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POLICY ESSAY

MANDATORY ARBITRATION: WHAT PROCESS IS DUE?

SENATOR RUSSELL D. FEINGOLD*

In this Policy Essay, United States Senator Russ Feingold reviews the value of the alternative dispute resolution tool arbitration, how Congress enacted the Federal Arbitration Act to encourage the use of arbitration, and how courts have expanded its application. Senator Feingold argues that powerful parties in contracts governing employment relationships, automobile franchises, and consumer credit are abusing the promise of the Federal Arbitration Act, and converting it into a tool to deprive others of their right to pursue their claims in the court system. Senator Feingold proposes legislative changes to prevent this abuse. These changes include a prohibition of mandatory, binding arbitration in specific contexts where bargaining power is inherently unequal, and a possible arbitration bill of rights.

An insurance company fired agency manager Robert Bungard from his job. Bungard believed that the company fired him because of his age, so he tried to bring an age discrimination claim against the company in court. According to the Wisconsin Court of Appeals, if his case had been decided under the Wisconsin Arbitration Act,[1] he would have had the right to pursue his claim in court. Nonetheless, the court held that the mandatory, binding arbitration clause in his employment contract forced him to submit his case instead to an arbitration panel.[2] The court relied on the reasoning of the United States Supreme Court in *Southland Corp. v. Keating*,[3] which holds that the Federal Arbitration Act ("FAA")[4] preempts state laws like Wisconsin's Arbitration Act. Further, in *Gilmer v. Interstate/Johnson Lane Corp.*,[5] the Supreme Court held that compulsory arbitration "agreements" can trump remedies available under age discrimination laws. Thus, the Wisconsin Court of Appeals asserted that it had no choice but to deny Robert Bungard his day in court.

Mr. Bungard is not alone. This Policy Essay examines how he and hundreds of thousands of people like him are being deprived of their

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[1] WIS. STAT. ch. 788 (2000).

[2] Bungard v. Rural Mut. Ins. Co., 537 N.W.2d 433 (Wis. Ct. App. 1995).

[3] 465 U.S. 1 (1984).

[4] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15, 201–208 (2002).

[5] 500 U.S. 20 (1991).

rights to go to court by mandatory, binding arbitration clauses.[6] Part I discusses the benefits of arbitration and its limitations in cases of unequal bargaining power. Part II provides a brief legislative history of the FAA, and Part III a brief judicial history. Part IV discusses procedural concerns raised by arbitration, especially mandatory, binding arbitration. Part V examines problems caused by mandatory, binding arbitration and possible legislative remedies in three specific areas: employment agreements, auto dealership franchise contracts, and credit card and other consumer loan agreements. Part IV concludes by recommending that Congress take action to stop the abusive use of arbitration clauses.

I. ARBITRATION AND ITS VALUE

In the same breath, Hamlet complained of "the whips and scorns of time . . . [t]he pangs of dispriz'd love" and "the law's delay."[7] Since then, the law's delay has abated no more than time's whips and love's pangs. Today, civil cases congest court dockets throughout the country.[8] Pursuing litigation continues to exhaust the finances and patience of all but the wealthiest institutions.[9] These delays and expenses may be exacerbated, some argue, because Americans litigate so frequently, possibly overusing the court system.[10]

As a result, many disputants have turned to alternatives such as mediation and arbitration to resolve disputes without going to court. Because such alternatives streamline adjudicative procedures and allow parties to have their case heard long before a possible court trial, these

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[6] *See, e.g.*, American Arbitration Association, *Proud Past, Bold Future: 2000 Annual Report* 5, *available at* http://www.adr.org/upload/LIVESITE/About/annual_reports/annual_report_2000.pdf (noting that 198,491 cases were filed with the American Arbitration Association in 2000 alone).

[7] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

[8] *See, e.g.*, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2001, at 13, 23 (2002), *available at* http://www.uscourts.gov/judbus2001/contents.html; Melissa August, *Crowded Courts*, TIME, Aug. 13, 2001, at 15; Francis L. Van Dusen, *Comments on the Volume of Litigation in the Federal Courts*, 8 DEL. J. CORP. L. 435 (1984); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3–9 (1990); BROOKINGS INSTITUTE, JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (1989).

[9] *See, e.g.*, Saundra Torry, *Many With Legal Needs Avoid the Court System; ABA Survey Finds Wide Sense of Futility*, WASH. POST, Feb. 6, 1994, at A3; *Mid-Year Meeting of American Bar Association*, 52 U.S.L.W. 2471, 2471 (1984) (quoting Chief Justice Burger calling the United States civil litigation system "too costly, too painful, too destructive, too inefficient for a truly civilized people."); AMERICAN BAR ASSOCIATION, ATTACKING LITIGATION COSTS AND DELAY 59–60 (1984) (assuming that a major consequence of delay is increased costs which are manifested in additional attorney's fees).

[10] *See, e.g.*, Shashi Tharor, *Litigious America*, NEWSWEEK, July 30, 2001, at 52 (discussing "America's most crippling disease—fear of litigation."); Melissa August, *Crowded Courts*, TIME, Aug. 13, 2001, at 15 (chronicling "recent highlights of our litigious society"); M.E. Sprengelmeyer, *Litigious Society Feeds on Homeowners Insurance*, MILWAUKEE J. SENTINEL, Dec. 10, 2000, at 3F (citing today's litigious society as reason for increase in popularity of personal "umbrella" insurance policies).

alternatives enable parties to resolve disputes expeditiously. These alternatives, thus, have merit when they provide efficiency and the voluntary choice of whether or not to go to court. Where there are abuses, however, we should act to curtail them, and improve the systems of alternative dispute resolution.

Americans are using arbitration at an increasing rate. The American Arbitration Association reports that 2000 was its sixth year in a row with record caseloads.[11] The number of cases filed with the Association jumped forty-two percent in 2000 alone, to nearly 200,000 cases nationally,[12] and about one-quarter of the 1.7 million cases in the Association's seventy-five year history were filed within the last five years.[13]

In arbitration hearings, as in court, a third party—the arbitrator or arbitration panel—reviews the parties' arguments and issues a decision. Arbitration uses rules of evidence and procedure, although it may use simpler or more flexible rules than a court would use.

Arbitration can be either "binding" or "non-binding."[14] If arbitration is "non-binding," the arbitrator's decision takes effect only if the parties agree to the resolution *after* they know what the decision is. If the arbitration decision is "binding," parties agree in advance to abide by the arbitrator's decision, whatever that decision may be.

Another distinction is made between arbitration that is "mandatory" and "voluntary."[15] In "mandatory" arbitration, contracts contain clauses that designate arbitration as the exclusive remedy to resolve disputes after the contract takes force. If a dispute arises, the contractual provision prevents the complaining party from filing suit in court; the complainant can pursue only arbitration. In "voluntary" arbitration, the complaining party has the option of filing suit or of pursuing arbitration.

Thus, "mandatory, binding arbitration," is the form with most potential for abuse because the parties *must* use arbitration to resolve future disagreements by contractual agreement, and the arbitrator's decision will be final. The parties have no ability to seek relief in court or other methods of dispute resolution.

If a court resolves a dispute, the parties may have broad grounds upon which to pursue an appeal. Under mandatory, binding arbitration, however, even if a party believes that the arbitrator did not consider all the facts or follow the governing law, the party cannot file a suit in court or appeal the decision on the merits.[16] In only a narrow set of circum-

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[11] American Arbitration Association, *supra* note 6, at 4.

[12] *Id.* at 5.

[13] *Id.* at 13.

[14] *See, e.g.*, Meis & Waite v. Parr, 654 F. Supp. 867, 869 (N.D. Cal. 1987); Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 401.

[15] *See, e.g.*, United States v. Bankers Ins. Co., 245 F.3d 315, 322 (4th Cir. 2001).

[16] *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435–38 (1953) (noting that the power of the court to vacate arbitration awards is limited and failure to follow the SEC Act must be "made clearly to appear" despite the lack of a written opinion or record).

stances may a party challenge a binding arbitration decision. The arbitrator must have committed actual fraud; or have been partial, corrupt, or guilty of misconduct; or exceeded his or her powers.[17] In all probability, if a party is not satisfied with the arbitration outcome, the party has no recourse.

Because mandatory, binding arbitration is so conclusive, it is a credible means of resolving disputes only when all parties enter into the agreement fully and intelligently. They must know and understand the ramifications of agreeing to mandatory, binding arbitration and freely choose to waive their rights. Where one party does not understand these ramifications, however, or lacks the bargaining power to negotiate other dispute resolution terms, mandatory, binding arbitration contracts raise concerns.

In a variety of contexts, including employment contracts, motor vehicle franchise agreements, and credit card agreements, informed, voluntary consent is often lacking. In these contexts, parties with little bargaining power are effectively coerced into waiving their rights to go to court. The more powerful parties present them with adhesion contracts that give the weaker parties no realistic choice as to the terms of the contract.

Regrettably, with the help of the federal courts, powerful institutions are subverting Congress's original intention in passing the FAA. Instead of providing disputants with options for dispute resolution, the courts and these institutions are converting arbitration into a tool for the powerful to exert authority over the less powerful. Thus, many people are essentially forced to forgo constitutional rights when disputes arise relating to their jobs, businesses, and finances.

Congress should act to remedy the abuses of mandatory, binding arbitration to preserve all citizens' access to the court system, particularly where parties have very unequal bargaining power.

II. A Brief History of the Federal Arbitration Act

President Calvin Coolidge signed the FAA into law on February 12, 1925. Congress passed the act to make arbitration agreements "valid, irrevocable, and enforceable . . . in any maritime transaction or a contract evidencing a transaction involving commerce."[18]

Congress's first motivation was to realize the efficiency gains of arbitration. The House Judiciary Committee report on the bill that became the FAA cited the cost and length of litigation as one motivation to enact the law: "[A]ction should be taken at this time when there is so much

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[17] *See, e.g.*, 9 U.S.C. § 10(a) (listing grounds for vacating arbitration awards); *see also Wilko*, 346 U.S. at 436.

[18] 9 U.S.C. § 2 (1925).

agitation against the costliness and delays of litigation." [19] The report asserted that "agreements for arbitration, if . . . made valid and enforceable" would "largely eliminate[ ]" these problems.[20]

Congress's second motivation was to address the courts' reluctance to enforce agreements to arbitrate. The House Judiciary Committee report called this reluctance "an anachronism of our American law" resulting from "the jealousy of the English courts" seeking to protect their jurisdiction centuries earlier.[21] Years later, the Supreme Court summarized that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."[22]

Ironically, it was a Supreme Court decision in 1924 that opened the door for Congress to legislate on the subject. In *Red Cross Line v. Atlantic Fruit Co.*,[23] the Court upheld the constitutionality of a 1920 New York law that made arbitration in a maritime contract "valid, enforceable and irrevocable."[24]

Senator Thomas Sterling (R-S.D.) and Representative Ogden Mills (R-N.Y.) had first introduced federal arbitration legislation in 1922, under the name "A bill to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations."[25] The House Judiciary Committee report attributed the law's authorship to "a committee of the American Bar Association," and its sponsorship to the ABA and "a large number of trade bodies."[26] The ABA specifically sought "the further extension of the principle of commercial arbitration."[27]

To extend this principle, the House Judiciary Committee report went on to state that, under the bill, "[a]n arbitration agreement is placed upon the same footing as other contracts."[28] House Judiciary Committee Chairman George Graham (R-Pa.) said that the bill would "simply provide for one thing, and that is to give an opportunity to enforce an

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[19] H.R. REP. No. 68-96, at 2 (1924).

[20] *Id.*

[21] *Id.* at 1–2.

[22] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995). *See also* Circuit City v. Adams, 532 U.S. 105, 125 (2001) (Stevens, J., dissenting); Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 466-7 (1957) (Frankfurter, J., dissenting). For a review of history before the FAA, *see generally* Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995).

[23] 264 U.S. 109 (1924).

[24] *Id.* at 118. Note that the Federal Arbitration Act echoes the New York statute's words. Compare *supra* note 18 and accompanying text with *supra* note 22 and accompanying text.

[25] S. 4214, 67th Cong. (1922); H.R. 13522, 67th Cong. (1922); 64 CONG. REC. 732, 797 (1922).

[26] H.R. REP. No. 68-96, at 1.

[27] *Report of the Forty-Third Annual Meeting of the ABA*, 45 A.B.A. REP. 75 (1920).

[28] H.R. REP. No. 68-96, at 1.

agreement in commercial contracts and admiralty contracts."[29] Representative Mills explained that the bill "provides that where there are commercial contracts and there is disagreement under the contract, the court can enforce an arbitration agreement in the same way as other portions of the contract."[30] The chairman of the New York Chamber of Commerce, one of the many business organizations that sought the bill's introduction, testified before a Senate Judiciary Committee Subcommittee that it was needed "to enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the Federal and State courts."[31]

The law had important exclusions, however, when Senator Sterling and Representative Mills reintroduced the bill in 1923. The exclusions stated: "nothing contained herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[32] The legislative history of the act indicates the importance of this exclusion in passing the law. In the words of Justice Stevens, the legislative history indicates that:

> the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the FAA, which it feared would require courts to enforce unfair employment contracts. That same concern . . . underlay Congress'[s] exemption of contracts of employment from mandatory arbitration.[33]

Thus, again in the words of the Supreme Court, with the passage of the act, Congress "declared a national policy favoring arbitration" and "withdrew" from the states the power to ignore agreements to arbitrate.[34]

III. A Brief History of Case Law Under the Federal Arbitration Act

Until a 1995 Supreme Court decision under the FAA, courts had been divided over how much "commerce" the FAA covered. Some courts

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[29] 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham).

[30] 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills).

[31] *Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 2 (1923).

[32] S. 1005, 68th Cong. (1923); H.R. 646, 68th Cong. (1923); *Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. (1924).

[33] Circuit City v. Adams, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting). *Cf.* Leading Cases, 115 Harv. L. Rev. 507, 515 (arguing that the majority had "attributed an utterly implausible intent to Congress" by reading the employment exemption in accord with the "commerce power when the FAA was adopted" while reading the coverage "in accord with the modern commerce power," thus attributing the congressional intent not to exempt only those employment contracts it did not, but would eventually, have power over).

[34] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

had limited the FAA's applicability only to contracts where the parties contemplated interstate commerce.[35] For example, Judge Lumbard of the Second Circuit phrased the issue to be "not whether . . . the parties did cross state lines, but whether, at the time they . . . accepted the arbitration clause, they contemplated substantial interstate activity."[36]

Other courts, by contrast, extended the reach of the FAA to the limits of Congress's power to regulate commerce.[37] The Seventh Circuit, for example, had interpreted previous Supreme Court decisions under the FAA to mean that "Congress intended the FAA to apply to all contracts that it constitutionally could regulate"[38] under the Commerce Clause.

In 1995, the Supreme Court adopted an expansive interpretation of the FAA's language "involving commerce."[39] It held that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress'[s] commerce power to the full."[40] The Court then rejected Judge Lombard's "contemplation of the parties" view.[41]

Not only did the Supreme Court adopt an expansive reading of the FAA, but in another case the Court also, in a more troubling move, held that states could not pass legislation to carve exceptions to the FAA to account for unequal bargaining power.[42] Many state legislatures had enacted laws to prohibit mandatory, binding arbitration clauses in certain kinds of agreements.[43] In *Southland Corp. v. Keating*,[44] however, the Supreme Court held that the FAA implicitly preempts these state laws. Thus, the decision nullified the many state arbitration laws enacted to protect parties with weak bargaining positions from signing away their rights. Although contract law is generally the province of the states, the

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[35] *See, e.g.*, Lacheney v. Profitkey Int'l, Inc., 818 F. Supp. 922 (E.D. Va. 1993); Allied-Bruce Terminix Cos. v. Dobson, 628 So.2d 354 (Ala. 1993), *reversed by*, 513 U.S. 265 (1995); R.J. Palmer Constr. Co. v. Wichita Band Instrument Co., 642 P.2d 127 (Kan. 1982); Burke County Pub. Sch. Bd. of Educ. v. Shaver P'ship, 279 S.E.2d 816 (N.C. 1981).

[36] Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F. 2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring); *Burke*, 279 S.E.2d at 822 (quoting Chief Judge Lumbard).

[37] *See, e.g.*, Foster v. Turley, 808 F.2d 38 (10th Cir. 1986); Snyder v. Smith, 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

[38] *Snyder*, 736 F.2d at 418.

[39] *Allied-Bruce*, 513 U.S. at 266.

[40] *Id.* at 277.

[41] *Id.* at 277–81.

[42] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[43] *See, e.g.*, CAL. CORP. CODE ANN. § 31512 (2001) (California statute declaring void provisions in franchise contracts purporting to waive compliance with the law); Section 9:2779 of the Louisiana Revised Statutes (B)(1) (declaring unenforceable clauses allowing arbitration proceedings to be brought in a forum or jurisdiction outside of this state); 15 OKLA. STAT. § 818 (2002) (limiting making arbitration agreements between employers and employees, and insurers and insureds, unenforceable); Alabama Motor Vehicle Franchise Act, 1975 ALA. CODE § 8-20-4 (m) (2001) (declaring attempts by automobile manufacturers to coerce automobile dealers to assent to mandatory arbitration agreements to be unfair and deceptive trade practices).

[44] 465 U.S. 1 (1984).

Court's *Southland* decision has effectively barred any state action on this contract issue.[45]

Under the Court's interpretation of the FAA, congressional action would be required to exclude certain contracts, and certain forms of predispute arbitration agreements, from the FAA. I believe Congress should do so. Congress should reconsider arbitration to remedy its inadequacies, especially in situations with unequal bargaining power.

IV. The Problems Arbitration Creates by Curtailing Due Process

One reason that mandatory, binding arbitration has become so troubling is because it threatens a fundamental principle of our justice system: the constitutional right to take a dispute to court. All Americans have the right to trial by jury in certain contexts. The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[46] The Seventh Amendment provides: "In suits at common law . . . the right of trial by jury shall be preserved."[47] Many states provide a similar right to a jury trial in state court. Although individuals can of course waive constitutional rights,[48] we need to remember the constitutional foundation of our civil justice system and that individuals should not be coerced or duped into waiving their fundamental rights.

Without the option to go to court, the FAA could lead to the inequitable application of substantive law. Under the FAA, arbitrators are not required to apply the particular federal or state law that would be applied by a court.[49] This enables the stronger party to use arbitration to circumvent laws specifically enacted to regulate the parties' relationship in a particular jurisdiction. Circumventing these laws is inequitable and eliminates their deterrent effects.

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[45] For a critical view of the Supreme Court's decision to read the FAA as preempting state laws, *see, e.g.*, *Overview of Contractual Mandatory Binding Arbitration: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 2–3 (2000) [hereinafter *Hearing*] (statement of Chairman Grassley).

[46] U.S. Const. amend. VI.

[47] U.S. Const. amend. VII.

[48] *See, e.g.*, Patton v. U.S., 281 U.S. 276, 298 (1930) (upholding waiver of Sixth Amendment right to jury trial in criminal prosecution); U.S. v. Moore, 340 U.S. 616, 621 (1951) (upholding waiver of Seventh Amendment right to jury trial in civil action); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (recognizing the right to waive assistance of counsel in criminal prosecutions if made knowingly and voluntarily).

[49] *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435–38 (1953) (noting that arbitrators' determinations of legal meanings of statutory requirements cannot be examined, as their award may be made without explanation of their reasons and without complete records of their proceedings).

In addition to substantive law, the procedural methods of binding arbitration might disadvantage a party with a grievance. Arbitration lacks many of the important due process safeguards offered by administrative procedures and the judicial system. For example, binding arbitration lacks the formal court-supervised discovery process often necessary to establish facts and to gain documents.[50] Further, in arbitration, a victim cannot join with a class of persons similarly harmed;[51] nor can parties seek injunctive relief; nor must it be conducted with public access, often being conducted in secret. Arbitrators need not follow judicial rules of evidence,[52] and they generally have no obligation to provide a factual or legal discussion of their decision in a written opinion.[53] Moreover, arbitration often allows for only very limited judicial review. As a result, arbitration procedural safeguards pale in comparison with those of the courts.

Nonetheless, mandatory, binding arbitration clauses have become commonplace. If individuals today want to engage in many common economic activities, they may be forced to relinquish their legal rights and forego the use of courts or administrative forums to resolve disputes.

Though I doubt Congress originally intended the FAA to enable stronger parties to force weaker parties into binding arbitration, the FAA now enables this outcome by nullifying state laws that attempt to create exceptions to protect employees and other weaker parties. The FAA should not be a tool to coerce parties to relinquish important protections and rights that the judicial system affords. This invidious practice is at odds with our nation's elementary notions of fair play and justice. Congress should act to enable states to curb this practice to protect citizens from unknowingly or involuntarily sacrificing their rights.

V. Problem Areas and Proposed Legislative Responses

Pre-dispute contractual agreements are requiring mandatory, binding arbitration in a growing number of circumstances, including employment

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[50] *See, e.g.*, Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359 (D.C.N.Y. 1957) (vacating notice to take depositions because by agreeing to arbitration respondent elected to avail itself of procedures peculiar to the arbitral process rather than those in judicial determinations); Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9 (D.C. Pa. 1960).

[51] *See, e.g.*, Ann C. Hodges, *U.S. Supreme Court Roundup; Take 'Em to Arbitration; Five Times this Term, Justices Stand up for Integrity of ADR System*, LEGAL TIMES, June 25, 2001, at 76.

[52] *See, e.g.*, Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co., 794 F. Supp. 1265 (S.D.N.Y. 1992) (stating that in handling evidence an arbitrator need not follow all the niceties observed by the federal courts and must only grant the parties a fundamentally fair hearing).

[53] *See, e.g.*, United Steelworkers of America v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) (stating that an arbitrator is not required to provide written legal discussion or opinion).

agreements, auto dealership franchise contracts, and credit card and other consumer loan agreements. Congress should consider the effects of the FAA and the Court's interpretation of it in each of these areas and attempt to remedy the problems they create.

A. Employment Contracts

In the Civil Rights Act of 1991,[54] Congress expressly created a right to a jury trial for employees when it voted overwhelmingly to amend Title VII of the Civil Rights Act of 1964.[55] Employers in a variety of industries, however, are undermining the intent of the 1991 Act and other civil rights and labor laws, such as the Age Discrimination in Employment Act of 1967,[56] by requiring employees to submit to mandatory, binding arbitration as a condition of employment or advancement.[57]

Pre-dispute arbitration agreements in employment contracts have caused problems in the securities industry. In the late 1990s, when New York Attorney General Dennis Vacco[58] and the United States Senate Banking Committee[59] held separate public hearings on discrimination and sexual harassment in the securities industry, the industry was the only industry as a whole that required its employees to waive their rights to bring such claims in court as a precondition of employment.[60] At the time, more than 550,000 securities industry registered representatives were required to sign Form U-4—the Uniform Application for Securities Industry Registration or Transfer—as a condition of employment in the industry. Form U-4 contained a clause mandating that the employee file any employment dispute before an arbitration panel.

In the wake of these inquiries, the National Association of Securities Dealers ("NASD") agreed to remove the mandatory, binding arbitration clause from its Form U-4.[61] The association's decision to remove the

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[54] Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 2 U.S.C. §§ 601, 1201–1224, 16 U.S.C. § 1a-5 note, 29 U.S.C. § 626, and scattered sections of 42 U.S.C.).

[55] 42 U.S.C. §§ 2000e to 2000e-17 (1994).

[56] 29 U.S.C. §§ 621–634 (1967).

[57] *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997).

[58] *See* Susan Harrigan, *Vacco Criticizes Gender-Bias Plan*, NEWSDAY, Jan. 23, 1998, at A49 (reporting public hearing on issues of discrimination and sexual harassment in the securities industry).

[59] *Mandatory Arbitration Agreements in Employee Contracts in the Securities Industry: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (1998).

[60] *Id.* at 2 (statement of Sen. Feingold); *see id.* at Prepared Testimony of the Honorable Edward Markey (D-Mass.), Member of Congress; Prepared Testimony of the Honorable Isaac Hunt, Commissioner Securities and Exchange Commission; Prepared Testimony of Ms. Patricia Ireland, President, National Organization for Women.

[61] *See* Securities Exchange Act Release No. 40109, 63 F.R. 35299 (June 29, 1998) (approving change to NASD rules eliminating requirement that securities industry employees arbitrate statutory employment discrimination claims).

binding arbitration clause, however, does not prohibit its constituent organizations from including a mandatory, binding arbitration clause in their own employment agreements, even if it is not mandated by the industry as a whole.

Increasingly, working Americans face the choice of accepting a mandatory arbitration clause in their employment agreements or having no employment at all. The number of labor cases submitted to arbitration increased by seventy percent between 1972 and 1985.[62] In 2000, more than a quarter of California companies required employees to sign arbitration agreements.[63] The American Arbitration Association reports that it now resolves 14,500 labor-management disputes every year.[64] Many more employers are requiring employees to agree, or perhaps more accurately "submit," to resolve employment discrimination or sexual harassment claims through mandatory, binding arbitration before they can be hired or promoted.

The Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*[65] and *Circuit City v. Adams*[66] have further broadened the application of arbitration to the employment relationship and invited employers to expand this practice. *Gilmer* made clear that pre-dispute arbitration contracts could affect the Age Discrimination in Employment Act of 1967.[67] *Circuit City* removed another potential obstacle to mandatory arbitration by narrowly construing the FAA's exclusion of employment contracts. The Court held that the exclusion applies only to seamen, railroad workers, and other workers directly engaged in the interstate transportation of commerce.[68]

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[62] Linda Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 n.7 (1985).

[63] Lisa Girion, *Arbitration Hearings Expected To Rise in Wake of Court Ruling*, L.A. TIMES, Aug. 26, 2000, at C1.

[64] American Arbitration Association Web site, *available at* http://www.adr.org/index2.1.jsp?JSPssid=10530.

[65] 500 U.S. 20 (1991).

[66] 532 U.S. 105 (2001).

[67] 29 U.S.C. §§ 621–634 (1967).

[68] *Circuit City*, 532 U.S. at 121 (2001). In January 2002, the Supreme Court decided EEOC v. Waffle House, 122 S. Ct. 754 (2002), holding that an agreement between the employer and employee to arbitrate disputes relating to the employment relationship does not bar the Equal Employment Opportunity Commission ("EEOC") from seeking victim-specific or injunctive relief when the EEOC is seeking to vindicate a public interest. *Id.* at 766. The Court determined that despite the FAA policy favoring arbitration agreements, there is nothing in the FAA that allows a court to compel arbitration by any party that is not a party to the agreement. *Id.* at 764. The Court concluded that "the FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum." *Id.* at 762. Although the Court limited the application of arbitration agreements to the parties who entered into the agreements, the court continued to express its willingness to uphold private arbitration agreements between parties, regardless of the nature of the bargaining positions between the parties when the agreement was made.

Despite the appearance of a freely negotiated contract, in reality, mandatory arbitration clauses in employment contracts often amount to a non-negotiable requirement that prospective employees relinquish their rights to redress in a court of law. Such requirements have been referred to as "front door" contracts: they require employees to surrender certain rights to "get in the front door."[69] With the threat of not getting a job or a promotion, these agreements effectively, by withholding work, coerce individuals into relinquishing fundamental legal protections.[70]

Mandatory arbitration provisions force employees to waive their right to take legitimate grievances, such as charges of discrimination, to court. The practice of mandatory, binding arbitration does not comport with the purpose and spirit of our nation's civil rights and sexual harassment laws. As a nation that values work and actual freedom of contract, and that deplores discrimination, we should not allow this practice to continue.

Consequently, beginning in 1994, I have introduced in each Congress the Civil Rights Procedures Protection Act,[71] which aims to preserve the right to take employment discrimination claims to court. Over the years, Representatives Pat Schroeder (D-Colo.) and Edward Markey (D-Mass.) have introduced companion legislation.[72] In January 2001, along with Senators Patrick Leahy, Edward M. Kennedy, and Robert Torricelli, I introduced the Civil Rights Procedures Protection Act of 2001.[73] Representative Markey, along with twenty-seven other Members of Congress, has introduced a similar bill in the House of Representatives.[74]

The Civil Rights Procedures Protection Act of 2001 would amend seven civil rights statutes to guarantee that a federal civil rights or sexual harassment plaintiff can still seek the protection of our nation's courts rather than being forced into mandatory, binding arbitration. The legisla-

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[69] *See, e.g.*, 143 CONG. REC. E407–04 (daily ed. Mar. 6, 1997) (statement of Rep. Markey) ("At best such a setting has the appearance of unfairness; at worst, it is a tainted forum in which an employee can never be guaranteed a truly fair hearing. Like forcing employees to buy goods at the company store, the price of such so-called justice is just too high . . . . No employer should be permitted to ask workers to check their constitutional and civil rights at the front door."); Press Release, Russ Feingold, Prevent Mandatory Arbitration of Civil Rights Claims, (July 31, 1998) (on file with author).

[70] *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

[71] S. 2405, 103d Cong., 140 CONG. REC. S12101–02 (daily ed. Aug. 18, 1994); S. 366, 104th Cong., 141 CONG. REC. S2272 (daily ed. Feb. 7, 1995); S. 63, 105th Cong., 143 CONG. REC. S438–39 (daily ed. Jan. 21, 1997); S. 121, 106th Cong., 145 CONG. REC. S551 (daily ed. Jan. 19, 1999); S. 163, 107th Cong., 147 CONG. REC. S530 (daily ed. Jan. 24, 2001).

[72] H.R. 4981, 103d Cong. (1994) (Rep. Schroeder and nine others); H.R. 3748, 104th Cong. (1996) (Rep. Schroeder and ten others); H.R. 983, 105th Cong. (1997) (Rep. Markey and 61 others); H.R. 872, 106th Cong. (1999) (Rep. Markey and 53 others); H.R. 1489, 107th Cong. (2001) (Rep. Markey and 27 others).

[73] S. 163, 107th Cong., 147 CONG. REC. S530 (daily ed. Jan. 24, 2001).

[74] H.R. 1489, 107th Cong. (2001).

tion affects claims raised under Title VII of the Civil Rights Act of 1964,[75] section 505 of the Rehabilitation Act of 1973,[76] the Americans with Disabilities Act,[77] section 1977 of the Revised Statutes,[78] the Equal Pay Act,[79] the Family and Medical Leave Act,[80] and the FAA. By amending the FAA, the protections of this legislation are extended to claims of unlawful discrimination arising under state or local law and other federal laws that prohibit job discrimination.

The bills specify that the statutory procedures for enforcement of those laws can be superceded only by a voluntary agreement to engage in arbitration *after* a claim arises. Our bills aim to protect civil rights in a fairly narrow way. They target only mandatory, binding arbitration clauses in employment contracts entered into by the employer and employee *before* a dispute has arisen. The bills would restore the right of working men and women to pursue their claims in the venue that they choose, and would thus help restore the spirit of our nation's civil rights and sexual harassment laws.

Representative Dennis Kucinich (D-Ohio) and thirty-seven other Members of Congress have responded with an even broader approach. Their bill, the Preservation of Civil Rights Protections Act of 2001,[81] would amend the FAA to modify the definition of "commerce" to exclude employment contracts generally from arbitration provisions. This has merit because parties in employment situations almost never have relatively equal bargaining power for voluntary agreement, and binding arbitration is only appropriate in a truly voluntary agreement. Therefore, Congress could simply amend the FAA to make it clear that these provisions are unenforceable in employment contracts. Representative Kucinich's bill would do that, and I plan to offer a similar bill in the Senate.

B. Automobile Dealerships

Automobile and truck manufacturers are increasingly including mandatory and binding arbitration clauses as a condition for entering into or maintaining an auto or truck franchise. Currently, at least 11 auto and truck manufacturers—including Saturn, Daimler-Chrysler, Nissan, and Volkswagen—require some form of such arbitration in their dealer contracts.[82] According to one estimate, by 2000, manufacturers had subjected 5700 to 5800 auto dealers to mandatory, binding arbitration agreements.[83]

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[75] 42 U.S.C. §§ 2000e to 2000e-17 (1994).
[76] 29 U.S.C. § 794(a).
[77] 42 U.S.C. §§ 12101–12213 (1994 & Supp. IV 1998).
[78] 42 U.S.C. § 1981.
[79] 29 U.S.C. §206(d).
[80] 29 U.S.C. §§ 2601–2654 (1994 & Supp. IV 1998).
[81] H.R. 2282, 107th Cong. (2001).
[82] *Hearing, supra* note 45, at 15–16 (statement of Gene N. Fondren, President of the Tex. Automobile Dealers Ass'n and response to questioning of Jill N. MacDonald, Con-

Applications and renewals of franchise agreements for auto and truck dealerships are typically not negotiable between the manufacturer and the dealer. Manufacturers often present dealers with "take it or leave it" contracts.[84] The dealer accepts the terms offered by the manufacturer, or it loses the dealership. In some jurisdictions, manufacturers can unilaterally amend these agreements merely by mailing the dealer an addendum.[85] Dealers, therefore, have been forced to rely on the states to pass laws designed to balance the manufacturers' far greater bargaining power and to safeguard the rights of dealers.

Most states have laws protecting auto dealers in some way. Wisconsin was the first state to protect auto dealers in 1937 by enacting an automobile statute to protect citizens from injury caused when a manufacturer or distributor induced a Wisconsin citizen to invest considerable sums of money in dealership facilities, and then canceled the dealership without cause.[86] Since then, all states except Alaska have enacted laws to balance the enormous bargaining advantage enjoyed by manufacturers over dealers and to safeguard small business dealers from unfair automobile and truck manufacturer practices.[87]

Most states have created their own alternative dispute resolution mechanisms and forums with access to auto industry expertise that provide inexpensive, efficient, and non-judicial resolution of disputes. Wisconsin, for example, requires mediation before the start of an administrative hearing or court action, or, if both parties agree, arbitration.[88] These state dispute resolution forums, with years of experience and precedent, are largely responsible for the small number of manufacturer-dealer law-

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sultant to the Alliance of Automobile Manufacturers).

[83] *Id.* at 10–11 (statement of Gene N. Fondren, President of the Tex. Automobile Dealers Ass'n).

[84] *Id.* at 26 (statement of William Shack, Automobile Dealer, Henderson, Nevada, and his response questioning).

[85] *Id.* at 27 (statement of William Shack, Automobile Dealer, Henderson, Nevada). But some states, among them Wisconsin, limit the ability of manufacturers to modify the agreements. *Id.* (statement of Jill MacDonald, Consultant to the Alliance of Automobile Manufacturers).

[86] Act of July 1, 1937, ch. 377–78, 417, 1937 Wis. Laws. 602–03, 688.

[87] *See, e.g.*, California Automobile Franchise Act, Cal. Veh. Code Ann. § 3062 (1978) (requiring an automobile manufacturer who proposed to establish a new retail automobile dealership in California, or to relocate an existing one, first to give notice of such intention to a California agency and to each of its existing franchisees in the same "line-make" of automobile located within the defined "relevant market area,"); Rhode Island General Laws, sec. 31-5.1-4.2 (establishing 20-mile market radius and giving dealers within radius right to protest proposed new dealerships within radius); 46-534(3) of the Code of Virginia (1950) (limiting cancellation of automobile dealerships and forbidding manufacturer coercion or threats of dealers to force contracts or unordered products upon them); *see also* 82 A.L.R.4th 624.

[88] *See* Wis. Stat. § 218.0136 (1) (requiring licensee to serve a demand for mediation upon the other licensee before a hearing will be granted); § 218.0137 (a manufacturer, importer or distributor and a dealer may agree to submit a dispute arising under a franchise agreement to binding arbitration).

suits. When mandatory, binding arbitration is included in dealer agreements, however, these specific state laws and forums established to resolve auto dealer and manufacturer disputes are effectively rendered null and void with respect to dealer agreements.

Senators Orrin Hatch (R-Utah), Patrick Leahy (D-Vt.), Charles Grassley (R-Iowa), and I have introduced a bill to ensure that dealers are not coerced into waiving their rights. Our bill, the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001,[89] would provide that each party to an auto or truck franchise contract has the *option* of selecting arbitration, but cannot be forced to do so. Senator Grassley advanced this legislation in the last Congress. By the end of the 106th Congress, we had the support of 56 Senators for this bill. The ranking member and former chair of the Judiciary Committee, Senator Hatch, has taken the lead on the bill this year, and, as a result, the prospects for its enactment seem good.[90]

The bill would not prohibit arbitration. On the contrary, the bill would encourage arbitration by making it a fair choice that both parties to a franchise contract may willingly and knowingly select. The bill simply seeks to ensure that the rights and remedies provided for by our judicial system are not waived under coercion.

C. Consumer Credit Agreements

Credit card companies and consumer credit lenders are also increasingly requiring their customers to use binding arbitration when a dispute arises. These institutions use adhesion contracts at the initiation of such loans to lock consumers into these terms. So, consumers are often unaware of the arbitration agreements, or lack the bargaining power to retain their rights while securing credit. Consumers are then barred by contract from taking a dispute to court, even small claims court. One consumer advocate noted, "consumer protection is in jeopardy . . . in the important areas of credit and finance."[91]

Companies like First USA Bank, American Express, and Green Tree Discount Company unilaterally insert mandatory, binding arbitration clauses into their agreements with consumers, often without the consumers' knowledge or consent. Credit card companies like American Express, Bank of America, First USA, and Saks Fifth Avenue have commonly done this through the advertisements and other materials they insert into envelopes with the customers' monthly statements, often called

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[89] S. 1140, 107th Cong., 147 CONG. REC. S7195–96 (daily ed. June 29, 2001).

[90] S. 1140 was reported by the Senate Judiciary Committee on October 31, 2001, by voice vote. It now awaits action by the full Senate.

[91] *Hearing*, *supra* note 45, at 44 (statement of Patricia Sturdevant, Executive Director and General Counsel, National Association of Consumer Advocates).

"bill stuffers."[92] The arbitration provision is often buried in a lengthy legal document within these bill stuffers that most consumers do not so much as glance at, much less read carefully. These stuffers provide that if customers continue to use the cards, then they are bound by these arbitration contractual provisions. In one case involving Bank of America, the bank knew that no more than four percent of card holders would read bill stuffers.[93] Yet it still used this method to provide notice, though consumers rarely know about or read these provisions.

The problem is also a growing practice in the consumer loan industry. Consumer credit lenders like Green Tree Consumer Discount Company are including mandatory, binding arbitration clauses in their loan agreements.[94] Consumers seeking a loan from such companies are in no position to bargain to have the clause removed. Some consumer borrowers may not fully understand exactly what mandatory, binding arbitration is. Often, they do not understand that they have just signed away their right to go to court to resolve a dispute with the lender. Consumers must either sign the agreement as is, or forgo a loan.

It might be argued that if consumers object to a mandatory arbitration clause, they can cancel their credit cards, or refuse to execute their loan agreements, and take their business elsewhere. Unfortunately, however, the practice is becoming so pervasive that consumers may soon no longer have an alternative unless they forego a credit card or a consumer loan entirely. Consumers should not be forced to make that choice.

Credit companies sometimes argue that they rely on mandatory arbitration to resolve disputes more quickly and cheaply than court litigation. Arbitration organizations, however, often charge expensive fees to the consumer who brings a dispute. These costs can be much higher than bringing the matter to small claims court and paying a court filing fee.[95] They could very well be greater than the consumer's claim.[96]

In December 2000, in *Green Tree Fin. Corp.-Alabama v. Randolph*,[97] the Supreme Court found that an arbitration clause that is silent as to the costs and fees of arbitration is enforceable. It left unanswered, however, the question of whether large arbitration costs that effectively preclude a litigant from vindicating federal statutory rights in the arbitral forum render the arbitration clause unenforceable. Thus, arbitration does not necessarily resolve a consumer's claim more efficiently from the consumer's point of view. If the costs outweigh the amount in dispute, or if

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[92] *Id.* at 21 (statement of Gene Fondren).

[93] *Id.* at 45 (statement of Patricia Sturdevant).

[94] Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79 (2000).

[95] *See, e.g.*, Licitra v. Gateway, Inc., 734 N.Y.S.2d 389, 394 (2001) (fees for arbitration in excess of small claims court costs).

[96] *See, e.g.*, Hale v. First USA Bank, 2001 U.S. Dist. LEXIS 8045, *11–*13 (S.D.N.Y. June 12, 2001) (rejecting claim that arbitration provision was invalid because cost of arbitration exceeded value of claim).

[97] 531 U.S. 79 (2000).

the consumer cannot afford the costs, the consumer will likely not be able to pursue the claim.

Another significant problem with mandatory, binding arbitration in this context is that the lender gets to decide in advance who the arbitrator will be. For example, American Express and First USA have both chosen the National Arbitration Forum.[98] All credit card disputes with consumers involving American Express or First USA are handled by that entity. A significant danger exists that this may advantage the lenders, who are "repeat players." If, for example, the National Arbitration Forum develops a pattern of decisions favoring cardholders, then American Express or First USA could take their arbitration business elsewhere. A system where the arbitrator has a financial interest to reach an outcome favoring the credit card company is not a fair alternative dispute resolution system.

At least one state court has found that mandatory arbitration provisions in credit card bill stuffers are unenforceable. In *Badie v. Bank of America*,[99] a California state court considered the enforceability of a mandatory arbitration provision announced in mailings by Bank of America to its credit card and deposit account holders. In 1998, the California Court of Appeals ruled that the mandatory arbitration clauses unilaterally imposed on the Bank's customers were invalid and unenforceable, and the California Supreme Court refused to review the decision.[100]

As a result, credit card companies cannot invoke mandatory arbitration in their disputes with customers in California. The American Express bill stuffer notes that the mandatory, binding arbitration provision will not apply to California residents until further action from the company. Though I believe that the California judicial decision was well-reasoned on legal and policy grounds, courts in other states may not reach the same conclusion, and thus those consumers may remain vulnerable.

In 1999, I introduced the Consumer Credit Fair Dispute Resolution Act,[101] to prohibit mandatory arbitration provisions in consumer credit agreements. In January 2001, I once again introduced the Consumer Credit Fair Dispute Resolution Act of 2001 with Senator Leahy.[102] My bill extends the holding of the California appellate decision to every credit cardholder and consumer loan borrower by amending the FAA to invalidate mandatory, binding arbitration provisions in consumer credit agreements.

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[98] Hossam M. Fahmy, *Arbitration: Wiping Out Consumers Rights?*, 64 TEX. B.J. 917 (2001).

[99] 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

[100] *Id.*

[101] S. 2117, 106th Cong., 146 CONG. REC. S935 (daily ed. Feb. 29, 2000).

[102] S. 192, 107th Cong., 147 CONG. REC. S587 (daily ed. Jan. 25, 2001).

We need to restore fairness to the resolution of consumer credit disputes. I believe the Consumer Credit Fair Dispute Resolution Act would help do so.[103]

VI. Time for a Broader Approach

Arbitration can be a fair and efficient way to settle disputes. We ought to encourage alternative dispute resolution. Arbitration can settle conflicts fairly, however, only when it is entered into knowingly and voluntarily by both parties to the dispute after the dispute has arisen. This is not likely to happen in a variety of cases, including the areas of employment, auto franchise, and consumer credit contracts, where unequal bargaining power exists.

Thus, it is time for a broader prohibition of mandatory, binding arbitration in settings where bargaining power is inherently unequal, or at least unequal in almost all cases. Congress should consider whether it should ban mandatory, binding arbitration agreements from all consumer and employment settings.

Even short of a legislative prohibition, an arbitration bill of rights could improve the situation. We could define standards for what constitutes a conflict of interest that would prohibit an arbitrator from hearing a dispute. Some guarantee of access to the dispute resolution should exist, which may require a cap on filing fees and costs. At least some limited right to discovery should be available to the parties in arbitration, and arbitrators should be required to state their reasons for their decisions in writing. At the very least, arbitrators should have to abide by applicable law, and their decisions should be subject to greater judicial review.

The time has come for Congress to protect the rights of Americans to their day in court, and Congress should not delay in providing that protection.

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[103] During Senate consideration of the farm bill, S. 1731, 107th Cong. (2001), the Senate adopted by a vote of 64 to 31 an amendment that I offered to allow parties to a contract for the sale or production of livestock or poultry to seek resolution to disputes arising from the contract in accordance with any lawful method of dispute resolution, regardless of whether the contract contained a provision requiring arbitration. Senate amend. no. 2522, 147 Cong. Rec. S13,087-92 (daily ed. Dec. 13, 2001). The parties would still have the option of voluntarily submitting the dispute to binding arbitration, but they would not be limited to that forum as the sole place to seek resolution to their grievances. Under my amendment, a party in a better bargaining position would not be able to contractually choose the forum for resolution of all dispute arising out of the contract. The weaker party would be entitled to assert their rights, should they choose, in a civil proceeding.

POLICY ESSAY

PROTECTING NATIONAL SOVEREIGNTY IN AN ERA OF INTERNATIONAL MEDDLING: AN INCREASINGLY DIFFICULT TASK

REPRESENTATIVE BOB BARR*

In this Policy Essay, Congressman Barr argues that United States involvement in international organizations and treaties—whether for humanitarian, dispute resolution, or peacekeeping purposes—has come at the cost of national sovereignty. Congressman Barr explains that involvement in, inter alia, the United Nations and its concomitant treaties has led to obligations and responsibilities that may be effected appropriately only through Constitutional amendment. Criticizing United States participation in the International Criminal Court, UNESCO, and treaties such as the Biological Weapons Convention and the Kyoto Protocol, Congressman Barr warns that those international obligations come at the price of national sovereignty. Without care, United States foreign policy has resulted in the de facto amendment to the Constitution without the appropriate procedural and therefore substantive protections of the democratic process. Congressman Barr suggests that legislators revisit attempts to protect sovereignty, including Constitutional amendments designed to limit the Senate's ability to ratify treaties that abridge enumerated Constitutional rights.

As the last vestiges of the Cold War fade and new challenges emerge around the globe, international organizations are searching for relevancy and are increasingly involving themselves in the domestic affairs of member states. As a result of changing geo-politics, organizations such as the United Nations have lost their traditional focus. These organizations are moving away from missions focusing on humanitarian relief, international dispute resolution, and providing forums for world leaders to meet and discuss important international issues. Instead, they are shifting rapidly towards an activist, internationalist agenda that comes at the cost of the United States' traditional constitutional freedoms and independence.

For example, in recent months, the United Nations has pursued global gun control in the name of human rights;[1] investigated the inadequacies of America's prison system through a Human Rights Commis-

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* Congressman Bob Barr has represented the 7th district of Georgia since 1994. He is an Assistant Majority Whip and a member of the Financial Services, Government Reform, and Judiciary Committees. He is Chairman of the Judiciary Subcommittee on Commercial and Administrative Law, and Vice Chairman of the full Government Reform Committee. Before his election to Congress, he served as the United States Attorney for the Northern District of Georgia and also in the Central Intelligence Agency. He spent an extensive portion of his early life living overseas.

[1] *See, e.g.*, G.A. Res. 54/54, *infra* text accompanying notes 90–97.

sion, which includes among its members such flagrant human rights violators as Cuba and Sudan, but which ousted the United States from membership;[2] and crafted international treaties that injure America's national defense and subrogate its domestic policies. These initiatives are occurring at a time when the United States continues to bear a disproportionate burden in member dues and responsibility, even as other member nations such as China continue to violate international standards of freedom and human rights with impunity and arrogance. Historic notions of sovereignty are being subjugated to self-anointed "intellectually progressive" and vague concepts of international responsibilities and control. For those of us who believe fundamental principles of sovereignty form the cornerstone of national power, the threat of this particular "new world order" is very real and very serious.

Foundations of national sovereignty are threatened by our own government when it enters into treaties that run counter to basic constitutional principles, thereby circumventing the appropriate amendment process but nonetheless resulting in a de facto amendment to the Constitution.

I. INTRODUCTION: THE CONCEPT OF SOVEREIGNTY

Sovereignty is the "international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation."[3] The concept of sovereignty is relatively new in the great scheme of human history, but its importance, especially as the United States emerges as the world's only super-power in the new millennium, is profound. Use of the term can be traced to the Renaissance, when the law of France was considered supreme to that of even the Pope.[4] The intellectual father of international law, Hugo Grotius, asserted that "sovereignty was an attribute of the State," as symbolized by, or embodied in, "the Sovereign": the ruler of the nation-state.[5] The genesis of the nation-state during the sixteenth century solidified a relationship between the political entity of the state and its citizens, grounded in the concept of sovereignty.

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[2] *See* Anne E. Kornblut, *U.S. Loses Seat on U.N. Rights Panel*, BOSTON GLOBE, May 4, 2001, at A1.

[3] BLACK'S LAW DICTIONARY 971 (Abridged 6th ed. 1991).

[4] *See* JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE VIII (Kenneth Douglas McRae ed., Harvard University Press 1962).

[5] *See* PETER BORSCHBERG, HUGO GROTIUS, "COMMENTARIUS IN THESES XI": AN EARLY TREATISE ON SOVEREIGNTY, THE JUST WAR, AND THE LEGITIMACY OF THE DUTCH REVOLT (1994).

A. Founders and Sovereignty

American notions of the importance of sovereignty are clearly embodied in the writings of our founding fathers. For example, Thomas Jefferson eloquently outlined the notion of sovereignty, stating that "[i]ndependence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law."[6] It is this "independence" that is the essence of "sovereignty." In the international context, sovereignty presumes independent nations. Jefferson elaborated further in crafting the Declaration of Independence, writing that, "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."[7] This phrase reflects the essential nature of—and reason for—the American Revolution. As a colony, America lacked sovereignty and therefore independence. With independence, America gained sovereignty; without sovereignty, a nation-state cannot, by definition, be independent.

During America's Revolutionary War, the Articles of Confederation were drafted to establish a legal framework within which its sovereignty could be given substance.[8] The Articles, however, created a national government far too decentralized to be effective in organizing the former colonies. After significant problems and frustration, the Constitutional Convention drafted the Constitution, creating a larger and more effective central government than that of the Articles of Confederation. However, the Constitution explicitly and implicitly reserved the bulk of governmental powers to the various states based on the principles of federalism.[9] This framework established a form of dual sovereignty that, quite amazingly, struck the appropriate balance necessary to create a system of government that not only has endured but also has prospered. Its underpinning was a tailored concept of sovereignty, resting not on a single person as "sovereign," but mandating that any power vested in a central government was and must have been by consent of *the people* alone. By extension, that power could be surrendered to an entity—either national or foreign—only through the explicit consent of the people. Reiteration of this notion was evinced in George Washington's farewell address, where he cautioned against becoming entangled in foreign alliances.[10] Today our actions stray from that fundamental principle.

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[6] THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON, Vol. XV, 213–14 (Albert Ellery Bergh ed.: The Thomas Jefferson Memorial Association, 1904) (quoting letter to Judge Spencer Roane on Sept. 6, 1819).

[7] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[8] THE ARTICLES OF CONFEDERATION, art. II (U.S. 1789).

[9] U.S. CONST., amend. X.

[10] George Washington, Farewell Address, para. 39–40 (Sept. 17, 1796).

II. The Rise of International Organizations

A. United Nations

The proliferation of nation-states in the years following the United States' accession to world power, in addition to advancements in the fields of communication and transportation throughout the twentieth century, have given rise to agreements among nations regarding all manner of interaction, including the resolution of potential—and real—conflicts. These types of arrangements originally were entirely consistent with historic and constitutional concepts of both federalism and sovereignty.[11] The organizations allowed each nation to operate independently of one another, providing specific procedures when conflict arose—but always retaining for the state its power over its internal affairs. The increasing interaction among nation-states led to the establishment of standing organizations that functioned as trade or defense pacts, for example. In joining these entities, member states agreed to subrogate their individual sovereignty in a specific, limited matter or for a specific, limited time.[12] Nevertheless, the competition of interests between state and international organization has given rise to a slippery slope in cession of power, and has created much of the tension the United States has experienced in other parts of the world over the last half century.

The first half of the twentieth century witnessed the creation of several unions among various nations governing trade and judicial proceedings.[13] The Treaty of Versailles, signed at the end of the First World War, served as the genesis for the first modern worldwide effort to unite distinct and unique nations with little in common,[14] by establishing the League of Nations. The League of Nations was the brainchild of the treaty's architect, United States President Woodrow Wilson.[15] The stated goal of the League of Nations was to "promote international cooperation and to achieve peace and security."[16] The United States Congress, however, correctly viewed the League as an encroachment on the country's constitutional independence—and sovereignty—and consequently, the Senate never ratified the treaty.[17] Without United States involvement, the

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[11] *See, e.g.*, Statute of The Hague Conference on Private International Law, Oct. 15, 1964, 15 U.S.T. 2228, T.I.A.S. No. 5710; World Trade Organization; World Intellectual Property Association.

[12] *See, e.g.*, Constitution of the World Health Organization, arts. 18–20 (July 22, 1946) (establishing the limited function and authority of the organization).

[13] For example, the International Telecommunication Union, Universal Postal Union, Convention for the Pacific Settlement of International Disputes, and League of Nations.

[14] *See* Basic Facts About the United Nations 2000, Sales No. E.00.I.21.

[15] *See* United Nations Library: The League of Nations in Retrospect 64 (1983).

[16] Basic Facts About the United Nations 2000, *supra* note 14.

[17] *See* Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 Yale L.J. 664, 665 (1943) (discussing failure of the United States to ratify the Treaty of Versailles).

League of Nations ceased activities after it failed to prevent the Second World War.[18]

The tragedy of World War II motivated all interested parties to support another attempt to form a worldwide organization. In 1945, at the conclusion of the Second World War, over fifty nations met in San Francisco to draft and sign the charter of the United Nations ("U.N.").[19] The charter was ratified by China, France, the Soviet Union, the United Kingdom, the United States, and many other nations as an organization of nations seeking peace in a world ravaged by two global conflicts; most of the signatories were allies during the war.[20] The purpose was to prevent—not initiate or participate in—future aggression and to promote humanitarian ventures.[21] Hopes for accord consistent with these goals, however, quickly evaporated with the dawn of the Cold War.

The United Nations has become much more intrusive, proactive, and indeed aggressive than originally intended at its inception. The opinions of the majority of the world elite and academe have largely led to the expansion of the mission of what was intended to be a passive international organization. By advocating for an activist and paternalistic U.N., one that could act unilaterally on behalf of a large number of or even a few member states, the elite and academe created the potential for unchecked procedural abuse and the advancement of "parochial" national interests.[22] Some countries, specifically those with a parliamentary form of government, lend themselves to this type of overtly centralized system with little separation between executive and legislative arms.[23] Sovereignty is still embraced by these states, but where distinct separation of powers are less evident, the *perceived* threats to sovereignty in involvement with international bodies are mitigated. Of course, less powerful countries, as well as those that desire to be superpowers, are more than satisfied to see the U.N. create and implement policy on their behalf. The fact that such policies virtually always come at the expense of America's own power matters little to these other nations; in fact, it appears they welcome it insofar as it potentially diminishes United States power relative to that enjoyed by other nations.[24] This, however, is—and should be—intolerable to our republic.

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[18] *See* UNITED NATIONS LIBRARY, *supra* note 15, at 64.

[19] BASIC FACTS ABOUT THE UNITED NATIONS 2000, *supra* note 14.

[20] *See* Press Release, U.N., United Nations Member States (Sept. 26, 2000) (on file with the U.N.).

[21] *See* U.N. CHARTER, pmbl.

[22] *See* William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L L. REV. 647, 718 (2001).

[23] For examples of such parliamentary governments, see the United Kingdom, France, and Germany.

[24] *See* Anne E. Kornblut, *supra* note 2, at A1 (quoting U.N. Representative of the Human Rights Watch as stating that the United States' removal from the U.N. Commission on Human Rights should serve as a "wake up call," and noting removal of the United States

B. U.N. Charter Provisions Supersede United States Sovereignty

The U.N. Treaty was signed by President Franklin Roosevelt and subsequently ratified by the United States Senate shortly before the end of World War II.[25] There are several instances in which the U.N. Treaty, consisting of the United Nations Charter and Statute of International Court of Justice, attempts to supersede the United States Constitution in effect.

For example, Chapter XIV of the United Nations Charter establishes the existence of the International Court of Justice ("ICJ").[26] The ICJ was granted jurisdiction over all disputes involving treaties between member states that submit to its jurisdiction. The Statute provides that "states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto . . . the jurisdiction of the Court in all legal disputes concerning treaties."[27]

The U.N. Charter proscribes "non-pacific" conduct unless necessary to counter threats to peace, breaches of peace, acts of aggression, or to act in self-defense.[28] By potentially giving the ICJ the compulsory jurisdiction to adjudicate "all legal disputes concerning treaties," the United States has effectively tied its hands to resolve such disputes in a manner deemed to be in accord with the ICJ—and within the general proscriptions of the Charter to forego the use of force in such disputes. The Senate never should have agreed to such a provision, as it presents a potential conflict with the United States Constitution,[29] which grants Congress alone the power to declare war[30] and gives the President the sole power as Commander-in-Chief to wage war on behalf of our sovereign nation.[31] The Constitution does not grant the federal government the power to cede such authority. So long as the United States had the power, the understanding, and the will to restrict the U.N. provisions to the supremacy of our Constitution, such a problem may have been tolerable. Now, however, the understanding and will are largely absent from national debates, and a serious problem presents itself.

The most dramatic and recurrent example of the United Nations exerting powers reserved by the United States Constitution is the de facto transfer of war powers from our government to the mechanism of the

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from the International Narcotics Control Board, despite the United States being the largest contributor to the elimination of the drug trade).

[25] *See* BASIC FACTS ABOUT THE UNITED NATIONS 2000, *supra* note 14.

[26] U.N. CHARTER art. 92–96.

[27] STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 2.

[28] U.N. CHARTER art. 39–51.

[29] The United States for many years accepted compulsory jurisdiction, except in cases falling under the jurisdiction of the United States courts, and Ronald Reagan withdrew even this commitment in 1986. *See* PETER R. BAEHR & LEON GORDENKER, THE UNITED NATIONS AT THE END OF THE 1990'S 29 (1999).

[30] U.S. CONST. art. I, § 8, cl. 11.

[31] U.S. CONST. art. II, § 2, cl. 1.

U.N.[32] Constitutional grant to Congress to declare war and to the President to wage that war[33] is thwarted when international organizations attempt to interject their views on when and where such combat is legitimate. For example, the U.N. Charter mandates that, "all Members . . . undertake to make available to the Security Council, *on its call* . . . armed forces, assistance, and facilities . . . ."[34] This provision of the charter usurps congressional power to declare war by allowing the Security Council to have direct influence and/or control over America's fighting forces and resources.[35] By allowing the U.N. to interpret when United States troops are to be made available on its own beckoning, the *unilateral* and *sovereign* power of the United States becomes diluted and weakened. It is into these muddy waters that the United States has been repeatedly pulled or led in the last years of the twentieth century, and into the beginning years of the twenty-first, with little or no long-term forethought to the consequences or bases for such action by the United States.

1. History up to 1990

Initially, the United Nations was primarily composed of World War II allies and other countries from the Americas and Europe.[36] The primary focus was to prevent any recurrence of the events that led to WWII, and to support various international humanitarian efforts.[37] However, prolific addition of member states has created a drastic shift in priorities and power since the 1960s.[38] A huge number of former colonial, Third World countries in Africa and Asia became voting members, leading to repeated and almost constant stands against the interests of the former allied nations that formed the organization in the first place, especially the United States.[39]

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[32] *See* U.N. CHARTER art. 43–45 (transferring, or at a minimum, making member armed forces subservient to the U.N.).

[33] U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. II, § 2, cl. 1.

[34] U.N. CHARTER art. 43, para. 1 (emphasis added).

[35] *See* John C. Woo, *U.N. Wars, U.S. Powers*, 1 CHI. J. INT'L. L. 355, 365–67 (2000) (discussing U.N. operations in Somalia and Bosnia where United States troops were under the command of non-United States generals acting under the authority of the U.N., and the constitutional problems of the President delegating command over United States troops to a foreign body).

[36] *See* BAEHR & GORDENKER, *supra* note 29, at 17.

[37] *See* U.N. CHARTER pmbl.; Franz Cede, *The Purposes and Principles of the United Nations*, in THE UNITED NATIONS: LAW AND PRACTICE 11, 12–13 (Franz Cede & Lilly Sucharipa-Behrmann eds., 1999).

[38] *See* Franz Cede, *Historical Introduction*, in THE UNITED NATIONS: LAW AND PRACTICE 3, 7 (Franz Cede & Lilly Sucharipa-Behrmann eds., 1999); BAEHR & GORDENKER, *supra* note 29, at 52–53.

[39] *See* BAEHR & GORDENKER, *supra* note 29, at 52–53; GAMBHIR BHATTA, REFORMS AT THE UNITED NATIONS: CONTEXTUALISING THE ANNAN AGENDA 46 (2000) (discussing increasing Third World dominance of the U.N. and the "strident anti-U.S. rhetoric that

This expansionist period also has been marked by U.N. involvement in areas that had previously been presumed "internal matters" of the member and original signatory states. One of the internal matters off-limits was the civil conflict in the Congo in 1960.[40] The Congolese government actively sought U.N. assistance in quelling the move for independence by one of its provinces.[41] Congo finally realized independence after years as a Belgian colony in 1960.[42] The Congolese government originally sought technical advice on military affairs from the U.N. to keep law and order following decolonization.[43] Soon after the mission was deployed, however, the civil insurrections worsened, and the province of Katanga attempted to secede from the newly sovereign state.[44] The Security Council revised the mission's mandate to authorize "all appropriate measures" to prevent civil war, including the use of force.[45] The United Nations' force essentially squelched the uprising, forcing Katanga to remain a province of Congo. This situation represented one of the first of many occasions in which the United Nations "persuaded" itself to become involved in the internal struggles of a sovereign nation. The lesson learned from such action is clear: once a nation surrenders its sovereignty, it fundamentally loses its independence. For those colonies that strove to acquire independence, cession of their powers to international organizations effectively saps the country of that independence—completing a cycle in which a nation goes from colony, to independent nation, back to de facto colony status.

2. U.N. Overreach

Beyond the conflict between U.N. power and individual state independence, the U.N. has also overstepped its humanitarian role. The Economic and Social Counsel ("ECOSOC") acts as a U.N. gatekeeper by determining which Non-Governmental Organizations ("NGO") will be granted recognition by the General Assembly, and therefore granted U.N. access and resources.[46] The ECOSOC and other U.N. entities have shown

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began to emanate from the General Assembly"). *See also* BAEHR & GORDENKER, *supra* note 29, at 55–59.

[40] *See* Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force*, 27 DENVER J. INT.'L L. & POL'Y 239, 251–53 (1999); Lilly R. Sucharipa-Behrmann & Thomas M. Franck, *Preventive Measures*, 30 N.Y.U. J. INT'L L. & POL. 485, 504–05 (1998); Amy Eckert, *United Nations Peacekeeping in Collapsed States*, 5 J. INT'L L. & PRAC. 273, 276–77 (1996).

[41] *See* DEMOCRATIC REPUBLIC OF THE CONGO, PERMANENT MISSION-UNITED NATIONS, *available at* http://www.un.int/drcongo/history.htm.

[42] *See* Eckert, *supra* note 40, at 276.

[43] *See id.*; Sucharipa-Behrmann & Franck, *supra* note 40, at 504.

[44] *See* Sucharipa-Behrmann & Franck, *supra* note 40, at 505.

[45] *Id.* (quoting S.C. Res. 161, U.N.SCOR, 942d mtg., U.N. Doc. S/RES/161 (1961)); *see also* Cox, *supra* note 40, at 252.

[46] *See* U.N. CHARTER art. 71.

continued biases, by deferring recognition of pro-life and pro-Second Amendment groups in favor of pro-abortion and gun-control groups.[47] Furthermore, NGOs recognized by the ECOSOC demonstrate a definite bias towards "family planning" in Third World member countries.[48] In allowing Third World countries a disproportionate voice in this process the U.N. has rarely, if ever, served United States interests. This evidence of the U.N.'s advocacy of one moral position over another should not be tolerated but almost always is by both United States presidents and Congresses, even as they pay lip service to United States sovereignty and constitutional provisions. These types of decisions are essential to a nation's exercise of its own sovereignty via formulation of its domestic policy, and U.N. infringement upon these choices ipso facto jeopardizes the nation's sovereignty.

3. History: 1990 to the Present

The last decade has seen the United Nations fall on rough times financially. In 1945, assessment of United States dues to support the U.N. budget was 39.98% of the entire collection of dues, while the poorest members were each assessed 0.04%, even though each had a vote in the General Assembly equal to that of the United States.[49] The vast expansion of member states during the fifties and sixties of mostly underdeveloped countries led to further drastic imbalance in the United States' lion's share of all monetary contributions to the U.N.[50] Although the United States was able to secure a reduction in its contributions to 31%, it still remained the largest contributor.[51] Although only allotted a single vote in the General Assembly, the United States was nevertheless forced to provide an inordinate amount of economic support. This is evidenced by the fact that in 1992 seventy-nine members contributed the minimum (reduced to 0.01% in 1978) and another nine countries contributed 0.02%.[52] Forty-eight percent of the voting members in the General As-

[47] For example, the ECOSOC deferred the membership application by Human Life International for its strong support of pro-life principles; the pro-life and pro-family oriented Family Research Council's application was deferred for almost four years; and there was great opposition to acceptance of the National Rifle Association in 1996. *See* Home School Legal Defense Fund, *U.N. Finishes Reviewing Pro-Family NGO Applicants*, (2001), *at* http://www.hslda.org/docs/news/hslda/200106140.asp.

[48] ECOSOC created the International Conference on Population and Development in 1989, which not so subtly advocated abortion as an integral "family-planning" tool, while virtually shutting out other alternatives advocated by the Vatican. *See, e.g.*, Barbara Crosette, *Vatican Holds Up Abortion Debate at Talk in Cairo*, N.Y. TIMES, Sept. 8, 1994, at A1.

[49] *See* Stefan Halper, *A Miasma of Corruption, The United Nations at Fifty*, CATO POLICY ANALYSIS No. 253 (Apr. 30, 1996).

[50] *See* UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, BASIC FACTS ABOUT THE UNITED NATIONS 294–95 (2000).

[51] *See id.* at 293.

[52] *See id.*

sembly contributed less than one percent of the total general budget.[53] Conversely, a mere fourteen members contributed 84%.[54] To compound this financial inequity, the United States also contributed 31% of the organization's "peacekeeping" budget (which is usually larger than the general budget).[55] This unfairness led to responsive action being taken, at least temporarily, by the United States Congress. Beginning in the late 1990s, Congress began withholding portions of our annual contributions. By 1999, the United States had withheld $1.9 billion—the bulk of which was recently paid.[56]

While most in the mainstream media, both internationally and domestically, are quick to draw attention to the amount in dues the United States owed to the United Nations,[57] this is far from the most troubling issue. On the eve of the U.N.'s 54th General Assembly in 1999, Secretary General Kofi Annan argued that the United Nations Security Council must be, "the sole source of legitimacy on the use of force."[58] He further stated that, "only the [U.N.] charter provides a universally legal basis for the use of force."[59] Statements such as these by the leader of the presumed ruling body of international affairs stress the trend towards the delegitimization of a nation's inherent sovereignty—namely to determine when, where, and how to use force in defending itself and its interests.

Although encapsulated in the provisions of the U.N. Charter, the emphasis of the so-called "Annan Doctrine" can be directly traced to the end of the Cold War, and to the profound ignorance of United States leaders and citizens as to the principles of international relations. Many in the United States erroneously fail to see or acknowledge a continuing threat to our sovereignty after the explicit threat of the Cold War seemingly disappeared. However, the United Nations' attempts to institutionalize intrusions into United States decision-making present a threat every bit as real to United States sovereignty as was posed previously by the Soviet Union. To defer, by treaty, to the U.N. Security Council's determination of when or if a threat exists is to cede power that should remain wholly in the United States.

The conventional wisdom of the international community is that a world without the threat of the former Soviet Union is one without mili-

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[53] *See id.*

[54] *See id.*

[55] *See* United Nations News Centre, *Setting the Record Straight: Facts About the United Nations* (1999), *available at* http://www.UN.org/News/Facts.

[56] *See* Office of the Spokesman for the Secretary General, *Financial Tidbits*, (1999) *available at* http://www.un.org/News/ossg/finance.htm.

[57] *See, e.g.*, *Decision on UN Sets a Bad Precedent*, WORLD NEWS CONNECTION, Dec. 28, 2000; *United States Calls for Urgent Reform of UN Peacekeeping Missions*, THE CANADIAN PRESS, May 16, 2000; Tom Raum, *U.N. Security Council Spar*, ASSOCIATED PRESS, Mar. 30, 2000; *Helms' Bombast at the U.N.*, BOSTON GLOBE, Jan. 22, 2000, at A14.

[58] U.N. GAOR, 54th Sess., Supp. No 1, U.N. Doc. A/54/1 (1999).

[59] *Id.*

tary need for force.[60] There exists, of course, a notable exception in cases of alleged human rights abuses. In furtherance of this pacifist world view, when the world community, or more precisely the U.N. Security Council, deems force necessary, it must then be deployed only under the command of the U.N., not by its member nations.[61] A reasonable inference is that a primary reason for the doctrine's ascendancy lies in the desire of other states to strip the United States of the supranational legitimacy it currently enjoys. This "doctrine" is not only incorrect substantively, but fails in practice, as evidenced most recently in the former Yugoslavia. Had the proposal for using force in Kosovo been brought before the Security Council, it undoubtedly would have been vetoed by Russia or China.[62] Thus, application of the Annan Doctrine would have yielded either "illegitimate" action, or no action at all. However, because the United States and other nations are so eager for their actions to have the "blessing" and "legitimacy" of international approval, another international organization searching for post-Cold War relevancy—the North Atlantic Treaty Organization ("NATO")—was recruited as the "legitimizer" in an attempt to stop Slobodan Milosevic's ethnic cleansing.[63] If action is in our interests, we should act in furtherance of these interests; if it is not, we should not act, even if such action is "legitimized" by the imprimatur of some international organization, whether the U.N., NATO, or some other group.

Regardless of the merits of NATO's actions, the fundamental right and duty of nations to react when necessary to its interests must be preserved as legitimate—with or without United Nations approval. To examine the impractical effects of awaiting U.N. authorization, one need look only to recent events. It is clear that American anti-terrorism efforts in Afghanistan, in retaliation for the attacks of September 11, 2001, would have been considered illegitimate by the international community with a single veto vote by China. Such an inane result merits study, and the fountainhead of its effects must be stopped.

The absurdity of relinquishing national security decision-making in the international arena is further manifest in the debacles in Somalia and Iraq in the early 1990s. In 1992, the United States entered into military Operation Restore Hope, after a U.N. Security Council's sanctioned effort encountered heavy resistance by recalcitrant warlords (including al Quaeda operatives).[64] The primary basis for United States involvement was humanitarian—an estimated 300,000 Somali deaths had resulted

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[60] *See* JEFFREY A. JACOBS, THE FUTURE OF THE CITIZEN SOLDIER 1 (1984).

[61] *See* U.N. GAOR, 50th Sess., Supp. No.1, U.N. Doc. A/50/60-S/1995/1 (1995).

[62] *See* G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

[63] *See* Press Release, U.N., SC/6659, Security Council Rejects Demands for Cessation of Use of Force Against Federal Republic of Yugoslavia, 1999, *available at* http://www.un.org/News/Press/docs/1999/1990326.sc6659.html.

[64] *See, e.g.*, JARAT CHOPRA ET AL., FIGHTING FOR HOPE IN SOMALIA 41 (Norwegian Institute of International Affairs 1995).

from famine immediately preceding American involvement.[65] The humanitarian mission was accomplished in spades, as witnessed by the cessation of famine-related deaths within a matter of months after our arrival.[66] However, when faced with an early end to U.N. involvement for its stated purpose, the U.N. Security Council pushed international focus towards "nation building."[67] The tragedy that claimed the lives of eighteen American soldiers in the Battle of Mogadishu can be directly attributed to this shift in focus and the extension of the mission.[68] The mission which resulted in the intolerable American deaths was not even remotely related to the originally stated and at least arguably legitimate humanitarian mission of the United States.

The current state of weapons inspections in Iraq is but another example of the sacrifice of United States sovereignty in the name of world consensus. Following the rout of Iraq by American-led forces during the Gulf War in 1991, the U.N. Security Council moved to eradicate Iraq's weapons of mass destruction and its ability to produce them.[69] The Security Council established the United Nations Special Commission on Iraq ("UNSCOM") to search out and destroy the regime's weapons and weapons-manufacturing capabilities.[70] UNSCOM also provided for ongoing monitoring to prevent Iraq from acquiring this deadly capability again.[71] It proved successful in eliminating portions of Iraq's nuclear program, along with its significant arsenal of chemical weapons.[72] However, UNSCOM was much less successful in destroying Iraq's biological weapon infrastructure because of the dual-use nature of certain facilities such as pharmaceutical plants.[73] There is little doubt that the United States, acting without U.N. strictures, could have eliminated Iraq's threat.

To make matters worse, after years of increasing resistance by Saddam Hussein, Iraq decided in October of 1998 to deny access to UNSCOM inspectors.[74] This action created a huge outcry at the time, but is now virtually a non-concern outside of the United States. The U.N. Security Council has not been able to decide on the appropriate action to

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[65] *See id.* at 28.

[66] *See id.* at 102.

[67] *See id.* at 52; *see also* Jonah Goldberg, *Bill in Kosovo or Somalia Redux*, NAT'L REV. ONLINE, Mar. 24, 1999, *available at* http://www.nationalreview.com/goldberg/goldberg032499.html

[68] *See* Goldberg, *supra* note 67.

[69] *See* RICHARD BUTLER, SADDAM DEFIANT: THE THREAT OF WEAPONS OF MASS DESTRUCTION AND THE CRISIS OF GLOBAL SECURITY 50–51 (2000).

[70] *See id.*

[71] *See id.*

[72] *See* Steve Bowman, *Iraqi Chemical & Biological Weapons (CBW) Capabilities*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS 98–129, Foreign Affairs and National Defense Division, Feb. 17, 1998, *available at* http://www.senate.gov/%7Edpc/crs/reports/ascii/98-129.

[73] *See* Steven Lee Myers & Eric Schmitt, *Iraq Rebuilt Bombed Arms Plants, Officials Say*, N.Y. TIMES, Jan. 22, 2001, at A1.

[74] *See* BUTLER, *supra* note 69, at 200, 214.

be taken in response to Saddam Hussein's defiance, even as Iraq presents a real threat to the United States-led coalition effort to eliminate terrorist operations in that region.[75] It is clear that force must be used to ensure Iraq allows further weapons inspections. However, the Security Council has done little to facilitate such action. Moreover, many of our "allies" even argue against continued economic sanctions.[76] All the while Saddam Hussein has been left free to rebuild his nuclear, chemical, and biological capabilities, directly placing American national security in jeopardy.[77] As "international efforts" continually fail to eliminate the threat Iraq presents to the United States, we are left with little choice but to act on our own accord. Furthermore, American action will likely be more efficient and effective if it maintains strict control over the goal and mission without an international organization altering them to vagueness.

A. Regional Organizations

An organization such as the United Nations cannot consistently—or perhaps ever—truly provide for a nation's individual interests, at least for the United States. Less than a year after the U.N. Charter was ratified, Winston Churchill delivered his epic oration, introducing the term "Iron Curtain" to describe the division between communist Eastern Europe and the democratic West.[78] As the Cold War burgeoned, Western Europe became vulnerable to the threat of communist expansion. It was this competition that led to the establishment of regional state organizations such as NATO and the Warsaw Pact.[79]

These regional conglomerations of states had much narrower goals than that of the United Nations. Where the U.N. was originally established as an organization of supposed peace-loving states to promote humanitarian causes, these regional organizations were devised explicitly as military alliances.[80] Because these alliances based on military concerns have proven more focused, particularized, and controlled, the risk of aggrandizement of the individual nation's sovereignty is significantly reduced.

In 1949, the North Atlantic Treaty was ratified, with the primary purpose of checking communist insurgence and stabilizing a region of

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[75] *See id.* at 240, 327.

[76] *See* Colum Lynch, *U.N. Inspectors Will Not Return to Iraq*, WASH. POST, Sept. 24, 1999, at A22. Countries such as Russia, France, and China have opposed sanctions. *See id.*

[77] *See* Myers & Schmitt, *supra* note 73.

[78] *See* Raymond Smith, *A climate of opinion: British officials and the development of British Soviet policy, 1945–47*, INT'L AFF., 638 (Autumn 1998).

[79] *See* TED GALEN CARPENTER, BEYOND NATO: STAYING OUT OF EUROPE'S WARS 1 (Cato Institute 1994).

[80] CATO INSTITUTE, *NATO Expansion*, *in* CATO HANDBOOK FOR CONGRESS (1998), *available at* http://www.cato.org/pubs/handbook/hb105-43.html.

the world clearly prone to war.[81] The treaty created an operating body, NATO, to fulfill this purpose.[82] One of the defining factors that differentiates NATO from the U.N. is that it operates under a federalist premise that authority remains vested in the member states rather than ceding power to an outside, central, governing body.[83]

NATO was designed to act as a deterrent to an attack by its Soviet-led rivals, the nations of the Warsaw Pact.[84] The deterrent rested on cooperative action: an attack on any member nation was to be treated as on attack on all members.[85] This provision minimized the political infighting prevalent within the U.N. Security Council, where unifying factors are few and far between.

NATO served its purpose, its legitimacy coming to an end with the demise of the Soviet Union and Warsaw Pact in 1991. However, this historic realignment created a major crisis within NATO: with its mission fundamentally complete, many questioned its continuing existence.[86] Some argued for dissolution, but others—reflecting the view that no bureaucracy, once created, should ever die—championed its continued existence and its expansion through the addition of former Warsaw Pact nations.[87] This conflict was partially resolved with the creation of the Partnership for Peace.[88] Twenty-nine non-NATO countries have joined this partnership providing for joint military strategy and exercises with NATO members, while not actually becoming members of NATO.[89] Its vision, mission, and goals are now as vague and ill-defined as its older sibling, the United Nations.

As a result of the inability of the U.N. to deal effectively with the problems in Yugoslavia, NATO temporarily justified its existence with the break-up of that country.[90] The veto power of Russia and China assured that the U.N. Security Council would take no action in stopping the military conflicts between the former Yugoslavian states. Facing a major destabilizing event in the Balkan region, NATO was used by member states in a manner clearly at odds with its charter, filling a role that the United Nations was not able to fill under the Annan doctrine.[91] The ex-

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[81] *See* NORTH ATLANTIC TREATY ORGANIZATION, NATO HANDBOOK 31 (2001), *available at* http://www.nato.int/docu/handbook/2001/pdf/handbook.pdf.

[82] *See id.* at 31.

[83] *See id.*

[84] *See id.*

[85] *See id.* at 528.

[86] *See* CARPENTER, *supra* note 79, at 1–2; Norman Kempster, *Regional Outlook with No Cold War to Fight, NATO Faces an Identity Crisis*, L.A. TIMES, July 3, 1990, at A1; Fred Kaplan, *NATO Puts Its Future on the Table*, BOSTON GLOBE, July 4, 1990, at A1.

[87] *See* CARPENTER, *supra* note 79, at 2.

[88] *See id.* at 24; *see also*, NORTH ATLANTIC TREATY ORGANIZATION, *supra* note 75, at 67.

[89] *See* NORTH ATLANTIC TREATY ORGANIZATION, *supra* note 71, at 67.

[90] *See* CARPENTER, *supra* note 79, at 88–90.

[91] *See id.* at 89.

pansionists in the U.N. bureaucracy appear determined not to be shown up by their younger rival again. The apparent expansion of NATO's role should be checked, as it already presents a sufficient risk, before its purpose and breadth distends to that of the United Nations.

C. Ad Hoc International Vehicles that Jeopardize National Sovereignty

The fall of the Berlin Wall and collapse of other communist governments in Europe have done little to ease the tension between the freedom of independent nations and the push towards an interventionist doctrine. The last decade has produced a troubling pattern of international organizations grasping at straws in their efforts to preserve relevancy and purpose. These organizations attempt to perpetuate their own existence by ignoring and then redefining their charters. As industrialized nations such as the United States become party to these misused international organizations, dangerous situations arise since such entities will not always remain within the control of the more powerful members, most notably the United States. As such, the erosion of our power gradually subsumes the means by which the United States has become the country it is today.

1. Small Arms and Light Weapons Conference

One of the most glaring examples of an international organization exceeding its role is the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons ("SA/LW"). In January of 2000, the United Nations General Assembly adopted resolution 54/54 *General and Complete Disarmament,* calling for a "special session of the General Assembly devoted to disarmament."[92] The resolution included a statement that the General Assembly recognizes "the importance of the role of civil society . . . in preventing and reducing . . . accumulations of small arms."[93] In accord with this resolution, the General Assembly convened the SA/LW Conference in New York in July 2001.[94]

The general goals of the conference were praiseworthy on their face: attempting to prevent global *illicit* trade in small arms and light weapons is a noble mission.[95] It is irrefutable that this illicit trade has endangered civilians and peacekeepers alike in various countries and regions, such as Africa. A closer look at the conference, however, reveals it to be the international counterpart to the gun-control movement within the United

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[92] G.A. res. 54/54, U.N. GAOR, 54th Sess., Supp. No. 49 at 111, U.N. Docs. A/RES/54/54 (1999).

[93] *Id.* at 112.

[94] Congressman Barr attended as an official United States delegate.

[95] *See* REPORTS OF THE PREPARATORY COMMITTEE FOR THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, U.N. Doc. A/CONF.192/15 (May 11, 2001).

States: it seeks to regulate far more than just the *illicit* trade in military and military-style weapons.

Note, for example, that the conference defined "small arms" to include "weapons designed for personal use," including "revolvers, self-loading pistols, [and] rifles."[96] This definition clearly opened the possibility that *all* firearms fit within the conference's mandate, failing to distinguish between a hunting rifle and a fully automatic high-caliber machine gun used by a repressive regime or a terrorist organization. In delivering the Bush Administration's statement to the conference, Under-Secretary of State for Arms Control John Bolton noted that the United States considered "small arms," in the context of the conference, to be "strictly military arms—automatic rifles, machine guns . . . that are contributing to the continued violence and suffering in regions of conflict around the world."[97] Unfortunately, his eloquence left him in a clear—perhaps singular—minority, as member after member delivered opening statements praising the expansive scope of the conference.

The intent of the conference was not just to eliminate the illicit international trade in illegal firearms but to eliminate the ability of any private citizen to ever own or possess any firearm, regardless of the stated law of the respective nations themselves. It ultimately vested control over firearms, through international licensing and record-keeping, in the United Nations.[98] Under-Secretary Bolton recognized the impropriety of this goal, stating, "[s]ome activities inscribed in this program are beyond the scope of what is appropriate for international action and should remain issues for national lawmakers in member states."[99] Such a scope remains the most blatant attempt by an international organization to assume for itself power over a domestic matter and to force its will on sovereign states. Unfortunately, it is certainly not the only example.

2. *International Criminal Court*

Another striking example of an international organization threatening the sovereignty of member—and in this case even non-member—states is the International Criminal Court ("ICC").

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[96] UNITED NATIONS, REPORT OF THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS, U.N. Doc. A/CONF. 192/15.

[97] U.N. CONFERENCE ON ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS (July 9, 2001) (statement by John R. Bolton, the United States Under-Secretary of State for Arms Control and International Security Affairs), *available at* http://usinfo.state.gov/topical/pol/arms/stories/01070902.htm.

[98] *See* REPORT OF THE UNITED NATIONS CONFERENCE ON THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS NEW YORK, § II (8),(9), (14) p. 10–11 (July 2001) (noting a statement by the President of the Conference), *available at* http://www.un.org/Depts/dda/CAB/smallarms/files/aconf192_15.pdf.

[99] U.N. CONFERENCE ON ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS, *supra* note 97.

Almost since its inception, the United Nations has sought to address and control the prosecution of crimes of genocide.[100] In 1948, it adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[101] This Convention operated on an ad hoc basis when approved by the Security Council.[102] This system of addressing these crimes against humanity worked somewhat effectively, as demonstrated in the ongoing International Criminal Tribunal for the Former Yugoslavia to address instances of ethnic cleansing.[103] This ad hoc system is, or can be, effective because it can only be utilized when approved by the Security Council members to address specific alleged crimes, and only when individual nations fail to address such allegations via their judicial system. The ad hoc nature limits its risk to national sovereignty by accomplishing specific and limited goals specifically approved and limited by member states.

The current leadership of the United Nations, unsatisfied with the success of the precursor to the ICC, or more properly, not being fully in charge, has once again simply shifted focus and vision, and coupled many of its less powerful member nations to create a potentially more encroaching entity. In this effort, its job was made easier because former United States President Clinton was interested, for various reasons, in promoting the U.N. and Kofi Annan's agenda.

In the summer of 1998, the General Assembly convened the United Nations Diplomatic Conference on the Establishment of an International Criminal Court in Rome, Italy.[104] The purpose of the conference was to establish a permanent, standing court to investigate, try, and punish crimes against humanity, both broadly and vaguely defined.[105] This unprecedented power wielded by a foreign body presents significant threats to Americans, especially those fighting abroad under our flag.

The conference produced the Statute for the International Criminal Court. The United States had enunciated several objections and was one of only seven nations voting against the treaty.[106] Among the objections was the statutory claim of jurisdiction over states that are not a party to the treaty.[107] This would formalize the long-held United Nations desire to

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[100] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[101] G.A. Res. 260, U.N. GAOR, 3d Sess., Vol. 1 at 174, U.N. Doc A/810 (1948).

[102] *See id.*

[103] *See* Martin Fletcher, *Milosevic is Charged with Genocide,* TIMES OF LONDON, Nov. 24, 2001, at 3.

[104] *See* UNITED NATIONS, DIPLOMATIC CONFERENCE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, UN Doc A/Conf.183/9* (1998).

[105] *See id.*

[106] *See* Stuart Taylor, *Be Wary Of The War Crimes Court, But Not Too Wary*, NATL. J. 14 (Apr. 6, 2002).

[107] *See* UNITED NATIONS DIPLOMATIC CONFERENCE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, *supra* note 104.

establish itself as the ultimate international ruling body, superseding the sovereignty of all nations, whether they ceded such power or not. The statute is overly broad in defining potential crimes, deferring to the court to identify crimes that fall under its jurisdiction.[108] There are absolutely no guarantees that laws will be applied equally under the parameters of the United States Constitution, even presuming that such laws are not in violation of our Constitution to begin with. Though marginally limited by exhaustion requirements and ostensible cooperation agreements with domestic judiciaries, the ICC's ability and capacity to decry any court's actions as a sham pose true dangers to American jurisprudence.

The resulting lack of due process and equal protection are compounded when coupled with the fact that the court can also investigate potential crimes at will, without even a formal complaint being filed.[109] The conference rejected American insistence that all cases be referred to the court by the Security Council.[110] This decision eliminated at least one potential safeguard—the veto. The procedural deficiencies and opportunity for malicious prosecutions and general corruption, however, are not even the most significant concerns.

The assertion of universal jurisdiction over Americans, even if the United States is not a party to the statute, raises monumental constitutional concerns. Cases could be brought ex parte against an individual United States combatant or even a United States President, by a U.N. bureaucrat, foreign leader, or NGO, who disagrees with the legitimate actions of our armed forces protecting United States interests overseas. Article III, section 2 of the U.S. Constitution definitively states that the "judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties."[111] Any attempt to subrogate that authority, by treaty or otherwise, to a third-party nation is in direct violation of the God-given rights guaranteed Americans by the Bill of Rights. It is in direct violation of this vital right when an American is tried by a foreign court, even if our government approves. To cede such authority is without constitutional authorization. Furthermore, a trial by a foreign court raises, inter alia, Fourth, Fifth, Sixth, and Tenth Amendment concerns. The ICC would have no need to ensure that these constitutionally protected safeguards are effected. Regardless of what measure of due process is accorded by the ICC, there would be no guarantee that such standards would mirror, or be applied in accordance with, our Constitution. The possibility of American service-members being brought before an international court for political reasons would be virtually guaranteed given the feelings of resentment and hatred directed towards the United States

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[108] *See id.*
[109] *See id.*
[110] *See* Taylor, *supra* note 106, at 16.
[111] U.S. CONST. art. III, § 2, cl. 1.

by despots and many religious extremists in countries now a part of this international "court."

The International Criminal Court is ripe with perils, especially for Americans. Yet, former President Clinton signed the statute in the last month of his presidency.[112] The United States Senate should never ratify such a blatantly unconstitutional treaty and legitimize one of the most questionable acts a President of the United States has ever done. Former President Clinton's action, despite his inability to secure Senate ratification of the ICC Treaty, creates a morass of international legal problems by the seeming legitimacy—and international momentum—that it can give to such an organization. Both as a matter of policy and as a matter of Constitutional mandate, the United States should remain avowedly independent of and expressly apart from the ICC.

3. UNESCO

The rampant anti-democratic doctrine and socially questionable policies of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") is yet another example of an international organization's attempted curtailing of national sovereignty. In 1984, the Reagan Administration withdrew from UNESCO in protest of its policies.[113] Yet for seventeen years since, UNESCO continues to focus its programs and debates on disarmament, anti-Western philosophy, and collective rights.[114] Though it has been argued that UNESCO policies have tempered from previous extremism, they typically remain contrary to United States policy. The issues purportedly resolved by UNESCO should be reserved for each individual nation to decide on its own accord.

The Reagan administration concluded that UNESCO's policies were departures from its original mandate, and in 1984, withdrew the United States from membership.[115] UNESCO had devolved into little more than an advocacy group for socialism and Third World despots, attempting to establish their doctrines beyond the borders of their countries.[116]

Continuously since the 1970s, UNESCO has pursued a policy of international information control. Advocating that a concentration of in-

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[112] *See* Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

[113] *See Text of Statement by U.S. on Its Withdrawal from UNESCO*, N.Y. TIMES, Dec. 20, 1984, at A10 (hereinafter "U.S. Withdrawal from UNESCO"); Paul Lewis, *UNESCO May Take Dispute with U.S. to Court*, N.Y. TIMES, Jan. 23, 1985, at A5.

[114] *See* Brett D. Schaefer, *Not the Time for the United States to Rejoin UNESCO*, THE HERITAGE FOUNDATION BACKGROUNDER, Jan. 17, 2001, at 5–6.

[115] *See U.S. Withdrawal from UNESCO*, *supra* note 113.

[116] *See generally* SAGARIKA DUTT, THE POLITICIZATION OF THE UNITED NATIONS SPECIALIZED AGENCIES 75–234 (1995).

formation perpetuates a corresponding concentration of wealth,[117] UNESCO has called for a New World Information and Communication Order ("NWICO").[118] A central premise for the NWICO is that it decentralize the information "cartels" that are concentrated in the West, those that purportedly dominate the worldwide, public-opinion debate.[119] The espoused remedy of the NWICO for this centralization of both print and broadcast media is control via licensing the international press.[120] The purpose of this suggested licensing would be to ensure all journalists were held to a U.N. approved code of ethics.[121] Ultimately, Third World regimes desired to utilize this standard to allow for censoring of media critical of their governments.

The United Nations has absolutely no legitimate purpose for such blatant and harmful political activities. The Clinton and current Bush administrations, along with several members of Congress had considered the idea of rejoining the agency, though ultimately declined to do so.[122] Rejection of membership in the agency is the only choice, as the United States should not support organizations that function to disrupt democracy and silence freedom, ever.

II. Constitutional Arguments and Treaties

Threats to United States sovereignty do not originate only in bodies like the United Nations. There has been a noticeable effect on the United States in entering into treaties that subvert constitutional freedoms and jeopardize national security. United States sovereignty cannot be abdicated legitimately by our government, as it lacks the constitutional authority to do so.

A. Treaty Supremacy

In 1920 the United States Supreme Court decided the case, *Missouri v. Holland*, which seriously threatened aspects of American sovereignty.[123] The United States had entered into a treaty with Great Britain for the protection of migratory birds. The treaty included a provision that required both parties to pass laws that would forbid the killing, capturing,

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[117] *See* International Commission for the Study of Communication Problems, Unesco, Many Voices, One World 23–25 (1980).

[118] *See* Peter I. Hajnal, Guide to Unesco 246–55 (1983).

[119] *See* International Commission for the Study of Communication Problems, Unesco, *supra* note 117, at 266–67; Hajnal, *supra* note 118, at 251.

[120] *See* Schaefer, *Not the Time for the United States to Rejoin UNESCO*, *supra* note 114, at 2 n.7.

[121] *See id.*

[122] *See id.* at 3–4; *UNESCO Chief Seeks out U.S., Says Waste, Bias Eliminated, Asks Washington to Rejoin*, Wash. Times, Feb. 7, 2002, at A12.

[123] 252 U.S. 416 (1920).

or selling of the birds except in accordance with certain regulations. Pursuant to the treaty, Congress enacted legislation and Missouri brought suit, claiming its reserved powers under the Tenth Amendment were violated by the act and the treaty. The Court framed the issue as whether the treaty and statute interfered invalidly with the rights reserved to the states by the Tenth Amendment. Justice Oliver Wendell Holmes wrote for the seven-to-two majority, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."[124] The court noted that acts of Congress must be made in pursuance of the Constitution, whereas treaties are valid *upon being entered into* under the authority of the United States.

The court effectively argued that the treaty with Great Britain was constitutional because it involved an issue of "national interest," regardless of whether the subject matter was specifically reserved for the federal government to regulate. It is precisely because the Constitution does not enumerate to the federal government the power to regulate the hunting of fowl that such power is reserved to the states by the Tenth Amendment. If a treaty infringes upon the state's authority to regulate the hunting of fowl, with no other Congressional authorization for such action, then it must be unconstitutional regardless of how compelling the "national interest" may be in supporting or furthering our relations with a key ally. The President and the Senate of the United States do not have the authority to abrogate a right not enumerated the federal government and thus reserved for the states, simply by making it part of a treaty. By taking such action, they are abrogating the sovereignty of the citizens of a state—in the case of *Missouri v. Holland*, those of the citizens of Missouri.

Remarkably, this ruling is still valid law, even though there is no way to view this holding other than an illegitimate amendment of the Constitution. Treaties need approval by the President and ratification by two-thirds of the Senate.[125] However, to propose an actual amendment requires either two-thirds of both houses or two-thirds of state legislatures, and ratification by three-fourths of the state legislatures or three-fourths of the state conventions.[126] If the treaty directly conflicts with a constitutional provision, and yet is still held valid, it is a de facto amendment that has not met the requisite constitutional rigors of legitimate passage. A treaty cannot be deemed constitutional merely because it involves a "national interest" and was entered into via proper procedural mechanisms. If it involves subject matter beyond those enumerated to the federal government in the Constitution, then the government cannot properly enter

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[124] *Id.* at 433.
[125] *See* U.S. CONST. art. II, § 2, cl. 2.
[126] *See* U.S. CONST. art. V.

into a treaty regulating such subject matter without infringing upon the rights reserved to the states. Once the treaty is entered into, the state can no longer regulate the subject matter as it rightfully should be able to do. Thus the Constitution has been violated and the basic structure of our government undermined.

B. Bricker Amendments

Many in Congress were not pleased with the precedent set by the *Holland* Court. During the 1950s a series of constitutional amendments were introduced to remedy the Court's mistake. Several of these amendments were introduced by Senator John Bricker (R-Ohio), and thus the amendments commonly bear his name.[127] The Bricker Amendments attempted to limit the domestic effects of treaties and any other international agreements within the constitutional framework clearly contemplated by the Constitution and its draftsmen.[128] Though each amendment took a slightly different tack, each included provisions that precluded treaties from having any effect domestically, in the absence of specific implementing legislation.[129] Taken as challenges to executive authority, Bricker's amendments were not welcomed by the Eisenhower Administration or by succeeding administrations from either party.[130] Ultimately, the Eisenhower Administration was successful in preventing passage of the Bricker Amendments; however, the movement shaped the treaty ratification process for years to come.[131] Bricker's push led to a higher level of scrutiny on proposed treaties by the Senate than before, but the bad constitutional law reflected in the *Holland* decision remains unchallenged.

III. National Security

Treaties not only threaten the Constitution, but they also represent a serious threat to the national security of the United States. Many of the nations and organizations that advocate globalism have embraced the international treaty process as their tool of choice to reach this goal.

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[127] *See* Geoffrey Perret, Eisenhower 485 (1999).

[128] *See* Herbert Brownell & John P. Burke, Advising Ike: The Memoirs of Attorney General Herbert Brownell 263 (1993).

[129] *See id.* at 268; Perret, *supra* note 127, at 485–87.

[130] *See* Brownell & Burke, *supra* note 128, at 263–71; Perret, *supra* note 127, at 485–87.

[131] *See* Brownell & Burke, *supra* note 128, at 263–71; Perret, *supra* note 127, at 485–87; *see generally* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 349 (1995) (stating "Senator Bricker lost his battle, but his ghost is now enjoying victory in war"). *See also* Steven Brust, *Chenoweth Amendment*, Vital Signs, *at* http://www.catholic.net/rcc/Periodicals/Crisis/1997-09/vital.html (last visited Mar. 3, 2002).

A. Kyoto Treaty

If the United States signs the Kyoto treaty, the nation's defense would be one of the first areas noticeably affected.[132] Emissions from jet engines are one of the highest concentrated polluters of chlorofluorocarbons, so to comply with Kyoto's emission restrictions, the only choice would be to cut flight time drastically and decrease military readiness.[133] The same argument would also apply to our massive fleet of diesel engine vehicles that move our military on land, sea, and air.[134] Activity would be curtailed in order to comply with the treaty's mandates, resulting in a decline in training and thus, readiness. Of course, our adversaries in China, Asia, Africa, and elsewhere conveniently exempted themselves from such strictures, as they are not subject to Kyoto requirements.[135]

B. Biological Weapons Convention

By complying with the 1972 Biological Weapons Convention, the United States subjects itself to searches of even its most sensitive military facilities.[136] As the Convention stands now, there exists no practical method for enforcement. However, if and when an enforcement vehicle is created, as a party to the convention, the Unites States is subject to search and verification of compliance at research facilities, nuclear plants, and even military installations.[137] There exists no provision for protecting classified or sensitive areas. This creates a potential for foreigners—even clearly adversarial ones—to gain access to such locations and consequently to jeopardize our security.[138]

Article VIII of the convention provides that a party to the convention, "ha[s] the right to withdraw from the Convention if it decides that

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[132] Kyoto Protocol to the United Nations Framework Convention on Climate Change, *session held* Dec. 1–10, 1997, Members of the United Nations Framework Convention on Climate Change, 37 I.L.M. 22.

[133] *See* Sterling Burnett, *Is the Global Warming Treaty a Threat to National Security?*, National Center for Policy Analysis, *available at* http://www.ncpa.org/ba/ba277.html (Aug. 6, 1998).

[134] *See id.*

[135] *See* Editorial, *Airing Both Sides of Global Warming*, L.A. TIMES, Feb. 28, 2002, at B14.

[136] *See* Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, Apr. 10, 1972, art. IV–VII, 26 U.S.T. 583; *see also* Mike Allen & Steven Mufson, *U.S. Scuttles Germ War Conference; Move to Halt Talks Stuns European Allies*, WASH. POST, Dec. 8, 2001, at A1.

[137] *See* Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *supra* note 136; *see also* Heather A. Dagen, *Bioterrorism, Perfectly Legal*, 49 CATH. U. L. REV. 535, 542–50 (2000); David A. Kaplow & Philip G. Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Developing Assistance*, 91 COLUM. L. REV. 993, 1019–21 (1991); Allen & Mufson, *supra* note 136.

[138] *See* Allen & Mufson, *supra* note 136.

extraordinary events . . . have jeopardized the supreme interests its country."[139] Though this clause provides an exit if a nation decides its sovereignty is threatened, it also requires three months notice in advance of withdrawal.[140] A surprise inspection of a classified facility would harm national security interests; without providing the lengthy advance notice, the nation cannot make a timely withdrawal and presumably is subject to sanctions.

IV. Recommendations and Warnings

I am not the first, nor will I be the last, to comment on the precariousness of America's hold on its sovereignty or on the threats it faces every day. Measures need to be adopted and steps need to be taken to stem the tide washing away our freedom. Several attempts have been made in recent years to bolster our constitutional freedoms and protect them for our posterity. During the first session of the 105th Congress, then-Congresswomen Helen Chenoweth (R-Idaho) introduced a constitutional amendment to limit the Senate's authority to ratify treaties that abridge constitutionally enumerated rights.[141] The proposed amendment would also require Congress to enact domestic legislation giving effect to treaty provisions before they take effect. This reincarnation of the Bricker Amendment would have addressed the same issue, by disallowing a single body of Congress to effectively amend the Constitution. Congresswoman Chenoweth's amendment was never brought up for a vote in the House, but hopefully will be revisited in the future.

Recently, Representative Ron Paul (R-Tex.) has carried the banner for American withdrawal from the United Nations.[142] In each of the last three Congresses, Rep. Paul has introduced the American Sovereignty Restoration Act, which would repeal legislation authorizing American participation in the U.N., close the United States mission to the U.N., and prohibit any federal funding of the U.N.[143] The United Nations has outlived any usefulness that it once may have had, and I will continue to support Congressman Paul's efforts to protect our sovereignty by seeking to withdraw the United States from the U.N.

The landslide Republican congressional victory of 1994, and the subsequent passage of the *Contract with America*, at least brought to the forefront of Congressional and public awareness a focus on national sov-

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[139] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *supra* note 136.

[140] *See id.*

[141] H.J. Res. 83, 105th Cong. (1997).

[142] *See* Ron Paul, Statement Paul Amendment to Defund the U.N. (July 18, 2001), *available at* http://www.house.gov/paul/congrec/congrec2001/cr071801.htm (last visited Mar. 2, 2002).

[143] H.R. 1146, 107th Cong. (2001).

ereignty that had been relinquished by complacent administrations over time and had been absent from national policy and debate for many years. One provision of the *Contract* was the National Security Revitalization Act, which assured that United States troops would not fall under U.N. command, and that they would only be deployed to support missions in America's national security interests.[144] As a freshman Congressman, I was proud to vote for this bill and return constitutional protections to the United States military that negligently had been waived.

However, largely because of its benign and innocuous image, it appears unlikely that the U.N. will cease to exist or that Congress will take the necessary stand to protect our nation's sovereignty by withdrawing United States membership. This does not mean there are no alternative actions to be taken. First and foremost, if the United States is to continue membership in the U.N., then the U.N.'s mission must be revisited. Even as many of the justifications for the U.N. cease to exist, it has resisted its natural demise by embracing new ventures outside of its mandate. These activities must be stopped. The Security Council must revisit the U.N. charter and determine why the organization exists. Its findings should then be incorporated via amendment into the charter. By enumerating the rationale for U.N. existence, within the strict limitations of its original purpose, it will be more difficult for it to act beyond its mandate.

The United Nations, in all its parts, functions as the largest bureaucracy in the world. This is possible partly because it is not financially accountable. An independent audit should be commissioned to review U.N. operations from top to bottom, and the findings made public. Upon production of the report, the United States Congress should address how much to appropriate to the U.N. There is a much better possibility of limiting United States financial involvement in the U.N. if the sheer magnitude of the U.N.'s operations are reviewed and made transparent. This is especially true when such operations are juxtaposed against its stated mission.

The Founders realized that Americans possess nothing more indispensable than national sovereignty. This realization was the fundamental rationale for the revolution against England—freedom to self-govern. To the detriment of the country and its posterity, this sacrosanct freedom has been slowly and methodically eroded since the inception of the United Nations. Today, nary a thought is given when international organizations, like the U.N., attempt to enforce their myopic vision of a one-world government upon America, while trumping our Constitution in the process. Moreover, many in our own government willfully or ignorantly cede constitutionally guaranteed rights and freedoms to the international community. The hour has arrived in which we must soberly question our involvement in global organizations and our implementation of internal

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[144] H.R. 7, 104th Cong. (1995).

policies that directly threaten our precious sovereignty—the very sovereignty that so many have shed blood protecting.

POLICY ESSAY

THE TAXATION OF INTERNET COMMERCE

REPRESENTATIVE JOHN E. SUNUNU*

The Internet Tax Freedom Act*'s moratorium on state imposition of Internet taxation is set to expire on November 1, 2003. In this Policy Essay, Representative John Sununu argues that Congress should prohibit the authorization of new Internet taxes or multi-state "Internet Tax Compacts" because such taxes violate federalism, create new administrative burdens, place undue barriers to Internet commerce, and single out new technologies with unique impediments. Congressman Sununu recommends that Congress clarify the intent and scope of existing Internet tax statutes proscribing taxation while aggressively prohibiting new taxes on Internet commerce.*

I. INTRODUCTION

As both business and consumer use of the Internet has grown dramatically, debate at both the state and federal level has focused on the taxation of Internet access, services, and goods purchased online. Each tax discourages the expansion of this important communications medium, hinders innovation and investment in a rapidly growing industry, and stifles interstate trade. Although it may be in the public interest for Congress to clarify the intent and scope of existing Internet tax statutes, authorizing new Internet taxes or permitting "Internet Tax Compacts" would be a mistake.

Among the various theories of government, the need to levy and collect taxes is a uniform attribute regardless of structural differences. Governments, by definition, undertake activities designed to secure the public good.[1] In order to finance these activities, governments raise funds, the allowable methods for which are typically prescribed in a Charter or Constitution. Choices for raising revenues abound, with key questions examining which activities generate "income,"[2] what property to tax, which level of government has responsibility for taxation, and how much power agencies may have to enforce tax codes.

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[1] *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 482, (4th ed. 1999) ("Government: The agency or apparatus through which a governing body exercises authority and performs required duties.").

[2] *See, e.g.*, U.S. CONST., amend. XVI.

Throughout the history of the United States, debates regarding the nature, need, and right to tax have been at the core of several defining moments in our path to freedom and to the present day. The Stamp Act brought questions concerning representational government and accountability to the fore, resulting in the creation of the Stamp Act Congress of 1765;[3] a serious domestic test of the new government was the crushing of the Whiskey Rebellion against federal excise taxes in 1794;[4] the adoption of the Sixteenth Amendment in 1913 allowed for the constitutional imposition of income taxes for the first time, laying the foundation for a dramatic expansion in the size of government during the 20th century;[5] and the acceptance of special purpose payroll taxes in 1933 further paved the way for the Social Security Act and the emergence of a broad social welfare program in the wake of the Great Depression.[6]

Today, the central elements of these debates—the need for revenue, the rights of individuals, the constitutional limits of taxation, and the economic effects of taxation—shape the policy development of critical issues, including Social Security reform, healthcare policy, and Internet taxation. The last of these issues raises important questions regarding the nature and regulation of commerce and the capacity for technology effectively to expand the reach of the state. Not only must the aforementioned central issues be addressed, but also because the debate over Internet taxation takes place on a frontier of technological change and innovation, policymakers are confronted with the challenges of creating policy in contextually unfamiliar terrain.

II. Sales Taxes in the United States

While the question of taxing Internet commerce is relatively new, the matter of taxing retail commerce is not. General sales taxes in the United States were first proposed by the State of Mississippi in 1932.[7] The measure—adopted largely in response to sharp revenue losses during the Great Depression—consisted of a two percent tax on retail sales. Within 15 years, sales taxes had become the largest source of revenue at the state

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[3] *See* Richard Norton Smith, Patriarch: George Washington and the New American Nation 10 (1997).

[4] *Id.* at 210–23.

[5] U.S. Const. amend. XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." *See also* James L. Pate, U.S. Dep't of Commerce, Bureau of Census, Historical Statistics of the United States: Colonial Times to 1970, H.R. Doc. No. 93-78, at pt. 2 (1975). Between 1903 and 1913, federal expenditures increated at an average rate of 3.3%. Between 1914 and 1924, the annual rate of increase soared to nearly 15%. *Id.*

[6] Social Security Act of 1933, Pub. L. No. 74-271, 49 Stat. 620 (1933).

[7] John L. Mikesell, *Sales Taxes*, The World Bank Group, *available at* http://www.worldbank.org/publicsector/tax/salesretail.htm.

level, and remained the largest contributor to state treasuries for over fifty years.[8]

By 2001, forty-five states and the District of Columbia had implemented a retail sales tax.[9] Thirty-three states had authorized local governments to impose sales taxes, and 7500 taxing jurisdictions within the United States had chosen to impose a retail sales or use tax.[10]

The distinction between the two sources of revenue boils down to purchaser location. An in-state transaction or transfer of property is subject to a "sales" tax while a transaction to an out-of-state buyer generates a "use" tax.[11] In both situations, the tax covers goods of all kinds and, in many, the tax also applies to services. Tax rates range from one percent to as high as eleven percent in some local jurisdictions.[12]

The administrative hurdle to collecting sales taxes is a system of certification and audit for vendors throughout a given taxing jurisdiction. The vendor collects and records taxes on each transaction and remits revenues to the State on a periodic basis. Administrative costs are thus borne by the vendor, although some states allow a nominal "hold-back" to defray these expenses. A measure of the modern system's breadth can be taken by the recent trend in gross receipts nationwide. In 1996, states collected $139.36 billion in general sales taxes; that figure grew to $147.07 billion in 1997 and $155.97 billion in 1998.[13]

To maintain the financial and political integrity of this system, states have generally made two broad exceptions to sales taxes. First, to limit the regressive nature of the taxes, purchases of food and medicine, which represent a higher percentage of total consumption for the poor, are usually made exempt. Second, purchases made by businesses for use in production are also exempt, so as to avoid "pyramiding" or multiple layers of taxation on a final retail product.[14]

More difficult, and more controversial than in-state taxation, however, is regulation and enforcement activity of goods purchased by residents from outlets outside their states' borders. A state that imposes a use tax is legally entitled to collect that tax from residents on all goods purchased by the individual from sources outside the state. Because such purchases are difficult to track, and payment is made on a voluntary basis

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[8] *See id.*

[9] Delaware, Montana, New Hampshire, Oregon, and Alaska do not impose a sales or use tax. *See* Nonna A. Noto, *Internet Tax Legislation: Distinguishing Issues,* CRS Report for Congress RL30667, Jan 11, 2001, at 3 n.6.

[10] *See id.* States that have a retail sales tax typically have a corresponding use tax levied upon the consumption or storage of goods purchased by an individual or business.

[11] *See* Michael T. Fatale, *State Tax Jurisdiction and the Mythical "Physical Presence" Constitutional Standard,* 54 TAX LAW 105 (2000).

[12] *See* Federation of Tax Adminstrators, *States Sales Taxes, at* http://www.taxadmin.org/fta/rate/tax_stru.html.

[13] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 316 (2000).

[14] *See, e.g.,* FLA. STAT. ANN. § 212.081 (2001).

by millions of individual consumers, effective audit systems are expensive and compliance rates with use taxes on out-of-state purchases are low.

Collection of such taxes, therefore, has been shifted from the individual to the vendor. Because states have more regulatory power over businesses, they have emphasized vendor collection methods. Historically, however, states have been allowed to compel out-of-state vendors to collect and remit use taxes only to the extent that the seller maintains a physical presence within the taxing state.[15] As access to online services spreads, and interstate transactions increase, a national approach either to taxing or protecting such business activity has become a priority in the tax policy debate.

III. Constitutional Limitations upon Taxing Interstate Commerce

The United States Constitution makes clear Congress's authority for regulating commerce between the states by declaring: "The Congress shall have power to regulate commerce with foreign nations, and among the several states."[16] It implicitly discourages barriers to interstate trade, but allows Congress to authorize interstate compacts deemed to be in the national interest. The degree to which these Constitutional limitations protect consumers from sales taxes was examined in a series of Supreme Court decisions,[17] notably *Quill Corp. v. North Dakota By and Through Heitkamp*,[18] decided in May 1992.

The Court's ruling in *Quill* established the basic framework for considering the constitutional limits of sales taxes imposed on cross border transactions. First, the Court overruled a prior due process clause argument: collection of use taxes from consumers of businesses without a physical presence in the taxing state met the "minimum contacts requirement" of the Fourteenth Amendment.[19] The Court held that Quill Corporation, incorporated in Delaware, had purposefully directed its marketing activity toward residents of North Dakota, allowing Quill to be

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[15] *See* Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 317–18 (1992).

[16] U.S. Const. art. I, § 8.

[17] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *National Bellas Hess, Inc. v. Dept. of Revenue of the State of Illinois*, 386 U.S. 753 (1967).

[18] *Quill*, 504 U.S. at 298 (finding that a mail-order company based in one state was not taxable by another state under the Commerce Clause).

[19] *Id.* (overruling *Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Illinois,* 386 U.S. 753 (1967)). The court held that the due process requirement for a "definite link" or "minimum connection" was met by the mail-order company with its volume of sales and advertisements. *Id.* at 308.

subject to the legal jurisdiction of the state consistent with the due process clause.[20]

However, the Court ultimately remanded North Dakota's request to tax Quill. Noting that the commerce clause[21] prohibits states from directly interfering with the conduct of interstate business, Justice Stevens noted Justice Johnson's concurrence in *Gibbons v. Ogden*,[22] agreeing that "the Commerce Clause is more than an affirmative grant of power, it has a great negative sweep as well. The clause . . . prohibits certain state actions that interfere with interstate commerce."[23] Thus, while a tax could be consistent with due process under *Quill*, it could still violate the commerce clause.

The Court, in its commerce clause analysis of interstate taxes in *Quill*, also reaffirmed a four-part test first established in *Complete Auto Transit Inc. v. Brady*.[24] Under *Complete Auto*, the validity of a state tax for a given transaction prescribed that: (1) there must be "substantial nexus" between the business and the state imposing the tax; (2) the tax must be fairly related to the services provided by the state; (3) the tax must be fairly apportioned; and (4) the tax must not discriminate against interstate commerce.[25]

Though the "substantial nexus" requirement in *Complete Auto* mandated a physical presence for the business,[26] the *Quill* Court made explicit that Congress was free to reevaluate that requirement:

> No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions . . . . Accordingly, Congress is now free to decide whether, when, and, to what extent the States may burden interstate mail order concerns with a duty to collect use taxes.[27]

With this decision, the Court made clear that it was left to Congress to decide whether physical presence would continue to be a requisite for burdening interstate mail-order, and by extension, Internet transactions, with a duty to collect use taxes.

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[20] *Id.* at 308.

[21] U.S. CONST. art I, § 8 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States.").

[22] 22 U.S. (9 Wheat.) 1, 231–32, 239 (1824).

[23] *Quill*, 504 U.S. at 318.

[24] 430 U.S. 274 (1977).

[25] *Id.*

[26] *Id.* at 479. The Court implied that Congress had been reluctant to change existing law because of the due process concerns that were put to rest in *Quill*.

[27] *Quill*, 504 U.S. at 318 (1992).

IV. CONGRESSIONAL ACTION

In 1998, Congress debated and adopted The Internet Tax Freedom Act, the first federal statute to address explicitly questions regarding taxes levied against Internet services, access, or retail transactions.[28] The bill did not allow, or address in any way, the formation of multi-state compacts that could compel a business in one state to collect and remit the use taxes owed by a resident of a second state on out-of-state purchases. In addition to establishing a special commission on electronic commerce, the bill set in place a prohibition in clear terms:

> Section 1101(a) Moratorium—No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending three years after the date of the enactment of this Act—(1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998;[29] and (2) multiple or discriminatory taxes on electronic commerce.[30]

On November 28, 2001, the existing moratorium was extended through November 1, 2003.[31]

More than a dozen bills have been introduced during the 107th Congress which in some way attempt to clarify, adjust, or regulate the imposition of taxes on Internet commerce.[32] These measures generally address four areas of concern:

> Whether to establish clear rules delimiting the "substantial nexus" requirement for the Commerce Clause.
>
> Whether to authorize states to compel out-of-state vendors to collect use taxes from its residents.
>
> Whether to prohibit or allow discriminatory taxes on intrastate Internet commerce.
>
> Whether to prohibit or allow new taxes on Internet access.[33]

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[28] The Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[29] *See infra* note 41 and accompanying text.

[30] Internet Tax Freedom Act, *supra* note 28.

[31] Internet Tax Nondiscrimination Act, Pub. L. No. 107-75, 115 Stat. 703 (2001).

[32] *See, e.g.*, Internet Tax Moratorium and Equity Act, H.R. 1410, 107th Cong. (2001); Internet Nondiscrimination Act, H.R. 1675, 107th Cong. (2001); Internet Tax Fairness Act of 2001, H.R. 2526, 107th Cong. (2001); New Economy Tax Fairness Act, S. 664, 107th Cong. (2001).

[33] *See, e.g.*, Nonna A. Noto, *Internet Tax Bills in the 107th Congress: A Brief Comparison*, CRS Report for Congress RL31158, Dec. 6, 2001.

V. FRAMING THE INTERNET TAXATION DEBATE

Although debates surrounding these policy questions are often liberally sprinkled with mentions of new technology, innovation, and the future, these questions are firmly rooted in our understanding and historical treatment of the mail-order business—a business at least as old as Sears, Roebuck and Co., which was founded in 1893.[34] In fact, as *Quill* made clear, the first two areas of concern listed above—defining "substantial nexus," and compelling out-of-state vendors to collect use taxes from consumers—would be of concern to Congress had Internet commerce never been invented.

Some advocates of broadly expanding states' ability to collect use taxes argue that Internet sales are wholly different from mail-order purchases, and that the Internet has somehow created a legal loophole that makes large new classes of transactions exempt from sales taxes. From the customer's standpoint, however, the most significant difference between Internet and mail-order businesses is that current Internet servers are able to hold a large amount of product data, thereby making it accessible online. Traditional mail-order businesses rely primarily on the presence of a physical, mailed catalog to provide customers with data.

While online servers also offer links to other product sites and access for anyone with Internet service, both mail-order and online systems utilize telecommunication and mail to acquire information, place product orders, and deliver products. Modern broadband systems may have increased the data bandwidth coming into the home, but the same fiber-optic backbone that is used to access Amazon.com may carry the long distance call to the L. L. Bean catalog sales department.

The second concern—the ostensible "loophole problem"—is a common misconception that distorts current taxation law. Today, all *intrastate* Internet transactions, like all intrastate mail orders, are fully subject to any existing state sales and use tax regimes. Moreover, *interstate* Internet transactions are subject to existing sales tax regimes to the extent that the four-part standard including a physical presence requirement under *Quill* has been met. For example, online purchases from Wal-Mart or Barnes & Noble are subject to sales tax collected from all customers living in states in which those retailers have an outlet or storefront.

The presence of a large storefront aside, the Court in *Quill* noted that legislative clarification of the "nexus" standard is well within the prerogatives of Congress. By offering a statutory rule, Congress can permit state and local jurisdictions to tax sales from Internet companies within

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[34] *See* Infoplease, *Richard Warren Sears*, *at* http://www.infoplease.com/ipa/A0772557.html.

their borders, while setting uniform standards for businesses operating across state lines through mail-order sales or the Internet.

Perhaps no piece of legislation lays the foundation for the "nexus" debate better than The New Economy Tax Fairness ("Net Fair") Act.[35] Based directly upon the *Quill* "nexus" standard, and at the majority recommendation of the Advisory Commission on Electronic Commerce, the Net Fair bill codifies the nexus requirement.[36] Specifically, the Act allows states to require companies to collect sales and use taxes only where the business has a physical presence in the state.[37] As Congress weighs methods of regulating Internet taxation, the NET FAIR Act—or a proposal of similar construction—should prevail. Such a statute is constitutionally grounded, does not interfere with interstate commerce, and offers a clear and economically sensible solution to the e-commerce sales and use tax dilemma.

Thus the decision for policymakers is not whether to update laws in order to address a new class of transactions that technology has made possible and are currently unregulated. Rather, it is whether to authorize states to establish interstate taxing compacts and thereby force out-of-state entities or third parties to collect taxes on their behalf. This broad new power would enable states to tax certain interstate transactions, which are effectively protected against such interference under current law. Alternatively, as prompted by *Quill*, Congress could choose to clarify or reaffirm the definition of "substantial nexus."[38]

VI. The Arguments Against Internet Taxes

A. Expanded Taxation of Internet Sales Represents an Unduly Burdensome Tax Increase on Consumers

Proposed federal legislation has the potential to increase taxes on consumers in several ways: in some, a lifting of the current tax moratorium would allow states to approve new access charges for Internet service; in others, states would also be free to place specific taxes on interstate transactions or services; and finally, some legislation would allow states to begin taxing interstate retail sales in toto.[39]

By authorizing states to compel out-of-state vendors to collect and remit sales taxes, Congress would ensure that interstate Internet *and*

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[35] S. 664, 107th Cong. (2001).

[36] *See* Cong. Rec. S3172–73 (daily ed. Mar. 29, 2001) (statements of Sen. Gregg).

[37] *See id.*

[38] *See* New Economy Tax Fairness Act, S. 664, 107th Cong. (2001).

[39] *See, e.g.*, Internet Tax Moratorium and Equity Act, H.R. 1410, 107th Cong. (2001). This legislation would authorize a multi-state compact with the approval of Congress, ultimately allowing interstate taxes. Upon application, any state would be granted the authority to require all out-of-state vendors to collect use taxes from their customers.

mail-order transactions currently protected from sales taxes would become subject to new taxes. Given the existing range and median for retail sales tax rates of taxing jurisdictions, a levy of 5% would represent a reasonable estimate. A lifting of the moratorium on Internet-specific taxes such as access charges could also be expected to increase, on average, the tax burden on consumers.[40] Current estimates of annual revenue collections grandfathered under section 1101(a)(1) of the Internet Tax Nondiscrimination Act are seventy-five million dollars.[41]

It bears emphasis that these Internet sales have never been "outside the law" in any way. Businesses engaged in mail-order and Internet sales are subject to all existing laws and regulation of the states in which they operate. Under proposed "compact" legislation, firms already paying income taxes, property taxes, and payroll taxes in the states where they are organized would then have to collect use taxes from customers residing in dozens of other states.[42] This represents a significant new administrative burden to be borne entirely by businesses and likely to be passed on to customers. These costs would be in addition to the use taxes now imposed by the business upon out-of-state sales. In addition, states have made clear that their overriding objective is to increase their existing revenue bases, i.e., raise taxes, by Internet taxes.

B. Expanded Taxation of Internet Sales Represents a Barrier to Interstate Commerce.

The Supreme Court has held that imposing sales taxes on interstate transactions is a violation of the Commerce Clause if the substantial nexus requirement is not met. To date, Congress has not yet changed that nexus to include non-physically present businesses. By application, such taxes act as a barrier that discourages interstate transactions and the resulting flow of goods and services that enhance economic activity and improve productivity. Of the $445 billion in online sales estimated for the year 2000, over ninety percent was for business-to-business transactions.[43] These transactions, which are not subject to sales or use taxes, are presumably made because of the value they create for customers. New taxes on Internet based services or access will only discourage the growth of this new marketplace and curtail the efficiencies it creates.

These barriers also carry the potential to distort market activity by discouraging solicitations or sales through certain media, or encouraging location and relocation to states which remain free from sales taxes. With

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[40] Hawaii, New Mexico, North Dakota, Ohio, South Dakota, Tennessee, Texas, and Wisconsin levy their retail sales tax on Internet access. *See* Noto, *supra* note 9, at 7.

[41] *See id.* at 8 (citing Federation of Tax Administrators estimate for fiscal year beginning July 1, 2000).

[42] *See, e.g.*, Internet Tax Moratorium and Equity Act, H.R. 1410.

[43] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 763 (2000).

mandated sales taxes or access charges, the incentive to relocate overseas may bring unintended harm to onshore business activity.

C. Sales Tax Compacts Place a Unique Burden on a New Technology

The use of the Internet in commerce has grown primarily because of the value it provides to consumers. In the general privacy of one's own home, the Internet offers a breadth of vendor and product choices, detailed information, and convenience through access on demand. Growth rates for retail and business-to-business Internet commerce during 2000 were 91% and 130%, respectively.[44]

A new tax, however, discourages use by increasing prices, thereby stifling innovation and exploration of a new technology. Moreover, a reduction in utilization or innovation of the technology could adversely affect smaller, traditional "Main Street" operations for whom technology holds the potential to open new market opportunities at a relatively low cost.

VII. The Arguments for Internet Taxation

One of the principal arguments for authorizing state compacts for Internet taxation is that states risk losing growing levels of revenue to interstate, non-taxable sales. The National Governors Association goes so far as to claim $439 billion in lost tax revenue by 2011.[45] Through 1998, however, general sales tax growth has remained consistent, rising by 5.7%, or $155.967 billion, from 1997 levels.[46] More recent estimates place the total volume of Internet consumer sales at less than $15 billion in 1998 and estimates of revenue lost of the year at $210 to $430 million, less than .05% of total sales tax revenue.[47]

Moreover, this estimate of potential revenue gains must be traded off against administrative costs for implementation and enforcement, as well as against economic costs associated with lower productivity rates due to higher barriers to interstate commerce.

Proponents also argue for Internet taxation by arguing that current law should be modified to adjust for changes in technology. This line of reasoning better suits circumstances when technology allows individuals to *evade* existing laws; for example, modifying wiretap laws to accommodate wireless technology, or mail-fraud laws to encompass illegal acts that are committed via the Internet. Internet-based sales, however, are no

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[44] *Id.*

[45] *See* Nat'l Governors Ass'n, Sales Tax Simplification, *available at* http://www.nga.org/nga/newsRoom/1,1169,C_PRESS_RELEASE^D_2635,00,00.html.

[46] U.S. Census Bureau, Statistical Abstract of the United States 316 (2000).

[47] Austan Goolsbee & Jonathan Zittrain, *Evaluating the Costs and Benefits of Taxing Internet Commerce*, 52 Nat'l Tax J. 413 (1999).

different from orders placed over the phone, or through the mail. An improvement in the means for placing a remote order should not require a change in law. Moreover, like mail-order transactions, many Internet transactions are taxed based upon the operating structure and physical presence of the seller.

Finally, proponents of Internet sales tax compacts emphasize the need for a "level playing field," the absence of which purportedly has grave effects upon traditional storefront retailers.[48] This argument fails on several levels. For example, many traditional storefront retailers are among those who have exploited this medium most effectively. With Web site creation and maintenance available to even the smallest of businesses for less than $1,000 per year, firms have the ability to reach customers across the country or even overseas as never before. Mail-order and Internet-based firms also bear higher costs in areas unique to their business model, including shipping costs, information system management, and online customer service. Lastly, firms engaged in interstate transaction are still liable for payroll taxes, local property taxes, business profit taxes, and telecommunication taxes with the state where they maintain a physical presence. In this regard, it is important to emphasize that economic climate, more than any other factor, determines revenue growth rates at the state, local, and federal level.

VIII. CONCLUSION

The modern infrastructure of the Internet spans continents, not just states. To access the Internet for any reason other than pure entertainment is to participate in interstate—or perhaps global—commerce. Advertising, promotion, information, and products are all provided at the click of a mouse through a distribution system that renders state and national borders effectively meaningless. Even as states retain the right to tax local phone lines, property, and in-state commerce, taxes on Internet access itself are taxes on interstate commercial activity. For Congress to cede this authority to states would be unprecedented and bad policy.

Rather than promoting interstate commerce, Internet access charges would discourage such commerce. Rather than expanding the availability of electronic commerce to all households, Internet access charges would discourage broader availability. Instead of promoting technological innovation, higher taxes would reduce the market as well as the returns of new product development.

Similarly, laws authorizing states to require all businesses to collect use taxes would create an unprecedented new system of revenue collec-

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[48] *See* CONG. REC. H6804–05 (daily ed. Oct. 16, 2001) (statements of Cong. Delahunt and Cong. Istook); *see also* H.R. REP. No. 107-240, at 49 (2001) (statement of Cong. Nadler).

tion. No state would forego participation in a compact when all other states are forcing businesses to collect taxes from its own citizens for use by outside governments.

It is difficult to imagine a multi-state compact that is not joined by all states that impose sales taxes; with the requirement for a physical nexus no longer effective, only firms with an offshore location would retain the advantage of sales protected from retail taxes. This not only acts to discourage Internet retailers from basing operations in the United States, but also would draw offshore the accompanying investments in product development and human capital associated with this emerging industry.[49]

As November 1, 2003 approaches, these concerns will be weighed against one simple factor: money. As revenue from electronic commerce grows, so will estimates of revenue losses from citizens avoiding use taxes. Perhaps, however, the realities of Internet commerce growth—like the stock valuations of the start-ups that spawned the industry—will be more mundane, but no less worthwhile, than as portrayed by much of the current hyperbole touting it as a revenue-loser rather than an economic-winner. In such an environment, at least, policy makers can carefully consider the precedents they set at least as much as the new taxes they hope to collect.

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[49] *See* J. Clifton Fleming, Jr., *Electronic Commerce and the State and Federal Tax Bases*, 2000 BYU L. REV. 1 (2000) (explaining that businesses, including Microsoft, IBM, and AT&T, could relocate offshore to escape state and local consumption taxes, as well as avoid federal tax liabilities).

ESSAY

INCENTIVE STOCK OPTIONS AND THE ALTERNATIVE MINIMUM TAX: THE WORST OF TIMES

FRANCINE J. LIPMAN*

Congress enacted the Alternative Minimum Tax ("AMT") to stop high-income individuals from escaping their tax liabilities through tax code loopholes. In recent years, increasing numbers of moderate-income taxpayers have been subject to astronomical AMT liabilities. The problem has been especially acute for technology sector employees who exercised stock options while the market was high, sold their stock after its value fell, and found themselves owing AMT they could not afford to pay. In this Essay, Professor Lipman explains the Internal Revenue Code's complicated treatment of Incentive Stock Options ("ISOs"). She argues that the AMT adjustment for ISOs should not be eliminated, but suggests several reforms to simplify tax treatment of ISOs and reduce the number of taxpayers who are subject to AMT.

I. INTRODUCTION

A. *"The Best of Times"*

The 1990s were the decade of employee stock options.[1] Employees from the Silicon Valley to high-tech areas along the East Coast demanded and negotiated compensation packages that included grants of stock options. As the stock market continued to soar into record territory through

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[1] The number of employees actually receiving stock options increased from less than one million at the beginning of the 1990s to about ten million by the end of the decade. Corey Rosen, *Five Common Myths About Stock Options*, Feb. 2002, *at* http://www.nceo.org/library/option_myths.html (last visited Mar. 20, 2002); *see also* Liz Pulliam Weston, *Stock Options Add Tax Wrinkle for Many 'Dot-Com' Employees*, L.A. TIMES, Dec. 22, 2000, at C1 (citing National Center for Employee Ownership statistics demonstrating that the number of American workers eligible to receive stock options increased from 2.5 million in 1992 to 14.0 million in 1999). More than ten million employees in America own stock options today with an estimated value of between $500 billion and $1.2 trillion. Jennifer Nelson, *Opting In*, BLOOMBERG NEWS, Aug. 13, 2001, *available at* LEXIS, News Library, Bloomberg File; *see also* David M. Schizer, *Executives and Hedging: The Fragile Legal Foundation of Incentive Compatibility*, 100 COLUM. L. REV. 440, 442 (2000) (citing John Helyar & Joann S. Lublin, *Corporate Coffers Gush With Currency of an Opulent Age*, WALL ST. J., Aug. 10, 1998, at B1).

the spring of 2000,[2] everyone wanted a piece of the growing stock-market pie.[3] Stories about overnight millionaires among the ranks of youthful and enthusiastic "dot.comers" made headlines in newspapers, magazines, and on the Internet.[4] Employees and independent contractors, including lawyers and accountants, increasingly sought equity interests in employers or clients in lieu of cash compensation.[5] More and more companies adopted broad-based stock option plans and granted stock options to all levels of employees.[6] Employees desiring to minimize their tax costs preferred tax-favored incentive stock options ("ISOs").[7] In response, numerous corporations created ISO plans and granted their employees ISOs as part of their compensation packages.[8]

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[2] *See* Tom Petruno, *For Nasdaq, A Bittersweet Anniversary; Two Years After Reaching Its Peak, The Market is Rallying, But Will Investors Ever See 5,000 Again?*, L.A. TIMES, Mar. 10, 2002, at Bus.1 (stating that the Dow index set a record high of 11,722 in January 2000 and the Nasdaq index set a record high of 5049 in March 2000).

[3] *See Personal Wealth: Money Isn't Everything in Salary Negotiations*, BLOOMBERG NEWS, Feb. 7, 1996, *available at* LEXIS, News Library, Bloomberg File (quoting one compensation executive that guaranteed bonuses, perks, and even base salaries "are out of vogue" and that "incentives and stock options are in"); Matt Richtel, *Need for Computer Experts Is Making Recruiters Frantic*, N.Y. TIMES, Nov. 18, 1999, at A1 (noting that recruiters entice computer technicians and engineers with generous perquisites, including stock options).

[4] *See* Michael S. Malone, *Nerds' Revenge: A How-To Manual*, N.Y. TIMES, Feb. 18, 1996, § 3, at 1 (noting that after initial public offering, Netscape employees had instant personal fortunes); Eryn Brown, *Fortune's 40 Under 40: Valley of the Dollars; The Young, Wealthy Netheads of San Francisco and Silicon Valley Protest That It's Not About the Money. Give Us A Break*, FORTUNE, Sept. 27, 1999, at 100 (stating that "[m]ost people who have a few million dollars have been compensated in options from one of the big superstar companies"); Judith H. Dobrzynski, *Chief Executive Puts Stock-Only Pay to Ultimate Test*, N.Y. TIMES, Oct. 4, 1996, at D1 (describing chief executive of Ingram Micro, Inc.'s stock option-only compensation package).

[5] *See* Michael McDonald, *California 'Model' Had Law Firms in New York Chasing Fool's Gold; Equity Stakes, Expensive Staffs Don't Pan Out*, CRAIN'S N.Y. BUS., Mar. 26, 2001, at 13 (noting that "Brobeck's decision to take equity stakes as part of its fee seemed like genius" and that Shearman & Sterling and Wilson Sonsini also took fees in clients' stock in lieu of cash).

[6] For example,

> Research by Joseph Blasi at Rutgers University found that 97 of the top 100 e-commerce companies offer options to most or all employees. A 1997 survey of 1,100 public companies conducted by ShareData, Inc., and the American Electronics Association found that 53% of respondents provide options to all employees. A 1999 William Mercer study showed that options are popular in all kinds of public companies, with 17% of large public companies offering options to most or all employees.

Employee Stock Options Fact Sheet, 2002, *at* http://www.nceo.org/library/optionfact.html (last visited Mar. 20, 2002).

[7] *See* DENNIS R. LASSILA & BOB G. KILPATRICK, U.S. MASTER COMPENSATION TAX GUIDE ¶ 1502.02 (2d ed. 1999). ISOs provide favorable tax treatment compared to other forms of compensation. *See* Thomas Z. Reicher et al., *Statutory Stock Options*, 381 Tax Mgmt. (BNA), at A18 – A19 (2001); *see also infra* Part II.B.3.

[8] *See New Data Show Venture-Backed Companies Still Issue Options Broadly*, 2002, at http://www.nceo.org/library/option_venturebacked.html (last visited Mar. 20, 2002) (not-

B. "The Worst of Times"

Then the stock market bubble burst, and the unbridled exuberance transformed itself into rising unemployment, dramatic capital losses for investors, vacancies for property owners, and recession.[9] For many employees, lay-offs and retirement-plan losses were only the beginning of the worst of times. Just when they thought things could not get any worse, the tax man poured salt into their wounds.

Employees who enthusiastically exercised ISOs during the 2000 tax year, believing that their "phantom gains" were tax free, soon discovered that they owed massive amounts of Alternative Minimum Tax ("AMT").[10] The employees incurred AMT on their economic income from the exercised options, measured as of the date of exercise, even though much of this paper income had disappeared long before the end of the 2000 tax year.[11] In many cases, the AMT consequences of ISO exercises took unsuspecting employees by surprise and caught them without sufficient cash to pay their AMT on April 15, 2001.[12]

As these unsuspecting employees work through their financial and emotional challenges, many have joined together in a grassroots effort to change the tax law.[13] This effort is exemplified by ReformAMT, a grassroots tax reform informational and advocacy group.[14] The movement to

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ing that 82% of 275 high-tech companies recently surveyed provide ISOs rather than nonqualified stock options and that 62% provide only ISOs).

[9] *See* Richard W. Stevenson, *Economists Make It Official: U.S. Is in Recession*, N.Y. TIMES, Nov. 27, 2001, at C1 (stating that the National Bureau of Economic Research has concluded that the U.S. economy entered a recession in March of 2001); Leslie Eaton and Jayson Blair, *Silicon Alley's Dimming Lights*, N.Y. TIMES, Oct. 27, 2000, at B1; *see also The Tech Economy: Silicon Valley Party Literally Over; Once-Vibrant Dot-Com Bash Scene Among Casualties of Area's Burst Bubble*, INVESTOR'S BUS. DAILY, May 18, 2001, at A4 (estimating that 327 internet companies folded between January 2000 and February 2001 and 8,000 high-tech workers in Silicon Valley lost their jobs from October to May 2001).

[10] *See* Ryan J. Donmoyer, *Riches to Rags: Workers Ambushed by Tax on Options*, BLOOMBERG NEWS, Aug. 8, 2001, *available at* LEXIS, News Library, Bloomberg File (stating that internet and technology workers who received and lost millions of dollars of stock value from year 2000 option exercises want Congress to relieve them from more than $1 billion of AMT). Congress enacted the AMT in 1969 in response to concern that certain high-income individuals were using deductions and exclusions available in the regular income tax system to avoid paying any tax. H.R. REP. No. 91-413, at 9–10 (1969). The AMT system operates in addition and parallel to the regular income tax system to ensure that these taxpayers pay a minimum amount of tax. *See* I.R.C. § 55 (All I.R.C. references in this Essay are to the 2001 version).

[11] *See* Matt Richtel, *Stock Option Blues: Slide Leaves Little but a Big Tax Bill*, N.Y. TIMES, Feb. 18, 2001, § 1, at 1.

[12] *See id.*; *see also* Donmoyer, *supra* note 10 (describing one taxpayer's $1.9 million AMT debt and financial ruin).

[13] *See* Liz Pulliam Weston et al., *Tech Workers' Stock Options Turn into Tax Nightmares*, L.A. TIMES, Apr. 13, 2001, at A1.

[14] For information about the organization's mission, see the ReformAMT Web site, *at* http://www.reformamt.org (last visited Mar. 20, 2002). In March 2002, ReformAMT had about 1590 members. *See* ReformAMT Geographic Membership, *at* http://www.kls2.com/

reform the AMT has attracted support from many members of Congress.[15] Senator Joseph I. Lieberman (D-Conn.) and House Ways and Means Committee member Richard E. Neal (D-Mass.) have introduced legislation to provide tax relief for individuals who exercised ISOs during calendar year 2000.[16] These bills have bipartisan support and an estimated cost of $1.3 billion over ten years.[17] ReformAMT acknowledges that its cause may not garner sympathy from those who believe that its members are just "dot.com millionaires who do not want to pay their taxes."[18] However, ReformAMT has made admirable strides in focusing attention on the AMT system. This attention is critical and timely. Recent estimates indicate that the AMT will generate more than $600 billion of tax revenue through 2011 and, more significantly, by 2010 will impact approximately thirty-three percent of all taxpayers, most of whom are not dot.com millionaires.[19]

C. The AMT and the Exercise of ISOs

This Essay argues that, while extensive reform of the AMT is necessary, the exercise of ISOs should continue to result in a positive AMT adjustment to regular taxable income, and thus remain subject to AMT taxation. Congress enacted the AMT to ensure that high-economic income individuals who reduce their regular tax liability through income exclusions or deductions pay some amount of tax. The positive AMT adjustment for ISO exercises ensures that employees who realize a significant amount of otherwise excluded bargain purchase income pay some tax. Elimination of this adjustment would be inconsistent with congressional intent to limit ISO benefits and to tax individuals with high economic income.

The exercise of an ISO results in an employee's realization of economic income equal to the positive difference between the fair market

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reformamt/geomembers.html (last visited Mar. 20, 2002).

[15] For a list of AMT-related legislation, see Active Legislation, *at* http://www.reformamt.org/legislation.php (last visited Mar. 20, 2002).

[16] *See Lieberman Bill Would Provide AMT Relief for Incentive Stock Options*, 92 TAX NOTES 1196 (2001); *Neal Bill Would Provide AMT Relief for Incentive Stock Options*, 92 TAX NOTES 1194 (2001); *see also* Active Legislation, *at* http://www.reformamt.org/legislation.php (last visited Mar. 26, 2002). On April 4, 2001, Representative Zoe Lofgren (D-Cal.) sponsored a bill in the House of Representatives, H.R. 1487, which would repeal the AMT adjustment for ISO exercises in 2000 and thereafter. *See* 147 CONG. REC. H1487 (daily ed. Apr. 4, 2001).

[17] *See Lieberman Bill Would Provide AMT Relief for Incentive Stock Options*, 92 TAX NOTES 1196 (2001); Sponsorship of H.R. 2794 (noting that twenty-four Republicans and twenty-four Democrats are sponsors), *at* http://www.kls2.com/cgi-bin/hrspon?bill=hr2794 (last visited Mar. 21, 2002).

[18] *See* About ReformAMT, *at* http://www.reformamt.org/about.php (last visited Mar. 20, 2002).

[19] *See* Heather Bennett, *EGTRRA Will Subject 'Startling' Number of Taxpayers to AMT By 2010*, 93 TAX NOTES 1150, 1150–51 (2001).

value of the stock at the date of exercise and the exercise price paid ("bargain purchase income"). In the case of the exercise of a non-qualified stock option ("NQSO"),[20] or of most other employee purchases of assets for less than market value ("bargain purchase"), this bargain purchase income must be included in an employee's gross income and is subject to income and payroll taxes as compensation.[21]

Qualifying exercises of an ISO receive favorable tax treatment.[22] The bargain purchase income realized through the exercise of an ISO is specifically excluded from gross income.[23] However, Congress has limited this favorable treatment by including ISO bargain purchase income as a positive AMT adjustment to regular taxable income to determine whether a taxpayer owes AMT.[24] The AMT was enacted to impose tax liability on high-income individuals who otherwise could avoid paying taxes through artful manipulations of deductions and exclusions.[25] Given this congressional intent, it is appropriate to include otherwise excludable economic income such as ISO bargain purchase income as a positive AMT adjustment and subject it to AMT to limit the extent to which individuals can escape tax liability.

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[20] Options that do not qualify for tax-favored treatment under I.R.C. § 421 are NQSOs. Any income an employee realizes from the exercise of NQSOs is subject to ordinary income and payroll taxes under the general rules for transfers of property for services. *See* I.R.C. § 83.

[21] Any benefit an employee receives from her employer must be included in gross income as compensation subject to ordinary income and payroll taxes, unless Congress has specifically excluded it. *See* I.R.C. §§ 61(a), 83 (defining gross income for ordinary income tax); *id.* § 3121(a) (defining wages for payroll tax). Thus when an employee realizes bargain purchase income from her exercise of an NQSO or other bargain purchase, the income is usually subject to taxation. In such purchases, the employee receives a benefit from her employer, in that she can purchase stock or some other asset at a price below its fair market value. This is analogous to a cash bonus to buy the asset. Like any cash payment, bonus, fringe benefit, or other accession to wealth, this benefit must be included in gross income unless Congress specifically has excluded it. *See id.* §§ 61(a), 83.

[22] Congress instituted tax-favored employee stock options, that is, ISOs, in 1981 under the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 251, 95 Stat. 172, 256–59 (amending I.R.C. §§ 421–25). An employee who receives ISOs from her employer does not have to recognize any compensation on the grant or exercise of the ISOs. *See* I.R.C. § 421(a)(1). Moreover, when the employee sells her ISO stock, any appreciation is subject to tax at favorable long-term capital gains tax rates. *See id.* § 1(h) (setting a maximum long-term capital gains tax rate of 20%). Thus, tax-favorable treatment for ISOs effectively converts compensation (currently subject to ordinary income tax rates of up to 38.6%) into long-term capital gains (subject to tax rates up to 20%) and defers recognition of any capital gain until the employee decides to sell the stock. *See id.* §§ 1(h)–(i), 1001, 1222; Rev. Proc. 2001-59, 2001-52 I.R.B. 623, § 3.01.

[23] *See* I.R.C. §§ 421(a)(1), 422(a).

[24] *See id.* § 56(b)(3). As a result, if an employee's alternative minimum taxable income—including bargain purchase income—is large enough, she may have to pay AMT on the bargain purchase income in the year of exercise. *See id.* § 55(b).

[25] *See* H.R. REP. No. 91-413, at 9–10 (1969). A study of 1966 high-income tax returns found 154 taxpayers with adjusted gross incomes greater than $200,000 who nonetheless had no income tax liability. Twenty-one of the taxpayers in the study had incomes of over $1 million. DANIEL J. LATHROPE, THE ALTERNATIVE MINIMUM TAX: COMPLIANCE AND PLANNING WITH ANALYSIS ¶ 1.01 (1994).

While many ISO exercisers experienced significant adverse AMT consequences in 2000, the problem is not that they are unique in having to pay tax on assets that have declined significantly in value. The same tax consequences result whenever any taxpayer acquires an asset with after-tax dollars and the asset subsequently declines in value. The taxpayer has realized and recognized income and must pay any applicable taxes. If the taxpayer uses her after-tax dollars to make an equity investment that subsequently declines, she cannot then adjust the original amount of income recognized to reflect the asset's later value. The taxpayer will only recognize a tax loss and reduce her tax liability if she sells her equity holding at a loss, and this tax loss would be significantly limited under the current capital loss limitation rules.[26]

In fact, taxpayers exercising ISOs benefit from an exceptional exclusion from regular income tax on their realized economic income.[27] If this realized economic income is significant, then the taxpayer might be subject to the AMT. However, the maximum marginal AMT rate is only 28%, versus the current highest marginal ordinary income tax rate of 38.6%.[28] Therefore, even if ISO bargain purchase income is subject to AMT, it is subject to taxation at a lower rate than the applicable tax rate for ordinary income not excluded under the regular income tax system.

The real problem is the extreme complexity and lack of transparency in the federal income tax system. Taxpayers who exercise ISOs often do not understand that there are any income tax consequences, so they do not act in an informed manner to plan the exercises optimally.[29]

Part II of this Essay begins with a brief explanation of the AMT followed by a presentation of the current state of the tax consequences of transactions involving ISOs and NQSOs. Understanding these consequences is challenging because of the extreme complexity of the relevant

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[26] *See* I.R.C. § 1211(b) (limiting tax losses from the sale or exchange of a capital asset to the amount of capital gains plus up to $3,000 ($1,500 for married taxpayers filing separately)).

[27] Exclusion from gross income is the exception to the general rule of inclusion. *See id.* § 61. Unless specifically excluded, benefits received by employees from their employers are included in gross income as compensation. *See id.* Employee benefits such as certain life insurance benefits, cash bonuses, certain meal and moving allowances, and bargain purchases, including the exercise of an NQSO, must be included in gross income as compensation. *See id.* §§ 61, 79, 82, 83, 132. However, the bargain purchase income an employee realizes from the exercise of an ISO is excluded specifically from gross income. *See id.* § 421.

[28] *See id.* § 55(b)(1)(A)(i) (AMT rates); Rev. Proc. 2001-59, 2001-52 I.R.B. 623, § 3.01 (setting forth 2002 individual regular income tax rates ranging from 10 to 38.6%).

[29] *See* Weston, *supra* note 1, at C1 (describing widespread misunderstanding regarding tax consequences of ISOs and communication of misinformation by companies to their own employees); *see also* Amy Hamilton, *Advocate Sends Simplification Proposals to Congress*, 94 TAX NOTES 7, 8 (2002) (National Taxpayer Advocate Olson comments that, due to the AMT's complexity, a large number of taxpayers do not know that they have AMT liabilities.).

tax law.[30] After working through the intricacies of the general tax consequences presented in Part II, the reader should appreciate the complexity of congressional efforts and the confusion of affected taxpayers.

Part III explains the ever-growing problems in the AMT system. This explanation includes an overview of ReformAMT, its members, and its grassroots efforts to educate the public and Congress about the impact of the AMT on ISO exercisers. It also describes legislative responses to ReformAMT's concerns and lobbying efforts. Part III then details the most commonly proposed modifications to the AMT, which do not include elimination of the positive AMT adjustment for the bargain purchase income realized from an ISO exercise. They do include indexing the AMT system for inflation and allowance of state and local tax and personal and dependency exemptions as deductible items under the AMT.[31] These model reforms should decrease significantly the number of taxpayers subject to the AMT, including some ISO exercisers. By simplifying the AMT, taxpayers, including ISO exercisers, should be able to understand better the application of and calculations for the AMT. Taxpayers who understand how the simplified AMT operates should be able to manage the exercise of their ISOs more efficiently to minimize their overall tax costs, including any AMT.

Part IV describes why the elimination of the positive AMT adjustment for the bargain purchase income resulting from an ISO exercise is not a desirable AMT reform. While Congress provided tax-favored treatment for ISOs,[32] it also imposed certain limitations on these tax benefits.[33] Along with qualifications on the favored treatment of stock options under the regular income tax,[34] if ISO benefits and other income received exceed certain thresholds, then the ISO bargain purchase income is subject to AMT.[35] Congress enacted the AMT to ensure that taxpayers with significant economic income pay some tax.[36] This Essay argues that the positive AMT adjustment for the economic income realized by an

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[30] Daniel Shaviro, *Tax Simplification and the Alternative Minimum Tax*, 91 TAX NOTES 1455, 1457–58 (2001) (noting that taxpayers annually spend over 29 million hours completing and filing the AMT tax form and that more than ten percent of tax returns with AMT—most of which were completed by paid preparers—had errors in the AMT calculation); Hamilton, *supra* note 29, at 8 (National Taxpayer Advocate states that the fifty-four-line AMT form, with ten pages of instructions and a thirteen-line worksheet, is too complicated for taxpayers to use without professional help).

[31] Currently, taxpayers must add back deductions for state and local taxes and personal and dependency exemptions to compute alternative minimum taxable income. *See* I.R.C. § 56(b)(1)(A)(ii), (b)(1)(E). Under the proposed AMT reforms, they would not have to add back such deductions and exemptions. The reforms would also increase exemption amounts and index tax rates and exemptions for inflation. This would reduce potential AMT liability and thus decrease the number of taxpayers paying AMT. *See infra* Part III.C.

[32] *See* I.R.C. §§ 421(a), 422(a).

[33] *See id.* § 422(b)(1)–(6), (d).

[34] *See id.*

[35] *See id.* §§ 56(b)(3), 55(b).

[36] *See* H.R. REP. No. 91-413, at 9–10 (1969).

ISO exerciser is consistent with congressional intent to limit ISO benefits and to ensure that high economic income individuals have tax liability.

Part V demonstrates that the AMT treatment of ISOs merely puts them on par with other employee benefits, including NQSOs and other employee bargain purchases.[37]

II. THE AMT AND EMPLOYEE STOCK OPTIONS

A. What Is the AMT?

Congress instituted the AMT as a separate tax system that would parallel the regular income tax system by creating tax liability for certain individuals who otherwise would have none. The Code imposes the AMT on every taxpayer subject to the regular tax.[38] The AMT system is basically a flat tax that applies the same tax rate to all classes of taxpayers, whether married, single, or head of household.[39] The manner in which income is computed for AMT purposes often translates into a higher tax liability.

Taxpayers compute their AMT using an expanded tax base called alternative minimum taxable income ("AMTI"),[40] which is determined by adding or subtracting certain listed adjustments and preferences to regular taxable income.[41] These adjustments and preferences include, inter alia, all state and local taxes, deductible miscellaneous itemized deductions, certain interest on home equity loans, the standard deduction, all personal and dependency exemptions, the bargain purchase income realized in an ISO exercise, the exclusion for capital gains on the sale of qualified small business stock, and certain accelerated depreciation deductions.[42] Taxpayers then subtract an exemption amount to determine the "taxable excess."[43] The exemption amount is phased out completely when AMTI exceeds a certain threshold dollar amount.[44] After determining "taxable excess," the taxpayer calculates "tentative minimum tax" by applying a tax rate of 26% on the first $175,000 of taxable excess, and a 28% tax rate on the balance.[45] If a taxpayer's tentative minimum tax is

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[37] *See* J. COMM. ON TAXATION, 106TH CONG., OVERVIEW OF FEDERAL INCOME TAX PROVISIONS RELATING TO EMPLOYEE STOCK OPTIONS, JCX-107-00, at 2 (2000) (stating that ISO transactions under the AMT are treated the same as NQSO transactions).

[38] I.R.C. § 55(a).

[39] Michael J. Graetz, *The 1982 Minimum Tax Amendments as a First Step in the Transition to a 'Flat-Rate' Tax*, 56 S. CAL. L. REV. 527, 550–554 (1983).

[40] I.R.C. § 55(b)(2).

[41] *Id.*

[42] *Id.* §§ 56–57.

[43] *Id.* § 55(d).

[44] *Id.*

[45] *Id.* § 55(b)(1).

higher than the taxpayer's regular income tax, the taxpayer must pay the higher amount.[46]

B. ISOs

1. ISOs Explained

Congress has provided special tax-favored rules for ISOs.[47] The Code's ISO provisions allow an employee to convert ordinary income realized from the performance of services, which currently is subject to a maximum federal marginal income tax rate of 38.6%,[48] into long-term capital gain, which currently is subject to a maximum federal capital gain tax rate of 20%.[49] Moreover, the employee recognizes capital gain at the time that she sells her shares, not when she receives them through her bargain purchase. Other transfers of property for the performance of services are subject to tax at ordinary income tax rates at the time of the transfer of property.[50] Accordingly, ISOs provide employees with two significant tax-favored treatments: (1) the bargain purchase income of the ISO is subject to tax at preferential long-term capital gain tax rates; and (2) recognition of income is deferred until the shareholder engages in a sale or exchange of the ISO stock.

The Senate Finance Committee enacted the ISO provisions in 1981 with the intention of "provid[ing] an important incentive device for corporations to attract new management and retain the service of executives, who might otherwise leave, by providing an opportunity to acquire an interest in the business."[51] Congress believed that encouraging "management of a business to have a proprietary interest in its successful operation [would] provide an important incentive to expand and improve the profit position of the companies involved."[52]

Many academics and business executives question whether stock options accomplish this objective.[53] Economic studies regarding the ef-

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[46] *Id.* § 55(a).

[47] *Id.* § 421.

[48] *Id.* § 1(a)–(d); Rev. Proc. 2001-59, § 3, 2001-52 I.R.B. 623 (setting forth 2002 tax rate tables for individual taxpayers under I.R.C. § 1(a)–(d), with ordinary income tax rates ranging from 10% to 38.6%).

[49] I.R.C. § 1(h).

[50] *Id.* § 83 (gross income includes the transfer of property for services to the extent of the excess of the fair market value of the unrestricted property over the amount, if any, paid for such property).

[51] S. REP. No. 97-144, at 98 (1981).

[52] *Id.*

[53] *See* James R. Repetti, *Accounting and Taxation: The Misuse of Tax Incentives to Align Management-Shareholder Interests*, 19 CARDOZO L. REV. 697, 701 (1997) (quoting Warren Buffett's observation in 1985 that "[o]nce granted the option is blind to individual performance. Because it is irrevocable and unconditional (so long as a manager stays in the company), the sluggard receives rewards from his options precisely as does the star.").

fectiveness of stock options in enhancing business profits are inconclusive: "Although some studies conclude that the stock market reacts positively to the initial adoption of stock option plans, most studies are uncertain about whether stock options or increased executive stock ownership actually contribute to corporate profitability."[54]

At least one commentator suggests that congressional skepticism about ISOs' motivational effectiveness led Congress to enact the AMT in order to limit the tax-favored treatment of ISOs.[55] That same commentator, however, criticizes this approach to tax policy and suggests that "[r]ather than express ambivalence in the Code, Congress should eliminate either the favorable regular income tax treatment of incentive stock option provisions or the unfavorable alternative minimum tax treatment."[56] He concludes that Congress should eliminate the favored regular tax treatment, which effectively would obviate the need for any AMT consequences.[57]

2. *Qualification for ISO Treatment Under the Code*

To qualify for favorable tax treatment, the ISO and its holder must satisfy several statutory requirements.[58] The ISO must have been granted to an employee, pursuant to a plan adopted by stockholders, within ten years from the date the plan is either adopted or approved by shareholders, whichever is earlier; the option must not be exercisable after the expiration of ten years from the date of grant; the option cannot be transferable except by will "or by the laws of descent or distribution" and must be exercisable only by the grantee during his lifetime; and it must have an exercise price equal to or greater than the stock's fair market value at the time of grant.[59] The option holder must "not own stock possessing more than 10% of the total combined voting power of all classes of stock of the employer corporation or of its parent or subsidiary corporation."[60] The holder of the ISO must hold the stock purchased under the option for a minimum of two years from the receipt of the option and one year from the exercise of the option.[61] Moreover, the holder must be an employee of

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[54] *Id.* (citing, among others, James A. Brickley et al., *The Impact of Long-Range Managerial Compensation Plans on Shareholder Wealth*, 7 J. ACCT. & ECON. 115 (1985) and Kevin J. Murphy, *Corporate Performance and Managerial Remuneration: An Empirical Analysis*, 7 J. ACCT. & ECON. 11, 19, 29, 32 (1985) (finding no statistical relationship between current year's stock option awards and performance)).

[55] *Id.* at 702.

[56] *Id.* at 703.

[57] *Id.* (suggesting an elimination of the favorable regular income tax treatment and revision of provisions in the Code "that contribute to management's tendency to behave inefficiently.").

[58] I.R.C. § 422.

[59] *Id.* § 422(b)(1)–(5).

[60] *Id.* § 422(b)(6).

[61] *Id.* § 422(a)(1).

the issuer, or its parent or subsidiary corporation, at all times from the grant of the ISO until three months before its exercise.[62]

In addition to these conditions, Congress also has limited the tax-favored benefits of ISOs through a $100,000 per year limit. The aggregate fair market value of stock with respect to which ISOs are first exercisable during a calendar year is limited to $100,000 per year, measured at the time of the grant.[63]

3. Tax Treatment of ISOs

a. Grant of an ISO

A transfer of property in connection with the performance of services is an income recognition event for the recipient of the property.[64] The amount of recognizable income is equal to the fair market value of the property less the amount, if any, paid by the recipient for such property (any bargain purchase income).[65] For instance, if an employer gives its employee a new car, the fair market value of the car less the amount, if any, paid by the employee for the car is included in the employee's gross income and is subject to income and payroll taxes.

Under this tax provision, an employer's grant of an ISO to its employee is a transfer in connection with the performance of services that normally would cause an income recognition event for the employee. One of the tax benefits of ISOs, however, is that an employee does not have to recognize any taxable income upon the grant, because the Code and the related Treasury Regulations exclude an ISO grant from classification as a "transfer of property."[66] The Treasury Regulations specifically state that an ISO grant is not a transfer of the underlying property.[67] An employee must recognize income only if an employer transfers property in connection with the provision of services. Because an ISO grant is not a transfer of property, employees do not recognize any income upon the grant of an ISO.

b. Exercise of an ISO: Regular Tax Consequences and AMT Tax Consequences Compared

The primary tax benefit of an ISO is that an employee does not recognize income—either as ordinary income or capital gain—upon the ex-

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[62] *Id.* § 422(a)(2).
[63] *Id.* § 422(d).
[64] *Id.* § 83(a)(1).
[65] *Id.* § 83(a)(1)–(2).
[66] Treas. Reg. § 1.83-3(a)(2) (as amended in 1985).
[67] *Id.*

ercise of the ISO.[68] However, when calculating taxable income for AMT purposes, the bargain purchase income of the ISO must be included in AMTI for the year in which the option is exercised.[69] AMT paid as a consequence of an ISO exercise will result in an AMT credit for use in future tax years.[70] The AMT credit is allowed as an offset against a taxpayer's regular tax liability to the extent of the excess of the regular tax liability over tentative minimum tax.[71] Furthermore, this AMT credit can be carried forward indefinitely.[72]

The tax treatment of the disposition of ISO stock also depends upon whether the stock is disposed of within the statutorily required holding period. The statutory ISO holding period begins on the date the employee exercises her ISOs and ends on the date that is the later of: (1) two years from the date of the ISO grant; or (2) one year from the date on which the ISO stock was transferred to the employee upon ISO exercise.[73]

A qualifying disposition results if the employee disposes of the stock after the end of the statutory period. An employee disposing of ISO stock after the end of the statutory holding period will recognize a long-term capital gain equal to the positive difference between the sale proceeds and the employee's basis in the stock.[74] For regular income tax purposes, an employee's basis in her ISO stock is the exercise price; that is, the dollar amount paid by the employee for the shares of stock.[75] For AMT purposes, an employee's basis in her ISO stock is larger because it includes not just the amount paid by the employee for the shares, but also the bargain purchase income included in the shareholder's AMT in-

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[68] I.R.C. §§ 421(a)(1), 422(a).

[69] *Id.* § 56(b)(3). The "bargain purchase element" or the excess of the fair market value of the ISO stock at exercise over the exercise price is treated as an "item of adjustment" for AMT purposes. Originally, the "bargain purchase element" was a tax preference item. However, the Technical and Miscellaneous Revenue Act of 1988 ("TAMRA") reclassified the item as an item of adjustment, effective with respect to options exercised after 1987. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1007(b)(14)(A), 102 Stat. 3342, 3430. The AMT provisions, I.R.C. § 56(b)(3), provide that the nonrecognition provisions found in I.R.C. § 421 do not apply to the exercise of an ISO for AMT purposes. Therefore, the I.R.C. § 83(e)(1) exclusion from the application of I.R.C. § 83 does not apply. Accordingly, the bargain element is included in AMT income when the holder exercises her ISOs. If the shares received from her exercise are subject to a substantial risk of forfeiture as defined in I.R.C. § 83 and the related Treasury Regulations, the date for the calculation of the preference adjustment and for inclusion of the adjustment in the calculation of AMTI is the date the restrictions lapse. The taxpayer may file an I.R.C. § 83(b) election within thirty days following the exercise of the ISO and, thereby, elect to include the bargain element in income as of the date of exercise, and not when the substantial risk of forfeiture lapses, if at all.

[70] I.R.C. § 53.

[71] *Id.*

[72] *Id.*

[73] *Id.* § 422(a)(1).

[74] *Id.* § 1001. If the employee's basis in her ISO shares is greater than the sale proceeds, she will realize and recognize a capital loss subject to any capital loss limitations. *Id.* § 1211(b).

[75] *Id.* §§ 1011, 1012.

come.[76] The bargain purchase income consists of the positive difference between: (1) the ISO exercise price; and (2) the fair market value of the ISO stock at the time of option exercise.[77]

If an employee disposes of ISO stock before the statutory holding period expires, the disposition is considered a "disqualifying disposition," which is treated differently under the regular income tax system and the AMT system if the ISO exercise and the disqualifying disposition occur in different tax years.[78]

To understand treatment under the regular income tax system, first consider what happens when the stock price increases after the date of exercise. In the case of a disqualifying disposition, the employee generally must recognize the bargain purchase income, measured as of the date of exercise, as ordinary income,[79] and any stock appreciation occurring after the date of exercise is characterized as capital gain.[80] The capital gain will be long-term or short-term, depending upon whether or not the employee held her shares for more than one year after the ISO exercise.[81]

The results change when the stock price decreases after the date of exercise. When the price received by an employee who sells her stock in a disqualifying disposition is less than the fair market value of the stock on the exercise date, the amount of ordinary income she recognizes is the excess, if any, of the amount realized on the sale over her tax basis in her ISO stock.[82] Any recognized loss is fully deductible against the bargain purchase income realized on the date of exercise.[83] Therefore, the amount

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[76] *Id.* § 56(b)(3). An employee's gain on the sale of her ISO stock will be a smaller amount for AMT purposes, because the employee has already recognized as income the bargain element in the exercise of the ISOs.

[77] Under the AMT, I.R.C. § 421 does not apply; therefore, the bargain purchase income resulting from the ISO exercise must be included in AMTI. *Id.* §§ 56(b)(3), 83.

[78] *See supra* note 73 and accompanying text.

[79] Prop. Treas. Reg. § 1.422A-1(b)(1), 49 Fed. Reg. 4507 (Feb. 7, 1984). Because the option has failed to qualify as an ISO, the Code provides that the exercise of the option is treated as any other transfer of property for services. I.R.C. § 83. Accordingly, the employee must include in gross income the excess of the fair market value of the shares of stock (as of the date of exercise) over the amount paid for the stock, if any, in the taxable year in which the disqualifying disposition occurred. *Id.* §§ 83, 421(b); *see also* Reicher et al., *supra* note 7, at A9.

[80] I.R.C. § 1001(c).

[81] *Id.* §§ 1222–1223. For example, on December 28, 1998, Company grants Employee 100 ISOs to purchase shares of Company stock at $15 per share, the fair market value of the stock on the date of grant. On April 15, 2000, Employee exercises all 100 ISOs, when the stock price has increased to $20 per share. On December 31, 2000, Employee sells the shares of stock for $26 per share. The sale of the stock was a disqualifying disposition (that is, the employee did not hold the ISO shares for at least one year from the date of exercise). *Id.* § 421(a)(1). Employee must recognize $500 of bargain purchase income as ordinary income in 2000 ($20 fair market value on date of exercise less $15 amount paid = $5 x 100 shares). *Id.* §§ 83, 421(b). Additionally, Employee must recognize a $600 short-term capital gain in 2000 ($26 sales proceeds less $20 basis in shares sold within one year = $6 x 100). *Id.* § 1001, 1222; *see* Reicher et al., *supra* note 7, at A9.

[82] I.R.C. § 422(c)(2).

[83] *Id.* §§ 56(b)(3), 422(c)(2). For example, using the same facts as set forth in *supra*

of the bargain purchase income recognized is limited to any gain realized on the sale.[84] However, if the loss is not otherwise recognized under the Code, then the entire amount of the bargain purchase income as of the date of the exercise must be included in gross income.[85] The amount of bargain purchase income recognized is added to the employee's basis in her stock.[86] Thus, the stock sale will result in a capital loss, which will be disallowed under the applicable nonrecognition provision.[87] Accordingly, the employee must recognize all of her bargain purchase income measured as of the date of exercise as ordinary income and the subsequent decrease in stock value is characterized as a capital loss. However, the capital loss cannot offset any amount of recognized income, because the Code has otherwise disallowed it (e.g., capital losses resulting from a "wash sale" are disallowed).[88]

The AMT treatment will differ depending on whether or not the disqualifying disposition occurs in the same year as the options are exercised. When a shareholder sells her shares in a disqualifying disposition, her income for regular tax purposes and AMT purposes is the same so long as the sale occurs in the same tax year that she exercised her ISOs.[89] As noted above, under the regular tax system the shareholder has to recognize the bargain purchase income as ordinary income.[90] If the shares are sold for an amount less than the fair market value of the shares on the date of exercise, however, then the amount of ordinary income recognized is limited to any gain realized.[91] Because the regular tax system and the AMT system afford the same treatment, the shareholder will not have

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note 81, assume that Employee sells the shares for $18 (an amount less than the $20 value of the shares on the date of exercise). Employee only recognizes $300 of bargain purchase income as ordinary income in 2000 ($18 sale price less amount paid $15 = $3 x 100 shares). *See* Reicher et al., *supra* note 7, at A10. However, if the loss is not otherwise recognizable (*e.g.*, due to a "wash sale" under I.R.C. § 1091 or related party sale under I.R.C. § 267), then the realized loss cannot be offset against the bargain purchase income. I.R.C. § 422 (c)(2); *see also* Reicher et al., *supra* note 7, at A10–A11; *infra* note 98 and accompanying text (discussing hypothetical application of the "wash sale" rules to Jeffrey Chou). In such case, Employee would have to recognize the bargain purchase income of $500 as of the date of exercise ($20 fair market value at date of exercise less $15 amount paid = $5 x 100 shares). Employee would increase her tax basis in the shares sold by the recognized bargain purchase income. I.R.C. § 1012. Thus, the employee also would realize a capital loss of $200 in 2000 ($18 sales price less $20 tax basis = $2 x 100 shares), which the taxpayer could not recognize under the wash sale rules. *Id.* § 1091(a). These tax consequences are the same for any transfer of property for services, *id.* § 83, where the property is later sold at a loss in a transaction in which the taxpayer cannot recognize the loss. *See, e.g.*, *id.* §§ 1091, 267, 165(c).

[84] I.R.C. § 422(c)(2).

[85] *Id.*

[86] *Id.* § 1012.

[87] *See, e.g.*, *id.* §§ 1091, 267.

[88] *Id.* § 1091.

[89] *Id.* §§ 56(b)(3), 422(c)(2); HR REP. NO. 100-795, at 90 (1988); S. REP. NO. 100-445, at 96 (1988).

[90] *See supra* note 79 and accompanying text.

[91] I.R.C. § 422(c)(2).

any AMT adjustment for her exercise if both the exercise and the disqualifying disposition take place in the same tax year.[92]

As a result, an employee may eliminate her AMT adjustment by selling her shares before the end of the tax year when their fair market value drops below what it was on the exercise date. However, if she repurchased the same company stock within thirty days before or after the sale date, a "wash sale,"[93] then the employee will have to recognize the bargain purchase income as of the date of exercise as ordinary income subject to less favorable ordinary income tax rates, and the loss realized on the sale of stock will be disallowed.[94]

c. Real Life Experiences with AMT

To illustrate the complexity of the system, consider the following real life scenario involving taxpayer Jeffrey Chou, leader of the grassroots organization ReformAMT, and his wife Cindy.[95] In 2000, the Chous exercised ISOs to buy approximately 100,000 shares of stock in Cisco Systems, Inc. ("Cisco") at five to ten cents per share. At the time of the exercise, Cisco was trading between sixty dollars and seventy dollars per share. As a result of the ISO exercise, Jeffrey and Cindy Chou did not have any recognition of regular taxable income, but they had a positive AMT adjustment equal to the bargain purchase income from their exercise. Because of the enormous discrepancy between the ISO exercise price and the fair market value, the AMT adjustment totaled almost $7 million. This significant positive AMT adjustment and the Chous' other AMT adjustments translated into over $2.5 million of AMT and state income tax. By the end of 2000, Cisco had dropped to thirty-seven dollars per share, significantly reducing the value of the Chous' assets and making it difficult for them to pay the AMT owed.

The Chous would not have found themselves in such a difficult situation if they had understood the relevant tax provisions. If the Chous

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[92] *See* Weston et al., *supra* note 13 (suggesting that federal tax law offers an out for those who used incentive options to buy stock that dropped significantly by the end of the tax year, but only if the shares were sold before the end of the year).

[93] *See id.* "Wash sale" rules disallow a loss sustained upon a sale or other disposition of securities if, during the period beginning thirty days prior to the sale date and ending thirty days after the sale date, the taxpayer acquires new securities substantially identical to securities that had been sold. I.R.C. § 1091(a); Treas. Reg. § 1.1091-1 (as amended in 1967).

[94] Because the employee sold her ISO shares in a disqualifying disposition, the stock does not qualify for ISO treatment. I.R.C. §§ 421(a), 422. Therefore, the regular income tax system applies to the exercise, and the bargain purchase income as of the date of exercise is subject to tax as ordinary income. *Id.* §§ 83, 1091. In this situation, the loss is not recognizable and cannot offset the bargain purchase income realized as of the date of exercise. *Id.* §§ 56(b)(3), 422(c)(2); *see also* Reicher et al., *supra* note 7, at A10.

[95] *See* Weston et al., *supra* note 13 (describing Jeffrey and Cindy Chou's 2000 AMT disaster); Donmoyer, *supra* note 10 (describing Jeffrey Chou's $1.9 million AMT debt and financial ruin).

had sold their Cisco shares for thirty-seven dollars before the end of 2000, they would have had a disqualifying disposition because the ISO shares would not have been held for at least one year after exercise or two years from the grant of the option. They no longer would have been liable for AMT on $7 million in bargain purchase income. Rather, they would have been required to recognize as ordinary income the lesser of the bargain purchase income at the date of exercise ($7 million) or the excess of the sales proceeds over their adjusted basis in the shares sold ($3.7 million). By choosing the latter option, they could have greatly reduced their tax liability. If they had understood that selling their shares before the end of 2000 would have saved so much money, they could have avoided the AMT and reduced their federal income tax bill by at least $500,000.[96]

If, however, the Chous had reacquired their Cisco shares within 30 days of the disqualifying disposition (30 days before or 30 days after), they would not be able to reduce their gross income.[97] Rather, the entire amount of the bargain purchase income ($7 million) would be included in gross income and subject to tax as ordinary income. The resulting regular income tax would be approximately $2.8 million ($7 million x 39.6%). While the Chous' actual 2000 tax liability under the AMT was significant ($2 million), it was less than what the tax consequences would have been had they sold their Cisco shares in a disqualifying disposition and reacquired them in a "wash sale" ($2.8 million).[98]

In summary, the Chous' tax liability would have varied greatly depending on whether and when they sold their shares, as well as whether they sold them in a wash sale. Because the Chous exercised their options during the exuberant markets of 2000, they had to pay $2 million in AMT. If they had sold their shares by the end of 2000 for thirty-seven dollars per share, then the sale would have been a disqualifying disposition, the regular income tax system would have applied, and the Chous would have paid only $1.5 million of regular income tax. If, however, the Chous reacquired their shares in a wash sale, then the resulting regular income tax would have been $2.8 million.

A fourth alternative for the Chous would have been to exercise their ISOs shortly after their grant date, when their exercise price of five to ten cents per share was equal to the fair market value of the ISO stock.[99] This would have resulted in zero bargain purchase income, zero AMT, and zero regular income tax. Along with the reduced tax liability, the incentive aspect of the ISOs would not have decreased, since the Chous would

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[96] $1.5 million in ordinary income tax ($3.7 million x 39.6%) as compared with $2 million in AMT ($7 million x 28%). *See* Weston et al., *supra* note 13.

[97] *See supra* notes 93–94 and accompanying text.

[98] *See* I.R.C. §§ 422(c)(2), 1091(a).

[99] An employer must grant ISOs with an exercise price not less than the fair market value of the stock on the date of grant. *Id.* § 422(b)(4).

have to hold their Cisco shares for two years from the date of the grant to receive favorable ISO tax benefits. Accordingly, the Chous still could have profitted from the long-term effects of their contributions to Cisco. If the Chous choose to sell their Cisco shares at any time after the ISO statutory holding period, any appreciation realized above their insignificant cost basis would be subject to tax at favorable long-term capital gains tax rates.

The Chous' fact pattern demonstrates that taxpayers can plan their transactions to minimize their overall tax costs, including eliminating AMT. However, tax planning requires an understanding of the tax laws before consummating transactions. Because the AMT system is so complicated and intricate, most AMT-payers seek professional tax assistance to prepare their tax returns.[100] As demonstrated by the Chous' situation, tax planning for ISO transactions must occur well before the preparation of tax returns.

d. Disqualifying Disposition and Exercise in Different Tax Years

If a shareholder exercises her ISO in one year, but then sells her shares in a disqualifying disposition in a later tax year, the regular tax and AMT consequences are different, and the employee might be subject to AMT in the year of the ISO exercise. Under the regular income tax system, there are no tax consequences in the year of the ISO exercise.[101] Under the AMT system, the shareholder must recognize the bargain purchase income as a positive AMT adjustment in the year of exercise and, therefore, might owe AMT.[102]

In the year of the disqualifying disposition of the ISO shares, the shareholder must recognize the bargain purchase income in her gross income for regular income tax purposes.[103] In addition, any increase in value of the stock realized after the date of exercise is capital gain.[104] The shareholder's capital gain will be long-term if the shareholder held the shares for more than one year after the date of exercise, and short-term if the holding period was one year or less.[105]

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[100] Shaviro, *supra* note 30, at 1457 (stating that almost 93% of taxpayers with AMT liability used paid tax preparers).

[101] I.R.C. §§ 422, 421(a).

[102] *Id.* §§ 56(b)(3), 55.

[103] *Id.* § 83. Because the option has failed to qualify as an ISO, the Code provides that the exercise of the option is treated as any other transfer of property for services. *Id.* Accordingly, the employee must include in gross income the excess of the fair market value of the stock as of the date of exercise over the amount paid for the stock, if any, in the taxable year in which the disqualifying disposition occurred. *Id.* §§ 83, 421(b); *see also* Reicher et al., *supra* note 7, at A9. If the shares are sold for an amount less than the fair market value of the shares on the date of exercise, then the amount of bargain purchase income is limited to any gain realized. I.R.C. § 422(c)(2).

[104] I.R.C. § 1001(a).

[105] *Id.* § 1222.

The bargain purchase income that is recognized for regular income tax purposes in the year of the disqualifying disposition will not be recognized for AMT purposes.[106] Under the AMT system, the bargain purchase income is recognized in the year of exercise and, therefore, is not included again in the year of the disqualifying disposition.[107] Therefore, regular taxable income must be reduced by any recognized bargain purchase income to derive AMTI.[108] Additionally, under the AMT system, the basis of the ISO stock sold includes the bargain purchase income recognized in the year of exercise.[109] Any gain or loss recognized on the disqualifying disposition for AMT purposes is computed using the higher AMT stock basis.[110] As a result of these reductions to an employee's regular taxable income to derive AMTI, the employee's regular income tax should be greater than the employee's AMT.[111] The employee can use her AMT credit (that is, any AMT taxes paid in a prior tax year with respect to her ISO exercise) to reduce her regular tax liability to her AMT.[112] The employee can carry any AMT credit not used forward to future tax years indefinitely to reduce her regular tax liability to her AMT.[113]

The Chous' situation illustrates how tax liability changes when the exercise and disqualifying sale take place in different years. In 2000, the Chous will have a positive AMT adjustment equal to $7 million (the bargain purchase income) and a year 2000 AMT bill of $2 million.[114] If the Chous sold their ISO shares of Cisco in an April 2001 disqualifying disposition for $18 per share, they would have to recognize ordinary income of approximately $1.8 million.[115] For 2001 AMT purposes, the Chous would be able to reduce their taxable income by $1.8 million to offset the $1.8 million bargain purchase income included in regular taxable income from their stock sale.[116] They also would have a $5.2 million capital loss, consisting of the $7 million AMT basis in Cisco shares, minus the $1.8 million realized from the sale.

Unfortunately, because the disqualifying disposition would not have occurred in the same tax year as the exercise, a complete offset of the

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[106] *See* David R. Wenzel, *Incentive Stock Options: Impact of Disqualifications, Interaction with AMT Credit*, 22 TAX ADVISER 435 (1991) (noting that in the year of disqualifying disposition the taxpayer will have to make a negative adjustment to taxable income to compute her AMTI and that the applicable tax forms do not provide for such an adjustment).

[107] *See* H.R. REP. NO. 100-795, at 90 (1988).

[108] *See* Wenzel, *supra* note 106.

[109] I.R.C. § 56(b)(3).

[110] *Id.*

[111] *See, e.g.*, *infra* notes 114–123 and accompanying text.

[112] I.R.C. § 53(c).

[113] *Id.*

[114] *See supra* note 95 and accompanying text.

[115] $1,800,000 ($18 x 100,000) less $5,000 (5 cents (exercise price) x 100,000). *See* I.R.C. § 422(c)(2).

[116] *See* Wenzel, *supra* note 106.

loss on the stock since the date of exercise against the bargain purchase income is not available for AMT purposes.[117] As in the regular income tax system, the $5.2 million capital loss under the AMT system could not be carried back to prior tax years and would be limited on an annual basis to recognized capital gains plus $3,000 per tax year.[118] Therefore, unless the Chous had a $5.2 million AMT capital gain, in 2001 they could use only part of their entire $5.2 million AMT capital loss. Any portion of the AMT capital loss that remains unused could be carried forward indefinitely to subsequent tax years to reduce the Chous' AMT capital gains plus up to $3,000 of their AMTI.[119]

As a result of the negative AMT adjustment of $1.8 million and their AMT capital loss, the Chous' 2001 AMTI would be significantly less than their regular taxable income. Assuming that the Chous' other items of taxable income equal their allowable deductions, the Chous' 2001 regular taxable income would be $1.8 million of ordinary income due to their disqualifying disposition of Cisco stock. The Chous' 2001 regular income tax liability would be approximately $700,000.[120] Assuming that the Chous have no AMT capital gains or other AMT adjustments, their 2001 AMTI would be zero and their 2001 AMT would also be zero.[121] The Chous could use $700,000 of their $2 million AMT credit (resulting from their 2000 AMT) against their regular income tax liability and pay zero tax in 2001.[122] The balance of their AMT credit of $1.3 million would be carried forward indefinitely to subsequent tax years to reduce the Chous' regular tax liability to—but not below—their AMT for those years.[123]

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[117] *See* I.R.C. § 56(b)(3).

[118] *Id.* § 1211(b); *see* Kurt Heinrichson et al., *Revisiting ISOs With 24% AMT*, 22 TAX ADVISER 151, 152 (1991).

[119] *See* I.R.C. §§ 1211(b), 56(b)(3).

[120] $1.8 million x 39.1% = $700,000. *See id.* § 1(i)(2) (setting forth reduced tax rates for taxpayers for tax year 2001).

[121] The Chous would reduce their regular taxable income of $1.8 million by $1.8 million (bargain purchase income) plus $3,000 capital loss recognized resulting in AMTI of zero. *See id.* § 55(b)(2). Tentative minimum tax would also be zero. *See id.* § 55(b)(1). The Chous would have an AMT capital loss carryforward of $5.197 million ($5.2 million realized loss less $3,000 recognized loss), which they could offset against recognized AMT capital gains plus AMTI up to $3,000 per tax year. *See id.* §§ 56(b)(3), 1211(b).

[122] *See id.* § 53(c).

[123] *See id.* The Chous' AMT credit carryforward of $1.3 million would be available in subsequent tax years to reduce their regular tax liability to their AMT. Because the Chous have a $5.197 million AMT capital loss carryforward from the sale of their Cisco stock (and no regular income tax capital loss carryforward), they would have a negative adjustment to their regular taxable income of at least $3,000 per tax year (plus any offset against recognized capital gains) to derive their AMTI. *See id.* § 1211(b). This might result in a slightly lower annual AMT relative to their regular tax liability ($780, or $3,000 multiplied by the lowest AMT tax rate, which is 26%). *See id.* § 55(b)(1)(A)(i)(I). Therefore, the Chous might be able to reduce minimally their regular income tax liability to their AMT. Unless the Chous are able to generate AMT capital gains, they might have to use their $1.3 million AMT credit carryforward ($1.3 million divided by $780 per year) and

As one can see from the foregoing scenarios, the tax consequences of a disqualifying disposition of ISO stock where the exercise and sale occur in different tax years are complicated. In all cases, the total amount of income recognized in the year of sale for regular income tax purposes is greater than or equal to the amount recognized for AMT.[124] This occurs because, for AMT purposes, any bargain purchase income was recognized previously in the year of the ISO exercise. Comparatively, if the disqualifying disposition occurs in the same tax year as the exercise, the total amount of income recognized is the same for regular income taxes and under the AMT.

If the disqualifying disposition and exercise occur in different tax years, any recognized gain or loss for AMT purposes from the disqualifying sale is capital gain or loss.[125] Because AMTI might be lower than regular taxable income, AMT might be lower than regular income tax in the year of disqualifying sale. Any AMT paid as a result of ISO exercises can be offset as an AMT credit against regular income tax to reduce it to the lower AMT. Any excess AMT credit can be carried forward indefinitely to reduce regular income tax to AMT. Excess AMT credit and AMT capital loss carryforwards will likely result if AMT capital losses are significant and limited.

C. The Non-Tax Favored Sister to ISOs: NQSOs

1. What Is an NQSO?

An NQSO (non-qualified stock option) is any compensatory option that does not satisfy the statutory requirements for characterization as an ISO and tax-favored treatment.[126]

2. Tax Treatment of an NQSO

a. Grant of an NQSO

Because NQSOs do not satisfy the requirements for tax-favored treatment, they are subject to the tax provisions applicable to transfers of property in connection with the performance of services.[127] Therefore,

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$5.197 million capital loss carryforward ($5.197 million divided by $3,000 per year) over the next 1700 or so tax years (that is, assuming no changes in the Code).

[124] If ISOs are exercised when the bargain purchase income is zero, then the total amount of income recognized in the year of sale for regular income tax purposes and for AMT will be the same.

[125] The capital gain is long-term if the employee has held her ISO shares for more than one year after exercise.

[126] Options that do not qualify under I.R.C. § 421 are non-qualified stock options (NQSOs). As a result, NQSOs are subject to tax under I.R.C. § 83.

[127] *See* I.R.C. § 83.

unless the NQSO has a readily ascertainable fair market value at the time of the grant,[128] the grant of the NQSO is not a recognition event; as with a grant of an ISO, the grant itself does not constitute a transfer of property.[129]

b. Exercise of an NQSO

When an employee exercises an NQSO she must recognize as ordinary income the bargain purchase income of the NQSO (that is, the positive difference between the fair market value of the stock at the date of exercise and the exercise price paid, if any).[130] This income is subject to employee withholdings and regular income and payroll taxes.[131] Any amount recognized as ordinary income is added to the amount paid for the shares to determine the shareholder's tax basis.[132] The holding period for the shares acquired begins on the day after the exercise.[133]

There are no AMT consequences for the exercise of an NQSO because all of the economic income has already been included in the employee's regular income.

c. Disposition of NQSO Stock

When a shareholder sells her shares of stock acquired through the exercise of NQSOs, the general rules applicable to any sale of a capital asset dictate the tax consequences.[134] The shareholder recognizes capital gain or loss equal to the difference between the amount realized from the sale and the adjusted basis in the shares sold.[135] Capital gain or loss is long-term or short-term depending upon how long the shareholder held the shares after her exercise.[136] The capital loss limitations[137] and the favorable capital gains tax rates apply.[138]

Employees holding NQSOs often defer exercising as long as possible because publicly traded stocks have historically increased in value over time. By waiting, the holder of the NQSO benefits from the stock appreciation without investing any cash to exercise the option. At the same time, the holder has avoided the investment risk if the stock price

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[128] *See* Treas. Reg. § 1.83-7(a) (1978).
[129] *See* Treas. Reg. § 1.83-3(a) (as amended in 1985).
[130] I.R.C. § 83(a).
[131] *See* Treas. Reg. § 1.83-1 (1978).
[132] I.R.C. § 1012.
[133] *See* Rev. Rul. 66-7, 1966-1 C.B. 188.
[134] *See* I.R.C. § 1001.
[135] *Id.* § 1001(a).
[136] *See id.* § 1222.
[137] *See supra* note 26 and accompanying text.
[138] *See* I.R.C. § 1(h) (applying a maximum tax rate of 20% on sales of appreciated stock held for more than one year as a capital asset).

should decline. However, this deferral of exercise will cause a greater amount of income to be subject to ordinary income and payroll taxes upon exercise. If the employee holds the shares for more than one year, the appreciation after exercise will be subject to tax at favorable long-term capital gain tax rates.[139] If, however, the holder exercises the NQSOs as soon as possible, then, provided that the stock value increases over time, she will minimize the bargain purchase income that is subject to ordinary income and payroll taxes and maximize any favorable tax treatment of long-term capital gains. Because the amount of income characterized as ordinary income is the excess of the fair market value (as of the date of exercise) over any amount paid, if the holder exercises as soon as possible, the fair market value will be at its lowest and any ordinary income will be a smaller amount than if she had exercised at a later date.[140] Any subsequent appreciation recognized more than one year after exercise will be characterized as long-term capital gain, subject to favorable tax rates.

III. THE PERVASIVE AMT PROBLEM

Academic and practitioner groups as well as the Internal Revenue Service and National Taxpayer Advocates have called for repeal or simplification of the AMT.[141] Many people agree that the AMT is too complicated[142] and that its current and expanding impact is no longer consistent with Congress's purpose in enacting it. There is bipartisan support

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[139] *Id.*

[140] For example, Employer grants Employee 100 NQSOs with an exercise price of $10 when the fair market value of the stock is $15. Employee exercises her NQSOs one month after the grant when the fair market value of the stock has increased to $16. Employee must recognize $600 of ordinary income ($16 fair market value as of the date of exercise less $10 paid = $6 x 100 shares), subject to ordinary income and payroll taxes. Assume the stock price increases to $100 during the next eighteen months. If Employee sells her stock, she will recognize $8,400 of long-term capital gain ($10,000 sales price less $1,600 ($1,000 paid + $600 bargain purchase income) adjusted basis in shares), subject to maximum long-term capital gain tax rate of 20%. *Id.* § 1(h). If, however, Employee waits to exercise her NQSOs until the stock price reaches $100 and immediately sells the shares, she will have to recognize $9,000 as ordinary income ($100 fair market value less $10 paid = $90 x 100 shares), subject to ordinary income and payroll taxes, and no capital gain ($10,000 sales price less $10,000 ($1,000 paid + $9,000 bargain purchase income) adjusted basis in shares).

[141] Hamilton, *supra* note 29 (National Taxpayer Advocate Olson recommends that Congress repeal the individual AMT); *see* Annual Report from the Commissioner of the Internal Revenue Service on Tax Law Complexity, June 5, 2000; Ryan J. Donmoyer, *NAEA Says AMT Is Biggest Tax Headache of All*, 87 TAX NOTES 42 (2000); William G. Gale, *Tax Simplification: Issues and Options*, 92 TAX NOTES 1463 (2001); Sheryl Stratton, *Oveson Speaks Out on Tax Code Complexity*, 88 TAX NOTES 1177, 1199 (2000) (former National Taxpayer Advocate W. Val Oveson calls for the repeal of the AMT).

[142] Shaviro, *supra* note 30, at 1457–58 (noting that the AMT adds to "transactional complexity" and "rule complexity," that taxpayers spent over 29 million hours annually completing and filing the AMT tax form, and that more than 10% of tax returns with AMT had errors in the AMT calculation).

for AMT reform.[143] Democratic and Republican members of Congress from more than twenty-five states have cosponsored various bills to simplify, minimize, or even repeal the AMT.[144]

In lieu of AMT repeal, which would cost over $600 billion in lost revenue through 2011,[145] critics have made numerous recommendations for AMT reform. While these amendments do not include elimination of the ISO exercise AMT adjustment, they nonetheless would minimize AMT costs for ISO exercisers.[146] They would do this by potentially reducing AMTI through larger exemption amounts and additional deductions.[147] This Part will discuss a number of the most commonly proposed AMT amendments: indexing for inflation; eliminating AMT adjustments for state and local taxes; and eliminating AMT adjustments for personal and dependency deductions. Academics and practitioners have made additional recommendations for reform, including elimination of the AMT adjustments for the standard deduction and miscellaneous itemized deductions.[148] In addition, a strong grassroots movement is developing in favor of AMT relief for certain ISO exercisers. Notwithstanding, the three modifications discussed here should vastly simplify the AMT and significantly reduce the number of AMT taxpayers. Under these propos-

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[143] Margo Thorning, *Policy Briefs: ACCF Research Center Reports on AMT*, 67 TAX NOTES 1425 (1995) (mentioning that AMT reform has bipartisan support and that Presidents Bush and Clinton proposed changes to the AMT).

[144] *See* Active Legislation, *at* http://www.reformamt.org/legislation.php (last visited Mar. 26, 2002). On April 4, 2001, Representative Zoe Lofgren sponsored a bill in the House of Representatives, H.R. 1487, which would repeal the AMT adjustment for ISO exercises in 2000 and thereafter. *See* 147 CONG. REC. H1487 (daily ed. Apr. 4, 2001). As of March 2002, H.R. 1487 had 58 cosponsors (35 Democrats and 23 Republicans representing 22 states). *See* Sponsorship of H.R. 1487, *at* http://www.kls2.com/cgi-bin/hrspon?bill=hr1487 (last visited Mar. 26, 2002).

[145] Bennett, *supra* note 19 (stating estimates from Jerry Tempalski, an economist with the Treasury Department's Office of Tax Analysis, that repealing the AMT after enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. 107-16, 115 Stat. 38, would cost $600 billion in lost revenue from 2002 through 2011 and would cause 35.1 million taxpayers (33% of all taxpayers) to owe AMT in 2010). Estimates of the tax revenue costs before enactment of EGTRRA, Pub. L. No. 107-16, 115 Stat. 38 (2001), were $200 billion from 2001 through 2010. *See* Martin A. Sullivan, *Needed But Not Wanted: $200 billion of AMT Relief*, 88 TAX NOTES 724, 726 (2000).

[146] Under the current AMT, taxpayers must add back any deductions for state and local taxes and personal and dependency exemptions to compute their AMTI. I.R.C. §§ 55(b)(2), 56(b)(1)(A)(ii), 56(b)(1)(E). Under the proposed AMT reforms, ISO exercisers would not have to increase their taxable income by their state and local tax deductions and personal and dependency exemptions to determine their AMTI. Additionally, ISO exercisers would compute their AMT by using increased exemption amounts and tax rates indexed for inflation, which would reduce any AMT. *See infra* Part III.C. (discussing proposed model reforms for the AMT).

[147] *See infra* Part III.C.

[148] *See* Shaviro, *supra* note 30, at 1464–65 (describing proposed elimination of the AMT adjustments for the standard deduction, medical deductions, and miscellaneous itemized deductions); Hamilton, *supra* note 29 (noting that Olson recommends that, if Congress does not repeal the AMT, it should eliminate the standard deduction, deductible state and local taxes, personal exemptions, and miscellaneous itemized deductions as AMT adjustments).

als, the AMT would become more transparent, allowing taxpayers to plan their transactions in accordance with their economic goals.

A. ReformAMT.com

Shocked and stripped of jobs, investment and retirement value, and other savings, a large number of former dot.com employees have joined together in a grassroots organization called ReformAMT. The group's mission, stated on its Web site, "is to correct an injustice created by the way in which the Alternative Minimum Tax (AMT) is inappropriately and unjustly imposed upon owners of incentive stock options."[149] ReformAMT's mission is: (1) to lobby the government to reform AMT treatment of employee stock options and to provide retroactive relief to affected employees; and (2) to educate the public about, and build support for the reform of, the AMT's treatment of employee stock options.[150] ReformAMT also serves as a support group for taxpayers affected by the AMT's treatment of employee stock options.[151]

The popular perception of stock options as perks for the wealthy belies the reality that the AMT has financially ruined many ISO exercisers, especially those of more moderate means. The ReformAMT Web site includes stories of members' AMT disasters. For example, consider the following "Real-Life AMT victim":[152]

> Norma Mogilefsky, 59, grew up in New York, has a master's degree in special education, and currently works as a curriculum developer at a software company. She is a single mom with two grown children. Throughout her life, she worked hard to raise her family, pay the bills, and build perfect credit. She hoped to retire in June.
>
> Last spring, on the advice of a recommended enrolled agent, Norma took out a second loan against her home for $80,000 so she could purchase her incentive stock options (ISOs), and then hold them for a year. This, the agent advised, would put her into a long-term capital gains tax bracket, which was the prudent thing to do. The agent never mentioned the potential for an Alternative Minimum Tax (AMT) disaster. He also did not speak with Norma again until the day that he did her taxes.

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[149] http://www.ReformAMT.com (last visited Mar. 20, 2002). In March 2002, ReformAMT had about 1591 members. *See* ReformAMT Geographic Membership, *at* http://www.kls2.com/reformamt/geomembers.html (last visited Mar. 20, 2002).

[150] *See* About ReformAMT, *at* http://www.reformamt.org/about.php (last visited Feb. 24, 2002).

[151] *See* Real-Life AMT Victims, *at* http://www.reformamt.org/stories.php (last visited Feb. 24, 2002).

[152] *Id.*

> Her company, meanwhile, sent an e-mail to its employees on April 2, recommending that those who exercised ISOs in 2000 might be subject to AMT, and should seek professional advice immediately. It was too late. On April 15, 2001, Norma owed a tax bill of $303,000, three times her annual salary, on paper profits she never saw.[153]

ReformAMT has rallied a large group of "real-life AMT victims" and sympathetic allies to educate Congress and the public about its goal of eliminating AMT liability for the exercise of ISOs in year 2000 and thereafter. The list of legislators who have supported AMT reforms includes Senators Joseph Lieberman (D-Conn.), Tom Harkin (D-Iowa), Wayne Allard (R-Colo.), John Kerry (D-Mass.), and Barbara Boxer (D-Cal.),[154] as well as almost fifty members of the House of Representatives.[155] In August 2001, Senator Lieberman and Congressman Richard E. Neal (D-Mass.) introduced identical bills in the Senate and the House that potentially would eliminate the AMT for taxpayers who exercised their ISOs in 2000.[156] The bills would provide a one-time fix for taxpayers who were subjected to the AMT due to their 2000 exercise of ISOs and whose stock experienced significant post-exercise declines in value. The bills, which have a cost of $1.3 billion over ten years,[157] have been referred to the House Ways and Means Committee and the Senate Committee on Finance.[158] More recently, in the October 24, 2001 House of Representatives mark-up of the "Economic Security and Recovery Act of 2001," the House considered, but rejected, a proposal by Representative Charles B. Rangel (D-N.Y.), to eliminate year 2000 and 2001 ISO exercises from normal AMT treatment.[159]

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[153] *Id.*

[154] On August 2, 2001, Senator Lieberman sponsored a bill to grant AMT relief to those who exercised ISOs in 2000. S. 1324, 107th Cong. (2001); 147 CONG. REC. S8704 (daily ed. Aug. 2, 2001). Senators Harkin, Kerry, Boxer, and Allard became cosponsors between October and December 2001. *See* 147 CONG. REC. S10457 (daily ed. Oct. 10, 2001); 147 CONG. REC. S11549 (daily ed. Nov. 7, 2001); 147 CONG. REC. S11940 (daily ed. Nov. 15, 2001); 147 CONG. REC. S12682 (daily ed. Dec. 7, 2001).

[155] Forty-seven representatives cosponsored a House bill granting AMT relief. *See* H.R. 2794, 107th Cong. (2001), *available at* http://thomas.loc.gov/bss/d107/d107bill.html (last visited Feb. 24, 2002).

[156] The bills would limit AMT liability for those who exercised ISOs in 2000 by calculating income using the stock value on April 15, 2001 or the amount realized if the stock was sold, rather than its value on the exercise date. *See* H.R. 2794, 107th Cong. (2001); S. 1324, 107th Cong. (2001).

[157] *See Lieberman Bill Would Provide AMT Relief for Incentive Stock Options*, 92 TAX NOTES 1196, 1196–97 (2001) (stating that the Joint Committee on Taxation estimates that the bill would reduce revenues by $1.3 billion over ten years).

[158] *See* 147 CONG. REC. H5336 (daily ed. Aug. 2, 2001); 147 CONG. REC. S8704 (daily ed. Aug. 2, 2001).

[159] The Rangel Amendment failed (166–261) on a mostly party-line vote, with forty-three Democrats voting with Republicans. *See* 147 CONG. REC. H7279-80 (daily ed. Oct.

B. The AMT: A Pervasive and Expensive Problem

The AMT has been the subject of concern and controversy since its enactment as a minimum tax in 1969.[160] Many academic and practitioner groups as well as the Internal Revenue Service and National Taxpayer Advocates are calling for its repeal or simplification.[161] The Economic Security and Recovery Act of 2001, which was adopted by the House of Representatives on October 24, 2001, contained a provision that would repeal the corporate AMT.[162] The Joint Committee on Taxation estimated that this provision would cost approximately $24 billion through 2011.[163] Critics called the potential repeal of the corporate AMT a windfall for corporate bankrolls.[164]

24, 2001). The text of the amendment was as follows:

> SEC. 131. ALTERNATIVE MINIMUM TAX RELIEF WITH RESPECT TO INCENTIVE STOCK OPTIONS EXERCISED DURING 2000.
>
> In the case of an incentive stock option (as defined in section 422 of the Internal Revenue Code of 1986) exercised during calendar year 2000 or 2001, the amount taken into account under section 56(b)(3) of such Code by reason of such exercise shall not exceed the amount that would have been taken into account if, on the date of such exercise, the fair market value of the stock acquired pursuant to such option had been—
>
> (1) its fair market value as of—(A) April 15, 2001, in the case of options exercised during 2000, and (B) December 31, 2001, in the case of options exercised during 2001, or
>
> (2) if such stock is sold or exchanged on or before the applicable date under paragraph (1), the amount realized on such sale or exchange.

147 Cong. Rec. H7261 (daily ed. Oct. 24, 2001). The Rangel Amendment or a variation thereof might appear in new tax bills. *See, e.g.*, 148 Cong. Rec. S106 (daily ed. Jan. 24, 2002) (submission by Senator Kerry of a variation on the Rangel amendment).

[160] Congress enacted the statutory ancestor of the AMT as part of a broad tax reform in 1969. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

[161] *See* Annual Report from the Commissioner of the Internal Revenue Service on Tax Law Complexity, *supra* note 141; Donmoyer, *supra* note 141; Gale, *supra* note 141; Stratton, *supra* note 141 (noting that former National Taxpayer Advocate W. Val Oveson emphasized repeal of the AMT, which he described as "absolutely, asininely stupid"); Sheryl Stratton, *Taxpayer Advocate Addresses 9/11 Relief, Offers in Compromise*, 93 TAX NOTES 471 (2001).

[162] H.R. 3090, 107th Cong., § 103 (2001). The provisions were rejected by the Senate in late 2001, when the Committee on Finance reported out an amendment in the nature of a substitute that failed to include any provisions for repeal of the corporate AMT. *See* 147 CONG. REC. S11678–11696 (daily ed. Nov. 13, 2001); Bill Summary and Status for 107th Congress, H.R. 3090, *at* http://thomas.loc.gov/bss/d107/d107bill.html (last visited Apr. 17, 2002)

[163] *See* J. COMM. ON TAXATION, 107TH CONG., ESTIMATED BUDGET EFFECTS OF A MODIFIED CHAIRMAN'S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO THE REVENUE PROVISIONS CONTAINED IN H.R. 3090, THE "ECONOMIC SECURITY AND RECOVERY ACT OF 2001," JCX-70-01 (Comm. Print 2001).

[164] Warren Rojas, *Corporate AMT Repeal Strikes a Chord with Democrats, Critics*, 93 TAX NOTES 455 (2001) (noting that IBM would receive $1.4 billion, General Motors $833 million, General Electric $671 million, ChevronTexaco $572 million, Enron $254 million, American Airlines $184 million, and Comdisco $144 million).

While President George W. Bush "has incessantly prodded the Senate to pass the stimulus measure,"[165] the Senate rejected the bill, along with its proposed revisions to the AMT, in late 2001.[166] Debate on an economic stimulus package continued in early 2002, and, on March 9, 2002, President George W. Bush signed into law the Job Creation and Worker Assistance Act of 2002.[167] The new law does not make any changes to the existing individual AMT and makes only one temporary change to the corporate AMT.[168]

Thus, the individual and corporate AMT continues to exist today. If Congress does not amend the AMT, it will impact an increasing number of taxpayers at an aggressive pace. The Joint Committee on Taxation estimates that, under current law, by 2010 thirty-five million taxpayers (approximately 33% of all individual taxpayers) will face the AMT.[169] There is overwhelming consensus that the AMT is no longer operating as Congress intended and that something must be done.[170] However, the notion of repealing the individual AMT has paralyzed members of Congress because the cost of eliminating the individual AMT is estimated at more than $600 billion through 2011.[171] Additionally, some members of Con-

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[165] Janet Hook, *Stimulus Bill on Way to Its Death*, L.A. TIMES, Feb. 6, 2002, at A1.

[166] On November 13, 2001, the Committee on Finance introduced amended bill SA2125 (the Economic Recovery and Assistance for American Workers Act of 2001 proposed by Senator Max Baucus (D-Mont.)), which effectively replaced the "Economic Security and Recovery Act of 2001." *See* 147 CONG. REC. S11678-11696 (daily ed. Nov. 13, 2001). On November 14, 2001, the Senate rejected the Economic Recovery and Assistance for American Workers Act of 2001. *See* 147 CONG. REC. S11,783 (daily ed. Nov. 14, 2001).

[167] Pub. L. No. 107-147, 116 Stat. 21.

[168] The Job Creation and Worker Assistance Act of 2002, among other things, provides for temporary relief from corporate net operating loss limitation under the AMT. 148 CONG. REC. S1661 (daily ed. Mar. 7, 2002). The Act also provides for special accelerated depreciation for certain assets acquired after September 10, 2001 and before September 11, 2004. *Id.* at S1660. To ensure that qualifying taxpayers will enjoy this tax benefit, the 2002 Act amends the AMT to provide that this deduction is allowable under the AMT system. *Id.*; *see also* Job Creation and Worker Assistance Act, § 101.

[169] *See* Bennett, *supra* note 19. Estimates of the tax revenue costs before enactment of EGTRRA, Pub. L. No. 107-16, 115 Stat. 38 (2001), were $200 billion through 2010. *See* Gale, *supra* note 141, at 1469 (citing J. COMM. ON TAXATION, 107TH CONG., ESTIMATED REVENUE EFFECTS OF THE PRESIDENT'S FISCAL YEAR 2002 BUDGET PROPOSAL (2001)); *see also* Warren Rojas, *JCT Estimates Bush Tax Cut Would Double AMT Taxpayers*, 89 TAX NOTES 171 (2001).

[170] *See* Shaviro, *supra* note 30, at 1455–56 (stating that "[p]erhaps no rules in the Internal Revenue Code are so regularly featured on tax simplification hit lists as the individual and corporate alternative minimum taxes" and supporting his comment with reports calling for simplification from the ABA Tax Section, AICPA, Tax Executives Institute, National Association of Enrolled Agents, IRS, and a National Taxpayer Advocate); *see also* Hamilton, *supra* note 29; Stewart S. Karlinsky, *American Taxation Association Recommends Modifications to AMT*, 71 TAX NOTES 1167 (1996) (suggesting five changes to the AMT).

[171] *See* Bennett, *supra* note 19. One estimate placed the cost of repealing the AMT prior to the enactment of the EGTRRA at $162 billion. Warren Rojas, *Taxpayers Burned by AMT Look for Support*, 92 TAX NOTES 153, 154 (2001); *see also Economic Analysis—Like Gasoline on a Fire, House Bill Fuels AMT Problems*, *in* Readings in Federal Tax Policy,

gress are concerned that an absolute repeal of the AMT, which Congress originally enacted to ensure that high economic income taxpayers paid at least some income taxes, might not be good tax policy.[172]

Considering the broad impact the AMT is fast imposing on millions of taxpayers, AMT reform (although probably not repeal) is very likely in the near future.[173] However, whether or not the AMT adjustment for an exercise of ISOs will be eliminated or even modified, as proposed in the ReformAMT-supported bills currently under consideration by congressional committees, is not clear. There are twenty-eight AMT preferences and adjustments. Three of these twenty-eight items account for over 90% (in dollar terms) of total AMT preferences: state and local tax deductions (54%), personal and dependency exemption deductions (23%), and miscellaneous itemized deductions above the 2% floor (20%).[174] The ISO adjustment accounted for 5% of all AMT preferences and adjustments in 2000 ($1.9 billion of adjustments) and is estimated to account for only 1% of the total projected preferences and adjustments in 2010 ($4.5 billion).[175] As compared to the AMT adjustments for state and local tax deductions, personal and dependency exemption deductions, and miscellaneous itemized deductions, the ISO adjustment does not and is not projected to represent a significant component of aggregate AMT adjustments.

C. Model Reforms

1. Index for Inflation

The primary reason for the increase in the number of taxpayers subject to AMT is that the AMT system fails to index for inflation.[176] The

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available at www.tax.org/federal/Federal_Readings/freadmain.htm (last visited Oct. 27, 2001) (citing cost estimates for eliminating the AMT of $242 billion under the Bush proposal or $292 billion under H.R. 3; a modified version of the two plans was signed into law as the EGTRRA, Pub. L. No. 107-16, 115 Stat. 38, on June 7, 2001).

[172] These members seek to avoid the loss of taxpayer confidence that would result if the system did not assess any tax on high-income individuals or entities. *See* J. COMM. ON TAXATION, 99th Cong., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, JCS-10-87, at 432–33 (1987). "The ability of high-income taxpayers to pay little or no tax undermines respect for the entire tax system and, thus, for the incentive provisions themselves. In addition, even aside from public perceptions, Congress decided that it is inherently unfair for high-income taxpayers to pay little or no tax due to their ability to utilize tax preferences." *Id.; see also* Heidi Glenn et al., *Simplification and AMT: Costly and Anything But Simple*, 22 INSUR. TAX REV. 23, 24 (2002) (suggesting that while most members of Congress would support the idea of AMT repeal, they have consistently decided against doing anything because AMT serves a purpose in the tax system and to repeal it without otherwise dealing with these issues would revive them).

[173] *See* Shaviro, *supra* note 30, at 1456.

[174] ROBERT REBELEIN & JERRY TEMPALSKI, WHO PAYS THE INDIVIDUAL AMT?, OFFICE OF TAX ANALYSIS PAPER 87 (2000).

[175] *Id.* at Table 5.

[176] *Id.*

regular income tax system indexes many deductions,[177] deduction limits, and tax rate schedules[178] for inflation. Indexing is good policy because it prevents tax costs from increasing solely because inflated income outpaces fixed deductions and rates. Surprisingly, the AMT does not have an analogous inflation adjustment system, even though Congress intended that the two systems operate in a parallel manner. Over the years taxpayers have become increasingly likely to be subject to the AMT, not because of their artful manipulation of deductions and exclusions in the Code, but because their tentative minimum tax has not been adjusted for bracket creep while their regular tax has.[179]

Indexing the exemption amounts, the phase-out thresholds, and the tax rate brackets for inflation from 1986 through 2000 would have reduced the number of tax returns subject to AMT in 2000 from 1.3 million to 300,000.[180] For 2010, the projected effect would reduce the number of returns subject to AMT from 17 million to 300,000.[181] Because the AMT rate brackets would be adjusted and a larger exemption amount would be allowed under an indexed AMT system, many ISO exercisers no longer would be subject to AMT if the law were amended to include inflation indexing.[182]

Unfortunately, the cost of indexing the exemption amount, the phase-out thresholds, and the tax rate brackets to 2001 levels is a staggering $370 billion from 2002 through 2011.[183] This cost may be worthwhile, however, to prevent the number of taxpayers subject to AMT from increasing until the AMT effectively replaces the regular income tax system.[184] By 2010, one out of three taxpayers, or more than 35 million

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[177] *See, e.g.*, I.R.C. §§ 63(c)(4) (indexing the standard deduction amounts) and 151(d)(4) (indexing personal and dependency exemption amounts).

[178] *Id.* § 1(f).

[179] *See* Shaviro, *supra* note 30, at 1456 (stating that from 1996 to 1998, the number of AMT taxpayers rose from 480,000 to 828,000, which is a 72.5% increase). Bracket creep occurs when inflation lifts a person's taxable income into a higher tax bracket or increases income relative to allowable deductions. The net result is stagnant purchasing power with an increase in income tax payable.

[180] REBELEIN & TEMPALSKI, *supra* note 174, at Table 1.

[181] *Id.* Note that this information does not include the AMT impact of the Economic Growth and Tax Relief Reconciliation Act of 2001, which is expected to increase the number of AMT taxpayers in 2010 to 35 million. *See* Bennett, *supra* note 19 (citing Tempalski's estimate that indexing the AMT at 2001 levels would reduce the number of AMT payers by about 10 million in 2005 and 20 million in 2009).

[182] If Congress indexes the AMT exemption, phase-out levels, and the tentative minimum tax calculation for inflation, then the exemption amount will be approximately $70,000 (increased from $45,000), and the tentative minimum tax will be 26% on the first $208,000 (increased from $175,000) of taxable excess and 28% on any amount of excess over $208,000 (increased from $175,000). *See* Shaviro, *supra* note 30, at 1463.

[183] *See* Bennett, *supra* note 19 (citing Tempalski's estimate). Prior to the enactment of the EGTRRA, Pub. L. No. 107-16, 115 Stat. 38 (2001), the estimated cost for indexing the AMT for inflation to 2000 levels was $83.3 billion from 2001 through 2010. *See* Rebelein & Tempalski, *supra* note 174, at Table 2.

[184] *See* Graetz, *supra* note 39.

taxpayers, will owe AMT.[185] However, because the application of the AMT and its tax calculations are so complicated, most taxpayers are not aware that they may be subject to AMT or even that the AMT system exists.[186] This kind of stealth tax policy lacks transparency and destroys taxpayer confidence in the federal income tax system. Taxpayers are not likely to tolerate this type of policy, and, given the significant number and percentage of impacted taxpayers, their political outcry could eventually dwarf ReformAMT's grassroots efforts.[187]

2. *Eliminate AMT Adjustments for State and Local Tax Deductions*

Taxpayers residing in high tax states such as California and New York might find themselves subject to AMT if they take large deductions for their state tax payments. The 2000 AMT adjustment for state and local itemized deductions was by far the largest adjustment item, accounting for 54% of all adjustments.[188] By 2010, as the AMT adjustment for personal and dependency exemptions increases at a relatively faster rate, the state and local tax deductions are projected to decrease, but still account for 44% of all AMT adjustments.[189] It is unreasonable that the current AMT regime effectively penalizes individuals for paying their state and local taxes. These payments actually reduce taxpayers' economic income. Moreover, they are legally enforceable taxpayer obligations, not artful or abusive manipulations of the Code.

Arguments can be made for and against state and local tax deductibility under any tax system.[190] Because taxes paid by an individual sometimes correlate with government-provided goods and services, and because these benefits are excluded from gross income, some argue that disallowing state and local tax deductions is a fair substitute for taxing

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[185] See Bennett, *supra* note 19.

[186] Hamilton, *supra* note 29 (noting National Taxpayer Advocate Olson's comments that the AMT is so complicated, many taxpayers are not aware that they may be subject to it).

[187] ReformAMT and its 1591 members have done a commendable job of marshalling support from Congress. *See* http://www.ReformAMT.com (last visited Apr. 4, 2002); ReformAMT Geographic Membership, *at* http://www.kls2.com/reformamt/geomembers.html (last visited Mar. 20, 2002). With 35 million more voices, the campaign for AMT reform will be even stronger.

[188] REBELEIN & TEMPALSKI, *supra* note 174, at Table 5.

[189] *Id.* at 15 (determining that decline in percentage of state and local tax deductions will occur because taxpayers with several personal and dependency exemptions will comprise an increasing share of AMT taxpayers).

[190] *See* Shaviro, *supra* note 30, at 1465 (stating that the arguments against deductibility of state and local taxes have the upper hand in current academic debate and citing Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax System*, 82 VA. L. REV. 413 (1996), opposing deductibility, and Brookes D. Billman & Noël B. Cunningham, *Nonbusiness State and Local Taxes: The Case for Deductibility*, 28 TAX NOTES 1107 (1985), favoring deductibility).

consumption of state or local government-provided goods and services.[191] This argument might provide support for a change in the tax law to eliminate deductions for state and local taxes and the exclusion from taxable income of these goods and services for taxpayers in low or zero tax states. However, the current denial of state and local tax deductions under the AMT system causes taxpayers (including ISO exercisers) in high tax states to lose this material deduction, while not requiring taxpayers in low or zero tax states to include government-provided goods and services in their incomes. If members of Congress want to eliminate the deduction for state and local taxes and the exclusion of government-provided goods and services in low or zero tax states, the legislation should be straightforward and readily understandable by constituents. The complexity and lack of inflationary indexing in the AMT should not be used to obscure its disallowance of increasing state and local tax deductions for taxpayers in high tax states. Legislation that makes sweeping and significant changes should not be drafted to hide its purpose.[192]

It is particularly arbitrary that ISO exercisers lose their state and local tax deductions merely because they realize economic income that makes them liable for AMT. If the state and local tax deduction is allowed under the AMT, fewer ISO exercisers will be subject to the AMT. To the extent that some ISO exercisers would remain subject to the AMT after deducting state and local tax payments, these individuals would receive fairer tax treatment because their AMT would result from their bargain purchase income in excess of any allowable exemption amount and not from the loss of their state and local tax deductions.

3. Eliminate AMT Adjustments for Personal and Dependency Deductions

Personal and dependency exemption deductions are allowed in the regular income tax system for taxpayers with adjusted gross income levels below certain threshold amounts.[193] These exemptions are not tax shelters or artful or abusive manipulations of the Code; rather, they are accepted tools for decreasing the tax liability of middle- and low-income taxpayers. Because these deductions are phased out at higher levels of income under the regular tax system,[194] high-income taxpayers generally

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[191] *See* Kaplow, *supra* note 190; *see, e.g.*, I.R.C. § 265 (setting forth the rules for the denial of deduction for expenses and interest related to tax-exempt income).

[192] *See* Shaviro, *supra* note 30, at 1457–58 (suggesting that "anyone who values transparency in the tax system—whether to improve monitoring by voters or to assist policymakers in understanding what they are actually doing—has reason to consider the AMT highly objectionable").

[193] I.R.C. § 151(d)(3).

[194] Note, however, that under the EGTRRA, Pub. L. No. 107-16, § 102, 115 Stat. 38 (codified at 26 U.S.C. § 151 (2001)), the phase-out of the personal and dependency exemptions is itself phased out over time beginning in 2006 through 2009. However, in 2010

do not benefit from personal and dependency exemptions. Thus, the regular income tax system already monitors the deductibility of personal and dependency exemptions, only allowing such deductions for middle- and low-income taxpayers. Therefore, the adjustment in the AMT system is redundant for high-income taxpayers, since they would not even receive the deductions under the regular income tax system.[195] To the extent that the AMT system is intended to target such high-paying taxpayers, adjustments for personal and dependency deductions are unnecessary because they currently benefit only middle- and low-income taxpayers.

IV. THE AMT ADJUSTMENT FOR ISO BARGAIN PURCHASE INCOME IS APPROPRIATE BECAUSE IT REPRESENTS ECONOMIC INCOME OTHERWISE EXCLUDED FROM TAXABLE INCOME

Congress intended that the AMT adjustment for the bargain purchase income from the exercise of ISOs limit the tax benefits ISO exercisers derive under the Code.[196] The bargain purchase income realized as a result of the ISO exercise is not included in regular taxable income, because the Code specifically excludes it.[197] An ISO exercise at a price below the fair market value of the stock, however, generates economic income for the employee. The employee has benefited from a bargain stock purchase, and, but for the ISO income exclusion provisions, she would otherwise have to recognize and include this economic income in her gross income.[198]

Congress enacted a number of ISO-specific provisions to minimize the tax benefits of the ISO exclusion. Most importantly, the bargain purchase income realized by an employee in her ISO exercise is an AMT adjustment.[199] If the bargain purchase income plus the taxpayer's other AMT adjustments exceeds the AMT exemption amount,[200] and if the taxpayer's "tentative minimum tax"[201] exceeds her regular income tax (with a top marginal tax rate of 38.6% in 2002),[202] she will owe AMT.[203] Addi-

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and thereafter, the phase-out of personal and dependency exemptions is scheduled to return. *Id.*

[195] *See* I.R.C. § 56(b)(1)(E).

[196] *See* I.R.C. §§ 56, 421.

[197] *Id.* § 421(a)(1).

[198] *Id.* § 83(e)(1).

[199] *See id.* § 56(b)(3).

[200] After inflation adjustments, this amount would be approximately $60,000–$70,000 for married taxpayers filing jointly or surviving spouses. *See* Shaviro, *supra* note 30, at 1463.

[201] A taxpayer computes her tentative minimum tax by determining her AMTI in excess of any allowable exemption amount. I.R.C. § 55(b)(1)(A)(ii). This "taxable excess" is subject to tax at 26% for the first $175,000, plus 28% on any excess above $175,000. *Id.* § 55(b)(1)(A)(i). If indexed for inflation, the tax would be 26% on the first $208,000, plus 28% on any excess above $208,000. *See* Shaviro, *supra* note 30, at 1463.

[202] Rev. Proc. 2001-59, § 3, 2001-52 I.R.B. 623 (setting forth the 2002 tax rate tables for individual taxpayers under I.R.C. § 1(a)–(d) with ordinary income tax rates ranging

tionally, Congress has specifically limited the amount of ISO grants exercisable for the first time by any employee in any tax year to $100,000 of stock, valued as of the date of the grant, in order to limit the amount of annual ISO tax benefits.[204] Congress has further limited the potential ISO tax benefits by requiring employers to grant ISOs at an exercise price no less than the fair market value of the stock price.[205] Therefore, on the date an employee receives an ISO from her employer, the bargain purchase income is zero.[206] Furthermore, employers may not grant ISOs to individuals with 10% or more of the corporate voting power.[207] Accordingly, Congress has limited ISO benefits to less than 10% owners and, effectively, limited the aggregate number of ISO grants to any one employee.[208] These provisions ensure that excessive ISO grants will not qualify for favorable ISO tax treatment. Moreover, even if ISO grants meet the annual and aggregate ownership limitations, if an employee's bargain purchase income recognized in any one year is significant, she may have to pay AMT.[209]

There are several ways for ISO exercisers to minimize or even avoid AMT. An ISO exerciser will be subject to AMT only if her bargain purchase income plus her other AMT adjustments exceeds her exemption amount, and if her "tentative minimum tax" exceeds her regular income tax.[210] When an employee receives an ISO grant, she has zero bargain purchase income (that is, her ISO exercise price is no less than the fair market value of the stock).[211] If an employee exercises her ISOs soon after the date of grant, she will have little or no bargain purchase income and, therefore, will not owe AMT. Moreover, annual and aggregate ISO

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from 10% to 38.6%).

[203] AMT is the excess of a taxpayer's tentative minimum tax over her regular tax for the taxable year. I.R.C. § 55(a).

[204] *Id.* § 422(d)(1).

[205] *Id.* § 422(b)(4).

[206] Bargain purchase income is the excess of the fair market value of stock over its exercise price. If exercise price is equal to fair market value, bargain purchase income is zero.

[207] I.R.C. § 422(b)(6). In any such case, I.R.C. § 422(c)(5) changes the total disqualification to a requirement that ISOs granted to any 10% or greater owner (measured by corporate voting power) must have an exercise price at least equal to 110% of the fair market value of the stock on the date of grant and a maximum term of five years.

[208] ISO grants are limited on an annual basis to $100,000 of stock value and must be exercised within ten years of the grant. *Id.* § 422(d), (b)(3). Thus, an employee-owner receiving the maximum annual ISO grants could attain ownership of 10% or more of the corporate voting power and, thereafter, be limited in her ISO tax benefits. *See id.* § 422 (b)(6), (c)(5).

[209] *See id.* §§ 56(b)(3), 55.

[210] If Congress indexes the AMT exemption, phase-out levels, and the tentative minimum tax calculation for inflation, then the exemption amount will be approximately $70,000, and the tentative minimum tax will be 26% on the first $208,000 of taxable excess and 28% on any amount of excess over $208,000. *See* Shaviro, *supra* note 30, at 1463.

[211] I.R.C. § 422(b)(4).

grants to each employee are also limited.[212] Thus, ISO stock value would have to increase significantly from the date of grant to the date of exercise to generate enough bargain purchase income to cause an ISO exerciser to owe AMT if she exercises her ISOs soon after the grant.[213]

Effective planning also may eliminate AMT liability. Employees exercising their ISOs immediately after the date of grant will have zero bargain purchase income and, therefore, will not owe AMT or regular income tax on the exercise.[214] The employee will defer recognition of any subsequent appreciation on her ISO shares until she sells them.[215] Any gain recognized after the end of the statutory holding period will be subject to tax at favorable long-term capital gain tax rates.[216] Employees holding ISOs with a significant amount of built-in bargain purchase income can manage their ISO exercises over time to minimize or even eliminate their AMT. ISOs can usually be exercised over a period of time of up to ten years from the date of grant.[217] Therefore, a holder can plan to exercise her ISOs in a manner that minimizes her overall tax liability.

Congress enacted favorable tax treatment for ISOs but intentionally limited the amount and scope of these tax benefits. Employers and employees can structure their ISOs to receive the maximum amount of tax benefits provided under the Code. Elimination of the ISO adjustment under the AMT is inconsistent with congressional intent to limit these benefits and to tax economic income.

V. The AMT Adjustment for the Bargain Purchase Income of an ISO Exercise Puts ISOs on Par With NQSOs, Other Employee Bargain Purchases, and Investments

Employees who receive any amount of compensation, NQSO exercisers, and employees benefiting from any bargain purchase from their employers must recognize these benefits, subject to ordinary income tax rates (up to 38.6% in 2002).[218] Correspondingly, if an employee realizes a significant amount of bargain purchase income upon exercise of her

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[212] The fair market value of shares (as of the date of grant) with respect to which all ISOs held by an employee may first become exercisable in any calendar year may not exceed $100,000. *See id.* § 422(d). Employers may not grant ISOs to individuals with 10% or more of the corporate voting power. *Id.* § 422(b)(6), (c)(5).

[213] Without considering any phase-out of the exemption amount, the bargain purchase income plus other AMT adjustments would have to exceed $70,000 on $100,000 of initial stock value. Therefore, in order to owe AMT, an employee exercising the maximum annual stock value grant of $100,000 during the first possible tax year would have to receive stock with a fair market value in excess of $170,000, with an exercise price of $100,000 (a 70% return on her investment).

[214] *See* I.R.C. §§ 56(b)(3), 55, 83.

[215] *See id.* § 1001.

[216] *See id.* §§ 422(a)(1), 1222, 1(h).

[217] *Id.* § 422(b)(3).

[218] *See id.* §§ 1(i), 61, 83; Rev. Proc. 2001-52, 2001-59 I.R.B. 623.

ISOs, she will have to pay AMT at a current tax rate of up to 28%.[219] If qualifying ISO stock later declines in value, the employee cannot offset the decline against her previously recognized income, but instead must recognize her capital loss subject to any capital loss limitations.[220] Similarly, if stock acquired by NQSOs or any other bargain-purchased asset declines in value, an employee cannot reduce previously recognized income, but must likewise recognize her capital loss subject to any capital loss limitations.[221] Thus, ISO exercisers with significant amounts of bargain purchase income must pay AMT and will receive tax treatment on par with other employee investors.[222]

Employees who use their compensation to make independent investments in the stock market must pay ordinary income and payroll taxes on that compensation. If the stock investments subsequently decline in value, the only way that those employees could realize a tax benefit would be by selling the stock and recognizing a capital loss, which then could be offset first against recognized capital gains and then against ordinary income up to $3,000 per tax year.[223]

Likewise, employees exercising NQSOs pay ordinary income and payroll taxes on the bargain purchase income realized from their exercises. If the stock they acquire subsequently declines in value, they have no ability to offset previously recognized ordinary income subject to tax at ordinary income tax rates. Once again, these employees' only tax benefit from a sale of the depreciated stock is to recognize a capital loss.[224]

Similarly, employees who benefit from any bargain purchase of property from their employers (for example, any bargain purchase of a car, boat, furniture, or other property) will recognize ordinary income

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[219] *See* I.R.C. §§ 55, 56(b)(3).

[220] *See id.* § 1211(b).

[221] *Id.*

[222] *See* J. COMM. ON TAXATION, 106TH CONG., OVERVIEW OF FEDERAL INCOME TAX PROVISIONS RELATING TO EMPLOYEE STOCK OPTIONS 2 (Comm. Print 2000) (stating that ISO transactions under the AMT are treated the same as NQSO transactions). Similarly, if the gain on a sale of qualified small business stock is significant, an AMT adjustment effectively eliminates the tax preference for qualified small business stock gains and taxes such gains like any other long-term capital gain. *See* I.R.C. § 57(a)(7). Currently, a shareholder realizing a gain on the sale of qualified small business stock may exclude 50% of such gain from income. *Id.* § 1202(a). The 50% recognized gain is subject to tax at a 28% long-term capital gain tax rate. *Id.* § 1(h)(5)(A)(ii). Therefore, the effective tax rate on the gain recognized is 14%. Under the AMT, 21% (42% of the 50% excluded gain) must be added back to taxable income. *See id.* § 57(a)(7). As a result, 71% of the gain on qualified small business stock is included in AMTI and subject to tax at 28%; therefore, the effective tax rate for qualified small business stock gains is approximately 20% (71% of the gain x 28% tax rate), which is the maximum tax rate for long-term capital gains. *Id.* § 1(h)(1)(C). In this way, the AMT adjustment eliminates the preferential tax treatment for qualified small business stock and puts such gains on par with other long-term capital gains.

[223] *See* I.R.C. § 1211(b).

[224] *Id.*

subject to income and payroll taxes.[225] They also risk depreciation of their purchased assets to levels below the market value on the date of purchase. If the purchased assets decline in value, the employee's only potential for recognizing any tax benefit on realized economic losses and sale of such assets would be through limited capital loss tax benefits.[226]

Thus, the AMT adjustment for ISO exercisers merely puts such employees in the same tax position as employee investors, NQSO exercisers, and other employee bargain purchasers described above. Even if ISO stock declines in value after the date of exercise, an employee's tax position is no worse than any other employee investor subject to capital loss limitations. Eliminating the AMT adjustment for ISO exercisers would anomolously allow them to pay lower long-term capital gain tax rates on an unlimited amount of bargain purchase income and to defer taxes until they sell their ISO stock.

VI. CONCLUSION

> People want just taxes, more than they want lower taxes. They want to know that every man is paying his proportionate share according to his wealth.
>
> —Will Rogers[227]

The AMT system is broken and must be fixed. Given the current projected budget deficits, Congress might not be in a position to incur the enormous costs of repealing the individual AMT. Nonetheless, Congress will have to make significant amendments to the AMT system to get it back on track to achieve its intended goals. As more and more taxpayers become liable for AMT, resistance will become an increasingly serious problem for the tax system.

Congress should amend the individual AMT to focus its impact on high economic income taxpayers and to simplify its rules and influences on business transactions. ReformAMT is lobbying for elimination of the AMT adjustment for ISO exercises. The ISO AMT adjustment, however, is the type of adjustment Congress intended: a tax on significant economic income that would otherwise escape current taxation. However, other reforms would increase AMT transparency and decrease the number of middle- and low-income taxpayers subject to AMT while meeting

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[225] This does not include allowable employee discounts. *See id.* § 132(c) (allowing qualified discounts to be excluded from an employee's gross income).

[226] *See id.* §§ 1211(b) (limiting recognized capital losses to recognized capital gains plus $3,000), 165(c) (disallowing any loss from the sale of a personal use asset, such as a car or personal residence).

[227] Jeffrey L. Yablon (compiler and arranger), *As Certain as Death—Quotations About Taxes (Expanded 1997 Edition)*, 77 TAX NOTES 1485, 1497 (1997).

the original intent of the AMT system. If Congress indexes for inflation the AMT exemptions, phase-out thresholds, and tax rate brackets, many middle- and low-income taxpayers will no longer be subject to the AMT. Only taxpayers who have realized a significant amount of economic income not subject to regular income taxes should pay AMT. By also eliminating adjustments for state and local tax deductions and personal and dependency exemption deductions, Congress can ensure that taxpayers are not arbitrarily subjected to AMT liability merely because they happen to live in a high-tax state or have a large family.

Simplification of the AMT will increase the system's legitimacy by improving taxpayer understanding of the application of the AMT and its tax calculations. Once taxpayers understand these rules, they can manage their transactions to minimize their overall tax costs, including reducing any AMT.[228] Most vitally, fewer taxpayers should find themselves in the financially devastating position of recent ISO exercisers. In the future, we likely will see AMT reform that will save many ISO exercisers from AMT liability, but it will probably be packaged in AMT amendments that do not modify the AMT adjustment for the bargain purchase income from an ISO exercise.[229]

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[228] Taxpayers legitimately may structure their ISO transactions so as to minimize their tax:

> Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced extractions, not voluntary contributions. To demand more in the name of morals is mere cant.

Comm'r v. Newman, 159 F.2d 848, 850–51 (2d Cir.) (L. Hand, J., dissenting), *cert. denied*, 331 U.S. 859 (1947).

[229] *See* Amy Hamilton, *Congress Hands Thorny AMT Issue to Taxpayer Advocate,* 93 TAX NOTES 755, 755 (2001) (noting that congressional staff for the taxwriting committees has consistently told National Taxpayer Advocate that there will be no legislative fix for ISO exercisers).

ESSAY

IT'S A HARD KNOCK LIFE: DOES THE ADOPTION AND SAFE FAMILIES ACT OF 1997 ADEQUATELY ADDRESS PROBLEMS IN THE CHILD WELFARE SYSTEM?

JIM MOYE*
ROBERTA RINKER, M.S.W.**

One of the biggest problems with the child welfare system in this country is that there are too many children in foster care for too long a period of time. In response to this concern, Congress enacted the Adoption and Safe Families Act of 1997 ("ASFA"), the primary purpose of which is to facilitate the quicker placement of foster children into permanent homes. The statute's chief vehicle for accomplishing this objective is the requirement that a permanency hearing be held within twelve months of a child's entering the foster care system. In this Essay, Mr. Moye and Ms. Rinker argue that ASFA, far from reforming the child welfare system, has actually exacerbated the problems inherent in the system. In particular, the statute's twelve-month permanency deadline has made it almost impossible for a family that has lost a child to the foster care system to reunify.

Have you ever wondered what happened to the children you read about in yesterday's newspaper who were beaten by their parents? What about those kids you saw on the television news, whose drug-addicted parents left them alone to live in squalor? Unfortunately, the chances are high that those children became statistics in the American child welfare system.

The system is comprised of children who have been neglected, abused, abandoned, orphaned, or otherwise led into the system because of behavioral issues. These children, as wards of the state, are sent to foster homes, youth group homes, or "kinship care."[1] The government

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[1] Kinship care is usually defined as care of a child by biological family members or a familial representative. *See* Maria Wilhelmus, *Mediation in Kinship Care: Another Step in the Provision of Culturally Relevant Child Welfare Services*, 43 SOC. WORK 117, 118 (1998).

bureaucracy charged with overseeing this vast system consists of social workers, family support workers, therapists, lawyers, judges, and an assortment of other professionals.

The child welfare system is larger, more expensive, and in a greater crisis than most Americans probably realize. The statistics alone are astounding. The number of children in foster care numbered 262,000 in 1982.[2] Against a backdrop of decreasing available foster placements, the number of children entering the foster care system has increased 77% since the mid-1990s.[3] Based on the most recent statistics released by the United States Department of Health and Human Services ("HHS"), there were 581,000 children in foster care as of September 1999, with 127,000 of those children awaiting adoption.[4] About 100,000 of the children will never be able to return to their biological homes.[5] Additional statistics show that, of the 127,000 adoption-eligible children, 68% have been in continuous foster care for two years or more.[6] Indeed, in 1998, foster care children spent an average of three years in out-of-home care.[7] There are about 20,000 children adopted from public agencies annually, but that number represents only 16% of the total number of children adopted in the United States; meaning that more than 80,000 American children available for public adoption are passed over by families opting for costly private and foreign adoptions.[8] A significant number of children in the foster care system come from families that live in poverty.[9] Minorities constitute a vastly disproportionate share of those in the child welfare system. Even though African Americans comprise roughly 12.3% of the general population,[10] they make up approximately 50% of the children in

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[2] *Vital Statistics: State of the Child*, U.S. NEWS & WORLD REP., Apr. 30, 2001, at 12.

[3] *Abuse in Foster Care*, ST. PETERSBURG TIMES, Nov. 26, 2001, at 12A.

[4] U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Afcars Report Interim FY 1999* (2001), *available at* http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm.

[5] *See* Amanda Spake, *Adoption Gridlock*, U.S. NEWS & WORLD REP., June 22, 1998, at 30, 31.

[6] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 4.

[7] Spake, *supra* note 5.

[8] *See id.*

[9] *See* Alice Thomas, *Report: Number of Foster Kids Not Affected by Welfare Reform*, COLUMBUS DISPATCH, Feb. 4, 1999, at 9C (majority of children in the Ohio foster care system come from families living in poverty); *see also Foster Child Numbers, Costs of Care Increase*, GRAND RAPIDS PRESS, Nov. 23, 1998, at B3 ("But Marian Wright Edelman, head of the Washington-based Children's Defense Fund, thinks federal and state welfare cuts have forced more American children into poverty and pushed many into foster care."). *See generally* Leslie Doty Hollingsworth, *Promoting Same-Race Adoption for Children of Color*, 43 SOC. WORK 104, 111 (1998) ("Poverty has been linked to the circumstances that result in out-of-home placements. A recently released National Incidence Study of Child Abuse and Neglect ('Survey Shows,' 1996) showed that 'children from families with annual incomes below $15,000 were over 22 times more likely to experience maltreatment than children from families whose incomes exceeded $30,000. They were also 18 times more likely to be sexually abused, almost 56 times more likely to be educationally neglected, and over 22 times more likely to be seriously injured.'").

[10] U.S. CENSUS BUREAU, *Census 2000 Summary File 1: 100 Percent Data, DP-1 Profile of*

foster care.[11] Of the 581,000 foster children, 55% are supported through federal funds.[12] The total cost to administer the foster care system in America is over $7 billion a year.[13]

Equally disturbing are the statistics reflecting the outcomes of children who have languished in the foster care system. A University of Wisconsin study found that after "aging out"[14] of foster care, 27% of males and 10% of females were incarcerated within twelve to eighteen months.[15] Furthermore, 50% of the former foster care kids were unemployed, 37% did not graduate from high school, 33% were on public assistance, and 19% of the females had given birth to their own children.[16] Unbelievably, 47% of former foster children were receiving some form of counseling or medication for mental health problems before aging out, and that number only dropped to 21% after leaving the system.[17] Around 33% of the children in foster care have been diagnosed with three or more psychiatric problems.[18]

Over the last twenty-five years, Congress has attempted to correct the problems of the child welfare system through legislation. The first effort came in 1980 when both houses passed the Adoption Assistance and Child Welfare Act of 1980.[19] It took seventeen years and political leadership changes in the Presidency and both houses of Congress to enact the Adoption and Safe Families Act of 1997 ("ASFA").[20] ASFA was seen by its supporters as the cure for years of poor child welfare system administration and represented a philosophical shift from reunifying broken homes to putting the health and safety of children first.[21]

This Essay examines whether ASFA adequately addresses systemic problems in the child welfare system. Part I discusses the history of child

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General Demographic Characteristics (2001), *available at* http://factfinder.census.gov/servlet/QTTable?_lang=en&ds_name=DEC_2000_SF1_U&geo_id=D&qr_name=DEC_2000_SF1_U_DP1&_ts=32239455740.

[11] Timothy Roche, *The Crisis of Foster Care*, TIME, Nov. 13, 2000, at 74; *see also* Lottie L. Joiner, *The State of Black Children*, EMERGE, Oct. 31, 1998, at 39 ("Black children are in a state of emergency. Of the 10.4 million African American youth under the age of eighteen, 40 percent live in poverty. They make up nearly 50 percent of the foster care system and are disproportionately victims of violence, abuse and neglect.").

[12] Spake, *supra* note 5.

[13] Roche, *supra* note 11.

[14] *See* Barbara Vobejda, *At 18, It's Sink or Swim*, WASH. POST, July 21, 1998, at A1 (explaining that at age eighteen, people are no longer considered wards of the state and are exited out of the system).

[15] *Id.* (quoting statistics compiled by Mark Courtney and Irving Pliavin as part of a study conducted at the Univ. of Wis., Sch. of Soc. Work).

[16] *Id.*

[17] *Id.*

[18] Susan DosReis et al., *Mental Health Services for Youths in Foster Care and Disabled Youths*, 91 AM. J. PUB. HEALTH 1094 (2001).

[19] Pub. L. No. 96-272, 94 Stat. 500 (1980).

[20] Pub L. No. 105-89, 111 Stat. 2115 (1997).

[21] *Cf.* Heath Foster, *Move Toward Permanent Home is on Faster Track*, SEATTLE POST-INTELLIGENCER, June 18, 1998, at A10.

welfare in America and looks at the precursor to ASFA, the Adoption Assistance and Child Welfare Act of 1980.[22] Part II details ASFA and some of the more important elements of the law. Part III analyzes some of the problems with ASFA. Specifically, ASFA has increased the already overburdened workload of social workers at state child welfare authorities, ignored the hardships for families seeking to reunify created by inadequate state court supervision and the loss of welfare benefits, made it less likely that parents in need of substance abuse treatment will be able to receive that treatment before their children are placed in permanent homes, and created a perverse incentive scheme that encourages states to put children up for adoption as soon as possible. Part IV of the Essay suggests recommendations to address some of the concerns with ASFA. These include statutorily limiting the social worker to family ratio, providing the states with more money to hire new social workers and retain current ones, amending the welfare laws to allow families that have lost their children to retain their benefits, creating financial incentives to encourage states to achieve permanency for foster children, and requiring state judges to give the recommendations of the child welfare agencies substantial weight. This Essay concludes that even though ASFA has a noble purpose, it essentially fails to address some of the core problems in the child welfare system.

I. THE EARLY HISTORY OF THE AMERICAN CHILD WELFARE SYSTEM

The child welfare system evolved very slowly in the United States. During the 1600s and early 1700s, there was no formal child welfare system. In the beginning, children who were poor, orphaned, or illegitimate were "indentured to learn trades."[23] By the late 1700s and throughout the 1800s, abandoned and orphaned children were sent to live in almshouses and publicly funded shelters, where relatives or strangers could claim them.[24] Adults who claimed such children became known as "foster parents."[25]

It was not until after the New York Society for the Prevention of Cruelty to Children was founded that states started creating child protection agencies.[26] In 1912, the United States Children's Bureau became the first federal entity created and charged with addressing child welfare issues.[27] The Social Security Act of 1935, which is the basis of most mod-

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[22] Pub. L. No. 96-272, 94 Stat. 500 (1980).

[23] *Broken Lives, A History of Foster Care,* SACRAMENTO BEE (June 13, 2001), *available at* http://www.sacbee.com/static/archive/news/projects/foster/timeline.html.

[24] *See generally id.* Most of the children claimed were usually used as household servants. *See id.*

[25] *See id.* "Public funds are paid to these 'foster parents,' but there is no check on whether children are being adequately cared for." *Id.*

[26] *See id.*

[27] *See id.* The United States Children's Bureau had responsibility for all child welfare

ern social welfare programs, provided federal funds for children in poverty-stricken families, as well as those children who were abused, neglected, and abandoned.[28] In 1974, Congress passed the Child Abuse Protection and Treatment Act,[29] which required states to pass mandatory child abuse reporting laws.[30]

Congress made its first real attempt to overhaul the child welfare system with the passage of the Adoption Assistance and Child Welfare Act of 1980.[31] The statute sought to de-emphasize the use of the foster care system since many in Congress felt that the phenomenon of "foster care drift" had become far too pervasive.[32] Most importantly, the law required that after a child had been removed from a home by the state, the state had to make "reasonable efforts" to prevent or eliminate the need for the child to be removed from his/her home and make it possible for the child to return home.[33] Involuntary removal of a child from a home could be achieved only as "the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child."[34] Finally, the legislation tied federal funds to the actions of the states by mandating that each state submit a foster care plan to the federal government for approval, and required HHS to ensure that reasonable efforts language was included in every court order.[35]

II. New Leadership, New Philosophy: The Adoption and Safe Families Act of 1997

ASFA is divided into roughly three sections dealing with: (1) reasonable efforts and safety requirements for foster care and adoption placements; (2) incentives for providing permanent families for children; and (3) additional requirements and reforms.

A. Reasonable Efforts and Safety Requirements for Foster Care and Adoption Placements

ASFA changed the primary goal of the child welfare and adoption system from promoting family reunification to holding a child's health

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issues, including legislation, oversight of children's institutions, and statistics on birth rates and infant mortality. *Id.*

[28] *See id.*

[29] Pub. L. No. 93-247, 88 Stat. 4 (1974).

[30] *See Broken Lives*, *supra* note 23. The law provided model legislation for states and also created the requisite procedures for investigating abuse and reporting neglect. *See id.*

[31] Pub. L. No. 96-272, 94 Stat. 500 (1980).

[32] *See* S. Rep. No. 96-336, at 12 (1979).

[33] *See* 42 U.S.C. § 671(a)(15) (1980).

[34] *Id.* § 672(a)(1).

[35] *See id.*

and safety as the paramount concern.[36] ASFA's biggest change to foster care and adoption law is the requirement that a "permanency hearing" must be held within twelve months of a child entering into foster care.[37] At this hearing, a permanency plan must be worked out for the child as to whether he/she will return home, be placed for adoption, be placed in kinship care, or whether the state will file for the termination of parental rights.[38] This twelve-month permanency deadline has created more problems for the child welfare system than any other provision in ASFA, as will be discussed below.

The new law continues the reasonable efforts requirement of states to preserve and reunify families; however, states are relieved of the reasonable efforts duty if a court has determined that a parent has: (a) murdered one of his/her children; (b) committed voluntary manslaughter of one of his/her children; (c) conspired to commit murder or voluntary manslaughter against one of his/her children; (d) committed a felony assault resulting in serious bodily injury to the child or the other parent; (e) had his/her parental rights involuntarily terminated for one of his/her other children; or (f) subjected the child to "aggravated circumstances."[39] Interestingly enough, the law leaves it up to the states to define "aggravated circumstances."[40] If the court determines that reasonable efforts are not necessary, the state must hold a permanency hearing within thirty days of the court's decision and take whatever steps are necessary to finalize a permanent placement for the child.[41]

Another unprecedented change wrought by ASFA upon the child welfare system is that the state must file a petition to terminate the parental rights of the child's parent(s) if the child has been in the system for

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[36] *See* 42 U.S.C. § 671(a)(15) (2001) ("[I]n determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern.").

[37] *See id.* § 675.

[38] *See id.* The statute states that there must be a "permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interest of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement . . . ." *Id.*

[39] *See id.* § 671(a)(15).

[40] *See id.* Even though states are allowed to define "aggravated circumstances," the statute lists some offenses that could trigger this provision. Those offenses include abandonment, torture, chronic abuse, and sexual abuse. *See id.*

[41] *See id.* ("[I]f reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D)—(i) a permanency hearing (as described in section 675(5)(C)) shall be held for the child within 30 days after the determination; and (ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child . . . .").

fifteen of the most recent twenty-two months, if a court has determined that the child was an abandoned infant, or if the court finds one of the elements that eliminates the state's reasonable efforts requirement.[42] Concurrently, the state must "identify, recruit, process, and approve" an adoptive family for the child, unless the child is being cared for by a relative, the state has documented a compelling reason for determining that filing such a petition is not in the best interest of the child, or the state has not provided the child's family with adequate services.[43]

Finally, there are two other major provisions in this portion of ASFA. States are now required to complete criminal record checks before a foster parent can be certified,[44] and states must accurately and completely document the steps they are taking to find alternative placements for a child who will be permanently removed from his/her home.[45]

B. Incentives for Providing Permanent Families for Children

The major provision under this arm of the legislation involves adoption incentive payments. Under ASFA, if the number of foster child adoptions exceeds a base number, the state will be rewarded with "adoption incentive payments" of $4,000 for regular foster care adoptions and $6,000 for special needs foster care adoptions.[46] The incentive payments are made directly to the state, not the adopting parents, and can only be used to provide services for the child or the adopting family.[47] As discussed below, this incentive scheme unfortunately has encouraged states to turn their focus away from family reunification.

C. Additional Improvements and Reforms

This part of ASFA encompasses three major provisions. The first major development calls for health insurance coverage for children with special needs.[48] The purpose of the provision seems to be to provide the

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[42] *See id.* § 675(5).

[43] *See id.* Specifically, the adequate services portion of the statute reads: "(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 471(a)(15)(B)(ii) are required to make be made with respect to the child." *Id.*

[44] *See id.* § 671(a).

[45] *See id.* § 675(1).

[46] *See id.* § 673b ("A State is an incentive-eligible State for a fiscal year if . . . the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year . . . .").

[47] *See id.* ("A State shall not expend an amount paid to the State under this section except to provide to children or families any service (including post-adoption services) . . . .").

[48] *See id.* § 671.

requisite coverage for children whose special needs, and the associated costs for care, make it difficult for such children to be adopted.

The second major development requires states to ensure that they are providing quality foster care services.[49] Specifically, by "[no] later than January 1, 1999, [states] shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children."[50] Ironically, the law does not define "quality services." One way to improve ASFA, as will be discussed later, would be to define "quality services" in a manner that provides the states with some guidance regarding what kind of services Congress expects their child welfare systems to provide.

Finally, regarding reporting requirements, states are required to maintain data under the Adoption and Foster Care Analysis and Reporting System ("AFCARS") and report the information to the Secretary of HHS.[51]

III. What Are the Problems with ASFA?

At the time it was adopted, supporters of ASFA believed that the law would dramatically change the pattern of the child welfare system, making it one that keeps children safe, moves children to permanency quickly, and provides services more effectively than before. However, four years later, ASFA has not created a better system. In fact, ASFA has exacerbated existing problems in the child welfare system and created a new set of complications. While it was expected to improve the child welfare system, the legislation fails to address some of the most systemic obstacles for children and their families involved in the child welfare system.

A. ASFA and State Child Welfare Authorities

The provision of stable and quality services to those in the child welfare system depends upon the states' ability to recruit and retain child welfare administrators and social workers effectively. However, ASFA does not provide states with sufficient funds to reduce the high turnover rates among administrators and social workers in child welfare agencies. Furthermore, the strict twelve-month permanency hearing deadline and reporting requirements imposed by ASFA have contributed to increased "burn-out" and turnover among child welfare administrators and social workers. ASFA has neither solved these turnover and retention problems,

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[49] *See id.*
[50] *Id.*
[51] *See* Pub. L. No. 105-89, § 402, 111 Stat. 2115 (1997).

nor has it alleviated their potentially harmful effects on families and children in the child welfare system.

High turnover rates among the leadership positions of child welfare agencies often have destabilizing effects on the provision of child welfare services. In *Assessing the New Federalism*, a multi-year, twelve-state case study examining the evolution of the United States foster care system, the Urban Institute determined that frequent changes in the leadership of child welfare agencies can hamper coordination and cohesiveness among government actors in the child welfare system.[52] According to the study, leadership changes at child welfare agencies typically result in a refocusing of agency priorities, and "frequent changes in leadership may simply yield a lack of consistency and continuity in day-to-day practice and procedural matter."[53] Numerous respondents in the study stated that the mission of their agency had continually fluctuated between child safety and family preservation, and that leadership changes had helped cause these fluctuations.[54] The study also found that leadership changes might "affect important relationships with other service systems or state and local legislators."[55]

Frequent changes in leadership also affect the families and children involved with the child welfare system. As leadership changes, the agency enters a period of transition in which the staff of child welfare agencies, the children in the custody of the system, and the children's families all face new and often different expectations. During this transition period, the necessary adjustment to new leadership and new policies often diverts the agency's focus away from the needs of the child and the reunification desires of the family.

Additionally, each leader may have his or her own view of the child welfare system. One leader may believe that family preservation should be the priority of the system while another one may err on the side of child safety.[56] This can often send a mixed message to a family who has been involved in the system under both leaders. Under one leader, the family may receive multiple support services, while under another leader there may be a rapid move toward adoption. This can often leave the family frustrated and angry. Changes in leadership can also hinder a family's consistent, timely movement towards reunification, a problem that has been amplified by ASFA. Prior to the change in the law to ASFA,

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[52] *See* Malm et al., *Running to Keep in Place: The Continuing Evolution of our Nation's Child Welfare System*, ASSESSING THE NEW FEDERALISM, OCCASIONAL PAPER NO. 54 (Urban Inst., Washington, D.C.), Oct. 2001, at 5 ("During the approximately three years between our site visits, the leadership at the human services agency or child welfare agency changed in half the ANF states. In New Jersey, it happened more than once; the state has more than three welfare directors in three years.").

[53] *See id.*

[54] *See id.* at 5–6.

[55] *Id.* at 5.

[56] *See id.* at 7.

some delay in the move towards permanency did not affect the family as much as it does currently. With ASFA, any delay can mean an end to the goal of reunification and the start of the goal of adoption.

In addition to frequent leadership changes, difficulties encountered by state agencies in the recruitment and retention of social workers have also hindered the provision of child welfare services. There are many reasons for the high turnover rate of social workers in child welfare. First, social workers are more able to explore different career choices than once thought.[57] Previously limited to the areas of child welfare, social workers are now in hospitals, mental health facilities, governmental agencies, schools, and the military. Second, social workers are often able to find other positions that are less stressful and offer more compensation.[58] Third, high documentation demands consume a great deal of a worker's time and energy and lead many to find other avenues of employment.[59] Finally, many social workers have enormous caseloads, in which they are responsible for multiple children and families. Such pressure leaves many workers overwhelmed and "burned out," resulting in their exit from the child welfare system.[60]

The low pay, heavy documentation requirements, large caseloads, and the resulting high turnover rates among child welfare social workers have negatively impacted the families and children in the child welfare system. According to the Urban Institute, "[c]hild welfare caseloads have long been considered too large, and more often than not agencies cannot consistently meet the standards established by the Child Welfare League of America."[61] High caseloads prevent social workers from building relationships with families who are seeking to reunify with their children, and "make it very difficult to ensure timely checks on whether families have complied with services."[62] In general, social workers with high caseloads will probably not be able to complete a proper assessment of the family, consistently address its needs, and appropriately engage the family in services that they need in order to reunify with their children. Furthermore, when agencies have difficulty recruiting and retaining so-

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[57] *See id.* at 12.

[58] *See id.*

[59] *See id.* at 13.

[60] *See* Catherine Saillant, *Incentives Help Eliminate a Shortage of Social Workers*, L.A. TIMES, Sept. 17, 2001, at B4 ("It takes a certain grit to enter a profession where, on a daily basis, you deal with societal taboos and failing parents outraged that their children are about to be taken away from them . . . . Eventually, after their first year or second year or third year, [the social workers] will be really burned out.") (internal quotations omitted); *see also* Ed Cullen, *Young Social Workers Stay Focused on Positive Aspects of Their Profession*, BATON ROUGE ADVOC., Dec. 4, 2000, at 1C ("A lot of case managers burn out if they don't understand they're making a difference . . . . Many social workers change jobs within the profession every two years to get a new lease on their work.") (internal quotations omitted).

[61] Malm et al., *supra* note 52, at 17.

[62] *Id.*

cial workers, children and their families are often left with either an overburdened or new, inexperienced service provider.[63] The combination of an inexperienced social worker with a high caseload can have disastrous effects on the family.

State agencies' difficulties in recruiting and retaining social workers have not been alleviated by ASFA. In fact, in several ways ASFA has contributed to those difficulties. For example, the documentation and reporting requirements of ASFA increase social workers' paperwork and consume a great deal of workers' time, energy, and motivation. Additionally, when ASFA set the twelve-month permanency hearing deadline, it failed to take into consideration the issue of social worker turnover and how it would affect the success of families attempting to reunify with their children.

As this Essay will discuss later, one recommendation for improving ASFA to address these concerns is to statutorily limit the number of families that can be assigned to a particular social worker, and to provide the states with more money that is earmarked for the purpose(s) of hiring more social workers and/or retaining current workers.

B. ASFA and the Court System

Another obstacle to the provision of effective child welfare services that the authors of ASFA failed to address relates to the organization of the court system and the legal officials presiding over child abuse and neglect cases. Some jurisdictions, such as Virginia, have separate family courts to adjudicate such cases. This develops a better relationship between social workers and legal officials. However, most states combine these court hearings with other legal matters. Until recently in the District of Columbia, for example, the judges presiding over neglect matters also presided over criminal matters. Such intermingling prevents judges from focusing on matters relating to neglect and abuse.[64] As there are different resources and rules in criminal and child welfare cases, judges asked to switch between the two different areas may be compelled to make difficult decisions about families and children without a fundamental understanding of child welfare issues.[65] Furthermore, these

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[63] *See id.*

[64] *See* Neely Tucker, *D.C. Family Court Would Emerge from Overhaul Bill*, WASH. POST, May 23, 2001, at A18. New legislation has passed which will create a separate family court for the District of Columbia. The D.C. court system has been hit with controversy over a number of its decisions in foster care cases, including its decision that led to the death of 23-month old Brianna Blackmond. *See id.*

[65] *See District of Columbia Family Court Act of 2001: Hearing on H.R. 2657 Before the Subcomm. on D.C. of the House Comm. on Gov't Reform*, 107th Cong. (2001) (statement of Judge Scott McCown, Texas state district judge), *available at* LEXIS, Federal Document Clearing House Congressional Hearings Summaries ("I now know that making good decisions about families requires more than common sense; it requires a great deal of

judges' dockets are often overloaded with neglect/abuse cases as well as criminal cases, leaving very little time to analyze each case and its attendant complexities. Additionally, most courts employ a rotation system, in which judges shift between areas of law (i.e., family, civil, criminal) at different intervals of time. Accordingly, a judge who hears a neglect case in the initial stage of trial and disposition may not be the same judge to hear the case during the review hearing schedule.[66]

The shortcomings of these judicial arrangements have created several types of problems in the administration of ASFA. First, judges who lack expertise in child welfare matters might terminate parental rights and place a family's children up for adoption without giving the family the appropriate opportunity for reunification. For example, a parent struggling with substance abuse and mental health problems may not be receiving needed services due to obstacles in the system beyond his or her control, and a judge unfamiliar with the child welfare system might not recognize and remedy the system's bottlenecks before terminating parental rights. Second, judge rotations may hinder the movement of cases through the system. New judges assigned to these cases will need to get to know the case and the workers assigned to the case. New judges may also have a different view of the family, which can often change the focus of the case and may even create different expectations of the family. Third, and most important, the ASFA twelve-month permanency hearing deadline may not be extended to accommodate judicial arrangements. Even if there have been six different judges from the onset of the case to the present, even if a judge has been woefully lacking in expertise, and even if a judge is overwhelmed with neglect/abuse cases and criminal cases, the time limit may not be extended. Many states' judicial arrangements may not be structured in a way to serve families effectively within the twelve-month timeframe called for by ASFA, and families may suffer as a result.

C. ASFA and Its Interaction with Other Laws

ASFA interfaces poorly with other laws that relate to child welfare. The problematic interactions between ASFA and other laws create difficulties in establishing permanency within ASFA's twelve-month deadline and further reduce the effectiveness of the child welfare system.

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expert knowledge. . . . [F]rom my experience, I have come to the certain conclusion that a trained and experienced judge specializing in family law and presiding over a family law case from beginning to end can obtain a better outcome.").

[66] In West Virginia, for instance, "[f]amilies often see a magistrate for a spouse abuse case, a family law master to settle child support and custody issues, and a circuit judge to handle a divorce or child abuse cases." Dawn Miller, *Family Court Amendment Gets Overwhelming Voter Approval*, CHARLESTON GAZETTE, Nov. 8, 2000, at P18A.

One example of a law that interfaces poorly with ASFA and the child welfare system is Temporary Assistance for Needy Families ("TANF").[67] TANF creates a window of time, or time limit, during which a family can receive welfare benefits. As the time limits expire for families receiving such benefits, many children are forced into foster care because the families are left without another form of financial support. As one newspaper reports, "In some cases, children may wind up in foster care when mothers who relied on a welfare check to feed them turn to social services departments in desperation when the money disappears."[68] As more children enter the foster care system and flood the child welfare rolls, public officials often speak in terms of how they can create more adoptive placements and improve the child welfare system as it serves these children. However, the more serious problem posed by this situation is "the prospect that poor families will lose their children to the state simply because they are poor."[69]

Indeed, there are early signs that more welfare recipients are seeing their children enter foster care. According to one newspaper, "In Wisconsin—which embarked on welfare reform early and avidly—5 percent of former welfare recipients, or one in twenty, reported being forced to abandon their children."[70] Also, that same newspaper reports that "[w]hen researchers interviewed San Diego families who had become homeless after losing their benefits, 18% said their children subsequently went into foster care."[71]

Furthermore, if a family is receiving TANF benefits and for some reason its child enters foster care, those benefits cease because the children are no longer in the home. The families are then left deeply impoverished without adequate housing, utilities, food, proper clothing, and medical assistance. Some families lose their housing because they are not able to pay the rent or because they fall below the income restrictions in their leases. As a corollary issue, when children are removed from their biological parents' care, the parents not only lose their welfare benefits, but also lose access to Medicaid benefits. Many of the parents who have substance abuse problems are unable to receive treatment or proper medical care without TANF benefits because most of these treatment programs are not free, and those that are have long waiting lists. Thus, the family is now faced with the additional hardships that go along with losing their TANF benefits. With a history of dependency on public assistance, and with so many problems facing them, many parents are left

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[67] 42 U.S.C. § 601 et seq. (2001).

[68] Nell Bernstein, *Is Welfare Reform Sending More Kids to Foster Care?*, SALON.COM, Sept. 1, 1999, *at* http://www.salon.com/news/feature/1999/09/01/welfare.

[69] *Id.*

[70] *Id.*

[71] *Id.*

to get education, job training, or permanent employment without assistance.

To further complicate matters, before the family can reunify, most child welfare agencies require that the parents have appropriate housing and the ability to provide adequately for the child's basic needs. Without TANF support, the family may not be able to meet these requirements.[72] Since TANF benefits are unavailable if children are not in the home, this makes it almost impossible for parents who lose their children to the foster care system to get "back on their feet" and do what is necessary to reunify their families, particularly within the ASFA twelve-month deadline.

D. The Inability of Parents to Access and Utilize Needed Services Within the Time Limits Imposed by ASFA

The general unavailability of certain services poses a problem for parents attempting to reunify their families within the twelve-month deadline called for by ASFA. For example, there are a limited number of publicly funded substance abuse programs available to parents. National child welfare agencies report that "[j]ust over two-thirds of parents involved in the child welfare system need substance abuse treatment, but child welfare agencies can provide treatment services for less than one-third of them."[73] In addition to there being limited substance abuse treatment resources, there is a limited number of publicly funded housing, mental health, utility assistance, and child care programs to address the needs of families. Furthermore, even if the resources are available, the social worker may not know of them or may not offer them to the family. This is often linked, as discussed earlier, to the turnover in social workers as workers are overwhelmed and inexperienced.

ASFA's twelve-month time limit often proves too short for parents to locate and utilize services for such problems as substance abuse and mental illness. For those parents who are offered and provided substance abuse services, research has demonstrated that it often takes longer than twelve months to overcome their addictions. HHS reported in 2001 that "nearly one-third of those in treatment achieve permanent abstinence in their first attempt at recovery . . . [a]n additional one-third have periods of relapse but eventually achieve long-term abstinence, and one-third have chronic relapses that result in premature death from substance abuse and related consequences."[74] According to these data, few people are able to achieve abstinence on their first attempt. Treatment for such a condi-

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[72] *See id.*

[73] Child Welfare League of America, *The Child Protection/Alcohol and Drug Partnership Act (S. 484/H.R. 1909) Will Help Keep Children Safe and in Permanent Families* (Washington, D.C.), June 2001, *at* http://www.cwla.org/advocacy/2001legagenda03.htm.

[74] *Id.*

tion can last several months, which means that parents who are unable to achieve abstinence on their first attempt may have to go through several rounds of treatment. This may result in a period of time for treatment longer than twelve months, which will be too late for parents to reunify their families within ASFA's time limit.

For many parents, completing or even starting a course of substance abuse treatment within twelve months is unrealistic. Most parents whose children are in the foster care system are impoverished; in fact, "[p]arental substance abuse and poverty are the top two problems in child protective caseloads in 85% of the states."[75] In addition to being poor, these parents are often without the benefits of cash or medical assistance due to the rules of TANF. This leads to parents being unable to get treatment without a publicly funded program, of which there are few. There are also waiting lists for these programs.

In sum, the obstacles to reunification facing parents who have substance abuse problems and whose children are in foster care can be overwhelming. Parents who are fortunate enough to have a social worker and judge who offer and provide substance abuse treatment, locate a publicly funded program, wait several weeks to get off the waiting list, get into the program, persevere through setbacks, and ultimately achieve sobriety, may still be denied reunification if this process lasts longer than twelve months. This will end in families losing their children to adoption.

The inability of public housing programs to provide adequate housing for families attempting to reunify within twelve months further demonstrates the problematic interaction between services and the ASFA deadline. Housing is often an important commodity to families seeking to reunify with their children. It can be impossible to become stable, stay clean from drugs, and maintain a job without an appropriate place to live. The housing issue can be very difficult to resolve in areas where the housing market is overcrowded and costs are high. This may prevent a family from being able to reunify with their children in twelve months. For example, in the District of Columbia in 1999, "the fair market rent for a two-bedroom apartment . . . was $820, 77% of the average monthly income for a worker earning the State minimum wage, and 115% of the maximum monthly TANF cash assistance grant plus Food Stamps for a family of three."[76] With the high cost of housing, the long waiting list at the local housing authority, and limited resources available in the form of vouchers for housing, reunification in the twelve months set by ASFA will be impossible. If there were more publicly funded programs to ad-

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[75] Child Welfare League of America, *Children 2001: Creating Connected Communities: Policy, Action, Commitment*, National Fact Sheet (Washington D.C.), 2001, *at* http://www.cwla.org/advocacy/nationalfactsheet01.htm.

[76] Child Welfare League of America, *District of Columbia's Children 2001* (Washington, D.C.), 2001, *at* http://www.cwla.org/advocacy/statefactsheets/2001/dc.htm.

dress the needs of families for affordable housing, there would be more opportunities for families to reunify. The lack of interaction between existing agencies and programs heightens the barriers parents have to overcome to reunify their families. Accordingly, with such a poorly organized system, the number of parents losing their children permanently in the child welfare system will continue to increase.

E. Adoption Bonuses

According to the National Commission on Children, children are often "prematurely and unnecessarily" removed from their families because federal aid formulas give states "a strong financial incentive" to do so rather than provide services to keep families together.[77] ASFA is no different in that it rewards states for removing children from their families of origin and getting them adopted. These rewards come in the adoption bonuses to states in the amount of $4,000 for a child without special needs and $6,000 for a special needs child each time an adoption is finalized.[78] This money is received every time an adoption is completed, and the money is not contingent on providing support to the adoptive family or child prior to adoption or post-adoption. Furthermore, the states do not need to meet requirements for "successful adoptions." In essence, payment is based on the number of adoptions finalized rather than the number of successful adoptions. This problem is apparent from "[a] 1997 study [that] found that [only] one-third of the children legally freed for adoption in 1996 actually were adopted."[79] This results in a group of children who are legally free for adoption without permanent homes.[80] Even if an adoption unravels, the state can benefit by finding another adoption source and count the next adoption toward the goal of reaching a bonus. This incentive scheme creates a situation where the state is driven to create as many adoptions as possible, rather than achieving as many permanent home situations as possible. There is no real incentive for the state to work with the birth parents toward a goal of reunifying because the state receives bonuses for adoptions, not for maintaining existing families. This ultimately leads to families losing their children to adoption and the state benefiting from the parents' loss.

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[77] *Beyond Rhetoric: A New American Agenda for Children and Families* (National Commission on Children, 1991), at 290.

[78] *See supra* note 46 and accompanying text.

[79] Conna Craig & Derek Herbert, THE STATE OF CHILDREN: AN EXAMINATION OF GOVERNMENT-RUN FOSTER CARE 7 (1997).

[80] *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 139 (1995).

IV. RECOMMENDATIONS

With a system as complex and interconnected as the child welfare system, there do not appear to be any easy answers for improvement. Furthermore, the authors acknowledge that there are numerous other problems with the child welfare system outside of ASFA. Poverty and substance abuse have been the causes of many children entering into the child welfare system, and it must be noted that any policy answer that fails to address the root causes of those problems will cover up problems in the system instead of correcting them. There are, however, several legislative steps Congress could take to strengthen ASFA and provide a more stable child welfare system.

The first step toward improvement involves the actual social workers who interact with clients in the child welfare system. This Essay discussed, in detail, their overburdened caseloads, poor pay, and the high "burn out" factor.[81] Legislation should be brought forward limiting the number of children or families that could be assigned to an individual social worker and, as an additional step, providing federal funds to hire more social workers, increase social workers' pay, and increase the number of family support workers.

The rationale behind such a proposal is compelling. As stated earlier, workers are required to carry far too many cases to provide the adequate services that are called for in ASFA. This proposal would force state authorities to find ways to create continuity in their staff without compromising the services they provide to families in the foster care system. By statutorily limiting the number of cases assigned to each worker, workers will no longer be overwhelmed with their caseloads and will be able to spend enough time with their clients to address all of their needs. Furthermore, social workers will be better able to serve their critical role in bringing about possible family reunifications. The increase-in-pay portion of the proposed legislation would help in retaining social workers, and could also be used as a recruiting tool. To ensure that these funds are used for the sole purpose of pay increases, Congress can earmark the funds and place them in trust with HHS. Each state would then simply need to petition HHS to have the funds distributed. Increasing the number of family support workers would help by providing necessary resources for families and alleviating some of the burden currently experienced by social workers.

A second recommendation involves the issues surrounding the interaction of ASFA with other federal laws, particularly TANF. To relieve some of the tension between these two laws, and others, Congress could pass legislation commissioning a task force to complete a six-month legislative analysis, with input from the states, on ASFA's impact on other

[81] *See supra* notes 57–63 and accompanying text.

laws. Specifically, the task force would be charged to seek out those discrepancies, such as those discussed above, that were not properly considered when ASFA was originally passed. The task force would be empowered to make legislative and policy recommendations to remove any discrepancies that may exist and, as an additional element to the legislation, Congress would be required to act on those recommendations from the task force within six months.

A third recommendation would focus on amending ASFA to allow parents to retain their welfare benefits after they have lost their children. Such a modification would allow parents, within six months of losing their children to foster care, to have welfare benefits restored. For this temporary restoration, the supervising court would have to certify that the parents have taken steps toward correcting the underlying issues that caused the child to be removed, as outlined in the service agreement between the parents and the state authorities. The state child welfare agency, as part of the parents' application to have benefits restored, would be required to certify that the parent is following the service agreement. Once benefit payments are restored, they could be used only for obtaining housing, food, medical assistance, or clothing. This would give parents an opportunity to correct some of the underlying deficiencies that sent their children into foster care and still give them hope of achieving family reunification.

As an additional matter, parents who have substance abuse problems should be allowed to keep Medicare coverage after their children have entered foster care. As discussed earlier, many of these biological parents have substance abuse problems and when their children enter foster care, they lose their welfare benefits, including Medicare. Publicly funded substance abuse programs are difficult to get into because of overcrowding and most of these biological parents could never afford private substance abuse programs. Allowing a biological parent to keep Medicare after the children have entered this system gives the parent a fair opportunity to remedy one of the greatest factors that send children into foster care. Furthermore, if a biological parent loses access to health care, this could create additional obstacles in achieving reunification. For instance, if a parent were being treated for a serious illness without proper medical care, the parent might become even more ill, thus making it impossible for the parent to do what is necessary, such as seek employment, to reunify the family.

A fourth recommendation involves the lack of services available to families who have children in the foster care system. As discussed earlier, the lack of access to services for families is a serious problem. HHS, as part of the regulations package tied to ASFA, could require that states detail what services are available to families and how the state intends to provide those services. As part of its reporting requirements in this regard, the state would have to justify the number of housing assistance,

substance abuse, mental health, and food assistance programs, and break down per capita the level of access to the services by its constituents. Furthermore, the state would be required to provide long-term goals insuring that services would be available to constituents for the future. HHS would then monitor how services are currently being provided, based primarily on the information provided by the states in AFCARS. HHS could then impose civil penalties upon states that fail to address adequately the most basic resource issues for clients.

A fifth recommendation is that Congress amend ASFA to give states bonuses for achieving permanency for children, not just for adoptions. Under the current bonus system, states are rewarded for creating a certain number of adoptions above a base number. However, there are no incentive payments for states if they maintain families or find kinship care placements. Under amended language, the federal government would provide bonuses to states for achieving permanent homes (biological, adoptive, or kinship care) above a base number. This shifts the focus from just having children adopted to the more basic and moral goal of achieving permanency for children in a timely and efficient manner. The proposed amendment takes away the incentive from states to focus exclusively on creating more adoptions, and instead rewards states for getting children out of the system permanently. Such an incentive does not exist now.

A sixth recommendation would look to solve the tensions between the court system and ASFA. Congress could address many judges' lack of expertise and the numerous rotations that are common to court systems by requiring that judges hearing such cases give substantial weight to the recommendations made by the state child welfare agency. This takes away some, but not all, of the discretion of judges, who often lack expertise in child welfare issues and the family's case history, and prevents them from making grave errors due to unfamiliarity with the area of law and those cases being heard. As a precautionary measure, if the recommendations of state welfare agencies are given heightened judicial deference, extensive documentation proving that adequate services for clients have been provided should be required. If the judge finds that the state has failed to provide those services, the judge should then be relieved of his or her duty to give the state authority's recommendation substantial weight.

Finally, as discussed earlier, Congress expects that each state will provide "quality services" in the child welfare system.[82] To give states better guidance on how services should be provided, Congress needs to define "quality services." A proper definition of "quality services" would include ensuring that children are at all times safe and properly provided for, that all necessary resources are made available to biological parents,

[82] *See supra* notes 49–50 and accompanying text.

that all decisions made by child welfare authorities will be fair and based on thorough investigation, and that the overriding interest is to get a child into a permanent home as quickly and efficiently as possible. By failing to provide any definition for "quality services," Congress places the states at a loss in complying with ASFA, and ultimately burdens the children and families mired in the current state systems.

V. Conclusion

The goal of ASFA was to make the health and safety of children of paramount concern. The law, however, has managed to overlook some of the systemic problems in the child welfare system. It fails to address problems with state child welfare authorities, the court system, ASFA's interaction with other laws, and the lack of services available to children and their families, and it has misplaced priorities by offering states adoption bonuses rather than focusing on the possibility of family reunification. If Congress is serious about improving the lives of children in foster care, then it needs to address all of these issues facing children and their families.

ARTICLE

DYNAMIC AGENDA-SETTING ON THE UNITED STATES SUPREME COURT: AN EMPIRICAL ASSESSMENT*

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According to the "dynamic" account advanced by William Eskridge and other scholars, statutory interpretation is not simply a matter of the text's plain meaning or legislative history. Rather, by this account, justices interpreting a statute also consider the likely responses of other governmental branches. This Article presents a dynamic account of the Supreme Court's decision-making at the certiorari stage. Because Congress cannot easily override constitutional decisions, the authors hypothesize that the justices will accept a higher proportion of constitutional cases, as opposed to statutory ones, when two conditions are met: first, the political predilections of a majority of justices must be out of line with Congress's; and second, the justices must be too politically heterogeneous amongst themselves to produce the near-unanimous statutory decisions that prior research indicates Congress is unlikely to override. The authors present empirical evidence supporting their view from the Court's 1946–1992 Terms.

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All data used in this Article are available at http://artsci.wustl.edu/~polisci/epstein/research/dynamic.html. We used STATA and SPSS to analyze the data.

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However diverse they may be, traditional approaches to statutory interpretation—such as, textualism,[1] intentionalism,[2] purposivism,[3] and their variants—share a common feature: They place emphasis on laws at the time the legislature wrote them, requiring judges to undertake "archeological" digs to interpret them.[4] To the extent that these approaches would have judges—regardless of who those judges are or when the interpretation occurs—reach the same conclusions about a statute's meaning, they are static.

It is this feature of traditional accounts with which Professor William N. Eskridge, Jr. (and various co-authors), in a series of highly influential works, takes issue.[5] "Just as modern literary theory has taught that the meaning of literary texts changes from reader to reader and over time," so too, Eskridge argues, "the meaning of statutory texts changes over time." Hence, "statutory texts, like literary texts, are transformed every time they are interpreted."[6] To ignore this *dynamic* aspect of statutory interpretation would be to ignore the realities of how judges, espe-

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[1] Textualism comes in different variants. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38–47 (1994) (outlining and criticizing "plain meaning" textualism, which focuses only on the "ordinary meanings of words and accepted precepts of grammar and syntax," and "holistic textualism," which permits consideration of contextual factors such as the traditional meaning of words, the statute's overall structure, and any policy presumptions articulated in the statute); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 223–35 (2000) (describing a "soft plain meaning rule"). One variant that has received a good deal of attention, perhaps because its proponents include Justice Antonin Scalia and Judge Frank Easterbrook, commends that judges interpret a statute in accord with the apparent meaning of the words in the statute's text. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

[2] The theory of intentionalism or legislative intent suggests that judges interpret a statute in line with what the legislature intended when it enacted the statute. According to WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 338 (1994) [hereinafter Eskridge, DYNAMIC INTERPRETATION], the earliest discussion of intentionalism is in a sixteenth-century manuscript, *A Discourse upon the Exposicion & Understandinge of Statutes with Sir Thomas Egerton's Additions. See id.* The manuscript was published in 1942 by Samuel E. Thorne. *Id.*

[3] The theory of purposivism or legislative purpose holds that judges should try to discover the purpose of laws so as to interpret specific phrases in light of that overarching objective. Henry M. Hart and Albert M. Sacks may be the legal scholars most closely associated with this approach. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[4] *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21–32 (1988); ESKRIDGE, *supra* note 2, at 13–47.

[5] *See, e.g.*, ESKRIDGE, DYNAMIC INTERPRETATION, *supra* note 2; ESKRIDGE, FRICKEY & GARRETT, *supra* note 1; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging*]; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding*].

[6] WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 571 (1ST ED. 1988).

cially justices of the United States Supreme Court, reach decisions—or so the argument goes.

While "dynamic statutory interpretation" may seem innocuous enough, it has (at least in the way Eskridge and others explicate it)[7] some rather dramatic normative and empirical implications. Most notably: (1) Justices should and do interpret laws in line with the policy preferences of *contemporary* political actors (including the President and members of Congress, especially congressional "gatekeepers," such as committee chairs and party leaders) rather than in accord with the intent of the *enacting* legislators; and (2) justices should and do behave in this way even if their policy preferences are out of line with the desires of contemporary political actors. For when justices are inattentive to the preferences of the contemporaneous Congress and the President—that is, when they fail to act *strategically*[8]—they run the risk of seeing their most preferred interpretations overridden by the political branches.[9] To put it in somewhat different terms, under Eskridge's account, justices have goals that, according to him, amount to seeing their policy preferences written into law,[10] but realize that they cannot achieve them without taking into account the preferences and likely actions of other relevant political actors.

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[7] *See, e.g.*, Eskridge, *Overriding*, *supra* note 5; Eskridge, *Reneging*, *supra* note 5. For similar studies, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583 (2001); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263 (1990); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions*, 23 RAND J. ECON. 463 (1992).

[8] Here and throughout the Article, we adopt the following definitions of acting *strategically* (i.e., strategic behavior) and of two interrelated terms, acting in a *sincere* or an *insincere* fashion (i.e., sincere or insincere behavior). Strategic decision making is "about interdependent choice: an individual's action is, in part, a function of her expectations about the actions of others. To say that a justice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions." EPSTEIN & KNIGHT, *supra* note 7, at 12. Sometimes, strategic calculations will lead a justice to make decisions that reflect her sincerely held preferences (sincere behavior); other times, they will lead her to act in a sophisticated or insincere fashion (insincere or sophisticated behavior), that is, in ways that do not accurately reflect her true preferences.

[9] *See generally* Eskridge, *Reneging*, *supra* note 5; Eskridge, *Overriding*, *supra* note 5.

[10] Eskridge is not alone. Many proponents of strategic approaches to statutory interpretation assume that the goal of most justices is to see the law reflect their most preferred policy positions. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; Spiller & Gely, *supra* note 7. This need not be the case, however. Strategic actors—including justices—can be, in principle, motivated by many things. As long as the ability of a justice to achieve his or her goal, whatever that may be, is contingent on the actions of others (as Eskridge suggests), his or her decision is interdependent and strategic. *See supra* note 8. For an example of a strategic account of judicial decisions in which justices are motivated by jurisprudential principles, see John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L. REV. L. & ECON. 263 (1992).

Given these implications, it is hardly surprising that "dynamic statutory interpretation" has been the subject of intense debates since the day Eskridge first developed it. Some are normative in nature, with scholars questioning whether judges should read statutes dynamically;[11] others are empirical, with analysts asking whether, in fact, judges do take into account changes in the political context when they interpret statutes.[12] Certainly, Eskridge believes that they do, claiming that justices on the United States Supreme Court keep a watch on the halls of Congress and on the oval office when they engage in statutory interpretation.[13] Indeed, he further claims that such attentiveness may explain why "conservative" Courts sometimes render "liberal" interpretations of laws and vice versa: they do not want to be overridden by irate Congresses.[14]

Though the normative debates will undoubtedly continue, as an empirical matter, many scholars have come to believe that Eskridge has captured an important feature of United States Supreme Court decision-making, that justices do read statutes dynamically, and that they are attentive to the preferences and likely actions of the contemporaneous Congress and other political actors when they go about reaching decisions on the merits of cases.[15]

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[11] Even leading proponents of this account acknowledge that problems may emerge when judges ignore the purpose of or intent behind a law and, instead, read it in light of the climate of the times. Eskridge and Frickey, for instance, note that decisions that conflict with the text or legislative history of a statute may appear illegitimate:

> [I]t may seem illegitimate if an interpretation goes against both the text and the legislative history of the statute to promote current values, for in that instance the court might be seen as violating a clear legislative command. Moreover, even if a court may sometimes do that, are we confident that the current values reflected in the Supreme Court's opinions are defensible ones? Might dynamic statutory interpretation become just another way the "Haves" in our polity advance their interests, at the expense of the "Have Nots"?

WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 127 (Supp. 1992).

[12] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; Spiller & Gely, *supra* note 7; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 326–51 (2002); Epstein, Knight & Martin, *supra* note 7; Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

[13] *See, e.g.*, Eskridge, *Reneging*, *supra* note 5; Eskridge, *Overriding*, *supra* note 5; *see also supra* note 8. Our language in this sentence takes its cues from CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, at 118 (1987) ("The historian of the Court should keep his watch in the halls of Congress, not linger in the chamber of the Court.").

[14] *See generally* Eskridge, *Reneging*, supra note 5; Eskridge, *Overriding*, supra note 5.

[15] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; Gely & Spiller, *supra* note 7; Andrew David Martin, Strategic Decision Making and the Separation of Powers (1998) (unpublished Ph.D. dissertation, Washington University) (on file with Washington University library); Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, AM. POL. SCI. REV. (forthcoming 2001) [hereinafter Martin, *Congressional Decision Making*]. For an exception, see Segal, *supra* note 12.

This Article attempts an empirical analysis of a related issue: how do the justices decide whether to grant or deny certiorari? Do they take into account the preferences and likely actions of the elected branches when they go about the task of "deciding to decide"?[16] Do they engage in dynamic "agenda-setting," to borrow Eskridge's phrase?

From a theoretical vantage point, the answer may seem evident. If, as Eskridge's theory suggests, justices are concerned about the preferences and likely actions of Congress when they interpret laws, then they should be equally—*if not more*—attentive to those preferences and actions when they go about the task of making their certiorari decisions. That is to say, it seems reasonable to suppose that justices avoid placing cases on their agenda when they think their decisions will cause elected officials to react in an adverse fashion. To push the argument even further, we might question—as our emphasis above on "if not more" implies—why justices, *in the main*,[17] would need to bend to the wishes of Congress (again, as Eskridge suggests they occasionally must) given that they could avoid granting certiorari to petitions that would force them to bend in the first place.

Supposition is different from support, however, and on this score the answers to the questions we pose are murkier. Despite an immense amount of writing—by social scientists and legal academics alike—on the subject of agenda-setting and especially on the correlates of the Court's decision to grant certiorari,[18] no study of which we are aware has

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[16] Throughout this Article, we use the terms "deciding to decide" and "agenda-setting" (in the next sentence) as shorthand ways to describe how the branches of government go about the task of determining which of the issues on the "public" agenda (which contains all the issues of concern to society) they will schedule "for active and serious consideration" and, thus, place on their "institutional agenda." *See* ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 14 (1992); *see also* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 4 (1984). We recognize that that some cases arrive at the Court by routes such as appeal or certification rather than a grant of certiorari, but because the great majority of the more than 7000 cases that arrive at the Court each year arrive as requests for certiorari, we generally presume throughout this Article that granting and denying certiorari is the process by which the Supreme Court sets its agenda and "decides to decide." Other Supreme Court scholars have used similar terminology. *See, e.g.*, H. W. PERRY, DECIDING TO DECIDE: AGENDA-SETTING IN THE UNITED STATES SUPREME COURT 5–7 (1991); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda-Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

[17] We stress "in the main" because we do believe that, under some circumstances, justices may feel compelled to grant certiorari to petitions that they realize could eventually force them to disregard their own policy views and accommodate congressional preferences at the merits stage. That circumstance might arise, for instance, when a petition involves a question of statutory interpretation that several Circuits of the United States Courts of Appeals have answered differently.

[18] *See, e.g.*, SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE (1986) [hereinafter ESTREICHER & SEXTON, COURT'S ROLE]; PERRY, *supra* note 16; DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 210–54 (1959) [hereinafter SCHUBERT, QUANTITATIVE ANALYSIS]; Virginia C. Armstrong

considered the role that elected political actors may play in the Court's agenda-setting process.[19] What has instead received the lion's share of

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& Charles A. Johnson, *Certiorari Decisions by the Warren and Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141 (1982); Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828 (1989); Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649 (1979); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision-Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Caldeira & Wright, *supra* note 16; Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984) [hereinafter Estreicher & Sexton, *A Managerial Theory*]; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335 (1990); Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101 (1997); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda-setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387 (1982); Glendon Schubert, *Policy without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962) [hereinafter Schubert, *Policy*]; Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185 (1979); Kevin H. Smith, *Justice for All? The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381 (1999); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, *in* JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963); Stuart Teger & Stuart Kosinski, *The Cue Theory of Supreme Court Certiorari Jurisdiction: Further Consideration of Cue Theory*, 42 J. POL. 834 (1980); Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflict Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861 (1993); S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "On the Merits,"* 4 POLITY 429 (1972) [hereinafter Ulmer, *Decision to Grant*]; S. Sidney Ulmer, *Conflict with Supreme Court Precedent and the Granting of Plenary Review*, 45 J. POL. 474 (1983) [hereinafter Ulmer, *Conflict with Precedent*]; S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984) [hereinafter Ulmer, *Predictive Variable*].

[19] To be sure, legal scholars have paid a good deal of attention to the impact of the Solicitor General ("SG") on the Court's agenda-setting decisions. *See, e.g.*, Lawless & Murray, *supra* note 18, at 112 (noting that the Supreme Court grants three quarters of the Solicitor General's certiorari requests); Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 622–23 (1984) (same); Caldeira & Wright, *supra* note 16, at 1121 (noting that the Solicitor General's position is a significant factor in the statistical likelihood that the Court will accept certiorari); Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1210 (1988) (noting that the Solicitor General had requested certiorari in approximately 25% of the Supreme Court's cases between 1952 and 1985, and that the Court granted 75% of the Solicitor General's certiorari requests during that period); Tanenhaus et al., *supra* note 18, at 122–23 (noting the Supreme Court's deference to the Solicitor General's position on certiorari questions). It is unclear, however, whether the success of the SG is due to (1) deference on the part of the justices to the wishes of the President; (2) litigation expertise on the part of the SG; or (3) other factors, such as the message the SG's participation sends about the importance of a petition. More relevant to us, this literature virtually ignores the role of Congress in the agenda-setting process, though the influence of Congress over a sitting Court should also be significant. *See, e.g.*, Eskridge, *Reneging*, *supra* note 5, at 617 (arguing that the Supreme Court has traditionally been more attentive to the preferences of the current Congress than to legislative history, but noting that the Rehnquist Court appears more "activist" in the sense of neglecting the preferences of the current Congress); Eskridge, *Overriding*, *supra* note 5, at 378–87 (arguing the Supreme Court's decisions are

attention are factors internal to the Court (or to the judicial branch more generally), such as whether conflict exists in the lower courts over the matter at hand[20] or whether the justices, when they cast their vote for or against review of a particular dispute, believe they can ultimately prevail on its merits.[21] In other words, existing explanations for the Court's certiorari decisions depict an institution in isolation, establishing its own policy priorities with little attention to the desires of elected politicians.[22]

In this Article we take a different tack—one embodied in what we call a dynamic account of agenda-setting. This account, which takes seriously Eskridge's notions about the dynamic, strategic nature of Supreme Court decision-making, tests the following hypothesis: If, as Eskridge argues, it is generally plausible[23] that Supreme Court justices are attentive to the preferences and likely responses of external actors when they decide cases on the merits, then *they should be even more likely to consider the preferences of those actors at the agenda-setting stage.* In other words, we assume, as Eskridge does, that justices seek to establish policies that are other political actors are unlikely to override.[24] We take the inquiry a step further and examine the "decision to decide": Why would justices accept a petition for review if the likely response to their decision by other political actors would ultimately generate laws distant from their preferences?

Our thesis is that the justices' certiorari decisions rest not only on their perception of internal dynamics on the Court, but also on their perception of the political environment they confront. For example, if the justices believe, first, that Congress will dislike their interpretation of a statute, and, further, that they cannot achieve a near-unanimous decision

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often attentive to the preferences of the current Congress).

[20] *See, e.g.*, PERRY, *supra* note 16; Estreicher & Sexton, *A Managerial Theory*, *supra* note 18; Lawless & Murray, *supra* note 18; Baker, *supra* note 19; Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989); Tiberi, *supra* note 17; Ulmer, *Predictive Variable*, *supra* note 18.

[21] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; PERRY, *supra* note 16; Boucher & Segal, *supra* note 18; Caldeira et al., *supra* note 18; Schubert, *Policy*, *supra* note 18; Ulmer, *Decision to Grant*, *supra* note 18. For more on this perspective, see *infra* notes 29–35 and accompanying text.

[22] We do not mean to imply that the literature ignores all external actors. To the contrary, several recent studies of agenda-setting highlight the role played by interest groups. *See, e.g.*, Caldeira & Wright, *supra* note 16, at 1122–23 (reporting statistical evidence that Supreme Court certiorari decisions are influenced by interest-group amicus briefs); *see also supra* note 19 (noting the Solicitor General's influence on certiorari decisions). We only wish to emphasize that existing research does not consider the effect that elected actors, especially members of Congress, may have on the Court's case selection decisions.

[23] *See supra* note 17.

[24] *See* Eskridge, *Reneging*, *supra* note 5, at 616 (positing "a model of the Court as a political actor in statutory interpretation"); Eskridge, *Overriding*, *supra* note 5, at 334 (positing a model of interaction between Congress, the President, and the Supreme Court in which "ultimate statutory policy is set through a sequential process by which each player—including the Court—tries to impose its policy preferences").

such that Congress will hesitate to overturn their interpretation,[25] then we predict that they will shift into "constitutional mode," and avoid statutory decisions, either by denying certiorari to statutory cases or by reaching decisions on constitutional grounds. This strategy will reflect the presumption, shared by jurists and academics alike, that Congress can overturn statutory decisions more easily than constitutional ones.[26] On the other hand, if the justices believe that Congress holds similar policy preferences to the Court, then, we posit, they will accept petitions of what-

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[25] Empirical evidence suggests that Congress is less likely to overturn Supreme Court decisions that are unanimous or near-unanimous. *See* Virginia A. Hettinger, The Supreme Court as an Independent Policy Maker: Statutory Interpretation and the Separation of Powers, at 21 (1998) (paper presented at the Midwest Political Science Association, Chicago, Ill.) (on file with the authors) (concluding on the basis of statistical analysis of 660 statutory civil rights and and civil liberties cases in the Supreme Court's 1964–88 terms that unanimity in the Court's decision decreased the likelihood of Congressional override); Christopher J. Zorn & Gregory A. Caldeira, Separation of Powers: Congress, the Supreme Court, and Interest Groups, at 12, 18–19 (1995) (paper presented at the Public Choice Society, Long Beach, Cal.) (on file with the authors) (presenting statistical analysis showing that the House and Senate were unlikely to attempt responsive action following a unanimous Supreme Court decision); *see also infra* notes 58–62 and accompanying text and Table 1.

[26] For examples of scholarly literature examining Congress's power to override statutory decisions, see EPSTEIN & KNIGHT, *supra* note 7, at 141; Eskridge, *Overriding*, *supra* note 5, at 394–95; Eskridge, *Reneging*, *supra* note 5, at 617; Segal, *supra* note 12, at 28. Recent cases from the Supreme Court have made clear, as a matter of constitutional law, that Congress may not override the Court's constitutional decisions. In Boerne v. Flores, 521 U.S. 507 (1997), the Supreme Court rejected Congress's attempt to dictate the level of scrutiny that the Court should apply to state laws that burden religious exercise. The Court had held in Employment Division v. Smith, 494 U.S. 872 (1990), that such laws do not receive heightened scrutiny. *See id.* at 885. Congress then passed the "Religious Freedom Restoration Act ("RFRA"), which mandated strict scrutiny review. *See Boerne*, 521 U.S. at 545–61 (quoting statute). The Court's decision to invalidate the statute included the following strong statement of judicial supremacy in constitutional matters:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id. at 535–36. Three years later, the Court reiterated this message in Dickerson v. United States, 530 U.S. 428 (2000). At issue was a law Congress enacted in 1968 that was designed to overturn the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). Once the justices held that *Miranda* announced a constitutional rule, they concluded that the 1968 congressional law was unconstitutional. *See Dickerson*, 530 U.S. at 427 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.") (citing *Boerne*, 521 U.S. at 517–21).

ever variety they desire, for they will perceive little risk of Congressional override.

In short, our dynamic account of agenda-setting suggests that Supreme Court justices who are interested in maximizing their policy preferences will be attentive to the preferences and likely responses of actors in other governmental branches when they go about setting the Court's agenda. That attention will not necessarily lead the justices to behave "insincerely"[27] and decline certiorari petitions in cases they would prefer to decide; when justices believe the Court will produce the sort of near-unanimous decision that can fend off Congressional attack, they may accept a case notwithstanding their perception of Congress's views. Yet the sentiments of other branches will always be a factor in their decision.

Our assessment of this hypothesis proceeds in three steps. In Part II, we lay out the dynamic account of agenda-setting from which our theory flows. In Parts III and IV, we turn to testing the proposition empirically. Although a range of possible research strategies exists, we have adopted the following approach: We consider the percentage of cases on the Court's plenary docket that raise statutory (rather than constitutional) questions.[28] Our presumption is that the percentage should decrease when the Court's and Congress's policy preferences diverge, unless the Court also believes it can insulate its decisions from reversal. Our analysis of the data leads us to conclude that the justices do indeed consider the preferences and likely responses of other political actors in deciding whether to grant certiorari. In Part V we take stock of our results, reflecting on their implications for future discussions of agenda-setting on the United States Supreme Court, as well as for relations between the Court and the elected branches of government.

I. A Dynamic Account of Agenda-Setting on the United States Supreme Court

As we noted above, the bulk of the contemporary agenda-setting literature depicts justices as isolated decision-makers who establish their priorities without paying heed to the interests of elected officials.[29] Indeed, at least some of this literature goes so far as to suggest the Supreme Court's certiorari decisions are divorced not only from the priorities of other governmental actors, but also from the justices' own assessments of the cases' merits. The early social science research reflected this view,[30]

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[27] For our definition of this term, see *supra* note 8.

[28] The Court's plenary docket consists of those cases that the Court has agreed to decide on their merits, that is, mainly cases to which it has granted certiorari. *See supra* note 16.

[29] *See supra* text accompanying notes 18–22.

[30] *See, e.g.*, Tanenhaus, et al., *supra* note 18; Ulmer, *Conflict with Precedent*, *supra* note 18; Ulmer, *Predictive Variable*, *supra* note 18; *but see* Schubert, *supra* note 18, at 211

and many studies by legal academics today do as well.[31] These works offer explanations that are grounded in the petitions themselves, giving little regard to the decisions that the justices ultimately have to make on the merits of the disputes they agree to resolve.

An early article by Tanenhaus, et al.,[32] which for years was the seminal study of agenda-setting,[33] provides an example of this approach. Tannehaus's research asserts that four "cues" guide the certiorari decision: (1) whether the federal government seeks review; (2) whether there is dissension in the courts below; and (3) whether a civil liberties or (4) an economics issue is present.[34] Justices are not, on this view, strategic forward-thinking actors when they "decide to decide";[35] rather, they base their choices on issues presented in the petitions pending before them.

While recent scholars describe the agenda-setting very differently,[36] they likewise neglect the impact of external considerations on certiorari decisions. These scholars presume that justices generally seek to further their own policy preferences, and thus conclude that the justices must formulate expectations about the preferences their colleagues on the Court will assert at the merits stage.[37] Should justices fail to think prospectively, such scholars argue, they run the risk of accepting cases for review that the majority of the Court will ultimately decide against them, or of rejecting cases in which their most preferred policy could have become the law of the land.[38] These scholars do not consider, however, that the justices may also formulate expectations about actors outside the Court in deciding which certiorari decisions to accept.

(presenting model of the Supreme Court as a "power group, with sub-groups whose organization, motivation, and behavior are political").

[31] *See, e.g.*, ESTREICHER & SEXTON, *supra* note 18; Estreicher & Sexton, *A Managerial Theory*, *supra* note 18, at 714; Lawless & Murray, *supra* note 18; Tiberi, *supra* note 18; *but see* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979) ("Not every denial of certiorari means that the Court agrees with the decision and opinion below, but in a significant number of cases a denial does indicate that most of the Justices were not strongly dissatisfied with the actions below.").

[32] Tanenhaus, et al., *supra* note 18.

[33] *See* PERRY, *supra* note 16, at 114–15 (deeming it "one of the earliest and most important articles . . . on the Court's certiorari process"); PROVINE, *supra* note 18, at 76 (writing that it "may be the best-known attempt to determine review criteria from the pattern of grants and denials").

[34] *See* Tanenhaus, et al., *supra* note 18.

[35] H. W. Perry coined this phrase in the title of his book. *See* PERRY, *supra* note 16.

[36] *Compare* Boucher & Segal, *supra* note 18, at 824 (concluding there is "strong evidence that justices who wish to affirm carefully consider probable outcomes, but . . . no evidence that justices who wish to reverse do so"), *with* Caldeira et al., *supra* note 18, at 549 (finding that justices not only grant certiorari aggressively but also deny it defensively).

[37] *See supra* note 24 and accompanying text. *See also* EPSTEIN & KNIGHT, *supra* note 7; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 4–7 (1993).

[38] *See id.*

To be sure, some scholars continue to take issue with the claim that the justices behave "strategically" with respect to their colleagues' preferences, let alone the preferences of external actors. According to Krol and Brenner, for example, justices simply vote against accepting petitions from lower court decisions that accord with their ideological preferences and vote in favor of hearing petitions from lower court decisions that do not.[39] Yet evidence to support the strategic view has grown substantial, particularly following a noteworthy study by Caldeira, Wright, and Zorn.[40] Unlike most previous efforts, Caldeira and his colleagues go to great lengths to include variables to account for the ideological preferences of the individual justices *along* with those of their colleagues.[41] The results are clear: While the researchers find evidence of policy voting (defined in the study as voting to grant or deny certiorari based on ideological preference), they show that there is equally strong evidence of strategic behavior (defined in the study as voting to grant or deny inconsistently with the justice's own most preferred policy position).[42]

We have no doubt that debates over whether justices act strategically vis-à-vis their colleagues at the agenda-setting stage will continue. At the same time, however, the evidence, especially that offered by the most recent (and sophisticated) studies, tips the scales substantially in favor of the strategic camp.[43] Indeed, many judicial specialists have come to the same conclusion as scholars who study legislators: It is difficult to believe that policy-maximizing members of Congress "who initiate proposals [do not] tailor the policy content to have a chance to win."[44]

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[39] *See* Krol & Brenner, *supra* note 18.

[40] Caldeira et al., *supra* note 18.

[41] *See id.* at 559–61.

[42] *See id.* at 561–66. While both types of behavior may be forms of strategic voting, only the second type can be explained solely in strategic terms.

[43] *See, e.g.*, Boucher & Segal, *supra* note 18, at 824 (reporting "strong evidence that justices who wish to affirm carefully consider probable outcomes"); Caldeira et al., *supra* note 18, at 549 (analyzing data from the Supreme Court's 1982 October Term and concluding that justices anticipate likely decisions at the merits stage in deciding how to vote on certiorari).

[44] Calvin J. Mouw & Michael B. MacKuen, *The Strategic Agenda in Legislative Politics*, 86 AM. POL. SCI. REV. 87, 87 (1992); *see also* Caldeira et al., *supra* note 18, at 549 (concluding justices engage in strategic decision-making at the certiorari stage); Boucher & Segal, *supra* note 18, at 824 (same). Even journalists have taken note of strategic behavior at the agenda-setting stage. For example, in an article reporting on a statement filed by four justices concerning their dissent from the denial of certiorari in a Texas death penalty case, Linda Greenhouse observes:

> What made this statement unusual was that it takes the votes of only four of the nine justices to grant review of a case. So these four had the ability to add this case to the docket for argument and decision. That they chose not to do so may reflect their concern that the other five justices, if put to the test, would vote to uphold the Texas law and, in doing so, convert a single state court's decision into a national rule of law.

Linda Greenhouse, *Justices Refuse to Review Texas Death Penalty Case*, N.Y. TIMES, Oct.

If we consider seriously Eskridge's notions about the dynamic nature of Supreme Court decisions, we can push the strategic argument even further. Just as it seems counterintuitive to believe that preference-maximizing Supreme Court justices would not be attentive to the most preferred positions and likely actions of their colleagues at the agenda-setting stage, *it seems equally difficult to understand why they would not consider the preferences and likely actions of external actors who may be in a position to thwart their efforts to make policy.* While this claim—which embodies what we call a dynamic account of agenda-setting—may hold across a range of disputes, we believe it is especially apt in cases of statutory interpretation. In these cases justices know that a non-trivial probability exists that Congress will override or, at least, scrutinize their opinions.[45]

This logic is illustrated in Figure 1, depicting a hypothetical set of preferences over a particular policy, in this example a federal civil rights statute. The horizontal line represents a policy space, ordered from left (most "liberal") to right (most "conservative"). The vertical lines show the preferences (the "most preferred positions") of the relevant actors: the President, the median member of the Court, the median member of Congress, and the key committees and other gatekeepers in Congress that make the decisions over whether to propose civil rights legislation to their respective houses.[46] Note that we also identify the committees' indifference point "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber."[47] To put it another way, because the indifference point and the median member of Congress are equidistant from the committees, the committees like the indifference points as much as they like the most preferred position of Congress; they are indifferent between the two.

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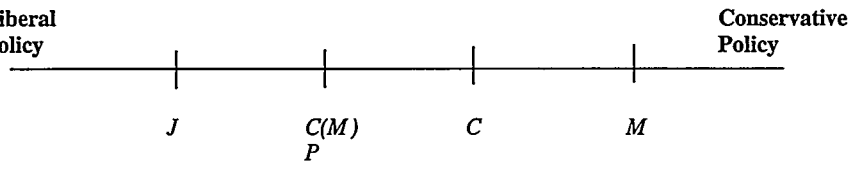
21 1997, at A23.

[45] *See* Eskridge, *Overriding*, *supra* note 5, at 387–89.

[46] In denoting these "most preferred" (or "ideal") points, we assume that the actors prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, "beginning at [an actor's] ideal point, utility always declines monotonically in any given direction. This . . . is known as single-peakedness of preferences." Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263 (1988). We also assume, that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policy-making enfolds as follows: the Court interprets a law, the relevant congressional committees propose (or do not propose) legislation to override the Court's interpretation, Congress (if the committees propose legislation) enacts (or does not enact) an override bill, the President (if Congress acts) signs (or does not sign) the override bill, and Congress (if the President vetoes) overrides (or does not override) the veto.

[47] Eskridge, *Overriding*, *supra* note 5, at 378.

FIGURE 1. HYPOTHETICAL DISTRIBUTION OF PREFERENCES[48]



Equilibrium Result, x ≅ C(M)

Note: *J* is justice *J*'s most preferred position (assume she is the median member of the Court); *M* and *P* denote, respectively, the most preferred positions of the median member of Congress and the President; *C* is the most preferred position of the key committees in Congress that decide whether or not to propose legislation to their respective houses; and *C(M)* represents the committees' indifference point, that is, the point on the policy spectrum of which the committee becomes indifferent as to whether that policy option or the Court's view is adopted because the committee prefers neither.

Now suppose a justice (whom we have labeled as *J*) must decide whether to grant certiorari to a petition that would require the Court to interpret a federal civil rights statute. Further suppose that *J* believes that the majority of her colleagues will adopt her most preferred statutory interpretation, should the Court agree to grant review. At the same time, given the preference distribution in Figure 1, *J* realizes that if the Court accepts and decides the case, her most preferred policy may not "stick": The most preferred positions of all the key elected actors—the congressional committees, the median member of Congress, and the President—are to the right of her most preferred point. So, surely, there is some possibility that these external actors will attempt to override her policy and replace it with a more conservative one.

What would justice *J* do? Would she vote to grant certiorari? On the account offered by many contemporary studies of agenda-setting—including Caldeira, Wright, and Zorn's—the answer is simple enough: as long as *J* believes that a majority of the Court will support her preferred interpretation (as she does), she would agree to hear the case.[49] She would do so because, under these accounts, the only strategic calculations that justice *J* makes pertain to the preferences and likely actions of her colleagues.

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[48] We adapt this figure from Eskridge, *Overriding*, *supra* note 5, at 381.

[49] *See, e.g.*, Boucher & Segal, *supra* note 18, at 824; Caldeira et al., *supra* note 18, at 549.

There is an obvious problem with this analysis: why would a justice who wants to establish policy for the nation concern herself exclusively with the preferences and likely actions of her colleagues, when elected actors (e.g., members of Congress and the President) are in a position to override her most preferred position or move it outside a range she would deem acceptable? The answer, according to a dynamic account of agenda-setting, is that she would not. Rather, she would also formulate expectations about the preferences and likely actions of those other actors, and use those expectations to make a case-selection decision.

What would those calculations lead her to do? The answer depends on the sort of political environment in which she believes that she is operating. On the one hand, if she observes a political environment that *does not constrain* her (say, Congress and the President agree with her most preferred interpretation of the statute) and she continues to believe that a majority of her colleagues share her preference, then she would have every reason to vote to grant certiorari.

If, on the other hand, she observes a political environment that *constrains* her (for instance, the sort depicted in Figure 1), then her decision is more complex, as she has two possible courses of action. First, she could attempt to frustrate efforts on the part of Congress and the President to override Court decisions by "strategically selecting certain judicial instruments over others."[50] In the agenda-setting context, such strategizing would take the form of *opting out of a statutory mode and into a constitutional one*, either by (1) rejecting a petition that requires her to interpret a federal act, in favor of one that raises constitutional questions; or (2) focusing on constitutional claims contained in a petition, rather than on those of a statutory nature.[51]

While scholars have not previously appreciated the likelihood of such strategic behavior on the level of the United States Supreme Court,[52] this account of the justices' agenda-setting decisions has intuitive appeal. Indeed, given that it is far more difficult for the elected branches to override a constitutional decision than a statutory one,[53] it seems implausible

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[50] Joseph P. Smith & Emerson H. Tiller, The Strategy of Judging: Evidence from Administrative Law 7 (1997) (unpublished working paper, Center for Legal and Regulatory Studies, Graduate School of Business, University of Texas) (on file with the authors).

[51] In so writing, we assume that justices are free to pick and choose among the issues they will address in their decisions—an assumption resting on firm empirical ground. *See, e.g.*, Kevin T. McGuire & Barbara Palmer, *Issue Fluidity of the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691 (1995); S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 322 (Stephen D. Halpern & Charles M. Lamb eds., 1982).

[52] The vast majority of work on strategic instrumentation has centered on the ways United States Court of Appeals judges attempt to insulate their decisions from reversal by the United States Supreme Court. *See, e.g.*, Smith & Tiller, *supra* note 50; Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 362 (1999).

[53] *See supra* note 26.

that a justice at odds with Congress would agree to hear and decide, for example, an affirmative action case brought solely on Title VII grounds, when among the thousands of certiorari petitions she could surely locate a similar dispute raising (at least some) Fourteenth Amendment claims.

The justice does, of course, have a second option: she could grant the statutory petition and risk a congressional override. While some scholars seem to view this as an "irrational" choice for policy-oriented justices,[54] other research has suggested that there are circumstances when it is not.[55] For example, if congressional preferences are not fixed but rather can be influenced by the Court, the justices might have the institutional wherewithal to safeguard themselves from reversal. Alternatively, the Court might not be able to alter congressional preferences, but could change congressional beliefs about the consequences of various actions.[56] Finally, if Congress does not necessarily have the last word, the justices could signal their willingness to battle Congress over the issue.[57]

To be sure, these circumstances differ in form but they share at least one important feature: All three are more likely to obtain when the Court presents a united front to Congress rather than when it is deeply divided. While the deployment of, say, an 8-1 or even unanimous decision does not guarantee congressional compliance, scholars, legislators, and the justices themselves have acknowledged that the more authoritative an opinion, the less likely that Congress will attempt to overturn it.[58] Eskridge has provided data to support this claim.[59] As Table 1 shows, the percentage of congressional override attempts increases as the degree of unanimity decreases.[60] To put it another way, a Supreme Court decision handed down by a one-vote margin has about a one in two chance of get-

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[54] *See, e.g.*, Spiller & Gely, *supra* note 7 (arguing against the possibility that a policy-oriented justice would risk a congressional override).

[55] *See, e.g.*, Mark C. Miller, *Courts, Agencies, and Congressional Committees: A Neo-institutional Perspective*, 55 REV. POL. 471, 486 (1993) (reporting results from personal interviews suggesting that three House committees "treat court decisions with much more deference than they treat decisions from federal agencies," and concluding that "committee reactions to court decisions are seen as much more unusual than reactions to agency decisions"); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 565 (1992) ("[C]ourt action that determines the meaning of statutes fundamentally affects the deliberative processes in the other branches").

[56] *See* Martin, *Congressional Decision Making*, *supra* note 15.

[57] *See* Ferejohn & Weingast, *supra* note 55, at 566–67 (arguing that the Court's interpretive decisions may "profoundly affect the kind of democracy that is practiced in the more overtly political branches" by creating incentives for legislators to adopt certain deliberative processes).

[58] *See, e.g.*, BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1999); THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989).

[59] *See* Eskridge, *Overriding*, *supra* note 5, at 350; *see also* Hettinger, *supra* note 25, at 21; Zorn & Caldeira, *supra* note 25, at 12, 18–19.

[60] *See* Eskridge, *Overriding*, *supra* note 5, at 350.

ting the congressional once-over.[61] The odds are only one in four for unanimous decisions.[62]

TABLE 1. CONGRESSIONAL OVERRIDE ATTEMPTS BY VOTE SPLITS IN SUPREME COURT DECISIONS, 1978–1984[63]

Vote Split on the Court	**% Scrutinized by Congress**
9-0 Decisions (N=85)	28
8-1 Decisions (N=33)	33
7-2 Decisions (N=36)	45
6-3 Decisions (N=65)	41
5-4 Decisions (N=56)	48

A. Prediction from the Dynamic Account of Agenda-Setting

Particular data points in Table 1 are, to be sure, of interest. It is the more general lesson, however, that should not be missed: Justices can insulate their decisions from override attempts if they are able to muster substantial majorities behind them.

When we couple this point with our observation that justices may decide strategically to hear constitutional rather than statutory cases,[64] the dynamic account of agenda-setting leaves us with a straightforward prediction about case-selection decisions. If contemporaneous political actors affect the Court's agenda-setting decisions, then the effects of those actors should manifest themselves in the following way: Justices will opt into a constitutional mode, eschewing statutory decisions for those of a constitutional variety, *unless they believe that they can insulate their ultimate policy decisions from reversal.* In other words, justices will pursue constitutional decisions, rather than statutory ones, unless they believe they can produce statutory decisions that are near-unanimous and thus unlikely to face Congressional reversal. Of course, we are not saying that justices need know with certainty whether their Court will produce unanimous or near-unanimous decisions. We are simply suggesting, as our emphasis on "believe" indicates, that they have some general sense of

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[61] *See id.*
[62] *See id.*
[63] Adapted from Eskridge, *Overriding*, *supra* note 5, at 350.
[64] *See supra* notes 50–51 and accompanying text.

how their colleagues will vote and, thus, of the margins of victory their decisions will produce.

B. Scattered Evidence Supporting the Dynamic Account's Prediction

In its most general and conceptual form, our prediction suggests that political actors in one branch of government may avoid placing policies on their institutional agenda when they believe that members of other branches would move policy far from their most preferred points, unless they also believe that they can insulate their ultimate policy decisions from reversal. Certainly, we recognize that we are not the first to offer such a hypothesis—at least not in this general form and as it may pertain to other political organizations. Academics who study the legislative process, for example, have long observed that congressional committees contemplate the likely outcomes on the floor, as well as the probable actions of the President, when they consider proposing legislation.[65]

Even within the scholarship on law and courts there is scattered evidence to support the view that courts facing the sort of environment depicted in Figure 1 act in a sophisticated fashion when it comes to case selection. We know, for example, that there are many salient and seemingly "certworthy" petitions that the Court has denied over the years,[66] *at least in part because it desired to avoid collisions with Congress and the President.* Along these lines, the justices never resolved the question of the constitutionality of the Vietnam War, despite its obvious importance and many requests to do so.[67] Further, Supreme Court clerks (who make recommendations to the justices regarding certiorari) occasionally point out the political consequences of accepting petitions.[68]

Consider the following advice, proffered by Justice Burton's clerk, regarding a miscegenation petition (*Naim v. Naim*),[69] which arrived at the Court's doorstep the very year after it issued its highly controversial decision in *Brown v. Board of Education*:[70]

> In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for the time being . . . [but] I don't think we can be honest and say that the

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[65] *See, e.g.*, PETER M. VAN DOREN, POLITICS, MARKETS, AND CONGRESSIONAL POLICY CHOICES (1991); Mouw & MacKuen, *supra* note 44.

[66] Writers have invoked the term "certworthy" to signify those petitions that, by virtue of some identifiable feature, seem to merit the Court's attention. *See, e.g.*, PERRY, *supra* note 16. Usually the feature is a conflict among federal circuit courts over the matter at hand. *See id.*

[67] *See* PROVINE, *supra* note 18, at 54–60 (discussing the same examples).

[68] *See id.*

[69] 350 U.S. 985 (1955) (denying a motion to recall the mandate and to set the case down for oral arguments), *vacated & remanded*, 350 U.S. 891 (1955).

[70] 347 U.S. 483 (1954).

> claim is unsubstantial . . . . It is with some hesitation . . . that I recommend that we NPJ [note probable jurisdiction, i.e., grant review]. This hesitation springs from the feeling that we ought to give the present fire a chance to burn down.[71]

Justice Burton declined to take his clerk's advice, voting instead to dismiss.[72] Four others, however, namely, Justices Douglas, Reed, Black, and Warren, wanted to resolve the dispute.[73] Despite the existence of a sufficient number of votes to review, the Court put the case on hold.[74] On the next vote, only Justices Douglas, Reed, and Black agreed to note jurisdiction and, at the final conference, the justices unanimously agreed to issue a vacate and remand order.[75] Why the change? According to Justice Clark, the author of the published order in the case, the probability of a negative reaction to a decision on the merits "had been an important consideration in the decision."[76]

There also is more systemic evidence, albeit of a limited nature. Provine shows that between 1954 (after *Brown*) and 1957, the Court received at least five petitions (in addition to *Naim*) involving major segregation issues.[77] It granted certiorari in just one, *Holmes v. City of Atlanta*,[78] only to vacate the lower court's ruling without a full hearing on the merits.[79] Invoking more recent data on petitions raising claims of race and sex discrimination in employment practices, Epstein and Knight report that during the 1978 term, when the Court's Republican-appointed majority was more conservative than the Democratic Congress and the President, the justices rejected nearly 90% of these petitions, with many of those they denied presenting seemingly important (and certworthy) issues.[80] When the political landscape changed in the early 1980s, with all three branches moving in a more conservative direction (majority-Republican except for the House), so too did the Court. During the 1982 term, it agreed to hear 28% of the employment cases, nearly 15% more than it did in 1978 and over five times its overall average acceptance rate

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[71] PROVINE, *supra* note 18, at 59–60.
[72] *See id.* at 60.
[73] *See id.*
[74] *See id.*
[75] *See id.*
[76] *Id.*
[77] *See id.*
[78] 350 U.S. 879 (1995).
[79] *See* PROVINE, *supra* note 18, at 60 (citing Speed v. City of Tallahassee, 356 U.S. 913 (1958); Florida ex rel. Hawkins v. Bd. of Control, 355 U.S. 839 (1957); Hood v. Bd. of Trustees, 352 U.S. 870 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Ill. Commerce Comm'n v. Ill. Cent. R.R. Co., 348 U.S. 823 (1954)).
[80] *See* EPSTEIN & KNIGHT, *supra* note 7, at 83. The authors examined cases listed under the subject "Equal Employment Practices," subheading "Race" and "Sex," listed in the index of the *CCH Supreme Court Bulletin*. *See id.*; *see also* http://www.artsci.wustl.edu/~polisci/epstein/choices/ (describing coding rules and data).

for that term (6%).[81] Finally, there is Friedman's analysis of *United States v. Lopez*,[82] in which the Court (for the first time in 60 years) struck down an act of Congress as a violation of the Commerce Clause.[83] In speculating on why the justices have, since *Lopez*, denied certiorari to several similar cases, Friedman suggests that "the Court, having made its views known in *Lopez*, simply is biding its time, watching to see what a very different Congress might do with regard to new legislation."[84]

II. Research Design

These bits of evidence are tantalizing. What we do not know, however, is whether they represent systematic behavior that can be uncovered using accepted standards of empirical inquiry. Do Supreme Court justices, who clearly (at least to us) engage in forward thinking with regard to their colleagues at the certiorari stage, also take into account the likely reactions of other relevant actors (for example, the Congress and the President), as the dynamic account would predict?

We can envisage many ways to address this question.[85] Given our interest in making general claims about the agenda-setting process, one emerges as particularly appropriate: We consider the percentage of constitutional and non-constitutional cases that the justices have agreed to hear since 1946, expecting that—if the dynamic account holds—the percentage of constitutional cases will increase in times when the justices and external political actors are far apart in policy terms, but that this effect will be mitigated when the Court is, speaking, relatively homogenous in ideology and, thus, in a position to produce authoritative decisions.

A. Assumptions

Before turning to the data, we ought to comment on the assumptions embedded in our plan for assessing the dynamic account. The first is ob-

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[81] *See* Epstein & Knight, *supra* note 7, at 83.

[82] 514 U.S. 549 (1995).

[83] *See* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 Case W. Res. L. Rev. 757 (1996).

[84] *Id.* at 797–98. Since the publication of Friedman's piece, the Supreme Court has decided several cases based on the Commerce Clause. Most notable is United States v. Morrison, 529 U.S. 598 (2000), in which the justices relied on *Lopez* in striking down portions of a federal statute creating civil remedies for gender-motivated violence. *See id.* at 601; *see also Jones v. United States*, 529 U.S. 848 (2000) (holding that a federal criminal statute against arson, passed pursuant to the commerce power, could not be applied to regulate behavior taken against a private residence that was not used in any commercial activity).

[85] We could, for example, follow the leads of Provine, *supra* note 18, or Epstein & Knight, *supra* note 7, and investigate particular areas of the law. This approach, however, can tell us only whether the Court is engaging in dynamic agenda-setting over that legal issue, and not in the main.

vious: As we noted earlier, we adopt a mainstream assumption about the goals of justices: they wish to establish policy that other political actors will respect and comply with and is as close as possible to their own most preferred position. Thus, we agree with the sentiment: "[A]lthough justices occasionally pursue other goals and the occasional justice never pursues policy, most justices in most cases seek to establish law as close as possible to their own preferences."[86]

Second, we believe that justices are freer to pursue their sincere preferences in constitutional cases than in non-constitutional ones. We realize that this assumption is not perfect. For example, some scholars argue that the constraints imposed by other actors—if they, in fact, exist—may also be operative in constitutional cases.[87] To the extent that members of Congress are able to deploy any number of weapons to attack the Court when it issues constitutional (or, for that matter, any other sort of) decisions it dislikes[88] and the justices are aware of these weapons, we appreciate this argument. Still, for the simple reason that it is far more difficult for the elected branches to override a constitutional decision than a statutory one, this is an assumption that guides Eskridge's and others' work on judicial decisions,[89] and one we think plausible to make in our study of dynamic agenda-setting.[90]

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[86] EPSTEIN & KNIGHT, *supra* note 7, at 49; *see also* SEGAL AND SPAETH, supra note 37, at 4, 17–18.

[87] *See, e.g.*, Epstein, Knight, & Martin, *supra* note 7; FRIEDMAN, *supra* note 83. Furthermore, even some of the examples we used above suggest as much. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); *Lopez*, 514 U.S. at 549.

[88] A few of these weapons are outlined in Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369 (1992). For example, the Senate could use its confirmation power to select judges who hold certain views. *See id.* at 377. Alternatively, Congress could pass a bill to amend the Constitution. *See id.* In extreme situations, judges who often rule against Congress could be impeached. *Id.* Congress may also attempt to reinstate regulations held unconstitutional by the Court by suggesting an alternative constitutional ground for the policy. *Compare* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009-369, 3009-372 (1996) (amending 18 U.S.C. § 922(q) to provide criminal penalties for knowing possession in a school zone of a firearm that "has moved in or that otherwise affects interstate or foreign commerce") *with* United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating a previous version of § 922(q) that banned knowing possession of a firearm within a school zone without requiring that the gun have moved in interstate commerce); *cf.* Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (invalidating a statute which Congress passed with the express purpose of overruling a prior Constitutional decision by the Court). To the extent that the Court believes Congress may invoke such powers, the mere threat of their use may constrain the Court, even if Congress rarely uses them in practice.

None of this takes away from the point we make in the text; namely, that it is more difficult to override constitutional decisions than statutory ones, particularly in light of Court decisions like Boerne and Dickerson. *See supra* note 26.

[89] *See, e.g.*, Eskridge, *Overriding*, *supra* note 5, Eskridge, *Reneging*, *supra* note 5; Segal, *supra* note 12.

[90] Certainly there are some scholars who argue that "Congress can and does attempt to reverse Supreme Court [constitutional] rulings." James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447, 458 (1997); *see also* LOUIS FISHER, CONGRESSIONAL CHECKS ON THE JUDICIARY, CONGRESS

Third, we assume that justices recognize that they may be able to insulate their policies from legislative reversal by reaching authoritative decisions (those that are as close to unanimous as possible)[91] but, at the same time, acknowledge that internal heterogeneity may inhibit their ability to do so. Hence, when justices believe that ideological divisions on the Court will prevent them from deploying a wide-margin opinion on a matter of statutory interpretation (that is, when they believe they lack the institutional wherewithal to discourage a congressional override attempt), they will eschew making statutory decisions in favor of those of a constitutional variety.

Finally, we assume that there are a sufficient number of constitutional and statutory petitions each term (or enough that raise both kinds of claims) that the Court could substitute one type of case for the other (or address one kind of claim to the neglect of the other).[92] Given that the justices receive more than 7000 petitions per term, and issue written opinions on fewer than 1% of them, we do not think that this is a particularly onerous assumption to make.[93]

B. Data and Measurement

Animating our research design requires us to obtain data on the dependent variable, the Court's case mix (specifically, the percentage of constitutional and non-constitutional decisions it reaches each year). We also must create measures of our two independent variables (those variables we are invoking to explain variation in case mix): preference homogeneity on the Court, which ought tap the degree to which the justices *believe* they can insulate themselves from legislative reversal by producing authoritative decisions; and the preferences of the political institutions, which should reveal the extent of the *constraints* that the other institutions place on the Court.

CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 28 (Colton C. Campbell & John F. Stack eds., 2001). Even they do not argue, however, that it is more difficult for Congress to override statutory interpretations than constitutional ones.

[91] There is no shortage of literature to support this assumption. For examples, *see* CANON & JOHNSON, *supra* note 58; WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 66 (1964) ("The greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases.").

[92] To return to our earlier example: We assume that a Court at odds with Congress could locate, for example, an affirmative action petition raising Fourteenth Amendment claims, rather than one brought exclusively under Title VII.

[93] During the last term for which available data exist (1999), the Court received 7374 requests for review; it granted 1.2% (n=92). *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 15 (2001). Of the terms we analyze in this Article (1946–1992; *see infra* p. 416), the Court received the fewest petitions in 1950 (n=1,055). It granted review to 10% (n=106) that term. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 80 (1996).

The first task is easy enough. The dependent variable, as depicted in Figure 2, is the percentage of all constitutional and statutory decisions (issued by the Court between the 1946 and 1992 terms) that are statutory. We define constitutional decisions as those in which the *primary* authority for the Court's decision, according to Spaeth's United States Supreme Court Judicial Database,[94] is judicial review at the national or state level. Statutory decisions are those in which the Court interpreted a federal statute, treaty, court rule, executive order, administrative regulation, or administrative rule.[95] Note that under these definitions, as the figure shows, a great deal of variance exists in the percentage of statutory decisions made in any term. (The percent ranges from a high of 77.6 in the 1956 term to a low of 40.5 in the 1976 term). Additionally, no long-term secular increase or decrease appears to exist in the data.

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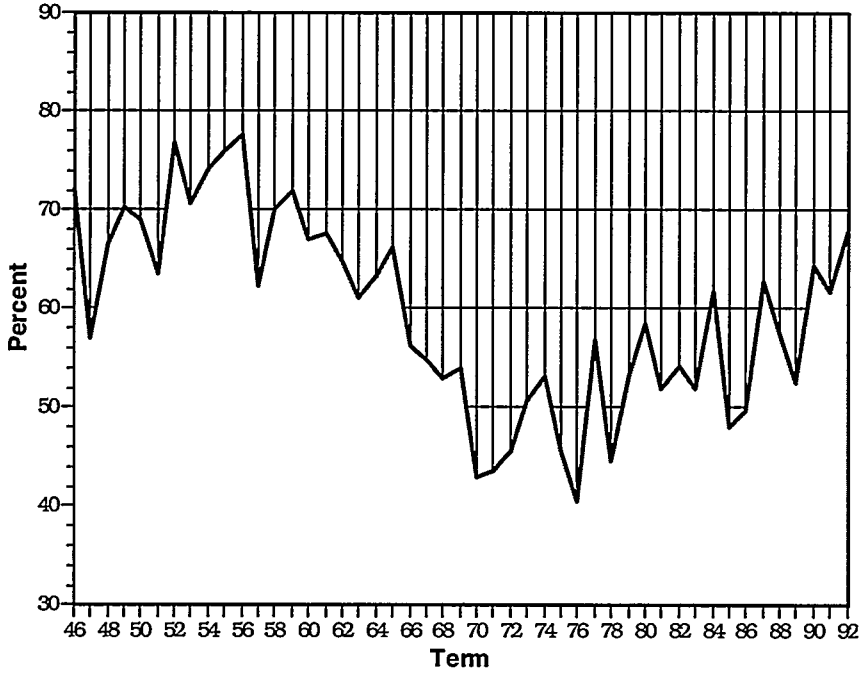
[94] The United States Supreme Court Judicial Database (and its variants) is a multi-user database that Harold J. Spaeth, created in the late 1980s. It contains scores of attributes of Court decisions, handed down since 1946, ranging from the date of the oral argument to the identities of the parties to the litigation to how the justices voted. The database (and the documentation necessary to use it) is available at: http://www.ssc.msu.edu/~pls/pljp/sctdata1.html.

[95] All data used in this Article are available at: http://artsci.wustl.edu/~polisci/epstein/research/dynamic.html. So, suffice it to note here, we included cases (from the Spaeth database) that met the following definitions: analu=0 or 1 or 4 (meaning each docket number, plus split vote cases, included); dec_type=1 or 6 or 7 (meaning orally argued cases decided by signed opinions, judgments, or per curiams included).

FIGURE 2. PERCENTAGE OF COURT'S PLENARY DOCKET COMPOSED OF STATUTORY CASES, 1946–1992 TERMS[96]



The second task, developing a measure of justices' beliefs on preference homogeneity on the Court, is equally straightforward: We rely on Segal and Cover's judicial preference scores[97]—scores that many scholars have invoked to study judicial decisions.[98] To derive them, the researchers content-analyzed newspaper editorials written between the time of justices' nominations to the United States Supreme Court and their confirmations. Specifically, and as Segal and Cover tell it,

> [W]e trained three students to code each paragraph [in the editorial] for political ideology. Paragraphs were coded as *liberal,*

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[96] *See* Harold J. Spaeth's United States Supreme Court Judicial Database, *supra* note 94.

[97] Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 (1989).

[98] *See, e.g.*, EPSTEIN ET AL., *supra* note 93; Epstein, Knight, & Martin, *supra* note 7; Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 260 (1996); SEGAL & SPAETH, *supra* note 37; Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995).

> *moderate*, *conservative*, or *not applicable*. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.[99]

Segal and Cover then measure judicial policy preferences by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate. Their resulting scale of policy preferences ranges from −1 (unanimously conservative) to 0 (moderate) to +1 (unanimously liberal)—with Table 2 displaying the specific scores for justices serving on the Court since 1946.[100]

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[99] Segal & Cover, *supra* note 97, at 559.

[100] *Id.* Table 2 displays the scores in the form that Segal and Cover report them. *Id.* To use them for our analysis, we take the standard deviations of the scores, multiply by −1 (to make the more homogeneous courts larger) and add .40 (to give the least homogeneous Court a positive score of .01; the most homogeneous Court has a score of .23).

TABLE 2. MEASURING JUSTICES' BELIEFS ABOUT PREFERENCE HOMOGENEITY ON THE COURT: THE SEGAL-COVER SCORES[101]

Justice	Segal/Cover Score
Black	.75
Blackmun	–.77
Brennan	1.00
Breyer	–.05
Burger	–.77
Burton	–.44
Clark	.00
Douglas	.46
Fortas	1.00
Frankfurter	.33
Ginsburg	.36
Goldberg	.50
Harlan	.75
Jackson	1.00
Kennedy	–.27
Marshall	1.00
Minton	.44
Murphy	1.00
O'Connor	–.17
Powell	–.67
Reed	.45
Rehnquist	–.91
Rutledge	1.00
Scalia	–1.00
Souter	–.34
Stevens	–.50
Stewart	.50
Thomas	–.68
Vinson	.50
Warren	.50
Warren	.50
White	.00
Whittaker	.00

[101] The Segal/Cover values are from 1.00 (most liberal) to –1.00 (most conservative). They were derived from content analyses of newspaper editorials prior to confirmation. We obtained them from Segal & Cover, *supra* note 97, at 560.

For two reasons, these measures are ideal for our purposes. First, as we note above, we require an indicator that reflects the sort of information we believe the justices possess about the likely actions of the Court; namely, that they have beliefs about, but do not know with certainty, the ultimate size of the majority coalition. Because the Segal/Cover scores are based on newspaper editors' assessments of the justices and, thus, measure general perceptions of preferences, they nicely fit the bill. Second, while the Segal/Cover scores are independent of judicial votes, they provide a satisfactory predictor of them. Certainly, they explain the votes in some issue areas better than they do others, but, overall, across a range of cases, they have above-threshold predictive power.[102]

The final task, determining the constraints placed on the Court by the other branches, is more complex. We begin by considering the notion, advanced by Eskridge and other proponents of dynamic accounts of Court decisions, that justices foresee what Congress and the President would do if the Court heard a case and decided it in any given direction.[103] This requires that justices either have, or act as if they have, an intuitive model of national lawmaking.

Nevertheless, little agreement exists among academics over how best to model the legislative process. Accordingly, we rely on two separate accounts, hoping to find consistent results regardless of which we use.[104] The first, the Committee-Power model, requires that committees report legislation to the floor for consideration under an open rule.[105] The second, the Party-Caucus model, assumes that majority party leaders, committee chairs, and even majority party committee members, act as relatively faithful agents of their party caucus.[106] Under this model, the type

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[102] *See* Epstein & Mershon, *supra* note 98.

[103] Eskridge, *Overriding*, *supra* note 5, at 378 ("The Court is attentive to current congressional (and, as will be shown, presidential) preferences when it interprets statutes."); Eskridge, *Reneging*, *supra* note 5, at 644 ("The Court/Congress/President game assumes that each player operates with complete information about other players' preferences, and, therefore, perfectly anticipates the future course of play.").

[104] *See* Segal, *supra* note 12, for a full discussion of these models. The Multiple-Veto model is a third option; however, since this model produces only one year in which the Court is constrained by the relevant political actors, we are unable to assess the dynamic account against it.

[105] This model takes its cues from the account offered by John Ferejohn & Charles Shipan, *Congressional Influence on the Bureaucracy*, J.L. ECON. & ORG. Special Edition 1990 at 1, 3–4.

[106] *See, e.g.*, GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 251–52 (1993) ("Because the payoffs of the majority leadership reflect the collective interests of the party . . . the leadership's scheduling preferences do too."); D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, THE LOGIC OF CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 92–93 (1991) ("The party caucus should be reluctant to entrust such important duties to members whose preferences over spending levels are unrepresentative of the caucus as a whole. Assuming that a reliable indicator of members' preferences across a wide range of policies is their position along a general, liberal-conservative continuum, we hypothesize that the congressional party, in order to achieve its desired policy goals, strives to make the median voter in its

of legislation that can come to a vote and be approved by a chamber moves to the left when the chamber switches from Republican control to Democratic control and to the right when control passes from Democrats to Republicans. For example, the recent takeover of the Senate by the Democrats moves the balance of power in that chamber and in its Judiciary Committees to the left.

These two models, of course, differ in their depiction of the legislative process. For our purposes, they overlap in an important way: To test the prediction flowing from our dynamic account of agenda-setting, we must: (1) develop measures of the preferences of the key actors embedded in each model; and (2) identify the set of irreversible decisions so that we can calculate the constraints (or lack thereof) the Court faced each year from those actors.

1. Measuring Preferences

To measure the (revealed) ideological preferences of members of Congress, we use support scores provided by the Americans for Democratic Action ("ADA"). While ADA scores have noted deficiencies (for example, the ADA counts non-voting members as voting against its position), those flaws should have little influence on chamber and committee medians.[107] Moreover, recent research demonstrates the reliability, validity, and stability of ADA scores as a proxy for congressional ideology.[108]

Assuming that ADA scores measure preferences on a liberal-conservative dimension, we require an indicator of Supreme Court preferences that does the same and is independent of the preferences of Congress. We obtain such a measure from research by Segal, who uses predicted, annual, liberalism support scores in non-unanimous civil liberties constitutional cases.[109] These allow us to derive the median justice and, thus, our measure of the Court's most preferred position.

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contingent on a committee coincide with the median voter of the caucus as a whole.").

[107] While any factor that leads to a change in a member's voting score would change the *mean* for that member's chamber, changes in a member's voting score only change the chamber's *median* if the member passes from one side of the median to the other. Yet, even this would only shift the median from what was the 50th percentile Congressman to what was the 49th (or 51st) percentile Congressman.

[108] RICHARD HERRERA ET AL., *Stability of Congressional Roll-Call Indexes*, 48 POL. RES. Q. 403 (1995). Alternatively, we could have used the NOMINATE scores developed in KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997). Given the advantages of the ADA scores, we believe: (1) the ADA approach is superior, and (2) the substitution of NOMINATE scores would not appreciably affect our results since the two scores are highly correlated. (The correlation is typically around 0.9). *See* E. Scott Adler & John S. Lapinski, *Demand-Side Theory and Congressional Committee Composition: A Constituency Characteristics Approach*, 41 AM. J. POL. SCI. 895 (1997).

[109] As Segal, *supra* note 12, indicates, he goes to great lengths to ensure that these scores are independent of congressional preferences. First, and for obvious reasons, he excludes statutory decisions. Second, Segal uses only civil liberties cases because the

2. Identifying the Set of Irreversible Decisions

With these preferences measures in hand, we must determine—for both models of the legislative process—the set of irreversible decisions that the Court faced each year, such that decisions mapping within that set could not be reversed. From these we calculate the constraints confronting the Court. If the Court's predicted preference falls within the set of irreversible decisions, the constraint is zero and the Court can safely act on its sincere policy preferences. If the Court's predicted preference falls above the maximum (or below the minimum), then the constraint is the distance from the Court to the maximum (minimum). The larger the distance, the more likely the Court should be to agree to hear constitutional cases over statutory ones.

To construct these "winsets,"[110] we invoke the procedures outlined in Segal,[111] with Table 3 displaying the specific calculations for the two models of the legislative process. Note that these calculations do not merely take into account the relevant congressional actors but the President as well. This ensures that we capture a key feature of the dynamic agenda-setting account, and an underlying feature of Eskridge's theory of dynamic statutory interpretation, that the justices should be attentive to

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House and Senate Judiciary Committees have jurisdiction over almost all of the Court's civil liberties decisions. While this method might limit generalizability, it does so over an area that encompasses a large proportion of the Court's docket. Third, Segal selects nonunanimous decisions only. He does so to enhance the ability to scale these decisions with the ADA measure of congressional preferences. Fourth, he uses annual support scores, not aggregates across an entire career. A fair number of justices demonstrate long-term changes in their sincere preferences. *See* Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801 (1998). Fifth, Segal uses OLS regression predicted annual support scores, not actual annual support scores. This further works to ensure that these votes are independent of short-term contemporary congressional preferences. It also has the added advantage of eliminating short-term fluctuations due to changes in case stimuli.

After taking these steps, we, like Segal, scale the scores for their comparability to ADA scores. We followed Segal's approach since there is no other clear method. He sought expert judgments from four highly regarded public law colleagues, asking them how, in their judgments, these scores related to ADA scores. For example, is 93.3 (Justice Douglas's score) about where Douglas would be if he had real and comparable ADA scores, or is it too high, or too low? Is 5.0 (Justice Rehnquist's score) about where Justice Rehnquist would be if he had real and comparable ADA scores, or is it too high, or too low? The three scholars who answered Segal's query unanimously stated that it was preferable to use the scores "as is" rather than rescaling them higher, lower, more toward the middle, more toward the extremes, or any combination thereof.

As this is our view as well, we use the scores "as is." While this is obviously not a textbook example of scaling, we believe the results have a fair amount of facial validity, and are certainly less arbitrary than the placement of players that one finds in some of the extant literature.

[110] We call them "winsets" because the Court should behave in predicted ways when it is within the boundaries of these constraint sets. They are not Pareto sets, for there are points in each constraint set that are in equilibrium but suboptimal.

[111] Segal, *supra* note 12; Jeffrey A. Segal, *Correction to 'Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 92 AM. POL. SCI. REV. 923 (1998).

all relevant elected actors in a position to move policy away from their most preferred position, not just legislators.

TABLE 3. CONSTRUCTION OF WINSETS (CONSTRAINT SETS) FOR TWO LEGISLATIVE MODELS

Committee-Power Model		**Party-Caucus Model**	
Republican President	**Democratic President**	**Republican President**	**Democratic President**
Minimum	*Minimum*	*Minimum*	*Minimum*
HSE33, SEN33, HJMed, SJMed, HJind, SJind	HSEMed, SMed, HJMed, SJMed, HJind, SJind	HSE33, SEN33, HMCaucm, SMCaucm, HMCind, SMCind	HSEMed, SMed, HMCaucm, SMCaucm, SMCind, HMCind,
Maximum	*Maximum*	*Maximum*	*Maximum*
HSEMed, SMed, HJMed, SJMed, HJind, SJind	HSE67, SEN67, HJMed, SJMed, HJind, SJind	HSEMed, SMed, HMCaucm, SMCaucm, HMCaucm, HMCind, SMCind	HSE67, SEN67, HMCaucm, SMCaucm, HMCind, SMCind

Key: HSE33=33rd percentile member of the House; SEN33=33rd percentile member of the Senate; HJMed=House Judiciary Committee Median; SJMed=Senate Judiciary Committee Median; HJind=House Judiciary Committee indifference point; SJind=Senate Judiciary Committee indifference point; HSEMed=House Median; SMed=Senate Median; HSE67=67th percentile member of the House; SEN67=67th percentile member of the Senate; HMCaucm=House Majority Party Caucus median; SMCaucm=Senate Majority Party Caucus median; HMCind=House Majority Party Caucus indifference point; SMCind=Senate Majority Party Caucus indifference point. Note: Indifference points only matter when gatekeepers are outside the constraints set by the chamber medians and veto-override points.

Using the ADA scores to make the requisite calculations, we find that—over the forty-six terms we examined—the median of the Court falls outside the set of irreversible decisions four times in the Committee-Power model and three times in the Party-Caucus Model. Such results tell us that the justices are almost always unconstrained (at least under our measurement scheme) to go about their agenda-setting task without fear of eventual override, given their perceptions of the preferences of the sitting Congress. From a statistical standpoint, the results also commend

caution in conducting our investigation. That is because we are invoking models with few non-zero constraints to predict a rather long series of annual data. Certainly this is not unusual in quantitative research but it does suggest that the analysis ought proceed gingerly.[112]

C. Assessing the Dynamic Account of Agenda-Setting

Despite the fact that our models of the legislative process produce only three (the Party-Caucus Model) or four (the Committee-Power Model) terms in which the median justice lies outside the irreversible set, it is surely important to examine those instances when they occur and, more specifically, to determine whether the prediction flowing from our dynamic agenda-setting account accurately captures Court behavior. To do so, we follow the same procedure for both models of the legislative process. We begin by placing the Supreme Court (as measured by the median justice) and members of Congress on a consistent ideological dimension and measure the preferences of the Court vis-à-vis the set of irreversible decisions established by the relevant model. Then, for each year, we measure: (1) the degree of homogeneity on the Court, as revealed by the Segal/Cover scores, and (2) whether, under each model of the legislative process, the Court is constrained and, if so, by how much and in which direction. Finally, we use these data to determine whether the constraints influence the relative percentage of constitutional and statutory cases on the Court's plenary docket.

III. RESULTS

We are, of course, most interested in assessing the predictive value of the dynamic account of agenda-setting. Let us start, however, with the simpler, bivariate notion suggested by some scholars:[113] when the Court is constrained by Congress, it lacks the institutional wherewithal to withstand challenges; in other words, it is completely *dominated* by the legislative branch and cannot overcome that domination even when its homogeneity permits it to produce authoritative decisions. In empirical terms this simply means that as the Court's preferences move further from those of Congress the percentage of statutory cases heard by the Court decreases. We begin this way, even though, as we noted earlier, attentiveness to the preferences of other institutions need not always lead to sophisticated behavior, for it is unlikely that, under our Madisonian system, one political institution can be wholly dominated by another.

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[112] We could cite many illustrations, but one that readily comes to mind is research on the effect of war on presidential popularity, using the presence or absence of conflict in a given year as an independent variable. A classic example is John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 AM. POL. SCI. REV. 18 (1970).

[113] *See* Spiller & Gely, *supra* note 54.

We assess this simple "domination" prediction with an AR(1) process using maximum likelihood techniques.[114] Table 4 presents the results, that is, the correlation coefficients for each legislative model on the percentage of statutory cases the Court hears each term.[115] As we can see, the findings are weak at best. Both the Committee-Power model and the Party-Caucus models yield substantively and statistically insignificant coefficients. In other words, the Court does not respond to a constrained political environment by simply retreating from statutory cases: either the external political environment has no effect on the agenda-setting process, or the process, as the prediction flowing from our dynamic account anticipates, is more complex.

TABLE 4. ASSESSING THE DOMINANCE PREDICTION OF SUPREME COURT AGENDA-SETTING

	Model of the Legislative Process	
	Committee-Power	**Party-Caucus**
Estimate		
ß	–.22	–.16
S.E. ß	.27	.24
Significance	n.s.	n.s.
Constant	60.84	60.76
ρ	.71	.71

To determine which has the better case, let us now turn to that more nuanced prediction of agenda-setting: the one that we have posited here. On this "dynamic" prediction, the effect of the distance of the Court from the set of irreversible decisions will be conditional on the Court's ability to influence the preferences and beliefs of members of Congress, as well as on its ability to signal a willingness to fight back in response to ad-

[114] Unlike the OLS (ordinary least squares) model, which assumes that prediction errors from regression models are uncorrelated with one another, the AR, or autoregressive model, allows prediction errors at one point to be related to the prediction errors at another point systematically. The AR(1) indicates the common expectation that these time points will be sequential to one another. For example, if a statistical model underpredicts President Bush's approval rating in March 2002 due to unmeasured factors, then an AR(1) model suggests that the model will likely underpredict Bush's approval rating in April 2002.

[115] Since the vast majority of the Court's decisions for a given term come down the following year, we match decisions from each term with ADA scores for the following year. While such a procedure assumes that the Court peers a bit into the future when creating its docket, this is exactly what backward induction requires.

verse congressional reaction. Thus the predictive equation is multivariate: the extent to which Congress's preferences are decisive is alternately limited by the Court's own preference set and the homogeneity of that set. Statistically, this takes the following form:

$$Y_i = \beta_0 + \gamma_1 X_1 + \beta_2 X_2 + \varepsilon_i$$

where

$$\gamma_1 = \beta_1 + \beta_3 X_2,$$

X_1 = the distance from the set of irreversible decisions and
X_2 = the degree of homogeneity on the Court; and
Y_i = the percentage of statutory (as opposed to constitutional) cases the Court will hear.

Substitution demonstrates that the congressional constraint on the Court's willingness to take statutory cases is influenced by the Court's homogeneity and its own distance from Congress's preferences:

$$Y_i = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_1 X_2 + \varepsilon_i.$$

The relationship between the congressional constraint and Court homogeneity is now conditional: the greater the homogeneity on the Court (and, thus, the higher the probability that the Court will be able to produce a unanimous or near-unanimous decision), the lesser the impact of the congressional constraint. Importantly, the conditional-effects specification, made explicit in the dynamic account's prediction, changes the normal interpretation of $ß_1$ and $ß_2$. They are now the effect of each variable when the other variable is at zero.[116] Accordingly, as the homogeneity variable bottoms close to zero (.01), we can interpret $ß_1$ as the impact of the distance from the set of irreversible decisions when Court homogeneity is at its lowest level.

We expect $ß_1$ to be negative and $ß_3$ to be positive: at the lowest observed levels of Court homogeneity, we anticipate increases in the distance to the set of irreversible decisions to lower the percentage of statutory cases the Court would hear, but that this impact would be counterbalanced as the Court becomes more homogenous.

The prediction for $ß_2$ is not as clear. If Congress is the only factor that influences the Court's agenda, when the congressional preference constraints are at zero, the Court would be free to proceed in accord with

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[116] Robert Friedrich, *In Defense of Multiplicative Terms in Multiple Regression Equations*, 26 AM. J. POL. SCI. 797 (1982).

its own preferences regardless of whether it was homogenous or heterogeneous. If, however, the Court is concerned about other factors—including reactions from the lower courts or future Congresses—then homogeneity might be a significant consideration even when the contemporaneous Congress is not a threat to the Court.

With these statistical expectations in mind, let us turn to the results displayed in Table 5. Note, first, that a homogenous Court is indeed more likely to reach statutory decisions even when unconstrained by Congress. That is, the effect of homogeneity on the Court's agenda, while *partially* dependent on Congress (a point to which we return momentarily), exists even when the Court is free from contemporaneous congressional constraints. In situations in which the Court faces no constraints from Congress (such that the "Constraint" and "Homogeneity*Constraint" variables drop out), a Court with average levels of homogeneity would hear about a 60-40 mix of statutory to constitutional cases. If we then jump to the maximum levels of homogeneity,[117] which occurred during roughly half of the Warren Court years (the 1959–1965, 1967, and 1968 Terms) and the final pre-Clinton terms of the Rehnquist Court (1991 and 1992), we would expect to find about a 68-32 split of statutory to constitutional cases under the Party-Caucus model. Alternatively, if we moved to the minimum levels of homogeneity, which occurred during the 1971–1980 terms of the Burger Court, we would expect to find a 53-47 split of statutory to constitutional cases.

[117] Recall that the homogeneity scores range from .01 (most heterogeneous) to .23 (most homogeneous). *See supra* note 100.

TABLE 5. ASSESSING THE DYNAMIC ACCOUNT PREDICTION OF SUPREME COURT AGENDA-SETTING (MAXIMUM LIKELIHOOD ESTIMATES)

	Model of the Legislative Process	
	Committee-Power	**Party-Caucus**
Variable		
Constraint ($ß_1$)	–5.41	–7.09
	(3.61)	(2.68)
Homogeneity ($ß_2$)	78.14	68.94
	(14.10)	(15.92)
Interaction ($ß_3$)	21.48	30.23
	(15.94)	(11.89)
Constant	50.75	51.91
ρ	.33	.46

Note: N=47. Standard errors are in parentheses.

β_1 significant at $p < .10$ (C-P model) and $p < .01$ (P-C model), one tailed.
β_2 significant at $p < .01$ (both models).
β_3 significant at $p < .10$ (C-P model) and $p < .01$ (P-C model), one tailed.

Second (and of direct relevance to the dynamic account's prediction), note that under both models, at the lowest levels of Court homogeneity, the greater the distance between the Court and Congress, the lower the percentage of statutory cases that the Court hears. Moreover, as the Court's homogeneity increases, the impact of Congressional preference markedly decreases. In other words, when the justices confront a constrained political environment and do not believe they can produce authoritative decisions, they opt out of a statutory mode and into a constitutional one. At the same time, when they believe they can produce authoritative decisions, they continue to engage in statutory interpretation even in the face of a constrained political environment.

This is precisely the behavior predicted by the dynamic account of agenda-setting. Is it behavior of consequence? Or does it merely generate a statistically significant finding with little substantive import? For two reasons, we cannot offer systematic conclusions for a single isolated vari-

able. First, the conditional effects specification necessarily means that there is no straightforward effect of congressional constraints.[118] Second, the estimates of the coefficients are bound to be imprecise because the Court is so seldom (at least under our measurement procedures) constrained. We can, however, demonstrate the combined effect of the constraint and the interaction for those terms when the Court is actually constrained.

Table 6 presents the results of this analysis. We predict rather large drops in the percentage of statutory cases under the Committee-Power model for the 1947 and 1967 terms, and under the Party-Caucus model for the 1947 and 1976 terms. In fact, the magnitude of the predicted decrease is so substantial that we cannot help but believe that the combined effect of the constraint and the interaction is not merely one of conceptual or statistical significance. This suggests that when Congress, the Court as a whole, and individual members of the Court are distant in policy terms, legislation may be at greater risk of Court override on constitutional grounds than it is on an "incorrect" (at least in the eyes of Congress) statutory interpretation. This follows from the fact that justices respond to constraints and internal heterogeneity by making non-trivial increases in the percentage of constitutional cases they accept—just as the dynamic account of agenda-setting hypothesizes.

TABLE 6. PREDICTED IMPACT OF CONGRESSIONAL CONSTRAINTS ON THE COURT'S PERCENTAGE OF STATUTORY DECISIONS, 1946–1992 TERMS

	Model of the Legislative Process	
	Committee-Power	**Party-Caucus**
Term		
1947	–11.22	–12.37
1966	–1.90	.00
1967	–10.93	–3.23
1968	–3.14	.00
1976	.00	–9.23

Note: In all other terms, the predicted impact is .00.

[118] Technically, we face this problem in trying to assess the impact of homogeneity as well, but the problem here is ameliorated by the fact that the homogeneity variable represents the impact of homogeneity when the constraint is at 0. This is not only a theoretically meaningful level, but also a level that actually occurs in a significant portion of our sample.

IV. IMPLICATIONS

This last point, an implication of our study, is ironic indeed. Just at historical moments when the Court and relevant political actors are at ideological odds and when the justices feel relatively defenseless (owing to a perceived inability to produce authoritative rulings), it may be the Court, not Congress or even the President, that triumphs. That is because the justices, recognizing their "constrained" position, act in accord with the dynamic account of agenda-setting: They opt into a constitutional mode, thereby making it exceedingly difficult for the legislature and the executive to override them.

This is an intriguing implication of our study for a number of reasons, not the least of which is that it casts the Court in a somewhat different light than does Eskridge's theory of dynamic statutory interpretation. On Eskridge's account, once the Court grants certiorari to a case requiring it to interpret a statute, it must bend to the will of contemporaneous elected actors if it wishes to avoid a legislative override. This would suggest the court is relatively powerless when it confronts a hostile political environment. On our account, the Court emerges as anything but powerless, for not only can it avoid (via strategic instrumentation or some other selection rule at the agenda-setting stage) the sort of cases that might induce it to cave to Congress in the first place. It also can, under certain circumstances, create constitutional rules that are extraordinary difficult, if not impossible, for Congress to override.

This distinction between our account and Eskridge's emerges because we begin our consideration of Court decision-making at an earlier stage in the process: dynamic statutory interpretation considers its starting point to be the Court's deliberations over a petition it has accepted, while dynamic agenda-setting begins at the certiorari phase. We believe that focusing on this initial stage has the advantage of incorporating features of the process that may be otherwise obscured, including the Court's ability to remain a powerful force in American society even when it operates in an adverse political setting. It also calls into question the extent to which the justices must actually bend to the wishes of Congress when they go about interpreting statutes. Although we can imagine certain circumstances under which they would have to modulate their views in the way Eskridge suggests to avoid congressional overrides,[119] on our account justices typically would not need to act in an insincere fashion at the merits stage. They could cull from their docket those cases that would put them in a position to do so, supplanting them with constitutional disputes which the justices could then decide without fear of congressional reprisal.

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[119] *See supra* note 17.

In other ways, though, our analysis lends support to some of Eskridge's general assumptions. For example, we too find that the Court seems attentive to the preferences and future conduct of relevant political actors. While it may be true that the justices (at least by our measurement strategy) are rarely constrained by Congress, during those years when they are, the Court's agenda reflects the effect of that constraint. The Court's agenda in those years also reveals the justices' internal calculations over whether they have the institutional wherewithal to overcome a hostile legislature.

This basic finding, as it pertains to the merits stage, led Eskridge and others to identify numerous implications of "dynamic statutory interpretation" for on-going discussions about the Court. Our account of dynamic agenda-setting lends itself to similar conclusions. One, which we have already detailed, has direct bearing on the balance of power between the elected branches and the Court; others implicate future thinking about certiorari, a topic of significant interest to the legal community. Along these lines, we hope our results encourage academics to contemplate the dynamic nature of Supreme Court agenda-setting.

In this Article, we offered evidence to show that other (contemporaneous) political actors affect the sorts of disputes that the justices agree to hear and decide. While we feel confident that the evidence we offer is solid and that our test is appropriate given the prediction we offered, we can imagine other ways to measure some of the concepts contained in the dynamic account. We attempted to invoke salient disputes as dependent variables, and the following figures as independent variables: (1) the presence or absence of divided government; (2) the number of congressional overrides; and (3) the presence or absence of ideological division in the lower courts. We also attempted to adjust the ADA scores to make them more comparable over time and across the chambers of Congress.[120] These particular strategies failed and, given recent concerns about the adjustment strategy itself, we do not commend this particular approach to others. Nevertheless, we hope that future researchers will develop distinct and creative ways to evaluate our account. Only through additional assessments can we become more (or less) certain that it accurately captures an important feature of the Supreme Court's agenda-setting process.

Assuming our account does hold up under other systematic tests, several extensions of it could be examined. One example would be to consider Caldeira and Wright's seminal study of agenda-setting,[121] which assesses many factors that may influence the Court's certiorari decisions, including conflict in the lower courts, the presence of amici curiae, and

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[120] Tim Groseclose, Steven D. Levitt & James M. Snyder, *Comparing Interest Group Scores Across Time and Chambers: Adjusted ADA Scores for the U.S. Congress*, 93 AM. POL. SCI. REV. 33 (1999).

[121] Caldeira & Wright, *supra* note 16.

the justices' ideologies. What the authors exclude, however, may be equally as important as what they include. For example, the study excluded variables designed to capture the degree to which justices are constrained by external political actors as they go about constructing their docket. Certainly we understand why Caldeira and Wright omitted such indicators. At the time they were writing, little justification existed for their inclusion.[122] Based on our findings, however, future investigations should rectify this omission by attempting to account for the political environment within which the justices operate.

A second implication of our findings also pertains to future scholarship, particularly to studies exploring constitutional courts in emerging democracies rather than in the United States. As these courts in Eastern Europe and elsewhere struggle to establish the rule of law in their societies (along with their own legitimacy), they have been asked to resolve many politically delicate disputes—ranging from whether elections have been conducted fairly to whether presidents can serve additional terms.[123] Naturally, the great bulk of discussion within the legal community has focused on how these constitutional courts have gone about deciding such cases. To our minds, however, the disputes they "decide not to decide" may be equally interesting. As one justice on the Russian Constitutional Court puts it:

> The Court must avoid getting entangled in current political affairs, such as partisan struggles. . . . When in December 1995, before the [parliamentary] elections and in the very heat of the electoral campaign, we received a petition signed by a group of deputies concerning the constitutional validity of the five percent barrier for party lists. We refused to consider it. I opposed considering this request, because I believe that the Court should not be itching for a political fight.[124]

Is this dispute (or justice) an anomaly or part of a larger pattern? Is Russia a special case or is the behavior of their constitutional court representative of its counterparts in other new democracies? Addressing these sorts of questions via a dynamic account—one that takes into account both intra- and inter-branch constraints on agenda-setting—would

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[122] *Id.* Moreover, the authors only examined one term at the Court; assessments of the dynamic account require longer periods of time in order to capture variation in the political environment.

[123] *See, e.g.*, Albert P. Melone, *Judicial Independence and Constitutional Politics in Bulgaria*, 80 JUDICATURE 280 (1997); *see also* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000).

[124] Quoted in Leonid Nikitinsky, *Interview with Boris Ebzeev, Justice of the Constitutional Court of the Russian Federation*, 6 E. EUR. CONST. REV. 83, 85 (1997).

not only help to shed light on the work of courts elsewhere, but also on the part they play in the democratization process.

A third implication is of a different sort because it pertains to Congress rather than the scholarly community. While our results suggest that justices, when they find themselves at odds with Congress, attempt to insulate themselves from reversal by "deciding to decide" constitutional disputes rather than those that require the interpretation of statutes, members of the legislature are not entirely powerless. To be sure, under existing Supreme Court precedent they may find it difficult to overturn constitutional decisions by simple legislation. Nevertheless, as we noted earlier, they can deploy a whole host of other weapons to "punish" the Court.[125] Imposing sanctions, especially on a regular basis, could lead justices to depart from the strategy we observe here.

A final implication of our study takes the form of a recommendation: since we found evidence of an external constraint operating on the justices' case selection decisions, we encourage others to investigate how the Court might constrain agenda-setting in the two other branches of government. This seems a particularly apropos enterprise at a time in American history when even journalists report that Members of Congress take into account the effect of Supreme Court rulings on their ability to set policy[126]—not to mention at a time when the Court itself seems to be telling Congress how to carry out its deliberative process.[127] Only a handful of academics have paid even the slightest attention to this general phenomenon.[128] We can and should fill this unfortunate gap, for doing so will provide us with a more developed picture of the role the Supreme Court plays in American society.

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[125] *See supra* note 88. These "weapons" include, *inter alia*, the Senate's advise and consent function as well as Congress's discretion over the judiciary's budget.

[126] Eric Schmitt, *Campaign Finance: The Congress; Senate Debates Campaign Bill, But Two Sides Remain Divided*, N.Y. TIMES, Sept. 27, 1997, at A1.

[127] *See, e.g.*, William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 87 (2001). In addressing the constitutionality of federal legislation, the United States Supreme Court recently has put great weight on the state of "the legislative record."

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), demonstrates the full emergence of this new intensive and skeptical review of legislative materials. In *Garrett*, the Court invalidated provisions of the Americans with Disabilities Act, asserting that the legislative record did not contain sufficient evidence of unconstitutional discrimination by states in the context of employment to warrant congressional action. *See id.* at 374. The Court in *Garrett* raised legislative record review to new, dispositive significance by focusing its ruling on the perceived inadequacy of legislative materials. *See id.*

[128] *See* Martin, *Congressional Decision Making*, *supra* note 15, for a rare example of this type of scholarship.

RECENT DEVELOPMENTS

USA PATRIOT ACT

Following the terrorist attacks of September 11, 2001, Congress moved with tremendous alacrity to authorize new powers for the federal government to prevent future terrorism. The most comprehensive new effort is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA Patriot Act") of 2001, signed into law on October 26,[1] less than six weeks after the attacks. The legislation grants additional wiretapping and surveillance authority to federal law enforcement, removes barriers between law enforcement and intelligence agencies, adds financial disclosure and reporting requirements to combat terrorist funding, and gives greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties.[2]

The USA Patriot Act's expansion of government authority has made it a focal point for the ongoing national debate over balancing protection against terrorism with preserving civil liberties. While there was clear political support for expanded government power in the wake of September 11,[3] as evidenced by the decisive margin by which the bill passed,[4] a vocal coalition of civil libertarians, privacy advocates, and immigrant organizations have challenged the USA Patriot Act as an overbroad and unjustified infringement of privacy, association, and due process rights.[5] Of particular concern is the speed with which the bill was considered: the accelerated timetable bypassed both the committee process and floor debate.[6] The haste was considered essential, however, by law enforcement officials seeking to prevent further attacks feared to be imminent.[7] Attor-

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[1] Pub. L. No. 107-56, 115 Stat. 272 (2001).

[2] *Id. See also Bill Summary and Status, H.R. 3162, at* http://thomas.loc.gov.

[3] *See, e.g.*, Jim Drinkard, *Another Attack May Have Been Planned*, USA TODAY, Sept. 17, 2001, at A1 (describing results of a USA Today/CNN/Gallup poll).

[4] The House vote was 357-66. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001) (Roll Call No. 398). The Senate vote was 98-1, with Senator Russ Feingold (D-Wis.) the lone dissenter. 147 CONG. REC. S11,059 (daily ed. Oct. 25, 2001) (Roll Call No. 313).

[5] *See* Walter Shapiro, *Usual Adversaries Unite Over Threat to Liberties*, USA TODAY, Sept. 26, 2001, at A6. The coalition included groups on the left and right of the political spectrum, including the unlikely partnership of House Judiciary Committee rivals Representatives Maxine Waters (D-Cal.) and Bob Barr (R-Ga.). *See id.*

[6] *See* Gia Fenoglio, *Jumping the Gun on Terrorism?*, 33 NAT'L J. 3450 (2001). The effects of the rush to passage were magnified because many lawmakers and their staffs were preoccupied with anthrax contamination in congressional offices and therefore had even less opportunity to consider the legislation fully. *See id.*

[7] *See Homeland Defense: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2001) [hereinafter *Homeland Defense Hearings*] (statement of Att'y Gen. John Ashcroft) ("Every day that passes with outdated statutes and the old rules of engagement is a day that terrorists have a competitive advantage."), *available at* http://judiciary.senate.gov/te092501f.htm. Anthrax letters increased fears that waves of attacks were planned. *See*

ney General John Ashcroft had hoped Congress would grant additional authority in days, not weeks.[8]

Any resolution of the debate over whether the USA Patriot Act is appropriate or excessive, however, is premature, since the effects of the Act depend on how the executive branch exercises its broadened authorities. Instead of labeling the Act's provisions as "good" or "bad" based on their potential for misuse, a more useful analysis of the legislation looks at how the Act balances the need for a more powerful executive to fight terrorism with congressional and judicial oversight to protect individual rights. This analysis reveals how Congress modified the Administration's original proposals in important ways to ensure a continuing oversight role for Congress and the courts. Although these modifications do not ensure that the USA Patriot Act will never infringe upon civil liberties, they do make it more likely that the political and judicial processes will protect them.

September 11 provided a wake-up call to the reality of terrorist threats, but America's vulnerability to terrorism was not a complete surprise in Washington, D.C. The 1995 Oklahoma City bombing, coupled with a terrorist nerve gas attack on the Tokyo subway system, raised the profile of terrorism and increased pressure for government action.[9] In response, Congress enacted two major pieces of antiterrorism legislation in 1996. The Antiterrorism and Effective Death Penalty Act of 1996 provided new definitions and enhanced penalties for terrorist crimes, revised immigration procedures to streamline deportation of criminals, and authorized increased funding for law enforcement to fight terrorism.[10] The Defense Against Weapons of Mass Destruction Act of 1996 addressed the threats posed by biological, chemical, and nuclear weapons.[11] Several congressional committees also responded to specific terrorist threats by creating targeted programs within federal agencies.[12] By fiscal year 2001, federal

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Michael Kranish, *Anthrax '2d Wave' of Terror, Bush Says*, BOSTON GLOBE, Nov. 4, 2001, at A1.

[8] *See* John Lancaster, *Hill Puts Brakes on Expanding Police Powers*, WASH. POST, Sept. 30, 2001, at A6.

[9] *See* PHILLIP HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 1–2 (1998).

[10] *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see generally* H.R. CONF. REP. No. 104-518 (1996).

[11] *See* Pub. L. No. 104-201, § 1401, 110 Stat. 2422, 2714 (1996); *see also* H.R. CONF. REP. No. 104-724, at 824–29 (1996). The act mandated training and equipment for federal and state emergency responders to react to an attack using weapons of mass destruction. *See* Pub. L. No. 104-201, § 1401, 110 Stat. 2422, 2714 (1996); *see also* H.R. CONF. REP. No. 104-724, at 824–29 (1996). This law is commonly referred to as Nunn-Lugar-Domenici after its sponsors, Senators Sam Nunn (D-Ga.), Richard Lugar (R-Ind.), and Pete Domenici (R-N.M.).

[12] *See* Richard A. Falkenrath, *The Problems of Domestic Preparedness: Challenges Facing the U.S. Domestic Preparedness Program*, EXECUTIVE SESSION ON DOMESTIC PREPAREDNESS DISCUSSION PAPER ESDP-2000-05, at 3–7 (Harvard University John F. Kennedy School of Gov't, Dec. 2000), *available at* http://ksgnotes1.harvard.edu/BCSIA/ESDP.

spending on counterterrorism totaled $9.7 billion—an increase of $3 billion since 1998.[13]

With a base of programs established, by the late 1990s Congress was focusing on refining terrorism preparedness. Three separate blue-ribbon commissions[14] had reached the troubling conclusion that the nation's institutions were dangerously unprepared for terrorist attack. The commissions found that the federal approach to terrorism was hopelessly fragmented across several agencies with little coordination, and that intelligence and law enforcement agencies had inadequate resources and authorities to gather intelligence, infiltrate groups, and prevent attacks.[15] Spurred by these reports, Congress held hearings but, largely due to civil liberties concerns, did not pass legislation to correct the problems that would ultimately be addressed in the USA Patriot Act.[16]

The attacks of September 11 breathed new life into the proposals Congress had previously considered by turning abstract flaws in terrorism preparedness into stinging indictments of how the system was broken. First, the Central Intelligence Agency ("CIA") had intelligence prior to

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nsf/www/research. For example, the DOJ developed training programs that overlapped with the Nunn-Lugar-Domenici programs in response to congressional earmarks in appropriations legislation. *See id.* at 5–6.

[13] *See* OFFICE OF MANAGEMENT AND BUDGET, ANNUAL REPORT TO CONGRESS ON COMBATING TERRORISM 5–7 (2001); *see also* Gregory D. Koblentz, *Overview of Federal Programs to Enhance State and Local Preparedness for Terrorism with Weapons of Mass Destruction*, EXECUTIVE SESSION ON DOMESTIC PREPAREDNESS DISCUSSION PAPER ESDP-2001-03, 3–4 (Harvard University John F. Kennedy School of Gov't, Apr. 2001), *available at* http://kgnotes1.harvard.edu/BCSIA/Library.nsf/pubs/2001ESDP3.

[14] The Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction was created by the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1405, 112 Stat. 1920, 2169 (1998). Chaired by former Governor Jim Gilmore (R-Va.), it is commonly referred to as the Gilmore Commission. The National Commission on Terrorism was created by the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 591, 112 Stat. 2681-210 (1998). Chaired by former Ambassador-at-Large for Counterterrorism L. Paul Bremer III, it is commonly referred to as the Bremer Commission. The United States Commission on National Security/21st Century was created by Secretary of Defense William Cohen on Sept. 2, 1999. *See* U.S. COMMISSION ON NATIONAL SECURITY/21ST CENTURY, ROAD MAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE 130 (February 15, 2001) [hereinafter HART-RUDMAN REPORT], *available at* http://www.nssg.gov/Reports/reports.htm. It is known as the Hart-Rudman Commission after its co-chairs, former Senators Gary Hart (D-Colo.) and Warren Rudman (R-N.H.).

[15] *See generally* ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, FIRST ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS (Dec. 15, 1999) [hereinafter GILMORE I] and SECOND ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS (Dec. 14, 2000) [hereinafter GILMORE II], *available at* http://www.rand.org/nsrd/ terrpanel/; *see also* NATIONAL COMMISSION ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM [hereinafter BREMER REPORT], *available at* http://w3.access.gpo.gov/nct/index.html (last updated Aug. 2, 2000); HART-RUDMAN REPORT, *supra* note 14, at viii. Chillingly, a photograph of the World Trade Center towers appears on the cover of the Bremer report with a target superimposed. *See* BREMER REPORT, *supra*.

[16] *See* Jake Tapper, *Don't Blame it on Reno*, SALON.COM, Jan. 2, 2002, *at* http://www.salon.com/politics/feature/2002/01/02/reno/index.html.

September 11 that two hijackers were suspected terrorists, but this information was not shared with the Federal Bureau of Investigation ("FBI") or Immigration and Naturalization Service ("INS") in time to prevent their entry into the United States.[17] This failure of communication reemphasized the fragmentation of antiterrorism efforts within the federal government. The lack of investigative and intelligence authority was another problem cited in the aftermath of the attack.[18] For example, the FBI had been unable to obtain a search warrant for the computer of accused terrorist Zacarias Moussaoui, who was detained by the FBI and INS in August 2001 after his enrollment in flight simulator training for jumbo jets raised suspicions.[19] Evidence that terrorists made extensive use of e-mail and the Internet in their planning recast the debate on appropriate government monitoring of electronic communication.[20] In addition, the fact that the terrorist operation cost an estimated $500,000 renewed calls for closer monitoring of financial transactions.[21] Finally, the revelation that hijackers had entered the United States on legal visas showed a need for terrorist-related immigration reforms.[22]

Just eight days after September 11, with the FBI and Justice Department mounting a nationwide investigation into the attacks, Attorney General Ashcroft and the Bush Administration proposed legislation to address the weaknesses September 11 had exposed and to provide tools to prevent future terrorism.[23] The proposed legislation would dismantle barriers to information sharing between intelligence and law enforcement agencies, encourage use of the relaxed warrant requirements of the Foreign Intelligence Standards Act ("FISA")[24] in terrorism investigations, expand wiretap laws to account for mobile and electronic communica-

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[17] *See* Guy Gugliotta, *Terrorism 'Watch List' Was No Match For Hijackers*, WASH. POST, Sept. 23, 2001, at A22.

[18] *See* Dan Eggen, *Hijack Plot Suspicions Raised With FBI in Aug.*, WASH. POST, Jan. 2, 2002, at A1; *see generally* Richard K. Betts, *Fixing Intelligence*, FOREIGN AFF. Jan. 1, 2002.

[19] *See* James V. Grimaldi, *With Perfect Hindsight, Some Question Decision Not to Seek Surveillance of Curious Flight Student*, WASH. POST, Oct. 8, 2001, at E13. Moussaoui was indicted on December 11, 2001 on six conspiracy counts. *See* Indictment, U.S. v. Moussaoui, No. CRNo. 01-455 (E.D. Va. Dec. 11, 2001), *available at* http://www.usdoj.gov/ag/moussaouiindictment.htm. The indictment alleges that he was intended to be the twentieth hijacker on September 11. *See id.*; *see also* Att'y Gen. John Ashcroft, News Conference Regarding Zacarias Moussaoui (Dec. 11, 2001), *at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks12_11.htm.

[20] *See* David S. Fallis & Ariana Eunjung Cha, *Agents Following Suspects' Lengthy Electronic Trail*, WASH. POST, Oct. 4, 2001, at A24.

[21] *See Weekend All Things Considered* (National Public Radio, Nov. 25, 2001), 2001 WL 7766665.

[22] *See* Brian Donohue & Dunstan McNichol, *13 Hijackers Entered U.S. Legally*, STAR-LEDGER (Newark, N.J.), Oct. 12, 2001, at 14.

[23] *See* John Lancaster & Jonathan Krim, *Ashcroft Presents Anti-Terrorism Plan to Congress*, WASH. POST, Sept. 20, 2001, at A24.

[24] Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801.

tions, authorize seizure of terrorist assets, and mandate detention and deportation of non-citizens with links to terrorist organizations.[25]

Congressional leaders and civil liberties groups immediately raised concerns about the scope of the proposed legislation, but recognized that swift action was necessary.[26] Members of Congress, mindful that prior emergencies had prompted rushed decisions the nation later regretted, made clear that they were not willing to rubber-stamp the Administration's proposals.[27] At the same time, though, they heeded the Administration's plea that "the American people do not have the luxury of unlimited time in erecting the necessary defenses to future or further terrorist attacks."[28] The result was six weeks of negotiation between the Justice Department and key congressional leaders, informed by limited committee hearings.[29] The Democratic and Republican leadership worked out differences between House and Senate versions of the Act, which were presented to the chambers and passed quickly with little floor debate.[30] The paucity of committee and floor debate, along with decisions to short-circuit the typical amendment process,[31] make it seem that Congress had indeed acted as a rubber stamp. Congress did, however, win an important final concession from the executive branch: some of the new powers in the Act would sunset in four years, ensuring a continued congressional oversight role.[32] Further, the six weeks between proposal and passage, while brief by standards of typical legislation, did provide time for Congress to debate and amend some of the trickier issues raised by the Administration's proposal.

Overall, Congress granted the executive branch broad new authority as requested, but tempered the authority with provisions for congressional and judicial oversight to check executive discretion. First, although the final bill eliminates legal barriers to information sharing between law enforcement and intelligence agencies, it also prevents abuse of authority by providing a private tort cause of action against govern-

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[25] *See* Ted Bridis & David Rogers, *Agency Proposes Much Broader Antiterror Laws*, WALL ST. J., Sept. 20, 2001, at A3.

[26] *See* Lancaster, *supra* note 8.

[27] *See id.* An oft-cited example of a regrettable wartime decision was the internment of Japanese American citizens on the West Coast in response to the attack on Pearl Harbor. *See id*; *see also* Korematsu v. U.S., 323 U.S. 214 (1944) (holding that the exclusion of Japanese Americans from certain cities on the West Coast did not violate the Equal Protection Clause).

[28] *Homeland Defense Hearings*, *supra* note 7 (statement of Att'y Gen. John Ashcroft).

[29] *See* John Lancaster, *House Approves Terrorism Measure*, WASH. POST, Oct. 25, 2001, at A1. The House Judiciary Committee held a markup and vote on what would become the USA Patriot Act, *see generally* H.R. REP. NO. 107-236 (2001), but the Senate Judiciary Committee never voted on the measure. *See* Kirk Victor, *The Conscience—or Crank—of the Senate*, 33 NAT'L J. 3264 (2001).

[30] *See* Lancaster, *supra* note 29.

[31] *See* Victor, *supra* note 29, at 3264.

[32] *See* USA Patriot Act of 2001, Pub. L. No. 107-56 § 224, 115 Stat. 272, 295 (to be codified at 18 U.S.C. § 2510 (2001)); *see also* Lancaster, *supra* note 29.

ment officials who improperly reveal sensitive information. Similarly, the Administration's proposal to use powerful espionage warrants to investigate terrorism was granted, but Congress toughened the standard under which a judge issues the warrant. The USA Patriot Act also authorizes government monitoring of addressing information for e-mail, but prohibits the monitoring of content. Anti-money laundering provisions allow asset seizure, but provide for judicial review. Finally, Congress specifically limited an Administration proposal that would have given the Attorney General authority to detain non-citizens suspected of terrorism indefinitely by requiring detainees to be brought before a judge within seven days.[33]

The first major issue addressed by the Act is the fragmentation of antiterrorist activities within the federal government, particularly the relationship between the law enforcement and intelligence communities.[34] The reasons for the fragmentation were both political and substantive. The political reasons stemmed from the money and power attached to anti-terrorism efforts.[35] Terrorism is a high-profile issue that brings media attention to politicians involved in it, and the increased attention justified increased funding in the federal appropriations process.[36] This, in turn, attracted legislators interested in steering spending to their constituencies, and executive branch agencies who wanted a piece of the budgetary pie.[37] The result was a confusing array of programs in more than forty federal agencies without a strong central planning or budgetary authority.[38] The substantive reason for the fragmentation between intelligence and law enforcement was a desire to protect civil liberties by limiting intelligence gathering within the United States to domestic law enforcement agencies restrained by warrant requirements.[39]

The agenda in 2000 and 2001 included competing proposals to create a central authority within the executive branch for combating terrorism.[40] While the various bills did focus on coordination, however, much

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[33] USA Patriot § 412, 115 Stat. at 351.

[34] *See supra* note 15 and accompanying text; *see also* Falkenrath *supra* note 12, at 3–7.

[35] *See* Falkenrath, *supra* note 12, at 3–7. This problem was underscored by the findings of two separate commissions—the Bremer and Gilmore Commissions—and addressed by multiple congressional committees. *See id. See, e.g.*, H.R. REP. No. 106-731 (2000).

[36] *See* Robert Dreyfuss, *The Phantom Menace*, MOTHER JONES, Sept. 1, 2000, at 40.

[37] *See id.*

[38] *See* Falkenrath, *supra* note 12, at 5.

[39] *See infra* notes 43–45 and accompanying text.

[40] *See, e.g.*, Preparedness Against Terrorism Act of 2000, H.R. 4210, 106th Cong. (2000). The bill, which failed to obtain passage in 2000, would have created a President's Council on Domestic Terrorism Preparedness in the White House, composed of Cabinet members with a Senate-confirmed executive director. *See id.*; *see also* H.R. REP. No. 106-731 (2000); 146 CONG. REC. H6893 (July 25, 2000); Vernon Loeb, *After Counterterrorism Bill Fails, Nation's Preparedness is Debated*, WASH. POST, Oct. 9, 2000, at A21. Also introduced in Congress were bills to create a National Homeland Security Agency, *see* H.R. 1158, 107th Cong. (2001), and to require the President to designate a single official responsible for homeland security, *see* H.R. 1292, 107th Cong. (2001). In addition, the Sen-

of the pre-September 11 debate was on coordinating consequence management—how to react to attacks.[41] None of the proposals directly addressed the real weakness revealed by September 11—a fragmentation between efforts to prevent international terrorism as a component of foreign policy and national security, and prevention of domestic terrorism as a federal law enforcement mission. The likely reason that this weakness was not addressed prior to September 11 is that the consequence management divide was an easier target, since there was consensus that it needed to be fixed.[42] The domestic-international divide, however, resulted in large part from a deliberate decision in the 1970s to separate national security and law enforcement functions in order to protect civil liberties.[43] In response to revelations that the CIA, FBI, and military engaged in extensive, illegal wiretapping and surveillance of political groups within the United States, Congress and President Ford instituted reforms to restrict the role of national security agencies like the CIA within the United States.[44] Instead, the FBI was given primary responsibility for terrorism investigations.[45]

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ate calendar for September 11 set aside time for floor debate on the Justice Department's fiscal year 2002 appropriations bill, which included a provision creating a Deputy Attorney General for Combating Domestic Terrorism. *See* S. 1215, 107th Cong. (2001); *see also* S. REP. No. 107-42, at 10–12 (2001). This proposal was incorporated in the final appropriations bill. Department of Justice Appropriations Act of 2002, Pub. L. No. 107-77, § 612, 115 Stat. 748, 800–01 (2001); *see also* Jim Oliphant, *Terrorism Czar for DOJ?*, LEGAL TIMES, Nov. 12, 2001.

The executive branch also launched its own programs. In 1998, President Clinton created a counterterrorism coordinator position in the National Security Council, and the FBI had a National Domestic Preparedness Office to oversee federal efforts, but these positions lacked budgetary and management authority over other federal programs. *See* Protection Against Unconventional Threats to the Homeland and Americans Overseas, Presidential Decision Directive 62, (May 22, 1998). The directive is unpublished, but a summary is available at http://www.fas.org/irp/offdmnocs/pdd/index.html, and then-President Clinton described its provisions in a speech. *See* President's Commencement Address at the United States Naval Academy in Annapolis, Maryland, 1998 PUB. PAPERS 825 (May 22, 1998); *see also* Loeb, *supra*. More recently, President Bush issued an executive order on October 8 creating the Office of Homeland Security within the Executive Office of the President. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001). *See generally* Thomas Cmar, Recent Development, *Office of Homeland Security*, 39 HARV. J. ON LEGIS. 455–74 (2002).

[41] For a comparison of proposals, see generally GENERAL ACCOUNTING OFFICE, COMBATING TERRORISM: OBSERVATIONS ON OPTIONS TO IMPROVE THE FEDERAL RESPONSE, GAO-01-660T (Apr. 24, 2001).

[42] *See generally*, HART-RUDMAN, *supra* note 14; GILMORE I, *supra* note 15; GILMORE II, *supra* note 15; BREMER REPORT, *supra* note 15.

[43] *See* William C. Banks & M. E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 32–35 (2001).

[44] *See id.* In 1975, the Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, commonly known as the Church Commission after its chairman, Senator Frank Church (D-Idaho). *See* S. RES. 94-21, 94th Cong. (1975); *see also* Banks & Bowman, *supra* note 43, at 33. The report of this committee prompted President Ford to issue an executive order clarifying the roles of the FBI and CIA, and reiterating restrictions on the CIA's authority to conduct domestic surveillance. *See* Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976); *see also* Banks & Bowman, *supra* note 43, at 35. The FBI and CIA had long been rivals and operated as separate

The separation of domestic and foreign intelligence gathering was of less consequence when terrorist threats to homeland security came from within and foreign operatives stayed overseas, but international terrorists acting within the United States revealed a weakness in the system. While no legislation could force the notoriously combative FBI and CIA to cooperate more,[46] Congress could at least remove some of the bureaucratic barriers impeding information sharing. To this end, the USA Patriot Act modifies the grand jury secrecy rules of the Federal Rules of Criminal Procedure[47] to allow grand jury information to be disclosed to federal officials without a court order.[48] It also allows federal law enforcement and intelligence information obtained through surveillance to be shared among "law enforcement, intelligence, protective, immigration, national defense, or national security" officials.[49] The practical effect of these provisions is to authorize the FBI, CIA, and other intelligence agencies to share information developed in terrorism investigations freely, without regard to whether the intelligence is gathered domestically or internationally, or pursuant to criminal investigation or intelligence gathering authorities.

This change has been criticized on the ground that it would permit a return to the misuse of intelligence and surveillance for political purposes. Morton Halperin, senior fellow at the Council on Foreign Relations, testified against the proposed change[50] as a result of personal experience: his home telephone had been illegally wiretapped when he served in the Nixon Administration.[51] Other witnesses invoked the illegal surveillance of civil rights advocates and Vietnam War protesters as cautionary incidents.[52] The Administration defended the change as essential in

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fiefdoms, but these new rules only encouraged the agencies to operate separately. *See generally* MARK RIEBLING, WEDGE: THE SECRET WAR BETWEEN THE FBI AND CIA (1994).

[45] *See* Tim Weiner, *Look Who's Listening; the CIA Widens its Domestic Reach*, N.Y. TIMES, Jan. 20, 2002, at 4.

[46] *See supra* note 44.

[47] *See* Fed. R. Crim. P. 6(e)(3)(c).

[48] *See* Pub. L. No. 107-56 § 203, 115 Stat. 272, 279 (2001).

[49] *Id.*

[50] *See Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. (Oct. 3, 2001) (statement of Morton Halperin), *available at* http://judiciary.senate.gov/te100301sc-halperin.htm. *Cf.* MORTON HALPERIN, THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES (1976).

[51] *See* Weiner, *supra* note 45.

[52] *See* John Lancaster & Walter Pincus, *Proposed Anti-Terrorism Laws Draw Tough Questions*, WASH. POST, Sept. 25, 2001, at A5. Senator Patrick Leahy (D-Vt.) and Representative Barney Frank (D-Mass.) were among those expressing this concern. *See id.; see also Hearing on the Administration's Draft Anti-Terrorism Act of 2001 Before the House Comm. on the Judiciary*, 107th Cong. (Sept. 24, 2001) [hereinafter *Anti-Terrorism Draft Hearings*] (statement of Rep. Barney Frank) ("[O]ne of the problems we've seen historically is the inappropriate release of information garnered by surveillance, and one of the worst instances in history was the savage campaign of defamation waged by J. Edgar Hoover as head of the FBI against Dr. Martin Luther King."), 2001 WL 1143717.

light of the new terrorist threat, however, and a compromise was reached to assuage civil liberties concerns. Specifically, the USA Patriot Act provides for administrative discipline and civil and criminal liability for improper disclosures.[53] These sanctions provide disincentives for government officials to release sensitive information to embarrass political foes, and give judges an independent oversight role from which to monitor the executive branch.

The separation between criminal investigations and intelligence gathering is more than a jurisdictional divide between the FBI and CIA, however. It is also partially attributable to two different statutory authorities for obtaining warrants for electronic surveillance. Title III of the Omnibus Crime Control Act of 1968[54] governs warrants in criminal investigations, but FISA applies to national security investigations.[55] Under FISA, the Attorney General requests warrants from a secret court to collect foreign intelligence information.[56] Unlike Title III criminal warrants, FISA warrants for electronic surveillance can be issued without probable cause of a crime, as long as the government can show probable cause that the primary purpose of the surveillance is intelligence gathering and that the target is a foreign power or an agent of a foreign power,[57] including international terrorist groups.[58] In addition, unlike under Title III, the government need not reveal the warrant to the target upon completion of surveillance.[59] The effect of this scheme is to provide much broader electronic surveillance authority for intelligence gathering than for criminal investigations.

Despite its extensive power under FISA, the Justice Department became gun-shy about using the Act to gather evidence for anti-terrorism after use of FISA was challenged in several high-profile cases.[60] The

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[53] *See* § 223, 115 Stat. at 279; *see also* Lancaster & Pincus, *supra* note 52.

[54] Pub. L. No. 90-351, § 802, 82 Stat. 197, 212 (codified as amended at 18 U.S.C. §§ 2510-2522 (1994)).

[55] Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801; *see also* Banks & Bowman, *supra* note 43, at 48–53. FISA was another product of the 1970s investigations into unlawful CIA and FBI surveillance, coupled with Supreme Court Fourth Amendment decisions. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). After the Court applied the Fourth Amendment warrant requirement to electronic surveillance in *Katz*, Congress enacted Title III to specify warrant procedures in criminal investigations but did not apply the scheme to executive authority to protect national security. *See* Banks & Bowman, *supra* note 43, at 48–53. In U.S. v. U.S. District Court, 407 U.S. 297, 306 (1972), the Court applied the warrant requirement to national security surveillance of domestic groups, but recognized that different warrant standards may—and indeed should—apply to national security and criminal investigations. FISA was enacted in response. *See* Banks & Bowman, *supra* note 43, at 48–53.

[56] 50 U.S.C. § 1803(a). FISA created the Foreign Intelligence Surveillance Court, comprised of eleven federal district court judges designated by the Chief Justice. *See id.*

[57] *See id.* § 1805.

[58] *See id.* § 1801(b)(2)(c).

[59] *See* 18 U.S.C. § 2518 (8)(d); *see also* Richard Willing, *Anti-terror Bill Expands Government's Reach*, USA TODAY, Oct. 25, 2001, at A7.

[60] *See* Grimaldi, *supra* note 19; *see also* GENERAL ACCOUNTING OFFICE, FBI INTELLI-

main problem was that a FISA warrant must have the primary purpose of gathering intelligence,[61] while terrorism-related surveillance has the dual purpose of intelligence gathering and law enforcement. To make FISA an appropriate tool for terrorism investigations, the USA Patriot Act replaces "purpose" with "significant purpose" throughout the FISA statute.[62] As a result, federal law enforcement can now obtain FISA warrants with the intent of using them in criminal matters, so long as intelligence gathering is also a significant purpose of the request.

This one-word change was hotly debated, as its opponents claimed that any change would threaten both civil liberties and the constitutionality of the FISA scheme. The original Bush Administration proposal was to change "purpose" to "a purpose," clearing the way for FISA warrants in any case with a plausible connection to foreign intelligence gathering.[63] Senators Mike DeWine (R-Ohio), Dianne Feinstein (D-Cal.) and John Edwards (D-N.C.), however, raised questions about the constitutionality of the change, since court cases have only upheld the constitutionality of using FISA evidence in criminal cases when intelligence gathering was a "primary purpose" of the warrant.[64] The Justice Department's position was that, though courts may exclude some evidence under the amendment to FISA, the amendment would "eliminate any artificially high statutory barrier and allow the constitutional standard to be developed on a case-by-case basis," while not making FISA vulnerable to a facial challenge.[65] Nevertheless, civil liberties groups feared that the "a purpose" language did not sufficiently limit FISA to terrorism and national security investigations but would allow secret, unaccountable warrants to be issued in any criminal case even tangentially related to foreign intelligence.[66] The compromise was to replace the primary purpose test with "significant purpose." This change gives law enforcement flexibility to use FISA in terrorism probes without fear the evidence will

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GENCE INVESTIGATIONS: COORDINATION WITHIN JUSTICE ON COUNTERINTELLIGENCE CRIMINAL MATTERS IS LIMITED, GAO-01-780 (July 16, 2001) [hereinafter FBI INTELLIGENCE INVESTIGATIONS], *available at* http://www.gao.gov. CIA officer Aldrich Ames argued for suppression of FISA evidence in his espionage prosecution on grounds that the primary purpose of the surveillance had been to develop evidence for his prosecution. *See* Grimaldi, *supra*. Although Ames pleaded out, the Justice Department became reluctant to use FISA in national security cases, including the Wen Ho Lee investigation, for fear evidence would be excluded. *See* FBI INTELLIGENCE INVESTIGATIONS, *supra*, at 25–26.

[61] *See* U.S. v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980); *see also* FBI INTELLIGENCE INVESTIGATIONS, *supra* note 60, at 3.

[62] Pub. L. 107-56 § 218, 115 Stat. 272, 291 (to be codified at 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B) (2001)).

[63] *See* Lancaster & Pincus, *supra* note 52.

[64] *Hearing Before the Senate Comm. On Intelligence*, 107th Cong. (Sept. 24, 2001) [hereinafter *Intelligence Comm. Hearings*] (questions of Senators Dewine, Feinstein, and Edwards), 2001 WL 1147486.

[65] *Id.* (statement of Ass't Dep. Att'y Gen. David Kris).

[66] *See Intelligence Committee Hearings*, *supra* note 64 (statement of Jeremy Berman, Exec. Dir., Center for Democracy and Technology).

be excluded, while ensuring that FISA cannot be used to obtain warrants in ordinary domestic criminal investigations.

The USA Patriot Act also made other amendments to FISA that make it more useful in terrorist investigations, such as providing authority for pen registers, trap and trace devices,[67] and roving wiretaps.[68] Roving wiretap warrants authorize surveillance of any phone that a target may be using, instead of a particular piece of equipment; they were prompted largely by the increased use of cellular telephones, which targets may change frequently to avoid detection.[69] Pen registers and trap and trace devices are like "caller ID" for telephones; they record the date, time, and telephone numbers of outgoing and incoming calls, but not their content.[70] The inclusion of these devices in the FISA scheme was relatively uncontroversial, since the change does not expand the content of permissible surveillance, but simply adapts traditional authorities to new technology.[71] Pen register and trap and trace authorities are already present in Title III,[72] and the Administration's position was that the same tools should be available for terrorist investigations as already exist for drug trafficking cases.[73]

A more controversial provision of the USA Patriot Act changed the definitions of pen register and trap and trace device to include devices that track "dialing, routing, addressing, or signaling information."[74] This permits the tracking of e-mail and Internet usage instead of just telephone calls.[75] The provision prompted a reopening of the debate on the propriety of government surveillance of computer systems, which arose most recently in 2000, when the FBI's use of the Carnivore system to monitor e-mail became public.[76] This revelation elicited an outcry from

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[67] § 214, 115 Stat. at 286.

[68] *Id.* at § 206.

[69] *See* Robert L. Jackson, *Senate OKs Anti-Terrorism Program*, L.A. TIMES, Oct. 12, 2001, at A13.

[70] *See* Mark G. Young, Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 FORDHAM L. REV. 1017, 1031 (2001). The warrant requirement for these devices is purely statutory; the Court has ruled that their use does not rise to the level of a search under the Fourth Amendment. *See Hearing on the Justice Department's Counterterrorism Proposal Before the Senate Comm. On Intelligence*, 107th Cong. (Sept. 24, 2001) (statement of Ass't Dep. Att'y Gen. David Kris), 2001 WL 1147486; *see also* Smith v. Maryland, 442 U.S. 735, 741–46 (1979).

[71] *See Anti-Terrorism Draft Hearings, supra* note 52 (statement of Att'y Gen. John Ashcroft).

[72] *See* 18 U.S.C. § 2518(11) (1968).

[73] *See Anti-Terrorism Draft Hearings, supra* note 52 (statement of Att'y Gen. John Ashcroft).

[74] Pub. L. No. 107-56 § 216, 115 Stat. 272, 288–90 (to be codified at 18 U.S.C. §§ 3121, 3127 (2001)).

[75] *See* Willing, *supra* note 59.

[76] *See* Young, *supra* note 70, at n.47. For an overview of Carnivore, see generally *The 'Carnivore' Controversy: Electronic Surveillance and Privacy in the Digital Age: Hearing Before Senate Comm. on the Judiciary*, 106th Cong. (Sept. 6, 2000) (prepared statement of Donald M. Kerr, Assistant Dir., FBI) [hereinafter *Carnivore Hearings*], *available at*

electronic privacy advocates,[77] despite the FBI's argument that Carnivore actually protects privacy since the program filters out information not subject to surveillance orders before it even reaches government agents.[78] First, privacy advocates argue that forcing wide swaths of data to pass through a government computer requires trust that the government is monitoring only the subset of data that it is authorized to obtain.[79] Second, the analogy to a pen register may be inapt, since e-mail routing information and Web addresses differ greatly from telephone numbers—e-mail addresses identify a person instead of a fixed piece of equipment, and Web addresses provide content information on a person's thoughts and interests.[80] The USA Patriot Act states that the authority to use Carnivore-like devices "shall not include the contents of any communication,"[81] but this provision may not satisfy privacy advocates, since "content" remains undefined. It is unclear whether information like the subject line of an e-mail message will be categorized as routing or addressing information, or as content.[82]

The USA Patriot Act also aims to stop terrorism by disrupting terrorist financial networks through Title III of the Act, the International Money Laundering and Abatement and Anti-Terrorist Financing Act of

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http://judiciary.senate.gov/oldsite/w196200f.htm; Graham B. Smith, Note, *A Constitutional Critique of Carnivore, Federal Law Enforcement's Newest Electronic Surveillance Strategy*, 21 LOY. L.A. ENT. L. REV. 481 (2001). According to the FBI, Carnivore is a computer program installed at an Internet Service Provider ("ISP") that performs the same functions as a pen register at a telephone switching office. *See Carnivore Hearings*, *supra* (statement of Donald M. Kerr). All data passing through the ISP is routed through Carnivore, which is programmed to filter and retain only the information that the warrant authorizes. *See id.* For example, if the warrant is for the contents of a particular user's messages, Carnivore will retain the contents, but if the warrant authorizes only addressing information on senders and recipients, Carnivore retains only that information. *See id.* After the public relations fiasco regarding the unfortunately named program, the FBI changed the name to the more innocuous-sounding DCS1000. *See* Young, *supra* note 70, at n.44.

[77] *See Carnivore Hearings*, *supra* note 76 (statement of Senator Leahy, Ranking Member, Sen. Comm. on the Judiciary).

[78] *See id.* (statement of Donald M. Kerr).

[79] *See* Young, *supra* note 70, at 1072.

[80] *See Carnivore Hearings*, *supra* note 76 (Professor Jeffrey Rosen, George Washington Univ. Law School). To be sure, a list of Web sites that a person visits seems more analogous to bookstore purchase or video rental records, government use of which has been criticized in two high-profile political controversies. Independent Prosecutor Kenneth Starr subpoenaed the purchase records of Monica Lewinsky from two bookstores. *See* David Streitfeld & Bill Miller, *Starr's Quest for Book Titles Faces High Bar*, WASH. POST, Apr. 10, 1998, at B1. In 1987, a reporter obtained and publicized the video rental records of Supreme Court nominee Robert Bork, and the outcry led to legislation protecting the privacy of video records. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710; *see also* S. REP. No. 100-599, at 5 (1988).

[81] Pub. L. No. 107-56 § 216, 115 Stat. 272, 290 (to be codified at 18 U.S.C. § 3127 (2001)).

[82] *See* Willing, *supra* note 59. *See also* Senator Maria Cantwell's (D-Wash.) Statement on the Senate Anti-Terrorism Bill (Oct. 12, 2001) ("I would like to believe that technologies like Carnivore will not be used to derive content from e-mail communications under the terms of this bill, but I am skeptical."), *at* http://cantwell.senate.gov/news/releases/2001_10_12_01_statement.html.

2001.[83] Even before September 11, Congress had identified money laundering as a serious problem—for the last two years, it had been considering legislation to increase banks' obligations to monitor and report suspicious transactions, but it made little progress.[84] Citing high costs, banks strongly opposed new regulations, while privacy advocates protested provisions that would require banks to report financial transactions to law enforcement.[85] Senator Phil Gramm (R-Tex.) also opposed such legislation and used his position as chair of the Senate Banking Committee to block it.[86] In December 1998, federal financial regulators, including the Federal Reserve and Treasury Department, proposed new regulations requiring detection and reporting of suspicious transactions, but these regulations were withdrawn in March 1999 after more than 300,000 public comments were submitted, most attacking the regulations as an invasion of privacy.[87]

The political climate changed in the summer of 2001. The Democratic takeover of the Senate unseated Senator Gramm from his chairmanship, and the Bush Administration was more willing to pursue money laundering legislation as part of its criminal justice agenda.[88] In this climate, the clear evidence that the hijackers and their organization were well-financed provided the impetus to pass money laundering legislation quickly.[89] Banks dropped their previous opposition,[90] and the privacy ob-

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[83] § 301, 115 Stat. at 296.

[84] *See, e.g.*, Rob Garver, *Laundering Measures Suddenly a Priority*, AM. BANKER, Aug. 13, 2001, at 1; *see also* H.R. 3886, 106th Cong. (2000); H.R. REP. No. 106-728 (2000); S. 1663, 106th Cong. (1999); S. 1920, 106th Cong. (1999); S. 2972, 106th Cong. (2000). The House bill was passed 31-1 by the House Banking Committee but never came to a floor vote. *See* Garver, *supra* at 1. The Senate Banking Committee took no action on the bills. *Id.*

[85] *See* Garver, *supra* note 84, at 1.

[86] *See id.*

[87] *See* David F. Scranton, *Public Cried 'No' to Know-Your-Customer Regulations*, NAT'L L.J., May 10, 1999, at B5. The proposals were commonly described as "know your customer," since they required banks to have enough knowledge of customer financial habits and assets to be able to predict activity and flag suspicious transactions. *Id.* After the backlash against the proposed regulations, Congress considered legislation to prohibit such regulations in the future. *See* S. 508, 106th Cong. (1999). Title V of the Gramm-Leach-Bliley Act, which reformed banking and finance law, required institutions to protect the privacy of customer information. *See* Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 15 U.S.C. 6901); H.R. REP. No. 106-74, Pt. 3 at 200 (1999).

[88] Att'y Gen. John Ashcroft, Remarks at the Organized Crime Conference, Chicago, IL (Aug. 7, 2001), *at* http://www.usdoj.gov/ag/speeches/2001/0807organizedcrimerem.htm; *see also What Is the U.S. Position on Offshore Tax Havens?: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Affairs*, 107th Cong. (July 18, 2001) (statement of Michael Chertoff, Asst. Att'y Gen., Crim. Div., U.S. Dep't of Justice).

[89] *See* Rob Garver, *Anti-Laundering Bills Find Few Detractors*, AM. BANKER, Sept. 27, 2001, at 1.

[90] *See Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the House Comm. on Financial Services*, 107th Cong. (Oct. 3, 2001) (statement of Edward L. Yingling, American Bankers Association), *available at* http://www.house.gov/

jections so widely expressed to the 1998 "know-your-customer" regulations were more muted.

Generally, the money laundering provisions of the USA Patriot Act require banks and financial institutions to monitor account activity and to report suspicious transactions. The Act also provides for increased information sharing: it allows suspicious activity reports received by the Treasury Department to be shared with intelligence agencies[91] and authorizes sharing of surveillance information between law enforcement and intelligence agencies.[92] Finally, the Act grants government access to credit records without notifying the target,[93] just as FISA allows undisclosed warrants.[94] These provisions raise civil liberties concerns analogous to those raised by the information sharing and FISA provisions—that the government will abuse the information that it secretly gathers.[95] Because the money laundering provisions were added to the USA Patriot Act at the last minute, however,[96] the concerns of civil libertarians were never really addressed. The House wanted to pass a money laundering bill separately to give more time for consideration, but the Senate thought it important to include money laundering in the antiterrorism package.[97] Since the Senate strategy prevailed, the money laundering provisions were never subject to the same scrutiny as the rest of the bill.

The surveillance and money laundering provisions of the USA Patriot Act are good examples of how September 11 provided the impetus to pass reforms that Congress had been moving toward at a glacial pace. The terrorist attacks, however, had the opposite impact on immigration reforms. The Antiterrorism and Effective Death Penalty Act of 1996, passed after the Oklahoma City bombing, had clamped down on noncitizens, mandating detention for asylum seekers until their claims could be adjudicated and deportation for immigrants convicted of crimes or certain minor offenses.[98] Prior to September 11, Congress had been considering legislation to mitigate some of the law's harsher effects,[99] spurred in part by two 2001 Supreme Court decisions that overruled as-

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financialservices/100301yi.pdf.

[91] USA Patriot Act of 2001, Pub. L. No. 107-56 § 358, 115 Stat. 272, 326 (to be codified at 31 U.S.C. § 5319 (2001)).

[92] *See supra* text accompanying notes 48–53.

[93] § 358, 115 Stat. at 327–28.

[94] *See supra* text accompanying note 59.

[95] Fact Sheet, American Civil Liberties Union, How The USA-Patriot Act Puts Financial Privacy At Risk (Oct. 23, 2001), *at* http://www.aclu.org/congress/ 1102301f.html.

[96] *See* Rob Garver & Michele Heller, *Laundering—Terror Bill Advances*, AM. BANKER, Oct. 19, 2001 at 4.

[97] *See id.*

[98] *See* Pub. L. No. 104-132 §§ 422, 423, 110 Stat. 1214, 1270-72 (codified at 8 U.S.C. §§ 1252, 1961 (1996)); *see also* H.R. CONF. REP. No. 104-518, at 3320 (1996).

[99] *See, e.g.*, Secret Evidence Repeal Act of 2001, H.R. 1266, 107th Cong. (2001); Stanley Mailman & Steven Yale-loehr, *As the World Turns: Immigration Law Before and After Sept. 11*, N.Y.L.J., Oct. 22, 2001, at 3.

pects of the INS's broad interpretation of the law.[100] September 11 took the wind out of those sails, as the legislative machinery tacked toward its usual course of disfavoring immigrants in the wake of a terrorist attack.[101]

The original Bush Administration proposal would have allowed indefinite detention of non-citizens suspected of terrorism without charges being filed.[102] Even in a time of crisis, though, the specter of indefinite detention without judicial review was too reminiscent of military internment of Japanese Americans during World War II,[103] and Congress was emphatic about limiting this provision.[104] As a result, the USA Patriot Act authorizes detention for only seven days, after which the government must bring immigration or criminal charges.[105] Civil libertarians say that this provision is still unconstitutional, since it would allow indefinite detention of non-citizens suspected of terrorism who could not be deported to their home countries.[106] Under the 1996 antiterrorism legislation, the Attorney General is required to detain and remove aliens convicted of certain crimes.[107] For those who were not deportable because their country of origin would not accept them, the INS interpretation was that the law mandated continued detention.[108] The effect of the USA Patriot Act on this scheme is to allow the Attorney General to detain indefinitely not only those convicted of crimes or immigration offenses, as under old law, but also any person the Attorney General has reasonable grounds to believe is a terrorist or "is engaged in any other activity that endangers the national security of the United States."[109] Thus, the USA Patriot Act extends the Attorney General's powers beyond those granted in the 1996

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[100] *See* INS v. St. Cyr, 533 U.S. 289 (2001); Zadvydas v. Davis, 533 U.S. 678 (2001); *see also* Mailman & Yale-loehr, *supra* note 99, at 3. The Antiterrorism and Effective Death Penalty Act mandated detention of illegal immigrants awaiting deportation. *See* 18 U.S.C. § 1231(a)(6) (1996); *see also* Mailman & Yale-loehr, *supra* note 99, at 3. The INS interpreted this to mean that even immigrants who could not be deported must be detained indefinitely. *See id.* The Court held in *Zadvydas* that such immigrants may not be detained if there are no prospects that they will be deported in the near future. *Zadvydas*, 533 U.S. at 2505.

[101] *See, e.g.*, text accompanying *supra* note 98; text accompanying *infra* note 104.

[102] *See* Lancaster, *supra* note 8.

[103] *See supra* note 27.

[104] *See id.*

[105] Pub. L. No. 107-56 § 412, 115 Stat. 272, 351 (to be codified at 8 U.S.C. § 1226(a) (2001)).

[106] *See* Fact Sheet, American Civil Liberties Union, How The USA-Patriot Act Permits Indefinite Detention Of Immigrants Who Are Not Terrorists (Oct. 23, 2001), *at* http://www.aclu.org/congress/ 1102301e.html; *see also* David Cole, *National Security State*, NATION, Dec. 17, 2001, at 4; *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. (Oct. 3, 2001) (statement of David D. Cole, Professor of Law, Georgetown University Law Center), *available at* http://judiciary.senate.gov/te100301sc-role.htm.

[107] *See* Antiterrorism and Effective Death Penalty Act of 1996, Publ. L. No. 104-132 §§ 422-23, 110 Stat. 1214, 1270–72 (codified at 8 U.S.C. §§ 1252, 1961 (1996).

[108] *See* Zadvydas, 533 U.S. at 689.

[109] § 412(a), 115 Stat. at 351.

legislation and may give the Attorney General unfettered discretion to determine who is a terrorist.[110] Furthermore, judicial review of the Attorney General's decision is only available through *habeas corpus* proceedings.[111]

The broad definition of "terrorism" and "terrorist organizations" creates a further objection that the law infringes on association rights of non-citizens. While previous definitions limited terrorist groups to a short list designated by the Secretary of State, the USA Patriot Act expands the definition to include any group that engages in violence or destruction of property.[112] Opponents point out that this definition encompasses advocacy groups causing minor property damage during an act of civil disobedience; moreover, it is not limited to foreign or international groups.[113] The Justice Department claims that these hypothetical examples are just that—hypothetical, since the authority in the bill would never be used in that way.[114] Civil liberties groups remain unsatisfied, though: just as they question surveillance systems that sweep in swaths of information as law enforcement promises to look only at what they have authority to view or hear, opponents of expanded immigration powers remain chary of the executive branch applying them only to violent and dangerous terrorists.[115]

For opponents of the USA Patriot Act, there are two other objections that apply across all of its sections, from immigration, to money laundering, to surveillance, to information sharing. The first is that many of the new powers granted in the Act extend beyond terrorism per se. The second is that many provisions were drawn from other legislation pro-

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[110] *See* Fact Sheet, American Civil Liberties Union, How The USA-Patriot Act Permits Indefinite Detention Of Immigrants Who Are Not Terrorists (Oct. 23, 2001) [hereinafter ACLU Fact Sheet], *at* http://www.aclu. org/congress/ l102301e.html; *see also* David Cole, *National Security State*, NATION, Dec. 17, 2001, at 4; *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. (Oct. 3, 2001) (statement of David D. Cole, Professor of Law, Georgetown University Law Center), *available at* http://judiciary.senate.gov/te100301sc-role.htm.

[111] § 412, 115 Stat. at 351–52. The availability of habeas corpus relief has, however, been significantly curtailed by the Antiterrorism and Effective Death Penalty Act of 1996, §§ 101–07, 110 Stat. at 1217–26.

[112] § 411, 115 Stat. at 346–48.

[113] *See* Fact Sheet, American Civil Liberties Union, How The USA-Patriot Act Allows For Detention And Deportation of People Engaging in Innocent Associational Activity, (Oct. 23, 2001), *at* http://www.aclu.org/congress/l102301h.html.

[114] *See DOJ Oversight: Preserving Our Freedoms While Protecting Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (Dec. 6, 2001) [hereinafter *DOJ Oversight Hearings*] (statement of Att'y Gen. John Ashcroft), *available at* http://www.usdoj.gov/ag/terrorismaftermath.html ("Each action taken by the Department of Justice, as well as the war crimes commissions considered by the President and the Department of Defense, is carefully drawn to target a narrow class of individuals—terrorists .... Since 1983, the United States government has defined terrorists as those who perpetrate premeditated, politically motivated violence against noncombatant targets.").

[115] *See* ACLU Fact Sheet, *supra* note 113.

posed before September 11.[116] These criticisms suggest that the executive branch and sympathetic legislators capitalized on the political aftermath of September 11 to expand executive power by enacting previously blocked legislation only marginally related to terrorism. In sum, the government took advantage of a national crisis to arrogate powers long desired, but politically unacceptable in peacetime.[117]

Civil libertarians are correct that many provisions of the bill are over-inclusive, but the argument that this indicates a power grab is not self-evident. First, the structure of the Act can be explained in part by the speed with which it was passed. The short time period for consideration, coupled with the chaos on Capitol Hill due to anthrax contamination,[118] meant that legislators simply lacked the time and opportunity to develop complex, nuanced definitions that would be neither over-inclusive nor under-inclusive. Given the perceived threat to the country and the pressure from the Administration, they erred on the side of over-inclusiveness.[119]

Second, to the extent that the expansion of powers was deliberate, it is not necessarily attributable to a national frenzy to disregard civil rights in the wake of September 11.[120] Instead, lawmakers may have reached a measured conclusion that the attacks had indeed changed assumptions about the nature of the threat to domestic security, and that prior political conceptions about executive authority were no longer apt.[121] The attacks of September 11 revealed gaping vulnerabilities in the capacity of the executive branch to detect and prevent terrorism within United States borders. Lacking time to develop a carefully refined program to increase this capacity, Congress granted broad authority, relying on the executive branch to limit its new powers to the intended purpose of fighting terrorism, and instituting congressional and judicial oversight to correct any abuses.[122]

In the debate over the USA Patriot Act, one should not lose sight of the fact that the law itself does not take away civil liberties, although

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[116] *See* Lancaster & Krim, *supra* note 23.

[117] *See* Lancaster & Pincus, *supra* note 52; *see also Legislative Proposals Designed to Combat Terrorism: Hearing Before the House Comm. on the Judiciary*, 107th Cong. (Sept. 24, 2001) (statement of Rep. Bob Barr (R-Ga.) (stating that law enforcement urged swift passage as a means of taking "advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously."), 2001 WL 1143717.

[118] *See* Fenoglio, *supra* note 6.

[119] *Cf.* Peter Grier, *Fragile Freedoms*, CHRISTIAN SCI. MONITOR, Dec. 13, 2001, at 1 ("[I]n times of crisis, US officials usually err on the side of tightening domestic law enforcement too much rather than too little").

[120] For the argument that the USA Patriot Act did result from national panic, see Jesse Walker, *Panic Attacks*, REASON, Mar. 1, 2002, at 3642.

[121] *See* Lancaster & Krim, *supra* note 23 (Senator Bob Graham (D-Fla.) describing shift from espionage to terrorism as focus of intelligence laws).

[122] *See* Jess Bravin, *Questions of Security: Congress Reaches Accord on AntiTerror Bill*, WALL ST. J., Oct. 19, 2001, at A8.

some of its provisions permit the executive branch to take actions that may do so. For example, the plain text of the law would allow deportation of a non-citizen who donates coloring books to a daycare center run by an organization that also has terrorist ties,[123] but such a result is not automatic. The Attorney General retains discretion in how he or she exercises authority, and political factors would certainly mitigate against deporting someone on that basis. Indeed, many laws are flexible enough and grant enough discretion to authorize decisions of questionable merit for the public interest.[124] This point was made in debate over the Independent Counsel Act, when it became clear that "[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."[125] In the USA Patriot Act, as in ordinary criminal prosecutions, political and judicial checks on broad authority cabin executive discretion just as much as a narrow grant of authority. Therefore, the real assessment of whether Congress acted prudently in passing the USA Patriot Act must be drawn by observing how the Administration uses its new powers and how Congress and the courts react to any abuses.

One significant hurdle to effective oversight of how the executive branch uses its new powers is secrecy.[126] The more politically accountable legislative branch provides an effective check on executive authority only when the legislature is responsive to citizen concerns, which depends on abuses of discretion being discovered. There can be no public outcry and congressional pressure over abuse of secret FISA warrants if targets are unaware of the surveillance; there can be no habeas corpus proceedings for immigrants secretly detained. Since voters and attorneys will be unable to raise abuses of secret procedures, Congress and the courts must be aggressive in acting sua sponte to monitor how the powers granted by the USA Patriot Act are being used.

Congress has been aggressive in the first few months following the passage of the bill, with the Senate Judiciary Committee holding a series of hearings less than six weeks later to review its implementation.[127] Review of the hearings, however, reveals that many of the questions raised about the Administration's actions since September 11 do not relate at all

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[123] *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. (Oct. 3, 2001) (statement of David D. Cole, Professor of Law, Georgetown University Law Center), *available at* http://judiciary.senate.gov/te100301sc-role.htm.

[124] *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397 (2001).

[125] *Id.* at 407 (quoting Morrison v. Olsen, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting)).

[126] *See generally* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE (1998) (describing tendency of executive branch to use excessive classification to avoid public scrutiny).

[127] *See DOJ Oversight Hearings*, *supra* note 114.

to the USA Patriot Act, but to decisions outside the scope of the legislation altogether,[128] such as the presidential order establishing military tribunals[129] and Justice Department regulations to monitor conversations between terrorist suspects and their attorneys.[130] The fact that many controversial actions derive from legal authorities other than the USA Patriot Act reinforces the point that congressional oversight is routinely essential to limiting executive discretion, but the impact of the USA Patriot Act to date remains unclear.

Ultimately, the debate over the USA Patriot Act is just as much about the delegation of executive authority as it is about civil liberties. If the Administration exercises its new authorities with respect for civil liberties, and Congress provides appropriate oversight to prove that this has been the case, then the USA Patriot Act will have been a wise and timely piece of legislation in a national crisis. If the Administration fails to use restraint, and Congress and the courts let down their guard, however, the USA Patriot Act could become another chapter in America's history of suspending Constitutional values during difficult times.

—*Michael T. McCarthy*

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[128] *See* Adam Cohen, *Rough Justice*, TIME, Dec. 10, 2001, at 30.

[129] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[130] National Security; Prevention of Acts of Violence and Terrorism Authorization, 28 C.F.R. pts. 500–01).

OFFICE OF HOMELAND SECURITY

On September 20, 2001, just nine days after one of the worst tragedies in American history, President Bush announced to a joint session of Congress the appointment of Pennsylvania Governor Tom Ridge to the newly created Cabinet-level position of Director of the Office of Homeland Security ("OHS").[1] OHS, which is located in the Executive Office of the President, was subsequently established by executive order "to coordinate the executive branch's efforts to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States."[2] While the order itself enumerates a long list of the Office's duties and responsibilities—including the coordination of national efforts at detection, preparedness, prevention, protection, response and recovery, and incident management of terrorist attacks[3]—the actual scope of its authority remains unclear.[4] Nevertheless, by appointing Governor Ridge, a close personal friend,[5] to the post, President Bush seemed to be sending the message that the Director would have broad authority to organize, coordinate and review federal policy between the over forty federal agencies whose responsibilities include counterterrorism.[6]

The appointment of Governor Ridge and the creation of OHS cannot appropriately be understood without situating them in a larger debate predating September 11 over the proper way of structuring government to deal with terrorist threats. Before September 11, three options were debated in policymaking circles: maintaining the status quo, whereby the Department of Justice ("DOJ") acted as "lead agency" for domestic counterterrorism; creating a new office in the White House responsible for coordinating counterterrorism policy between agencies; and creating a new government agency that would be given direct authority to secure America's infrastructure and coordinate emergency response to both natural and man-made disasters.[7]

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[1] *See* Eric Pianin & Branley Graham, *Ridge is Tapped to Head Homeland Security Office*, WASH. POST, Sept. 21, 2001, at A1.

[2] Exec. Order No. 13,288, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

[3] *See id.*

[4] Even Ridge's actual title is unclear. According to the executive order, Ridge's official title is "Assistant to the President for Homeland Security." Exec. Order No. 13,288, 66 Fed. Reg. 51,812. Some commentators have suggested that this effectively makes Ridge an "Assistant President," who has been delegated the full authority of the President for dealing with all matters related to homeland security. *See, e.g.*, Ernest R. May, *Small Office, Wide Authority*, N.Y. TIMES, Oct. 30, 2001, at A17. Consistent with this view are White House suggestions that Governor Ridge does not need any additional legislative authority to accomplish his job. *See* Pianin & Graham, *supra* note 1; *see also Some Say Ridge's Job Should Be Set By Law*, SEATTLE TIMES, Oct. 8, 2001, at A8.

[5] *See* Pianin & Graham, *supra* note 1, at A1.

[6] *See A Drama with Many Players*, NAT'L J., Oct. 20, 2001, at 42 (listing forty-three agencies whose duties include counterterrorism).

[7] *See* ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, TOWARD A NATIONAL STRATEGY FOR COM-

Although foregrounded by the events of September 11, many elements of this debate have remained substantially the same despite changing political circumstances. Nevertheless, the unexpected nature of the September 11 terrorist attacks altered the balance of the debate in a number of ways. Perhaps most importantly, allowing the DOJ to continue as lead agency for domestic terrorism was seen as no longer tenable.[8] President Bush's appointment of Governor Ridge, while of obvious political value during a crisis, is viewed most appropriately as a pragmatic recognition of the need for change. In the face of highly credible threats of terrorist attack, providing for homeland security requires "orders-of-magnitude improvements" in policy and planning at all levels of government.[9]

Through OHS, the Bush Administration is attempting to restructure federal counterterrorism policy by creating an office within the Executive Office of the President to coordinate national strategy. The OHS model appears attractive in the immediate aftermath of a crisis as it offers the government quicker implementation and added flexibility in making new policy, as compared to a new bureaucratic department. The vaguely worded grants of authority empowering OHS appeal to the Executive Branch because their malleability affords the Office broad, informal discretion in defining a role for itself. Over the long term, however, a more concrete and permanent solution to the structural problem is needed; such a solution can only come through the creation of a consolidated agency with its own unique set of budgetary and political priorities, features which OHS currently lacks. Moreover, because of the danger inherent in empowering a new government entity responsible for domestic security, this agency will need to be subject to strict government oversight and bound to follow transparent, politically approved rules of procedure during times of crisis.

BATING TERRORISM (2000) [hereinafter GILMORE COMMISSION 2ND ANNUAL REPORT], *available at* http://www.rand.org/nsrd/terrpanel/terror2.pdf. The Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, commonly known as the Gilmore Commission after its chairman, Governor James Gilmore (R-Va.), was established by Congress under the Strom Thurmond National Defense Authorization Act for the Fiscal Year 1999 as a "panel . . . [of] private citizens of the United States with knowledge and expertise in emergency response matters." Pub. L. No. 105-261 § 1405, 112 Stat. 1920, 2169 (1998). The Act established the panel as part of a more general mandate to the Executive Branch "to increase the effectiveness at the Federal, State, and local level of the domestic emergency preparedness program for response to terrorist incidents involving weapons of mass destruction . . . ." *Id.* at § 1402.

[8] *See, e.g.*, 147 CONG. REC. S9,574 (2001) (statement of Sen. Max Cleland (D-Ga.)).

[9] U.S. COMMISSION ON NATIONAL SECURITY/21ST CENTURY, ROAD MAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE 10 (2001) [hereinafter HART-RUDMAN COMMISSION], *available at* http://www.nssg.gov/phaseIII.pdf. The Commission has come to be known as the Hart-Rudman Commission, after its co-chairmen, former senators Gary Hart (D-Colo.) and Warren Rudman (R-N.H.). It was chartered by the Defense Department to "redefine national security . . . in a more comprehensive fashion than any other similar efforts since 1947." *Id.* at iv. The goal of the Commission was to redefine U.S. national security policy in light of both the changed geopolitics and social and technological changes in the post-Cold War world. *See id.* at iv.

The Executive Order creating OHS represents the most recent in a long series of attempts by the federal government to structure itself in response to the unique threat posed by terrorism.[10] Because terrorism is a hybrid phenomenon that reaches across many levels of government organization, there is no natural fit between the problems involved in combating it and the traditional jurisdictions of federal agencies.[11] Terrorist organizations are "sub-state" actors that are difficult to hold accountable for their activities through diplomatic or military means, but they have a global reach and level of sophistication that makes them difficult to address with traditional law enforcement methods.[12] Additionally, the threat of terrorist attacks on American soil involves the jurisdictions of many federal agencies, dealing with everything from public health and food safety to border security and nuclear power.[13]

Since the Carter Administration, American counterterrorism policy followed the "lead agency" paradigm, in which responsibility for different aspects of counterterrorism policy is roughly divided and apportioned to different federal agencies according to the closeness of fit to that agency's traditional area of responsibility.[14] The development of a coherent national strategy for counterterrorism, and the monitoring of the budgets and activities of the agencies charged with that strategy's imple-

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[10] President Bush's announcement preempted a debate within the Senate over whether to create a new counterterrorism post within the Justice Department, as proposed by Assistant Senate Majority Leader Harry Reid (D-Nev.), or within the Executive Office of the President, as proposed by Senator Bob Graham (D-Fla.), Chairman of the Senate Select Committee on Intelligence. *See* Noelle Straub, *Senate Set to Create New Anti-Terrorism Post*, THE HILL, Sept. 19, 2001, *available at* http://www.hillnews.com/091901/czar.shtm. Meanwhile, the day following the President's announcement, Senator Joseph Lieberman (D-Conn.), Chairman of the Senate Committee on Governmental Affairs, held previously scheduled hearings to discuss legislation to create a new governmental department, to be headed by a Cabinet secretary, that would deal with counterterrorism and homeland security. *See Responding to Homeland Threats: Is Our Government Organized for the Challenge? Hearing Before the Senate Comm. On Governmental Affairs*, 107th Cong. (2001) [hereinafter *Responding to Homeland Threats Hearings*] (statement of Sen. Joseph Lieberman (D-Conn.), Chairman, Sen. Comm. on Governmental Affairs).

[11] *See* Laura K. Donohue, *In the Name of National Security: U.S. Counterterrorist Measures 1960–2000*, HARV. U. JOHN F. KENNEDY SCHOOL OF GOV'T EXEC. SESS. ON DOMESTIC PREPAREDNESS DISCUSSION PAPER ESDP-2001-04, at 3 (Aug. 2001), *available at* http://ksgnotes1.harvard.edu/BCSIA/library.nsf/pubs/ESDP200104.

[12] *See id.*

[13] *See Domestic Security Czar to Tame "Bowl of Spaghetti,"* CNN, Sept. 24, 2001, *at* http://www.cnn.com/2001/US/09/21/rec.homeland.defense. For example, the Nuclear Regulatory Commission ("NRC") has sole responsibility for monitoring security and counterterrorism readiness at nuclear plants. *See* Press Release, Office of U.S. Senator Charles Schumer, Schumer calls on Homeland Security Office and NRC to Boost Security at New York Nuclear Sites (Nov. 14, 2001), *available at* http://www.senate.gov/schumer/SchumerWebsite/pressroom/press_releases/PR00738.html.

[14] *See* Donohue, *supra* note 11. President Carter designated responsibility to three lead agencies: the Department of State for terrorism overseas, the Justice Department/FBI for domestic terrorism, and the Federal Aviation Administration for terrorism on domestic aircraft. *See id.* These designations have undergone slight variations under different administrations, but the lead agency organizing principle has remained the same. *See id.*

mentation, requires leadership and coordination above the level of the individual agencies involved.[15] The forum for such coordination has traditionally been an interagency council or working group, which works to produce formal guidelines and contingency planning.[16]

To the extent that domestic terrorism can be conceived as a discrete area of policy concern, military and intelligence agencies must play only background roles for obvious political and legal reasons.[17] Thus, domestic counterterrorism has traditionally been the domain of the DOJ; it was conceptualized under a law enforcement rather than a military or intelligence framework.[18] The "lead agency" paradigm, however, proved inherently problematic for the DOJ. The department was poorly placed to coordinate action among agencies, and it was also not wholly responsible for all major areas of policy that a fully empowered "focal point" for counterterrorism policy would include in its domain.[19] The DOJ was ex-

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[15] *See* GENERAL ACCOUNTING OFFICE, COMBATING TERRORISM: SELECTED CHALLENGES AND RELATED RECOMMENDATIONS GAO-01-822, at 31 (2001) [hereinafter GAO].

[16] *See id. at* 32. This solution to the problem of coordination emerged *ad hoc* in the Carter Administration, which created the Special Coordination Committee within the National Security Council ("NSC"). *See id.* In the Reagan and Senior Bush administrations, the coordinating body was known as the Interdepartmental Advisory Group on Terrorism and was chaired by the Secretary of State. *Id.* at 38. In the Clinton Administration, however, there was a growing recognition that terrorism was not a purely foreign phenomenon, and control over interagency coordination was returned to the NSC. *See id.* at 39–40.

[17] *See* GILMORE COMMISSION, 2ND ANNUAL REPORT, *supra* note 7, at 28 (recommending that the Defense Department always have its counterterrorism role subordinated to that of another, civilian policymaker). There are both constitutional and statutory reasons for keeping the military out of domestic counterterrorism efforts. *See Responding to Homeland Threats Hearings*, *supra* note 10 (statement of Gary Hart (D-Colo.), Co-Chairman, Hart-Rudman Commission). Statutory restrictions on military involvement in domestic affairs date back to the Posse Comitatus Act of 1878 which was enacted to ensure that U.S. military forces were not used against American citizens. 18 U.S.C. § 1385. The Act proscribes the use of military power for domestic law enforcement: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." *Id.* Thus, the Department of Defense and the CIA may assist in domestic counterterrorism efforts only in very limited roles. Nevertheless, according to a study of statutory authority conducted by the General Accounting Office,

> the Posse Comitatus Act is subject to exceptions that permit the use of the Armed Forces in dealing with domestic terrorist incidents in special situations. According to Department of Justice officials, these statutory exceptions would require a request by the Attorney General and concurrence by the Secretary of Defense. . . . [I]f military forces are required to restore order as a result of an act of domestic terrorism . . . the President must issue an executive order and a proclamation.

GAO, *supra* note 15, at 61–62.

[18] *See* Donohue, *supra* note 11, at 38.

[19] GAO, *supra* note 15, at 33. "Focal point" is an abstract definition of the type of institutional solution sought by both sides of the debate—those in favor of the "czar" model for OHS, and those who would prefer to see it constituted as a separate federal agency—and demonstrates the extent of their agreement. Both sides seek a central position that can coordinate and manage counterterrorism efforts, but disagree on what specific institutional

pected to monitor fellow agencies, which created bureaucratic "turf wars," made even more intractable because the DOJ had no formal authority by which to hold other agencies accountable.[20] Placing the DOJ in a broadly defined leadership role in counterterrorism policy also created internal conflict between its institutional focus and the additional policy areas with which it became involved as counterterrorism coordinator. For example, the DOJ assumed a role in emergency incident response, a far cry from its traditional role of investigating and prosecuting crimes.[21]

In addition, while the DOJ, in the person of the Attorney General, was charged with overseeing national counterterrorism strategy,[22] the department lacked the budgetary authority to compel other departments and agencies to adopt that strategy's priorities.[23] The DOJ's performance of the lead agency role was also bogged down by the perception that the Department's institutional focus on law enforcement and prosecution limited its effectiveness and made it a "parochial" actor that did not have the broadest possible policy interests at heart.[24] In the absence of direct authority over other agencies, the DOJ actively had to rely on their good will and cooperation to be fully effective.[25]

Finally, the DOJ was criticized in the past for failing to account adequately for the role of state and local governments when creating its national strategy,[26] and for failing to create a satisfactory methodology for

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structure the focal point should assume. *See id.* at 11.

[20] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at Appendix E ("The [lead agency] structure relies on a very involved process of interagency 'coordinating groups' which depends heavily on meetings to get things done. While there is opportunity for discussion and for suggestions to improve programs, there is no real authority to enforce program or budget changes. Moreover . . . [the] format for budget submissions is insufficient in detail to prove useful in the budget deliberative process.").

[21] *See* Richard A. Falkenrath, *The Problems of Domestic Preparedness: Challenges Facing the U.S. Domestic Preparedness Program*, EXECUTIVE SESSION ON DOMESTIC PREPAREDNESS DISCUSSION PAPER ESDP 2000-05, at 5 (Harvard University John F. Kennedy School of Govt., Dec. 2000), *available at* http://ksgnotes1.harvard.edu/BCSIA/ESDP.nsf/www/Research. Dr. Falkenrath, a former member of the NSC, is now senior director of policy and plans at OHS. *See* Alison Mitchell, *Security Issues Called a Focus of Next Budget*, N.Y. TIMES, Dec. 27, 2001, at B1.

[22] Despite the Attorney General's involvement, within the DOJ there is no senior official appointed by the President and confirmed by Congress—and thus fully accountable to both—whose exclusive policy focus is counterterrorism. *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at Appendix E. Before September 11, the top counterterrorism officials accountable to the President were in the NSC, but because the NSC is an organ of the President's staff, those officials could not be have been compelled to testify before Congress. *See* GAO, *supra* note 15, at 34. Congress can only compel testimony from department heads, even if NSC officials are actually the ones most responsible for managing counterterrorism programs within individual agencies. *See id.*

[23] *See* GAO, *supra* note 15, at 34. The Office of Management and Budget has been charged with monitoring the achievement of budgetary priorities as part of the national strategy, but has yet to develop a procedure for doing so. *See id.* at 44.

[24] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at Appendix E.

[25] *See id.*

[26] *See id.* at Appendix C ("The Attorney General's 'Five-Year Plan,' while salutary,

measuring compliance and achievement under the overall national strategy.[27] Despite some efforts by the DOJ in recent years,[28] actual coordination of research and development at state and local levels is handled primarily by the Technical Support Working Group ("TSWG"), a separate interagency coordinating group.[29] In response to these criticisms, the Clinton Administration promulgated Presidential Decision Directive Thirty-Nine ("PDD-39")[30] in an attempt to clarify the DOJ's role as lead agency for domestic counterterrorism.[31] Under this directive, FEMA was given a companion role to the DOJ as lead agency for "consequence management" (as opposed to the DOJ/FBI, whose duties involved "crisis management") during domestic terrorism incidents where local responders requested federal assistance.[32] This measure was only a small step

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falls short of a fully-coordinated strategy, one that is promulgated by the President; and it does not in our view have the requisite 'bottom-up' approach—having as its underpinnings the needs of the local and State response entities.").

[27] *See id*; *see also* GAO, *supra* note 15, at 49 ("Although the Attorney General's Five-Year Plan links performance to objectives, it focuses on agency activities representing outputs rather than results-oriented outcomes.").

[28] *See Federal Government Capabilities Regarding Terrorism, Hearing Before the Commerce, Justice, State and Judiciary Subcom. Of the Senate Comm. on Appropriations*, 107th Cong. (2001) (statement of John Ashcroft, Attorney General). In the DOJ, both the National Domestic Preparedness Office (which works with state and local emergency response units) and the National Institute of Justice (the research arm of the DOJ) have been involved in research and development efforts concerning emergency response equipment. *See id.*

[29] *Id.* at 79. The TSWG was originally established as an adjunct to the Interdepartmental Advisory Group on Terrorism, the interagency coordinating group during the Reagan and Senior Bush Administrations. *See supra* note 16. The TSWG will only fund research on the approval of a majority of its members. *See* GAO, *supra* note 15, at 82. Numerous other federal agencies conduct research outside of the TSWG, but their coordination of projects is only through informal methods, such as liaison offices, whose overall effectiveness is limited: "officials acknowledge that informal relationships cannot be expected to capture the universe of projects or inform agencies of all relevant and related research and development projects." *Id.* at 83.

[30] PDD-39 was originally a classified document. *See* FEDERAL EMERGENCY MANAGEMENT AGENCY, UNCLASSIFIED FEMA ABSTRACT ON PDD-39 (1995) (unclassified summary of PDD-39), *available at* http://www.fas.org/irp/offdocs/pdd39_fema.htm; *see also* PRESIDENTIAL DECISION DIRECTIVE 39 U.S. POLICY ON COUNTERTERRORISM (1995) (redacted version of document obtained by Federation of American Scientists through Freedom of Information Act request), *available at* http://www.fas.org/irp/offdocs/pdd39.htm.

[31] *See* Falkenrath, *supra* note 21, at 2. While going into greater detail in elaborating bureaucratic areas of responsibility, PDD-39 did little to strengthen coordination among agencies. *See id.*

[32] *See* ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, ASSESSING THE THREAT 61 (1999) (first annual report of the Gilmore Commission), *available at* http://www.rand.org/nsrd/terrpanel/terror.pdf. The division between "crisis management" and "consequence management" is not always clear. "The crisis" and "the consequences" may occur simultaneously, or at different periods of time, and there may be considerable overlap in areas such as on-site coordination of state and local responders. *See id.* The DOJ acts through the FBI's Critical Incident Response Group ("CIRG") in organizing "crisis management" of terrorist incidents. *See* GAO, *supra* note 15, at 59–60. The CIRG specializes in tactics (such as hostage rescue, surveillance, etc.) and investigative techniques. *See id.* The Interagency Domestic Terrorism Concept of Operations Plan ("CONPLAN") lays out guide-

toward solving the problems associated with DOJ's status as lead agency.[33]

Even as traditional default strategies for interagency coordination within the Executive Branch proved ineffective, conflicts between Congress and the Clinton Administration only exacerbated institutional problems. In the last several years, as terrorism grew into "enemy number one" in the post-Cold War world,[34] both Congress and the Clinton Administration felt compelled to act to create a stronger "focal point" for national counterterrorism strategy.[35] In the absence of an obvious location, however, the two branches chose different agencies.

The Clinton Administration worked to build a stronger role for the NSC. To this end, President Clinton issued Presidential Decision Directive Sixty-Two, which created the NSC National Coordinator for Security, Infrastructure Protection and Counterterrorism.[36] Primarily through aggressive support from the White House, the NSC National Coordinator was responsible for some improvements in counterterrorism policy, most notably raising the level of awareness and preparedness for biological weapons attacks.[37] Nevertheless, the directive laid out the duties of the position in only general terms, leaving responsibility for major aspects of counterterrorism policy in the hands of other agencies.[38] Moreover, the directive was never followed by an executive order or legislation that would have institutionalized the NSC's authority.[39] Thus, the NSC National Coordinator was not able to assume full responsibility for planning the fight against terrorism.[40] A further problem with this approach was that, because NSC officials are career members of the Executive Branch, making an NSC National Coordinator responsible for counterterrorism

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lines for interagency coordination in these situations. *See id.* State and local governments have primary responsibility in the field of "consequence management," with FEMA directing the administration of federal assistance if it is requested. *See id.* FEMA apportions tasks and coordinates between agencies according to the Federal Response Plan. *See id.*

[33] *See* HART-RUDMAN COMMISSION, *supra* note 9, at 15 (recommending that FEMA be made the structural basis of a new National Homeland Security Agency because its decentralized structure is better suited for working with state and local governments). Despite its decentralized structure and expertise in emergency response, FEMA was ill-suited to taking over lead agency duties from the DOJ because it lacks the "command and control" capabilities and border security component that an effective counterterrorism agency must necessarily include. *But see* S. 1534, 107th Cong. § 4 (2001) (proposing a new Department of Homeland Security based on the Hart-Rudman recommendations).

[34] Donohue, *supra* note 11, at 4.

[35] *See supra* note 19.

[36] *See* Press Release, White House Office of the Press Secretary, Combating Terrorism: Presidential Decision Directive 62 (May 22, 1998), *at* http://www.fas.org/irp/offdocs/pdd-62.htm; *see also* GAO, *supra* note 15, at 32 ("The directive enumerated responsibilities for the coordinator that included general coordination of federal efforts, chairing certain meetings, sponsoring interagency working groups, and providing budget advice.").

[37] *See* Falkenrath, *supra* note 21, at 8 n.27.

[38] *See* GAO, *supra* note 15, at 33.

[39] *See id.*

[40] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at Appendix E.

policy leaves no one "in charge" and directly accountable to Congress or the public.[41]

In contrast, Congress acted to impose new requirements on the DOJ and to strengthen its role as lead agency. For example, Congress created a "Counterterrorism Fund" in the DOJ and instituted the Attorney General's "Five-Year Interagency Counter-Terrorism and Technology Crime Plan" to lay out the basic elements of a national strategy to combat terrorism.[42]

To further complicate matters, Congress also created new and more complex counterterrorism programs.[43] Due to the personal interests of individual legislators responsible for the programs' creation as well as budgetary politics inherent in the legislative process, however, these programs were created in an uncoordinated and often inconsistent fashion.[44] Despite redundancies and duplicative programs both between and within agencies, once established these programs were rarely repealed for fear that doing so would result in under-preparedness.[45] Because federal agencies are obliged to keep these programs running within budget parameters fixed by statute,[46] the added funds these measures provide is a mixed blessing that creates obstacles to the creation of a coherent national strategy for counterterrorism policy by the Executive Branch.[47]

In the face of this disorder, various advisory groups issued recommendations for change, but no concrete action was taken until President Bush felt compelled to act quickly and unilaterally after September 11 to create OHS as a part of his staff in the Executive Office of the President.[48] A careful examination of the language of the executive order does

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[41] *See* Falkenrath, *supra* note 21, at 8.

[42] H.R. CONF. REP. No. 105-405, 92–93 (1997) ("[T]he Attorney General . . . [shall] develop a five-year inter-departmental counterterrorism and technology crime plan that . . . will serve as a baseline strategy for coordination of national policy and operational capabilities to combat terrorism and will be updated annually to institutionalize this effort."); *see also* Falkenrath, *supra* note 21, at 8.

[43] *See* Donohue, *supra* note 11, at 4–5.

[44] *See* Falkenrath, *supra* note 21, at 4. For example, in 1996 the Nunn-Lugar-Domenici Act created a major domestic preparedness program in the Department of Defense ("DOD") despite the fact that the DOD did not want it. *See* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, Title XIV, 110 Stat. 2422, 2714–31 (1996), *see also* Falkenrath, *supra* note 21, at 4 ("[T]he Pentagon and especially the uniformed military did not wish to assume responsibility for domestic [weapons of mass destruction] preparedness or response, which is a distraction from the core mission of warfighting."). The Senators chose to create the program in the DOD both because they had greater confidence in its capabilities than those of civilian agencies, and because the exigencies of that year's budget process made it easier for them to establish the program by amending the Executive Branch's annual defense budget request. *See id.*

[45] *See* Donohue, *supra* note 11, at 5.

[46] *See* Falkenrath, *supra* note 21, at 28.

[47] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 6, at 3.

[48] *See* Exec. Order No. 13,288, 66 Fed. Reg. 51,812 (Oct. 8, 2001). President Bush's decision to create the OHS with Governor Ridge at the helm is very much in keeping with the "unilateral" style of decision-making evidenced by his administration from his first day in office. *See* Dana Milbank, *In War, It's Power to the President*, WASH. POST, Nov. 20,

little to clarify the duties and powers of OHS. For example, the Director of OHS is instructed to "develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks,"[49] but not actually to develop the strategy itself.[50] The Director is also empowered to identify some of the programs that will compose the counterterrorism strategy and to advise department and agency heads on these programs.[51] The Director of OHS does not, however, have any of the formal tools necessary for ensuring compliance with his programs or coordination among agencies with counterterrorism components. The Director can neither develop budget proposals of his own, nor certify the budget proposals made by federal agencies concerning individual homeland security programs.[52] This lack of concrete, affirmative language within the executive order gives rise to calls by even strong supporters of OHS to make its powers more explicit.[53]

Since assuming his duties at OHS, Governor Ridge has seized on the rather open-ended mandate given to him by President Bush to get involved in a variety of ways in efforts to improve both domestic preparedness and overall homeland security.[54] Nevertheless, even several months after its creation it remains difficult to define the precise role of OHS

2001, at A1.

[49] Exec. Order No. 13,288, 66 Fed. Reg. 51,812.

[50] *See Legislative Options Hearings to Strengthen Homeland Defense: Hearing Before the Senate Comm. on Governmental Affairs*, 107th Cong. (2001) [hereinafter *Legislative Options Hearings*] (statement of Rep. Jane Harman (D-Cal.)).

[51] *See* Exec. Order No 13,288 § 3, 66 Fed. Reg. 51,812.

[52] *See id.*

[53] *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)).

[54] The executive order creating OHS declares that its mission is "to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks." Exec. Order No. 13,288 § 2, 66 Fed. Reg. 51,812. Since taking office, however, Governor Ridge has steered OHS into several other informal but highly visible roles whose relationship to developing a national strategy are unclear. Most importantly, Governor Ridge has been informally playing the role of "crisis coordinator" for domestic security, responsible for information-sharing among federal, state and local agencies. When a November 12, 2001 plane crash in Queens, New York, immediately raised fears of terrorist attacks, Governor Ridge was personally involved in directing the federal response. *See* Alison Mitchell, *First Test for a Disaster Response Plan*, N.Y. TIMES, Nov. 13, 2001, at D9 [hereinafter *First Test*]. To facilitate this function in the future, Governor Ridge has created a national emergency "war room" in Washington, D.C., that is staffed with detailed personnel from all federal agencies involved in domestic security. *See* Alison Mitchell, *Ridge is Opening a Center to Analyze and Share Data*, N.Y. TIMES, Dec. 25, 2001, at B5. On a broader scale, Governor Ridge has introduced a national "terror alert" system designed to inform state agencies of the gravity of classified intelligence threats. *See* Philip Shenon, *Color-Coded System Created To Rate Threat of Terrorism*, N.Y. TIMES, Mar. 13, 2002, at A16. On the other hand, during the anthrax crisis, Governor Ridge's frequent press briefings drew criticism that he was acting as little more than "an auxiliary White House press secretary." May, *supra* note 4, at A17. In addition to crisis coordination, Governor Ridge has taken on the role of presidential negotiator with Canada and Mexico on border security issues. *See* Joel Brinkley, *Canada Wants Some Trucks Exempt from Border Exemption*, N.Y. TIMES, Feb. 1, 2002, at A13; Tim Weiner, *U.S. and Mexico to Share Work at the Border*, N.Y. TIMES, Mar. 6, 2002, at A8.

within the federal government. As Senate Majority Leader Thomas Daschle (D-S.D.) remarked in March 2002, "I don't know that anybody can say with any real confidence how good a job [Governor Ridge is] doing or the office is doing because we have such little information."[55] While Governor Ridge has had success encouraging coordination and cooperation between agencies in the months following September 11, as currently constituted OHS has only a limited staff of its own and is able to do virtually nothing autonomously.[56] With no explicit authority to overrule other agency or department heads, Governor Ridge must rely either on the voluntary agreement of individual leaders, or he must go all the way to the President for approval before he is able to make new policy.[57]

In addition to its vaguely worded grant of authority, the executive order establishing OHS also sets out a formal mechanism by which it is to conduct business: the Homeland Security Council.[58] The Council "shall be responsible for advising and assisting the president with respect to all aspects of homeland security," and is also charged with ensuring that the homeland security strategy is effectively implemented by coordinating the counterterrorism components of the various executive departments and agencies.[59] The Council's importance as a coordinating body should not be dismissed out of hand, but early indications suggest that in responding to homeland security threats OHS will rely more on informal contacts between federal officials than on formal meetings of the Homeland Security Council.[60] While it is likely that over time more formal

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[55] Alison Mitchell & Elisabeth Bumiller, *Bush Orders Inquiry into Visas Issued to Terrorists After Attack*, N.Y. TIMES, Mar. 14, 2002, at A1. Senator Daschle has become a vocal critic of the current OHS model, complaining that as a presidential advisor, Governor Ridge has no accountability to Congress, making it impossible for the legislature to assess his effectiveness. *See id.* After President Bush submitted his 2003 budget, which contains a $38 billion budget request for domestic security, Senator Robert Byrd (D-W. Va.), Chairman of the Senate Appropriations Committee, demanded that Ridge testify before his committee to answer questions concerning the budget request. *See* Elizabeth Becker, *Senator Insists Ridge Testify Before Congress*, N.Y. TIMES, Apr. 5, 2002, at A16. The Bush Administration declined to have Governor Ridge testify formally, but Governor Ridge offered to conduct informal briefings for committees in both the House and Senate. *See* Elizabeth Becker, *Ridge to Brief 2 House Panels, but Rift with Senate Remains*, N.Y. TIMES, Apr. 4, 2002, at A19. While House Republicans welcomed this compromise, Senator Byrd was joined in rejecting it by Senator Ted Stevens (R-Alaska), the ranking Republican on his committee. *See id.*

[56] *See infra* text accompanying notes 84–87.

[57] *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)).

[58] *See* Exec. Order No. 13,288 § 5, 66 Fed. Reg. 51,812.

[59] *Id.* While the Director of OHS is the primary facilitator of this Council, the President is its nominal head; it has been suggested that this was done to prevent bureaucratic jealousy on the part of various department and agency heads. *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)).

[60] *See, e.g.*, *First Test*, *supra* note 54 (describing those convened by Governor Ridge to coordinate the response to the anthrax scare and the Queens, N.Y., airplane crash as "a patched-together group of government officials").

procedures will be developed for coordinating among agencies, it is unclear what role the Homeland Security Council or any other formal body will play in this process.

Governor Ridge has also become a strong advocate for another informal mechanism for conducting homeland security policy, the public-private partnership. Through public-private partnerships, federal money would be channeled to corporations in the private sector for new research and technologies to secure America's "critical infrastructure."[61] In addition, Governor Ridge has proposed bringing in "special employees" from the private sector to work for OHS for two or three month terms.[62] Numerous federal grant programs and grant-making corporations already exist that give money for research related to homeland security.[63] This process needs to be expanded, Governor Ridge has argued, into a full-scale "mobilization" not unlike the mobilization that took place in the 1940s following Pearl Harbor, as part of a fundamental, permanent reordering of American institutions that includes "creating a blueprint to win the wars of the future."[64] Many venture capitalists and industry representatives have embraced this opportunity, while at the same time calling for reductions in so-called "red tape" restrictions that prevent funds from being disseminated as rapidly and effectively as possible.[65] Nevertheless, as is noted by Representative Henry Waxman (D-Cal.), problems arise when the relationship between industrial sector special interests and policymakers becomes too close, such that the makers of a potentially dangerous technology begin to have a say in the policy whereby that technology is used.[66] These public-private partnerships, once established, may outlast the immediate need that spawned them and be put to use in new and unpredictable ways.[67] The important role that OHS will presumably

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[61] *See* Alison Mitchell, *Security Quest Also Offers Opportunities*, N.Y. TIMES, Nov. 25, 2001, at 1B1.

[62] *See id.* (internal quotation marks omitted). These kinds of temporary employees "are usually not subject to the same kind of stringent financial disclosure rules and postgovernment employment restrictions as full-time White House officials." *Id.*

[63] *See* Amy Cortese, *Suddenly, Uncle Sam Wants to Bankroll You*, N.Y. TIMES, Dec. 30, 2001, at § 3, 1.

[64] Press Release, White House Office of the Press Secretary, Gov. Ridge Speaks at Homeland Security and Defense Conference (Nov. 27, 2001) [hereinafter Gov. Ridge Speaks], *available* at http://www.whitehouse.gov/news/releases/2001/11/20011128-6.html. Governor Ridge believes public-private partnerships to be the ideal way to harness American entrepreneurialism: "We look to American creativity to help solve our problems and to help make a profit in the process. That's what drives them. That's what really drives the research. That's what pays for the research." Mitchell, *supra* note 61, at 1B1 (internal quotation marks omitted).

[65] *See* Cortese, *supra* note 63, at § 3, 1. According to Gilman Louie, chief executive of In-Q-Tel, a private nonprofit company created and funded by the Central Intelligence Agency in late 1999, public-private partnerships are "no longer an experiment but a necessity .... The government can't afford to build these technologies alone anymore." *Id.* (internal quotation marks omitted).

[66] *See* Mitchell, *supra* note 61, at 1B1.

[67] *Cf.* William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L.

play in how these funds are distributed highlights the need for formal mechanisms that guarantee it operates in a transparent and politically accountable manner.

The OHS is based on the "National Office for Combating Terrorism" ("NOCT") model, which calls for the creation of an agency within the Executive Office of the President to develop a comprehensive strategy for dealing with terrorist threats at all levels of government.[68] The principal rationale for this approach is that only an office existing outside and above the federal bureaucracy would have the requisite authority to manage homeland security policy comprehensively.[69] An OHS that was viewed by other agencies as "just another agency" would be trapped in an endless series of "turf wars" with the agencies whose activities it was trying to coordinate.[70] If the office involved in coordinating various bureaucratic turfs also had its own turf demarcated, it would be hindered in broadening its effectiveness by other agencies' fears that it was trying to encroach upon their authority.[71] Because OHS has been placed outside of the bureaucracy, its efforts at coordination are less likely to spark rivalries with other departments and agencies.[72] An executive office is likely able to manage other agencies credibly because it would derive authority directly from the President and be viewed as speaking for the President on homeland security issues.[73] In this regard, OHS would gain an added advantage as a result of its proximity, and consequent direct access, to the President.[74]

Nevertheless, advocates of the NOCT model tend to go farther than President Bush did in his executive order, calling for Ridge's position to

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REV. 1869, 1878 (2000) ("Anticipating a pattern repeatedly imitated since the 1930s, a piece of emergency economic legislation dating from *wartime* functioned as a convenient statutory basis for vast *peacetime* exercises of exceptional economic authority which its authors clearly did not have in mind.").

[68] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at 7. The NOCT model was first proposed by the Gilmore Commission in its second report. *See id.* After September 11, these recommendations were incorporated into bills in both the House and Senate. *See* H.R. 3026, 107th Cong. (2001); S. 1449, 107th Cong. (2001). The General Accounting Office ("GAO") has also said that placing a homeland security focal point within the Executive Office of the President is the most effective way to disentangle the overlapping programs and jurisdictions involved in counterterrorism policy and to develop a coherent national strategy. *See* GAO, *supra* note 15, at 39–40. The GAO review was conducted prior to the September 11 attacks, but the publication of its report did not take place until their immediate aftermath. *See id.* at 1.

[69] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at 7–15.

[70] *See Legislative Options Hearings*, *supra* note 50 (statement Rep. Jane Harman (D-Cal.)).

[71] *See id.*

[72] *See id.*

[73] *See* Press Conference, Gov. James S. Gilmore III, Gov. James S. Gilmore III (R-Va.) Holds News Conference on National Advisory Panel to Assess Domestic Response Capabilities for Terrorism (Sept. 17, 2001), *at* http://www.rand.org/nsrd/terrpanel/minutes/pressconf.09.17.html.

[74] *See* GAO, *supra* note 15, at 39.

be strengthened and made permanent by legislation.[75] As currently formulated in the language of the Executive Order, the powers of the Office are delineated in rather amorphous terms that do not assign OHS formal legal authority that it can rely on to bind other agencies and departments to its directives.[76] Proponents of the NOCT model would assign OHS certification authority over the homeland security components of the budgets of federal agencies, assign the office its own dedicated staff and budget, and give it the authority to call interagency meetings.[77]

Three reasons are commonly cited for why such legislation is necessary. First, OHS must be able to influence agencies' budgetary processes to ensure that agencies comply with the national strategy that develops.[78] Both the Senate and House have proposed legislation to empower an executive counterterrorism office; the House legislation, for example, would give the office certification authority over those aspects of federal agencies' budgets that have to do with homeland security.[79] The certification mechanism, which has already been developed for use with the ONDCP, would require department heads to obtain approval for their budget requests from the Director of OHS; if the Director refused certification, the department head could either reformulate his budget request or appeal directly to the President.[80] While this, in a sense, amounts to a veto by the Director over the homeland security aspects of an agency's budget,[81] the department heads would still retain the right to

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[75] *See Legislative Options Hearings*, *supra* note 50 (statement of Gen. (Ret.) Barry R. McCaffrey). In the words of General McCaffrey, former Director of the Office of National Drug Control Policy ("ONDCP") under President Clinton: "[o]ur government does best when it establishes institutions for the long haul, that are based on rationality, not personality." *Id.*

[76] *See* Exec. Order No. 13,288, 66 Fed. Reg. 51,812 (Oct. 8, 2001). A careful examination of the language of the executive order does little to clarify the duties and powers of OHS. For example, the Director of OHS is directed to "'develop and coordinate the implementation' of a comprehensive national strategy against terrorism," but not actually to develop the strategy itself. *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)).

[77] *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)). As currently defined, the OHS has none of this authority. *See* Exec. Order No. 13,288, 66 Fed. Reg. 51,812.

[78] *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)) ("[W]hat Governor Ridge needs most is the authority to design a national strategy and compel agencies and departments to follow it. This is best achieved by giving Ridge direct authority to reject agency and department spending proposals that are inconsistent with homeland defense.").

[79] *See* H.R. 3026, 107th Cong. (2001); S. 1449, 107th Cong. (2001).

[80] *See* GILMORE COMMISSION 2ND ANNUAL REPORT, *supra* note 7, at vi. The Gilmore Commission expressly refused to call its proposed NOCT a "czar," thinking that such a model carried with it connotations of direct control over individual budgets and programs that it did not want associated with the proposed NOCT's coordination and management role. *See id.* at 13. In addition, the drug czar has also been made subject to congressional confirmation and oversight, while the Bush Administration wanted to shield the Director from congressional review. *See* 21 U.S.C. § 1703(b)(6) (2000).

[81] *See Legislative Options Hearings*, *supra* note 50 (statement of Rep. Jane Harman (D-Cal.)).

make all final and detailed decisions regarding their budgets.[82] Like a veto, the bold step of decertification would not be used often, but the threat of decertification would work as an important tool to shape the budgetary process.[83]

Two other reasons why legislation is needed to strengthen the powers of OHS are to ensure that it has adequate resources of its own and to place it on a permanent, institutionalized footing within the Executive Branch. The OHS currently does not have its own staff or budget. Rather, it is dependent on the White House Chief of Staff to allow it funds out of the main budget of the Executive Office, and it will be staffed with personnel detailed from the departments and agencies that work with it.[84] The OHS cannot fulfill its responsibilities effectively if forced to depend on other government offices for its resources, because such reliance will weaken its ability to take on contentious issues and make meaningful changes in the structure of government.[85] This issue relates to the third reason for OHS legislation: inasmuch as the threat of domestic terrorism and the need for a vigorous focus on homeland security are ongoing problems that transcend administrations, the office needs to be constituted on a permanent, institutionalized footing independent of political vicissitudes.[86] If the Director of OHS is not given greater formal autonomy within the Executive Branch, his ability to do his job effectively will lessen over time as current events become more removed from the crisis that precipitated the Office's creation.[87] By granting the OHS formal authority Congress would ensure its long-term institutional effectiveness.

While a legislatively strengthened version of OHS is favored in many policy circles, a second set of proposals that would create a "National Homeland Security Agency" ("NHSA")[88] receive a similar level of

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[82] *See* GAO, *supra* note 15, at 40.

[83] *See Legislative Options Hearings*, *supra* note 50 (statement of Gen. (Ret.) Barry R. McCaffrey).

[84] *See* Exec. Order No. 13,288, § 4(b)–(c), 66 Fed. Reg. 51,812.

[85] *See Legislative Options Hearings*, *supra* note 50 (statement of Gen. (Ret.) Barry R. McCaffrey).

[86] *See id.*

[87] *See* 147 CONG. REC. E1815 (2001) (statement of Rep. Jane Harman (D-Cal.)).

[88] HART-RUDMAN COMMISSION, *supra* note 9, at viii. The idea for creating a National Homeland Security Agency was conceived by the Hart-Rudman Commission in its second report as a response to its finding that there are "no coherent or integrated governmental structures" in place to respond to and combat the threat of terrorism on American soil. *See id.* Shortly after the Hart-Rudman Commission issued its recommendations, Representative William Thornberry (R-Tex.) introduced a bill that would have put them into effect by creating an NHSA. *See* H.R. 1158, 107th Cong. (2001). Although this legislation languished in the House for months, Senator Joseph Lieberman (D-Conn.) revived the proposal in the Senate in the aftermath of September 11. *See* S. 1534, 107th Cong. (2001). The Senate bill is substantially the same as the Hart-Rudman and House proposals, but it is the first to propose a Department of National Homeland Security, with full Cabinet status. *See* S. 1534, 107th Cong. (2001). Senator Lieberman also chaired hearings on the relative merits of this proposal vis-à-vis the Gilmore Commission's proposal for a NOCT. *See Legislative Options Hearings*, *supra* note 50; *see also Responding to Homeland Threats*

support from both Republicans and Democrats.[89] The NHSA would be established as an independent department of the federal bureaucracy with distinct operational functions and headed by its own Cabinet secretary.[90] This department would not be built from scratch, but rather assembled from component parts that already exist under different departments, including FEMA, the Border Patrol, the Customs Service and the Coast Guard.[91] As an integrated unit, the NHSA would be able to take advantage of such synergies as the consolidation of information, training, and equipment within agencies directly responsible for border security.[92] By combining these functions under a single operational structure, the NHSA would create a functional unit within the federal bureaucracy uniquely devoted to homeland security.[93] This proposed agency would be consistent with the Cabinet form of American government and could be integrated into the existing NSC structure as an equal partner alongside other departments and agencies in planning America's overall national security strategy.[94] In addition, the agency would also raise the profile of "homeland security" as a discrete issue area worthy of its own budget, rather than allowing its various component programs to get lost in the shuffle of other agencies and departments, where they are only of peripheral concern.[95]

Hearings, *supra* note 10. Coincidentally, the first set of hearings took place the day after President Bush announced the creation of OHS and Governor Ridge's appointment as its director. *See Responding to Homeland Threats Hearings*, *supra* note 10 (statement of Sen. Joseph Lieberman (D-Conn.), Chairman, Sen. Comm. on Governmental Affairs).

[89] On the whole, positions on this issue are largely nonpartisan. Prominent moderate Republicans, such as Senators John McCain (R-Ariz.) and Arlen Specter (R-Pa.), have spoken publicly in favor of the creation of an NHSA. *See* Ann Scales, *Lawmakers Softly Criticize President's Proposal*, BOSTON GLOBE, Sept. 28, 2001, at A23; *see also* 147 CONG. RECORD S10,424 (2001) (statement of Sen. Specter (R-Pa.)). While one does detect faint hints of a conservative ideological predisposition against bureaucracy, this does not seem to have a strong effect on the debate. *But see* Joseph S. Nye, Editorial, *How to Protect the Homeland*, N.Y. TIMES, Sept. 25, 2001, at A29.

[90] *See Responding to Homeland Threats Hearings*, *supra* note 10.

[91] *See id.*

[92] *See id.* at 16.

[93] *See id.*; *see also Legislative Options Hearings*, *supra* note 50 (statement of Charles G. Boyd, former Executive Director of the Hart-Rudman Commission).

[94] *See Legislative Options Hearings*, *supra* note 50 (statement of Charles G. Boyd, former Executive Director of the Hart-Rudman Commission). Because homeland security cannot be separated from larger issues of national security, NHSA proponents would argue that its organization along the standard lines of the Cabinet form of American government is all the more appropriate; any coordination between agencies that needs to be done regarding homeland security would be done by the NSC, the same entity that manages interagency coordination in all areas of national security. *See id.* Opponents of an NHSA model would counter, though, that homeland security's inseparability from other aspects of national security is precisely the reason why an NHSA should not be created in the first place. *See infra* text accompanying note 96.

[95] *Cf.* HART-RUDMAN COMMISSION, *supra* note 9, at 15 ("In each case, the border defense agency is far from the mainstream of the parent department's agenda and consequently receives limited attention from the department's senior officials.").

Proponents of the NHSA model argue that over the long term, an NHSA would be superior to an office existing solely in the Executive Branch. By incorporating homeland security into the already existing NSC structure, the NHSA model would better integrate its priorities into the federal government as a whole, rather than treating homeland security as a "stand alone mission" that is given great attention during times of crisis but then ignored after the crisis dissipates.[96] Over the short term, an Executive Office might be successful in overseeing the national strategy to combat terrorism as long as a lingering sense of urgency and fear in the aftermath of the September 11 terrorist attacks continues to make homeland security a prominent political issue.[97] If this strategy is not institutionalized in a permanent organizational structure, however, the various component agencies' compliance with that strategy will gradually erode over time with changing personnel and public attention being diverted to other issues.[98]

The principal advantage of the NHSA model is that it would create, in the head of the NHSA, a single individual directly responsible to the President who has full control not just of coordination but of budgetary and operational implementation of national counterterrorism.[99] The direct access to the President afforded by placing OHS in the Executive Office of the President does not, by itself, afford the Office enough authority to be effective in allocating funds and conducting operations.[100] If anything, placement in the Executive Office may interfere with relations between the President and his department heads, whose own formal authority and managerial control of their departments make them critically important to the policymaking process.[101] Direct access to the President and budgetary authority are considered absolutely essential for effectiveness within a bureaucratic setting by many who have long experience dealing with government.[102] Moreover, the suggestion that a department head and member of the President's Cabinet would have a qualitatively inferior level of access to the President than the head of an office in the White House itself, simply because the latter official happens to be housed in the same building as the President, is unrealistic. An official with Cabinet

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[96] *Legislative Options Hearings*, *supra* note 50 (statement of Charles G. Boyd, former Executive Director of the Hart-Rudman Commission).

[97] *See id.*

[98] *See id.*

[99] *See* HART-RUDMAN COMMISSION, *supra* note 9, at 14.

[100] *See Legislative Options Hearings*, *supra* note 50 (statement of Lee Hamilton, former member of the Hart-Rudman Commission).

[101] *See* GAO, *supra* note 17, at 39. Only if the Director of OHS truly had the authority to speak on behalf of the President, as a kind of "Assistant President," would this not become a problem. *See supra* note 4. Nevertheless, such a relationship would necessarily have to be predicated on the character of the current administration. *See supra* note 74.

[102] *See* Scales, *supra* note 89, at A23; *see also* Ann E. Kornblut & Glen Johnson, *Ridge Faces Tough Task in Security Office, Specialists See Need for Broad Authority*, BOSTON GLOBE, Sept. 22, 2001, at A12.

rank is just as likely to be able to schedule meetings with the President as a Cabinet-level advisor like Governor Ridge, regardless of where his or her office is located.[103]

Critics of reconstituting the OHS along the lines of the NHSA model argue that adding an additional layer of bureaucracy is the last thing the government should be doing during a time of crisis.[104] Moreover, even a consolidated homeland security agency still fails to include a significant portion of the counterterrorism activities conducted by the government, as most would remain in their original departments or agencies, which have more claim to particular expertise.[105] Only a coordinating official located in the Executive Office of the President, they argue, would be capable of "leveraging expertise" of the various agencies involved in combating terrorism, so that those agencies' efforts could come together most efficiently according to a logical and consistent strategy.[106] Furthermore, agencies such as the Coast Guard and the Border Patrol have functions outside of a pure "homeland security" role; indeed, those functions are the very reason they were located in different departments to begin with.[107] By stripping these programs from their original homes and consolidating them into a single department, the other functions that these programs performed become devalued in favor of the crisis of the moment.[108] Arguments such as this call into question whether a discrete issue area of "homeland security" even exists.

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[103] *See Responding to Homeland Threats Hearings*, *supra* note 10 (testimony of former Sen. Warren Rudman, Co-Chairman, Hart-Rudman Commission) ("I have seen others come into the White House with supposedly high-visibility positions, and a few months went by, and they weren't reporting to the president, they were talking to some staff aide. . . . [T]he Secretary of Defense isn't in the White House, he's sitting over in Virginia, but he's important, and when he wants to see the President, he sees the President. And we believe that you could have a Cabinet Secretary with the same kind of responsibilities without being necessarily located in the White House."); *see also* GAO, *supra* note 17, at 39.

[104] *See* Robert M. Gates, Editorial, *The Job Nobody Trained For*, N.Y. TIMES, Nov. 19, 2001, at A19. Proponents of the NHSA model, however, claim that because it is a reorganization of already existing agencies, it does not create an "additive" structure, but rather represents a more efficient realignment of existing structures. *See Legislative Options Hearings*, *supra* note 50 (statement of Charles G. Boyd, former Executive Director of the Hart-Rudman Commission).

[105] *See* GAO, *supra* note 17, at 11.

[106] *Id.* at 39.

[107] *See Legislative Options Hearings*, *supra* note 50 (statement of Thomas H. Stanton, Johns Hopkins University) ("The Coast Guard, for example, has many responsibilities—for safety, search and rescue, maritime pollution, high seas fishing, and oceanographic research, for example—that have little overlap with enforcement of the security of the nation's borders. According to one rough estimate only perhaps one-fifth of Coast Guard functions may relate directly to homeland security."). In response to this argument, however, the Hart-Rudman Commission argues that by placing the Coast Guard in the NHSA, where it would be a more prominent part of the hierarchy and be "recapitalized" with a higher priority level of funding, its other missions would be better served. *See* HART-RUDMAN COMMISSION, *supra* note 9, at 17.

[108] *See Responding to Homeland Threats Hearings*, *supra* note 10 (statement of Gov. James Gilmore (R-Va.), Chairman, Gilmore Commission).

Another set of arguments against the NHSA model focuses on the disruptive effects that such a sweeping structural reorganization would have on the government, particularly when in the middle of a crisis. Creating the correct formal structures for authority to match new threats will take time. In the meantime, allowing the OHS to operate solely out of the Executive Office of the President maintains maximum flexibility to deal with the exigencies of the current crisis, while leaving the details of bureaucracy to be figured out at a later date.[109] Moreover, it is very easy to underestimate the administrative costs associated with such a long-term reorganization of bureaucratic structures.[110] The idea of an efficiently consolidated NHSA may make sense as part of a broad vision for homeland security policy, but until the details of how the individual components are to work together are determined, the potential remains for organizational disaster.[111] While such a broad reorganization of the machinery of government seems like a monumental task, proponents of the NHSA model are correct in claiming that the United States has successfully undertaken such efforts in the past.[112]

Many proponents of the NHSA model believe that establishing both positions—an independent federal homeland security department and an office in the Executive Branch that coordinates policy between this new agency and others with a role in combating terrorism—would perhaps be superior to choosing one model over the other.[113] For his part, Governor Ridge has made it clear that he does not wish to be placed at the head of a new agency or department.[114] Indeed, the establishment of such a de-

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[109] *See* Gates, *supra* note 104. Former CIA director Robert M. Gates observes that the current structures for protecting national security interests overseas have evolved over fifty years since the end of World War II, and argues that it would be unrealistic to create a new Department of Homeland Security and expect it to be up and running overnight. *See id.*

[110] *See Legislative Options Hearings*, *supra* note 50 (statement of Thomas H. Stanton, Johns Hopkins University) ("[M]easurable and immeasurable costs may be substantial because reorganizations are disruptive and often require transfers and geographical relocation of personnel, facilities, and records") (quoting Harold Seidman, POLITICS, POSITION AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION 12 (1998)).

[111] *See id.* The Hart-Rudman Commission proposal is unclear on the degree of collaboration that it expects to result from the consolidation of the three primary "border control" agencies. *See* HART-RUDMAN COMMISSION, *supra* note 9, at 16. The agencies are expected to share training, equipment and information. *See id.* On the other hand, the expectation seems to be that the agencies will continue to operate as before, relatively independently of one another. *See id.* No clear discussion is made over whether each agency will retain its present organizational hierarchy, or whether those hierarchies will be consolidated as well. *See id.*

[112] *See Responding to Homeland Threats Hearings*, *supra* note 10 (statement of Sen. Joseph Lieberman (D-Conn.), Chairman, Sen. Comm. on Governmental Affairs). Senator Lieberman compared the current challenge of reorganization to those undertaken in preparation for World War II, the Cold War, and the Gulf War. *See id.*

[113] Senator Joseph Lieberman, Press Conference on Homeland Security Legislation (Oct. 11, 2001), *at* http://www.senate.gov/~gov_affairs/101101statement.htm; *see also Legislative Options Hearings*, *supra* note 50 (statement of Charles G. Boyd, former Executive Director of the Hart-Rudman Commission).

[114] *See* Alison Mitchell, *Ridge Agrees Taliban Losses May Lead to New Terrorism*, N.Y.

partment would diminish Ridge's role and influence, particularly if it was established by legislation while Ridge's position continued to derive its power from executive order.[115] Though it is true that the two proposals could be made to coexist, they were originally designed to be mutually exclusive and would require significant revision before they could be combined.[116]

There is a great deal to be said for not creating a new federal department that the President thinks unnecessary, and then forcing him by statute to appoint a new Cabinet member to head that unwanted department. This is especially true in light of present circumstances, in which the President's staff believes it has already solved the organizational problem of homeland security, and the President has appointed a close friend to head an office whose authority is threatened by the new department. Thus, even though there are some very strong arguments in favor of creating a National Homeland Security Agency, the political realities of the situation may preclude its coming into being, at least in the near future. This is not to say that legislation is unnecessary, however. If there is one aspect of this issue on which a majority of Congress agrees, it is that legislation of some form is needed to strengthen the authority of OHS and make it politically accountable.

Only through strict government oversight can transparent, politically approved procedures be developed to establish in advance how OHS will respond to terrorist threats as they develop. As the Hart-Rudman Commission argued, the best way to prevent the abridgement of civil liberties in a crisis is through careful planning for all contingencies by creating response strategies that prepare for worst-case scenarios while taking into account constitutional constraints.[117] While the OHS is needed to coordinate state action in protecting and defending the homeland, if the Office does not become fully integrated and institutionalized within the federal bureaucracy, the danger exists that it will serve as a mechanism for expanding executive emergency powers in ways that might encroach on civil liberties.[118] This danger is especially present if the OHS contin-

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TIMES, Nov. 16, 2001, at B8 ("While many in Congress say Mr. Ridge needs more power and an independent agency, he insisted that his responsibilities were too diffuse to be put in one cabinet department. 'If they choose to create another agency, if they choose to create a cabinet position, that's fine,' he said, 'but I'm not applying. I already have a job, and I like it.'").

[115] *But see Responding to Homeland Threats Hearings*, *supra* note 10 (statement of David Walker, Comptroller General, General Accounting Office). During a question-and-answer exchange between Senator Lieberman and Governor Gilmore, former Senator Hart, former Senator Rudman and GAO Comptroller General David Walker all had positive things to say about the possibility of combining the two proposals and adopting both structures harmoniously. *See id.*

[116] *See id.* (statement of L. Paul Bremer, former Ambassador-at-Large for Counterterrorism).

[117] *See* HART-RUDMAN COMMISSION, *supra* note 9, at 11.

[118] *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J.

ues to conduct homeland security policy through informal methods such as public-private partnerships.[119] Unless OHS is given a legislative basis that subjects it to congressional oversight, there will be no formal mechanisms by which its activities can be effectively monitored.

Just as terrorism is likely to remain America's "enemy number one" for the foreseeable future, so too will homeland security remain an important domestic political issue over the long term. If this is the case, then the governmental response to terrorism needs to be placed on a permanent institutional footing. While a thorough reorganization of the federal bureaucracy will be needed if a consolidated homeland security agency is to be created, such a reorganization can and should be done with the end goal of creating an integrated agency whose sole responsibility will be to create coherent counterterrorism policy. Moreover, the mission of OHS is perfectly compatible with such a reorganization; indeed, the Office is clearly the entity best placed to carry it out. Governor Ridge has suggested that a consolidation of federal agencies and programs along the lines of the Hart-Rudman Commission's recommendations may be a necessary part of the long-term strategy of OHS.[120] It is important, then, that the homeland security debate not become polarized or turned into a highly partisan issue. Not only is there ample common ground between the two sides of the debate, there is also a compelling public interest at stake: the freedom from fear.

—Thomas Cmar

1385, 1386 (1989) ("Executive reliance on emergency powers to respond to perceived foreign threats has presented a challenge to the maintenance of constitutional governance since the Republic's beginning.")

[119] *See* text accompanying *supra* notes 61–67.

[120] *See* Alison Mitchell, *Official Urges Combining Several Agencies to Create One that Protects Borders*, N.Y. TIMES, Jan. 12, 2002, at A8. In a "border security white paper" produced by OHS staff, it was recommended that the Coast Guard, Customs Service, Border Patrol, and the Department of Agriculture's agricultural quarantine inspection program all be combined into a single "federal border administration." *Id.* The proposal is still under development by OHS staff, but could be submitted to Congress this year. *See id.*

FAITH-BASED INITIATIVES

From the first days of George W. Bush's administration, "faith-based initiatives"—efforts by the federal government to broaden funding and support for the charitable efforts of religious organizations—have been a central component of the President's domestic agenda.[1] Specifically, the Bush White House has lobbied Congress to pass legislation that would expand federal funding to religious social service providers.[2] In response, the House of Representatives passed the Charitable Choice Act of 2001 ("CCA").[3] The CCA authorizes religious organizations to receive federal funding for providing social services ranging from hunger relief efforts and housing assistance to juvenile delinquency treatment and crime-prevention programs.[4] Under the bill, religious organizations may receive funding either via a government grant to run a social service program, or by accepting vouchers that the government has issued to aid beneficiaries to redeem for social services.[5] The CCA also exempts recipient religious organizations from laws prohibiting employment discrimination on the basis of religion.[6]

Criticized for weakening the separation between church and state, jeopardizing the religious freedom of social service beneficiaries, and permitting religious social service providers to flout anti-discrimination laws, the CCA stalled in the Senate.[7] Early in the current session of Congress, however, a bipartisan group of Senators led by Democrat Joseph I. Lieberman of Connecticut and Republican Rick Santorum of Pennsylvania introduced a scaled-back version of the CCA as part of the Charity Aid, Recovery, and Empowerment Act of 2002 ("CARE").[8]

This Essay will explore the debate over faith-based initiatives by evaluating the most controversial elements of the House legislation and comparing it to the more politically palatable but less detailed Senate

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[1] Frank Bruni & Laurie Goodstein, *Bush to Focus on a Favorite Project: Helping Religious Groups Help the Needy*, N.Y. TIMES, Jan. 26, 2001, at A17. One of the President's first executive orders created the Office of Faith-Based and Community Initiatives to facilitate cooperation between the federal government and religious organizations. *See* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

[2] *See* Bruni & Goodstein, *supra* note 1.

[3] *See* 147 CONG. REC. H4281 (daily ed. July 19, 2001). The CCA is part of a larger bill, the Community Solutions Act of 2001, H.R. 7, 107th Cong. § 201 (2001).

[4] *See id.* § 201(c). The bill applies to all federally funded social service programs, including those implemented by state and local governments with federal funds as well as those carried out by the federal government itself. *See id.* § 201 (c)(1)(a).

[5] *See id.* § 201(c)(1)(A), (*l*).

[6] *See id.* § 201(e).

[7] *See* Elizabeth Becker, *Bush Plan Would Revise Bill to Aid Charities*, N.Y. TIMES, Nov. 8, 2001, at A17.

[8] Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301 (2002). Both the House and Senate versions are contained in larger bills that provide tax incentives to encourage charitable giving. *See* H.R. 7, §§ 101–08; S. 1924, §§ 101–08. The Senate version also increases the amount of federal funding to be provided to the states in 2003 and 2004 for implementing social service programs. *See* S. 1924 § 602(b).

alternative. The House-approved CCA, the more comprehensive of the two bills, exemplifies three major concerns raised by faith-based initiatives.[9] First, while the CCA appears constitutional in allowing religious organizations to redeem government-issued vouchers for social services, its direct funding of religious organizations may violate the Establishment Clause of the First Amendment.[10] Second, the CCA provides insufficient protection for the religious freedom of aid beneficiaries, who may be subject to religious coercion when receiving aid from pervasively religious organizations. Unlike the direct funding of religious organizations, this second set of concerns is not likely to render the bill unconstitutional. Nevertheless, because aid beneficiaries will be ill-equipped to seek relief, with claims either under the Free Exercise Clause of the First Amendment[11] or under the provisions of the CCA itself[12] unlikely to succeed, potential encroachments of religious freedom may go unremedied. Finally, the CCA permits recipient organizations to practice employment discrimination in a federally funded program and to ignore state and local civil rights laws. Like the religious freedom issue, discrimination under the CCA is a policy concern rather than a constitutional one: because CCA recipient organizations are unlikely to qualify as "state actors,"[13] their discriminatory practices would be largely insulated from constitutional challenge. The constitutionality of such practices, however, does not mitigate their subversive effect on civil rights laws: permitting organizations to carry out government programs while engaging in types of discrimination normally prohibited by federal law represents, in the words of one congressional opponent, "a giant step backwards for civil rights."[14]

CARE, the Senate alternative to the CCA, moderates the House bill significantly by removing the explicit provisions for the direct funding of religious organizations and by omitting the special exemption of such

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[9] The broad bipartisan support enjoyed by the Senate version (co-sponsors include such politically diverse Senators as Hillary Clinton (D-N.Y.) and Orrin Hatch (R-Utah)) and the unwillingness of the Senate Democratic leadership to bring the House version to a vote, *see* Becker, *supra* note 7, suggest that if faith-based initiatives are to reach the President's desk the final product will more closely resemble the Senate's CARE than the House-approved CCA. Nevertheless, the CCA provides a better starting point for analysis of the issues surrounding faith-based initiatives because it develops the President's basic proposal more fully.

[10] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[11] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

[12] *See* H.R. 7, § 201(n).

[13] *See infra* notes 194–217 and accompanying text. Under the state action doctrine, a private actor may be held to the same constitutional requirements as the government. *See id.*

[14] 147 CONG. REC. H4256 (daily ed. July 19, 2001) (statement of Rep. Etheridge (D-N.C.)).

organizations from anti-discrimination laws.[15] Nevertheless, the Senate bill also eliminates the CCA subsections aimed at protecting social service beneficiaries' religious freedom and preventing government funds from being used for religious purposes.[16] Additionally, CARE does not expressly address many important questions, such as what types of organizations it would fund.[17]

The current round of legislation is not Congress's first effort to fund faith-based social services. "Charitable Choice," first enacted as part of the 1996 Welfare Reform Act,[18] authorized federal and state governments to provide religious organizations with direct money grants to run social service programs ("direct aid"), or to contract with religious organizations to redeem government-issued vouchers for welfare services ("indirect aid").[19] Religiously affiliated organizations have been providing social services with government money for years;[20] what Charitable Choice changed was the type of organization eligible for public subsidy. Instead of funding only organizations that, while religiously affiliated, provide entirely secular services, federal and state governments may now also

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[15] *Compare* S. 1924, § 301, *with* H.R. 7, § 201(c)(1)(A), (e).

[16] *Compare* S. 1924, § 301, *with* H.R. 7, § 201(g), (h), (j).

[17] *See infra* notes 43–45, 137–142 and accompanying text; S. 1924, § 301(a). The vagueness of the Senate bill is not surprising in light of the difficulty Democrats and Republicans have had in reconciling their differences on the most contentious issues. In January 2002, a working group sponsored by Senators Santorum and Lieberman released a set of twenty-nine recommendations for implementing faith-based initiatives. WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, FINDING COMMON GROUND 6–7 (2002). Comprised of thirty-three leaders representing diverse ideological and religious interest groups, the working group suggested practical steps to facilitate the participation of faith-based organizations in social service work, while declining to take positions on politically and constitutionally charged questions about the Establishment Clause, the religious freedoms of beneficiaries, and employment discrimination. *Compare id.* at 6 (recommendation 12) (recommending increasing private technical assistance to small faith-based social-service providers), *with id.* at 6 (recommendation 7) ("Government agencies should not set limitations or conditions that apply . . . to the benefit or to the detriment of faith-based organizations . . . unless they understand them to be constitutionally or legally required."). The Senate version adopts many of the working group's uncontroversial recommendations, *see, e.g.*, S. 1924, §§ 501–505 (providing technical assistance to small faith-based social service providers), but also reflects the working group's ambivalence as to some of the most fundamental criticisms of faith-based initiatives.

[18] Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 604a (Supp. V 1999).

[19] *Id.* § 604a(a)(1)(A)–(B). Federal social service money is allocated both by the federal government (via the Department of Health and Human Services) and by the states, which receive from the federal government "block grants" to use for the provision of social services. *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, HHS: WHAT WE DO, *at* http://www.hhs.gov/news/press/2002pres/profile.html (last modified Apr. 4, 2002); U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SERVICES BLOCK GRANT PROGRAM OVERVIEW, *at* http://www.acf.dhhs.gov/programs/ocs/ssbg/docs/overv.htm (last modified Feb. 15, 2001).

[20] *See* Martha Minow, *Choice or Commonality: Welfare and Schooling after the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 531 (1999). Catholic Charities USA and the Salvation Army are two prominent examples. *See* Jonathan Friedman, Note, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103, 104 (1997).

contract with pervasively sectarian organizations—including churches themselves—that do not separate the religious from the secular.[21] Additionally, Charitable Choice forbids federal and state governments from discriminating against organizations on the basis of their religious character when selecting private providers of welfare services.[22] In 1998, Congress extended Charitable Choice to a number of other federal social service programs,[23] and during the 2000 presidential campaign, George Bush and Al Gore both advocated further broadening the program.[24]

In July 2001, the House passed the CCA, which would expand the applicability of Charitable Choice to nine broad areas of federal social service work, including juvenile delinquency, housing assistance, and hunger relief activities.[25] Like the original 1996 provision, the CCA authorizes direct as well as indirect aid[26] and prohibits federal and state governments from discriminating against faith-based organizations in choosing which service providers to fund.[27] The CCA also regulates the relationship between government and faith-based providers by forbidding recipient organizations to use government grants to support religious activities,[28] and proscribing government interference in the internal governance, religious iconography, or religious practice of any recipient organization.[29] In order to safeguard the religious rights of social service beneficiaries, the bill explicitly prohibits discrimination against a beneficiary on the basis of religious beliefs or lack thereof, and requires that alternative yet equivalent aid be made available to beneficiaries who object to the religious character of the organizations from which they would receive aid.[30] Addressing a critique leveled against the original 1996 provision,[31] the CCA also requires that beneficiaries be notified of their right to alternative assistance.[32] Finally, the CCA exempts recipient religious organizations from laws prohibiting employment discrimination on the basis of religion.[33]

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[21] *See* Minow, *supra* note 20, at 532.

[22] *See* 42 U.S.C. § 604a(c).

[23] *See* Minow, *supra* note 20, at 529.

[24] *See* Laurie Goodstein, *States Steer Religious Charities Toward Aid*, N.Y. TIMES, July 21, 2001, at A1.

[25] *See* Community Solutions Act, H.R. 7, 107th Cong. § 201(c)(4) (2001). The other areas are crime prevention, workforce investment, assistance for the elderly, domestic violence, job access, and secondary school diploma equivalents. *See id.*

[26] *See id.* § 201(*l*).

[27] *See id.* § 201(c)(1)(B).

[28] *See id.* § 201(j).

[29] *See id.* § 201(d)(1)–(2).

[30] *See id.* § 201(g)–(h).

[31] *See* Minow, *supra* note 20, at 537 ("The absence of a statutory duty to tell applicants of their option to object to services provided by a religious organization reduces the likelihood of such objections from economically and psychologically vulnerable people.").

[32] *See* H.R. 7, § 201(g)(2).

[33] *See id.* § 201(e).

Congressional supporters of faith-based initiatives have argued that religious organizations are especially effective providers of social services, both because of the spiritual dimension of their programs[34] and because of their familiarity with their local communities.[35] Funding well-established religious organizations may increase the efficiency as well as the effectiveness of social service programs: as one congressional advocate has argued, "[i]t does not make sense to reinvent the wheel to establish government programs to provide services in communities where services already exist in an overzealous effort to isolate religious from public policy."[36] Additionally, supporters contend that current government and secular organizations cannot meet the demand for social services, so federal funding should be used to help sustain small local religious providers, especially in areas where government social services are largely unavailable.[37] Finally, the House bill would rectify what some perceive to be a government prejudice against faith-based providers in the allocation of federal grants for social service work.[38]

These premises are not widely disputed by congressional opponents of faith-based initiatives. Instead, criticism has focused on the implications of faith-based initiatives for the Religion Clauses of the First Amendment and for civil rights. Both liberals and conservatives—including leaders of the religious right—have expressed concern that faith-based initiatives would violate the Establishment Clause by providing impermissible government support for, or engendering excessive government entanglement in, religious organizations.[39] Allocating federal funds to faith-based social service providers could also jeopardize the religious freedom of aid beneficiaries by subjecting them to religious proselytizing and discrimination based on their beliefs.[40] Perhaps the

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[34] *See* 147 CONG. REC. H4223 (daily ed. July 19, 2001) (statement of Rep. Pryce (R-Ohio)) ("[T]hose grounded in faith can often provide the steadiest helping hand for those in despair . . . ."). *Cf.* David J. Freedman, Casenote, *Wielding the Ax of Neutrality: The Constitutional Status of Charitable Choice in the Wake of* Mitchell v. Helms, 35 U. RICH. L. REV. 313, 344 (2001) (attributing a similar belief to the drafters of the original 1996 Charitable Choice provision).

[35] *See* 147 CONG. REC. H4226 (daily ed. July 19, 2001) (statement of Rep. Shows (D-Miss.)).

[36] *Id.*

[37] *See id.* at H4224 (statement of Rep. Hall (D-Ohio)) (praising organizations that, while "barely keeping their heads above water financially," are "motivated by their love and faith to work in areas where nobody else will work").

[38] *See id.* at H4226 (statement of Rep. Stearns (R-Fla.)) ("[T]oo often the Federal Government has valued process over performance and not welcomed faith-based charities as partners in fighting social ills . . . .").

[39] *See, e.g., id.* at H4231 (statement of Rep. Kaptur (D-Ohio)); *id.* at H4230 (statement of Rep. Jackson-Lee (D-Tex.)); Laurie Goodstein, *Bush's Charity Plan is Raising Concerns For Religious Right*, N.Y. TIMES, Mar. 3, 2001, at A1.

[40] *See, e.g.*, 147 CONG. REC. H4228 (daily ed. July 19, 2001) (statement of Rep. Pelosi (D-Cal.)); *Church, State and Joe Lieberman*, N.Y. TIMES, Sept. 1, 2001, at A14 [hereinafter *Church, State*].

most frequent and strenuous objection is that the CCA exempts recipient religious organizations from employment discrimination laws.[41]

The Senate version addresses some of the objections to the House legislation while leaving other problems unresolved. In a major concession to opponents of the CCA, CARE dispenses with the exemption from employment discrimination laws.[42] To assuage opponents' fears of an unconstitutional mingling of government with religion, the Senate bill also omits some of the characteristic elements of Charitable Choice, such as the CCA's provision for indirect aid and its requirement that federal and state governments not discriminate against religious providers in the allocation of grants to perform social service work.[43] These omissions enable CARE's lead sponsor to reassure his constituents that "[t]his bill does not include charitable choice."[44] The absence of the "Charitable Choice" label, however, belies the functional similarity between the House and Senate versions: the retention in the Senate bill of protections for recipient organizations against government interference with religious iconography or internal governance shows that CARE, like the CCA, is aimed at funding faith-based organizations.[45] Moreover, in removing language explicitly detailing faith-based initiatives, CARE also eliminates many of the safeguards provided in the CCA. In particular, the Senate bill contains no explicit prohibition on the use of government grants to support sectarian activities, nor does it require the government to provide alternative aid to beneficiaries objecting on religious grounds.[46] Overall, CARE may be more politically palatable than the CCA because it has eliminated the employment discrimination provision and appears to have eliminated Charitable Choice. Nonetheless, because it neither precludes the funding of pervasively religious organizations nor contains any protections for the religious freedom of beneficiaries, CARE is subject to many of the same Establishment Clause and policy objections made against the CCA.

Raising some of these objections, recent lawsuits challenging government funding of religious social service programs have met with mixed success. So far, a federal district court in Texas has upheld a state program authorizing such funding;[47] a federal district court in Wisconsin

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[41] *See* 147 CONG. REC. H4229 (daily ed. July 19, 2001) (statement of Rep. Lee (D-Cal.)); *id.* at H4263 (statement of Rep. Cummings (D-Md.)). *See also infra* notes 179–187 and accompanying text.

[42] *See* Press Release, Office of Senator Joe Lieberman, Common Questions About the CARE Act (Feb. 7, 2002), *available at* http://www.senate.gov/~lieberman/press/02/02/2002207720.html.

[43] *Compare* Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301 (2002), *with* Community Solutions Act, H.R. 7, 107th Cong. § 201(c)(1)(B), (*l*).

[44] *See* Press Release, Office of Senator Joe Lieberman, *supra* note 42.

[45] *See* S. 1924, § 301(a).

[46] *Compare* S. 1924, § 301 *with* H.R. 7, § 201(j), (g).

[47] *See* R.G. Ratcliffe, *Bush's Faith-Based Idea Wins a Round in Federal Court*, HOUSTON CHRON., Feb. 1, 2001, at A21. The program, which President Bush set up in Texas

has held state funding of a religious social service program to be unconstitutional on Establishment Clause grounds;[48] and in a third case, a federal district court in Kentucky has sustained an Establishment Clause claim against a motion to dismiss.[49] None of these rulings, however, specifically addressed the constitutionality of Charitable Choice.[50] On the basis of this sparse and inconsistent record, few conclusions can be drawn. A meaningful assessment of the constitutionality of CCA and CARE will require an analysis of the Establishment Clause and its history before the Supreme Court.

The Establishment Clause has spawned a fragmented jurisprudence that one judge has aptly described as a "vast, perplexing desert."[51] In 1971, the Court decided *Lemon v. Kurtzman*,[52] in which it promulgated its most influential standard for evaluating Establishment Clause claims. Under *Lemon*, a law or practice is consistent with the Establishment Clause only if it: (1) has a secular purpose; (2) does not as its primary effect advance or inhibit religion; and (3) does not promote excessive entanglement of government and religion.[53] Though the *Lemon* test was the baseline of Establishment Clause analysis for more than a decade after its creation,[54] its influence has waned in the wake of a series of more recent Court decisions that have marginalized or ignored it entirely.[55]

Although *Lemon* remains the nominal starting point for an Establishment Clause inquiry,[56] it has ceased to be a unifying factor in a jurisprudence now best characterized by the array of divergent approaches that the Court applies in different contexts.[57] In cases involving public

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when he was governor, was found constitutional because the court found "no evidence . . . of a state policy of funding religious indoctrination." *Id.*

[48] *See* Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wis. 2002) (order granting summary judgment).

[49] *See* Pedreira v. Ky. Baptist Homes for Children, Inc., No. 3:00CV-210-S, 2001 U.S. Dist. LEXIS 10283 (W.D. Ky. July 23, 2001). The court also rejected a Title VII employment discrimination claim against a faith-based organization receiving government funding. *See id.*

[50] *See McCallum*, 179 F. Supp. 2d 950 (declining to address constitutionality of Charitable Choice).

[51] Helms v. Picard, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd*, 530 U.S. 793 (2000).

[52] 403 U.S. 602 (1971).

[53] *See id.* at 612–13.

[54] *See* Paul W. Ambrosius, *The End of Welfare As We Know It and the Establishment Clause: Government Grants to Religious Organizations Under the Personal Responsibility Act of 1996*, 28 COLUM. HUM. RTS. L. REV. 135, 140–41 (1996).

[55] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area . . . ."); Marsh v. Chambers, 463 U.S. 783 (1983) (declining to apply *Lemon* at all in upholding a practice of opening state legislature sessions with a prayer). *See generally* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323.

[56] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000).

[57] *See* Ambrosius, *supra* note 54, at 156–57 (introducing an Establishment Clause analysis organized in terms of several post-*Lemon* categories). *But see* Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Be-*

school curricula and classroom activity, the Court tends to apply the strictest standard, viewing with suspicion all infusions of religion into the classroom and searching carefully for an underlying religious purpose.[58] The Court has been similarly wary of the involvement of religious organizations in activities that assume the appearance of government functions; in these cases, the Court generally inquires whether the government has impermissibly "delegated" its authority to a religious organization.[59] In considering prayer at public school extracurricular functions, the Court's test is whether under the circumstances the religious activity amounts to "coercion."[60] In cases involving public religious displays, the Court tends to ask whether there has been government "endorsement" of the display.[61] Where free expression rights are involved, as in cases involving the availability of public fora to religious groups, the Court generally requires the government to adhere to a "neutrality" standard, neither favoring nor disfavoring religious groups.[62] Finally, in the one modern Supreme Court case addressing government grants to religious social service providers, the constitutionality of the grant program turned on whether recipient organizations were "pervasively sectarian."[63]

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tween Establishment and Private Religious Expression, 28 PEPP. L. REV. 681 (2001) (arguing that *Santa Fe* and *Mitchell* illustrate an emerging consensus on the Court for a unified approach to Establishment Clause cases). While McConnell offers a plausible synthesis of the Court's most recent Establishment Clause cases, he relies primarily on cases about prayer at public schools and government funding of parochial schools. *See id.* It remains to be seen whether McConnell's nascent hypothesis will prove applicable to Establishment Clause cases in other contexts, such as public religious displays or religiously motivated curriculum choices.

[58] *See* Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (striking down a Louisiana law requiring equal classroom treatment of evolution and "creation science," on the grounds that "a State's articulation of a secular purpose . . . [must] be sincere and not a sham").

[59] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (striking down a Massachusetts statute that allowed houses of worship to block the granting of liquor licenses to establishments within 500 feet of their premises).

[60] *See Santa Fe*, 530 U.S. at 312 (striking down a school district's policy allowing student-led prayers before football games because a "pregame prayer has the improper effect of coercing those present to participate in an act of religious worship").

[61] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). The Court by a vote of 7-2 upheld Ohio's decision to allow a private religious display in a state-sponsored public forum next to its statehouse. *See id.* Though no opinion garnered a majority, five Justices (three concurring and two dissenting) agreed that the appropriate test was whether the display constituted government endorsement of religion. *See id.* at 772 (O'Connor, J., concurring), 799–800 (Stevens, J., dissenting).

[62] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 840 (1995) (holding on free speech grounds that a university cannot discriminate against a religious publication in the application of the school's publication-funding policy, and that funding the religious publication would not violate the Establishment Clause because the university's policy was "neutral toward religion").

[63] Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (upholding a federal grant program that included religiously affiliated organizations as potential grantees providing adolescent sexuality and pregnancy counseling, because there was no indication that "a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions").

In analyzing faith-based initiatives, the Court is most likely to apply the approach it developed recently in *Agostini v. Felton*, in which the Court held constitutional a federal program paying for public school teachers to provide instruction to disadvantaged children at parochial schools.[64] Although *Agostini* involved sectarian schools rather than sectarian social service providers, courts and commentators alike have analyzed Charitable Choice in terms of *Agostini* and its progeny.[65] The *Agostini* test retains the *Lemon* purpose prong while collapsing the other two prongs of the *Lemon* test into an expanded "effects" prong under which a government program must satisfy three criteria: it may not "result in governmental indoctrination [of religion]; define its recipients by reference to religion; or create an excessive entanglement [between government and religion]."[66] Under the two-prong *Agostini* test, the direct aid component of the CCA is likely to be unconstitutional: though the CCA meets the purpose prong, it fails the effects prong because it leads to government indoctrination of religion and may result in excessive entanglement of government and religion as well.

The CCA satisfies the *Agostini-Lemon* purpose prong. Although the motives of the original Charitable Choice drafters—particularly their belief that "injecting a spiritual element into social welfare services equates to successful assistance"—seem to demonstrate a religious purpose,[67] a statute will not fail the purpose prong unless a religious purpose predominates.[68] As the text of the CCA offers several plausible secular purposes, including "enabl[ing] assistance to be provided to individuals and families in need in the most effective and efficient manner" and "supplement[ing] the Nation's social service capacity,"[69] the Court is unlikely to

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[64] *See* 521 U.S. 203, 203 (1997).

[65] *See, e.g.*, Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950, 966 (W.D. Wis. 2002) (order granting summary judgment) (using *Agostini* to evaluate suit challenging government funding of a religious social service program); Freedman, *supra* note 34, at 343–52 (using the *Agostini* approach as the basis of his analysis of Charitable Choice). *See generally* McConnell, *supra* note 57 (observing the transformation of the Court's approach from *Lemon* to *Agostini* and its applications). Although *Bowen v. Kendrick*, 487 U.S. 589 (1988) the one modern case that specifically assesses the Establishment Clause implications of government grants to religious social service providers, is more analogous on its facts, the Court has in recent years taken a hard look at *Lemon*-based precedents through the lens of its later decisions. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 808 (2000) (overruling Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977)); Agostini, 521 U.S. at 235–36 (overruling Aguilar v. Felton, 473 U.S. 402 (1985) and Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)).

[66] *Agostini*, 521 U.S. at 234.

[67] Freedman, *supra* note 34, at 344.

[68] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (observing that "a statute that is motivated in part by a religious purpose may [nonetheless] satisfy" the constitutional requirement of a secular purpose); Edwards v. Aguillard, 482 U.S. 578, 599 (1987) (Powell, J., concurring) ("to invalidate an act . . . [t]he religious purpose must predominate.").

[69] Community Solutions Act, H.R. 7, 107th Cong. § 201(b)(1)–(2) (2001).

find that the drafters' strong belief in the efficacy of faith-based social services constitutes a predominant religious purpose.[70]

For a government program providing aid to a religious organization to be constitutional under the *Agostini* effects prong, it cannot: (1) define its recipients in terms of religion; (2) produce an excessive entanglement of government and religion; or (3) result in "governmental indoctrination" of religion.[71] A program does not "define its recipients by reference to religion" if aid "is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[72] Two CCA provisions suggest that the bill satisfies this requirement. First, the CCA authorizes the funding of "other nongovernmental organizations"[73] as well as religious providers and declares that the government must consider both types of organizations "on the same basis."[74] Thus, the starting point for the allocation of grants is a requirement of equal treatment. Second, the bill specifically forbids discrimination against religious providers,[75] thereby including an express mandate that the government fulfill in practice the bill's promise of equal treatment. Based on these two provisions, the first criterion of the effects test is likely to be satisfied.

The CCA may, however, precipitate excessive entanglement of government and religion. The Supreme Court has recognized that excessive entanglement results when a government law or program delegates public functions to religious institutions.[76] The Court used the "delegation" theory to invalidate a Massachusetts statute that allowed houses of worship to block liquor license grants to establishments within 500 feet of their premises,[77] and more recently to strike down New York's creation of a special school district for a religious community.[78] The Court's rulings were founded on the premise that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[79] The CCA seems to violate this principle by delegating to religious institutions the authority to develop and implement programs to provide government social services, thus bringing about an impermissible "fusion of govern-

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[70] *Cf. Aguillard*, 482 U.S. at 591 (striking down a law whose "*preeminent* purpose . . . was *clearly* to advance [a] religious viewpoint") (emphasis added); *Wallace*, 472 U.S. at 56 (striking down a law because it "had *no* secular purpose") (emphasis in original).

[71] *Agostini*, 521 U.S. at 234. *Agostini* lists the three criteria in a different order; they have been transposed here for organizational purposes.

[72] *Mitchell*, 530 U.S. at 829 (quoting *Agostini*, 521 U.S. at 231), 845–46 (O'Connor, J., concurring).

[73] H.R. 7, § 201(c)(1)(A).

[74] *Id.*

[75] *See id.* § 201(c)(1)(B).

[76] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

[77] *See id.*

[78] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

[79] *Larkin*, 459 U.S. at 127.

ment and religious functions."[80] The Court, however, has not specified what degree of delegation constitutes "excessive entanglement."[81] If the Court chooses to apply the theory only to the most comprehensive delegations of government functions to religious entities, it might not find entanglement where, for example, a CCA recipient religious institution operates alongside a governmental option for social services. The CCA, however, does not require a state to preserve a secular social service option.[82] Theoretically, a state could turn over all services in a given area to religious providers, a wholesale delegation that would likely qualify as an unconstitutional entanglement even under a narrow interpretation of the delegation theory.

Because it involves a governmental choice about which institutions to fund, CCA direct aid is more likely than indirect aid to constitute a delegation of a government function. If a federal or state government were to issue vouchers under the indirect aid provision, it could argue that it is the private choice of the beneficiaries, not the public choice of the government, that involves religious organizations in the government function.[83] Direct aid, by contrast, provides no buffer between the government and the religious organizations to which it delegates the social service function.

The "indoctrination" element is the most controversial component of the *Agostini* effects prong. The Court's recent decision in *Mitchell v. Helms*[84] reveals deep disagreement among the Justices over what constitutes "government indoctrination" of religion. In *Mitchell*, the Court held that a federal law providing government aid in materials and equipment to public and private schools was constitutional as applied in a district where nearly all of the private schools receiving government aid were religiously affiliated.[85] The six justices in the majority could not agree on a single rationale for their decision, and the meaning of the "indoctrination" criterion was at the heart of their dispute. Justice Thomas, writing in *Mitchell* for a four-member plurality, evaluates this element using a "neutrality" standard under which government aid to religious institu-

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[80] *See Kiryas Joel*, 512 U.S. at 702.

[81] *Larkin* can be distinguished factually from faith-based initiatives because the statute at issue in *Larkin* gave churches "the power effectively to veto applications for liquor licenses," *Larkin*, 459 U.S. at 117, a power not at all analogous to that of providing social services. Nevertheless, the power to determine how the neediest Americans will receive essential social services is arguably *more* of an "important, discretionary government power" than the granting of liquor licenses. *Id.* at 127. If the Court adopts this view, then faith-based initiatives would entail a "delegation" at least as significant as that which the Court struck down in *Larkin*.

[82] *See* Community Solutions Act, H.R. 7, 107th Cong. § 201 (2001). *Cf.* Minow, *supra* note 20, at 535 (making the same observation about the original 1996 Charitable Choice provision).

[83] *See* Minow, *supra* note 20, at 534.

[84] 530 U.S. 793 (2000).

[85] *See id.* at 803.

tions is permissible if it "is offered to a broad range of groups or persons without regard to their religion."[86] For the plurality, the neutrality standard applies regardless of whether government aid to religious organizations is direct or indirect.[87] Justices O'Connor and Breyer concurred in the *Mitchell* result on the basis of a multi-factor analysis in which neutrality is relevant but not dispositive to the question of indoctrination.[88] Observing that "we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid,"[89] the concurring Justices fault the plurality for elevating neutrality to a position "close to . . . singular importance" in Establishment Clause analysis.[90] In addition, they disagree strongly with the plurality's rejection of the distinction between direct and indirect aid to religious organizations.[91] The dissenting Justices agreed with the concurrence that programs aiding religious institutions must be evaluated by reference to many factors rather than on neutrality alone,[92] and that direct aid programs warrant more exacting scrutiny than those involving indirect aid.[93] The *Mitchell* decision, in exposing the Court's lack of consensus over the application of *Agostini*, further complicates the Court's already murky Establishment Clause jurisprudence.

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[86] *See id.* at 809. In recent years, the neutrality criterion has been the most salient factor in cases involving the Establishment Clause in conjunction with free speech rights. *See supra* note 62 and accompanying text.

[87] *See* 530 U.S. at 816.

[88] *See id.* at 867 (O'Connor, J., concurring). These factors are enumerated and analyzed below, *see infra* note 97 and accompanying text.

[89] *Mitchell*, 530 U.S. at 839 (2000).

[90] *Id.* at 837.

[91] *See id.* at 842–43 ("[A] government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools."), 856 (characterizing direct aid as "fall[ing] precariously close to the original object of the Establishment Clause's prohibition").

[92] *See id.*, at 884–85 (Souter, J., dissenting). Explaining the "insufficiency of even-handedness neutrality as a stand-alone criterion of constitutional intent or effect," Justice Souter hypothesizes that "if we looked no further than evenhandedness, and failed to ask what activities the aid might support . . . religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money." *Id.* Neutrality has continued to play a role in Establishment Clause cases, but the reservations expressed by Justices O'Connor and Souter about its use as the primary standard may have resonated with the plurality Justices. In *Good News Club v. Milford Central School*, decided one term after *Mitchell* and authored by Justice Thomas, neutrality was only one of five grounds for holding that the Establishment Clause did not require a school district to deny a religious organization access to its limited public forum. *See* 533 U.S. 98, 114–18 (2001). While *Good News* is instructive regarding the Court's most recent thinking about neutrality, it is less helpful in analyzing the constitutionality of faith-based initiatives because it is factually inapposite: the question in *Good News* involved a religious organization's access to a limited public forum, not its access to government funding. *See* 533 U.S. at 102.

[93] *See* 530 U.S. at 888–89 (Souter, J., dissenting) (observing that "[d]irect aid obviously raises greater risks" than indirect aid).

Lower courts confronted with a fractious split decision such as *Mitchell* have employed the principle that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[94] On this basis, the Fourth and Sixth Circuits have both treated Justice O'Connor's *Mitchell* concurrence as controlling.[95] Justice O'Connor's position is of further significance as a practical matter. Joined by Justice Breyer, Justice O'Connor's concurrence holds the balance of power between the four justices of the *Mitchell* plurality and the three Justices in dissent. Notably, Justice O'Connor has been part of the Court's majority in every religion case since 1988.[96] Evaluating the CCA in terms of her framework is therefore essential to predicting how the Court will rule.

The CCA appears constitutionally suspect under Justice O'Connor's approach. Her *Mitchell* concurrence evaluates the "governmental indoctrination" question by balancing seven factors: (1) whether the aid to religious institutions is secular in content; (2) whether the aid supplants private funds; (3) whether the program includes adequate safeguards against religious indoctrination; (4) whether the aid is being diverted to religious purposes; (5) whether funding is available to religious and secular organizations on a "neutral" basis; (6) whether the program fosters the perception of government endorsement of religion; and (7) whether government funds "reach the coffers" of religious institutions.[97] CCA direct aid is only sure to meet the first of Justice O'Connor's seven standards: as monetary grants have no inherent religious content, the aid is clearly "secular." The second standard—whether private funds are supplanted—will be difficult to apply prospectively, as the Court can only guess how the introduction of government funding will affect private contributions to recipient organizations. The CCA is likely to violate the remaining tests for indoctrination. The Act's only safeguards against religious indoctrination are its stated prohibition against the use of government funds for "sectarian instruction, worship, or proselytization";[98] the requirement that any religious activities offered must be voluntary for beneficiaries and separate from the social service program;[99] and the pro-

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[94] Simmons-Harris v. Zelman, 234 F.3d 945, 957 (6th Cir. 2000) (citing Marks v. United States, 430 U.S. 188, 193 (1977)) (further citations and internal quotation marks omitted).

[95] *See* Columbia Union College v. Oliver, 254 F.3d 496, 504 (4th Cir. 2001); *see also Zelman*, 234 F.3d at 957.

[96] *See* Ambrosius, *supra* note 54, at 158.

[97] *Mitchell*, 530 U.S. at 867 (O'Connor, J., concurring). Justice O'Connor explicitly reserves the question of whether these seven factors amount to "constitutional requirements." *Id.*

[98] Community Solutions Act, H.R. 7, 107th Cong. § 201(j) (2001).

[99] *See id.*

scription of religious discrimination against beneficiaries.[100] Within these bounds religious coercion is still quite possible. For example, a recipient organization could locate its soup kitchen in a room where a clergy member hired with private funds is leading a group of beneficiaries in prayer. As long as participation is voluntary and the religious organization could characterize the activity as nominally "separate" from the aid program, this scenario appears permissible under the CCA.[101] A key premise behind Charitable Choice is the belief that the spiritual dimension of faith-based social service providers contributes to their efficacy, so religious components of aid distribution are not merely a likely by-product but a fundamental goal of faith-based initiatives.[102] Thus a federal judge recently found that a faith-based organization's use of "the integration of religion into [its program] as a strong selling point for obtaining funding" belied its claim that the secular and sectarian elements of its program were separable.[103] Moreover, by prohibiting the government from interfering with the religious iconography of the recipient religious organizations,[104] the CCA in effect authorizes the provision of social services in an environment replete with religious imagery. The subsection of the CCA that prohibits the use of government grants for sectarian activity expressly contemplates the presence of such activity alongside the provision of social services.[105] With beneficiaries in the especially vulnerable position of relying on providers for basic necessities such as food and housing,[106] it is not difficult to imagine that "the participation of desperate people in religiously styled programs may cross the line into coercion."[107] In light of the many opportunities for religious indoctrination in spite of CCA safeguards, the Court is unlikely to deem these safeguards adequate.

Although the extent to which CCA funds might be diverted to religious purposes (the fourth factor of the *Mitchell* concurrence) is difficult to measure in the abstract, the nature of the recipient institutions provides strong grounds for a facial challenge. The *Mitchell* concurrence is con-

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[100] *See id.* § 201(h).

[101] *See id.* § 201(j). Representative Charles B. Rangel (D-N.Y.) introduced an amendment that would forbid the practice just described: "No direct funds shall be provided . . . to a religious organization that engages in sectarian instruction, worship, or proselytization *at the same time and place* as the government funded program." 147 CONG. REC. H4266–67 (daily ed. July 19, 2001) (emphasis added). The House rejected the amendment. *See id.* at H4278.

[102] *See* Minow, *supra* note 20, at 529–30; *see also* Freedman, *supra* note 34, at 344; Ambrosius, *supra* note 54, at 145.

[103] Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950, 969 (W.D. Wis. 2002) (order granting summary judgment).

[104] *See* H.R. 7, § 201(d)(2)(B).

[105] *See id.* § 201(j) ("If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services . . .").

[106] *See* Minow, *supra* note 20, at 535.

[107] *Id.* at 531; *see also* Freedman, *supra* note 34, at 349.

cerned with the actual diversion of funds for religious purposes and not merely the potential for diversion ("divertibility"),[108] but the Court has recognized that when "pervasively sectarian" institutions are involved, religious and secular purposes may not be separable.[109] The Supreme Court has defined a "pervasively sectarian" institution as one in which "secular activities cannot be separated from sectarian ones."[110] While church-affiliated primary and secondary schools are the only institutions that the Court has explicitly recognized as pervasively sectarian,[111] even avowed Charitable Choice proponent Professor Carl Esbeck admits that "[p]resumably a church, synagogue, or mosque would also be regarded as pervasively sectarian insofar as it performs sacerdotal functions."[112] The inclusion of churches as eligible recipients practically ensures that some CCA recipient institutions will qualify as "pervasively sectarian" and therefore be subject to the presumption that government aid will be diverted to religious purposes.[113]

The CCA may also violate the fifth factor of the *Mitchell* concurrence, the neutrality principle, by giving faith-based social service providers special treatment.[114] The *Mitchell* plurality says that neutrality is satisfied "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose."[115] Under the CCA, religious recipi-

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[108] *See* Mitchell v. Helms, 530 U.S. 793, 853 (2000) (O'Connor, J., concurring).

[109] *See* Bowen v. Kendrick, 487 U.S. 589, 610 (1988). As Chief Justice Rehnquist—by no means an ardent proponent of strict church-state separation, *see, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 113–14 (1985) (Rehnquist, J., dissenting)—has written:

> Aid *normally may be thought to have a primary effect of advancing religion* when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . . The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's religious mission.

Kendrick, 487 U.S. at 610 (citations and internal quotation marks omitted) (emphasis added).

[110] Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976).

[111] *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation With Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 10 n.31 (1997).

[112] *Id.*

[113] *See Kendrick*, 487 U.S. at 610 (stating that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is . . . pervasive") (citations and internal quotation marks omitted). The *Mitchell* plurality dismisses the "pervasively sectarian" category as no longer relevant, finding that it has been disregarded in the recent school aid cases. *See Mitchell*, 530 U.S. at 826–27. This claim has not garnered the support of a majority of the Justices: the concurring justices do not endorse it, and the dissenting justices explicitly reject it. *See id.* at 885 (Souter, J., dissenting) (maintaining that "aid recipients heighten Establishment Clause concern" if they are "pervasively religious").

[114] *See* Friedman, *supra* note 20, at 116 (making the same claim about the original Charitable Choice law based on provisions similar to those found in the CCA).

[115] *Mitchell*, 530 U.S. at 810.

ent institutions have at least three advantages over non-religious private providers: they are exempt from certain employment discrimination laws,[116] they are subject to a more limited audit,[117] and they are specifically protected against discrimination by the government in the allocation of grants.[118] These advantages suggest that the CCA will offer aid to religious organizations on terms that are, vis-à-vis secular grantees, not simply equal but favorable, thus raising a serious question as to the CCA's neutrality.

The concessions granted to religious organizations also contribute to the appearance of government endorsement of religion, the sixth *Mitchell* concurrence factor.[119] The Justices have never specified the criteria for a finding of endorsement,[120] but Justice O'Connor suggests that for a program inculcating religious values, direct funding alone could stimulate the perception of government endorsement of religion.[121] Though faith-based initiatives are not necessarily aimed at inculcating religious values per se, the religious components of the social service programs to be funded, combined with the vulnerable position of aid beneficiaries, suggest that religious inculcation is a likely by-product.[122] Justice O'Connor's *Mitchell* dictum suggests that she could find an impermissible endorsement of religion based solely on the CCA's direct funding of social service providers saturated with religious content. Other elements of the CCA also contribute to the appearance of government endorsement of religion. The CCA not only provides direct funding for religiously styled programs, but does so through direct payments to pervasively sectarian institutions. Finally, as noted above, the CCA affords these institutions several types of special treatment.[123] Based on these factors, the CCA appears likely to trigger a finding of government endorsement.[124]

Perhaps as a defense to the "endorsement" line of argument, the CCA contains the stipulation that "[t]he receipt by a religious organization of Federal, State, or local government funds or other assistance under this section is not an endorsement by the government of religion or of the organization's religious beliefs or practices."[125] It is unlikely, however, that this disclaimer would affect the constitutionality of the bill. Justice O'Connor measures endorsement by reference to the perceptions

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[116] *See* Community Solutions Act, H.R. 7, 107th Cong. § 201(e) (2001).

[117] *See id.* § 201(i)(2).

[118] *See id.* § 201(c)(1)(B).

[119] Endorsement has always been a factor of particular salience to Justice O'Connor. *See* Ambrosius, *supra* note 54, at 158; *see also* Minow, *supra* note 20, at 533 (characterizing endorsement as "Justice O'Connor's test for Establishment Clause challenges").

[120] *See* Ambrosius, *supra* note 54, at 158–60.

[121] *See Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring).

[122] *See supra* notes 98–107 and accompanying text.

[123] *See supra* notes 114–118 and accompanying text.

[124] *See* Minow, *supra* note 20, at 532–33; *see also* Friedman, *supra* note 20 at 120.

[125] H.R. 7 § 201(c)(3).

of the reasonable person, whom one imagines does not read the text of federal legislation to discover which groups the government does or does not endorse.[126] Moreover, as the Court has held in other contexts, a mere conclusory assertion by Congress does not amount to a constitutional finding.[127]

As to the seventh and final factor of the *Mitchell* concurrence, there is little doubt that direct aid authorized by the CCA will "reach the coffers" of religious institutions, as this is what the Act is designed to bring about.[128] Both the concurrence and the dissent in *Mitchell* agree that direct funding of religious institutions increases the risk of an Establishment Clause violation,[129] and even the plurality, despite its rejection of the direct/indirect aid distinction in general, admits that "we have seen special Establishment Clause dangers when money is given to religious schools or entities directly."[130]

While direct aid under the CCA is constitutionally suspect, the indirect aid provision stands on much firmer constitutional ground.[131] As Justice O'Connor argues in *Mitchell*, indirect aid allows the individual beneficiary to "retain control over whether the secular government aid will be applied" to the religious organization.[132] Under these circumstances, the funding of religious institutions is dependent entirely on the private choice of the individual rather than the mandate of the government,[133] and so "endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid" rather than to the government.[134] Following O'Connor's reasoning, the Supreme Court will likely find CCA indirect aid to be constitutional because the interposition of a beneficiary's private choice dilutes the nexus between the gov-

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[126] *See* Ambrosius, *supra* note 54 at 159.

[127] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 614 (2000) (declaring that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of a law).

[128] *See, e.g.*, 147 CONG. REC. H4228 (daily ed. July 19, 2001) (statement of Rep. Boehner (R-Ohio)). Representative Boehner argues that CCA safeguards such as separate accounting requirements would prevent federal funds from being used impermissibly. *See id.*

[129] *See supra* notes 91, 93.

[130] *Mitchell*, 530 U.S. at 818–19 (citation and internal quotation marks omitted). In a footnote, however, Justice Thomas qualifies this statement by hypothesizing circumstances under which direct aid would be permissible and pointing out that some of the cases striking down direct aid have also involved other Establishment Clause concerns. *See id.* at 819 n.8.

[131] A number of commentators and at least one federal court have made the same distinction with respect to the original 1996 Charitable Choice provision. *See, e.g.*, Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wis. 2002) (order granting summary judgment); Minow, *supra* note 20, at 534; Freedman, *supra* note 34, at 361; Friedman, *supra* note 20, at 118.

[132] *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

[133] *Id.*

[134] *Id.* at 843.

ernment and the religious activities the First Amendment forbids it to fund.[135]

Of the seven factors identified as relevant by the *Mitchell* concurrence, five are likely or certain to be violated by the direct aid provisions of the CCA. These factors, taken together with concerns about excessive entanglement under the "delegation" theory, strongly suggest that the direct aid portions of the CCA have the impermissible effect of advancing religion. The CCA is thus likely to fail the effects prong of the *Agostini* test and to be found unconstitutional under the Establishment Clause.

Because the Senate bill contains far fewer details about the organizations it is intended to fund,[136] its constitutionality will depend on how federal grant money is allocated by federal and state governments. As noted above, despite the apparent elimination of "Charitable Choice" from CARE, the provisions protecting recipient religious organizations against government interference show that CARE contemplates the allocation of funds to faith-based organizations.[137] The government has constitutionally funded religiously *affiliated* social service organizations in the past,[138] but if the organizations receiving funding under CARE are "pervasively sectarian,"[139] the same constitutional deficiencies that plague CCA direct aid will render the Senate bill vulnerable to as-applied challenges. Federal and state governments must therefore choose grant recipients carefully in order to avoid constitutional problems.

Complicating this task is the provision of CARE that allows the government to allocate social service grant money to nongovernmental "intermediate grantors," who in turn are authorized both to administer social service programs themselves and to distribute subgrants to other nongovernmental social service providers.[140] CARE does not limit intermediate grantors' discretion in awarding subgrants, so an intermediate grantor, even if not itself "pervasively sectarian," could choose to allocate the government's money to a "pervasively sectarian" institution.[141] Moreover, authorizing religious organizations to function as intermediate

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[135] *See* Minow, *supra* note 20, at 534; *see also* Freedman, *supra* note 34, at 360; Friedman, *supra* note 20, at 118. Nevertheless, the conclusion that the choice is voluntary depends on the availability of viable alternatives to religious social service providers: if alternatives are not available, the user of the voucher cannot be said to have made a private "choice" in any meaningful sense. As Professor Minow warns, "[e]limination of a public, secular option for the distribution of human necessities such as food and shelter would pressure individuals toward a religious option they might not want." Minow, *supra* note 20, at 535.

[136] *See* Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301(a) (2002).

[137] *See id.*; *see also supra* notes 43–45 and accompanying text.

[138] *See* Friedman, *supra* note 20, at 104.

[139] *See* Bowen v. Kendrick, 487 U.S. 589, 610 (1988).

[140] Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301(c) (2002). The House version contains a similar provision. *See* Community Solutions Act, H.R. 7, 107th Cong. § 201(m) (2001).

[141] *See* S. 1924, § 301(c).

grantors could constitute an impermissible "delegation" of the government function of allocating social service grants.[142] By leaving open the question of whether and to what extent religious organizations will be funded, the Senate bill may attract votes as a politically palatable compromise, but in practice it might run afoul of the Establishment Clause, depending upon which organizations are funded.

Whereas the Establishment Clause analysis reveals the constitutional vulnerability of the CCA and (to a lesser extent) CARE, the second major concern with faith-based initiatives—that they will impinge on the religious freedom of beneficiaries—highlights a policy problem rather than a constitutional one. Involving faith-based organizations in the distribution of vital social services may have the effect of pressuring beneficiaries into environments or even activities that they find objectionable on religious grounds.[143] Compounding the problem is the insufficiency of legal avenues by which beneficiaries could seek to assert their rights.[144]

On a cursory reading, the CCA seems to provide ample protection for religious freedom, both by explicitly prohibiting discrimination against a beneficiary on the basis of his religion or lack thereof, and by requiring that alternative yet equivalent forms of aid are made available to beneficiaries objecting to the religious character of organizations from which they would receive aid.[145] The CCA additionally requires the government to ensure that beneficiaries are aware of these rights.[146] In theory, then, a beneficiary's rights are in his own hands, as each beneficiary may choose to receive alternative aid in a non-sectarian environment.[147]

In practice, however, there is no guarantee that an equivalent alternative to objectionable aid will be easily or quickly obtained. Convenience is a matter of no small importance for those who are hungry: "[e]ven a staunch atheist who is sufficiently hungry and poor might end up praying"[148] if he believed it was the only way to obtain food. This issue of convenience may be even more of a problem for beneficiaries receiving aid of other kinds.[149] Food at least can be easily transported, but several of the types of social services funded under the CCA—such as domestic violence prevention,[150] treatment for juvenile delinquency,[151] and high school equivalency programs[152]—may take the form of coun-

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[142] *See supra* notes 76–82 and accompanying text.
[143] *See* Minow, *supra* note 20, at 536–37.
[144] *See infra* notes 161–178 and accompanying text.
[145] *See* H.R. 7, § 201(g)–(h).
[146] *See id.* § 201(g)(2).
[147] *See id.* § 201(g)(1).
[148] Minow, *supra* note 20, at 536.
[149] *See id.*
[150] *See* H.R. 7, § 201(c)(4)(A)(vi).
[151] *See id.* § 201(c)(4)(A)(i).
[152] *See id.* § 201(c)(4)(B)(i).

seling services or classes that would not be easily susceptible to alternative provision without a comparable program already in place nearby.[153] If a pervasively religious organization is the only service provider in a rural area, the nearest alternative provider may be many miles away.[154] Arranging alternative aid could take weeks or months, which the state might consider a reasonable time period under the circumstances.[155] Thus beneficiaries may be forced to choose between accepting religiously objectionable aid because it is the only aid available, or receiving no aid at all.[156] Even where the state is able to provide the alternative aid required by the CCA,[157] the same practical considerations could make it quite costly to the state in terms of time and resources, and thus discourage states from finding alternative aid.[158] Beneficiaries would have no leverage against the state, short of filing suit, to ensure that their rights are enforced,[159] and beneficiaries who are reliant on government social services could potentially lack the resources to be able to bear the costs of a lawsuit.[160]

If beneficiaries are able to bring legal actions to enforce the CCA's guarantee of alternative aid, they can first invoke the remedial right provided in the CCA itself, which authorizes beneficiaries to bring civil actions against the state or federal government. Because the CCA authorizes wronged parties to seek only injunctive relief,[161] however, the remedial right provides no incentive for recalcitrant government officials to respect beneficiaries' right to alternative aid: if a beneficiary prevails, the court could order government officials to provide alternative aid, but in the absence of a provision for awarding damages the government would end up no worse off financially than it would have been had it complied with the CCA initially.[162] It may therefore be in the economic interest of the government not to spend the money to provide beneficiaries with alternative aid unless ordered to do so by a court.

Whatever the flaws of the CCA in protecting beneficiaries' freedom from infringements on their religious beliefs and practices, the Senate bill offers even less protection for religious freedom than its House counterpart. While the CCA provides at least nominal safeguards against

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[153] See Minow, *supra* note 20, at 537.

[154] *See id.*

[155] *See id.* The requirement that alternative aid be provided "within a reasonable period of time" is at H.R. 7, § 201(g)(1).

[156] See Minow, *supra* note 20, at 537.

[157] *See* H.R. 7, § 201(g).

[158] *See* Minow, *supra* note 20, at 537.

[159] See H.R. 7, § 201(n) (granting remedial right to seek enforcement of rights granted by the section).

[160] *See* Michael E. Stamp, Comment, *Are the Woolf Reforms an Antidote for the Cost Disease? The Problem of the Increasing Cost of Litigation and English Attempts at a Solution*, 22 U. PA. J. INT'L ECON. L. 349, 349 (2001).

[161] *See* H.R. 7, § 201(n).

[162] *See id.*

religious coercion of beneficiaries, CARE is silent on the subject.[163] One possible explanation for the omission of CCA safeguards from CARE is that the Senate sponsors may have considered them unnecessary in the absence of explicit Charitable Choice provisions and may have wanted to avoid a politically touchy subject. Nevertheless, as CARE leaves open the potential for the government to fund houses of worship that may proselytize or integrate religious and secular services, the religious freedom of beneficiaries may require just as much protection under the Senate version as under the House version.[164]

Although either CARE or the CCA may burden beneficiaries' religious freedoms, a claim brought under the Free Exercise Clause of the First Amendment is likely to prove unavailing under the Supreme Court's current jurisprudence. In defending a law impinging on the free exercise of religion, the government once bore the heavy burden of showing that "some compelling state interest . . . justifies the substantial infringement of [the individual's] First Amendment right."[165] In the 1990 case of *Employment Division, Department of Human Resources v. Smith*, however, the Court significantly relaxed the standards for judging state laws alleged to violate Free Exercise rights.[166] *Smith* involved the denial of unemployment benefits to two Native Americans who were fired for "work-related 'misconduct'" because of their use of peyote, an illegal drug, for religious purposes.[167] Finding that the Constitution "bars application of a neutral, generally applicable law to religiously motivated action" only in cases involving "the Free Exercise Clause *in conjunction with other constitutional protections*,"[168] the Court held the compelling state interest test inapplicable.[169] As a result, the Court found that Oregon's prohibition on peyote use, and therefore its denial of unemployment benefits, did not infringe on the Native Americans' Free Exercise rights.[170] The Religious Freedom Restoration Act of 1993 ("RFRA"), an attempt by Congress to reinstate the compelling state interest test for Free Exercise cases, was rebuffed by the Court in *City of Boerne v. Flores*.[171]

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[163] *Compare* H.R. 7, § 201 (g)–(h), (j), *with* Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301 (2002).

[164] *See supra* notes 148–160 and accompanying text.

[165] Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that South Carolina violated a Seventh-Day Adventist's Free Exercise rights in denying her unemployment benefits based on her failure to accept employment requiring her to work on Saturday, her religious day of rest).

[166] *See* 494 U.S. 872, 879 (1990).

[167] *Id.* at 874.

[168] *Id.* at 881 (emphasis added). This dictum has become known as the "hybrid rights doctrine." *See* Robin Cheryl Miller, Annotation, *What Constitutes "Hybrid Rights" Claim Under* Employment Div., Dept. of Human Resources of Oregon v. Smith, 163 A.L.R. FED. 493 (2000).

[169] *See Smith*, 494 U.S. at 885.

[170] *See id.* at 890.

[171] 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional as applied to a municipal zoning decision because a congressional attempt to define the substance of a constitutional

In the wake of *Smith*, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[172] The Supreme Court has found laws not to be neutral where "the object of a law is to infringe upon or restrict practices because of their religious motivation."[173] While faith-based initiatives may have the *effect* of infringing upon the religious practices of beneficiaries who must accept aid they find religiously objectionable, even an uncharitable reader of the House and Senate bills would be hard-pressed to unearth in their text an *intent* to achieve this result. The CCA's secular purposes[174] and its explicit attempts (however ineffective they may prove) to safeguard the religious freedoms of beneficiaries,[175] offer prima facie evidence that the object of the bill is not to obstruct religious freedom. Though CARE lacks comparable provisions, its omission of "Charitable Choice" leaves challengers with little ammunition to argue that the bill is, on its face, aimed at suppressing religious practice by subjecting beneficiaries to contrary religious rituals. In the absence of such intent, both bills are likely to pass the constitutional test for facial neutrality. As "valid and neutral law[s] of general applicability," both CARE and the CCA would likely be difficult to challenge under *Smith*.[176]

Lingering gaps and ambiguities after *Smith* and *Flores* suggest two legal strategies to obtain constitutional review of faith-based initiatives under the compelling state interest test. First, it is possible that the combination of a Free Exercise claim with an Establishment claim could subject faith-based initiatives to stricter review under the *Smith* "hybrid rights" doctrine.[177] Second, though the Court has refused to apply RFRA to a municipality, *Flores* leaves open the possibility that the compelling state interest test of RFRA is still applicable to federal law.[178] As neither of these arguments has been tested before the Supreme Court, however, they remain purely speculative. In light of the dim prospects for relief under the First Amendment and the potential inadequacy of the remedial

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provision "contradicts vital principles necessary to maintain separation of powers").

[172] *Smith*, 494 U.S. at 879 (citation and internal quotation marks omitted).

[173] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (striking down on their face a set of city ordinances regulating animal slaughter because they were targeted at suppressing the Santeria religion).

[174] *See supra* note 69 and accompanying text.

[175] *See supra* note 30 and accompanying text.

[176] *See Smith*, 494 U.S. at 879.

[177] *See* Miller, *supra* note 168.

[178] *See* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999) (assuming, without deciding, that RFRA is constitutional as applied to federal law); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 131 ("The Supreme Court did not explicitly decide the fate of RFRA's federal applications.").

right within the CCA itself, beneficiaries are likely to be ill-equipped to seek judicial redress if the CCA proves underprotective of their rights.

The final major objection to faith-based initiatives is that they afford insufficient guarantees that organizations receiving federal funds will follow fair employment practices. While the CCA requires recipient organizations to adhere to federal civil rights laws prohibiting discrimination based on race, color, national origin, sex, age, and disability,[179] the bill allows recipient religious organizations to disregard provisions prohibiting employment discrimination on the basis of religion.[180]

This aspect of the bill raises several concerns. First, by allowing recipient religious organizations to retain their exemption from Title VII employment discrimination laws,[181] the CCA authorizes these organizations to receive federal funds even while engaging in a type of discrimination normally prohibited under federal law.[182] In a related concern, critics of the bill fear that the government will be subsidizing discrimination against employees not only on the basis of their religious beliefs but also on the basis of any characteristic that a religious organization could *claim* is inconsistent with its religious beliefs.[183] As one congressional opponent charges, "H.R. 7 will allow religious organizations to discriminate in hiring on the basis of race, color, sex, national origin and sexual orientation while using federal tax dollars."[184] Finally, opponents of the bill are alarmed by the preemptive effect of the CCA on state and local anti-discrimination laws:[185] the CCA allows recipient organizations not to comply with efforts by state and local governments to combat

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[179] Community Solutions Act, H.R. 7, 107th Cong. § 201(f) (2001).

[180] *See id.* § 201(e).

[181] Title VII of the Civil Rights Act of 1964 provides that "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(a) (1994). Title VII provides an exemption for religious entities "with respect to the employment of individuals of a particular religion . . . ." *Id.* § 2000e-1(a). The CCA permits recipient religious organizations to retain this exemption in spite of any provisions to the contrary that would ordinarily apply to organizations providing services under federal programs. *See* H.R. 7, § 201(e) ("[A]ny provision in such programs that is inconsistent with or would diminish the exercise of an organization's autonomy recognized [by the Title VII exemption] shall have no effect.").

[182] *See* 147 CONG. REC. H4227 (daily ed. July 19, 2001) (statement of Rep. Scott (D-Va.)) ("We have not been able to discriminate in Federal contracts based on religion for decades. You can under this bill."); *id.* at H4231 (statement of Rep. Edwards (D-Tex.)) ("Having a religious test for tax-supported jobs is wrong. No American citizen, not one, should have to pass someone else's religious test to qualify for a federally funded job.").

[183] *See id.* at H4256 (statement of Rep. Kleczka (D-Wis.)) ("Under the bill, for instance, a religious group can refuse to hire . . . a person of a different race, if their [sic] 'status' violates the doctrine of that religion.").

[184] *Id.* (statement of Rep. Etheridge (D-N.C.)).

[185] *See id.* at H4224 (statement of Rep. Frank (D-Mass.)).

forms of discrimination not addressed by federal law,[186] particularly discrimination based on sexual orientation.[187]

While the House bill enables these types of discrimination, the Senate has rejected them, by omitting from CARE the section of the CCA that addresses employment practices.[188] Given the negative press the CCA has received over the issue[189] and the widespread concern among Senate Democrats about employment discrimination,[190] it is unlikely that this Congress would approve a version that retained the House provision. Whatever the short-term prospects, though, the issue is by no means settled: conservatives have championed the rights of religious organizations to make employment decisions on religious grounds,[191] and should the Republicans regain control of both Houses after the upcoming elections, they could reintroduce the House employment language either as part of a future attempt to pass the CCA itself or as a rider to another bill.

If Congress passes legislation containing language that allows for the possibility of employment discrimination by religious organizations funded under faith-based initiatives, this discrimination will likely be difficult to challenge in court. The Supreme Court has held the exemption of religious organizations from Title VII religious discrimination laws to be constitutional.[192] A more promising legal strategy for a victim of discrimination would be to sidestep the Title VII exemption entirely by attributing the discriminatory employment practice to the government rather than to the religious institution by demonstrating that the recipient organization meets the constitutional test for a "state actor."[193]

Established in the *Civil Rights Cases*[194] of 1883, "state action" is a jurisprudential category that recognizes the blurring of the line between government and private parties: if by virtue of its close connection with the government a private party is found to be a "state actor," it may be held to the same constitutional requirements as the government.[195] Fol-

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[186] *See id.* (statement of Rep. Sensenbrenner, Chairman, House Comm. on the Judiciary (R-Wis.)) ("Federal law applies where Federal funds go, and State law does not apply.").

[187] *See id.* at H4248 (statement of Rep. Baldwin (D-Wis.)).

[188] *Compare* Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. § 301 (2002), *with* Community Solutions Act, H.R. 7, 107th Cong. § 201(e) (2001).

[189] *See, e.g.*, *Church, State*, *supra* note 40.

[190] *See In Brief*, WASH. POST, Jan. 19, 2002, at B9.

[191] *See* Frank Bruni & Elizabeth Becker, *Charity Is Told It Must Abide by Antidiscrimination Laws*, N.Y. TIMES, July 11, 2001, at A15.

[192] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (holding that "the government may (and sometimes must) accommodate religious practices") (citation omitted).

[193] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (prohibiting states from enforcing racially restrictive residential covenants on the grounds that it would impermissibly involve the states in racial discrimination in violation of the Fourteenth Amendment).

[194] 109 U.S. 3 (1883).

[195] *See* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search For Governmental Responsibility*, 34 HOUS. L. REV. 333, 334–38 (1997).

lowing expansive interpretations of the "state action" concept by the Warren Court,[196] subsequent decades witnessed the doctrine's decline and near demise,[197] but state action has experienced a curious renaissance in recent years despite the Court's growing conservatism.[198] The doctrine has remained in flux throughout the 1980s and 1990s, as the Court has formulated and abandoned a series of different approaches to the question of when a private entity qualifies as a state actor.[199]

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Court finally gave up all pretext of a comprehensive test, declaring that "no one fact can function as a necessary condition across the board for finding state action,"[200] and holding that a private actor may be classified as a state actor as long as it satisfies any one of several state action paradigms.[201] These include: (1) if the government has exercised coercive power over a private party; (2) if the government has significantly encouraged the challenged activity; (3) if the private actor is willfully engaging in a joint activity with the government; (4) if the private actor is controlled by the government; (5) if the government is "entwined" with the policies or management of the private actor; and (6) if the private actor "has been delegated a public function by the State."[202]

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[196] *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (finding state action in private racial discrimination practiced by a restaurant leasing space in a public building); Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down state constitutional provision protecting discretion of property owners to decline to sell, lease, or rent property for any reason, on the grounds that the provision constituted state involvement in private racial discrimination).

[197] *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (finding state approval of company business practices did not confer state action for suit challenging company's action); Blum v. Yaretsky, 457 U.S. 991 (1982) (finding no state action when state decreased Medicaid patients' benefits in response to nursing homes' decision to transfer patients to lower level of care).

[198] *See generally* Buchanan, *supra* note 195 (providing a detailed history of the evolution of the state action doctrine).

[199] *Compare* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (requiring for a finding of state action a constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state" where "the party charged with the deprivation . . . may fairly be said to be a state actor"), *and* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–22 (1991) (evaluating state action by "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional government function; and whether the injury caused is aggravated in a unique way by the incidents of government authority") (citations omitted), *with* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (denying a state action claim without making a single reference to *Edmonson* or giving any indication as to which traditional state action theories, if sustained by the facts, would have warranted a finding of state action).

[200] 531 U.S. 288, 295 (2001).

[201] *See id.* at 302 (holding that a finding of state action on a single ground is "in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts").

[202] *Id.* at 296 (citations omitted). The Court in *Brentwood* found the Tennessee Secondary School Association to be a state actor because of the "entwinement" of state officials in the association. *See id.* at 291.

Nevertheless, the Court stipulated that "[e]ven facts that suffice to show public action . . . may be outweighed in the name of some value at odds with finding public accountability in the circumstances."[203] Although predictions about state action are inherently tenuous given the unsettled state of the doctrine, a recipient religious organization would probably not be deemed a state actor under the *Brentwood* approach. In light of the government's long history as a provider of social services,[204] recipient religious organizations probably qualify as state actors under the "public function" analysis, which in its most recent formulation asks "whether the actor is performing a traditional government function."[205] Whether or not any of the other state action paradigms would apply to recipient religious organizations, the satisfaction of any single test is enough under *Brentwood* to merit a finding of state action.[206] Nevertheless, Free Exercise and Establishment Clause concerns are likely to provide a sufficiently strong countervailing value to induce the Court to reject an application of the state action designation to the religious organizations funded under faith-based initiatives.[207] The Court has long recognized that "[r]eligious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[208] This freedom would surely be impaired were religious institutions to be subject to constitutional constraints as state actors. Indeed, lower courts have held that religious institutions' exemptions from Title VII cannot be waived, as they "reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention."[209] Though the Supreme Court's validation in *Brentwood* of several state action theories paves the way for a significant expansion in the applicability of state action doctrine generally, the First Amendment freedoms of religious

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[203] *Id.* at 303. Unfortunately, the Court provides neither a standard by which to identify a "value at odds with finding public accountability" sufficient to outweigh a finding of state action, nor a principle to guide the process of balancing such a value against considerations supporting a finding of state action.

[204] *See generally* Joel F. Handler, *The "Third Way" or the Old Way?*, 48 U. KAN. L. REV. 765, 778–83 (2000). By 1970, public social services had become so much a part of American life that the Supreme Court recognized government assistance to be "a matter of statutory entitlement" of which beneficiaries could not be deprived without due process of law. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

[205] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991).

[206] *Brentwood*, 531 U.S. at 302.

[207] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (recognizing that the special importance of rights guaranteed by the first ten amendments may require courts to employ "more exacting judicial scrutiny" in their defense).

[208] Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 697 (1976) (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

[209] Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (dismissing a religious discrimination claim on the grounds that receipt of substantial government funding did not constitute a waiver of a religious organization's Title VII exemption); *see also* Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Siegel v. Truett-McConnell Coll., Inc., 13 F. Supp. 2d 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).

organizations are likely to prevent the Supreme Court from recognizing recipient religious organizations as state actors in spite of their performance of a traditional public function.

Although religious discrimination suits against recipient religious organizations will probably fail, state action analysis has important implications. First, it bolsters the Establishment Clause challenge by supporting the "delegation" theory of excessive entanglement.[210] The identification of countervailing values that preclude a finding of state action does not negate the concern that faith-based initiatives would involve religious organizations in a "traditional government function"—a category that resembles the "important, discretionary governmental powers" that the Establishment Clause forbids to "be delegated to or shared with religious institutions."[211] The link between the state action and Establishment Clause lines of inquiry has been highlighted by Professor Michael McConnell, who posits that in light of recent cases "the emerging Establishment Clause jurisprudence can be seen as a specialized application of the state action doctrine."[212] Thus the Court has found religious activity to be unconstitutional when "instigated, encouraged or—in the strongest case—coerced by the government," but permissible when it is "the product of private judgment."[213] McConnell's separation of public and private religious activity dovetails both with the state action framework and with the direct/indirect aid distinction upon which an Establishment Clause evaluation of faith-based initiatives would likely turn.[214]

State action analysis also underscores one of the major problems with privatization of public services generally: the dearth of remedies for deprivations of rights by publicly subsidized private actors. In recent years, the combination of increased government contracting and narrow conceptions of state action doctrine may have left constitutional rights significantly underprotected.[215] Justice Marshall argued that "[t]he State should not be permitted to avoid constitutional requirements simply by delegating its statutory duty to a private entity,"[216] but the current state action doctrine may allow it to do just that if the Supreme Court reads *Brentwood* too narrowly. Faith-based initiatives may thus be part of a disturbing trend of the government shirking its constitutional obligations

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[210] *See supra* notes 76–82 and accompanying text.

[211] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

[212] McConnell, *supra* note 57, at 682.

[213] *Id.*

[214] *See supra* notes 131–135 and accompanying text.

[215] *See* Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 204 (2001); *see also* Kevin J. Hamilton, Note, *Section 1983 and the Independent Contractor*, 74 GEO. L.J. 457, 458 (1985).

[216] Rendell-Baker v. Kohn, 457 U.S. 830, 849 (1982) (Marshall, J., dissenting).

by contracting its functions out to private parties not subject to constitutional constraints.[217]

Though their purpose of expanding the country's social service capacity is a noble one, the faith-based initiatives of the 107th Congress raise a number of constitutional and policy problems. First, they may violate the Establishment Clause by delegating an important government function to religious organizations and by directly funding "pervasively sectarian" institutions in which secular and religious functions are inseparable. Second, they may be underprotective of the religious freedoms of some of the most vulnerable members of our society. Finally, they may invite discriminatory hiring practices in federally funded programs, undermining state and local anti-discrimination laws and blurring the boundary between private and government discrimination. Nonetheless, Americans' strong affinity for religious institutions and support for government social service programs are likely to sustain the popularity and legislative momentum of faith-based initiatives. While democratic representatives should be responsive to the will of their constituents, responsible policymakers must also respect the fundamental American values of liberty and equality. At a minimum, our national commitment to these values should mean that our government will not directly fund religious organizations, subject aid beneficiaries to conditions they find religiously objectionable, or sponsor employment discrimination.

—*Scott M. Michelman*

[217] *See* Kennedy, *supra* note 215, at 204.

CRIMINAL GANG ABATEMENT ACT

Several provisions of juvenile justice legislation that died in the 106th Congress[1] have returned to life in the Criminal Gang Abatement Act ("CGAA"),[2] a proposal introduced by Senators Dianne Feinstein (D-Cal.) and Orrin Hatch (R-Utah). The CGAA has three primary purposes: to create zones in which local, state, and federal agencies work together to fight gangs; to discourage gangs from recruiting juveniles; and to increase both the funding and the scope of grants to law enforcement for combating gangs.[3] Other parts of the bill would amend the law[4] in response to recent court decisions[5] and modify existing criminal statutes, primarily to lengthen sentences for gang-related crimes.[6]

The CGAA attempts to address comprehensively the persistent problem of gang-related violence in the United States. In a letter to Senator Feinstein endorsing the proposal, the executive director of the National Association of Police Organizations wrote that the legislation would "effectively combat the growth of gangs in the United States and give law enforcement the needed tools to fight the spread of youth gang violence."[7] In fact, the Act would give law enforcement little power that it does not already possess, instead making changes to the status quo that are primarily cosmetic. The most expensive part of the bill, the creation of High Intensity Interstate Gang Activity Areas ("HIIGAs"), would mimic a tactic that has had questionable success against the drug trade, while giving only passing attention to other approaches, such as prevention and intervention services, that some studies have suggested might work better. Its other components—expanding the use of juvenile records in adult sentencing, criminalizing gang recruitment, redefining the criminal street gang, and increasing sentences, among others—would only build on ex-

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[1] S. 254, 106th Cong. (1999); H.R. 1501, 106th Cong. (1999).

[2] S. 1236, 107th Cong. (2001). No companion bill has appeared in the House, but Representative Elton Gallegly (R-Cal.) has introduced the more limited Anti-Gang Violence Act, H.R. 1775, 107th Cong. (2001).

[3] *See* S. 1236, §§ 11, 2–4, 12.

[4] *See id.* §§ 5, 10, 13.

[5] *See* Apprendi v. New Jersey, 530 U.S. 466 (2000) (requiring that any fact, other than prior conviction, that would increase penalty for crime beyond statutory maximum be submitted to jury and proven beyond reasonable doubt). The CGAA would convert committing a crime in the name of a gang from a sentence enhancer to an independent crime. *See* S. 1236, §§ 5, 10. *See also* United States v. Juvenile (RRA-A), 229 F.3d 737 (9th Cir. 2000) (interpreting Juvenile Delinquency Act to require arresting officer to carry out statutory parental notification requirements personally). The CGAA would allow any representative of the Attorney General, not only arresting officers, to notify juveniles and their parents or guardians of their rights. *See* S. 1236, § 13.

[6] *See* S. 1236, §§ 6–8.

[7] Press Release, Senator Dianne Feinstein, National Association of Police Organizations Endorses Feinstein/Hatch Gang Bill (Aug. 7, 2001), *at* http://www.senate.gov/~feinstein/releases01/R-NAPO.htm.

isting statutes that have so far yielded only marginal success in fighting gangs.

The CGAA is aimed at a significant nationwide problem. One half of the residents of America's cities, towns, and villages share their hometowns with members of youth gangs.[8] Between 1970 and 1995, a problem that had been limited to only nineteen states expanded to touch all fifty and the District of Columbia.[9] In one-quarter of the jurisdictions reporting a gang problem, authorities say that most or all of their gang members are involved in illegal drug sales.[10] In more than half of the jurisdictions that are home to gangs, gang members "often" or "sometimes" use firearms in assaults.[11] Even though the number of gang members dropped during the most recent years for which estimates are available, from 846,000 in 1996 to 780,000 in 1998,[12] school shootings[13] and the ongoing popularity of "gangsta rap"[14] have kept policymakers focused on juvenile crime in general and youth gangs[15] in particular. The media, too, have remained interested: since the turn of the millennium, newspapers in Boston, Buffalo, Hartford, New Orleans, San Francisco, and Washington have given gang violence front-page treatment.[16]

Congressional debate about juvenile crime peaked in 1999 in response to the Senate's Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act[17] and the House's Consequences for Juve-

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[8] *See* WALTER B. MILLER, U.S. DEP'T OF JUSTICE, THE GROWTH OF YOUTH GANG PROBLEMS IN THE UNITED STATES: 1970–98, at 16 tbl.4 (2001).

[9] *See id.* at 19.

[10] *See* NAT'L YOUTH GANG CENTER, U.S. DEP'T OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY 29 tbl.29 (2000).

[11] *Id.* at 30–31.

[12] *See id.* at 12 tbl.9. (2000).

[13] *See* 145 CONG. REC. H4364 (daily ed. June 16, 1999) (statement of Rep. McCollum (R-Fla.)) ("[T]he tragic events at Columbine High School on April 20 have left us all asking tough questions, looking for real answers.").

[14] *See* MILLER, *supra* note 8, at 46 ("In the 1990s, the substance of gang life was communicated to national audiences through a new medium known as gangsta rap.").

[15] Researchers often define youth gangs as criminal groups made up primarily of twelve to twenty-four-year-olds. *See id.* at 6. Motorcycle gangs, hate groups, organized crime families, and other groups composed exclusively of adults are excluded. *Id.* at 5–6. Fifty-eight percent of law enforcement agencies responding to a recent survey identified a youth-gang crime as one in which a member of such a gang is the perpetrator or victim. *See* NAT'L YOUTH GANG CTR., *supra* note 10, at 25 tbl.25. Thirty-two percent said the characteristic feature of such a crime is that it is intended "to further the interests and activities of the gang." *Id.* The report on the survey left these "interests" undefined. *See id.*

[16] *See* Charles A. Radin & Jamal E. Watson, *Activists Revisit Gang Strategy: Some See Complacency as Youth Violence Increases in Boston*, BOSTON GLOBE, Sept. 5, 2000, at A1; Lou Michel, *Homicide Upsurge*, BUFFALO NEWS, Jan. 2, 2002, at A1; Josh Kovner et al., *A City of Tension, Turf Wars*, HARTFORD COURANT, July 8, 2001, at A1; Steve Cannizaro, *N.O. Gang Suspects Rounded Up in Weekend Shooting Outside Bar*, NEW ORLEANS TIMES-PICAYUNE, Jan. 12, 2000, at A1; Jaxon Van Derbeken & Jonathan Curiel, *Police Blame S.F. Killings on Rap Gang War*, SAN FRANCISCO CHRON., May 5, 2000, at A1; Bill Miller, *Extreme Security for D.C. Trial of Alleged Drug Gang; Charges Include 18 Killings*, WASH. POST, Jan. 9, 2001, at A1.

[17] S. 254, 106th Cong. (1999).

nile Offenders Act.[18] These massive bills addressed such controversial issues as trying juveniles as adults[19] and regulating gun shows.[20] Each house of Congress passed its own bill,[21] but neither version survived conference committee to become law. Senators Feinstein and Hatch have retained just a few pieces of the Senate version in their current proposal.[22]

The most ambitious element of the CGAA is the proposal to create HIIGAs. At a cost of $100 million each year from 2002 through 2008,[23] the HIIGAs would be "modeled after"[24] the High Intensity Drug Trafficking Areas[25] ("HIDTAs") that the nation's "drug czars" have created since 1990.[26] The Attorney General would designate the new areas as zones in which federal, state, and local law enforcement would work together in regional task forces.[27] He or she could detail federal personnel to the areas, including non-Department of Justice personnel when the relevant department or agency heads agreed.[28] Forty percent of HIIGA financing would go toward grants for "community-based programs to provide

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[18] H.R. 1501, 106th Cong. (1999).

[19] *See* S. 254, §§ 102–103; H.R. 1501, § 102. For a discussion of this element of the House bill, *see generally* Tara Kole, Recent Development, *Juvenile Offenders*, 38 HARV. J. ON LEGIS. 231 (2001).

[20] *See* S. 254, § 502. For a discussion of the debate over gun show regulations and the role that debate played in derailing Senate Bill 254, *see generally* Beth A. Diebold, Recent Legislative Activity, *Arrested! How Gun-Control Issues Have Placed a Halt on Juvenile Justice Reform*, 12 LOY. CONSUMER L. REV. 259 (2000). According to Diebold, "The gun show issues . . . have brought the legislative branch to a virtual impasse, causing the entire matter of juvenile justice legislation to remain unresolved at the close of the 106th Congress." *Id.* at 260. Issues in dispute include "what type of venue qualifies as a 'gun-show,' whether or not background checks should be mandatory when individuals purchase guns from private sellers at gun shows, and how much time the FBI should be allowed to perform the background checks." *Id.* at 260–61.

[21] *See* 145 CONG. REC. S5725 (daily ed. May 20, 1999); 145 CONG. REC. H4573 (daily ed. June 17, 1999).

[22] *Compare* S. 254, § 104 *with* S. 1236, § 13 (covering notification after minor's arrest); *compare* S. 254, § 201 *with* S. 1236, § 2 (covering gang recruitment); *compare* S. 254, § 202 *with* S. 1236, § 4 (covering sentencing for using minors to distribute drugs); *compare* S. 254, § 203 *with* S. 1236, § 3 (covering use of minors in violent crimes); *compare* S. 254, § 204 *with* S. 1236, § 5 (covering criminal street gangs); *compare* S. 254, § 205 *with* S. 1236, § 11 (covering high intensity interstate gang activity areas); *compare* S. 254, § 206 *with* S. 1236, § 7 (covering witness tampering); *compare* S. 254, § 207 *with* S. 1236, § 12 (covering prosecutors' grants); *compare* S. 254, § 208 *with* S. 1236, § 10 (covering sentencing gang members); *compare* S. 254, § 209 *with* S. 1236, § 6 (covering travel in aid of gangs); *compare* S. 254, § 210 *with* S. 1236, § 9 (covering juvenile drug offense as a sentencing factor); *compare* S. 254, §§ 1613, 1626, 1952 *with* S. 1236, § 8 (covering carjacking, areas of exclusive federal jurisdiction, and racketeering).

[23] *See* S. 1236, § 11(c)(1).

[24] 147 CONG. REC. S8209 (daily ed. July 25, 2001) (statement of Sen. Feinstein).

[25] 21 U.S.C. § 1706 (1994).

[26] *See* OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFFICE OF THE PRESIDENT, THE HIGH INTENSITY DRUG TRAFFICKING AREA PROGRAM 2001 ANN. REP. 2 (2001).

[27] *See* S. 1236, § 11(b).

[28] *See id.* § 11(b)(2)(B).

crime prevention and intervention services that are designed for gang members and at-risk youth" within the special zones.[29]

Under the Act, the Attorney General would consider several factors in designating an HIIGA: local gangs' interstate connections, the effects of out-of-state gangs and gang members on the area, the commitment local law enforcement has demonstrated to finding solutions to gang-related problems, and the potential impact of federal resources.[30] The Attorney General would make the final decision to establish an HIIGA, in consultation with the Secretary of the Treasury and the governors of the state or states in which the zone would operate.[31]

The CGAA also includes four provisions aimed at discouraging gangs from recruiting minors. The most controversial of these would expand the use of juvenile delinquency records in adult sentencing.[32] Under current law, someone convicted in federal court of illegal gun possession—on grounds, for example, of being a felon, fugitive, or illegal alien[33]—normally can be imprisoned for up to ten years.[34] If such a person has three previous violent felony or "serious drug offense" convictions, however, a mandatory minimum prison sentence of fifteen years takes effect.[35] Convicts with "three strikes" are also subject to fines of up to $25,000.[36] Currently, juvenile convictions for violent felonies are counted as strikes.[37] Under the CGAA, juvenile convictions for "serious drug offense[s]"[38]—those carrying up to ten years or more in prison[39]—would be strikes as well.[40]

While this sentence enhancement would lead to harsher punishment for juvenile delinquents who grow into adult criminals, other provisions of the Act would aim to reduce juvenile gang involvement by targeting adults responsible for recruiting juveniles. To accomplish this, the Act would create two new federal crimes. First, the Act would establish the crime of "us[ing] a minor to commit a [federal] crime of violence . . . or to assist in avoiding detection for such an offense."[41] For the purposes of

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[29] *Id.* § 11(c)(2)(B).

[30] *See id.* § 11(b)(3). The Attorney General would consider these factors and any other criteria found to be appropriate. *See id.*

[31] *See id.* § 11(b)(1). The Department of the Treasury is responsible for several law enforcement agencies that would be involved in HIIGAs, including the Bureau of Alcohol, Tobacco, and Firearms, *see* Treas. Dep't Order No. 221 1972-1 C.B. 777; the Customs Service, *see* 19 U.S.C. § 2072(a) (1994); the Internal Revenue Service, *see* 26 U.S.C. § 7803(a)(1)(A) (1994); and the Secret Service, *see* 18 U.S.C. § 3056(a) (1994).

[32] *See* S. 1236, § 9.

[33] *See* 18 U.S.C. § 922(g) (1994).

[34] *See id.* § 924(a)(2).

[35] *Id.* § 924(e)(1).

[36] *Id.*

[37] *See id.* § 924(e)(2)(C).

[38] S. 1236, 107th Cong. § 9 (2001).

[39] *See* 18 U.S.C. § 924(e)(2)(A).

[40] *See* S. 1236, § 9.

[41] *Id.* § 3.

this new crime, anyone who "employs, hires, persuades, induces, entices, or coerces" a minor to commit a violent crime would be deemed to have "used" that minor.[42] The penalty would be twice the maximum prison term and twice the maximum fine possible for the violent crime itself; second and subsequent offenses would carry triple the term and fine.[43]

The second crime established by the Act would be traveling in interstate or foreign commerce to "recruit, solicit, induce, command, or cause another person to be or remain as a member of a criminal street gang, or conspire to do so, with the intent that the person . . . participate in" one of a list of gang offenses.[44] Those convicted under the statute would receive up to ten years in prison.[45] If the person recruited were a minor, the CGAA would give the sentencing judge additional discretion to hold the recruiter "liable for any costs incurred by the Federal Government, or by any State or local government, for housing, maintaining, and treating the person until the person attains the age of 18 years."[46]

The new crime of recruiting a gang member would function in concert with another part of the bill that would broaden the legal definition of a criminal street gang.[47] Under current law, a gang is a group of five or more people that has as one of its primary purposes the commission of, or the conspiracy to commit, serious drug offenses or federal violent felonies.[48] Gang members must "engage, or have engaged within the past 5 years, in a continuing series" of these crimes, and their activities must affect interstate commerce.[49] Under the CGAA, the minimum size of a gang would drop to three people.[50] Perhaps more importantly, several federal crimes would be added to those considered predicates of gang activity: recruiting a gang member, committing various explosives offenses, demanding kidnapping ransom or threatening kidnapping across state lines, transmitting illegal bets across state lines, laundering drug money, obstructing justice, bringing admissible or certain inadmissible aliens into the country illegally, bringing an alien into the country for the purposes of prostitution, conspiring or attempting to commit any of these crimes, and committing any state offense that would be one of these offenses if federal jurisdiction existed.[51]

The CGAA's final provision aimed at discouraging gangs from taking advantage of juveniles would increase the penalties for using a minor

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[42] *Id.*

[43] *See id.*

[44] *Id.* § 2. The triggering offenses would be the predicates listed as part of the CGAA's new definition of a criminal street gang. *See infra* text accompanying notes 47–51.

[45] *See* S. 1236, § 2.

[46] *Id.*

[47] *See id.* § 5.

[48] *See* 18 U.S.C. § 521(a), (c), (1994).

[49] *Id.* § 521(a)(2)(B)–(C).

[50] *See* S. 1236, § 5.

[51] *See id.*

in a drug offense. Under current law, the crime carries a sentence of at least one year in prison for both first-time and repeat offenders.[52] Under the proposed bill, first-time offenders would face at least three years in prison and repeat offenders would face at least five.[53]

In addition to its explicitly gang-related provisions, the Act would expand the scope of a federal grant-making fund that currently supports violence and child-abuse prevention programs, coordination among law enforcement and other community members, and the use of "individualized sanctions" specially designed for the offenders on whom they are imposed.[54] Under the bill, such grants could also go toward hiring new prosecutors, paying for technology and training for prosecutors, and supporting community prosecution programs.[55] The Act would appropriate $50 million for the program each year from 2002 through 2006[56]—more than four times annually the $12 million the program received in 2000.[57]

Finally, the CGAA includes several other provisions that create another new crime, redefine some existing crimes, and lengthen the possible sentences for others.[58] The bill would establish a federal crime of interstate witness intimidation.[59] Conviction would carry a prison sentence of up to twenty years unless the crime resulted in a death, in which case the defendant could be sentenced to up to life in prison or death.[60] The CGAA would also eliminate intent to injure from the required elements of the federal versions of carjacking and, when committed within exclusive federal jurisdiction, assault with a dangerous weapon.[61] Additionally,

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[52] *See* 21 U.S.C. § 861(b)–(c) (1994).

[53] *See* S. 1236, § 4.

[54] 42 U.S.C. § 13862 (1994).

[55] *See* S. 1236, § 12(a)(3). Community prosecution programs assign prosecutors to specific localities in which they "develop special relationships with members of the police department, businesses, non-profit organizations, educational institutions, the faith community and, of course, the citizens themselves . . . . [They] become problem solvers who are looking to improve the quality of life for the communities they serve." Eric H. Holder Jr., *Community Prosecution*, PROSECUTOR, May–June 2000, at 31.

[56] S. 1236, § 12(b).

[57] 42 U.S.C. § 13867 (1994).

[58] *See* S. 1236, §§ 6–8.

[59] *See id.* § 6(a)(3). The Act would include in this crime anyone who, "by bribery, force, intimidation, or threat, directed against any person," intentionally traveled in interstate or foreign commerce or used the mail "to delay or influence the testimony of or prevent from testifying a witness in a State criminal proceeding," or caused "any person to destroy, alter, or conceal a record, document, or other object, with intent to impair the object's integrity or availability for use in such a proceeding." *Id.* For a description of one gang's power to kill and intimidate witnesses, see Neely Tucker, *Brutal Gang's Demise Leaves Legacy of Fear*, WASH. POST, Mar. 9, 2002, at A1.

[60] *See* S. 1236, § 6(a)(3).

[61] *See id.* § 8(a)–(b)(1). Currently under federal law, a carjacker is one who, "with the intent to cause death or serious bodily harm," takes or attempts to take a car from another "by force and violence or by intimidation." 18 U.S.C. § 2119(a) (1994). The crime carries a sentence of up to fifteen years in prison. *Id.* § 2119(a)(1). If serious bodily injury results, the maximum sentence rises to twenty-five years, and if death results a defendant can be sentenced to up to life imprisonment or death. *Id.* § 2119(a)(2)–(3). The CGAA would

the bill would expand the definition of interstate or foreign murder-for-hire such that intent that the hired person commit any "felony crime of violence against the person"—not only murder—would qualify the hirer for conviction.[62] Finally, the Act would double the maximum sentences for several violent crimes, and more than triple the maximum sentence for one.[63]

The CGAA appears to overhaul the federal government's approach to gangs. What little substantive change it does provide, however, may not be for the better. The Act's major elements include some good ideas along with several significant flaws. While the Act's provisions that would create HIIGAs are similar to those that established the HIDTAs,[64] there are important differences. The creation of HIDTAs was authorized by the same Act that established the Office of National Drug Control Policy ("ONDCP").[65] The Director of the Office, popularly known as the "drug czar," was assigned the responsibility of designating HIDTAs.[66] Though the ONDCP was to work in consultation with the Attorney General and other law enforcement officials, its grant of statutory authority freed it from excessive involvement with the office of the Attorney General.[67] The CGAA, on the other hand, envisions no similar "gang czar."

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strike the phrase "with intent to cause death or serious bodily harm" from the statute. S. 1236, § 8(a). Similarly, the bill would strike the phrase "with intent to do bodily harm" from the statute governing assault with a dangerous weapon in the special maritime and territorial jurisdiction of the United States. *Id.* § 8(b)(1). That crime is punishable by up to ten years in prison. 18 U.S.C. § 113(a)(3) (1994).

[62] S. 1236, § 8(c)(1). Traveling or causing another to travel in interstate or foreign commerce or using the mail in a murder-for-hire scheme now carries a sentence of up to ten years in prison. 18 U.S.C. § 1958(a) (1994). If personal injury results, the defendant can receive up to twenty years; if death results, the defendant must receive either death or life imprisonment, or a fine of up to $250,000. *Id.* Under the CGAA, these same penalties would apply if the hired person were supposed to commit any "felony crime of violence against the person." S. 1236, § 8(c)(1) (internal quotation marks omitted).

[63] The Act would increase the penalty for using or attempting to use force to intimidate a witness, from up to ten years in prison, 18 U.S.C. § 1512(b)(3) (1994), to up to twenty, S. 1236, § 7(a)(1)(C)–(D)(ii); for voluntary manslaughter within the special maritime and territorial jurisdiction of the United States, from up to ten years, 18 U.S.C. § 1112(b) (1994), to up to twenty, S. 1236, § 8(b)(2); for threatening, in support of racketeering, to murder, maim, assault with a dangerous weapon, or assault resulting in serious bodily injury, from up to five years, 18 U.S.C. § 1959(a)(4) (1994), to up to ten, S. 1236, § 8(c)(2)(A)(i)(II); for attempting or conspiring to commit murder or kidnapping in support of racketeering, from up to ten years, 18 U.S.C. § 1959(a)(5) (1994), to up to twenty, S. 1236, § 8(c)(2)(A)(ii); and for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, in support of racketeering, from up to three years, 18 U.S.C. § 1959(a)(6) (1994), to up to ten, S. 1236, § 8(c)(2)(A)(iii).

[64] *See* Anti Drug-Abuse Act of 1988, Pub. L. No. 100-690, § 1005(c), 102 Stat. 4181, 4186–4187 (1988) (current version at 21 U.S.C. § 1706(a) (1994)).

[65] *See id.* § 1002(a)–(b)(1).

[66] *See id.* § 1005(c)(1).

[67] *See* Charles Rangel, *Our National Drug Policy*, 1 STAN. L. AND POL'Y REV. 43, 52 (1989) ("The boundaries within which the drug czar can operate now appear to be very broad, with everything from research efforts and education to testing and enforcement under the ambit of his coordinating powers."). Representative Rangel (D-N.Y.) was one of

The Act instead adds to the duties of the Attorney General, demanding that he or she create each HIIGA and including no provision for the delegation of that responsibility.[68]

The criteria that would be used to select HIIGAs would also differ somewhat from those used to pick HIDTAs. The zones to be targeted in the war on drugs are those where drug-related activities "hav[e] a harmful impact in other areas of the country."[69] The places that would receive federal assistance in fighting gangs, on the other hand, are those affected by gang members "located in, or . . . relocated from, other States" or foreign countries[70] and those "affected by the criminal activity of gangs that originated in other States or foreign countries."[71] Thus, while HIDTAs attack the roots of the country's drug problem, HIIGAs would aim for the gang problem's outer branches.[72]

Interest in the supposed phenomenon of "gang migration" may have prompted the change in direction.[73] According to a federally sponsored report, the movement of gangs to new locations "has been mentioned with increasing frequency in State legislative task force investigations, government-sponsored conferences, and law enforcement accounts at the Federal, State, and local levels."[74] Gangs have appeared in places "once thought to be immune to the crime and violence associated with street gangs in large metropolitan areas."[75] If gang members were moving out of the inner cities, it might be reasonable to conclude that efforts to combat them there were working; shifting attention to their new homes, as the CGAA appears to do, would amount to chasing them down.[76] In this vein, the CGAA would require that at least ten percent of HIIGA financing go to rural states.[77]

This approach is problematic, however, because there is little evidence that movement of gang members from one place to another is re-

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the sponsors of the bill that created the ONDCP. *See id.*

[68] *See* S. 1236, § 11(b)(1).

[69] Anti Drug-Abuse Act, § 1005(c)(2)(C).

[70] S. 1236, § 11(b)(3)(B)(i), § 11(b)(3)(B)(ii).

[71] *Id.* § 11(b)(3)(C).

[72] Regardless of its law enforcement philosophy, the CGAA's explicit attention here and in its other elements to the interstate nature of the gang problem should protect it from invalidation under *United States v. Lopez*, 514 U.S. 549 (1995) (holding federal statute prohibiting gun possession in school zones unconstitutional because statute did not require such possession to affect interstate commerce).

[73] CHERYL L. MAXSON, U.S. DEP'T OF JUSTICE, GANG MEMBERS ON THE MOVE 2 (1998) (defining gang migration as "the movement of gang members from one city to another.").

[74] *Id.*

[75] *Id.* at 1.

[76] *See* 147 CONG. REC. S8209 (daily ed. July 25, 2001) (statement of Sen. Feinstein) ("As gangs have spread into rural areas and become more interstate and international, it has become more important than ever to ensure coordination between local, state, and federal law enforcement to combat gangs.").

[77] S. 1236, § 11(c)(3).

sponsible for the gangs' presence in new areas of the country: "[l]ocal, indigenous gangs usually exist prior to gang migration . . . ."[78] In one study, for example, just 3.9% of 1100 cities surveyed saw out-of-town gang members move in before the creation of local gangs.[79] In other surveys, every responding city with more than 250,000 residents continues to report a gang problem year after year.[80] It seems unlikely, then, that gangs are abandoning the cities for the countryside. The proposed focus of the HIIGAs on the outer reaches of the nation's gangs—even as gangs' presence in core areas remains strong—makes little sense.

Despite these differences between the proposed HIIGAs and the HIDTAs that came before them, proponents of the CGAA rely on the claim that the HIDTAs are effective. When she introduced Senate Bill 1236, Senator Feinstein said the HIDTA program "work[s] well and provides a good model."[81] She argued that the HIIGAs would be just as effective.[82] Government reports show that some HIDTAs do in fact work. The Central Valley HIDTA, covering nine counties in and around Sacramento, California, predicted that it would dismantle ten methamphetamine laboratories in its first year of operation,[83] which would have made barely a dent in the reported "hundreds, if not thousands" of such labs in the area.[84] Instead, the HIDTA exceeded expectations by taking down fifty-six labs in just eight months.[85] Similarly, the Puerto Rico/United States Virgin Islands HIDTA attributes the dissolution of more than sixty drug-related organizations to its work since 1995.[86]

Some of the reports from other HIDTAs, however, are not as positive. The one covering New York and New Jersey, for example, is able to claim only that it has "enhanced coordination and information sharing among law enforcement agencies."[87] Although coordination is a stated goal of the program, it is only a first step toward effective law enforcement. The Houston HIDTA, meanwhile, can offer only a mixed report: "The effectiveness of the investigation groups, through the cooperative

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[78] MAXSON, *supra* note 73, at 8.

[79] *Id.* at 8 fig.3.

[80] *See* NAT'L YOUTH GANG CTR., *supra* note 10, at 10 tbl.4. The estimated numbers of gangs and gang members in all cities with 25,000 or more residents dropped slightly from 1996 to 1998, by two percent and six percent, respectively. *See id.* at 12 tbl.9. Decreases in national averages, however, were even greater, at seven and eight percent, respectively, suggesting that current law enforcement efforts are more successful in rural than in urban areas. *See id.*

[81] 147 CONG. REC. S8209 (daily ed. July 25, 2001) (statement of Sen. Feinstein).

[82] *See id.* ("[T]he high intensity interstate gang activity area program will help reduce the gang problem in the same way [the HIDTA program has reduced the drug problem] . . . .").

[83] *See* OFFICE OF NAT'L DRUG CONTROL POL'Y, *supra* note 26, at 28.

[84] Evelyn Nieves, *Drug Labs in Valley Hideouts Feed Nation's Habit*, N.Y. TIMES, May 13, 2001, at § 1, 1.

[85] *See* OFFICE OF NAT'L DRUG CONTROL POL'Y, *supra* note 26, at 28.

[86] *Id.* at 114.

[87] *Id.* at 81.

spirit of the HIDTA program, has caused criminal organizations to change the ways they are operating."[88] Because the groups have not stopped functioning, however, this result is a partial success at best.

Some in the media have been less subtle in criticizing HIDTAs. In Las Vegas, an editorial objected to the designation of the area as an HIDTA, arguing,

> If there is a way to convince people to stop frittering their lives away in drug use, it's likely to be through stronger communities and families and churches and temples and treatment programs—all focuses of energy and money and public attention from which programs like HIDTA only divert us.[89]

The CGAA appears to address this type of complaint—which could also be made against narrow efforts to fight gangs—by earmarking forty percent of HIIGA spending for "community-based programs to provide crime prevention and intervention services."[90] The stipulation hints at the sort of non-traditional approach that the Act mostly overlooks, but it appears to have received little attention from the bill's drafters: the CGAA does not describe the kinds of programs that might be eligible for funding, nor does it define "community-based," "prevention," or "intervention."[91]

Other critics have charged that the HIDTAs are simply another way for politicians to bring money from Washington back to their home districts: "Every congressman has raised their hand and said, 'I need relief from this problem too.'"[92] The budget of the program has swelled from $25 million distributed over five Areas in 1990 to $191.3 million over twenty-six Areas in 2000.[93] Though some HIDTA budgets have been scaled back—the Houston Area's, for example, peaked at $11.9 million in 1992, but was just $9.6 million in 2000—none of the Areas has been dissolved in the program's first decade.[94] Doubts about the motivations behind the growth of HIDTAs, as well as about their effectiveness, suggest legislators should not be so quick to adapt the program to fight gangs.

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[88] *Id.* at 47.

[89] Editorial, *Secret Programs Not Accountable*, LAS VEGAS REV.-J., Jan. 31, 2001, at 6B. For a comparison of the merits of law enforcement and non-traditional methods of reducing drug use, see Debate, *The War on Drugs: Fighting Crime or Wasting Time?*, 38 AM. CRIM. L. REV. 1537, 1544–47 (2001).

[90] S. 1236, 107th Cong. § 11(c)(2)(B)(2001).

[91] *Id.* § 11.

[92] Glenn Puit, *Drug Enforcement Program Adds Las Vegas to Ranks*, LAS VEGAS REV.-J., Jan. 28, 2001, at 1B (quoting Mark A. R. Kleiman, a professor at UCLA's School of Public Policy and Social Research).

[93] OFFICE OF NAT'L DRUG CONTROL POL'Y, *supra* note 26, at 7.

[94] *See id.*

In addition to questions about its effectiveness, the HIDTA formula brings with it at least one internal contradiction that reappears in the proposal for HIIGAs. When designating HIIGAs, the Attorney General must consider both "the extent to which State and local law enforcement agencies have committed resources to respond to the problem of criminal gang activity in the area, as an indication of their determination to respond aggressively to the problem,"[95] and "the extent to which a significant increase in the allocation of Federal resources would enhance local response to gang-related criminal activities in the area."[96] The HIDTAs were established with nearly identical criteria.[97] Yet there is an inherent tension between these criteria: the first favors the creation of new Areas where there is substantial preexisting local financing, while the second favors creating Areas where there is a dearth of local money. Each idea has merit. Local investment may truly demonstrate local support for anti-gang efforts, which federal officials are entitled to demand before getting involved.[98] On the other hand, federal dollars should go where they are needed most, that is, where local dollars do not exist.[99] A federal program should choose which constituency it intends to serve; trying to serve both with the same program will probably lead to confusion.

Despite these problems, there is evidence that the central idea behind HIIGAs—coordinating the various levels and divisions of government—is a good one. According to a recent survey of anti-gang efforts, "[m]any cities and counties claim success in pooling resources with Federal and State agencies to combat youth and adult gangs and related violence."[100] The Los Angeles Metropolitan Task Force, for example, brought together local police, the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco, and Firearms ("ATF").[101] Created in the wake of the city's 1992 riots, the task force eventually led to nearly 300 federal and state convictions.[102] A Department of Justice handbook for local police and prosecutors explains how federal agencies can help fight gangs: the

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[95] S. 1236, 107th Cong. § 11(b)(3)(D) (2001).

[96] *Id.* § 11(b)(3)(E).

[97] *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 §§ 1005(c)(2)(B), 1005(c)(2)(D), 102 Stat. 4181, 4186–87 (current version at 22 U.S.C. §§ 1706(c)(2), 1706(c)(4) (1994)).

[98] *Cf. State Land and Water Conservation Act Oversight: Hearing Before the Subcomm. on National Parks and Public Lands of the House Comm. on Research*, 105th Cong. 16 (1997) (statement of Donald W. Murphy, Dir., Cal. Dep't of Parks and Recreation) (praising a federal conservation fund for requiring state investment "so the States have incentive and responsibility").

[99] *See Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 13 (2000) (statement of Janet Reno, Att'y Gen., Dep't of Justice) ("Federal dollars can . . . provid[e] communities . . . in crisis for violence with seed money to develop new programs.").

[100] JAMES C. HOWELL, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, U.S. DEP'T. OF JUSTICE, YOUTH GANG PROGRAMS AND STRATEGIES 30 (2000).

[101] *See id.*

[102] *See id.*

ATF can trace guns, analyze ballistics, and supply "buy money" for stings; the United States Marshals Service can contribute the resources of the federal witness protection program; the Immigration and Naturalization Service can deport aliens; and the Department of Housing and Urban Development can force property cleanup.[103] Federal agents, in return, can benefit from the information and experience local agents have gained in the field.[104] Though few challenge the idea that a multi-agency approach can work, only forty-nine percent of jurisdictions responding to a recent survey reported fighting gangs with a task-force method.[105] Of these, two-thirds were in large cities.[106] Perhaps, then, some sort of federal effort to promote such collaboration is necessary. The HIIGA proposal's underlying goal is worthwhile, but the mixed success of the HIDTAs it mimics raises questions about its structure.

Another element of the CGAA that deserves scrutiny is the proposal to use juvenile convictions for drug offenses to enhance adult sentences. According to Senator Feinstein, this provision would "ensure[ ] that career criminals do not escape higher sentences just because their most serious drug offenses occurred when they were . . . juvenile[s]."[107] The Senator argues that "[g]angs recruit minors because they know that children are often not fully aware of their actions."[108] Gangs, she claims, also recognize that juveniles will likely receive lighter sentences than adults,[109] presumably causing less of a disruption to gang operations. Theoretically, the CGAA would deter youthful offenders, because their juvenile convictions for drug crimes would come back to haunt them if they were convicted of illegal gun possession as adults.[110] Though advocates of the bill have not said as much, these stiffer adult sentences might also hurt gangs by affecting long-time, and presumably high-ranking, members.

Courts in many states have held that judges may consider juvenile records in sentencing, even absent a statute explicitly allowing them to do so.[111] Where such statutes do exist, however, they sometimes attract controversy. In Senator Feinstein's own state of California, certain adult felons are sentenced to five extra years for each of their previous convictions, including some juvenile adjudications.[112] The policy has been criticized for equating adult and juvenile convictions even though the court

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[103] *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, URBAN STREET GANG ENFORCEMENT 81 (1997).

[104] *See id.*

[105] NAT'L YOUTH GANG CTR., *supra* note 10, at 37 tbl.40.

[106] *Id.* at 36.

[107] 147 CONG. REC. S8209 (daily ed. July 25, 2001) (statement of Sen. Feinstein).

[108] *Id.* at S8208.

[109] *See id.*

[110] *See* S. 1236, 107th Cong. § 9 (2001) (amending 18 U.S.C. § 924(e)(2)(C) to include serious juvenile drug offenses as predicates for armed career criminal status).

[111] *See* Daniel E. Feld, Annotation, *Consideration of Accused's Juvenile Court Record in Sentencing for Offense Committed as Adult*, 64 A.L.R.3D 1291, 1294 (1976).

[112] *See* CAL. PENAL CODE § 667 (West 1999).

procedures that produce them are different;[113] juveniles in California, for example, do not have a right to a jury trial.[114] Some also claim the statute undermines the state's sealed juvenile records statute,[115] which is intended to serve as "a reward to the reformed juvenile . . . [that] provides motivation and incentive" to abandon criminal behavior.[116] One state legislator introduced legislation last year that would have, among other measures, removed juvenile adjudications from consideration in applying the habitual offender law.[117] The bill, however, was later revised to leave the current juvenile records provision in place.[118]

In Louisiana, it has been the courts that have limited the reach of a state habitual offender law that includes juvenile proceedings.[119] The Louisiana statute classifies a specific list of drug- and violence-related juvenile delinquency findings as equivalent to adult felony convictions,[120] an approach quite similar to the one the CGAA proposes.[121] A circuit of the Louisiana Court of Appeal has interpreted the statute literally and refused to count a finding of delinquency for second-degree battery as a prior conviction, because while a "second or subsequent aggravated battery" is listed among the juvenile offenses to be counted,[122] second-degree battery is not.[123] Challenges such as these to the use of juvenile records in adult sentencing, from both state legislatures and judiciaries, counsel caution before expanding that use at the federal level.

While none of the provisions intended to combat gang recruitment of juveniles would create new weapons for law enforcement, they do propose enlarging existing tools by lengthening sentences. According to a study in Wichita, Kansas—where juvenile adjudication records for felony-level offenses are, as sentence enhancers, equivalent to adult records—the use of juvenile records lengthens prison terms by as much as four years.[124] The juvenile records had an impact on fifty-nine percent of cases; in the remainder, the juvenile records were "inconsequential" or

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[113] *See* Tonya K. Cole, Note, *Counting Juvenile Adjudications as Strikes Under California's 'Three Strikes' Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 342–43 (1998).

[114] *See id.* at 342.

[115] CAL. WELF. & INST. CODE § 781(a) (West 1998).

[116] Cole, *supra* note 113, at 345.

[117] A.B. 1652, 2001-2002 Assem., Reg. Sess. (Cal. 2001) (as introduced by State Assemblywoman Jackie Goldberg (D-45th Assem. Dist.) on Feb. 23, 2001).

[118] *See id.* (as amended May 1, 2001).

[119] 15 LA. REV. STAT. ANN. § 529.1(A)(1) (West 1992).

[120] *See id.*

[121] *See* S. 1236, 107th Cong. § 9 (2001) (amending 18 U.S.C. § 924(e)(2)(C)).

[122] 15 LA. REV. STAT. ANN. § 529.1(A)(2)(h) (West 1992).

[123] *See* State v. Ayche, 717 So. 2d 1218, 1222 (La. Ct. App. 1998), *cert. granted on other grounds*, 723 So. 2d 952 (La. 1999).

[124] *See* Neal Miller, *National Assessment of Criminal Use of Defendants' Juvenile Adjudication Records*, *in* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NONCRIMINAL JUSTICE USES 27, 28 (1997).

the defendants' adult records were so extensive that using juvenile records was unnecessary.[125] Considering juvenile records in adult sentencing, however, may be of limited value to law enforcement because it will only add to the sentences of people found delinquent as children and convicted of other crimes as adults—that is, people who could already be going to prison under current law. Even the new crimes that would be created would work only alongside existing crimes. Recruiting a gang member would be illegal only if the criminal gang already existed and if the recruiter intended the recruit to commit a specific crime.[126] Longer sentences may have some deterrent effect, but single-minded reliance on them will probably do little to reduce juvenile crime and gang involvement.[127]

The CGAA's statutory redefinition of a gang is also problematic, in both its increase in the number of crimes that merit the title "gang crimes" and its reduction of the minimum size a group must reach to qualify as a gang.[128] The former change amounts to little more than increasing sentences for certain crimes. The latter has been attacked as expanding federal authority too far.

Adding to the list of gang predicates, combined with creating a new crime of gang-member recruitment, would increase sentences for a wide range of activities that are already criminal. While today only groups engaged in drugs or violence are considered gangs, the CGAA would apparently allow prosecution of groups of alien smugglers, kidnappers, and pimps, among others.[129] The Act's sponsors claim that the offenses to be added to the predicates of gang activity[130] are "commonly pursued by gangs."[131] Senator Feinstein argues that drug gangs launder their profits and commonly use explosive-based booby traps to protect their operations.[132] She claims that alien smuggling and harboring is especially

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[125] *Id.*

[126] *See* S. 1236, 107th Cong. § 2 (2001).

[127] *See Youth Violence Prevention Program: Hearing Before the Subcomm. on Labor, Health and Human Services, and Education, and Related Agencies of the Senate Comm. on Appropriations*, 106th Cong. 48 (2000) [hereinafter *Youth Violence Prevention Program Hearings*] (prepared statement of Eric H. Holder Jr., Deputy Att'y Gen., Dep't of Justice) ("[T]he positive trend we have observed in recent juvenile arrest rates is due, at least in part, to the balanced approach we have adopted in juvenile justice—one that combines prevention programs for at-risk youth with early intervention and sanctions that hold offenders accountable . . . .").

[128] *See* S. 1236, 107th Cong. § 5 (2001).

[129] *Compare* 18 U.S.C. § 521(c) (1994) *with* S. 1236, § 5.

[130] *See* S. 1236, § 5(a). These offenses include recruiting a gang member, committing various explosives offenses, demanding kidnapping ransom, threatening kidnapping across state lines, gambling illegally across state lines, laundering drug money, obstructing justice, bringing admissible or certain inadmissible aliens into the country illegally, bringing an alien into the country for the purposes of prostitution, conspiring or attempting to commit any of these crimes, and committing any state offense that would be one of these offenses if federal jurisdiction existed. *See id.*

[131] 147 CONG. REC. S8208 (daily ed. July 25, 2001) (statement of Sen. Feinstein).

[132] *See id.*

prevalent among gangs in San Francisco, Los Angeles, Boston, and New York.[133] These activities are already illegal, and organizing to perpetrate them is already punishable under the federal conspiracy statute.[134] By calling these acts not simply conspiracies but gang conspiracies, however, the CGAA would increase the penalty for such organization from five years in prison to ten.[135] To justify the adjective "gang," prosecutors would need to prove only that at least three conspirators, rather than two, took part in the conspiracy,[136] and that the conspirators engaged in a continuing series of these crimes, either at the time of charging or during the previous five years.[137]

When reducing the minimum size of a gang was proposed as part of the Senate's and House's juvenile justice bills in 1999,[138] the measure was opposed from both the left and the right. The American Civil Liberties Union, for example, argued that the new definition would be too inclusive: "Lowering the number of persons required to trigger prosecution under gang laws creates an overbroad provision that sweeps in persons who may have committed a crime together, but are not part of a gang."[139] Conservatives, too, opposed broadening the reach of the law[140] and criti-

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[133] *See id.*

[134] *See* 18 U.S.C. § 371 (1994).

[135] *Compare* 18 U.S.C. § 371 (1994) *with* 18 U.S.C. § 521(b) (1994). Professor Susan W. Brenner, evaluating state statutes that allow simultaneous charges of committing a crime and of committing that crime on behalf of a gang, calls this increasing liability for a single act "lateral compounding." Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 275–79 (1993).

[136] *Compare* 18 U.S.C. § 371 (1994) *with* S. 1236, 107th Cong. § 5 (2001).

[137] *See* 18 U.S.C. § 521(a) (1994).

[138] *See* S. 254, 106th Cong. § 204(a)(1)(A) (1999); H.R. 1501 106th Cong. § 704(a)(1)(A) (1999).

[139] RACHEL KING ET AL., AM. C.L. UNION, JUVENILE DELINQUENCY: COMPARISON OF PRESENT LAW AND TWO PROPOSALS IN THE 106TH CONGRESS, H.R. 1501 AND S. 254 AS PASSED BY THE HOUSE AND SENATE RESPECTIVELY, AND ACLU RECOMMENDATIONS 20 (1999), *available at* http://www.aclu.org/congress/l073099a.pdf.

[140] *See Federalism and Crime Control: Hearing Before the Senate Comm. on Govt'l Affs.*, 106th Cong. 75–76 (1999) [hereinafter *Federalism and Crime Control Hearings*] (statement of Sen. Fred Thompson (R-Tenn.), Chairman, Senate Comm. on Govt'l Affairs) ("We get the camel's nose under the tent—juvenile gangs, and then people who help juvenile gangs, then people who help people who help juvenile gangs, and we keep going in that direction."). Senator Thompson's comments, made on May 6, 1999, were echoed by the Supreme Court one month later when the Court struck down another anti-gang measure in *City of Chicago v. Morales*, 527 U.S. 41 (1999). In *Morales*, the Court invalidated a Chicago ordinance that called for the arrest of anyone who continued to loiter "with no apparent purpose" in the presence of a suspected gang member after a police officer's order to disperse. *Id.* at 47. The Court held the ordinance unconstitutionally vague, because it "require[d] no harmful purpose and applie[d] to nongang members as well as suspected gang members." *Id.* at 62. The CGAA would likely survive similar scrutiny because it would reach only people who committed crimes (in its expanded definition of a gang, and in its sentencing increases), *see* S. 1236, 107th Cong. §§ 4–10 (2001), or those who used others to commit crimes (in its recruitment and "use of a minor" provisions), *see* S. 1236, 107th Cong. §§ 2–3 (2001).

cized the explicitly gang-oriented elements of the bills as expanding federal authority into a matter better left to the states.[141]

Examining the causes of youth gangs' growth could suggest more effective methods of combating them. Certain factors such as the rise of the drug trade have aggravated the problems posed by inner-city gangs to the extent that a substantial investment in law enforcement such as that proposed by the CGAA probably is required.[142] There are other factors, however, that contribute to the spread of gang activity that also must be taken into account. As then-Deputy Attorney General Eric H. Holder Jr. once testified, "in law enforcement now, we have to not only do the traditional kinds of things that we are expected to do—investigate cases, make good prosecutions—but we also have to be concerned with the social factors that tend to breed crime as well."[143]

According to one Department of Justice report, "[m]ost people who study gangs agree that immigration has played a major role in the formation and spread of gangs for more than a century."[144] The CGAA's inclusion of alien smuggling as one of the new predicates of gang activity, as well as the HIIGAs' interest in areas affected by gang members from foreign countries, suggests that its architects, too, see a connection between gangs and immigration.[145] Rather than reclassifying the already criminal activity of alien smuggling as a criminal gang activity, it may be more productive to examine why generations of immigrants, from around the world, form gangs in the United States.[146] Research in this area and on how to ease immigrants' transition would be a useful government venture.

Looking beyond gangs to the more general social problem of youth crime, a central concern of the CGAA,[147] then-Secretary of Labor Alexis Herman once argued that "the best crime prevention strategy is in fact a jobs promotion strategy."[148] According to this theory, high unemployment

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[141] Reagan-era Attorney General Edwin Meese III went so far as to argue that the bills, if passed, "would have zero effect on violent crime or juvenile crime across the United States. It is the local officials, it is the local resources that are going to have the impact on this." *Federalism and Crime Control Hearings*, *supra* note 140, at 76 (statement of Edwin Meese III).

[142] *See* MILLER, *supra* note 8, at 43.

[143] *Youth Violence Prevention Program Hearings*, *supra* note 127, at 9 (statement of Eric H. Holder Jr., Deputy Att'y Gen., Dep't of Justice).

[144] MILLER, *supra* note 8, at 43.

[145] *See* S. 1236, 107th Cong. §§ 5, 11(b)(3)(B)(2) (2001).

[146] *See* MILLER, *supra* note 8, at 43 ("Gangs in the 1800's were composed largely of recently immigrated Irish, Jewish, Slavic, and other ethnic populations. Major waves of immigration during the past 25 years have brought in a [sic] many groups . . . whose offspring have formed gangs in the classic immigrant gang tradition.").

[147] *See* 147 CONG. REC. S8208 (daily ed. July 25, 2001) (statement of Sen. Feinstein) ("I am very troubled by the fact that many youngsters, some barely in their teens, are lured into gangs by older children and start a life of crime even before they start high school.").

[148] *Youth Violence Prevention Program Hearings*, *supra* note 127, at 13 (statement of Alexis M. Herman, Sec'y of Labor, Dep't of Labor).

rates and low education levels are often "inextricably linked" to high crime rates.[149] Federal programs such as Job Corps[150] and youth opportunity grants[151] operate in part under this rationale.[152]

Other theories use sociological methods in attempting to explain why young people get involved with gangs, focusing on factors such as the absence of father figures in many children's lives and the influence of the mass media.[153] One way these problems can be addressed is through community programs such as Boys and Girls Clubs that provide positive examples for youth.[154] According to one Columbia University study, federally supported Boys and Girls Clubs in public housing projects reduced the juvenile crime rate by thirteen percent, increased school attendance, and improved academic performance.[155] Many of these non-traditional approaches to law enforcement depend, like the CGAA's HIIGA proposal, on interagency cooperation.[156] Unlike that of the HIIGAs, however, this cooperation functions at an interdisciplinary level, a distinction that draws further attention to the narrow view of law enforcement underlying the CGAA.[157]

Another useful approach would be to follow the lead of areas that have succeeded in fighting gangs.[158] One study identified thirteen cities and towns where law enforcement reported gang problems in the 1970s but did not do so between 1990 and 1995.[159] The largest of these was Charleston, South Carolina, with a 1995 population of 80,400, and the smallest was Castroville, California, population 5,300.[160] Eleven of the thirteen were located in California, Massachusetts, or Pennsylvania; the policies of those states should also be considered.[161] Though the study is only a survey of these success stories, it points out that research into the

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[149] *Id.* at 14 (statement of Alexis M. Herman, Sec'y of Labor, Dep't of Labor).

[150] *See* 29 U.S.C. §§ 2881–2901 (1994).

[151] *See* 29 U.S.C. § 2914 (1994).

[152] *See Youth Violence Prevention Program Hearings*, *supra* note 127, at 13 (statement of Alexis M. Herman, Sec'y of Labor, Dep't of Labor).

[153] *See* MILLER, *supra* note 8, at 45–46. Such theories argue, for example, that gangs provide models of masculinity to boys who lack such models at home, and that the news and entertainment industry have glorified gangs. *See id.*

[154] *See Youth Violence Prevention Program Hearings*, *supra* note 127, at 46 (prepared statement of Eric H. Holder Jr., Deputy Att'y Gen., Dep't of Justice).

[155] *See id.*

[156] *See id.* at 17 (prepared statement of Alexis M. Herman, Sec'y of Labor, Dep't of Labor).

[157] *See id.* ("Staff from across the Department of Labor, as well as other Departments, including Justice, Education, Health and Human Services, and the Corporation for National Service have been working to connect our youth programs.").

[158] *See* MILLER, *supra* note 8, at 46–47.

[159] *See id.* at 18 tbl.7. The thirteen cities and towns were Camarillo, Castroville, Manteca, and South Pasadena, California; Lake Bluff, Illinois; Belmont, Milton, and Winthrop, Massachusetts; Bristol Township, Cheltenham, Norristown, and West Chester, Pennsylvania; and Charleston, South Carolina. *See id.*

[160] *Id.*

[161] *See id.*

methods that were used in these places could reveal useful approaches.[162] These approaches could then be spread around the country through grants encouraging them, an approach that would appeal to those wary of expanding the federal criminal code.[163]

Compared to the many areas the CGAA could have pursued but did not—immigration, underemployment, family problems, the media, and apparent local successes—the changes the bill would make to current gang policy are minor. The most significant move would be the creation of HIIGAs, which might or might not work but would certainly cost several hundred million dollars. Most of the bill's other provisions would simply add a few years to the sentences of criminals who are already being convicted under current law. The bill's grant provision would increase financing dramatically, but at the same time would change the rules to allow spending the money not on community-based solutions but on more prosecution. The persistence of the gang problem suggests that Congress should look for new approaches rather than simply tinkering with old ones through the Criminal Gang Abatement Act.

—*Andrew E. Goldsmith*

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[162] *See id.* at 47.

[163] *See Federalism and Crime Control Hearings*, *supra* note 140, at 76 (statement of Gerald B. Lefcourt, former President, Nat'l Assoc. of Crim. Def. Lawyers) (describing H.R. 1501's use of grants to states rather than expansion of federal agencies as "a better way to go than to create a Federal bureaucracy").

SCHOOL TAX CREDITS

On January 31, 2001,[1] Representative Ron Paul (R-Tex.) introduced the Family Education Freedom Act ("FEFA"),[2] a bill designed to amend the Internal Revenue Code to grant a tax credit[3] for the cost of attending any "qualified educational institution."[4] This bill is a comprehensive attempt to improve the quality of schools through national legislation. The bill failed to obtain passage in the 106th Congress and, given the real differences between Republicans and Democrats on the issue, the enactment of any future tax credits legislation remains doubtful. Regardless of whether this bill is ultimately enacted, the Act exemplifies the important new efforts being made to give parents more choice in the schools to which they send their children.

FEFA is motivated by the national debate over how to improve the public education system.[5] Since the early 1980s, numerous studies have exposed various problems in American public schools.[6] The blemishes in K–12 education include overcrowding[7] and crime in some poorer urban public schools,[8] making these schools an uncomfortable learning environment for students. In addition, school policies have often hampered the ability of administrators and teachers to educate their students. Because public schools are often heavily regulated by rigid state and local rules, administrators can be "handcuffed" in their ability to be flexible

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[1] 147 CONG. REC. E77 (weekly ed. Jan. 31, 2001) (statement of Rep. Paul).

[2] Family Education Freedom Act of 2001, H.R. 368, 107th Cong. (2001). Eleven cosponsors support the bill, including Representatives Roscoe Bartlett (R-Md.), Charles Norwood (R-Ga.), and Robert Schaffer (R-Colo.). *See id.*

[3] Educational tax credits are income tax breaks at the state or federal level. *See* Note, *Education Vouchers and Tuition Tax Credits: In Search of Viable Public Aid to Private Education*, 10 J. LEGIS. 178, 179 (1983). Under such plans, parents who pay tuition or related educational expenses can subtract that amount from their income taxes, up to the amount of the credit. *See id.*

[4] *See* H.R. 368, § 2. "The term qualified educational institution means any educational institution (including any private, parochial, religious, or home school) organized for the purpose of providing elementary or secondary education, or both." *Id.* (internal quotation marks omitted).

[5] The American school system is mostly public, with eighty-eight to ninety percent of students attending public schools. Richard Campbell & Lawrence Hepburn, *Educational Choice: Is it Really a "Panacea" for What Ails American Schools?*, 2 KAN. J.L. & PUB. POL'Y 61, 62 (1992).

[6] *See, e.g.*, NAT'L CENTER FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION (2001); NAT'L GOVERNORS' ASS'N, TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION (1986); NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), *available at* http://www.ed.gov/pubs/NatAtRisk.

[7] *See generally* U.S. DEP'T OF EDUC., BACK TO SCHOOL REPORT ON THE BABY BOOM ECHO: AMERICA'S SCHOOLS ARE OVERCROWDED AND WEARING OUT (1998), *available at* http://www.ed.gov/pubs/bbecho00.

[8] *See* Interview by New Perspectives Quarterly with J. Anthony Lukas, Pulitzer Prize winner and busing expert (fall 1990), *available at* http://www.npq.org/issues/v74/p38.html [hereinafter Lukas Interview].

and authoritative in addressing student and parent concerns.[9] Reports have also questioned the caliber of some public school teachers, arguably a result of the low pay teachers receive and the weak accountability systems in place to monitor them.[10] In general, the poor caliber of public education is largely a result of the fact that, according to a recent congressional finding, "many elementary and secondary schools [are] structured according to models that are outdated and ineffective."[11] Nevertheless, there has been a dearth of recent efforts to address public schools comprehensively.

The problems with the public education system have led to low pupil performance, and an ongoing achievement gap between Americans and the rest of the world, and among Americans of different classes and races. Due to a combination of flawed schools and low achievement standards,[12] Americans have consistently performed poorly on standardized tests, and evidence indicates that their scores may have even fallen in recent years.[13] As a result, American pupils consistently score lower, especially on math and science tests, than school children from other countries.[14] The public education system has also been criticized for producing "a widening and unacceptable chasm between good schools and bad, between those youngsters who get an adequate education and those who emerge from school barely able to read and write." [15] Poor and minority children tend to bear the brunt of poor schooling, as they tend

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[9] Nick Weller, *School District's Troubles Reveal System's Flaws*, CASCADE COMMENTARY (Cascade Policy Institute, Portland, Oreg.), June 30, 2001, at 1, *available at* http://www.cascadepolicy.org/edpubs.asp. *Cf.* JOHN CHUBB & TERRY MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 186–87 (1990) (arguing that the bureaucratization of public schools makes them less flexible and therefore less effective).

[10] *See* Michael Kirst & Allan Odden, *National Initiatives and State Education Policy*, 4 STAN. L. & POL'Y REV. 99, 105–06 (1992); *see also* Dave DeSchryer et al., *Fifteen Years After* A Nation At Risk, PBS ONLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/vouchers/howbad. One solution to increasing skills and performance of teachers is outreach and training. For instance, Harvard University's School of Education, Kennedy School of Government, and Joan Shorenstein Center on the Press, Politics, and Public Policy, in collaboration with institutions such as the School of Journalism at the University of Texas at Austin, have implemented a national teacher training institute in a variety of subjects, including history, social studies, English, humanities and communication. *See generally The Media and American Democracy Program*, *at* http://www.teachingdemocracy.gse.harvard.edu.

[11] Jack Kramer, *Vouching for Federal Educational Choice: If You Pay Them, They Will Come*, 29 VAL. U. L. REV, 1005, 1006 n.8 (1995) (quoting H.R. 2460 § 101(1)(a), 102d Cong. (1991)).

[12] *See* Kirst & Odden, *supra* note 10, at 99–100.

[13] *See* DeSchryer et al., *supra* note 10. For example, literacy among fifteen to twenty-one-year-olds has fallen since 1984, with a resulting twenty-five percent of twelfth graders reading at below standard levels. *See id.* SAT scores have also fallen seventy points from 1963. *See id.*

[14] *See id.* (stating that on the Third International Math and Science Survey, "American 12th graders ranked 19th out of 21 industrialized nations in mathematics achievement and 16th out of 21 countries in science.").

[15] *A Nation Still At Risk: An Education Manifesto,* THE CENTER FOR EDUCATION REFORM ONLINE, Apr. 30, 1998, *available at* http://edreform.com/pubs/manifest.htm.

more than other groups to be enrolled in less effective schools in poorly financed school districts.[16]

In response to flaws in the public education system many commentators are beginning to advocate innovative new solutions. Some states, for example, have sought to adopt school choice systems.[17] Generally, school choice involves an umbrella of programs designed to allow students and parents to select freely among schools so that even lower income families can send their children to their school of choice.[18] Its basic premise is that allowing parents to select their children's school will foster competition, forcing schools to improve their services in order to attract pupils.[19] Choice programs range from choice mechanisms that are restricted to public schools to plans allowing vouchers to be used for enrollment in religious schools.[20] Tax credits are the latest innovation in implementing school choice.

In 2001, Representative Paul introduced FEFA in an attempt to "restore a parent's right to choose how best to educate [his or her] own child."[21] The Act would give taxpayers a dollar-for-dollar tax credit up to $3,000 per child for money parents spend on tuition and expenses at any qualified public or nonpublic elementary or secondary school.[22] The bill

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[16] *See id.*

[17] *See* Campbell & Hepburn, *supra* note 5, at 61; *see also* Joe Nathan, *More Public School Choice Can Mean More Learning*, EDUC. LEADERSHIP, Oct. 1989, at 51 (explaining that forty states have school choice programs of some sort). By 2001, education tax credit bills existed in six states, *see* Todd Ziebarth, *School Choice: State Actions*, ECS STATE NOTES, (Education Commission of the States, Denver, Colorado), *available at* http://www.ecs.org/clearinghouse/13/75/1375.htm (last updated Dec. 2001), and were introduced in at least ten more, *see* Jennifer Garrette, *Progress on School Choice in the States*, BACKGROUNDER, May 16, 2001, at 2 (Heritage Foundation, Washington, D.C.); *available at* http://www.heritage.org/library/backgrounder/bg1438.es.html. For example in 1985, Minnesota created a system of choice among public schools. Minnesota's programs allow students in grades kindergarten through twelve to choose their schools regardless of district boundary lines, so long as racial balances are not disrupted. *See* NANCY PAULU, U.S. DEPT. OF EDUC., IMPROVING SCHOOLS AND EMPOWERING PARENTS: CHOICE IN AMERICAN EDUCATION, 3 (1991) (delineating choice programs in several states). Arizona now offers a $500 tax credit for donating to a school tuition fund; this program was upheld by the Arizona Supreme Court against an Establishment Clause challenge, *see* Kotterman v. Killian, 972 P.2d 606, 616 (Ariz. 1999), and denied certiorari by the United States Supreme Court. 528 U.S. 921 (1999); *see also* Mark Walsh, *High Court Leaves Tuition-Tax-Credit Ruling in Place*, EDUC. WEEK, OCT. 13, 1999, *available at* http://www.edweek.org/ew/ewstory.cfm?slug=07scotus.h19&keywords=%22high%20court%20leaves%22.

[18] *See* Kramer, *supra* note 11, at 1015.

[19] *See* Campbell & Hepburn, *supra* note 5, at 62.

[20] *See* Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J.L. & EDUC. 525, 526 (1998); *see also* Henry M. Levin, *Educational Choice and the Pains of Democracy*, *in* PUBLIC DOLLARS FOR PRIVATE SCHOOLS: THE CASE OF TUITION TAX CREDITS 31–38 (Thomas James & Henry M. Levin eds., 1983).

[21] 147 CONG. REC. E74 (weekly ed. Jan. 31, 2002) (statement of Rep. Paul). Representative Paul evidenced his strong belief in school choice by calling it "a fundamental freedom that has been eroded by the increase in federal education expenditures and the corresponding decrease in the ability of parents to provide for their children's education out of their own pockets." *See id.*

[22] *See* H.R. 368, 107th Cong. § 2 (2001).

would provide a credit to all parents, regardless of whether their children attend public, private, or home-based schools, and would allow them to spend money they normally would send to Washington directly on their children's education.[23]

Unlike vouchers, whose funds are disbursed up front, a tax credit is more like an income tax break. Tax credits are subtracted from the computed tax liability of an individual at the end of the taxable year.[24] To take advantage of the credit, therefore, taxpayers would need to have taxable income and be willing and able to pay tuition themselves and wait to be reimbursed until they received their tax returns.[25] Under credit plans, parents who pay educational expenses such as tutoring, texts, computers, extracurricular activities, and even private school tuition can then subtract that amount from their income taxes, up to the amount of the credit.[26]

Supporters of a school tax credit argue that it would allow parents to express their preferences in schooling their children. Educational choice is not a new concept. Economist Milton Friedman first developed the idea of school choice, positing that allowing parents to choose from many sources of education for their children would inject competition into the education market.[27] Friedman argues that education is like any other market: the less competition, the lower the quality of service provided at higher cost.[28] School choice is especially important in allowing poorer families to join the educational marketplace since they would not otherwise have the income to take advantage of choices among more expensive schools that are already available to the more affluent.[29] Since

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[23] *See id.*; *see also* 147 CONG. REC. E74 (weekly ed. Jan. 31, 2002) (statement of Rep. Paul).

[24] *See* PATRICK ANDERSON ET AL., MACKINAC CENTER FOR PUBLIC POLICY, THE UNIVERSAL TUITION TAX CREDIT: A PROPOSAL TO ADVANCE PARENTAL CHOICE IN EDUCATION 17 (Nov. 13, 1997), *available at* http://www.mackinac.org/S1997-04.

[25] *See* Carrie Lips & Jennifer Jacoby, *The Arizona Scholarship Tax Credit Giving Parents Choices, Saving Taxpayers Money*, POL'Y ANALYSIS (Cato Institute, Washington, DC) Sept. 17, 2001, at 4, *available at* http://www.cato.org/pubs/pas/pa-414es.html (discussing a scholarship tax credit).

[26] *See* Note, *supra* note 3, at 178–79.

[27] *See* Milton Friedman, THE ROLE OF GOVERNMENT IN EDUCATION, IN ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solow ed., 1955), *cited in* Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 247 n.22 (1996).

[28] *See* MILTON FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 152–58 (Harcourt Brace Jovanovich 1990). Moreover, Caroline Hoxby of Harvard University studied the natural variations in the level of competition between schools districts in the country. *See* Caroline Hoxby, *Analyzing School Choice: Reforms that Use America's Traditional Forms of Parental Choice*, *in* LEARNING FROM SCHOOL CHOICE 143–44 (Paul E. Peterson & Bryan Hassel eds., 1998). She found that an increase of one standard deviation in the amount of competition in an area is associated with a two percentage point increase in student reading and math scores and a seventeen percent decrease in per pupil spending. *See id.*

[29] *See* ANDERSON ET AL., *supra* note 24, at 7.

parents have more monetary options with education tax plans, they are able to make decisions about sending their children to their preferred schools.[30]

School tax credits could thus theoretically make schools more immediately accountable to parents. With tax credits, parents receive money back from taxes, which they can use to educate their children.[31] Since parents will thereby become directly responsible for paying all or part of their children's tuition, tax credit proponents argue that parents will begin to play a larger role in their children's education.[32] Parents will increasingly police the quality of their children's schools, and, with their newfound economic independence, they will only choose to spend money on the most effective schools.[33] Tax credits would thereby compel public schools to compete with higher quality nonpublic schools for students,[34] and "[s]chools that compete for students, teachers, and dollars will, by virtue of their environment, make those changes that allow them to succeed."[35] Low performing public schools that compete with higher quality schools will be forced to improve.[36] Since the choices provided by tax credits allow parents to penalize poorly performing schools immediately by withdrawing money, moreover, tax credits may be the best way to force rapid change in public schools.[37] This effect will be height-

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[30] *See id.* at 14–15.

[31] *See* Note, *supra* note 3, at 178–79. Since over ninety percent of school funding comes from state and local governments, however, many tax credit proponents claim that federal tax credits should function as a "spur" to implementing school choice through state tax credits; only state school tax credits could truly "revolutionize" K–12 education. Darcy Olsen, Carrie Lips & Dan Lips, *Fiscal Analysis of a $500 Federal Education Tax Credit to Help Millions, Save Billions*, POL'Y ANALYSIS (Cato Institute, Washington, D.C.), May 1, 2001, at 12, *available at* http://www.cato.org/pubs/pas/pa-398es.html.

[32] *See* Darcy Olsen, Editorial, *Give Parents the Reins*, USA TODAY, Jan. 24, 2001, at 10A.

[33] *See id.*

[34] *Cf.* Larry Armstrong, *California May Choose School Choice*, BUS. WK., Oct. 18, 1993, at 34 (quoting the orchestrator of the signature program for Proposition 174—which would have allowed parents to choose their child's school by providing them with a $2,600 voucher—as stating "[e]ducation is now just a monopoly . . . . Our objective is to bring the forces of the marketplace to bear to force public schools to improve"); *see also* CHUBB & MOE, *supra* note 9 (citing a ten-year study of 500 schools that concludes that the only way to improve the quality of education is to remove layers of bureaucracy and make the public education system responsive to the demands of consumers). By bringing competition into education and forcing public schools to increase the quality and efficiency of the schools' services, both private and public students would benefit. *See* ANDERSON ET AL., *supra* note 24, at 10.

[35] NAT'L GOVERNORS' ASS'N, TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION 12, (1986).

[36] *See* ANDERSON ET AL., *supra* note 24, at 9.

[37] *See* Olsen, *supra* note 32, at 10A. Darcy Olsen, Director of Education and Child Policy at the Cato Institute, explains:

> Parental choice, through such mechanisms as tax credits for education purposes from tuition to tutoring, makes educators accountable immediately, not in another 10 or 20 years. Until parents can demand that schools do it right and do it now,

ened by the fact that tax credits go to all parents, forcing schools to compete for all students. In the end, schools will become more effective, as "schools that fail to produce will not attract students and be forced to shut down."[38] This accountability system must, however, "be used carefully and introduced cautiously" so that low-performing students do not get left behind.[39]

In general, education tax credits may be more effective in improving the education system than spending more money on public education. Spending more money on the education, by itself, may not improve quality measured by graduation and dropout rates. For example, a recent analysis concludes that neither graduation nor dropout rates are significantly affected by public expenditures per student.[40] Thus, giving additional public funds to the public education system, without structural reform, may only "make the nation's schools more expensive, not better."[41] Since the competitive market created by tax credits seeks to induce holistic reforms in the education system, tax credits could improve education significantly as compared to increased funding alone.[42]

Supporters of tax credits further argue that the credits would promote overall efficiency in education. Private school tuition, on average, is less than the annual per-pupil expenditures in public schools,[43] which could encourage parents to transfer their children to private schools if given the option through tax credits. Since school tax credits thus may

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so-called accountability measures amount to little more than fresh paint on an old jalopy.

See id.

[38] Timothy T. Blank, *The Milwaukee Parental Choice Program, its Policies, and its Legal Implications*, 107 REGENT U.L. REV. 121, 133 (1991). In 1990, the Wisconsin legislature enacted a school choice program that provides nonsectarian private schools with funds that would have gone to the public school district. *See id.* at 111. Asked why she supported the Milwaukee plan, Annette "Polly" Williams (a black liberal Democrat who twice served as Jesse Jackson's campaign manager) explained the effect the plan would have on administrators at poorly performing public schools: these schools "are worried that kids will get a better education in this town at schools that cost half the amount that kids will spend on the public schools. In their shoes, I'd be worried, too." *Id.* at 134.

[39] *See* Helen Ladd, *School-Based Educational Accountability Systems: the Promise and the Pitfalls*, 54 NAT'L TAX J. 385, 398 (2001) (stating that abuse of school choice could induce "principals and teachers to avoid the schools serving students who are most difficult to educate.").

[40] *See* ANDERSON ET AL., *supra* note 24, at 21 n.53 (citing WILLIAM ALLEN & EUGENIA TOMA, A NEW FRAMEWORK 102–03 (1996) (stating that "there is less than a one-in-twenty chance that public expenditures per student on their own cause a change in graduation or dropout rates.")).

[41] Edward M. Gramlich, Setting National Priorities: 1992, Distinguished Lecture on Economics in Government, *in* J. ECON. PERSPECTIVES, Spring 1992, at 7–8 (citing John Chubb & John Hanusheck, *Reforming Educational Reform*, *in* SETTING NATIONAL PRIORITIES: POLICIES FOR THE NINETIES 213–47 (Henry J. Aarom ed., 1990)); *see also* ANDERSON ET AL., *supra* note 24, at 21 ("[S]imply putting money into the current system has not worked in the past and will not in the future.").

[42] *See* ANDERSON ET AL., *supra* note 24, at 21.

[43] *See id.* at 52.

encourage transfer to private schools, the community's financial obligations to public schools and schools in general might be relaxed.[44] If a pupil can be enticed by a tax credit to move to a better quality and at the time cheaper school, the public might save the expenses for that student's attendance at a public institution.[45] School tax credits, like scholarship tax credits, would save taxpayers money over time by reducing the tax burden for those who pay private school tuition as well as school taxes.[46]

In addition, education tax credits could accomplish all of these goals without at the same time increasing government regulation of private schools. Tax credits flow to individuals rather than to schools; to the extent that the government program would enter schools, it would do so only through the private choices of many individuals.[47] Thus, the tax credit program would be involved directly with parents rather than schools.[48] The government would not, however, impose any more regulatory burden on parents than it would on any other taxpayer—it would only require them to keep receipts of their educational expenses in order to receive the tax credit. Indeed, a persuasive case can be made that "tax credits remove governmental interference in education by allowing families to retain enough of their personal income to afford to choose safer and better schools for their children."[49]

Tax credits for education could also decrease social conflicts in education. School choice may induce some middle-class families to stay in the city rather than move to the suburbs to escape failing urban public schools; the resultant city community would thereby remain more diverse and connected across class and race lines.[50] While little is known about

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[44] *See* JAMES S. CATTERALL, TUITION TAX CREDITS: FACT AND FICTION 19 (1983). While state and local governments would save on public school costs as a result of school tax credits, the federal government would lose funds as a result. *See* Olsen, Lips & Lips, *supra* note 31, at 3.

[45] *See id.*; *see also* Lips & Jacoby, *supra* note 25, at 2 (arguing that "taxpayers save money when students who would have been educated at public expense transfer to non-public schools.").

[46] *See* Olsen, Lips & Lips, *supra* note 31, at 2. Some supporters of education tax credits even make the controversial claim that parents who do not send their children to public schools should not have to pay for, or contribute to, the operation of public schools through property taxes, federal and state income taxes, sales taxes, and excise taxes. *See, e.g.*, CATTERALL, *supra* note 44, at 17. Relief of this extra burden comes from use of tax credits for independent or private schools. *See id.*

[47] *See* Family Education Freedom Act, H.R. 368, 107th Cong. § 2 (2001); *see also* Mueller v. Allen, 463 U.S. 388, 399 (1983).

[48] *See id.* at 165. The sole state administrative involvement would be in determining who is eligible for the program. *See id.*

[49] *See* MATTHEW BROUILLETTE, MACKINAC CENTER FOR PUBLIC POLICY, SCHOOL CHOICE IN MICHIGAN: A PRIMER FOR FREEDOM IN EDUCATION 29 (Nov. 13, 1997), *available at* http://www.mackinac. org/s1999-06.

[50] *See* Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 431 (2000) (citing John Norquist, THE WEALTH OF CITIES: REVITALIZING THE CENTERS OF AMERICAN LIFE 83–98 (1998)).

the underlying causes of "white flight," the phenomenon may stem in part from economic incentives to depart from mixed or poor all-black cities, which generally have higher taxes and substantially inferior public services.[51] These services include public schools, where crime is often rampant and children feel unsafe.[52] Such school and community problems are "[a]bsolutely" a reason parents take their children out of urban public schools.[53] Thus, improving public schools, as tax credits are designed to do, might encourage parents to keep their children in urban public schools. Preventing middle-class flight to suburban areas may then create a sense of connectedness and goodwill among members of the community, allowing them to become more socially compatible.

Finally, proponents of educational tax credits argue that school choice fostered through tax credits for all schools would serve public values more effectively than the existing public school system.[54] John Chubb of the Brookings Institute and Terry Moe of the Hoover Institute argue that: "[I]n terms of general goals, public schools place significantly greater emphasis on basic literacy, citizenship, good work habits, and specific occupational skills, while private schools—regardless of type—are more oriented toward academic excellence, personal growth and fulfillment, and human relations skills."[55] In other words, the value of attending private instead of public schools, as they currently exist, is that the former may place greater emphasis on such pertinent values as overall excellence. In addition, private schools increase the diversity of schooling options,[56] which is important to ensure that students are allowed to "choose a type of school best fitted for [their] individual learning needs."[57] The fact that students prosper at schools with which they share a "common mission" is borne out by studies of private school students; these indicate that children who attend Catholic schools—where

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[51] *See* Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1850–51 (1994).

[52] *See* Lukas Interview, *supra* note 8.

[53] *Id.*

[54] *See* Macedo, *supra* note 50, at 450–51 (citing Michael McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, *in* NOMOS XLIII: MORAL & POLITICAL EDUC. (Stephen Macedo & Yael Tamirs eds., 2000).

[55] Campbell & Hepburn, *supra* note 5, at 66 (quoting John E. Chubb & Terry Moe, *No School is an Island: Politics, Markets, and Education*, POL. EDUC. ASS'N Y.B. 1987, at 131, 138).

[56] *See* CATTERALL, *supra* note 44, at 18. Private schools allow for a more tailored program for students, for example providing religious training, teaching in languages other than English, and increased programs for gifted students. *See id.*; *see also* Campbell & Hepburn, *supra* note 5, at 68; ANDERSON ET AL., *supra* note 24, at 9 (arguing that school choice "allows educational programs to be tailored to the needs of individual parents, not simply provided as a one-size-fits-all package.").

[57] Blank, *supra* note 38, at 135.

such a central mission tends to be strongest—produce higher test scores than children from public schools.[58]

Some supporters of FEFA even believe it does not go far enough. Because evidence suggests that tax credits alone may not solve the flaws in the education system, they argue that the best school reform plan would include vouchers, a potentially stronger tool for promoting equal educational attainment and further empowering parents.[59]

On the other hand, opponents of tax credits programs like FEFA claim that market-based approaches have no place in education. They argue that schools are not only a private right of parents and students, but also a public good that cannot be relinquished to the laissez faire models of economics.[60] Public schools are important to fostering "national unity and social cohesion" and to inculcating social values through a compulsory curriculum that allows the country to survive as a unit.[61] In contrast, private schools may be more geared towards private values, such as personal growth.[62] Thus, any system designed to move children into private schools and establish an entirely private system of schooling would sacrifice the good of the community to the selfish choices of individual families.[63] In addition, since parents are often not informed enough about education choices, it may be a doubtful proposition to even argue that parents could follow the best interests of their own children in selecting schools.[64]

Another potential problem of applying a competitive model to public schools is the risk of furthering, rather than correcting, inequalities among students. Market-based approaches have most often been criticized for their "incapacity to address issues of equity and redistribu-

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[58] Blank, *supra* note 38, at 136; *see also* Campbell & Hepburn, *supra* note 5, at 62. *But see* JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 107 (1999) (discussing data from the Milwaukee choice program, which indicate that students' math scores have improved as a result of the plan, while their reading scores have actually fallen).

[59] *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (Chicago, IL: University of Chicago Press, 1962), *cited in* HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE 25–28 (2000).

[60] *See* Campbell & Hepburn, *supra* note 5, at 63–64.

[61] *Id.* at 66; *see also* Levin, *supra* note 20 at 19 (arguing that public schools help students fit comfortably within their communities by, for example, teaching them "the dominant forms of work and work organizations as well as the requirements for participating in those organizations."). While bureaucracy is often decried as "uncomfortably restraining," the bureaucracy in public schools fosters unity among students by enforcing a common curriculum to "reflect our commitment to citizenship and other public goals." Campbell & Hepburn, *supra* note 5, at 63.

[62] *See supra* text accompanying note 55.

[63] *See* Campbell & Hepburn, *supra* note 5, at 63.

[64] *See id.* at 69–70. Opponents of school choice programs stress the irony of the new focus on parental choice at this time when "the social role of the family in . . . society has been compromised, and the willingness and ability of all parents to assume the responsibility for making informed educational choices on behalf of their children is being seriously questioned." *See id.* at 62.

tion."[65] Thus, tax credit opponents fear that education tax credits, while touted as being open to all, will fail to aid economically disadvantaged families who need the most help. Tax credits, which are not refundable, are of no use to families who have little or no income,[66] who may not be able to pay income taxes to begin with.[67] School tax credit legislation would not provide the underprivileged with an opportunity to spend money they do not have on tuition and books. In addition, given rising private school costs, FEFA's $3,000 cap on credits may provide parents with only a fraction of the assistance they need to send their children to a private school of their choice. To compound the effect, according to social science research, low-income and less educated families may know less about educational choice options, decreasing their ability to take advantage of tax credit plans.[68] Thus, if a tax credit fails to change a family's option of schools, the family's choice has not been enhanced.

The bill thereby fails to increase the ability of disadvantaged, often minority, groups to enroll in private schools. For example, pupils with special needs, who are notably underrepresented in private schools, would not as easily share the benefits of school tax credits.[69] Poor families would also not use school tax credits as frequently as more economically fortunate families since they would not be able to fund their children's education up front.[70] In contrast, tax credits would only increase the ability of wealthier parents to pay higher tuition at better schools, leaving less-privileged children behind at the less effective schools.[71] The rich students could flee to the best schools, widening the gap between well-to-do and poor school districts and effectively creating a "two-tiered educational system consisting of nonpublic schools and pauper schools."[72] Higher-income, white children with normal educational needs

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[65] *See id.* at 64.

[66] *See, e.g.*, Note, *Tax Breaks for Higher Education*, 18 VA. TAX REV. 217, 234 (1998).

[67] *See* David Kirkpatrick, *Congress Considers Universal Tuition Tax Credits*, SCHOOLREPORT.COM (Aug. 2001), *available at* http://www.schoolreport.com/schoolreport/articles/utts_8_01.htm.

[68] *See* Campbell & Hepburn *supra* note 5, at 70.

[69] *See* James S. Catterall, *Tuition Tax Credits: Issues of Equity*, *in* PUBLIC DOLLARS FOR PRIVATE SCHOOLS: THE CASE OF TUITION TAX CREDITS 130, 148 (Thomas James & Henry Levin eds., 1983). Data reveal that 5.8% of all private schools offer special-education services, while children with special needs make up between thirteen and nineteen percent of the population. *See id.* at 142–43. On the other hand, public schools, which are required by law to accommodate students with disabilities, have a greater range of programs for the learning impaired. *See* Campbell & Hepburn, *supra* note 5, at 70.

[70] *See* Catterall, *supra* note 69, at 146.

[71] *Cf.* Carol L. Ziegler & Nancy M. Lederman, *School Vouchers: Are Urban Students Surrendering Rights for Choice?*, 19 FORDHAM URB. L.J. 813, 819 (1992) (stating that school choice programs such as tax vouchers would "create two separate, unequal and de facto racially segregated school systems."); *see also* Susan Chira, *Research Questions the Effectiveness of Most School Choice Programs*, N.Y. TIMES, Oct. 26, 1992, at A1 ("choice primarily benefits children of better-educated parents . . . and may actually widen the gap between rich and poor school districts.").

[72] *See* Mary Anne Raywid, *Public Choice, Yes; Vouchers, No!*, 68 PHI DELTA KAPPAN

may be the only ones who benefit from tax credit legislation.[73] Since consumer-driven choice mechanisms tend to distort education further in favor of those who are already privileged, school choice opponents would argue that the government, through public schools, should control education.[74]

Besides failing to improve choices for low-income parents, school tax credits may compound their ill effects by taking money and students from existing public schools, leaving them less effective than before. Opponents of education tax credits argue that Congress has a fundamental choice: provide tax credits or explicitly grant funds to improve neighborhood public schools.[75] Thus, school tax credit plans may constitute the government's abandonment of public education, draining funds for federal programs and moving them instead to the private sector.[76] For example, Arizona's tax credit system has been said to "deplete state funds, making less money available for needed improvements in public schools that serve low-income and disadvantaged students."[77] If so, the tax credits parents would receive through FEFA should be spent instead on bettering the existing school system through government grants.[78]

School tax credit plans that are made available to private schools may also violate the Establishment Clause, which dictates that "Congress shall make no law respecting the establishment of religion. . . ."[79] At a minimum, the Establishment Clause prevents the government from creating its own church or financially supporting religious organizations.[80] If parents choose to use education tax credits to send their children to any private school, state or federal money could be involved in funding parochial schools. The Supreme Court, however, has emphasized its "consistent rejection of the argument that any program which in some manner aids an institution with a religious affiliation violates the Establishment

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762, 763 (1987).

[73] *See* Catterall, *supra* note 69, at 149.

[74] See Campbell & Hepburn, *supra* note 5, at 64.

[75] *See* CATTERALL, *supra* note 44, at 22.

[76] *See id.* FEFA would also cut federal funding for public schools by forcing schools to share their money with nonpublic schools. On the other hand, since the federal government only provides about 6.9% of the funds used to support K–12 public schools, the effect of withdrawing federal money, while significant, would still leave schools with their much larger grants from state and local governments. *See* U.S. CENSUS BUREAU, STATISTICAL TABLES, PUBLIC ELEMENTARY—SECONDARY EDUCATION FINANCES: 1998–99, at 5 tbl. 5 (2001), *available at* http://www.census.gov/govs/school/99tables/pdf.

[77] *See* PEOPLE FOR THE AMERICAN WAY FOUNDATION, A MODEL TO AVOID: ARIZONA'S TUITION TAX CREDIT LAW 2 (2001), *at* http://www.pfaw.org/issues/education/reports/arizona/index.html. Indeed, the $55 million Arizona has invested into its tax credit plan has gone mostly to middle and upper class families. *See id.* Meanwhile, the poor do not have enough resources to take full advantage of the credit, and the state has $55 million less to help fund public schools. *See id.*

[78] *See id.*

[79] U.S. CONST. amend I.

[80] *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

Clause."[81] Thus, the Court most recently upheld a tax deduction plan for school expenses against an Establishment Clause challenge in *Mueller v. Allen*.[82] *Mueller* addressed a Minnesota law that would provide tax deductions for "tuition, textbooks, and transportation" for children attending public and private schools.[83] Although the tax deduction might be used by parents to help them pay for religious schooling, the Court found that the law did not have the primary effect[84] of advancing religion and held generally that "a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[85] The Court also relied heavily on the fact that the tax deductions went to parents rather than religious schools to uphold the law in *Mueller*.[86] While the Court has never addressed a tax credit program like FEFA, the federal law bears many of the features that the Court relied on in *Mueller* to sustain the Minnesota tax deduction.[87] FEFA is broadly available to all parents of school-age children, not only those enrolled in public or sectarian schools, and tax breaks go to parents rather than directly to religious schools.[88] In light of *Mueller*, then, FEFA would probably withstand Establishment Clause attack.[89]

Despite their probable constitutionality, tax credits may nevertheless be a negative public policy move in allowing religious schools to gain too much power over education. Since tax credits are designed to make

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[81] Mueller v. Allen, 463 U.S. 388, 393 (1983).

[82] *See id.* at 391.

[83] *Id.* at 388.

[84] *Id.* at 402. In analyzing the Minnesota tax program, the Court referred to the seminal Establishment Clause analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Mueller*, 463 U.S. at 391. In *Lemon*, the Court announced a three-part test: for a law to be consistent with the Establishment Clause: (1) it must have a secular purpose; (2) its "primary effect must be one that neither advances nor inhibits religion;" and (3) it "must not foster an excessive government entanglement with religion." *Id.* at 391 (quoting *Lemon*, 403 U.S. 612–13). The Court in *Mueller* found that the Minnesota tax deduction satisfied the *Lemon* test. First, the law had a permissible secular purpose of promoting a well-educated citizenry. *See id.* at 395. The Court relied on the fact that the tax program in question was available for public as well as private school children and that it gave money to parents rather than directly to schools to hold that the Minnesota law did not have a primary religious effect. *See id.* at 398–99. Finally, the Court rejected the argument that the government's involvement in the regulating the tax deduction program would involve it too heavily in church affairs. *See id.* at 403.

[85] *Id.* at 398–99 (internal quotations omitted).

[86] *See id.* at 399.

[87] In addition, the Supreme Court has indicated that there is no constitutionally significant difference between tax deductions and credits. *See* Abe Frank et al., Mueller v. Allen*: A Constitutional Crosswalk to Federal Tuition Tax Credits*, 11 J. LEGIS. 163, 170 (1984).

[88] *See* Family Education Freedom Act, H.R. 368, 107th Cong. § 2 (2001).

[89] *Cf.* Frank et al., *supra* note 87, at 174 (discussing a Reagan Administration tuition tax credit in light of *Mueller*). Moreover, four of the current Supreme Court justices—Antonin Scalia, Clarence Thomas, Anthony M. Kennedy, and Chief Justice William Rehnquist—are likely to go beyond tax credits to validate stronger school choice plans such as vouchers. *See* Mark Walsh, *A School Choice for the Supreme Court*, EDUC. WEEK, Feb. 27, 2002, *available at* http://www.edweek.org/ew/newstory.cfm?slug=24vouch.h21.

parents flock to the best performing schools, these schools will become prized commodities among citizens.[90] Thus, an effective religious school would be in a position to "exact concessions from the state in exchange for opening up its school to a broader range of students."[91] The religious school could gain a strong bargaining position against the government as state officials seek to placate their constituencies by opening up enrollments in the best school. With the government and religious establishments in negotiations over who will be allowed to attend top-performing religious schools, there may be a risk of some religious schools gaining a voice in government decisions and a stronger position against each other and against secular groups.[92]

Finally, education tax credits could increase government regulation of private schools by involving the Internal Revenue Service ("IRS") in their implementation. Under FEFA, the IRS would be involved with private schools at least to the extent of certifying the amount of school costs students actually paid and determining whether those costs were legitimately incurred in education.[93] In addition, tax credits to private schools may make the government more involved in monitoring those schools: "[g]enerous government subsidies to private schools usually go hand in hand with a high level of government regulation."[94] The goal of school tax credits is to improve the American school system, and the federal government will have a stake in ensuring that the private schools on which individuals spend their tax credits are worth the money they receive. Since private schools are treated in the same way as public schools under FEFA, moreover, the law also raises the question of whether private school students should now receive the same constitutional protections as public school students.[95] Although such a drastic change is unlikely in the near future, if increasing numbers of students begin to attend private schools, the courts may begin to impose some constitutional limitations on private schools.[96] Finally, if FEFA were enacted during this time of steadily rising educational costs, groups could use FEFA as

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[90] *Cf.* Olsen, Lips & Lips, *supra* note 31, at 11 (stating that the short-term effect of an education tax credit would be to increase demand for private schools above supply).

[91] Jarod Bona, Recent Legislation, *School Vouchers*, 37 HARV. J. ON LEGIS. 607, 621 (2000).

[92] *See id.*

[93] *Cf.* Lawrence E. Gladieux & Robert D. Reischauer, *Clinton's Tuition Tax Breaks: Bad Tax Policy, Worse Education Policy*, OPPORTUNITY (Postsecondary Education OPPORTUNITY, Oskaloosa), Sept. 1996, at 2 (discussing then-President Clinton's plan to give tax breaks for college tuition).

[94] Press Release, Center on Regulation Policy, *Public Aid to Private Schools Brings Government Strings, International Analysis Shows*, available *at* http://www.ctredpol.org/vouchers/pressreleasepublicaidprivateschools.pdf.

[95] *See* Donald N. Jensen, *Constitutional and Legal Implications of Tuition Tax Credits*, *in* PUBLIC DOLLARS FOR PRIVATE SCHOOLS: THE CASE OF TUITION TAX CREDITS 151, 166, 170 (Thomas James & Henry M. Levin eds., 1983).

[96] *See id.* at 170.

precedent to lobby for additional governmental assistance, raising the prospect of not only increasing governmental intrusion but also political divisiveness.[97] Thus, opponents conclude that in order to avoid excessive government involvement in private schools, education tax credit plans should be abandoned.

Upon reintroduction, FEFA's chances of passage are uncertain at best. The opposition of most national education organizations endangers the bill's enactment.[98] On the other hand, among the public, attitudes towards school tax credits seem positive. Seventy percent of Americans support educational tax credits;[99] school tax relief appears "wildly popular among voters."[100] In addition, the Bush administration is clearly favorable to education tax credits.[101]

Regardless of whether FEFA ultimately passes, the problems in United States public schools have created pressure for a federal response. A policy response including school tax credits is a necessary part of creating an innovative, fair solution to current flaws. Future efforts to implement tuition tax credit programs should, however, be careful to ensure that such legislation benefits all families equally, either through supplementary education programs or donations to private scholarship funds. Congress could, for example, implement a scholarship tax credit based on Arizona's model. Such a program would allow parents who make a voluntary contribution to a school tuition organization ("STO") to receive a matching tax credit up to a maximum amount.[102] Thus, when tax-

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[97] *See id.* at 165.

[98] Opposition to choice programs comes from civil liberties organizations, teacher unions, and the National Education Association, among others. *See* Ziegler & Lederman, *supra* note 71, at 819; *see also* Kirkpatrick, *supra* note 67. These organizations object most commonly that choice programs that include private schools decrease the funds available for public schools, violate the First Amendment, and increase disparities among class and racial groups. *See* Ziegler & Lederman, *supra* note 71, at 819.

[99] 147 CONG. REC. E73 (weekly ed. Jan. 31, 2001) (statement of Rep. Paul).

[100] Lawrence E. Gladieux & Robert D. Reischauer, *Higher Tuition, More Grade Inflation*, WASH. POST., Sept. 4, 1996, at A15.

[101] *See* Interview by Public Broadcasting System with George W. Bush, then-Governor of Texas (May 23, 2000), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/vouchers/interviews/bush.html. President Bush has signed tax legislation that expands "education savings accounts to permit parents of K–12 students to save money for expenses such as tuition, tutoring, and computer equipment." Dan Lips, *School-Choice Alternatives,* NAT'L REV. ONLINE (Cato Institute, Washington, D.C.), Sept. 6, 2001. Starting in January 2002, families can put up to $2,000 into these education individual retirement accounts with the account earnings growing tax-free. *See id.* In addition, United States Secretary of Education Roderick Paige, who would be charged with enforcing such legislation, is also pro-tax credit. Secretary Roderick Paige defended the Bush school choice initiative, asserting it was a "necessary condition to effective public education." Interview by Kwame Holman with Roderick Paige, U.S. Secretary of Education, NewsHour with Jim Lehrer (Jan. 10, 2001), *available at* http://www.pbs.org/newshour/bb/politics/jan-june01/paige_01-10.html.

[102] *See* Lisa Keegan, *Tuition Tax Credits: A Model for School Choice*, BRIEF ANALYSIS (Nat'l Ctr. for Pol'y Analysis, Dallas, Tex.), Dec. 12, 2001, at 1, *available at* http://www.ncpa.org/pub/ba/ba384.

payers donate to an STO, they reduce their state tax burden by the amount of the credit; parents can then choose to apply directly to the STO for a scholarship, which enables parents to send their children to the school of their choice.[103] Arizona's tax credit program has been overwhelmingly successful: since 1999, the number of taxpayers making contributions to STOs has jumped from 4247 in 1998 to 37,368 in 2000.[104] By 2015, the scholarship credit could generate more than $58 million per year to fund scholarships for nearly 37,000 Arizona families.[105]

School choice through tax credits would be an important move in correcting current problems with the public school system. Tax credits would produce greater diversity and pluralism in schooling options.[106] Parents could pay fewer income taxes, and education may receive more funding than before.[107] Tax credits would allow for more accountability, standards, and assessments within the public education system as a result of parents' increased ability to choose only the best schools for their children.[108] While school tax credits are far from perfect, at the very least, they would be a fast step in the right direction for the nation's troubled education system and effectively teaching America's fifty-three million school children.[109]

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[103] *See id.*
[104] *See id.*
[105] *See id.* at 2.
[106] *See* BRIGHOUSE, *supra* note 59, at 31.
[107] *See* Olsen, Lips, & Lips, *supra* note 31, at 19.
[108] *See* Olsen, *supra* note 32, at 10A; *see also* ANDERSON ET AL., *supra* note 24, at 17.
[109] *See* Olsen, *supra* note 32, at 10A.