala. 1998); Hakken v. Washtenaw County, 901 F. Supp. 1245, 1253 (E.D. Mich. 1995); Smith v. City of Elyria, 857 F. Supp. 1203, 1212 (N.E. Ohio 1994); Cellini v. City of Sterling Heights, 856 F. Supp. 1215, 1222 (E.D. Mich. 1994); Hynson v. City of Chester, 731 F. Supp. 1236, 1240 (E.D. Pa. 1990); Bartalone v. County of Berrien, 643 F. Supp. 574, 577 (W.D. Mich. 1986); Doe v. Calumet City, 641 N.E.2d 498, 510 (Ill. 1994).

[217] 521 U.S. 507 (1997).

[218] S. REP. No. 103-138, at 55 (1993).

[219] 521 U.S. at 519. In *City of Boerne*, the Court held that Congress had exceeded its § 5 power in enacting the Religious Freedom Restoration Act because the Court perceived the statute as an attempt to supersede Employment Division v. Smith, 494 U.S. 872 (1990). *Smith* had held that the First Amendment does not require states to demonstrate a compelling interest before applying neutral, generally applicable laws that substantially burden the free exercise of religion. The Religious Freedom Restoration Act responded to *Smith* by reinstating the compelling interest test. Ruling that § 5 gives Congress power only to "enforce," and not the power to "alter[ ] the meaning" of the Constitution, *Boerne*, 521 U.S. at 519, the Court determined that Congress had exceeded its Fourteenth Amendment enforcement authority. *See id.* at 529–36.

[220] *Id.* at 532.

meaning of the Equal Protection Clause. Instead, § 13981 is designed to address acts by state participants at every level of state legal systems that violate *established* principles of constitutional law.

Nor does the Court's recent decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[221] undercut the validity of § 13981. There the Court ruled that the Patent Remedy Act, which attempted to abrogate state sovereign immunity from claims of patent infringement, could not be construed to enforce the Fourteenth Amendment Due Process Clause because the Court found "little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation" in enacting the statute.[222] Searching the record in vain for the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, the Court found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[223]

By contrast, as documented above, in enacting § 13981, Congress identified a "massive" and "widespread" pattern of equal protection violations by state actors.[224] In no case does Congress have a greater power to act than where "the criminal justice system is not providing equal protection of the laws [to] women in the classic sense."[225]

C. *The Supreme Court's Reconstruction-Era Precedents on the Scope of Congressional Power to Enforce the Fourteenth Amendment*

Despite this pattern of equal protection violations, the Fourth Circuit in *Brzonkala* relied on *United States v. Harris*[226] and the *Civil Rights Cases*[227] to find that Congress lacked the power to

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[221] 119 S. Ct. 2199 (1999).
[222] *Id.* at 2208.
[223] *Id.* at 2207.
[224] *Cf. id.*
[225] S. REP. No. 103-138, at 55 (1993) (citing *1991 S. Hrg.*, *supra* note 6, at 105 (statement of Prof. Cass Sunstein)); *see also 1993 H. Hrg.*, *supra* note 6, at 96 (congressional findings supported by the legislative record demonstrate "a classic denial of equal protection") (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice).
[226] 106 U.S. 629 (1883).
[227] 109 U.S. 3 (1883).

create a remedy that would reach private conduct.[228] The court of appeals misread these nineteenth-century precedents. Neither *Harris* nor the *Civil Rights Cases* prohibits Congress from regulating private conduct, so long as Congress does so to remedy official discrimination.

In *Harris,* the Court invalidated a criminal statute[229] that originally had been part of § 2 of the Ku Klux Klan Act of 1871.[230] That statute outlawed private conspiracies to deprive any person of "the equal protection of the laws, or of equal privileges or immunities under the laws." The Court's conclusion that Congress had no power to enact the criminal statute depended explicitly on the fact that "there [was] no intimation that the State of Tennessee has passed any law or done any act forbidden by the Fourteenth Amendment."[231] Because the statute was "directed *exclusively* against the action of private persons, *without reference to the laws of the states, or their administration by the officers of the states,*" the Court concluded that it was not warranted by the Fourteenth Amendment.[232]

Similarly, in the *Civil Rights Cases,*[233] the Court struck down those provisions of the Civil Rights Act of 1875[234] which prohibited private discrimination in public accommodations. The Court again emphasized that Congress's power to enforce the Fourteenth Amendment is designed to "correct[ ] the effects of such prohibited State law and State acts" and "to provide modes of relief against State legislation, or State action."[235] The public accommodation law, however, as the Court observed, *"ma[de] no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. . . .* It proceed[ed] *ex directo* to declare that certain acts committed by individuals shall be deemed offenses . . . ."[236] Accordingly, the Court concluded that the act "step[ped] into the domain of local jurisprudence, . . . without referring in any manner to any supposed action of the State or its authorities."[237]

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[228] *See Brzonkala,* 169 F.3d at 865–69.
[229] U.S. Rev. Stat. § 5519 (1874).
[230] Civil Rights Act of 1871, ch. 22, 17 Stat. 13, 14 (1871).
[231] *Harris,* 106 U.S. at 639–40.
[232] *Id.* at 640 (emphasis added).
[233] 109 U.S. 3 (1883).
[234] Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).
[235] *Civil Rights Cases,* 109 U.S. at 11.
[236] *Id.* at 14 (emphasis added).
[237] *Id.*

It is clear, then, that *Harris* and the *Civil Rights Cases* invalidated the statutes at issue because they were based on an assumption that *private persons* could violate the Equal Protection Clause, without regard to whether the states had failed in their duties to extend equal protection to their citizens. This is not a failing from which § 13981 suffers, resting as it does on the failings of state and local governments.

D. *Congress's Choice of Remedy in Responding to the Failings of State Legal Systems*

Finally, the Court held in *City of Boerne* that to pass muster as appropriate legislation enforcing the Fourteenth Amendment, there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[238] Relying on *City of Boerne*, the Fourth Circuit in *Brzonkala* denounced the civil rights remedy as both under- and over-inclusive, and thus lacking in both "congruence" and "proportionality."[239] That conclusion was unjustified.

Section 13981 is calibrated precisely to address the very constitutional violation that Congress had identified—the states' failure to afford victims of gender-based violence an opportunity to vindicate their rights on a par with other victims of serious violent crime. Indeed, § 13981 is the *only* provision in the Violence Against Women Act that directly empowers women. As Congress explained: the civil rights remedy "puts another legal tool in victim's hands to call their attacker to account. . . . [S]uch remedies are important because they allow survivors an opportunity for legal vindication that the survivor, not the State, controls."[240]

Nonetheless, the *Brzonkala* court condemned the statute first for not directly regulating the states themselves, since it was with state action that Congress claimed to be concerned.[241] Yet Congress was not required, as the court suggested, to enact a far more sweeping and intrusive remedy for state failings, such as

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[238] *City of Boerne*, 521 U.S. at 520; *see also* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2207 (1999).

[239] *See Brzonkala*, 169 F.3d at 885–87.

[240] S. REP. No. 101-545, at 42 (1990).

[241] *See Brzonkala*, 169 F.3d at 842, 885.

by preempting the states' criminal and tort laws altogether,[242] authorizing lawsuits directly against states or their officials, extending federal jurisdiction over family law matters, denying states concurrent jurisdiction over actions brought under § 13981, or by regulating *all* violence against women, regardless of the presence or absence of gender-based animus.[243] What the court of appeals saw as the statute's vice is actually its virtue: Congress crafted the civil remedy with care so as not to displace state laws or burden state functions. That Congress could have gone farther than it did, and taken action far more invasive to state sovereignty, is no reason to find the civil rights remedy void for lack of "congruence."[244]

To hold otherwise would be to force Congress to take action that it knew to be as impractical and unwise as it would be punishing to the states. Congress had no intention of assuming control over all of family law so that it could address the specific problem of gender-based violence. Similarly, Congress is without power to require the states to enact new laws more to its liking.[245] The Fourteenth Amendment does not limit Congress to creating undesirable or unrealistic causes of action directly against the states or their agents. Instead of penalizing the states, Congress adopted the private attorney general model, in which private individuals sue to vindicate their rights while, at the same time, motivating states to do a better job of protecting those rights.[246]

Section 13981's alleged overbreadth is also no constitutional defect. The court of appeals determined that the statute's remedy was "out of proportion" to any possible unconstitutional state

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[242] Congress deliberately struck a careful balance between directly preempting discriminatory state laws, such as the marital rape exemption, and indirectly codifying such bias. Thus, by design, § 13981 includes within its definition of "crime of violence" those acts that would constitute a federal or state felony *but for the relationship* between the perpetrator and the victim; in other words, if a man committed what, under state law, would amount to a "crime of violence" but for the fact that the victim was his wife, § 13981 would furnish a remedy. 42 U.S.C. § 13981(d)(2)(B). For the same reasons, Congress ensured that the commission of a qualifying "crime of violence" under the statute did not turn on whether the crime *actually* had led to criminal charges, prosecution, or conviction, 42 U.S.C. § 13981(d)(2)(A), because Congress intended to redress the unequal enforcement of such crimes in state legal systems, not validate it.

[243] *See Brzonkala*, 169 F.3d at 842, 859, 875–76.

[244] *Cf.* Presault v. ICC, 494 U.S. 1, 18–19 (1990) ("[W]e are not at liberty . . . to hold the [statute] invalid merely because more Draconian measures . . . might advance more completely the [congressional] purpose.").

[245] *See* New York v. United States, 505 U.S. 144 (1992).

[246] *See* City of Riverside v. Rivera, 477 U.S. 56, 574 (1986).

action because it reaches all victims of gender-based crimes, all defendants who commit such crimes, and all states, without regard to the adequacy of their laws and enforcement efforts.[247] Yet it was reasonable for Congress to conclude that to require an individualized showing of state constitutional violations in each and every case would have imposed an undue—and likely impossible—burden of proof on the very victims whose access to the legal system Congress intended to ease, not restrict.

Such discretionary choices are in keeping with Congress's prophylactic power to effectuate the purposes of the Fourteenth Amendment. The Fourth Circuit conceded that Congress may proscribe state conduct that does not violate § 1 of the Fourteenth Amendment, but contended that Congress lacks such prophylactic power when it reaches *private conduct*,[248] even though the congressional purpose is the same—to remedy unconstitutional state action. There simply is no authority for that distinction. Congress either has the power to reach private conduct or it does not. If Congress has the power to reach private conduct *at all*, then Congress retains the same discretion it has always enjoyed to determine the best way to structure its response. The remedy Congress selected corresponded to the nature of its findings: Congress found an across-the-board failure by states to provide equal protection to the victims of gender-based violence and responded by enacting an across-the-board remedy to permit those victims to bypass the state systems that too often had failed them.

IV. CONCLUSION

Although there are limits to what laws can do to ameliorate the scourge of violence against women, § 13981 nonetheless represents a long overdue national response to systemic violence motivated by a hatred of women—violence which deprives women of the chance to participate in our national economy as equals. Such violence "not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those

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[247] *Brzonkala*, 169 F.3d at 886–87.

[248] *See id.* at 874. Similarly, the Court held that § 13981 is invalid, "regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." *Id.* at 873.

similarly situated."[249] The statute responds to systemic biases in state criminal and civil legal systems by freeing victims from total dependence on the state systems that had belittled and demeaned their claims.

Far from usurping state authority, the civil rights remedy represents cooperative federalism at its best, furnishing an avenue of redress that supplements, but does not supplant, existing state remedies. Forty-one attorneys general wrote to Congress that their "experience as Attorneys General strengthens [their] belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."[250] Having answered the call, it would be a shame indeed if Congress were denied the power to address and alleviate the "critical challenges" faced by the states in addressing "the devastating effects of violence against women."[251]

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[249] S. REP. No. 103-138, at 49 (1993).

[250] *1993 H. Hrg., supra* note 6, at 35. In addition, the attorneys general from 36 states and Puerto Rico recently filed an amicus brief in the Supreme Court urging the Court to uphold § 13981. *See* Brief of the States of Arizona, et al., United States v. Morrison & Brzonkala v. Morrison (U.S. 1999) (Nos. 99-5, 99-29).

[251] *Id.*

ESSAY

THE PROPER SCOPE OF THE COPYRIGHT AND PATENT POWER

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In 1998, Congress passed the Sonny Bono Copyright Term Extension Act, extending the duration of copyright protection from the life of the author plus fifty years to the life of the author plus seventy years. The constitutionality of this extension has been challenged on First Amendment and other grounds. In this Essay, the authors argue that the language of Article I, Section 8, Clause 8 contains judicially enforceable limits on Congress's power to protect intellectual property and suggest that the 1998 Extension Act exceeds those limits.

Property, these days, is increasingly likely to be intellectual property (IP). As more and more people make their living in the "information economy," intellectual property sounds like a more and more reasonable proposition. As one of our law professors once said, "I used to think that all property was theft—but that was before I had anything worth stealing."

As an increasing amount of society's wealth is tied up in intangible assets, strong, clear property rights can make a good deal of sense. But it is also possible to have too much of a good thing, and our society is in danger of reaching that point. Recent scholarship suggests as much: a growing body of literature details the expansion of particular doctrines,[1] the rising burden of IP-related transaction costs,[2] or the pressing need for collective

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[1] *See, e.g.*, Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519 (1993) (arguing that since 15 U.S.C. § 1115(b) speaks of a conclusive presumption of the trademark holder's "ownership of the mark," trademark incontestability creates what is in effect an unprecedented property right in trademarks).

[2] *See, e.g.*, Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 700 (1998).

institutions to mediate between individual firms and the mushrooming pile of IP rights they must traverse to do business.[3]

In this Essay, we approach one part of this problem at the source. We argue that there are limits on Congress's power to create and extend intellectual property interests. Such limits are "internal" in the sense that they are the result of the very same constitutional provision giving rise to Congress's power in the first place, the Copyright and Patent Clause of the Constitution which grants the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[4]

We argue that the language of the Copyright and Patent Clause may restrict some of Congress's more far-reaching efforts at promoting intellectual property in recent years, particularly in passing *ad hoc* extensions of copyrights and patents for the benefit of individual companies. We then suggest some approaches that courts might take in evaluating, and perhaps striking down, congressional actions in this area.

In one sense, there is nothing novel about our approach. From the earliest days of our nation to the present era, courts have repeatedly stressed that Congress's intellectual property powers under the Copyright and Patent Clause are limited. Courts, however, have been somewhat reticent when the question of defining those limits has arisen. We hope to encourage a less deferential approach in the future.

I. Some History and Background

One characteristic of legally granted monopolies is their tendency to be misused by those in power. The grant of a legal monopoly, after all, constitutes an easy way for the state—or those in control of state power—to reward friends without spending state money.[5]

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[3] *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293, 1301 (1996).

[4] U.S. Const. art. I, § 8, cl. 8.

[5] *See* Robert P. Merges, *The Economic Impact of Intellectual Property Rights: An Overview and Guide*, 19 J. Cultural Econ. 103, 110–11 (1995). For an account featuring this factor in the genesis of our own intellectual property regime, see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell.

Not surprisingly, the grant of monopolies becomes particularly attractive to politically embattled leaders faced with government revenues that are inadequate for their purposes. Monopolies for intellectual property are not immune from this tendency. Indeed, our modern system of copyrights and patents arose in reaction to exactly this state of affairs. Cries of unfair influence led English subjects to protest the grant of royal monopolies under Queen Elizabeth I and King James I:

> [In the late sixteenth century,] malpractices began to creep in that were to bring [the patent system] into disrepute and ultimately threaten its existence . . . . [Finally,] a bill in 1624 [was] enacted as the Statute of Monopolies.
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> Courtiers who extorted large sums from petitioners as the price of advancing their claims were roundly condemned. But most offensive of all was the granting of monopoly powers in established industries . . . to courtiers whom the crown could not otherwise afford to reward.
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> These abuses parliament sought to eradicate in 1624 by the restriction of letters patent, conferring monopoly powers, to first inventors alone. The validity of royal licenses would henceforth be liable to trial at common law, and anyone aggrieved by them could sue for relief.[6]

The Founding Fathers did not forget this history lesson. The constitutional clause enabling Congress to pass patent laws explicitly states that patents shall be granted to "inventors" for their "discoveries" and that these grants shall be "for limited times."[7] Thus, the grant of copyright and patent power in the Constitution was intended to provide a positive incentive for technological and literary progress while avoiding the abuse of monopoly privileges.[8] As Joseph Story put it:

> It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large,

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PROP. L. 1, 34–35 (1994) [hereinafter *To Promote the Progress of Science*].

[6] CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660–1800 (1988), 14–15.

[7] U.S. CONST. art. I, § 8, cl. 8.

[8] *See id.* (setting forth Congress's power to grant copyrights and patents in order to "Promote the Progress of Science and the Useful Arts").

> after a short interval, to the full possession and enjoyment of all writings and inventions without restraint . . . .
>
> It has been doubted, whether [C]ongress has authority to decide the fact, that a person is an author or inventor in the sense of the [C]onstitution, so as to preclude that question from judicial inquiry. But, at all events, such a construction ought never to be put upon the general terms of any act in favour of a particular inventor, unless it be inevitable.[9]

Story's characterization seems to mesh with our own: that the general evils of monopoly are overcome, in this specific instance, by the benefits accruing to the public from encouraging authors and inventors to create and invent, and to make their works public. Story makes another important point in discussing congressional power: he doubts that Congress has the power to make the question of authorship or invention a purely legislative one, beyond judicial review, and is suspicious of special—as opposed to general—legislation on the subject.

General legislation, of course, often requires administration, and even before the drafting of the Constitution, the need for a special patent administration was becoming apparent. This was due in no small part to the controversy over steamboat patents raging at the time.[10] In the 1770s and 1780s two rival inventors, James Fitch and Charles Rumsey, each claimed invention of a workable steamboat.[11] As was the custom in colonial times, they sought protection for their inventions at the state level.[12] The result was that, as each presented his case to a new state legislature, conflicting and overlapping monopolies were granted.[13] To

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[9] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 558–559 (RONALD D. ROTUNDA & JOHN E. NOWAK eds., 1987).

[10] The following account draws on JAMES THOMAS FLEXNER, STEAMBOATS COME TRUE: AMERICAN INVENTORS IN ACTION (1944).

[11] *See id.* at 73–76 (discussing Fitch) and 66–69 (discussing Rumsey).

[12] *See id.* at 87–100 (describing various state patents granted in Virginia, Pennsylvania, New York, and Delaware).

[13] *See* Walterscheid, *To Promote the Progress of Science*, *supra* note 5, at 22–23:

> Although the states in their individual capacities had sought to provide some form of limited-term exclusive rights to inventors and authors, by early 1787 the defects in the state copyright and patent customs were obvious. The most singular defect was that states only could legislate with respect to their own territory. Thus, state patents and copyrights could be infringed with impunity in adjoining states. Obtaining multiple state patents or copyrights was time consuming, expensive, and frequently frustrating. Moreover, consistency in terms and conditions varied from state to state. With regard to patents, no guarantee of consistency from patent to patent existed even within a particular state because each patent required a private legislative act. Furthermore, what a state could grant, it could also take away, and on occasion did so.

clarify their rights, each inventor sought special legislation from the federal government, then operating under the Articles of Confederation.[14]

The situation rapidly became quite confused, and the factors surrounding each inventor's claim were hotly disputed. The battle for credit as to priority of invention was fought in individual meetings with each state's representatives, as well as by publishing pamphlets purporting to set forth the "true" story of the steamboat's invention.[15] Even George Washington became involved as a supporter of Rumsey.[16] But because the status of federal grants at the time was unclear, not much progress was made. Nevertheless, the steamboat case, with its complex facts pleaded to inexpert legislators, was an important impetus behind the call for a uniform national patent system in the Constitution and then in the first Congress. Consequently, the 1790 Patent Act was among the first orders of business taken up in the new federal legislature.[17]

The steamboat case shows, among other things, that the complicated and idiosyncratic facts associated with patent disputes are ill-suited to resolution in a legislative forum. Busy legislators, with little expertise in steamboat technology, were called upon to resolve a complex dispute between rival claimants based on little more than their innate sense of justice. And John Fitch, a somewhat untutored frontiersman, always felt that the better connected and courtlier James Rumsey had a distinct advantage in the arena of legislative influence.[18] Both the real and potential unfairness of such an *ad hoc* approach was understood at the time to militate in favor of the creation of a nonpolitical system.[19]

In tracing the next step in the development of a professional, specialized patent agency, the experience of Thomas Jefferson is instructive. He was the only President to serve as a patent examiner, something that speaks volumes about the perceived im-

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[14] *See id.* at 124 (discussing Fitch's proposed bill before Congress in 1787 and 1788).

[15] *See id.* at 122–24.

[16] *See id.* at 82 (describing Washington's influence in obtaining state protection, and his role in Rumsey's steamboat company).

[17] *See* P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y 237, 240 (1936).

[18] *See* Flexner, *supra* note 10, at 132–33.

[19] *See* Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a "First-to-Invent" Patent System*, 23 AM. INTELL. PROP. L. ASS'N Q.J. 263, 265 (1995) [hereinafter Walterscheid, *Priority of Invention*].

portance of patent scrutiny two centuries ago.[20] As Secretary of State, Jefferson devoted a great deal of energy to examining the patent applications that came before him. It soon became apparent, however, that a Secretary of State—even one as interested in technology as Jefferson—simply lacked the time to do the job properly.[21] In response to this problem, a new patent system was enacted in 1793 that allowed inventors to register their patents in Washington without examination, leaving questions of patent validity to the courts.[22] This, too, proved unworkable as the system became flooded with spurious patents.[23] The final step in establishing today's patent system came in 1836, when the forerunner of today's Patent Office was established to examine each application and pass on its merits.[24]

Taken together, the steamboat example and Jefferson's experience demonstrate that there is considerable wisdom behind the notion of a patent *system* with administrative regularity. Such a system is not only fairer to applicants and more regular in its results, but also—because professional patent examiners are likely to be far more expert than legislators, judges, or Secretaries of State—more efficient.

II. THE POLITICAL ECONOMY OF PATENT EXTENSIONS

Nobel prize-winner Douglass North has argued that governments very rarely define property rights in ways that maximize economic growth.[25] Great Britain, in this view, was fortunate enough to evolve efficiency-enhancing institutional structures (including property rights) that in turn set the stage for economic growth.[26] Such is the case, North argues, with the emergence of modern patent systems.[27] For North, the sovereign abuses of mo-

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[20] *See id.*

[21] *See* Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 JOHN MARSHALL L. REV. 269, 293 (1995) (quoting a letter from Jefferson describing the burdens of patent examination duty).

[22] *See id.* at 292–97 (describing the origin and passage of the 1793 Act).

[23] *See* Edward C. Walterscheid, *The Winged Gudgeon–An Early Patent Controversy*, 79 J. Pat. & Trademark. Off. Soc'y 533 (1997) (describing the origins of the 1836 Act).

[24] *See* Patent Act of July 4, 1836, ch. 357, § 6,5 Stat. 117, 119; *see also* Edward C. Walterscheid, *To Promote the Progress to Useful Arts: American Patent Law and Administration, 1787–1836 (Part I)*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 61 (1997).

[25] *See* DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY 147–48 (1973).

[26] *See id.* at 155.

[27] *See id.* at 152–53.

nopoly grants in the sixteenth and early seventeenth centuries are examples of wealth-reducing property rights.[28] The Anglo-American patent systems that succeeded the old monopoly privileges, on the other hand, exemplify the brighter, pro-growth side of the property rights picture.[29]

North's view is consonant with two other traditions in constitutional theory that bear on this Essay: (1) the view, associated with legal historians J. Willard Hurst and Stanley I. Kutler, that the Constitution embodies a spirit of economic dynamism and growth;[30] and (2) the more recent "public choice"-inspired literature describing the Constitution as a bulwark against rent-seeking[31] by special interests.

A. *Economic Dynamism and Growth Perspective*

The economic dynamism perspective is best exemplified by Stanley I. Kutler's famous account of the *Charles River Bridge* case.[32] Kutler described this cornerstone case as a contest between the forces of the privileged and well-positioned holders of an old state charter to operate a ferry crossing and the dynamic new forces that led a group of entrepreneurs to propose building a bridge.[33] Faced with the choice of upholding the original charter against a claim of impairment of state contracts and allowing the new bridge, the Supreme Court chose the latter.[34] The general lesson was the defeat of the entrenched charter-holders' rent-seeking and the liberation of vigorous economic forces of

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[28] *See id.* at 148–49. *Cf.* WILLIAM J. BAUMOL, ENTREPRENEURSHIP, MANAGEMENT, AND THE STRUCTURE OF PAYOFFS 1 (1995) (arguing that entrepreneurs will innovate either productively or, alternatively, via rent-seeking schemes, depending on the incentives they face).

[29] *See* DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 164–65 (1981) ("It is only with the Statute of Monopolies in 1624 that Britain developed a patent law.").

[30] *See* STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971); JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH (1964).

[31] Economists define "rent" as a supra-normal return, i.e., revenue higher than would be necessary to justify a given investment, taking into account a "normal" level of profit. *See* Alan W. Evans, *On Monopoly Rent*, 67 LAND ECON. 1, 2–4 (1991). Rent-seeking is the expenditure of resources in an effort to capture these supra-normal returns; lobbying for special legislative privileges is a classic example. *See* JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 7 (1980).

[32] STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

[33] *See id.*

[34] *See* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

change.[35] Kutler's antinomic title—"Privilege and Creative Destruction"—describes what is at stake in many proposals to extend intellectual property rights. Our appeal is to maintain the early nineteenth-century, pro-growth conception of the Constitution.[36]

B. *Public Choice Literature on Rent-Seeking*

The second literature, on public choice, sees the Constitution as a mechanism designed to prevent well-organized interest groups from obtaining special favors from the government.[37] In scholarship extending back to the mid-1980s, authors such as Jonathan Macey have argued that the Constitution was designed primarily as a bulwark against rent-seeking. It is tempting to agree with some of Macey's critics, however, and argue that the Constitution did not enact James Buchanan's *The Calculus of Consent*.[38] Cass Sunstein, in particular, sees the Constitution as a "republican" means of transcending interests, rather than simply a well-oiled mechanism for reconciling them.[39] But for our purposes, it is not necessary to enter deeply in this debate. Regardless of whether the Copyright and Patent Clause represents a larger theme in the design of the Constitution, it does limit one specific congressional power. This limit originated in British analogues that were explicitly designed to eliminate rent-seeking abuses. In at least this context, the limit on Congress, and the abuses that informed it, dictate a concrete constitutional approach.

Against this backdrop, we claim that the constitutional footing for intellectual property protection was constructed with inherent

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[35] *Cf.* Robert E. Mensel, *Privilege Against Public Right: A Reappraisal of the Charles River Bridge Case*, 3 DUQ. L. REV. 1 (1994) (arguing that the *Charles River Bridge* case introduced Jacksonian themes of economic dynamism and democratic egalitarianism into constitutional discourse).

[36] *Cf.* Charles K. Rowley et al. eds., *Rent-Seeking in Constitutional Perspective, in* THE POLITICAL ECONOMY OF RENT-SEEKING 447, 462–63 (1988).

[37] *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247–50 (1986) (discussing ways in which the structure of the Constitution impedes rent-seeking by interest groups); Robert D. Tollison, *Symposium on the Theory of Public Choice: Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) (giving an overview of the "economic theory of legislation").

[38] JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

[39] *See, e.g.*, Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690–91 (1984).

limitations, as well as with a grant of power. The specific language ("to promote progress," and "for limited times"), the history, and the context of the Clause dictate that the congressional power to create property rights does not extend to non-productive rent-seeking. Congress exceeds its authority to grant property rights when those rights do not promote progress, or are not sufficiently limited in time. Members of Congress should keep this in mind when considering the many bills for "private relief" and term extensions that they now receive. And, failing that, the courts must exercise their authority to enforce constitutional limits on the Copyright and Patent power. To ignore this duty is to risk the kinds of abuses that threatened the economic progress of seventeenth-century Britain, and to turn our backs on the historical transformation of *ad hoc* grants of rent-seeking privileges into rule-based systems for recognizing intellectual property rights.

This history is of particular relevance now, as special legislation extending individual patent terms has become more common. Occasionally, efforts to secure such legislation overreach, as when Swiss pharmaceutical giant Hoffman-LaRoche attempted to sneak a patent extension rider covering its drug Toradol into legislation providing relief for Midwest flood victims.[40] However, they sometimes succeed, as when G.D. Searle slipped language extending the patent on its drug Daypro into an emergency budget bill.[41] Nor is the matter limited to patents: the Disney copyright on Mickey Mouse was poised to enter the public domain in 2003, but the Walt Disney Company decided that procuring legislation extending that copyright for an additional twenty years was to be its "highest priority."[42] The Disney request was folded into a general bill that recently became law,

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[40] *Roche Taradol Patent Language Removed from Senate Appropriations Bill.*, PINK SHEET, May 12, 1997, Vol. 59, Issue 19, *available in* 1997 WL 16952572.

[41] Jim Drinkard, *Drug Firm Seeking Rider on Flood Relief; Hoffman-LaRoche Finds Friends in Senate*, CINCINNATI ENQUIRER, May 3, 1997, at B10.

[42] The Hotline (American Pol. Network), Aug. 12, 1998, at 41. *See also* Steve Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. TIMES, Apr. 25, 1998, at A15 ("Dennis Karjala, law professor at the University of Arizona, has noted that under the new law our roly-poly Santa Claus, originally created by the 19th-century cartoonist Thomas Nast, would not have gone into the public domain until 1973. Even the United States Government would have had to pay royalties to use Nast's Uncle Sam in all of this century's wars. Just as Uncle Sam and Santa eventually became part of the public domain, available for anyone to use in any season, so eventually should Mickey Mouse and Bugs Bunny take their places in our free-to-all pantheon of cultural icons.").

and is thus not a classic private bill.[43] Still, some experts fear that in today's freewheeling political-funding culture it will not be long until a copyright-reliant company discovers the magic of private intellectual property protection.[44] Such departures from the norm could well become the norm, with wealthy corporate interests securing by legislative influence what they would not be able to obtain in the normal course of business.

Such extensions raise the standard political collective action problem: the gains to the drug companies or Disney (even after subtracting political contributions and lobbying costs) are enormous and obvious, while the additional harms to consumers are relatively small on a per-person basis and not at all obvious. This is the classic situation in which economic theory tells us government will be over-responsive to the entreaties of well-organized parties:

> [S]mall groups have a greater likelihood of being able to organize for collective action, and can usually organize with less delay, than large groups. It follows that the small groups in a society will usually have more lobbying . . . power per capita . . . than the large groups.[45]

This phenomenon certainly has been appreciated by politicians regardless of their degree of economic training, yet what is seldom appreciated is that success in organizing a special interest and pursuing its claims costs society in several ways. In addition to redistributing wealth from society to the small group (in the case of patent extensions, from consumers to the patentee), successful special-interest organizing also increases the likelihood that others similarly situated will seek their own special legislation. As Jonathan Rauch puts it:

> In the economy, as in nature, a parasite is set apart from a mere freeloader by its ability to force its target to fend it off. This is the sense in which transfer-seekers are, not so loosely speaking, parasitic: they are not only unproductive themselves, *they also force other people to be unproductive* . . . . A bad stockbroker or a pesky real-estate agent can take

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[43] *See* The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[44] *Cf.* United Christian Scientists v. First Church of Christ, 829 F.2d 1152, 1166 (D.C. Cir. 1987) (invalidating private copyright bill for certain works of the Christian Science religion, but under the Establishment Clause, rather than under the Copyright and Patent Clause).

[45] MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 41 (1982).

> your money if you do hire him, but only a transfer-seeker can take your money if you *don't* hire him.[46]

Thus, political parasites are a double danger: they not only pursue their own self-interested agenda, but also force others into a political "arms race" to protect their own interests. "What is peculiar about the parasite economy, then, is its ability to suck in resources that people would rather invest elsewhere. Activism on one side draws counteractivism on another."[47] And, of course, efforts aimed at the political redistribution of wealth make society poorer, not richer. To the extent that people are investing in lobbyists, lawyers, and public relations firms instead of, say, research and development, they are foregoing investments that might benefit society as a whole. In the language of the economic literature on "rent seeking" that describes these behaviors, one must consider "the resource costs of individuals seeking privileges from the government."[48]

As this literature makes clear, the decision to shift resources in the direction of lobbying is quite rational if there is even a modest chance of success. When the return on lobbying is greater than the average returns on research and development expenditures, lobbying may well turn out to be the more lucrative investment option.

This, of course, is only from the firm's point of view. From society's point of view, any expenditure on lobbying that might instead have been invested in research and development is a loss. This is due to the fact that the return from lobbying accrues only to the patent holder, while the return from research and development accrues in good part to society as well. Studies consistently show that, at least for major technological advances, society as a whole gains a very large share of the total value generated by an invention.[49] Indeed, it is the need for firms to capture

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[46] JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 72–73 (1994).

[47] *Id.* at 75. *See also* Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635 (1995) (discussing costs to society of transfer-seekers and ways constitutional structure may reduce such costs); Glenn Harlan Reynolds, *Chaos and the Court,* 91 COLUM. L. REV. 110 (1991) (same).

[48] THRAINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 278 (1990).

[49] *See, e.g.*, Zvi Griliches, *Research Expenditures, Education, and the Aggregate Agricultural Production Function*, 54 AM. ECON. REV. 961, 961 (1964) (asserting that the social rate of return on agricultural research is at least 150% greater than the private rate of return to the researchers); Robert E. Evenson & Yoav Kislev, *Research and Productivity in Wheat and Maize*, 81 J. POL. ECON. 1309, 1309 (1973) (arguing that the social return is up to 300% greater than private return); Edwin Mansfield *et al., Social*

some of the value they create through research and development that lies at the heart of private property rights over inventions in the first place. Where lobbying activities are concerned, there is no need to ensure a fair return to firms—the nature of the activity dictates that most of the returns will accrue to them in any event.

This point can be pushed a bit further, for the contrast between a patent system and individual requests for patent extensions is quite striking. Patents encourage *new things*, while requests for patent extensions attempt to preserve *old markets*. Patents are forward-looking, growth-oriented, entrepreneurial—almost (if such a word can apply to a legal construct) optimistic in nature. By contrast, many requests for special treatment are backward-looking, fearful of losing ground, and pessimistic or reactionary in character. Why protect yesterday's breakthroughs for a longer period if there is something new just around the corner? Obviously, efforts to protect old discoveries seem most urgent as excitement about new ones ebbs. Putting aside economic theory, this attitude of impending decline is perhaps the most discouraging thing about such requests; they betray the very spirit of the patent system.

III. Taking the Copyright and Patent Clause Seriously

And perhaps more than just its spirit. For while the Copyright and Patent Clause was certainly drafted without the benefit of modern economic theory, the concerns it embodies mesh closely with the analysis above. Monopolies are bad for the public welfare, both because they impose a "deadweight loss" on society and because they encourage the sort of special-interest maneuvering that consumes valuable resources and tends to corrupt the political system. Although monopolies are generally undesirable, monopolies that "promote the progress of science and the useful arts" by securing to inventors and authors property rights "for a limited time" are the exception. They are monopolies that pay

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and Private Rates of Return from Industrial Innovations, 91 Q.J. Econ. 221, 221 (1977) (concluding that the social rate of return on 17 major products was between 77% and 150% greater than the private rate of return); Timothy F. Bresnahan, *Measuring the Spillovers from Technical Advance: Mainframe Computers in Financial Services*, 76 Am. Econ. Rev. 742, 753 (1986) (demonstrating very large social gain from mainframe computers, 1.5 to 2.0 orders of magnitude above cost of inventing them).

their own way with new knowledge and creation. The competition that they inspire—because of their limited character—serves the public good by sponsoring invention and creation, rather than competition aimed at corrupting the public's representatives.

Indeed, these sentiments were also held by the Framers, judging from an exchange between James Madison and Thomas Jefferson. Jefferson wrote to Madison arguing in favor of a provision outlawing government-created monopolies, and repeated his position in a second letter: "It is better . . . to abolish . . . Monopolies, in all cases, than not to do it in any."[50]

Madison did not quite disagree, but rather argued that monopolies for intellectual property were a special case. As Madison put it, "With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries they are not too valuable to be wholly renounced?"[51] Of course, for Madison's argument to hold, the monopolies in question must in fact serve as "encouragements" and not simply as political rewards. If the latter, they would seem to be more accurately classed with Madison's "nuisances."

For this to be true, of course, the monopolies must be those described in the Copyright and Patent Clause. They must be "for a limited time" because part of the public's payback is that the invention or creation will eventually enter the public domain. They must also be reasonably calculated to "promote the progress of science and the useful arts," meaning that they must bear some relationship to creativity, not simply political clout.

As the Supreme Court put it in *Graham v. John Deere Co.*:

> The [Copyright and Patent] [C]lause is both a grant of power and a limitation . . . . It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or

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[50] Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON, 1788, at 442–43 (Julian P. Boyd ed., 1958).

[51] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON, 1788–1789, at 17 (Julian P. Boyd ed., 1956).

> social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of . . . useful Arts." This is the *standard* expressed in the Constitution and it may not be ignored.[52]

This passage clearly states a principle latent in other Supreme Court cases: Congress may not obviate settled administrative practices by overriding constitutional requirements for protection, such as originality in copyright law[53] or non-obviousness in patent law.[54] Not to put too fine a point on it, this means that special legislation extending the patents and copyrights of favored individuals or corporations is often a dubious constitutional proposition. Arguably, at least, legislation extending a particular copyright or patent fails both prongs of the test. First, as an *ad*

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[52] 383 U.S. 1, 5 (1966) (citation omitted). In *Graham* the Court did not discuss the copyright provision, "which we omit as not relevant here." *Id.* at 5 n.1. There seems to be no reason for interpreting the provision differently given the parallel structure of the clause.

The quoted passage is in stark contrast to the early views of Justice Story, who wrote (in his capacity as a circuit judge):

> The [constitutional] power is general, to grant to inventors; and it rests in the sound discretion of congress to say, when and for what length of time and under what circumstances the patent for an invention shall be granted. There is no restriction, which limits the power of congress to enact, [only to] where the invention has not been known or used by the public.

Blanchard v. Sprague, 3 Fed. Cas. 648, 650 (Case No. 1,518) (C.C.D.Mass. 1839). We are indebted to Edward C. Walterscheid for this citation.

[53] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (1991) (holding that copyrights in factual compilations, such as phone directories, are invalid under the "originality" requirement of the Constitution).

[54] *See* 35 U.S.C. § 103 (1998). *See also* Trademark-Cases, 100 U.S. (10 Otto) 82, 94 (1879) (invalidating Trademark Act passed by Congress under Copyright and Patent Clause authority of Constitution):

> [A trademark] is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings and the like.

Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm'n, 483 U.S. 522, 532 (1987) ("There is no need in this case to decide whether Congress ever could grant a private entity exclusive use of a generic word.").

hoc (actually, a *post hoc*) reward, it seems unlikely to "promote the progress of science and the useful arts."[55] Second, as an extension of a previously granted patent or copyright, it undercuts any constitutionally significant notion of "limited time."

With respect to the first of these failings, two issues are important. First, the value of intellectual property is that it encourages authors, inventors, and investors, to take risks "on the front end" with the expectation of reaping profits later. A *post hoc* reward, granted on the basis of legislative whim or influence, is unlikely to provide such encouragement as effectively as a regularized system. The vagaries of the political process dictate that extensions will not always be available, and that when they are, they may not always be granted for the most significant inventions or copyrighted works.[56] In addition, an important aspect of the copyright and patent system's promotion of creativity lies in the way it ensures that ideas will eventually enter the public domain. Walt Disney, after all, drew on public-domain folk tales when he created such classics as *Snow White* and *Cinderella.* Presumably, future creators will draw on Disney's work once it enters the public domain. The same is true of pharmaceutical research, or any other field of technology in which cumulative invention is the rule. Such opportunities are frustrated by legislation that keeps creative or inventive works out of the public domain for years or decades beyond those needed to encourage innovation.

Second, special legislation extending patents and copyrights does violence to the constitutional time limits that apply to the grant of intellectual property rights. Patents and copyrights are granted for a "limited time." The length of that time, of course, is discretionary, and Congress has fixed copyright and patent

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[55] It must be admitted, though, that at least under some theories of innovation, mega-awards to highly successful inventors may serve as the primary spur to further invention and innovation. For more on this "home run" theory of invention, see F.M. Scherer, The Innovation Lottery (June 25, 1998), paper presented at NYU Law School Conference on Intellectual Products: Novel Claims to Protection and Their Boundaries, Florence, Italy (June 25, 1998) (on file with the authors).

[56] *See, e.g.*, Library of Congress, Congressional Research Service, The History of Private Patent Legislation in the House of Representatives, Jan. 31, 1978, *reprinted in Hearings on Private Patent Litigation (H.R. 2882) before the House Committee on the Judiciary, Subcomm. On Courts, Civil Liberties, and the Admin. Of Justice,* 98th Cong., 2d sess. (Sept. 13, 1984) (written by Christine P. Benagh), at 97, 102 [hereinafter Library of Congress Report] (patent extension denied to Oliver Evans, a very important early nineteenth century inventor; yet granted for many minor inventions).

terms at varying lengths throughout our history.[57] Yet while the length of the generally applicable term is largely at Congress's discretion (including, under the Patent Act in effect for part of the nineteenth century, a renewal term), once the patent or copyright has been granted we know the length of its maximum "limited time." When the term is subsequently extended, that "limit" is abolished because, in principle, there is no reason that it cannot be extended more than once. Can anyone doubt that now that Disney has the twenty-year extension on Mickey Mouse that it wanted, it will be back in 2023 asking for another? If the language of the Clause is to mean anything, the grant of an intellectual property right that can be extended by special, *post hoc* legislation can hardly be considered "limited" for constitutional purposes.[58]

Just how radical is our proposal? On the one hand, it would appear to call into question a longstanding practice. A Library of Congress study commissioned in 1984 shows that modest numbers of patent extensions have been part of the patent scene almost from the time of the first Patent Act in 1790.[59] But the study also shows that most requests for patent extensions traditionally have been denied.[60] Of the few that were successful, the lion's share involved cases of government infringement.[61] Before contemporary doctrine softened the impact of traditional principles of sovereign immunity, inventors were forced to make special requests for relief when their inventions were, in effect, taken by the government for some public purpose.[62] A large group of such requests came, for example, in the aftermath of World War II.[63] Inventors argued that they had allowed and even encouraged royalty-free government use of valuable war technologies until the war was over, which in some cases meant that

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[57] *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 131 n.23 (1997); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 669–79 (1996) (reviewing history of copyright term up until 1995).

[58] *Cf.* Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act Of 1996*, 73 U. DET. MERCY L. REV. 311, 313 (1996) (arguing that the copyright term extension under GATT amendments in 1996 violated the "for a limited time" language of the Copyright and Patent Clause).

[59] *See* Library of Congress Report, *supra* note 56, at 102.

[60] *See id.* at 102–04.

[61] *See id.* at 105.

[62] *See id.*

[63] *See id.*

the patent in question had expired before any compensation could be earned.[64]

It is likely that such requests would today take the form of claims for compensation under the Takings Clause of the Fifth Amendment. Under this approach fair compensation would be paid for the past value of the invention used by the government, and there would be no need for a prospective extension of the patent term.

The 1984 Library of Congress Report is instructive for another reason: it recounts in detail a tradition of congressional unease with the legislation of private patent bills. In particular, the Report shows that Congress consistently acted to consolidate related special requests into new administrative practices, beginning with the first Patent Act itself, which pre-empted a number of special requests for the reward of particular inventions (including the Rumsey-Fitch dispute referred to earlier).[65] A similar consolidation occurred in the early nineteenth century when the process of ruling on many particular requests for private relief was replaced with an administrative procedure that would determine which patents should be extended for a single, final, seven-year term.[66] Congress pre-empted another category of special relief when it passed an amendment to the Patent Act permitting alien citizens to file patent applications.[67] In each case, the evolution of *ad hoc* legislation into a system of regularized procedures subject to judicial review recapitulated the evolution of the modern patent system from its origins as a tangle of royal privileges.[68] The emergence of administrative regularity does not necessarily show that Congress considered special legislation

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[64] *See id.*

[65] *See id.* at 101; Edward C. Walterscheid, *Priority of Invention*, *supra* note 19, at 265 (describing disposition of Rumsey-Fitch dispute under 1790 Patent Act).

[66] *See* Act of July 4, 1836, ch. 361, § 18, 5 Stat. 117, 124–25 (1846) (granting a seven-year extension for patentees who showed they had failed to obtain "reasonable remuneration for the time, ingenuity, and expense [of the invention], and the introduction thereof into use."). The 1836 Act reflected its Jacksonian origins in that it established, in the words of Jacksonian Senator Ruggles, not a "regal prerogative" but "a general law . . . without discrimination." *Report of the Select Committee Appointed To Take into Consideration the State and Condition of the Patent Office*, 24th Cong., 1st sess. (1936), *reprinted in* 6 NEW AMERICAN STATE PAPERS, SCIENCE AND TECHNOLOGY 47 (1973).

[67] *See* Library of Congress Report, *supra* note 56, at 103, (noting that between 1808 and 1836, when the law was changed, Congress passed eighteen special acts allowing aliens to file patent applications).

[68] *See id.* at 104 ("The principal reasons underlying the passage of the earlier private patent bills [i.e., from 1790 to 1836] had been addressed through general legislation.").

unconstitutional under the Copyright and Patent Clause.[69] But it certainly shows consistent congressional doubts regarding the wisdom of excessive legislative treatment. It is our view that the Framers shared these doubts and imposed implicit limits on copyrights and patents.

It is true, of course, that the extension of existing copyrights and patents differs in one way from the discredited practice outlawed by the Statute of Monopolies. Under the old English system, monarchs rewarded court favorites with monopolies on goods that, in the Supreme Court's words, "had long before been enjoyed by the public."[70] When a patent or copyright is extended, on the other hand, it deals with goods that have previously been "enjoyed by the public" only in accordance with the patent- or copyright-holder's monopoly.

This distinction, however, is not as great as it may seem. In fact, the extension of a patent or copyright interest *prospectively* removes items from the public domain. When a patent or copyright is granted, the creation in question will automatically—by action of law—enter the public domain when the patent or copyright expires. Prior to that grant, the public has no right to the creation in question; the owner could have kept it as a trade secret and secured protection of indefinite length. Upon the granting of a patent or copyright, however, the statutory protection is vested, as is, arguably, the entry of the creation into the public domain when the protection expires. In many cases business plans will be drawn based on that expiration. And even when they are not, it is not too fanciful to characterize the movement

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[69] Indeed, a Congressional Report from 1879 details a number of convincing prudential reasons to deny private patent bills, but does not express the opinion that such extensions are unconstitutional in general. Private bills of various kinds have been upheld as constitutional. *See, e.g.*, Williams v. Norris, 25 U.S. (12 Wheat.) 117 (1827) (holding the Court has no jurisdiction over an essentially private act under state law that does not raise federal constitutional issues); United States v. Gettysburg Electric Realty Co., 163 U.S. 427 (1896) (upholding constitutionality of private bill to pay claims on government under expired and later renewed sugar bounty acts). And indeed, there are some very old cases upholding private patent extensions in the face of constitutional challenges. *See* Evans v. Jordan, 13 U.S. (9 Cranch) 199, 203–04 (1815); Evans v. Weiss, 8 Fed. Cas. (No. 4,572) (C.C.D.Pa. 1809); Evans v. Robinson, 8 Fed. Cas. (No. 4,571) (C.C.D.Md. 1813) (all involving congressional statutes extending patents of Oliver Evans). Note that in each case, however, objection of the special bill was premised on the Constitution's prohibition of ex post facto laws, not on the copyright and patent clause. Note also that Thomas Jefferson strenuously objected to the outcome in these cases. *See* Letter from Thomas Jefferson to Issac McPherson (Aug. 13, 1813) *in* THE WRITINGS OF THOMAS JEFFERSON, at 326–27 (A.A. Lipscomb ed., 13th ed., 1903). We thank Edward C. Walterscheid for the cites and information in this footnote.

[70] *Graham*, 383 U.S. at 5.

of the protected interest into the public domain as creating a remainder interest in the public. In this sense, the extension of an already-granted patent or copyright, by depriving the public of the remainder interest it already holds by statute, is in fact the deprivation of a right "enjoyed by the public." Indeed, a number of rules and doctrines in patent and copyright law are designed precisely to protect the public's "reliance interest" in fixed expiration dates.[71]

We would be remiss if we did not answer one other possible objection to our argument: can't Congress just extend patents and copyrights by invoking the Commerce Clause, thus rendering our argument beside the point? Certainly some commentators have argued that, in the absence of the Copyright and Patent Clause, Congress would have the power to create a patent and copyright system under its authority to regulate commerce among the several states.[72]

There is much to this position, but as a criticism of our approach it has one key failing. Instead of the absence of a copyright and patent clause, we have the presence of the Copyright and Patent Clause. That Clause is generally understood to serve as a limit on congressional power, not simply a grant thereof. To allow Congress to do things under its general commerce power that it is forbidden to do under its specifically applicable copyright and patent power would in essence read the Copyright and Patent Clause out of the Constitution. Such an approach could hardly be said to be faithful to the text of the Constitution or the intent of the Framers.

Nor is this observation merely an example of academic curmudgeonism at work. We grant that, at least in the post-*Wickard*[73] era, one could argue that Congress possesses the

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[71] *See, e.g.*, 35 U.S.C. § 154(c)(2)(A) (Supp. 1998) (failing to provide for remedies against infringers whose activities began before or within six months of passage of Act extending patent term from 17 years from patent grant to 20 years from patent filing); 17 U.S.C. § 104A (Supp. 1998) (giving "reliance parties" a grace period of 12 months to end uses of previously uncopyrighted works whose copyrights were restored under 1995 amendments to the Copyright Act).

[72] U.S. CONST. art I, § 8, cl. 3. *Cf.* Chamberlin v. Uris Sales, Inc., 150 F.2d 512 (2d Cir. 1945). Indeed this very theory underlies recent bills aimed at protecting computer databases under copyright-like federal law. *See* Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998).

[73] The high-water mark of congressional power under the Commerce Clause is often said to be Wickard v. Filburn, 317 U.S. 111 (1942). In *Wickard*, the Court upheld the regulation of wheat grown upon a farmer's own land and consumed upon his property by his family and livestock as an exercise of Congress's power to regulate commerce among the several states—the theory being that such wheat took the place of wheat that

power to regulate intellectual property under the Commerce Clause. The Supreme Court rejected a similar argument made with regard to the bankruptcy power in *Railway Labor Executives Association v. Gibbons*.[74] "[I]f," said the Court, "we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."[75] "To hold otherwise," the Court continued, "would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution."[76] The same argument should apply to efforts to override the restrictions imposed upon Congress by the Copyright and Patent Clause.

IV. A Fairly Modest Proposal

As should be obvious, we believe that special legislation to extend copyrights and patents for individuals or corporations should receive the strictest of scrutiny from the courts.

There is an additional value to our approach. As humorist P.J. O'Rourke has said, when buying and selling are controlled by legislation, the first things to be bought and sold will be legislators. Control of corruption was an important goal of our constitutional system, and there is no doubt that the Framers believed that a system of limited and enumerated powers was a significant check on corruption. There also seems little doubt that copyright and patent extension bills—granted almost uniformly to wealthy corporations and big contributors, rather than to struggling basement inventors—constitute exactly the kind of corruption that the limits in the Copyright and Patent Clause were designed to prevent.

As a result, we believe that courts should strictly scrutinize laws extending copyrights and patents that have already been granted. Although it would be difficult, and probably impossible,

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would otherwise be purchased on the interstate market for wheat. *But see* United States v. Lopez, 514 U.S. 549, 559–60 (1995) (stressing that the regulation in *Wickard* was economic in character, and that so was wheat growing, and denying that this logic might render the commerce power effectively unlimited). For more on the limits imposed by *Lopez* see David B. Kopel and Glenn H. Reynolds, *Taking Federalism Seriously*: Lopez *and the Partial-Birth Abortion Ban Act*, 30 Conn. L. Rev. 59 (1997) (arguing that Congress may not regulate abortion practices under the commerce power).

[74] 455 U.S. 457 (1982).

[75] *Id.* at 468–69.

[76] *Id.* at 473.

to formulate a satisfactory *per se* rule, we suggest some factors that courts should consider. The first might be called the "extent of the extension"—how many companies or individuals qualify, and how long is the extension? The fewer who benefit, the greater is the likelihood that the extension represents special-interest graft of the sort that the Copyright and Patent Clause was intended to prevent. The longer the extension, the greater is the inroad it represents into the "limited time" prescribed by the Copyright and Patent Clause.

Similarly, statutes that set up a regularized process for extending patents—without naming the beneficiaries explicitly (or implicitly via too-narrow criteria)[77]—are far less suspect than those that merely set up a procedure whereby the Patent and Trademark Office may extend patents held up by lengthy regulatory (typically, Food and Drug Administration) review.[78] Where extensions are based on some specific and identifiable government error (say a failure to notify a patentee that a patent has been granted, or inordinate delay in processing claims), they are less suspect than they would be if based on other considerations.

One possible approach to the constitutional test we advocate would be to examine a proposed extension from the hypothetical perspective of an author or inventor who is at the very outset of his or her creative work—that is, to ask: could the term of protection possibly serve as additional motivation to set pen to paper, or to sit down at the lab bench? Or does it stretch out so far in time that the latter years of the term are irrelevant to any potential creator? This approach essentially translates proposed patent extensions into the "present value" calculations familiar to accountants. The constitutional rationale for such an approach is simple: the phrase "to promote the progress of science and the

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[77] *Cf.* 35 U.S.C. § 155A (Supp. 1998) (granting a *very* specific "general" extension, applying for example to a patent for a product "which . . . if during regulatory review . . . the [FDA] notified the patentee, by letter dated February 20, 1976, that such product's new drug application was not approvable . . . [but] the [FDA] approved, by letter dated December 18, 1979, the new drug application for such product . . ."). This was a patent extension for the drug Lopid, manufactured by Warner-Lambert Pharmaceuticals, Inc.

[78] *Compare* 35 U.S.C. § 156 (Supp. 1998), codifying Pub. L. No. 100-418, §§ 9201–9202, 102 Stat. 1107 1569–70; S. Rep. No. 83, 100th Cong., 1st sess. (1987) (describing reasons for special legislative relief for Lopid) *with* Drug Price Competition and Patent Term Restoration Act of 1984, codified at 35 U.S.C. § 156 (Supp. 1998) (regular extension procedure for general classes of patents). *See generally* Richard M. Cooper, *Legislative Patent Extensions*, 8 FOOD & DRUG L.J. (1993) (reviewing legislative history of Lopid Bill, and arguing that private bills such as this are well-accepted, constitutional, and in effect, a growth industry).

useful arts" is inherently prospective. It states a utilitarian, incentive-based rationale for intellectual property protection. If the term of protection could not, under any plausible set of assumptions, serve as an incentive, it fails the constitutional requirement of a forward-looking grant of property rights.[79] When the absence of a plausible incentive is joined by the presence of firm-specific legislation, the conclusion must be that the proposed bill amounts to rent-seeking, pure and simple.[80] Since we know—based on the closely contemporaneous experience of British abuses of the patent monopoly—that the Framers wanted to avoid just such abuses, we also know that these extensions fail the constitutional test.[81]

One argument typically made on behalf of patent extensions is that the invention in question has contributed enormously to the general social welfare.[82] This is joined in many cases by the assertion that for one reason or another the inventor has not received a commensurate or adequate reward.[83] Both arguments

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[79] Extensions only serve as an incentive if they are anticipated at the time a work is created; given how rare they are, this is unlikely. And for many proposed extensions, particularly in the copyright realm, an additional term of protection adds next to nothing in present value terms because of the powerful effect of discounting over time. *See, e.g.*, Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1223 n.115 (1996) (demonstrating the effects of discounting over time).

[80] Of course, there must be some room for the classic case of a private bill to relieve government oversight or mistake. *See* Library of Congress Report, *supra* note 56, at 105 n.101 (affording patent protection where Patent Office had misplaced patent application); *id.* at 106 (restoring patent invalidated as a result of judicial corruption). One way to preserve this traditional congressional safety valve, while at the same time cutting off rent-seeking, is to characterize the government oversight as a taking and grant compensation under the Fifth Amendment.

[81] At the same time, it is clear that even a general intellectual property statute should be invalidated if it extends protection for an absurdly long period. For a good example of proposed legislation that would surely qualify for this treatment, consider a proposal made in the U.S. House of Representatives. The Hon. Mrs. Sonny Bono (R-Cal.) wanted Congress to extend the copyright term to forever minus one day. *See* 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998), *reprinted in* 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 740 (1998). One recently filed complaint even alleges that a series of recent copyright term extensions violate the Constitution. *See* Hiawatha Bray, *Net Publisher Challenges Law; Harvard Law Faculty, Firm Join Copyright Fight*," BOSTON GLOBE, Jan. 13, 1999, at C1.

[82] *See* Library of Congress Report, *supra* note 56, at 105 (requesting patent extension for Samuel Colt's invention of the revolver); *U.S. Senate Committee on the Judiciary, Subcommittee on Patents, Copyrights and Trademarks, Patent Extension Hearing,* 102d Cong., (1991) at 9 [hereinafter 1991 Senate Extension Hearings] (1991 Senate Extension Hearings statement of Sen. John Glenn in support of S. 1506, "A Bill to Extend the Term of the Olestra Patents, and for Other Purposes": "Olestra may be one of the most important food additives in history").

[83] *See* Library of Congress Report, *supra* note 56, at 104–05 (describing numerous extensions granted to inventors who alleged they had not sufficiently recouped investments); 1991 Senate Extension Hearings, *supra* note 82, at 281 (declaring that a ten-year patent extension is required for the Olestra food additive in order to justify needed

beg the question whether Congress has the authority to exercise independent judgment in individual cases. By settling on a generally available patent term (the current statutory source for which, incidentally, has built-in relief for excessive administrative delay),[84] Congress has exercised its constitutional role of "securing" rights via a systematic administrative procedure. To grant perpetual patents or copyrights would clearly violate the Constitution's "for limited times" language, even if Congress thought the default statutory term an inadequate reward in a particular case. The same limits on Congress's ability to "balance" social costs and benefits (under the watchful eyes of a bevy of well-heeled lobbyists) are latent in the remaining language and historical context of the Copyright and Patent Clause. Surely progress will not be "promoted" if every successful invention spawns a lobbying effort aimed at patent extension. And just as surely, the British experience of the late sixteenth and early seventeenth centuries was in the minds of the Framers as they adopted a prudent, limited form of state-backed monopoly for significant "writings and discoveries."

The key in all these cases is to ensure that Congress is living up to its constitutional duty as spelled out in the Copyright and Patent Clause. Taking this duty and its corresponding limit on congressional power seriously will no doubt require judicial interpretation, just as determining the extent of Congress's power under the Commerce or Bankruptcy Clauses has required extensive judicial interpretation.[85] This task should be easier here than it has been elsewhere, however, because of the relatively clear history and text of the Copyright and Patent Clause.

As the Supreme Court has made clear in cases like *United States v. Lopez*,[86] constitutional limitations do matter, and it is

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investment in manufacturing facilities).

[84] *See* 35 U.S.C. § 154(b) (Supp. 1998) (granting extensions for excessive patent examination time and appeals of rejected applications).

[85] *Cf.* Richard Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 10 (1987) (pointing out that it may be difficult for the judiciary to tell the difference between rent-seeking and efficiency-enhancing legislation: "[C]ourts cannot readily identify purely redistributive legislation, in part because much redistributive legislation may be defensible on efficiency grounds by reference to problems of social peace, free-rider problems, and so forth."). Of the enumerated grounds, only free riding could plausibly create difficulties for a judge sorting redistributive from efficient private IP legislation. Note that Congress presumably strikes the appropriate balance between appropriation and free riding when it sets the uniform term of protection under copyright and patent law. *See generally* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487 (1996).

[86] 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as outside

the job of courts to locate and enforce those limitations. The Supreme Court has already recognized such limitations in the Copyright and Patent Clause. Enforcing these limitations will not only uphold both the letter and the spirit of the Clause, but will also remove one source of persistent corruption from the legislative arena.

Congress's Commerce Clause power). *See also, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act as outside Congress's Fourteenth Amendment enforcement power).

ARTICLE

THE RECUSAL ALTERNATIVE TO CAMPAIGN FINANCE LEGISLATION

JOHN COPELAND NAGLE*

Typical campaign finance proposals focus on limiting the amount of money that can be contributed to candidates and the amount of money candidates can spend. This Article suggests an alternative proposal that places no restrictions on contributions or spending, but rather targets the corrupting influence of contributions. Under the proposal, legislators would be required to recuse themselves from voting on issues directly affecting contributors. The author contends that this proposal would prevent corruption and the appearance of corruption while remedying the First Amendment objections to the regulation of money in campaigns.

Campaign finance legislation is necessary, we are told, because of the corruption and apparent corruption that accompanies the money given to political candidates. Millions of dollars are spent on contributions to candidates for elected office. Why? Many believe that contributors—especially big contributors—hope to receive some reward for their generosity, such as a vote against a troublesome bill, a promise to push for a tax break, or a night in the Lincoln bedroom. Even if the contributor and the candidate both enjoy the most altruistic motives, many in the public believe that they have cut an illicit deal.

The typical response to this corruption or appearance of corruption is to propose restrictions on the amount of money that may be contributed to a candidate and the amount of money that the candidate may spend in a campaign. The Federal Election Campaign Act (FECA), expanded by Congress in the aftermath of the campaign finance scandals of the Watergate era, featured both contribution and expenditure limits.[1] Today Congress is considering numerous proposed statutes to close the perceived loopholes that have allowed lots of money to flow from contributors to candidates notwithstanding the existing legal restric-

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[1] *See* 2 U.S.C. §§ 431–455 (1971).

tions.[2] States are even more aggressive in their efforts to control the amount of money involved in political campaigns.[3]

But spending and contribution limits suffer from numerous flaws as tools for combating corruption. The experience of the past quarter century with FECA shows that often the law has simply prompted contributors and candidates to become more ingenious in their efforts to give and spend money in campaigns. Campaign contributions flow like water: whenever one obstacle appears, the stream is simply diverted until it finds another way to proceed.[4] Moreover, laws prohibiting the contribution and spending of money for political campaigns strike at the heart of First Amendment values. *Buckley v. Valeo* was only the first of numerous decisions invalidating the efforts of Congress, the Federal Election Commission (FEC), and the states to regulate campaign contributions and expenditures.[5] Furthermore, the laws still allow legislators to act on any matter that affects parties who have given them money.

These standard objections to campaign finance reform legislation are forceful,[6] but they overlook the fundamental manner in which such laws are misdirected. Restrictions on the amount of money that may be contributed or spent in a political campaign

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[2] *See, e.g., infra* note 12.

[3] *See, e.g., infra* note 37.

[4] This metaphor has occurred to others. *See* Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (noting that "political money, like water, has to go somewhere"); Daniel R. Ortiz, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1742 (1999) (referring to "Issacharoff and Karlan's evocative hydraulic metaphor" and observing that "[i]f we constrict one path, it will take another").

[5] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating parts of the 1974 amendments to FECA, including the expenditure limits); *see also, e.g.*, Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (invalidating the application of FECA's party contribution provision to money that a political party spends independently without coordination with any candidate); FEC v. National Conservative PAC, 470 U.S. 480 (1985) (invalidating a prohibition on PAC's spending more than $1,000 to support any presidential or vice presidential candidate who receives public funds); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) (striking down state limits on campaign contributions made by non-economic political action committees and by nonprofit corporations); FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999) (holding that the distribution of voter's guides does not constitute prohibited express advocacy of a candidate).

[6] *See, e.g.*, Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311; Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); *see also* Issacharoff & Karlan, *supra* note 4, at 1734 ("part[ing] company with the most prominent reformers of campaign finance regulations" and offering "far more modest" proposals).

address a symptom, not a cause. The premise underlying the use of campaign finance legislation to combat corruption is that money is the root of all evil.[7] Another proverb is more apt. It states that it is the *influence* of money—not money itself—that is the root of all evil.[8] The influence or perceived influence of money accounts for most of the support for campaign finance reform legislation. The remedy, therefore, is to eliminate that influence and the perception that there is any such influence.

I propose the following alternative: allow contributors to give whatever they want to political candidates, but require successful candidates to recuse themselves from voting on or participating in any legislation or other matters that directly affect those contributors. Recusal provides the most direct response to the apparent corrupting influence of campaign contributions. The mechanics of how to establish a recusal requirement based on campaign contributions present some difficult choices,[9] though the system of campaign spending regulation that a recusal requirement would replace is hardly a model of effortless enforcement itself. By contrast, the virtues of a recusal requirement are straightforward. Corruption and its appearance are avoided, the First Amendment is protected, and contributors and candidates are free to decide what to do.

Of course, it remains questionable whether campaign contributions are actually corrupting. If they are not corrupting, then both a recusal requirement and contribution limits are unnecessary. Even if they are corrupting, the typical reform proposals are misguided. Influence and money are not identical, and one can be regulated without imperiling the other. That is my solution to the campaign finance problem.

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[7] *See* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of all Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989) (defending campaign finance reform as responsive to "that strain in our culture that perceives money as the root of all evil"); *see also* ALAN ROSENTHAL, DRAWING THE LINE: LEGISLATIVE ETHICS IN THE STATES 139 (1996) (analyzing campaign finance issues with the understanding that "[f]or the press and the public, money is the root of evil—not all evil, perhaps, but much of it").

[8] *See* 1 *Tim.* 6:10 (advising that "the love of money is a root of all evil").

[9] *See infra* text accompanying notes 50–95 (explaining how a recusal requirement could operate).

I. THE CAMPAIGN FINANCE PROBLEM AND ITS STANDARD SOLUTIONS

Charges that the existing campaign finance system is "corrupt" dominate the editorial pages of the *New York Times*.[10] The system is corrupt because "it elevates the voice of the wealthy special interests over that of the average voter."[11] Existing campaign finance laws "have all been circumvented by the deviously conceived fiction that the parties can raise so-called 'soft money' outside Federal regulation."[12] The problem extends to "President

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[10] *See, e.g., Senator Hegel's Deceptive Bill*, N.Y. TIMES, Nov. 18, 1999, at A24 (decrying "the corrupt status quo"); *Campaign Finance Tactics*, N.Y. TIMES, September 15, 1999, at A28 (referring to "the long, grinding effort to drive corrupt money out of the process"); *The $2 Billion Election*, N.Y. TIMES, Aug. 11, 1999, at A18 (describing a proposed tax cut as "[a] fairly good example of the corruption of campaign money"); *A Dubious Campaign Ruling*, N.Y TIMES, Aug. 4, 1999, at A18 (decrying "the corrupting power of money in elections"); *A New Speaker Errs on Reform*, N.Y. TIMES, Mar. 8, 1999, at A16 (referring to "a corrupt system" of campaign finance); *A New Year for Campaign Reform*, N.Y. TIMES, Dec. 27, 1998, § 4, at 8 (noting that "Americans will have a new opportunity to rescue their political culture from the grip of corruption and cynicism"); *A Pivotal Vote on Campaign Reform*, N.Y. TIMES, Oct. 23, 1997, at A26 (referring to "the nation's corrupt campaign finance system"); *Next Round for Campaign Reform*, N.Y. TIMES, Sept. 3, 1997, at A22 (describing "[t]he challenge of cleaning up the nation's corrupt campaign finance system"); *Clash Over Congressional Cash*, N.Y. TIMES, Mar. 8, 1993, at A16 (characterizing the campaign finance status quo as "corrupt, outdated and harmful"); *Priorities, Priorities*, N.Y. TIMES, Nov. 11, 1992, at A24 (describing the political process as "awash in corrupting campaign contributions"); *Republican Snipers in the House*, N.Y. TIMES, Apr. 12, 1992, § 4, at 20 (denouncing "the present corrupt incumbent-protection campaign finance system"); *Another Campaign Finance Fight*, N.Y. TIMES, Oct. 19, 1999, at A22 (observing that Senator McConnell (R-Ky.) had complained that the *Times* had editorialized on campaign finance reform 114 times since the beginning of 1997)

[11] *Where Did Campaign Finance Go?*, N.Y. TIMES, June 20, 1996, at A20. *See also, e.g., John McCain's Message*, N.Y. TIMES, Nov. 7, 1999, § 4, at 14 (praising Senator McCain (R-Ariz.) for illustrating "the crucial connection between campaign donations and bad laws" benefitting special interests); *A Republican Full House*, N.Y. TIMES, Dec. 2, 1999, at A34 (referring to "the corrupt campaign finance system that has kept [special interests] so powerful"); *The $2 Billion Election, supra* note 10, at A18 (writing that "[m]ore scandals and evidence of favors in return for donations are bound to corrupt the system as fund-raising accelerates in coming months"); *A New Year for Campaign Reform, supra* note 10, at 8 (explaining that "the nation's two biggest political parties have completed their transformation from representing popular constituencies to serving as fund-raising machines that cater to special interests," and concluding that "the legislative and executive branches of Government will be more and more beholden to the forces that give the money" after the 1998 elections); *A Moment for Reform*, N.Y. TIMES, Mar. 9, 1997, § 4, at 14 (noting that "the current system of selling access for corporate and to a lesser extent labor union money is a bipartisan invention"); *Meeting for Dollars*, N.Y. TIMES, Dec. 31, 1996, at A12 (writing that "party fund-raisers were bartering meetings with President Clinton for contributions during the election campaign this year"); *Where Did Campaign Finance Go?, supra*, at A20 (worrying that "this Congress may outdo its predecessor in mortgaging the legislative process to powerful donors").

[12] *A New Year for Campaign Reform, supra* note 10, at 8. *See also Senator Hegel's Deceptive Bill, supra* note 10 (criticizing proposed legislation to limit but not eliminate

Clinton's shameful legacy" during "one of the most corrupt election campaigns in modern history" in 1996,[13] and to congressional campaigns as well.[14] Thus the *Times* frequently calls for new federal legislation, it opposes potential FEC nominees who do not share its vision,[15] and it endorses public financing as the ultimate solution to the corruption that plagues the system.[16]

The *New York Times* is not alone. Hundreds of other newspapers have editorialized in favor of campaign finance reform.[17] Organizations like Common Cause and New York University's Brennan Center report on campaign finance scandals and press for new reform legislation.[18] Fred Wertheimer has made the case for campaign finance reform in a dizzying host of forums, both during his time as the president of Common Cause and in his

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soft money because it "would not end the corrupt soft-money system so much as legitimize it"); *Campaign Reform Gains an Ally*, N.Y. TIMES, July 24, 1999, at A14 (complaining that "unregulated donations to political parties are poisoning the political process by allowing wealthy individuals, corporations and unions to use the 'party-building' dodge to evade the Federal limitations on direct contributions to candidates"): *A New Speaker Errs on Reform, supra* note 10, at A16 (stating that "[o]nce the Presidential campaign heats up, hundreds of millions of dollars in soft money from special interests will pollute the system"); *Plotting Against Reform*, N.Y. TIMES, Mar. 14, 1998, at A16 (objecting to "the soft-money contributions that have made a mockery of the nation's present fund-raising limits").

[13] *Janet Reno May Finally Get It*, N.Y. TIMES, Sept. 4, 1998, at A22; *accord Illegal Use of Soft Money*, N.Y. TIMES, Dec. 2, 1998, at A26 (describing the 1996 election campaign as "one of the most corrupt in modern history"). *See also A Moment for Reform, supra* note 11, at 14 (objecting to the campaign fundraising tactics of President Clinton and Vice President Gore in 1996).

[14] *See A Moment for Reform, supra* note 6, at 14 ("Yes, of course, Congressional fund-raising is corrupt at the core, too.").

[15] *See Mischief in the Senate*, N.Y. TIMES, July 13, 1999, at A16 (insisting that President Clinton is right to resist naming Professor Bradley Smith to the FEC); *An Insult to Campaign Reform*, N.Y. TIMES, June 4, 1999, at A28 (opposing the selection of Professor Smith to the FEC). For examples of Professor Smith's writings on campaign finance reform, see Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179 (1998); Smith, *Money Talks*, *supra* note 6; Smith, *Faulty Assumptions*, *supra* note 6.

[16] *See Clash Over Congressional Cash, supra* note 10, at A16 (advising that "[a]bsent a decent infusion of public financing, it will be impossible to stop Congressional dependence on special-interest money"); *President Bush and the Sewer*, N.Y. TIMES, May 12, 1992, at A22 (concluding that "[t]he only way to reduce the influence of corrupting private money and to help challengers is to supply public money").

[17] *See* 144 CONG. REC. S10156 (daily ed. Sept. 10, 1998) (reprinting a list of 196 newspapers that had published more than 400 campaign finance reform editorials in the preceding six months).

[18] The activities of both groups are detailed in their web sites. *See Common Cause: Holding Power Accountable* (visited July 21, 1999) <http://www.commoncause.org>; *Brennan Center*, (visited July 21, 1999) <http://www.brennancenter.org/index.html>. For lists of numerous other groups seeking to reform the campaign finance laws, see *Center for Responsive Politics: Links/Resources* (visited July 21, 1999) <http://www.opensecrets.org/resources.htm> (providing links to the web sites of other advocacy groups).

current position as head of Democracy 21.[19] Scholars have urged the reform of the existing system of financing electoral campaigns.[20] Supportive members of Congress have delivered impassioned speeches urging their colleagues to change the current system for financing elections.[21]

The primary basis for their concern is the amount of money that is raised for and spent on political campaigns. Candidates raised $781.3 million and spent $740.4 million for the 1998 congressional elections.[22] Sixteen months before the 2000 elections, prospective presidential candidates had raised over $100 million—including $37 million raised by Texas Governor George W. Bush—and they had already spent nearly $50 million.[23] Fundraising estimates for one particularly interesting 2000 Senate race run as high as $50 million.[24]

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[19] *See, e.g., Campaign Advertising: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 50 (1991) (statement of Fred Wertheimer); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 COLUM. L. REV. 1126 (1994); Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603 (1980); Fred Wertheimer, *Candidate Carte Blanche*, N.Y. TIMES, Nov. 30, 1998, at A23.

[20] *See, e.g.*, DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 195–213 (1990) (offering a comprehensive campaign finance reform proposal); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994) (arguing that "[t]he Constitution of the United States should contain a principle . . . that would guarantee to each eligible voter equal financial resources for purposes of suporting or opposing any candidate or initiative on the ballot in any election held within the United States"); Lowenstein, *supra* note 7, at 335, 348–66 (concluding that "[t]he campaign finance system is corrupt" and outlining a reform proposal).

[21] *See, e.g.*, 144 CONG. REC. S10147 (daily ed. Sept. 10, 1998) (statement of Sen. Feingold (D-Wis.)) (asserting that "[t]he biggest threat to our democracy still comes from this out-of-control campaign finance system"); *id.* at S10150 (statement of Sen. Snowe (R-Me.)) (remarking that "[h]ow we choose our elected officials goes to the heart of who we are as a nation"); *id.* at S10161 (statement of Sen. Thompson (R-Tenn.)) (describing the current campaign finance system as "an open invitation to corruption"); *id.* at S10166 (statement of Sen. Glenn (D-Ohio)) (contending that campaign finance law loopholes are "inviting corruption of the electoral process" and thus "they threaten our democracy"); *id.* at S10166 (statement of Sen. Kennedy (D-Mass.)) (stating that "[t]he vast sums of special interest money pouring into campaigns are a cancer on our democracy"); *id.* at S10170 (statement of Sen. Bumpers (D-Ark.)) (opining that "the method of financing campaigns in this country [is] rotten to the core").

[22] *See FEC Reports on Congressional Fundraising for 1997-98* (visited July 21, 1999) <http://www.fec.gov/press/canye98.htm>. Those figures represented a decrease of $9.2 million in receipts and $24.9 million in expenditures from the 1996 congressional elections. *See id.*

[23] *See Financial Activity of 1999-2000 Presidential Campaigns Through June 30, 1999* (visited July 21, 1999) <http://www.fec.gov/finance/prsq299.htm>.

[24] *See* Adam Nagourney, *Backers Set Record Goal for First Lady*, N.Y. TIMES, July 16, 1999, at B1 (indicating that Hillary Rodham Clinton hopes to raise $25 million to run for the Senate from New York, and that Rudolph Guiliani promised to match Clinton's fundraising in "what is shaping up as the costliest Congressional contest in

Large amounts of money contributed to and spent on political campaigns is not necessarily bad. One would hope that people would be interested enough in their governance to support those who will represent their views. Moreover, the amount of money is tiny compared to spending on Big Macs and other items that are presumably less important to the health of a democratic society.[25] Still, it is not the money itself that is of concern, but rather the influence that it has. If elected officials are making decisions based on who gave them the most money for their campaigns, then we have a problem.

The evidence suggests that we do have a problem. Certain individuals and organizations contribute far more to electoral causes than other individuals and organizations. Corporations, unions, wealthy individuals, trade associations, and trial attorneys contribute millions of dollars to political campaigns annually. So do the political action committees (PACs) established by such interests. By contrast, as Senator Dole once observed, "[t]here aren't any Poor PACs, or Food Stamp PACs or Nutrition PACs or Medicare PACs."[26] Moreover, the interests of those contributing such large sums often coincide with the votes of the elected officials who receive them. There are many examples of such apparent influence. Common Cause proclaimed in 1998 that alcohol, oil, transportation, and gambling interests all provided substantial campaign contributions to members of Congress and were rewarded with favorable legislative action.[27] Other observers, including members of Congress themselves,

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the nation's history").

[25] *See* 144 CONG. REC. S10174 (daily ed. Sept. 10, 1998) (statement of Sen. Grams (R-Minn.)) (noting that the $3.50 per person per year that is spent on elections in the United States is less than the money spent on supporting the United Nations and "less money than we spend on a Value Meal at McDonald's"). It is possible that Senator Grams is more familiar with what lunch costs in Washington than what it costs in his home state of Minnesota. *See* Telephone Interview with Professor Michael Stokes Paulsen, Minnesota Law School (July 27, 1999) (reporting that a Value Meal costs about $2.99 in the Minneapolis area).

[26] 134 CONG. REC. S1188 (daily ed. Feb. 23, 1988) (statement of Sen. Murkowski (R-Ark.)) (quoting Elizabeth Drew, who quoted Senator Dole (R-Kan.)). *But see id.* (statement of Sen. Murkowski) (responding that "there is a food stamp program, a Medicare program, and a substantial array of welfare programs. They were enacted because they were thought to be good ideas and, even if recently trimmed, they survive because people still believe them to be good ideas and because they have substantial constituencies.").

[27] The Common Cause reports are detailed in their web site. *See Common Cause* (visited July 20, 1999) <http://commoncause.org/publications/booze1.htm> (alcohol), <http://commoncause.org/publications/drilling.htm> (oil), <http://commoncause.org/publications/concrete.htm> (transportation), <http://commoncause.org/publications/062697_sdytoc.htm> (gambling).

make similar claims.[28] This leads many congressional supporters of campaign finance reform to conclude that "[t]he paramount goal of any true effort to reform the system of financing elections for federal office must be to reduce the influence of special interest money on elected officials."[29]

But spending and contribution limits are blunt instruments for rooting out corruption. They are overinclusive to the extent that they prohibit contributions and expenditures that are truly independent of any obligation between the donor and the candidate. They are underinclusive to the extent that they allow smaller contributions or other activities that really do instill an obligation between the candidate and the donor. They rely on the contested assumption that contributors give money in order to persuade an elected official how to vote, rather than assuming that contributors give money because they like the way an elected official has already voted or promises to vote. Moreover, laws

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[28] *See, e.g.*, 144 CONG. REC. S10157 (daily ed. Sept. 10, 1998) (statement of Sen. McCain) (describing a 1996 Democratic National Committee document outlining the privileges that would be extended to large contributors); *id.* at S10159 (reprinting two documents indicating the benefits offered to Republican campaign contributors); *id.* at S10166 (statement of Sen. Kennedy (D-Mass.)) (arguing that campaign contributions directed the way in which Republicans voted on bankruptcy, tobacco, and managed care legislation). The empirical studies examining the actual influence of campaign contributions are discussed *infra* note 101.

[29] 144 CONG. REC. S10164 (daily ed. Sept. 10, 1998) (statement of Sen. Chafee (R-R.I.)). *Accord* 145 CONG. REC. H1305 (daily ed. Mar. 16, 1999) (statement of Rep. Udall (D-N.M.)) (observing that people "view the system as one that is controlled by special interests, and they do not believe that their voices are being heard"); *id.* at H1306 (statement of Rep. Moore (D-Kan.)) (noting that "[p]eople in this country believe that both political parties receive so much corrupt money from interest groups, from lobbyists, from other sources, that the whole system is corrupt"); 144 CONG. REC. S10157 (daily ed. Sept. 10, 1998) (statement of Sen. McCain (R-Ariz.)) (asserting that "there is undue influence on the part of special interests"); *id.* at S10158 (statement of Sen. Reed (D-R.I.)) (encouraging Congress to pass campaign finance reform legislation to "make elections about ideas and policies, and not auctions to the highest bidder"); *id.* at S10160 (statement of Sen. Collins (R-Me.)) (asserting that "political equality is the essence of democracy, and an electoral system fueled by money is one lacking in political equality"); *id.* at S10163 (statement of Sen. Mikulski (D-Md.)) (arguing that "[b]y limiting the influence of those with big dollars, and increasing the influence of those with big hearts, we can bring government back to where it belongs—with the people"); *id.* at S10166 (statement of Sen. Kennedy (D-Mass.)) (remarking that "[t]he voice of the average citizen today is scarcely heard over the din of lobbyists and big corporations contributing millions of dollars to political campaigns and buying hundreds of TV ads to promote the causes of their special interests"); *id.* at S10167 (statement of Sen. Murray (D-Wash.)) (arguing that "[t]he campaign system is so clogged with money, there is hardly room left for the average voter"); *id.* at S10170 (statement of Sen. Bumpers (D-Ark.)) (stating that "[a]nybody who believes that a democracy can survive when the people you elect and the laws you pass depend on how much money is given for the cause are daydreaming").

I consider the other reasons why campaign finance legislation might be desirable *infra* text accompanying notes 103–104.

candidate Bill Bradley advocates the same ideas plus public financing and free television broadcast time for candidates.[36] States have enacted a variety of sweeping campaign reform measures that incorporate similar provisions.[37] But Congress has not enacted any of these proposals or anything like them.

Furthermore, the Supreme Court has shown little willingness to reconsider its conclusion that campaign spending is protected by the First Amendment. *Buckley* held that the federal contribution limitations satisfied constitutional strict scrutiny because they served the government's compelling interest in combating corruption and its appearance, but the Court struck down the federal expenditure limits because they did not achieve those ends.[38] The invalidation of the spending limits has made *Buckley* the target of scholars supporting campaign finance legislation.[39] But rather than heeding those calls, the Court is perhaps more likely to revisit its conclusion that campaign contributions may be limited consistent with the First Amendment. Justice Thomas said as much in the Supreme Court's most recent FECA decision,[40] and soon the Court will decide a case that challenges the constitutionality of the types of contribution expenditures that were upheld in *Buckley*.[41] The upshot, in the colorful words of Kathleen Sullivan, is that *Buckley* "has become the great white whale of constitutional law: the more elusive its demise be-

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[36] *See Campaign Finance Reform Fact Sheet* (visited Oct. 25, 1999) <http://www.billbradley.com/bin/article.pl?path=220799/2>. An earlier version of the McCain-Feingold bill would have encouraged voluntary compliance with spending restrictions by providing public campaign financing and discounted television advertising. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 662–63 (1998) (describing the 1997 version of the McCain-Feingold bill).

[37] *See, e.g.*, Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A, §§ 1121–1128 (West. Supp. 1997) (adopting voluntary public financing conditioned upon a candidate's acceptance of expenditure limitations, contribution limits of as low at $250 per election, and restrictions on independent expenditures); Daggett v. Webster, 1999 U.S. Dist. LEXIS 17830 (D. Me. Nov. 5, 1999) (sustaining most of the Maine Act against a constitutional challenge).

[38] *See Buckley*, 519 F.2d at 821.

[39] *See, e.g.*, E. JOSHUA ROSENKRANZ, BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM (1998) (report by legal scholars comprising the Twentieth Century Fund Working Group on Campaign Finance Litigation that describes how to persuade the Court to overrule *Buckley*).

[40] *See* Colorado Republican Campaign Comm. v. FEC, 116 S. Ct. 2309, 2325–29 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (suggesting that *Buckley* should be reconsidered to the extent that the decision permits the regulation of campaign contributions). Note, however, that no other Justice joined that part of Justice Thomas' opinion.

[41] Shrink Missouri Government PAC v. Adams, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

prohibiting the contributing and spending of money for political campaigns conflict with First Amendment values.[30]

Proponents of campaign finance reform believe that the public is on their side,[31] though some admit that the extent of the public's enthusiasm is questionable.[32] Campaign finance reform ranked seventeenth and last in public concern according to a poll released in July 1999.[33] In any event, the anguish has produced little actual federal legislation. The leading bill, sponsored by Senators McCain (R-Ariz.) and Feingold (D-Wis.), would ban soft money contributions to political parties, regulate campaign advertisements funded by corporations and unions, and promote increased disclosure and enforcement efforts.[34] The leading House bill, sponsored by Representatives Shays (R-Conn.) and Meehan (D-Mass.), contains similar provisions.[35] Presidential

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[30] There is an extensive literature on the constitutionality of campaign finance legislation. Most writers acknowledge the First Amendment implications of spending and contribution restrictions, including both those who oppose such restrictions, *see, e.g.*, Smith, *Money Talks*, *supra* note 6, at 48–52, and those who favor them. *See* DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 535 (1995) (noting that "most defenders of reform have accepted the Court's conclusion that spending limits need to be treated as speech limitations"). A notable exception is Judge J. Skelly Wright, who wrote the lower court opinion upholding the FECA restrictions at issue in *Buckley*, *see* Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), and who later expressed his disagreement with the proposition that such restrictions may violate the First Amendment. *See* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1012 (1976).

[31] *See* 145 CONG. REC. H1306 (daily ed. Mar. 16, 1999) (statement of Rep. Udall (D-Colo.)) (citing a *New York Times* survey showing that "9 out of 10 Americans think that we ought to have significant campaign finance reform"); 144 CONG. REC. S10155 (daily ed. Sept. 10, 1998) (statement of Sen. Levin (D-Mich.)) (asserting that "[s]eventy-five percent of the American people want campaign finance reform"); *A New Speaker Errs on Reform*, *supra* note 10, at A16 (insisting that "voters are demanding an overhaul of a corrupt system").

[32] *See* 145 CONG. REC. H1305 (daily ed. Mar. 16, 1999) (statement of Rep. Udall (D-N.M.)) (indicating that he has heard the comment that there is no popular support for campaign finance reform "over and over again"); *id.* at H1307 (statement of Rep. Baird (D-Wash.)) (admitting that campaign finance is "an issue which, if we ask pollsters, they will tell us it does not poll high"); 144 CONG. REC. S10148 (daily ed. Sept. 10, 1998) (statement of Sen. Snowe (R-Me.)) (acknowledging that "some have said that the American people actually aren't very concerned about this issue").

[33] *See Public Opinion Online*, July 29, 1999, *available in* LEXIS, News Library, Wires File (providing responses to the question "what one issue would you most like to hear presidential candidates talk about next year").

[34] *See* S. 26, 106th Cong., 1st Sess. (1999); *see also Summary of the McCain-Feingold Campaign Finance Reform Bill* (visited Aug. 11, 1999) <http://www.senate.gov/~feingold/cfrsumm.html> (providing Senator Feingold's summary of the provisions of the bill).

[35] *See* H.R. 417, 106th Cong., 1st Sess. (1999); *see also Shays-Meehan Bipartisan Campaign Finance Reform Act Short Summary* (visited Aug. 11, 1999) <http://www.house.gov/shays/reform/cfr3526-sum.htm> (providing Representative Shays' summary of the provisions of the bill).

comes, the greater the intellectual exertion expended in its pursuit."[42]

Once these objections are combined, the outlook for campaign finance reform is none too promising. The proposed campaign finance legislation may well be misguided, it is doubtful whether it will be enacted, and it will probably continue to be held unconstitutional in any event.

II. MONEY AND OFFICIALS IN THE EXECUTIVE AND JUDICIAL BRANCHES

Meanwhile, officials in other parts of the government perform their duties without similar controversy. Federal judges may own stock in any corporation they wish. The Secretary of Energy can own stock in Exxon. An attorney in the Department of Justice may enjoy a lunch paid for by a friend who is a partner with a leading Washington law firm. But these officials cannot then work on any matters involving the corporation or individuals with whom they have that kind of connection.

Federal statutes prohibit government officials from participating in any matters in which they have a financial interest. Executive branch employees are prohibited from participating in any matter in which they or their family have a financial interest.[43] An official who transgresses that statute faces the possibility of spending up to five years in prison.[44] The federal conflict of interest statutes, however, do not prohibit the financial interests as such. Judges, prosecutors and bureaucrats can hold whatever stock or other financial interests they please; they just cannot work on any official matters that relate to those interests.

Legislators must abide by similar constraints. House and Senate rules require a member to recuse from any legislative business in which the member has a personal financial interest.[45]

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[42] Sullivan, *supra* note 6, at 311. For other images of the failed efforts at campaign finance reform, see Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837 (1999) (remarking that "[c]ampaign finance reform has become the Vietnam of First Amendment theory and doctrine," or more accurately, "it has become the Kosovo, since the beneficence of our intentions in the latter case is so much more apparent"); Isscharoff & Karlan, *supra* note 4, at 1705 (stating that "[e]lectoral reform is a graveyard of well-intentioned plans gone awry").

[43] *See* 18 U.S.C. § 208 (1994).

[44] *See* 18 U.S.C. § 216(a)(2) (1994).

[45] *See* H.R. R. III(1) (providing that "[e]very Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote

Senate Majority Leader Trent Lott recused (R-Miss.) in part from involvement in the tobacco legislation considered by Congress in 1998 because his brother-in-law was a lead attorney for the plaintiffs in the consolidated state litigation being reviewed by Congress.[46] Pending litigation, business ownerships, and the work of a senator's wife on a matter have prompted other members of Congress to recuse from involvement in particular legislation.[47] State legislators are subject to similar rules requiring recusal whenever they have a special financial or personal interest in a matter before the legislature.[48]

Such examples, though, are not precisely analogous to the issues raised by campaign contributions. The conflict of interest problems described above involve the permissibility of actions taken by a current government official. Campaign contributions,

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on each question put, unless he has a direct personal or pecuniary interest in the event of such question"); S. R. XII (describing the procedure by which a Senator may be excused from voting on a question and permitting a Senator to decline to vote "on any matter when he believes that his voting on such a matter would be a conflict of interest").

[46] *See* 144 CONG. REC. S6434 (daily ed. June 17, 1998) (statement of Sen. Ashcroft (R-Mo.)) (noting that Senator Nickles (R-Okla.) was managing the proposed tobacco legislation because Senator Lott "has recused himself in large measure from this consideration"). Senator Lott was criticized for not completely withdrawing from any participation on tobacco related matters. *See* Alison Mitchell, *Lott, On Sidelines, Remains Key Player on Tobacco Bill*, N.Y. TIMES, June 11, 1998, at A26. President Clinton did not recuse himself from involvement in the tobacco legislation even though his own brother-in-law had an interest similar to that of Senator Lott's brother-in-law. *See* Ed Henry, *Majority Leader Recused Himself from Tobacco Deal, But What Does it Mean?*, ROLL CALL, Sept. 22, 1997.

[47] *See, e.g.*, 143 CONG. REC. E1248 (daily ed. June 18, 1997) (statement of Rep. Campbell (R-Cal.)) (stating that he will recuse from "debating, commenting upon and voting on USIA funding for my wife's specific program" to open a business school in Russia); 141 CONG. REC. S17982 (daily ed. Dec. 5, 1995) (statement of Sen. Bond (R-Mo.)) (indicating that he will recuse from proceedings on securities litigation reform legislation because he is "engaged in securities litigation of the kind this legislation seeks to reform"); 102 CONG. REC. S7303 (daily ed. June 2, 1992) (statement of Sen. Kohl (D-Wis.)) (noting that he recused himself from participating in the debate on a sports gambling bill because of his ownership of the Milwaukee Bucks basketball team); Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 13 n.36 (1996) (noting that Senator Bingaman (D-N.M.) recused himself from the Ethics Committee's proceedings in the Keating Five case because his wife had worked for associates of Senator Cranston (D-Cal.), one of the targets of the investigation).

[48] *See* George F. Carpinello, *Should Practicing Lawyers Be Legislators?*, 41 HASTINGS L.J. 87, 92–93 (1989) (stating that "[w]hen a legislator directly benefits in a unique way from a particular piece of legislation . . . the legislator generally is expected to announce his or her involvement and to recuse from any further involvement with the legislation"); *see also id.* at 113–14 n.92 (quoting state statutes and rules requiring legislatures to recuse from involvement in legislation in which they have a conflict of interest). For a discussion and occasional criticism of the rules requiring recusal, see ROSENTHAL, *supra* note 7, at 84–93.

by contrast, are intended to help decide who will serve in the government in the first place. The best analogy, then, considers efforts to influence who will be chosen to serve as a federal judge, the Secretary of Energy, or an attorney in the Justice Department. For example, suppose that Exxon believes that its pet offshore oil project would receive a more favorable hearing if the Administrator of the Environmental Protection Agency names Attorney Oil to serve as her assistant administrator for water. To encourage that choice, Exxon gives $10,000,000 to the Administrator. This is a bribe within the meaning of the federal criminal law.[49] In other words, the law forces executive branch officials and employees to choose between money and their work. Legislators, however, are allowed to choose both.

III. A RECUSAL REQUIREMENT FOR THE RECIPIENTS OF CAMPAIGN CONTRIBUTIONS

The conflict of interest rules applicable to the work of government officials suggest a route around the obstacles to campaign finance reform. *Allow contributors to give whatever they want to political candidates, but require any successful candidates to recuse themselves from voting on or participating in any legislation or other matters that affects those contributors.* For example, Exxon can contribute whatever it wants to Senator Oil, but if he accepts the company's money, Senator Oil cannot have any involvement in any legislation or other congressional business that would affect Exxon.

Such a prohibition would have either of two results. On the one hand, if Exxon realizes that it will not be able to count on

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[49] *See* 18 U.S.C. § 201(c)(1)(A) (making it illegal to give anything of value to a public official for an official act to be performed by that official); *see also infra* at text accompanying notes 50–53 (discussing the bribery statute). The hardest case under the federal statutes would occur if Exxon instead gives the money to Attorney Oil, who then uses the money to wage a "campaign" to be named to the assistant administrator post. Exxon's provision of the money to Attorney Oil would not be illegal because Attorney Oil is neither a public official nor one "selected to be a public official." But Attorney Oil would violate the statute if in the course of his "campaign" he used some of Exxon's money to give, offer or promise anything of value to the EPA Administrator (or any other government official), and arguably Exxon would be liable, too, if the company knew that is what Attorney Oil planned to do. If Attorney Oil spent the money in other ways, e.g., buying TV ads promoting his appointment, he would not violate the statute, but it is doubtful that such spending offers a useful way to secure a federal appointment. *But cf.* Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 577–78 (1995) (advocating organized campaigns for and against federal judicial nominees).

Senator Oil's support when the Clean Gasoline Act is debated in Congress, then Exxon may be less inclined to contribute to Senator Oil in the first place. Indeed, Exxon may lose a vote it would have otherwise had if Senator Oil was predisposed to support Exxon's position. On the other hand, if Exxon decides that it wants to contribute the money to Senator Oil anyway, and the Senator accepts it, then Exxon must be doing so for reasons besides an allegedly corrupt effort to sway the Senator to act in a certain fashion.

Likewise, the recusal requirement would impact candidates for elected office in one of two ways. If Senator Oil accepts Exxon's money, then Senator Oil will not be able to participate in matters involving the Clean Gasoline Act. If Exxon contributes to the campaigns of enough senators, and if enough Senators make that choice, then we are faced with the not entirely appealing spectacle of the fate of the Clean Gasoline Act being decided by a 5-4 vote of the senators who have not recused. And if Senator Oil accepts enough contributions from enough different contributors, then Senator Oil will not be too busy with legislative work in Washington, and he will presumably have to explain his idleness to many skeptical constituents who thought they were voting for someone to represent them in the legislative deliberations in the Senate. On the other hand, if Senator Oil does not accept Exxon's money, then he will be free to vote on the Clean Gasoline Act and anything else, but he will then be faced with the need to collect sufficient money to fund his campaign to be elected Senator in the first instance. If Senator Oil refuses all contributions in order to avoid the recusal prohibition, then the financial picture for his campaign becomes very bleak indeed.

The recusal requirement may seem drastic at first, but campaign contributions can already have more ominous consequences than mandated recusal. The federal bribery statute may be applied to a member of Congress who participates in a matter affecting a campaign contributor. The standard components of bribery statutes are: (1) a public official is involved; (2) the defendant has a corrupt intent; (3) the public official must gain anything of value; (4) there is a relationship between the thing of value and an official act; and (5) the relationship involves an intent to influence the public official regarding the official act.[50]

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[50] *See* 18 U.S.C. § 201 (1994) (federal statute prohibiting bribery); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784,

Numerous cases have held or assumed that campaign contributions can fit within such federal or state statutory definitions of bribery.[51] Indeed, Daniel Lowenstein has concluded that "[u]nder most bribery statutes as they have been interpreted by most courts, most special interest campaign contributions are bribes."[52] Simply claiming that something is a campaign contribution instead of a bribe does not make it so; the reported cases contain numerous examples of bribery defendants who protested that the contested money was a permissible campaign contribution rather than an impermissible bribe.[53]

Recusal even seems modest in comparison to the other sanctions that could be imposed on a member of Congress whose votes seem dictated by the campaign contributions that he or she receives. The penalty for violating the federal bribery statute can be as high as fifteen years in prison.[54] At least one judge has had to defend against a federal civil rights action filed by a litigant who claimed that the judge violated her due process rights by failing to recuse from a case involving a campaign contributor.[55] And prison or civil liability might not be the worst fate that could befall a legislator who is judged to be corrupt.[56]

796–97 (1985) (listing the components of typical bribery statutes). *See generally* JOHN T. NOONAN, JR., BRIBES (1984) (comprehensive study of the concept of bribery). Other statutes define the lesser included offense of giving or receiving an illegal gratuity. *See* Lowenstein, *supra*, at 796–97 (comparing illegal gratuity provisions with bribery provisions).

[51] *See, e.g.*, United States v. Derrick, 163 F.3d 799, 815–17 (4th Cir. 1998); *Jackson*, 72 F.3d at 1373; United States v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995); United States v. Allen, 10 F.3d 405, 410–11 (7th Cir. 1993); United States v. Bailey, 990 F.2d 119, 124 (4th Cir. 1993); *see also* Lowenstein, *supra* note 50, at 808 & nn.86–88 (1985 article citing numerous cases holding or assuming that a campaign contribution can qualify as a bribe).

[52] Lowenstein, *supra* note 50, at 828; *accord* Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451, 452 (1978) (acknowledging that campaign contributions are problematic "under a literal reading of the federal bribery statute"). Even one Senator admitted that "[t]he distinction between a campaign contribution and a bribe is almost a hairline's difference." 120 CONG. REC. 10351 (1974) (remarks of Sen. Inouye quoting Sen. Long). *See generally* NOONAN, *supra* note 50, at 621-651 (chapter entitled "the donations of democracy").

[53] *See, e.g.*, *Derrick*, 163 F.3d at 815–17; *Tomblin*, 46 F.3d at 1379; United States v. Mokol, 957 F.2d 1410 (7th Cir. 1992).

[54] 18 U.S.C. § 201(b) (Supp. V 1999). The penalty for bribery can also include a fine of up to three times the amount of the bribe and disqualification from any future federal office. *See id.*

[55] *See* Sheperdson v. Nigro, 5 F. Supp. 2d 305 (E.D. Pa. 1998) (rejecting the due process claim and admonishing the plaintiff pursuant to Fed. R. Civ. P. 11 for ignoring the judge's immunity from suit).

[56] *Cf.* United States v. Sun-Diamond Growers of California, 526 U.S. 398, 119 S. Ct. 1402, 1404 (1999) (Scalia, J.) (observing that "Talmudic sages believed that judges who accepted bribes would be punished by eventually losing all knowledge of the divine

My proposed recusal requirement prevents both corruption and the appearance of corruption. Rather than seeking to do so indirectly by controlling the flow of money, it responds directly by eliminating any opportunity for campaign contributions to influence a senator or representative's votes or other activities involving any business before Congress. Campaign contributions cannot corrupt if the recipient is no more able to influence the contributor's legislative agenda than anyone else in the public at large. Nor would the appearance of corruption remain once the disqualifying effect of a contribution becomes known.

This proposal also avoids the First Amendment problems posed by restrictions on campaign contributions and expenditures. Anyone can contribute any amount to any candidate. What they cannot do, though, is make such a contribution in the hope of encouraging the candidate to support their legislative agenda once in Congress. The constitutional objection to such a recusal requirement is hard to construct. There is no First Amendment right to bribery. Speech may be used to try to persuade an elected official to support a cause; money may not.[57] Nor has the First Amendment been read to limit the application of bribery laws to campaign contributions. Several convicted campaign contributors and lobbyists have asserted that the First Amendment imposes a quid pro quo requirement on bribery statutes, but the courts have refused to impose such a constitutional limit on what qualifies as bribery.[58]

To require a member of Congress to recuse from any matters affecting a campaign contributor is both a direct response to charges of apparent corruption and a straightforward extension of existing recusal practices and bribery law. Nonetheless, it may

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law").

[57] *See, e.g.*, State v. Agan, 384 S.E.2d 863, 867 (Ga. 1989) (explaining that citizens "have every right to try to influence their public officers—through petition and protest, promises of political support and threats of political reprisal. They do *not* have, nor have they every had, the 'right' to buy the official act of a public officer"), *quoted in* Agan v. Vaughn, 119 F.3d 1538, 1544 (11th Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998).

[58] *See* United States v. Jackson, 72 F.3d 1370, 1375–76 (9th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996); United States v. Cleveland, No. 96-207, 1997 U.S. Dist. LEXIS 5060, at *20–*27 (E.D. La. 1997); *see also Agan*, 119 F.3d at 1542–45 (rejecting another First Amendment objection to the bribery conviction of a campaign contributor); United States v. Allen, 10 F.3d 405, 410–12 (7th Cir. 1993) (discussing the question but finding it unnecessary to answer it). Of course, it is *permissible* for a bribery statute to impose a quid pro quo requirement, *see, e.g.*, McCormick v. United States, 500 U.S. 257 (1991), but no case decided since *McCormick* holds that a bribery statute *must* contain such an element.

have occurred to you by now that my modest little proposal presents a few difficulties. Let me try to address several of them in turn.

A. *The Validity of Legislation Supported by a Legislator Who Should have Recused*

In the judicial context, the standard remedy for a judge's wrongful failure to recuse from a case is to repeat the affected proceedings: hold a new trial, resentence a defendant before a different judge, or rehear the appeal.[59] The transposition of that approach into the legislative context would mandate a new vote on a bill whenever a senator or representative fails to recuse despite the interests of a campaign contributor. The invalidation of legislation because of the subsequent disqualification of one of its supporters is not unprecedented,[60] but such a rule would pres-

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[59] *See, e.g.*, United States v. Greenspan, 26 F.3d 1001, 1007 (10th Cir. 1994) (ordering the resentencing of a defendant after a judge failed to recuse himself from sentencing despite receiving a death threat); Cool Light Co., Inc. v. GTE Prods. Corp., 832 F. Supp. 449, 460 (D. Mass. 1993) (describing a new trial before another judge as "the classic remedy" for a trial judge's improper failure to recuse); Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 253–58 (Utah 1992) (vacating a court of appeals decision and ordering a rehearing because one of the appellate judges was related by marriage to two members of the plaintiff's law firm). In other instances, though, the judge's decisions may stand even though the judge should have recused. *See generally* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862–70 (1988) (describing the factors to be considered when deciding the remedy for a federal judge's improper failure to disqualify from a case); United States v. Cerceda, 172 F.3d 806 (11th Cir. 1999) (en banc) (applying *Liljeberg* and holding that a trial judge's improper failure to recuse himself from several cases did not necessitate vacating the judgments and sentences in those cases).

[60] There are a few cases in which a city council's zoning decision was invalidated because one of the council members possessed a conflict of interest. *See* Lagrange City Council v. Hall Bros. Co. of Oldham County, Inc., No. 1998-CA-000181-MR, 1999 Ky. App. LEXIS 83 (Ky. Ct. App. July 23, 1999); Fleming v. City of Tacoma, 502 P.2d 327 (Wash. 1972); *see also* Griswold v. City of Homer, 925 P.2d 1015 (Alaska 1996) (remanding for a determination of whether a zoning ordinance should be invalidated because of the improper participation of a city council member who had a conflict of interest). The majority rule in zoning cases does not require recusal in such instances, let alone invalidation of the resulting action. *See* JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 1021 (1998) (explaining that "[o]nly a few courts, however, require recusal of *legislative* officials who may have a conflict of interest, absent a statute prohibiting conflicts of interest for such officials). Zoning is viewed as combining features of legislative, administrative and judicial decisionmaking, so even those cases supporting the invalidation of a zoning decision have emphasized that a similar rule need not follow for all legislative determinations. *See Fleming*, 502 P.2d at 330–31 (stating that "zoning amendments or zoning reclassifications are sufficiently distinguishable from other legislative functions that an exception to the general rule [against inquiring into the motives of legislative officials] is desirable").

ent substantial practical challenges. Instead, the recusal rule should be enforced prospectively in conjunction with contribution disclosure requirements. The burden for seeking recusal should be placed on anyone who believes that a legislative matter affects a contributor to a particular senator or representative. Federal law already requires that campaign contributions be disclosed.[61] Armed with this information, a careful analysis of proposed legislation can usually reveal which contributors stand to benefit or suffer from it, and anyone who contends that the recusal of a particular senator or representative is necessary could inform the House or Senate ethics committee. Those committees could then decide whether to order the recusal of the legislator. Failure to seek recusal before the legislative action takes place would waive any claim for recusal, just as belated motions for recusal are rejected in the judicial context.[62]

But a retroactive remedy is necessary to deter legislators who manage to escape a forced recusal even though they know that their campaign contributors will benefit from particular legislation. The identification of which contributors stand to benefit from a proposed bill is not always easy, especially if the scope of the bill is changed at the last minute. Timely recusal motions become virtually impossible when Congress legislates on the floor of the House or Senate. The appropriate response in such circumstances is directed not at the validity of the legislation, but instead at the conduct of the legislator. A member of Congress who knowingly participates in a matter that affects a campaign contributor should be required to repay the amount of the contribution received. The money should go to the federal treasury—or even to the national committee of the opposing political party—rather than being returned to the contributor. The sanc-

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[61] *See* 2 U.S.C. § 434 (Supp. III 1997); *see generally Campaign Finance Reports and Data* (visited Aug. 12, 1999) <http://www.fec.gov/1996/sdrindex.htm> (FEC web site containing campaign finance reports); Leslie Wayne, *Following the Money, Through the Web*, N.Y. TIMES, Aug. 26, 1999, at G1 (finding that "[t]he Internet is making it easy for journalists, competing candidates and ordinary citizens to connect the dots between politicians and their sources of money").

[62] *See, e.g.*, Polizzi v. United States, 926 F.2d 1311, 1321 (2d Cir. 1991); Parker v. State, 486 S.E.2d 687, 691 (Ga. Ct. App. 1997); State v. Bordelon, 75 So. 429, 431 (La. 1917); MacCormick v. MacCormick, 513 A.2d 266, 267 (Me. 1986); State v. Keene, 693 N.E.2d 246, 263 (Ohio 1998); State v. Hoeft, 594 N.W.2d 323, 326 (S.D. 1999); Pena v. Pena, 986 S.W.2d 696, 700–01 (Tex. App. 1998); *see generally* Richard C. Tinney, Annotation, *Waiver or Loss of Right to Disqualify Judge by Participation in Proceedings—Modern State Civil Cases*, 24 A.L.R. 4th 870, 877–79 (1983) (summarizing the rules concerning waiver of an objection to a judge's failure to recuse from a case).

tion for repeat violators who knowingly participate in legislation for which they should have recused because of a campaign contribution should be consideration for expulsion from Congress.[63]

B. *Elected Judges Do Not Have to Recuse from Cases Involving Campaign Contributors*

Many state court judges are elected, and like aspiring members of Congress, they rely upon campaign contributions to fund activities designed to persuade the electorate to vote for them. Once elected, judges occasionally find themselves hearing a case in which one of their campaign contributors is representing one of the parties, or even where the party himself or herself was a contributor. Not surprisingly, the opposing party often moves to recuse the judge in such circumstances. Surprisingly, such motions hardly ever succeed.[64]

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[63] *See* U.S. CONST. art. I, § 5, cl. 2 (providing that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member"); *see also* United States v. Brewster, 408 U.S. 501, 519 n.13 (1972) ("'The right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.'") (quoting *In re* Chapman, 166 U.S. 661, 669–70 (1897)). *Powell v. McCormack* is no obstacle to expulsion because the Court there considered only the *exclusion* of Adam Clayton Powell from the House, explicitly expressing no view on any potential constitutional questions regarding *expulsion*. *See* 395 U.S. 486, 507 n.27 (1969).

[64] *See* Shepherdson v. Nigro, 5 F. Supp. 2d 305 (E.D. Pa. 1998) (holding that recusal was not required when the law firm representing the defendant had contributed to the judge's campaign); *Ex parte* The Kenneth D. McLeod, Sr. Family Ltd. Partnership XV, 725 So. 2d 271 (Ala. 1998) (holding that recusal was not required when the defendant had contributed $200 to the trial judge's campaign for the appellate court); Velarde v. Osborn, No. 37789-2-I, 1997 Wash. App. LEXIS 1404 (Wash. Ct. App. Aug. 25, 1997) (holding that a judge need not recuse despite receiving a $100 campaign contribution from the defendant); Aguilar v. Anderson, 855 S.W.2d 799 (Tex. App. 1993) (holding that recusal was not required when the judge solicited a $300 campaign contribution from the plaintiff's law firm); Keane v. Andrews, 555 So. 2d 940 (Fla. Dist. Ct. App. 1990) (holding that a trial judge need not recuse from a case despite receiving $500 campaign contributions from several members of an attorney's firm); J-IV Investments v. David Lynn Machine, Inc., 784 S.W.2d 106 (Tex. App. 1990) (holding that recusal was not required when a judge accepted a $500 campaign contribution from the defendant's attorney); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 844–45 (Tex. App. 1987) (refusing to order the recusal of a trial judge who received a $10,000 campaign contribution from Pennzoil's lead counsel two days after the company filed its answer), *cert. dismissed*, 485 U.S. 994 (1988); River Road Neighborhood Ass'n v. South Texas Sports, Inc., 673 S.W.2d 952 (Tex. App. 1983) (holding that the recusal of two justices was not required when the attorneys representing the appellant accounted for about 20% of each justice's campaign contributions); Rocha v. Ahmad, 662 S.W.2d 77 (Tex. App. 1983) (holding that the recusal of two judges was not required when the attorney representing the appellees had contributed several thousand dollars to both judges' campaigns and had held election victory celebrations for them at his offices); Raybon v. Burnette, 135 So.2d 228 (Fla. Dist. Ct. App. 1961) (concluding that a trial judge need

The courts offer several reasons for why a judge need not recuse from a case in which a campaign contributor serves as counsel for one of the parties. They deny that a reasonable observer would view a judge as biased when deciding a case involving a campaign contributor.[65] They see it as an inevitable consequence of judicial elections.[66] It would be impractical, they say, for a judge to have to choose between running an underfinanced campaign and having to recuse from lots of cases involving attorneys who contributed to the campaign.[67]

These decisions are not especially popular among the writers who have considered them. Indeed, the scholarly opinion is just as unanimous that a campaign contribution should require a judge to recuse as the courts are agreed that recusal is unnecessary.[68] The academic writings and the occasional dissenting

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not recuse from a case where the defendant's attorney contributed to the judge's campaign and the plaintiff's attorney contributed to the judge's opponent); Coker v. Harris, 281 S.W.2d 100 (Tex. App. 1955) (affirming the denial of motion to recuse a judge who had received campaign contributions from the attorneys representing both sides in the case). Recusal is not even required when a judge contributes to the political campaign of an attorney appearing before him. *See* Frade v. Costa, 171 N.E.2d 863 (Mass. 1961).

[65] *See Aguilar*, 855 S.W.2d at 802 (opinion of Larsen, J.) (noting that "Texas courts have repeatedly rejected the notion that a judge's acceptance of campaign contributions from lawyers creates bias necessitating recusal, or even an appearance of impropriety"); *id.* at 805 (Osborn, C.J., concurring) (stating that "I do not believe the 'reasonable person on the street' would conclude that receipt of a $100 contribution or even a $500 contribution, with today's standards and cost of campaigns, would result in a trial judge being biased or prejudiced"); Breakstone v. MacKenzie, 561 So. 2d 1164, 1174 (Fla. Dist. Ct. App. 1989) (Nesbitt, J., dissenting) (concluding that "a contribution of $1,000 or less made by a litigant or his counsel to the political campaign of a trial judge or the judge's spouse does not create a legally sufficient basis for a reasonable person to fear a bias by the trial judge in favor of the contributing side"), *vacated in part*, 571 So. 2d 32 (Fla. 1990); *but see infra* note 71.

[66] *See Breakstone*, 561 So. 2d at 1176 (Nesbitt, J., dissenting) (insisting that "[b]ecause it is the people's desire that trial judges submit to contested elections, I do not find that the people have a reasonable expectation that they can be free of all of the necessary evils that attend such an election").

[67] *See Aguilar*, 855 S.W.2d at 814 (Barajas, J., dissenting) (contending that "if the trial judge tries to preserve his or her integrity and maintain an appearance of impartiality by refusing to raise funds, the election is destined to be lost"); *Breakstone*, 561 So. 2d at 1179 n.4 (Schwartz, C.J., dissenting) (describing the "chilling effect" of mandatory recusal on judicial campaign contributions from lawyers); *Rocha*, 662 S.W.2d at 78 (opining that "[a] candidate for the bench who relies solely on contributions from non-lawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.").

[68] *See* Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217 (1991); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988); Mark Andrew Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L.

judges dispute the practical effects of requiring recusal.[69] More importantly, the critics of these decisions emphasize that the integrity of the system—the avoidance of the appearance of corruption, if you will—overrides any of those other concerns. As one court put it, "[t]he overriding priority . . . is to assure that our courts are impartial, and that they have the appearance of impartiality."[70] Many writers—and some judges—submit that campaign contributions provide the *appearance* that a judge is not impartial, regardless of whether or not such bias actually exists.[71]

These critics have the better argument. The practical arguments regarding the implementation of a recusal requirement are not without force, but accepting them consigns a poor litigant to the disturbing spectacle of having her case decided by a judge who holds office in part because of the financial generosity of the attorney for the opposing party.[72] One could reasonably conclude that an attorney's $10,000 campaign contribution to the

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REV. 382 (1987); *see also Breakstone*, 561 So. 2d at 1168 n.6 (listing numerous bar journal and other articles criticizing the decisions allowing judges to decide cases involving campaign contributors).

[69] *See Breakstone*, 561 So. 2d at 1172 (responding that "[t]o suggest that a candidate's friends and supporters will fail to assist at a substantial level through fear of possible disqualification of the judge on motion in future cases (thus running the risk that the opposition will instead be elected) defies both logic and experience"); *id.* at 1174 (Ferguson, J., concurring) (claiming that "[i]n all likelihood today's decision [requiring recusal] will no more trouble the present system than a teardrop in Biscayne Bay").

[70] *Id.* at 1172.

[71] *See Ex parte* Bryant, 675 So. 2d 552, 556 (Ala. Crim. App. 1996) (Cobb, J., dissenting) (suggesting that a person of ordinary prudence could question the judge's impartiality even if it is the contributing attorney who seeks the judge's recusal); *Aguilar*, 855 S.W. 2d at 814–16 (Barajas, J., dissenting) (asserting that receipt of campaign contributions can sometimes eliminate the appearance that a judge is impartial); Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. 15, 19 (1986) (statement by Nebraska's Chief Justice that "[o]ne may be the most ethical individual in the world and, yet, if one must seek funds as the other two branches of government do when running for office, one inevitably creates the appearance of impropriety"); Siciliano, *supra* note 68, at 227 (questioning the motives of campaign contributors in light of the substantial contributions that are made to judicial candidates who are running unopposed, or who are sure to win, or who have already won their election).

[72] *See Aguilar*, 855 S.W. 2d at 815 (Barajas, J., dissenting) (noting that the realities of judicial elections are "not comforting to the single mother of five, unable to afford counsel of her choice for the purpose of enforcing child-support obligations, who discovers that opposing counsel attorney made a financial contribution to the judge's reelection campaign"); Breakstone v. MacKenzie, 561 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 1989) (asserting that "[c]ertainly the ordinary litigant does not make, or have the financial capacity to make, a $500 contribution" and concluding that such a contribution could cause a reasonable person to fear that the judge would not be impartial), *vacated in part*, *Breakstone*, 565 So. 2d at 1332. The decisions refusing to mandate recusal include a disturbing number of instances where the disadvantaged party was in particularly dire straits.

judge who is handling his case creates a fair question about the ability of the judge to decide a case according to the law, not the money.[73] That the courts say otherwise suggests that they perceive corruption differently than most others do. If the popular perception of the corrupting influence of campaign contributions is correct, then the appropriate response is to extend the recusal requirement to the judicial context, rather than imitating the contrary judicial decisions in the legislative context.

C. *The Type and Scope of Interests Subject to the Recusal Requirement*

Note that my description of the rule requires recusal whenever a contributor has any interest in the matter before Congress, not just when the contributor has a *financial* interest in the matter. Many ethics statutes only apply to conflicts of interest arising out of financial holdings.[74] Such a limitation could be added here, too, so that recusal is necessary only if a contributor stands to benefit financially from how the legislator votes. The existing standards for identifying when a member of Congress has a financial interest could be employed to determine when a campaign contributor has a financial interest.[75]

But the concern about the influence of money on those who receive it applies equally to funds given by people or organizations who make campaign contributions for non-economic reasons. Suppose that Senator Oil accepted a million-dollar campaign contribution from the Sierra Club, which reminds him of its generosity on the day that the Clean Gasoline Act is before the Senate. Senator Oil would seem to face the same dilemma—vote in accordance with the desires of a contributor lest future contributions be extinguished—that he would face if the con-

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[73] *But see* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 842–45 (Tex. App. 1987) (holding that a $10,000 campaign contribution to the judge who is hearing a party's case does not create an appearance of impropriety).

[74] *See* 18 U.S.C. § 201(b)(1) (1994) (prohibiting corrupt gifts of "anything of value" to a public official).

[75] *See* S. R. XXXVII(4) (stating that "[n]o Member, officer, or employee shall knowingly use his official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he, or his immediate family, or enterprises controlled by them, are members of the affected class."); H.R. R. III(1) (requiring members to vote on all questions unless the member has "a direct personal or pecuniary interest in the event of such question").

tributor had been Exxon instead. The desire to please a contributor and encourage future contributions exists regardless of what the contributor wants.

This approach, however, carries its own baggage. Once all interests are relevant for purposes of determining whether recusal is necessary, there must be some means of identifying the interests of a contributor. Other ethics rules require disqualification based on non-financial interests, so the task is not unique.[76] In fact, there are a number of ways to ascertain an organization's interests. An organization can be presumed to have an interest in any legislation about which it has lobbied Congress or otherwise taken a public position. More generally, an organization's stated purposes can be consulted to determine whether proposed legislation will affect the organization. For example, the Sierra Club's web site contains sixty-seven stated policies on particular issues.[77] An examination of these policies confirms that the Sierra Club would be interested in the Clean Gasoline Act while leaving no basis for concluding that the organization is concerned about funding for refuges in Kosovo. Accordingly, a member of Congress who receives a campaign contribution from the Sierra Club would have to recuse from the Clean Gasoline Act but not from a bill to aid Kosovo refugees. To be sure, an organization could try to prevent the application of the recusal requirement by declining to lobby or post stated policies or otherwise explain its views, but such measures would also make it difficult to support the inference that the campaign contribution was given to influence the member of Congress on particular legislation.

The scope of the recusal requirement can be tempered by limiting its application to interests that are sufficiently substantial to be viewed as likely to influence a legislator. The rules governing

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[76] *See, e.g.*, 28 U.S.C. § 455(a) (1994) (requiring a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); OKLA. STAT. art. V, § 24 (1981) (requiring a legislator who has a "personal or private interest" in a matter to recuse); CODE OF JUDICIAL CONDUCT, canon 3E(1)(c) (1999) (requiring disqualification when a judge or a member of the judge's immediate family holds "any other more than de minimis interest that could be substantially affected by the proceeding" of a matter before the judge); Carpinello, *supra* note 48, at 113–14 n.92 (listing state rules requiring legislators to recuse from matters in which they have certain interests); *see also* JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 4.24 (2d ed. 1995) (noting the difficulties in applying Code of Judicial Conduct test); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 331–43 (1998) (arguing that Catholic judges should recuse themselves in certain capital punishment proceedings but not others).

[77] *See Sierra Club Conservation Policies* (visited Aug. 23, 1999) <http://www.sierraclub.org/policy/conservation/index.html>.

financial interests are subject to tests of directness and proximity. Many state conflict of interest laws do not apply to interests that are shared by a group, class or profession.[78] Other rules include an exemption for de minimis interests.[79] The recusal requirement should contain similar exemptions so that a contribution from the Sierra Club, for example, would not mandate recusal from defense spending appropriations even though the Sierra Club believes that "[i]nvestments in environmental security should begin to replace new military expenditures."[80]

The hardest case arises when an individual makes a contribution for a non-economic reason. Suppose that Bill Gates contributes $1,000,000 to each Senate candidate who promises to support pro-choice policies, or that Nancy DeMoss contributes $1,000,000 to each Senate candidate who promises to support pro-life policies.[81] Should the senators who received such contributions have to recuse from any matters involving abortion? Such contributions pose the same threats of corruption or apparent corruption. A candidate is just as likely to be influenced by a campaign contribution from an individual motivated by a non-economic interest as by a contribution from a multinational corporation. But it is more difficult to apply the recusal rule to indi-

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[78] *See* Carpinello, *supra* note 48, at 92 n.16 (citing state statutes and rules); *see also* ROSENTHAL, *supra* note 7, at 94 (observing that "New Mexico lawmakers, like lawmakers elsewhere, are allowed to introduce legislation that benefits the class of citizens to which they belong . . . even though it may also benefit themselves"). The congressional ethics rules contain a similar limitation, though its scope has been controversial. *See* Elizabeth A. Palmer, *Campbell Ethics Complaint Dismissed*, 57 Cong. Q. 2772 (1999) (reporting that the Senate Ethics Committee concluded that Senator Campbell (R-Colo.) had engaged in an apparent conflict of interest—but no violation of the ethics rules—when he introduced legislation that would benefit 1,100 landowners including himself).

[79] *See* CODE OF JUDICIAL CONDUCT, canon 3E(1)(c) (1999); *see also In re* Virginia Elec. & Power Co., 539 F.2d 357, 368–69 (4th Cir. 1976) (holding that a judge's $100 interest in a utility rate reduction was de minimis).

[80] *Environmental Security Policy* (visited Aug. 23, 1999) <http://www.sierraclub.org/policy/conservation/envsecurity.html>. The policy statement contains the qualification that such spending changes should be "consistent with existing Club policies and whenever feasible through arms control negotiations or other international agreements." *Id.*

[81] *Cf.* David Van Biema, *Who Are Those Guys?*, TIME, Aug. 9, 1999, at 52 (noting that Nancy DeMoss is the CEO of the Arthur S. DeMoss Foundation, which funds advertisements opposing abortion); Jennifer Kabbany, *Gates, Tycoons' Largess Aims to Curb World's Birthrate*, WASH. TIMES, Mar. 24, 1999, at A2 (reporting that "The William H. Gates Foundation, which recently received $2.2 billion in Microsoft stock from Mr. Gates, plans to give the majority to Planned Parenthood and other population control agencies"). Note that these examples are different from my hypothetical to the extent that they involve contributions by organizations rather than individuals, and they do not involve political campaign contributions.

vidual contributions. The interests of an individual can be much more difficult to ascertain than the interests of a corporation or other organization.[82] Even when an individual's contribution is motivated by a specific policy concern, it can be difficult to prove the identity of that interest. Gates or DeMoss or any other individual could avoid triggering the recusal requirement by contributing money to a candidate without explaining why. But the practical difficulties in determining when an individual's campaign contribution should be the basis for the recusal of its recipient are not substantial where the contribution can be fairly characterized as corrupting because of its influence on the recipient. The stated purpose of the contribution and other evidence of its purpose can be consulted to determine the contributor's interests, and thus, the scope of the recusal requirement. If the reason for the contribution remains unknown, then there is little reason to fear that any corruption will result from it.

D. *Money Will Be Diverted to Other Means of Influencing the Political and Legislative Process*

Another worry about a recusal requirement is that it would encourage contributions to political parties or PACs instead of political candidates. The Supreme Court would probably not be too concerned about contributions to parties because of the Court's support for the role of political parties in the electoral process.[83] But the large sums of money that have been contributed to political parties and PACs in recent years—so-called "soft money"

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[82] *See, e.g.*, Mike Flaherty, *Road Builders' Influence Criticized*, WIS. ST. J., June 5, 1999, at 3B (reporting that campaign finance reform group characterized a family's $32,263 campaign contributions as supportive of highway construction because the family owns a cement business, while others attributed the contribution to the family's support of an anti-abortion candidates).

[83] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997) (holding that states have "a strong interest in the stability of their political systems," an interest that "permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system"); Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604, 615–16 (1996) (plurality opinion of Breyer, J.) (stating that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure"); *id.* at 629–30 (Kennedy, J., concurring in the judgment and dissenting in part) (extolling the role of political parties); *see generally* ISSACHAROFF, KARLAN & PILDES, *supra* note 36, at 244–63 (discussing the entrenchment of the two-party system).

because it is outside the FECA's restrictions on "hard" money given directly to specific candidates—have been the focus of many of the current campaign finance reform proposals. Alternatively, the organizations and individuals who now spend millions of dollars on campaign contributions will just shift their spending to lobbying if such campaign contributions become impossible or counterproductive because of the recusal requirement. Any effort to block the flow of money into lobbying would confront constitutional constraints that are at least as demanding as those applicable to campaign spending.[84]

There is no doubt that a recusal requirement will divert the flow of money from candidates so that it reaches PACs, political parties, lobbyists, or others instead. The applicability of the recusal requirement depends upon what those entities do with the money that they receive. If they make contributions of their own to political candidates, then it would be easy to apply the recusal requirement. For example, a legislator could be required to recuse from any legislative business that affects the interests of a PAC that has contributed to his or her campaign. This makes sense in the context of PACs, whose interests can be identified in the same manner as the interests of other organizations.

Besides making contributions, PACs also spend money to further their own political objectives. Such spending is the object of much of the wrath of campaign reformers, but it may not be regulated if it is independent of a candidate's own campaign. "Independent," moreover, has been broadly understood by the courts as including any spending except that which is explicitly coordinated with a candidate's campaign or which explicitly supports or opposes a specific candidate.[85] But corruption, not independence, determines whether or not recusal is necessary. If campaign spending by PACs influences or appears to influence how legislators vote in Congress because of the desire to benefit

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[84] *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 316–18 (2d ed. 1995) (discussing the constitutional constraints on the regulation of lobbying); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 77–90 (1996) (explaining how the Court has narrowly construed lobbying regulations because of constitutional concerns).

[85] *See, e.g.*, *Colorado Republican Campaign Comm.*, 518 U.S. at 619–23 (holding that a political party's spending is independent from, rather than coordinated with, the party's candidate); FEC v. The Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999) (holding that the distribution of voter's guides does not constitute prohibited express advocacy of a candidate).

from such spending in future campaigns, then the same reasons for applying the recusal requirement to other campaign money would justify its application to PAC spending.

It is more difficult to extend the recusal rule to money contributed to candidates by political parties, or to spending by parties in support of candidates. Money given to political parties is not as corrupting as money given directly to candidates. Votes on laws in the United States Congress are cast by senators and representatives, not by the Republican or Democratic Party. The Republican Party can be influenced by a campaign contribution from Exxon, and a Republican congressional candidate can be financially dependent on the party, but the threat of corruption is reduced by the existence of the party as an intermediary between the contributor and the candidate. Both of the major political parties include members of Congress who oppose the agendas of the party's primary contributors, yet the contributors continue to support the parties. The increased amount of money contributed to political parties at a time when members of Congress show increased independence from their parties suggests that more money for political parties would not necessarily result in any particular legislative outcomes. And even if a contribution is seen as somehow corrupting the party, it is more difficult to characterize the party's financial support for its own candidates as corrupt. The Court's unwillingness to permit the regulation of a political party's independent spending on its candidates shows as much.[86]

A similar result occurs if funds are diverted to lobbyists instead of candidates. Lobbying does not present the same danger

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[86] *See Colorado Republican Campaign Comm.*, 518 U.S. 604 (holding that the first amendment prohibits the application of FECA's expenditure limits to money spent by a political party without coordination with a candidate). The opinions in *Colorado Republican Campaign Committee* reveal the Court's skepticism about the possibility that a political party's spending could corrupt its candidates. *See id.* at 616 (plurality opinion of Breyer, J.) (observing that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"); *id.* at 623 (suggesting that if a party and its candidate are thought of as being identical then "one might argue that the absolute identity of views and interests eliminates any potential for corruption"); *id.* at 630 (Kennedy, J., concurring in the judgment and dissenting in part) (stating that "[t]he greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do"); *id.* at 646 (Thomas, J., concurring in the judgment and dissenting in part) (suggesting that "if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system.").

of a corrupting quid pro quo relationship between a contributor and a legislator. A legislator who ignores the pleas of a lobbyist may face the ire of a company or group, but the consequences of that ire are diminished dramatically by the recusal rule. The lobbyist may want to support the legislator's opponent in the next election, but any campaign contributions would render the opponent ineligible from supporting the contributor's interests in Congress because of the recusal requirement. Without the tool of campaign contributions as a threat, a legislator faces relatively limited sanctions from a disappointed lobbyist. Conversely, lobbying is desirable because it is the means by which the people express their views about particular legislation in a representative democracy.[87] Of course, lobbying can be abused, and it can slip dangerously close to corruption in its own right. But other statutes are available to control those excesses. Lobbying thus offers a combination of lesser dangers and greater advantages compared to the fears of corruption and apparent corruption accompanying campaign spending.

So where will the money that is now spent on campaign contributions end up if the recusal rule is adopted? Much of it will probably go to political parties and to lobbyists, and while their spending presents problems of its own, it is less susceptible to the charge of corruption that is so often leveled at campaign contributions. Other funds might go to general educational efforts to teach the public about the erstwhile contributor's point of view. The studies of spending on ballot initiatives suggest that the amount of money spent on such efforts increases the likelihood that the public will be persuaded,[88] but again, the charge of corruption is harder to level because it views a particular outcome as evidence that the people were corrupted themselves. Finally, it is possible that money that was once spent on campaign contributions will now be spent on different matters altogether. Whatever those matters are, they will be preferable to campaign contributions from the perspective of avoiding corruption or its appearance.[89]

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[87] *See* U.S. CONST. amend. I (prohibiting federal laws abridging the right "to petition the Government for a redress of grievances").

[88] *See, e.g.*, Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 22 (1997) (noting that "[a] handful of studies suggests that the amount of money spent in a campaign is crucial in determining the outcome of the vote").

[89] For additional speculation about the course that money would take if traditional campaign finance proposals are adopted, see Issacharoff & Karlan, *supra* note 4, at

E. *The People Will Lose Their Representatives*

A fifth concern about the recusal requirement assumes that candidates will choose to accept contributions despite the prospect of recusal. The practical effect of mandating recusal is to deny the successful candidate's constituents representation in Congress whenever the interests of the campaign contributors are at issue.[90] Recusal would become the norm rather than the exception if enough candidates accepted contributions from enough different sources. The recusal requirement could even be used strategically by those opposed to a candidate who would contribute to the candidate in order to force recusal, though the success of that ploy could be defeated by the diligence of the candidate.

Nevertheless, it is hard to imagine wholesale recusals. Contributors are likely to vanish if forced recusal is the consequence of a contribution. Even if contributors persist, the people themselves can ensure that their representative is not a frequent recuser by not voting for a candidate who will be required to recuse on issues of importance to the voters. This self-help remedy will encourage candidates to avoid recusal by declining contributions that would require it.

F. *Campaigns Cannot Be Financed*

The only remaining problem is how a candidate can collect the funds needed to run a campaign once the recusal requirement causes many of the existing sources of campaign contributions to disappear. Campaigns are expensive, and there is little likelihood that they will suddenly become cheap just because candidates can no longer collect contributions. Without spending from political candidates, television stations will air advertisements for other products, and pollsters and consultants will find other businesses that are interested in their services. To avoid this result, candidates will turn to other means of funding campaigns.

1713–16 (worrying that money would be spent without the "mediating influence" of political parties or candidates); Sullivan, *supra* note 6, at 321–22 (suggesting that money will go to issue advocacy).

[90] *See* ROSENTHAL, *supra* note 7, at 97 (objecting to a legislator's recusal from matters in which he or she might be accused of having a conflict of interest because "the recused legislator's constituents are denied representation").

Those candidates who possess substantial personal wealth will still be able to run expensive campaigns. Then pressure for public financing of campaigns may grow in response to the inability of those who lack personal wealth to run for elected office.

The likely alternative means of financing campaigns present the most serious objection to imposing a recusal requirement. I am unaware of anyone who contends that the nation is well served by limiting our choice of political candidates to those who are sufficiently wealthy to pay for their own campaigns. Nor is public financing especially appealing, for reasons that others have already articulated.[91] Nevertheless candidates still need money to campaign for election.

The best solution would be to modify the recusal rule so that it is not triggered by contributions below a certain amount. For example, a candidate could be permitted to accept any contributions below $100 or $1,000 and still participate in legislative matters affecting the contributor. The premise of the exception would be that contributions below the stated amount neither corrupt nor provide the appearance of corrupting the candidate who receives them. In other words, a candidate who receives a host of $1,000 contributions is unlikely to vote a certain way just because some of his or her contributors desire such a vote. Such a threshold finds precedent in suggested solutions to the apparent corruption attending campaign contributions in state judicial elections.[92] Furthermore, a substantial amount of campaign funds can be collected from individuals or organizations who contribute no more than $1,000 each. For example, about half of the contributions received by 1998 Senate candidates came from individuals who gave no more than $1,000 each, with the New York Senate race alone yielding nearly $25 million in individual contributions.[93] The smaller donations encouraged by the

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[91] *See, e.g.*, Sullivan, *supra* note 6, at 327–29; Smith, *Faulty Assumptions, supra* note 6, at 1084–86; David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 156–57. The case for public financing is made in Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994). For an overview of the debate, *see* LOWENSTEIN, *supra* note 30, at 733–82.

[92] *See* Banner, *supra* note 68, at 478–83 (proposing that judges should be required to recuse themselves from any case involving an attorney who contributed more than $1,000 to the judge's campaign); *see also* Breakstone v. MacKenzie, 561 So.2d 1163, 1170–71 (Fla. Dist. Ct. App. 1988) (declining to adopt that proposal because recusal decisions involving campaign contributions must be made on a case-by-case basis).

[93] *See 1997-98 Top 50 Senate—Contributions from Individuals* (visited Aug. 10, 1999) <http://www.fec.gov/press/seind98.htm>.

modified recusal rule may not fully fund increasingly expensive election activities, but neither will they render elections the exclusive province of the independently wealthy.

This would seem to solve the problem of providing a reasonable source of money for election campaigns, except for one tiny problem: it returns us full circle to the status quo. Federal law already limits individual campaign contributions to $1,000.[94] That limit, however, has not deterred charges that the existing system of campaign finance is corrupt. Perhaps a lower limit would eliminate the corruption and apparent corruption on the theory that a $100 contribution is not corrupting even if a $1,000 contribution is. However, the $1,000 individual contribution limit set by Congress in 1974 equals less than half of that amount today because of inflation,[95] which undercuts the force of the argument. Also, a lower limit would exacerbate the difficulties in trying to raise campaign funds when the recusal requirement is in effect.

The scope of the recusal requirement is thus inversely related to the availability of campaign contributions. My proposal here—to require recusal from legislative matters affecting a more than de minimis or general interest of a corporation, PAC, other organization or individual who contributed more than $1,000—reflects only one way of balancing the need for private campaign contributions with the concern about corruption. A broader application of the rule to all contributions made by all entities would eliminate all corruption, but it would do so at the cost of leaving any viable sources of campaign funds other than personal wealth or public financing. A narrower application of the rule that excludes some contributors or those contributors with only non-economic interests would free up more money for campaigns, but would simultaneously reopen the door to charges of corruption. In other words, the recusal requirement always avoids the First Amendment pitfalls of traditional campaign finance reform proposals, but it must then strike an uneasy bal-

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[94] *See* 2 U.S.C. § 441a(a)(1)(A) (1994).

[95] *See* Shrink Missouri Government PAC v. Adams, 161 F.3d 519, 523 n.4 (8th Cir. 1998), *cert. granted sub nom.* Nixon v. Shrink Missouri Government PAC, 119 S. Ct. 901 (1999) (noting that a state contribution limit of $1,075 established in 1976 was equal to $378 in 1998 dollars when adjusted by the consumer price index). The failure to periodically adjust a contribution limit for inflation gives rise to its own constitutional claim. *Id.* at 522–23 (judging the constitutionality of the 1976 state contribution limits by their meaning "[i]n today's dollars").

ance between avoiding corruption and allowing for the actual funding of campaigns.

IV. The Recusal Requirement and the Nature of Corruption

I know that the recusal requirement proposed here would work a dramatic change in the manner in which political candidates and legislatures operate. Recusal of an elected official from a particular matter draws attention already, even when the recusal is because of financial or personal interests. Senator Lott's decision to recuse from the tobacco legislation that was deliberated by Congress in 1997 and 1998 was characterized as "apparently unprecedented."[96] To require a legislator to recuse himself from participating in legislative business whenever the interests of a campaign contributor would be affected would have the seemingly drastic consequences of either disqualifying countless legislators from voting on certain bills or cutting the flow of campaign money to a trickle. To extend the recusal requirement to the President would be even more drastic.[97]

But drastic measures may be necessary if the existing campaign finance system really is corrupt. Many believe that it is.[98] That view, however, is not universally held. Indeed, the measure of the existing system of campaign finance depends upon one's definition of "corrupt." The stigma of corruption has been applied to a host of activities, with little agreement about when the label is appropriate.[99] Thomas Burke offers perhaps the most helpful analysis of the idea of corruption in the context of campaign finance. He distinguishes three types of corruption: (1) a *quid pro quo* in which a legislator takes money in exchange for an official action, (2) a legislator's actions affected by *monetary influence*, and (3) the *distortion* of policymaking by money that causes a legislator to act inconsistently with public opinion.[100]

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[96] Henry, *supra* note 46, at 22.

[97] *Cf. id.* (noting that "it is rare for a President to recuse himself on anything because he has such a wide-ranging impact on policy").

[98] *See supra* text accompanying notes 10–29.

[99] *See* Strauss, *supra* note 91, at 142 (observing that "[t]he claim that the current system of campaign finance is corrupt can mean many things"); Lowenstein, *supra* note 50, at 798–806 (recounting various possible understandings of corruption).

[100] *See* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comm. 127, 131 (1997).

The rhetoric about the corruption of the campaign finance system presupposes either the monetary influence or the distortion standard. To the extent that the objectionable corruption is monetary influence, the question becomes whether campaign contributions do in fact influence legislative decision-making. Many simply assume that they do, but the empirical evidence is more highly contested.[101] To the extent that the objectionable corruption is the distortion of legislative policymaking, the question then becomes what does an undistorted legislative process look like? Or, more broadly, an understanding of corruption as distortion implicates fundamental theories of representation.[102]

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[101] The most extraordinary demonstration of the disagreement about the corruption of the existing system occurred during a colloquy between Senator McCain and his Republican colleagues in the Senate who resented the characterization of their activities as corrupt. *See* 145 Cong. Rec. S12575–S12668 (daily ed. Oct. 14, 1999). For other examples of the contested assumptions and evidence about the corruption of the current campaign finance system, compare Elizabeth Drew, The Corruption of American Politics: What Went Wrong and Why (1999), *and Justice Souter on Campaign Cash*, N.Y. TIMES, Oct. 6, 1999, at A22 (reporting that Justice Souter stated during an oral argument in a campaign finance case that "[m]ost people assume, and I do, certainly, that someone making an extraordinarily large contribution gets something extraordinary in return"), *and* Lowenstein, *supra* note 7, at 306–35 (analyzing the evidence and concluding that "[t]he campaign finance system is corrupt"), *and* Lowenstein, *supra* note 50, at 826–27 (insisting that "almost no one denies that special interest campaign contributions usually are intended to *influence* the official acts of recipients" and that "[t]here is also ample anecdotal evidence and some quantitative evidence that contributions do in fact influence official actions") (footnotes omitted), *and* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 618 (1982) (contending that "[w]hatever the cause and effect relationship, studies of issue after issue demonstrate that a much higher percentage of legislators who voted with a PAC's position received money from that PAC in the previous campaign than those who voted the other way"), *with* FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 307–17 (1988) (examining the evidence and concluding that "there simply are no data in the systematic studies that would support the popular assertions about the 'buying' of the Congress or about any other massive influence of money on the legislative process."), *and* Smith, *Money Talks, supra* note 6, at 58 (indicating that "systematic studies of voting records . . . have found little or no connection between campaign contributions and legislative voting records."), *and* Smith, *Faulty Assumptions*, *supra* note 6, at 1071 (concluding that "[t]he available evidence simply does not show a meaningful, causal relationship between campaign contributions and legislative voting patterns."); *see generally* ROSENTHAL, *supra* note 7, at 150–51 (suggesting that the results of the empirical studies are inconclusive, but that nearly everyone believes that campaign contributions buy influence); Burke, *supra* note 100, at 139 n.45 (suggesting that "contributions do influence representatives, but less than many suppose. Political scientists have produced a wealth of studies on this question but are only beginning to answer it."); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 114 & n.14 (citing empirical studies which show that the influence of campaign contributions "is a lively topic of dispute in political science.").

[102] For helpful discussions of the relationship between theories of representation and appropriate models of campaign finance, see Burke, *supra* note 100, at 140–48; Lowenstein, *supra* note 50, at 831–43.

The recusal requirement responds to either the monetary influence or the distortion theory of corruption. If the idea of corruption is best limited to the quid pro quo understanding, then the recusal requirement is misguided. Recusal makes sense only if campaign contributions do influence legislative decisions or distort the legislative process in a way that can properly be characterized as corrupt. The wisdom of the recusal requirement thus turns on the resolution of those empirical and theoretical disputes. But the contested meaning of corruption affects more than just the recusal requirement. Proponents of contribution and expenditure limits and other typical features of campaign finance reform claim that their remedies are necessary to eliminate corruption, thereby presuming either the monetary influence or distortion theories of corruption. Even if they are right, the recusal requirement demands that the defenders of more traditional campaign finance reform proposals explain why such measures are better suited to combat corruption than recusal.

The fact that the recusal requirement is designed to combat corruption has one more consequence for the debate over campaign finance reform. Even if the current system is not corrupt, there may be other reasons to promote campaign finance reform. Defenders of campaign finance reform point to the need to free legislators from the distraction of having to raise vast sums of money and the need to equalize the electoral playing field as independent reasons for imposing more stringent contribution and expenditure restrictions.[103] These arguments are not without force, but they suffer from two possibly fatal shortcomings. First, the Supreme Court views them as inadequate to justify campaign finance regulation.[104] Of course, the Court may be

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[103] *See, e.g.*, Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994) (advancing the distraction argument); Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603 (1999) (collection of articles analyzing the equalization argument); Foley, *supra* note 20 (advancing the equalization argument). David Strauss has argued that concerns about corruption are really concerns about equality of the democratic process, but that simply returns us to the contested understanding of corruption. *See* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371–75 (1994).

[104] *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 36, at 645 (noting that "[a]fter *Buckley*, it appeared that the sole legitimate government interest in regulating campaign finance lay in removing the temptation for corruption"); Burke, *supra* note 100, at 127 (agreeing that *Buckley* rejected campaign finance goals "such as equalizing the influence of citizens over elections, limiting the influence of money in electoral politics, or creating more competitive elections"). The Court has shown some—but not too much—flexibility in that position since *Buckley*. *See* LOWENSTEIN, *supra* note 30, at

wrong, but until it changes its mind, any effort to ground campaign finance reform in the distraction or equalization argument is probably doomed. Second, those arguments do not appear to be as persuasive as the corruption argument. Most accounts of the need for campaign finance reform begin by stating concerns about the corrupting influence of campaign contributions and spending, and turn to the other arguments only once the corruption theme is exhausted. In other words, in the brief that campaign finance reform defenders submit to the public, corruption is the lead argument, and the other arguments are visibly secondary. Whatever momentum campaign finance reform enjoys is primarily attributable to the corruption argument, not to a passionate public desire to relieve legislators of the burdens of raising campaign funds or to assure every political candidate an equal source of campaign funds.

What this means for the recusal requirement is that the dominance of the corruption argument matters. So are campaign contributions corrupting? I am not sure. The rhetoric suggesting that they are masks the other reasons why legislators act as they do and why contributors give money in political campaigns. There are, however, many troubling anecdotal suggestions of the influence of campaign contributions on legislative decisions, though the empirical studies have yielded mixed results. Either way, the recusal requirement renders obsolete traditional campaign finance reform proposals to restrict contributions and expenditures. If the existing system is not corrupt, then the recusal requirement becomes unnecessary, but so do other campaign finance proposals because the alternative justifications for such reform are both rhetorically and constitutionally inadequate. If the existing system is corrupt, then the recusal requirement offers a drastic but understandable remedy that avoids the First Amendment objections to regulating money that is spent to speak. It addresses the influence of money, rather than money itself. It would change the way that contributors, candidates and the legislature do business, but that is precisely the point. Thus if we are concerned that the existing system of financing campaigns is corrupt or that it appears to be corrupt, it is worthwhile to begin considering measures that directly respond to that concern.

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541 (observing that "later campaign finance decisions have seemed to show fluctuating attitudes on the Court toward equalizing regulations").

ARTICLE

PSYCHOLOGICAL INJURY AND THE PRISON LITIGATION REFORM ACT: A "NOT EXACTLY," EQUAL PROTECTION ANALYSIS

JAMES E. ROBERTSON*

In 1996, Congress passed the Prison Litigation Reform Act, which curtails prisoners' rights both to proceed in forma pauperis in federal courts and to claim damages for psychological injury without accompanying physical injury. In this Article, Professor Robertson argues that prisoners as a class should be considered a "discrete and insular" minority, and hence that laws that deprive them of privileges because of their status as prisoners should be subject to heightened judicial scrutiny. He maintains that the Act, insofar as it limits prisoners' access to legal remedies, does not survive such scrutiny.

> Social groupings have apparently become more complex in this century, but the problem of the devaluation of those less powerful in the political/social arena has not dissipated.[1]

Inmate Johnnie Watts may have erroneously believed that an effective remedy accompanies every right.[2] Filing pro se,[3] he alleged in *Watts v. Gaston*[4] that jail overcrowding resulted in his sharing a cramped cell with a mentally ill, HIV-positive inmate, who urinated on him one night while he slept on a concrete floor

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[1] Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 110, text accompanying note 9, at 2 (1990).

[2] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803):

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

[3] To file pro se is to initiate a civil action without the assistance of counsel. *See* BLACK'S LAW DICTIONARY 1221 (6th ed. 1990) [hereinafter BLACK'S LAW DICTIONARY].

[4] No. 97-0114-CB-M, 1999 U.S. Dist. LEXIS 6593, at *5–*6 (S.D. Ala. Apr. 1, 1999).

for want of any bedding.[5] Watts lamented, "In my mind and heart I feel like a dog and somewhat unhuman because of the [memories] of the urine . . . in my face and the chance that the inmate with [AIDS] could have dropped blood in my food."[6] Despite his repeated complaints to prison officials, this sleeping arrangement continued for most of two months.[7]

By averring "mentially [sic] distress and emotionally [sic] damage,"[8] his claim came within § 803(d) of the Prison Litigation Reform Act [PLRA].[9] Codified as 42 U.S.C. § 1997e(e),[10] the Act provides that "[n]o federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody *without a prior showing of physical injury.*"[11]

While Watts's distress seemed genuine, his failure to allege a physical injury ended further consideration of his complaint. Section 1997e(e) barred his claim for damages.[12] Moreover, Watts's eventual transfer mooted his additional claim for equitable relief.[13] Even if he had established a constitutional violation, the court could not give him an effective remedy.[14]

This Article argues that § 1997e(e) discriminates against inmates[15] in violation of the equal protection provisions of the Fifth[16]

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[5] *See id.* at *6.
[6] *Id.*
[7] *See id.* at *6–*7.
[8] *Id.* at *12–*13
[9] Pub. L. No. 104-134 (Apr. 26, 1996), 110 Stat. 1321 (1996).
[10] 42 U.S.C.A. § 1997e(e) (West Supp. 1999).
[11] *Id.* (emphasis added).
[12] *See Watts*, 1999 U.S. Dist. LEXIS 6593, at *17–*18
[13] *See id.* at *18–*19
[14] *See generally* WILLIAM C. COLLINS, CORRECTIONAL LAW FOR THE CORRECTIONAL OFFICER 20–22 (1990) (delineating injunctions and damages as the "[t]wo basic kinds of relief available under the Civil Rights Act.").
[15] For purposes of this Article, an inmate is a person either awaiting trial in custody or incarcerated upon conviction. As a rule of thumb, jails hold pretrial detainees and persons sentenced to confinement for not more than one year. Prisons house persons sentenced to more than one year of incarceration. *See* BUREAU OF JUSTICE STATISTICS, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 165 (2d ed. 1981) (defining prison commitment).
[16] The Fifth Amendment's due process provision guarantees equal protection of the laws. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974) ("[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment."); Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "'so unjustifiable as to be violative of due process.'") (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

and Fourteenth Amendments.[17] The most famous and influential footnote in constitutional law, footnote four of *United States v. Carolene Products*,[18] provides the basis for the analysis. Footnote four sets forth "a line of reasoning"[19] applicable to § 1997e(e): as the countermajoritarian branch of government, federal courts should engage in "more searching" or "exacting" judicial scrutiny of legislation burdening powerless, "discrete and insular" groups.[20]

The Article proceeds as follows. Part I examines the origins of § 1997e(e) and briefly reviews the caselaw addressing its reach and scope. Part I will demonstrate that § 1997e(e) impacts inmates in a significant and disparate manner, thereby inviting equal protection scrutiny.

After recounting the history and scholarly criticism of footnote four, Part II addresses the pivotal question of the Article: are inmates a discrete and insular minority? The Article answers this question by drawing an analogy[21] to the archetypal discrete and insular minority: black Americans of the *Carolene* era.[22] Part II will demonstrate that inmates are similar to but "not exactly" like *Carolene*-era blacks and are thus deserving of heightened protection from discriminatory legislation.[23]

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[17] *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws.").

[18] 304 U.S. 144, 152–53 n.4 (1938). *See also infra* note 106 and accompanying text (quoting the relevant text of footnote four). *Cf.* LIEF H. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING 86 (1985) (describing footnote four as "the commonly cited justification for . . . active [judicial] protection of civil rights and liberties"); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (referring to footnote four as "these famous words"); Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 686, 690 (1991) (stating that "[f]ootnote four encompasses much of the ensuing half-century of constitutional law"); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982) (describing footnote four as "the most celebrated footnote in constitutional law") (footnote omitted). *But see* L.A. Powe, Jr., *Does Footnote Four Describe?* 11 CONST'L COMMENTARY 197 (1994) (arguing that constitutional changes often attributed to footnote four can also be explained by an alliance of the Supreme Court, federal government, and Northern elites).

[19] Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291, 1291 (1986).

[20] *Carolene Products*, 304 U.S. at 152 n.4.

[21] Cass Sunstein has argued that reasoning by analogy injects "principled consistency" into judicial decisionmaking, a quality that should serve us well given the analytical confusion over which groups should receive heightened scrutiny. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993). *See also infra* note 233 (discussing the Supreme Court's sometimes inconsistent efforts to define suspect classifications).

[22] *See infra* note 134 and accompanying text (identifying African Americans as "the paradigmatic Carolene minority group").

[23] *Cf.* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices*

Part III inquires whether there is an "exceedingly persuasive justification" for § 1997e(e).[24] Delineated in *United States v. Virginia*[25] for another group similar to but "not exactly" like blacks, this degree of equal protection scrutiny requires "searching analysis"[26] of both the legislative "ends" and "means."[27] Part III will demonstrate that pejorative exaggeration dominates the government's case for prison litigation reform, and § 1997e(e) as a means to that end rests on unwarranted assumptions. Hence, the psychological injury provision of the PLRA cannot withstand the "searching analysis" advocated by the *Virginia* Court and this Article. Concluding remarks follow in Part IV.

I. 42 U.S.C § 1997E(E)

A. *The Prelude to § 1997e(e)*

Until the late 1960s, federal courts rarely sided with inmates and frequently afforded high deference to the judgment of prison administrators.[28] Such courts advanced several justifications for this "hands-off" doctrine, including their lack of expertise in pe-

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of Rules and Standards, 106 HARV. L. REV. 22, 61 n.248 (1992) (observing that "[g]ender discrimination is like race discrimination, but not exactly"). *See generally* Farber & Frickey, *supra* note 18, at 695–96 (stating that "the reference to 'discrete and insular minority' [in the third paragraph of footnote four] may refer to groups *other* than blacks and religious and national-origin minorities"; "[accordingly,] lack of political power may justify heightened judicial solicitude for *other* groups in the future").

[24] *See* United States v. Virginia, 518 U.S. 515 (1996).

[25] *Id.*

[26] *Id.* at 536 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982)) (internal quotation marks omitted).

[27] *See generally* Jeffrey M. Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 242 (1983) (emphasis added):

> When the [Supreme] Court examines the ends of government action, it is making a policy determination, and when it examines the means of government action, it is making a factual determination. *The issue of constitutionality is thus made up of two components—ends and means.*

[28] *See, e.g.*, Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme circumstances."); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955 (8th Cir. 1956) ("We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners . . . .") (internal quotation marks and citations omitted); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("[C]ourts have no supervisory jurisdiction over the conduct of the various institutions . . . ."); United States *ex rel.* Palmer v. Ragen 159 F.2d 356, 358 (7th Cir. 1947) ("Under repeated decisions, state governmental bodies, who are charged with prosecution and punishment of offenders, are not to be interfered with except in case of extraordinary circumstances.") (internal quotation marks and citations omitted).

nal administration;[29] the potential for undermining the authority of correctional staff[30]; the fear of triggering a flood of inmate lawsuits;[31] and adherence to the principles of federalism, which vested the responsibility for operating state prisons in state governments.[32]

The hands-off doctrine masked from public view a sorry state of affairs. Correctional staff received little training[33] and meager resources.[34] Some institutions abandoned inmates to the exploitation of trustees.[35] Racial discrimination reached into the day-to-day operations of the prison.[36] An inmate's lot included harsh

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[29] *See, e.g.*, *Garcia*, 193 F.2d at 278 ("Whether a federal prisoner is a suitable subject for hospitalization . . . is, in our opinion, a question for the Attorney General and the prison authorities, and not for the courts."); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 18 (1973) (observing that "[j]udges felt that correctional administration was a technical matter to be left to experts rather than to courts").

[30] *See, e.g.*, Cullum v. California Dep't of Corrections, 267 F. Supp. 524, 525 (N.D. Cal. 1967) ("[I]f every time a guard were called upon to maintain order he had to consider his possible tort liabilities it might unduly limit his actions."); Golub v. Krimsky, 185 F. Supp. 783, 784 (S.D.N.Y. 1960) ("We incline to the proposition that to allow such actions would be prejudicial to the proper maintenance of discipline . . . .").

[31] *See, e.g.*, Stroud v. Swope, 187 F.2d 850, 852 (9th Cir. 1951) ("[V]ery practical considerations militate against granting to appellant the relief for which he prays for to do so would open the door to a flood of applications from federal prisoners which would seriously hamper the administration of our prison system.").

[32] *See, e.g.*, United States *ex rel.* Lawrence v. Ragen, 323 F.2d 410, 412 (7th Cir. 1963) ("It is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law."); Kelly v. Dowd, 140 F.2d 81, 83 (7th Cir. 1944) (stating that actions of a state prison warden "are questions peculiarly fit to be determined in the first instance by the courts of the state").

[33] *See* LUCIEN X. LOMBARDO, GUARDS IMPRISONED 39 (1981) (stating that new officers received "little training" and thus sought instruction from inmates); Marilyn D. McShane, *Correctional Officers*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 117, 118 (Marilyn D. McShane & Frank P. Williams III eds. 1996) ("The correctional officer force, from the earliest institutions until the late 1940s and even later in some states, was untrained, unprofessional, and received their positions on the basis of political patronage.").

[34] *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 12 (1967) [hereinafter THE CHALLENGE OF CRIME IN A FREE SOCIETY] ("In sum, America's system of criminal justice is overcrowded and overworked, undermanned, underfinanced, and very often misunderstood."); STAN STOJKOVIC & RICK LOVELL, CORRECTIONS 54 (2d ed. 1997) (describing the financing of prisons as "insufficient" during this period).

[35] *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970) (finding only eight staff on guard duty for over 1,000 inmates, leaving trustees in control of the inmate population); Charles B. Fields, *Trusties*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 33, at 461–62 (observing that trusties were widely used until the 1960s, particularly in the South, where the prison hierarchy reflected the region's "caste-like social structure").

[36] *See, e.g.*, Nichols v. McGee, 169 F. Supp. 721, 723 (N.D. Cal. 1959) (alleging racially separate sleeping and feeding practices in a California prison); JOHN IRWIN, PRISONS IN TURMOIL 9 (1980) (observing that "[r]acial prejudice, discrimination, and segregation prevailed" in the Big House era of prisons (1900–1950)); DAVID M. OSHINSKY, "WORSE THAN SLAVERY" *passim* (1996) (discussing racial segregation in Missis-

and arbitrary discipline[37] and little medical care.[38] "Life in many institutions," wrote the President's Commission on Law Enforcement and Administration of Justice, "is at best barren and futile, at worst unspeakably brutal and degrading."[39]

In 1961, the Supreme Court issued a groundbreaking ruling in *Monroe v. Pape*.[40] *Monroe* held that § 1983 of the recodified Civil Rights Act of 1871[41] provided a damage remedy for violations of federal statutory or constitutional rights.[42] The Court's decision recast civil rights litigation:

> Before *Monroe* and the revival of § 1983, there was no point in thinking in constitutional terms about an injury that took place in the past and . . . had no bearing on any other legal obligation owed by or to the victim. No constitutional remedy was available in federal court for such harms in any event. Making damage awards possible, as the Court did in

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sippi's Parchman Penitentiary).

[37] *See, e.g.*, TODD R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 339 (4th ed. 1997) ("Less than thirty years ago, formal codes of institutional conduct either did not exist or were ignored; punishment was at the full discretion of the warden, and inmates had no opportunity to challenge the charges."); James E. Robertson, *Judicial Review of Prison Discipline in the United States and England: A Comparative Study of Due Process and Natural Justice*, 26 AM. CRIM. L. REV. 1323, 1327–33 (1989) (describing the extensive, unchecked power that staff held over inmates during the hands-off era).

[38] *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974) (observing that inmates failed to receive "prompt and efficient" medical care); Newman v. Alabama, 349 F. Supp. 278, 281 (M.D. Ala. 1972) (concluding that "[t]he medical facilities of the Alabama prison system are grossly understaffed"); BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL 42 (1991) (describing medical facilities at Georgia State Prison as "wholly inadequate and understaffed").

[39] THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 34, at 159. *See also, e.g.*, NORMAN A. CARLSON, ET AL., CORRECTIONS IN THE 21ST CENTURY (1999) (observing that the hands-off doctrine caused some inmates to "suffer under conditions of squalor and inhumane treatment by correctional personnel and had nowhere to turn for help"); KENNETH J. PEAK, JUSTICE ADMINISTRATION 218 (2d ed. 1998) ("Until the 1970s conditions in many prisons were almost insufferable for both staff members and inmates . . . .").

[40] 365 U.S. 167 (1961).

[41] Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871). The Act carried the title "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Its current codification is 42 U.S.C. § 1983 (1994). It reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[42] *See Monroe*, 365 U.S. at 183.

> *Monroe* . . . had the effect of opening up a whole new field of substantive constitutional litigation, for it gave lawyers an incentive to conceive of past, tort-like harms in constitutional terms.[43]

A prisoners' rights movement soon emerged.[44] Its cadre of attorneys and jailhouse lawyers[45] found § 1983 capable of breaching the hands-off doctrine during the tumultuous 1960s.[46] As

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[43] Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 620–21 (1997). *See also* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1242 (1979) ("One of the most significant developments in the field of civil rights litigation has been the emergence of damages as a remedy for the enforcement of constitutional guarantees."). *Cf.* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 19 (1985) (observing that *Monroe* "is correctly credited as being a watershed in the development of § 1983"). Prior to *Monroe*, courts read the "under color of state law" provision in § 1983 to mean that their jurisdiction only extended to violations authorized by state law. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 32–33 (1998) (examining the status of the Civil Rights Act prior to *Monroe*).

[44] James Jacobs defined the prisoners' rights movement as "a broad-scale effort to redefine the status (moral, political, economic, as well as legal) of prisoners in a democratic society." JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 34 (1983). He asserted that the movement was part of a "fundamental democratization" of American society in the post-World War II era. *Id.* at 35 (parenthetical citation omitted). Elsewhere, Jacobs identified this transformation as the coming of a "mass society" in which previously excluded and largely powerless groups were integrated into "society's central institutional and value systems." JAMES B. JACOBS, STATEVILLE 6 (1977).

[45] Jailhouse lawyers are inmates who assist other inmates in bringing suit. *See* Cynthia B. Hart, *Jailhouse Lawyers*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 33, at 267.

[46] Among the many factors that contributed to the demise of the hands-off doctrine during this time were the following: attorneys committed to prison reform, prison disturbances and riots, and the Supreme Court's commitment to advancing the rights of powerless minority groups. *See* LYNN S. BRANHAM & SHELDON KRANTZ, CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 283 (5th ed. 1997). Current conceptions of inmates' rights have changed dramatically since the hands-off era. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 483–84 (1995) (holding that procedural concerns arise when disciplinary sanctions constitute a "dramatic departure from the basic conditions [of a sentence]" or impose "atypical and significant hardships"); Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that deliberate indifference to a significant risk of inmate-on-inmate assault constitutes cruel and unusual punishment); Hudson v. McMillian, 503 U.S. 1, 4 (1992) (holding that staff's malicious use of force inflicts cruel and unusual punishment); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–51 (1987) (holding that inmates possess a limited right to religious freedom); Turner v. Safley, 482 U.S. 78, 91–92 (1987) (holding that inmates possess a limited right to receive and send correspondence); Hudson v. Palmer, 468 U.S. 517, 530 (1984) (holding that inmates possess a limited right to privacy); Bell v. Wolfish, 441 U.S. 520, 534 (1979) (holding that pretrial detainees cannot be punished); Bounds v. Smith, 430 U.S. 817, 828–29 (1977) (holding that inmates possess a right of meaningful access to the courts); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (holding that procedural safeguards are triggered by threatened loss of good time); Johnson v. Avery, 393 U.S. 483, 490 (1969) (holding that jailhouse lawyers possess limited constitutional protection).

early as 1963, a federal district court employed § 1983 to rule in favor of an inmate.[47] The following year, in *Cooper v. Pate*,[48] the Supreme Court allowed an inmate to bring a § 1983 action for alleged infringement of his constitutional rights.[49]

By 1970, prisoner filings under § 1983 grew to some 2000, a nearly ten-fold increase from the 218 of 1966.[50] Annual filings by inmates continued to multiply, exceeding 39,000 when the proposed PLRA came before Congress.[51] Although comparatively few proceeded to trial,[52] inmate lawsuits brought much needed reform of the nation's prisons:

> [I]f the question is one of net assessment, then the impact of judicial intervention into prisons and jails over the last two decades has been positive—a qualified success, but a success just the same. For proponents of judicial restraint, there is no use denying that in most cases levels of order, amenity, and service in prisons and jails have improved as a result of judicial intervention. And in most cases it is equally futile to assert that such improvements would have been made, or made as quickly in the absence of judicial intervention.[53]

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[47] *See* United States *ex rel.* Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963).

[48] 378 U.S. 546 (1964) (per curiam).

[49] *See id.* at 546.

[50] *See* JIM THOMAS, PRISONER LITIGATION 110 tbl.5d (1988).

[51] *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1996 REPORT OF THE DIRECTOR, at 142 tbl.C-3 (1996). Prisoner cases comprised 23% of the civil docket of U.S. district courts. *See* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 24 (1994).

[52] *See infra* note 269 (recounting Senator Hatch's (R-Utah) repeated assertion that 3.1% went to trial).

[53] John J. DiIulio, Jr., *Conclusion: What Judges Can Do to Improve Prisons and Jails*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION 287, 291 (John J. DiIulio, Jr. ed., 1990). *See also* FEELEY & RUBIN, *supra* note 43, at 368 (concluding that "[the prison reform] cases were an important contribution to three major developments: the emergence of a national corrections profession, the formulation of national standards for corrections, and the general bureaucratization of state prisons"); M. KAY HARRIS & DUDLEY P. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 21 (1977) ("The judicial intervention in each of the correctional law cases studied had impact that was broad and substantial."); Alvin J. Bronstein, *15 Years of Prison Litigation*, 11 J. NAT'L PRISON PROJECT 1, 6 (Spring 1987) ("Litigation has resulted in profound and permanent changes in the conditions under which tens of thousands of prisoners must live."); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 670 (1993) (concluding that "court intervention generally has improved the living conditions and practices in the facilities at issue"); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 HARV. L. REV. 610, 639 (1979).

B. *The Enactment of § 1997e(e)*

Complaints of voluminous and meritless prison litigation[54] led to the hurried enactment of the PLRA in 1996.[55] Senator Kennedy (D-Mass.) complained that "[t]he PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves."[56] Both the House of Representatives and the Senate voted overwhelming for the PLRA.[57]

The PLRA contains three major provisions. First, absent a showing of "imminent danger of serious physical harm," the PLRA bars an inmate from proceeding *in forma pauperis*[58] if federal courts dismissed three previous filings for frivolity, maliciousness, or failure to state a cause of action.[59] Inmates who

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[54] *See, e.g.*, 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"), *reprinted in* 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, PUB. L. NO. 104-134, at doc. 14 (1997) (Bernard D. Reems, Jr. & William H. Manz eds., 1997) [hereinafter 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996]; 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham (R-Mich.)) ("[N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason."), *reprinted in id.* at doc. 15; Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) ("The text of the Prison Litigation Reform Act itself reflects that the drafters' primary objective was to curb prison condition litigation."); Mitchell v. Farcass, 112 F.3d 1483, 1488 (11th Cir. 1997) ("Congress promulgated the Act to curtail abusive prisoner . . . litigation."); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) ("The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts.").

[55] *See* Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996):

> [I]it is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not. A single Senate hearing before the Judiciary Committee, one substantive House Report, and some floor debate is all we can find.

[56] *See* 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy (D-Mass.)), *reprinted in* 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, *supra* note 54 at doc. 23.

[57] On April 24, 1996, the House of Representatives and the Senate agreed to the conference report containing the PLRA by a vote of 399 to 25 and 89 to 11, respectively. *See id.* at vii (setting forth the legislative chronology of the PLRA).

[58] This provision is significant because many inmates proceed *in forma pauperis*. *See* Darrell L. Ross, *Emerging Trends in Correctional Civil Liability: A Content Analysis of Federal Court Decisions of Title 42 United States Code Section 1983: 1970–94*, 25 J. CRIM. JUST. 501, 509 (1997) (finding that 92% of the § 1983 lawsuits that went to trial from 1970 to 1974 were filed *in forma pauperis*); THOMAS, *supra* note 50, at 156 (observing that inmates "nearly always" proceed *in forma pauperis*).

[59] *See* 28 U.S.C.A. § 1915(g) (West Supp. 1999). The Act empowers courts to dismiss *sua sponte*, i.e., at the judge's own will, claims failing to state a cause of action. *See* 28 U.S.C.A. § 1915A(b) (West Supp. 1999). Furthermore, frivolous or malicious claims can result in loss of good conduct time and the consequent prolongation of

have not "struck out" must incrementally pay the filing fee that courts once waived.[60] Additionally, any inmate seeking to file a claim under the Act must first exhaust all administrative remedies.[61]

Second, the Act provides that prospective relief "shall extend no further than necessary to correct the violation of the Federal right [in question]."[62] In addition, any party can terminate such relief within two years of its issuance; one year after denial of a motion to terminate; or two years after the enactment of the PLRA.[63]

Finally, the PLRA amended the Civil Rights of Institutionalized Persons Act[64] to limit recovery for psychological injury under § 1997e(e). No aspect of the PLRA received less congressional deliberation than § 1997e(e).[65] As the district court in *Zehner v. Trigg*[66] observed, "The legislative history contains virtually no discussion specifically concerning ... § 1997e(e)."[67] Nonetheless, Congress surely intended § 1997e(e) to serve as a dike against a perceived flood of meritless litigation.[68]

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confinement. *See* 28 U.S.C.A. § 1932 (West Supp. 1999).

[60] *See* 28 U.S.C.A. § 1914(a) (West Supp. 1999).

[61] *See* 42 U.S.C.A. § 1997e(a) (West Supp. 1999).

[62] 18 U.S.C.A. § 3626(a)(1) (West Supp. 1999).

[63] *See* 18 U.S.C.A. § 3626(b)(1) (West Supp. 1999).

[64] *See* 42 U.S.C.A. § 1997 (West Supp. 1999). In examining the history of the Civil Rights of Institutionalized Persons Act, the Supreme Court in *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), observed that it was enacted primarily to ensure that the United States Attorney General has "legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons." *Id.* at 508 (quoting H.R. Conf. Rep. No. 96-897, at 9 (1980) (Conf. Rep.)).

[65] Early versions of the PLRA made no mention of a physical injury requirement. *See* 2 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, docs. 14-32 (1997). The provision first appeared IN S.866, PRISON LITIGATION REFORM ACT OF 1995 (May 25, 1995), *reprinted in id.* at doc. 53.

Senator Dole (R-Kan.) briefly described the physical injury requirement. *See* 141 CONG. REC. S7525 (daily ed. May 25, 1995) (statement of Sen. Dole), *reprinted in* 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, *supra* note 54, at doc. 7; 141 CONG. REC. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl (R-Ariz.)), *reprinted in id.* at doc. 8.

The subsequent Senate and House hearings did not discuss damage claims for mental or emotional injuries.

[66] 952 F. Supp. 1318 (S.D. Ind. 1997).

[67] *Id.* at 1325.

[68] *See, e.g.*, Davis v. District of Columbia 158 F.3d 1342, 1347 (D.C. Cir. 1998) (identifying the purpose of § 1997e(e) as "cutting back meritless prisoner litigation"); Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) ("Congress ... perceived a propensity among prisoners to file frivolous lawsuits and reacted to that perception [by drafting § 1997e(e)]"); Watts v. Gaston, No. 97-0114-CB-M, 1999 U.S. Dist. LEXIS 6593, at *16 (S.D. Ala. Apr. 1, 1999) ("The purpose of § 1997e(e) ... is to limit lawsuits filed by prisoners a result of increasing litigation by prisoners.")

C. *The Reach and Scope of § 1997e(e)*

Shortly after the passage of the PLRA, the Chief Judge of the Court of Appeals for the Sixth Circuit chided Congress for its sloppy drafting of the Act.[69] The uncertain meaning of various words and phases of § 1997e(e) has invited litigation. Ironically, judges rather than Congress have become its lexicon.

1. "No Federal Civil Action"

The inclusive language of § 1997e(e) suggests an expansive reach. Indeed, dictum in *Davis v. District of Columbia*[70] proclaimed that § 1997e(e) governs federal civil actions "*regardless* of the statutory or constitutional basis of the legal wrong."[71] Filing under the Americans With Disabilities Act did not save the plaintiff's claim in *Davis* from dismissal.[72] Earlier, the district court in *Zehner* had strongly suggested that § 1997e(e) applies to *Bivens* actions,[73] the counterpart of § 1983 for federal prisoners. On the other hand, several courts have fenced-off habeas corpus petitions. While habeas corpus petitions initiate civil actions,[74]

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[69] *See* McGore v. Wigglesworth, 114 F.3d 601, 603 (6th Cir. 1997) (citations omitted):

> When Congress penned the Prison Litigation Reform Act . . . the watchdog must have been dead. The statute contains typographical errors, . . . creates conflicts with the Rules of Appellate Procedure . . . ; and is internally inconsistent . . . . Moreover, the year in its name, 1995, does not correspond to the date of its enactment, 1996. We have even issued an unprecedented administrative order . . . in an attempt to organize the chaos.

[70] 158 F.3d. 1342.

[71] *Id.* at 1349 (emphasis added).

[72] *See id.*

[73] Because § 1983 actions can only be brought against persons acting "under color of state law," the Supreme Court ruled in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), that the Bill of Rights implicitly permits actions against federal officials to vindicate constitutional rights. *See id.* at 392. *See also infra* note 350(discussing the constitutional scope of Bivens Actions).

Prior to the enactment of the PLRA, the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140 (1992), held that § 1997e did not govern *Bivens* actions. *See id.* at 149–50. However, the district court in *Zehner* observed:

> While § 1997e(a) formerly referred to actions brought pursuant to 42 U.S.C. § 1983, it now refers to actions brought under § 1983 "or any other Federal law." This reference to suits under "any other Federal law" could be interpreted to include the judicial interpretation of the Constitution that supports *Bivens* claims.

Zehner, 952 F. Supp. at 1334. Similarly, the Tenth Circuit Court of Appeals in *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997), held that a closely related feature of the PLRA—§ 1997e(a), which requires inmates to exhaust administrative remedies—applies to *Bivens* actions. *See id.* at 1265 n.2.

[74] *See* United States v. Morgan, 346 U.S. 502, 506 (1954) (stating that a habeas corpus hearing is not the continuation of a criminal adjudication). Habeas corpus pro-

caselaw has deemed them unique and thus exempt from § 1997e(e).[75]

2. "May Be Brought"

The PLRA fails to specify the date on which it takes effect. When asked to sustain claims for injuries allegedly predating the PLRA, federal judges have balked. They have held that § 1997e(e) lacks retroactivity.[76] The statutory phrase "*may be* brought,"[77] according to the Tenth Circuit Court of Appeals, envisages only prospective application.[78]

3. "By a Prisoner"

The Act defines a "prisoner" as someone "confined in a jail, prison, or other correctional facility."[79] Lower federal courts have read "prisoner" to include pretrial detainees.[80] Moreover, *Zehner* ruled that § 1997e(e) applies to former prisoners if the alleged injury occurred during confinement.[81]

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ceedings are the exclusive remedy for securing release or speedier release from confinement. *See* Preiser v. Rodriguez, 411 U.S. 475, 488–90 (1973) (holding that actions to restore cancelled good time credits must be brought under habeas corpus). *See also* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994). Habeas corpus is also the exclusive remedy for attacking parole release and parole revocation decisions. *See, e.g.*, White v. Gittens, 121 F.3d 803, 807 (1st Cir. 1997) (addressing parole revocation).

[75] *See, e.g.*, Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) ("A review of the language and intent of the PLRA reveals that Congress was focused on prisoner civil rights and conditions cases, and did not intend to include habeas proceedings in the scope of the Act . . . ."); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) ("We conclude that Congress did not intend the PLRA to apply to petitions for a writ of habeas corpus.").

[76] *See, e.g.*, Craig v. Eberely, 164 F.3d 490, 494 (10th Cir. 1998); Swan v. Banks, 160 F.3d 1258, 1259 (9th Cir. 1998); Allen v. Chapman, No. 97-0175-P-C, 1999 U.S. Dist. LEXIS 6686, at *11 (S.D. Ala. Mar. 10, 1999); Bolton v. Goord, 992 F. Supp. 604, 625 (S.D.N.Y. 1998); Harris v. Lord, 957 F. Supp. 471, 474 (S.D.N.Y. 1997). In contrast, federal courts are divided over the application of the PLRA's "three strikes" provision to cases pending appeal prior to the enactment of the PLRA. *See* Canell v. Lightner, 143 F.3d 1210, 1213 n.2 (9th Cir. 1998) (citing cases that document the division among federal courts).

[77] 42 U.S.C.A. § 1997e(e) (West Supp. 1999) (emphasis added).

[78] *See Craig*, 164 F.3d. at 464.

[79] 42 U.S.C.A. § 1997e(e) (West Supp. 1999).

[80] *See, e.g.*, Lucas v. Nichols, No. 97-2060, 1999 U.S. App. LEXIS 8151, at *5 (6th Cir. Apr. 23, 1999); Kerr v. Pucket, 138 F.3d 321, 323 (7th Cir. 1998); Zehner v. Trigg, 952 F. Supp. 1318, 1325 (S.D. Ind.), *aff'd*, 133 F.3d 459 (7th Cir. 1997). *See also* 42 U.S.C. § 1997e(h) (West Supp. 1999) (defining "prisoner" as "any person incarcerated or detained in any facility who is *accused of, convicted* of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program) (emphasis added).

[81] *See Zehner*, 952 F. Supp. at 1326.

4. "For a Mental or Emotional Injury"

In *Amaker v. Haponik*,[82] the court contended that "[t]he term 'mental or emotional injury' has a well understood meaning as referring to such things as stress, fear, and oppression, and other psychological impacts."[83] Nonetheless, judges have struggled with vaguely worded pro se complaints to determine the nature of the alleged injury.[84] Furthermore, several courts have joined with *Amaker* in holding that deprivation of First Amendment rights[85] merits relief, including damages, independent of any physical or emotional injury.[86]

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[82] No. 98 Civ. 2663, 1999 U.S. Dist. LEXIS 1568 (S.D.N.Y. Feb. 15, 1999).

[83] *Id.* at *22–*23 (quoting 42 U.S.C.A. § 1997e(e) (West Supp. 1999)).

[84] *See, e.g.*, Watts v. Gaston, No. 97-0114-CB-M, 1999 U.S. Dist. LEXIS 6593, at *1 (S.D. Ala. Apr. 1, 1999) (interpreting the plaintiff's statement that "the injury was a mental state of being" as a request for mental and emotional damages); Rivera v. Chesney, No. 97-7547, 1998 U.S. Dist. LEXIS 14619, at *17 & n.9 (E.D. Pa. Sept. 15, 1998) (interpreting the plaintiff's allegations that he had not received a meal and experienced emotional abuse as a request for mental and emotional damages); McComb v. Sheahan, No. 97-C5446, 1998 U.S. Dist. LEXIS 7645, at *2 (N.D. Ill. May 12, 1998) (dismissing the plaintiff's suit because he did not allege actual harm arising from staff's failure to provide food following administration of high blood pressure medication and their yelling obscenities at him).

When the petitioner fails to allege physical injury per se, some defendants have sought dismissal under § 1997e(e) on the erroneous contention that the statute bars *all* suits not averring a physical injury. The statute does not apply unless mental or emotional damages are sought. *See* Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) ("The domain of the statute is limited to suits in which mental or emotional injury is claimed."); Lewis v. Sheahan, 35 F. Supp. 2d 633, 636 n.3 (N.D. Ill. 1999) (rejecting the defendant's motion to dismiss via § 1997e (e) for want of alleging a physical injury).

[85] *See* U.S. CONST. amend. I ("Congress shall make no law" establishing religion or abridging its free exercise or that of speech, religion, or association).

[86] *See, e.g.*, Canell v. Lightner, 143 F.3d 1210, 1212 (9th Cir. 1998) (holding that a deprivation of First Amendment rights entitles a plaintiff to relief aside from that arising from physical, mental, or emotional injury); Warburton v. Underwood, 2 F. Supp. 2d 306, 322 (W.D.N.Y. 1998) (declining to dismiss an Establishment Clause claim "despite the fact that the only injury plaintiff could experience as a result . . . would be mental or emotional").

However, the district court in *Cassidy v. Indiana*, IP 97-731-C-T/G, 1999 U.S. Dist. LEXIS 6654 (S.D. Ind. Apr. 8, 1999), stated the obvious: "This [purported] limitation is not apparent from the language of the statute." *Id.* at *9–*10. Furthermore, it is unclear whether *Canell* and its brethren are basing damages on the inherent worth of First Amendment rights, which would contravene the Supreme Court's ruling in *Carey v. Piphus*, 435 U.S. 247, 262–68 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299, 310–13 (1986), which barred damages for the intrinsic value of substantive and procedural rights respectively. *But see* Jean C. Love, *Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 67 (1992) (arguing that "the [C]ourt has not categorically prohibited the recovery of presumed damages in all types of constitutional tort actions").

Several courts have indicated that damages for other intrinsic injuries can be awarded regardless of § 1997e(e). *See, e.g.*, Friedland v. Fauver, No. 96-3456 (MLC), 1998 U.S. Dist. LEXIS 5805, at *50–*51 (D.N.J. Mar. 31, 1998) (ruling that § 1997e(e) did not bar an action in which the plaintiff sought damages for illegal confinement); Barnes v.

5. "Suffered"

Various rulings, including *Davis*, have placed equitable remedies outside the reach of § 1997e(e).[87] The *Davis* court reasoned that § 1997e(e) speaks of injuries already "suffered" by plaintiffs,[88] whereas injunctive and declaratory relief address likely future injuries.[89] In turn, some courts have suggested that § 1997e(e) permits nominal damages because their award, unlike actual damages, does not rest on a prior compensable injury.[90] Although punitive damage claims also lack a compensatory basis, *Davis* held that § 1997e(e) can bar them.[91]

6. "Prior Showing of a Physical Injury"

The PLRA fails to define "physical injury."[92] Left to their own devices, courts have largely followed *Siglar v. Hightow*.[93] The Fifth Circuit held that a sore and bruised ear failed to satisfy the physical injury requirement because § 1997e(e) requires the harm to be more than de minimus, although not necessarily serious.[94] Later, in

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Ramos, No. 94 C 7541, 1996 U.S. Dist. LEXIS 15260, at *7–*8 (N.D. Ill. Oct. 11, 1996) (ruling that § 1997e(e) did not bar an action in which the plaintiff sought damages for cruel and unusual punishment and alleged violations of other protected interests).

[87] *See, e.g.*, Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 808 (10th Cir. 1999); Higgason v. Cohn, 1999 U.S. App. LEXIS 3668, at *5 (7th Cir. Mar. 4, 1999); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Watts*, 1999 U.S. Dist. LEXIS 6593, at *18; Zehner v. Trigg, 952 F. Supp. 1318, 1331 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997). *Cf. Clark*, 121 F.3d at 227 n.8 (implying that § 1997e(e) does not bar injunctive relief). As it appeared in the Prison Litigation Reform Act of 1995, Public Law No. 104-134, 110 Stat. 1321 (1996), the language of what is codified as § 1997e(e) bore the title "Limitation on Recovery," which also suggests that the statute's drafters intended to limit only damages.

[88] *See* 42 U.S.C.A. § 1997e(e) (West Supp. 1999) (addressing in relevant part civil actions "for mental or emotional injury *suffered* while in custody") (emphasis added).

[89] *See Davis*, 158 F.3d at 1346.

[90] *See, e.g., Perkins*, 165 F.3d at 808 n.6; Cassidy v. Indiana Dep't of Correction, IP 97-731-C-T/G, 1999 U.S. Dist. LEXIS 6654, at *11 (S.D. Ind. Apr. 8, 1999); Wright v. Miller, 973 F. Supp. 390, 396 (S.D.N.Y. 1997).

[91] *See Davis*, 158 F.3d at 1348.

[92] Section 1997e(e) contains the Act's only reference to physical injury. *See* 42 U.S.C.A. § 1997e(e) (West Supp. 1999) (barring claims for psychological harm "without a prior showing of a physical injury").

[93] 112 F.3d 191 (5th Cir. 1997).

[94] *See id.* at 193. The court in *Siglar* looked to the Supreme Court's rulings in *Hudson v. McMillan*, 503 U.S. 1 (1992), and *Whitley v. Alberts*, 475 U.S. 312 (1986), which held that an inmate's physical injury at the hands of prison staff must be more than de minimus but not necessarily "serious" to inflict "punishment" under the Eighth Amendment. *Hudson*, 503 U.S. at 4; *Whitley*, 475 U.S. at 320–21. *See also* Gomez v. Chandler, 163 F.3d 921, 924–25 (5th Cir. 1999) (comparing *Siglar*, in which no medical treatment was sought, with the *Gomez* plaintiff's medical treatment for "cuts, scrapes,

Luong v. Hatt,[95] a court defined the de minimus standard as whether the injury "would . . . require a free-world person to visit an emergency room, or have a doctor attend to, give an opinion, diagnosis and/or medical treatment for the injury."[96]

Moreover, physical injuries arising as manifestation of psychological harm do not count regardless of their severity. In *Davis*, an inmate with HIV contended that he sustained loss of weight and appetite, as well as insomnia, upon the defendant's unauthorized disclosure of his disease.[97] In dismissing the claim, the court interpreted the phrase "prior showing"[98] to mean prior to *and independent of* psychological injuries.[99]

II. A FOOTNOTE TO § 1997E(E)

A. Footnote Four

At first glance, *United States v. Carolene Products*[100] seems far afield from the nation's teeming prison population. In *Carolene Products*, the Supreme Court addressed a constitutional challenge to legislation banning from interstate commerce "filled milk," that is, milk with vegetable oil rather than butter fat.[101] Speaking for the Court, Justice Stone concluded that the legislation neither exceeded Congress's power to regulate interstate commerce nor violated the equal protection guarantee of the Fifth Amendment.[102]

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contusions to the face, head and body"); Hill v. Plummer, No. C98-2066 SI, 1998 U.S. Dist. LEXIS 8472, at *3 (N.D. Cal. June 4, 1998) (dismissing as de minimis per *Sigler* the wearing of electronic restraining device).

[95] 979 F. Supp. 481 (N.D. Tex. 1997).

[96] *Luong*, 979 F. Supp. at 486. *Zehner*, on the other hand, looked to tort law in concluding that the impact of asbestos on the plaintiff's body fell short of being a physical injury. *See* Zehner v. Trigg, 952 F. Supp. 1318, 1323 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

[97] *See Davis*, 158 F.3d at 1349.

[98] 42 U.S.C.A. § 1997e(e) (West Supp. 1999).

[99] *See Davis*, 158 F.3d at 1349.

[100] 304 U.S. 144 (1938).

[101] *See* Filled Milk Act of 1923, Ch. 262, 42 Stat. 1486 (codified at 21 U.S.C.A . §§ 61–63 (West Supp. 1999)).

[102] *Carolene Products*, 304 U.S. at 147–49. As to the equal protection issue, the Court concluded that the statute rationally promoted public health. *See id.* at 148. The Court's decision in *Carolene Products* was a key moment in extending Congress's power over interstate commerce. *See* BRUCE A. ACKERMAN, WE THE PEOPLE 359–77 (1998) (discussing the emergence of a new Court by 1937 and the "disintegration of traditional principles" limiting federal power).

Carolene Products, however, is synonymous with its famous footnote.[103] No afterthought,[104] footnote four called for "more searching" or "more exacting" judicial scrutiny of legislation (1) threatening specific textual rights; (2) impeding the normal operation of democratic process; or (3) demonstrating prejudice toward discrete and insular groups.[105] In relevant part, footnote four stated:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth [Amendment].
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a specific condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[106]

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[103] *See supra* note 18 (observing that various commentators consider footnote four the most famous and influential footnote in constitutional law).

[104] *See* Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982) (recalling the belabored task of writing the footnote).

[105] *Carolene Products*, 304 U.S. at 152–53 n.4. *See also, e.g.*, GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 542 (10th ed. 1980) (describing footnote four as having "pervasive influence" in contemporary, multi-tiered equal protection analysis); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1291 (1982) (tracing the origins of tiered review to footnote four); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 115 n.25 (1983) (observing that the normal presumption of constitutionality would not apply in cases involving certain distinctions).

[106] *Carolene Products*, 304 U.S. at 152 n.4 (citations omitted). Professor Ackerman argued that footnote four attempted to "fill[ ] the gap" created by the Court's repudiation of a constitutional system grounded on "state's rights, property and contract." ACKERMAN, *supra* note 102, at 369. According to Ackerman, footnote four was one of several "trial balloons" defining the function of the Court in this new era. *Id.* Professor White's profile of Justice Stone, on the other hand, portrayed footnote four as part of Stone's effort to articulate "a general theory of judging," one that focused on the "character of the interest invaded." G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 220 (1978).

Various commentators, most notably Professors Tribe and Ackerman, have argued that footnote four is bad constitutional doctrine.[107] Professor Tribe charged that it renders equal protection indeterminate. He rhetorically inquired, "[H]ow [are] we supposed to distinguish ... 'prejudice' from principled, if 'wrong,' disapproval? Which groups are to count as 'discrete and insular minorities?' Which are instead to be deemed appropriate losers in the ongoing struggle for political acceptance and ascendancy?"[108]

Professor Ackerman turned *Carolene Product*'s analysis of discreteness and insularity on its head. These attributes, he argued, now represented political assets rather than liabilities.[109] His thesis rested on two interrelated assumptions: the body political consists of numerous factions; and collective, group action leads to political power. Ackerman contended that discreteness and insularity give rise to group identity and geographic concentration of group members—key ingredients of an influential voting block.[110] Conversely, according to Ackerman, numerically large but comparatively anonymous and geographically diffuse groups, such as the poor, dissipate their electoral potential.[111] He

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[107] *See, e.g.*, Ackerman, *supra* note 18, at 717 ("A reappraisal of *Carolene* is a pressing necessity . . . ."; Brilmayer, *supra* note 19, at 1334 ("*Carolene's* approach has led us seriously astray."); Geoffrey Miller, *The True Story of Carolene Products*, *in* 1987 THE SUPREME COURT REVIEW 397, 428 (Philip B. Kurland et al., eds., 1988) ("The political theory underlying the *Carolene Products* footnote . . . needs to be updated."); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (implying that footnote four is "radically indeterminate and fundamentally incomplete").

[108] Tribe, *supra* note 107, at 1073.

[109] *See* Ackerman, *supra* note 18, at 723 (describing *Carolene Products* as "utterly wrongheaded;" "other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage . . . for a group engaged in pluralist American politics"). *Compare* Ackerman, *id.* at 735 (positing that "'middling minorities' of the 'discrete and insular' kind will elect a significant number of Representatives"), *with* Farber & Frickey, *supra* note 18, at 688 (responding that "it would be a serious mistake to conclude that racial minorities have achieved full political equality").

[110] *See* Ackerman, *supra* note 18, at 722–31. Ackerman observed that either discreteness or insularity represented political advantage. In one telling passage, he wrote:

> Over the past half-century, we have been treated to an enormous number of welfare-state variations on a theme of insularity by the farm bloc, the steel lobby, the auto lobby, and others too numerous to mention. In this standard scenario of pluralistic politics, it is precisely the diffuse character of the majority forced to pay the bill for tariffs, agricultural subsidies, and the like, that allows strategically located Congressmen to deliver the goods to their well-organized local constituents.

Id. at 728.

[111] *See id.* at 727. Farber and Frickey find support for Ackerman's thesis in Mancur Olson's classic work, *The Logic of Collective Action*. *See* Farber & Frickey, *supra* note 18, at 700. Olson contended that members of small groups are more likely to organize

concluded that *Carolene Products* needs "doctrinal reorientation."[112]

Footnote four has a sound basis in interpretative review[113] if one looks to a Madisonian principle: an "overbearing majority" poses a continuing threat to "the rights of the minor party [or faction.]"[114] The Framers intended the textually specific components of the constitutional system—the Bill of Rights,[115] republicanism,[116] federalism,[117] and the separation of powers[118]—to both guarantee and limit majority rule.[119] The Supreme Court safeguards the constitutional system when it balances the interests manifested through the majoritarian branches of government against individual rights born of the text[120] or background principles of the Constitution.[121] Footnote four provides a judicial for-

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that their large group counterparts. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 48 (1965).

[112] *See* Ackerman, *supra* note 18, at 737.

[113] *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 10 (1982) ("[Interpretativism] ascertains the constitutionality of a given policy choice by reference . . . to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution.").

[114] THE FEDERALIST No. 10, at 129–30 (James Madison) (Benjamin Fletcher Wright ed., 1961) (observing that measures are too often decided by interested and overbearing parties). *See also* Norman R. Williams II, *Rising Above Factionalism: A Madisonian Theory of Judicial Review,* Note, 69 N.Y.U. L. REV. 963, 963 (1994) (arguing that the Framers recognized the central problem of democratic government was protecting minorities from a tyranny of the majority).

[115] *See generally* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 150–54 (1988) (recounting the Federalists' concern that a Bill of Rights would be read as exhaustive of individual rights).

[116] *See, e.g.*, THE FEDERALIST No. 43, at 312 (James Madison) (Benjamin Fletcher Wright ed., 1961).

[117] *See, e.g.*, THE FEDERALIST No. 14, at 152 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("The subordinate [state] governments . . . will retain their due authority and activity.").

[118] *See, e.g.*, THE FEDERALIST No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.").

[119] *See* H.N. HIRSCH, A THEORY OF LIBERTY 5 (1992) ("Properly understood, American constitutionalism is *meant* to be countermajoritarian."); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1526 (1992) (describing "the Madisonian dilemma" as juxtaposing two conflicting principles—majority rule and individual rights).

[120] *See* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1376 (1998) (footnotes omitted) (discussing that judicial review is not found explicitly in the Constitution).

[121] *See, e.g.*, THE FEDERALIST No. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."). Professor Aleinikoff delineated two forms of

mula for assigning weights to the competing interests. Its first paragraph designates greater weight to fundamental rights[122] as does paragraph three to groups vulnerable to majoritarian tyranny.[123]

B. *An Equal Protection Analogy*

Fifty-nine years after the *Carolene Products* decision, the plaintiffs in *Zehner v. Trigg*[124] invoked the constitutional legacy of footnote four. They contended that the classification critierion employed by § 1997e(e)—"prisoner[s]"[125]—should be considered "suspect,"[126] thus triggering the "more searching" or "more exacting" scrutiny envisaged in *Carolene Products*.[127] The Seventh Circuit Court of Appeals rejected this characterization[128] and foretold the outcome of subsequent equal protection challenges to § 1997e(e).[129] *Zehner* and its progeny effectively con-

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such balancing. One form consisted of "one interest outweighing another." He indicated that *Carolene Products* embraced this form. The other form comprised "'striking a balance' between or among the competing interests .... One interest does not override another; each survives and is given its due." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987). "Balancing," as defined in this Article and by Professor Aleinikoff, consists of "the identification, valuation, and comparison of competing interests." *Id.* at 945.

[122] *See Carolene Products*, 304 U.S. at 152–53 n.4 (addressing those rights found in "the first ten amendments . . . [and] embraced within the Fourteenth Amendment").

[123] *See id.* (addressing "discrete and insular minorities").

[124] Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997).

[125] 42 U.S.C.A. § 1997e(e) (West Supp. 1999).

[126] *See Zehner*, 133 F.3d at 463.

[127] *Carolene Products*, 304 U.S. at 152–53 n.4. The equal protection provisions of the Constitution do not prohibit legislative classifications that treat people differently. Strict scrutiny applies to classifications employing suspect criteria. *See, e.g.*, In re Griffiths, 413 U.S. 717, 721 (1973) (holding that legislation barring aliens from practicing law violated equal protection); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (holding that legislation barring the cohabitation of interracial unmarried couples violated equal protection). *Cf. infra* note 233 (discussing the Court's varied approaches to defining suspect classifications). To escape invalidation, these measures must advance a compelling state interest in a narrowly tailored manner. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969) (concluding that the selective exclusion of otherwise eligible voters from school board elections denied equal protection); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (barring new residents from receiving welfare benefits denied equal protection).

[128] *See Zehner*, 133 F.3d at 463 (finding that "the idea [that inmates constitute a suspect class] is completely unsupported"). Indeed, the case law firmly backs *Zehner* on this point. *See, e.g.*, U.S. v. King, 62 F.3d 891, 895 (7th Cir. 1995); Wilson v. Giesen, 956 F.2d 738, 744 (7th Cir. 1992); Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990); Moss v. Clark, 886 F.2d 686, 690 (4th Cir. 1989); Beck v. Symington, 972 F. Supp. 532, 536 (D. Ariz. 1997).

[129] *See, e.g.*, Davis v. District of Columbia 158 F.3d 1342, 1345–47 (D.C. Cir. 1998) (finding no equal protection violation); Craig v. Eberly, No. 95-M-368, 1997 U.S. Dist.

sidered inmates to be like the "opticians, hot dog vendors, or debt adjusters"[130] receiving rational-basis scrutiny.[131] For the *Zehner* plaintiffs, this analogy proved fatal: after a perfunctory review of § 1997e(e), the court concluded that "the statute is . . . constitutional."[132]

This Article contends that the court in *Zehner* badly erred when it applied rational-basis scrutiny to § 1997e(e). Through an equal protection analogy,[133] I will demonstrate the following: the contemporary inmate population bears striking similarity to "the paradigmatic *Carolene* minority group"—black Americans circa 1938.[134] The points of comparison speak to segregation; prejudice or animus; disenfranchisement; and impoverishment.

LEXIS 22949, at *5–7 (D. Colo. July 27, 1997) (finding no equal protection violation). To date, only the Northern District of Illinois has questioned in dicta the constitutionality of § 1997e(e) under the equal protection clause of the Fourteenth Amendment. *See, e.g.*, Dorn v. DeTella, No. 96 C 3830, 1997 U.S. Dist. LEXIS 1983, at *15–*19 (N.D. Ill. Feb. 20, 1997); Calhoun v. DeTella, No. 96 C 3564, 1997 U.S. Dist. LEXIS 11745, at *17–*18 (N.D. Ill. Feb. 18, 1997). Several courts have also rejected equal protection challenges to the filing fee provisions of the PLRA. *See, e.g.*, Tucker v. Branker, 142 F.3d 1295, 1300 (D.C. Cir. 1998); Mitchell v. Farcass, 112 F.3d 1483, 1488 (11th Cir. 1997); Roller v. Gunn, 107 F.3d 227, 233 (4th Cir. 1997).

[130] Sullivan, *supra* note 23, at 61 n.238.

[131] *See, e.g., Davis*, 158 F.3d at 1347; *Zehner*, 133 F.3d at 463; *Craig*, 1997 U.S. Dist. LEXIS 22949 at *5–*7; *Zehner*, 952 F. Supp. at 1331. Rational basis scrutiny represents the "minimal level of scrutiny that all government actions challenged under equal protection must meet." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES 533–34 (1997).

[132] *See Zehner*, 133 F.3d at 463. The Seventh Circuit let stand the trial court's application of the rational-basis test. *See id.* Indeed, the caselaw firmly backs *Zehner* on this point. *See, e.g.*, U.S. v. King, 62 F.3d 891, 895 (7th Cir. 1995); Wilson v. Giesen, 956 F.2d 738, 744 (7th Cir. 1992); Pryor v. Brennan, 914 F.d 921, 923 (7th Cir. 1990).

In turn, lower federal courts have indicated that the PLRA as a whole satisfies the rational-basis test. *See, e.g.*, Tucker v. Branker, 142 F.3d 1294, 1300 (D.C. Cir. 1998) ("The Congress . . . obviously has a legitimate interest in keeping meritless litigation out of the federal courts . . . ."); Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997) ("The act easily passes the rational basis test."); Roller v. Gunn, 107 F.3d 227, 234 (4th Cir. 1997) ("The legislative solution is entirely rational . . . .").

[133] For an example of the use of analogical reasoning to determine "suspectness," see Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing:" Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65 (1997) (drawing an analogy between racial and sexual orientation discrimination). Professor Ackerman posits a different formula by looking to "statutory prejudice" as a guide for using enhanced judicial protection. Ackerman, *supra* note 18, at 740.

Because males comprise just under 94% of all inmates and are believed to be far more litigious than women, the following discussion of inmate life will solely address male inmates. DARRELL K. GILLIARD & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 1997, at 5 (Aug. 1998) (stating that by the close of 1997 women represented 6.4% of all prisoners). Accordingly, when referring to inmates during the remainder of the Article, I will use the masculine form of indefinite pronouns.

[134] Ackerman, *supra* note 18, at 732. *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST 147 (1980) (stating that race is "the clearest case of a classification that should count as suspect").

1. Segregation

Carolene-era blacks lived in the presence of Jim Crow.[135] Throughout the South a "legal apartheid" had followed Reconstruction.[136] Jim Crow laws extended to virtually all situations in which whites and blacks might gather, including transportation,[137] schools,[138] housing,[139] and prisons.[140] C. Vann Woodward described Jim Crow's ubiquitous presence in public life:

> [U]p and down the avenues and byways of Southern life appeared with increasing profusion the little signs: "Whites Only" or "Colored." Sometimes the law prescribed their dimension in inches, and in one case the kind and color of paint. Many appeared without the requirement by law—over entrances and exits, at theaters and boarding houses, toilets and water fountains, waiting room and ticket rooms.[141]

A "spotty," largely de facto color line ran through the North.[142] By the 1930s, one could trace its path into churches,[143] schools,

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[135] Jim Crow came to represent a system of laws and customs segregating blacks from whites following the Civil War. *See* DOUGLAS S. MASSEY & NANCY DENTION, AMERICAN APARTHEID 25 (1993) (describing the "Jim Crow system"). The origin of this term "is lost in obscurity." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (2d rev. ed. 1966).

[136] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 441–43 (1973) (discussing the "[r]econstruction of legal apartheid" in the American South).

[137] *See* CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 181–222 (1940) (examining the numerous and complex statutory provisions separating blacks and whites on railroads).

[138] *See id.* at 78–137 (referring to segregation in southern schools as "mandatory" and delineating provisions for racial segregation in education).

[139] *See id.* at 138–62 (describing black housing enclaves as "'nigger town[s],'" which could be found in every southern city).

[140] *See id.* at 223–35 (describing segregation in charitable and penal institutions as "an established fact").

[141] WOODWARD, *supra* note 135, at 98.

[142] GUNNAR MYRDAL, AN AMERICAN DILEMMA 617 (1944). The color line predated *Carolene Products*. *See* RAY STANNARD BAKER, FOLLOWING THE COLOR LINE 109–29 (1964) [1908] (observing that blacks in Boston experienced prejudice in restaurants, hotels, and acquiring housing in white neighborhoods). On the other hand, eighteen states enacted civil rights acts that barred segregation in certain public accommodations. *See* MANGUM, *supra* note 137, at 34–77.

[143] *See* Robert Moats Miller, *The Attitudes of American Protestantism Toward the Negro, 1919–1939*, *in* THE NEGRO IN DEPRESSION AND WAR 105, 108 (Bernard Sternsher ed., 1969) (discussing the prejudice evident against blacks by church congregations).

labor unions,[144] prisons,[145] residential areas,[146] and places of public accommodation.[147] Writing in 1944, a Hobart College professor observed that "apparently there is a difference [in the North] between sympathy for the Negro who is far away and the one who is actually present."[148]

Contemporary inmates experience two forms of segregation. First, their confinement segregates them from society for reasons inseparable from race and social class. More than one in four black men will be incarcerated during their lives, a rate six times that of white men.[149] Several factors account for this disparity,[150] but race still matters. A review of thirty-eight major studies addressing the relationship between race and imprisonment finds that "race is a consistent and frequently significant disadvantage when . . . [incarceration] decisions are considered."[151] This dis-

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[144] *See id.* at 381 (observing that many unions affiliated with the American Federation of Labor excluded or segregated blacks).

[145] *See, e.g.*, JOHN IRWIN & JAMES AUSTIN, IT'S ABOUT TIME 71–74 (2d ed. 1997) (describing the placement of black and white inmates in the South into separate prisons, whereas in the North the inmate subculture enforced de facto segregation patterns); NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT, *supra* note 44, at 63 ("Prisons in every section of the United States have long been characterized by racial segregation and discrimination.").

[146] *See, e.g.*, MYRDAL, *supra* note 142, at 618 (observing that in the North residential segregation became the basis for institutional segregation); Carey McWilliams, *Race Discrimination and the Law*, *in* 1 RACE, LAW, AND AMERICAN HISTORY 1700–1990, at 291, 311 (Paul Finkelman ed., 1992) (describing spatial segregation of blacks and whites in the North).

[147] *See* MYRDAL, *supra* note 142, at 617 (observing that blacks were "requested" not to use beaches, hotels, and the like).

[148] JOHN G. VAN DEUSEN, THE BLACK MAN IN WHITE AMERICA 3 (rev. ed. 1944).

[149] THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997) (reporting that 28.5% of black males versus 4.4% of white males will experience imprisonment).

[150] *See, e.g.*, Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQ. 478, 480 (1994) (examining the widespread disagreement among researchers about the causes of disproportionate minority incarceration).

[151] Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, *in* ETHNICITY, RACE, AND CRIME 281, 297 (Darnell F. Hawkins ed., 1995). Race appears to play a more critical role in the "front end" of the criminal justice system than the "backend," i.e., at sentencing. Michael Welch, *Racial and Social Class in the Examination of Punishment*, *in* JUSTICE WITH PREJUDICE 156, 169 (Michael J. Lynch & Edwin Patterson, eds. 1996). The most compelling evidence of discrimination arises in two critical "front end" stages. The first is arrest. *See, e.g.*, JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 21–26 (1983) (finding that arrests of blacks are based on less compelling evidence than for whites); Douglas A. Smith, et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 246 (1984) (finding that arrests are more likely when the alleged offender is a black female or the victim is white). *But see* Alfred Blumstein, *On the Racial Disproportionality of United States Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1278 (1983) (finding arrests for serious crimes to be "reasonably representative"). Studies of charging decisions also

advantage remains strongest in the South: after controlling for prior record and crime severity, African American heritage increases the defendant's chances of incarceration by fifty-three percent.[152] Differential treatment of the races thus colors the prison population[153] and, at the very least, portrays an unconscious racism.[154]

Unemployment more than doubles the odds of imprisonment,[155] which represents a "significant, substantial, and independent impact."[156] The social construction of criminality presents the chronically unemployed underclass—the pejorative la-

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evidence considerable racial disparity. *See, e.g.*, Margaret Farnsworth et al., *Ethnic, Racial, and Minority Disparity in Felony Court Processing*, *in* RACE AND CRIMINAL JUSTICE 54, 67 (Michael J. Lynch & E. Britt Patterson eds., 1991) (finding that white male drug defendants consistently enjoyed court processing advantages over black and Hispanic males); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Racial Discrimination*, 18 L. & SOC'Y REV. 437, 455 (1984) (finding the race of the victim to influence charging decisions).

[152] *See* Chiricos & Crawford, *supra* note 151, at 297. Outside the South, blacks face a 34% greater likelihood of incarceration. *See id.*

[153] *See* David Cohen, *Democracy and the Intersection of Prisons, Racism and Capital*, 15 NAT'L BLACK L.J. 87, 88 (1997) (decrying that "black is the color of crime"; and that "[t]he rhetorical driving force behind this increase in incarceration . . . is the faceless, nameless, identity-less African-American man doing violence to white society." (footnotes omitted). *See also* JEROME G. MILLER, SEARCH AND DESTROY 235 (1996) (stating that "[u]nspoken racial premises . . . sustain our national anticrime strategies . . . ."). *Cf.* JEWELLE TAYLOR GIBBS, YOUNG, BLACK, AND MALE in AMERICA: AN ENDANGERED SPECIES 2 (1988) (observing that "young black males are stereotyped by the five 'ds': dumb, deprived, dangerous, deviant, and disturbed").

[154] Some commentators attributed the racial disparity in the prison population to racism on the part of prosecutors and legislators. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995) (arguing that racism permits legislative tolerance of a drug law that results in blacks comprising over 91% of federal crack defendants); Jason A. Gillmer, Note, United States v. Clary*: Equal Protection and the Crack Statute*, 45 AM. U.L. REV. 497, 501–03 (1995) (asserting that the federal crack statute reflected unconscious racism and should be held unconstitutional). *See also* MICHAEL TONRY, MALIGN NEGLECT 123 (1964) ("It is hard to imagine any legitimate rationale for the decision by the drug war's designers to adopt policies that were unlikely to achieve their ostensible goals and that were foreordained to affect disadvantaged black Americans disproportionately."). *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–39 (1987) (describing how psychoanalytic theory and cognitive psychology account for unconscious racism).

[155] *See* Theodore Chiricos & William Bales, *Unemployment and Punishment: An Empirical Assessment*, 29 CRIMINOLOGY 701, 712 (1991) (finding that unemployed defendants were 3.2 times more likely to be jailed before trial than employed defendants). This finding is consistent with most of the scholarly literature. *See id.* at 702–04 (reviewing the literature). Race, however, influenced incarceration decisions regardless of employment: Chiricos and Bales found that employed blacks were 5.8 times more likely to be imprisoned for drug crimes than employed whites. *See id.* at 719. *See also* JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 101, 136 (5th ed. 1998) (concluding that the criminal justice system works systematically to punish and confine only the poor who are dangerous and criminal).

[156] Chiricos and Bales, *supra* note 155, at 719.

bel for impoverished inner-city residents[157]—as crimineogenic and thus properly housed in prison.[158] Indeed, the nation's ghettos function as farm clubs for our major league prisons given the movement of offenders between them.[159] Managing this urban rabble drives contemporary penal policy toward incapacitating offenders[160] irrespective of their dangerousness.[161]

At one time public policy in the North and South mandated separation of the races inside prison.[162] That ended in 1968 when *Lee v. Washington*[163] prohibited de jure segregation unless it

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[157] *See, e.g.*, WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 8 (1987) (describing the underclass as a mix of (1) the long-term unemployed; (2) street criminals; and (3) individuals experiencing protracted poverty and/or reliance on welfare); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 467 (1992) ("The term 'underclass' is used to refer to a largely black and Hispanic population living in concentrated zones of poverty in central cities, separated physically and institutionally from the suburban locus of mainstream social and economic life in America."); Michael Welch, *Jail Overcrowding*, *in* CRIME AND JUSTICE IN AMERICA 263, 270 (Paul F. Cromwell & Roger G. Dunham eds., 1997) (describing the underclass as "uneducated, possess[ing] virtually no job skills, and hav[ing] little or no work experience").

[158] *See, e.g.*, JOHN IRWIN, THE JAIL 2 (1985) (arguing that the jail primarily operates to control the "rabble," "meaning the disorganized and disorderly, the lowest class of people") (internal quotations mark and footnote omitted); REIMAN, *supra* note 155, at 102 (arguing that the criminal justice system weeds out people so that the vast majority of people in prison are from the lower classes); Edward P. Sbarbo & Robert L. Keller, *Introduction* to PRISON CRISIS: CRITICAL READINGS 1, 11 (Edward P. Sbarbo & Robert L. Keller eds., 1995) (contending that "[s]ocial junk"—the inner city poor and minorities—form "a dangerous class," which the criminal justice system seeks to control).

[159] *See* Leo Carroll, *Race, Ethnicity, and the Social Order of the Prison*, *in* THE PAINS OF IMPRISONMENT 181, 182 (Robert Johnson & Hans Toch eds., 1988) (identifying "most" minority inmates as former "residents of ghettos"). *See also infra* note 198 (comparing the ghetto to the prison); *infra* notes 203–207 and accompanying text (discussing the socio-economic status of contemporary inmates).

[160] Incapacitation has been called "the principal justification" for the nation's imprisonment binge. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION 3 (1995). Incapacitation theory posits that disabling offenders will reduce crime rates. *See* RICHARD HAWKINS & GEOFFREY ALPERT, AMERICAN PRISON SYSTEMS 108–28 (1989) (reviewing incapacitation theory). Most of scholarly literature concludes that imprisonment exercises a marginal impact on crime rates. *See, e.g.*, JOSEPH DILLION DAVEY, THE POLITICS OF PRISON EXPANSION 108 (1998) (stating that "the association between increases in crime rates and the increase in imprisonment rates showed a low correlational coefficient"); ALBERT J. REISS & JEFFREY ROTH, UNDERSTANDING AND PREVENTING VIOLENCE 6 (1993) (tripling the prison population between 1975 and 1989 had "[a]pparently, very little" impact on crime rates); RICHARD A. WRIGHT, IN DEFENSE OF PRISONS 165 (1994) (stating that prisons are "modestly effective" in reducing crime rates).

[161] *See* DAVEY, *supra* note 160, at 102–03 (contending that most inmates are not dangerous); IRWIN & AUSTIN, *supra* note 145, at 3 (writing that 52% of the crimes resulting in prison sentences are petty in nature, which is consistent with studies finding that 50–70% of inmates are classified as minimum-custody).

[162] *See, e.g.*, NEW PERSPECTIVES, *supra* note 44, at 63–64; Leo Carroll, *Racial Conflict*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 33, at 377.

[163] 390 U.S. 333 (1968) (per curiam).

arose from "the necessities of prison security and discipline."[164] Since then, inmates themselves have drawn a color line. De facto segregation in housing and communal activities, such as recreation, meals, and "hanging out," prevails throughout the federal and state prison systems.[165] Commentators attribute this color line to fear of interracial assault[166] and interracial hatred.[167]

2. Prejudice

Carolene-era blacks did not experience the segregation of equals. In his dissent in *Plessy v. Ferguson*,[168] Justice Harlan observed that segregation rested on prejudice:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed upon the grounds that colored citizens are so inferior and degraded that they can not be allowed to sit in public coaches occupied by white citizens?[169]

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[164] *Id.* at 334.

[165] *See, e.g.*, LEO CARROLL, HACKS, BLACKS, AND CONS 141–71 (1988) (describing race relations in a Rhode Island prison); IRWIN, *supra* note 36, at 183–86 (discussing racial relations among incarcerated blacks and whites). Lower federal courts have disapproved of "voluntary" segregation in housing assignments. *See, e.g.*, Jones v. Diamond, 636 F.2d 1364, 1373 (5th Cir. 1980) (finding unconstitutional a housing plan in which newly admitted black inmates could choose to reside either in an all-black housing unit or an all-white unit holding many assaultive inmates); Finney v. Mabry, 534 F. Supp. 1026, 1042–43 (E.D. Ark. 1982) (barring placement grounded on racial preference but indicating that placement based on risk of assault would be acceptable); Rentfrow v. Carter, 296 F. Supp. 301, 303 (N.D. Ga. 1968) (forbidding housing assignments based on "freedom of choice").

[166] Studies of rape in prison find a predominance of black aggressors and white victims. *See, e.g.*, CARROLL, *supra* note 165, at 182 (estimating that at least 75% of sexual assaults involved black assailants and white victims in a Rhode Island prison); DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 28–29 (1980) (recounting that in New York prisons blacks comprised 80% of the aggressors as compared to 6% of white inmates). One commentator argued that these rapes symbolize "'get[ting] back at the white man.'" Leo Carroll, *Humanitarian Reform and Biracial Sexual Assault in a Maximum Security Prison*, 5 URBAN LIFE 417, 422 (Jan. 1977).

[167] *See* IRWIN, *supra* note 36, at 182 (concluding that "[r]aces, particularly black and white, are divided and hate each other [in prison]").

[168] 163 U.S. 537 (1896).

[169] *Id.* at 560 (Harlan, J., dissenting). Nearly a half-century after *Plessy*, commentators drew similar conclusions. *See, e.g.*, EDWIN R. EMBREE, BROWN AMERICANS 160 (1943) (describing a "vicious cycle of caste," whereby racism "pushed [African Americans] still farther down"); VAN DEUSEN, *supra* note 148, at 1 (stating that the "real reason" behind the inferior treatment of blacks of the era was the supposed inferiority of the black race).

In his classic study of "the Negro problem," Gunnar Myrdal delineated "the white man's . . . discriminations."[170] In descending priority, they constituted (1) the ban against intermarriage and interracial sex; (2) "several etiquettes and discriminations" in interpersonal relationships, e.g., dancing, bathing, handshaking, and use of titles; (3) "segregations and discriminations" in public facilities; (4) disenfranchisement; (5) "discriminations in law courts, by the police, and by other public servants;" and (6) "discriminations" in earning a livelihood or securing welfare benefits.[171]

The degree of racial prejudice found in the contemporary prison exceeds that of any other public institution. When discussing race relations in prison, penologists speak of "mistrust, suspicion, and tensions separating the races;"[172] inmates' "hat[red]" of other races;[173] "racial polarization;"[174] and "racial conflict."[175] Race exercises a greater influence on the prison experience than any other factor.[176] It dictates where an inmate will be housed, stand or sit, with whom he can socialize, and the cliques he can join.[177]

Racial dynamics in prison resemble a crucible—from the heated interaction of racial and ethnic groups, hate boils to the surface.[178] Persons who may have repressed racial prejudice outside the prison find no such restraint behind bars:

> After 10:30, the noise dropped a decibel or two, and from the morass of sound Ron began to recognize certain voices by timbre and catch snatches of conversation. Above him,

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[170] MYRDAL, *supra* note 142, at 60.

[171] *Id.* at 60–61.

[172] CARROLL, *supra* note 165, at 380.

[173] IRWIN, *supra* note 36, at 182 (1980).

[174] NEW PERSPECTIVES, *supra* note 44, at 74.

[175] CARROLL, *supra* note 165, at 235.

[176] *See* Jim Thomas, *Racial Codes in the Prison Culture, Snapshots of Black and White*, *in* RACE AND CRIMINAL JUSTICE 126, 142 (Michael J. Lynch & E. Britt Patterson eds., 1991) (observing that "the prison experience is a racial experience for all who participate in the prison subculture"). *See also* NEW PERSPECTIVES, *supra* note 44, at 71, 81 (describing spatial and social separation of inmates by race); MICHAEL WELCH, CORRECTIONS: A CRITICAL APPROACH 275 (1996) (identifying de facto racial segregation in prison).

[177] *See* ERIK OLIN WRIGHT, THE POLITICS OF PUNISHMENT 167–68 (1973) (describing the racially segregated lifestyle of San Quentin prisoners in the 1970s). *See also* J.A. SLOSAR, JR., PRISONIZATION, FRIENDSHIP AND LEADERSHIP 88 (1978) (finding that race was a "very important factor" in influencing inmates' choice of friends and leaders).

[178] Racial animus is not limited to whites. A study of juvenile institutions found black inmates also exhibit race-specific norms fostering the exploitation of white inmates. *See* CLEMENS BARTOLLAS ET AL., JUVENILE VICTIMIZATION 62–67 (1976).

> perhaps on the second tier, he picked up a gumboed black voice saying he'd like to kill all white babies, while his listener agreed it was the best way to handle the beasts—before they grew up. A year earlier, Ron would have felt compassion for anyone so consumed by hate and whenever whites casually used "nigger" he was irked. Now he felt tentacles of hate spreading through himself—and a half an hour later, he smiled when a batch of voices began chanting: "Sieg Heil! Sieg Heil! Sieg Heil![179]

As one commentator observed, "[t]he very structure of the prison—its walls and bars, its rigid hierarchy, its whiteness [amongst prison staff]—seems designed to foster an image of a racist conspiracy."[180] Discretionary decisions by a largely white prison staff confirm "[t]he sense of discrimination."[181] White officers perceive black inmates as more dangerous than white inmates, leading to their enhanced surveillance.[182] Correctional officers are also more likely to disperse gatherings of blacks, search their cells, and charge them with disciplinary violations.[183]

3. Disenfranchisement

Southern states had blocked black citizens' access to the ballot box long before *Carolene Products*.[184] They did so largely through poll taxes,[185] intimidation,[186] and criminal disenfranchisement

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[179] IRWIN, *supra* note 36, at 183–84 (footnote omitted).

[180] Carroll, *supra* note 159, at 184.

[181] *Id.* at 185. *Cf.* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 423 (1993) (observing that most of the early inmate suits claimed racial discrimination).

[182] *See* Carroll, *supra* note 159, at 185.

[183] *See id.*

[184] *See* FRANKLIN & MOSS, *supra* note **Error! Bookmark not defined.**, at 261 (writing that blacks in the South had effectively lost the right to vote during the late 19th and early 20th centuries); VAN DEUSEN, *supra* note 148, at 122–25 (describing the disenfranchisement of black voters at the turn of the century).

[185] *See* MANGUM, *supra* note 137, at 389–90 (observing that "[lawmakers] believed that many Negroes would not pay the tax and hence would be disqualified"); MYRDAL, *supra* note 142, at 481 (characterizing the poll tax as "the most notorious" means of excluding would-be black voters); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second, in* MINORITY VOTE DILUTION 27, 34 (Chandler Davidson ed., 1984) (describing the poll tax as an effective means of disqualifying potential voters). The Supreme Court in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), would find state poll taxes unconstitutional. *See id.* at 665–70. The Twenty-fourth Amendment prohibits federal poll taxes. *See* U.S. CONST. amend. XXIV.

[186] *See* MYRDAL, *supra* note 142, at 446 ("A review of the various devices by which the Negroes are disfranchised in the South today cannot avoid exposing a rather odious panorama of legal trickery, unfair administration, intimidation and forthright violence." (footnote omitted)).

statutes tailored to offenses attributed to African Americans.[187] In the North, "nonvoting" by African Americans rendered them politically powerless.[188] Presently, legislation in all but four states—Maine, Massachusetts, New Hampshire, and Vermont—excludes imprisoned felons from voting.[189] Ex-felons fare only somewhat better, with one-fourth of the states providing for automatic restoration of voting rights.[190] Criminal disenfranchisement closes the voting booth to some four million people, who are disproportionately black.[191]

4. Impoverishment

"The economic situation of the Negroes in America is pathological," declared Myrdal.[192] He attributed their socio-economic status to a "vicious cycle":

> In the beginning the Negroes were owned as property. When slavery disappeared, caste remained. Within this framework of adverse tradition the average Negro in every generation has had a most disadvantageous start. Discrimination against Negroes is thus rooted in this tradition of economic exploitation. It is justified by false racial beliefs . . . . This deprecation of the Negro's potentialities is given a semblance of proof by the low standards of . . . [achievement].[193]

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[187] *See* MANGUM, *supra* note 137, at 391 (observing that South Carolina authorities disenfranchised half of its population by several methods, including criminal disenfranchisement statutes). In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court read § 2 of the Fourteenth Amendment to permit disenfranchisement of convicted felons. *See id.* at 54–56. A later ruling, *Hunter v. Underwood*, 471 U.S. 222 (1985), struck down Alabama's criminal disenfranchisement statue because its drafters intended to and succeeded in disproportionately purging blacks from the electorate. *See id.* at 227–33. Section 2 of the Fourteenth Amendment provides that "the basis of representation shall be reduced" when states deny the franchise to otherwise eligible male voters, "except for participation in rebellion or other crime . . . ." U.S. CONST. amend. XIV, § 2.

[188] *See* MYRDAL, *supra* note 142, at 491. Myrdal attributed their "nonvoting" to ignorance, poverty, and "timidity" arising from the intimidation of the black electorate in the South. *Id.*

[189] George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999).

[190] *See* BARBARA B. KNIGHT & STEPHEN T. EARLY, JR., PRISONERS' RIGHTS IN AMERICA 290 (1986). Fourteen states impose a lifetime voting ban on ex-felons. *See* Fletcher, *supra* note 189, at 1898.

[191] *See* Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 & n.17 (1993). Criminal disenfranchisement statutes render 14% of black men—1.46 million—ineligible to vote. *See* Fletcher, *supra* note 189, at 1900.

[192] MYRDAL, *supra* note 142, at 205.

[193] *Id.* at 208.

Most *Carolene*-era blacks lived in poverty.[194] They remained concentrated in the overpopulated and economically depressed rural South,[195] where emancipation had brought them peonage as tenant farmers.[196] Nonagricultural employment for African Americans in both the North and South principally consisted of low paid service occupations or menial jobs in industry.[197]

The socio-economic status of contemporary inmates resembles that of *Carolene*-era blacks, especially those confined to the ghetto. Most inmates come from the impoverished inner city, long a source of cheap labor.[198] Of those persons who had been free for a year or more before their arrest, fifty percent had incomes under $10,000 and nineteen percent reported incomes less than $3000.[199] Pre-arrest unemployment rates mirror those of the Great Depression.[200] Fifty percent left school before the eleventh grade.[201] Three of every four inmates cannot read above an eighth grade level and as many as half may be functionally illiterate.[202]

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[194] *See* FRANKLIN & MOSS, *supra* note **Error! Bookmark not defined.**, at 384 (stating that 17% of whites and 38% of blacks were considered "incapable of self-support in any occupation" during the 1930s); MYRDAL, *supra* note 142, at 205 (describing the poor blacks as comprising an "extraordinary large proportion" of their racial group). *See also* RAYMOND WOLTERS, NEGROES AND THE GREAT DEPRESSION, at ix (1970) (writing that during the depression blacks were the most disadvantaged group).

[195] *See* CHARLES E. HALL, U.S. DEP'T OF COMMERCE, NEGROES IN THE UNITED STATES 1920-32 3 (Greenwood Press 1969) (1935) (stating that 78.7% of blacks resided in the South as of 1930); MYRDAL, *supra* note 142, at 183–85 (writing in 1940 that 23.8% of blacks lived in the North and West but comprised just 3.7% of the total Northern population; and in the South just 37.3% of the black population resided in cities).

[196] *See* CARTER GODWIN WOODSON, THE RURAL NEGRO 67–88 (1930). Woodson argued that black peonage arose as a "natural consequence of things in the agricultural South." *Id.* at 69–70. *See also* WOLTERS, *supra* note 194, at 16 (observing that a large share of New Deal agricultural funds went to landlords rather than tenant farmers).

[197] *See* MYRDAL, *supra* note 142, at 279–363 (concluding that the depression and the influx of immigrants drove blacks out of jobs once reserved for them). *Cf.* FRANKLIN & MOSS, *supra* note **Error! Bookmark not defined.**, at 384 (noting that blacks faced discrimination in securing relief work during the depression).

[198] *See* Carroll, *supra* note 159, at 182 (finding that the contemporary prison and the ghetto both house a high percentage of minority residents, provide cheap labor, and through "order segmentation" separate their multi-ethnic residents; furthermore, "most" inmates of color once resided in ghettos).

[199] *See* REIMAN, *supra* note 155, at 135.

[200] *Compare id.* at 134 (observing that 33% of inmates lacked any employment at time-of-arrest and another 12% had part-time employment), *with* FRANKLIN & MOSS, *supra* note **Error! Bookmark not defined.**, at 384 (stating that 38% of African Americans were deemed "incapable of self-support in any occupation" in 1934).

[201] *Compare* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, at 551 tbl.6.30 (1995) (indicating that in 1992 the median education of inmates in 38 states was the 11th grade), *with* HALL, *supra* note 195, at 210 tbl.5 (indicating that 46.3% of blacks age 16–17 were attending school in 1930).

[202] *See* Eisenberg, *supra* note 181, at 442.

Once released, they remain social and economic outcasts.[203] Many experience joblessness or underemployment.[204] Some employment barriers are statutory, such as denying ex-felons access to various licensed occupations.[205] Others amount to informal, de facto discrimination.[206]

C. *"But not Exactly"*

In *Frontiero v. Richardson,*[207] the Supreme Court held that gender discrimination merits heightened scrutiny.[208] An analogy between the subordination of women and African Americans during the nineteenth century buttressed the ruling. In relevant part, the plurality opinion contended that "[t]raditionally, [gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[209] Commenting on this analogy, Professor Sullivan would add that "gender discrimination is like racial discrimination *but not exactly* . . . [because] the histories are different: no one ever confused an auction block for a 'pedestal,' even a 'pedestal' that turned out to be a 'cage.'"[210] This Article concedes that an analogy between inmates and *Carolene*-era blacks also requires a "not exactly" qualification on two counts: they have different histories; and race, unlike penal status, is geneti-

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[203] *See* IRWIN & AUSTIN, *supra* note 145, at 80 (characterizing inmates as "among society's leading pariahs"); Fletcher, *supra* note 189, at 1898 (describing felons as "the undercaste of American society"). Pamela S. Karlan, *Bringing Compassion Into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N. DAK. L. REV. 173, 176 (1995) (describing inmates as "the least sympathetic group of 'outsiders' in our constitutional jurisprudence.").

[204] *See* IRWIN & AUSTIN, *supra* note 145, at 121–22 (stating that in 1991 only 21% of California's parolees had full-time employment).

[205] *See* CLEAR & COLE, *supra* note 37, at 464.

[206] *See id.* at 461 (observing that employers are reluctant to hire parolees because they perceive a conviction to be "evidence of untrustworthiness").

[207] 411 U.S. 677 (1973).

[208] *See id.* at 682, 684–86 (Brennan, J., for the plurality) (holding that legislation discriminating against women merited "close judicial scrutiny").

[209] *Id.* at 684. The Court also observed:

> Neither slaves nor women could hold office [during the nineteenth century], serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right–which is itself "preservative of other basic civil and political rights"–until adoption of the Nineteenth Amendment half a century later.

Id. at 685 (footnotes and citations omitted).

[210] Sullivan, *supra* note 23, at 61 n.248.

cally predetermined. Nevertheless, these distinctions are of limited significance for equal protection purposes.

1. "Cells" and "Cages"

Nearly one of every two inmates has ancestors who were auctioned for sale.[211] Moreover, inmates recognize their cages for what they are—representations of involuntary servitude,[212] the modern equivalent of plantation slavery. Indeed, the prison experience resembles plantation slavery in several respects: (1) inmates' keepers, like the keepers of slaves, dictate routine daily activities; (2) just as slaves typically lived in remote areas, inmates often reside far from major cities; and (3) inmates' cultural insignia of "hard labor," distinctive dress, and the "clanking of chains" mirror that of slavery.[213]

Because oppression forms a long and significant chapter of black history,[214] the contribution of the penal system to that oppression cannot be understated.[215] Prisons, particularly those in

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[211] *See* GILLIARD & BECK, *supra* note 133, at 9 (indicating that in 1996 blacks comprised 49.4% of all inmates under state and federal jurisdiction, whereas whites made up 47.9%, American Indian/Alaskan natives, 1.8%, and Asian/Pacific Islanders, 0.8%). *See also* WELCH, *supra* note 176, at 268 ("[M]ost African Americans are descendants of slaves.").

[212] The Constitution does not bar penal slavery. *See* U.S. CONST. amend. XIII (prohibiting slavery and involuntary servitude "except as punishment for crime"). While contemporary inmates possess limited rights, courts of the 19th and early 20th centuries regarded the inmates' forebears as "slaves of the State." Ruffin v. Virginia, 62 Va. (21 Gratt.) 790, 796 (1871). "This perspective mirrored the prevailing view in American society that prisoners suffered a total deprivation of liberty when entering the doors of the prison." John R. Farrar, *Legal Issues, II. Historical Background, in* ENCYCLOPEDIA OF AMERICAN PRISONS *supra* note 33, at 282, 282. *But see* Donald H. Wallace, *Prisoners' Rights: Historical Views, in* CORRECTIONAL CONTEXTS 248, 248–52 (James W. Marguart & Jonathan R. Sorensen eds., 1997) (arguing that *Ruffin* is not representative of the era because courts did occasionally intervene on behalf of inmates under statutory and common law causes of action during the late 19th and early 20th centuries).

[213] ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY 71 (1992). *See also* CARROLL, *supra* note 165, at 131 (observing the presence of plantation terminology in prison: if an inmate cooperates with prison staff he becomes a "tom," "a position analogous to the house servant or overseer on the slave plantation"); FEELEY & RUBIN, *supra* note 43, at 155–57 (observing that Southern prisons "were modeled on the slave plantation" and followed several of the traditions of the slave plantation, such as whipping recalcitrant inmates and pursuing escapees with dogs).

[214] William Julius Wilson wrote that "[r]acial oppression was designed, overt, and easily documented." William Julius Wilson, *The Declining Signficance of Race, in* SOURCES: NOTABLE SELECTIONS IN RACE AND ETHNICITY 44, 45 (Adlaberto Aguirre, Jr. & David V. Baker eds., 2d ed. 1998).

[215] One black history text observed the following:

> After the Civil War the criminal justice system was corrupted in that it assumed the controlling role formerly played by the institution of slavery. Many blacks walked away from the chains of slavery only to become ensnared in the

the South, openly functioned to control and exploit "able-bodied young colored men" well into this century.[216] As we enter the new century, the prison retains a semblance of its post-Civil War role: racism persists,[217] the criminal justice system supervises one of every three young black men,[218] and prisons are no less blind to race as a defining characteristic.[219]

2. "Not Exactly" an Accident of Birth

For the *Frontiero* Court, the immutability of race and gender made discrimination on those bases manifestly unfair:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate

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faceless and, in many respects, more horrible oppression of courts, executions, prisons, poverty, and despair.

MARY FRANCES BERRY & JOHN W. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA 231 (1982).

[216] *See* FEELEY & RUBIN, *supra* note 43, at 151 ("This [plantation] model, like segregation, was a lineal descendant of the South's separate culture .... The Civil War ended the slave plantation, but certainly did not destroy its appeal."); OSHINSKY, *supra* note 36, at 223 (describing Mississippi's Parchman Prison Farm as "[a] [f]arm with [s]laves"); WILBERT RIDEAU AND RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS (1972) (describing the inmate experience in Louisiana's Angola Prison, which occupies the grounds of a former plantation). These prisons evolved out of the convict lease system, another "species of slave labor." MARK T. CARLETON, POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM 45 (1990). *See generally* Christopher R. Adamson, *Punishment After Slavery; Southern Penal Systems, 1865–1900*, *in* 8 RACE, LAW, AND AMERICAN HISTORY 1700–1990 1, 11 (Paul Finkelman ed., 1992) (observing that after the Civil War "race control [in the South] became the central aim of crime control").

[217] *See* Coramae Richey Mann, *The Contribution of Institutionalized Racism to Minority Crime*, *in* ETHNICITY, RACE AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 259, 259 (Darnell F. Hawkins ed., 1995):

> The racism found in each of the nation's established institutions is enormous, pervasive, and debilitating. At every level of contemporary human existence—education, housing, politics, health, law, welfare, economics, religion, and the family—racism and racial discrimination in American institutions have contributed to and continue to perpetuate the minority status and the current condition of African-Americans, Native Americans, Hispanic Americans, and Asian-Americans.

Id.

[218] *See* David H. Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies, One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1211 (1997) (referring to black men between the ages of 20 and 24).

[219] *See* Michael J. Lynch & E. Britt Patterson, *Thinking About Race and Criminal Justice: Racism, Stereotypes, Politics, Academia, and the Need for Context*, *in* JUSTICE WITH PREJUDICE 1, 17 (Michael J. Lynch & E. Britt Patterson ed., 1996) ("The criminal justice system is not an isolated institution that influences the remainder of society by the way it behaves. It is a reflection (as well as coproducer) of broader social institutions.").

> "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ."[220]

But does immutability constitute an appropriate basis for distinguishing inmates from blacks for equal protection purposes? This article answers "not exactly" for the reasons delineated below.

a. *The reproduction of the prison population.* The idea of imprisonment as an accident of birth is reconcilable with biology-based explanations of crime.[221] While most criminologists look elsewhere for causation,[222] it would be premature to dismiss categorically biogenic and biosocial theories. James Q. Wilson and Richard Herrnstein present one of the best argued cases for a biological link to crime.[223] They contend that various inherited traits, including body type and I.Q., in combination with certain environmental conditions, predispose individuals to criminal behavior.[224]

Many criminologists find sociological inquiries indispensable in explaining crime.[225] Among the factors these criminologists link to individuals' criminality are societal conditions,[226] subcultures,[227] social disorganization,[228] and normative conflict.[229] Like

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[220] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Casualty & Surety Co. et al., 406 U.S. 164, 175 (1972)).

[221] For an extended summary and critique of the numerous biogenic and biosocial theories of criminality, see, for example, FRANK E. HAGAN, INTRODUCTION TO CRIMINOLOGY: THEORIES, METHODS, AND CRIMINAL BEHAVIOR 138–51 (2d ed. 1990); FRANK SCHMALLEGER, CRIMINAL JUSTICE TODAY: AN INTRODUCTORY TEXT FOR THE TWENTY-FIRST CENTURY 92–97 (annotated instructor's ed., fifth ed. 1999); GEORGE B. VOLD & THOMAS J. BERNARD, THEORETICAL CRIMINOLOGY 84–107 (3d ed. 1986).

[222] A survey of criminologists found 3.9% and 0.7% subscribed to biosocial and neo-Darwinian theories, respectively. *See* Lee Ellis & Anthony Walsh, *Criminologists' Opinions About Causes and Theories of Crime and Delinquency*, 24 CRIMINOLOGIST 1, 5 tbl.1 (1999).

[223] *See* JAMES Q. WILSON & RICHARD HERRNSTEIN, CRIME AND HUMAN NATURE (1985).

[224] *See id.* at 103 ("[C]rime cannot be understood without taking into account individual predispositions and their biological roots.").

[225] *See generally* HAGAN, *supra* note 221, at 164 (arguing that the "preeminence of sociological approaches to criminological theory" took hold in the 1930s).

[226] *See, e.g.*, Robert K. Merton, *Anomie*, *in* 1 CRIME AND JUSTICE 442, 454–57 (Leon Radzinowicz & Marvin E. Wolfgang, eds. 1971) (positing that crime arises when conventional paths to social goals are blocked).

[227] *See, e.g.*, Richard A. Cloward & Lloyd E. Ohlin, *Opportunity Theory*, *in* CRIME IN SOCIETY 124, 126–37 (Leonard D. Savitz & Norman Johnston eds., 1978) (contending that delinquent subcultures arise out of the disjunction between social goals and legitimate access to those goals).

[228] *See, e.g.*, Clifford R. Shaw & Henry D. McKay, *Social Disorganization*, *in* 1 CRIME AND JUSTICE, *supra* note 226, at 406, 415–19 (positing that the highest crimes rates occurred in urban areas in a state of social disorganization as illustrated by poverty, unemployment, and illegitimacy).

[229] *See, e.g.*, Thorsten Sellin, Conflicting Norms, *in* 1 CRIME AND JUSTICE, *supra* note 226, at 395, 397–99 (suggesting that conflicting cultural codes within a society give rise

biogenic and biosocial theories, sociological approaches marginalize the moralistic notion of *individual responsibility* for crime and any consequent punishment.[230]

Discriminatory practices within the criminal justice system also influence the reproduction of the prison population. Recall that being black and/or unemployed—both unrelated to culpability—significantly enhance a defendant's chances of imprisonment.[231] Youthfulness and maleness, both accidents of birth, further increase the likelihood of confinement among unemployed black defendants.[232]

b. *Vulnerability and* Carolene Products*—a reprise. Frontiero*'s focus on immutability confuses the analysis of whether a particular group should be considered "discrete and insular," and thus afforded heightened judicial scrutiny, for equal protection purposes.[233] Louis Lusky, Justice Stone's clerk during the 1937-1938 Term,[234] stated that "the phrase 'discrete and insular' applies to groups that are not embraced within the bond of community kinship but are held at arm's length by the group or

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to crime).

[230] *See* Robert MacIver, *Social Causation*, *in* CRIME IN SOCIETY, *supra* note 227, at 215, 216 ("The numerous conjectures of occasion, opportunity, personal experience, and socio-economic situation, to which acts of crime are responsive, make the appeal to any universal moral principle at best an inadequate and unilluminating explanation.").

[231] *See supra* notes 151–152, 155–156 and accompanying text (finding that race and unemployment exercise significant and independent effect on incarceration decisions).

[232] *See* Chiricos & Bales, *supra* note 155, at 717 tbl.8.

[233] *Frontiero* is one of many cases in which the Supreme Court has failed to articulate its criteria in determining suspect and semi-suspect classifications. *See, e.g.*, In re Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting) (contending that "the Court, in a rather casual way, has articulated the phrase 'suspect classification' as though it embraced a reasoned constitutional concept"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (asserting that "decisions in the field of equal protection defy . . . easy categorization"); Douglas R. Widin, Note, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 427–28 (1982) (contending that "[t]he first striking deficiency of suspect classifications analysis is the lack of a cogent definition of 'suspect class'") (footnote omitted).

The Court's rulings suggest that several broad themes unite groups given quasi-suspect status: (1) a history of discrimination; (2) lack of political power; and (3) a defining characteristic that is immutable to the extent that one cannot deny his or her membership in the disadvantaged group. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442–45 (1985); Plyer v. Doe, 457 U.S. 202, 219 n.19 (1982).

However, the Court has not consistently emphasized the same factors, leading one commentator to describe the Court's analysis as an "analytical muddle." Simon, *supra* note 1, at 141.

[234] Lusky claims he was "privy . . . [to] the spirit in which it [footnote four] was offered." Lusky, *supra* note 104, at 1093.

groups that possess dominant political and economic power."[235] Vulnerability to oppressive political and economic power, then, is the key to determining whether a given classification is suspect. Although mutability may, in some contexts, inform a judgment whether a group is particularly vulnerable, mutability is certainly not a necessary condition of a suspect class. Indeed, footnote four does not distinguish between vulnerability arising as an accident of birth or from a chosen religious persuasion.[236] Footnote four speaks to vulnerability per se, not its etiology.

3. "Skeptical Scrutiny"

We have seen that inmates confront disadvantages quite similar to, but "not exactly" like those directed at *Carolene*-era blacks. Accordingly, discriminatory measures directed against inmates, including § 1997e(e), ought to receive equal protection review one step down from the strict scrutiny applied to racial classifications.[237]

When Professor Sullivan argued that gender discrimination was similar to but "not exactly" as onerous as racial discrimination, intermediate scrutiny[238] stood just below strict scrutiny. Since then, in *United States v. Virginia*,[239] the Court invoked "skeptical scrutiny"[240]—a standard that "[does] not merely re-

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[235] *Id.* at 1105 n.72. *See also Rodriguez*, 411 U.S. at 28 (defining a suspect class as "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

[236] *See* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938) (stating that religious minorities were groups worthy of "more searching judicial inquiry").

[237] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (concluding that legislation restricting welfare benefits on the basis of alienage violated equal protection); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (ruling that segregated schools violated equal protection).

[238] Intermediate scrutiny requires the government to establish that the discriminatory measures are "substantially related" to an "important" or "legitimate" governmental objective. *See, e.g.*, Mississippi University for Women, 458 U.S. at 724 ("[W]e conclude that the challenged statutory classification is not substantially related to an important objective . . . ."); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (stating that governmental restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest").

[239] 518 U.S. 515 (1996).

[240] *Id.* at 531.

state the intermediate scrutiny test but press[es] it closer to strict scrutiny."[241] Courts should apply this standard to § 1997e(e).

The *Virginia* Court held that the exclusion of females from the Virginia Military Institute violated the equal protection clause of the Fourteenth Amendment.[242] Speaking for the Court, Justice Ginsburg ruled that the state had failed to establish an "exceedingly persuasive justification," the "core instruction of [the] Court's pathmarking decisions [on gender discrimination]."[243]

Three elements constitute an exceedingly persuasive justification.[244] First, the state must "*at least* [demonstrate] that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[245] Second, this burden rests "entirely on the state."[246] Third and most importantly, a reviewing court must evaluate the strength of the government's case for discriminatory legislation.[247] Legislative ends and means grounded on "overbroad generalizations" or invented *post hoc* in response to litigation are constitutionally unacceptable.[248]

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[241] Cass R. Sunstein, *The Supreme Court 1995 Term–Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 75 (1996). *See also, e.g.*, Rosemary M. Kennedy, *The Treatment of Women Prisoners After the VMI Decision: Application of a New "Heightened Scrutiny,"* 6 AM. U. J. GENDER & LAW 65, 67 (1997) (concluding that "the Court [in Virginia] applied a new standard of heightened scrutiny"). Some commentators have argued that the Supreme Court has recently employed a "sliding scale" approach to judicial scrutiny as a whole. See, e.g., Sunstein, supra, at 77; Peter S. Smith, Note, *The Demise of Three-tier Review: Has the United States Supreme court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 475 (1997).

[242] *See Virginia*, 518 U.S. at 534–46.

[243] *Id.* at 531. The state of Virginia argued that single-sex education promoted diverse educational opportunities and thus justified the discrimination. *See id.* at 525–26.

[244] *See id.* at 524–41.

[245] *Id.* at 524 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted) (emphasis added).

[246] *Id.* at 533.

[247] *See id.* at 541 (1996) (stating that courts ought to take "a hard look" at "generalizations" advanced in support of gender discrimination). *See also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 299–301 (1997) (observing that the Court in recent equal protection cases, including *Virginia*, has engaged in purpose scrutiny, which marks a break with its earlier practice of solely focusing on the means of achieving the purpose). Scrutiny of this kind invariably requires stringent evaluation of legislative facts. *Cf., e.g.*, Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 644 (1966) (asserting that "no sound constitutional judgment can be made except by consideration of legislative facts"); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 84 (arguing that "every constitutional issue contains important factual elements which control the decision").

[248] *Virginia*, 518 U.S. at 545–46.

III. SKEPTICAL SCRUTINY OF § 1997E(E)

A. *Evaluating the Need*

Writing six years before the passage of the PLRA, Jim Thomas observed:

> In denigrating prisoner suits, critics tend to use such terms as "litigation explosion," "frivolous suits," "abuse of courts," or "crowding out legitimate claims." Such a vocabulary provides an account-generating mechanism that "explains" a state of affairs that needs "attending to." Account-generating rhetoric tends to replace data, and arguments against prisoner suits are packaged in ways that distort rather than illuminate the nature and processes of prisoner grievances.[249]

The "account-generating rhetoric" that Thomas describes pervades the congressional case for curtailing inmate litigation[250] and certainly does not constitute an "exceedingly persuasive justification."[251]

1. The Litigation "Explosion" as Half-Truth

In proposing the PLRA, Senator Dole (R-Kan.) bemoaned the "alarming explosion" of inmate lawsuits.[252] "The bottom line," he declared, "is that prisons should be prisons, not law firms."[253] Thereafter, Senators Dole, Hatch (R-Utah), and Kyl (R-Ariz.)

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[249] Jim Thomas, *The "Reality" of Prisoner Litigation: Repackaging the Data*, 15 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 29 (1989).

[250] Many backers of the PLRA resorted to anecdotal accounts of abuse and frivolity, often told repeatedly, to correct for the rarity of a genuine complaint. *See* 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (describing an inmate suing over a bad haircut); 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Reid (D-Nev.)) (describing an inmate suing because mail delivery interfered with his sleep); 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (describing an inmate suing over a bad haircut), *reprinted in id.* at doc. 16; 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (describing an inmate suing because he did not receive a particular brand of shoes); 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (describing an inmate suing because of a "defective haircut"); 141 CONG. REC. S10896 (daily ed. July 28, 1995) (statement of Sen. Reid) (describing an inmate suing because staff confiscated his hat); 141 CONG. REC. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl) (describing an inmate suing because of ill-fitting jeans).

Senator Kyl once claimed: "Prisoners file free lawsuits in response to almost any perceived slight or inconvenience—being served chunky instead of creamy peanut butter, for instance, or being denied the use of a Gameboy video game . . . ." 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

[251] *Virginia*, 518 U.S. at 533.

[252] 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

[253] *Id.* at S7525.

portrayed prison litigation as a rapidly spreading plague on the body politic.[254]

The data showing an increase in lawsuits[255] should be appended by two footnotes not found in the *Congressional Record.* First, the rate of filings per 1000 inmates *decreased* seventeen percent between 1980 and 1996.[256] Studies published several years before the passage of the PLRA told of this downward trend.[257] The absolute number of filings grew because of the rapid growth in prison population.[258]

Second, during the period of the perceived increase in filings, prisoners experienced very real abuses. Immediately preceding the passage of the PLRA, examples of prison staff misconduct included sexually assaulting female inmates;[259] using a stun gun on an inmate who refused to clean his cell;[260] arranging the assault of an inmate by a fellow inmate;[261] denying a paraplegic inmate the use of a wheelchair;[262] confining an inmate to a vermin infested, unlit cell for two years;[263] forcing inmates to work

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[254] *See, e.g.*, 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (decrying a "civil justice system overburdened"); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (denouncing the "crushing burden of these frivolous suits"); 141 CONG. REC. S14413 (daily ed. Sept. 27 1995) (statement of Sen. Dole) (stating that inmate lawsuits "tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens"); 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) (describing inmate lawsuits as "recreational activity").

[255] *See supra* notes 50–51 and accompanying text (recounting the increase in § 1983 filings from some 218 in 1966 to 39,000 by 1996).

[256] *See* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96 iii (1997). *See also* Harvey Berkman, *Reform Act Cuts Prisoner Suits*, NAT'L L.J., Aug. 18, 1997, at A10 (observing that inmate lawsuits increased 41% from fiscal year 1992 to 1996, while the federal and state inmate population rose 43% from 1990 to 1995); Ross, *supra* note 58, at 507 (finding that from 1981 to 1994 the state inmate population tripled but filings failed to keep pace).

[257] *See* THOMAS, *supra* note 50, at 110, tbl.5d (noting that the rate of civil rights filings by state prisoners had reached a peak of 4.69 per 100 prisoners in 1981 and then declined for four of the next five years); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 666, 667 (1987) (observing that while prisoner civil rights filings increased 185% between 1975 and 1984, the "prison population growth and the national growth in litigiousness might explain all the growth in prisoner civil rights filings").

[258] *See* SCALIA, *supra* note 256, at 5 tbl.4 (stating that the number of federal inmates increased from 23,779 to 95,088 between 1980 and 1996, while the number of state inmates increased from 295,819 to 1,033,186 during the same period).

[259] *See* Women Prisoners v. District of Columbia, 877 F. Supp. 634, 639–40 (D.D.C. 1994).

[260] *See* Hickey v. Reeder, 12 F.3d 754, 756 (8th Cir. 1993).

[261] *See* Westmoreland v. Brown, 883 F. Supp. 67, 69 (E.D. Va. 1995).

[262] *See* Weeks v. Chaboudy, 984 F.2d 185, 187 (6th Cir. 1993).

[263] *See* McCord v. Maggio, 927 F.2d 844, 846 (5th Cir. 1991).

in the prison's sewers without protective clothing;[264] and denying outdoor recreation to an inmate for a four year period.[265] State correctional authorities often allowed their prisons to degenerate into human warehouses[266] that systematically brutalized inmates both psychologically and physically.[267] The following account of Massachusetts's Walpole prison described many institutions:

> What I observed was something akin to a literal version of what the political philosopher Thomas Hobbes called a "state of nature," "wherein men live without other security, than their own strength .... And the life of man, solitary, poor, nasty, brutish, and short."
>
> Inmates roamed about virtually unimpeded, glaring, making threatening gestures, often shouting profanities at the officers .... The inmates were rarely more charitable to each other than they were to the staff, and most assaults were inmate on inmate. Inmates spent their days of idleness punctuated by meals, violence, and weightlifting.

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[264] *See* Fruit v. Norris, 905 F.2d 1147, 1148–49 (8th Cir. 1990).

[265] *See* Spain v. Procunier, 600 F.2d 189, 199–200 (9th Cir. 1979).

[266] *See* James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1022–23 (1997):

> Prisons have long been called warehouses, but as John Irwin and James Austin observed, the label has been used in a misleading manner. Until recently, inmates performed many institutional jobs, such as cooking, building maintenance, and record keeping. Furthermore, they served their time in a complex, stratified inmate social system that provided them with pride and dignity. [The contemporary] warehouse prison is quite different. Offenders are largely idle and live in a divided inmate subculture weakened by internecine conflict. Prison authorities provide them with little more than the necessities of daily survival–food, shelter, clothing, medical care, and exercise. (footnotes omitted).

[267] *See* CARAMAE RICHEY MANN, UNEQUAL JUSTICE 227 (1993) ("[M]ost prisoners spend their days in stupefying idleness, packed together with virtually no privacy in noisy, dirty, smelly, cells or dormitories. These quite stressful conditions, unsurprisingly, beget rampant inmate violence, directed against guards and other inmates.") (quoting Curtis Skinner, *Overcrowded Prisons: A Nation in Crisis*, 98 CRISIS 18, 19 (1990)); MATTHEW SILBERMAN, A WORLD OF VIOLENCE 2 (1995) (describing contemporary prison life as a "world of violence in which weakness is shunned and strength is worshipped"); HANS TOCH, POLICE, PRISONS, AND THE PROBLEM OF VIOLENCE 53 (1977) (observing that "[i]nmates are terrorized by other inmates, and spend years in fear of harm"); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 50 (1999) (concluding that sexual harassment occurs frequently among male inmates and comprises a significant form of psychological victimization); Peter Scharf, *Empty Bars: Violence and the Crisis of Meaning in Prison*, *in* PRISON VIOLENCE IN AMERICA 27, 28 (Michael C. Braswell et al. eds., 2d ed. 1994) (observing that "[r]apes, beatings, knifings, and killings are commonplace occurrences in many prisons").

> Virtually every correctional officer I talked to was quick to confide that "the inmates run the joint" and "can take over whenever they want to."[268]

2. Finding Merit in Prison Litigation

A lawsuit possesses merit, according to Senator Hatch, only if it reaches trial. He claimed that a mere three percent of prison suits satisfied this criterion.[269] But does reaching trial constitute the appropriate measure of merit? Far broader criteria for judging merit have been advanced. Professors Eisenberg and Schwab argue that a filing is "successful" if "(1) the plaintiff wins after trial, (2) the parties settle their dispute, (3) the court grants a stipulated dismissal, or (4) the plaintiff dismisses the case voluntarily."[270] Eisenberg and Schwab found that fifteen percent of inmate suits achieved "success" under their standard.[271] Other studies advocating similarly sophisticated measures of merit have found increased rates of success.[272]

The presence of counsel dramatically improves success rates. Eisenberg and Schwab reported that more than half of claims brought by inmates with the assistance of counsel succeeded under their standard.[273] And Turner found the assistance of counsel to make a "decisive difference."[274] Unfortunately, counseled filings occur quite infrequently.[275]

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[268] JOHN J. DIIULIO, JR., GOVERNING PRISONS 1–2 (1987) (quoting THOMAS HOBBES, LEVIATHAN 84–85 (Francis B. Randall, ed. 1976)).

[269] *See* 141 CONG. REC. S18136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch) (stating that "only a scant 3.1 percent have enough merit to reach trial").

[270] Eisenberg & Schwab, *supra* note 257, at 681.

[271] *See id.* at 692 n.207.

[272] *See* Kim Mueller, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived From a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, at 1283 n.115, 1284 (1995) (describing trial outcome as a "shortsighted" measure of success, and concluding that more than 14% of the inmate fillings in the Eastern District of California "appear to have made some kind of difference for their inmate claimants"); Steward J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 730 (1988) (finding that 18% of the inmate filings in three federal districts met a broad definition of "success"); Thomas, *supra* note 249, at 49 (observing that "'dismissal' may, in fact, obscure the fact that the prisoner has come away with something that would not have been given if not for the suit," and finding that about two-thirds of the 63% of inmate filings in the Northern District of Illinois to survive *in forma pauperis* review led to "some gain for the prisoner"). *Cf.* Ross, *supra* note 58, at 508 (finding that inmates prevailed in 43% of § 1983 cases that went to trial).

[273] *See* Eisenberg & Schwab, *supra* note 257, at 692.

[274] Turner, *supra* note 53, at 624.

[275] *See, e.g.*, SCALIA, *supra* note 256, at 2 (stating that over 90% of inmates petition-

A seemingly frivolous complaint written by an inmate without the assistance of counsel may well mask a justiciable dispute. After examining filings in three states, Howard Eisenberg concluded that an inmate's notion of "some arbitrary, irrational, bureaucratic, or dehumanizing" aspect of confinement might appear to a court as frivolous.[276] Eisenberg explained that "[w]hat to most people would be a very insignificant matter becomes, because of the nature of prison life, a mater of real concern to the inmate."[277] In his study of California filings, Theodore Eisenberg deduced that "most prisoner section 1983 complaints were not plainly trivial assertions . . . ."[278] Judge Jon O. Newman, reflecting on his own caseload, agreed.[279] Finally, Turner's landmark study of five federal districts found "no assurance that meritorious cases were sorted out from frivolous ones" in that *in forma pauperis* petitions appeared to be "bureaucratically processed rather than adjudicated."[280]

Jim Thomas sought to explain why courts dismissed meritorious inmate cases. He concluded that inmate pro se petitions expressed "values, norms, and expectations" unlike those of their judicial audience.[281] Thomas explained this miscommunication as follows:

> Prisoners and court personnel might not understand the same way the phrase "I'm being punished in prison." The lexicon is clear and the individual words are relatively uncomplex. Translating this phrase into something substantively or legally meaningful requires either further explication of meaning on the part of the prisoner, or a sophisticated understanding of the story's contextual transformative rules by

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ing district courts filed pro se and 88% did so on appeal); Howard B. Eisenberg, *supra* note 181, at 420 n.8 (observing that in three federal districts "literally every prisoner civil rights case was filed pro se"); Turner, *supra* note 53, at 617 (observing that in three federal districts "almost all . . . cases were filed pro se," and in the remaining two districts attorneys filed 15% and 21.6% respectively). *Cf.* Matosky, *supra* note 201, at 300 ("Within correctional confinement, illiteracy stands as a direct barrier between a prisoner and those fundamental rights which bridle the deprivation of life, liberty, and property.").

[276] Eisenberg, *supra* note 181, at 438.

[277] *Id.* at 438–39 (internal quotation marks and footnote omitted).

[278] *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 537 (1982).

[279] *See* John O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519, 527 (1996) (characterizing truly frivolous inmate suits as "needles" in "the 'haystacks' of prisoner lawsuits").

[280] Turner, *supra* note 53, at 625. *Cf.* Eisenberg, *supra* note 281, at 524 ("There is evidence that courts strain doctrine to dismiss section 1983 cases and that federal judges are inhospitable to the clumsy pleadings of pro se litigants.") (footnote omitted).

[281] THOMAS, *supra* note 50, at 132.

the reader in order to reconstruct the meaning intended by the author.[282]

B. *Evaluating the Means*

The purported efficacy of § 1997e(e) for reforming prison litigation rests on three assumptions. First, the common law experience with a physical injury requirement supports its statutory application to inmate lawsuits. Second, physical injury comprises the defining characteristic of Eighth Amendment violations behind bars.[283] Third, § 1997e(e) does not encroach on the judiciary's constitutional powers. As shown below, these assumptions rest on "overbroad generalizations."[284]

1. A Common Law Postscript

The district court in *Zehner v. Trigg*[285] claimed that "by enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can be easily be feigned or exaggerated, in the absence of physical injury."[286] But the trend among American jurisdictions is to abandon the common law physical injury requirement. And § 1997e(e) is not consistent with this trend.

Well into this century, most American jurisdictions, following the *Restatement of Torts*,[287] permitted damages for emotional injury only upon proof of an independent tort.[288] In 1948, however, the *Restatement* recognized intentional infliction of emotional distress as an independent tort.[289] In 1965, *The Restatement (Sec-*

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[282] *Id.* at 133. Thomas concluded that "[c]ourts and corrections are a community of uneasy neighbors. Each has different organizational goals and rhetorical styles, neither is well integrated with the other, and their goals and operative styles often conflict." *Id.* at 132.

[283] *See* U.S. CONST. amend. VIII (prohibiting, in relevant part, "cruel and unusual punishments").

[284] United States v. Virginia, 518 U.S. 515, 531, 545–46 (1996).

[285] 952 F. Supp. 1318 (S.D. Ind.), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

[286] *Id.* at 1325.

[287] *See* RESTATEMENT OF TORTS § 46 (1934) (positing that recovery for emotional distress rested upon an independent tort).

[288] *See generally* Hub Harrington, *Recent Decision, Torts—Alabama Supreme Court Recognizes Intentional Infliction of Severe Emotional Distress as an Independent Cause of Action*, 12 CUMB. L. REV. 525, 530–32 nn.42–52 (1982).

[289] *See* RESTATEMENT OF TORTS § 46 (Supp. 1948). *Restatement (Second) of Torts* later stipulated that emotional distress must be "severe" and arise from "extreme and outrageous conduct" committed "intentionally or recklessly." RESTATEMENT (SECOND)

ond) of Torts acknowledged that negligence resulting in psychological injury also justified recovery.[290] Most jurisdictions followed suit.[291]

As a predicate to recovery, *The Restatement (Second)* required a physical injury or impact on the plaintiff's body.[292] One commentator described the function of the physical injury requirement as follows: "[It] vouches for the emotional distress claims, it serves as a breach of the duty owed, and the resulting emotional distress is a foreseeable result."[293] New York's highest court, in *Mitchell v. Rochester Railway*,[294] embraced a similar requirement for fear of a "flood of [specious] litigation"[295]—a justification that resonates in the legislative history of § 1997e(e).[296]

OF TORTS § 46 (1965). Law review commentators provided the groundwork for this new tort. In an influential 1936 article in the *Harvard Law Review*, Professor Calvert Magruder had identified a nascent body of caselaw supporting an emotional distress tort. *See* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1058 (1936). Before the outbreak of World War II, Dean Prosser would concur. *See* William L. Prosser, *Intentional Infliction of Emotional Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939) ("It is time to recognize that the courts have created a new tort. It appears, in one disguise or another, in more than a hundred decisions, the greater within the last two decades"). *See also* John G. Langhenry, Jr., *Personal Injury Law and Emotional Distress*, 9 J. PSYCHIATRY & L. 91, 93 (1981) (observing that "[c]ourt[s] are now in almost universal agreement that one is liable for emotional distress inflicted intentionally") (footnote omitted).

[290] *See* RESTATEMENT (SECOND) OF TORTS § 436A (1965). *See generally* David Crump, *Evaluating Independent Torts Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby From Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 443 (1992) (observing that negligence as the basis for an emotional distress tort constitutes "a celebrated issue at the forefront of today's tort law").

[291] *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43–44 n.9 (1982) (listing jurisdictions that recognize the tort of negligent infliction of emotional distress).

[292] *See* RESTATEMENT (SECOND) OF TORTS § 436A (1965) ("If the actor's conduct is negligent in creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.").

[293] Langhenry, *supra* note 289, at 95. *See also* Zelinsky v. Chimics, 175 A.2d 351, 354 (Pa. Super. Ct. 1961) ("[T]he purpose of the rule requiring physical impact is to prevent 'illusory or imaginative or "faked"' claim[s].").

[294] 45 N.E. 354 (N.Y. 1896), *overruled by* Battalla v. State, 10 N.Y.2d 237 (1961).

[295] *Id.* at 354. *See also* Mary Donovan, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 UCLA L. REV. 1337, 1348 (1994) (describing the physical injury requirement as an "artifice" constructed by courts "[f]earing a flood of litigation based upon false or trivial claims") (footnote omitted).

[296] *See supra* notes 252–254 and accompanying text (recounting the perceived inmate litigation "explosion").

Mitchell has long since been overruled, however,[297] and prior to the PLRA as many as forty states may have repudiated the physical injury requirement.[298] Some jurisdictions have replaced the physical injury rule with the zone of danger rule, which requires fear of imminent and severe bodily harm to accompany any psychological injury.[299] Other jurisdictions have permitted recovery for foreseeable psychological harm.[300]

The principal criticisms of the physical injury rule apply as well to its counterpart in the PLRA. *Prosser and Keaton on Torts* states that "mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money than the physical pain of a broken leg, which never has been denied compensation."[301] Professor Bell argues that different recovery rules are inappropriate because psychological and physical injuries

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[297] *See Battalla*, 10 N.Y.2d at 239.

[298] It is unclear exactly how many states have repudiated the physical injury rule. *Compare* Gates v. Richardson, 719 P.2d 193, 195 n.1 (Wyo. 1986) (listing 40 states), *with* Donovan, *supra* note 295, at 1355 (listing 15 states), *and* Scott D. Marrs, *Mind Over Body, Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 FORUM 1, 1–2 (1992) (observing that "[a]n ebbing majority of jurisdictions adhere to the traditional rule requiring some form of physical injury," and listing 14 that have abandoned this requirement).

Nonetheless, one finds a "significant evolution" away from the physical injury/impact rule. Langhenry, *supra* note 289, at 101. *See also, e.g.*, Douglas Bryan Marlowe, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 VILL. L. REV. 781, 788 (1988) (observing "much criticism" of the social policies underpinning the rule).

[299] *See* Marlowe, *supra* note 298, at 794.

[300] *See* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 334–35 (1984). Several commentators have advocated the latter approach. *See, e.g., id.* at 334–35; Terri Krisvosha Herring, Note, *Administering the Tort of Negligent Infliction of Mental Distress: A Synthesis*, 4 CARDOZO L. REV. 487, 511–17 (1983); Douglas Bryan Marlowe, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 782 (1988); Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 620 (1982).

[301] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 55 (5th ed., Hornbook Series 1984) [hereinafter PROSSER AND KEETON ON TORTS] (footnote omitted). *See also* Hudson v. McMillan, 503 U.S. 1, 17 (1992) (Blackmun, J., concurring) ("Psychological pain often may be clinically diagnosed and quantified through well-established methods, as in the ordinary tort context where damages for pain and suffering are regularly awarded."); Hagerty v. L. & L. Marine Serv., Inc., 788 F.2d 315, 318 (5th Cir. 1986) ("It is doubtful that the trier of fact is any less able to decide the fact or extent of mental suffering in the event of physical injury or impact."); Bell, *supra* note 300, at 354–55 (footnote omitted) ("Physical pain is just as subjective as psychic pain . . . . [D]amages for emotional distress are not extraordinarily uncertain . . . . Expert testimony and objective symptoms will give the jury a reasonable understanding of the injury."); Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 22 MICH. L. REV. 497, 503 (1922) ("The measurement of the injury in terms of money is no more difficult a problem here than in any case of non-pecuniary damage–a broken leg or bruised head.").

"are difficult, if not impossible to distinguish in essential nature and critical characteristics.[302]

2. The Genealogy of Incarceral Injury

Just as Jim Crow laws "bespoke . . . [black Americans'] low and brutish nature[ ],"[303] the physical injury requirement of § 1997e(e) signifies that inmates are little more than "body and appetite."[304] But modern notions of cruel and unusual punishment extend to safeguarding inmates' psychological well-being. Consequently, the broad concept of compensable harm found in Eighth Amendment jurisprudence cannot be reconciled with the narrow physical injury requirement of § 1997e(e).

a. *Imprisonment as micropower.* Corporal punishments once dominated the penal body. Whippings were a common punishment in colonial times.[305] Other common punishments included branding; severing of ears and noses; and hanging.[306] The public was invited to attend the administration of penal justice and hear cries of pain and view the destruction of flesh.[307]

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[302] Bell, *supra* note 300, at 401. *See also, e.g.*, PROSSER AND KEETON ON TORTS, *supra* note 301, at 56 (footnote omitted) ("[M]edical science has long recognized . . . [that] grief, anxiety, rage, and shame, are in themselves 'physical' injuries, in the sense that they produce marked changes in the body, and symptoms that are readily visible to the professional eye."); Note, Molien v. Kaiser Foundation Hospitals, *Recovery for Negligent Infliction of Emotional Distress Absent Physical Injury*, 10 CAP. U.L. REV. 851, 861 (1981) (concluding that "it is now recognized by medical experts that mental and physical injuries are not separate and distinct types of harm").

[303] RICHARD KLUGER, SIMPLE JUSTICE 305 (1975).

[304] In an earlier article, I argued that warehousing inmates, i.e., "provid[ing] for nothing more than their most elementary needs," portrays them as "'living corpses'—as solely body and appetite . . . ." Robertson, *supra* note 267, at 1032.

[305] *See* DAVID J. ROTHMAN, DISCOVERY OF THE ASYLUM 48 (1971) (writing that whippings and fines comprised the most frequently administered sanctions). *See also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 37 (1993) (describing whipping as "an extremely common punishment throughout the American colonies").

[306] *See, e.g.*, HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA 29–30 (1968) (describing the Pennsylvania criminal code of 1676, which included 11 capital crimes and imposition of the pillory, whipping, branding, and the stocks for lesser offenses); CLEAR & COLE, *supra* note 37, at 51 (summarizing the Quaker Code, which provided for the death penalty for all felonies but larceny, with "[w]hipping, branding, mutilation, and other corporal punishments" for lesser offenses); HIRSCH, *supra* note 213, at 5 (delineating a variety of sanctions in colonial Massachusetts, including whippings, the stocks, branding, and capital punishment).

[307] *See, e.g.*, FRIEDMAN, *supra* note 305, at 37 (stating that "[p]unishment tended to be exceedingly public"); MICHAEL MERANZE, LABORATORIES OF VIRTUE 19–20 (1996) (observing that public punishments "dramatically and explicitly merged the symbolic and the corporal, seizing the body to inflict pain or death—and they did so before the

Commencing in the early nineteenth century, penal authorities embraced confinement as the normative sanction for serious crime.[308] The founders of the penitentiary system sought both to control and to transform offenders.[309] To accomplish these goals the founders harnessed a new form of power—micropower, an attempt to shape behavior through "'small' procedures and techniques."[310] To maximize their capacity to manipulate and control, prison administrators sought to create a "total institution," which would govern offenders around the clock.[311] The revolutionary shift from corporal to incorporeal punishment[312] moved the locus of punishment from the physical body to the offender's psyche.[313]

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eyes of the community") (footnote omitted).

[308] *See, e.g.*, FRIEDMAN, *supra* note 305, at 77 ("[L]ocking people up is the primary tool for punishing serious offenders . . . ."); Robert Johnson, *Preface*, *in* THE PAINS OF IMPRISONMENT 11, 11 (Robert Johnson & Hans Toch eds., 1988) ("[P]risons have come to be synonymous with punishment in the modern mind."); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591 (1996) ("[F]or those who commit serious criminal offenses, the law strongly prefers one form of suffering—the deprivation of liberty—to the near exclusion of all others.").

[309] *See, e.g.*, JOHN BENDER, IMAGINING THE PENITENTIARY 2 (1987) ("These penitentiaries . . . represented the sensible world . . . in order to alter motivation and, ultimately, to reconstruct the fictions of personal identity that underlie consciousness."); ROBERT JOHNSON, HARD TIME 26 (2d ed. 1996) (writing that the early prison had two aims: "To protect prisoners from moral contamination, and to restore them to the habits of correct living"); ROTHMAN, *supra* note 305, at 79 (observing that the invention of the penitentiary "attempted to eliminate the specific influences that were breeding crime").

[310] WILLIAM G. STAPLES, THE CULTURE OF SURVEILLANCE 3 (1997). Staples refers to "'micro' techniques of discipline and social control . . . ." *Id.* His concept of "'micro' techniques" is derived from Michel Foucault's concept of disciplinary power, i.e., power that "inserts itself in actions and attitudes, their discourses, learning processes, and everyday lives." Michel Foucault, *Prison Talk*, *in* POWER/KNOWLEDGE 39 (Colin Cordon ed., 1980). *See also* STEVEN M. BUECHLER, SOCIAL MOVEMENTS IN ADVANCED CAPITALISM 148 (2000) (describing the "microphysics of power" as decentralized, institutional power that "circulates through a netlike organization and is dispersed and localized, . . . [to yield] multiform relations of domination rather than a fundamental binary structure of dominators and dominated").

[311] *See* ERVING GOFFMAN, ASYLUMS 6 (1961):

> The central feature of total institutions can be described as a breakdown of the barriers separating three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled . . . . Finally, the various enforced activity are brought together into a single rational plan purportedly designed to fulfill the official objectives of the institution.

[312] *See* George G. Killinger & Paul F. Cromwell, Jr., *Preface* to PENOLOGY, v,v (George G. Killinger & Paul F. Cromwell, Jr. eds., 1973) ("The substitution of imprisonment for torture and death was the most revolutionary step in the entire history of punishment for crime.").

[313] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 29–30 (Alan Sheridan trans., Pantheon Books 1975).

Prisons have since failed as houses of correction,[314] and prison managers have found that institutionalization brings unintended consequences.[315] Rather than rehabilitating inmates, prison sentences rarely result in more than "pains of imprisonment."[316] First, loss of liberty "represents a deliberate, moral rejection of the criminal by the free community."[317] Second, restrictions on goods and services constitute a form of impoverishment and, with it, the "burden of social definitions which equate . . . material deprivation with personal inadequacy."[318] Third, denial of sexual relationships with women challenge "an essential component of a man's self-conception—his status of male . . . ."[319] Fourth, numerous institutional rules erode individual autonomy and become "a serious threat to the prisoner's self-image as a

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[314] Rehabilitative efforts have had little success. *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 42 PUBLIC INTEREST 22, 25 (1974) (reviewing numerous studies of rehabilitation and concluding that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effects on recidivism"). During the 1970s and 1980s, rising crime rates, social tumult, and the growing numbers of non-white inmates led to public opposition to rehabilitation. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 29–31 (1981) (discussing the demise of rehabilitation as correctional policy).

[315] Although the founders of the penitentiary envisaged the mastery of inmates, staff actually possess limited control over inmates. *See, e.g.*, WILLIAM L. SELKE, PRISONS IN CRISIS 72 ("To a large extent, the convicts have always 'run the prison' and continue to do so today, especially given the levels of overcrowding and understaffing."). Once a person is imprisoned, additional means of coercion are few and of limited effectiveness. *See* GRESHAM SYKES, THE SOCIETY OF CAPTIVES 41–62 (1958) (finding that inmates cannot be controlled by a sense of duty toward their keepers and that rewards and punishments are few). *See, e.g.*, Richard Cloward, *Social Control in the Prison*, *in* PRISON WITHIN SOCIETY 78, 93–108 (Lawrence Haxelrigg ed., 1969) (describing accommodations made to the inmate elite by staff).

[316] SYKES, *supra* note 315, at 65. That certain universal deprivations inhere in a prison sentence is widely accepted by penologists and students of total institutions. *See, e.g.*, ULLA V. BONDESON, PRISONERS IN PRISON SOCIETIES 156–63 (1989) (discussing the pains of imprisonment in Swedish penal institutions); GOFFMAN, *supra* note 311, at 14 (arguing that residents of total institutions undergo "a series of abasements, degradations, humiliations, and profanations of self"); SELKE, *supra* note 315, at 71 (observing that inmates cannot vote, decide where to live or with whom to associate, or decide when to sleep, eat, and shower); Cloward, *supra* note 315, at 78–79 (writing that imprisonment represents a "status degradation" process that socially redefines them as a "lower species") (internal quotation marks and footnote omitted). Giallombardo's classic study of female inmates found that they, too, experience pains of imprisonment: "[I]t would be a gross error indeed to suppose that a real difference exists between the male and female prison environment in the conditions for survival . . . ." ROSE GIALLOMBARDO, SOCIETY OF WOMEN: A STUDY OF A WOMEN'S PRISON 103 (1966).

[317] SYKES, *supra* note 315, at 65.

[318] SYKES, *supra* note 315, at 70. *See also* GIALLOMBARDO, *supra* note 316, at 95 (concluding that denying goods and services to the female inmate "tends to destroy her self-image").

[319] SYKES, *supra* note 315, at 71. *See also* GIALLOMBARDO, *supra* note 316, at 99 (concluding that loss of heterosexual relationships deny female inmates "self-respect and status" to a greater degree than their male counterparts).

fully accredited member of adult society."[320] Lastly, deprivation of personal safety represents an "ego threat" because the prisoner equates self-worth with physical prowess.[321] According to Gresham Sykes, these hardships "can be just as painful as the physical maltreatment which they have replaced."[322]

Inmates respond in varied ways to the pains of imprisonment.[323] Most emphasize self-reliance and toughness in the face of adversity.[324] For some inmates, litigating conditions of their confinement is a means of both coping and resisting.[325]

b. *Micropower as cruel and unusual punishment.* Contemporary Eighth Amendment jurisprudence rejects the notion that physical injury is a necessary condition of cruel and unusual punishment. In *Jordan v. Gardner*,[326] female inmates complained of clothed-body searches by male officers.[327] The court described a search as follows:

> During the cross-gender clothed body search, the male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet .... The guard must "[p]ush inward and upward when searching the crotch and upper thighs of the inmate." ... Using the back of the hand, the

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[320] SYKES, *supra* note 315, at 76. *See also* GIALLOMBARDO, *supra* note 316, at 95 (concluding that institutional rules impart "the status of childhood dependence" upon women in prison).

[321] SYKES, *supra* note 315, at 78. *See also* GIALLOMBARDO, *supra* note 316, at 99–100 (concluding that the loss of security is not as keenly felt by female inmates but that they do experience the stress of living with women they find untrustworthy and predatory).

[322] SYKES, *supra* note 315, at 64.

[323] Common coping strategies include "physical escape from problem situations" (54–60% of the inmates sampled); "avoiding problem situations" (47–53% of inmates); and "searching out others for social support" (25–29%). Kenneth Adams, *Adjusting to Prison Life*, *in* 16 CRIME AND JUSTICE 275, 288–89 (Michael Tonry ed., 1992). With the exception of the last strategy, these coping techniques emphasize self-reliance and are consistent with the "real man" image that is so highly valued by inmates. *Id.*

[324] *See id.* at 286.

[325] *See* Eisenberg, *supra* note 181, at 440–41 (observing that inmate suits are of therapeutic benefit to the prisoner and constitute a safety valve for the pressures of prison life). *See also* Cynthia B. Hart, *Jailhouse Lawyers*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 33, at 267, 268 ("Being a jailhouse lawyer is a valued identity in prison. It provides a way to gain power, money, and independence, all highly prized in the prison environment. Being a jailhouse lawyer also provides a positive social identity, hope for release, and a constructive, nonviolent activity during incarceration.").

See also THOMAS, *supra* note 50, at 214–17 (observing that jailhouse lawyers receive tangible rewards, such as gifts and favors, as well as intangible rewards, such as "being taken seriously"—an important symbolic attainment in the prison subculture).

[326] 986 F.2d 1521 (9th Cir. 1993).

[327] *See id.* at 1523.

> guard also is to search the breast area in a sweeping motions, so that the breasts will be "'flattened.'" [328]

These searches inflicted cruel and unusual punishment.[329] To reach this holding, the *Jordan* court did not look for prior physical injury. By observing that cross-gender searches placed "men in positions of ultimate authority to flatten the breasts of women who are powerless and totally subject to their control,"[330] the court grasped the invasive nature of micropower.

The Eighth Amendment originally barred only the worst of corporal sanctions, such as disemboweling and the rack.[331] Its framers sought to prohibit barbarities like those committed during England's Glorious Revolution and outlawed by the English Bill of Rights of 1688.[332] They surely did not anticipate the dominance of penal confinement.

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[328] *Id.* (quoting a state correctional manual).

[329] *See id.* at 1525. The court indicated that its holding applied solely to female inmates: "The record in this case supports the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women." *Id.* at 1526. *But see* Karoline Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 995 (1998) (arguing that cross-gender searches of both sexes "are degrading, humiliating, and violate the basic tenets of human decency").

[330] *Jordan*, 986 F.2d at 1540. *See generally* HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, ALL TOO FAMILIAR (1996) (documenting sexual victimization of female inmates). Surveillance of inmates' bodies lies at the core of micropower in prison. It begins within minutes of entering the prison:

> My escort guard ordered me to "get naked" and surrender my personal effects to an inmate dressed in brown prison garb. I was still wearing my nice prison suit and tie from the Courthouse. As I stripped down, I handed the silent inmate the last vestiges of my social identity . . . . After the guard conducted another "bend-over-and-stretch-'em" search, I was given delousing shampoo and ordered to shower.

VICTOR HASSINE, LIFE WITHOUT PAROLE 8 (2d ed. 1999).

[331] *See* James S. Campbell, Note, *Revival of the Eighth Amendment and Development of the Cruel Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 997 n.8 (1964) (quoting Davis v. Berry, 216 Fed. 413, 417 (1914)):

> No doubt delegates to the [state] conventions [ratifying the Bill of Rights], in providing against cruel punishments, had largely in mind what Blackstone had then recently written, in Volume 4, page 376, such as being drawn or dragged to the place of execution, disemboweling alive, cutting off the hands or ears, branding on the face or hand, slitting at the nostrils, placing the person in the pillory, the ducking, the rack, and the torture, and in Spanish countries, crucifying.

[332] *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) ("Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment."); *In re* Kemmler, 136 U.S. 436, 446 (1890) ("[T]he provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688 . . . ." *See generally* MAURICE ASHLEY, THE GLORIOUS REVOLUTION OF 1688 (1966).

Despite the young nation's fixation on imprisonment,[333] nineteenth-century courts adhered to the Framers' original intent in penal matters.[334] The Supreme Court voiced no objection to shooting[335] or electrocution as means of capital punishment[336] because neither inflicted the cruelty of disemboweling or crucifixion. And as the Kansas Supreme Court observed, the Eighth Amendment did not prohibit excessive prison terms.[337]

The Supreme Court did not broaden the meaning of the Eighth Amendment until *Weems v. United States*.[338] In striking down a sentence that included a prison term of fifteen years at "hard and painful labor," the *Weems* Court held that sanctions grossly disproportionate to an offense constituted cruel and unusual punishment.[339]

Presently, as the Court stated in *Rhodes v. Chapman*,[340] "the Eighth Amendment disallows *all* punishments which, although not physically barbarous, 'involve[ ] the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the crime."[341] Nor does the Eighth Amendment require inmates to "suffer physical injury before obtaining court-ordered correction of objectively inhumane prison conditions."[342]

Extant case law posits that psychological harm alone can inflict harm cognizable under the Eighth Amendment.[343] The pre-

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[333] *See* GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 80 (1979) (observing that "[philanthropists] have caught the monomanie of the penitentiary system, which to them seems the remedy for all the evils of society"). This "monomanie" continues. *See* MICHAEL SHERMAN & GORDON HAWKINS, IMPRISONMENT IN AMERICA 75 (1981) (observing that Americans have "fused the notions of imprisonment and punishment").

[334] *See* Weems v. United States, 217 U.S. 349, 402 (1910) (White, J., dissenting) (citing cases for the following proposition: "it is given to me to understand them, without a single exception, the clear and certain exclusion of any prohibition upon the lawmaking power to determine the adequacy with which crime shall be punished, provided only the cruel bodily punishments of the past are not resorted to").

[335] *See* Wilkerson v. Utah, 99 U.S. 130, 135–37 (1878).

[336] *See Kemmler*, 136 U.S. at 444–46.

[337] *See* State v. White, 25 P. 33, 35 (1890) ("That section of the Constitution [banning cruel and unusual punishment] probably . . . relates to the kind of punishment to be inflicted, and not to its duration.").

[338] 217 U.S. 349 (1910).

[339] *Id.* at 373.

[340] 452 U.S. 337 (1981)

[341] *Id.* at 346 (1981) (citations and footnote omitted) (emphasis added).

[342] Farmer v. Brennan, 511 U.S. 825, 845 (1994).

[343] *See, e.g.*, Babcock v. White, 102 F.3d 267, 273 (7th Cir. 1996) (observing that "the Constitution does not countenance psychological torture merely because it fails to inflict physical injury"); Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995) (holding that a "significant . . . emotional injury" can constitute Eighth Amendment pain) (citation and internal quotation marks omitted); Hobbs v. Lockhart, 46 F.3d 864, 869 (8th Cir.

PLRA case of *Scher v. Engelke*[344] demonstrates the discord between Eighth Amendment jurisprudence and the physical injury requirement of the PLRA. In *Scher*, prison staff engaged in repeated, groundless searches of the plaintiff's cell in retaliation for his reporting staff misconduct.[345] The plaintiff did not aver physical injury.[346] Nonetheless, the court of appeals let stand the jury's damage award.[347] "[T]he scope of [E]ighth [A]mendment protection," it concluded, "is broader than the mere infliction of physical pain . . . and evidence of fear, mental anguish, and misery . . . could suffice as the requisite injury . . . ."[348]

3. Congress's Encroachment on *Carolene Products*

Footnote four is countermajoritarian in focus and complements what one commentator describes as "the Madisonian goal of avoiding tyranny though the preservation of separated powers . . . ."[349] As the only unelected branch of federal government, the federal judiciary is uniquely suited to advance this Madisonian goal by granting remedies to the targets of abusive majorities.[350]

1995) (ruling that allegations of severe emotional distress, nightmares and constant fears stated a constitutionally cognizable claim); Thomas v. Farley, 31 F.3d 557, 559 (7th Cir. 1994) ("Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases . . . to be actionable as cruel and unusual punishment."); Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993) (observing that in unusual instances an emotional injury "would be cognizable" under the Eighth Amendment); Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (stating that "psychological injury may constitute pain under the Eighth Amendment"); Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1991) (ruling that "fear, mental anguish, and misery" can cause sufficient pain to violate the Eighth Amendment); White v. Napoleon, 897 F.2d 103, 111 (3d Cir. 1990) (finding that "allegations [of mental anxiety] are sufficient to state a claim under the Eighth Amendment").

[344] 943 F.2d 921.

[345] *See id.* at 923.

[346] *See id.* at 924 (explaining that the defendant sought dismissal on the grounds of no physical injury).

[347] *See id.* at 925.

[348] *Id.*

[349] Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–16 (1991).

[350] *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1534 (1972) (stating that "[o]nce substantive legal norms have been declared to be in the Constitution, there is much to be said for a judicial prerogative to fashion remedies that give flesh to the word and fulfillment to the promise those norms embody"); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991) (indicating that the Framers presupposed the rule of law and common law-based causes of action); Lawrence Gene Sager, *The Supreme Court, 1980 Term–Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 88 (1981) (equating denial of an effective remedy with "forc[ing] . . . a particular result" because "in both cases the courts would be asked to

Section 1997e(e) compromises the countermajoritian role of footnote four. First, it effectively forecloses meaningful remedy[351] of nonrecurring constitutional torts causing solely mental or emotional injury. Not only are the victims of these torts barred by § 1997e(e) from securing damages, they are also prohibited from obtaining injunctive relief by *City of Los Angeles v. Lyons.*[352] In *Lyons*, the Court held that federal courts lack jurisdiction under the "case" or "controversy" requirement of Article III[353] to grant injunctive relief "absent a real and immediate proof of future injury."[354] As if it anticipated § 1977e(e), the Supreme Court stated that "[t]he emotional consequences of a prior act simply are not a sufficient basis for an injunction absent . . . [such proof of physical threat]."[355]

Section 1997e(e) also weakens the deterrent function of damage awards.[356] Deterrence suffers when actual harms go uncom-

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participate in an adjudication ritual, the end result of which would be the preordained defeat of the rights of constitutional claimants") (footnote omitted).

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court spoke to its inherent power to remedy constitutional violations in the absence of an effective statutory remedy. *See id.* at 392. The Court would later extend and qualify the *Bivens* doctrine. *See* Carlson v. Green, 446 U.S. 14, 18–19 (1980) (holding that *Bivens* extends to Eighth Amendment claims, but limiting *Bivens* to instances (1) in which "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective"; and (2) when "special factors counsel[ ] hesitation"). *See also* United States v. Stanley, 483 U.S. 669, 676–78 (1987) (concluding that *Bivens* does not reach due process claims arising under the Fifth Amendment); Bush v. Lucas, 462 U.S. 367, 389–90 (1983) (holding that *Bivens* does not remedy First Amendment claims); Davis v. Passman, 442 U.S. 228, 233–49 (1979) (ruling that *Bivens* applies to equal protection claims arising under the Fifth Amendment).

[351] This Article does not consider nominal damages to be a meaningful remedy in that they fail to adequately compensate or deter.

[352] 461 U.S. 95 (1983).

[353] A "case" or "controversy" under Article III of the U.S. Constitution is a prerequisite for jurisdiction by the federal courts. They must have a "live controversy . . . to avoid advisory opinions on abstract propositions." Hall v. Beals, 396 U.S. 45, 48 (1969) (per curiam).

[354] *Lyons*, 461 U.S. at 102. The respondent in *Lyons* sought damages as well as an injunction against the use of police chokeholds in non-threatening situations. *See id.* at 98.

[355] *Id.* at 107 n.6.

[356] Alongside compensation, deterrence constitutes one of the two principal goals of civil rights actions. *See* Board of Regents v. Tomanio, 446 U.S. 478, 488 (1990) (describing deterrence and compensation as the "principal policies embodied in § 1983"). In choosing to read § 1983 "against the background of tort liability," the Court in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), left inmates vulnerable to tort-inspired damage restrictions such as § 1997e(e). Indeed, prior to the PLRA, the Court had imposed several tort-based restrictions on § 1983 damages, leading one commentator to write that "the Court . . . is attempting to marginalize [§] 1983 . . . ." Sheldon H. Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719, 1720 (1989). *See generally* Daniel J. Meltzer, *Deterring Constitutional Violations By Law*

pensated.[357] By assuring prison staffers that they will be immune to damage awards for even *intentional* psychological harms in the absence of prior physical injury, § 1997e(e) might work to increase the frequency of such harms.

IV. CONCLUSION

Justice Stevens has consistently argued for "skeptical scrutiny" of penal practices.[358] In *Hudson v. Palmer*[359] he asserted that "[p]risoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'"[360] This Article has argued that *Carolene Products* supports classifying inmates in the manner recommended by Justice Stevens because modern prisoners are, in many relevant ways, similar to *Carolene*-era blacks. The argument provides a principled and logically consistent approach to applying footnote four in the

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Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 COLUM. L. REV. 247, 249 (1988) (positing that compensatory damages, as well as injunctions, are not "deterrent remedies" because their scope is no broader than the harm); Wells, *supra* note 43, at 83 (focusing on actual injury will undervalue the right in question).

[357] Given the Court's restrictions on actual damages, punitive awards must carry the burden of deterrence. *Cf.* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 448–50 (1978) (observing that other means of safeguarding constitutional rights, such as the exclusionary rule, criminal prosecution of government officials, and compensatory damages, fail to ensure deterrence of official wrongdoing). But punitive awards are likewise generally modest. *See* Love, *supra* note 43, at 1282 (stating that "[f]ederal court decisions indicate that punitive damage awards rarely exceed $3,000") (footnote omitted).

[358] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 409 (1996) (Stevens, J., dissenting) (positing that inmates should have ready access to the courts because they "are uniquely subject to the control of the State, and . . . unconstitutional restrictions on the right of access to the courts . . . frustrate the ability of prisoners to identify, articulate, and present to courts injuries flowing from that control"); Hudson v. McMillian, 503 U.S. 1, 13 (1992) (Stevens, J., concurring) (arguing that staff inflict cruel and unusual punishment on inmates when they impose unnecessary and wanton pain on inmates, in contrast to the majority's malicious-and-sadistic standard); Washington v. Harper, 494 U.S. 210, 237–52 (1990) (Stevens, J., dissenting in part) (objecting to staff dominated boards empowered to medicate inmates); Hewitt v. Helms, 459 U.S. 460, 480 (1983) (Stevens, J., dissenting) (arguing administrative segregation is sufficiently similar disciplinary segregation and thus should trigger procedural safeguards); Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting) (asserting the prison transfers ought to trigger procedural safeguards in that "[e]ven the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore").

[359] 468 U.S. 517 (1984).

[360] *Id.* at 557 (Stevens, J., dissenting).

post-*Carolene* era. It also raises doubt as to the constitutionality of the Prison Litigation Reform Act.

MODEL STATUTE

WWW.COMMERCIAL_TERRORISM.COM: A PROPOSED FEDERAL CRIMINAL STATUTE ADDRESSING THE SOLICITATION OF COMMERCIAL TERRORISM THROUGH THE INTERNET

BRUCE BRAUN*
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The increasing popularity of the Internet has created a new forum for the solicitation of criminal behavior. In particular, corporations have become vulnerable to acts of commercial terrorism encouraged through Internet web sites. In response to this growing problem, Bruce Braun, Dane Drobny, and Douglas Gessner propose a Model Statute that imposes criminal penalties on individuals who use the Internet to solicit the commission of violent felonies.

The development of the Internet as a means of communication marks a dramatic change in the manner in which information is exchanged and disseminated in our culture. Quickly fading are the days in which a person's main venue for expressing her revolutionary views included standing on a soapbox or distributing leaflets. Instead, the Internet provides any person with any opinion the ability to reach a virtually unlimited audience without the formidable barriers previously posed by costly and inaccessible mainstream visual or print media.[1] In the current "Information Age," the marketplace of ideas is booming on the Internet.

However, along with the benefits of increased access to information, ease of communication, and new avenues for commerce have come the problems associated with a largely unregulated

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[1] Anyone with access to a computer and a modem can potentially reach a vast Internet audience.

environment. In its present infant stage, the Internet resembles the lawless "Wild West." The Internet is open to governance by human instincts, including those of greed, deception, and hate. In recent months there has been an alarming increase in the use of the Internet to sponsor, solicit and encourage the use of "commercial terrorism."[2] For the purposes of this Model Statute, "commercial terrorism" is defined as the unlawful use of force or violence against persons or property to intimidate or coerce commercial interests.[3] Inflammatory web sites promoting commercial terrorism have targeted corporations such as McDonald's,[4] 7-Eleven,[5] Kinko's,[6] Walt Disney Company,[7] Blockbuster Entertainment[8] and Mattel.[9] These web sites foster animosity towards the corporation and urge readers to take affirmative steps to tarnish the corporation's image and to sabotage its operations. Indeed, such web sites threaten acts of destruction that may cause substantial financial damages to a targeted company.

Presently, the operators of these web sites have little reason to fear prosecution. Because the Internet transcends state boundaries, state and local authorities are ill-equipped to address the unique set of problems posed by commercial terrorism. Despite

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[2] *See infra* notes 3–9 and accompanying text.

[3] *See* Jimmy Sproles & Will Byars, *Cyber-terrorism* (visited Oct. 27, 1999) <http://www-cs.etsu.edu/gotterbarn/stdntppr/index.htm>.

[4] *See infra* notes 12–22 and accompanying text.

[5] *See infra* notes 23–28 and accompanying text.

[6] *See* ®™ark, *The Mutual Funds/Full Projects List* (visited Oct. 27, 1999) <http://rtmark.com/listallprojects.html>. This Web site requests funds and workers for projects designed to tamper with corporate products and limit corporate wealth. "Investors" can pledge money to sponsor a project. The Kinko's project, which has not attracted any financing, seeks someone to make copies of the Kinko's logo with the phrase "Thank you for your patronage" over an obscene pornographic backdrop. These copies would then be placed upside down in the paper trays of Kinko's self-serve machines. *See id.*

[7] *See id.* The "Mutual Funds" Web site lists two Disney projects. First, $200 has been raised to encourage 20 individuals to jump the fence around the perimeter of Disneyland and simultaneously run to the security office to turn themselves in. A second unfunded project attempts to sponsor up to five individuals to don a character's costume, enter a Disney theme park, and distribute children's literature explaining the problems with Disney's depictions of revisionist history. *See id.*

[8] *See id.* According to the "Mutual Funds" Web site, Blockbuster edits the content of many of its videos. The Web site currently has one unfunded project to rent the edited Blockbuster tapes and record onto them the unedited versions of the videos, with the goal of having Blockbuster press charges in order to attract media attention. *See id.*

[9] *See id.* The "Mutual Funds" Web site has an entire division known as the "Barbie Liberation Organization." One project, which has received $50 in investments, seeks individuals to alter the "Cheerleading Barbie" doll into "Activist Barbie." Barbie's pompoms will be replaced with protest signs, and her recorded audiotape will have information on social issues instead of football cheers. *See id.*

the clear need for federal action, the Justice Department, faced with competing priorities, has devoted little in the way of time and resources necessary to track down and prosecute Internet terrorists.[10] Even if prosecution was a priority, current federal criminal laws have not kept pace with the new issues created by this unique form of terrorism. These statutes are often too broad, too cumbersome, or fail to address the type of destruction caused by Internet terrorism.

This Model Statute addresses that legislative void. We begin with an examination of whether existing federal criminal statutes are sufficient to include the conduct of Internet terrorists. Finding these statutes deficient, we propose a model federal criminal statute. We also discuss the numerous implications of enforcing such a statute, and address constitutional implications, such as First Amendment issues, that could arise from this statute.

I. COMMERCIAL TERRORISM ON THE INTERNET

The sponsorship of commercial terrorism on the Internet is a growing concern. Many web sites not only provide a blueprint for readers to perform acts of sabotage and destruction, but also actively encourage such acts.[11]

For example, the "Phrack Magazine" web site contains a downloadable document entitled "Screwing over your local McDonald's" by "Charlie X."[12] The author boldly states his mission at the outset: "Everyone must realize that McDonald's sucks, and you must do your part to put the [expletive deleted] place out of commission."[13] The author begins by advocating a series of juvenile pranks including: publishing fake ads in local newspapers; melting trash can liners with hot water so that the employees have to pick up the garbage by hand, which is reported to be "hilarious to watch"; and disrupting the operation of a McDonald's by placing complicated orders.[14]

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[10] Even though the federal government funds some projects to address computer crime, *see infra* notes 106–109, the authors believe that this action is insufficient given the magnitude of the problem.

[11] *See supra* notes 6–9 and accompanying text.

[12] Charlie X, *Screwing over your local McDonald's*, PHRACK MAG. Vol. 5, 45 (visited Oct. 12, 1999) <http://www.phrack.com/search.phtml?view&article=p45-19>.

[13] *Id.*

[14] *See id.*

The author escalates from these nuisances to more serious methods of disrupting store operations. In a section entitled "Grease Disposal Fun," the author suggests opening the tightly sealed grease vats next to the garbage dumpsters behind most McDonald's.[15] The author states that the vats "smell like [expletive deleted]" and will "cause nausea, and definitely a loss of appetite", leading to a decline in customers.[16] On warm days, the author urges readers to empty the vats, leaving a long lasting "sticky, raunchy mess in the parking lot that will be impossible to clean up, and will stink infinitely."[17] For technologically minded vandals, the author includes a portion called "Computer Phun" where he gives a detailed description of how to break into McDonald's computer system and further disrupt store operations.[18] As a closing note, the author encourages bored individuals to molest children in the play area.[19] All of the above is designed to "create your local McDonald's into an utter McHell."[20]

The web site author purports that the majority of the suggestions are within the guidelines of existing law: "Don't consider it illegal (most of it isn't . . .) consider it more of a public service."[21]

However, those responsible for the Phrack Magazine web site implicitly acknowledge the dangerousness of the activities they describe with the following disclaimer: "NOTE: The following file is presented for informational and entertainment purposes only. Phrack Magazine takes NO responsibility for anyone who attempts the actions described within."[22]

McDonald's is not the only quick-service business targeted by commercial terrorists. The "How To Turn The Work Life Of A Local 7-Eleven Employee Into A Living Hell"[23] web site offers sixty-four ways to accomplish its stated objective. The author begins by suggesting immature stunts such as using a needle to

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[15] *See id.*
[16] *Id.*
[17] *Id.*
[18] *See id.*
[19] *See id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *See* RedBoxChiliPepper, *How To Turn the Work Of a Local 7-Eleven Employee Into A Living Hell* (visited Oct. 12, 1999) <http://www.student.uit.no/~paalde/revenge/Scripts/7-11.html>.

poke holes in condoms; putting laxatives in donuts, coffee machine, and the cashier's soda; and mixing all of the items in the condiments bar together to form a disgusting salad.[24] The author further advocates crimes such as the dismantling of store air conditioning units and the disconnection and destruction of telecommunications equipment.[25] In addition, the author urges 7-Eleven employees to steal money and property from their store and describes over a dozen step-by-step methods for committing such thefts.[26] Unlike other commercial terrorists' web sites that conclude with a broad and self-serving disclaimer,[27] this web site ends with a paragraph claiming responsibility for all actions taken as a result of its exhortations:

> DISCLAIMER: RedBoxChiliPepper takes all responsibility for your actions. If anyone gets pissed off at you, anyone dies or anything is damaged, just show them this file and the note below:
> To whom it may concern: The information presented in this text has brainwashed _____. Please refrain from doing anything to him as RedBoxChiliPepper takes absolutely all responsibility for their action(s). Contact him if problems arise.[28]

One particularly dangerous commercial terrorist advocating criminal acts over the Internet is Pål D. Ekran, a.k.a. "the avenger."[29] On the avenger's web site, he posts a handbook that provides ninety-nine ways to "make your mark [intended victim] suffer in one way or another."[30] Among the acts of terrorism advocated and taught in the avenger's handbook are the filing of false tax returns on behalf of the mark, the sending of death threats to the mark, the destruction of the mark's property, and the commission of credit card fraud on behalf of the mark.[31]

In addition, the avenger's web site publishes the works of other commercial terrorists and thus provides a forum for commercial terrorists to share their methods of operation. For example, there are links to articles promoting vandalism on golf

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[24] *See id.*
[25] *See id.*
[26] *See id.*
[27] *See supra* note 22.
[28] RedBoxChiliPepper, *supra* note 23.
[29] *See* Pål D. Ekran, *The Avenger* (last modified Apr. 12, 1998) <http://www.ekran.no/html/revenge>.
[30] *Id.*
[31] *See id.*

courses,[32] simple ways to disrupt people's lives,[33] and a revolutionary guide for high school students.[34] Furthermore, the avenger's web site actively solicits the submission of articles to aid those in need of getting even with someone.[35] Although several of the avenger's advocated acts of terrorism are directed at individuals, as opposed to direct commercial targets, a terrorist looking to harm commercial interests may choose to sabotage a corporation by terrorizing its officers or other employees.

Despite the destructive nature of these web sites, they receive relatively little publicity.[36] Also, the existing federal criminal statutes do not adequately address these costly and damaging problems. This Model Statute proposes a solution.

II. THE EXISTING FEDERAL CRIMINAL LAW LANDSCAPE

A federal prosecutor seeking to indict a group or individual who uses the Internet to encourage acts of terrorism has at her disposal a wide array of criminal statutes aimed at punishing and preventing various forms of fraud, sabotage, and general societal misconduct that implicate a federal interest. The statutes that may apply to such Internet crimes include laws against mail and

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[32] *See* Tim Masterson, *F[expletive deleted]ing Up A Golf Course* (visited Oct. 12, 1999) <http://www.student.uit.no/~paalde/revenge/Scripts/X/ GolfRevenge.html>. The author writes, "[W]e should be going after the big corporations and [sic] what is the number one sport of those rich bastards? Golf! The following are some ways to [expletive deleted] up a golf course." *Id.*

[33] *See* RedBoxChiliPepper, *Ruining Someone's Life* (last modified Oct. 23, 1994) <http://www.student.uit.no/~paalde/revenge/Scripts/ PLA003.html>. This author suggests various techniques ranging from forwarding a mark's mail to Africa to canceling a victim's credit cards and damaging real property. *See id.*

[34] *See* Anonymous, *The School Stopper's Textbook* (visited Sept. 14, 1998) <http://www.student.uit.no/~paalde/revenge/Scripts/ StopSchool.html>. This Web site encourages the disruption of schools through acts such as filling school locks with glue, stealing gym equipment, and burning the whole building down. *See id.*

[35] *See* Ekran, *supra* note 29.

[36] Although such Internet postings are so outrageous that one might expect them to be widely reported in the mainstream media, the opposite appears to be true. The authors believe the companies or individuals being targeted by Internet terrorism have a strong incentive to avoid publicity, since publicity of this sort would attract copycats who create and publish on the Internet other ingenious ways to attack. *See* Jim Benson, *Cyberterrorism Resource Center* (visited Nov. 8, 1999) <http://www.globaldisaster.org/cyberterrorrescen.html> (reporting that British computer hackers have extorted $1.6 million as "cyber-ransom" from two banks. The banks did not notify the authorities or the press for fear of hurting investor and depositor confidence). Publicity could expose the targeted company's vulnerability, thereby increasing the chance that Internet terrorists could succeed in their plan to disrupt the company's activity.

wire fraud,[37] the federal riot act,[38] consumer protection acts,[39] commerce protection acts,[40] and statutes prohibiting the issuance of threats[41] and solicitations of violent crimes.[42] However, most of these criminal provisions have been in effect for decades and were neither crafted nor enacted to address the unique problems posed by Internet terrorists. The speed at which the Internet has grown and the fact that Congress has been slow to react to Internet-related issues may explain the absence of Internet-tailored statutes.

The lack of criminal statutes specifically designed for the Internet forces federal prosecutors to use statutes that were created to combat non-Internet criminal behavior. For example, mail and wire fraud statutes criminalize schemes to defraud another of money or property by use of mail or the wires.[43] Prosecutors have utilized mail and wire fraud statutes to attack conduct ranging from student-aid fraud[44] to defrauding financial institutions,[45] fraudulently obtaining a liquor license,[46] stealing cable television[47] and fraudulently running a lottery.[48] However, the provisions are poorly tailored for use against Internet terrorists. For instance, the McDonald's-related Internet web site discussed

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[37] *See* 18 U.S.C. §§ 1341, 1343 (1994).
[38] *See id.* § 2101.
[39] *See id.* § 1365.
[40] *See id.* § 1951.
[41] *See id.* § 875.
[42] *See id.* § 373.
[43] *See id.* §§ 1341, 1343.
[44] *See* United States v. Berger, 22 F. Supp. 2d 145 (S.D.N.Y. 1998) (determining that defendants' actions causing the Department of Education to mail Student Aid Reports to individuals apparently enrolled as students at various post-secondary institutions, in furtherance of a scheme to fraudulently obtain student grant money, constitutes mail fraud); United States v. Olatunji, 872 F.2d 1161 (3d Cir. 1989) (finding false statements made by a Nigerian citizen for purpose of obtaining student financial aid falls within the meaning of the mail fraud statute, even though the false statements and representations were not made directly to the ultimate victim, the Department of Education).
[45] *See* United States v. Cherif, 943 F.2d 692 (7th Cir. 1991) *cert. denied*, 503 U.S. 961 1992) (affirming conviction for mail and wire fraud in connection with a scheme to obtain confidential information from a bank and use that information to trade on stock market).
[46] *See* United States v. Ianniello, 677 F. Supp. 233 (S.D.N.Y. 1988) (holding that submitting false liquor license applications as part of a scheme to skim profits from the operation at bars and restaurants supports a mail fraud conviction).
[47] *See* United States v. Coyle, 943 F.2d 424 (4th Cir. 1991) (upholding conviction under the mail fraud statute for using the mail to sell and distribute cable television descramblers intended to allow customers to receive cable programs without paying for them).
[48] *See* United States v. DeFusco, 930 F.2d 413 (5th Cir. 1991), *cert. denied*, 502 U.S. 885 (1991) (declaring that use of the mail to fraudulently lead victims to believe they had won a contest supports a mail fraud conviction).

above,[49] which is broadcast over the Internet through wire transmissions, has stated that its goal is the deprivation of property.[50] Yet the creators of the web site would be liable under the wire fraud statute only if it is proven that they aided or abetted the readers who acted to deprive the company of its property.[51] In addition, law enforcement agents must prove that the web site was made with the intent to defraud, and not merely to ridicule, the company.[52] These problems of proof would impact the prosecutor's discretionary decision to pursue the case.

A prosecutor might also consider using the lesser known federal riot statute.[53] This statute broadly defines a riot as a public disturbance involving:

> (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual, or
> (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any individual.[54]

The statute prohibits any use of the wires with the intent to incite, organize, promote, encourage, participate or carry on a riot.[55] To address First Amendment concerns, the statute provides that such actions "shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts."[56] Courts have routinely upheld this statute against First Amendment challenges.[57]

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[49] *See supra* notes 12–22 and accompanying text.
[50] *See* Charlie X, *supra* note 12.
[51] *See* 18 U.S.C. §§ 1341, 1343 (1994).
[52] *See id.*
[53] 18 U.S.C. § 2101 (1994).
[54] *Id.* § 2102(a).
[55] *See id.* § 2101(a)(1)–(2).
[56] *Id.* § 2102(b).
[57] *See* National Mobilization Comm. to End the War in Vietnam v. Foran, 411 F.2d 934 (7th Cir. 1969) (holding that the statute did not raise a "substantial constitutional question" sufficient to require the convening of a three-judge district court); United

Finally, the statute criminalizes any use of the wires with the intent to commit an act of violence in furtherance of a riot or aiding or abetting another for the same purpose.[58] An overt act is required for prosecution.[59]

On its face, the riot statute appears to apply to the conduct undertaken by Internet terrorists. For example, the McDonald's web site seemingly was prepared with the intent to incite or encourage others to damage the company's property. However, the application of this statute implicates difficult issues of proof. The Internet terrorist whose web site results in corporate property damage may have aided or abetted another in inciting the harm, but the statute only applies to groups of three or more.[60]

An even greater problem, however, may be convincing a prosecutor to apply this relatively infrequently used statute to such a novel situation.[61] Congress enacted this statute as part of the Civil Rights Act of 1968.[62] The purpose of the Act was to combat "racial terrorism" by "strengthen[ing] the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's exercise of civil rights."[63] Thus, the statute was intended not to address acts of violence against corporations, but to deal with the deep-seated and historical problem of discrimination, including that of race, religion, and national origin.[64]

Furthermore, the intent of an Internet terrorist is not to incite a riot as that term is defined by the statute,[65] but instead to disrupt or destroy a corporation's business operations. For an Internet terrorist, that result may be better achieved without the commotion commonly associated with a riot. Consequently, federal prosecutors may choose to not apply the riot statute in these situations.

To the extent that Internet web sites have resulted in the tampering of a company's products, the "Tampering with Consumer

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States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971) (following *National Mobilization Comm.* and rejecting defendant's claim that the statute was unconstitutional).

[58] *See* 18 U.S.C. § 2101(a)(3)–(4) (1994).

[59] *See id.* § 2101(b).

[60] *See id.* § 2102(a).

[61] *See* 18 U.S.C.A. § 2101 (West 1999). The United States Code Annotated reveals fewer than a dozen cases prosecuted under this statute. *See id.*

[62] *See* S. REP. No. 90-721, at 3 (1967).

[63] *Id.*

[64] *See id.*

[65] *See* 18 U.S.C. § 2101 (1994).

Products Act" [66] may apply. In addition to prohibiting food tampering,[67] the statute also forbids the communication of false information that a product has been tainted:

> (c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such tainting, had it occurred, would create a risk of death or bodily injury to another person, shall be fined under this title or imprisoned not more than five years, or both.[68]

The statute further criminalizes threats to tamper with a product under circumstances in which the threat may reasonably be expected to be believed.[69]

The applicability of the Product Tampering Act to Internet terrorists depends on several factors. The statute could apply if the Internet web site presented false claims of product tampering, which if true, would have subjected an individual to bodily harm. In addition, the authors of the web site would have to have schemed with or aided or abetted the readers who acted upon the information in the web site.[70] However, the Product Tampering Act's main limitation with respect to Internet terrorism is its inapplicability when the terrorist's conduct does not affect a company's products, but only involves property damage.

Federal prosecutors could also try using the Hobbs Act,[71] entitled "Interference with Commerce by Threats or Violence." This Act applies to anyone who "in any way or degree obstructs, delays or affects commerce . . . or commits or threatens physical violence to any person or property" that similarly impedes commerce.[72] This statute would apply where an Internet web site threatens physical violence to property and interferes with a company's business. The primary issues of relevance would be whether the definition of "physical violence" applies to the conduct of an Internet terrorist and whether a web site encouraging or threatening physical violence against a company's property falls within the scope of the statute.

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[66] *Id.* § 1365.
[67] *See id.*
[68] *Id.* § 1365(c)(1).
[69] *See id.* § 1365(a).
[70] *See id.*
[71] *Id.* § 1951.
[72] *Id.* § 1951(a).

In addition to threats that affect commerce, the federal government also protects people from the interstate transmission of threats of physical violence with the Interstate Communications Act.[73] This statute imposes criminal liability for the threat itself, whether or not it was actually acted upon. The drawback of this statute, however, is that it only criminalizes threats to people, not property.

If a prosecutor was able to prove only that an Internet Web site itself constituted a solicitation as opposed to a threat, then she could use the "Solicitation to Commit a Crime of Violence" statute.[74] This Act criminalizes the solicitation or inducement of another to engage in the use of physical force against the person or property of another "in violation of the laws of the United States."[75] Although seemingly applicable to the situation posed by Internet terrorists, this statute is limited in that it only applies to the solicitation of conduct that constitutes a federal crime. Therefore, a broader statute is necessary to cover conduct that does not independently rise to the level of a federal offense.

In sum, several statutes exist that a prosecutor could conceivably employ to combat commercial Internet terrorism. However, each suffers from fundamental limitations that could lead a federal prosecutor to decline to charge the Internet terrorist. For an attorney to prosecute this misconduct effectively, Congress must approve legislation designed to address it specifically.

III. A PROPOSED FEDERAL STATUTE

A. *Language of the Model Statute*

U.S.C. § 2001 Online Solicitation of Commercial Terrorism

I. Definitions:

a. "Internet" shall mean the international computer network of both Federal and non-Federal interoperable packet switched data networks,

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[73] *Id.* § 875(c) (prohibiting "any threat to kidnap any person or any threat to injure the person of another . . .").

[74] *Id.* § 373.

[75] *Id.*

b. "Interactive computer service" shall mean any information service, systems, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

c. "Information content provider" shall mean any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or other interactive computer service.

II. Online solicitation to commit a crime of violence.

a. Any information content provider who authors and then transmits or causes to be transmitted via the Internet or interactive computer service in interstate or foreign commerce any communication containing any demand or request that another person engage in conduct constituting a felony in violation of state law or the laws of the United States, shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

b. It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. A renunciation also is not "voluntary and complete" if the defendant merely removes, retracts, or deletes, or causes to be removed, retracted, or deleted, the solicitation from the Internet. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

c. It is a defense to a prosecution under this section that a defendant interactive computer service provider or Internet

service provider show that it did not author or create the content of the communication containing the solicitation, but was merely a conduit for dissemination of the communication without partial or complete knowledge of the content of the communication.

d. It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

B. *Sources and Operation of Model Statute*

The Model Statute, based largely on the language of two current federal statutes,[76] prohibits an individual from using the Internet to solicit the commission of a felony involving violence.[77] The definitions of the terms "Internet," "Interactive Computer Service," and "Information Content Provider" contained in the Model Statute parrot the definitional provisions of the Communications Decency Act.[78] Although the Supreme Court recently struck down the provisions of the Communications Decency Act that prohibited the dissemination of pornographic material to minors via the Internet, certain provisions of the statute, including the definitional provisions, remain in force.[79]

The second section of the statute detailing the actual crime and defenses originates from the federal solicitation statute.[80] The Model Statute states that an individual violates the law if he authors and transmits a message over the Internet that solicits another to commit a felony.[81] In so doing, the Model Statute de-

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[76] *See* 47 U.S.C. § 230(e) (1994); 18 U.S.C. § 373 (1994).

[77] The Model Statute does not criminalize merely spreading rumors about a company's products on the Internet or making a fake "official" web site with false information, mainly because the harm, if any, to the company is too attenuated and does not involve the solicitation of a felony. Such actions may be prohibited under other federal statutes and/or may subject the actor to civil liability.

[78] *See* 47 U.S.C. § 230(e) (1994).

[79] *See* Reno v. ACLU, 521 U.S. 844, 874–81 (1997) (invalidating § 223(a) and (d) of the statute for constitutional infirmities). *See also infra* notes 141–152 and accompanying text.

[80] *See* 18 U.S.C. § 373 (1994).

[81] *See supra* Statute Part II.a.

viates from the language of the federal solicitation statute in three important ways.

First, the Model Statute does not limit the offense to solicitations of violations of federal law. Rather, it includes the solicitation of any felony. Thus, a person violates the statute if he solicits another to commit a crime cognizable as a felony in the state in which the solicited offense was committed, or was intended to be committed.[82] This broader definition operates to include the type of offenses that Internet terrorism usually implicates.

Second, the Model Statute includes the solicitation of any felony rather than just those involving violence, or threats of violence, to people or property. By eliminating language that limits violations to solicitations of violent felonies, the Model Statute will apply to the felonies commonly perpetrated by Internet terrorists. For example, the Model Statute would apply to both the solicitation of false advertising in local newspapers committed by the McDonald's terrorist[83] and the solicitation of theft committed by the 7-Eleven terrorist,[84] assuming the amount stolen qualifies the theft as a felony. The elimination of the "violent felony" requirement would also allow prosecutors to use the statute to punish solicitations of non-violent crimes, such as computer sabotage.

Finally, the Model Statute does not include "specific intent" language requiring that the defendant actually intend to solicit the offense. This would preclude the defendant from arguing that the Internet message did not constitute a "solicitation" *per se*, but rather was an expression of satire or a sharing of ideas.

The affirmative defense of renunciation outlined in the Model Statute differs from the federal solicitation statute in one significant aspect. While both statutes permit a person to avoid criminal liability by manifesting a voluntary and complete renunciation of criminal intent,[85] the Model Statute states that the renunciation is insufficient if the defendant simply removes, retracts, or deletes the solicitation from the Internet.[86] This additional language recognizes the fact that even if the defendant

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[82] As state laws vary, the imposition of criminal liability under the Model Statute may also vary depending on the laws of the state in which the solicited offense was committed or intended to be committed.

[83] *See supra* notes 12–22 and accompanying text.

[84] *See supra* notes 23–28 and accompanying text.

[85] *Compare supra* Statute Part II.b *with* 18 U.S.C. § 373(b) (1994).

[86] *See supra* Statute Part II.b.

later deleted a solicitation, a person browsing the Internet could have viewed it on the Internet almost immediately after it was first posted. Consequently, further action is required to satisfy the Model Statute's affirmative defense, including perhaps sending out another message urging readers to ignore the prior solicitation, notifying the intended victim about the message, and/or notifying law enforcement authorities.

The second defense provision of the Model Statute creates a safe harbor for Internet service providers whose systems merely act as conduits for the dissemination of the illegal communication.[87] Accordingly, the statute does not impose criminal liability on Internet service providers, such as America Online, for failure to censor every message that passes through their systems. This safe harbor is consistent with recent federal court decisions that have struck down statutes that imposed criminal liability on Internet service providers for allowing the posting of illicit messages authored by third parties.[88] However, this provision should be interpreted narrowly so as to provide no protection from liability for individuals or entities that, although not the creator of the solicitation, knowingly forward or transmit the solicitation with knowledge of its contents.

The severity of the punishment under the Model Statute is tied to the gravity of the solicited crime. The Model Statute imposes a penalty equal to one half the maximum penalty, whether imprisonment and/or a fine, prescribed for the crime solicited.[89] If the crime is punishable by death or natural life, then the statute prescribes a twenty-year maximum sentence.[90] This penalty scheme is identical to that contained in the federal solicitation statute.[91] It is consistent with the policy of most jurisdictions that the punishment for an incomplete crime such as solicitation should be less severe than the punishment for the underlying offense.[92] This policy recognizes the notion that if the solicited of-

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[87] *See supra* Statute Part II.c.

[88] *See* ACLU v. Reno, 31 F. Supp.2d 473, 497 (E.D. Pa. 1999) (invalidating portions of the Child Online Protection Act because, in part, it imposed an unconstitutional burden of self-censorship on Web site providers).

[89] *See supra* Statute Part II.a.

[90] *See id.*

[91] *See supra* note 74.

[92] *See* SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 185–86 (1995). The majority of states punish inchoate crimes at a lower level than the punishment for a completed crime, e.g., CAL. PENAL CODE § 664 (1998); N.Y. PENAL LAW § 110.05 (McKinney 1998). However, a substantial minority of states have followed the Model Penal Code § 5.05(1) and made the

fense is actually committed, then both the solicitor and the actual offender will be punished for both the offense itself and conspiracy to commit the offense. The solicitation would not be separately punished as it would be a lesser included offense of the conspiracy.

C. *Enforcement of Proposed Statute*

The Model Statute raises a number of law enforcement issues unique to the Internet. The Internet has changed the way people communicate and disseminate ideas and opinions. A sophisticated Internet speaker has a number of tools that allow him to conceal his identity from his audience. This technological "advance" is also a limitation in terms of law enforcement, for prosecutors need to be at least as sophisticated in order to track down Internet terrorists.

In a typical criminal solicitation not involving the Internet, the illegal acts tend to occur in a physical place and the solicitation is either spoken or written. In these conventional situations, the government may rely on eyewitness testimony of those present at the time the solicitation was made. Written solicitations may be investigated using forensic devices such as fingerprint and handwriting analyses. Prosecutors can rely on decades of law enforcement experience in identifying and apprehending individuals involved in these crimes.

These traditional investigation methods do not readily transfer to the enforcement of crimes committed via the Internet. Online solicitations come in many forms, including electronic mail, postings on a message board or in a "chat room," or postings on a specially designed web site. The unique challenge to law enforcement is to overcome the sophisticated Internet user's ability to remain anonymous. The culture of the Internet is intensely democratic and fiercely individualistic.[93] Anonymity, or at least

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punishment for solicitation and attempt on a nearly equal basis with the completed crime (with an exception for the death penalty and life imprisonment, and reducing first degree felonies to to second degree felonies). Among the state codes that follow the Model Penal Code are 720 ILL. COMP. STAT. 5/8-4 (West 1999), CONN. GEN. STAT. ANN. § 53a-51 (West 1999), DEL. CODE ANN. tit. 11, § 531 (1998), and PA. STAT. ANN. tit. 18, § 905 (West 1999).

[93] As a matter of logic, the individualistic nature of the Internet community will make it more difficult for prosecutors to identify Internet terrorists; as the number of other people with whom an individual works falls, the potential number of people who can provide law enforcement authorities with incriminating evidence also declines.

attempted anonymity, is actively encouraged on the Internet.[94] Indeed, there are web sites devoted to assisting Internet users in remaining anonymous.[95] The most technologically sophisticated, pernicious, and organized Internet terrorists are likely to be best positioned to make use of these tools.

Furthermore, experience to date has shown that the federal government can not solve these crimes alone, but needs to rely on the academic community, the private sector, and the Internet community at large to succeed in this type of cyber-manhunt. The authors reach this conclusion based upon three assumptions. First, many, if not most, of those with the necessary technological skills and expertise are employed in the private sector or in academia. Second, the rise of Internet consultants who offer cyber-protection services to businesses[96] will require increased cooperation with law enforcement officers. Finally, the incredible size of the Internet will render centralized government enforcement ineffective.

Because the Internet is made up of thousands of computer networks and millions of computers all over the world,[97] no accurate accounting exists as to the total number of web sites. According to recent estimates, however, the number exceeds 800 million.[98] It is not feasible for the federal government to police hundreds of millions of ever-changing web sites. In addition, the authors believe that given limited resources, a prosecutor exercising her discretion will be unlikely to pursue violations of

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[94] For example, a large number of Internet Web sites host "chat rooms," where users are permitted to discuss any (or a specific) topic. Although most Web sites require a user to "sign in" and give some basic information about themselves, users can select a pseudonym, and the information a user gives is rarely verified. *See also The Beginner's Guide to Internet Chat* (visited Oct. 29, 1999) <http://www.cnet.com/Content/Reports/Guides/BegChat/ss01.html>; *Netscape Chat FAQ* (visited Oct. 29, 1999) <http://home.netscape.com/eng/chat/1.0/faq_chat.html#ctw10>.

[95] *See, e.g., Anonymizer* (visited Oct. 12, 1999) <www.anonymizer.com/3.0/index.html>. This Web site is one of the most popular Web sites on the Internet. It provides users with the tools necessary to send anonymous e-mails, to browse Web sites anonymously, and post Web sites anonymously. In fact, it boasts that it has helped "anonymize" over 252,395,800 Web sites as of October 12, 1999. *See id. See also* Arnould Engelfriet, *Anonymity and Privacy on the Internet* (last modified Jan. 26, 1997) <http://www.stack.nl/~galactus/remailers>. This Web site shows its readers how to post Web sites and send e-mails with "almost impregnable anonymity." *Id.*

[96] *See, e.g., Yahoo! Security and Encryption* (visited Oct. 29, 1999) <http://dir.yahoo.com/Business_and_Economy/Companies/Computers/Business_to_Business/Security_and_Encryption/> (listing over eighty computer security companies).

[97] *See 20 Questions: How the Net Works* (visited Oct. 29, 1999) <http://www.cnet.com/Content/Features/Techno/Networks/ss01.html>.

[98] *See* Peter Rojas, *The Race is on to Build the Most Comprehensive Search Engine*, RED HERRING, Nov. 1991, at 48.

the proposed statute unless she is convinced that there is a clear and imminent danger of economic injury or bodily harm as a result of an Internet terrorist's web site.

There are several other factors, however, that may make enforcement easier. First, not all Internet terrorists attempt to preserve their anonymity.[99] These individuals will not be difficult to identify, locate and arrest for they leave a number of easily discernible trails for the police to follow.[100] For example, a user who sends electronic mail through the Internet automatically includes a return mail address.[101] Also, many web sites download files onto the computers of people who visit their web sites.[102] These files, known as "cookies," allow web site operators to track an individual user's movements throughout the Internet.[103] Finally, every posting on the Internet is linked to a special address known as an "IP address," which is a numeric code that uniquely identifies a particular computer on the Internet.[104] Prosecutors can use these tracers and traditional law enforcement measures to apprehend less savvy Internet terrorists.[105]

Also, the federal government has resources that could be allocated to enforcing the proposed statute. For example, the Federal Bureau of Investigation recently established a "cybercrime" unit known as the National Infrastructure Protection Center.[106] In ad-

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[99] *See supra* note 29 and accompanying text.

[100] In addition, for any given crime, there will be a natural group of suspects toward whom law enforcement officers can direct their efforts. For example, with a targeted corporation, a likely initial list of suspects would include disgruntled former and current employees, dissatisfied customers, competitors subject to perceived sharp business practices, and other individuals known to hold a grudge against the target.

[101] *See* André Bacard, *Anonymous Remailer FAQ* (last modified Sept. 1, 1999) <http://www.andrebacard.com/remail.html>.

[102] *See The Unofficial Cookie FAQ* (visited Oct. 27, 1999) <http://www.cookiecentral.com/faq/index.shtml#1.1>.

[103] In the conflict between the tracking of users in cyberspace and the desire for anonymity, some Web sites specialize in blocking the use of cookies. *See, e.g., Electronic Privacy Information Center: Cookie Busters* (visited Oct. 12, 1999) <http://www.epic.org/privacy/tools.html>.

[104] *See* Webopedia, *IP Address* (visited Oct. 27, 1999) <http://webopedia.internet.com/TERM/I/IP_address.html>; Chuck Semeria, *Understanding IP Addressing: Everything You Always Wanted to Know* (visited Oct. 27, 1999) <http://www.3com.com/nsc/501302.html>.

[105] The prosecutor's challenge does not end with the positive identification of the computer from which the criminal solicitation originated. She must still prove the identity of the person who used the computer in question.

[106] *See National Infrastructure Protection Center: Welcome to NIPC* (visited Oct. 28, 1999) <http://www.fbi.gov/nipc/welcome.htm>. The Federal Bureau of Investigation has also announced plans to unveil an Internet fraud complaint center as a cooperative effort between the FBI and the National White Collar Crime Center, which is a federally funded research organization. *See FBI Plans to Unveil Internet Website to Report*

dition, the Department of Justice has formed an internal Computer Crime and Intellectual Property Section ("CCIPS") to address international computer crime.[107] Finally, the federal government might be assisted by the spontaneous unified action of the federal government, academia, and the Internet community at large. The authors believe that the Internet is self-policing and when focused, can bring together hundreds of computer-forensic experts and freelance sleuths. For example, there are approximately eighty Computer Emergency Response Teams ("CERTS") around the world.[108] The CERTS, funded and organized by national governments, businesses and academia, work with the Internet community to facilitate responses to computer security events, including the detection and defeat of computer viruses.[109]

One recent example of cooperation between law enforcers and the larger Internet community occurred during the outbreak of the "Melissa" virus.[110] This virus rapidly spread around the Internet and paralyzed many corporate and municipal computer systems.[111] The author of the "Melissa" virus was tracked down in less than one week.[112] The suspect was identified through the collaborative efforts of private companies that provide Internet

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Web Crimes in Summer, WALL ST. J., May 11, 1999, at B5.

[107] *See Computer Crime and Intellectual Property Section* (last modified Nov. 24, 1998) <http://www.usdoj.gov/criminal/cybercrime/ccips.html>. CCIPS attorneys work with "government officials . . . the private sector . . . academic institutions, and foreign representatives to develop a global response to cyberattacks." *Id.*

[108] *See Meet the CERT® Coordination Center* (last modified Oct. 11, 1999) <http://www.cert.org/meet_cert/meetcertcc.html>. A division of the Department of Defense formed CERT in December 1988. Carnegie Mellon University houses the first CERT and current command center. *See About the CERT/CC* (last modified Oct. 11, 1999) <http://www.cert.org/nav/aboutcert.html>.

[109] *See id.*

[110] The "Melissa" virus came in the form of electronic mail, usually containing the subject line "Important Message From . . . " followed by the name of a friend or colleague. When opened by an unsuspecting user, the virus automatically recreated itself, and sent an electronic mail message to the first 50 people in the infected user's electronic mail address book. As each of those people opened their electronic mail, the virus would strike again, growing exponentially until entire electronic mail servers across the world began to crash. The virus disrupted the operations of thousands of companies and government agencies whose employees were unable to communicate by electronic mail. *See* Elinor Mills Abreu, *Officials: Suspect Admits Creating Melissa* (visited Oct. 28, 1999) <http://www.idg.net/idgns/1999/08/25/UPDATEOfficials SuspectAdmitsCreatingMeli.shtml>; Patrick Thibodeau, *The Melissa Virus Lesson: Quicker Reaction Needed* (visited Oct. 28, 1999) <http://www.idg.net/go.cgi?id=172909>.

[111] *See* Dean Takahashi & Dean Starkman, *"Melissa" Shows It's Harder to Hide in Cyberspace*, WALL ST. J., Apr. 5, 1999, at A3.

[112] *See id.*

security services, individual Internet users in Sweden (a computer science student) and the United States (a computer engineering student), America Online, and federal and state law enforcement.[113] The unusual collaborators pinpointed the origin of the offending virus to a single telephone line in New Jersey.[114] While the typical virus writer seemingly is motivated by a quest for notoriety, the authors believe that most individuals in academia and the Internet community want to locate and disable such viruses in order to protect the infrastructure of the Internet. As the "Melissa" case demonstrates, international, not just domestic, collaborative efforts are needed. Without such cooperation, Internet terrorists can operate off-shore with little fear of arrest or prosecution.

The existence of Internet terrorism presents unique enforcement issues. Confronted with a violation of the Model Statute, law enforcement officials will not be able to rely solely upon standard investigative techniques, but will have to apply their ever-increasing level of technological sophistication and call upon the advanced expertise of the academic and Internet communities at large.

IV. CONCERNS IMPLICATED BY THE MODEL STATUTE

A. *Freedom of Speech and the Regulation of Internet Terrorism*

As with any piece of proposed legislation that regulates the content of certain types of speech, the Model Statute potentially implicates the First Amendment to the United States Constitution. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[115] When determining whether a particular statute infringes on an individual's freedom of speech, courts apply the highest level of scrutiny to content-based regulations that carry criminal sanctions.[116] Courts increase their vigilance because statutes that regulate the content of speech have a greater chilling effect on free speech than do

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[113] *See id.*

[114] See ZDNet News Staff, Officials: AOL Info Cracked Virus Case (visited Oct. 29, 1999) <http://www.zdnet.com/zdnn/stories/news/0,4586,2236028,00.html>.

[115] U.S. CONST. amend. I.

[116] *See* Reno v. ACLU, 521 U.S. 844, 871–72 (1997).

time, place, and manner restrictions.[117] Moreover, statutes that impose criminal penalties have an even more dramatic impact and "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[118]

Consequently, the Model Statute, at first read, apparently invites the highest level of judicial scrutiny under the First Amendment. Nevertheless, it is well settled that not all types of speech, whether transmitted over the Internet or some other type of medium, trigger a First Amendment inquiry.[119] Specifically, the Supreme Court has held that the First Amendment does not protect obscenity,[120] fighting words,[121] libel,[122] commercial speech advertising illegal activity,[123] and speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (the *Brandenburg* standard).[124]

The Model Statute falls within the final category of unprotected speech because it only regulates speech that solicits unlawful conduct, and not mere advocacy. Although the Supreme Court has stated that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment,"[125] lower courts have found that "speech, commercial or otherwise, which solicits illegal activity is not protected

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[117] *See id.*

[118] *Id.* at 872.

[119] *See infra* notes 120–124 and accompanying text.

[120] *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (holding that the state may regulate material which: "(a) appeals to the prurient interest; (b) depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) lacks serious literary, artistic, political, or scientific value").

[121] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (finding that a statute that prohibited offensive, derisive, or annoying speech addressed specifically to another person in a public place did not violate the First Amendment). The "fighting words" exception involves speech that "by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace." *Id.*

[122] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (while upholding libel laws in general, declaring that an otherwise impersonal criticism of a government official for governmental operations is protected by the First Amendment and does not constitute libel).

[123] *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (finding that a statute which prohibited advertisements that illegally discriminated on the basis of sex did not violate the First Amendment).

[124] Brandenburg v. Ohio, 395 U.S. 444, 447 (1973) (holding that a statute which punished the mere advocacy of lawless acts violated the First and Fourteenth Amendments).

[125] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (declaring that the First Amendment generally shielded boycott participants from liability damages resulting from all violence and threats made during the boycott, but did not shield those whose conduct was the proximate cause of loss).

by the First Amendment."[126] While the First Amendment protects advocacy, it does not extend to criminal solicitations merely because they are spoken or written.[127] Thus, when an individual uses printed words to encourage and counsel others in the commission of a crime, the First Amendment confers no protection on the communication.[128]

According to a strict reading of the *Brandenburg* standard, speech advocating lawless action that poses no imminent, likely threat still retains its First Amendment protections. Imminence is a significant issue for the Model Statute because of the duration of certain Internet messages. A person can read a message on the Internet years after it was posted. However, commentators have noted that the context and content of the speech, rather than the immediacy of the advocated crime, is more important in determining whether the speech poses a threat of imminent lawless action:

> [T]he *Brandenburg* standard of "imminence" does not mean *immediate*. Imminence is not an absolute term, but rather a relative term, which must always be evaluated against the backdrop of setting and risk. Particularly for serious crimes such as murder, defendants should not be permitted to escape liability because months intervene between their conduct and the crime.[129]

Accordingly, the *Brandenburg* imminence test can still be satisfied even if substantial time passes between the speech and the lawless action. For example, in *Rice v. Paladin Enterprises, Inc.*,[130] the United States Court of Appeals for the Fourth Circuit

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[126] Record Revolution v. City of Parma, Ohio, 492 F. Supp. 1157, 1178 (N.D. Ohio 1980) (upholding an ordinance which regulated the advertisement of drug paraphernalia), *aff'd*, 709 F.2d 534 (6th Cir. 1983). *See also* United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990) (affording no First Amendment protection to an anti-tax organization that conducted a course on preparing false or fraudulent tax returns), *cert. denied*, 498 U.S. 828 (1990); United States v. Mendelson, 896 F.2d 1183 (9th Cir. 1990) (declaring that a computer program producing information for bookmakers on how to run an illegal gambling operation was not protected under the First Amendment); United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982) (finding that the First Amendment did not protect defendant's sale of printed instructions for the manufacture of PCP); United States v. Buttorff, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978) (holding speech that gave listeners instructions on how to violate federal income tax laws unprotected by the First Amendment).

[127] *See* United States v. Freeman, 761 F.2d 549, 551 (9th Cir. 1985) (holding that "[w]ords alone may constitute a criminal offense, even if they spring from the anterior motive to effect political or social change"), *cert. denied*, 476 U.S. 1120 (1986).

[128] *Barnett*, 667 F.2d at 843.

[129] 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10.35 at 10-41 (1996) (citations omitted).

[130] 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

found that a book which provided detailed instructions for planning, committing, and concealing a murder merited no protection under the First Amendment.[131] In *Rice*, the relatives of murder victims sued the publisher of a book that the killer used as a handbook to commit the crimes.[132] In its decision, the court emphasized that the publisher admitted that it knew the book might be used by murderers and was intended to provide such assistance.[133] The speaker's criminal intent precluded the speech from fairly being characterized as "advocacy."[134]

The court then noted that the *Brandenburg* standard[135] protected only the "abstract advocacy of lawlessness and the open criticism of government and its intentions [rather than] the teaching of the technical methods of criminal activity—in this case, the technical methods of murder."[136] The court found that "this book constitutes the archetypal example of speech which, because it methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct, finds no preserve in the First Amendment."[137]

The *Rice* case and prior decisions suggest that the Model Statute does not contravene the First Amendment. Because the Statute on its face and in practice regulates communications that solicit the commission of a felony, it reaches the same conduct that other courts have found unprotected by the First Amendment. The Model Statute does not proscribe the types of communications that could be considered "advocacy."[138] For example, it would not operate to regulate speech that merely criticizes the business practices of commercial entities. Nor would it serve to prohibit communications directing others to boycott a particular business. Instead, the Model Statute simply criminalizes solicitation over the Internet of unlawful acts. Thus, the Statute is not over broad in the activities it seeks to prevent or vague in its terms.

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[131] *See id.* at 266–67.
[132] *See id.* at 241.
[133] *See id.* at 247–48.
[134] *See id.* at 248–49.
[135] *See supra* notes 124, 129 and accompanying text.
[136] *Rice*, 128 F.3d at 250.
[137] *Id.* at 256.
[138] *Id.* at 249.

Indeed, no court has found that any conviction under the long-standing federal solicitation statute, which does not directly regulate Internet communications,[139] offends the First Amendment.[140] Prohibiting criminal solicitations over the Internet likewise should not implicate the First Amendment. Although the Supreme Court has refused to acknowledge a special justification for government regulation of speech transmitted over the Internet,[141] the same decision suggests that courts likewise will not afford Internet speech any additional First Amendment protection.[142]

In this case, *Reno v. ACLU*,[143] the Supreme Court invalidated, on First Amendment grounds, two provisions of the Communications Decency Act ("CDA") that criminalized transmissions over the Internet.[144] Congress enacted the CDA in 1996 in an attempt to protect minors from "indecent" and "patently offensive" Internet communications.[145] The first provision of the CDA at issue in *Reno* prohibited the "knowing" transmission of "obscene or indecent" messages to any recipient under eighteen years of age.[146] The second provision prohibited the "knowin[g]" sending or displaying to a person under eighteen of any message "that in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[147]

The Court found that these provisions were too vague to achieve the congressional goal of protecting minors from exposure to harmful material disseminated over the Internet without

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[139] *See supra* text accompanying note 74.

[140] *See* 18 U.S.C.A. § 373 (West 1999).

[141] *See* Reno v. ACLU, 521 U.S. 844, 869–70 (1997). However, previous Supreme Court opinions have recognized special justifications for government regulation of television or radio based upon the invasive nature of these forms of communication. *See id.* at 868 (citing FCC v. Pacifica Foundation, 438 U.S. 726, 728 n.2 (1978)). In *Pacifica*, the Court upheld an FCC sanction on a radio station for transmitting obscene, indecent, or profane broadcasts and noted the "special treatment" afforded to broadcasting. *Pacifica*, 438 U.S. at 728. Yet in *Reno v. ACLU*, the Court distinguished the Internet from radio and television since "[c]ommunications over the Internet do not invade an individual's home or appear on one's computer screen unbidden." Reno v. ACLU, 521 U.S. at 869 (quotations omitted).

[142] *See* Reno v. ACLU, 521 U.S. at 870 ("We agree with [the District Court's] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

[143] *Id.*

[144] *See id.* at 871–72.

[145] 47 U.S.C. § 223 (1994).

[146] *Id.* § 223(a)(1)(B)(ii).

[147] *Id.* § 223(d).

unduly burdening protected speech directed towards adults.[148] Specifically, the Court stated that the statute's failure to define the terms "indecent" and "patently offensive" would lead to uncertainty.[149] The Court concluded that the vagueness of the CDA would envelop legitimate speech on topics that adults have a constitutional right to receive, such as birth control, homosexuality or the dangers of prison rape.[150] Because the cited provisions of the CDA were not narrowly tailored to meet the statute's purpose and because less restrictive alternatives existed,[151] the Court held that the statute's heavy burden on free speech violated the First Amendment.[152]

Despite the fact that both the CDA and the Model Statute are criminal statutes that regulate transmissions over the Internet, the Model Statute can be distinguished from the CDA, rendering *Reno v. ACLU* inapplicable. Importantly, the statutes regulate different types of speech. Whereas the CDA regulates the transmission of offensive and indecent material of a sexual nature which adult audiences have the right to receive, the Model Statute regulates the transmissions of criminal solicitations, which are not so protected. Thus, the Model Statute does not place a heavy burden on free speech like the one created by the CDA. In addition, even if a court were to find that the Model Statute did burden free speech, the Model Statute, unlike the CDA, is narrowly tailored to achieving its purpose of preventing Internet terrorism. The language of the Model Statute confines its application to speech that solicits felonies.[153] Since separate state and federal statutes defines all felonies, the Model Statute regulates an easily definable, narrow class of speech. Accordingly, critics of the Model Statute could not successfully challenge its constitutionality by promoting an extension of the Court's decision in *Reno v. ACLU*.[154]

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[148] *See* Reno v. ACLU, 521 U.S. at 875.

[149] *See id.* at 870–71.

[150] *See id.* at 871.

[151] *See id.* at 879. The Court referenced alternatives such as "tagging" indecent material in a way that facilitates parental control, with exceptions for messages with artistic or educational value. Some portions of the Internet, such as commercial Web sites, could be regulated differently than others, such as chat rooms. *See id.*

[152] *See id.*

[153] *See supra* Statute Part II.a.

[154] Courts have recently refused to expand *Reno v. ACLU* when faced with challenges to the surviving provisions of the CDA. *See, e.g.*, Apollomedia Corp. v. Reno, 19 F. Supp. 2d 1081, 1096 (N.D. Cal. 1998), *aff'd*, No. 98-933, 1998 WL853216, at *1 (U.S. Apr. 19, 1999), *amended by* 119 S. Ct. 1450 (1999). In *Apollomedia*, a multimedia

B. *Federalism and the Model Statute*

In addition to First Amendment concerns, the Model Statute needs to have a sufficient federal interest to justify its existence. The worldwide reach of the Internet and the manner in which the information crosses state lines justifies the need for federal legislation. The broad power of the federal government to regulate interstate and international trade is well recognized.[155] The Internet undeniably is a growing tool of interstate commerce[156]. As indicated by booming stock prices of Internet-related companies, in the not too distant future, the Internet may become the primary means by which interstate transactions are conducted.

Another rationale for the Model Statute is the federal government's role in the development of the Internet.[157] Equally important is that individual states seem ill-equipped to punish conduct that so readily transcends state and national boundaries. Even if state enforcement were possible, federal legislation is necessary to ensure uniformity. It would be anomalous for an Internet Web site to subject an individual to criminal liability in one state but not another when the web site is equally accessible and could cause the same harm in each state. The Model Statute prevents such a result, except in the rare circumstances when conduct constitutes a felony in one state and not in another.

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technology company brought First Amendment challenges against provisions of the CDA that regulated the content of electronic mail messages sent over the Internet which were "obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person." *Id.* at 1084. The district court interpreted this statute only to prohibit the transmission of obscene material over the Internet. *See id.* at 1096. Because the First Amendment does not protect obscene speech, the court found that the challenged provisions did not violate the First Amendment. *See id.*

[155] *See* U.S. CONST. art. I, § 8, cl. 3. *See also* Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264 (1981) (holding that Congress's rational determination that the regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from such activity is sufficient to validate a regulatory act under the Commerce Clause).

[156] See, e.g., Amazon.com (visited Nov. 8, 1999) <http://amazon.com>; eBay (visited Nov. 8, 1999) <http://ebay.com>.

[157] The Internet began as the ARPANET [Advanced Research Projects Agency] in the late 1960s during the Cold War. The United States Department of Defense, together with a number of military contractors and universities, developed the Internet to explore the possibility of a communication network that could survive a nuclear attack. Research for the Internet continued because the involved parties found that it provided an efficient way to communicate. *See Internet History* (visited Oct. 29, 1999) <http://smithsonian.yahoo.com/internethistory.html>.

CONCLUSION

The world in which we live is rapidly changing. As society reaps the benefits from the daily advances in technology, it must also act to protect itself against the myriad of ways that individuals on the fringes of society inevitably use those advances to further their goals, and, in the end, to try to harm society as a whole. The enactment of the proposed federal statute to criminalize Internet sabotage fills a glaring gap in the federal criminal code, a gap that did not exist even a few years ago, but one that was created by the lightning-fast developments of the information age. This proposed legislation will arm society with an important weapon against this new, virulent strain of terrorism.

NOTE

DEMOCRACY IN THE DETAILS: A PLEA FOR SUBSTANCE OVER FORM IN STATUTORY INTERPRETATION

MICHAEL B. SLADE*

Many judges and scholars argue that the use of legislative history in interpreting statutes is undemocratic because it gives legal authority to materials not conclusively voted into law. In this Note, Michael Slade argues that under a civic republican conception of deliberative democracy, the use of legislative history promotes, rather than undermines, American republican democracy. Further, courts' use of legislative history is critical to forcing politicians to participate in deliberation, which Slade suggests is an intrinsic democratic good.

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[1]

Citing a plethora of reasons relating to the role of courts in our democratic republic,[2] many judges and scholars have railed against the use of legislative history in statutory interpretation.[3]

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[1] LEWIS CAROLL, THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE 124 (1928).

[2] The debate includes an impressive array of judges and scholars diverse in background and ideology. Most participants, however, accept the general premise that democracy is paramount, and that the use or non-use of legislative history should depend on how democratic the practice is. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) ("Our legal culture's understanding of the link between statutory interpretation and democratic theory verges on the canonical . . . ."). *But see* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy, and Legal-System Values*, 21 SETON HALL LEGIS. J. 233 (1997) (asserting that "democratic legitimacy" should be subordinated to the greater good in many circumstances).

[3] Justice Scalia has been the most vocal critic of the use of legislative history in statutory interpretation. *See, e.g.*, Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 17 (Amy Gutman, ed.,1997). However, he is hardly alone. *See, e.g.*, Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986)

In doing so, these "anti-historians" accept the premise that enforcing the unintended consequences of legislation's plain meaning is acceptable, even desirable, because this methodology produces the most "democratic" outcome. This is untenable. In our democracy, statutes are a product of substantial give and take between elected representatives, their electors, and various intermediaries. When courts attempt to interpret statutes without using their legislative history,[4] they are applying the product of congressional action without the benefit of its process. This form of statutory interpretation encourages legislators to play passive roles in the legislative process, increasing the threat of countermajoritarianism. As such, this form of statutory interpretation produces formal, but not substantive, democracy.

Statutes are written against a background of statutory and common law that they will inevitably affect. However, the impact such statutes will have upon the status quo is not always clear.[5] When courts are called upon to apply such newly enacted statutes, they often must make a fundamental decision: does this statute completely overrule pre-existing doctrine, merely alter it, or leave it alone?[6]

This paper will argue that in answering this question, courts should use *all* the tools at their disposal—"nothing that is logically relevant should be excluded."[7] Statutes are essentially

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(Kozinski, J., concurring); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation,* 17 HARV. J.L. & PUB. POL'Y 61 (1994); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987).

[4] A recent empirical study, building on the 1979 study of Jorge L. Carro and Andrew R. Brann, shows that since Justice Scalia's appointment to the Court, all of the federal courts (from the district level to the Supreme Court) have relied on legislative history on increasingly fewer occasions. *See* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

[5] *See* Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2185 (1996) ("A bill which looks fine as a discrete political statement could wreak havoc in the body of law that must accommodate it after its enactment if the drafters have not paid enough attention to the existing legal materials with which it must now co-exist."). *See generally* HENRY M. HART, JR. & ALBERT M. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1211 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123 (1992).

[6] For a list of situations where Congress, in the statutory text or various parts of the legislative history, has explicitly described its desired affect on the common law, see James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 4–5 & nn.6–7 (1994).

[7] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947), *cited in* Starr, *supra* note 3, at 373–74.

words, sentences, and paragraphs that must be analyzed and defined to have any relevant application. The query posed by the statutory interpretation debate is this: who, in our government, holds the power to decide the meaning of such words? This Note argues that the Legislative Branch, to the extent possible, should have such power. Allowing judges to decide what each word in a statute means allows these appointed officials to be master; such a practice merely fosters democracy in form, rather than promoting it in substance.

Part I of this Note describes why, in theory, the use of legislative history promotes, rather than stifles, democracy. Part II rebuts various standard arguments often used to deny the validity of legislative history. Part III applies this analysis to two hypothetical problems involving the interpretation of recently enacted statutes, involving Supplemental Jurisdiction[8] and Habeas Corpus,[9] and describes how legislative history is integral to their proper application.

I. THEORY

A. *The Basics*

We should start from the premise that what makes our form of republican democracy work is the extensive process ideas must go through before they become the law of the land. Neither executive, legislative, nor judicial fiat is sufficient to bind the public to law: all (at least a majority in Congress) must agree that the proposal is good policy and the Court (again, at least a majority) must find that it is not counter to the principles established in the Constitution. Such a decision is not arrived at hastily—as Alexis de Toqueville commented, the American system "is a conciliatory government under which resolutions have time to ripen, being discussed with deliberation and executed only when mature."[10]

Defining the "law" only by use of finally enacted legislation, however, makes the deliberative process irrelevant once it is completed. Such a definition effectively grants not only para-

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[8] *See* 28 U.S.C. § 1367 (1994 & Supp. III 1997).

[9] *See* 28 U.S.C. §§ 2241–2254 (1994 & Supp. III 1997).

[10] ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA, Part I, 232 (Henry Steele ed. Henry Reeve trans. 1947).

mount but exclusive importance to the process of voting. As those in favor of such a system argue, since a majority of senators and representatives presumptively voted for these words and only these words, we cannot imply that they did or did not intend to do anything more than those words indicate.[11] Nor, textualists argue, can we look to propositions not accepted, or the specific debate they spawned, in interpreting accepted legislation—that would diminish the accomplishment legislation represents, and undermine the democratic nature of that legislation.[12]

This view, however, neglects the idea that our government is democratic in its processes more than in its results. The majority will eventually win the day, but the structure of the republic ensures that they will have to work hard to do so. The democracy in this republic lies in the details, the extensive process an idea must undergo before it becomes law—to the extent a statute is democratic, it is only so because of the processes necessary to produce it.[13]

The legislative process is made far easier, however, and the democratic principles within it diminished, if dissent is discouraged and debate made irrelevant. As Joseph Bessette has argued,

> [T]he proper standard for evaluating the democratic character of deliberative democracy is how well the institutions of government foster the rule of informed and reasoned majorities rather than the rule of uninformed, passionate, or prejudiced majorities.[14]

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[11] *See* Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845) ("The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . ."); Waldron, *supra* note 5, at 19. However, many scholars have commented that the votes of congressmen do not accurately reflect their positions on pieces of legislation, as they are the product of a multiplicity of factors. *See* Edwards v. Aguillard, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting) (describing the possible motivations of any particular legislator, from obvious to ridiculous); ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 252–58 (6th ed. 1998); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1973).

[12] *See, e.g.*, Easterbrook, *supra* note 3, at 62 ("A method that sees legislative history as a friend rather than as merely inevitable leads to a jurisprudence in which statutory words become devalued."); Starr, *supra* note 3, at 375 ("Legislative history has the potential to mute (or indeed override) the voice of the statute itself."); Waldron, *supra* note 5, at 2204.

[13] *See* DAVID J. VOGLER & SIDNEY R. WALDMAN, CONGRESS AND DEMOCRACY 166 (1984) ("[T]he democratic legitimacy of Congress rests on both the legislative process and the resulting processes. The value of unitary democracy is found not simply in widespread agreement or consensus *but in the creative nature of the process itself.*") (emphasis added); BURDETT A. LOOMIS, THE CONTEMPORARY CONGRESS 10–12 (2d. ed. 1998).

[14] JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 35 (1994).

Therefore, the democratic character of any particular statute lies in the deliberative process it must undergo before becoming law. To deny any effectiveness to the process of deliberation is to deny that law's democratic nature. Further, to deny any effect to the process discourages those involved from spending their valuable time and energy participating, thus diminishing the democratic character of the law in particular and the republic in general.

Those who promote strict textualism often justify their views by arguing that "[a] piece of legislation deserves respect because of the achievement it represents in the circumstances of politics action-in-concert in the face of disagreement."[15] However, this by itself does not justify a complete dissolution of the "disagreement" out of which consensus was born, for the circumstances of disagreement may help us to understand the consensus. It is a far more substantial interference for judges to apply the statute in unintended ways than to merely look to the path a statute took before it reached its destination.

Further, disagreement itself is good in that it restrains extreme proposals aimed at certain components of the public in favor of more moderate ones aimed at the collective good. If those in the minority are certain that their disagreement will not prevent a certain disadvantageous proposal from becoming law, and that such disagreement will be irrelevant once the law is on the books, why should they spend their time and effort debating the policies? There is an intrinsic good in deliberation, and decreasing the importance of the circumstances and extent of debate provides little incentive to participate.

The method by which courts interpret statutes will undoubtedly influence the process by which such statutes are enacted. Any rational legislator will act to ensure that the law for which he is voting will be interpreted under the meaning he believes he is voting for.[16] As such, Cass Sunstein has argued, from a civic republican standpoint, that "one of the tasks of statutory construction is to promote actual deliberation in the lawmaking process and to interpret statutes, within the appropriate confines of the judicial role, so as to minimize the pathologies of plural-

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[15] Waldron, *supra* note 5, at 2204.

[16] The Supreme Court itself has noted "Congress legislates with knowledge of our basic rules of statutory construction . . . ." McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991); *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 699 (1979).

ism."[17] Given that the Constitution does not specifically define the method by which courts must interpret statutes, "[w]e should develop interpretive principles from the goal of assuring the successful operation of a deliberative democracy."[18]

B. *Law as a Process of Deliberation*

It has often been said that law is like sausage: "those that like it should not watch it being made."[19] From origination in committee, research in subcommittee, committee voting, obtaining a place on the congressional calendar, debate and amendment, and finally voting on by both houses, only to be later perused by the President for policy approval and possibly the Supreme Court for constitutionality (or lack thereof), an idea's path to binding law is long and treacherous.[20] The rationale behind this long road is that if a law is to govern the people, it should be a product of their representatives' collective decision-making. Further, because law will govern, it should be carefully considered and implemented only when we are certain it is correct.

The constitutional description of the legislature's power and its limitations is focused on two major principles: majority rule and minority protection. Countless provisions were inserted into the government's structure to check the potential tyranny of majority rule.[21] A critical component to the constitutional formula is the expectation of deliberation before decisions are made; only this mechanism ensures sound policies that benefit the common good.[22]

Though there is no doubt that the Constitution espouses the philosophy of majority rule, the framers were also concerned

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[17] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1581 (1988).

[18] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 133 (1993).

[19] KEITH KREHBIEL, PIVOTAL POLITICS 3 (1998) (attributing the quote to Otto Van Bismarck).

[20] *See generally* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 29 (2d ed. 1995); LOOMIS, *supra* note 13, at 166–99.

[21] *See* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102–05 (Robert A. Goldwin & William A. Schambra eds., 1980). Those protections, which include governing through representatives, the expectation of deliberation, the extensive separation of powers, and the bicameralism requirements, are what separate American republican democracy from a more direct form of democracy. *See id.*

[22] *See* BESSETTE, *supra* note 14, at 6–34.

about a potential tyranny of the majority. As Madison[23] expressed most clearly in Federalist No. 10, its threat was unavoidable in a democracy or a republic, and the "motive to invade the rights of other citizens" is diminished only by the proper scheme of representation.[24] While disagreement was inevitable, the government was structured so that laws would only be enacted through "the cool and deliberate sense of the community," as discussed through our elected representatives.[25] The majority would produce legislation, but only after both a majority of the population (determined by the House of Representatives) and a majority of the states (determined by the Senate) agreed with it. Debate theoretically should center around the common interests of the nation.[26]

The deliberative process is the function for which representatives are elected; correspondingly, their primary responsibility is to deliberate—to debate and eventually enact those policies that will benefit us most.[27] When congressmen do not deliberate, they fail in their primary duty to their constituents. Further, in the current system, voting (the only real mechanism by which electors can discern how their representatives are behaving in

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[23] Professor Larry Kramer argues that only Madison understood the arguments underlying Federalist No. 10 and that, correspondingly, the Framers did not write the Constitution with its essence (that extensive process was necessary to control faction) in mind. *See* Larry Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 614, 639 (1999) ("Madison repeatedly presented his theory . . . to silence and incomprehension . . . . No one picked up or repeated Madison's points; no one began to discuss issues in his language or with his conceptual framework."). While interesting, Kramer's argument does not explain the fact that the provisions that Federalist No. 10 had in mind to control faction were, in fact, those adopted by the Founders. *See* BESSETTE, *supra* note 14, at 18–34. Even if Kramer is correct that the founding fathers did not realize that the consequences of their actions were to promote deliberation before decision, the consequences were as clear in 1789 as they are today—law can only be made after extensive deliberation produces consensus. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983) ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for *full study and debate* in separate settings." (emphasis added)). *See also* Eugene W. Hickok, Jr. *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217, 235 (1986).

[24] THE FEDERALIST No. 10, at 135 (James Madison) (Benjamin Fletcher Wright, ed., 1961).

[25] *See* THE FEDERALIST No. 51, (James Madison) (Benjamin Fletcher Wright ed., 1961); BESSETTE, *supra* note 14, at 1–2. As Bessette argues, Madison is here suggesting "coalition building through reasoned appeals, as those who represent separate groups in society seek to find or fashion a common interest or principle around which a majority can form." BESSETTE, *supra* note 14, at 27.

[26] *See* BESSETTE, *supra* note 14, at 27 (CITING THE FEDERALIST NOS. 10, 46, 57, and 62).

[27] *See id.* at 218–20; Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 321–22 (1994).

Washington) is often an incomplete view of any congressman's views.[28] Therefore, when our representatives fail to participate fully in the process, it is difficult for their constituents to evaluate their performance.

For Madison, "the purpose of statutory interpretation was to ascertain or 'liquidate' meaning by applying a general rule to particular circumstances."[29] The powers of the legislature were defined with particularity to assure that the meaning of such general rules were to be determined by the entire legislature.[30] Bicameralism and presentment were critical to this equation, as the Federalists feared the "hotheads" in the House of Representatives and their responses to momentary losses of rationality.[31] Thus, "the Senate and President should serve as bulwarks of deliberation, demanding that the hotheads submit their proposals to cool analysis from competing perspectives."[32]

The Constitution was set up to ensure that our representatives would be responsible for fully deliberating and considering the proper laws that will govern America; correspondingly, their performance in the deliberation would be evaluated by the populace, who would periodically choose those representatives. Thus, the two cardinal precepts of this republic's democracy are as follows: (1) the law is deliberative, and (2) those that deliberate and decide are accountable for their actions. Our government's activities should be designed to promote these fundamental facets of our democracy.

C. *Deliberation and Accountability*

The House impeachment debate and the Senate trial of President Clinton was in many ways a unique event. The actual presence of most of Congress in the chamber,[33] the fervent and im-

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[28] *See* DAVIDSON & OLESZEK, *supra* note 11, at 252 ("Recorded votes on the House or Senate floor, while legislators' most visible decisions, are imperfect clues to their views. For a fuller measure of their performance, one must also consider how members participate in floor debate, take part in committee deliberations, gain expertise on issues. . . .").

[29] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 345 (1996).

[30] *See id.*; *see also* BRUCE ACKERMAN, WE THE PEOPLE 259 (1991).

[31] *See id.*

[32] ACKERMAN, *supra* note 30.

[33] For a large part of the trial almost all of the Senators attended. *See* David Von Drehle, *On the Floor*, WASH. POST, Jan. 15, 1999, at A1 ("Such attendance is nearly as rare as impeachment.").

pressive participation in the process, and the extensive deliberation the body engaged in before rendering a decision were quite unusual. Notwithstanding any judgment on the merits of Congress's actions, it is clear that the judgment was deliberative.

Correspondingly, there is little doubt that in the 2000 elections, those Congresspersons who participated in the process will be accountable for their actions; not only for how they voted, but also for the statements they made and for the extent of their participation.[34] In this unique circumstance, deliberation will produce accountability.

Critics of Congress have lamented the decrease of deliberation in the body, specifically conveying their displeasure that much legislation today is deal-making rather than actual discussion of the merits of various policies.[35] Debate on the floor of the House or Senate has become a rarity; "floor debates . . . bear [ ] few visible characteristics of collective reasoning on the issues facing the nation."[36]

Given the importance of forethought and consideration to sound policymaking, the fact that legislative deliberation is at its nadir in America is a tragedy for our republic. If such deliberation (or lack thereof) were made more visible, and its consequences more severe, the incentives for participation would increase.

Accordingly, those espousing the civic republican philosophy emphasizing deliberative democracy "would urge that principles of statutory construction be designed to ensure that decisions are

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[34] *See, e.g., Now That's Over*, ST. PETERSBURG TIMES, Feb. 13, 1999, at 26A ("Lawmakers who predict that voters will have forgotten this impeachment fiasco by the time the 2000 elections roll around are engaged in wishful thinking."); Michael Paulson and Joel Connelly, *Gorton Gets a Jump on the Competition; Democrats Scramble to Unseat Him*, SEATTLE POST-INTELLIGENCER, Feb. 15, 1999, at A1 (describing Senator Slade Gorton's facing of the electorate in the wake of his participation).

[35] *See, e.g.*, Solomon & Wolfensberger, *supra* note 26, at 321–23. *See also* LOOMIS, *supra* note 12, at 11 (pointing to specific recent examples and concluding that "only rarely can one tune in C-SPAN and observe substantive deliberation among legislators who are seeking to exercise their creative powers."). Recently, the House of Representatives made subtle changes attempting to move the body toward Oxford-style debates, but antiquated procedures have prevented their implementation. The Senate has not even tried to increase debate in the "deliberative" body. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, INTRODUCTION TO CONGRESS, THE PRESS, AND THE PUBLIC 1, 11 (Thomas E. Mann & Norman J. Ornstein eds., Brookings Inst. 1999).

[36] Joseph M. Bessette, *Is Congress a Deliberative Body?*, in THE UNITED STATES CONGRESS: PROCEEDINGS OF THE THOMAS P. O'NEILL, JR., SYMPOSIUM 7 (Dennis Hale ed., 1982). *See also* Mark Seal, *Leslie Stahl's Washington D.C.*, AM. WAY, Apr. 1999, at 25, 27 (exhorting tourists visiting our nation's capitol to "get a pass and go sit in the Senate gallery and listen to whatever they're debating, and see how few people show up for debates. . . . You walk in and one man is giving a big speech . . . and no one is listening to him.").

made by those who are politically accountable and highly visible."[37] Deliberation is more than a democratic good in and of itself; it also promotes the accountability of our elected officials.[38]

Justice Scalia argues that promoting the use of legislative history risks equating the introduction of potentially fabricated legislative history with an actual vote.[39] This threat exists, but it is far less perilous than the steady erosion of democratic principles occurring in the current Congress.[40] The goal of statutory construction should be, within the bounds of constitutional authority, to foster the proper functioning of the democratic process. Therefore, to best advance the cause of substantive deliberative democracy, the entire process needs to matter at all times.

II. COMPETING THEORY

A. *Using Legislative History Violates the Separation of Powers*

1. Bicameralism and Presentment

Textualists' initial attack against legislative history is that using such materials violates the constitutional prerequisites for law to be binding—bicameralism and presentment.[41] This assault has rhetorical appeal because of its democratic components; further, in the context of the deliberative model, the argument

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[37] Sunstein, *supra* note 17, at 1584.

[38] It has often been observed that to the extent deliberation actually occurs between most legislators today, it happens behind closed doors, "offstage, where legislators need not worry that their constituents and campaign contributors are watching intently." LOOMIS, *supra* note 13, at 11. To the extent this is true, we should structure the legislative and interpretative process to minimize this problem.

[39] *See* United States v. Taylor, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring),

> By perpetuating the view that legislative history *can* alter the meaning of even a clear statutory provision, we produce a legal culture in which . . . [a congressman could plausibly say] "I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it." . . . We should not make the equivalency between making legislative history and making an amendment so plausible . . . . I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.

[40] *See* Solomon & Wolfensberger, *supra* note 27, at 321–23; LOOMIS, *supra* note 13, at 11.

[41] *See* U.S. CONST., Art. I, § 7; *see also* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). *See generally* Steven Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863 (1992) ("The use of legislative history, according to this argument, tends to make these other matters—report language and floor speeches—the 'law' even though they had received neither a majority vote nor a presidential signature.").

may have even more force because "the requirements of Article I, Section 7 promote caution and deliberation . . . [and] reduce[ ] the incidence of hasty and ill-considered legislation."[42]

However, this argument assumes that legislative history has been granted the status of law by non-textualists, an assumption that is unfounded. Legislative history, rather, occupies a middle-ground between law and mere research that helps to give the statute meaning. Similarly, Justice Scalia is fond of using dictionaries to define statutory terms;[43] the argument that Justice Scalia is violating the bicameralism and presentment clause every time he resorts to extrinsic material to "interpret" a statute, however, seems ridiculous. As described earlier, a statute is nothing but words, sentences and paragraphs—meaningless without definition and application. The question is, who has the power to define—Congress or the courts?

Admittedly, the bicameralism and presentment critique is not answered that simply. Clearly, there must be a difference between the legal authority of an opinion poll of congressional desires and a fully enacted statute.[44] Likewise, there should be a difference between the legal authority of the statement of a single senator and a conference report agreed to by a majority of the body. However, like a dictionary definition or a statement of M*A*S*H regular Hawkeye Pierce,[45] legislative history's use in interpreting statutes is not unconstitutional unless it is given the status of law.[46] If used carefully as an interpretive device rather

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[42] John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708–09 (1997).

[43] *See, e.g.*, A.T.&T. Corp. v. Iowa Utilities Bd., 119 S. Ct. 721, 737 (1999) (Scalia, J.) (using dictionary to define "unbundled"); Pennsylvania Dep't. of Corrections v. Yeskey, 524 U.S. 206, 211 (1998) (Scalia, J.) (using dictionary to define "eligible"); City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring in the judgment) (using dictionary to define "peace").

[44] Judge Easterbrook has argued that because legislative history is unenacted, it should be entitled to no greater legal status than an opinion poll of congressional desires. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64–66 (1994). Given that such a poll would operate completely outside the bounds of the legislative process, and legislative history is by definition that created by the process, I dispute this assertion.

[45] In a recent Supreme Court case, four justices utilized a quotation from "M*A*S*H" character Hawkeye Pierce to help interpret the statutory words "carries a firearm." *See* Muscarello v. U.S., 524 U.S. 125, 144, n.6 (1998) (Ginsburg, J., Rehnquist, C.J., Scalia and Souter, JJ., dissenting).

[46] *See* Manning, *supra* note 42, at 705 ("Why must some, but not all, sources of law elaboration hew to the command of Article I, Section 7?"). As Justice Breyer has argued, this concern reasons for the careful use of legislative history, not its abandonment. *See* Breyer, *supra* note 41, at 847.

than exclusively as binding law, it can promote democracy without endangering the constitutional formula.

2. Delegation Doctrine

In a provocative recent article, Professor John Manning argues that using legislative history to interpret statutes violates the separation of powers by allowing Congress to "self-delegate" powers constitutionally reserved for the courts.[47] Manning suggests that since Congress legislates with knowledge of how its statutes will be construed, giving legislative history interpretive value gives Congress incentives to bypass the difficulties inherent in the legislative process.[48] Consequently, Congress is unconstitutionally "self-delegating" the power to resolve statutory ambiguities of its own making to itself as a whole or, even worse, to committees, subcommittees, or third parties.

This argument misses the mark for several reasons. First, as discussed earlier, using legislative history to assist in statutory interpretation does not inflate these materials to law; rather, such materials merely help apply the meaning of statutory language that Congress intended to enact.[49] More generally, failing to utilize the circumstances under which legislation was enacted may itself violate the provisions of Articles I and III, as "meaningful deliberation and representation are the larger values that Article I's procedures are calculated to promote."[50]

Therefore, under the deliberative conception, the sort of "delegation" that Manning condemns may actually be constitutionally compelled; it is certainly encouraged by the plethora of procedural hurdles to legislation described in the Constitution.[51]

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[47] *See* Manning, *supra* note 38, at 695. *See also* Scalia, *supra* note 3, at 35. Hints of Professor Manning's argument also appear in Justice Scalia's dissent in Mistretta v. United States, 488 U.S. 361, 422–26 (1989) (Scalia, J., dissenting).

[48] *See* Manning, *supra* note 47, at 715 ("If Congress can enact an open-ended phrase . . . and effectively bind the courts to the exposition of meaning contained in a committee report, it . . . makes it easier for Congress to avoid the burdens of bicameralism and presentment.").

[49] *See* Brudney, *supra* note 6, at 42–43. (observing that Article III does not "specify what method courts should follow when interpreting statutes").

[50] Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 42. (asserting that Manning "risks losing the conceptual forest for the trees").

[51] *See infra* Part I.B. It is possible, though unlikely, that a statute could be passed without the creation of *any* legislative history. In that circumstance, the statute would have to stand on its own when interpreted by a court.

There is no true delegation involved in creating legislative history, and even if there were, it is certainly a type of power delegation we should be prepared to accept in order to promote the greater good of deliberation.

Finally, even to the extent delegation doctrine applies to the creation of legislative history as an interpretative device, Manning's constitutional argument fails on the merits. When "delegating" authority, Congress satisfies its constitutional responsibilities by merely providing an "intelligible principle" that the agency doing the interpretation must apply.[52] The standard is not difficult to satisfy; as the Supreme Court itself has admitted, Congress's responsibilities in this regard are not particularly significant.[53] Any statute will almost certainly qualify as such an "intelligible principle," and thus any delegation to committees and the like that could result in less than the full Congress considering materials that assist in law interpretation should be constitutionally permissible.

Immigration and Naturalization Service v. Chadha,[54] relied upon by Manning, provides the most useful case analogy. *Chadha* concerned a section of the Immigration and Nationality Act that allowed Congress to override an Executive Branch decision suspending a deportation by a veto of one house.[55] The Supreme Court held that practice unconstitutional because the one-house veto was essentially "legislative" action that altered existing law without the benefits of bicameralism and presentment.[56] Essentially, Congress had delegated authority to "make law" to a portion of its body when such action was only constitutionally permissible when done through the whole.

By contrast, the creation of legislative history as an interpretive device by one house, a committee, or even one congressperson, is not, in effect, "legislative." While passing a resolution in the *Chadha* context was clearly "making law" in the sense that it firmly altered the status of an executive decision, creating legis-

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[52] *See Mistretta*, 488 U.S. at 372 ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

[53] *See id.* at 373–74.

[54] 462 U.S. 919 (1983). Interestingly, before his appointment to the Supreme Court, then-Judge Scalia wrote an amicus brief urging affirmance of the D.C. Circuit's ruling that the statute at issue in *Chadha* was unconstitutional. Amicus brief for Chadha at 1, INS v. Chadha, 462 U.S. 919 (1983) (No. 80-1832).

[55] *See Chadha*, 462 U.S. at 948.

[56] *See id.* at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I.").

lative history is not "[a]mend[ing] or repeal[ing]"[57] statutes but rather giving clues to their meaning.

Creating legislative history is not lawmaking; while a definite prerequisite to the establishment of law, the process of deliberation is not itself binding authority. As such, the use of materials created in this process to help interpret and apply that which *is* binding law does not make us depart from "a government of laws and not of men."[58] Rather, it helps clarify what those "laws" are to avoid blind governance by judges who apply statutes without the benefit of their history.

B. *Legislative History Is Created by Special Interests Desiring To Influence Judicial Construction*

A frequently asserted policy rationale for rejecting the use of legislative history (especially those specific materials that attempt to alter or retain existing judicial opinions) is that it is rarely read, let alone created, by Congress.[59] Therefore, the committee statement, congressional speech inserted into the congressional record without being read on the floor, or other piece of "history" is not really part of the "law" Congress enacted. Using it to interpret such law would give legal effect to materials not even considered by the congressmen, who may have rejected such materials if they had been considered.

This argument is easily rebutted by the deliberative democracy paradigm. Because participating in deliberation (which includes actually reading committee reports and thinking about the issues) is part and parcel of a representative's responsibilities, he or she should not excessively delegate these obligations to staff or other interested parties.[60] Although legislators could not perform all of their functions without staff assistance, this cannot

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[57] *Id.* at 954 n.18.

[58] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[59] *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring) ("As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction."). For an argument that Congress of late has paid particular attention to judicial decisions and constructed legislation accordingly, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

[60] *See* BESSETTE, *supra* note 14, at 218.

justify wholesale reliance on staff members to produce even quasi-legislative materials.

I agree with Justice Scalia that much of a bill's legislative history is probably not even considered by many representatives before they cast their ballots.[61] However, Justice Scalia's solution to this problem is to completely disregard legislative history. This would hardly foster the proper functioning of a true deliberative democracy. By contrast, the use of legislative history in judicial construction gives legislators an incentive to delegate their primary responsibility less, thus making them a more effective part of the republic.

C. *Legislative History Is Unreliable—What Do You Use and When?*

Connected to the fear of law interpreted as special interests define it is the fear that courts do not know when to use legislative history, or which part thereof.[62] As Kenneth Starr once put it, "[r]elying on extrastatutory materials . . . raises the danger that unrepresentative materials will be accepted as authoritative."[63] The risk in this is that a judge could sift through the materials and "pick his friends," that is, those parts of the vast legislative history that support the end he or she seeks.[64]

This problem is alleviated to some degree by adopting the deliberative paradigm, which, as described earlier, would use *all* of the legislative history *all the time*.

Further Congress could (and frequently does) stipulate within the statute that only specific parts of the debate, or that none of the debate at all, should be considered legislative history for interpretation purposes.[65] However, this remedy still fails to miti-

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[61] Scalia and his progeny fail to rebut the problem in that much *legislation*, as well as mere committee reports, was also written by special interests and considered only cursorily by legislators before being enacted. *See, e.g.*, Breyer, *supra* note 41, at 858 (describing how interest groups as well as staff often initiate legislation). This is a more fundamental, systemic ill that is another effect of the failure of deliberation in Congress.

[62] *See, e.g.*, United States v. Estate of Romani, 523 U.S. 517, 537 (1998) (Scalia, J., concurring) ("Today, however, the Court's fascination with the files of Congress . . . is carried to a new silly extreme.").

[63] Starr, *supra* note 3, at 375.

[64] This formulation is frequently attributed to Judge Harold Leventhal. *See* Breyer, *supra* note 41, at 845.

[65] *See* Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 125 & n.180 (1995) (citing the Civil Rights Act of 1991 as one instance where Con-

gate against the "activist" judge who disregards clear language and goes into history anyway, placing an affirmative obligation on legislators to act where textualists find they should not have such a duty.

The answer to this dilemma is not to avoid using legislative history—it is to trust judges. Activism can be a problem whether extra-textual materials are utilized or not, as statutes never address every problem to which they will be applied with absolute clarity.[66] When an application is unclear, the textualist judge is just as likely to "pick his friends" within an ambiguous statute as the historian is to pick helpful portions of the debate.[67] Either way, the threat of judicial activism remains; the textualist interpretation is not by definition more "democratic." Only the ethic of the individual judge, and not his or her method of statutory interpretation, can bind him or her to enforce what really constitutes "the law."[68]

D. *Efficiency and Empowerment*

Though it has improved of late, the task of researching a statute's legislative history is not easy. For state statutes, legislative history is often available only at the state capitol or the office of the Secretary of State, and more infrequently from various online sources.[69] Some states publish forms of "legislative history" in law school journals[70] or other publica-

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gress chose this course.) Even Judge Easterbrook, one of legislative history's foremost critics, has agreed that this mitigates against legislative history's potential harms. *See* Easterbrook, *supra* note 3, at 61–62 (1994); *infra* note 168 and accompanying text.

[66] This is especially true in the federal system given the fact that "every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution." Scalia, *supra* note 3, at 13.

[67] *See* Gordon S. Wood, *Comment*, in A MATTER OF INTERPRETATION 49, 63 (Amy Gutman ed. 1997) ("Textualism, as Justice Scalia defines it, appears to me as permissive and as open to arbitrary judicial discretion and expansion as the use of legislative intent or other interpretive methods, if the text-minded judge is so inclined.").

[68] A related problem is the difficulty when the legislative history is unclear or, worse, contradictory. As Justice Breyer has made clear, however, legislative history is rarely contradictory, and when it is, judges can easily discard it. *See* Breyer, *supra* note 41, at 862.

[69] In addition to Westlaw and Lexis offering Bill Tracking and hearings for federal statutes, "Congressional Universe" is an excellent online source for federal bills. However, for state statutes, searching is much more difficult.

[70] In Georgia, for example, statutes' legislative histories are published in what are known as "Peach Sheets" in the Georgia State University Law Review. Those sheets include a well-documented history of each piece of legislation, including the reasons for its introduction, the challenges the bill faced during debate, and public perceptions of the bill. *See* Nancy P. Johnson & Nancy Adams Deel, *Researching Georgia Law*, 14 GA. ST. U. L. REV. 545, 560 (1998).

tions,[71] and in some states researchers must listen to cassette tapes of floor debates to obtain such additional information.[72] As such, many have argued that the efficiency costs for courts and litigants being forced to use legislative history cannot possibly justify its limited benefits.[73]

However, as Professor Brudney has argued, an equal if not greater amount of resources is expended by Congress in its attempt to clarify and codify the law; courts' failure to respect the "signals" legislatures have given in legislative history forces legislators to "expend extra resources to achieve the same ends."[74] Though it would be difficult to calculate the accuracy of this empirical assertion, studies have shown that the United States Congress, at least, spends a good portion of its time and energy "clarifying" the law after courts have confused it.[75] To that extent, it is unclear whether litigants would be better off using legislative history to decide a question at the trial court rather than continually appealing and eventually waiting for Congress or state legislatures to provide a firm answer. As legislators only have a finite amount of time, many questions are simply not answered. And this fact, too, is a cost to the republic, at the very least a philosophical one.

Further, it has been argued that accepting the use of legislative history as an interpretative tool makes law inaccessible to a great majority of the country.[76] In effect, only those doing specific, detailed research on a question can find out if there is any legislative history bearing on it. Therefore only a small group of attorneys can truly know the meaning of enacted statutes.

As a threshold matter, law is inaccessible to the majority of the country. The prolixity of legal codes is so demoralizing that most legal scholars take years to learn their contents. Second,

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[71] Legislative histories in Illinois, for example, are published in a "Legislative Synopsis and Digest," published by the Legislative Research Bureau. *See* Robert C. Edwards, *Researching Legislative History*, 84 ILL. B. J. 209, 209 (1995).

[72] This is the case in Illinois and Georgia. *See id.*; Johnson & Deel, *supra* note 70.

[73] *See, e.g.*, Starr, *supra* note 3, at 378; Scalia, *supra* note *3*, at 36.

[74] Brudney, *supra* note 6, at 7–8.

[75] *See* Eskridge, *supra* note 59, at 331.

[76] *See* William T. Mayton, *Law Among the Pleonasms: The Futility And Constitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 133 (1992). *See generally* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring) ("Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history.").

the effects of adding legislative history to "law" are minimal at best. Very few statutes are "self-applying" in that their meaning can be easily ascertainable to an attorney, let alone a lay person.[77] For example, this criticism is completely irrelevant when considering statutes bearing on such subjects as supplemental jurisdiction and habeas corpus, topics that are barely understandable to most attorneys, let alone laymen.

Further, there is no reason why legislative history, if organized correctly, could not improve both the efficiency of the judiciary and the coherence of the law to non-lawyers. As one commentator has proposed, legislative history could be improved by some combination of publishing transcripts, having members sign committee reports (expressly indicating which hearings and floor statements should be authoritative) and specifying which remarks are directed at the courts.[78] If this were accomplished, research could be completed more quickly, and the answers to many questions could be less complicated.

As such, both the efficiency and empowerment arguments fail to rebut the case for using legislative history in statutory interpretation.

E. *Use Legislative History Only When Necessary*

Many judges and scholars, in what has been termed "The New Textualism," posit that if a statute is clear, it should be interpreted by its plain meaning; if a statute is unclear, legislative history deserves a glance.[79] In somewhat of a middle ground between strict plain-meaning textualists and those advocating the use of legislative history, these individuals argue that although the use of legislative history is sometimes beneficial, it is

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[77] *See* Maggs, *supra* note 5, at 126 ("Statutes sometimes speak so clearly that a layman may understand their meaning simply be reading them. Most legislation, however, contains some provisions sufficiently unclear that lawyers might argue about them in court.").

[78] *See* Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 580 (1996) (citing Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561, 575 (1992)).

[79] *See, e.g.*, West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98–99 (1991) (Scalia, J.) ("Where [the statute] contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 622 (1990).

problematic enough to call for minimizing its use. As a result, to mitigate some of the concerns mentioned above, courts should use legislative history only when the statute at hand is not clear.

The difficulty of this position is that, first and foremost, it assumes that courts can delineate when a statute is clear.[80] Courts will often differ on the clarity of a piece of legislation;[81] when clarity is a matter of debate, the possibility of the "selective deployment" of textualism gives equal rise to the threat of activism as does textualism itself.[82]

Second, what may appear clear on the face of the statute may not be what Congress intended; in fact, a statute's plain meaning may be completely absurd. The fact that Congress occasionally does not intend the clear intuitive reading of its language is easily demonstrated. One need only look at the plethora of statutes that, because they could not possibly mean what they say, have not been so interpreted.

Take, for example, the Sherman Act, section 1, which concisely provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states with foreign states, is hereby declared to be illegal.[83]

The meaning of this sentence seems easily discernible—every contract that restrains interstate trade is illegal.[84] Further, there are no disclaimers elsewhere in the statute, making clear that if the sole source of statutory meaning is the statute itself, the only meaning of "every" can be "every."

The "plain meaning" of this provision basically makes *all* contracts illegal. As such, the Supreme Court quickly realized the ridiculous consequences of this per se rule,[85] and interpreted

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[80] For a good discussion of the many different ways a statute could be said to be unclear, see RONALD DWORKIN, LAW'S EMPIRE 351 (1986).

[81] This point is clearly demonstrated when four federal circuit courts disagree as to the meaning of the same piece of legislation, as was the case with 28 U.S.C. § 1367, examined *infra* Part III.A. In this specific context, two of four circuit courts asserted that the statute is "clear," but in opposing directions; the other two courts, while agreeing on the statute's ambiguity, disagree on its meaning.

[82] *See* Mary Ann Glendon, *Comment*, *in* A MATTER OF INTERPRETATION 112 (Amy Gutman ed., 1997).

[83] 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1).

[84] Early Sherman Act cases often interpreted the provision as such, and invalidated all contracts because "every contract" means *every* contract. *See, e.g.*, United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 331–32 (1897).

[85] *See* Chicago Bd. of Trade v. U.S., 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their

the Sherman Act to only condemn *unreasonable* restraints.[86] As Justice Stevens noted:

> One problem presented by the language of § 1 of the Sherman Act is that *it cannot mean what it says*. The statute says that "every" contract that restrains trade is unlawful. But . . . restraint is the very essence of every contract; read literally, §1 would outlaw the entire body of private contract law.[87]

Therefore, reading of a clear text in a manner faithful to its plain meaning might produce a result that is not attributable to the legislature, and that is patently absurd. A faithful textualist, however, might apply this meaning notwithstanding its absurdity.

Justice Breyer (and many textualists) would classify this statute as an instance where legislative history should be used to avoid "an absurd result" from the application of a statute's plain meaning.[88] However, once this door is open, the judge is left to decide when a given result is absurd. In a similar manner to deciding matters of "textual meaning" and "clarity," this illustrates once again that an activist judge, no matter what his or her method of statutory interpretation, can evade a statute's "proper" meaning and achieve his or her chosen result.

A far more difficult case arises when a statute clearly points in one direction while the legislative history points in the other. For example, if a statute states "all dogs must be vaccinated," but the legislative history clearly posits that all congressmen involved voted for the provision believing it to include both dogs and cats, must cats be vaccinated as well?[89]

Under the deliberative conception of democracy, assuming that the legislative history were unquestionably clear, I would answer this hypothetical in the affirmative: cats as well as dogs must be vaccinated. While I am unable to conceive of a definition of "dogs" within my knowledge of the English language that includes cats, apparently Congress had such a definition in mind when it passed the statute. Since under the

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very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

[86] *See* United States v. American Tobacco Co., 221 U.S. 106, 177–78 (1911).

[87] National Soc'y of Prof. Eng'r v. United States, 435 U.S. 679, 687–88 (1978) (emphasis added).

[88] *See* Breyer, *supra* note 41, at 859.

[89] This interesting hypothetical was addressed to me by Professor David Shapiro of the Harvard Law School in response to an earlier draft of this paper.

deliberative conception of statutory interpretation Congress, not judges, has the power to define the terms it uses in its statutes, its definition must govern no matter how absurd it may seem.

The best method of statutory interpretation is the one that best assists the judge in achieving the proper result. This method, as discussed *infra*, is one that properly respects the democratic process and gives incentives to its proper functioning. Congress should be provoked to deliberate and consider the potential meanings of all the words it enacts as law and congressmen should be held accountable for what they intended to enact, not the meaning that an individual judge (or a panel of three or nine) attributes to them.[90] Consequently, all of Congress's actions in enacting a statute should be considered when interpreting that statute, all of the time. This method of statutory interpretation produces the best incentives for the proper functioning of our democracy and for the improvement of the democratic process.

[90] Under this same rationale, a court does not need an unclear statutory "hook" before resorting to the legislative history for interpretative guidance. If a "hook" were necessary, courts would again be deciding whether a statute was clear enough to disregard the legislative history. This method of interpretation, as described *infra*, does not sufficiently promote the proper functioning of the democratic process.

III. PRACTICE

A. *Supplemental Jurisdiction: Does 28 U.S.C. § 1367 Overrule* Zahn v. International Paper?[91]

Imagine that a fleet of trucks from the Friedman Chemical Corporation, a fictional entity incorporated in Delaware with its primary place of business in California, mysteriously explodes at the geographic location known as the "Four Corners."[92] Highly dangerous substances are scattered throughout the area, damaging assorted properties to varying degrees. The United States (as represented by the National Park Service) has suffered the most damage, approximately $500,000. Several nearby homeowners have lost everything, each approximately $100,000. Countless others, farther away, have been damaged to a lesser extent; estimated amounts range from $500 to $70,000. The owners of such properties, of course, desire to sue to recover the damage.

As at least four states and over 100 different litigants are involved, a class action in federal court seems the most prudent and effective way to resolve this conflict. Complete diversity exists, and thus at least some of the putative plaintiffs (those

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[91] The Supreme Court has recently granted certiorari on this issue. *See* Free v. Abbott Labs., 1999 WL 688699 (U.S. Nov. 29, 1999). Currently, the circuits are split 2–2 on this issue. *Compare* In re Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) (holding that §1367 overrules *Zahn*); *and* Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 930–31 (7th Cir. 1996) (Easterbrook, J.) ("We follow *Abbott Laboratories*, which has strong support from the statutory text."); *with* Leonhardt v. Western Sugar Co., 160 F.3d 631, 640–41. (10th Cir. 1998) (holding that the plain meaning of § 1367 does not overrule *Zahn*); Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 221–22 (3d Cir. 1999) (holding that § 1367 is ambiguous and, with reference to the legislative history, was not intended to overrule *Zahn*). The Second Circuit recently recognized the issue but declined to answer the question, noting in dicta that "a lower court in our circuit has asserted that the notion that § 1367 has overruled Zahn at all 'is the minority view and has not been followed in this Circuit.'" E.R. Squib & Sons, Inc. v. Accident & Casualty Ins., 160 F.3d 925, 934 (2d Cir. 1998) (Calabresi, J.). Many district courts have considered the issue, and the majority have held *Zahn* to still be good law. *See, e.g.*, Griffin v. Dana Point Condominium Ass'n, 768 F. Supp. 1299, 1302 (N.D. Ill. 1991) ("*Zahn* and its long line of predecessors forbid [the aggregation of claims], and such a dramatic change in established law is not within the purview of [§ 1367].") (citing the legislative history); *In re Potash Antitrust Litigation*, 866 F. Supp. 406, 413 (D. Minn. 1994) (citing a plethora of cases with similar holdings). See generally 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).

[92] The "Four Corners" is the exact spot where Arizona, Colorado, New Mexico, and Utah meet.

with claims in excess of $75,000)[93] would have no difficulty getting into federal court. Those with claims under the jurisdictionally sufficient amount, however, will only be able to get into federal court by the use of pendent party jurisdiction, if the class action device[94] permits such a maneuver.

In *Zahn v. International Paper*, the Supreme Court ruled that pendent party jurisdiction could not be utilized to undermine the diversity amount in controversy requirement.[95] Accordingly, diversity class actions could not proceed in federal court unless *all* plaintiffs had a claim exceeding the minimum for an individual claim.[96] If *Zahn* were good law, therefore, it would preclude this class action from proceeding in federal court.

In 1990, however, Congress passed 28 U.S.C. § 1367, which codified the doctrines of pendent and ancillary jurisdiction. It provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) . . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related . . . that they form part of the same case or controversy under Article III .... Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall *not* have supplemental jurisdiction under section (a) over claims by plaintiffs against persons made parties under *Rule 14, 19, 20, or 24* of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[97]

The United States and the others with large damages would seek to add parties with insufficient monetary claims under Fed-

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[93] *See* 28 U.S.C. § 1332 (1997).

[94] *See* FED. R. CIV. P. 23.

[95] *See* 414 U.S. 291, 292–93 (1973).

[96] Under *Zahn*, therefore, aggregation of claims will not suffice to confer jurisdiction upon a federal court, even if the combined claims exceed the jurisdictionally required amount. *Id.*; *cf.* Snyder v. Harris, 394 U.S. 332, 341–42 (1969) (holding that individuals, all of whom are under the jurisdictional amount, cannot aggregate claims against a defendant and thereby get into federal court).

[97] 28 U.S.C. § 1367(a)–(b) (1997) (emphasis added).

eral Rule of Civil Procedure 23. Since the claims probably fall within the wide ambit of supplemental jurisdiction articulated in § 1367(a), and are not addressed by the disclaimer in § 1367(b), supplemental jurisdiction seems statutorily appropriate.[98] By its plain meaning, therefore, § 1367 overrules *Zahn* and allows diversity class actions in the federal courts when at least one, but not all, plaintiffs have a claim in excess of the amount in controversy requirement.[99]

To discern the true meaning of § 1367's words as they apply to this hypothetical, a court should review all the tools at its disposal. It should investigate the background of the doctrine, why the statute was passed, the problems it was meant to address, and what Congress was thinking about. A conscientious court would begin with the background of supplemental jurisdiction, go through the statute's history, and in its history and text find its meaning as applied to the situation at bar.

1. Background

Federal courts, since their creation by Congress, have often insisted on some adjudication over state issues ancillary to federal claims as an integral component of their jurisdiction. Virtually all cases involve some non-federal elements; therefore, depriving federal courts of all supplemental jurisdiction would vitiate legislative attempts to grant jurisdiction to the federal courts.[100] Since subject matter jurisdiction is a constitutional notion that courts must raise *sua sponte* if not raised by litigants,[101] and federal courts are courts of limited jurisdiction, courts must find some constitutional power for exercising such jurisdiction.

Article III both provides and limits this power. In authorizing federal courts' jurisdiction over "all cases . . . arising under"

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[98] *See generally* CHARLES ALAN WRIGHT ET. AL., *in* FEDERAL PRACTICE AND PROCEDURE, *Jurisdiction and Related Matters, Supplemental Jurisdiction § 3523.1*, 113 (1999); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 20 EMORY L.J. 445, 485 (1991) ("The list of rules does not include Rule 23"). Of course, the federal court hearing the case would not be required to exercise the doctrine, as it is discretionary and should not be utilized if state issues predominate or other concerns mitigate against the benefits of federal jurisdiction. *See* 28 U.S.C. § 1367(c) (1997).

[99] *See Abbott Labs.*, 51 F.3d at 528–29; *Stromberg Metal Works*, 77 F.3d at 930–32.

[100] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.4 (3d ed., 1999).

[101] *See* FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.") (emphasis added).

federal law, the Constitution sets a ceiling on federal jurisdiction.[102] Underneath this ceiling, however, Congress can regulate the jurisdiction of the federal courts; it can authorize a federal forum to hear any case that contains an ingredient of federal law;[103] or it can require that the entire case be federal before authorizing federal jurisdiction.

Because most cases have both federal and non-federal elements, litigants' ability to vindicate federally created rights will frequently depend on an exercise of pendent or ancillary jurisdiction.[104] Without it, plaintiffs would frequently have to choose between litigating their entire case in state court, taking advantage of a federal forum to litigate their federal right while abandoning their state claim altogether, or "splitting their claims" into two separate suits.[105] As John Marshall wrote in *Osborn v. United States*:

> if the circumstance that other points are involved in [the case] shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause . . . words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal . . . [from] another tribunal, into which he is forced against his will.[106]

The question as to which cases are cognizable in federal court has been debated ever since *Osborn*, and legal doctrine has constantly changed its view on the answer.

2. *Gibbs* Through *Finley*: From Conclusively Decided to Questionable

The Supreme Court's adoption of the Federal Rules of Civil Procedure in 1938 liberalized rules for the joinder of claims and

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[102] U.S. CONST., Art. III, § 2.

[103] *See* Osborn v. Bank of the United States, 22 U.S. 738, 822 (1824).

[104] Accordingly, supplemental jurisdiction has been called the "child of necessity and the sire of confusion." *See* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 445 (1991) (citing Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 45 (1963)). *See generally* Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 863 (1992).

[105] *See Osborn*, 22 U.S. at 822.

[106] *Id.*

parties to facilitate economy and flexibility.[107] The focus on judicial economy was vindicated in *United Mine Workers of America v. Gibbs*,[108] where a former mine superintendent sought to bring his action combining a federal claim (a suit under section 303 of the Labor Management Relations Act) and a state claim (Tennessee tortious interference with contract) in federal court.[109] The Court, noting the Federal Rules' focus on "entertaining the broadest possible scope of action consistent with fairness to the parties," asserted that "joinder of claims, parties and remedies is strongly encouraged."[110] Thus, the district court had jurisdiction over both of Gibbs's claims, and should have exercised it.

Justice Brennan's opinion in *Gibbs* gave federal courts broad power to exercise pendent jurisdiction. So long as the federal and state claims "derive from a common nucleus of operative fact . . . [and] would ordinarily be expected to [be] tr[ied] in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."[111] Federal courts following *Gibbs* exercised supplemental jurisdiction routinely;[112] it was, for all practical purposes, accepted as a necessary component of federal jurisdiction.[113]

While acceptance of pendent claim jurisdiction remained virtually unanimous, disagreements later arose, and the scope of supplemental jurisdiction limited, in cases where pendent parties had to be attached to achieve *Gibbs* economy. The Supreme Court denied jurisdiction in cases where, respectively, separate plaintiffs sought to aggregate their claims over a single defendant to achieve the jurisdictionally required amount,[114] and plaintiffs without sufficiently large claims sought to "tag-along" with those who were sufficient so as to try the entire action in a single proceeding.[115] The Court also denied pendent party jurisdiction when its use would contravene the *Strawbridge* requirement of complete diversity, whether that non-diverse party was

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[107] *See* JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.12 (2d ed., 1993).
[108] 383 U.S. 715 (1966).
[109] *See id.* at 717–19.
[110] *Id.* at 724.
[111] *Id.* at 725.
[112] *See generally* FRIEDENTHAL ET AL., *supra note* 107, at § 2.12.
[113] *See id.*
[114] *See* Snyder v. Harris, 394 U.S. 332, 335–39 (1969).
[115] *See* Zahn v. International Paper Co., 414 U.S. 291, 294 (1973).

brought into the case in the plaintiffs' initial pleading[116] or by the defendant's impleader.[117]

The pendent party jurisdiction debate came to a head in *Finley v. United States*.[118] *Finley* involved a woman's Federal Tort Claims Act (FTCA) claim against the Federal Aviation Administration for the improper positioning of runway lights that allegedly led to her husband's death when his plane struck electronic transmission wires above the lights. Mrs. Finley sought to join in this federal court action a state tort claim against the San Diego Gas and Electric Company for the negligent placement of the wires.[119] This was a compelling circumstance for the exercise of pendent party jurisdiction; since federal courts have exclusive jurisdiction over FTCA claims, denying Mrs. Finley's joinder would force her either to bring two separate lawsuits or to abandon one of her claims altogether.[120]

Despite the compelling arguments for the exercise of pendent jurisdiction in this case,[121] the Supreme Court (Justice Scalia writing) asserted that federal courts lacked the power to allow pendent party jurisdiction. Citing John Marshall, Justice Scalia argued that while pendent party jurisdiction was within Article III's boundaries of the federal jurisdictional power, since Congress had not conferred such power on the federal courts, it "lies dormant."[122] Accordingly, pendent party jurisdiction was denied, forcing Mrs. Finley either to split her claims or drop her state tort law claim altogether.

The *Finley* decision sparked controversy; while its holding applied only to pendent party jurisdiction under the FTCA, its ra-

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[116] *See* Aldinger v. Howard, 427 U.S. 1, 18 (1976).

[117] *See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374–77 (1978) ("To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.").

[118] 490 U.S. 545 (1989).

[119] *See Finley*, 490 U.S. at 546. There was no independent basis of federal jurisdiction for the state tort claim.

[120] *See id.*

[121] The intuitive arguments to accept jurisdiction were so compelling that the Solicitor General's office developed a case-specific theory on rejecting pendent party jurisdiction in the FTCA context. The United States's argument was based on "proof positive that in enacting the FTCA, Congress considered, and rejected, the notion of pendent party jurisdiction." David Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211, 212–15 (1998) (providing, from the view of the Assistant Solicitor General assigned to litigate the case, a description of the government's case).

[122] *Finley*, 490 U.S. at 547–48. Of course, Justice Scalia's opinion failed to reconcile this argument with Justice Marshall's earlier statement in *Osborn*, which he failed to cite.

tionale threatened any exercise of pendent or ancillary jurisdiction.[123] Thus, Congress quickly moved toward codifying pendent and ancillary jurisdiction.[124]

3. The Federal Courts Study Committee

In 1988, Congress passed the Judicial Improvements and Access to Justice Act, which established the Federal Courts Study Committee to "examine problems and issues currently facing the courts and the United States" and propose long-range solutions.[125] The Committee dealt with a wide range of procedural issues.[126] With a membership consisting of judges, scholars, and practitioners, its goal was to provide suggestions to Congress that would eventually be implemented as law.[127]

The Committee's interest in pendent and ancillary jurisdiction spawned from the *Finley* rationale and its threat to the use of *any* supplemental jurisdiction.[128] As Justice Scalia had made clear in *Finley*, Congress was free to establish pendent party jurisdiction if it so chose.[129] The Committee took note of Justice Scalia's less than subtle hint and addressed the issue thoroughly.[130]

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[123] As the Federal Courts Study Committee later found, "[w]hile technically limited to suits based on the FTCA, the Court's rationale may prohibit any exercise of pendent party jurisdiction and threatens to eliminate pendent claim and ancillary jurisdiction as well." *See* FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 547 (1990); *see also* Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292, 1295 (2d Cir. 1990) (asserting that, after *Finley*, "the continued viability of the doctrine of pendent party jurisdiction in any context is seriously in question."); 136 CONG. REC. S17570–02, *S17580 (daily ed. Oct. 27, 1990) (statement of Sen. Biden) ("The [*Finley*] Court's rationale . . . threatens to eliminate other previously accepted forms of supplemental jurisdiction.").

[124] *Finley* was decided May 22, 1989. On April 2, 1990, the report of the Federal Courts Study Committee was published, of which supplemental jurisdiction codification was a part.

[125] Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988); FEDERAL COURTS STUDY COMM., 101ST CONG., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47–48 (Comm. Print 1990); FEDERAL JUDICIAL CODE REVISION PROJECT ON SUPPLEMENTAL JURISDICTION 15 (Tentative Draft No. 2 1998).

[126] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125. *See generally* Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L.J. 15 (1989).

[127] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125.

[128] *See supra* note 123 and accompanying text.

[129] *See Finley*, 490 U.S. at 556 ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.").

[130] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125, at 47. *See also* FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 554 (1990).

The Committee's broad suggestion, in bold type in its report, was that: "Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base."[131] Specifically, within the text of the proposal, the Committee desired to limit supplemental jurisdiction to "any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim."[132] As such, the recommendation was to codify pendent claim and ancillary jurisdiction, including the authorization of pendent party jurisdiction for federal question cases.[133]

The Committee's report, in other respects, was consistent in its desire to limit diversity jurisdiction as much as possible. Diversity jurisdiction had created friction between state and federal courts, entailed huge costs to the federal system, and only minimally effectuated the goal of allowing the litigation of federal rights in federal court.[134] As a means of substantially reducing the workload of the federal courts, the Committee suggested that Congress eliminate diversity jurisdiction altogether, subject to narrowly defined exceptions.[135] As a "back-up proposal," the Committee suggested changes "to remove the more extreme dysfunctions of the current [diversity] jurisdiction."[136]

Other Committee suggestions framed the issue as how to *remove* business from the federal courts, either by creating non-

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[131] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125, at 47.

[132] *Id.* (emphasis added). One scholar asserts that the Committee's eventual proposal was a broad suggestion that supplemental jurisdiction be allowed over all transactionally related claims; courts, of course, would have the option to remand in the interests of federalism. *See* Richard Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 469 (1991). However, as the statute's authors note, and the proposal itself proves, the Committee advocated a far more limited use of the doctrine. *See* Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 948–49 (1991).

[133] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125, at 47; *see also* McLaughlin, *supra* note 104, at 859.

[134] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125, at 38–41.

[135] *See id.* 39–40.

[136] *Id.* at 42. Those changes included forbidding plaintiffs from invoking diversity jurisdiction in their home states, holding corporations to be citizens of every state in which they do business, limiting the amount in controversy to economic damages, and raising the jurisdictional floor to $75,000 (a change that was later enacted). *See id. See also* 28 U.S.C. § 1332 (1998).

judicial forums for some actions,[137] increasing the roles of the United States Tax Court[138] and other judicial forums,[139] or reallocating current federal business to the state courts.

When the Committee's report was presented to Congress, therefore, it strongly suggested two alterations that would have a conflicting effect on the Supreme Court's holding in *Zahn*: (1) the broad authorization of pendent jurisdiction, even when it included jurisdiction over pendent parties; and (2) the severe curtailing and/or outright elimination of diversity jurisdiction. It was up to Congress to sort it out.

4. Congressional Debate[140]

As with all bills, the bill formulated by the Federal Courts Study Committee was first presented in an appropriate subcommittee, here the Subcommittee on Courts, Intellectual Property and the Administration of Justice within the House Judiciary Committee.[141] The Federal Courts Study Committee Implementation Act, as it was then called, was introduced by Representatives Robert Kastenmeier (D-Wis.) and Carlos Morehead (R-Cal.), as H.R. 5381 on July 26, 1990.[142]

A hearing was held on September 6, 1990, to discuss the bill.[143] The concrete supplemental jurisdiction statute under review, Section 120 of H.R. 5381, had been written by Professors Arthur Wolf and John Egnal. Wolf and Egnal, in language proposed in a letter to study committee member and Judiciary Committee Chairman Kastenmeier, had broadly authorized supplemental jurisdiction, exempting from the authorization only

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[137] Alternative dispute resolution, various administrative proposals, and parole boards were among the ideas to reduce the clutter in the federal courts. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 125, at 55–67, 81–86.

[138] *See id.* at 69–72.

[139] Proposed alternative judicial forums included bankruptcy courts, small claims procedures for federal tort claims, and the use of magistrates. *See id.* at 74–81.

[140] For discussion of § 1367's codification, written by one involved in the process, see Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1 (1992).

[141] *See Hearing Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, of the Committee on the Judiciary of the House of Representatives*, H.R. 5381 and H.R. 3989, Civil Justice Reform Act of 1990, Sept. 6, 1990 [hereinafter *Supplemental Jurisdiction Hearings*]; *see also* Wolf, *supra* note 140 at 17–18.

[142] H.R. REP. 101-734, 101st Cong., 2d. Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860.

[143] *See Supplemental Jurisdiction Hearings*, *supra* note 141, at 82 (statement of Rep. Kastenmeier).

pendent party claims where the plaintiff had brought the third party into the case (thus overruling *Kroger*, but codifying *Aldinger*.)[144] The Wolf/Egnal language was:

> § 1367. Supplemental Jurisdiction
> (a) IN GENERAL—(1) In any civil action of which the district courts have original jurisdiction, including an action removed from a State court, any party or person may assert a non-Federal claim against any person or other party if—
>
> (A) the Federal claim in the original complaint is not insubstantial; and
>
> (B) the original Federal claim and the non-Federal claim arise out of the same transaction or occurrence . . . .
>
> (2) If the original Federal claim in a civil action is founded solely on diversity of citizenship under section 1332, the original plaintiff may assert a non-Federal claim under paragraph (1) only against the original defendant or against a party or person who has been brought into the action by a party or person other than the plaintiff.[145]

Professors Steven Burbank and Thomas Mengler, however, in pre-hearing correspondence with Professor Wolf, had disagreed with such a broad authorization, asserting that the proposed language would "significantly relax the complete diversity requirement."[146] This idea, they claimed, was not only undesirable as a policy matter but also completely inconsistent with the various Federal Courts Study Committee proposals to eliminate diversity jurisdiction in all but the mass tort context.[147]

Professor Larry Kramer, who had been in correspondence with both sets of professors, communicated Burbank and Mengler's ideas to Judge Joseph Weis, Jr., chairman of the Federal Courts Study Committee and a key witness at the congressional hearings, shortly before the hearings began.[148] Kramer argued that the Wolf/Egnal proposal was poorly worded, and that it would al-

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[144] *See* Letter from Arthur D. Wolf to The Honorable Robert W. Kastenmeier (June 8, 1990), *in Supplemental Jurisdiction Hearings*, *supra* note 141, app. 686–89.

[145] H.R. 5381, *reprinted in Supplemental Jurisdiction Hearings*, *supra* note 141, at 28–29.

[146] Despite the restrictions in the proposed § 1367(a)(2), the statute plainly allowed diversity supplemental jurisdiction in many cases, and would allow the diversity requirements to be contravened in many others. *See* Letter from Thomas Mengler to Arthur Wolf (Aug. 24, 1990), *in Supplemental Jurisdiction Hearings*, *supra* note 141, at 711.

[147] *See id.*

[148] *See* Letter from Larry Kramer to The Honorable Joseph F. Weis, Jr. (Aug. 21, 1990), *in Supplemental Jurisdiction Hearings*, *supra* note 141, at 713–15.

ways allow plaintiffs to "evade the complete diversity rule."[149] Kramer observed that a better worded statute, which he had proposed while on the Federal Courts Study Committee, would "preserve[ ] pre-*Finley* limitations on pendent jurisdiction in diversity cases."[150]

Professor Thomas Mengler further added to Kramer's claim, asserting that the Wolf/Egnal proposal should be scrapped because "it expands diversity jurisdiction."[151] Mengler added to the Kramer proposal language that would clarify the complete diversity rule and its affect on Rule 19 compulsory pendent parties. According to Mengler, adding the language that pendent parties under Rules 14, 19, 20, or 24, should not be allowed "when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332," was intended to mean "when not inconsistent with the holding and rationale of *Kroger*."[152] Thus, under this language, *Kroger* as well as other pre-*Finley* limitations on pendent jurisdiction were intended to remain.

The supplemental jurisdiction proposal (as written by Wolf and Egnal) within H.R. 5381 received some degree of attention at the September 6, 1990 subcommittee hearing. Judge Joseph Weis, Jr., who had chaired the Study Committee, testified that he (and, he believed, the committee) favored coupling supplemental jurisdiction with the virtual repeal of *all* of diversity jurisdiction,[153] commenting specifically that "it would seem appropriate to confine the legislation to . . . federal question cases."[154] His specific proposal combined the language from Professor Mengler's letter with Professor Rowe's reservations and rejected pendent party jurisdiction in diversity cases where plaintiffs sought to add parties using the devices of impleader (Rule 14), compulsory joinder (Rule 19), or intervention (Rule 24).[155]

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[149] *Id.* at 714.

[150] *Id.* at 715. Kramer's earlier proposal can be found at WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 122, at 567–68. There is some evidence that Professor Kramer hoped that the new statute would be read as overruling *Zahn*, but his correspondence to Judge Weis dealt with only "pre-*Finley*" limitations in general and not *Zahn* in particular. *See* Shapiro, *supra* note 121, at 216 n.32.

[151] Letter from Thomas Mengler to Thomas D. Rowe, Jr. (August 28, 1990), *in Supplemental Jurisdiction Hearings*, *supra* note 141, app. at 716.

[152] *Id.* at 717.

[153] *See Supplemental Jurisdiction Hearings*, *supra* note 141, at 87 (testimony), 93 (prepared remarks).

[154] *Id.* at 93.

[155] *See Supplemental Jurisdiction Hearings*, *supra* note 142, at 98 ("Addendum: Sec-

The bill that appeared on the floor of Congress for debate and vote was a version of Judge Weis's proposal, updated and edited by Professors Mengler, Burbank, and Rowe.[156] As reported on the House floor on September 27, 1990, the supplemental jurisdiction provision read:

> § 1367. Supplemental Jurisdiction
>
> (a) IN GENERAL—Except as provided in subsections (b) or (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that the form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) DIVERSITY CASES—In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[157]

Without any discussion of the supplemental jurisdiction provision at all, the bill passed the house by a voice vote.[158]

A month later, the bill was up for consideration on the Senate floor. While in the Senate, the bill changed names (it became the Judicial Improvements Act) and received slightly more debate. The Supplemental Jurisdiction proposal was described thoroughly in the record; its purposes, goals, and limits were circulated to the body.[159] Generally, the Senate clarified that the statute would "essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental ju-

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tion 1367 Supplemental Jurisdiction").

[156] *Compare* September 11, 1990 Draft of § 1367, available at *Supplemental Jurisdiction Hearings*, *supra* note 142, at 722 *with* Addendum, *supra* note 155. Judge Weis's proposal had been altered slightly, adding permissive joinder (Rule 20) to the category of parties ineligible for pendent party jurisdiction, but was otherwise identical.

[157] 136 CONG. REC. H8256-01, H8260 (daily ed. Sept. 27, 1990).

[158] *See id.* at H8262–63.

[159] *See* 136 CONG. REC. S17570–02 (daily ed. Oct. 27, 1990).

risdiction."[160] Specifically, the record reflects (and cites *Zahn* for the proposition) that "[t]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*."[161]

The bill passed, and was sent back to the House after other portions were amended, where it passed without objection.[162] The House and Senate reports accompanying the statute make clear that to the extent the new section would impact pre-*Finley* limits on supplemental jurisdiction, it would leave *Zahn* intact.[163]

5. Conclusion

Returning to our previous hypothetical, all of the plaintiffs desire to sue the Friedman Chemical Corporation in a federal class action. Should the federal district court take jurisdiction over the suit?

In answering this question, both the Fifth and Seventh Circuits have gone with § 1367's plain meaning and screamed a resounding "no." Judge Patrick Higginbotham, in *Abbott*, gave a short discussion of the legislative history and concluded that "[p]erhaps, by some measure transcending its language, Congress did not intend . . . to overrule *Zahn* . . . . Omitting the class action from the [diversity] exception may have been a clerical error."[164] However, in language resounding of the new textualism, Judge Higginbotham asserted that "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result."[165] Concluding § 1367 was clear and not absurd, the Fifth Circuit went no further.[166]

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[160] *Id.* at S17581.

[161] *Id.*

[162] *See* 136 CONG. REC. H13297–01, H13312–16 (daily ed. Oct. 27, 1990).

[163] *See* H.R. REP. 101-734, 101ST CONG., 2D SESS., 1990, *reprinted in* 1990 U.S.C.C.A.N. 6860.

[164] *Abbott Labs.*, 51 F.3d at 528.

[165] *Id.* at 529.

[166] *See id.* In *Stromberg*, the Seventh Circuit noting that "we are reluctant to create a conflict among the circuits on a jurisdictional issue," asserted that "[w]e follow *Abbott Laboratories*, which has strong support from the statutory text." 77 F.3d at 930. For a policy analysis concluding that, as a prudential matter, *Zahn* should be overruled, see Mark C. Cowley, Note, *The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 In Multi-Plaintiff Diversity Litigation*, 73 NOTRE DAME L. REV. 1045 (1998).

Interestingly, interpreting § 1367 could raise many of the issues textualists assert to dispute the reliability of legislative history.[167] A careless judge could use § 1367's legislative history and "pick his friends" within its crowd to come to the same result reached by the Fifth and Seventh Circuits. The Committee's working papers[168] show that the group considered the precise question of whether the new supplemental jurisdiction statute should preserve or overrule *Zahn*. Generally, while pre-1367 law was to be preserved, the committee asserted:

> The exception is that our proposal would overrule the Supreme Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which held that each plaintiff in a diversity action must meet the amount in controversy requirement .... From a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it.[169]

Neither the Fifth nor Seventh Circuits relied on this statement—they strictly relied on the statute's "plain meaning."

Their method of statutory interpretation, and the result they reached, however, is hardly democratic. Section 1367 is the result of a tremendous amount of work, deliberation, and debate. A thorough look at the legislative history would conclude the following:

> (1) the Federal Courts Study Committee proposed the broad authorization of supplemental jurisdiction to achieve goals of judicial economy; the Committee also proposed the virtual elimination of diversity jurisdiction to decrease the burdens on the federal courts without compromising their essential role.

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[167] *See supra* Part II.

[168] Critics of legislative history's use, as described earlier, frequently neglect the point that if Congress so chooses, it can include in a statute a statement that some or all of the legislative history is not to be deemed authoritative. *See supra* note 65 and accompanying text. The Federal Courts Study Committee did exactly that with regard to its working papers and subcommittee reports. *See* WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 122, at I ("In no event should the enclosed materials be construed as having been adopted by the committee.") The Third Circuit explicitly noted the committee's disclaimer of its working papers and commented that "It is unfortunate that some commentators and courts have erroneously concluded that the Working Papers represented the view of the Federal Courts Study Committee." *Meritcare, Inc.*, 166 F.3d at 220 n.4.

[169] WORKING PAPERS AND SUBCOMMITTEE REPORTS, *supra* note 122, at 561 n.33. *See also id.* (citing David Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753, 755–67 (1978), for the proposition that "*Zahn* is the bad apple.")

> (2) during Congressional debate, the Committee's recommendations were altered, reflecting a desire to preserve limits on supplemental jurisdiction existing prior to *Finley*. Further, the Committee's suggestions to eliminate or drastically curtail diversity jurisdiction were dispensed with.

This result is obtained by looking to the entire history of the supplemental jurisdiction statute, completely examining the process by which it was enacted. This method of statutory interpretation gives proper respect to the extent of deliberation necessary to produce such a bill; relying on legislative history encourages the debate necessary to the proper functioning of our democracy. Further, only this method of statutory interpretation makes those responsible for the bill and the debate that spawned it properly accountable for their actions. Section 1367(b) was not intended to overrule *Zahn v. International Paper*: its failure to list Rule 23 within its contents should not be dispositive of the issue.[170] To interpret § 1367(b) and receive an unintended result is the epitome of countermajoritarianism.

The Tenth Circuit's recent holding on the issue, while coming to the "correct" result, is equally flawed. In short, the court there concluded that not only was the statute clear, but clear in the other direction, asserting that "a literal and textually faithful reading of § 1367(a) [in combination with § 1367(b)] leads to the opposite conclusion from that of the Fifth and Seventh Circuits."[171] This decision borders on the ridiculous.[172] Contrary to the Tenth Circuit's strained rationale, at the very least, the absence of Rule 23 from § 1367(b)'s disclaimer to the broad jurisdiction authorized by section (a) creates ambiguity. While getting to the correct result, the Tenth Circuit's rationale also failed to promote substantive democracy.

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[170] As discussed earlier, under the deliberative paradigm, one does not need a "hook" within the statute to support an interpretation of words consistent with one's case before a court should go to legislative history: a court should use legislative history *all of the time. See supra* note 90 and accompanying text. However, even if a "hook" is necessary, it can be found within § 1367(b) in the form of Congress's inclusion of Rule 20 within its diversity disclaimer. In fact, Rule 23 is merely an extension of Rule 20's broad permissive joinder with respect to claims "arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." FED. R. CIV. P. 20(a).

[171] *Leonhardt*, 160 F.3d at 640.

[172] More than anything, this decision illustrates the problem with "The New Textualism." *See supra* Part II.E. If legislative history is only relevant when the statute is "unclear," this still leaves the courts open to determine when in fact it qualifies as such.

The Third Circuit's holding in *Meritcare, Inc.* is the deliberative ideal.[173] Its thoughtful opinion goes through the activity of the Federal Courts Study Committee, discusses how its recommendations differed from congressional proposals, and made extensive references to the legislative history.[174] The panel concluded, after a "review of the text, legislative history, and origins of Section 1367," that *Zahn* was preserved.[175]

Judge Weis went right to the heart of this issue when he cited an earlier district court case that articulated:

> To retain this case in this court is to say to Congress: "We know what you meant to say, but you did not quite say it. So the message from us in the judicial branch to you in the legislative branch is: 'Gotcha! And better luck next time.'" Such a message is not required by the separation of powers. Nor is it in harmony with the fact that Congress and the courts, however different their respective roles, are parts of a single government.[176]

Unlike the Third Circuit's opinion, the Tenth, Fifth, or Seventh Circuits' decisions neither foster deliberation in Congress (indeed, they find it irrelevant) nor promote the accountability of its members for their actions. These decisions fail to improve, or even respect, American republican democracy.

B. *Habeas Corpus: Does the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") Overrule* Stone v. Powell?[177]

Imagine that Brandon Press, while driving in his roommate's car from New York City to Boston, on January 2, 1999, is pulled over for speeding. The police officer writes Press a citation (he was going 68 in a 50 mph zone), but does not arrest him. The officer senses something suspicious, however, orders Press out of the car, and begins a complete search of the automobile. The

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[173] Interestingly, the Third Circuit's decision was authored by Judge Joseph Weis, Jr., who had chaired the Federal Courts Study Committee and been a key witness at the subcommittee hearings.

[174] *See Meritcare, Inc.*, 166 F.3d at 219–22.

[175] *Id.* at 222.

[176] *Id.* at 221 (quoting Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808, 820 (E.D. Pa. 1997)).

[177] 428 U.S. 466 (1976). No court has directly addressed this question, but courts applying the AEDPA have still used *Stone* in rejecting habeas petitioners' Fourth Amendment claims because they were "fully and fairly litigated" in state court. *See, e.g.*, Smallwood v. Gibson, 191 F.3d 1257, 1265 (10th Cir. 1999); Sweet v. Delo, 125 F.3d 1144, 1149 (11th Cir. 1999); Torres v. Irvin, 33 F. Supp. 2d 257, 264 (S.D.N.Y. 1998).

officer finds nothing until he unzips the fabric covering the back seats. Within the cushions the officer finds approximately 250 grams of crack cocaine. Press is arrested, indicted, and brought to trial.

In a pre-trial motion in a Massachusetts state court, Press argues vehemently that the police officer's conduct violated the Fourth Amendment and that the only piece of evidence the state has should be excluded. After briefs are filed on the issue and the judge hears oral argument from both sides, the motion is summarily denied, and Press is convicted and sentenced to a long prison term. Appeals are to no avail, and state habeas proceedings are fruitless. Press, with only one shot left to overturn his conviction or get a new trial, petitions for federal habeas corpus. He asserts in his petition that "as petitioner was convicted solely on the basis of evidence obtained in violation of the Fourth Amendment to the United States Constitution, as interpreted by the Supreme Court, he is being held in violation of the Constitution."

In *Stone v. Powell*, the Supreme Court held that if a habeas petitioner had a full and fair opportunity to litigate his Fourth Amendment claim at trial, the claim cannot be a basis for granting a writ of habeas corpus.[178] The Court argued that while the exclusionary rule's enormous costs (setting free the guilty at trial) were justified by the deterrence effect the rule had upon police with respect to trial and direct review, the incremental benefit of extending such a rule to habeas petitions was insufficient to overcome such costs.[179] Therefore, since Press had a full and fair opportunity to litigate his Fourth Amendment claim at trial, it is not cognizable on habeas, and Press's petition should be denied summarily.

However, Congress, in the Anti-terrorism and Effective Death Penalty Act of 1996,[180] completely reformulated habeas corpus law. According to the new legislation:

> a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in a state court proceeding unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

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[178] *See Stone v. Powell*, 428 U.S. at 489-95.
[179] *See id.* at 489–90.
[180] *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996).

> law, as determined by the Supreme Court of the United States.[181]

The Massachusetts court's decision on Press's Fourth Amendment claim was clearly incorrect; the Supreme Court's recent decision in *Knowles v. Iowa*[182] is dispositive of the issue. Therefore, since the decision "was contrary to . . . clearly established Federal law, as determined by the Supreme Court,"[183] the statute seems to assert that Press's claim is cognizable on habeas review.[184] However, under *Stone*, since Press's Fourth Amendment claim received a full hearing in the state system, it is not entitled to habeas review.

Thus, to properly respond to Press's habeas petition, the court must answer a fundamental question: does 28 U.S.C. 2254(d) overrule *Stone v. Powell*? As described earlier, to properly answer such a question, a conscientious court would go through the background of the doctrine, describe why Congress addressed the issue and the goals it desired to accomplish, and then apply that information to the question at bar.

1. Background

Congress first authorized federal judges to grant writs of habeas corpus to prisoners held under state law in 1867.[185] Ever since that initial authorization, federalism concerns have fueled constant debate over the existence and extent of federal review of state criminal decisions.[186]

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[181] 28 U.S.C. § 2254(d)(1)–(2) (1996).

[182] 119 S. Ct. 484 (1998) (holding that a full automobile search incident to a speeding citation violates the Fourth Amendment).

[183] 28 U.S.C. § 2254(d)(1). Some observers have commented that under the "contrary to . . . clearly established Federal law" standard, "the federal circuit courts of appeals seem headed toward interpretations of 'unreasonableness' so narrow that district courts could be lulled into a rubber-stamp mentality." Evan Tsen Lee, *Section 2254(D) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103, 105 (1998). This hypothetical was constructed, however, to assume that the state court's decision on the Fourth Amendment issue was "contrary to . . . clearly established Federal law, as determined by the Supreme Court."

[184] *See* 28 U.S.C. § 2254 (d)(1).

[185] Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Statutory authorization was necessary because the Supreme Court, in two prior decisions, had held that habeas jurisdiction, especially over state prisoners, was not inherent in federal power and must be expressly granted by statute. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[186] *See, e.g.*, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing that habeas should be limited to those petitioners whose constitutional arguments are supplemented by colorable claims of innocence); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for*

While the 1867 Act allowed the granting of writs when a state prisoner was held in violation of federal law, it did not specify how state court determinations of federal law would be dealt with. As the petitioner would have undoubtedly raised his claim before the state tribunal, it was unclear whether some form of deference, if not issue preclusion, would apply.

The Supreme Court's first foray into this area was in 1915 with the case of *Frank v. Magnum.*[187] In that case, Leo Frank claimed, *inter alia*, that his trial in a Georgia state court had been "dominated by a mob," and thus that his rights to a fair trial and due process were violated, claims rejected by the Georgia Supreme Court.[188] The Supreme Court, on habeas review, gave deference to the Georgia Supreme Court's application of the facts of the case to the Fourteenth Amendment, reasoning that:

> To [ignore the decision of the state court of last resort] would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.[189]

Under this rubric, "so long as the state provided an adequate review process to hear the defendant's claims, there was no basis for habeas relief for state prisoners."[190]

Under this interpretation of the 1867 habeas corpus statute,[191] therefore, state decisions, even on issues implicating the United

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State Prisoners, 76 HARV. L. REV. 441, 455–60 (1963) (arguing that habeas should be limited to those petitioners challenging state courts' processes, but not state courts' results); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 991 (1985) (attempting to correct the problem that habeas jurisdiction will be debated "until the federal courts' authority to discharge prisoners from state custody is explained on some conceptually satisfying basis.")

[187] 237 U.S. 309 (1915).

[188] *Id.* at 335 (citing Frank v. State, 80 S.E. 1016, 1032–33 (Ga. 1914)).

[189] *Frank*, 237 U.S. at 334–35.

[190] CHEMERINSKY, *supra* note 100, at 787.

[191] Between 1867 and 1996, the habeas statute remained in large part unchanged. *See generally* RICHARD FALLON, DANIEL MELTZER, & DAVID SHAPIRO, HART AND WESCH-

States Constitution, were deserving of deference. For the next few decades, while habeas courts did not provide the full deference awarded under the rubric of *Frank*, state court determinations were still respected. This would change substantially, as would the availability of habeas corpus, during the heyday of the Warren Court.

2. *Brown v. Allen*[192] and Its Progeny

Despite the fact that collateral federal review of state criminal convictions had been available since 1867, it had been infrequently utilized. Many of the Bill of Rights amendments had yet to be applied to the states, and thus could not be utilized by state prisoners in habeas claims.[193] As a result, even though state prisoners could claim to a federal court that they were being held "in violation of law," they had little ammunition on which to base such a claim.

Brown v. Allen, combined with later Warren Court decisions, revolutionized habeas corpus, giving state prisoners a powerful, substantive remedy against state court misconduct.[194] In *Brown*, Justice Frankfurter argued that despite the importance of federalism, recognizing state autonomy, and finality, "surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy."[195] Therefore, state court legal determinations on federal

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LER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 1340–41 (4th ed. 1996). Therefore, while not technically the "statute of 1867" at the time of *Brown v. Allen*, the fundamental nature of the law remained the same.

[192] 344 U.S. 443 (1953) (opinion of Frankfurter, J.). Though Justice Reed wrote the opinion of the court in *Brown*, he did not speak for a majority of the court, and he spoke cryptically. Justice Frankfurter's opinion "reflects the way that the case has been understood by subsequent Supreme Court decisions." FALLON ET AL., *supra* note 191, at 1351.

[193] *See generally* Palko v. Connecticut, 302 U.S. 319, 322 (1937) (holding that the Fifth Amendment does not apply to the states; CHEMERINSKY, *supra* note 100, at 846. The Supreme Court had earlier held that the Bill of Rights did not apply to the states. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[194] *See, e.g.*, Sharad Sushil Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 435–36 (1997).

[195] *Brown*, 344 U.S. at 498. Justice Frankfurter did make clear that Congress *could* have left enforcement of federal constitutional rights in state courts exclusively within the domain of the state system. However, since Congress had provided for federal jurisdiction, the Supreme Court had to "give fair effect to the habeas corpus jurisdiction . . . [into which] Congress has imbedded . . . the historic function of habeas corpus adapted to reaching an enlarged area of claims." *Id.* at 499–500.

constitutional issues were entitled to *de novo* review on habeas.[196]

The consequences of this decision were multiplied as subsequent Warren Court decisions substantially enlarged the constitutional protections granted to criminal defendants. As the Fourth,[197] Fifth,[198] and Sixth[199] amendments were applied to the states and their respective protective capacities enlarged, the scope of habeas review expanded accordingly via *Brown*. Many believed that the combination of *Brown* and the Warren Court's pro-defendant procedural decisions was detrimental to the cause of federalism.[200]

Without overturning *Brown* or any of the Warren Court decisions on criminal procedure, the Burger and Rehnquist Courts slowly chipped away at habeas jurisdiction.[201] Procedurally, the Court asserted that any claim not raised earlier is not cognizable on habeas unless the petitioner can demonstrate both that the petitioner had good cause for failing to raise it and that failure to do so was prejudicial *vis a vis* their innocence.[202] Substantively, the most significant inroad was the Court's holding in *Stone v. Powell* that Fourth Amendment exclusionary rule claims could not be relitigated on habeas when they had received full and fair hearings in the state system.

The *Powell* court grounded its holding in the judiciary's questioning of the exclusionary rule's source and purpose, asserting that the deterrence rationale upon which it is based does not ap-

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[196] To that extent, *Brown* overruled any deference that *Frank* may have required a habeas court to give to state decisions on federal constitutional issues.

[197] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding the Fourth Amendment's right to freedom from unreasonable searches and seizures, and its corresponding exclusionary rule, applicable to the states).

[198] *See* Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fifth Amendment's right against self-incrimination applicable to the states); Miranda v. Arizona, 384 U.S. 436 (1966) (expanding that right).

[199] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the Sixth Amendment's right to counsel applicable to the states); *In re* Oliver, 333 U.S. 257 (1948) (holding the Sixth Amendment's right to a public trial applicable to the states).

[200] *See, e.g.*, Friendly, *supra* note 186, at 152.

[201] *See generally* CHEMERINSKY, *supra* note 100, at 847–48. Many of the Supreme Court justices during these periods have repeatedly condemned the propriety of habeas jurisdiction for state prisoners. *See generally* Yackle, *supra* note 186, at 993-94 nn.13–14. (describing specific examples where, on and off the bench, Chief Justices Burger and Rehnquist and Justices Powell, O'Connor, Blackmun, White, and Stevens have expressed their distaste for habeas corpus).

[202] *See* Wainwright v. Sykes, 433 U.S. 72 (1977). The Court later further restricted the scope of habeas relief by holding that any new rules formulated by the Supreme Court will not apply to cases on collateral review, subject to vary narrow exceptions. *See* Teague v. Lane, 489 U.S. 288, 305–07 (1989).

ply to habeas hearings.[203] The Court specifically emphasized the tremendous costs associated both with applying the exclusionary rule and with habeas corpus in general.[204] Its holding effectively removed many cases from the habeas corpus system, as it turned one of the largest bullets in petitioners' guns into a blank.[205]

However, the cry to restrict habeas corpus remained.[206] Somehow, despite increasing frustration with the processes, civil libertarians were able to fight off these attempts.[207] That would all end, however, as a direct result of a tragic and fateful day in April 1995.

3. Oklahoma City, Terrorism, and Reform

On April 19, 1995, an enormous explosion destroyed the Alfred D. Murrah Federal Building in Oklahoma City, killing 168 people, including children, and injuring over 500.[208] The tragedy

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[203] *See Powell*, 428 U.S. at 485–86.

[204] *See id.* at 490–91.

[205] *See* Phillip Halperin, *Federal Habeas Corpus and the Mapp Exclusionary Rule after Stone v. Powell*, 82 COLUM. L. REV. 1, 34–35 (1982). The Burger and Rehnquist Courts resisted efforts to expand the *Powell* rationale and further restrict habeas jurisdiction. *See* Withrow v. Williams, 507 U.S. 680 (1993) (holding that *Miranda* claims are cognizable on habeas notwithstanding full and fair hearings in state courts); Kimmelman v. Morrison, 477 U.S. 365 (1986) (allowing *Strickland* claims on habeas even if granted full and fair hearings in state courts); Rose v. Mitchell, 443 U.S. 545 (1979) (holding that claims of discrimination in grand jury selection are cognizable on habeas notwithstanding a full and fair hearing in the state courts).

[206] For example, in 1982 the Attorney General introduced legislation that would have limited habeas courts' jurisdiction to a determination of whether the claim had received a fair and full hearing in state court. *See The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. On the Judiciary*, 97th Cong., 2d Sess. 9–15 (1982). As one commentator (and former federal circuit judge) noted, acceptance of this proposal would return habeas jurisdiction to that in *Frank*, giving tremendous deference to state decisions, even on federal constitutional issues. *See* Donald F. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1021 & nn.42–43 (1993).

[207] Congress considered various forms of habeas reform countless times during the 1980s and 1990s, but could not seem to satisfy enough members to pass a bill. *See, e.g.*, *Habeas Corpus, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 103d Cong., 2d Sess. (1993); *Habeas Corpus Issues, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 102nd Cong., 1st Sess. (1991); *Habeas Corpus Reform, Hearings Before the Committee on the Judiciary of the United States Senate on S. 88, S. 1757, and S. 1760*, 101st Cong., 2d Sess. (1989 & 1990) (presenting the report of the Powell Committee on how to reform habeas corpus); *Habeas Corpus Reform, Hearing Before the Committee on the Judiciary of the United States Senate on S. 238*, 99th Cong., 1st Sess. (1985). The House Judiciary Committee, in fact, held a hearing on habeas approximately three weeks before the Oklahoma City Bombing. *See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing Before the Committee on the Judiciary on S. 623*, 104th Cong., 1st Sess. (1995).

[208] *See* Dale Russakoff & Serge F. Kovaleski, *An Ordinary Boy's Extraordinary Rage*,

was immediately described by the press as terrorism, which, like the earlier World Trade Center fiasco, spurred Americans to ask both why it occurred and how it could have been prevented.[209] These sentiments spurred politicians into action. House and Senate resolutions, adopted almost immediately and unanimously, condemned the bombing and pledged to enact legislation to bolster federal agencies' abilities to combat terrorism.[210] President Clinton shortly thereafter asked Congress for $142 million in funding for an investigation, clean-up of the site, and victim assistance.[211] Congress felt the need to act, and it did so quickly.

Several anti-terrorism bills, most prominent among them the President's Omnibus Counterterrorism Act of 1995, were circulating in Congress before the bombing.[212] Hearings began in the House Subcommittee on Crime on May 3, 1995, and those present spoke repeatedly of the desire to act quickly in the wake of Oklahoma City.[213] Those hearings, however, did not concern habeas corpus—the President's anti-terrorism bill did not include those provisions; rather, it only concerned what congressional action was needed to increase law enforcement's ability to deter future terrorism.[214]

WASH. POST, July 2, 1995, at A1.

[209] *See, e.g., Oklahoma City Terror: Perils of Open Society*, S.F. CHRON., Apr. 20, 1995, at A24; Laura E. Keeton, *In Broad Daylight: Terrorism Hits Home—U.S. Building Bombed; Dead Include Children*, WALL ST. J., Apr. 20, 1995, at A1; David Dahl, *American Terror: Special Report on the Oklahoma Explosion*, ST. PETERSBURG TIMES, Apr. 20, 1995, at A1 ("It claimed the lives of the most innocent: 17 children brought to a day care center by their parents for safekeeping. And it left the United States wondering: Who's next?").

[210] The Senate resolution was adopted 97-0, the House resolution 409-0. *See* H.R. Res. 135, 104th Cong., 141 CONG. REC. H4458-02, H4464 (daily ed. May 2, 1995); S. Res. 110, 104th Cong., 141 CONG. REC. S5638-01, S5368 (daily ed. Apr. 25, 1995).

[211] *See* John F. Harris, *Clinton Asks $142 Million for Bomb Probe, Security; Other Areas in Budget Scheduled for Cuts*, WASH. POST, May 3, 1995, at A15.

[212] *See Combating Domestic Terrorism, Hearing Before the Subcommittee on Crime of the Committee on the Judiciary*, 104th Cong., 1st Sess. 10 (1995) (statement of Jamie S. Gorelick, Dep. Attn'y Gen.).

[213] *See, e.g., id.* at 2 (statement of Rep. McCollum (R-Fla.)) ("In the wake of this tragedy . . . government has an absolute duty to protect its citizens from terrorism."); *id.* at 3 (statement of Rep. Schumer (D-N.Y.)) ("The bombing in Oklahoma City made clear that this illness is, unfortunately, in America a fact of life, and it will infect our society and could destroy our culture if we do not act."); *id.* at 5 (statement of Rep. Hyde (R-Ill.)) ("The pain of Oklahoma City should [quiet] those voices of doubt.").

[214] At the hearings, Deputy Attorney General Jamie Gorelick was asked about the administration's position on habeas reform, as habeas was not a part of the President's plan. Gorelick responded that the President supported habeas reform, but that it was not included in the proposal because he did not want it to "become a political football." *Id.* at 48.

Provisions for habeas reform were amended to the pending legislation as part of the Dole-Specter-Hatch habeas corpus reform bill, introduced on May 25, 1995.[215] The bill planned to reformulate habeas jurisdiction almost completely, with the goal to reduce the amount of time involved in the system, especially in death penalty cases.[216] Accordingly, the proposed amendment to § 2254(d) provided:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[217]

Habeas corpus reform was extremely controversial, and spawned more debate than any other part of the Comprehensive Terrorism Prevention Act. Throughout the debate, however, there was little controversy over what the new § 2254(d) would mean in practice: it would require deference, at least to some extent, to all state determinations of federal constitutional law.[218] The debate was, for the most part, about two ideas: whether inserting

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[215] *See* 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Senator Hatch (R-Utah)).

[216] *See id.*

[217] *See* Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. (1995).

[218] Congressmen from both parties, whether they agreed with the reform or not, universally held such an interpretation. *See, e.g.*, 141 CONG. REC. 14523, 14531 (1995) (statement of Sen. Biden (D-Del.)) ("The standard proposed . . . would direct a Federal court to defer to a State court decision as long as it is not unreasonable."); 141 CONG. REC. 15018, 15024 (1995) (statement of Sen. Kennedy (D-Mass.)) ("The bill might be read to require Federal courts to defer to State courts on issues of Federal constitutional law."); *id.* at 15031 (statement of Sen. Feingold (D-Wis.)); *id.* at 15050 (statement of Sen. Specter (R-Pa.)); *id.* at 15057–58 (statement of Sen. Biden) ("I said the Federal courts should exercise independent review while the Specter-Hatch bill requires Federal courts to defer to the states.") (comparing the proposed deference to *Chevron*-type deference); *id.* at 15062 (statement of Sen. Hatch) ("State courts, in many respects, are just as good, if not better, than the Federal courts- in these areas, just as good."); 141 CONG. REC. S16892, 16903 (daily ed. Nov. 9, 1995) (statement of Sen. Levin (D-Mich.)) ("This standard establishes a whole new concept—the 'reasonable' violation of the U.S. Constitution."); *id.* at 16909 (statement of Sen. Moynihan (D-N.Y.)); 142 CONG. REC. 4555, 4610 (1996) (statement of Rep. Hyde); 142 CONG. REC. 4793, 4794 (1996) (statement of Rep. Chenoweth (R-Idaho)); *id.* at 4809 (statement of Rep. Jackson-Lee (D-Tex.)).

this controversial measure was mere political opportunism better left alone,[219] and whether the reform itself was desirable.[220]

Two amendments were brought to the floor that, if adopted, would have drastically changed the habeas bill; both were rejected. First, Senator Joseph Biden (D-Del.) proposed that the standard of review portion of the habeas reform be discarded and that the new habeas limitations apply only to federal prisoners.[221] As Senator Biden argued, if habeas reform was linked to terrorism, and the federal bill made terrorism a federal crime, reforming the appeals of state prisoners was unnecessary.[222] After debate in which several senators expressed extreme disapproval of the provisions of the new habeas statute (especially the deference provisions), Biden's amendment was nonetheless tabled, never to reappear.[223]

On the other end of the political spectrum, Senator Kyl proposed an amendment that would completely eliminate federal habeas corpus for those state prisoners whose states had adequate state post-conviction systems.[224] This amendment would have provided far more deference than the proposed § 2254(d). As Senator Biden asserted:

> This amendment makes clear that the State court need not have gotten the result right in a particular case and, in fact, it need not even have applied its system in a particular case. All it says is they have to have had a process, and if they had a process, even though it may not have been applied fairly in a particular case, even though it may not have gotten the result right on a constitutional basis, the Federal court cannot look at it.[225]

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[219] *See, e.g.*, 142 CONG. REC. 4555, 4567 (1996) (statement of Rep. Conyers (D-Mich.)) ("Hamas will be mentioned 999 times today, and maybe it should be. But what do these have to do with habeas corpus?"); 141 CONG. REC. 14523, 14525 (1995) (statement of Sen. Hatch); 141 CONG. REC. 14919, 14926 (1995) (statement of Sen. Dole (R-Kan.)); 142 CONG. REC. 7953, 7956 (1996) (statement of Sen. Kennedy).

[220] *See supra* note 201 and accompanying text.

[221] *See* 141 CONG. REC. 15018, 15020–21 (1995) (statement of Sen. Biden).

[222] *See id.* at 15021. ("My amendment simply says, all right, if this is about Oklahoma City, let us have it about Oklahoma City. The provisions in the bill relate to Federal prisoners and Federal habeas corpus.").

[223] *See id.* at 15023.

[224] *See id.* at 15044–45. His proposal, amendment 1211, provided "an application for a writ of habeas corpus . . . shall not be entertained by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." *Id.* The amendment was supported by Senators Nickles and Inhofe and by Judge Robert Bork. *See id.* at 15045–46.

[225] *Id.* at 15048 (statement of Sen. Biden). *See also id.* at 15051 (statement of Sen. Hatch) ("The Kyl amendment would effectively end Federal habeas review of State

This amendment, too, was tabled.[226]

In spite of several attempts to change the proposed § 2254, the provision was enacted exactly as introduced in April of 1995. The conference reports, which were published days before the act was finally passed on April 19, 1996,[227] show the debate identical to its original form from April through November 1995.[228] There is little dispute that, at the very least, congressmen knew that the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 could be construed to give deference to state court determinations of federal law, enforcing such decisions even if they were incorrect because they were "reasonable."

When President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996,[229] he devoted, rather unusually, some time to a legal analysis of the act's habeas corpus provisions. Specifically, President Clinton stated that:

> Some have expressed the concern that two provisions of this important bill could be interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary. . . I expect that the courts . . . will read section 104 to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.[230]

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convictions where the State already has postconviction collateral review.").

[226] *See id.* at 15066.

[227] H.R. CONF. REP. No. 104-518 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 ("It . . . requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law.").

[228] The debate occurring the days before final passage is further evidence that all involved, no matter what their position, knew that the consequences of the new § 2254(d) included deference to state courts on matters of federal constitutional law. *See, e.g.*, 142 CONG. REC. 7780, 7784 (1996) (statement of Sen. Kennedy); *id.* at 7789 (statement of Sen. Feingold); *id.* at 7797 (statement of Sen. Specter); 142 CONG. REC. 7960, 7965 (1996) (statement of Rep. Berman (D-Cal.)); *id.* at 7967 (statement of Rep. Waters (D-Cal.)); *id.* at 7969 (statement of Rep. Pelosi (D-Cal)); 142 CONG. REC. 7953, 7957 (1996) (statement of Sen. Watt (D-N.C.)) ("What is a reasonable, unreasonable, interpretation of the Constitution?"). Senator Levin, while expressing concern that the language could create such deference, nonetheless expressed confidence that it would not be interpreted as such. *See* 142 CONG. REC. 7780, 7792 (1996).

[229] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996). President Clinton's entire statement is available at 1996 U.S.C.C.A.N. 961-1, 961-2-3.

[230] *Id.* at 961-2-3.

Apparently, the President read new § 2254(d) in a manner differently than did virtually all of the congressmen who considered it; more likely, the President desired to minimize the effect of a provision he did not like but was forced to sign as part of an enormously popular bill. Regardless of his motivation, the President signed the bill, pondering the anniversary of the Oklahoma City bombing, and left it up to courts to decide whether his interpretation was the correct one.

4. Conclusion

Whether or not the Antiterrorism and Effective Death Penalty Act of 1996 unconstitutionally or undesirably gutted habeas corpus is beyond the scope of this paper.[231] What we must decide, however, is whether § 2254(d) overruled *Stone v. Powell*; whether Brandon Press can receive a writ of habeas corpus based on a state court's clearly incorrect application of Supreme Court Fourth Amendment law to his case.[232]

The plain meaning of § 2254(d) might grant Press habeas corpus: the state court judgment "was contrary to" and "involved an unreasonable application of" Federal law.[233] However, the whole purpose behind Congress's habeas corpus reform, as expressed in the statute as well as throughout the debate, was to restrict the availability of habeas corpus. The argument that Congress's reformulation of habeas jurisdiction necessarily included that of jurisdiction over Fourth Amendment claims, therefore, must rely wholly on the statutory text, which is far from specific to the issue.

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[231] For criticism of the Act's habeas corpus provisions, see, e.g., Ronald J. Tabak, *Habeas Corpus As a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477 (1996); Lee, *supra* note 183, at 111.

[232] *See supra* Part III.B. Professor Yackle has argued that, considering the plethora of compromises that were made between various congressmen for the last decade or so, § 2254(d) was not *intended* to require deference to state court decisions on Federal issues. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 426–43 (1996). This method of statutory interpretation, focusing on issues considered well before the specific bill was brought to Congress, is questionable. It certainly would, however, incorporate deliberation and accountability concerns, as described in Part I, to some degree.

[233] § 2254(d) "might" (as opposed to "must") grant habeas corpus because the provision reads that the writ "shall not be granted . . . unless" the state court judgment was "contrary to or involved an unreasonable application of" federal law. 28 U.S.C. § 2254(d) (1996) (Supp. II 1996). If the statute stated that the writ "shall be granted if" the state court judgment was so deficient, the answer would be more definitive.

This question is a more difficult one than the interpretation of the supplemental jurisdiction statute,[234] primarily because there is no evidence that the *Stone v. Powell* situation was even considered by Congress when the statute was debated.[235] In this circumstance, one's method of statutory interpretation should, again, be what would best respect democratic goals of encouraging deliberation and accountability.

Again, looking to all of the statutory history, it is reasonably clear that Congress did not consider overruling *Stone v. Powell*.[236] Congress did seek to reformulate habeas corpus law to decrease the strain on the federal courts and to expedite finality, especially in death penalty cases. Throughout the debate, the discussion focused on whether deference should be afforded state court decisions on federal law; deference was eventually voted for.

To respect the debate, to promote it in the future, and to hold congressmen accountable for their conduct during the legislative process, a court should consult the records of that process in construing the statute. In this circumstance, that would result in a holding that *Stone v. Powell* remains despite the new § 2254(d), and a denial of Brandon Press's petition for habeas corpus. If a plain meaning approach would allow Press's petition, it would contravene the intent of the statute and the proper functioning of the democratic process to apply that plain meaning.

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[234] *See supra* Part III.A.

[235] *Stone v. Powell* was cited once by Senator Kyl in his argument that habeas restrictions should be rejected. *See* 141 CONG. REC. S7833 (daily ed. June 7, 1995) (statement of Sen. Kyl). However, Kyl cited *Stone* for the proposition that the Supreme Court was "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states. State courts, like Federal courts, have a constitutional obligation to safeguard personal liberties and to uphold Federal laws." *Id.* Nowhere in any of the debates did congressmen contemplate the impact this provision would have on Fourth Amendment claims.

[236] Again, as described above, a court should not need a textual "hook" before it goes to legislative history to answer a question of statutory interpretation. *See supra* note 90 and accompanying text. However, if one is needed, it can again be found within the text of § 2254. Under the provision, writs of habeas corpus shall not be granted unless the state court made an unreasonable determination of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (Supp. II 1996). Does "federal law" refer to "all" federal law, or does it exempt some? These words provide the textual hook, to the extent one is necessary, to justify a resort to legislative history to find meaning.

IV. CONCLUSION

Statutory construction should be designed to promote the proper functioning of a substantive republican democracy. In the American system, the essence of the democratic process is the extensive deliberation ideas must go through before they become law; the process is critical to ensuring both the constitutional mandate of careful legislation and the accountability of those given the privilege of engaging in the process. As such, an interpretive method that devalues the process at the expense of the results is producing democracy in form, but not in substance.

When courts must apply a given statute to a problem, they must apply not only the words in the statute but also the collective wisdom that produced those words in an effort to reach the most "democratic" result. In so doing, courts are encouraging the proper functioning of the democratic system while remaining in their proper role within that system. In the American republic, democracy is really in the details, and to neglect that fact is to promote form over substance in our most precious good.

RECENT LEGISLATION

HMO GRIEVANCE PROCESSES

Health maintenance organizations (HMOs) provide health insurance for many Americans today, offering a broad array of services at lower premiums than traditional fee-for-service health insurance.[1] In an HMO program, if a doctor recommends a particular treatment for the patient, the HMO must often first approve payment before the requested care can be given. Disagreements may result if an HMO declines to pay for a procedure, deeming it "medically unnecessary" despite a doctor's recommendation and the patient's desire for care. If such a denial results in harm to the patient, preemption of state tort law by the federal Employee Retirement Income Security Act (ERISA)[2] largely prevents her from suing the HMO over injurious denials of care.[3] This inability of patients and physicians to use legal remedies is partly responsible for the growing national furor over HMO behavior, which has led to several hotly debated bills in Congress in the past year.[4] In response to the ongoing debate among insurers, beneficiaries, and doctors over HMO authorization of medical treatments, Maryland's General Assembly passed the Health Insurance-Complaint Process for Adverse Decisions and Grievances Act.[5] The Act offers patients and providers a forum to challenge an HMO's denial of care by establishing a two-tiered grievance process: an internal review board established by the HMO, followed by an external review process overseen by the state.[6]

It does not take a Gallup Poll to recognize the overwhelming concerns many Americans currently have about their health care coverage. Health care reform has received significant attention from lawmakers since the development of HMOs in the early

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[1] Jason S. Lee, Managed Health Care: A Primer 14 (CRS Rep. No. 97-913 (1997)).

[2] 29 U.S.C. §§ 1001–1461 (1998).

[3] *See id.* § 1144. *See also* Julie K. Locke, Note, *The ERISA Amendment: A Prescription to Sue MCO's for Wrongful Treatment Decisions*, 4 Minn. L. Rev. 1027, 1036–37 (1999).

[4] *See, e.g.*, Patients' Bill of Rights Act of 1999, S. 1344, 106th Cong. (1999); Patients' Bill of Rights Act of 1999, S. 240, 106th Cong. (1999); Patients' Bill of Rights Act of 1999, H.R. 358, 106th Cong (1999).

[5] MD. CODE. ANN., Ins., §§ 15-10A-01 to 15-10A-09 (1999).

[6] *See infra* notes 29–57 and accompanying text.

1970s[7] and is likely to be a major issue during the 2000 election season.[8]

Health care reform is not an easy task, however, because it requires lawmakers to balance the often competing interests of high-quality care and of cost-containment and affordable health care coverage. The current dilemma in the health care system is a result of employer-based health insurance, a legacy of the World War II era when labor shortages made it imperative for industries to offer generous benefits. Health insurance thus became a crucial part of the benefits package, and post-war labor negotiations made health insurance benefits permanent.[9] The Medicare and Medicaid programs extended health benefits to the elderly and indigent in the 1960s, thereby expanding health coverage to a significant portion of the population.[10]

The increasing number of health insurance beneficiaries, combined with the traditional fee-for-service reimbursement methodology for medical care providers, expensive advances in technology, and the overall aging of the population, has been an ever-increasing drain on the national economy.[11] For example, in 1995, Americans spent nearly one trillion dollars on health care,[12] and, in 1997, health care expenditures consumed fourteen percent of the national gross domestic product.[13]

Consequently, a number of different health care cost containment mechanisms have been implemented. For the past twenty years, the preeminent cost-containing mechanism has been the HMO. The Health Maintenance Organization Act of 1973[14] initiated the movement to HMO care, providing $190 million in federal funds from 1974 to 1980 to encourage the development of

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[7] *See infra* note 14 and accompanying text.

[8] *See, e.g.*, Geoffrey Cowley & Bill Turque, *Critical Condition*, NEWSWEEK, Nov. 8, 1999, at 60.

[9] *See, e.g., Oversight of Tax Law Related to Health Insurance: Hearings on H.R. 3475 Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 105th Cong. 6 (1998) (statement of Willis D. Gradison, Jr., President, Health Insurance Association of America).

[10] *See, e.g.*, Steve Fox, *Medicare: The Issue*, Washingtonpost.com, (updated May 5, 1999) <http://www.washingtonpost.com/wp-srv/politics/special/medicar/issue.htm> (describing how Medicare has become the second largest social program behind Social Security since being established in 1965).

[11] *See* PricewaterhouseCoopers, *Health Care Statistics*, (visited Nov. 17, 1999) <http://www.pwmc.com/charts/chart14.html>.

[12] *See id.*

[13] *See* PricewaterhouseCoopers, *Health Care Statistics*, (visited Nov. 17, 1999) <http://www.pwmc.com/charts/chart13.html>.

[14] Pub. L. No. 93-222, 87 Stat. 914, 914–36 (1973) (codified as amended in 42 U.S.C. §§ 300e to 300e-17 (1994)).

HMOs.[15] And develop they did: as of 1996, between 50 and 60 million people, nearly twenty percent of the United States population, were enrolled in an HMO.[16]

An HMO is a type of health insurer, which, for a fixed monthly premium, provides members specified health benefits. Members seeking medical care must first visit an HMO-affiliated primary care physician, who makes an initial diagnosis and recommends treatments or follow-up consultations with specialists who also are often affiliated with the HMO. HMO managers must approve a large percentage of recommended treatments, procedures, or visits to specialists. This administrative review process contains costs by refusing to authorize treatments deemed "medically unnecessary" by the HMO managers.[17]

The approval process is also the point of greatest contention between members, doctors, and the HMO insurer. Patients, of course, are primarily interested in their own health and presumably will do whatever their doctors recommend, expecting the insurer to cover the costs.[18] The doctors are primarily interested in the health of the patients and their own fees, and are therefore likely to provide more care than necessary.[19] Doctors also are concerned about malpractice liability, and thus have another incentive to order more tests or procedures than they might otherwise.[20] HMOs, of which eighty-two percent were for-profit institutions in 1996,[21] have different motives—they deny payment for care except when they deem it "medically necessary" to contain costs and increase profits.[22] Since HMOs refuse to pay for some treatments that patients are traditionally accustomed to receiving, they are often public whipping-boys, denounced as greedy and heartless.[23] As the public outcry for government in-

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[15] *See* Lee, *supra* note 1, at 4.

[16] *See id.* at 9 (Fig. 1).

[17] *See id.* at 4–5.

[18] *See* Christine E. Brasel, *Managed Care Liability: State Legislation May Arm Angry Members with Legal Ammo to Fire at Their MCOs for Cost Containment Tactics . . . But Could It Backfire?*, 27 Cap. U. L. Rev. 449, 479 (1999).

[19] *See* Margaret B. Farrell, *Health Care Consumer Claims and Litigation*, ALI-ABA Course of Study Materials: Health Care Law and Litigation 271, 279 (Oct. 1998).

[20] *See* Brasel, *supra* note 18, at 473.

[21] *See* Lee, *supra* note 1, at 18.

[22] *See* Mark O. Hielper & Brian C. Dunn, *Irreconcilable Differences: Why the Doctor-Patient Relationship Is Disintegrating at the Hands of Health Maintenance Organizations and Wall Street*, 25 Pepp. L. Rev. 597, 603–04 (1998).

[23] *See generally* Russell Watson, *HMOs Go Under the Knife*, Newsweek, Nov. 8, 1999, at 63 (describing examples of patients and doctors frustrated with the HMO system).

tervention increases, policymakers are faced with the dilemma of determining the appropriate course of action when the HMO and the patient/physician strongly disagree on whether a certain medical procedure should be performed.

One obvious method of resolving such disputes in favor of the patient/physician would be to hold HMOs liable for injurious denials of care. Such liability, which would be based on state tort law, is currently impossible under ERISA.[24] ERISA was passed in 1974 as a means to ensure that employee benefit programs were properly managed and funded, to compel public disclosure of information about benefit plans, and to make regulations uniform by preempting the state law.[25] Because health insurance is a type of employee benefit plan, the effect of preempting state law vis-à-vis employee health plans has been to make HMOs invulnerable to state tort liability and other state health care regulations.[26] Although this invulnerability has been eroded somewhat in recent years,[27] holding an HMO liable for harmful denials of care remains extremely difficult.

Many states have responded to ERISA preemption with great creativity. Beginning with Michigan in 1978, a number of states have initiated external review processes to settle disputes between HMOs (and other managed-care organizations) and their members/physicians.[28] With its recently enacted HMO grievance legislation, Maryland has joined the external review process movement.[29]

The legislation's primary purpose is to institute both internal and external grievance processes for HMOs, thereby giving

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[24] *See* 29 U.S.C. § 1144 (1998). This federal preemption may change in the near future as Congress continues to debate a Patients' Bill of Rights, which may amend ERISA to allow patients to sue HMOs for harmful denials of care. *See infra* note 73 and accompanying text.

[25] *See* Locke, *supra* note 3, 1036; Eric M. Eusanio, *Control, Quality, and Cost: The Need for Federal Legislation Amending ERISA's Failure to Protect Consumers from Liability-Free MCO's*, 7 J.L. & POL'Y 627, 651–53 (1999).

[26] *See* Locke, *supra* note 3, at 1036–37.

[27] *See* U.S. Healthcare v. Dukes, 57 F.3d 350 (3d Cir. 1995) (holding that claims for injuries stemming from the quality of treatment were not preempted by ERISA); New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (holding that states could pass laws imposing surcharges on hospital rates for patients whose insurance is purchased by employee health care plans that fall under ERISA's purview).

[28] *See* Karen Pollitz et al., *External Review of Health Plan Decisions: An Overview of Key Program Features in the States and Medicare iii* (Nov. 1998) <http://www.kff.org/content/archive/1443/review_r.pdf> (executive study prepared for the Kaiser Family Foundation).

[29] *See* MD. CODE. ANN., INS., § 15-10A-C (1999).

doctors and patients an opportunity to challenge denials of care by the insurer before injury occurs. The first part of the Act establishes the internal review process within the HMOs and other health insurers. Therefore, if a member or provider contacts the HMO regarding an adverse care decision (i.e., a denial of care), the carrier must send to the member the details of its internal grievance process within two days of the initial contact.[30] Armed with this information, the member or his doctor can file a grievance with the HMO.

When a patient files a grievance, the HMO's internal review board or panel determines whether the denial of care was appropriate. To insure impartiality, Maryland's Insurance Commissioner approves the membership of these panels, as well as the criteria upon which the board must base its reviews.[31] These criteria include objectivity, clinical validity, compatibility with established principles of health care, and flexibility to allow deviations from norms on a case-by-case basis.[32] HMOs are permitted to contract out the "internal" review process to a third party "private review agent."[33] The Insurance Commissioner must approve the private review agent.[34]

Once the internal grievance is filed, the HMO has thirty days to reach a decision.[35] In emergencies, as deemed by the Insurance Commissioner, decisions are to be completed within twenty-four hours after filing.[36] Within five days after the decision is made, the insurer is required to send by mail the results of the internal review to the member or to the health care provider who filed the grievance on behalf of the member.[37] The insurer must state the decision and the specific factual basis for the decision in clear, understandable language.[38] Blithe statements or HMO catch phrases like "not medically necessary," are insufficient justifications for approving a denial of care.[39] In addition, the carrier is required to inform the member that he can file

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[30] *See id.* § 15-10A-02.
[31] *See id.* §§ 15-10A-02, 15-10B-05.
[32] *See id.* § 15-10B-05.
[33] *See id.* § 15-10A-02.
[34] *See id.* § 15-10B-03.
[35] *See id.* § 15-10A-02.
[36] *See id.*
[37] *See id.*
[38] *See id.*
[39] *See id.*

an external grievance with the Insurance Commissioner within thirty days.[40]

The state monitors the internal grievance process on an ongoing basis: insurers are required to annually submit a copy of their internal grievance process to the Insurance Commissioner and Health Advocacy Unit.[41] One might think that the HMOs would simply do a perfunctory job on internal review; however, by making the HMOs' internal standards public, they are likely to take the process more seriously.

To further increase public awareness of the internal grievance process, Maryland also has a Health Advocacy Unit, which is part of the Office of the Maryland Attorney General.[42] The Health Advocacy Unit assists HMO members with filing grievances for internal review; however, it does not represent the member.[43] Because it is conceivable that people unfamiliar with the grievance process or who lack legal assistance might not take advantage of the internal review process, the Unit's objective is to ensure that anyone may want to file a grievance can do so.

The second part of the Act creates an external review process, which provides another option for patients and doctors unsatisfied with an HMO's denial of care. If the internal review process approves a denial of care, the HMO member or the physician may then file an external grievance with the Maryland Insurance Commissioner within thirty days after receiving the decision from the internal review process.[44] The Commissioner then has thirty days to render a decision on the matter.[45] In emergency situations, the Commissioner has only twenty-four hours to decide.[46]

The external grievance process is crucial not only as another forum of appeal, but also as a truly independent, objective arbitrator. The Commissioner can refer to an independent medical expert or a medical peer review organizations (which, in general, will contract with a physician to review the case) to help make the decision.[47] The Commissioner may choose to accept the expert's decision or base his decision on the expert's recommenda-

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[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] *See id.*
[44] *See id.* § 15-10A-03.
[45] *See id.*
[46] *See id.*
[47] *See id.*

tion.[48] It is reasonable to presume that these reviewers would not favor the HMO. As independent medical professionals, they would, if anything, be biased toward approving the treatment in question since they are likely more concerned about the health of the patient than the bottom line of an HMO with which they are not affiliated. The legislation is extremely clear about the independence of these medical experts: they cannot be affiliated *in any way* with a carrier, hospital, pharmaceutical manufacturer, or any other health care organization involved in the grievance.[49]

The independence of these medical experts is a critical aspect of the Maryland process. It gives users of the system confidence that the decision is not being made by proverbial bean-counters or insurance company bureaucrats, but rather by medical professionals and experts. Furthermore, the Maryland legislation requires that the state choose the independent medical expert, rather than the HMO, to avoid any possible corruption of the process, a concern raised by several patient advocates.[50]

The external review process also places the burden of persuasion on the HMO in an external grievance hearing.[51] The HMO needs to demonstrate that its denial of care was, in the words of the statute, the "correct" decision.[52] In addition, under the statute, HMOs must pay the cost of the independent review or the fees of the medical experts convened to settle the matter.[53]

There is also additional government oversight of the external review process. HMOs are required to submit a quarterly report of their grievance process activities to the Insurance Commissioner's office.[54] These reports are to include many figures, such as: the number of total grievances filed against the HMO and their outcomes, the number of emergency cases that were filed, the speed with which decisions were made in both emergency and non-emergency cases, and the number of grievances filed regarding adverse decisions involving length of hospital stays.[55]

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[48] *See id.* § 15-10A-05.
[49] *See id.*
[50] *See* Locke, *supra* note 3, at 1056 (arguing that review boards chosen by an HMO might be biased and that a jury trial would be needed to handle possible corruption of the boards).
[51] *See* § 15-10A-03 (1999).
[52] *See id.*
[53] *See id.* § 15-10A-05.
[54] *See id.* § 15-10A-06.
[55] *See id.*

The reports provide a consumer protection function by making public the track record of the state's health insurers.

Maryland's Health Care Access and Cost Commission also maintains an Internet site that includes data on customer satisfaction with various HMOs operating in the state.[56] By publicizing consumer satisfaction information, the Internet site serves as a public relations incentive for the HMOs to provide quality care. In addition, the Insurance Commissioner is required to submit annually a summary report, based on the quarterly reports from the individual health insurers, to the Governor and the General Assembly.[57]

Maryland's grievance review procedure is a strong step toward making HMOs accountable for their decisions. A systematic process of grievance hearings and, if necessary, review by an independent medical expert, provide some checks to the ultimate decision-making power of HMOs in authorizing certain treatments. Under the grievance review process, HMOs have surrendered final decision-making authority to an outside expert, and face the real possibility of being ordered to allow the care in question, pay the costs of the review process, and suffer potentially adverse public relations. HMOs therefore run major risks if they let the bottom line overshadow the medical needs of their members.

Although from a patient's perspective, the legislation appears to be an overwhelming victory, it also has a number of potential shortcomings that deserve greater attention. For instance, one major drawback of Maryland's grievance process legislation is that it fails to specify whether the proceedings are binding. Therefore, at the end of the grievance process, it is legally possible for the HMO to deny the treatment in question.

Making the arbitration binding could, in theory, rectify this problem; however, there is the risk that any arbitration, whether binding or not, might conflict with ERISA. Courts might interpret arbitration as state regulation of the HMO, which is preempted by ERISA if the regulation "relates to" the administration of the employee health care plan.[58] For instance, a federal district judge struck down Texas's binding independent review

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[56] *See* Maryland Health Care Access and Cost Commission, *Comparing the Quality of Maryland HMO's* (visited Nov. 21, 1999) <http://www.glows.com/hcacc/ index.html>.

[57] *See* § 15-10A-06 (1999).

[58] *See, e.g.*, Eusanio, *supra* note 2525, at 650.

process, ruling it was preempted by ERISA.[59] The judge held that a decision about whether to cover or deny care did in fact "relate to" the administration of the insurer.[60] Therefore, amendments to ERISA may need to be established, especially if such arbitration is binding, to legitimize the states' external review processes.

Another concern with Maryland's legislation stems from the cost of external review, which is borne by the HMOs. This cost may eventually be passed onto the beneficiaries in the form of higher premiums, which in turn might price more people out of the health insurance market and add to the growing numbers of uninsured.

In addition, despite the emphasis on the independence of external reviewers and on state oversight of the review process, prejudicial biases could creep into the system in favor of either the patient or the HMO. If the review process is pro-patient, an HMO's cost of care and, consequently, its premiums may increase, defeating the cost-containment policy underlying the establishment of HMOs. On the other hand, a systematic bias in favor of the HMO would effectively undermine the entire goal of improving the quality of medical care provided by HMOs. Furthermore, some health care lawyers also have observed that HMOs have vast legal and medical expert resources at their disposal, which often overwhelm an individual with limited legal and medical expert resources in a grievance proceeding.[61]

In light of these potential problems with grievance process legislation, it is instructive to analyze the experiences of other states that have implemented review programs similar to Maryland's to determine whether these shortcomings are likely to arise. Upon review of the statistical information from these other states, the external review process appears to be fairly effective in raising the quality of care and improving consumer confidence in the system without excessive costs, systematic biases, or noncooperation on behalf of the HMOs.

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[59] *See* Corporate Health Ins. v. Texas Dep't of Ins., 12 F. Supp.2d 597 (S.D. Tex. 1998).

[60] *See id.* at 626. ("The Court has already determined that the [independent review organization] provisions concern the review of an adverse benefit determination and are therefore, an improper mandate of benefit administration.").

[61] *See* Joanne B. Stern, *The HMO Experience (as Seen by a Health Care Lawyer)*, 1 DEPAUL J. HEALTH CARE L. 395, 405 (1996).

The cost of the external review process is not as prohibitive as one might suspect. Costs per externally reviewed case in the thirteen states studied for which data was available in 1998 varied from less than $200 per case (Missouri) to $450–$650 per case (Texas).[62] In Texas, as under Maryland's new law, health care plans cover the cost of external review. Two hundred eighteen cases were filed in Texas between November 1997 and September 1998, and the total cost of hearing these cases fell between $98,000 and $141,700.[63] With regard to the proposed 1998 Patient Access to Responsible Care Act (PARCA), a Coopers & Lybrand study found that the cost of third-party reviews of HMO decisions would have been $1.20 per person annually.[64]

Even-handedness also appears to be a hallmark of the review processes established in the various states that were studied. For example, from the time Missouri's external review program was implemented in 1994 through September 1998, 76 external grievances were filed with the state.[65] Missouri's independent review system found in favor of the patient in 37 of those cases and, in 38 cases, sided with the HMO—a nearly even split.[66] In Texas, of the 218 cases heard between November 1997 and September 1998, 48% were decided in favor of the consumer, and 52% in favor of the HMO.[67] Between March 1997 through July 1998, New Jersey's review process ruled in favor of the patient in 42% of the 69 cases heard.[68] In addition, Pennsylvania consumers won 37% of the 729 cases brought between 1991 and mid-1998,[69] while Rhode Island consumers prevailed in 68% of the 59 grievances filed in 1997.[70]

In fact, the roughly fifty-fifty split in HMO external review hearings, which suggests that HMO treatment decisions are often more appropriate than many think, has improved the public's

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[62] *See* Pollitz, *supra* note 28, at 47.

[63] *See id.* at viii.

[64] *See* Kaiser Family Foundation, *Leading Health Care Consumer Protection Proposals Would Result in Modest Premium Increases for HMO's* (Apr. 22, 1998) <http://www.kff.org/content/archive/1391/protect.html> (press release).

[65] *See* Ron Patterson et al., *Implementation of Managed Care Consumer Protections in Missouri, New Jersey, Texas and Vermont 8* (Sept. 1999) <http://www.kff.org/content/1999/1518/ImplementationofManagedCare%20Full.pdf> (report prepared for the Kaiser Family Foundation).

[66] *See id.* In one case, the third-party review partially upheld and partially overturned the denial of care.

[67] *See* Pollitz, *supra* note 28, at viii.

[68] *See id.*

[69] *See id.*

[70] *See id.* at vii–viii.

view of HMOs. Furthermore, by participating in the external review process, HMOs can, to a certain degree, change the traditionally negative public opinion surrounding their industry.[71] The apparent even-handedness in decisions by the external review boards also may suggest that, despite the HMOs' vast legal and medical expert resources, the patients and providers have successfully been able to effectively advocate for necessary treatments.

With regard to HMO acquiescence to the states' external review systems, the statistical evidence suggests that HMOs are obeying. For example, between 1991 and 1998, no health insurer within Pennsylvania, a non-binding state, ever refused to comply with the external review's decision.[72] Such compliance suggests that other factors, such as good public relations, may make binding provisions unnecessary to ensure HMO compliance.

Despite the fact that the review procedures instituted by a number of states, which are similar to the review process in Maryland, appear to have improved the quality of care provided by HMOs in a cost-effective manner, there is still a widespread desire to give patients the right to sue their HMO. Although Maryland has refused to take that step, recently proposed legislation in Congress would allow such lawsuits.[73] However, it is arguable whether HMO liability would improve the quality of care beyond the benefits already achieved by independent external review of HMO decision-making.

If a strong independent external review program exists, HMO liability would be costly and superfluous. It would add nothing to the quality of care, and might well prove unjustifiably harmful to the HMO industry and those who rely on HMO coverage. First of all, it is important to acknowledge the special nature of the HMO industry. HMOs were developed to contain costs and provide more affordable health care coverage, which was achieved by creating profit incentives to deny care unless it was medically necessary. Essentially, as a cost-controlled enterprise, HMOs make decisions that no other health care provider has been willing to make: the decision of whether or not a medical procedure is truly necessary for a patient.

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[71] *See id.* at 7.
[72] *See id.* at 43.
[73] *See* Patients' Bill of Rights Act of 1999, S. 6, § 302, 106th Cong. (1999).

There are strong economic arguments against HMO liability for injurious treatment decision. Allowing patients to sue their HMO for harmful denials of care could potentially undermine the entire HMO system. Increased liability would force HMOs to spend more on marginally beneficial (or even unnecessary) care and purchase more liability insurance, with the expense being passed on to their members.[74] More likely than not, premiums would increase, making HMOs less affordable to those who rely on such coverage. In the end, such premium increases might increase the number of Americans without health insurance.[75]

The prospect of almost unlimited liability from an injurious denial of care decision could also frighten the industry into approving more and more care until the purpose of the HMO as a cost-containment mechanism is totally defeated. For instance, in 1997, Texas passed legislation, which thus far has been upheld by the Fifth Circuit,[76] making it possible to hold HMOs liable for harmful denials of care.[77] The result, according to a study commissioned by Scott & White, a non-profit HMO in Texas, is that HMO medical directors in Texas have approved almost every request for care made by plan physicians.[78] Some experts have estimated that HMO premiums in Texas will increase by more than a billion dollars as a result of Texas's HMO liability law.[79] Although such state-wide premium increases have not yet been observed in Texas, at least one HMO, Scott & White, admits to a large increase in premiums in response to the threat of increased liability.[80] On the other hand, some Texas HMOs have yet to increase premiums because to do so might scare away potential customers who are in search of affordable health coverage.[81] Nevertheless, if HMO authorization is being relaxed to the point where nearly all treatments are being approved, the whole policy behind the creation of HMOs—cost-containment—could be destroyed by the threat of liability that has questionable benefit.

Besides the economic arguments, in a state with a strong, independent external review of HMO care decisions, the general

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[74] *See* Brasel, *supra* note 18, 471–72 (1999).
[75] *See id.*
[76] *See Corporate Health Insurance*, 12 F. Supp.2d at 597.
[77] See Tex. Civ. Prac. & Rem. Code Ann. § 88.002 (West 1997).
[78] *See* Patterson, *supra* note 65, at 41.
[79] *See* Brasel, *supra* note 18, at 472.
[80] *See* Leigh Page, *Texas Law on HMO Liability Generates Little Cost—So Far*, AMERICAN MEDICAL NEWS, Oct. 18, 1999, at 12.
[81] *See id.* at 14.

right to sue an HMO seems unnecessary as well as unjust. If an HMO submits to external review, and agrees to be bound by the review's decision, the liability of the HMO should cease at the point at which the external review board makes its decision. Otherwise, the process allows double jeopardy. It seems unreasonable that after an independent panel of medical experts has approved a denial of care, an HMO could still be sued. HMOs would therefore have little reason to submit to an external review regime if they would be liable for the decision anyway.

In addition, state tort liability is only an *ex post facto* remedy. On the other hand, an external grievance process not only would achieve the same ends, but also provides an *ex ante* measure that has the potential to *prevent* the harm of improper denials of care. In fact, an external grievance process could effectively eliminate bad decision-making on the part of HMOs by supplanting it with independent expert review.

For doctors, however, giving patients the right to sue their HMO would rectify glaring injustices in the system. Doctors, who are usually the opponents of health care litigation, are ironically among the groups pushing hardest for HMO liability.[82] Their argument is that if the two health care providers, doctors and HMOs, are involved in the health care decisions of a given patient, then they should both be liable for the harmful consequences of their decisions.[83] In fact, to add to the doctors' concerns, it may not be possible for their decision-making process to be entirely independent even with liability, since they may still feel pressure from the HMO to cut costs or risk being dropped from the program.

There are ways to address these difficult concerns. A doctor, like her patient, is able to initiate the grievance process for an HMO's denial of care. Like an HMO, a doctor's liability should stop once the decision gets to the external review process since her responsibility for the selection of treatment is now out of her hands. There is the risk, however, that doctors may appeal every denial by the HMO regarding necessary medical treatments as a

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[82] *See, e.g.*, American Medical Association, *AMA Fights on All Fronts for Norwood-Dingell Patients' Rights Bill* (Oct. 5, 1999) <http://www.ama-assn.org/ad-com/releases/1999/991005.htm> (news release).

[83] *See* Bradley G. Williams, M.D., *Letter to the Editor*, WALL ST. J., Oct. 20, 1999, at A27 (arguing that "when I enter into a contract with a patient to provide medical care and expertise, I am held responsible for my decisions and actions. Why should insurance companies and HMOs be held to different standards when they make medical decisions?").

means of protecting themselves against liability. The transaction costs of initiating a grievance appeal, as well as the aforementioned risk of being dropped from the HMO, would likely dampen such excessive abuse of the grievance process.

There still is the gray area of procedures that are not medically necessary, for which doctors are not willing to appeal to the review process. For example, a physician may want prescribe drug *X* for a non-life-threatening condition of a patient, but the HMO insists on prescribing drug *Y*, a cheaper and perhaps less effective medication. Doctors might accept the HMO's decision, rather than fight it out in the grievance process.

Although it might appear that there is nothing a patient can do in this situation, there is, of course, another option, one that is often ignored: the patient could pay out-of-pocket to make up for the difference in costs between drug *X* and drug *Y*. If, in fact, both drugs treat the same condition, and one may be better but more costly, while the other is adequate and less expensive, policymakers should want the HMO to choose the less expensive alternative. Such cost-benefit analysis is the goal of HMOs and providing affordable health care: patients should get coverage for what they need, not necessarily what they want. If a patient wants a more expensive treatment and has the money to pay for it, he can pay for the difference himself. Of course, if drug *Y* is ineffective or harmful, there should be grounds for grievance or even a malpractice suit.

In the end, the goal of HMO liability for denial of care decisions is an effort to give patients greater leverage over their HMO insurers, enabling them to recover in full for the costly harms caused by unreasonable denials of care. Nevertheless, rather than opening up a potential litigation explosion in the name of empowering patients vis-à-vis their HMO, it might be better to utilize other cost-effective alternatives, such as external review, which have so far proven effective at the state level.

Therefore, Maryland's Health Insurance-Complaint Process for Adverse Decisions and Grievances Act is, on the whole, a sound measure whose basic premise—a grievance process for patients and physicians to challenge unreasonable HMO denials of care—is a cost-effective, evenhanded, *ex ante* protection of patients' rights. Thus far, similar review processes have been relatively successful in other states. Although Maryland's review process may not be binding, states with similar non-binding re-

view procedures have high levels of HMO compliance. Furthermore, external grievance proceedings are a better alternative then providing state tort remedies to patients. Other states are beginning to contend with the difficulties of HMO litigation, and the early signs of the effect of HMO litigation on the HMO industry are not promising. Such liability, whether as a substitute for or an addition to an external review process, not only would defeat the cost-containment policy of HMOs, but also could lead to the death of an affordable alternative to traditional fee-for-service health insurance.

—Michael E. Ginsberg

LINE ITEM VETO

In these heady days of economic growth and budget surplus, the issue of the line item veto barely registers on the political radar of the Washington establishment. Yet only a few short years ago, the line item veto was one of the hot-button political issues. The desire on the part of both Congress and the President to increase the fiscal power of the Executive Branch culminated in the passage of the Line Item Veto Act of 1996 (LIVA).[1] The triumph of LIVA did not last; the Supreme Court held it unconstitutional only two years later in *Clinton v. City of New York.*[2] Since *Clinton*, several members of both houses of Congress have attempted to revive the line item veto using a constitutional amendment.[3] Thus far, these amendments have met with zero success. Nevertheless, Senator McCain (R-Ariz.) is attempting to keep the issue alive by introducing Senate Bill 100, "The Separate Enrollment and Line Item Veto Act of 1999." This bill proposes a constitutional means of giving the President line item veto authority without resorting to a constitutional amendment.[4] The bill accomplishes this task by relying on the technique of separate enrollment; a procedural device designed to skirt the Court's decision in *Clinton.*

A discussion of S. 100 cannot proceed without first reviewing the history and major provisions of the original LIVA and the grounds on which the Court struck it down. The push for a presidential line item veto dates back to mid-1980s, when the Republicans briefly enjoyed control of the Senate and President Reagan called for a line item veto in his 1984 State of the Union Address.[5] Over the following years, various proposals surfaced in the Senate, none of which made any material progress.[6] Significant headway on a line item veto did not occur until 1994,

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[1] Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (codified as amended at 2 U.S.C. §§ 621, 681, 691 to 691f, 692 (1996)) [hereinafter *Line Item*]. The Act easily passed the Senate by a vote of 69-31. 142 CONG. REC. S2995 (1996). The Act encountered slightly more resistance in the House, where it passed 232-177. 142 CONG. REC. H2986 (1996).

[2] *See* 524 U.S. 417 (1998).

[3] *See generally* H.R.J. Res. 124, 105th Cong. (1998) (Introduced by Rep. Barr (R-Ga.) on the day *Clinton v. City of New York* was handed down); H.R.J. Res. 9, 106th Cong. (1999); H.R.J. Res. 30, 106th Cong. (1999); H.R.J. Res. 20, 106th Cong. (1999); S.J. Res. 31, 106th Cong. (1999).

[4] *See* 145 CONG. REC. S534–35 (1999) (introductory remarks of Sen. McCain).

[5] *See President Gets Budgetary Scalpel, in* CONGRESSIONAL QUARTERLY ALMANAC 104TH CONGRESS 2D SESSION, VOLUME LII 2–28 (1996) [hereinafter *President*].

[6] *See id.*

when the Republican Party adopted it as one of its goals in the "Contract With America." In the 104th Congress, the House of Representatives passed its version of the legislative line item veto, using an "enhanced rescission" approach.[7] The Senate passed a separate line item veto act, which relied on a "separate enrollment" procedure.[8]

The House of Representatives and the Senate delayed in sending the measures to conference, due to ideological differences between the two chambers and an impending budget battle with President Clinton.[9] After letting the bill languish for several months, Senate Majority Leader Dole (R-Kan.) and House Speaker Gingrich (R-Ga.) decided to push the measure through for approval.[10] The Senate agreed to adopt the House of Representatives' "enhanced rescission" approach. The key issue centered on whether or not the act would allow the President to reduce the spending on a given item.[11] Senate leaders settled the issue by deciding that the President would not receive reduction authority. After a brief debate in the Senate, highlighted by Senator Byrd's (D-W. Va.) opposition to the measure, LIVA passed and went to the House of Representatives, which also approved it.[12] The President signed the bill into law on April 9, 1996.[13]

By amending the Impoundment Control Act of 1974,[14] LIVA provided the President with the authority to cancel "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[15] Procedurally, LIVA did not give the President a true line item veto.[16] Instead of allowing the President to strike items from a bill before it became law, LIVA required that he first sign the bill. Upon enactment, the President could then exercise his cancellation power under the amendments to the Impoundment Control Act.[17]

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[7] An enhanced rescission approach usually gives the President discretion to cancel or to rescind those portions of a spending bill with which he disagrees.

[8] Generally, under a separate enrollment approach, a bill is divided into numerous individual parts. Congress then considers each of these parts as separate bills.

[9] *See President, supra* note 5.

[10] *See id.*

[11] *See id.*

[12] *See Line Item, supra* note 1.

[13] *See President, supra* note 5.

[14] *See* 2 U.S.C. § 681 et seq.

[15] 2 U.S.C. § 691(a) (1994 ed., Supp. III).

[16] *See* Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and The Line Item Veto Act*, 20 CARDOZO L. REV. 871, 877 (1999).

[17] Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 105, 621–688 (1982) and parts of 31 U.S.C. (1976)).

Once an eligible bill became law, the President was free to cancel any spending item, as long as doing so would "(i) reduce the Federal budget deficit; (ii) not impair any essential government functions; and (iii) not harm the national interest."[18] LIVA required the President to transmit a special message containing a list of all cancellations to Congress "within five calendar days (excluding Sundays) after the enactment of the law . . . ."[19] Unless Congress passed a special bill expressing its "disapproval" of the President's action, the cancellations would take effect.[20] LIVA exempted such disapproval bills from cancellation under its provisions.[21] The President could use his traditional veto power on disapproval bills, subject to a congressional override. Once the time frame for disapproval expired, the savings were applied proportionally to deficit reduction.[22]

Upon the enactment of LIVA, several members of Congress, seeking to have the law declared unconstitutional, filed suit under the Act's expedited review provision.[23] In *Raines v. Byrd*, the Supreme Court set aside the lower court's initial holding that the Act was unconstitutional on the grounds that the members of Congress lacked standing to sue.[24] After *Raines*, two suits were brought by various organizations and individuals, collectively representing hospital workers and farmers, who claimed to have received injury from certain Presidential cancellations.[25] The District Court for the District of Columbia consolidated the two actions and again found the Act unconstitutional on the grounds that it violated the Presentment Clause of the Constitution (Art. I, § 7) and the separation of powers doctrine.[26] In *Clinton*, the Supreme Court affirmed the plaintiffs' standing to sue and found that the Act did violate the Presentment Clause.[27] The Court did not rule on the separation of powers issue.

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[18] 2 U.S.C. § 691(a)(A) (1994 ed., Supp. III).
[19] 2 U.S.C. § 691(a)(B) (1994 ed., Supp. III).
[20] *See* 2 U.S.C. § 691b (1994 ed., Supp. III).
[21] *See* 2 U.S.C. § 691(c) (1994 ed., Supp. III).
[22] Cancellations of discretionary spending resulted in the Office of Management and Budget's (OMB's) reductions of budget estimates and discretionary spending limits. Cancellations of new direct spending and limited tax benefits required the OMB to submit a report to Congress that detailed the estimated deficit reduction accomplished specifically by those cancellations. *See* 2 U.S.C. § 691c (1994 ed., Supp. III).
[23] 2 U.S.C. § 692 (1994 ed., Supp. III).
[24] *See* 521 U.S. 811 (1997) (holding that the members of Congress filing suit had not established a concrete injury).
[25] *See* City of New York v. Clinton, 985 F. Supp. 168 (D.D.C. 1998).
[26] *See id.* at 178–80.
[27] *See* Clinton v. City of New York, 524 U.S. 417 (1998). The Court declined to ad-

In *Clinton*, Justice Stevens, for the majority, focused the Court's constitutional analysis on the Presentment Clause, which establishes the basic procedure by which a bill became a law. The Court's rationale represented a very straightforward reading of the Constitution: "There are important differences between the President's 'return' of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law."[28] Following the language of the Presentment Clause, the Court stated, "Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends part of duly enacted statutes. There are powerful reasons for construing constitutional silence . . . as equivalent to an express prohibition."[29]

The Court derived the main rationale for construing silence as a prohibition from the "great debates and compromises that produced the Constitution itself."[30] According to the Court, "[f]amiliar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[31] Under the terms of LIVA, the Court found that in the case at bar, "what has emerged . . . are truncated versions of two bills that passed both Houses of Congress. They are not the product of the 'finely wrought' procedure that the Framers designed."[32] As such, the Court held LIVA unconstitutional. The decision was not unanimous. In his dissenting opinion, Justice Scalia criticizes the majority for failing to interpret properly the plain language of LIVA and for avoiding the true issue of the case: namely, whether LIVA unconstitutionally delegated legislative power to the executive.[33] Scalia based his argument on the discretionary spending authority that Congress traditionally delegated to the President. After discussing the

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dress the separation of powers issue, holding that the Act's violation of the Presentment Clause was sufficient to decide to strike it down.

[28] *Id.* at 439 (emphasis in original).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 439–40 (citing INS v. Chadha, 462 U.S. 919, 951 (1983)).

[32] *Id.* at 440.

[33] *Id.* at 453 (Scalia, J. concurring in part and dissenting in part).

precedential basis for the delegation of such authority, Scalia concisely summarized his concern:

> Had the Line Item Veto Act authorized the President to 'decline to spend' any item of spending . . . there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead—authorizing the President to 'cancel' an item of spending—is technically different. But the technical difference does *not* relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which *is* at issue here, is preeminently *not* a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President's action . . . is no different from what Congress has permitted the President to do since the formation of the Union.[34]

Given the historical precedent for the delegation of such authority, Scalia found that LIVA did not violate the nondelegation doctrine.

Several scholars share Scalia's concerns regarding LIVA's delegation of legislative powers to the President. For example, Bernard Bell argues that the line item veto power granted by Congress to the President clearly falls within the bounds of traditional standards of delegation.[35] According to Bell, however, the real issue, which everyone has failed to address, is "whether the President must be limited to approving or disapproving bills in toto, rather than being able to disapprove of only portions of bills."[36] In the end, Bell concludes that the power given to the President by LIVA allowed the President to unnecessarily interfere with the legislative process.[37]

Elizabeth Garrett, taking her cue from the dissenting opinions in *Clinton*, also argues that the LIVA fell within the scope of Congress's traditional delegation of powers.[38] Garrett argues that portions of LIVA survive *Clinton* and that with some effort, "it is . . . likely that Congress could pass an enhanced rescissions bill with definitions that would convince the Court to apply a dele-

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[34] *Id.* at 468–69 (emphasis in original).

[35] *See* Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma and The Line Item Veto,* 44 VILL. L. REV. 189 (1999).

[36] *Id.* at 220.

[37] *Id.* at 224.

[38] Garrett, *supra* note 16.

gation analysis."[39] Additionally, Garrett mentions another means by which Congress might create a line item veto: separate enrollment of spending bills,[40] which is the method advocated by S. 100 and the method that the remainder of this Essay will address.

Like the original LIVA, S. 100 would grant the President the authority to "veto" items of discretionary spending, new direct spending, and new targeted tax benefits.[41] S. 100 attempts to overcome the possible constitutional concerns of the original LIVA by adopting an enrollment procedure that falls in line with the requirements of the Presentment Clause. Section 2 of the bill would require the Appropriations Committee of either the House of Representatives or the Senate to report an appropriation measure with "such level of detail on the allocation of an item of appropriation . . . as is set forth in the committee report accompanying such [a measure]."[42] S. 100 would impose the same specificity requirements on authorization measures that contain items of new direct spending or new targeted tax benefits.[43]

Once an appropriation or authorization bill passes both houses of Congress, S. 100 would require the disaggregation of the bill into separate items. Section 5, Paragraph 4 would provide the definition of an "item." For appropriations measures, "items" would consist of any numbered section, any unnumbered paragraph, or any allocation or suballocation of an appropriation made in compliance with the specificity requirements of Section 2. Provisions that are neither expenditures nor create an express or implied obligation for the President to expend funds would be excluded from disaggregation.

With regard to authorization measures, "items" would include any numbered section or unnumbered paragraph that contain new direct spending or new targeted tax benefits identified in compliance with the specificity requirements of Section 2.[44]

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[39] *Id.* at 891.

[40] *See id.* at 912–14.

[41] Senators Robb (D-Va.) and Hollings (D-S.C.) have also proposed a "Separate Enrollment and Line Item Veto Act" which would grant the President veto authority over any tax benefit, not just "targeted" benefits. *See* The Separate Enrollment and Line Item Veto Act of 1999, S. 139, 106th Cong. (1999). S. 100 defines a targeted tax benefit as a benefit "having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers." S. 100, § 5(5)(B). Aside from the difference over which tax benefits are eligible, the two bills mirror one another.

[42] *Id.* § 2(a)(1).

[43] *Id.* § 2(b)(1).

[44] *See* S. 100, § 5(4).

Whether an appropriation or an authorization bill, S. 100 would require disaggregation to occur "without substantive revision" to the bill and provides that each separate bill "shall bear the designation of the measure of which it was an item prior to such disaggregation, together with such other designation as may be necessary to distinguish such measure from other measures disaggregated . . . ."[45] Although not explicitly stating so, this provision implies that the disaggregated items would receive separate bill numbers.

Once the disaggregation occurs, S. 100 would call for the placement of the resulting bills "on the appropriate calendar in the House of origination, and upon passage . . . on the appropriate calendar in the other House. [The disaggregated bills] shall be the next order of business in each House and they shall be considered and voted on en bloc and shall not be subject to amendment."[46] S. 100's procedural provision would place further limits on the length of floor debate on the bills and on what motions are out of order.[47] Although S. 100 would not specifically state what happens next, the bills presumably would go to the President, who could either sign or veto the measures. As established in the Constitution, an override of a presidential veto would require a two-thirds majority of Congress.[48]

In addition to the main procedural mechanisms designed to give the President a constitutional line item veto, S. 100 also contains two provisions that apparently are direct responses to *Clinton*. Section 6, which deals with expedited judicial review, would provide that "[a]ny member of Congress may bring an action . . . for declaratory judgment and injunctive relief on the ground that a provision of this Act violates the Constitution."[49] This language differs from the expedited review section of the original LIVA, which states "[a]ny member of Congress or any individual *adversely affected* by part C of title X of the Congressional Budget and Impoundment Control Act of 1974 may bring an action . . . for declaratory and injunctive relief on the ground that any provision of this part violates the Constitution."[49] In *Raines v. Byrd*, the Court relied on the "adversely affected" lan-

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[45] S. 100, § 4(a)(2)(B).
[46] *Id.* § 4(b).
[47] *See id.*
[48] U.S. CONST. art. I, § 7.
[49] S. 100, § 6(a)(1).
[49] 2 U.S.C. § 692(a)(1) (emphasis added).

guage to find that members of Congress did not have standing to sue.[50] S. 100 would avoid the standing issue for members of Congress by omitting the language.

Additionally, Section 6 contains a severability clause which states "[i]f any provision of this Act, or the application of such provision to any person or circumstance is held unconstitutional, the remainder of this Act and the application of the provisions of such Act to any person or circumstance shall not be affected thereby."[51] Although not a factor in the Court's decision in *Clinton*, Justice Stevens mentioned the severability issue of the original LIVA: "We also find it unnecessary to consider whether the provisions of the Act relating to discretionary budget authority are severable from the Act's tax benefit and direct spending provisions. We note, however, that the Act contains no severability clause."[52] Although the Court does not specifically rule on this point, its language suggests that the provisions of the original LIVA are not severable. Therefore, the severability clause of S. 100 appears calculated to avoid such an issue if a party challenged the bill on constitutional grounds.

The question of the overall constitutionality of S. 100 raises different issues. At first blush, S. 100 appears to satisfy the requirements of the Presentment Clause. Since each item of appropriation would be a separate bill, then the President may sign or veto them as he sees fit. Congress could then override any of his vetoes. This procedure appears entirely consistent with the process of lawmaking as set forth in the Constitution. Closer scrutiny, however, reveals that several of S. 100's seemingly clear-cut provisions contain problematic language.

The constitutionality of S. 100 rests on whether or not the disaggregated measures represent actual "bills." The language of Section 4, which spells out the procedure for separate enrollment and disaggregation, indicates that the separate measures are bills in name only. For example, consider the path of a typical omnibus spending bill under this procedure. After passing both houses, the bill would undergo disaggregation pursuant to Section 4. Section 4 states that a disaggregated measure "shall bear the designation of the measure of which it was an item prior to such disaggregation . . . ." Under this guideline, a measure dis-

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[50] *See* 521 U.S. 811, 818–19 (1997).
[51] S. 100, § 6(d).
[52] 524 U.S. at 448, n.43.

aggregated from the omnibus spending bill would still bear the imprint of that bill. Standing separately from the portions of the omnibus bill that stated the provisions and conditions for the disbursement of appropriations, the disaggregated measures would lack any substantive meaning.

Critics of separate enrollment hasten to point out that under previous separate enrollment proposals, the disaggregated measures "would [not] have been considered, voted on, or passed by the two Houses as a separate bill formulation."[53] Following the Supreme Court's decision in *INS v. Chadha*,[54] these same critics note that "[a] fragmented bill that is never subjected to the full bicameral process is not a bill or resolution within the meaning of the presentment clauses."[56]

In addition, the Constitution contains no language dealing with enrollment. Critics of the item veto argue that "[e]nrollment is supposed to be merely the meticulous preparation of 'the final form of the bill, as it was agreed to by both Houses, for presentation to the President.'"[57] As such, disaggregation by a clerk would represent a usurpation of the power "that can only be performed by the two Houses themselves, acting in the traditional bicameral fashion."[58]

In order to avoid these enrollment concerns, S. 100 would adopt the additional step of returning the disaggregated bills to the floor of each house for another vote. Section 4, however, would place limits on debate and amendment and provides that all disaggregated measures "shall be considered and voted on en bloc." In effect, the omnibus spending bill, in its entirety, would return to the floor for a straight up-or-down vote. This vote would differ from the original passage of the bill only in the fact that each measure would contain its own separate bill number. The vote would not reflect any meaningful reconsideration of the individual measures. In essence, Congress would simply reaffirm its earlier vote. The division of the bill would not reflect any meaningful reconsideration of the individual measures. In short,

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[53] Eugene Gressman, *Is the Item Veto Constitutional?*, 64 N.C. L. REV. 819, 820 (1986).

[54] 462 U.S. 919 (invalidating the legislative veto on the grounds that it deviated too far from the bicameralism requirements of Article I).

[56] Gressman, *supra* note 53, at 821.

[57] Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233, 244 (1997).

[58] Gressman, *supra* note 53, at 821.

the disaggregated measures would not reflect the "step-by-step, deliberate and deliberative process" required by Article I.[59]

Returning to the hypothetical spending bill considered earlier, the formerly omnibus, now disaggregrated, spending bill would go to the President. Presumably, the number of disaggregated measures would number in the thousands, if not tens of thousands. Under a literal reading of the language of the Presentment Clause, the President must physically sign all of the measures of which he approves. He cannot simply sign a single document that states his approval of measures 1 through 99 and his veto of measure 100. The President also cannot simply have aides stamp his imprimatur on the numerous "bills." He must do it himself. The impracticality, bordering on absurdity, of having the President sign each measure is manifest. The fatal flaw of S. 100 becomes clear: practically speaking, the President cannot sign thousands of measures. As Justice Breyer stated in his dissent in *Clinton*, "Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately."[60] Any attempt to enact the bills without a true signature deviates from the "finely wrought" procedural requirement of the Presentment Clause and the *Clinton* decision.

Assuming the President could sign or veto every individual measure, S. 100 still faces constitutional problems. Under an original intent argument, the veto power S. 100 would give to the President exceeds the bounds of executive power envisioned by the Framers. In *Federalist 73*, Hamilton writes "The primary inducement to conferring the power in question [i.e., the veto] upon the executive is to enable him to defend himself. The secondary one is to increase the chances in favor of the community against the passing of bad laws . . . ."[61] The Framers expressed great concern about bestowing too great a veto power on the executive. In the early stages of the Constitutional Convention, the delegates considered giving the President an absolute veto over legislation. After extensive debate, the veto was modified to allow a congressional override, thereby preventing the President from abusing his power.[62]

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[59] *Chadha*, 462 U.S. at 959.

[60] 524 U.S. at 471.

[61] THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[62] *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787

Doubtless, proponents of the line item veto would argue that S. 100 merely seeks to achieve Hamilton's secondary goal of protecting the community against the enactment of bad laws. The use of the veto in this case, however, would not protect the community. Critics of the budget process often tout the line item veto as a means by which to eliminate wasteful spending and pork-barreling by members of Congress. Unlike the original LIVA, however, S. 100 would not, and constitutionally could not, spell out the criteria the President must consider in deciding whether or not to exercise his veto. Additionally, overriding a presidential veto under S. 100 would require the traditional two-thirds majority of each chamber. Under the original LIVA, Congress could override the President's cancellation through the use of a disapproval bill, which required a simple majority vote.

Given the difficulty of overriding a presidential veto, S. 100 would give the President virtually absolute power to strike spending measures from appropriations bills. This could wreak havoc on the budget process. The massive appropriations bills that Congress now produces are the result of an extensive process of legislative negotiation. In order to create an appropriations bill that will pass both houses, senators and representatives must engage in the deliberative give-and-take endemic to any legislative body. This give-and-take cannot occur without the congressional norm of reciprocity. This reciprocity basically means that congressmen keep their word to one another, regardless of partisan or other considerations.[63]

When the President possesses the power to unilaterally strike specifics parts of appropriations bills, the incentive to engage in give-and-take disappears. Legislators, acting in rational self-interest, will not enter into agreements to secure measures for their constituency if they know the President can unilaterally strike those measures from a bill. Congressmen could no longer take comfort in assurances that their favored issues and provisions would make it into the final bill; the item veto would always hang over their head. Because of the President's veto, the promises of other congressmen, even if made in earnest, would

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61–66, 465–66 (Norton 1987).

[63] *See* Norman J. Ornstein et al., *The U.S. Senate: Toward the Twenty-First Century*, *in* CONGRESS RECONSIDERED 5, 10–11 (Bruce Dodd and Lawrence Oppenheimer eds., 6th ed. 1997). The discussion of reciprocity in the text is necessarily simplified. Although reciprocity is primarily a Senate norm, the element of mutual respect embodied by the norm is also present, to a lesser degree, in the House of Representatives.

lose value. The compromising dynamics of Congress would be fundamentally altered. In effect, a line item veto would undermine the congressional institutional norm of reciprocity.

Ultimately, S. 100 faces the same fundamental problem as the original LIVA and the idea of a line item veto in general. Despite the various procedural mechanisms by which they operate, both S. 100 and the original LIVA achieve the end result of allowing the President to substantively modify an act of Congress.[64] Although S. 100 appears to overcome this problem through the use of separate enrollment, appearances are misleading. Under S. 100, both houses of Congress enact a bill, which would then be disaggregated. The President subsequently would strike those measures he does not like. The intermediate step of disaggregation would not change the end result: summary presidential amendment of an act of Congress. The fact that S. 100 would employ a clever means to achieve this result is of little matter. Although it may not violate the letter of the Presentment Clause, it would violate the spirit, as enunciated by the Court in *Clinton.*

Therefore, S. 100 would likely fail in its goal of legislatively bestowing a line item veto on the President. Indeed, the Court's decision in *Clinton* indicates that a line item veto can only come about through amendment of the Constitution, an event that does not appear likely in the near future. Perhaps the best hope for proponents of the line item veto is in the remains of the original LIVA. With some revisions and changes of language along the lines suggested by Justice Scalia, Congress could clear up some of the confusion he attributes to the majority in *Clinton.* By framing the issue as one of executive budgetary discretion, supporters of increased executive fiscal responsibility could shift the focus away from the Presentment Clause and towards the traditional notions of delegation, where the argument rests more in their favor.

—Brent Powell

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[64] *See* Bell, *supra* note 35, at 214 ("There is little substantive difference, as a constitutional matter, between the enhanced rescission approach taken in the Line Item Veto Act and the competing separate enrollment approach.").

NEEDLE EXCHANGE PROGRAM FUNDING

Issues at the intersection of public health and drug control policy are often heated, and the debate over federal funding for needle exchange programs (NEPs)[1] is no exception.[2] Despite the fact that no federal funds are currently spent on such programs, Representative Solomon (R-N.Y.) introduced House Resolution 3717 on April 23, 1998 to permanently ban federal funding for the distribution of needles or syringes for the hypodermic injection of illegal drugs.[3] The bill passed the House of Representatives on April 29, 1998, but was never acted on by the Senate.

H.R. 3717 would have implemented a significant change in the federal government's current position on NEPs. Deferring to the states' police powers, the federal government has traditionally limited its approach on needle exchange to the "more indirect issue of funding."[4] Accordingly, while leaving the ultimate decision to adopt needle exchange to the states, Section 506 of Public Law 105-78 prohibits the use of federal funds for NEPs, unless the Secretary of Health and Human Services certifies that needle exchange prevents the spread of HIV without encouraging illegal drug use.[5] By repealing Section 506, H.R. 3717 would have removed this caveat to the funding ban, ensuring that NEPs only operate with state, local, or private funds.[6]

In the previous session of Congress, a number of bills were introduced that, following in H.R. 3717's footsteps, would permanently ban the use of federal funds for NEPs. For instance, Senator Orrin Hatch (R-Utah) introduced S. 899, the 21st Century Justice Act of 1999, on April 28, 1999, which would, *inter*

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[1] NEPs provide sterile needles to intravenous drug users (IDUs) in exchange for ones that have already been used, attempting, *inter alia*, to prevent the spread of blood-borne disease through contaminated needles. *See generally* LINDESMITH CENTER, SYRINGE AVAILABILITY 2 (Oct. 1997) (describing the overall purpose of NEPs).

[2] *See Government Refuses Federal Funds for Needle Exchange*, MEDICAL INDUS. TODAY, Apr. 21, 1998, Device and Diagnostics (noting that needle exchange funding "has fueled sharply emotional debate for years").

[3] H.R. 3717, 105th Cong. § 1 (1998). On April 29, 1998, H.R. 3717 was called up under the provisions of H. Res. 409. 144 CONG REC. H2445 (1998). The House passed H.R. 3717, largely along party lines, by a vote of 287-140. 144 CONG. REC. H2478 (1998).

[4] Steven R. Salbu, *Needle Exchange, HIV Transmission, and Illegal Drug Use: Informing Law and Public Policy with Science and Rational Discourse*, 33 HARV. J. ON LEGIS. 105, 117 (1996).

[5] *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, § 506, 111 Stat. 1467, 1515 (1997).

[6] *See* H.R. 3717, 105th Cong. § 2 (1998).

alia, officially repeal Section 506.[7] S. 5, the Drug-Free Century Act, was introduced by Senator DeWine (R-Ohio) on January 19, 1999 and has identical language.[8] Representative Goodlatte (R-Va.) also introduced H.R. 982, the Keep Drug Needles Off the Streets Act, which has fifty-one co-sponsors and would similarly ban NEP funding.[9] These bills are currently pending Committee review.[10]

After reviewing the history of government oversight of NEPs at both the federal and state level, this Recent Legislation essay examines the anti-drug and political opposition to these programs, finally demonstrating that these concerns fail to overcome the public health benefits of needle exchange.

H.R. 3717 and the anti-NEP funding bills currently in Congress are not the first to address drug paraphernalia, but instead form another chapter in the long history of drug paraphernalia laws, a history that provides perspective in the debate over H.R. 3717. Laws proscribing the sale and possession of syringes were not enacted to reduce needle availability. Instead, the majority of drug paraphernalia laws were passed to combat the multi-billion-dollar drug paraphernalia industry that flourished in the 1960s and 1970s, when such merchandise was sold openly in pharmacies, record stores, and supermarkets.[11] The Select Committee on Narcotics Abuse Control (SCNAC) observed that "there were head shops (drug paraphernalia retail establishments) no matter where we looked."[12] The SCNAC Report argued that "the (drug) paraphernalia industry, through its glamorizing of the drug culture, act[ed] to undermine parental authority, as well as educational and community programs designed to prevent drug abuse among our youth."[13]

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[7] *See* S. 899, 106th Cong. § 2255 (1999).

[8] *See* S. 5, 106th Cong. § 3005 (1999).

[9] *See* H.R. 982, 106th Cong. (1999).

[10] In addition, Congress has also taken a "compromise" approach by addressing the needle exchange funding issue through the yearly appropriations process. This allows Congress to ban the use of federal funds for the immediate fiscal year without permanently revoking the power of the Secretary of Health and Human Services to authorize needle exchange funding. For example, Congress restricted the use of appropriated money for needle exchange activities in the Department of Health and Human Services appropriations bill for fiscal year 1999. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 505.

[11] *See, e.g.*, Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS Among Injection Drug Users: The Theory & Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 EMORY L.J. 587, 611–13 (1997).

[12] *Id.* at 612.

[13] *Id.* at 612–13.

Legislation at the state and federal levels was enacted to silence the industry's detrimental message; this legislation included "syringe prescription laws, drug paraphernalia laws, the Federal Mail Order Drug Paraphernalia Control Act, and pharmacy regulations and practice guidelines."[14] Many of these laws have remained in the books: forty-seven states currently have drug paraphernalia laws that limit the possession and/or distribution of syringes, while eight states also require a prescription for needles purchased by adults.[15]

The legislative response silenced the drug paraphernalia industry, and, as a result, also made clean needles harder to obtain.[16] In order to address the spread of disease from contaminated needles, the first NEP in the United States was started in 1986.[17] Since that time, 112 NEPs have appeared in seventy-one cities, exchanging approximately 10 million syringes each year.[18] Although there are just over 100 NEPs in the United States, which serve the 1.1 to 1.9 million intravenous drug users (IDUs), there are more than 2000 in Australia, a country with less than ten percent of the United States' population.[19] This discrepancy can be explained, in part, by the lack of federal funds to implement needle exchange programs.[20]

In the Health Omnibus Extension of 1988, Congress explicitly prohibited the use of federal funds allocated to stop the spread of AIDS for NEPs.[21] These programs could be funded, however, if "the Surgeon General of the Public Health Service determines that a demonstration needle exchange program would be effec-

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[14] *See id.* at 595.

[15] *See* LINDESMITH CENTER, *supra* note 1, at 4. *See also* Gostin, *supra* note 11, at 641–42 (outlining the current state regulations affecting drug paraphernalia).

[16] *See* LINDESMITH CENTER, *supra* note 1, at 3 (noting that, "Legal sanctions on injection equipment . . . increase the sharing of injection equipment") (quoting the U.S. National Commission on AIDS).

[17] *See* Laura Ferguson et al., *Syringe Exchange in Pennsylvania: A Legal Analysis,* 8 TEMP. POL. & CIV. RTS. L. REV. 41, 55 (1998).

[18] *See* Frank H. Boehm, *Guess Who Must Pay for a Bad Policy? You.*, TENNESSEAN, Oct. 14, 1997, at 9A; *cf.* David Perlman, *Needle Exchange Programs Proliferate; 17.5 million syringes distributed last year despite funds ban*, S.F. CHRON., Aug. 19, 1998, at A9 (noting a Centers for Disease Control and Prevention report that 113 active needle exchange programs in over thirty states distributed more than 17.5 million syringes in the previous year).

[19] *See* CAL. SENATE, HEALTH & HUM. SERVICES COMMITTEE ANALYSIS, S. 885 (1997) (visited Nov. 19, 1999) <http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_ 0851-0900/sb_885_cfa_19970424_161944_sen_comm.html> [hereinafter CAL. SENATE HEALTH COMM.].

[20] *See, e.g.*, Gostin, *supra* note 11, at 675.

[21] *See* Health Omnibus Extension of 1988, Pub. L. No. 100-607, § 256(b), 102 Stat. 3048, 3110 (1988) (codified as amended at 42 U.S.C. § 300ee-5 (1994)).

tive in reducing drug abuse and the risk that the public will become infected with the etiologic agent for acquired immune deficiency syndrome."[22] In addition, as mentioned earlier, the Secretary of Health and Human Services could also lift the funding ban under Section 506 of Public Law 105-78. Nevertheless, until the ban is removed, NEPs "must rely exclusively on state, local, or philanthropic funds for their operational activities, which is problematic given their uncertain legal status."[23]

The permanent federal funding ban sought by H.R. 3717 may further diminish the precarious legal status of NEPs, thus discouraging needle exchange exceptions to state drug paraphernalia laws. Indeed, the anti-needle exchange sentiment appears to have spread to many of the states. For example, a proposed NEP in Denver, Colorado experienced opposition from the city's police officers, despite an IDU population of 10,000 and statistics showing that twenty percent of the Denver AIDS population acquired the virus directly or indirectly through intravenous drug use.[24] A similar situation arose in Santa Fe, New Mexico, where opposition to a proposed NEP was, in large part, from religious groups.[25]

The federal stance may also influence the courts, which have already displayed reluctance in granting judicial cover for NEP organizers and participants when the legislature has not authorized such programs.[26] Needle exchange proponents have had mixed results in the courts, relying on three main defenses to challenge state drug paraphernalia laws: (1) medical necessity,[27](2) de minimis infraction,[28] and (3) public health emer-

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[22] *Id.*

[23] Gostin, *supra* note 11, at 675.

[24] *See* Michael O'Keeffe, *Cops balk at plan to swap needles; Webb's idea 'legitimizes' drug use, officers complain,* DENVER ROCKY MOUNTAIN NEWS, Oct. 15, 1997, at A4.

[25] *See* Dale Lezon, *City Eyes Needle Exchange*, ALBUQUERQUE J., Oct. 1, 1997, at 1.

[26] *See, e.g.*, People v. Bordowitz, 588 N.Y.S.2d 507, 510 (N.Y. Crim. Ct. 1991) (holding that the principle of separation of powers precludes the judiciary from overruling legitimate policy decisions made by the legislative or executive branches); *see also* Commonwealth v. Leno, 616 N.E.2d 453, 457 (Mass. 1993) (upholding defendants' convictions for violating a state drug paraphernalia statute, but "hop[ing]" that the evidence presented at trial favoring NEPs will "indicate to the Legislature the importance" of decriminalizing needle exchange) (Liacos, C.J., concurring).

[27] *See* Bordowitz, 588 N.Y.S.2d at 511 (holding that "the nature of the crisis facing [New York], coupled with the medical evidence offered, warranted defendants' action"). But see Leno, 616 N.E.2d at 454–57 (holding that despite a similar fact pattern to that in Bordowitz, the defendants were not entitled to jury instructions on the necessity defense).

[28] *See* State v. Sorge, 591 A.2d 1382, 1383–85 (N.J. Super. Ct. Law Div. 1991)

gency declarations by local officials,[29] which were mainly asserted in large cities that deem NEPs necessary to address the AIDS crisis.[30] The case law across jurisdictions is inconsistent,[31] often a result of statutes and other factors particular to each state, as well as the judge's willingness to believe the scientific and medical evidence in favor of needle exchange.[32] As Regina Aragon, San Francisco AIDS Foundation policy director, explains, "The lack of legal clarity has had a chilling effect on several communities . . . that have previously indicated support in some type of program."[33]

The mixed results in court not only demonstrate that the judiciary is unable to resolve the legality of NEPs, but also suggest that the proper forum for needle exchange policy is the legislature. As noted by the Massachusetts Supreme Judicial Court in *Commonwealth v. Leno*, "[o]ur deference to legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the 'undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature.'"[34]

(holding that when a defendant purposefully distributes needles to intravenous drug users in clear violation of a state statute prohibiting the same, that defendant cannot rely on de minimis grounds to dismiss his or her conviction); State v. McCague, 714 A.2d 937 (N.J. Super. Ct. App. Div. 1998) (rejecting, inter alia, the defendant's de minimis infractions defense).

[29] Although many states grant local governments the power to issue emergency health declarations for NEPs, many courts refuse to acquiesce, ruling that needle exchange programs are "[not] valid measures to prevent the spread of a deadly disease." David J. Merrill, Comment, *Compassion for Drug Addicts or Government-Sanctioned Drug Use?: An Overview of the Needle Exchange Controversy*, 23 PEPP. L. REV. 939, 952 (1996). *See* Gostin, *supra* note 11, at 690 (noting that state paraphernalia laws still apply during local emergency declarations, leaving the legal force of these declarations in question).

[30] *See* Merrill, *supra* note 29, at 945; *see also* Rone Tempest, *Davis To OK Revised Needle Exchange Bill*, L.A. TIMES, Sept. 2, 1999, at A3 (discussing the judicial use of emergency health declarations).

[31] *See* Gostin, *supra* note 11, at 684 ("The results [of the defenses] have been mixed.").

[32] *See* Merrill, *supra* note 29, at 950 ("The differing decisions . . . indicate the conflicting views about the proper method for stopping the spread of HIV without exacerbating the drug problem.").

[33] Tempest, *supra* note 30, at A3. *See also* Gostin, *supra* note 11, at 689 (noting the "[c]ontinued reliance on unofficial [NEPs] promises to escalate the nonproductive struggle between criminal justice and public health").

[34] *Leno*, 616 N.E.2d at 457 (citations omitted). *Accord* State v. Sorge, 591 A.2d 1382, 1386–87 (noting that balancing the social harm that may arise from needle exchange against its social benefits "is quintessentially a legislative function . . . . The court is simply not the place for that balance to be struck . . . .").

H.R. 3717 represents a concerted effort by Congress to establish federal policy against NEPs. A main concern of NEP opponents is the effect that the funding of needle exchange would have on the nation's efforts to control illegal drug use.[35] It cannot be overlooked that NEPs appear to conflict with well-established, anti-drug laws. The programs may be effective in reducing the spread of blood-borne diseases, but they only do so by directly providing the means to illegal activity such as intravenous drug use. H.R. 3717 therefore could be explained, in part, not by an unwillingness to believe scientific information or lack of concern for the health of IDUs, but instead as an attempt to preclude a conflict with strict drug control laws, a conflict that could send a confusing message to current and potential drug users while undermining the current efforts to stop drug use.

In addition to concerns about undermining national drug policy, the peculiar politics of America's war on drugs also played a significant role in the enactment of H.R. 3717 and the newly proposed anti-NEP legislation.[36] As Hoover Fellow Joseph McNamara explains, "Eighty years of drug-war propaganda has so influenced public opinion that most politicians believe they will lose their jobs if their opponents can claim they are soft on drugs and crime."[37] H.R. 3717 thus may have been more a product of electoral concerns than of public health policy.[38]

One political factor was the perceived risk of electorate whiplash, which became a key issue for Democrats voting both for and against H.R. 3717. "One Democratic member acknowledged that, because the needle exchange program is 'misunderstood by our constituents,' members of his party are remaining mostly quiet on the issue, [claiming] 'We all have only so much political capital we can invest.'"[39] This fear was amplified by the

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[35] *See, e.g.*, Merrill, *supra* note 29, at 941.

[36] *See* Alexis Simendinger, *When Splitting the Difference Buys Grief*, NAT'L J., May 2, 1998, at 998 (noting that NEP opponents are "eager to score points by assailing Clinton as soft on drugs, hastily pushed [H.R. 3717] to the floor as a form of political punishment").

[37] Joseph McNamara, *The War on Drugs is Lost*, NAT'L. REV., Feb. 1996, at 42.

[38] *See* Salbu, *supra* note 4, at 106 ("Political pressures have frequently determined the nature of public policy decisions . . . ."); *see also* Greg McDonald, *House OKs fund ban for needle exchanges; GOP bill signals lack of trust in Clinton*, HOUS. CHRON., Apr. 30, 1998, at A6 (noting that the Human Rights Campaign, a NEP supporter, condemned H.R. 3717 as too political and felt that "scientific evidence apparently has no role in shaping public health policy").

[39] A.B. Stoddard, *Republicans Seize on Needle Exchange Issue*, HILL, Apr. 29, 1998, at 6.

National Republican Campaign Committee, which warned House Democrats to "be prepared to answer for [their needle exchange votes]" in a public statement entitled "We're Watching You . . ."[40]

On the floor of the House of Representatives, the debate over H.R. 3717 also revealed the underlying political currents. Many needle exchange opponents, while discounting the majority of scientific evidence,[41] continuously employed grandiloquence to support their claims.[42] For example, Representative Souder (R-Ind.) stated that Congress cannot "enable people to violate the law, when that is also leading to *death and murder and rape and pillaging and the abuse of children.*"[43] This sort of sensational speech, focusing on emotion rather than fact, typified a large section of the debate.[44]

The politics, however, fails to recognize the public health merits of needle exchange. Although there may be real concerns about undermining national drug laws, and equal concern about the unpopularity of NEP funding among constituents, the available research strongly suggests that H.R. 3717 and the other anti-NEP bills currently pending in Congress have very little, if any, public health policy support.[45]

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[40] *Id.*

[41] Needle exchange opponents relied heavily on two Canadian studies that allegedly provide scientific evidence that NEPs do not work. *See House Approves Ban on Federal Aid for Needle Exchanges*, AIDS POL'Y & L., May 15, 1998. However, the authors of the studies claim that NEP opponents have misused their results. *See* Julie Bruneau & Martin T. Schechter, *The Politics of Needles and AIDS*, N.Y. TIMES, Apr. 9, 1998, at A27; Robert S. Remis et al., *Enough Sterile Syringes to Prevent HIV Transmission Among Injection Drug Users in Montreal?*, 18 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES & HUM. RETROVIROLOGY S57 (Supp. 1 1998). Representative Pelosi (D-Cal.) made this point during the House debate, calling attention to the authors' assertion that "officials have misinterpreted our results" and that Canadian local governments acted on the same research by expanding needle exchange programs. 144 CONG. REC. H2456 (daily ed. Apr. 29, 1998) (statement of Rep. Pelosi).

[42] *See* McDonald, *supra* note 38 (noting that NEP opponents used "bitterly partisan remarks" to "cast the vote on the bill as being either for or against drug use").

[43] 144 CONG. REC. H2459 (daily ed. Apr. 29, 1998) (statement of Rep. Souder) (emphasis added).

Another example of such rhetoric is Representative Traficant (D-Ohio), who stated during the House debate over NEP funding, "Over the years, if anybody is watching this debate or really cares, and they do, we allow Communists to work in our defense factories. The Constitution, they say, ensures that mass murderers shall have law libraries, free condoms to protect us from all this elicit sex, and now free needles to combat this great problem." *Id.* at H2448 (statement of Rep. Traficant).

[44] *See* McDonald, *supra* note 38.

[45] *See, e.g., House Approves Ban on Federal Aid for Needle Exchanges*, AIDS POL'Y & L., May 15, 1998 (quoting Representative Nancy Pelosi (D-Cal.), who, commenting on the House of Representatives' stand against NEPs despite the medical data in their support, said "One would think we were having a meeting of the Flat Earth Society.").

The research community overwhelmingly advocates needle exchange.[46] Studies conducted about needle exchange consistently show that NEPs: (1) do not encourage non-users to experiment with drugs; (2) do not increase drug use among current addicts; (3) effectively reduce HIV seroconversion rates; (4) do not increase the amount of discarded needles in the community; (5) are cost-effective; and (6) are more efficient than other alternatives suggested to control the harm of intravenous drug use.[47]

First, the evidence suggests that NEPs do not encourage non-users to experiment with drugs.[48] For instance, the National Research Council, upon reviewing age studies from the United States and Amsterdam, concluded that the availability of needles from NEPs has not increased the number of intravenous drug users.[49] These studies show that the average age of needle exchange participants increases over time, indicating that the same people, not new users, are frequenting the program.[50]

Furthermore, according to the Lindesmith Center, a drug policy research group, in the spring of 1992, three years after a San Francisco NEP opened, only 1.1% of the program's clients had used drugs for less than a year.[51] This percentage was significantly less than the 3.0% proportion of San Francisco IDUs reporting to be first year users in the spring of 1989.[52] From 1987 to 1992, the mean age of IDUs participating in the San Francisco program also increased from 36 to 42, while the minimum age remained constant.[53]

Supplementing the aforementioned studies, a number of public health groups and government agencies have reported that no evidence exists that indicates that NEPs increase drug experimentation.[54] The National Commission on AIDS (1991), the

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[46] *See* LINDESMITH CENTER, *supra* note 1, at 2.

[47] *See infra* text accompanying notes 48–88.

[48] *See, e.g.*, Ferguson et al., *supra* note 17, at 42.

[49] *See* Gostin, *supra* note 11, at 681.

[50] *See* Ferguson et al., *supra* note 17, at 42. The age increase implies either that the availability of clean needles does not encourage drug experimentation, or that new users do not have the same fear of disease as other users. Logic precludes the latter inference: if the fear of disease is what, according to needle exchange opponents, prevents non-users from trying drugs, then this fear could only be abated by needle exchange programs if the new users take advantage of their services.

[51] *See* LINDESMITH CENTER, *supra* note 1, at 6 n.41.

[52] *See id.*

[53] *See id.*

[54] *See* LINDESMITH CENTER, *supra* note 1, at 4 (Oct. 1997) (noting that six government reports agree that access to needles does not increase drug use and that "[n]o reports contradict this finding").

General Accounting Office (1993), the University of California (1993), the Centers for Disease Control (1993), the National Academy of Sciences (1995), the Office of Technology Assessment (1995), and most recently, a non-governmental consensus panel convened by the National Institutes of Health (NIH) have all concluded that NEPs do not increase drug use.[55] Specifically, the NIH panel concluded that no evidence supports the notion that "community norms change in favor of drug use or that more people begin using drugs" when needle exchange programs are enacted.[56] The panel found that "a preponderance of evidence shows either no change or decreased drug use [after NEPs are established]."[57]

Second, studies show that drug use among current addicts does not increase with the availability of clean needles from NEPs, but actually stays constant or even decreases. The Baltimore City Health Commissioner, Dr. Beilenson, stated that Baltimore IDUs participating in a needle exchange reported "a 22% decrease in their frequency of drug use since joining the NEP."[58] The most recent studies conducted in New York City, San Francisco, and Portland, Oregon also found either stable or decreased levels of drug use among NEP participants.[59] Another study spanning five and a half years observed that the median number of reported daily injections decreased from 1.9 to 0.7 per person.[60]

Third, the vast majority of evidence has found that NEPs do reduce the spread of blood-borne diseases. It is widely accepted that HIV/AIDS and other blood-borne diseases can be transmitted through intravenous drug use: 32% of all United States AIDS cases are related to intravenous drug use, with half the new HIV infections each year occurring among IDUs.[61] However, it is not

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[55] AIDS ACTION, NEEDLE EXCHANGE PROGRAMS TO PREVENT THE SPREAD OF AIDS (Nov. 9, 1997) (fact sheet).

[56] NATIONAL INSTITUTES OF HEALTH, INTERVENTIONS TO PREVENT HIV RISK BEHAVIORS (Feb. 11–13, 1997) (NIH Consensus Statement Online) <http://odp.od.nih.gov/consensus/cons/104/104-statement.htm>.

[57] *Id.*

[58] *Needle Exchange, Legalization, and the Failure of the Swiss Heroin Experiments: Hearing Before the Subcomm. on Nat'l Sec., Int'l Affairs and Criminal Justice of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 101 (1998) (prepared statement of Dr. Peter Beilenson, Baltimore City Health Commissioner) [hereinafter *Needle Exchange Hearing*].

[59] *See* Gostin, *supra* note 11, at 681.

[60] *See* Salbu, *supra* note 4, at 162.

[61] *See* AIDS ACTION, *supra* note 55.

only the addict who suffers from drug-related HIV transmissions: 44% of the HIV transmission through heterosexual contact occur among the sexual partners of injection drug users.[62] Furthermore, by June 1997, 53% of pediatric AIDS cases involved mothers directly or indirectly infected by intravenous drug use.[63]

Although some opponents challenge the ability of NEPs to reduce HIV seroconversion rates, the totality of the evidence suggests that the programs are effective in preventing the spread of blood-borne disease.[64] For example, one study showed that regular participation in a New York City NEP reduced the risk of HIV infection by approximately 66% among IDUs, including a 73% decrease in the use of rented or used syringes.[65] In 1992, Prevention Point, an NEP in San Francisco, disposed of approximately 8600 "HIV positive" needles in one month.[66] A New Haven needle exchange resulted in an estimated 33% relative reduction in the HIV incidence rate.[67] Diabetic IDUs who can legally buy syringes at pharmacies comprise a smaller proportion of HIV infected IDUs than non-diabetic IDUs—9.8% compared with 24.3%—despite similar injection practices and drug habits.[68]

And there are more studies supporting NEP's effectiveness in reducing the spread of HIV/AIDS. *The Lancet* approximates that the United States' HIV incidence rate could have been decreased by fifteen to 33% had a national needle exchange been implemented near the start of the epidemic.[69] The Pierce County needle exchange helped reduce new Hepatitis B and C cases related to drug use by 75% within two years while cases attributable to

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[62] *See* CAL. SENATE HEALTH COMM., *supra* note 19.

[63] *See* LINDESMITH CENTER, *supra* note 1, at 2.

[64] *See* NATIONAL RESEARCH COUNCIL AND THE INSTITUTE OF MEDICINE, PREVENTING HIV TRANSMISSION: THE ROLE OF STERILE NEEDLES AND BLEACH 3 (Jacques Normand et al. eds., 1995) (noting that "[t]he limitations of individual studies do not necessarily preclude us from being able to reach scientifically valid conclusions based on the entire body of literature available. The [needle exchange] situation resembles the exploration of the relationship between cigarette smoking and lung cancer; virtually every individual study was vulnerable to some particular objection, yet collectively those studies justified a compelling conclusion.") [hereinafter NATIONAL RESEARCH COUNCIL].

[65] *See* LINDESMITH CENTER, *supra* note 1, at 3.

[66] *See id.* at 5 n.18.

[67] *See* Gostin, *supra* note 11, at 679.

[68] *See* LINDESMITH CENTER, *supra* note 1, at 3.

[69] *See* AIDS ACTION, *supra* note 55.

sexual transmission remained stable.[70] One major study found that, on average, HIV seroprevalence rates grew 5.9% each year in the 52 cities without NEPs, and decreased by 5.8% annually in the 29 cities with needle exchange.[71] Dr. Ernest Drucker, professor of epidemiology and Social Medicine and the Director of Community Heath at Montifiore Medical Center, claimed that NEPs could have been used to prevent 10,000 to 20,000 cases of AIDS in 1996 and 1997.[72] Similarly, Dr. Donald De Jarley, professor of epidemiology at Albert Einstein College of Medicine, reported that NEPs reduce the spread of blood-borne disease anywhere from 30 to 70% without increasing overall drug use.[73] The evidence shows that NEPs represent an effective way to reduce the use of infected needles and the concomitant spread of AIDS among IDUs and their sexual partners.

Fourth, research shows that NEPs do not increase the number of dirty needles discarded in a community. NEP opponents stress that increasing the amount of needles in an area is bound to increase the amount of discarded needles in the streets, which may raise public health concerns. The "one-for-one" nature of many needle exchanges, however, provides addicts an incentive to hang on to dirty needles instead of discarding them in neighborhood parks or other public places, where such needles might pose a danger to others.[74] The Baltimore City Health Commissioner stated that "a well-designed study looked at discarded needles around the two [Baltimore] program sites compared to other high drug-use areas in the city and found *no* increase in the number of discarded needles in the areas surrounding the exchange."[75] A study in Portland, Oregon discovered "similar or decreased numbers of improperly discarded syringes."[76] To date, every study that has researched this issue has concluded that NEPs do not cause an increase in the total number of discarded needles.[77]

Fifth, NEPs, by reducing medical costs associated with HIV/AIDS and other blood-borne disease, are cost-effective. As

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[70] *See* Gostin, *supra* note 11, at 679.
[71] *See* Ferguson et al., *supra* note 17, at 44.
[72] *See* State v. McCague, 714 A.2d 937, 940 (N.J. Super. Ct. App. Div. 1998).
[73] *See id.* at 941.
[74] *See* Ferguson et al., *supra* note 17, at 46.
[75] Needle Exchange Hearing, *supra* note 58, at 100 (emphasis in original).
[76] LINDESMITH CENTER, *supra* note 1, at 4 (Oct. 1997).
[77] *See* Gostin, *supra* note 11, at 681.

Dr. Beilenson testified regarding the Baltimore exchange program, which costs $310,000 annually:

> A single case of AIDS in an adult costs 110,000 taxpayer dollars. A single case of AIDS in a baby costs 230,000 taxpayer dollars. Quick math tells you, you prevent three cases in adults and we save money. In fact, we're estimating we've prevented, because we know from science, by getting the blood results of our patients—this is not surveys, this is actually blood results. We prevented probably 300 cases in the last 3 years, which comes to about 30—this is just adult cases, direct prevention, 30 million taxpayer dollars.[78]

The median annual expense of a NEP is $169,000.[79] Compared with the average lifetime cost of treating one person with AIDS (over $100,000), each program needs only to prevent two instances of AIDS infection to pay for itself.[80] One study concluded that the successful implementation of a NEP from 1987 to 1995 would have saved between $244,000,000 and $538,000,000 in cost of treating patients with injection-related AIDS.[81]

Sixth, NEPs are more effective than other alternatives, namely bleach sterilization and drug treatment programs, in reducing the spread of HIV/AIDS and other blood-borne diseases. First, with regard to the efficacy of bleach, according to the National Research Council and the NIH consensus panel, observational studies have not "demonstrated a significant protective effect against HIV infection for injection drug users who report consistent use of bleach to decontaminate needles and syringes previously used by others."[82] In addition, the Centers for Disease Control and Prevention's Mortality and Morbidity Report of June 4, 1993, asserted, "sterile, never-used needles and syringes are safer than bleach-disinfected previously used needles and syringes."[83] With regard to the benefits of drug treatment in lieu of needle exchange, although many experts agree that treatment is important, they view needle exchange as an invaluable tool in enticing addicts to explore possible health programs and treatment services.[84] NEPs create a bridge to addicts who would otherwise go unnoticed. For instance, Dr. Beilenson testified that

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[78] Needle Exchange Hearing, supra note 58, at 106.
[79] *See* LINDESMITH CENTER, *supra* note 1, at 3.
[80] *See id.*
[81] *See* Ferguson et al., *supra* note 17, at 44–45.
[82] NATIONAL RESEARCH COUNCIL, supra note 64.
[83] AIDS ACTION, *supra* note 55.
[84] *See* Ferguson et al., *supra* note 17, at 45.

the Baltimore needle exchange program "serves as a much-needed point of access to care for hard-core addicts who otherwise have had virtually no access to drug treatment or other health care . . . ."[85] What are they going to be doing if we don't have a needle exchange? They're not going to magically appear in drug treatment centers."[86]

In agreement with Dr. Beilenson's testimony, Representative Pelosi (D-Cal.) stated, "[NEPs] can be an effective link to drug treatment and other medical services for people who have traditionally been outside the loop."[87] Furthermore, Dr. Frederick Rodgers, Professor of Psychology at Rutgers University, noted that one program guided twenty percent of its participants into drug treatment.[88]

In light of the comprehensive research in favor of NEPs as an effective means of combating the spread of HIV/AIDS while not increasing drug use, the NIH consensus panel summarized, "Can the opposition to [NEPs] in the United States be justified on scientific grounds? Our answer is simple and emphatic—no . . . . Such programs should be implemented at once."[89]

Legislation, however, is not exclusively a product of statistical findings. As noted earlier, there is legitimate concern that, despite their scientific support, NEPs conflict with other state and federal anti-drug laws, and that this conflict may undermine the nation's zero-tolerance drug policy. However, if NEPs have no tangible effect on the level of drug use, which the studies strongly suggest, then such anti-drug concerns are questionable. If the laws are inconsistent, and if this inconsistency generates a negative impact by sending a mixed message about drugs and drug use, one must wonder why the expected detriment from this inconsistency, i.e., increased drug use, does not occur. It may be

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[85] *Needle Exchange Hearing*, *supra* note 58, at 102.

[86] *Id.* at 106–07.

[87] *Id.* at 26 (statement of Rep. Pelosi).

[88] *See McCague*, 714 A.2d at 941.

[89] NATIONAL INSTITUTES OF HEALTH, *supra* note 56. Some disagree that the results are incontrovertible. For example, Professor Salbu has written that the data from the needle exchange studies are inconclusive, allegedly a result of scarce and conflicting findings. *Salbu*, *supra* note 4, at 129. He also reports that "[s]ome government health officials have evinced skepticism regarding the effectiveness of needle exchanges in the reduction of HIV, based in part on purported data from unpublished studies." *Id.* at 118. However, Professor Salbu does contend "the findings support the continued examination of needle program efficacy." *Id.* at 165. In addition, the amount of evidence, when taken together, overcomes the individual flaws in a number of the studies. *See* NATIONAL RESEARCH COUNCIL, *supra* note 64.

possible that while the laws conflict at face value, they do not conflict in fact. It is also possible that the public can separate the idea of condoning drug use from implementing a public health initiative to minimize a drug-related harm.

As long as AIDS remains a pressing concern, Congress should balance the importance of sending an uncontroverted message about drug use with the crucial need to stop the spread of this deadly disease. In light of the overwhelming public health benefits of needle exchange, H.R. 3717 and the anti-NEP legislation currently before Congress represent a misguided effort to repeal the only current federal law that can reconcile these considerations, Section 506 of Public Law 105-78. Congress therefore should leave the decision to use federal funds for needle exchange in the hands of the Secretary of Health and Human Services. Partly isolated from electoral politics, the Secretary can more reasonably balance the effectiveness of NEPs in combating the spread of HIV/AIDS with the risk of increasing illegal drug use.

—*Daniel Geyser*

PRISON LABOR

Prison labor is almost as old as prisons,[1] but for most of this century federal law has prohibited the fruits of prison labor from entering the stream of interstate commerce.[2] Since the Prison Industries Enhancement Act was passed in 1979,[3] however, state prison systems—if authorized by state law[4] and certified by the Department of Justice's Bureau of Justice Assistance (BJA)[5]—are now free to contract with private firms. The private firms then either hire inmates directly, putting the prisoners to work for the company, or purchase goods made by the prisoners under a prison-run project.[6] With New York Senate Bill 2339,[7] which was introduced by Senator John Sampson (D-Brooklyn) on February 8, 1999,[8] New York would take the first step towards a Prison Industries Enhancement (PIE) program of its own. The bill would create a Prison Industries Council with broad authority to establish the program.[9]

Private prison industries programs have obvious benefits. Idle prisoners learn a trade,[10] and a portion of their wages goes to offset the costs of incarceration.[11] However, the programs can also be politically sensitive. A private prison industries program raises several controversial issues: how to determine and distribute inmate wages; what kinds of work inmates should do; how inmate labor is to compete against free, non-inmate labor; and how businesses that win PIE contracts and employ inmates are to compete against non-PIE businesses.

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[1] *See* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 345 ("The earliest ancestor of the modern-day prison . . . was charged with the mission of draining 'the filthy puddle of idleness'" and was "to accomplish this mission through the discipline of hard labor.")

[2] *See id.* at 367.

[3] Pub. L. No. 96-157, § 827, 93 Stat. 1215 (1979).

[4] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. 17,000, 17,012 (1999).

[5] *See* 18 U.S.C. § 1761(c)(1) (1994).

[6] These are known as the "contract" system and the "state-account" system, respectively. *See* Garvey, *supra* note 1, at 344–45.

[7] S.B. 2339, 222d Leg. (N.Y. 1999) [hereinafter S.B. 2339].

[8] Representative Arthur Eve (D-Buffalo) introduced an identical bill in the State Assembly. *See* A. 4141, 222nd Leg. (N.Y. 1999).

[9] *See* S.B. 2339, § 3(172)(2).

[10] BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, FACT SHEET, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1 (1995) (calling "increasing inmate job skills" one of PIE's "primary objectives").

[11] *See* 18 U.S.C. § 1761(c)(2)(B).

If S.B. 2339 becomes law, the New York PIE program would be well-insulated from these political pressures for two main reasons. First, the bill would structure the program so that, once it has begun, the legislative and executive branches would have very little direct involvement. Second, the BJA's new guidelines,[12] which govern the certification of PIE programs, are significantly more comprehensive than the previous guidelines.[13] Together, these factors would protect the program from political partisanship at the state level.

After a summary of the bill and the new federal regulations that govern PIE programs, this Recent Legislation Essay demonstrates how the legislation and regulations together would insulate the New York program from the four political controversies that typically plague PIE programs: worker displacement, inmate wages, wage deductions, and the awarding of state contracts. With these contentious issues resolved, the New York PIE program would have a better chance of success than prison labor programs that have been established in other states.

The language of S.B. 2339 is relatively straightforward. The legislation would create a Prison Industries Council ("the Council") with the power to establish a PIE program. The Council would consist of a representative from the Governor's office, the Commissioner of Correctional Services, the Commissioner of Labor, the Commissioner of Economic Development, the Attorney General, the Chairman of the Commission of Correction, and representatives of labor and business.[14] The Council would have complete authority over the PIE program. It could accept and reject open bids for PIE contracts and authorize the installation of manufacturing equipment in prison facilities.[15] The Council could determine what goods the inmates could produce,[16] accept or reject specific plans for production,[17] set the price of inmate labor,[18] and issue guidelines for the for-profit sale of prison-made goods.[19] It could establish a deduction system,

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[12] Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. 17,000–14 (1999).

[13] *See* Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. 12,661–64 (1985).

[14] *See* S.B. 2339, § 3(172)(1).

[15] *See id.* § 3(172)(5).

[16] *See id.* § 3(172)(3).

[17] *See id.* § 3(172)(4).

[18] *See id.*

[19] *See id.* § 3(170)(2).

through which portions of inmates' wages would be diverted to pay for their room and board; it would also have the power to divert wages to victims' compensation funds and union benevolent funds.[20] Finally, the Council would have the "authoriz[ation] to do all other things necessary or convenient to carry out its functions, powers and duties."[21]

The rest of the bill would clear away procedural obstacles to a PIE program. The bill would make it legal for inmates to work under the Council's guidelines.[22] It would extend minimum wage and other employee protections to PIE workers.[23] It would grant the Commissioner of Corrections the power to sell goods produced under Council programs,[24] thereby giving private firms the option of hiring inmates directly or of purchasing inmate-made goods from the state.

The bill thus would do little besides create an independent council with expansive powers to create a PIE program. Other than minimal monitoring by the Commission of Corrections[25] and the presence of a few executive branch members on the Council,[26] the legislation would provide no political oversight. The state legislature would have no role, and the bill would provide little guidance on how the Council should handle the sensitive issues that it must address.

The new federal guidelines fill that void. With limited exceptions, federal law prohibits prison- or prisoner-made goods from entering interstate commerce.[27] This was not always the case, as private businesses used prison labor heavily through most of the nineteenth century.[28] Labor and business interests lobbied against it, however, claiming that prison workers and the businesses that employed them had unfair advantages.[29] A commission under then-Secretary of Commerce Herbert Hoover warned that the

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[20] *See id.* § 3(172)(7).
[21] *Id.* § 3(172)(8).
[22] *See id.* § 1(170)(2).
[23] *See id.* § 3(172)(6).
[24] *See id.* § 4(177)(6).
[25] *See id.* § 3(172)(7) (requiring that the Commission monitor the program to "ensure that prisoners are not coerced into participating in the program, that the conditions of inmate labor are acceptable, that adequate training, supervision, security and job opportunities are provided to inmates participating in the program").
[26] *See id.* § 3(172)(1).
[27] *See* 18 U.S.C. § 1761(a).
[28] *See* Garvey, *supra* note 1, at 345–57.
[29] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,001.

government must "eliminat[e] . . . the direct price competition of the prison products with so called 'free products.'"[30]

Congress responded in the years surrounding the Great Depression, severely limiting trade in prison-made goods. The Ashurst-Sumners Act[31] and subsequent amendments[32] prohibit the interstate transport of prison-made goods, effectively preventing such goods from being sold on the open market. The Walsh-Healey Act,[33] as it now stands, forbids federal government contractors from using prison labor to fulfill contracts worth more than $10,000. As the laws stand today, prison labor is limited to goods sold to the federal government for less than $10,000, to goods sold to state governments, and to goods provided to non-profit institutions.[34]

With the Prison Industries Enhancement Act, however, states became free to enter prison laborers and prison-made goods into private and interstate commerce. The BJA must certify each state's program,[35] subject to certain limitations. The statute requires that PIE programs offer prisoners "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed."[36] States may deduct up to eighty percent of each inmate's wages for a number of different purposes, including a mandatory deduction for victim compensation funds.[37] Prisoners who participate in the program must do so voluntarily[38] and must be eligible for workers' compensation benefits.[39] Prisoners are not to receive unemployment compensation.[40] In amendments to the PIE Act, Congress demanded that PIE participants consult with local union representatives and ensure that prison laborers will not displace non-prison workers who work in similar trades.[41]

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[30] *Id.*

[31] Pub. L. No. 74-215, 49 Stat. 494 (1935).

[32] *See, e.g.*, Act of October 14, 1940, Pub. L. No. 76-851, 54 Stat. 1134 (1940).

[33] Pub. L. No. 74-846, 49 Stat. 2036 (1936) (codified as amended at 41 U.S.C. § 35).

[34] *See* 18 U.S.C. § 1761. The statute also allows interstate sales of prison-made farm equipment. *See id.*

[35] 18 U.S.C. § 1761(c)(1).

[36] *Id.* at (c)(2).

[37] *See id.* at (c)(2)(A)–(D). States may also deduct taxes, room and board, and family support. *See id.*

[38] *See id.* at (c)(4).

[39] *See id.* at (c)(3).

[40] *See id.*

[41] *See* Act of October 12, 1984, Pub. L. No. 98-473, 98 Stat. 2093, 2096 (1984). The requirements are codified in a statutory note appearing under 18 U.S.C. § 1761.

In overseeing the PIE Certification Program, the BJA has twice issued guidelines offering more specific requirements for local programs seeking certification. The first set of guidelines, issued in 1985,[42] offered only slightly more structure than the PIE Act itself. Like the original Act, the guidelines required a mandatory victim compensation fund, payment of the prevailing wage as determined by a state agency, voluntary participation, and payments of benefits for injured workers.[43] On the issues of competition with non-prison labor and free worker displacement, the BJA guidelines did nothing more than incorporate the statutory language. Applicants for certification must simply consult with union representatives,[44] but there is no requirement regarding the degree of consultation necessary. And to alleviate concerns that business participants would hire prison inmates to replace, not supplement, non-inmate labor, the BJA merely incorporated the statute's requirement: "paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services."[45] It also did not define worker displacement.

The BJA's next set of guidelines, which were issued on April 7, 1999,[46] are significantly more vigorous. Although much remains the same, the guidelines reflect fourteen years of practical experience under the previous guidelines. First, even those regulations that are substantively the same are now significantly more dense. To aid programs in their interpretation of the guidelines, many of the regulations include a paragraph explaining their purpose. The guideline on inmate wages, for example, which still requires that inmates receive the going wage for that locality, explains, "This requirement benefits society by allowing for the development of prison industries while protecting the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace."[47] Other guidelines now require more extensive documentation. Where the BJA once ac-

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[42] Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,661–64 (1985).

[43] *See id.* at 12,663.

[44] *See id.*

[45] *Id.*

[46] Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. 17,000 (1999).

[47] *Id.* at 17,009.

cepted a participant's word that inmates were working voluntarily,[48] it now requires that inmates indicate their voluntary participation in writing.[49] Paper-trail requirements such as this one will go a long way in helping the BJA determine whether a suspect program is in compliance.

On the more controversial issues, the BJA's new, extensive guidelines and definitions have resulted in substantive changes for PIE certification. Regarding wages, the old guidelines required that applicants have a state agency verify that wages would be "comparable" to outside wages.[50] Although not explicitly altering that requirement, the new guidelines require that wages be "not less than" outside wages.[51] The guidelines also specify that wage calculations may not "take[ ] into consideration" the "unique expenses . . . of undertaking production within the prison environment."[52] Two other provisions are even more important. First, participants should adopt wage scales that "will not result in displacement."[53] In other words, PIE participants must pay close-to-market wages for less-than-desirable employees. Second, the BJA has extended the category of inmates who must receive this prevailing wage. Previously, the guidelines' lack of specificity[54] could lead participants to pay the higher wage only to those inmates working directly on PIE projects; for example, a garment partnership would pay the prevailing wage only to those inmates cutting and sewing fabric. Under the new, more detailed guidelines, the wage requirement applies to any inmate doing any "notable task[ ]" for which a similarly situated private business would incur costs, including those prisoners normally assigned to refuse pick-up.[55] This puts a large portion of the prison labor population onto a union pay scale and raises the cost of PIE participation.

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[48] *See* Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,663 ("Applicants must assure that inmate participation is voluntary").

[49] *See* 64 Fed. Reg. at 17,011.

[50] *See* Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,663.

[51] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,009.

[52] *Id.* at 17,010.

[53] *Id.*

[54] *See* Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,663 (failing to specify to whom the prevailing wage requirement applies).

[55] Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,010.

On the consultation issue, the new guidelines make it much easier for competing labor and business groups to oppose new PIE projects. The old guidelines simply required that PIE applicants "consult with" local unions and "local business[es] that may be affected" by the new project.[56] The new guidelines give competitors extensive information about the proposed program before it begins,[57] making them better equipped to oppose the new arrangement.

The new guidelines' most extensive explanation is on the displacement issue. The old guidelines ambiguously demanded that PIE programs "not result in the displacement of employed workers" and offered little definition or discussion of what would constitute displacement.[58] The new guidelines offer a much fuller explanation of how the BJA will apply the displacement prohibition. The BJA will presume non-compliance whenever "there is a non-inmate worker's job function replacement by a PIECP inmate worker or where a non-inmate worker's job function is eliminated or adversely impacted, to a significant degree, and there is a concomitant assumption of a similar job function by a PIECP inmate worker."[59] The guidelines then outline a method of challenging that presumption of non-compliance.[60] The new guidelines give PIE participants far more guidance about what kind of partnerships are and are not permissible.

There is no doubt that a private prison industries program raises several sensitive political issues. Workers may be displaced, wages must be set, inmates' incomes must be distributed, and contracts must be assigned. A legislature that does not address these issues from the outset is likely to face them later. From this perspective, S.B. 2339 initially did not appear to be a very good bill. When the bill was introduced on February 8, 1999, the 1985 guidelines, which left most of the controversial issues for individual state legislatures, were still in effect. On its own, the New York bill would do little to fill in those regulatory gaps. It does not mention worker displacement, and it would

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[56] Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,663.

[57] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,011.

[58] *See* Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,663.

[59] Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,010.

[60] *See id.*

give the Prison Industries Council free rein to set wages, to establish a deduction system, and to contract with private businesses.[61] All of these omissions could cause future legislative headaches and real-world consequences for inmates, private businesses, and non-inmate laborers.

However, thanks to the new federal regulations, which the BJA issued while S.B. 2339 was still in committee, a New York PIE program would avoid many of these headaches and consequences. The BJA's more elaborate guidelines leave much less room for legislative discretion, effectively removing many issues from state hands. The new federal guidelines have filled many of the holes that once appeared to riddle S.B. 2339.

A brief examination of how S.B. 2339 and the new BJA regulations interact on specific issues will demonstrates this. A look at four of the more sensitive issues is most helpful: worker displacement, wages, deductions, and the awarding of contracts to private businesses. On the first two of those issues, an examination of the bill in light of another state's experience is instructive. Wisconsin has run a moderately successful PIE program, producing $1.3 million in gross inmate wages and over $850,000 in wage deductions for the state in its first two years of operation.[62] At the same time, it has been the subject of much political controversy. Legislators have accused the program's overseers of giving a "sweetheart deal" to a private company owned by one of the governor's supporters.[63] The program has also been attacked on the worker displacement issue.[64]

Amazingly, S.B. 2339 does not mention the problem of worker displacement, even though it is an inherent concern when establishing any prison labor program. As long as unemployment exists, any prison inmate who works is, theoretically, displacing a non-inmate worker.[65] Indeed, competition with free labor killed

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[61] *See* S.B. 2339, §§ 3(172), 8(189).

[62] *See* Corrections Industry Association, *Prison Industry Enhancement Certification Program Cumulative Data* (visited July 22, 1999) <http://www.corrections.com /industries/cia/cum98.htm>. This covers the period from the program's start-up in May, 1996, through the second quarter of 1998, the most recent period for which information was available.

[63] *See* Cary Spivak, *Loan was Incentive to Hire Inmate Workers*, MILWAUKEE J. SENTINEL, June 15, 1997, at A1.

[64] *See* Richard P. Jones, *Urban Prisons Proposal Rejected*, MILWAUKEE J. SENTINEL, May 30, 1997, at A1.

[65] *See* Darren McDermott, *Economists Join Debate on Prison Work*, WALL ST. J., May 20, 1999, at A2 (discussing effects of prison labor on the economy). Indeed, labor

private prison industries in the 1920s.[66]

The bill's failure to mention displacement is even more surprising in light of Wisconsin's recent struggle with the issue, the Department of Justice investigation it caused, and the years of legislative difficulty. The problem began when one of Wisconsin's first private-sector partners hired ninety prison inmates very close to the time that it closed a plant and thereby reduced its private work force by eighty-five employees.[67] Although the Department of Justice eventually determined that there was an insufficient basis for legal action,[68] the experience caused difficulties for lawmakers. The state legislature tried at least three different times to create a definition of displacement that would prevent such a problem from happening again. In one instance, the legislature tried to require that the Department of Corrections create a definition; Governor Tommy Thompson vetoed that attempt.[69] In another attempt, the Joint Finance Committee rejected a motion by Senator Russ Decker (D-Schofield) that would have created statutory language defining displacement as either "(a) the reduction in earnings of existing non-inmate employes; or (b) the transfer of activities or functions from existing non-inmate employes to inmate labor."[70] In the most extensive attempt, a separate bill issuing a seven-part definition of displacement failed to pass.[71] The issue continues to occupy the legislative and political agenda.[72]

Fortunately for the New York legislature, Wisconsin's experience also prompted new federal guidelines[73] that fill in many of

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representatives who commented on a draft of the new PIECP guidelines argued that "prisoner labor should never be allowed to compete with free-world labor because it undermines the private sector labor force and inmate rehabilitation." Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,005. Another party commented, "Any PIECP operation is likely to affect the private sector marketplace and, consequently, private sector jobs." *Id.*

[66] *See* Garvey, *supra* note 1, at 358–62.

[67] *See* Jones, *supra* note 64, at A1.

[68] *See* Richard P. Jones, *Agency Holds Judgment on Inmate Deal*, MILWAUKEE J. SENTINEL, Apr. 16, 1998, at A5.

[69] *See* Act 27 § 3909b, 93d Reg. Sess., 1997 Wis. (indicating gubernatorial veto of language requiring that "'displacement' shall have the meaning provided in rules promulgated by the department").

[70] Joint Finance Motion on Private Industry/Prison Employment Program—Displacement of Workers, 93d Reg. Sess., 1997 Wis., copy on file with author. *See also* Jones, *supra* note 64, at A1.

[71] *See* S.B. 260 § 2, 93d Reg. Sess., 1997 Wis.

[72] *See State Should Cut Losses, End Contract with Fabry*, GREEN BAY PRESS-GAZETTE, May 23, 1999, at A14 (stating that "The Fabry program has failed on nearly every count," and specifically identifying the worker displacement issue).

[73] *See Feds Impose New Rules on Prison Work*, CAP. TIMES (Madison, Wis.), Aug. 24,

S.B. 2339's gaps. The new guidelines define displacement in great detail and describe the procedure that the BJA will use in evaluating compliance.[74] The new guidelines take worker displacement out of the state legislature's hands, "de-politicizing" an issue that has proved difficult for state lawmakers to handle.

On the issue of inmate wages, the New York bill would give almost complete control to its newly created Prison Industry Council.[75] The only restriction would be that the Council must set wages no lower than minimum wage.[76] Without the federal guidelines, S.B. 2339's handling of the wage issue would be a political mess. Labor and non-participant business interests would push for higher wages, in order to prevent PIE participants from competing with them. PIE proponents and participating business interests would push for lower wages, in order to compensate for the added security costs of running a factory behind bars.[77] A politically palatable and economically viable solution would be extremely difficult to find, especially given that labor, business, and correctional representatives would all sit on the Council.[78]

The new federal guidelines help states avoid this tension.[79] States now have clear instructions on which state agency is to

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1998, at A1 ("A federal agency's review of a glove manufacturer's decision to close a plant and transfer the work to a local prison has prompted new federal guidelines for such programs.").

[74] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17010; *see also supra* text accompanying notes 58–60. Although the new guidelines provide an answer that will severely limit private firms' flexibility and ability to participate in PIE programs, they provide an answer nonetheless.

[75] *See* S.B. 2339, § 3(172)(4).

[76] The language of the bill actually states that workers must be paid "at the minimum wage," not *at least* the minimum wage. *See id.* § 3(172)(6). However, the rest of the bill indicates that it must mean *at least.* Section 3(172)(4) gives the Council complete authority "to determine the price of inmate labor," which would be meaningless if the legislature was ordering the Council to set that price at the minimum wage. *Id.* § 3(172)(4). Further, the minimum wage language appears in a provision extending all relevant employment laws to inmate workers. *See id.*

[77] *See* Garvey, *supra* note 1, at 373 ("However, given the additional costs of doing business inside prison (e.g., additional security costs), few industries will find it worthwhile to set up shop behind prison walls."). *See also* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,004 (reporting that two authors who commented on the proposed guidelines referred to "the hidden, unusual costs of doing business in a prison environment such as the cost of transportation to rural areas, reduced production levels due to rapid turnover, and added expenses of worker training and start-up").

[78] *See* S.B. 2339, § 3(172)(1).

[79] The old federal guidelines tried to take the issue away, too, but they left significant loopholes. *See supra* text accompanying notes 50–55.

determine the prevailing wage,[80] what kind of work must receive the prevailing wage,[81] and how to handle overtime.[82] Legislatures can cede control over the wage issue to executive oversight boards, free from the worry that the boards, with all of the diverse interests they represent, will be unable to resolve the issue. In fact, the BJA barely lets them address it at all.

Once these wages have been set, the New York bill would give little guidance on how to distribute them and what to deduct from them. It states that the Council "shall . . . provide" that part of inmate wages go to the Department of Corrections for room and board expenses, and that the Council "may also provide" for contributions to victims' compensation or union benevolent funds.[83] Part of this is non-controversial. The opportunity for a state to recover some of its expenses is one of the program's stated goals.[84] S.B. 2339, however, would give the Council free rein. It would set no requirements regarding the amount of wages that the Council may deduct, opening it to powerful lobbies from labor unions[85] and victims' rights groups.[86]

Once again, the legislature would be free to remain silent on the issues only because federal guidelines fill in the gaps. Where the legislature gives free rein, the BJA reins in. The BJA limits deductions to eighty percent of wages,[87] preventing higher deductions that would discourage inmates from volunteering and thus kill the program. The BJA also requires victims' compensation deductions between five and twenty percent of wages,[88] recognizing—but limiting—the victims' movement. Moreover, the bill's lack of specific requirements mean that, even if federal regulations change, the law need not. Under the current regula-

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[80] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17010. In New York, the "appropriate state agency which determines wage rates," *id.*, would likely be the Commissioner of Labor. *See* N.Y. LAB. LAW § 220.3 (McKinney 1999); *see also* N.Y. PUB. HOUS. LAW § 152 (McKinney 1999).

[81] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,010.

[82] *See id.*

[83] S.B. 2339, § 3(172)(7).

[84] BUREAU OF JUSTICE ASSISTANCE, *supra* note 10, at 1.

[85] *See* Bob Baker, *Prop. 139 Would End State Ban on Hiring Out Inmates*, L.A. TIMES, Oct. 22, 1990, at A1 (describing organized labor's active opposition to PIE programs).

[86] *See* Jon Kyl, *What the System Owes the Victim*, WASH. POST, July 22, 1999, at A23 (advocating for and describing victims' rights movement).

[87] *See* Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,011.

[88] *See id.*

tions, for example, states may not deduct wages for union benevolent funds.[89] However, if the BJA would someday authorize such deductions, New York's Council could establish them without legislative interference.

The final issue, the awarding of prison contracts to private businesses, is a politically sensitive area. Wisconsin's experience shows what can happen if there is too much political involvement. The Wisconsin Department of Corrections had authority to enter into contracts[90] and, while any deal technically required approval from the legislature's Joint Committee on Finance,[91] the contract bidding and negotiating process was "cloaked in secrecy."[92] As a result, PIE contracts in Wisconsin were viewed with suspicion. Legislators called the state's first contract "a sweetheart deal" for one of the Governor's campaign contributors.[93] Under the contract's terms, the state financed the installation of manufacturing equipment "well below the prime rate,"[94] absorbed the costs of raw materials wasted during the production process,[95] and agreed not to contract with any other glove manufacturer for inmate labor.[96] This last exclusivity provision remained a secret even to some members of the program's oversight board.[97] The contract was not a good one, costing the state approximately $1.6 million.[98]

The new federal guidelines offer little structure for the contract-forming process, requiring only that participants "consult with" and provide "adequate information" to businesses that might be affected by the program.[99] Given the difficulties with

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[89] *See id.* (listing the categories of acceptable deductions).

[90] *See* WIS. STAT. § 303.01(2)(em) (1996).

[91] *See id.*

[92] Cary Spivak, *3rd Prison Labor Deal in Works*, MILWAUKEE J. SENTINEL, July 6, 1997, at A1.

[93] Cary Spivak, *Loan was Incentive to Hire Inmate Workers*, MILWAUKEE J. SENTINEL, June 15, 1997, at A1 (quoting Senate Majority Leader Chuck Chvala (D-Madison)); Cary Spivak, *Prison Work Program Runs Deficit*, MILWAUKEE J. SENTINEL, Nov. 14, at A1 (quoting Senator Rodney C. Moen (D-Whitehall)). *See also* GREEN BAY PRESS-GAZETTE, *supra* note 72, at A14 ("Would [Governor Tommy] Thompson ... have been quicker to demand reforms in the Fabry program if ... the company owner, had not been a campaign contributor?").

[94] *See* Spivak, *Loan was Incentive*, *supra* note 93, at A1.

[95] *See id.*

[96] *See* Spivak, *Prison Work Program*, *supra* note 93, at A1.

[97] *See id.*

[98] *See* Scott Hildebrand, *Fabry Program Hangs in Balance*, GREEN BAY PRESS-GAZETTE, May 16, 1999, at A1.

[99] Prison Industry Enhancement Certification Program Guidelines, 64 Fed. Reg. at 17,011.

direct political control of the contract process and the lack of BJA guidance on the issue, would New York face the same difficulties that Wisconsin encountered?

The answer is *no*, because the legislature has removed politics from the contract-forming process. S.B. 2339 would give complete control to the Council.[100] Contract awards would not occur through a process "cloaked in secrecy,"[101] but through open bids.[102] The open bid system would go a long way to limit the kind of closed-door patronage that can create poor deals for the state. Where the federal guidelines have not excluded politics, the drafters of S.B. 2339 have done so themselves.

Therefore, in some ways, New York got lucky. The new federal guidelines that might "save" New York's proposed PIE program did not come until *after* S.B. 2339 had been introduced. In other words, the bill's drafters did not know that the bill's many holes would be filled by BJA regulations. Furthermore, New York is benefiting from the legislative experience of some forty other programs that have already received PIE certification.[103] Thirty-eight of those programs had been certified for more than a year by the time New York introduced this legislation;[104] by comparison, Wisconsin could look to just twenty-two with similar experience.[105]

Whether due to legislative prescience or sheer regulatory luck, however, the New York PIE program would stand a good chance of success. Although the impact that the new guidelines have on PIE programs overall is uncertain—and it may be a negative impact, given that so many of the provisions will raise the price for any business that wants to participate—the guidelines' impact on state legislatures is clear. By resolving so many of the contentious issues, the new guidelines make it much easier for state lawmakers to take a de-politicized run at a politically sensitive issue.

—Brian Hauck

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[100] *See* S.B. 2339, § 3(172)(2).
[101] Spivak, *3rd Prison Labor Deal*, *supra* note 92, at A1.
[102] *See* S.B. 2339, § 3(172)(5).
[103] *See* Corrections Industry Association, *Prison Industry Enhancement Certification Program* (visited July 22, 1999) <http://www.corrections.com/industries/cia/PIE.html>.
[104] *See id.*
[105] *See id.*

BOOK REVIEW

MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS. By John R. Lott, Jr.[1] Chicago, Ill.: University of Chicago Press, 1998. Pp. 225, preface, line drawings, appendixes, notes, bibliography, index. $23.00 cloth.

In 1997, there were an estimated thirty-nine violent crimes per one thousand United States residents twelve years of age and older.[2] The question remains: what should be done to combat this alarming problem, and at what cost can these efforts be made? In *More Guns, Less Crime: Understanding Crime and Gun-Control Laws*, John R. Lott, Jr. uses statistical analysis in an attempt to prove that nondiscretionary concealed-handgun laws, which allow almost anyone to carry a concealed handgun,[3] deter violent crime at a more cost-effective rate than other well-known crime prevention measures. Simply stated, Lott concludes that more concealed weapons on the street result in less crime because criminals are deterred by the increased risk potential that these weapons pose. Lott argues that the statistics refute the anecdotes and emotions that most gun control advocates use to garner support for limiting the use of concealed handguns. Furthermore, he purports that the safety features recently enacted across the country (waiting periods, gun buybacks, and background checks) do not yield any benefits in crime reduction. Therefore, according to Lott, the most commonly held assumptions about gun control and its crime-fighting efficacy are simply wrong.

Before delving into his extensive statistical analysis, Lott espouses a proposition with which both proponents and opponents of gun control would probably agree, even though the two sides may disagree with the proposition's implications. Lott writes, "American culture is a gun culture—not merely in the sense that

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[1] John M. Olin Visiting Law and Economics Fellow, University of Chicago Law School.

[2] *See* BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION 1997: CHANGES 1996–97 WITH TRENDS 1993–97 (Dec. 27, 1998) (press release).

[3] Nondiscretionary concealed-handgun laws typically require the issuing authority to grant licenses to applicants if they meet minimum requirements in certain areas: criminal record, age, payment of fees, training, and mental illness. These requirements vary by state. *See, e.g.*, Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 680–708 (1995).

75 to 86 million people own a total of about 200 to 240 million guns, but in the broader sense that guns pervade our debates on crime and are constantly present in movies and the news" (p. 1). Furthermore, he argues that, even with the physical and cultural pervasiveness of guns, most Americans have little first-hand knowledge of them. He explains that Americans get many of their impressions of guns from the popular press and entertainment media, which widely publicize tragic, yet rare, gun-related incidents that are guaranteed to rouse sympathy and anger. Once people examine his findings, Lott argues that Americans should reevaluate their views about whether concealed handguns are really an ineffective means to protect life.

Lott's study is the most thorough statistical look at gun control and its relation to crime yet produced. After showing how the previous two hundred studies on gun control do not provide accurate results because of incomplete data sets, failure to control for certain changing conditions, or resistance to examine all possible variables, Lott claims that his comprehensive review of the Federal Bureau of Investigation's yearly crime figures for all 3054 counties in the United States, spanning from 1977 to 1992, provides a more accurate portrayal of the effects of gun control. Throughout his study, Lott seeks to minimize analysis problems by increasing the number of independent variables in his study. He combines both time-series and cross-sectional analyses, meaning that in the former, particular counties and states are studied over a period of time so that changes therein may be observed and, in the latter, the entire country is studied to contrast the laws operating in different places at the same time. This complicated analysis is devised to isolate the causes of adopting gun control laws, the causes of crime, and the impact of gun control measures. Only after these factors are isolated, Lott contends, is it possible to examine the actual influence of concealed handguns on crime. Although carrying a concealed handgun may lower an individual's probability of being attacked, that individual's chances of being attacked could still be higher than those faced by people who never felt the need to purchase and carry a gun. The decision to purchase a gun is often a confluence of many societal factors. For example, the decision to carry a concealed handgun may be due to the riskiness of the area in which someone lives, or the activities she undertakes. Therefore, Lott can only examine whether concealed handguns reduce the

not only to burglaries, but also to all other forms of crime. Lott states that the crimes most likely to be prevented by laws allowing concealed handguns are those involving direct contact between the victim and the criminal.

By extension, as laws are passed that allow more concealed-handgun possession, society can expect a shift in criminal behavior from high contact to lower contact crimes. In fact, this trend can already be seen in states with nondiscretionary concealed-handgun laws, thereby suggesting that criminals are responding to the increased risk of concealed-handgun possession by potential victims (p. 51). Furthermore, the deterrent effect is not limited to the concealed-handgun owner; a spillover effect occurs because criminals do not know who is armed, thereby benefiting all of society. "Open-carry" laws therefore may increase the crime rate because criminals would be able to easily identify vulnerable targets.

Lott proceeds to use statistical analysis to prove his hypothesis. According to his data, violent-crime rates are highest in states with the most restrictive gun control laws. The next highest rates were in states that allowed local authorities discretion in granting permits. Finally, the lowest rates exist in those states with nondiscretionary laws (p. 43).[5] "The difference is quite striking: violent crimes are 81 percent higher in states without nondiscretionary laws" (p. 47). Nine of the ten states that enacted their nondiscretionary concealed-handgun laws between 1977 and 1992 experienced declines in violent-crime rates, and eight of these ten states experienced declines in murder rates (p. 79). In the few outlier states where violent crimes, murders, or robberies rose, the increases were slight (p. 79).

In addition, the data supports the substitution effect of nondiscretionary concealed-handgun laws. After these laws were enacted, although violent-crime rates were reduced, other crimes such as auto theft and larceny rose (p. 54). This trend suggests that criminals respond to the threat of concealed handguns by choosing to commit less risky property crimes that involve only minimal contact with the victim.

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[5] As of 1996, the states with discretionary laws are California, Colorado, Delaware, Hawaii, Iowa, Massachusetts, Minnesota, Michigan, Maryland, New Jersey, New York, and Rhode Island. The only states that completely prohibit concealed handguns are Illinois, Kansas, Missouri, Nebraska, New Mexico, Ohio, and Wisconsin (p. 46).

total amount of violent crime by controlling other societal factors in his analysis.

When Lott examines the observed reduction in crime, he contends that concealed handguns are at least partly responsible. He claims that criminals are motivated by self-preservation and can be deterred from committing violent crimes if they fear that their potential victims have a concealed weapon. This assertion is based on the premise that criminals act rationally and respond to the increased risks and potential costs of criminal activity by either quitting all criminal activity, committing less dangerous crimes, or committing crimes in other areas where potential victims would not be armed. Lott uses national surveys to bolster his hypothesis: according to one study, ninety-eight percent of victims merely have to brandish a gun to repel criminals (p. 3). Lott also supports his hypothesis with a survey of ten state correctional facilities, which found that fifty-six percent of inmates claimed that they would not attack a potential victim they knew was armed (p. 6).[4] The U.S. Department of Justice's National Crime Victimization Survey reports between 80,000 and 82,000 defensive uses of guns each year, while other sources such as the *Los Angeles Times*, Gallup, and Peter Hart Research Associates estimate between 760,000 and 3.6 million such uses (p. 11). According to Lott, these figures may be low, not only because of the difficulty of collecting complete data, but also because many gun owners may not report the use of their gun for fear that the weapon may be confiscated, especially if they are carrying it illegally.

Lott argues that the deterrent effect of concealed handguns is further illustrated by the differences in the types of crimes committed where criminals know they may face armed victims and where they know that they will not. For example, in Canada and Great Britain, where gun control laws are stricter than those in the United States, there are also more "hot burglaries" (burglaries that occur when the occupants are at home) (p. 5). In the United States, burglars spend more time casing the house to ensure that the home will be empty (p. 5). These differences extend

[4] This decision calculus, however, only applies in instances when the inmate would know that the victim was armed, and this data says nothing about whether there would be any deterrent effect if the inmates knew that there was only a possibility that the victim was armed. Also, this survey does not offer much support to Lott's argument because 44% of the time a handgun would have no effect on an inmate's decision to commit crime even if the criminal *were* aware of the gun.

Lott also claims that the deterrence effect of nondiscretionary concealed-handgun laws increases with the number of permits issued. Although there is limited evidence available regarding the number of permits issued by individual counties or by states (only Arizona, Florida, Oregon, and Pennsylvania maintained records appropriate for Lott's study (p. 47)), one can presume, based on the permit issuance rates in the few states studied, that the number of permits issued after nondiscretionary laws are passed increases over time. Under this presumption, Lott writes, "Comparing the slopes of the crime trends before and after the enactment of the laws shows that the trends become more negative to a degree that is statistically significant after the laws were passed" (p. 73).

Moreover, Lott makes the highly controversial argument that allowing people to carry concealed handguns will decrease the severity and frequency of mass public shootings. Lott bases his research on information gathered from news article databases and notably excludes gang activity, drug dealing, holdups or robberies, drive-by shootings that explicitly or implicitly involved gang activity, organized crime or professional hits, and serial killings or killings that took place on more than one day. Although the deterrence effect may not prove beneficial in the human life equation since the substitution effect may encourage terrorists to increase lower-contact, bombing activity, Lott provides statistical evidence that shows a decrease in mass shootings after the enactment of concealed-handgun laws (pp. 100–02). He writes, "For those states from which data are available before and after the passage of [nondiscretionary concealed-handgun] laws, the mean per-capita death rate from mass shootings in those states plummets by 69 percent" (p. 100).

Upon reviewing his statistical analysis, Lott claims that concealed-handgun laws save lives. The question remains whether the possible cost in the increased number of accidents and suicides outweigh the benefits when considering the total number of lives affected by concealed weapons. In response, Lott argues that many of our fears regarding the dangers of gun possession are unfounded. For example, only about thirty people each year are accidentally killed by private citizens thinking that they are shooting an intruder (compared with the police, who kill as many as 330 innocent individuals per year) (pp. 1–2). With regard to suicides, Lott acknowledges that nondiscretionary con-

cealed-handgun laws will increase the probability that a gun will be available when an individual feels particularly depressed; however, he claims that the actual increase in suicides is statistically insignificant (only less than one-tenth of one percent) (p. 112).

Notwithstanding any additional cost in lives resulting from allowing people to carry concealed handguns, Lott maintains that society must balance those costs with the benefit of additional deterrence. Currently, the police in many areas are unable to protect those that they are sworn to defend. A 1996 mail survey conducted by the National Association of Chiefs of Police, which was mailed to 15,000 police chiefs and sheriffs, supports this claim. The survey found that ninety-three percent of those responding believed that law-abiding citizens should continue to be able to purchase guns for self-defense (p. 13).

Nevertheless, even the people who stand to gain the most from concealed handguns do not always agree. When discussing the crime rate for African Americans, Lott argues that African Americans are more likely to have been victims of crime or to live in neighborhoods with high incidents of crimes involving guns. As a reaction to witnessing the dangers resulting from guns, African Americans are more pro-gun control than are whites (p. 68). However, as Lott sees it, the problem is that the police cannot protect people when the criminals already possess and use guns. Therefore, African Americans living in dangerous areas should react differently and arm themselves.

According to Lott, once people are carrying concealed handguns, society will receive substantial benefits due to the weapons' deterrent effect. Lott uses monetary estimates for victim losses from crime to determine a dollar value of what savings would result from the additional use of concealed handguns. Pennsylvania statistics indicate that the potential savings to victims are $5,079 for each additional concealed-handgun permit and, for Oregon, the savings are $3,439 per permit (p. 109). Therefore, the monetary gains possible by enacting nondiscretionary concealed handgun laws are not insignificant.

In addition, when states mandate additional safeguards for the possession and purchase of concealed handguns, not only do they decrease the guns' beneficial value, but it is also debatable whether the safety precautions achieve their desired effects at all. For example, requiring protections for handguns, such as re-

quiring that bullets and weapons be stored separately, make the weapons less available when protection is needed. Also, there is always the threat that when manufacturers provide more gun safety devices, gun owners will seek less education about proper firearm use, thereby resulting in more gun-related accidents. Furthermore, it is not clear statistically whether requiring a waiting period or a minimal level of training in safe gun use will have much effect on crime. Lott goes so far as to state that "[t]he statistics . . . suggest that the long waiting period imposed by Oregon law (fifteen days) increased murder by 5 percent, rape by 2 percent, and robbery by 6 percent" (p. 106). Lott's allegations regarding the Brady Handgun Violence Prevention Act, which requires a national background check, are also very interesting. Lott claims that his statistics from 1994, the year after the law was enacted, show significant increases in rapes and aggravated assaults and that the declines in murder and robbery have been statistically insignificant (p. 91).

According to Lott, other attempts at reducing crime, such as working to improve the arrest and conviction rates and increasing the number of police officers, are less cost-effective than enacting nondiscretionary concealed-handgun laws. Although Lott admits that high arrest rates do appear to impact all categories of crime, he argues that high arrest rates are not uniform in impact. For example, because the stigma attached to arrest differs from one area to another, increasing the number of arrests may have different effects depending on the community. Furthermore, although imposing harsher sentences for the use of deadly weapons may reduce violent crime, Lott argues that this policy causes a loss of the benefits that those weapons provide.

Another unexpected finding in Lott's study is that society might actually experience a reduction in violent crimes if there were a reduction in the number of police officers. He writes, "[T]he drop in arrest rates associated with more police officers is too large to be explained by a drop in the crime rate. In fact, the direct relationship between the number of police officers and violent crime implies a positive relationship" (p. 121). Therefore, it is no surprise that Lott's research suggests that the net benefit of hiring more police officers is, at most, one-fourth the benefit of concealed-handgun laws (p. 159). Moreover, Lott argues that concealed-handgun laws affect high- and low-crime counties similarly (p. 60) and at a lower cost than all other crime

prevention methods (p. 159). Even increasing the overall wealth of society does not reduce crime to a significant degree, usually not more than four percent (p. 56).

In its entirety, *More Guns, Less Crime* claims that nondiscretionary concealed-handgun laws are the most cost-effective means of reducing crime. Lott contends that the advantage of concealed handguns exceeds that of the most often employed crime reduction tactics, providing a "higher return than increased law enforcement or incarceration, other private security devices, or social programs like early educational intervention" (p. 115). After completing this argument, Lott responds to critics by reproducing portions of several letters and comments he had already received. Although Lott's responses may reach the point of becoming too defensive, they do illustrate that his study is neither equaled in depth by existing research nor contradicted by any such comprehensive study.

Unfortunately, even the best studies can be flawed and draw incorrect conclusions, particularly when they deal with complex subjects such as gun control and crime. Lott acknowledges that one problem of his statistical analysis is that it is impossible to obtain some of the necessary data. For example, regarding the question whether carrying concealed handguns reduces the rate of crime, an important factor to analyze is how many people actually carry concealed handguns both before and after nondiscretionary laws are implemented. However, as there are limited statistics regarding how easily permits are granted and the number of permits issued, Lott only tests whether nondiscretionary laws changed crime rates the most in counties with the largest or densest populations. This limited analysis raises concerns of adequate statistical representation.

Furthermore, Lott is unable to obtain data regarding gun ownership prior to the enactment of nondiscretionary laws. Therefore, if a significant number of people did illegally carry handguns, any reduction in crime after the enactment of the laws would not necessarily be linked to the carrying of the now legal handguns. Unfortunately, this lack of data is a problem that cannot be rectified.

Another problem the analysis faces is that, in some instances, the only source of information available is survey data, which Lott admits is not highly dependable. With surveys, there are always the questions of whether people honestly report the facts

and if they can accurately determine whether the presence of a gun saved a life or prevented an attack. Furthermore, the answers people give are likely influenced by their personal political views. For example, the information on gun-ownership rates are derived directly or extrapolated from exit polls conducted during general elections. Arguably, this survey tests a particular category of people, who may be more law-abiding than the average American and may feel more strongly about specific issues, such as gun control.

Even after assuming that the nature of survey data will not impair the results, some of the numbers simply do not add up. For example, the numbers regarding gun ownership yield mixed results with respect to the differences in murder rates among racial categories. According to exit polls, "while white gun ownership exceeds that for blacks by about 40 percent in 1996 . . . , blacks are 4.6 times more likely to be murdered and 5.1 times more likely to be offenders than are whites. . . . [B]ut if the white gun-ownership rate is anywhere near correct, even a black gun-ownership rate of 100 percent could not explain by itself the difference in murder rates" (p. 39). Therefore, other factors must be taken into account to explain why simple arithmetic does not answer the gun control issue.

It is also interesting that when other studies produce conclusions different from his own, Lott disparages their accuracy. For example, Lott writes, "The [Bureau of Alcohol, Tobacco, and Firearms]'s own (undoubtedly high) estimate is that about 1 percent of federal license holders illegally sell guns, and that this percentage has remained constant with the decline in licensed dealers" (p. 162). Lott argues that the estimate is "undoubtedly high" because "most government agencies try to obtain higher funding, [and] exaggerating the problems helps justify such higher funding" (p. 214, n.12). Realistically, this argument should also cast doubt on Lott's statistics since the respondents to his surveys may have similar incentives to report gun usage. For instance, persons or agencies reporting crime may believe that reporting more crime will draw greater police attention, garner more sympathy, or gain additional funding. Even if citizens report crimes accurately, Lott fails to support the assertion that agencies are less truthful than ordinary citizens.

On another level, Lott faces significant obstacles in performing this type of statistical analysis because of the missing data in

various categories. Lott concedes that there are statistical complications when the crime rate in a county equals zero: it is impossible to determine whether the correct coefficient is zero or one. Furthermore, his data is sometimes based on best estimates, which introduce inaccuracies into the analysis. For instance, one of the criticisms Lott addressed about his study was regarding the dates he used for when several discretionary concealed-handguns laws were adopted. This criticism is premised on the fact that some states adopted their nondiscretionary laws gradually and allowed implementation to have a staggered effect, or even changed the law's key characteristics over a number of years. Maine, for example, changed its policy in 1981, 1983, 1985, and 1991 (p. 133). Lott states that "reclassifying" Maine does not change the results significantly (p. 142). Unfortunately, if reclassifying Maine over a course of years has no impact, then it raises concerns as to whether the enactment itself had much impact.

Another concern regarding Lott's study is the disproportionate influence specific counties or states have on the entire data set, especially that of Florida. Other gun control researchers such as Black and Nagin have argued that if Lott removes Florida from the data set, the regression would not validate Lott's findings. They argue that Florida must be excluded because of its unique crime situation during the period of Lott's study.[6] Lott refutes this point by stating that the murder rate in Florida was stable during this period, but began to drop after a nondiscretionary concealed-handgun law was passed in 1987 (p. 139). Unfortunately, a few pages later, Lott appears to contradict himself when he addresses a criticism that suggested limiting the analysis to counties with larger population size in order to correct for counties with no crime: "[I]t is only when they *also* remove the data for Florida that they weaken my results for murder and rape (though the results for aggravated assault and robbery are even larger and more statistically significant)" (p. 155). Lott dismisses the problem of Florida, stating that although Black and Nagin's criticisms somewhat weaken his results, there remains no proof that concealed handguns increase crime.

Even if one accepts all of Lott's data as accurate, it may still be interpreted in a variety of ways. Because Lott is unable to

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[6] Dan A. Black & Daniel S. Nagin, *Do "Right-to-Carry" Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209, 214 (1998).

collect data on all the necessary independent variables, he may only be able to prove correlation, rather than causation. This study attempts to use regression analysis to control for many of the other factors that affect crime rates, such as those Lott listed: "income, poverty, unemployment, population and population density, demographic characteristics, law enforcement, other gun laws" (p. 151). Nevertheless, Lott's study was not able to account for all potentially contributing factors, such as the use of home security systems, and that such oversights raise doubts as to whether he truly established a causal relationship between concealed handguns and crime.

Some scholars have concluded that the violent crime rate is tied to other problems found within society, such as illegal substances.[7] Only by disproving, and not overlooking, these other possible contributing factors can Lott effectively address the concern that nondiscretionary concealed-handgun laws may not be the actual cause of the observed reduction in crime. Even Lott writes that "[t]he more serious possibility is that some other factor may have caused both the reduction in crime rates and the passage of the law to occur at the same time" (p. 153).

After comparing various sections of Lott's book, every group in society would benefit from gun control, even the ones he claims would increasingly more likely be victims of violence as a result of greater gun possession. For example, he explains that the regressions show that "[t]he percent of white victims and the percent of victims killed by family members both declined when states passed concealed-handgun laws, while the percent of black victims and the percent killed by non-family members whom they knew both increased" (p. 98–100). However, Lott previously writes, "The impact of concealed-handgun laws varies with a county's level of crime, its population and population density, its per capita income, and the percentage of the population that is black. Despite the opposition to these laws in large, urban, densely populated areas, those are the areas that benefit the most from the laws" (p. 94). His support for arming those

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[7] *See, e.g.*, Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571 (1995); *see also* David Perlman, *Medical Researchers Track Gun Control, Shooting Deaths*, S.F. CHRON., Dec. 5, 1991, at A2 (discussing a study conducted by members of the Violence Research Group at the University of Maryland's Institute of Criminal Justice and Criminology, which compared the murder rate in the District of Columbia to the rate in the surrounding metropolitan areas of Virginia and Maryland. The researchers concluded that the District's tough gun laws continued to have a preventive effect on the number of homicides).

most likely to be victims of crime as a means of self-defense is the fact that the police provide less protection in urban and heavily black areas (p. 69). Nevertheless, if concealed weapons increase the murder rates for a segment of a population, encouraging greater access to concealed weapons for that segment of the population seems like dangerous public policy.

In addition, Lott ignores all costs to society other than the additional accidents and suicides, which he easily dismisses. Instead, Lott prefers a more economics-based analysis because it ignores all non-financial costs. Many could argue, however, that there is a psychic cost of having a society that is armed because it has lost faith in the government's ability to protect its citizens. The possible implications of desensitization are also great when everyone is encouraged to carry a concealed weapon. For the same reasons people worry over the amount of violence on television, society should perhaps worry about a pro-weapon culture. It should strike Lott as odd that although weapons are the "great equalizer" for women and African Americans, these groups still do not carry handguns as much as white males. This discrepancy may suggest that these women and African Americans view concealed handguns as having a countervailing cost that overshadows the supposed advantages in increased safety.

There are also other costs of a society-wide build-up of personal weapons, such as giving up faith in government's enforcement of its own laws. Lott's analysis is premised on the idea that the government would be as ineffectual in removing guns from the population as it currently is in removing illegal drugs from addicts and dealers. Although this task would be difficult (even without taking into account Second Amendment considerations), it deserves more explanation than Lott provides in his mere assertion of government incapability. Casting doubt on Lott's assertion, countries such as Canada and Great Britain have managed to accomplish this challenging task. Therefore, before assuming that the United States cannot do what its counterparts currently do, it would be best to research the topic further. However, by assuming that guns are an unavoidable part of Americans society, Lott is able to ignore in all of his studies the number of offensive uses of guns and the contribution of guns in committing crimes.

It is therefore not surprising that Lott fails to mention whether the removal of guns would reduce the total number of attacks.

For instance, a recent ABA report states, "Firearms in 1996 were involved in two-thirds of all murders, 40 percent of robberies and almost a quarter of the aggravated assaults . . . ."[8] Therefore, there is evidence that guns are currently prevalent in the crimes that Lott seeks to minimize by arming the victims. If it is possible to remove guns from society and from the perpetration of violent crimes, it may be true that everyone would be better off without them. In other words, should lawmakers arm society even more because they are afraid of the costs it would take to unarm it almost completely?

Although Lott depicts the national crime rate as catastrophic, the rate is fortunately decreasing whether as a result of the increase in nondiscretionary concealed-handgun laws, the Brady law, or socioeconomic factors. Between 1992 and 1997, violent crime dropped fifteen percent, including twenty-three percent fewer murders and eight percent fewer property crimes.[9] Although the murder rate remains disturbingly high, the violent crime rate in the United States is currently at its lowest level since 1973.[10] Although these reductions may be partly attributable to nondiscretionary concealed-handgun laws, the reduction also corresponds to an increase in the arrest and prison rate. During approximately the same time period analyzed by Lott, the prison population increased thirty-four percent as a larger percentage of criminals are going to jail.[11]

In the end, the gun control issue depends upon what Americans decide is best for everyone's safety. In *More Guns, Less Crime*, Lott makes an interesting and forceful argument that concealed handguns may lower the violent crime rate. Nevertheless, a more balanced approach that considers the dangers of unlimited access to handguns and other possible factors that could have caused the recent decline in crime rates may be more convincing. Although America does not need to abolish the Second Amendment, neither should lawmakers remove all limits to possessing a concealed handgun, even if those limits are not always successful in decreasing the crime rate. Besides the economic and statistical implications of widespread handgun use, the debate as to whether American society should become a

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[8] *ABA Reports Crime Down, Drug Arrests Up: Race Statistics Raise Questions*, FLA. B. NEWS, Mar. 1, 1999, at 10.

[9] *Id.*

[10] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 2.

[11] *ABA Reports Crime Down: Race Statistics Raise Questions*, *supra* note 8.

more heavily armed one also has psychological, social, and normative bases that cannot be overlooked.

—*Stephanie Hunter*