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ARTICLE

STATUTORY INTERPRETATION AND DIRECT DEMOCRACY: LESSONS FROM THE DRUG TREATMENT INITIATIVES

MICHAEL M. O'HEAR*

In recent years, ballot initiatives have become an increasingly important method of lawmaking on the state level. A key debate among scholars is whether the courts' interpretation of initiatives should differ in any fundamental way from their interpretation of conventional statutes. Two notable commentators—Professors Frickey and Schacter—have offered competing proposals, both of which employ interpretive rules that construe voter-made law narrowly to minimize displacement of preexisting law. This Article examines these proposals through the lens of a little-noticed but increasingly important body of cases interpreting two similar initiatives in Arizona and California. Both initiatives radically change sentencing for non-violent drug offenders, mandating treatment and probation in lieu of incarceration for qualifying defendants. After examining these cases, this Article concludes that the Frickey and Schacter proposals suffer from an overly rigid and unwarranted emphasis on continuity at the expense of substantive coherence in the law. The approach taken by the courts—a flexible, pragmatic one in line with their interpretation of conventional statutes—is better-suited in the direct democracy context.

INTRODUCTION

For the past quarter-century, ballot initiatives have played an increasingly important role in making law at the state level, from California's famed tax revolt of 1978,[1] to the Colorado antigay measure declared unconstitutional in *Romer v. Evans*,[2] to the "three-strikes" laws toughening criminal sentences in Washington and California,[3] to the medical mari-

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[1] In 1978, Californians enacted Proposition 13, which cut property taxes by at least half. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 3 (1989). Proposition 13, as subsequently amended, is codified at CAL. CONST. art. XIII, § 1(a).

[2] 517 U.S. 620 (1996).

[3] CAL. PENAL CODE § 667 (West 2002); WASH. REV. CODE § 9.94A.570 (2003). For a discussion of the Washington and California initiatives, see FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4–7 (2001).

juana initiatives enacted in at least eight different states.[4] Such direct lawmaking permits voters to circumvent state legislatures, which are often criticized as beholden to special interests.[5] The initiative process itself has become the target of much criticism,[6] but it does not seem likely to diminish in importance any time soon.[7]

As a necessary consequence of this explosion of direct democracy, courts are increasingly asked to decide how to interpret voter-made law. Scholars have questioned whether the interpretation of initiatives differs in any fundamental respect from the interpretation of conventional statutes.[8] In particular, two eminent scholars of legislation, Professors Philip P. Frickey and Jane S. Schacter, have offered competing proposals for interpreting initiatives.[9] Both proposals, for somewhat different reasons and in somewhat different ways, tend to emphasize continuity in the law: they would interpret initiatives narrowly, at least under certain circumstances, and minimize their displacement of the preexisting conventional statutory law.[10]

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[4] For a discussion of Arizona's Proposition 200, which legalized some medical uses of marijuana, see *infra* Part I.C.1. Other states to pass medical marijuana initiatives include Alaska, ALASKA STAT. § 11-71-090 (Michie 2002); California, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2002); Colorado, COLO. CONST. art. XVIII, § 14; Maine, ME. REV. STAT. ANN. tit. 22, § 2383-B (West 2002); Nevada, NEV. CONST. art. IV, § 38 (2000); Oregon, OR. REV. STAT. § 475.309 (2001); and Washington, WASH. REV. CODE § 69.51A.005 (2003). For an overview of these measures and a discussion of federal responses, see generally Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After* United States v. Lopez, 88 CAL. L. REV. 1575 (2000).

[5] *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 15–16 (1995) (discussing beliefs that motivated development of direct democracy).

[6] *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513–22 (1990) (arguing that direct democracy does not accurately reflect majority will); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 34–40 (1989) (discussing "10 most commonly cited" objections to initiatives).

[7] *See* DAVID S. BRODER, DEMOCRACY DERAILED 208 (2000) (discussing polls demonstrating popularity of direct democracy).

[8] *See, e.g.*, Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 35 (1997) (advocating as interpretive rule that "hard to classify" initiatives should be treated by the courts as legislative initiatives, rather than state constitutional amendments); Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Special Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 532 (1998) (concluding that proposals for special rules of interpretation are unpersuasive); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 522–23 (1996) (proposing special three-step inquiry for courts interpreting initiatives); Cathy R. Silak, *The People Act, The Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 39–47 (1996) (proposing new approach for interpreting initiatives); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 152–59 (1995) (proposing new interpretive rules to correct "pathologies" of direct lawmaking); Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 891 (1998) (concluding that courts should use "strict intentionalist" approach when interpreting initiatives).

[9] Frickey, *supra* note 8, at 522–23; Schacter, *supra* note 8, at 152–59.

[10] For a more detailed description of the proposals, see *infra* Parts IV.A.1 (Frickey), IV.B.1 (Schacter). My use of the term "continuity" is, in part, borrowed from Professor

Against this backdrop, the present Article provides the first comprehensive assessment of a little-noticed—but growing and increasingly important—body of cases that interpret two related initiatives in Arizona and California. The initiatives effect a radical change in sentencing for drug crimes, requiring the court to provide treatment in lieu of incarceration for many nonviolent offenders.[11] Because these initiatives represent such a stark departure from preexisting law, they provide a particularly fruitful opportunity to explore how courts use the interpretive process to draw boundaries between old and new law. Additionally, the initiatives merit close attention because proposals to adopt similar drug treatment laws have been made or are currently pending in several states.[12]

In examining the drug initiative case law, this Article has two principal objectives relating to the more general problem of interpreting initiatives. First, the Article considers the empirical question: how *do* courts interpret initiatives? In 1995, Professor Schacter addressed this question by analyzing fifty-three cases decided over a ten-year period.[13] She found, among other things, that courts "overwhelming[ly]" apply "ordinary rules of interpretation" to voter-made laws.[14] This Article—which canvasses fifty-one cases decided in the past six years[15]—supplements and updates her data set. In these cases, the courts employ a flexible and pragmatic approach, balancing statutory text, voter intent, and public policy objectives. The cases are consistent with Professor Schacter's conclusion that courts do not employ special methodologies when interpreting initiatives, but they suggest that she may have overemphasized the role of popular intent in the analysis.

Second, the Article addresses the normative question: how *should* courts interpret initiatives? In particular, the Article evaluates the Frickey and Schacter proposals, both of which call for special narrowing rules for interpreting initiatives. Frickey's "quasi-constitutional" approach is animated by a concern that lawmaking through direct democracy conflicts with the constitutional norm of republican lawmaking. His proposal advocates increased utilization of familiar canons of statutory interpretation in order to protect "public values."[16] Schacter offers a "metademocratic" approach to interpreting initiatives, employing two very different interpretive rules—the Narrowing Rule or the Pro-Deliberative Rule—depending

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Shapiro's treatment of the subject. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

[11] For a more detailed description of the initiatives, see *infra* Parts I.C.1.a (Arizona), I.C.2.a (California).

[12] For a discussion of other initiative efforts, see Michael M. O'Hear, *When Voters Choose the Sentence: The Drug Policy Initiatives in Arizona, California, Ohio, and Michigan*, 14 FED. SENT. R. 337, 338–39 (2002).

[13] Schacter, *supra* note 8, at 110.

[14] *Id.* at 119.

[15] These cases are listed in Appendix C.

[16] Frickey, *supra* note 8, at 510–22.

on whether the process of enacting the initiative was vulnerable to abuse.[17]

The drug initiative cases highlight important difficulties with both proposals. Some of these difficulties take the form of indeterminacy: the proposals, at least as presented, do not provide helpful guidance in resolving actual cases. More fundamentally, though, the proposals suffer from an overly rigid and unwarranted emphasis on continuity, even at the expense of substantive coherence in the law. In light of these and other difficulties, no persuasive justification is apparent for adopting either of the proposed rules of construction for narrowly interpreting initiatives.

These broad questions are approached through a focused study of the drug initiative cases. Previous studies cover an eclectic mix of cases dealing with several substantive areas of the law.[18] The drug initiative cases, by contrast, constitute a substantial body of cases dealing with a limited number of closely related interpretive issues. The narrow substantive focus facilitates a comparison of cases and the identification of patterns across the jurisprudence. Similarly, a focused case study may more readily take into account the political and policy context of the judicial decisions, making it easier to understand what is really at stake in the cases.

Additionally, the drug treatment initiatives offer a helpful counterpoint to more publicized initiatives, such as the three-strikes laws and the anti-gay initiatives,[19] directed against socially marginalized groups. The drug treatment initiatives, which are intended to *benefit* criminal defendants and drug addicts, should call into question characterizations of direct democracy as a tool of social oppression—characterizations that seem to play an important role in scholarly literature on the subject.[20]

Finally, this case study will begin to fill an unfortunate gap in the legal literature, which has largely neglected the drug treatment initiatives.[21] The Arizona and California initiatives represent important developments in their own right, but they may also have significance as precursors to similar laws in other states. Mandatory drug treatment was approved by voters in the District of Columbia in 2002[22] and is expected to be on the

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[17] Schacter, *supra* note 8, at 153–59.

[18] *See, e.g.*, *id.* at 110–19 (analyzing cases covering range of substantive areas).

[19] *See, e.g.*, CAL. PENAL CODE § 667 (West 2002) (California three-strikes law); WASH. REV. CODE § 9.94A.570 (2003) (Washington three-strikes law); COL. CONST. art. II, § 30b (1993) (Colorado antigay law).

[20] *See, e.g.*, Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Schacter, *supra* note 8, at 157 (discussing potential for "abuse" of initiative process by enactment of initiatives that target "socially marginalized groups").

[21] In an earlier article, I offered a critical comparison of the initiative proposals in Arizona, California, and two other states. O'Hear, *supra* note 12. A student note describes the Arizona and California initiatives, argues that they should be adopted as a model by other states, and suggests that the mandatory treatment programs should cover psychiatric, as well as substance abuse, disorders. Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1219 (2002).

[22] Brian DeBose, *Mayor Loses Bid to Block Drug Plan*, WASH. TIMES, Nov. 16, 2002,

ballot in Florida in 2004.[23] These initiatives were backed by a well-funded national organization, which may target additional states in the future.[24] Identifying interpretive problems with the Arizona and California initiatives and assessing judicial responses may contribute to the evaluation of such initiatives by providing a more complete picture of how they are implemented by the courts.

This Article is organized as follows. Part I, by way of background, describes the content of the initiatives, as well as their political and policy context. Part II discusses the interpretation of conventional statutes. Part III addresses the empirical question of how courts have in fact handled the major interpretive issues arising from the drug initiatives. Part IV addresses the normative question of how initiatives should be interpreted, offering a summary and critique of the Frickey and Schacter proposals. Part V, a conclusion, suggests lessons to be learned from the drug initiative case study.

I. BACKGROUND: DIRECT DEMOCRACY, CONVENTIONAL DRUG SENTENCING, AND THE DRUG TREATMENT INITIATIVES

A. Direct Democracy

One of the enduring reforms of the Progressive Era, direct democracy encompasses a range of different devices that the electorate may use to make law or otherwise control the legislative process. Although the specifics vary widely, the mechanisms of direct democracy may generally be divided into three categories. First, "recall" permits voters to remove a public official from office before the expiration of the official's term.[25] Second, the "referendum" allows voters to reject a legislative proposal or a bill enacted by the legislature.[26] Finally, the "initiative" permits voters to propose and enact laws on their own, without necessarily obtaining the

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at A8. For a description of the District of Columbia initiative, see *Washington D.C. Initiative Would Exclude Schedule I Substances*, ALCOHOLISM & DRUG ABUSE WKLY, Aug. 5, 2002, at 3.

[23] O'Hear, *supra* note 12, at 337.

[24] *Id.* The national organization is named the Campaign for New Drug Policies. Information about its various campaigns, including the full text of the initiative proposals, is available online at http://www.drugreform.org. Despite its ample resources, the organization experienced notable setbacks in 2002 in Ohio and Michigan. An Ohio drug treatment initiative was defeated at the polls, Alan Johnson, *Tafts Celebrate State Issue 1 Defeat*, COLUMBUS DISPATCH, Nov. 6, 2002, at 1C, while a Michigan drug treatment initiative was disqualified from the ballot based on technical deficiencies. Peter Luke, *Drug Laws Miss Ballot, Hit Budget*, GRAND RAPIDS PRESS, Sept. 22, 2002, at A23. The proposed Ohio initiative is reprinted at *Ohio Drug Treatment Initiative*, 14 FED. SENT. R. 350 (2002). The proposed Michigan initiative is reprinted at *Michigan Drug Treatment Initiative*, 14 FED. SENT. R. 344 (2002).

[25] CRONIN, *supra* note 1, at 2.

[26] *Id.*

legislature's involvement or approval.[27] The initiative will be the focus of this Article.[28]

Twenty-one states, as well as the District of Columbia, allow voters to enact statutes through the initiative process.[29] Some states also permit voters to amend the state constitution through the initiative process.[30] Direct lawmaking has been on the rise nationwide since the 1970s.[31] In recent years, criminal justice issues have been a particular (and controversial) focus of direct lawmaking.[32] In general, these initiatives have toughened the treatment of criminal defendants. For instance, California and Washington voters adopted harsh "three-strikes" laws in the 1990s in order to lengthen the prison terms of repeat offenders.[33] The drug treatment initiatives seemingly represent an unusual departure from the typical tough-on-crime stance of directly enacted criminal laws. This departure may be more apparent than real, however, as drug traffickers and defendants with histories of violent crime have been carefully excluded from the initiatives. These defendants might actually be left worse off with the initiatives than without.[34] Indeed, proponents have justified the initiatives by arguing that mandatory treatment for drug offenders would free prison space for more serious criminals.[35]

Procedural rules for proposing and enacting initiatives vary considerably from state to state.[36] Typically, though, initiative proponents must collect tens or hundreds of thousands of signatures on a petition in order to place an initiative proposal on the ballot.[37] Then, voters may decide by majority vote whether to accept or reject the proposal.[38] Many states pro-

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[27] *Id.*

[28] Since the recall and referendum are not truly law-making devices in their own right, they do not raise the sort of interpretive issues that arise when the voters adopt an initiative.

[29] Schacter, *supra* note 8, at 113–14.

[30] For a listing of these states, as well as the requirements for constitutional amendments in each, see SCHMIDT, *supra* note 6, at 296–97. Such constitutional initiatives are not specifically considered in this Article, although they may generate interpretive issues similar to the statutory issues that are the subject here.

[31] For a description of this phenomenon, as well as several proposed explanations, see Magleby, *supra* note 5, at 26–31.

[32] *See, e.g.*, David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 104–08 (2001) (discussing sentencing initiatives in Washington and noting even greater influence of direct democracy on development of sentencing policy in Oregon).

[33] ZIMRING ET AL., *supra* note 3, at 4–7. California's Proposition 115, which expanded the scope of the state's death penalty and scaled back defendants' procedural rights, supplies another example. Schacter, *supra* note 8, at 158.

[34] O'Hear, *supra* note 12, at 342.

[35] *See, e.g.*, *infra* Part I.C.1 (describing stated purposes and advocacy in support of Arizona initiative).

[36] For a summary of each state's law, see SCHMIDT, *supra* note 6, at 295–311.

[37] *Id.* at 296–97.

[38] *See* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 59 (1995) (discussing majority rule as a central justification for direct democracy).

vide official pamphlets to help voters make more educated choices.[39] In addition to the complete text of the initiative, these pamphlets might include an official summary of the proposal, an official assessment of its fiscal effect, and short arguments for and against the initiative.[40]

While conjuring idealistic visions of a modern-day participatory democracy—which might be contrasted with cynical visions of the legislature as dominated by wealthy special interests—the initiative process has sparked considerable and heated criticism on many grounds.[41] For instance, wealthy special interests arguably play as important a role in direct lawmaking as they do in conventional lawmaking.[42] Because of the large number of signatures needed to get on the ballot, initiative proponents often rely on professional signature-gathering agencies, which may charge hundreds of thousands of dollars for their services in a large state like California.[43] In light of these expenses, as well as the costs of media advertising, political consultants, and the other accoutrements of a modern-day election campaign, there should be little surprise that heavy spending seems to be a crucial ingredient in many successful initiative campaigns.[44] While wealthy interests do not always prevail in direct democracy, their financial resources do constitute an important advantage.

Additionally, some critics question the capacity of the electorate to deliberate effectively on initiative questions. Most voters lack the training to read and understand complex legal proposals, and few seem to read the text of the initiatives upon which they vote.[45] Official ballot pamphlets may be slightly more readable but also often suffer from length and complexity problems.[46] Studies thus indicate that voters are most

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[39] *Id.* at 91.

[40] *Id.*

[41] For a concise statement of the republican critique of direct democracy, see generally Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998) [hereinafter Frickey, *Communion*]. Professor Frickey's objections center on "the lack of deliberation and accountability in the initiative process." *Id.* at 439. For a contrasting, but no less forceful, critique emphasizing populist objections, see generally Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998). Professor Clark argues that direct democracy "actually prevent[s] the people from expressing themselves clearly" because a single-issue, up-or-down vote does not permit voters to express their priorities among issues. *Id.* at 436. While most recent scholarly writing on direct democracy seems critical, some commentators have observed a positive side. *See, e.g.*, Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 1002 (2001) ("[T]he initiative overcomes important defects in the practice of representative democracy arising from the self-interest of lawmakers.").

[42] For a thorough analysis of the role of money in the initiative process and a consideration of reform proposals, see generally Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999).

[43] Garrett, *supra* note 8, at 20–21.

[44] *Id.* at 22.

[45] Schacter, *supra* note 8, at 139–40.

[46] *Id.* at 141–43.

influenced by media communications and political advertising[47]—hardly reliable or sophisticated bases for deciding often quite complicated matters of public policy.

Finally, critics accuse direct democracy of promoting laws that discriminate against socially marginalized groups, such as criminal defendants and racial and sexual minorities.[48] For instance, they point to the many initiatives and referenda targeting homosexuals that have been adopted since the 1970s.[49] Private citizens, unlike legislators, may cast their votes on such issues in an anonymous, unaccountable fashion: they "do not have to look gay people in the eye and say, 'No, you don't deserve the protection of the law,' nor do they have to face media and constituent scrutiny for those views."[50] Compounding the problem, initiative proponents may use visceral symbols in media advertising "to inflame majorities to the detriment of socially subordinated minorities."[51] In short, critics suggest direct democracy may systematically disfavor minorities more than representative democracy does.[52]

B. Conventional Drug Sentencing

In order to appreciate the significance of the drug treatment initiatives, it is helpful first to consider conventional drug sentencing.[53] Drug crimes encompass a range of different offenses but may be roughly divided into the categories of simple possession and trafficking.[54] Statutes establish maximum sentences that may be imposed for different types of drug crimes.[55] Maximum sentences tend to be longer for trafficking than

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[47] *Id.* at 131.

[48] *See, e.g., id.* at 157–58; William E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 450–51 (1998); Bell, *supra* note 20, at 20–21.

[49] *See* Bell, *supra* note 20, at 20; Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 283–85 (1994); Adams, *supra* note 48, at 458–67.

[50] Frickey, *Communion*, *supra* note 41, at 441.

[51] Schacter, *supra* note 8, at 157.

[52] One study suggests that when minority civil rights are at issue in an initiative or referendum, the minority rights side loses more than eighty percent of the time. Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 425 (1999).

[53] As with direct democracy, the relevant legal constraints vary from state to state. *See, e.g.*, GALE GROUP, NATIONAL SURVEY OF STATE LAWS 164–75 (Richard A. Leiter ed., 2003) (surveying varying state penalties for cocaine offenses).

[54] "Possession," as used in this Article, encompasses unlawful possession of drugs, use of drugs, and transportation of drugs for personal use, as well as attempting or conspiring to do any of these things. "Trafficking" encompasses selling drugs, possessing or transporting with intent to sell, manufacturing, and producing, as well as attempting or conspiring to do any of these things.

[55] *See, e.g.*, 21 U.S.C. § 841(b) (2002) (establishing maximum sentences for various drug offenses); CAL. HEALTH & SAFETY CODE § 11357 (West 2002) (establishing maximum sentences for marijuana offenses).

possession,[56] and for "hard" drugs (like heroin) than "soft" drugs (like marijuana).[57] Maximum penalties may, however, be substantial in some states even for possession of marijuana for personal use. In Arizona, the maximum penalty for simple possession of marijuana ranges from one year to two and one-half years, depending on the quantity involved.[58] In California, the maximum penalty for simple possession of marijuana may be as much as six months, depending on the quantity.[59] In all, twenty-one percent of prisoners in state and federal institutions are being held for drug offenses.[60]

In addition to maximum sentences, many jurisdictions have also adopted mandatory minimum penalties for certain drug crimes, such as the federal government's notorious five-year mandatory minimum sentence for possessing five grams or more of crack cocaine.[61] Many states have also identified particular characteristics of the crime or the criminal that may lead to enhanced maximum or minimum penalties. For instance, under California's three-strikes law, a defendant convicted of a drug felony (or any other type of felony) faces a mandatory minimum sentence of twenty-five years in prison if he or she has two prior convictions of certain felonies.[62]

Statutory maximums and minimums thus establish a range within which the judge must sentence. Working within these parameters, the sentencing judge makes two important decisions for each convicted defendant: disposition and duration. The first decision amounts to a choice between probation and incarceration; the second establishes how long the defendant will be subject to probation and/or incarceration.[63] A sentence of probation allows the defendant to remain in the community, subject to conditions that may range from the perfunctory (for example, to check in with a probation officer once a month) to the mildly burdensome (such as

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[56] *See, e.g.*, ARIZ. REV. STAT. § 13-3405 (2002) (classifying simple marijuana possession offenses as less serious felonies than possession for sale); CAL. HEALTH & SAFETY CODE §§ 11350–51 (West 2002) (establishing mandatory prison term of at least two years for possession of narcotics for sale but not for simple possession).

[57] *See, e.g.*, ARIZ. REV. STAT. §§ 13-3405, 13-3408 (2002) (classifying narcotics offenses as more serious than marijuana offenses, except for very high quantities of marijuana); CAL. HEALTH & SAFETY CODE §§ 11350, 11357 (West 2002) (requiring incarceration in state prison for possession of certain narcotics but not for marijuana).

[58] ARIZ. REV. STAT. §§ 13-3405, 13-701 (2002).

[59] CAL. HEALTH & SAFETY CODE § 11357(c) (West 2002).

[60] PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2001, at 12 (2002).

[61] 21 U.S.C. § 841(b)(1)(B)(iii) (2002).

[62] CAL. PENAL CODE § 667 (West 2002).

[63] Most states employ a system of indeterminate sentencing, which means that a parole board actually has the final say as to how long an incarcerated defendant will remain in prison; the judge's durational decision establishes an upper and lower bound to the parole board's discretion. *See* Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1248 (1997) (discussing operation of parole).

community service) to the truly onerous (such as house arrest).[64] If a defendant violates a condition of probation, the judge may revoke probation and impose a term of incarceration.[65]

However sentenced, a defendant with a drug problem may be given the opportunity (or even required) to undergo drug treatment, although resources for treatment programs tend to be quite limited.[66] The effectiveness of drug treatment is also a matter of considerable debate.[67] Likewise, among those who are persuaded of the efficacy of treatment, opinion is divided as to whether treatment should be voluntary or coerced.[68] Classically, "coerced" treatment means treatment as a condition of probation, with the threat of imprisonment hanging over the "patient's" head if he or she fails to adhere to the treatment regimen.[69]

C. The Drug Treatment Initiatives

The drug treatment initiatives—Arizona's Proposition 200 and California's Proposition 36—modify conventional drug sentencing in three crucial respects. First, the initiatives prohibit the incarceration of eligible defendants, thus removing the judge's traditional discretion over sentencing disposition and requiring probation.[70] Second, the initiatives make drug treatment a mandatory condition of probation for eligible defendants and allocate substantial public funds for that purpose.[71] Finally, the

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[64] For a discussion of different sanctions that may be imposed in lieu of imprisonment, see MICHAEL TONRY, SENTENCING MATTERS 108–27 (1996).

[65] *See, e.g.*, ARIZ. REV. STAT. § 13-917(B) (2002) (providing for revocation of probation).

[66] TED GEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER 128 (2001).

[67] For a recent review of the evidence, see Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1469–73 (2000).

[68] O'Hear, *supra* note 12, at 340.

[69] This structure of treatment is associated with specialized drug courts, which are growing increasingly common across the country. *See generally* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999). For critical perspectives on the drug court movement, see Hoffman, *supra* note 65; Richard Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1215–18 (1998) (describing "tension" between therapeutic and punitive goals of drug courts and arguing that such courts undermine "larger efforts to develop an effective drug policy premised on a public health model"); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 73–75 (2000/2001) ("[F]uture assessments of drug courts should spend less time simply lauding the concept of court-monitored treatment as judicial innovation, and instead ask more probing questions about what is actually happening in such forums on a day-to-day basis and whether such practices comport with the law.").

[70] *See* ARIZ. REV. STAT. § 13-901.01(A) (2002); CAL. PENAL CODE § 1210(a) (West 2003).

[71] *See* ARIZ. REV. STAT. § 13-901.01(D) (2002); CAL. PENAL CODE § 1210(a) (West 2003).

initiatives substantially limit the judge's traditional authority to revoke the probation of eligible defendants and order incarceration.[72]

In adopting these initiatives, the voters of Arizona and California have provided momentum to what has become a well-funded national campaign to promote treatment as an alternative to the "drug war."[73] Proponents of the Arizona and California initiatives have also backed similar measures elsewhere.[74] While all of these initiatives have the same basic objective (mandatory treatment in lieu of incarceration), they differ somewhat in their structure and technical details. Accordingly, this Part discusses the Arizona and California initiatives separately, describing both the content of their substantive provisions and the circumstances of their passage.

1. Arizona's Proposition 200

a. Content

In its core sentencing provision, Arizona's Proposition 200 requires that "any person who is convicted of the personal possession or use of a controlled substance" be placed on probation and required to undergo drug treatment under court supervision.[75] While judges no longer make a disposition decision for eligible defendants, they do retain some discretion over the conditions of probation; drug treatment, however, is required. Two purposes are identified for the treatment requirements: "to

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[72] *See* ARIZ. REV. STAT. § 13-901.01(D) (2002); CAL. PENAL CODE § 1210(a) (West 2003).

[73] The drug treatment initiatives described here represent only one part, albeit perhaps the most significant, of a broader trend toward de-escalation of the war on drugs and de-emphasis of purely punitive responses to drug crimes. For instance, several states have by initiative legalized the medical use of marijuana. *See supra* note 4 and accompanying text. There have also been serious, though as yet unsuccessful, efforts to legalize non-medical marijuana possession in Alaska and Nevada. Tom Gorman, *Nevada Ponders Legalizing Possession of Marijuana*, L.A. TIMES, Aug. 25, 2002, at A18. For a broader discussion of changing public attitudes towards drugs, as well as evolving prosecutorial and sentencing practices, see generally Frank O. Bowman, III, *The Geology of Drug Policy in 2002*, 14 FED. SENT. R. 123 (2002); Ronald F. Wright, *Are the Drug Wars De-Escalating?*, 14 FED. SENT. R. 141 (2002). Nor is the apparent de-escalation confined to the United States. *See, e.g.*, Sarah Lyall, *Easing of Marijuana Laws Angers Many Britons*, N.Y. TIMES, Aug. 12, 2002, at A3.

[74] *See supra* text accompanying notes 22–24.

[75] ARIZ. REV. STAT. ANN. § 13-901.01(A) (West 2002). For relevant provisions of Proposition 200, see *infra* Appendix A. The operative provisions of Proposition 200 will be cited herein as they have been codified. In 2002, Arizona voters approved Proposition 302, which would make various changes to Proposition 200 as codified. *See infra* text accompanying note 102. As of the present writing, Proposition 302 has not yet entered into effect. All citations herein to the Arizona statutes are made to the version of the statutes in effect as of the present writing—that is, without changes mandated by Proposition 302.

free up space in our prisons for violent offenders,"[76] and to rehabilitate drug addicts.[77]

Proposition 200 denies mandatory treatment in lieu of incarceration to several categories of defendants, including: (1) any defendant convicted of the trafficking offenses of possession for sale, production, manufacturing, or transportation for sale; (2) any defendant with one prior conviction (or indictment) for a violent crime (a provision that will be referred to here as the "one-strike disqualifier"); and (3) any defendant with two prior convictions for personal possession or use (the "two-strikes disqualifier").[78] For eligible defendants, by contrast, Proposition 200 mandates treatment that is minimally coercive. If a defendant violates any of the conditions of probation, the court must impose additional conditions "short of incarceration."[79] Thus, the defendant may undergo treatment secure in the knowledge that he or she will not suffer the ultimate sanction of incarceration.

The defendant must pay for his or her treatment to the extent of his or her financial ability.[80] In order to make up the difference, the initiative allocates certain tax revenues to a "Drug Treatment and Education Fund."[81] Finally, in addition to its sentencing provisions, Proposition 200 also contains a variety of unrelated provisions that are not the focus of this Article.[82]

b. Enactment

Proposition 200 had its genesis in 1995, when John Sperling, a wealthy education entrepreneur, gathered twenty-five experts and community leaders to discuss alternatives to the war on drugs.[83] The group, which took on the name Arizonans for Drug Policy Reform ("ADPR"), decided to focus on promoting treatment in lieu of incarceration and to pursue reform

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[76] Text of Proposition 200, Drug Medicalization, Prevention, and Control Act of 1996, § 3 [hereinafter Proposition 200], *available at* http://www.sosaz.com/election/1996/General/1996BallotPropsText.htm.

[77] *See id.* (identifying as one purpose of the law "to expand the success of pilot drug intervention programs which divert drug offenders from prison to drug treatment, education, and counseling").

[78] ARIZ. REV. STAT. ANN. § 13-901.01(B)-(C), (G) (West 2002).

[79] *Id.* § 13-901.01(E).

[80] *Id.* § 13-901.01(D).

[81] *Id.* § 13-901.02.

[82] These provisions include legalization of the medical use of controlled substances, *id.* § 13-3412.01, a prohibition on parole for defendants who commit violent crimes while under the influence of a controlled substance, *id.* § 41-1604.15, and the creation of a new commission on drug education. *Id.* § 41-1604.17.

[83] Robert Nelson, *Big Bong Theory: Arizona's Pro-Pot Advocates Cast First Stone in Latest National Effort to Legalize Marijuana*, PHOENIX NEW TIMES, Sept. 13, 2001, *available at* http://www.phoenixnewtimes.com/issues/2001-09-13/feature.html/1/index.html. *See also* Timothy Egan, *Crack's Legacy*, N.Y. TIMES, June 10, 1999, at A1 (discussing Sperling's background and role).

through the initiative process.[84] In so doing, ADPR benefited from abundant financial resources. Sperling himself donated approximately $460,000,[85] while billionaire investor George Soros gave $430,000, and the Drug Policy Foundation, of which Soros is a patron, donated $300,000.[86] In total, donations reached $1.8 million.[87]

With such strong financial support, ADPR was able to hire signature-gatherers and consulting firms and to flood the airwaves with television and radio advertisements that promoted the initiative.[88] These advertisements informed voters that Proposition 200 would require tough sentences for violent drug offenders, that prisons were overrun with casual users, and that the initiative's medical marijuana provision would alleviate suffering for those with terminal diseases.[89] Similar points were emphasized in the official ballot pamphlet, which contained arguments by several different proponents of the initiative.[90] They argued that drug abuse is a medical problem rather than a criminal problem.[91] They claimed that the war on drugs had wasted billions of dollars[92] and that prisons were so overcrowded with drug offenders that there was no room left for more dangerous criminals.[93]

Notably, the ballot pamphlet contained only one opposing argument, which actually promoted the more radical step of legalization.[94] The status quo did have its defenders, but they were poorly funded and slow to organize: opponents raised only $32,000, and failed to file their organizational papers until just weeks before the election.[95] Not surprisingly, Proposition 200 ultimately won passage in the 1996 general election by nearly a two-to-one margin.[96]

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[84] Nelson, *supra* note 83.

[85] Judy Packer Tursman, *Voters Duped on Medical Use of Pot, Panel Told*, PITTSBURGH POST-GAZETTE, Dec. 3, 1996, at A1.

[86] *Id.*

[87] *Id.*

[88] Howard Stansfield, *Tokin' Resistance: Proposition 200—The Drug Medicalization Act—Is Causing High Anxiety Among Politicians and Lawmen*, PHOENIX NEW TIMES, Dec. 12, 1996, *available at* http://www.phoenixnewtimes.com/issues/1996-12-12/feature2.html/1/index.html.

[89] Joe Frolik, *Legalized Drug Backers Rejoice; Reformers Buzzing from Election Results*, PLAIN DEALER, Nov. 25, 1996, at 1A.

[90] The complete text of the ballot materials are available at http://www.sosaz.com/election/1996/General/1996BallotPropsText.htm [hereinafter BALLOT PAMPHLET].

[91] Rudolph J. Gerber, *Argument for Proposition 200*, BALLOT PAMPHLET, *supra* note 90.

[92] Marvin S. Cohen, *Argument for Proposition 200*, BALLOT PAMPHLET, *supra* note 90.

[93] Steve Mitchell, *Argument for Proposition 200*, BALLOT PAMPHLET, *supra* note 90.

[94] Kent B. Van Cleave et al., *Argument Against Proposition 200*, BALLOT PAMPHLET, *supra* note 90.

[95] Stansfield, *supra* note 88, at 11–12. Arguments against the initiative focused on two ideas. First, opponents argued that the Proposition would send the wrong message to people. Thomas A. Constantine, *Drug Enforcement Administration Makes Announcement*, BUS. WIRE, Oct. 17, 1996, *available at* LEXIS, News Library, Wire Service Stories. Second, opponents believed that the true goal of Proposition 200 was to lead to the legalization of drug use. *Id. See also* Frolik, *supra* note 81, at 1A.

[96] Egan, *supra* note 83, at A1.

c. Subsequent Developments

Arizona's legislature responded to Proposition 200 by enacting its own drug law, Senate Bill 1373, which overrode the initiative in several important respects.[97] Of greatest importance here, the bill permitted judges to impose a term of incarceration as a condition of probation for Proposition 200 defendants.[98] Legislators contended that voters had been misled about the content of Proposition 200, claiming, in particular, that Proposition 200 had been sold to voters as a medical marijuana law.[99] Backers of the initiative responded with a new referendum campaign intended to repeal Senate Bill 1373.[100] In November 1998, the electorate overturned the bill and reinstated Proposition 200 with fifty-seven percent of the vote.[101]

Having failed to override the initiative through legislative action, opponents of Proposition 200 later succeeded in modifying the law through an initiative campaign of their own. In November 2002, Arizona voters adopted Proposition 302, which authorized judges to impose incarceration as a sanction against Proposition 200 defendants who refused drug treatment or committed certain types of probation violations.[102]

2. California's Proposition 36

a. Contents

Like Proposition 200, California's Proposition 36 mandates probation and treatment in lieu of incarceration for eligible drug defendants.[103] Also like its Arizona counterpart, Proposition 36 targets possession for personal use and excludes defendants convicted of possession for sale, production, or manufacture.[104] Additional disqualification provisions are similar in spirit to Arizona's, but somewhat different in the details. For

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[97] Calik v. Kongable, 990 P.2d 1055, 1056 (Ariz. 1999). Senate Bill 1373 was passed by the legislature in 1997 but never took effect because of the successful referendum drive described in the text below. *Id.* at 1056–57.

[98] *Id.* at 1056.

[99] Howard Fischer, *Ariz. Supreme Court OKs Drug Referendum Ballot Wording*, ARIZ. DAILY STAR, Aug. 5, 1998, at 3B.

[100] *Id.*

[101] Egan, *supra* note 83, at A1.

[102] *See* Joe Burchell, *Prop. 202 Alive; 200, 201 Aren't*, ARIZ. DAILY STAR, Nov. 6, 2002, at A1 (noting victory of Proposition 302). The text of Proposition 302 is available at http://www.sosaz.com/election/2002/info/pubpamphlet/english/prop302.pdf. All of the cases considered in this Article were decided prior to the effective date of Proposition 302, so the latter initiative does not otherwise figure into the analysis below.

[103] CAL. PENAL CODE § 1210.1(a) (West Supp. 2003). For relevant provisions of Proposition 36, see *infra* Appendix B. Proposition 36 contains analogous provisions for parolees, generally prohibiting revocation of parole based on a parolee's first-time violation of a drug-related condition of parole. *Id.* § 3063.1(a).

[104] *Id.* § 1210(a).

instance, the law excludes defendants with prior violent felonies but provides an exception for defendants who have remained out of prison and avoided felony or violence convictions for a period of five years (the "washout period").[105] Also excluded are defendants who: (1) are convicted of certain non-drug offenses in the same proceeding as the drug offense; (2) use a firearm while possessing or being under the influence of specified hard drugs; or (3) refuse treatment.[106]

Proposition 36 indicates that its purposes, similar to those of Proposition 200, include: (1) "To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration—and reincarceration—of nonviolent drug users who would be better served by community-based treatment"; and (2) "To enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders."[107]

Unlike Proposition 200, Proposition 36 provides for revocation of probation, albeit through a somewhat complicated process.[108] A defendant who commits one drug-related probation violation may have probation revoked (and hence face incarceration) only if the state proves by a preponderance of the evidence that the defendant "poses a danger to the safety of others."[109] Revocation becomes progressively easier with successive violations.[110] Thus, treatment under Proposition 36 has a somewhat more coercive face than it does under Proposition 200, but it is still well short of the traditional drug court model.[111] Finally, like Proposition 200, Proposition 36 requires defendants who are "reasonably able to do so" to contribute to the cost of treatment,[112] but it also allocates significant public funds to cover treatment expenses for which defendants do not pay.[113]

b. Enactment

Like the Arizona campaign, the California campaign was marked by a significant disparity in the financial resources of supporters and opponents. By October 2000, Proposition 36 supporters had raised approximately $3 million while opponents had raised $215,000.[114] Prominent

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[105] *Id.* § 1210.1(b)(1).

[106] *Id.* § 1210.1(b)(2)–(4).

[107] Substance Abuse and Crime Prevention Act of 2000 (Prop. 36) § 3(b)–(c), *available at* http://www.adp.cahwnet.gov/SACPA/Proposition_36_text.shtml.

[108] CAL. PENAL CODE § 1210.1(e) (West Supp. 2003).

[109] *Id.* § 1210.1(e)(3)(A).

[110] *Id.* § 1210.1(e)(3)(B)–(C).

[111] *See supra* note 67.

[112] CAL. PENAL CODE § 1210.1(a) (West Supp. 2003).

[113] CAL. HEALTH & SAFETY CODE § 11999.5 (West 2002).

[114] Timm Herdt, *Prop. 36 Supporters Want "War on Drugs" Out of Court*, VENTURA COUNTY STAR, Oct. 16, 2000, at A6. Despite this financial surplus, only twenty percent of voters had heard of the initiative just one month before the election. Lynda Gledhill, *Most*

financial supporters included George Soros, John Sperling, and insurance executive Peter Lewis.[115] Campaign leaders included Ethan Nadelmann, the director of a national drug policy center,[116] and Gerald Uelman, a professor at Santa Clara School of Law who helped draft the initiative.[117] The state prison guards' union headed the opposition,[118] which also included Governor Gray Davis and most judges, law enforcement officials, and health care groups in the state.[119]

Proponents emphasized similar points to those raised in the Arizona campaign. They relied on a study indicating that Proposition 36 would save taxpayers as much as $200 million annually on prison costs and $500 million of capital expenses.[120] Proponents also suggested that, because of the medical nature of drug addiction problems, punitive approaches to drug policy were inappropriate.[121]

Unaware of 2 Initiatives; Campaign, Drug Measures Not Well Known, Field Poll Finds, S.F. CHRON., Oct. 14, 2000, at A23.

[115] Bill Ainsworth, *Meddling Tycoons or Visionary Activists: 3 Push Drug Initiative*, COPLEY NEWS SERV., Oct. 9, 2000, at *2–*3. The trio was brought together by Ethan Nadelmann, director of the Lindesmith Center (now the Campaign for New Drug Policies), who eventually became the primary advisor for the Proposition 36 campaign. William Booth, *The Ballot Battle; Drug War Is in Fight of Its Life; Wealthy Trio Takes Aim with California Initiative to End Penalties for Users*, WASH. POST, Oct. 29, 2000, at A24. According to Nadelmann, none of the men supports drug legalization. They simply agree that the drug war has been a disaster. *Id.*

[116] *Id.*

[117] Peter Hartlaub, *Drug Programs Under Prop. 36 Need Funding, Chief Probation Officer Requests $1.5 Million to Meet Influx of Thousands*, S.F. CHRON., Nov. 30, 2000, at A23.

[118] Peter Schrag, *Time for a New Approach to Drug Offenses: Even if Ballot Initiative Isn't the Answer, Both Sides Agree the Existing System Is Flawed*, VENTURA COUNTY STAR, Sept. 17, 2000, at B11.

[119] Jim Herron Zamora, *S.F., State Officials Clash Over Prop. 36; City Politicos Back Effort to Push Rehab Instead of Jail for Drug Offenses*, S.F. EXAMINER, Nov. 6, 2000, at A7; *Proposition 36: Calif. Chooses Drug Treatment Over Prison*, AM. HEALTH LINE, Nov. 10, 2000, at *1. In addition, the actor Martin Sheen, whose son Charlie had experienced well-publicized drug problems, was named honorary chairman of the opposition's campaign. Booth, *supra* note 112, at A24.

[120] Schrag, *supra* note 118, at B11.

[121] Ainsworth, *supra* note 115, at 3. Opponents rejected the characterization of drug offenses as a purely medical problem, arguing that many addicts do not want treatment and enjoy their addiction. *Eases Penalties; Prop. 36 Is Disguised Drug Legalization*, SAN DIEGO UNION-TRIB., Nov. 2, 2000, at B12. Additionally, opponents doubted the effectiveness of court-supervised treatment when the court had little ability to incarcerate defendants who failed to comply with their treatment regimens. James Milliken, *Proposition 36 Would Sabotage the State's Drug Courts*, SAN DIEGO UNION-TRIB., Sept. 14, 2000, at B13. Opponents also questioned the initiative's true motives, suggesting that supporters were not interested in treatment but the legalization of drugs. *No on 36; Drug Courts Are Working, Why Scrap System?*, SAN DIEGO UNION-TRIB., Oct. 17, 2000, at B8. Opponents concluded that the Proposition was "[d]angerous and [m]isleading." Jeffrey S. Tauber, RATIONAL DRUG POLICY REFORM: A RESOURCE GUIDE 26, *available at* http://www.problemsolvingcourts.com/pdf/Rreform.pdf (last visited Sept. 1, 2002). Opponents offered numerous additional arguments. They questioned supporters' cost savings estimates, claiming that prisons were not overcrowded with nonviolent drug offenders but with violent criminals who would not be eligible for parole and treatment even if voters did pass Proposition 36. Kim Cobb, *'Proposition Mandates Treatment, Not Prison; California to*

Ultimately, as in Arizona, voters in California adopted the initiative by a wide margin, as Proposition 36 captured sixty-one percent of the vote in the 2000 general election.[122]

II. Conventional Statutory Interpretation

In order to develop a framework for discussing the judicial decisions interpreting the drug treatment initiatives, this Part describes different approaches to "conventional" statutory interpretation (that is, interpretation of statutes enacted by the legislature). In particular, this Part considers three aspects of statutory interpretation: theories of interpretation, canons of construction, and evaluative criteria.

A. Theories of Interpretation

Scholars and judges have developed a multitude of theories of statutory interpretation. While judges rarely, if ever, rigidly adhere to any one particular theoretical approach, the different models supply a commonly used framework for explaining and critiquing judicial opinions. The leading theories of interpretation may be roughly divided into four categories: intentional, purposive, textual, and dynamic.[123]

Of the four general approaches, the Anglo-American legal tradition most strongly emphasizes intentionalism.[124] Intentionalists view statutory interpretation as an exercise in divining the legislature's intent.[125] In applying a statute to a particular set of facts, the judge should ask, "How would the legislature have wanted this case decided?" Statutory text, of course, makes a good starting point for the analysis, but it need not be the end point: legislative history (such as committee reports, floor speeches, and the like) may also be consulted.[126]

Vote on Drug-War Issue, Hous. Chron., Oct. 2, 2000, at A1. Opponents further argued that Proposition 36 would perpetuate at least one form of violent crime because offenders charged with possession of the date rape drug would be protected. *Id.* Opponents also objected to the initiative's failure to allocate funds for drug testing, *id.*, and lack of regulatory safeguards, which might lead to the appearance of rogue "treatment clinics" seeking to obtain a share of the new state treatment funds by fraud. Kevin Sabat, *Proposition 36 Is State-Condoned Drug Abuse*, Daily Californian, Oct. 26, 2000, at 2.

[122] Anna Gorman, *The State Judges Extend Drug Rehab for Felons; Courts: Appellate Justices Rule That Proposition 36 May Apply to Those Who Have Been Out of Prison Less Than Five Years*, L.A. Times, Jan. 16, 2002 at B8. *See also* Bill Ainsworth, *Voters Take a New Tack in War on Drugs*, San Diego Union-Trib., Nov. 9, 2000, at A1.

[123] William N. Eskridge, Jr. et al., Legislation & Statutory Interpretation 211–47 (2000). *See also* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 Nw. U. L. Rev. 629, 632–33 (2001) (summarizing categories of interpretive theories).

[124] Eskridge et al., *supra* note 123, at 213.

[125] *Id.* at 213–14.

[126] When text and legislative history fail to supply an explicit answer, the intentionalist judge may resort to a process of "imaginative reconstruction" of legislative intent based on

Alternatively, the judge may interpret the statute so as to achieve the general intent it embodies, an approach sometimes called "purposivism."[127] The idea here is not so much to identify an actual historical legislative intent as it is to determine a hypothetical intent based on the assumption that the statute was drafted by "reasonable legislators acting reasonably."[128] Represented by the "legal process" method of Professors Henry Hart and Albert Sacks, purposive interpretation is "an attempt to integrate the law coherently and harmoniously into the legal system as a whole."[129]

Textualists, by contrast, are concerned not with the legislature's actual or imagined intent, but with the "plain meaning" of the statutory text.[130] A legislature's failure to make its intent clear in the text of a law is of no particular concern to the strict textualist judge, who simply applies the facial meaning of the statutory language.[131] Textualism is perhaps most prominently and forcefully advocated today by Justice Antonin Scalia.[132]

Finally, dynamic theories suggest that statutory interpretation should be a search for best answers.[133] Interpretation takes place against a backdrop of evolving public values, as manifested in other statutes, the Constitution, and common law traditions.[134] When a particular statutory provision is being interpreted, the judge should favor proposed interpretations that are most consistent with such public values. Like purposivism, dynamic interpretation seeks coherence in the law, though with a more

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whatever documentary history is available. *Id.* at 218–20. For an influential argument in favor of imaginative reconstruction, see generally Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987) (emphasizing subordinate role of courts and need for courts to implement instructions from legislature). For an example of imaginative reconstruction, see INS v. Cadoza-Fonseca, 480 U.S. 421 (1987), a decision whose interpretive methodology is helpfully dissected in William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 630–40 (1990) [hereinafter Eskridge, *New Textualism*].

[127] ESKRIDGE ET AL., *supra* note 123, at 220–21.

[128] Garrett, *supra* note 8, at 32.

[129] *Id. See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–78 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[130] ESKRIDGE ET AL., *supra* note 123, at 223. For an important recent defense of textualism, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

[131] For a particularly pungent statement of this view, see Judge Easterbrook's decision in *In re* Sinclair, 870 F.2d 1340 (7th Cir. 1989).

[132] *See, e.g.*, Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part); Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting). *See generally* Eskridge, *New Textualism*, *supra* note 126, at 640–56.

[133] ESKRIDGE ET AL., *supra* note 123, at 237. For influential statements of the dynamic position, see, for example, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482–96 (1987) [hereinafter Eskridge, *Dynamic Interpretation*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 460–62 (1989); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988).

[134] *See generally* William N. Eskridge, Jr., *Public Values and Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) [hereinafter Eskridge, *Public Values*].

explicit recognition that public values evolve (hence the term "dynamic"), outmoded legislative purposes should be de-emphasized, and judges must often make policy choices among competing purposes.[135] Proponents contend that dynamic theories do the best job of explaining why cases are decided as they are but admit that judges only rarely employ such approaches in an explicit fashion.[136]

B. Canons of Construction

When courts interpret statutes, they often invoke canons of construction, that is, guidelines for understanding otherwise uncertain statutory language. Many of these canons simply reflect linguistic conventions of syntax and semantics. For instance, under the "last antecedent" canon, qualifying words in a statute are understood to refer only to the last antecedent, unless contrary to the statute's punctuation or policy.[137] Likewise, masculine pronouns in a statute are generally understood to refer to both men and women.[138] Canons such as these may be justified on intentionalist grounds (the legislature understands the linguistic conventions and takes them into account when drafting new laws) or textualist grounds (these canons help the court to discern "plain meaning").

Other canons have more substantive content and arguably advance particular public values. For instance, the Rule of Lenity indicates that ambiguous criminal statutes should be construed in favor of the defendant.[139]

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[135] For a more comprehensive comparison between the legal process approach and Professor Eskridge's model of dynamic interpretation, see Eskridge, *Dynamic Interpretation*, *supra* note 133, at 1544–49.

[136] ESKRIDGE, *supra* note 123, at 237. For a recent scholarly symposium assessing dynamic interpretation, see *Dynamic Statutory Interpretation*, *in* ISSUES IN LEGAL SCHOLARSHIP (Philip Frickey ed. 2002), *at* http://www.bepress.com/ils/iss3. While attention has turned in recent years to the possibility of empirical testing of the competing claims of different interpretative camps, it is not clear that more data alone are capable of resolving the deep normative issues underlying the interpretive debates. *See* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 684 (1999).

[137] ESKRIDGE, *supra* note 123, at 258.

[138] *Id.* at 259.

[139] *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); United States v. Granderson, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). For an overview of the history of the Rule of Lenity, see generally Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 86–122 (1998). The Rule of Lenity has sparked a vigorous scholarly debate. For arguments that the Rule should be abolished or substantially modified, see, for example, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 396–425 (1995); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 219–23 (1985). For an argument that the Rule should play a weaker role in the context of sentencing statutes than substantive criminal laws, see Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 572 (2002). For a more sympathetic treatment of Lenity, see Solan,

Commentators have identified several different public values served by this canon, such as fair notice: defendants should not be criminally punished for conduct that arguably falls outside the scope of the statutory language.[140] Likewise, commentators argue that lenity advances the ideal of legislative supremacy.[141] Courts are precluded from using ambiguous statutory language to fashion a common law of crimes; "criminal lawmaking is the prerogative of Congress and Congress alone."[142]

Other canons advance different public values. One important public value—already mentioned as an overarching objective of purposive and dynamic interpretation—is substantive coherence in the law. Canons of coherence seek to ensure that a particular legal regime (such as the drug sentencing laws) represents a rational and consistently applied set of public policy choices.[143] This objective has constitutional grounding in the mandate of the Equal Protection Clause that there be at least a rational basis for laws that treat different classes of people differently.[144]

Substantive coherence encompasses at least two different components, which may be in tension with one another: internal consistency within the statute being interpreted and continuity across related statutes enacted over a period of time. Particular canons are associated with each

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supra, at 134–43.

[140] *See* Kahan, *supra* note 139, at 345–46; Solan, *supra* note 139, at 134–35.

[141] Kahan, *supra* note 139, at 350; Solan, *supra* note 139, at 141–43.

[142] Kahan, *supra* note 139, at 350.

[143] Professor Ronald Dworkin has offered perhaps the most eloquent and well-known argument for coherence in the law, which he contends is central to the legitimacy of government. RONALD DWORKIN, LAW'S EMPIRE 190–92 (1986). Professor Dworkin's work has been criticized both for being a poor account of actual lawmaking practices and for having a conservative tendency that may "propagate morally outmoded values." *See, e.g.*, Eskridge, *Dynamic Interpretation*, *supra* note 133, at 1550–54 (summarizing objections to Dworkin). As Professor Eskridge argues, the vision of coherence, or as Dworkin calls it "integrity," must be qualified in the context of statutory interpretation by the ideal of legislative supremacy. *Id.* Even when the legislature makes law that is incoherent, the expectation is that judges will ultimately work within the parameters of what the legislature has decided. *Id.* at 1554. That said, where the norms of statutory interpretation give the judge some room to decide among plausible interpretations, the objective of coherence may nonetheless play a legitimate role in the analysis.

[144] In *Romer v. Evans*, the Court framed the constitutional analysis as follows:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Romer v. Evans, 517 U.S. 620, 631 (1996) (citations omitted). While courts are typically deferential to legislation under such "rational basis" review, the analysis is not wholly devoid of meaningful standards, as *Romer* itself illustrates. *See id.* at 635 (invalidating Colorado law because it was not "directed to any identifiable legitimate purpose or discrete objective").

component. The internal consistency canons indicate that individual statutory provisions should not be read in isolation but as part of a larger statutory scheme; courts should avoid interpretations that undermine other provisions or defeat the overall objectives of the statute.[145] The continuity canons are broader in focus, seeking to situate a provision not merely within a particular statute, but within the larger body of previously enacted statutes, with the goal of "not changing existing understandings [of the law] any more than is needed."[146] Thus, for instance, the rule against implied repeals encourages courts to interpret later-enacted statutes so as to preserve the effectiveness of prior statutes, unless the legislature indicated that it intended to repeal the earlier law.[147]

C. Evaluative Criteria

Competing theories of statutory interpretation and canons of construction may be evaluated based on numerous criteria. This section outlines three of the most prominent evaluative criteria. First, the "rule of law" criterion asks how well a theory or canon advances several related objectives, including that interpretative results should be predictable in advance, statutory meaning should be accessible to ordinary citizens, and statutes should be neutrally applied to everyone.[148] Second, the "democratic legitimacy" criterion emphasizes the primacy of the policy choices made by the democratically elected legislature (or perhaps by the voters directly); interpretive approaches should be disfavored to the extent that they permit judges to override decisions made through democratic processes.[149] Finally, the "pragmatism" criterion asks how well an interpretive approach advances legitimate public policy objectives.[150]

Sometimes these criteria will complement one another, though often they will point in different directions. Dynamic theories, for instance,

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[145] WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 835 (3d ed. 2001). Other internal consistency canons include the rule to avoid surplusage, *see, e.g.*, Kungys v. United States, 485 U.S. 759, 778 (1988) (plurality opinion) ("[N]o provision should be construed to be entirely redundant."); and the presumption of consistent usage, *see, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). *See generally* ESKRIDGE ET AL., *supra*, at 830–35.

[146] Shapiro, *supra* note 10, at 925.

[147] ESKRIDGE ET AL., *supra* note 123, at 273. *See also* Morton v. Mancari, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.") (citation omitted). Professor Shapiro argues that a whole range of canons serve continuity values, including linguistic canons that are not often thought to have substantive content. Shapiro, *supra* note 10, at 925.

[148] ESKRIDGE ET AL., *supra* note 123, at 212.

[149] *Id.*

[150] *Id.*

might fare quite well under the pragmatism criterion but raise significant concerns from the standpoint of the rule of law and democratic legitimacy.[151]

III. The Drug Initiative Cases

Against this backdrop of conventional statutory interpretation, this Part will describe the cases interpreting Arizona's Proposition 200 and California's Proposition 36. Despite their recent vintage, these initiatives have already produced a burgeoning body of case law. The cases involve a wide range of interpretive problems, many of which turn on the courts' self-conscious efforts to give the law substantive coherence. In analyzing the cases, this Part will focus on how the courts weigh continuity interests, that is, how the courts decide when to preserve the integrity of a preexisting legal regime, and when to permit displacement of the old regime by the new initiatives. Put differently, the focus is on how courts draw boundaries between old and new laws. Generally, those lines are drawn in light of the purposes embodied in the initiatives and the preexisting statutes.

The cases fall into several distinct categories based on the content of the interpretive problem presented. At the most general level, the cases are divided into those that present problems of "underinclusion" and those that present problems of true ambiguity. After discussing these two groups of cases, which include several subcategories, this Part concludes with a comparison between the findings of the present case study and Professor Schacter's earlier empirical work.

A. Problems of Underinclusion

Each of the cases discussed in this section represents an example of a particular sort of interpretive problem that Professor Lawrence Solan has termed "underinclusion."[152] Generically, the problem may be phrased thus: "a statute refers to Z, we know that the disputed event is not a Z,

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[151] Professor Eskridge defends his "cautious" model of dynamic interpretation against various legislative supremacy arguments in Eskridge, *Dynamic Interpretation*, *supra* note 133 at 1498–1538. He argues, for example, that

> [t]he countermajoritarian difficulty . . . ought not to be the basis for rejecting a cautious model of dynamic interpretation . . . . For example, when there has been a significant change in circumstances, the countermajoritarian difficulty presents slight justification for continuing to treat old statutory majorities as decisive and controlling. Additionally, other political values, apart from majoritarianism, are important in our constitutional polity. The legitimacy of government is ultimately based upon the continued responsiveness of the whole government to the objective needs of the evolving society.

Id. at 1523–24.

[152] Solan, *supra* note 139, at 78.

but we still feel that the statute should cover our situation because the disputed event is like Z."[153] That is, the disputed event lies beyond the language of the statute but arguably falls within the statutory purposes.

In the realm of criminal law, the underinclusion problem traditionally requires a court to decide whether the defendant's conduct constitutes a crime. Thus, in *United States v. Wiltberger*, an important early federal criminal case, the Supreme Court was required to decide whether a homicide that occurred on a river-going vessel in China could be prosecuted under a statute that criminalized homicide "upon the high seas."[154] While rivers do not fall within the normal meaning of "high seas," a murder does not necessarily appear any less worthy of punishment based on the place where it occurred. Congress likely did not intend such an artificial distinction. Writing for the Court, however, Chief Justice Marshall held otherwise, invoking what we would now call the Rule of Lenity, the principle that penal laws are to be construed narrowly.[155] *Wiltberger* thus exemplifies a phenomenon that Professor Solan refers to as the "linguistic wall": "When something is plainly outside the scope of a statute's proscription, we do not read it into the statute simply because the evil is both similar to and just as bad as the evil that the statute actually addresses."[156] Professor Solan argues that courts generally adhere to this principle when confronted with an underinclusive criminal statute.[157]

The drug initiative cases, however, present a contrasting form of the underinclusion problem. The issue is not whether the defendant has committed a crime, but, rather, given that the defendant has committed a crime, how the defendant should be sentenced. The defendant could be sentenced under a preexisting punishment regime, or under a new treatment regime. The drug initiative cases, which are divided into several subcategories set forth below, raise important questions about the weight to be given continuity interests.

1. Conviction of a Crime Other Than Simple Possession

On their face, the drug treatment initiatives apply only to defendants convicted of drug possession offenses. The drafters have been quite careful to exclude other categories of defendants, particularly drug sellers, from the benefits of the new laws.[158] Nonetheless, numerous defendants convicted of crimes other than simple possession have argued that they qualify for mandatory treatment in lieu of incarceration. In particular,

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[153] *Id.*

[154] 18 U.S. (5 Wheat.) 76, 86 (1820).

[155] *Id.* at 95.

[156] Solan, *supra* note 139, at 84.

[157] *Id.*

[158] ARIZ. REV. STAT. ANN. § 13-901.01(B) (West 2002); CAL. PENAL CODE § 1210(a) (West Supp. 2003).

courts have struggled with cases in which the defendant has been convicted of a crime that is quite closely related to simple possession but includes an additional or different element. Examples include convictions for possession of drug paraphernalia,[159] possession of drugs in prison,[160] possession of drugs in a school zone,[161] attempted possession of drugs,[162] theft of drugs for personal use,[163] and driving under the influence of drugs.[164]

In contrast to the general pattern in criminal cases, the linguistic wall has not played a particularly important role in the drug initiative cases. Instead, courts have often responded to underinclusion with a broad reading of the initiative so as to encompass conduct that seems to lie beyond the plain language of the law. *State v. Estrada*, one of the drug paraphernalia cases, supplies a good example.[165] Estrada, the defendant, was charged with both possession of a dangerous drug and possession of drug paraphernalia after a police search apparently uncovered two baggies of methamphetamine in her purse, as well as a glass tube of the sort commonly used to smoke the drug.[166] A jury convicted Estrada of both counts.[167] While Proposition 200 applied to the possession count, the trial court imposed a term of nine months incarceration for the paraphernalia count.[168] An intermediate appeals court reversed.[169]

On further appeal, the Arizona Supreme Court affirmed (*Estrada II*).[170] While the court observed that Proposition 200, "on its face, does not apply to paraphernalia convictions,"[171] the court nonetheless extended the initiative's benefits to Estrada and held that she must be sentenced to probation.[172] The court rejected the linguistic wall because it would produce an "absurd" result:

> [If paraphernalia convictions are excluded], the overwhelming majority of first time drug users would be subject to imprisonment despite Proposition 200's mandate that, "notwithstand-

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[159] State v. Estrada, 34 P.3d 356, 361 (Ariz. 2001); State v. Holm, 985 P.2d 527, 529 (Ariz. Ct. App. 1998).

[160] State v. Roman, 30 P.3d 661, 663 (Ariz. Ct. App. 2001).

[161] State v. Pereyra, 18 P.3d 146, 149 (Ariz. Ct. App. 2001).

[162] Stubblefield v. Trombino *ex rel.* County of Maricopa, 4 P.3d 437, 438 (Ariz. Ct. App. 2000).

[163] People v. Garcia, 120 Cal. Rptr. 2d 725, 727 (Ct. App. 2002).

[164] Wozniak v. Galati, 30 P.3d 131, 135–36 (Ariz. Ct. App. 2001).

[165] 34 P.3d 356, 361 (Ariz. 2001).

[166] *Id.* at 358.

[167] *Id.*

[168] *Id.*

[169] *Id.* That decision, referred to here as *Estrada I*, also considered another Proposition 200 issue that will be discussed below. *See infra* Part III.A.2.

[170] For a summary of the court's holding and analysis, see Abbe M. Goncharsky, Case Note, *Drug Paraphernalia Charges and Proposition 200:* State v. Estrada, 44 ARIZ. L. REV. 283 (2002).

[171] *Estrada II*, 34 P.3d at 358.

[172] *Id.* at 362.

> ing any law to the contrary," qualifying defendants convicted of "personal possession or use of a controlled substance" shall receive probationary treatment . . . .
>
> . . . The term "drug paraphernalia," broadly construed, includes virtually all devices or objects used or intended for use in connection with the possession, use, production, or sale of illegal drugs . . . . [A]s a practical matter, a person will rarely, if ever, possess or use a controlled substance without also possessing . . . associated paraphernalia . . . .
>
> To interpret Proposition 200 as mandating probation for the crime of smoking marijuana but permitting incarceration if the State charges the user with possessing paraphernalia because the shredded marijuana was wrapped in paper, produces an absurd result.[173]

Courts have likewise interpreted Proposition 200 broadly to include such other offenses as attempted possession[174] and possession in a school zone,[175] despite plain language arguments to the contrary. Likewise, Proposition 36 has been interpreted to include theft of drugs for personal use.[176]

Not all cases, however, read the initiatives so broadly. For example, in *State v. Roman*, the Arizona Court of Appeals held that Proposition 200 does not apply to a conviction for possession of contraband drugs in prison.[177] The court reasoned as follows:

> [Proposition 200] does not include promoting prison contraband within one of the offenses mandating probation, nor do the purposes of Proposition 200 indicate that it was intended to apply to such an offense. The legislature chose long ago to treat the possession of a controlled substance in a correctional facility more severely than mere possession.[178]

The court's analysis begs the question: why should the legislature's "long ago" policy choice carry any weight in the analysis when the voters have since rejected the legislature's whole approach to drug possession? *Estrada II* opens the Proposition 200 door to crimes other than those expressly covered by the initiative. *Roman* does not provide an entirely clear an-

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[173] *Id.* at 361 (citations omitted).

[174] Stubblefield v. Trombino *ex rel.* County of Maricopa, 4 P.3d 437, 438 (Ariz. Ct. App. 2000).

[175] State v. Pereyra, 18 P.3d 146, 149 (Ariz. Ct. App. 2001).

[176] People v. Garcia, 120 Cal. Rptr. 2d 725, 727 (Ct. App. 2002).

[177] 30 P.3d 661, 663 (Ariz. Ct. App. 2001). Similarly, a California court has held that Proposition 36 does not apply to a conviction for driving under the influence of drugs. People v. Canty, 123 Cal. Rptr. 2d 532, 533 (Ct. App. 2002).

[178] *Roman*, 30 P.3d at 662–63 (citations omitted).

swer as to why some related crimes should be treated like simple possession but possession in prison should not.

Upon closer inspection, however, *Estrada II* and *Roman* are not particularly difficult to distinguish. The distinction lies neither in the text of Proposition 200, nor in the existence of prior legislative policy judgment on the crime in question. Rather, the distinction lies in two other considerations. First, while an "overwhelming majority" of otherwise eligible drug users might be removed from the ambit of Proposition 200 by excluding paraphernalia defendants, a much smaller number of users would be affected by excluding prison contraband defendants. A ruling against Estrada thus threatened to make Proposition 200 a dead letter, while a ruling against Roman posed no such threat to the integrity of the initiative.

Second, the prior legislative policy judgment on drugs in prison implicated a set of public policy concerns ("the safety, security and preservation of order in a correctional facility"[179]) that were almost certainly not taken into account when the voters enacted Proposition 200. By contrast, the prior legislative judgment on paraphernalia likely involved only the familiar set of policy concerns that underlay the legislature's sentencing regime for simple possession. The legislature's judgment on prison contraband seems more entitled to deference than its judgment on paraphernalia because the voters have not as clearly rejected the legislature's weighing of the underlying policy considerations in the prison context.[180] Viewed in this light, *Estrada II* and *Roman* are relatively easy cases. Continuity interests were appropriately disregarded in the former, and appropriately emphasized in the latter.

2. *Prior Conviction for an Offense Not Mentioned in the Disqualification Provisions*

The drug treatment initiatives include both qualification and disqualification provisions.[181] The initiatives disqualify various classes of

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[179] *Id.* at 663 (quoting ARIZ. REV. STAT. § 13-2505(1) (West 2002)).

[180] A similar analysis has been used to decide a line of California cases dealing with a provision unique to Proposition 36. The provision disqualifies otherwise eligible defendants who are convicted in the same proceeding of a "misdemeanor not related to the use of drugs." CAL. PENAL CODE § 1210.1(b)(2) (West Supp. 2003). California courts have held that a conviction for driving under the influence of drugs is a disqualifying misdemeanor under this provision because driving under the influence "implicates important public safety concerns and does not involve the simple use or possession of drugs." People v. Garcia, 127 Cal. Rptr. 2d 410, 419 (Ct. App. 2002). For other cases reaching the same result by similar reasoning, see Trumble v. Superior Court, 127 Cal. Rptr. 2d 297, 304 (Ct. App. 2002); People v. Walters, 127 Cal. Rptr. 2d 267, 271 (Ct. App. 2002); People v. Canty, 123 Cal. Rptr. 2d 532, 535 (Ct. App. 2002). *Cf.* People v. Goldberg, 130 Cal. Rptr. 2d 192, 197 (Ct. App. 2003) (holding that probationer committing Driving Under the Influence not eligible for Proposition 36 treatment); People v. Campbell, 131 Cal. Rptr. 2d 221, 229–30 (Ct. App. 2003) (same). Similarly, a defendant is disqualified by a concurrent conviction for resisting arrest. People v. Ayele, 126 Cal. Rptr. 2d 262, 266 (Ct. App. 2002).

[181] The provisions are detailed above in Part I.C.

otherwise eligible defendants, principally on the basis of criminal history. Most notably, the initiatives disqualify defendants who have a prior conviction for a violent crime (the one-strike disqualifier) or two prior convictions for drug possession (the two-strikes disqualifier).[182]

The disqualification provisions have given rise to their own underinclusion issues. In these cases, the defendant has a type of criminal history that is not expressly addressed in the initiative but that seems to be of comparable seriousness to a type that is addressed. The consequences of underinclusion in this context differ from the consequences of underinclusion in the qualifying language: instead of *deserving* defendants being *excluded* from the benefits of the new law, *undeserving* defendants are *included*. Thus, in these cases, it is the prosecution, not the defense, that asks the court to correct the underinclusiveness of the initiative's language.

In addressing these sorts of underinclusion claims, Arizona courts have ruled that defendants may take advantage of Proposition 200 notwithstanding (1) a prior conviction for conspiracy to sell drugs;[183] (2) a prior conviction for a non-violent, non-drug-related felony;[184] and (3) two prior convictions for attempted possession.[185] Likewise, a California court has held that a juvenile adjudication of delinquency does not disqualify the defendant from Proposition 36.[186] By contrast, defendants may be disqualified from Proposition 200 based on two prior convictions for drug sales[187] or two prior convictions for conspiracy to possess.[188]

The courts' treatment of prior sales-related offenses is instructive. In *Goddard v. Superior Court*, the Arizona Court of Appeals dealt with a defendant who had been convicted of simple possession but had two prior trafficking convictions.[189] Proposition 200 disqualifies any defendant who has two prior convictions for possession (the two-strikes disqualifier), but it does not mention prior convictions for trafficking.[190] The court nonetheless held that Goddard was disqualified, just as if the two prior convictions had been for possession,[191] reasoning that the purpose of the two-strikes disqualifier was to exclude "repetitive offenders."[192] It further ob-

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[182] *See* ARIZ. REV. STAT. § 13-901.01(B), (G) (West 2002); CAL. PENAL CODE § 1210.1(b)(1), (5) (West Supp. 2003).

[183] State v. Estrada, 4 P.3d 438, 442 (Ariz. Ct. App. 2000).

[184] Foster v. Irwin, 995 P.2d 272, 276 (Ariz. 2000); Gray v. Irwin, 987 P.2d 759, 763 (Ariz. Ct. App. 1999).

[185] State v. Ossana, 18 P.3d 1258, 1261 (Ariz. Ct. App. 2001).

[186] People v. Westbrook, 122 Cal. Rptr. 2d 514, 519 (Ct. App. 2002).

[187] Goddard v. Superior Court, 956 P.2d 529, 532 (Ariz. Ct. App. 1998).

[188] *See* State v. Guillory, 18 P.3d 1261, 1263 (Ariz. Ct. App. 2001) (holding that conspiracy to possess counts as a "drug-related offense" that, when combined with a second drug-related offense, removes defendant from Proposition 200 coverage).

[189] *Goddard*, 956 P.2d at 530.

[190] ARIZ. REV. STAT. ANN. § 13-901.01(H) (West 2001).

[191] *Goddard*, 956 P.2d at 532.

[192] *Id.* at 532.

served that Proposition 200 itself indicated that trafficking should be treated more harshly than simple possession: only personal possession, and not possession for sale, was a qualifying offense under the initiative.[193] The court suggested that it would be "contrary to common sense" to treat repetitive offenders with prior trafficking convictions more leniently than those with the same number of prior possession convictions.[194] Thus, the court concluded that Goddard should be sentenced in accordance with the preexisting law.[195]

Goddard dealt with the sentencing of a defendant who had *two* prior trafficking convictions. In *Estrada I*, the appeals court considered the effect of *one* prior trafficking conviction.[196] In deciding whether Estrada should be disqualified based on her one prior trafficking conviction, the court, as in *Goddard*, looked for guidance in the structure and purposes of Proposition 200, relying in particular on the one-strike disqualifier for violent crimes.[197] The court concluded that this provision indicated an intent to distinguish violent from non-violent criminal history, noting that this distinction served two of the express purposes of the initiative: "to require that non-violent persons convicted of personal possession or use of drugs successfully undergo court-supervised mandatory drug treatment programs and probation" and "to free up space in our prisons to provide room for violent offenders."[198] Disqualifying a defendant for one prior trafficking conviction would mean treating that defendant the same as one with a violent criminal history. The court rejected such a result as inconsistent with the spirit of the rest of the initiative.[199]

Goddard and *Estrada I* thus represent contrasting responses to an alleged problem of underinclusion: *Goddard* expanded the disqualification provisions of Proposition 200, while *Estrada I* limited these provisions to their literal meaning. The two cases are not substantively inconsistent, however; they in fact employ the same interpretive methodology. Before considering that methodology, however, one should note that neither of the two interpretive considerations discussed in the previous section provides much assistance here. Neither case risks making Proposition 200 a dead letter; nor does either case implicate unexpected or idiosyncratic policy considerations (as in the prison contraband case).

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[193] *Id.* at 531 (citing ARIZ. REV. STAT. ANN. § 13-901.01(C) (West 2001)).

[194] *Id.*

[195] *See id.* at 532 ("[T]he statute simply does not address the impact of prior convictions for other offenses, including possession for sale, upon one's entitlement to mandatory probation, and leaves the consequence of such convictions to the determination of the sentencing judge pursuant to the discretion accorded elsewhere in the criminal code.")

[196] 4 P.3d 438 (Ariz. Ct. App. 2000). This was in addition to its consideration of the drug paraphernalia issue, which was the only part of the decision subsequently considered by the Supreme Court in *Estrada II*, 34 P.3d 356 (Ariz. 2001).

[197] 4 P.3d 438 (Ariz. Ct. App. 2000).

[198] *Id.* (quoting Proposition 200).

[199] *Id.* at 442–43.

Accordingly, rather than relying on these considerations, the courts instead looked to policy objectives implicit in Proposition 200. The *Goddard* court relied on a provision of the law indicating that trafficking should be treated as a more serious offense than possession. The *Estrada I* court relied on provisions that indicated violent offenders should be treated more harshly than nonviolent offenders. In both cases, the court read Proposition 200 so as to give the text of the law substantive coherence: the court identified policy objectives implicit in the law, and looked to those objectives for guidance in determining the scope of the disqualification provisions.

3. Juvenile Proceedings

States typically use specialized juvenile justice courts to handle young offenders. The drug initiatives do not expressly encompass juvenile cases. That said, at least one juvenile has argued that Proposition 200 should be interpreted so as to preclude his incarceration.[200] Following two drug possession offenses, a juvenile court committed "Fernando C." to the custody of the Department of Juvenile Corrections, which was either to hold him for three months or to provide drug treatment and hold him for a minimum of eight months.[201] In objecting to this disposition, Fernando raised an important continuity issue: should juvenile drug offenders be sentenced under the new law that requires treatment and prohibits incarceration, or under the preexisting juvenile law that permitted detention and did not require treatment?

The court rejected Fernando's invocation of Proposition 200 on two grounds. First, the court relied on the linguistic wall. Proposition 200 applies only to defendants who have been "convicted"; juveniles, however, are not "convicted" but "adjudicated delinquent."[202] Thus, by its plain meaning, the law does not cover juveniles. Second, the sole purpose of the juvenile justice system is rehabilitation,[203] in contrast to the more punitive orientation of adult justice. Extending the rehabilitative mandate of Proposition 200 to juveniles "was not necessary and, indeed, would have been redundant."[204]

Fernando C. looked for guidance to the purposes of Proposition 200 and the preexisting juvenile justice law. The court's analysis of those purposes, however, is not entirely persuasive. While Proposition 200 mandates treatment, it was not certain that Fernando was going to receive treatment in the juvenile system. Moreover, Proposition 200 does more than mandate treatment; the law also seeks to reserve limited incarceration

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[200] *In re* Fernando C., 986 P.2d 901, 902 (Ariz. Ct. App. 1999).
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*

resources for offenders, unlike Fernando C., who commit violent crimes. In short, despite its reference to the initiative's purposes, the court's holding does not seem to advance those purposes,[205] or, for that matter, the purposes of the competing juvenile justice regime.

4. Relationship with Recidivism Statute

Arizona, like many states, has a recidivism statute that ties sentence length to criminal history: in general, the more prior felony convictions the defendant has, the longer the defendant's sentence will be.[206] Not all prior convictions, however, count as a "historical prior felony" for sentence enhancement purposes. While the recidivism statute itself indicates that some drug possession offenses may count, one defendant has argued that Proposition 200 offenses may not be used to enhance a sentence.[207]

In *State v. Christian*, the defendant, who was convicted of theft, had two prior felonies: another theft and a Proposition 200 drug possession case.[208] With two historical prior felonies, Christian faced a sentence of 11.25 years; with one, his sentence would be only 6.5 years.[209] Christian claimed that his Proposition 200 case did not count, offering an underinclusion argument: "[T]he drafters could not logically have intended to mandate probation for first and second convictions for personal drug use, but allow those convictions to be used to enhance punishment for subsequent offenses."[210] Christian thus asked the court to interpret Proposition 200 so as to correct the underinclusion, and limit his sentence to 6.5 years.

The court rejected Christian's argument on the basis of the linguistic wall: "We find no language in [Proposition 200], and defendant has directed us to none, that suggests that a conviction for a first or second personal drug use offense under that statute is to be treated any differently than a prior conviction for any other offense for enhancement purposes . . . ."[211]

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[205] The court also failed to analyze the continuity interests in the case, which might supply a more compelling basis for its holding. Indeed, *Fernando C.* might have used a similar interpretive methodology as *Roman*. There is no reason to believe that Proposition 200 contemplates the unique aspects of sentencing juveniles, much as there is no reason to believe that the initiative contemplates the particular importance of keeping drugs out of prison. The interests in detaining juvenile drug offenders may be distinct from, and more compelling than, the interests in detaining adults. For instance, it may be more useful to remove juveniles from bad influences in the community, or juveniles under the influence of drugs may be more prone to hurt themselves or others. To use the terms suggested above, the juvenile laws may represent a set of policy tradeoffs by the legislature that are different from those that were rejected by voters. If so, the continuity interests in *Fernando C.* might be quite strong. This would be a speculative conclusion, however, because the court did not explore the continuity interests with any depth.

[206] ARIZ. REV. STAT. ANN. § 13-604 (West 2001).

[207] State v. Christian, 47 P.3d 666, 667 (Ariz. Ct. App. 2002).

[208] *Id.*

[209] *Id.*

[210] *Id.* at 668.

[211] *Id.* The holding of *Christian* was recently reaffirmed in *State v. Thues*, 54 P.3d 368,

The case is a rare example of one in which plain meaning, standing alone, is found to be dispositive; in other cases in which the court cites the linguistic wall, such as *Fernando C.*, the court generally relies on an analysis of statutory purposes as well.

The *Christian* court might have found a more compelling basis for its holding in continuity interests. Recidivism statutes are based on the tendency of repeat offenders to commit additional crimes in the future.[212] Harsh penalties protect society by incapacitating the highest-risk offenders, as well as deterring such offenders from committing new crimes.[213] Such penalties, however, impose considerable costs on society, including long-term incarceration expenses. Proposition 200 rejected the legislature's weighing of the costs and benefits of incarceration for drug possession defendants. There is no reason, however, to believe that the initiative contemplated the policy tradeoffs involved in keeping other sorts of recidivists off the street. *Christian* is thus similar to *Roman* inasmuch as both cases involve preexisting statutes whose purposes were not plainly rejected by the initiative. In short, the continuity interests seemed relatively strong.

The court might have also buttressed its holding by considering policy choices implicit in the structure of Proposition 200. For instance, there is the implicit policy on which *Goddard* turned: the two-strikes disqualifier suggests that multiple repeat offenders should be viewed as too great a risk to merit the initiative's protection. Additionally, Proposition 200 couples the protection it offers with mandatory community-based treatment; the initiative is not merely a "get out of jail free" card. Because Christian was going to prison for at least 6.5 years anyway, it is not clear how he could draw on the community-based treatment programs established under Proposition 200. Thus, his attempt to obtain some advantage from the initiative represented an effort to decouple the incarceration protection from the treatment mandate, which would undermine the law's integrity. In short, *Christian* seems correctly decided (though thinly reasoned) from the standpoint of coherence in the law.

369–70 (Ariz. Ct. App. 2002) (holding that prior drug possession convictions constitute "historical prior felonies").

[212] *See* GEST, *supra* note 66, at 197–98 (describing popular beliefs that motivated passage of three-strikes laws). Criminal justice statistics lend some support to the conventional wisdom. As one of the most comprehensive statistical studies of recidivism recently concluded, "[t]he number of times a prisoner has been arrested in the past is a good predictor of whether that prisoner will continue to commit crimes after being released." PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 10 (2002). The study indicates that more than two-thirds of defendants imprisoned for drug possession crimes—the defendants of greatest interest for present purposes—are rearrested at least once within three years of release from prison. *Id.* at 8.

[213] ZIMRING ET AL., *supra* note 3, at 90–91.

B. Problems of Ambiguity

1. Retroactivity: Meaning of "Convicted"

The initiatives are triggered, by their own terms, when a defendant is "convicted."[214] Because the laws do not apply retroactively, the meaning of "convicted" carries important consequences for defendants whose cases were still pending as of the initiative's effective date. If a defendant had not yet been "convicted" on that date, he or she might be entitled to treatment in lieu of incarceration; otherwise, he or she would face the possibility of incarceration under the old law.

"Conviction" carries different meanings in different contexts. At one extreme, a defendant might be "convicted" as soon as he or she enters a plea of guilty or is determined guilty by a jury. At the other extreme, a defendant might not be "convicted" until all of his or her direct appeals are exhausted. In the middle, a defendant might be "convicted" once a sentence is imposed and judgment entered. "Convicted" might plausibly mean any of these different options. Thus, the retroactivity cases present not a problem of underinclusion—in which we know, but may be dissatisfied with, the literal meaning of the statute—but of true ambiguity—in which we do not know the literal meaning of the statute.[215]

The California courts have resolved the ambiguity by holding that Proposition 36 does not apply to cases on appeal as of the initiative's effective date, July 1, 2001.[216] The courts have split, however, as to whether the law applies to cases in which the defendant's guilt had been established but no sentence imposed by the effective date.[217]

The court's decision in *In re DeLong* represents the majority approach. A jury convicted DeLong of drug possession in May 2001.[218] Sentencing was delayed until July 12—a few days after Proposition 36's effective date.[219] The trial court found that she was nonetheless ineligible for Proposition 36 treatment and sentenced her to 150 days in jail.[220]

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[214] ARIZ. REV. STAT. ANN. § 13-901.01(A) (WEST 2001); CAL. PENAL CODE § 1210.1(a) (West Supp. 2003).

[215] *See* Solan, *supra* note 139, at 62–63 (discussing meaning of "ambiguity").

[216] People v. Floyd, 116 Cal. Rptr. 2d 256, 262 (Ct. App. 2002); People v. Fryman, 119 Cal. Rptr. 2d 557, 569–70 (Ct. App. 2002); People v. Legault, 115 Cal. Rptr. 2d 352, 354 (Ct. App. 2002).

[217] *Compare In re* DeLong, 113 Cal. Rptr. 2d 385, 391 (Ct. App. 2001) (holding that "conviction" means both adjudication of guilt and entry of judgment), *with* Fryman, 119 Cal. Rptr. 2d at 569 (disagreeing with analysis of *DeLong*). Arizona courts have adopted yet a third approach, holding that Proposition 200 does not apply to any cases in which the offense occurred before the effective date. Baker v. Superior Court, 947 P.2d 910 (Ariz. Ct. App. 1997).

[218] *In re* DeLong, 113 Cal. Rptr. 2d at 387.

[219] *Id.*

[220] *Id.* at 388.

While acknowledging the ambiguity of the term "convicted," the appeals court reversed.[221]

The court relied on two considerations in reaching this result. First, the court observed, "the provisions of Proposition 36 reflect it was intended to have a far-ranging application to nonviolent drug offenders."[222] For instance, Proposition 36 applied to offenders who were already on parole or probation as of the effective date.[223] Second, the court concluded that the eight-month delay between the passage of Proposition 36 and its effective date was "solely for practical considerations."[224] Specifically, the delay was intended to permit the development of a new drug treatment "infrastructure": "[T]he voters delayed the effective date to July 1, 2001, so that treatment facilities could be in place, not out of a desire to preserve the stricter sentencing scheme for nonviolent drug offenders for a few more months."[225] Because the treatment infrastructure was already in place (or at least required to be in place) by the time of DeLong's sentencing, the court saw no reason to deny her the benefits of that infrastructure.[226]

A different district of the California Court of Appeal rejected *DeLong*'s reasoning in *People v. Fryman*.[227] The *Fryman* court adopted a plain meaning approach to the problem, relying on Proposition 36's mandate that "any person convicted of a nonviolent drug possession offense shall receive probation."[228] The court reasoned:

> This language indicates that first the defendant is convicted and then, if the defendant is otherwise eligible, the court places him or her on probation under [Proposition 36] . . . . Thus, the plain meaning . . . appears to reflect an intent to make *convicted* mean the adjudication of guilt.[229]

As a result of this sequential reading of text (first "conviction," then application of Proposition 36), the *Fryman* court concluded that the new law excluded defendants who were adjudicated guilty before July 1, 2001, regardless of whether they had been sentenced by the effective date.[230] Finding an answer in the "plain meaning" of the law, the court did not address the purpose-oriented interpretive approach of *DeLong*.[231]

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[221] *Id.* at 390.
[222] *Id.*
[223] *Id.*
[224] *Id.* at 391.
[225] *Id.*
[226] *Id.*
[227] 119 Cal. Rptr. 2d 557, 569 (Ct. App. 2002).
[228] *Id.* at 568 (quoting CAL. PENAL CODE § 1210.1(a) (West Supp. 2003)).
[229] *Id.* at 568–69.
[230] *Id.* at 562.
[231] For a more recent decision that also rejects *DeLong*, see People v. Mendozo, 131

The *Fryman* court, however, did not end its analysis with statutory interpretation. Instead, it proceeded to consider an Equal Protection challenge to the purely prospective application of Proposition 36. The court observed that the law created two classes of nonviolent drug offenders—"those convicted before July 1, 2001, whose judgments are not yet final and those convicted after July 1, 2001."[232] In order to determine the legality of the disparate treatment of these two classes, the court employed strict scrutiny analysis,[233] requiring the state to show that its treatment of the two classes was necessary to further a compelling interest.[234] Because the state was unable to carry this burden, the court held that the prospective-only application of Proposition 36 was unconstitutional.[235] The court reasoned:

> [T]he purpose of [Proposition 36] is to save money by ending wasteful spending on incarcerating nonviolent drug offenders and to enhance public safety and health by diverting these offenders to drug treatment . . . . [D]iverting to drug treatment a nonviolent offender found guilty before July 1, 2001, and whose judgment is not final, would save as much money and enhance public safety and health just as much as diverting an offender convicted after that date.[236]

While the court acknowledged the need to create a treatment infrastructure before Proposition 36 could be implemented, the court noted, "[t]he [new law] is now in effect and has been for some months. Presumably, therefore, treatment programs are funded and operational."[237] Thus, the *Fryman* court ultimately relied on a purposive analysis similar to *DeLong*'s but in a constitutional context.

In sum, the California courts have sought to preserve the substantive integrity of Proposition 36 when dealing with retroactivity issues, specifically, by making the benefits of the new law available to defendants as soon as the treatment infrastructure was required to be in place.[238] While continuity interests would indicate that the old law should be preserved as long as possible, particularly with respect to defendants whose prose-

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Cal. Rptr. 2d 375, 378 (Ct. App. 2003).

[232] Fryman, 119 Cal. Rptr. 2d at 570.

[233] The court used strict scrutiny because the challenged law infringed a fundamental liberty interest of the defendant. *Id.* at 571.

[234] *Id.* at 574.

[235] *Id.* at 579.

[236] *Id.* at 570.

[237] *Id.* at 575.

[238] Similarly, extending the analysis of *DeLong*, at least one court has held that Proposition 36 applies to probation violations that occurred before the effective date but that were not judicially determined until after the effective date. People v. Williams, 131 Cal. Rptr. 2d 546, 551 (Ct. App. 2003).

cutions were begun under the old regime, those interests carried little weight because they preserved legislative judgments that had been clearly rejected by the initiative.

2. Washout Period

Like Proposition 200, Proposition 36 excludes defendants with prior violent felony convictions, but it provides an exception if

> the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in (A) a felony conviction other than a nonviolent drug possession offense, or (B) a misdemeanor conviction involving physical injury or the threat of physical injury to another person.[239]

A California defendant may thus avoid incarceration if there has been a five-year crime-free "washout" period prior to his or her present drug possession charge.[240] The statutory language, however, contains an ambiguity: the law does not specify whether the washout period must occur immediately prior to the drug possession charge, or whether any crime-free five years will suffice. Depending on context, "after" may mean either "immediately after" or "any time after."

California courts have resolved this ambiguity against the defendant.[241] *Ex rel. Jefferson* provides a representative illustration.[242] After serving time in prison for attempted robbery, Jefferson remained out of prison and free of new convictions from 1987 to 1993—a time period in excess of five years.[243] Jefferson was returned to prison in 1993 for selling drugs.[244] Then, in 2001, less than five years after his release, Jefferson was convicted of drug possession.[245] At sentencing, Jefferson invoked the protection of Proposition 36 based on his six clean years between 1987 and 1993, notwithstanding his intervening conviction and imprisonment.[246] While the sentencing court apparently agreed with Jefferson's interpreta-

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[239] CAL. PENAL CODE § 1210.1(b)(1) (West Supp. 2003).

[240] A sentencing court, however, may strike an allegation of an otherwise disqualifying prior offense "in furtherance of justice." *In re* Varnell, 115 Cal. Rptr. 2d 464, 476 (Ct. App. 2002).

[241] People v. Superior Court *ex rel.* Martinez, 128 Cal. Rptr. 2d 372, 380 (Ct. App. 2002); People v. Superior Court *ex rel.* Henkel, 119 Cal. Rptr. 2d 465, 470 (Ct. App. 2002); People v. Superior Court *ex rel.* Jefferson, 118 Cal. Rptr. 2d 529, 534 (Ct. App. 2002); People v. Superior Court *ex rel.* Turner, 119 Cal. Rptr. 2d 170, 176 (Ct. App. 2002).

[242] 118 Cal. Rptr. 2d 529 (Ct. App. 2002).

[243] *Id.* at 531, 533.

[244] *Id.* at 531.

[245] *Id.*

[246] *Id.* at 531, 533.

tion of the law,[247] the appeals court reversed and held that Jefferson was ineligible for Proposition 36.[248]

In reaching this conclusion, the California Court of Appeal noted the law's ambiguity[249] but resolved the ambiguity against Jefferson for two reasons. First, the court relied on the "legislative history" of Proposition 36—here, the materials distributed to voters along with the ballot.[250] Most notably, the legislative history included language indicating that the washout period must occur "during the five years before [the defendant] committed [the present] nonviolent drug possession offense."[251] Second, the court concluded that its interpretation was "in accord with the voters' purpose in providing for a washout period":

> The provisions of Proposition 36 make a clear distinction between nonviolent, drug-dependent criminal offenders and those with a history of serious or violent felonies. Drug treatment is offered [sic] the former based on the belief that the primary obstacle to their becoming law abiding citizens is their dependency on drugs. There is no comparable expectation that drug treatment can easily rehabilitate hard-core offenders. However, even a person with a history of serious offenses may be attempting to rehabilitate himself or herself. Those persons will also be eligible for drug treatment instead of incarceration. By requiring a washout period, the voters wanted an assurance that the defendant is currently trying to give up a life of crime, even though he or she may still have a drug problem. The fact that sometime in the past there was a prison-free five-year period does not demonstrate that he is currently amenable to drug treatment.[252]

This latter aspect of the court's analysis mirrors the approach in the Arizona cases that deal with prior convictions, particularly *Estrada I* and *Goddard*.[253] The *Jefferson* court likewise looked to the policy objectives implicit in the new law (here, targeting those defendants who are *currently* most amenable to treatment), and adopted an interpretation that was consistent with those objectives.

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[247] *Id.* at 532.

[248] *Id.* at 533.

[249] *Id.*

[250] *Id.*

[251] People v. Superior Court *ex rel.* Henkel, 119 Cal. Rptr. 2d 465, 468 (Ct. App. 2002) (quoting description of washout period by California Legislative Analyst, which was distributed as part of the Proposition 36 Ballot Pamphlet).

[252] People v. Superior Court *ex rel.* Jefferson, 118 Cal. Rptr. 2d 529, 534 (Ct. App. 2002).

[253] *See* discussion *supra* Part III.A.2.

3. Jail as a Condition of Probation

Both Propositions 200 and 36 mandate a sentence of "probation" for eligible defendants.[254] While Proposition 36 specifies that "probation" may not include incarceration,[255] Proposition 200 is silent on the point. Arizona law provides that judges may impose a short period of incarceration (up to a year) when granting probation.[256] Yet, dictionary definitions of "probation" typically exclude incarceration.[257] This indicates an ambiguity in the law: when Proposition 200 mandates "probation," is that term used in the technical sense codified in Arizona law, or in the everyday sense?

The Arizona Supreme Court adopted the everyday definition in *Calik v. Kongable*.[258] The court found several sources of support for its holding. First, the court relied on the "graduated sequence of punishment" implicit in the law: a violation of probation results in new conditions of probation "short of incarceration"; a second offense may result in up to one year of jail time; and a third offense renders the defendant ineligible for the benefits of Proposition 200.[259] If incarceration were permitted for a first-time conviction, this graduated scheme would be violated.[260] In fact, using the technical meaning of "probation" would produce an "absurd" result inasmuch as the judge could order jail time as an initial condition of probation, but would be barred from imposing a jail term for subsequent probation violations.[261]

Second, the court relied on the definition of probation contained in the Proposition 200 ballot pamphlet, which indicated that a "person who is sentenced to probation does not serve any time in jail or prison."[262] Third, the court referred to the general purpose of Proposition 200: "treat[ing] initial convictions for personal possession and use of a controlled substance as a medical and social problem."[263] Finally, the court relied on another form of legislative history: developments subsequent to the initial passage of the law. Specifically, when Arizona voters repealed the legislature's amendments to Proposition 200 in 1998, one of the provisions they rejected explicitly provided judges with the power to impose incarceration as a condition of probation.[264] According to the court, this

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[254] ARIZ. REV. STAT. ANN. § 13-901.01(A) (West 2001); CAL. PENAL CODE ANN. § 1210.1(a) (West Supp. 2003).

[255] CAL. PENAL CODE ANN. § 1210.1(a) (West Supp. 2003).

[256] ARIZ. REV. STAT. ANN. § 13-901(F) (West 2001).

[257] BLACK'S LAW DICTIONARY 1220 (7th ed. 1999).

[258] 990 P.2d 1055, 1060 (Ariz. 1999).

[259] *Id.* at 1057–58.

[260] *Id.* at 1058.

[261] *Id.* at 1058.

[262] *Id.* at 1059 (quoting analysis of Proposition 200 by Arizona Legislative Council).

[263] *Id.* at 1060.

[264] *Id.*

history "lead[s] to the inevitable conclusion that the electorate never intended trial judges to have the discretion to impose jail time as a condition of probation."[265]

4. Penalty for Violating Probation

Probation under Propositions 200 and 36 may result in the imposition of many requirements on defendants. Normally, the court has wide discretion in determining what penalties to impose for a violation, including revocation and incarceration. The drug initiatives, however, curtail this discretion. Proposition 200 requires that judges respond to violations by imposing additional requirements "short of incarceration."[266] Those requirements may include "intensive probation," a probation program involving closer monitoring and more rigorous conditions.[267] Proposition 36 permits revocation, but—at least for a first-time violation—only if the state proves that the defendant "poses a danger to the safety of others."[268] Despite this guidance, defendants and prosecutors have found situations in which to litigate the consequences of a violation.

For instance, in *State v. Thomas*, the Arizona Court of Appeals considered whether incarceration could be imposed as a penalty for violating intensive probation.[269] The state relied upon what it contended to be an ambiguity in Proposition 200: while the initiative prohibits incarceration for a violation of probation, it does not specify whether "probation" in this context includes "intensive probation."[270] In light of this ambiguity, the State argued, the case should be governed by the preexisting intensive probation statute, which mandated incarceration as a penalty for violations.[271] The court rejected this argument, however, finding that the initiative's language evinced an intent "to keep persons eligible for probation or parole under [Proposition 200] out of prison and to ensure that they receive drug treatment."[272] The case is thus similar to *Calik* inasmuch as

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[265] *Id.*

[266] ARIZ. REV. STAT. ANN. § 13-901.01(E) (West 2001). Proposition 302 would modify this provision of Proposition 200. *See supra* text accompanying note 102.

[267] *Id.*

[268] CAL. PENAL CODE ANN. § 1210.1(e)(3)(A) (West Supp. 2003).

[269] 996 P.2d 113 (Ariz. Ct. App. 1999).

[270] *Id.* at 115.

[271] *Id.* (citing ARIZ. REV. STAT. ANN. § 13-917(B)(West 2002)).

[272] *Id.* at 116. A different division of the Court of Appeals reached the same conclusion as to this issue in *State v. Jones*, 995 P.2d 742, 744 (Ariz. Ct. App. 1999). For California cases rejecting attempts to incarcerate a Proposition 36-eligible defendant for a probation violation, see People v. Murillo, 126 Cal. Rptr. 2d 358, 363–64 (Ct. App. 2002); People v. Davis, 129 Cal. Rptr. 2d 48, 52 (Ct. App. 2003); *In re* Mehdizadeh, 130 Cal. Rptr. 2d 98, 107 (Ct. App. 2003); *In re* Taylor, 130 Cal. Rptr. 2d 554, 556–57 (Ct. App. 2003). The counterparts to these cases are those in which the defendant seeks a relaxation of probation conditions after a violation. In *State v. Hylton*, the Arizona Court of Appeals held that Proposition 200 requires that new conditions be imposed after a violation, even if the violation is merely technical (for example, failing to notify a probation officer of a change of

the court rejected an opportunity to preserve the integrity of an old probation scheme in favor of advancing the purposes of Proposition 200.

C. Summary

In the drug initiative cases, the courts consistently assess the purposes of the initiative and relevant preexisting statutes and attempt to accommodate competing purposes in a reasoned manner (*Christian* being the clearest exception). More specifically, the cases are generally explicable on the basis of a few simple rules. First, any interpretation that would substantially undermine the effectiveness of the initiative should be rejected (*Estrada II*). Second, prior law should be preserved if it implicates important public policy considerations that were not plainly taken into account in the initiative scheme (*Roman*). Finally, assuming that neither of the foregoing rules applies, then the court should interpret the initiative so as to preserve its substantive coherence. That is, it should be interpreted in the manner that is most consistent with the policy choices that are implicit in its text and structure (*Estrada I* and *Goddard*).

Notwithstanding substantial academic skepticism about direct democracy, the courts seem to take the initiatives seriously on their own terms. There is no reason to believe that the courts handle the interpretive task differently than they would if they were working with a conventional legislative enactment.

Still, the cases display a troubling lack of clarity as to interpretive methodology. While the results of the cases follow consistent patterns, the courts do not employ uniform, well-articulated rules of interpretation to reach those results. For instance, in the underinclusion cases, a few decisions purportedly rely on the linguistic wall, while others plainly reject the wall. Courts occasionally invoke the Rule of Lenity, but more often do not. Courts also sometimes rely on conclusory assertions as to "plain meaning" or "voters' intent."

The varying methodologies should raise rule of law concerns. Inconsistent or poorly articulated analysis may create a perception that results are arbitrary or improperly motivated. Courts would do well to employ a more self-conscious and open interpretive process. This might involve an explicit adoption of the three rules listed above, a clear rejection of the Rule of Lenity, and a recognition that "plain meaning"—while an appropriate starting point for analysis—should not supplant a broader inquiry into the initiative's purposes.[273]

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address). State v. Hylton, 44 P.3d 1005, 1006 (Ariz. Ct. App. 2002). In *State v. Tousignant*, the Arizona Court of Appeals held that a defendant may not reject additional probation after having failed drug treatment. State v. Tousignant, 43 P.3d 218, 220 (2002).

[273] This proposal assumes, of course, that the current interpretive practices used in most cases are acceptable; Professors Frickey and Schacter, as detailed in the next Part, might well object to this premise.

D. Comparison with Earlier Empirical Findings

Before taking up the normative question, this Part concludes with an assessment of the empirical question: how do the drug initiative cases compare with Professor Schacter's findings about what the courts actually do when interpreting initiatives? Schacter reviewed fifty-three cases decided between 1984 and 1994, and made the following findings.[274] First, courts employ the same approaches to interpreting initiatives as they do to interpreting conventional statutes: "courts have transported to the context of direct democracy the techniques and principles used to construe legislatively enacted law."[275]

Second, she examined the sources that courts use to aid interpretation. She considered two major categories. "Formal" sources include initiative language, official ballot pamphlets, and other legal texts.[276] "Informal" sources include media reports and advertising.[277] Schacter found an "almost exclusive focus" on formal sources,[278] while "informal" sources "played virtually no role."[279] Within the category of "formal sources," she found considerably more reliance on initiative language and other legal texts than on the ballot pamphlets.[280]

Third, she examined what theories of interpretation were emphasized by the courts. She found that intent was paramount: "[i]n the vast majority of the decisions . . . the courts declare that their task is to locate the controlling popular intent behind the provision at issue."[281] Thus, for instance, Schacter found "no express indications in the decisions studied that some courts chose to forsake the search for the subjective popular intent behind a statutory provision in favor of the assertedly objective 'plain meaning' approach of the kind so vigorously espoused by Justice Antonin Scalia."[282]

The drug initiative cases lend clear support to the first two findings. None of the cases suggests a special methodology for initiatives. None of the cases relies on media reports and advertising, and relatively few on ballot pamphlets. The story is a bit more complicated, however, as to the third finding. Many of the cases discuss the determination of popular intent as a central objective of the interpretive process, and none explicitly reject intent in favor of an alternative theory, such as a Scalia-style textualism.

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[274] Schacter, *supra* note 8, at 110, 169–76.
[275] *Id.* at 119.
[276] *Id.* at 120.
[277] *Id.* at 121.
[278] *Id.* at 122.
[279] *Id.* at 123.
[280] *Id.* at 122, tbls.1–3.
[281] *Id.* at 117.
[282] *Id.* at 118.

At the same time, the drug initiative cases demonstrate that courts are generally not engaged in a one-dimensional search for "subjective popular intent." Rather, the search for "intent" occurs against a backdrop of public values that shape the interpretive analysis. Courts identify the purposes implicit in the initiatives and consider those purposes in light of the competing purposes embodied in other statutes (such as the prison contraband statute in *Roman* and the juvenile laws in *Fernando C.*). The cases are, in short, marked by a search for coherence. Moreover, to the extent that the courts are engaged in a search for intent, the relevant intent often seems less an actual historical intent than the hypothetical intent of "reasonable legislators acting reasonably."

The purposive/dynamic aspect of the drug initiative cases may, of course, be an idiosyncratic characteristic of a small universe of cases. Schacter's case sample, however, may also reflect this tendency, based on her summary of the types of sources consulted. As noted above, her "formal" sources encompass other statutes, judicial decisions, canons of construction, and administrative materials. When courts employ sources such as these—and Schacter indicates that they did so in her sample more than twice as often as they consulted ballot pamphlets—their implicit objective is to fit an initiative into a preexisting body of law in a coherent fashion.[283] While such an objective does not necessarily represent a rejection of intent, it does suggest that something more is going on than an inquiry into actual voter preferences. Thus, the drug initiative cases may not contradict Schacter's cases so much as they highlight a nuance that is at least implicit in her own findings. A focused case study helps to draw out such nuances, permitting a clearer idea of what it is that the courts mean by their frequent references to "intent."

Nor is the distinction here—between actual and hypothetical intent—wholly academic. Schacter's principal criticism of existing interpretive practices lies in the courts' pursuit of popular intent, which she characterizes as "futile" and incoherent.[284] Judging by the drug initiative cases, even if Schacter is right about the inappropriateness of seeking actual popular intent, such a conclusion would not necessarily mean that existing practices must be rejected.

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[283] At one point, Schacter notes the purposive approach of some the cases she studied: "Some of the decisions studied . . . try to finesse the problems with popular intent by searching out the overarching purpose of the law and choosing an interpretation regarded as consistent with that purpose." *Id.* at 146. She rejects this approach because "the purpose inquiry is wholly circular when the very question at issue is what purpose the voters had in passing a law." *Id.* As another commentator has observed in responding to this aspect of Schacter's argument, however, the inquiry is not necessarily circular because "[p]urposivism need not be tied to actual intent." Garrett, *supra* note 8, at 32.

[284] Schacter, *supra* note 8, at 123–44, 153.

IV. Proposed Special Rules for Interpreting Initiatives

Professors Frickey and Schacter have each proposed rules for interpreting ballot initiatives. Their two proposals share some features but also differ in important respects. This Part summarizes and evaluates the proposals separately. The drug initiative case study is used, in particular, as a starting point in the evaluation of each.

A. Frickey's "Quasi-Constitutional" Approach

1. Description

Professor Frickey offers what he calls the "quasi-constitutional" approach to interpreting initiatives.[285] This approach is designed to "protect public values, especially underenforced constitutional norms."[286] At the same time, Frickey acknowledges the need to show "respect for direct democracy as an institution and for the people as lawmakers."[287] Reconciling constitutional norms with direct democracy is not easy, Frickey asserts, because the Constitution is premised on representative, not direct, lawmaking and guarantees a "republican" form of government.[288] Frickey's preference for the constitutional norm of representative lawmaking animates his interpretive theory.

Frickey proposes that the tension between public values and direct democracy be mediated through variations on familiar canons of statutory interpretation. More specifically, Frickey offers a three-part inquiry. First, he focuses on constitutional considerations: interpretations that raise "serious constitutional doubts" are to be avoided if there is an alter-

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[285] Frickey, *supra* note 8, at 502.

[286] *Id.* at 510.

[287] *Id.*

[288] *Id.* The Guarantee Clause provides, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. The Supreme Court has indicated that federal courts do not have jurisdiction to enforce the Guarantee Clause in cases that seek to overturn initiatives as unconstitutionally enacted. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 151 (1912). Commentators are divided as to whether Congress may constitutionally enforce the Guarantee Clause, as by passing a law that bans direct lawmaking. *Compare* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 878 (1994) (concluding that congressional enforcement of Guarantee Clause would be of "questionable constitutionality"), *with* Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 572 (2001) ("Congress' duty to guarantee a republican form of government includes the power to restrict state lawmaking by initiative."). For an argument that state courts have a duty to enforce the Guarantee Clause, see Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 953–58 (2001). As Professor Eule has argued, however, "The electoral accountability of the state courts raises significant doubt about their desire to take a leading role in curbing voter lawmaking." Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 736 (1994).

native plausible interpretation.[289] Frickey derives this principle from an established canon of statutory interpretation, though he suggests that this canon might apply with heightened force in the direct democracy context.[290] Second, "because ballot propositions are in derogation of republican government," Frickey argues for a general working presumption in favor of narrow construction when directly adopted laws clash with pre-existing law.[291] Thus, pre-existing law would be displaced "only when the clear text or evident, core purposes of the electorate so require."[292] This proposed rule will be referred to here as the Continuity Canon. Third, "to the extent a ballot proposition runs up against specialized substantive canons, such as the Rule of Lenity, those canons should have somewhat more force than they would in the context of a legislatively adopted law."[293] This third part of the inquiry seems to flow from the second: Frickey refers to the "bolstering" effect that a preference for republican lawmaking may have upon other canons.[294]

Frickey's canons are not intended to displace "plain text" or "evident, core purposes." Rather, the canons will come into play when there is a range of interpretations that do not violate either plain text or core purposes.[295] In these circumstances, he would emphasize certain quasi-constitutional values (avoidance, republicanism, lenity) as determinative in the choice among plausible interpretations.

2. *Evaluation*

Applying Frickey's proposal to the drug initiative cases reveals at least two areas of difficulty with the proposal. First, the proposal suffers from many uncertainties in practice. Second, and more fundamentally, the proposal seems to neglect an important public value: substantive coherence in the law.

Consider, for instance, *Estrada II*—the drug paraphernalia case in Arizona. In this case, a literal reading of Proposition 200 would substantially reduce the scope of the law, as prosecutors could charge virtually any drug possession case as a paraphernalia case in order to avoid the initiative's requirements. The text seemingly conflicts with the law's purpose. Although Frickey indicates that he would not preempt "clear text"

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[289] Frickey, *supra* note 8, at 522.

[290] *Id.* at 516–17. For a recent statement of the "avoidance canon," see Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 173 (2001) ("[W]]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citation omitted).

[291] Frickey, *supra* note 8, at 522.

[292] *Id.*

[293] *Id.* at 522–23.

[294] *Id.* at 523.

[295] *Id.* at 517.

or "evident, core purposes," it is hard to tell whether he would find the text here sufficiently clear, or the purposes sufficiently evident and central, to control the analysis—and, if both, how he would handle a situation like this in which text and purpose point in opposite directions.

Frickey's quasi-constitutional norms are also difficult to apply in this case. The proposed Continuity Canon suggests that, in the name of republicanism, Proposition 200 should be interpreted narrowly to minimize its displacement of conventional legislation, which would presumably include the drug paraphernalia law. The Continuity Canon would thus support a pro-prosecution ruling in *Estrada II*. However, Frickey also indicates that courts should apply the pro-defendant Rule of Lenity with particular vigor when interpreting initiatives. How is lenity to be reconciled with republicanism? Frickey does not address such conflicts. This quandary points to a systematic difficulty in applying Frickey's proposal to the drug treatment initiatives, or any other type of pro-defendant initiative: when conventional statutes turn out to be harsher than direct democracy, the republicanism norm conflicts with the lenity norm.

However Frickey would balance these norms, the analysis seems to miss the crucial question of whether the law, as a whole, would make any sense under the narrow interpretation of Proposition 200. The answer is quite clearly no. There is nothing intrinsically wrong about possessing an item of paraphernalia apart from its association with drug use. If Proposition 200 did not encompass paraphernalia, though, a defendant convicted of paraphernalia possession would face a stiffer sentence than one convicted of drug possession and likely be denied drug treatment to boot. No theory of punishment or drug rehabilitation would support such an odd disparity. Frickey's proposal might or might not produce this result, but the mere possibility of reaching this answer suggests that his proposal is not asking the right questions.

Consider next the juvenile delinquent case, *Fernando C.* Because neither clear text nor evident, core purposes seem implicated in the case, the Continuity Canon indicates that Fernando C. should be sentenced under the old law in the juvenile system. Yet, this would make for a substantively odd result. The purpose of the juvenile system is to deliver rehabilitation instead of punishment. Fernando C., however, received less rehabilitation and more punishment in the juvenile system than he would have in the adult system. To treat a juvenile more harshly than an adult seems, on its face, as inconsistent with the purposes of the old law as it is with the new.

Finally, consider *Calik*, the case that rejected jail as a component of Proposition 200 probation. Here, clear text and core purposes seem again unlikely to resolve the matter. The meaning of "probation" is ambiguous, while the central purposes of providing treatment and diverting nonvio-

lent drug offenders from prison would not be compromised by the imposition of a jail term.[296] The Continuity Canon would thus mandate minimal displacement of preexisting law. Since preexisting probation law provided for the possibility of jail, the Canon indicates that Proposition 200 should be interpreted to permit jail. As the *Calik* court observed, though, such a holding would make the new law incoherent. Because jail is expressly precluded for a violation of probation, permitting jail upon conviction would mean that a defendant who did not violate probation might receive harsher treatment than one who did. Indeed, a defendant sentenced to jail would actually have an incentive to violate the terms of probation in order to avoid jail. Thus, the actual holding in *Calik*, which precluded jail in all instances, seems to make for a far more rational scheme of sentencing.

These cases point to the chief difficulty with Frickey's proposal. While Frickey characterizes his proposal as an effort to balance direct democracy with public values, he exalts one particular public value, the preference for representative lawmaking, at the expense of other important public values, particularly substantive coherence in the law. The Continuity Canon demands that—absent clear text or evident, core purpose to the contrary—initiatives give way to conventional statutes, without regard to the effects an interpretive ruling will otherwise have on the legal regime at issue. This per se preference for conventional statutes over coherence values seems misguided for at least three reasons.

First, the absolute preference for conventional statutes seems self-defeating on its own terms. After all, the particular advantage that is claimed for representative over direct lawmaking lies in the superior opportunities for reasoned deliberation.[297] Yet, an interpretive rule that narrows the scope of initiatives without regard to substantive considerations may produce an incoherent legal regime that no reasonably deliberating legislature would accept. If Frickey's proposal does not ultimately advance the goal of rationality in the law, then it seems little more than an exercise in empty formalism.

Second, the deliberative quality of direct lawmaking differs less than is commonly supposed from that of representative lawmaking. Examples

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[296] Indeed, the "Purpose and Intent" section of the initiative refers only to diversion from "prison," without reference to jails or incarceration generally. Proposition 200, § 3. Two of the listed purposes are particularly relevant here: (1) "To require that non-violent persons convicted of personal possession or use of drugs successfully undergo court-supervised mandatory drug treatment programs"; and (2) "To free up space in our prisons to provide room for violent offenders." Proposition 200. The first purpose is not incompatible with jail terms: mandatory drug treatment may be administered while the defendant is in jail as easily as when the defendant is in the community. Nor is the second purpose compromised by jailing drug offenders; scarce prison resources are not consumed when a drug offender is sent to jail.

[297] *See* Frickey, *supra* note 8, at 519 (identifying republican values with "structurally induced opportunities for deliberation").

abound of ill-advised statutes hastily enacted by a legislature intent on responding to the latest media frenzy. Criminal law has been particularly marked by this phenomenon.[298] For instance, in response to the highly publicized abduction and murder of twelve-year-old Polly Klaas in 1993, the California legislature quickly enacted what was by far the nation's harshest "three-strikes" law, and it did so without the benefit of any analysis by criminal justice professionals or academic experts prior to passage.[299] Indeed, fearful of being branded soft on crime, the legislature engaged in no real deliberation whatsoever: the Democratic leadership simply promised in advance to pass whatever three-strikes law was proposed by the Republican governor.[300]

If representative lawmaking often falls short of republican ideals, direct lawmaking may incorporate more deliberation than first appears to be the case. As Frickey observes, "[d]irect democracy consists of two separate processes: proposal by well-organized interests and ratification by the electorate."[301] The first component may involve a substantial deliberative process, in which research is conducted, policy experts are consulted, and lessons are drawn from the experience of other jurisdictions. The history of the drug initiative movement itself may illustrate such a deliberative process, as the various initiative proposals have evolved since the first meeting of experts and community leaders in Arizona in 1995.[302] The second process, ratification, also reflects some level of deliberation. As Professor John Copeland Nagle has written:

> The direct democracy process is not as naïve or malleable as some critics suggest . . . . Some of the most constitutionally problematic initiatives presented to the voters [in the last election year] were defeated by the voters themselves . . . . The initiative most criticized as ambiguous . . . lost as well . . . . Also, public choice theory reminds us that the people do not have to worry about the impact of their votes on re-election campaigns or on other legislative issues to be considered in the future.[303]

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[298] Indeed, Professor William J. Stuntz argues that criminal justice legislation is systematically subject to a troubling institutional dynamic that "*always* pushes toward broader liability rules, and toward harsher sentences as well." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (emphasis in the original).

[299] ZIMRING ET AL., *supra* note 2, at 11. The three-strikes law has been codified at CAL. PENAL CODE § 667 (West 2003).

[300] ZIMRING ET AL., *supra* note 2, at 6. Judge Landau offers a similar critique of Professor Frickey's analysis, citing other examples of laws that reflect poor legislative deliberation. Landau, *supra* note 8, at 516–19.

[301] Frickey, *supra* note 8, at 519.

[302] *See supra* Part I.C.1.b. Subsequent initiatives reflect lessons learned from earlier experiences. *See, e.g.*, O'Hear, *supra* note 12, at 339 (discussing lessons learned about need to address status of drug paraphernalia defendants).

[303] John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN.

As Professor Nagle concludes, the differences between direct and representative lawmaking are "real but exaggerated."[304] Such differences should not be ignored, but they hardly seem a compelling basis for a new canon of statutory interpretation.[305]

Third, and finally, coherence possesses a constitutional grounding that is at least as strong as the preference for representative lawmaking. Indeed, while the Guarantee Clause mandates "republican" government, persuasive historical arguments have been made that the Framers' original understanding of "republican" government encompassed the devices that we would label direct democracy today.[306] By contrast, rationality in the law is a well-established mandate of the Equal Protection Clause. The decision of the California Court of Appeal in *Fryman*—which held that the Equal Protection Clause was violated by the unjustified exclusion of defendants from Proposition 36 who were convicted before the effective date—provides a nice illustration.[307] *Fryman* further suggests that the general constitutional mandate for legislative rationality has heightened force in the criminal justice arena (even to the point that courts might employ strict scrutiny) because the liberty interests at stake are of such fundamental importance.[308] To be sure, statutes have only rarely been overturned under rationality review; the constitutional scrutiny of substantive rationality is typically far short of searching. This judicial tendency, however, does not make coherence a less compelling interpretive objective. Quite the contrary, coherence seems precisely the sort of "un-

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SURV. AM. L. 535, 544–45 (1996).

[304] *Id.* at 544.

[305] The distinctions between direct and representative lawmaking may be particularly unimportant in smaller states with fewer legislative resources. Judge Landau makes this point using his own state of Oregon as an example:

> The Oregon Legislature is not a full-time, professional legislature. It meets for approximately six months, every other year. There are relatively few permanent staff. The legislature itself is not principally made up of lawyers . . . . Instead, Oregon's Legislature consists of citizens from all walks of life . . . who turn from their private endeavors every other year to spend a limited amount of time combing through an average of 3,000 bills per session and enacting some 700-900 laws. Moreover, Oregon legislators recently have become subject to term limits, which ensure that every two or three terms (depending on the office) new legislators will need to learn the ropes, including the legal landscape of bills that will come before them.

Landau, *supra* note 8, at 511–12.

[306] *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 814–15 (2002). *See also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 756–59 (1994) (concluding that "Anti-Direct Democracy reading" of Guarantee Clause is "not proven").

[307] *See supra* Part III.B.1.

[308] 119 Cal. Rptr. 2d 557, 571 (Ct. App. 2002).

derenforced constitutional norm" that Frickey would like to see inform statutory analysis.[309]

Frickey's interpretive methodology is an eclectic one, balancing text, purpose, and public values. In a sense, his approach mirrors what the Arizona and California courts have done when interpreting the drug initiatives. The courts look first to text and purpose. When text and purpose do not provide a clear answer, the courts, as Frickey prescribes, often take other public values into account. The courts do not, however, analyze public values in quite the manner that Frickey recommends. They do not interpret initiatives narrowly to preserve preexisting law merely because the initiatives have been enacted by the people directly; rather, when they do interpret narrowly to preserve prior law, they seem to do so in light of substantive policy considerations. This is a more sensible basis for continuity-enhancing interpretation.

B. Schacter's "Metademocractic" Approach

1. Description

Professor Schacter's proposal, like Professor Frickey's, grows out of her concerns with the poor deliberative quality of direct lawmaking. Schacter emphasizes what she calls the "informational dynamics" of direct lawmaking.[310] In particular, she identifies two sorts of problems that beset direct democracy. First, informational deficits impede "meaningful collective deliberation" by voters.[311] She puts the problem this way:

> Voters often do not read proposed laws, but instead rely on media coverage that is frequently reductive. The laws and the ballot pamphlets explaining them are difficult to comprehend. The obscuring legal jargon in initiatives and the gaps in the public's knowledge about the surrounding legal context hamper voters' ability to weigh and assess proposals. Even when voters read and understand proposed laws, they may fail to anticipate or consider an issue that arises only when the initiative law is later applied to a particular set of facts.[312]

The absence of meaningful deliberation leads her to conclude that the search for voter intent is "misguided"; there is simply no "voter engagement with, or comprehension of, the interpretive issues confronting courts."[313]

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[309] Frickey, *supra* note 8, at 500–01.
[310] Schacter, *supra* note 8, at 154.
[311] *Id.* at 155.
[312] *Id.*
[313] *Id.* at 165.

Second, not only does direct democracy suffer from informational deficits, but it is also subject to what Schacter calls "informational pathologies."[314] Her concern is that "highly organized, concentrated, and well-funded interests" may abuse the initiative process in ways that create a "phantom popular intent."[315] Initiatives may be worded intentionally so as to obscure the effect of a "yes" vote.[316] Proponents may then spend heavily "on subliminally directed advertising" that "focus[es] voters on abstract, visceral symbols and divert[s] them from the particulars of the proposed initiative."[317] The risks are particularly great, Schacter contends, when the initiative targets "socially marginalized groups."[318] To illustrate, she offers the anti-defendant criminal justice initiatives of the 1990s: "this is an area where voters are likely to have focused heavily on broad themes and slogans about being 'tough on crime,' some of which are mixed subtly and not so subtly with coded racial messages."[319]

Based on her analysis of these informational dynamics, Schacter proposes a "metademocratic" approach to interpreting initiatives.[320] This approach would forsake "the futile pursuit of popular intent" in favor of an effort to "democratize" the direct lawmaking process through the use of the new interpretive rules.[321] In order to implement this metademocratic approach, Schacter proposes a two-step analysis for any court confronted with the need to interpret an ambiguous initiative. First, the court should determine the likelihood that the initiative has resulted from an abuse of the initiative process.[322] Danger signals include "length, complexity, confusing wording, obscurity about the effect of an affirmative vote, heavy advertising (especially when coded with race-based or similar symbols), and propositions explicitly or implicitly targeted at socially subordinated groups."[323] When the risk of abuse is high, the court "should be reluctant to construe ambiguous words in [the] initiative law[ ] expansively."[324] This rule, which will be referred to here as the "Narrowing Rule," bears important similarities to Frickey's Continuity Canon, in that both rules would operate to limit the scope of initiatives relative to conventional statutes. The Narrowing Rule differs, though, inasmuch as its application would turn on an analysis of the particular circumstances of an initiative's enactment.

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[314] *Id.* at 156–57.
[315] *Id.* at 157.
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.* at 158.
[320] *Id.* at 153.
[321] *Id.*
[322] *Id.* at 159.
[323] *Id.*
[324] *Id.* at 157.

Second, when the Narrowing Rule does not apply, the court should "create a structure for the deliberation that was absent from the process that produced the initiative."[325] This mandate will be referred to here as the "Pro-Deliberative Rule." This Rule is, in part, procedural: Schacter would have courts "liberally" grant applications for intervention and *amicus curiae* participation, as well as consider appointing *pro bono* representation for unorganized interests.[326] In effect, she seems to want to transform the court into an alternative political forum, where different interest groups can compete for the heart and mind, not of the voters, but of the judge. The judge would then engage in a far-ranging consideration of public values in order to resolve interpretive problems.

To illustrate the Pro-Deliberative Rule in action, Schacter offers the South Dakota Supreme Court's decision in *SDDS, Inc. v. State*.[327] The court in *SDDS* confronted an ambiguity in an initiative that regulated the construction and operation of waste disposal facilities.[328] Under the initiative, no waste facility may be operated unless the state legislature first "enacts a bill" approving the facility.[329] SDDS, a facility operator, obtained legislative passage of a bill approving its facility, but opponents sought to use the referendum process to prevent the approval bill from taking effect.[330] While the referendum effort was pending, the Supreme Court was asked to decide whether SDDS could continue to operate its facility based on legislative passage of the approval bill. Opponents argued that the "enacts a bill" language encompassed the bill's survival of referendum challenge, while SDDS claimed that "enacts a bill" referred exclusively to the conventional legislative process.[331] The court self-consciously resolved the ambiguity on public policy grounds. Specifically, the court rejected SDDS's interpretation because it "would effectively defeat the referendum rights of this state's citizens."[332]

In cases such as *SDDS*, Schacter acknowledges that the judge's weighing of public policy considerations may seem inconsistent with democratic values, but she contends that "a court's choice from among competing constructions is unavoidably value laden."[333] Her proposal at least offers honesty and the possibility of more effective judicial deliberation through a more inclusive litigation process.

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[325] *Id.* at 155.
[326] *Id.* at 156.
[327] 481 N.W.2d 270 (S.D. 1992).
[328] *Id.* at 271.
[329] *Id.*
[330] *Id.*
[331] *Id.* at 272.
[332] *Id.*
[333] Schacter, *supra* note 8, at 156.

2. Evaluation

a. The Narrowing Rule

The drug initiative cases highlight a fundamental tension in the Narrowing Rule. Schacter would have the court determine whether an initiative's proponents have abused the initiative process, but this question defies analysis in the drug initiative context. Most of Schacter's "danger signals" are present: length, complexity, confusing wording, obscurity about the effect of an affirmative vote, and heavy advertising. Opponents have repeatedly characterized the initiatives' backers as wealthy interests who are misleading the public about their true intentions, that is, decriminalization of drugs.[334] From this vantage point, the drug initiatives seem to represent a high risk of Schacter's "phantom popular intent."

Yet, the drug initiatives do not target socially subordinated groups for adverse treatment, which may be an important part of what Schacter means by informational pathologies. Quite the contrary, the initiatives are intended to benefit drug addicts, a marginalized group. Schacter indicates that initiatives should be construed narrowly when the risk of abuse is high. If courts were to follow this rule in the drug initiative cases, Schacter would likely view the results as rather perverse: judicial decisions would systematically deny benefits to drug addicts.

Schacter's test ultimately seems to conflate two distinct concerns: (1) the procedural concern that initiative advocates are supplying inadequate or misleading information to voters, and (2) the substantive concern that initiative advocates are taking advantage of the initiative process to obtain passage of laws that disadvantage already marginalized groups. She is certainly right to suggest that both problems are sometimes present in the same initiative, as in the harsh anti-crime initiatives she discusses. That said, it is unclear how she would handle an initiative that reflects only one of the problems. What if the voters adopt a brief, straightforward initiative that is clearly discriminatory?[335] What if a nondiscriminatory initiative is sold to the voters through an expensive and egregiously misleading advertising campaign?

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[334] *See supra* Parts I.C.1.b, I.C.2.b.

[335] While such an initiative might be struck down as a violation of the Equal Protection Clause—thus perhaps obviating the need for conventional statutory interpretation—some courts have erected high barriers to proving unconstitutional discrimination. *See, e.g.*, Arthur v. City of Toledo, 782 F.2d 565, 573 (6th Cir. 1986) (holding that court may not inquire into possible racist motivation for facially neutral referendum "unless racial discrimination was the only possible motivation behind the referendum results"). For a proposal for more searching Equal Protection review of initiatives and referenda, see generally Lazos Vargas, *supra* note 52, at 516 (arguing that courts should employ "a strict scrutiny analysis to determine whether direct democracy measures have violated the Equal Protection Clause by unduly infringing on minorities' [civic] participation rights" or citizenship).

These difficulties demand a clearer understanding of what purpose, if any, is really served by the Narrowing Rule. Schacter seems to view the chief benefit as prospective, specifically, discouraging initiative backers from engaging in certain forms of "strategic drafting and advertising."[336] Schacter emphasizes procedural concerns: she would like to "reduce the incentives for initiative proponents to draft long, intricate, and ambiguous laws, the complexity of which can effectively be shrouded by slogans and soundbites."[337] While appealing at first blush, this justification for the Narrowing Rule loses much of its force upon closer analysis.

At the outset, of course, one may question how responsive initiative backers are to rules of statutory construction. Few laypersons appreciate the significance of interpretation in the law, and many lawyers even find statutory construction to be a mysterious and daunting field. Moreover, even if aware of the Narrowing Rule and its significance, initiative backers in the midst of an election campaign may be inclined to view the Rule as a remote and speculative concern. This tendency may be exacerbated by the indeterminacy of Schacter's triggering test, as well as the inherent uncertainty of litigation. Many of the initiative backers whose behavior Schacter would like to modify may simply decide to take their chances litigating the matter in court. If so, little justification would remain for the Narrowing Rule.

Even assuming that the Narrowing Rule is capable of modifying real-world behavior in a significant way, however, it is unclear whether the intended modifications are worth pursuing. Again, the drug initiatives highlight some important problems. Simply put, in a complicated world, length and complexity should not be regarded as a vice in drafting initiatives; indeed, they may be a virtue. When the drafters of Propositions 200 and 36 set about developing a new policy for drug sentencing, they were not writing on a blank slate. A vast body of drug laws already existed, most of which the initiative drafters intended to retain. Since the drafters targeted only one particular subset of drug offenders—and only a few particular aspects of their treatment by the criminal justice system—the drafters had to draw a great many boundaries between that which they were modifying and that which they were not. Consequently, it is difficult to imagine how the drug initiatives could have been anything but long and complex. Based on the volume of interpretive difficulties they have generated, the drafters, in fact, may have done better to make the initiatives even longer and more complicated than they are.[338]

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[336] *See* Schacter, *supra* note 8, at 158 (discussing risk of "strategic drafting and advertising" in initiative process).

[337] Schacter, *supra* note 8, at 159.

[338] Even to the extent that length and complexity are legitimate concerns, they are perhaps better (or at least more directly) addressed through more vigorous enforcement of a type of provision found in many state constitutions, the Single Subject Rule, which restricts the ability of lawmaking bodies to enact statutes that address multiple disparate

Ambiguity is perhaps harder to defend than length and complexity, but that does not necessarily mean that interpretive rules ought to be designed to discourage ambiguity. Initiative drafters already have an important incentive to avoid ambiguity: an ambiguous provision is as likely to be resolved against their interests as for. The drug initiative cases, which go about equally for and against defendants, nicely illustrate the risk.[339] Assuming that Schacter is right that voters do not pay attention to the text of proposed initiatives, drafters would probably do better to embody their preferences explicitly in the text than to take their chances in the court system after passage. Thus, the Narrowing Rule may add little to the existing incentives for clear drafting.

Additionally, some level of ambiguity may actually be desirable. In effect, ambiguity in the initiative leaves matters for the judge to decide later. While this may come at some cost to democratic values, judicial decisionmaking does have its advantages. As Schacter herself puts it:

> The litigants, as well as any intervenors and amici curiae, can explore in depth and argue the merits of different plausible interpretations of the initiative. The court can assign meaning to the contested provision with the benefit of this extended exploration and the court's own knowledge of the legal context in which the initiative is situated.[340]

Close questions of policy are thus sometimes best deferred by the voters for later judicial resolution. This may be an especially attractive option in the context of an ambitious and untested new legal regime like that created by the drug initiatives. By the time an interpretive issue reaches the courts, at least some information will be available as to how the new system is being implemented and how it is performing in the real world. Ambiguity gives the legal system more freedom to take advantage of this new information.

In any event, once length and complexity are recognized as unavoidable and often appropriate, reductive "slogans and soundbites" also seem rather less insidious. Indeed, given a technically complex subject, one would expect initiative proponents to always focus on their broad objectives

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issues. *See, e.g.*, Johnson v. Edgar, 680 N.E.2d 1372 (Ill. 1997) (finding criminal statute in violation of Single Subject Rule). Forty-two state constitutions include some version of the Single Subject Rule. ESKRIDGE ET AL., *supra* note 145, at 330.

[339] *See infra* Appendix C (indicating that defendants lost twenty-eight of fifty-one published decisions). Nor is the risk confined to pro-defendant initiatives. In their analysis of case law interpreting California's infamous three-strikes initiative, for instance, Professor Franklin Zimring and his colleagues argue that the anti-defendant initiative backers lost on the single most important three-strikes issue that arose in the courts, namely, whether judges could disregard a defendant's prior strikes "in the interests of justice." ZIMRING ET AL., *supra* note 3, at 131–33.

[340] Schacter, *supra* note 8, at 155.

rather than the specifics of their proposal. It is hard to see what would be gained by advertising technical details to an electorate with a limited attention span and little relevant education or experience. This reality may be a good reason to curtail direct democracy in legally complex fields—as Schacter herself suggests may be appropriate.[341] As long as the law permits the voters to legislate in areas like criminal justice, though, it seems neither entirely fair nor accurate to characterize slogans and soundbites as an "abuse" of the initiative process.

This is not, of course, to excuse affirmatively misleading advertising, but fraudulent advertising is not really Schacter's target. Consider her own example of an initiative that should be interpreted narrowly: California's Proposition 115, which expanded criminal liability and reduced defendants' procedural rights.[342] Schacter characterizes the advertising in support of the initiative as follows:

> Commercials supporting Proposition 115 spotlighted Richard Ramirez, the convicted "Night Stalker" murderer. Ramirez's image repeatedly appeared in commercials decrying the asserted "loopholes" and "delay" in the state's criminal justice system. Broad, visceral appeals like those deployed in these political advertisements forcefully distract the electorate from the arcane, albeit potent, details of laws such as Proposition 115.[343]

While distasteful, the advertising does not seem fraudulent; the law, in fact, delivered the easier convictions and harsher penalties it promised. Even had the backers avoided their racially inflammatory use of Richard Ramirez, it seems quite improbable that the advertising would have informed voters of the "arcane details" that trouble Schacter, or that the voters would have paid heed to such matters. "Distraction" hardly seems the right label when the voters would not have paid attention anyway.

In short, upon closer inspection, the justification for the Narrowing Rule seems to melt away. The "pathologies" that Schacter wants to discourage—length, complexity, ambiguity, and reductive advertising—seem inescapable, and perhaps not even so pathological. While Schacter says that her target is "abuse" of the initiative process, it is far from clear what

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[341] *See id.* at 163 ("[C]onsideration might be given to discontinuing the initiative in selected areas where the risks of confusion, manipulation, or exploitation are likely to be most severe . . . . The study suggests that these risks are particularly acute, for example, where voters are asked to enact detailed rules of legal procedure governing the process that adjudicates criminal guilt."). Schacter's views on this point have been echoed by other scholars. *See, e.g.*, Michael Vitiello, *Somewhat Frantic: A Brief Response to* Crime, Punishment, and Romero, 40 DUQ. L. REV. 615, 626 (2002) ("I am convinced . . . that we would we would make better use of public funds by insulating punishment decisions from the political arena.").

[342] Schacter, *supra* note 8, at 158.

[343] *Id.* (citations omitted).

"abuse" really means in this context, let alone how judges could reliably identify it after the fact.[344] Schacter's own "danger signals" seem rather less than helpful in this regard.

The Narrowing Rule might be more compelling if substantive, rather than procedural, objectives were emphasized: specifically, the Rule might be limited to initiatives that target socially marginalized groups.[345] This clarification would perhaps provide a clearer standard for determining when to apply the rule, as well as a more coherent justification based on egalitarian principles. While more coherent, this justification would also likely be more politically charged and controversial—and hence less likely to win converts among judges—than Schacter's value-neutral emphasis on simplicity and clarity in drafting.

Even if one agrees with the egalitarian political agenda, however, the refocused Narrowing Rule still has limited appeal. For example, existing canons of statutory construction might be used to accomplish similar results. In the criminal justice context, the Rule of Lenity already mandates a pro-defendant interpretation of ambiguous statutes. While lenity has somewhat different purposes than the Narrowing Rule, it is hard to see how the two rules have much functional difference. Outside the criminal justice context, marginalized groups may benefit from the Avoidance Canon: where a discriminatory law raises legitimate equal protection concerns, ambiguities in the law should be interpreted so as to minimize those concerns.[346]

More fundamental are the general objections to a rule of narrow construction that were raised above in the analysis of Frickey's Continuity Canon.[347] If the boundaries between old law and new are to be governed primarily by the new law's method of enactment, then courts are likely to implement the new law in a manner lacking substantive coherence. Schacter echoes these concerns:

> [C]onsistent with [the] focus [of the Narrowing Rule] on the initiative's text, it would replicate some of the basic problems posed by [a] "strong textualist" response. Placing such exclusive and dispositive weight on the statutory text and its clarity . . .

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[344] Judge Landau makes a similar point in his critique of Professor Schacter's proposal. Landau, *supra* note 8, at 524–25.

[345] Indeed, other commentators have more narrowly focused their initiative reform proposals on protection of such marginalized groups. *See, e.g.*, Elizabeth R. Leong, Note, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677, 707 (1997) (arguing for invalidation under authority of Guarantee Clause of any initiative that "uniquely burdens a member of an identifiable group traditionally the subject of arbitrary or invidious discrimination").

[346] These sorts of considerations would seem well-suited for consideration in Schacter's deliberative regime. This makes the notion of an exception to the Pro-Deliberation Rule for discriminatory initiatives seem all the less justifiable.

[347] *See supra* Part IV.A.2.

> would mean that policy outcomes would always turn on a source that is peripheral at best, and incomprehensible at worst, to voters.[348]

This concern explains why the Narrowing Rule is not applied universally, but rather only in abuse cases. Schacter's point, however, applies with equal force to her targeted version of the Narrowing Rule.

In sum, the Narrowing Rule lacks any compelling justification. As the drug initiative case study demonstrates, Schacter's concept of "abuse" of the initiative process seems to encompass distinct procedural and substantive components. Disaggregated, neither component seems to merit a special rule of construction. Even taken together, it is not clear what advantages the Narrowing Rule offers over existing canons of construction, or whether the benefits of the Rule outweigh the risks that initiatives will be implemented in a substantively incoherent fashion.

b. The Pro-Deliberative Rule

Vague and open-ended, the Pro-Deliberative Rule seemingly shares the eclectic spirit advocated by Frickey and actually employed by the courts. This is both a strength and a weakness. The Rule offers judges ample room to make decisions that preserve coherence in the law, but the Rule is so devoid of substantive guidance as to raise rule of law and legislative supremacy concerns. Beyond encouraging the participation of interested groups, it is entirely unclear how the drug initiative cases ought to be decided under the Pro-Deliberative Rule. While indeterminacy is not necessarily a drawback to a proposed legal rule, one cannot tell even what the terms of the debate would be under the Pro-Deliberative Rule. Schacter is surely correct in suggesting that interpretation invariably involves choosing among political values, but that does not mean that judges should interpret laws in as substantively unconstrained a fashion as legislators enact them. This may nonetheless be the import of the Pro-Deliberative Rule.

C. Summary

Professors Frickey and Schacter make a strong case for courts to take public values into account when interpreting initiatives, rather than relying on a strict textualism or intentionalism.[349] Both offer cogent critiques of direct democracy, particularly highlighting deficiencies in the deliberative process. Nevertheless, both go astray when attempting to

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[348] Schacter, *supra* note 8, at 160.

[349] *See* Schacter, *supra* note 8, at 153; Frickey, *supra* note 8, at 499–500.

translate their critiques of direct democracy into special new interpretive canons for initiatives.

Frickey's Continuity Rule and Schacter's Narrowing Rule ultimately suffer from the same defect: both would permit a law's method of enactment (for Frickey, the initiative process generally; for Schacter, abuse of the initiative process) to trump substantive considerations. In the interests of advancing norms of good deliberation in the law-making process, the Continuity and Narrowing Rules would encourage judges to disregard coherence in the law as an interpretive objective. Making bad law is too high a price to pay in the name of good deliberation.

VI. CONCLUSION: LESSONS FROM THE DRUG INITIATIVE CASE STUDY

The drug initiative jurisprudence continues to evolve, with courts still encountering new and often unexpected interpretive issues. A close study of the existing cases, however, reveals several notable patterns and suggests lessons for both the interpretation of initiatives generally and of the drug treatment initiatives specifically.

A. Interpreting Initiatives

The drug initiative cases lack methodological rigor but generally follow a consistent pattern. In most cases, the courts take into account multiple considerations when interpreting a particular initiative provision. The courts generally attempt to construct a coherent account of the purposes of the initiative and how these purposes may be reconciled with the purposes behind other relevant statutory regimes. Sometimes these accounts are quite persuasive; other times (for instance, *Fernando C.*), much less so.

More specifically, the cases are generally explicable on the basis of the rules laid out earlier: interpretations that significantly undermine the initiative's effectiveness should be rejected; important prior legislative policies should be preserved if they were not plainly taken into account in the initiative; and interpretations should be consistent with the initiative's policy choices as indicated in its text and structure. These rules represent a flexible, pragmatic approach to interpretation perhaps best characterized as purposive.

Adopting new interpretive rules is an unsatisfactory strategy for fixing the problems of the initiative process. The courts have certainly not been swayed: to date, neither Frickey nor Schacter's proposals have been adopted in a published opinion by any state court.[350] More direct solutions—such as restricting the subject matter of initiatives or adopting the "indirect initiative"[351]—may be more effective and have fewer per-

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[350] This is based on a computer search of state cases decided as of March 29, 2003.

[351] Collins & Oesterle, *supra* note 39, at 107. Indirect initiatives provide the legislature

verse consequences. If asked to do too much, the statutory interpretation process may end up not doing anything particularly well.

B. The Drug Treatment Initiatives

The drug treatment initiatives have been controversial, and rightly so. They rest upon dubious assumptions about the nature of drug crime, the efficacy of drug treatment, and the proper role of the court system in overseeing treatment.[352] Opponents suggest that the initiative campaigns in Arizona and California did not represent meaningful deliberation because of the disparity in financial resources available to the two sides in the debate. This may be so, but meaningful public deliberation was equally unlikely in the conventional lawmaking process, given the inertia and tough-on-crime biases of the legislature.[353]

Whatever the merits of the drug policy debate and whatever the most appropriate forum to decide the merits, mandatory drug treatment is now the law in Arizona and California and may become the law in several other states. This suggests at least two important reasons to study the drug treatment jurisprudence. First, the cases provide a context for evaluating the initiatives' success; the holdings suggest that the courts have done a balanced job in their interpretations. The courts have resisted opportunities to sabotage the initiatives by reading the eligibility language too narrowly or the disqualification language too expansively. At the same time, however, they have not used the initiatives as an opportunity to open the prison doors for defendants who plausibly qualify.[354] In short, it is unlikely that the success or failure of the initiatives could plausibly be attributed to a distinct judicial agenda that is at odds with the spirit of the initiatives themselves.

Second, identifying the key normative principles animating the current body of drug initiative cases will help the decisional law to develop in a coherent fashion. The cases thus far have focused predominantly on eligibility decisions. By and large, the courts seem to be making principled distinctions based on the potential for violence and recidivism associated with different categories of defendants. These decisions are designed to provide community-based treatment to those defendants who are least likely to cause significant harm while remaining in the community. This objective seems a promising foundation for the emerging "common law" of mandatory drug treatment that is resolving ambiguities and filling gaps in the initiatives.

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with an opportunity to deliberate on proposed initiatives.

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

[353] O'Hear, *supra* note 12, at 340.

[354] Indeed, defense and prosecution have each won about half of the published cases: twenty-eight wins for the prosecution to twenty-three for the defense. *See infra* Appendix C.

APPENDIX A: EXCERPTS FROM ARIZONA'S PROPOSITION 200[355]

§ 13-901.01. PROBATION FOR PERSONS CONVICTED OF PERSONAL POSSESSION AND USE OF CONTROLLED SUBSTANCES; TREATMENT; PREVENTION; EDUCATION

(A) Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance as defined in § 36-2501 is eligible for probation. The court shall suspend the imposition or execution of sentence and place such person on probation.

(B) Any person who has been convicted of or indicted for a violent crime as defined in § 13-604.04 is not eligible for probation as provided for in this section but instead shall be sentenced pursuant to the other provisions of chapter 34 of this title.

(C) Personal possession or use of a controlled substance pursuant to this section shall not include possession for sale, production, manufacturing or transportation for sale of any controlled substance.

(D) If a person is convicted of personal possession or use of a controlled substance as defined in § 36-2501, as a condition of probation, the court shall require participation in an appropriate drug treatment or education program administered by a qualified agency or organization that provides such programs to persons who abuse controlled substances. Each person enrolled in a drug treatment or education program shall be required to pay for participation in the program to the extent of the person's financial ability.

(E) A person who has been placed on probation under the provisions of this section and who is determined by the court to be in violation of probation shall have new conditions of probation established by the court. The court shall select the additional conditions it deems necessary, including intensified drug treatment, community service, intensive probation, home arrest, or any other such sanctions short of incarceration.

(F) If a person is convicted a second time of personal possession or use of a controlled substance as defined in § 36-2501, the court may include additional conditions of probation it deems necessary, including intensified drug treatment, community

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[355] ARIZ. REV. STAT. § 13-901.01 (2002).

service, intensive probation, home arrest or any other action within the jurisdiction of the court.

(G) A person who has been convicted three times of personal possession or use of a controlled substance as defined in § 36-2501 is not eligible for probation under the provisions of this section but instead shall be sentenced pursuant to the other provisions of chapter 34 of this title.

APPENDIX B: EXCERPTS FROM CALIFORNIA'S PROPOSITION 36[356]

1210. Definitions.

As used in Penal Code sections 1210.1 and 3063.1, and Division 10.8 of the Health and Safety Code:

(a) The term "non-violent drug possession offense" means the unlawful possession, use, or transportation for personal use of any controlled substance identified in Health and Safety Code sections 11054, 11055, 11056, 11057 or 11058, or the offense of being under the influence of a controlled substance in violation of Health and Safety Code section 11550. The term "non-violent drug possession offense" shall not include possession for sale, production, or manufacturing of any controlled substance.

. . . .

(d) The term "misdemeanor not related to the use of drugs" means a misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender or (2) any activity similar to those listed in (d)(1) above.

1210.1 Possession Of Controlled Substances; Probation; Exceptions.

(a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a non-violent drug possession offense shall receive probation.

As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. The court may also impose as a condition of probation participation in vocational training, family counseling, literacy training and/or community service. A court may not impose incarceration as an additional condition of probation. Aside from the limitations imposed in this subdivision, the trial court is not otherwise limited in the type of probation conditions it may impose.

In addition to any fine assessed under other provisions of law, the trial judge may require any person convicted of a non-violent drug possession offense who is reasonably able to do so to contribute to the cost of their [sic] own placement in a drug treatment program.

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[356] CAL. PENAL CODE § 1210 (West Supp. 2003).

(b) Subdivision (a) shall not apply to:

(1) Any defendant who has previously been convicted of one or more serious or violent felonies in violation of Penal Code sections 667.5(c) or 1192.7, unless the non-violent drug possession offense occurred after a period of 5 years in which the defendant remained free of both prison custody and the commission of an offense which results in (a) a felony conviction other than a non-violent drug possession offense or (b) a misdemeanor conviction involving physical injury or the threat of physical injury to another person.

(2) Any defendant who, in addition to one or more non-violent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony.

(3) Any defendant who:

(A) While using a firearm, unlawfully possesses any amount of (1) a substance containing either cocaine base, cocaine, heroin, methamphetamine, or (2) a liquid, non-liquid, plant substance, or hand-rolled cigarette, containing phencyclidine.

(B) While using a firearm, is unlawfully under the influence of cocaine base, cocaine, heroin, methamphetamine or phencyclidine.

(4) Any defendant who refuses drug treatment as a condition of probation.

(5) Any defendant who (a) has two separate convictions for non-violent drug possession offenses (b) has participated in two separate courses of drug treatment pursuant to subdivision (a) and (c) is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment. Notwithstanding any other provision of law, the trial court shall sentence such defendants to 30 days in jail.

APPENDIX C: PUBLISHED STATE COURT DECISIONS INTERPRETING PROPOSITIONS 200 AND 36[357]

Arizona Cases (Proposition 200)

Baker v. Superior Court, 947 P.2d 910 (Ariz. Ct. App. 1997) (holding that defendant who committed otherwise eligible drug offense before effective date of initiative did not qualify for mandatory treatment in lieu of incarceration).

Bolton v. Superior Court, 945 P.2d 1332 (Ariz. Ct. App. 1997) (holding that court may refuse to accept plea bargain calling for application of Proposition 200 where defendant has otherwise disqualifying prior convictions).

Calik v. Kongable, 990 P.2d 1055 (Ariz. 1999) (holding that court may not order incarceration in jail as condition of probation for eligible defendant).

In re Fernando C., 986 P.2d 901 (Ariz. Ct. App. 1999) (holding that defendant in juvenile proceeding does not qualify).

Foster v. Irwin, 995 P.2d 272 (Ariz. 2000) (holding that defendant with one prior conviction for non-violent, non-drug felony does qualify).

Goddard v. Superior Court, 956 P.2d 529 (Ariz. Ct. App. 1998) (holding that defendant with two prior convictions for drug sales does not qualify).

Gray v. Irwin, 987 P.2d 759 (Ariz. Ct. App. 1999) (holding that defendant with one prior conviction for non-violent, non-drug felony does qualify).

Montero v. Foreman, 64 P.3d 206 (Ariz. Ct. App. 2003) (holding that disorderly conduct involving "weapon or dangerous instrument" is disqualifying violent prior offense).

State v. Benak, 18 P.3d 127 (Ariz. Ct. App. 2001) (holding that state is required to provide pretrial notice of intent to introduce evidence of prior violent crime in order to preclude application of Proposition 200).

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[357] This list encompasses published decisions available on the Westlaw computer database as of March 28, 2003. Excluded are cases that bear on the administration of a drug treatment initiatives but that do not turn on interpretation of the initiative's text or intent. *See, e.g.*, Cherry v. Araneta, 57 P.3d 391, 394 (Ariz. Ct. App. 2002) (rejecting constitutional right to jury trial on whether defendant's prior conviction disqualifies defendant from Proposition 200); People v. Barasa, 126 Cal. Rptr. 2d 628, 634–35 (Ct. App. 2002) (holding, based on state evidence law, that defendant has burden of proof on qualification for Proposition 36).

State v. Christian, 47 P.3d 666 (Ariz. Ct. App. 2002) (holding that defendant may be subject to enhancement under recidivism statute based on prior conviction that would have been eligible for mandatory treatment).

State v. Estrada, 34 P.3d 356 (Ariz. 2001) (holding that defendant convicted of possession of drug paraphernalia does qualify).

State v. Estrada, 4 P.3d 438 (Ariz. Ct. App. 2000) (holding that defendant with one prior sale conviction does qualify).

State v. Guillory, 18 P.3d 1261 (Ariz. Ct. App. 2001) (holding that defendant with two prior convictions for possession and conspiracy to possess does not qualify).

State v. Hensley, 31 P.3d 848 (Ariz. Ct. App. 2001) (holding that court may not revoke probation imposed under Proposition 200).

State v. Holm, 985 P.2d 527 (Ariz. Ct. App. 1998) (holding that defendant convicted of possession of drug paraphernalia does not qualify).

State v. Hylton, 44 P.3d 1005 (Ariz. Ct. App. 2002) (holding that court may not lessen probation requirements after Proposition 200 defendant violates initial conditions).

State v. Jones, 995 P.2d 742 (Ariz. Ct. App. 1999) (holding that court may not order incarceration of defendant who violated probation under Proposition 200).

State v. Ossana, 18 P.3d 1258 (Ariz. Ct. App. 2001) (holding that defendant with two prior convictions for attempted possession does qualify).

State v. Pereyra, 18 P.3d 146 (Ariz. Ct. App. 2001) (holding that defendant convicted of possession of drugs in school zone does qualify).

State v. Roman, 30 P.3d 661 (Ariz. Ct. App. 2001) (holding that defendant convicted of possessing contraband drugs in prison does not qualify).

State v. Smith, 12 P.3d 243 (Ariz. Ct. App. 2000) (holding that defendant convicted of drug sale does not qualify).

State v. Thomas, 996 P.2d 113 (Ariz. Ct. App. 1999) (holding that court may not incarcerate defendant for violating probation under Proposition 200).

State v. Thues, 54 P.3d 368 (Ariz. App. Ct. 2002) (holding that defendant may be subject to enhancement under recidivism statute based on prior drug paraphernalia conviction that would have been eligible for mandatory treatment).

State v. Tousignant, 43 P.3d 218 (Ariz. Ct. App. 2002) (holding that defendant sentenced under Proposition 200 may not reject probation).

Stubblefield v. Trombino, 4 P.3d 437 (Ariz. Ct. App. 2000) (holding that defendant convicted of attempted possession does qualify).

Wozniak v. Galati, 30 P.3d 131 (Ariz. App. Ct. 2001) (holding that defendant convicted of driving under the influence of drugs does not qualify).

California Cases (Proposition 36)

In re DeLong, 113 Cal. Rptr. 2d 385 (Ct. App. 2001) (holding that defendant does qualify when guilt established but sentence not yet entered on initiative's effective date).

In re Mehdizadeh, 130 Cal. Rptr. 2d 98, 107 (Ct. App. 2003) (holding that probation may not be revoked for first violation of drug-related condition of probation absent showing that defendant was danger to others).

In re Scoggins, 114 Cal. Rptr. 2d 508 (Ct. App. 2001) (holding that defendant does qualify when guilt established but sentence not yet entered on initiative's effective date).

In re Taylor, 130 Cal. Rptr. 2d 554 (Ct. App. 2003) (holding that incarceration may not be imposed as a result of probationer's failure to report to probation officer for drug test).

In re Varnell, 115 Cal. Rptr. 2d 464 (Ct. App. 2002) (holding that sentencing court has discretion to strike state's allegation of prior offense that would otherwise disqualify defendant).

People v. Ayele, 126 Cal. Rptr. 2d 262, 266 (Cal. Ct. App. 2002) (holding that defendant convicted of resisting arrest does not qualify).

People v. Campbell, 131 Cal. Rptr. 2d 221 (Ct. App. 2003) (holding that probationer convicted of driving under the influence of drugs does not qualify).

People v. Canty, 123 Cal. Rptr. 2d 532 (Ct. App. 2002) (holding that defendant convicted of driving under the influence of drugs does not qualify).

People v. Davis, 129 Cal. Rptr. 2d 48 (Ct. App. 2003) (holding that probation may not be revoked for first violation of drug-related condition of probation absent showing that defendant was danger to others).

People v. Floyd, 116 Cal. Rptr. 2d 256 (Ct. App. 2002) (holding that defendant does not qualify when sentence was entered prior to initiative's effective date).

People v. Fryman, 119 Cal. Rptr. 2d 557 (Ct. App. 2002) (holding that defendant does not qualify under terms of initiative when guilt established

prior to initiative's effective date, but that Equal Protection Clause requires that defendant be treated as if he qualified).

People v. Garcia, 120 Cal. Rptr. 2d 725 (Ct. App. 2002) (holding that defendant convicted of theft of drugs for personal use does qualify).

People v. Garcia, 127 Cal. Rptr. 2d 410 (Ct. App. 2002) (holding that defendant convicted of driving under the influence of drugs does not qualify).

People v. Goldberg, 130 Cal. Rptr. 2d 192 (Ct. App. 2003) (holding that probationer convicted of driving under the influence of drugs does not qualify).

People v. Legault, 115 Cal. Rptr. 2d 352 (Ct. App. 2002) (holding that defendant does not qualify when sentence was entered prior to initiative's effective date).

People v. Mendozo, 131 Cal. Rptr. 2d 375 (Ct. App. 2003) (holding that defendant does not qualify when defendant pled guilty before effective date but was not sentenced until after effective date).

People v. Murillo, 126 Cal. Rptr. 2d 358 (Ct. App. 2002) (holding that defendant does qualify notwithstanding probation failures when trial court fails to find that defendant poses a danger to others).

People v. Superior Court *ex rel.* Henkel, 119 Cal. Rptr. 2d 465 (Ct. App. 2002) (holding that defendant with conviction in immediate five years prior to current conviction does not qualify).

People v. Superior Court *ex rel.* Jefferson, 118 Cal. Rptr. 2d 529 (Ct. App. 2002) (holding that defendant with conviction in immediate five years prior to current conviction does not qualify).

People v. Superior Court *ex rel.* Martinez, 128 Cal. Rptr. 2d 372 (Ct. App. 2002) (holding that defendant with conviction in immediate five years prior to current conviction does not qualify).

People v. Superior Court *ex rel.* Turner, 119 Cal. Rptr. 2d 170 (Ct. App. 2002) (holding that defendant with conviction in immediate five years prior to current conviction does not qualify).

People v. Walters, 127 Cal. Rptr. 2d 267 (Ct. App. 2002) (holding that defendant convicted of driving under the influence of drugs does not qualify).

People v. Westbrook, 122 Cal. Rptr. 2d 514 (Ct. App. 2002) (holding that defendant with prior juvenile delinquency adjudication for robbery does qualify).

People v. Williams, 131 Cal. Rptr. 2d 546, 551 (Ct. App. 2003) (holding that Proposition 36 applies to probation violation committed before effective date but not judicially determined until after effective date; hold-

ing that probationer may nonetheless be disqualified based on other violations occurring before effective date).

Trumble v. Superior Court, 127 Cal. Rptr. 2d 297, (Ct. App. 2002) (holding that defendant convicted of driving under the influence of drugs does not qualify).

ARTICLE

DEVILISH DETAILS: EXPLORING FEATURES OF CHARTER SCHOOL STATUTES THAT BLUR THE PUBLIC/PRIVATE DISTINCTION

JULIE F. MEAD*

Since charter schools first appeared in 1991, state legislatures have used them to spur education reform. With charter schools' rapid growth, to almost 2700 charter schools serving 684,000 students, a variety of legal issues have emerged. This Article examines several of these issues and describes the approaches used by different state legislatures and courts to resolve them. The issues implicated in these charter school laws often concern seminal features that have traditionally marked a distinction between private and public education. Part I examines issues affecting the establishment of charter schools, including the sponsorship of charter schools; the conversion of private schools to charter schools; the provisions for home schools and cyber schools; the involvement of for-profit charter school management companies; and the finality of decisions made by charter-granting authorities. Part II explores questions related to charter schools' operations, focusing on tuition; the application of health and safety standards; and the standards guiding revocation, charter renewal or non-renewal decisions, and contract enforcement.

Charter schools[1] emerged on the public education scene in 1991 when Minnesota enacted the first charter school law.[2] Since that time, charter schools have quickly surfaced as a tool employed by state legislatures to spur education reform. Now, only a decade later, thirty-nine states,[3] the

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[1] The term "charter schools" refers to schools created by contract, the parties to which vary by state.

[2] MINN. STAT. ANN. § 124D.10 (West 2002).

[3] ALASKA STAT. § 14.03.250 (Michie 2002); ARIZ. REV. STAT. ANN. § 15-181 (West 2002); ARK. CODE ANN. § 6-23-101 (Michie 2002); CAL. EDUC. CODE § 47600 (West 2002); COLO. REV. STAT. ANN. § 22-30.5-102 (West 2002); CONN. GEN. STAT. ANN. § 10-66bb (West 2003); DEL. CODE ANN. tit. 14, § 501 (2002); FLA. STAT. ANN. § 228.056 (West 2002); GA. CODE. ANN. § 20-2-2061 (2002); HAW. REV. STAT. ANN. § 302A-1182 (Michie 2002); IDAHO CODE § 33-5202 (Michie 2002); 105 ILL. COMP. STAT. ANN. 5/27A-5 (West 2002); IND. CODE ANN. § 20-5.5-2-1 (West 2002); IOWA CODE ANN. § 256F (West Supp. 2003); KAN. STAT. ANN. § 72-1903 (2001); LA. REV. STAT. ANN. § 17:3972 (West 2002); MASS. GEN. LAWS ch. 71, § 89 (West 2003); MICH. COMP. LAWS ANN. § 380.501 (West 2002); MINN. STAT. ANN. § 124D.10 (West 2002); MISS. CODE ANN. § 37-28-1 (2002); MO. ANN. STAT. § 160.400 (West 2002); NEV. REV. STAT. § 386.550 (Michie 2002); N.H. REV. STAT. ANN. § 194-B:1-a (2002); N.J. STAT. ANN. § 18A:36A-2 (West 2002); N.M. STAT. ANN. § 22-8B-3 (Michie 2002); N.Y. EDUC. LAW § 2850 (McKinney 2003); N.C. GEN. STAT.

District of Columbia,[4] and Puerto Rico[5] have all broadened their definition of public education to include charter schools. The Center for Education Reform reports that as of January 2003, there are almost 2700 charter schools serving a total of 684,000 students.[6]

It has often been said that charter schools trade public accountability for autonomy.[7] Charter schools share two common characteristics: (1) a charter contract that establishes their authority to exist and binds them to accountability standards; (2) some form of relief from the state statutory and regulatory requirements imposed on traditional public schools.[8] Nevertheless, the precise contours defining a charter school depend on the particulars adopted by a state legislature. The resultant variations from state to state affect both how schools are created and how they operate.

Supporters of the charter school movement often suggest that as public schools, charter schools bring accountability within a context of freedom: school personnel's freedom to innovate and parents' freedom to choose.[9] As one form of parental school choice, charter schools are also designed to create competition within the larger system of public schools. This competition, choice proponents argue, will encourage traditional public schools to be more responsive to parents in order to retain students and, therefore, will provide an impetus to school improvement.[10] On the other hand, some critics view the movement with concern, considering it one step on what they consider the slippery slope to the privatization of public education.[11] In addition, some worry that charter schools as a form of school choice will damage the democratic principles on which public education is

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§ 115C-238.29A (2002); OHIO REV. CODE ANN. § 3314.01 (West 2002); OKLA. STAT. ANN. tit. 70, § 3-130 (West 2002); OR. REV. STAT. § 338 (2001); PA. STAT. ANN. tit. 24, § 17-1741-A (West 2002); R.I. GEN. LAWS § 16-77-2 (2002); S.C. CODE ANN. § 59-40 (Law. Co-op. 2002); TENN. CODE ANN. § 49-13 (2002); TEX. EDUC. CODE ANN. § 12 (Vernon 2001); UTAH CODE ANN. § 53A-1a-501 (2002); VA. CODE. ANN. § 22.1-212.11 (Michie 2002); WIS. STAT. ANN. § 118.40 (West 2002); WYO. STAT. ANN. § 21-3-301 (Michie 2002).

[4] D.C. CODE ANN. § 38-1702.01 (2002).

[5] 18 P.R. LAWS ANN. § 1902 (2002).

[6] Center for Education Reform, *Charter School Highlights and Statistics*, *at* http://www.edreform.com/pubs/chglance.htm (last visited Mar. 5, 2003).

[7] *See, e.g.*, JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION 1 (1996); BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE 1 (1999); STACY SMITH, THE DEMOCRATIC POTENTIAL OF CHARTER SCHOOLS 30 (2001).

[8] OFF. OF EDUC. RES. AND IMPROVEMENT, U.S. DEP'T. OF EDUC., THE STATE OF CHARTER SCHOOLS 2000—FOURTH-YEAR REPORT 1 (2000), *available at* http://www.ed.gov/pubs/charter4thyear/es.html.

[9] *See, e.g.*, NATHAN, *supra* note 7, at xv–xvi; CHESTER E. FINN, JR. ET AL., CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 14–15 (2000).

[10] *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 32–35 (1990). For a seminal argument on choice and competition, see generally *id.*

[11] *See, e.g.*, Bruce Fuller, *Introduction: Growing Charter Schools, Decentering the State*, *in* INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 1, 4–5 (Bruce Fuller ed., 2000); SMITH, *supra* note 7 at 1.

based[12] and may even allow parents effectively to self-segregate.[13] Despite the rapid expansion of charter schools and the forceful arguments concerning them, there has been little research that demonstrates the veracity of the central claims of the concept, namely, that freedom from regulation, coupled with parental choice and contractual accountability for student results will produce better educational environments.[14]

Each state that has adopted charter school legislation has made a different series of choices that either mark a dramatic shift away from the status quo of traditional public schools or a modest change in the ways public schools are usually established and operated. These choices prompt important concerns over whether charter schools safeguard or threaten the characteristics the public has come to expect from its public schools. This Article will address the different approaches states have taken to charter schools, ranging from schools that resemble more traditional public schools, to schools that more closely resemble private institutions.

Public schools are typically defined as "school[s] maintained by public funds for the free education of the children of a community."[15] In contrast, private schools are "school[s] maintained under private or corporate management."[16] As these definitions suggest, "public" in this context has come to mean two major things: a marker of the source of funding and the involvement of some form of government in the school's operation. Since the early days of public education, traditional public schools have been established and operated by publicly elected school boards.[17] Therefore, political processes—including electing representatives and petitioning those representatives with ideas and concerns—have mediated the relationship between schools and the public they serve. Designed at least in some measure to experiment with this conventional way of establishing and operating schools, charter schools provide a window into how states are redefining what is meant by "public education."

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[12] MICHAEL ENGLE, THE STRUGGLE FOR CONTROL OF PUBLIC EDUCATION: MARKET IDEOLOGY VS. DEMOCRATIC VALUES 68–89 (2000).

[13] BRIAN P. GILL, P. MICHAEL TIMPANE, KAREN E. ROSS, & DOMINIC J. BREWER, RHETORIC VERSUS REALITY 139-43 (2001); EDWARD B. FISKE & HELEN F. LADD, WHEN SCHOOLS COMPETE: A CAUTIONARY TALE 197-202 (2000).

[14] Others have made the same observation. *See, e.g.*, SEYMOUR B. SARASON, CHARTER SCHOOLS: ANOTHER FLAWED EDUCATIONAL REFORM? 112 (1998).

[15] FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1126 (1997).

[16] *Id.*

[17] For a discussion of the development of school boards as a governance structure in the mid-1800s, see DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 33–39 (1974).

As such, charter schools have been variously described as "quasi-public,"[18] "other non-public,"[19] and "hybrid public schools."[20] Nonetheless, however one views charter schools, it is beyond argument that their special characteristics redefine public education. It is also beyond argument that state legislatures and charter school authorizers and operators have used these new types of public school to push the boundaries of what has traditionally marked schools as public institutions.[21]

As a way of examining the legislative policy decisions on charter schools, this Article describes the statutory variations of states' charter school laws as they relate to issues of school establishment and operation.[22] The exploration examines the ways in which charter schools differ from traditional public schools, particularly focusing on what the statutory variations imply about the choices being made for public education by legislatures under the banner of "charter schools." These special statutory characteristics have already sparked litigation in several jurisdictions and may do so in others. In addition, the issues implicated in charter school laws often concern seminal features that have traditionally marked a distinction between private and public education. Part I examines issues affecting the establishment of charter schools, specifically the sponsorship of charter schools; the conversion of private schools to charter schools; the provisions for home schools and cyber schools; the involvement of for-profit charter school management companies; and the finality of decisions made by charter-granting authorities. Part II explores questions related to charter schools' operations, focusing on tuition; the application of health and safety standards; and the standards guiding revocation, charter renewal or non-renewal decisions, and contract enforcement.

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[18] Sandra Vergari, *Introduction*, *in* THE CHARTER SCHOOL LANDSCAPE 1, 2 (Sandra Vergari ed., 2002).

[19] Letter from Office of Milwaukee City Attorney to John Kalwitz, President of Milwaukee Common Council (June 25, 1998) (on file with author) (construing Wisconsin's charter school statute and concluding that the state's charter schools were not public schools). This interpretation was soundly rejected by the Wisconsin Department of Public Instruction. Julie F. Mead, *Wisconsin: Chartering Authority as Reform*, *in* THE CHARTER SCHOOL LANDSCAPE 122, 147–49, (Sandra Vergari ed., 2002). For a discussion of the controversy, see *id.*

[20] THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 120 (2000).

[21] SMITH, *supra* note 7, at 1–3.

[22] Far more issues of statutory variation exist than will be reviewed here. For treatment of other variations (including personnel policy, student enrollment, special education delivery) and the attendant legal controversies, see PRESTON C. GREEN & JULIE F. MEAD, CHARTER SCHOOLS AND THE LAW: CHARTERING NEW LEGAL RELATIONSHIPS (forthcoming 2003).

I. Issues Affecting the Establishment of Charter Schools

A. Institutions/Entities That May Grant Charters

While elected boards of education usually determine when to open traditional public schools, states have authorized a variety of institutions and entities to sponsor charter schools. Some states have allowed for broad sponsorship by giving charter-granting authority to several entities. Other states have instituted far more restrictive charter school programs by more strictly limiting the entities with authorization authority. Accordingly, the specifics of how a charter school may be established differ from state to state. Table 1 (see Appendix) summarizes the variety of organizations and officials that enjoy charter-granting authority.

As Table 1 indicates, the majority of states only grant chartering authority to the state educational agency and either local school districts independently or local districts in combination with other districts. Colleges and universities also have this authority in eight states. The most unusual chartering authority variations occur in Minnesota, Wisconsin, and Indiana. Minnesota has granted authority to charitable organizations.[23] Wisconsin and Indiana have used chartering authority to address urban education reform concerns by granting chartering authority—limited to the city boundaries—to the Common Council of the City of Milwaukee[24] and the Mayor of Indianapolis,[25] respectively. Minnesota stands out as the state that has given charter-granting authority to the most entities.[26]

B. Options for Conversion to Charter School Status

Charter schools can be developed in one of three ways. A charter school may be a new educational program not in existence before being granted its charter.[27] Second, a charter school may be created when a traditional public school is converted to charter school status.[28] Third, a private school or program may be converted to a public charter school.[29] All three types of charter schools currently operate in the United States. De-

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[23] Minn. Stat. § 124D.10(3) (2002).

[24] Wis. Stat. § 118.40(2r) (2002). The Common Council of the City of Milwaukee is the elected governing board for the city charged with making policy. Milwaukee City Charter, ch. 4, *available at* http://www.ci.mil.wi.us/citygov/council/tableofcontents.htm (last visited, Mar. 20, 2003).

[25] Ind. Code § 20-5.5-1-15 (2002).

[26] Minn. Stat. § 124D.10(3) (2002).

[27] *See infra* notes 30–48 and accompanying text. *See e.g.*, N.Y. Educ. Law § 2851 (McKinney 2003).

[28] *See infra* notes 30–48 and accompanying text. *See e.g.*, Miss. Code Ann. § 37-28-5 (2002).

[29] *See infra* notes 30–48 and accompanying text. *See e.g.*, Ariz. Rev. Stat. Ann. § 15-183(C) (West 2002).

pending on the wording of the authorizing statute, any given charter school state may allow one, two, or all three types of charter schools.

Of all the ways that charter schools are created, the conversion of an existing public school to charter school status may be the least controversial: conversions of traditional public schools or public school programs are allowed in all charter school states.[30] In fact, one state, Mississippi, limits charter schools to this category, expressly prohibiting the development of "new" charter schools and the conversion of private schools to public charter schools.[31] All other charter school states allow the creation of new schools as charter schools,[32] although Iowa only allows the creation of "a new school within an existing public school."[33]

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[30] ALASKA STAT. § 14.03.250 (Michie 2002); ARIZ. REV. STAT. ANN. § 15-181 (West 2002); ARK. CODE ANN. § 6-23-101 (Michie 2002); CAL. EDUC. CODE § 47600 (West 2002); COLO. REV. STAT. ANN. § 22-30.5-102 (West 2002); CONN. GEN. STAT. ANN. § 10-66bb (West 2003); DEL. CODE ANN. tit. 14, § 501 (2002); FLA. STAT. ANN. § 228.056 (West 2002); GA. CODE. ANN. § 20-2-2061 (2002); HAW. REV. STAT. ANN. § 302A-1182 (Michie 2002); IDAHO CODE § 33-5202 (Michie 2002); 105 ILL. COMP. STAT. ANN. 5/27A-5 (West 2002); IND. CODE ANN. § 20-5.5-2-1 (West 2002); IOWA CODE ANN. § 256F (West Supp. 2003); KAN. STAT. ANN. § 72-1903 (2001); LA. REV. STAT. ANN. § 17:3972 (West 2002); MASS. GEN. LAWS ch. 71, § 89 (West 2003); MICH. COMP. LAWS ANN. § 380.501 (West 2002); MINN. STAT. ANN. § 124D.10 (West 2002); MISS. CODE ANN. § 37-28-1 (2002); MO. ANN. STAT. § 160.400 (West 2002); NEV. REV. STAT. § 386.550 (Michie 2002); N.H. REV. STAT. ANN. § 194-B:1-a (2002); N.J. STAT. ANN. § 18A:36A-2 (West 2002); N.M. STAT. ANN. § 22-8B-3 (Michie 2002); N.Y. EDUC. LAW § 2850 (McKinney 2003); N.C. GEN. STAT. § 115C-238.29A (2002); OHIO REV. CODE ANN. § 3314.01 (West 2002); OKLA. STAT. ANN. tit. 70, § 3-130 (West 2002); OR. REV. STAT. § 338 (2001); PA. STAT. ANN. tit. 24, § 17-1741-A (West 2002); R.I. GEN. LAWS § 16-77-2 (2002); S.C. CODE ANN. § 59-40 (Law. Co-op. 2002); TENN. CODE ANN. § 49-13 (2002); TEX. EDUC. CODE ANN. § 12 (Vernon 2001); UTAH CODE ANN. § 53A-1a-501 (2002); VA. CODE. ANN. § 22.1-212.11 (Michie 2002); WIS. STAT. ANN. § 118.40 (West 2002); WYO. STAT. ANN. § 21-3-301 (Michie 2002).

[31] MISS. CODE ANN. § 37-28-5 (2002).

[32] ALASKA STAT. § 14.03.250 (Michie 2002); ARIZ. REV. STAT. ANN. § 15-181 (West 2002); ARK. CODE ANN. § 6-23-101 (Michie 2002); CAL. EDUC. CODE § 47600 (West 2002); COLO. REV. STAT. ANN. § 22-30.5-102 (West 2002); CONN. GEN. STAT. ANN. § 10-66bb (West 2003); DEL. CODE ANN. tit. 14, § 501 (2002); FLA. STAT. ANN. § 228.056 (West 2002); GA. CODE. ANN. § 20-2-2061 (2002); HAW. REV. STAT. ANN. § 302A-1182 (Michie 2002); IDAHO CODE § 33-5202 (Michie 2002); 105 ILL. COMP. STAT. ANN. 5/27A-5 (West 2002); IND. CODE ANN. § 20-5.5-2-1 (West 2002); IOWA CODE ANN. § 256F (West Supp. 2003); KAN. STAT. ANN. § 72-1903 (2001); LA. REV. STAT. ANN. § 17:3972 (West 2002); MASS. GEN. LAWS ch. 71, § 89 (West 2003); MICH. COMP. LAWS ANN. § 380.501 (West 2002); MINN. STAT. ANN. § 124D.10 (West 2002); MISS. CODE ANN. § 37-28-1 (2002); MO. ANN. STAT. § 160.400 (West 2002); NEV. REV. STAT. § 386.550 (Michie 2002); N.H. REV. STAT. ANN. § 194-B:1-a (2002); N.J. STAT. ANN. § 18A:36A-2 (West 2002); N.M. STAT. ANN. § 22-8B-3 (Michie 2002); N.Y. EDUC. LAW § 2850 (McKinney 2003); N.C. GEN. STAT. § 115C-238.29A (2002); OHIO REV. CODE ANN. § 3314.01 (West 2002); OKLA. STAT. ANN. tit. 70, § 3-130 (West 2002); OR. REV. STAT. § 338 (2001); PA. STAT. ANN. tit. 24, § 17-1741-A (West 2002); R.I. GEN. LAWS § 16-77-2 (2002); S.C. CODE ANN. § 59-40 (Law. Co-op. 2002); TENN. CODE ANN. § 49-13 (2002); TEX. EDUC. CODE ANN. § 12 (Vernon 2001); UTAH CODE ANN. § 53A-1a-501 (2002); VA. CODE. ANN. § 22.1-212.11 (Michie 2002); WIS. STAT. ANN. § 118.40 (West 2002); WYO. STAT. ANN. § 21-3-301 (Michie 2002).

[33] IOWA CODE ANN. § 256F.2(4A) (West Supp. 2003).

Even the conversion of public schools, however, may not completely escape controversy. One interesting case is *International High School: A Charter School at LaGuardia Community College v. Mills*, which involved two public alternative high schools in New York.[34] Both had been designated "twenty-first century schools"[35] and therefore enjoyed some waivers from New York education statutes, including an exemption from participation in the state's Regents examinations.[36] After converting to charter school status, the schools requested an extension of this waiver, which the state denied.[37] The schools filed a judicial appeal and the court determined that New York's charter school statute clearly contemplated that charter school students would sit for the examinations and that, upon conversion to charter school status, the schools effectively surrendered the variances they had previously received.[38] This case can serve as a caution to those considering conversion to make certain that they understand not only what they can gain from charter school status, but also what they might lose from the conversion.

Another New York case challenged the development of a new charter school and illustrates the political interests that may become involved in the grant of a school's charter. In *Board of Education of Roosevelt Union Free School District v. Board of Trustees of the State University of New York*, a school district and a group of district parents and students challenged the grant of a charter to a proposed school that was to be developed within the district's boundaries.[39] The plaintiffs complained that the Board of Trustees, as the charter-granting authority, failed to follow proper procedures for granting the charter.[40] The court agreed, ruling that New York's charter school law required, as a prerequisite to granting any charter, that a charter-granting authority make explicit findings that a proposed charter school would improve student learning and achievement in the geographic area to be served.[41] In addition to the unambiguous reminder that procedures established in charter school statutes must be carefully observed, this case also highlights the tension that may arise

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[34] 715 N.Y.S.2d 490 (App. Div. 2000).

[35] "Twenty-first century schools," a category of schools separate and distinct from charter schools, are defined by state statute as "schools which are implementing approved . . . five-year plan[s] to enable all students to achieve levels of educational achievement that are competitive with high international standards through implementation of innovative instructional strategies and restructuring of school management and programs." N.Y. EDUC. LAW § 309-a(1) (McKinney 2003).

[36] *Mills*, 715 N.Y.S.2d at 491.

[37] *Id.* at 492.

[38] *Id.* at 493. The court found no basis for overturning the state's decision as arbitrary or capricious. *Id.* at 493–94.

[39] Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Tr. of the State Univ. of New York, 731 N.Y.S.2d 524, 527 (App. Div. 2001).

[40] *Id.* at 525–26.

[41] *Id.* at 526. Since the Board of Trustees had failed to make such findings, the court remanded to the Board of Trustees for further consideration. *Id.* at 528.

when charter school authorizers other than school districts exercise their authority. Here, the local school district forcefully opposed the actions of the university authorizer in creating a new public school option in the same locality.[42]

The conversion of private schools into public charter schools produces far more variation from state to state. As depicted in Table 2 (see Appendix), only nine states and the District of Columbia currently allow these conversions, while twenty-seven states expressly prohibit it. Of the states that allow private school conversion, Wisconsin[43] and Utah[44] restrict conversion to non-sectarian private schools.[45] Wisconsin also requires school districts considering private school conversions first to hold a hearing to "consider the level of employee and parental support for the establishment of the charter school and the fiscal impact of the establishment of the charter school on the school district."[46]

It is often difficult to discern when a structural change to a private school truly becomes a conversion to a new public status and all that it entails. Drawing this line may also raise legal issues. For example, most states require that charter schools admit students on a random basis if applicants outnumber available seats.[47] Accordingly, the Michigan Department of Education reportedly scrutinizes conversion charters to ensure that former students receive no preference in the enrollment process. Its regulations state that, "if over 75% of students had previously attended [the] non-public school this would be taken as evidence that good-faith advertising was not done and [the] charter school would have to defend its advertising efforts to receive state aid."[48] Similarly, states that prohibit conversion from private to charter school may define conversion with recognition that a new charter school may wish to inhabit premises formerly occupied by a private school. Determining whether a school has converted or whether a new school has occupied an old building may be

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[42] *Id.* at 525–26.

[43] WIS. STAT. § 118.40(2) (2002).

[44] UTAH CODE ANN. § 53A-1a-504(3) (2002).

[45] There are constitutional issues related to the conversion of sectarian private schools to public school status. For example, may states restrict religious entities from seeking charters consistently with the First Amendment's Establishment and Free Speech clauses. U.S. CONST. amend. I. One question is whether schools housed in religious buildings create an impressible symbolic link between church and state in the minds of students. A discussion of these issues is beyond the scope of this Article. For further discussion, see generally, Preston Green, *Charter Schools and Religious Institutions: A Match Made in Heaven?* 158 WEST'S EDUC. L. REP. 1, 1–18 (2001).

[46] WIS. STAT. § 118.40(2m)(am) (2001).

[47] *See, e.g.*, PA. STAT. ANN. tit. 24, § 17-1723-A(a) (West 2002). Random selection is also a requirement under federal law in order for charter schools to be eligible for federal monies offered through the federal charter schools program. 20 U.S.C.A. § 722li (West 2002).

[48] WAYNE JENNINGS ET AL., A COMPARISON OF CHARTER SCHOOL LEGISLATION: THIRTY-THREE STATES AND THE DISTRICT OF COLUMBIA INCORPORATING LEGISLATIVE CHANGES THROUGH OCTOBER, 1998, 37 (1998).

confusing. For example, New York's statute expressly prohibits the conversion of existing private schools to public school status.[49] It considers factors such as shared location and whether "the charter school would have the same or substantially the same board of trustees and/or officers as an existing private school" to help discern whether a charter school application is, in fact, a petition to convert.[50]

As these two examples illustrate, even when a statute contains clear provisions prohibiting the conversion of private schools, there remain difficulties and ambiguities in determining whether a proposed charter school is a "new" school or a "conversion" school. In such a statutory context, whenever a private school closes and a charter school opens in the same physical space, the charter school should be prepared to demonstrate its independence from the previous entity or risk denial of its application. It may also be necessary to show that all area students, not just those previously enrolled, had genuine and equal access to the charter school program.

C. Location Requirements for Schools: Home Schools and Cyber Schools

The use of charter schools to permit home schooling is another statutory variation that has sparked considerable controversy. Twenty-five states expressly prohibit the use of charter school laws to provide funding for the support of home schooling.[51] For example, an Oklahoma statute reads, "[a] charter school shall not be used as a method of generating revenue for students who are being home schooled and are not being educated at an organized charter school site."[52] Table 3 (see Appendix) lists the states with similar prohibitions. The remaining states' statutes are silent on the issue, allowing the inference that in those states a charter school could be used to support the education of students who never congregate at a place called "school" but instead remain at home.

Even among states in which statutory language prevents charter schools from supporting traditional home schooling, charter schools may

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[49] N.Y. EDUC. LAW § 2852(3) (McKinney 2003).

[50] *Id.* The statute lists additional factors:

> In determining whether an application involves the conversion of an existing private school, the charter entity and the board of regents shall consider such factors as: (a) whether the charter school would have the same or substantially the same board of trustees and/or officers as an existing private school; (b) whether a substantial proportion of employees of the charter school would be drawn from such existing private school; (c) whether a substantial portion of the assets and property of such existing private school would be transferred to the charter school; (d) whether the charter school would be located at the same site as such existing private school . . . ."

Id.

[51] *See infra* Table 3.

[52] OKLA. STAT. ANN. tit. 70, § 3-136(A)(9) (West 2002).

serve children who receive instruction through the Internet at home in so-called "cyber schools."[53] In order to justify cyber charter schools, their proponents have drawn a distinction between "home-schooling" and instruction that occurs in the home.[54] While the term "home-schooling" is apparently reserved for parental instruction of children in the home, instruction delivered in the home via the computer is described as a school that links teachers and students by means of the Internet in a sort of virtual educational community, creating a type of school putatively different from "home schools" such that it may fall under a different statutory category.[55]

In Pennsylvania, the question of whether this distinction marks a substantive rather than a semantic difference has already spawned litigation.[56] Pennsylvania's charter school law contains a provision expressly stating that it is not to be used to provide funds to home schoolers.[57] Nevertheless, Pennsylvania school districts have chartered a total of nine cyber charter schools.[58] Four lawsuits have been brought challenging the existence of these special charter schools or seeking to prevent them from enrolling students from across the state who were not residents of the sponsoring school district.[59] The legal challengers asserted that these cyber charter schools directly violated the statutory prohibition against home schooling and a number of other statutory provisions.[60] In response, the sponsoring school districts argued that their programs were neither home schools nor the conversion of home schools to charter status.[61] Rather, they suggested that the programs were best considered non-traditional home-

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[53] *See generally* Christian F. Rhodes, *Razing the Schoolhouse: Whether Cyber Schools Can Overcome Statutory Restrictions*, 167 WEST'S EDUC. L. REP. 561 (2002).

[54] *See* Defendant's Proposed Findings of Fact at para. 63, Fairfield Area Sch. Dist. v. Nat'l Org. for Children, Inc. (Com. Pl. of Adams County, Pa. Dec. 11, 2001) (No. 01-S-1008).

[55] Rhodes, *supra* note 53, at 567.

[56] Pa. Sch. Bds. Ass'n v. Zogby, 802 A.2d 6 (Pa. Commw. Ct. 2002); Butler Area Sch. Dist. v. Einstein Acad., No. 2001-50031 (Pa. Com. Pl. Sept. 10, 2001); Fairfield Area Sch. Dist. v. Einstein Acad., No. 01-S-1008 (Pa. Com. Pl. Dec. 11, 2001), *rev'd*, 804 A.2d 762 (Pa. Commw. Ct. 2002); Dep't of Educ. v. Einstein Acad. Charter Sch., No. 51 M.D. 2002 (Pa. Commw. Ct. filed Feb. 8, 2002).

[57] PA. STAT. ANN. tit. 24, § 17-1717-A(a) (West 2002).

[58] Pennsylvania Department of Education, *Charter Schools Legislation*, *at* http://www.pde.state.pa.us/charter_schools/cwp/view.asp?a=146&Q=61834&charter_schoolsNav=15721&charter_schoolsNav=1 (last visited Mar. 3, 2003).

[59] *Zogby*, 802 A.2d at 6; *Butler*, No. 2001-50031; *Fairfield*, No. 01-S-1008; *Einstein*, No. 51 M.D. 2002.

[60] *Zogby*, 802 A.2d at 6; *Butler*, No. 2001-50031; *Fairfield*, No. 01-S-1008; *Einstein*, No. 51 M.D. 2002; Brief for Petitioners, Einstein Acad. Charter Sch., No. 51 M.D. 2002 (Pa. Commw. Ct. filed Feb. 8, 2002). For example, the Pennsylvania School Boards Association ("PSBA") asserted that "virtual attendance" did not satisfy compulsory school attendance laws; that cyber schools were the functional equivalent of home schools, which were impermissible under the charter school statute; and that cyber schools violated school staff certification requirements. PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, WHITE PAPER ON CYBER SCHOOLS 27 (Oct. 2001) (on file with author).

[61] Brief for the Einstein Academy School, *Fairfield*, No. 01-S-1008.

based instruction.[62] The Commonwealth Court of Pennsylvania first refused the Pennsylvania School Boards Association's ("PSBA") request for a statewide preliminary injunction on the issue[63] and interpreted Pennsylvania's charter school law as permitting cyber charters.[64] The court rejected PSBA's arguments that the charter statute required schools to have specific premises, finding no explicit language to prohibit cyber charters and referencing instead various passages in the state charter school law that indicated legislative intent to use charter schools as a means to provide innovative environments for both students and teachers.[65] The court also determined "cyber education" satisfied compulsory attendance requirements.[66] Thus, the court determined that cyber charter schools were consistent with statutory requirements.[67]

The Pennsylvania Legislature settled the argument[68] in June 2002 with the enactment of House Bill 4.[69] The new provisions revised the state charter school statute by vesting the Pennsylvania Department of Education ("PDE") with exclusive authority to grant and oversee charters for cyber charter schools.[70] The provisions create additional requirements applicable only to cyber charter schools, requiring them to provide the state with details about their operation;[71] to maintain administrative offices and records physically within the state;[72] to provide students with all necessary equipment;[73] and to disclose relevant information about their school, their staff, and their operations to parents.[74] In addition, upon the expiration of their current contracts, existing cyber charter schools must seek charter renewal directly from the PDE; school districts are precluded from renewing those charters.[75] Finally, existing cyber charter schools must submit

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[62] *Id.*

[63] Pa. Sch. Bds. Ass'n v. Zogby, No. 213 M.D. 2001 (Memorandum Opinion 2001), *vacated by* 802 A.2d 6 (Pa. Commw. Ct. 2002).

[64] *Id.* at 11–12.

[65] *Id.*

[66] *Id.* at 12.

[67] *Id.*

[68] Prior to the *Zogby* decision, two Pennsylvania trial courts had previously ruled that cyber charter schools violated the Pennsylvania charter school statute and had entered injunctions prohibiting the Einstein Academy Charter School (the school enrolling sixty-four percent of Pennsylvania cyber charter students) from enrolling students from districts in two counties. Butler Area Sch. Dist. v. Einstein Acad., No. 2001-50031 (Pa. Com. Pl. Sept. 10, 2001); Fairfield Area Sch. Dist. v. Einstein Acad., No. 01-S-1008 (Pa. Com. Pl. Dec. 11, 2001), *rev'd*, 804 A.2d 762 (Pa. Commw. Ct. 2002). In addition, the Pennsylvania Department of Education filed a petition for declaratory judgment determining its responsibilities regarding one cyber charter school. Brief for Petitioners, Dep't of Educ. v. Einstein Acad. Charter Sch., Case No. 51 M.D. 2002 (Pa. Commw. filed Feb. 8, 2002).

[69] H.R. 4, 186th Gen. Assem., Reg. Sess. (Pa. 2002).

[70] PA. STAT. ANN. tit. 24, § 17-1741-A (West 2002).

[71] *See id.* § 17-1747-A.

[72] *See id.* § 17-1743-A(h).

[73] *See id.* § 17-1743-A(e).

[74] *See id.* § 17-1743-A(d).

[75] *See id.* § 17-1750-A(d), (e).

documents to the PDE to enable it to determine whether the schools are in compliance with statutory requirements.[76] As of August 14, 2002, three of the nine existing cyber charters were determined to be out of compliance with the statute.[77] The PDE has the authority to revoke the charters of cyber charter schools that fail to come into compliance.[78]

Cyber charters have also generated controversy in two other states. In California, as in Pennsylvania, the state legislature instituted provisions to regulate cyber charter schools.[79] Nothing in California's charter statute explicitly or implicitly precludes the use of home-based instruction as a method of education delivery. Although no litigation has challenged this status quo, statutory provisions enacted in 2001 require that charter schools providing less than eighty percent of student instruction at a physical school site fulfill further requirements in order to be eligible for state funding.[80] Moreover, non-classroom-based schools must complete a funding audit form to demonstrate that at least fifty percent of the funds they receive are spent on student instruction.[81] If that funding level is not met, the California State Board of Education is authorized to impose funding reductions of up to ten percent during the first year of noncompliance,[82] with increasing penalties in subsequent years.[83] Finally, a charter school providing non-classroom-based instruction is also prohibited from receiving any funding unless an audit form is properly filed with the state.[84]

In Wisconsin, as in California, nothing in the state charter school statute expressly precludes state funding for a charter school that serves home-schooled children and their families or delivers instruction via the Internet, yet a cyber charter school has drawn legal attack, nonetheless. The Wisconsin Education Association Council ("WEAC")[85] recently filed suit against the Appleton School District challenging the operation of its cyber charter school, Wisconsin Connections Academy, as a violation of state law.[86] WEAC asserts that the state legislature did not intend the

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[76] *See id.* § 17-1750-A(a).

[77] The three schools are Commonwealth Cyber Charter School, Einstein Academy Charter School, and Pennsylvania Learners Online Regional Charter School. Pennsylvania Department of Education, *Determination of Compliance to Subsection (c) of Charter School Law 8/14/02*, *available at* http://www.pde.state.pa.us/charter_schools/cwp/view.asp?a=146&Q=61834&charter_schoolsNav=|572|&charter_schoolsNav=| (last visited Mar. 3, 2003).

[78] PA. STAT. ANN. tit. 24, § 17-1741-A(a)(3) (West 2002).

[79] CAL. EDUC. CODE §§ 47605, 47612.5, 47614.5, 47616.7, 47634.2 (West Supp. 2003).

[80] *Id.*

[81] CAL. EDUC. CODE § 47634.2 (West Supp. 2003).

[82] *Id.* § 47634.2(2).

[83] *Id.* § 47634.2(3),(4).

[84] *Id.* § 47612.5(a)(2).

[85] WEAC is the Wisconsin affiliate of the National Education Association and represents the interests of the majority of public school teachers in Wisconsin. *See* Wisconsin Education Association Council, *About WEAC*, *at* www.weac.org (last visited Mar. 20, 2003).

[86] Johnson v. Wis. Dep't. of Pub. Instruction, No. 2002CV002943, (Dane County Cir.

charter school statute to allow virtual education or to allow the statewide open enrollment program[87] to be used to allow students to attend school in non-traditional virtual settings.[88]

In addition, public debate about cyber charter schools in Wisconsin has raised further objections beyond those emphasized by the challengers to Wisconsin Connections Academy. In particular, some critics have raised concerns about district funding for charter schools since students from other districts may enroll in them through Wisconsin's statewide open enrollment program.[89] Due to this program, state school aid follows each child from her own residential district to the district operating the cyber charter.[90] Wisconsin's system of charter school funding creates the possibility that a district sponsoring a charter student would receive funds through open enrollment without passing the full funding along with the student to the charter school.[91] Thus, the open enrollment funds could be channeled to the school districts sponsoring the virtual charter schools, enriching their coffers while draining the students' home districts financially.[92]

A second area of concern has been articulated by groups that represent home-schoolers: the question of whether the acceptance of cyber charter schools will subject home-schooling to regulatory control. One such group, the Wisconsin Parents' Association ("WPA"), fears that "with money comes strings."[93] According to one WPA member, "Home-schoolers have opted out of government schools for one reason or another. Now here's something that will bring the government right into people's homes."[94] Statutory provisions requiring charter schools to satisfy all health and safety regulations applicable to traditional public schools and subjecting charter school students to periodic state academic examinations are of predominant concern to this group.[95] The WPA succeeded in finding a sponsoring state Assemblyman to propose a bill amending the open enrollment pro-

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Ct., Wis., filed Sept. 19, 2002).

[87] WIS. STAT. ANN. § 118.51 (West 1999 & Supp. 2002).

[88] Notice of Pls.' Compl., Johnson v. Wis. Dep't. of Pub. Instruction, No. 2002CV002943, (Dane County Cir. Ct., Wis., filed Sept. 19, 2002). The petitioner's complaint sought to prevent the charter school from providing online schooling to nonresident students and sought a judicial declaration that Wisconsin statutes do not permit virtual charter schools. *Id.* at 3.

[89] WIS. STAT. ANN. § 118.51 (West 1999 & Supp. 2002).

[90] *Id.*

[91] *Id.* § 118.40(3). In Wisconsin, charter school funding is a function of the negotiated charter contract, which means that for school district charter authorizers, funding must be determined in the charter contract negotiated with the charter school; it is not based on a statutory per capita fee or formula as it is for the non-district chartering authorities in Milwaukee. *Id.* § 118.40(2r)(e).

[92] *See, e.g.*, Lee Sensenbrenner, *Online School Has 500+ Applicants*, CAPITAL TIMES, Feb. 28, 2002, at 1B, *available at* http://www.madison.com/archives/read.php?ref=tct:2002:02:28:40954:COMMUNITIES; Marc Eisen, *The Next Big Thing, Publicly Funded Cyber-Schools Could Serve Home-Schoolers*, ISTHMUS, Mar. 15, 2002, at 6.

[93] Eisen, *supra* note 92.

[94] *Id.*

[95] *Id.*

gram to preclude the participation of any "pupil [in] a school or program in which the pupil will receive less than 50% of his or her instruction from a licensed teacher who is present in the same room as the pupil,"[96] which would effectively prevent students from enrolling for a complete education in cyber charters under the open enrollment program.

As these three states' situations demonstrate, cyber charter schools may raise unique legal issues that require examination of the intersection of a state's charter school law with its laws governing compulsory education, home schooling, statewide open enrollment, and school funding in order to determine the legality of cyber charter schools in a given state. In addition, the manner in which states resolve these questions has the potential to radically alter traditional conceptions of public schools as places where communities send their children for collective instruction and social interaction. The experiences of these three states also suggest that policy-makers will be called upon to weigh the relative merits of cyberspace approaches to instructional delivery.

D. Possibilities for For-Profit Organizations to Operate Charter Schools

The question of whether for-profit management companies may obtain charters has also invited controversy. Most states require charter schools to operate as non-profit entities.[97] Five states (Arizona,[98] Colorado,[99] New York,[100] Virginia,[101] and Wisconsin[102]) have enacted statutes that contain no language requiring charter schools to operate as non-profit entities. Presumably, then, each of these states permits charter-granting authorities to grant a charter directly to a for-profit entity. In all other states, schools must operate as nonprofit organizations, but they may still elect to contract with a for-profit company for management of the school.[103] In such a situation, the relationship between the nonprofit operators of the charter school and the for-profit contractors may come under scrutiny.

Questions about the relationship between for-profit contractors and charter schools in this type of partnership motivated four Pennsylvania lawsuits. In the first two cases, *West Chester Area School District v. Col-*

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[96] H.R. 893, 2001 Leg., 95th Sess. (Wis. 2001).

[97] *See e.g.*, MASS. GEN. LAWS ANN. ch. 71, § 89(e) (West 2003); PA. STAT. ANN. tit. 24, § 17-1703-A (West 2002).

[98] ARIZ. REV. STAT. § 15-183 (2002).

[99] COLO. REV. STAT. §§ 22-30.5-101 to -30.5-208 (West 1998 & Supp. 2002).

[100] N.Y. EDUC. LAW §§ 2850–2857 (McKinney 2001).

[101] VA. CODE. ANN. §§ 22.1-212.5–22.1-212.16 (Michie 2000 & Supp. 2002).

[102] WIS. STAT. ANN. § 118.40(7)(3) (West 1999 & Supp. 2002). One limitation regarding for-profit charter schools exists in Wisconsin statutes. If the City of Milwaukee grants a charter to a for-profit entity, the school would become "an instrumentality" of the Milwaukee Public Schools ("MPS"), thereby making all charter school employees MPS employees, subject to the collective bargaining agreements governing employee relationships in the district. *See id.*

[103] *See, e.g.*, MO. REV. STAT. § 160.400 (5) (2000).

legium Charter School[104] and *Brackbill v. Ron Brown Charter School*,[105] the local school districts had denied charter applications due to concerns about the closeness of the school's relationship with its contractor. In both cases, courts examined whether each school's proposed board of trustees was sufficiently independent of the for-profit company, Mosaica, Incorporated, that was contracted to operate both schools.[106] Mosaica had prepared each charter school's application, raising the question of whether the schools had been properly "established" by nonprofit companies.[107] In both cases, the court rejected the challengers' argument and allowed the grant of charters to the school.[108] In its *Brackbill* holding, the court emphasized the independence of the school's Board of Trustees, which had full authority to operate the school, from the for-profit company.[109]

By contrast, the relationship between a nonprofit charter school operator and its for-profit vendor may trigger a violation of Pennsylvania's statutory not-for-profit rule if it appears to lack the requisite independence.[110] For example, in *Butler Area School District v. Einstein Academy*, the fact that the nonprofit Einstein Academy Charter School and its for-profit vendor, Tutorbots, Incorporated, were owned and operated by the same two individuals raised the question of whether the nonprofit was simply a front for the operator.[111] In fact, the PDE, in its related petition in a separate case requesting declaratory judgment from the state's Commonwealth Court on its role in the oversight of Einstein Academy noted that "[d]ocuments provided by Einstein to the PDE do not evidence any independent fiscal oversight or any other independent entity of Einstein's operations or of the contract between Einstein or Tutorbots."[112]

Another Pennsylvania case, *School District of the City of York v. Lincoln-Edison Charter School*,[113] established that determining the relationship between the nonprofit charter applicant and its for-profit management company depends on a complete assessment of the final agreement between the parties.[114] In *Lincoln-Edison*, the school district had denied an application for the conversion of an existing public school to a charter school, which was to be operated by a for-profit company, Edison

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[104] 760 A.2d 452 (Pa. Commw. Ct. 2000).

[105] 777 A.2d 131 (Pa. Commw. Ct. 2001).

[106] *W. Chester Area Sch. Dist.*, 760 A.2d at 468–69; *Brackbill*, 777 A.2d at 136.

[107] *W. Chester Area Sch. Dist.*, 760 A.2d at 469; *Brackbill*, 777 A.2d at 137.

[108] *W. Chester Area Sch. Dist.*, 760 A.2d at 473; *Brackbill*, 777 A.2d at 139.

[109] *Brackbill*, 777 A.2d at 137.

[110] Butler Area Sch. Dist. v. Einstein Acad. No. E.Q. No. 2001-50031 (Pa. Com. Pl. Sept. 10, 2001).

[111] *Id.* at paras. 8–9. The court granted the plaintiffs' motion for an injunction, concluding that plaintiffs had demonstrated "a clear right to relief on the issue of whether Einstein was validly chartered by [its sponsor]." *Id.* at para 20.

[112] Brief for Pt.'s, Dep't of Educ. v. Einstein Acad. Charter Sch. at para. 29, No. 51 M.D. 2002 (Pa. Commw. filed Feb. 8, 2002).

[113] 772 A.2d 1045 (Pa. Commw. Ct. 2001).

[114] *Id.* at 1050.

Schools, Incorporated.[115] The charter applicant appealed to the Charter School Appeal Board ("CAB"),[116] which overturned the denial and ordered the school district to grant the charter even though no agreement had been finalized between the proposed charter school and Edison, Incorporated.[117] On appeal, the Commonwealth Court determined that the CAB had erred in ordering the school district to grant the charter in the absence of a finalized management agreement.[118]

These cases examining the relationship between non-profit charter holders and their for-profit vendors suggest that when states require charters to be held by non-profit entities, disputes may arise concerning their contracts with for-profit management companies. Resolving these cases requires a careful examination of the application, bylaws and management contract; a determination of how and by whom decisions are made for the school; and an investigation of the relationships between the for-profit entity and those involved in the school's governance.

E. Charter Schools and Appealing the Denial of a Charter

Charter school applicants may or may not be able to appeal the denial of a charter school petition. Fourteen states have elected not to create an appeals process.[119] In fact, some statutes may even preclude appeals altogether. For example, Delaware has determined that "[i]f application is made to the Department or a local board as an approving authority and the charter application is not approved, such decision shall be final and not subject to judicial review."[120] Notwithstanding the absence of procedures for appeals, one might argue that states that have multiple charter-granting authorities with overlapping jurisdictions actually have a *de facto* appeals process, as an applicant denied by one authority could simply petition another charter-granting authority for approval.[121]

As Table 4 (see Appendix) shows, twenty-seven chartering states have created some type of appeals process to challenge the denial of a charter application.[122] Appeals may be directed to a variety of reviewing bodies. The most common appeals route, allowed in nineteen states, is to the state board of education. Five other states allow appeals to some other state agency or official, including two states (Indiana[123] and Pennsylvania[124])

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[115] *Id.* at 1046. The district pointed to "the questionable relationship between the applicant and Edison Schools, [Incorporated]" as one of its reasons for denying the charter. *Id.* at 1047.

[116] *Id.*

[117] *Id.* at 1048. The parties had only submitted a "model" agreement to the CAB. *Id.* at 1050.

[118] *Id.*

[119] *See infra* Table 4.

[120] DEL. CODE ANN. tit. 14, § 511(k) (2002).

[121] *See, e.g.*, MINN. STAT. ANN. § 124D.10 (West 2002).

[122] *See infra* Table 4.

[123] IND. CODE ANN. § 20-5.5-3-11 (West 2002).

that have created special boards specifically authorized to hear charter school appeals. Two more unusual processes occur in Michigan, which allows voters to decide appeals through a ballot initiative process,[125] and Oklahoma, which permits dissatisfied applicants to submit the issue to mediation or arbitration.[126] Finally, eight states have statutory provisions expressly granting judicial appeal, either directly or after exhaustion of an administrative review process.[127]

States that have created administrative appellate procedures sometimes grant the reviewing decision-maker the authority to grant directly a charter denied by another charter-granting authority,[128] while in other states the matter is remanded to the initial charter-granting authority with an order to grant the charter.[129] Still other states limit the appellate decision-maker to issuing recommendations the charter-granting authority must consider upon a re-hearing of the charter application.[130]

At least one court has ruled that denials of charter school applications must include specific findings of fact in order to ensure adequate judicial review. In *Shelby School v. Arizona State Board of Education*,[131] the court determined that specific findings were necessary to document "the precise basis for the Board's decision"[132] in order for a reviewing court to ascertain whether the decision was reasonable.[133] The court also determined that the state board could consider creditworthiness of applicants and the relationship of the charter school directors to a church, given the charter school statute's requirement that schools demonstrate a plan for financial soundness and operate in a non-sectarian manner.[134]

The Supreme Court of South Carolina in *Beaufort County Board of Education v. Lighthouse Charter School*[135] first determined that the state Board of Education should not reverse the denial of a charter school application by a local school board unless the findings made by the local school board were "clearly erroneous."[136] Likewise, any reviewing court should apply the same standard.[137] In this instance, the court held that a

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[124] PA. STAT. ANN. tit. 24, § 17-1717-A(f) (West 2002).
[125] MICH. COMP. LAWS § 380.503(2) (West 2002).
[126] OKLA. STAT. ANN. tit. 70, § 3-134(f) (2002).
[127] *See infra* Table 4.
[128] MO. REV. STAT. § 160.405.2(3) (1998).
[129] S.C. CODE ANN. § 54-40-90(c) (Law. Co-op. 1996).
[130] FLA. STAT. ch. 228.056(4)(b)–(c) (1996).
[131] 962 P.2d 230, 244 (Ariz. Ct. App. 1998).
[132] *Id.* at 237.
[133] *Id.*
[134] *Id.* at 243. The court also rejected the school's contention that it had a constitutional property interest under the Fourteenth Amendment to the grant of a charter once the state board determined that its application satisfied all the requisite elements. *Id.* at 242. A determination that an application is satisfactory is but one step in the process and no protected property interest exists until a charter is actually issued. *Id.* at 243.
[135] 516 S.E.2d 655, 661 (S.C. 1999).
[136] *Id.* at 660.
[137] *Id.* at 657.

school board's denial of a charter on the grounds that the proposed charter school failed to satisfy health and safety requirements and the racial composition requirements under state law was supported by the evidence.[138] In another case,[139] an Illinois appellate court, which also applied a "clearly erroneous" standard of review, determined that the reversal of a charter school application conditioned on the submission of a viable facility plan was within the school board's authority.[140]

A series of six Pennsylvania cases have established several guiding principles related to charter school appeals in that state.[141] *West Chester Area School District v. Collegium Charter School*[142] established the leading precedent determining that the CAB has the statutory authority to conduct a *de novo* review of any charter school application and can substitute its judgment for that of the denying local school district if the CAB determines such action to be proper.[143] Subsequent cases also establish that a charter school's failure to include all requisite elements in its application provides sufficient grounds for the denial of a charter.[144] These cases also establish that a charter school must exhaust available administrative remedies prior to asserting a judicial claim.[145]

II. Issues Affecting the Operation of Charter Schools

After a charter school has been established, a variety of other issues arise with respect to the operation of the school. These issues include whether charter schools may charge tuition, what standards of health govern charter schools, what standards guide charter revocation and renewal decisions, and whether charter schools may sue to enforce a charter contract.

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[138] *Id.* at 658.

[139] *See* Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 59 v. Ill. State Bd. of Educ., 740 N.E.2d 428 (Ill. App. Ct. 2000).

[140] *Id.* at 434–35.

[141] *See* West Chester Area Sch. Dist., 760 A.2d 452 (Pa. Commw. Ct. 2000) (establishing standards for the propriety of management contracts with for-profit management companies); Souderton Area Sch. Dist. v. Souderton Charter Sch. Collaborative, 764 A.2d 688, 697–98 (Pa. Commw. Ct. 2000) (holding that the CAB may grant charters on a conditional basis); Shenango Valley Regional Charter Sch. v. Hermitage Sch. Dist. 756 A.2d 1191 (Pa. Commw. Ct. 2000); Sch. Dist. of the City of York v. Lincoln-Edison Charter Sch., 772 A.2d. 1045 (Pa. Commw. Ct. 2001) (holding that a finalized contract between any charter school and a for-profit management company is necessary for a decision on any appeal where questions have been raised about the non-profit status of the charter applicant); Sch. Dist. of Philadelphia v. Indep. Charter Sch., 774 A.2d 798 (Pa. Commw. Ct. 2001) (holding that a seventy-five day limit for school districts to either grant or deny a charter was mandatory, and the act by an applicant of filing an appeal after the expiration of that period transfers jurisdiction for the application from the school district to the CAB); Brackbill v. Ron Brown Charter Sch., 777 A.2d 131 (Pa. Commw. Ct. 2001).

[142] 760 A.2d 452, 460 (Pa. Commw. Ct. 2000).

[143] *Id.* at 461–62.

[144] *See Shenango Valley Reg'l Charter Sch.*, 756 A.2d at 1194.

[145] *See* Village Charter Sch. v. Chester Upland Sch. Dist., 813 A.2d 20, 24 (Pa. Commw. Ct. 2001).

Once again, the legislative policy decisions codified by state statutes indicate how willing states have been to re-conceptualize public education.

A. Charter Schools and Tuition

People may often consider tuition to be one obvious distinction between public and private schools. All but three states (Alaska,[146] Connecticut,[147] and Georgia[148]) have explicit statutory language prohibiting charter schools from charging tuition.[149] Three other jurisdictions (the District of Columbia,[150] New Jersey,[151] and Tennessee[152]) allow schools to charge tuition under the same conditions as traditional public schools, such as when a student who resides outside the school district's boundaries seeks to attend the school.

Federal charter school legislation also addresses the issue of tuition. First enacted as the Charter Schools Expansion Act and now incorporated as part of the recent reauthorization of the Elementary and Secondary Education Act, known as the No Child Left Behind Act of 2001,[153] federal law defines a charter school as one that "does not charge tuition."[154] Therefore, in order for a charter school to be eligible for planning and implementation grants or participation in the credit enhancement program[155] a charter school must abide by the prohibition on charging tuition.[156]

One would think that these prohibitions and the condition prohibiting tuition in order to receive federal funds would prevent the question of whether charter schools may charge tuition from even arising. Nonetheless, the Common Council of Milwaukee has raised this very issue. In its ordinance[157] and in its charter school contracts, the City of Milwaukee—as a charter-granting authority under Wisconsin statutes—declares that its charter schools may accept students on a tuition basis, except those students authorized to attend under the charter statute.[158] Wisconsin statutes

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[146] *See* ALASKA STAT. § 14.03.250 (Michie 2002).
[147] *See* CONN. GEN. STAT. § 10-66aa–hh (2003).
[148] *See* GA. CODE ANN §§ 20-2-2064 to -2066 (2002).
[149] *See, e.g.*, ARIZ. REV. STAT. § 15-185(A)(7) (2002).
[150] *See* D.C. CODE ANN. § 38-1702.07(d) (2002).
[151] *See* N.J. STAT. ANN. § 182:36A-8(b), (d) (West 2002).
[152] *See* TENN. CODE ANN. § 49-13-111(k) (2002).
[153] No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002).
[154] *Id.* § 7221i.
[155] The credit enhancement provision of the No Child Left Behind Act provides federal funds to be used as collateral to facilitate the ability of charter schools to borrow funds "to address the cost of acquiring, constructing, and renovating facilities." 20 U.S.C. § 7223 (2002).
[156] *Id.* § 7221i (2002).
[157] MILWAUKEE, WIS. CODE, § 330-7(1) (1999).
[158] The City allows schools to charge tuition to students "who are attending [the] Charter School, but who are not doing so under sec. 118.40(2r) [the charter school statute]." Contract between the City of Milwaukee and the Downtown Montessori Academy 7 (Aug. 31, 1998) (on file with author) [hereinafter Montessori Contract].

prohibit charter schools from charging tuition.[159] In part, the City's challenge derives from the state's limititation on students eligible for City charter school attendance to resident Milwaukee students who were previously: (1) enrolled in Milwaukee Public Schools; (2) enrolled in the Milwaukee Parental Choice Program ("MPCP");[160] (3) enrolled in grades K-3 in Milwaukee private schools not participating in the MPCP; (4) not enrolled in school; or (5) enrolled in another charter school.[161] The provisions in the City's ordinance and the City charter contracts, however, allow schools to accept students who do not fit any of these five categories on a tuition basis.[162] Thus, the City's position appears to conflict directly with the Wisconsin statute's clear prohibition on students paying tuition.[163] The Wisconsin Department of Instruction ("DPI"), however, has taken no direct action on this issue.[164] The Legislative Audit Bureau recommended that "the Legislature amend statutes to allow charter schools established by the City of Milwaukee, [the University of Wisconsin-Milwaukee], and Milwaukee Area Technical College to charge tuition to non-charter school students or to enroll students at all grade levels in the charter school program, even if the students did not participate in the Milwaukee Parental Choice Program."[165] The Wisconsin legislature has not acted on this recommendation as of yet, and there have been no changes to this portion of the statute.

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[159] WIS. STAT. § 118.40(4)(b)(1) (2002).

[160] The MPCP allows low-income Milwaukee students to use a publicly funded voucher to attend any participating private school in the city. *See* WIS. STAT. § 119.23 (1999–2000).

[161] *See* WIS. STAT. § 118.40 (2r)(c) (2002).

[162] *See* MILWAUKEE, WIS. CODE, § 330-7(1) (1999); Montessori Contract, *supra* note 158. For example, some students may be in grades four through twelve and have neither participated in the MPCP nor attended MPS. Some students may not reside in Milwaukee, but still may wish to attend the charter school. Presumably, these provisions were enacted because the City's first charter applicants were existing private schools participating in the MPCP but seeking to convert to charter school status. *See* MILWAUKEE CHARTER SCH. REVIEW COMM., 1998–1999 ANNUAL REPORT 3 (1999). Therefore, if schools could not have accepted some students on a tuition basis, they may have faced the difficult choice of turning away currently enrolled students in order to convert to charter status. Downtown Montessori, one the City's first charter schools, had three tuition students for the 2000 to 2001 school year. Telephone Interview with Director, Downtown Montessori Academy (Aug. 29, 2000). In phone calls, directors of other city charter schools reported no tuition students currently enrolled. Telephone Interview with Director, Central City Cyberschool (Aug. 29, 2000); Telephone Interview with Director, Khamit Institute (Aug. 29, 2000); Telephone Interview with Director, YMCA Global Carer Academy (Aug. 29, 2000).

[163] *See* WIS. STAT. § 118.40(2r)(b) (2002); WIS. LEGISLATIVE AUDIT BUREAU, REP. 98-15, AN EVALUATION: CHARTER SCHOOL PROGRAM, 57 (1998).

[164] This may be the case because the agency lacks the statutory authority to challenge directly the charter school contracts created by the City or other chartering authorities. WIS. STAT. § 118.40 (2002). It is unclear what direct action DPI could take against a charter school charging tuition to some of its students under contractual provisions. Presumably, the agency could investigate a formal complaint. Another avenue might be to withhold federal grant monies if the school in question were eligible for any. The parties could also submit the question to a court of law to construe the statute.

[165] *Id.*

B. Charter Schools and Health and Safety Standards

Charter school statutes uniformly hold charter schools to the same health and safety standards as traditional public schools.[166] Federal law also defines a charter school as one that adheres to "all applicable Federal, State and local health and safety requirements."[167] Such compliance, then, is a necessary condition to participation in federal programs providing support to charter schools.[168]

The imposition of health and safety standards may be particularly complicated for a cyber charter school—there may be no clear "school" that must meet these standards. The school could be the offices where the teachers work, or, as the Wisconsin Parents Association fears,[169] the rooms in the homes where the children learn. In the absence of statutory definitions, no clear answers to these questions exist. If it were determined that homes where children learn must comply with the standards, a wide range of questions would arise as to how a cyber charter school or its charter-granting authority would ensure that the standards were being met. For example, one concern is whether parents would have to open their homes to inspection. Furthermore, if it were determined that the homes did not meet the standards, it is unclear whether parents or school authorities would be responsible for making the necessary changes.

Health and safety requirements were an issue in *Beaufort County Board of Education v. Lighthouse Charter School Committee.*[170] In that case, the school district requested additional information from a charter school applicant regarding how the school's proposed facility would satisfy the health and safety requirements "applied to public schools operating in the same school district,"[171] as required by South Carolina's charter school law.[172] The school responded only with assurances that its standards would be comparable to public schools, but provided no information concerning how the requirements would be satisfied.[173] The school district subsequently denied the charter, in part on the grounds that the school did not satisfy the health and safety requirements of the application process.[174] The Supreme Court of South Carolina determined that the school district's finding in this regard was based on sufficient evidence

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[166] *See, e.g.*, ALASKA STAT. § 14.03.255(d) (Michie 2002); IOWA CODE ANN. § 256F.4(2)(a) (West Supp. 2003); KAN. STAT. ANN. § 72-1906(d)(4) (Supp. 2001); TENN. CODE ANN. § 49-13-105(b)(2) (2002).

[167] No Child Left Behind Act of 2001, 20 U.S.C. § 7221I (2002).

[168] *Id.*

[169] *See supra* notes 94–95 and accompanying text.

[170] 516 S.E.2d 655 (S.C. 1999).

[171] *Id.* at 658.

[172] S.C. CODE ANN. § 59-40-50(B)(1) (Law. Co-op. 2002).

[173] *Beaufort County*, 516 S.E.2d at 658–59.

[174] *Id.* at 658.

and was not clearly erroneous.[175] Unfortunately, given that acquisition of facilities may be difficult, especially at the application phase of the charter process, some applicants may find it difficult to provide more than assurances that health and safety codes will be honored.

C. Standards Guiding Revocation/Renewal Decisions

Revocation is the withdrawal of a school's charter during its term.[176] Renewal relates to the decision by a charter-granting authority to enter into a new contract once the term of an existing contract expires.[177] Both revocation and renewal raise legal issues of due process and contract compliance.

All but three jurisdictions (Hawaii, New Mexico, and Puerto Rico)[178] enumerate the reasons justifying revocation in their charter school statutes. Table 5 (see Appendix) details those standards. The four most common standards relate to charter contract compliance: compliance with the charter school law, compliance with other applicable laws, fiscal management, and student performance standards. In addition to these statutory grounds, charter school contracts may delineate additional standards for revocation.

The controversy surrounding Einstein Academy Charter School in Pennsylvania raises an interesting revocation question: what are the responsibilities of the state educational agency in relation to revocation of a charter? The PDE posed this question in its February 2002 petition for a declaratory judgment[179] because it believed it had actual knowledge that the Einstein Academy was not in compliance with the charter school law and its charter, and the charter-granting authority[180] had taken no action to correct the problems identified. The PDE asked the court to declare either that the PDE had no choice under state law but to forward payments to the charter school regardless of the knowledge of the improper operation or that it had the authority to withhold payments and that the charter-granting school district "shall comply with its oversight responsibilities."[181] The Pennsylvania legislature, instead, resolved the issue by en-

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[175] *Id.* at 659.

[176] *See* BLACK'S LAW DICTIONARY 1321 (7th ed. 1999).

[177] *See id.* at 1080.

[178] HAW. REV. STAT. ANN. § 302A-1186(b) (Michie Supp. 1999); N.M. STAT. ANN. § 22-8B-12(D) (Michie 2002); 18 P.R. LAWS ANN. § 1902 (2002).

[179] *See* Petition for Review in the Nature of an Action for Declaratory Judgment, Pa. Dep't of Educ. v. Einstein Acad. Charter Sch. (Pa. Commw. Ct., filed Feb. 8, 2002) (No. 51 M.D. 2002).

[180] A 2001 United States Department of Education report indicates that charter school authorities vary widely with regard to the manner in which they oversee charter schools. For example, some may exercise oversight responsibilities with frequent contact, while others adopt a more distant relationship. U.S. DEP'T. OF EDUC., A STUDY OF CHARTER SCHOOL ACCOUNTABILITY 53–59 (2001).

[181] Petition for Review in the Nature of an Action for Declaratory Judgment at 10, Pa.

acting provisions that now grant the educational agency the authority to revoke a cyber school's charter after notice and hearing if a material component of the student's education is not being provided.[182] Should a

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Dep't of Educ. v. Einstein Acad. Charter Sch. (Pa. Commw. Ct. filed February 8, 2002) (No. 51 M.D. 2002). The Pennsylvania Department of Education complaint also raised issues of agency liability. The petition detailed numerous complaints by parents about the school's failure to provide promised computers, texts, and services and raised concerns that the charter-granting authority had taken no action to revoke the school's charter. *See, e.g.*, *id.* at para. 19. It then justified its request for a declaratory judgment by stating, "[f]or these reasons the Secretary and PDE are concerned that they may be exposed to potential liability in the event a court of competent jurisdiction should finally determine that Einstein has been in violation of the CSL [charter school law], its charter or other laws." *Id.* at para. 52. In its defense, the charter school contended that its trouble meeting its obligations stemmed from funds being withheld by the state. *See* Defendant's Proposed Findings of Fact, Fairfield Area Sch. Dist. v. Nat'l Org. for Children, Inc., (Ct. Com. Pl. of Adams County, Pa., Dec. 11, 2001) (Case No. 01-S-1008); Alan Richard, *Short of Funds, Cyber School Awaits Ruling*, EDUC. WEEK, Mar. 20, 2002, at 18.

Educational malpractice has not been a recognized cause of action since the decision in *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Ct. App. 1976) (holding that an illiterate high school graduate could not recover for the school's failure to teach him to read). The court reasoned that "classroom methodology affords no readily acceptable standards of care," an essential element in any finding of liability for negligent action. *See id.* at 860. In addition, the court found it difficult to determine the cause of the problem because a child's learning is affected by a number of factors both inside and outside the classroom environment. *See id.* at 861. Public policy concerns also convinced the court that such an award would be problematic as judges would be forced to evaluate the daily happenings in schools, damage awards would impose financial burdens on schools that would implicate their ability to serve other students, and courts would become clogged with a deluge of similar claims even though an administrative avenue for dispute resolution already exists in many state educational agencies. *Id.*

Arguably, however, the special characteristics of charter schools, including their emphasis on accountability, might make them more susceptible to educational liability claims because the rationales used by courts to reject liability in the cases of conventional public elementary and secondary institutions do not apply to charter schools with the same force. For a detailed discussion of charter schools and educational liability, see Julie F. Mead & Preston C. Green III, *Keeping Promises: An Examination of Charter Schools' Vulnerability to Claims for Educational Liability*, 2001 BYU EDUC. & L.J. 35 (2001). For instance, charter schools might be vulnerable to causes of action based on contract law because the charter school/parent relationship is more contractual in nature than the relationship between conventional schools and parents. *See* Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L.J. 69, 98–101 (1998). In addition, the charter contract, in combination with state statutes, may define a "duty" that is difficult to identify in a more traditional context. In the same way that courts have recognized this contractual obligation in some cases involving private schools, charter schools may be held to the promises made in order to entice parents to enroll their children. Squires v. Sierra Nev. Educ. Found., Inc., 823 P.2d 256 (Nev. 1991); Ross v. Creighton Univ. 957 F.2d 410 (7th Cir. 1992); Gupta v. New Britain Gen. Hosp., 687 A.2d 111 (Conn. 1996). In addition, charter schools might be susceptible to statutory liability because charter school legislation makes it perfectly clear that charter schools have a mandatory duty to meet the goals established in charter statutes or else face revocation or nonrenewal. Courts may conclude that a child who fails to make progress at a charter school should recover the per-pupil funds her parents "spent" at the charter school or be awarded compensatory education in the form of tutoring or additional years of schooling to remedy an educational injury endured at a charter school. In either case, a child would first have to show that the education received was in some way sub-standard. *See* Mead & Green, *supra* at 54–64.

[182] *See* 24 PA. CONS. STAT. § 17-1741-A (2002).

similar issue arise with respect to a classroom-based charter school, however, the PDE may find the need once again to appeal to a court to compel an authorizer to act.

Some states have explicitly addressed the issue of oversight of authorizers.[183] Iowa, for example, vests independent authority in its Board of Education to revoke a charter in the event that a local authorizer fails to do so.[184] Many states' charter school statutes, however, contain no provisions for oversight of authorizers or the exercise of their discretion to revoke or refuse to renew.[185] As such, charter school authorizers may enjoy largely unfettered discretion.

In addition to decisions to revoke charters, charter authorizers must also determine whether to renew a school's charter at the end of its term. Table 6 (see Appendix) lists causes specified in state statutes that justify the non-renewal of a charter. Not surprisingly, the four main causes—material violation of the charter contract, failure to meet educational goals, violations of the charter contract or other laws, and fiscal mismanagement—replicate those for revocation. The most striking issue about non-renewal standards, however, is not what is specified, but what is not. A comparison of Tables 5 and 6 reveals that non-renewal decisions lack the statutory guidance provided for revocation. In fact, twenty states have not established statutory provisions specifying reasons for which a charter school may be denied a subsequent contract.[186] One state, Louisiana, which also does not specify grounds for denying renewal, does condition renewal on the charter school demonstrating student improvement in academic performance based on standardized test scores.[187] In other states, a charter renewal is treated in a manner similar to the initial awarding of the charter.[188] The charter school seeking renewal must often satisfy the same application requirements previously met.[189] Renewal requirements may also be included in the charter contract. For example, Indiana requires that contracts specify grounds for renewal.[190] On the other end of the spectrum, some jurisdictions, such as the District of Columbia and Nevada, create a statutory presumption of renewal.[191] In this situation, renewal decisions are more analogous to revocation, since the burden shifts to the authorizer to show why a school should not be renewed.[192]

Charter schools in states that do not specify grounds for non-renewal would be prudent to follow Indiana's lead and negotiate those

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[183] *See, e.g.*, IOWA CODE § 256F.8(4) (West Supp. 2003).
[184] *See id.*
[185] *See, e.g.*, TENN. CODE ANN. § 49-13-122 (2002).
[186] *See infra* Table 6.
[187] *See* LA. REV. STAT. ANN. § 3992(A)(2) (West 2003).
[188] *See, e.g.*, MICH. COMP. LAWS § 380 (West 2003).
[189] *See, e.g., id.*
[190] *See* IND. CODE § 20-5.5-4-1(7)(B) (West 2002).
[191] *See* D.C. CODE ANN. § 38-1802.12(c) (2002); NEV. REV. STAT. 386.530(2) (2001).
[192] *See* D.C. CODE ANN. § 38-1802.12(c) (2002); NEV. REV. STAT. 386.530(2) (2001).

standards as a provision of the initial charter contract. Since charters are term contracts by definition, the relationship between the parties ends at the expiration of the term. Therefore, without any statutory or contractual language to define renewal standards, the charter-granting authority enjoys unencumbered discretion in determining whether to grant or deny renewal of a charter. In states that also allow only limited appeals of the discretionary decisions of charter-granting authorities, a charter school may be left little or no recourse outside the political arena.

One Florida case examined the issue of charter renewal.[193] On the recommendation of the school district, the St. Lucie County School Board determined not to renew the charter of the Orange Avenue Charter School.[194] After the school successfully appealed that decision to the State Board of Education,[195] the matter was remanded to the school district for reconsideration in accordance with Florida law.[196] For such situations, Florida statutes provided:

> [T]he district board may fail to act in accordance with the recommendation of the state board only for good cause. Good cause for failing to act in accordance with the state board's recommendation arises only if the school board determines by competent substantial evidence that approving the state board's recommendation would be contrary to law or contrary to the best interest of the pupils or the community.[197]

Ultimately, the school district board determined that, because students failed to make adequate progress on student performance measures, continuing the charter school's contract would be contrary to the best interests of the pupils.[198] The court held that substantial evidence supported the board's decision and affirmed.[199]

D. Charter Schools' Ability to Enforce Charter Contracts

Revocation and non-renewal decisions are the ultimate penalty a charter-granting authority may impose on a charter school that does not comply with its contract. It is unclear, however, what recourse the charter school has when it complies with the contract, but the charter-granting

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[193] Orange Ave. Charter Sch. v. St. Lucie County Sch. Bd., 763 So. 2d 531 (Fla. Dist. Ct. App. 2000).

[194] *Id.* at 532.

[195] *Id.*

[196] *Id.*

[197] FLA. STAT. ANN. § 228.056(4)(c) (West 1998) (repealed 2003).

[198] *Orange Ave. Charter Sch.*, 763 So.2d at 534–35.

[199] *Id.* at 532–34. The court also noted that, when such hearings produce conflicting evidence, as occurred in this case, the board has the discretion to determine which testimony it will accept. *Id.* at 534.

authority does not. A Colorado court recently offered one answer to this question.[200] The charter school complained that its sponsor, a local school district, had withheld funds and interfered with budgeting, hiring, and contracting.[201] The school, after the Board of Education declined to intervene, filed suit in state court to compel enforcement of the contract.[202] The Supreme Court of Colorado distinguished between the provisions of the contract that were "service provisions" and those concerning the "governing policy provisions."[203] The court held that charter schools could sue to enforce the service provisions or those provisions of the contract "entered into in order to carry out the educational program described in the charter."[204] On the other hand, any "dispute between [a charter school] and [its sponsoring school district] arising out of [the] implementation of the statutorily required portions of the charter contract" must be submitted to the state's Board of Education for resolution.[205]

The result of this case demonstrates that the relationship between a charter school and its operator may have different elements. As in this case, the charter-granting authority may be part authorizing agent and part vendor for particular services. When such mixed relationships occur, charter school operators would be prudent to consider what options were available to them and what limitations might be imposed on them by state law should their "vendor" default on promised goods and services.

CONCLUSION

State charter school laws raise a number of interesting legal and policy issues that span the life of a charter school, from establishment, to operation, to revocation. It is also clear that each policy decision made by state legislatures marks the schools as more or less similar to traditional public schools.[206] As the foregoing description and analysis detail, state policy decisions regarding certain issues on charter schools may push the boundaries of what characterizes public schools. Figure 1 contains a series of continuums that illustrate some of those issues.

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[200] Acad. of Charter Sch. v. Adams County Sch. Dist. No. 12, 32 P.3d 456 (Colo. 2001).

[201] *Id.* at 458.

[202] *Id.* The trial court dismissed the complaint after determining that charter schools lacked the authority to enforce their contracts. *Id.* An appeals court affirmed, reasoning that "the fact that charter schools are subordinate to their school districts prevents them from bringing suit." *Id.*

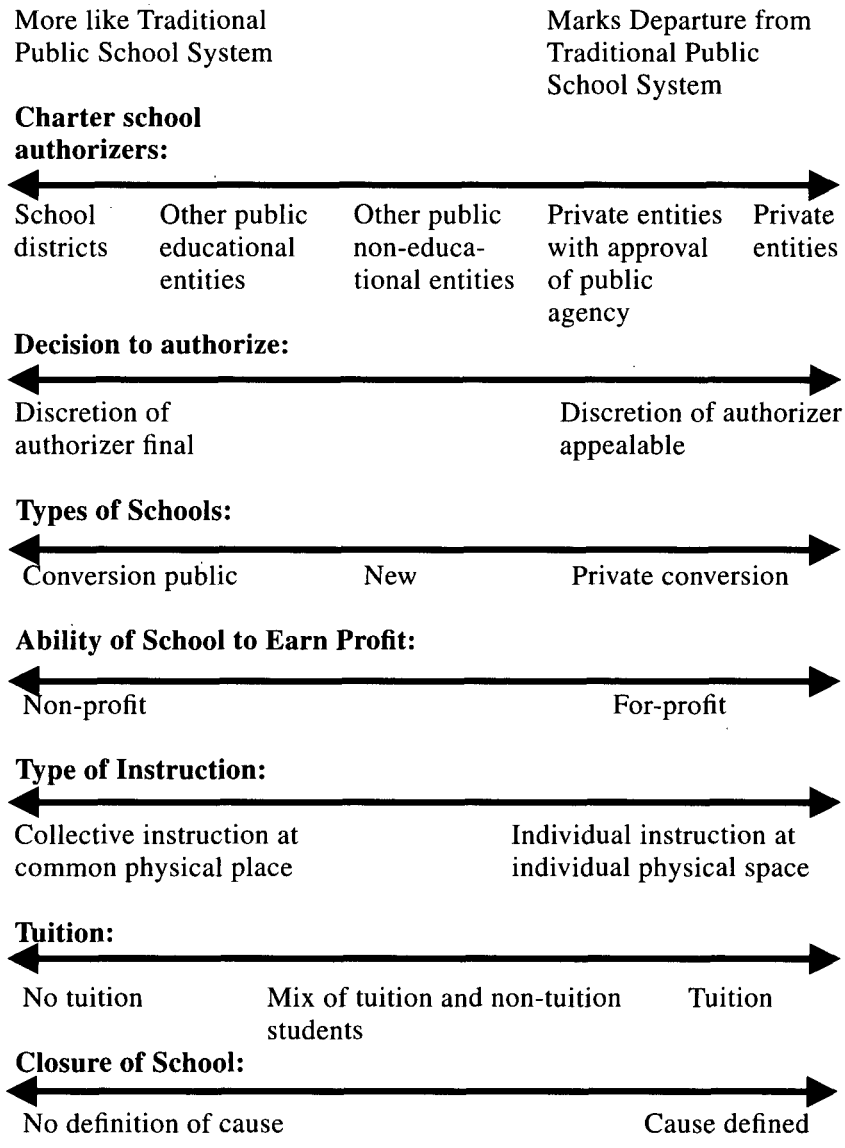
[203] *Id.* at 459–62.

[204] *Id.* at 459. A service provision of a charter contract may involve the agreement of the sponsor school district to provide some educational service (for example, special education evaluation) or other service (for example, custodial) for the charter school.

[205] *Id.*

[206] *See infra* Figure 1.

FIGURE 1: CONTINUUMS OF PUBLIC/PRIVATE NATURE OF CHARTER SCHOOLS



Each continuum depicted in Figure 1 demonstrates a potential policy decision regarding how charter schools will become established and how they will operate. Arizona, Minnesota, and Texas, for example, have created systems with significant departures from traditional public schools since they allow a variety of charter school authorizers and all three types

of charter schools. In essence, they have more liberally embraced the free market principles advocated by school choice proponents.[207] States such as Mississippi and Oklahoma have crafted charter school laws that reflect more cautious approaches to the charter school movement since they limit authorizers to public school districts and the types of charter schools that can be created. Issues such as the ability of a school to earn a profit, the type of instruction delivered and cause to close a school also show variation from state to state. Only the matter of charging students tuition seems to have escaped variance, although even it was at least nominally tested by the City of Milwaukee in its exercise of charter-granting authority.[208]

Controversies resulting in the litigation reported here indicate that the definition of "charter school" is evolving as courts become involved in construing charter school legislation. This development should not be surprising. Since charter schools have been designed to innovate,[209] it follows that legislators could not anticipate every new approach that might be conceived under the charter school banner (for example, cyber education), nor what resistance might develop in response to various uses of charter schools. Litigated controversies also raise questions about whether state legislatures have struck the proper balance between a charter school's public accountability and its operational autonomy.

It is also interesting to note that some jurisdictions have spawned far more litigation than others. In particular, Pennsylvania school districts and charter schools have frequently requested judicial assistance in determining how charter schools should operate.[210] While this increased activity is without doubt a function of the state's statutory provisions, it may also stem from the fact that Pennsylvania statutes require that school districts relinquish both state and local funds to functioning charter schools[211] and that parents have discretion to enroll their children in schools without regard to district boundaries.[212] Accordingly, the competition created by charter schools causes greater impact on existing schools than occurs in states where only state funds are at risk and local funds remain the province of local school district decision-making.

Of course, this treatment of statutory variation leaves other scholars[213] with numerous important policy questions: whether charter school laws should allow entities other than school boards to authorize charter schools; whether they should permit private school conversion; whether they should check authorizer discretion with an appeals process; whether

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[207] *See generally* CHUBB & MOE, *supra* note 10.

[208] *See supra* notes 157–165 and accompanying text.

[209] *See supra* note 10.

[210] *See, e.g.*, *supra* notes 56, 141.

[211] *See* 24 PA. CONS. STAT. ANN. § 17-1725-A(a)(5) (2003).

[212] *See id.* § 17-1723-A(c).

[213] *See, e.g.*, INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION (Bruce Fuller ed., 2000); GOOD & BRADEN, *supra* note 20 at 120; Alex Molnar, *Charter Schools: The Smiling Face of Disinvestment*, 54 EDUC. LEADERSHIP 9 (1996).

they should allow elementary and secondary education to be delivered solely through a computer; whether they should be bound by traditional health and safety requirements; and whether they should operate under a presumption of renewal. All of these policy questions are the details that will determine whether supporters' vision of a vigorous system of public educational choices where only schools that produce results for children thrive[214] or detractors' worries of a push toward privatization of schooling that will threaten democratic values long held dear[215] will carry the day.

It is not remarkable that charter schools have raised numerous questions and drawn the attention of numerous interest groups.[216] What seems remarkable is that the rapid expansion of the charter school movement has occurred in the absence of research that demonstrates the truthfulness of the central arguments supporting charter schools—that freedom from regulation, coupled with parental choice and contractual accountability for student results will produce better educational environments.[217] Research is just now beginning to be produced that examines those central issues.[218] Similarly, research regarding the implications of the policy choices reviewed here has just begun. In the absence of such guidance, charter schools, their sponsors, state policy makers, teachers, parents, and others have turned to the judiciary to define more clearly the relationships that exist between each of the parties in the charter school movement. State legislatures, too, have revised laws, sometimes expanding the availability of charter schools[219] and sometimes responding to controversies with additional regulation.[220] In so doing, each state has engaged in a complex process of defining what "charter school" means in its public education system. As one author concludes, "[t]he verdict is still out on whether charter schools will serve our students well, and on whether they will serve primarily as a privatizing or as a democratizing force in public education reform."[221] Only by careful examination of the legislative choices

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

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

[216] There are strong interest groups on both sides of this debate. *See generally* GOOD & BRADEN, *supra* note 20. Proponents of school choice, such as conservative political groups and business interests, see charter schools as a means to demonstrate the efficacy of the central premise that parental choice benefits schooling. *Id.* at 12–15. The American Federation of Teachers and the National Education Association, large stakeholders in public education, have voiced suspicions that charter schools are designed to blunt or even bust union influence over education. *Id.* For a discussion of the interests for and against charter schools, see *id.* at 120.

[217] Others have made the same observation. *See, e.g.*, SEYMOUR B. SARASON, CHARTER SCHOOLS: ANOTHER FLAWED EDUCATIONAL REFORM? 112 (1998).

[218] *See, e.g.*, FULLER, *supra* note 213 (addressing the central assertions supporting the creation of charter schools).

[219] *See, e.g.*, Joe Nathan, *Minnesota and the Charter Public School Idea*, *in* THE CHARTER SCHOOL LANDSCAPE 17, 22 (Sandra Vergari ed., 2002).

[220] *See, e.g.*, Sensenbrenner, *supra* note 92 (describing the recently enacted changes to California's statute relating to nonclassroom-based schools).

[221] STACY SMITH, THE DEMOCRATIC POTENTIAL OF CHARTER SCHOOLS 212 (2001).

made in each charter school statute, however, can that verdict be rendered with any accuracy. For as the adage has long advised, the devil (if there is one to be found) is in the details.

APPENDIX

TABLE 1: ORGANIZATIONS AND OFFICIALS WITH CHARTER-GRANTING AUTHORITY

Organization/Official	Number of States	States
Charitable Organizations	1 state[222]	Minnesota
City Council	1 state[223]	Wisconsin
County School Districts	1 state[224]	California
Intermediate Educational Agencies	3 states[225]	Michigan, Minnesota; Ohio
Local School Districts	32 states and the District of Columbia[226]	Alaska, Arizona, California, Colorado, Connecticut,[227] Delaware, District of Columbia, Florida, Georgia, Indiana, Idaho, Illinois, Iowa,[228] Kansas, Lou-

[222] MINN. STAT. ANN. § 124D.10(3) (West 2002).

[223] Only the Common Council of the City of Milwaukee has this authority. WIS. STAT. ANN. § 118.40(2r)(b) (West 2002).

[224] CAL. EDUC. CODE § 47605 (West 2002).

[225] MICH. COMP. LAWS ANN. § 380.502(2) (West 2002); MINN. STAT. ANN. § 124D.10(3) (West 2002); OHIO REV. CODE ANN. § 3314.02(B)–(C) (West 2002).

[226] ALASKA STAT. § 14.03.250 (Michie 2002); ARIZ. REV. STAT. ANN. § 15-183(c) (West 2002); CAL. EDUC. CODE § 47605 (West 2002); COLO. REV. STAT. ANN. § 22-30.5-104 (West 2002); CONN. GEN. STAT. ANN. § 10-66bb(e)–(f) (West 2003); DEL. CODE ANN. tit. 14, § 503 (2002); D.C. CODE ANN. § 38-1702.01 (2002); FLA. STAT. ANN. § 228.056(4) (West 2002); GA. CODE. ANN. § 20-2-2064 (2002); IDAHO CODE § 33-5204(1) (Michie 2002); 105 ILL. COMP. STAT. ANN. 5/27A-6 (West 2003); IND. CODE ANN. § 20-5.5-1-15 (West 2002); IOWA CODE ANN. § 256F.3(3) (West Supp. 2003); KAN. STAT. ANN. § 72-1904 (2001); LA. REV. STAT. ANN. § 17:3973(3) (West 2002); MICH. COMP. LAWS ANN. § 380.502(2) (West 2002); MINN. STAT. ANN. § 124D.10(3) (West 2002); MO. ANN. STAT. § 160.400(2) (West 2002); NEV. REV. STAT. ANN. §§ 386.515, 386.520(2) (Michie 2002); N.J. STAT. ANN. § 18A:36A-3(a) (West 2002); N.M. STAT. ANN. § 22-8B-5 (Michie 2002); N.C. GEN. STAT. § 115C-238.29B(c) (2002); OHIO REV. CODE ANN. § 3314.02(B)–(C) (West 2002); OKLA. STAT. ANN. tit. 70, § 3-134(C) (West 2002); OR. REV. STAT. § 338.005(3) (2001); PA. STAT. ANN. tit. 24, § 17-1703-A (West 2002); S.C. CODE ANN. § 59-40-40(4) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-104(2) (2002); TEX. EDUC. CODE ANN. §§ 12.101, 12.011 (Vernon 2001); UTAH CODE ANN. §§ 53A-1a-505, 53A-1a-515 (2002); VA. CODE ANN. § 22.1-212.7 (Michie 2002); WIS. STAT. ANN. § 118.40(1m), (2r) (West 2002); WYO. STAT. ANN. § 21-3-305 (Michie 2002).

[227] Local charter schools are first approved by local boards of education and then by the Connecticut Board of Education. CONN. GEN. STAT. ANN. § 10-66bb(e) (West 2003).

[228] Local charter schools are approved first by a local board of education and then by the Iowa Board of Education. IOWA CODE ANN. § 256F.3(3) (West Supp. 2003).

		isiana, Michigan, Minnesota,[229] Missouri, New Mexico, Nevada,[230] North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania,[231] South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming
Mayor of a City	1 state	Indiana[232]
State Board of Education	18 states[233]	Arkansas, Arizona, Connecticut, Delaware, Hawaii, Idaho, Illinois,[234] Louisiana, Massachusetts, Mississippi, Missouri,[235] New Hampshire, New York,[236] North Carolina, Oregon, Texas, Utah, Virginia

[229] Education districts may grant charters. MINN. STAT. ANN. § 124D.10 (West 2002). Education districts are partnerships among either at least five school districts, at least four districts with a total of at least 5000 pupils in average daily membership, or at least four districts with a total of at least 2000 square miles. MINN. STAT. ANN. § 123A.15 (West 2002).

[230] Local school districts need the Nevada Board of Education's approval. NEV. REV. STAT. § 386.515 (2002).

[231] A regional charter school may be chartered by a group of local school districts. PA. STAT. ANN. tit. 24, § 17-1703-A (West 2002).

[232] IND. CODE ANN. § 20-5.5-1-15 (West 2002). Only the Mayor of Indianapolis has this authority. Indiana Department of Education, *Indiana Charter School Questions and Answers, at* http://doe.state.in.us/charterschools/welcome.html (last visited Mar. 19, 2003).

[233] ARIZ. REV. STAT. ANN. § 15-183(c) (West 2002); ARK. CODE ANN. § 6-23-202 (Michie 2002); CONN. GEN. STAT. ANN. § 10-66bb(e)–(f) (West 2003); DEL. CODE ANN. tit. 14, § 503 (2002); HAW. REV. STAT. ANN. § 302A-1182(d) (Michie 2002); IDAHO CODE § 33-5204(1) (Michie 2002); 105 ILL. COMP. STAT. ANN. 5/27A-6 (West 2003); LA. REV. STAT. ANN. § 17:3973(3) (West 2002); MASS. GEN. LAWS ANN. ch. 71, § 89(a)-(b) (West 2003); MISS. CODE ANN. § 37-28-7 (2002); MO. ANN. STAT. § 160.400(2) (West 2002); N.H. REV. STAT. ANN. § 194-B:3(III) (2002); N.Y. EDUC. LAW § 2851(3) (McKinney 2003); N.C. GEN. STAT. § 115C-238.29B(c) (2002); OR. REV. STAT. § 338.005(3) (2001); TEX. EDUC. CODE ANN. §§ 12.101, 12.011 (Vernon 2001); UTAH CODE ANN. §§ 53A-1a-505, 53A-1a-515 (2002); VA. CODE ANN. § 22.1-212.7 (Michie 2002).

[234] The Illinois Board of Education may grant a charter on appeal of the local school board's decision or if the charter is approved by referendum. 105 ILL. COMP. STAT. ANN. 5/27A-6.5 (West 2002).

[235] The Missouri Board of Education may only grant charters on appeal. MO. ANN. STAT. § 160.405.2(3) (West 2002).

[236] Charters may also be submitted to local school districts or boards of trustees of state universities. N.Y. EDUC. LAW § 2851(3) (McKinney 2003). The New York Board of

State Board of Charter Schools	1 state and Puerto Rico[237]	Arizona, Puerto Rico[238]
State Commissioner of Education	1 state[239]	New Jersey
Vocational School Districts	1 state[240]	Oklahoma
Colleges and Universities	8 states[241]	Florida,[242] Indiana, Michigan, Minnesota, Missouri, North Carolina, Ohio, Wisconsin[243]

Education is the only entity authorized to issue a charter. *Id.*

[237] ARIZ. REV. STAT. ANN. § 15-183(c) (West 2002); 18 P.R. LAWS ANN. § 1902 (2002).

[238] The charter school organization is known as the Educational Reform Institute. 18 P.R. LAWS ANN. § 1901 (2002).

[239] N.J. STAT. ANN. § 18A:36A-3(a) (West 2002).

[240] OKLA. STAT. ANN. tit. 70, § 3-134(C) (West 2002).

[241] FLA. STAT. ANN. § 228.056(4) (West 2002); IND. CODE ANN. § 20-5.5-1-15 (West 2002); MICH. COMP. LAWS ANN. § 380.502(2) (West 2002); MINN. STAT. § 124D.10(3) (2002); MO. ANN. STAT. § 160.400(2) (West 2002); N.C. GEN. STAT. § 115C-238.29B(c) (2002); OHIO REV. CODE ANN. § 3314.02(B)–(C) (West 2002); WIS. STAT. § 118.40(2r) (2002).

[242] State universities may develop research schools. FLA. STAT. ANN. § 228.056(4)(e) (West 2002).

[243] Only the University of Wisconsin-Milwaukee, the Milwaukee Area Technical College, and the University of Wisconsin-Parkside enjoy this authority, which is limited to an area based on the university's geographical location. WIS. STAT. ANN. § 118.40(2r)(b) (West 2001).

TABLE 2: PRIVATE SCHOOL CONVERSION TO CHARTER SCHOOLS

Permissibility of Conversion	Number of States	States
Private School Conversions Allowed	9 states and the District of Columbia[244]	Arizona, District of Columbia, Michigan, Missouri, Oregon,[245] Pennsylvania, South Carolina, Texas, Utah,[246] Wisconsin[247]
Private School Conversions Prohibited	27 states[248]	Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, Wyoming

[244] ARIZ. REV. STAT. ANN. § 15-183(C) (West 2002); D.C. CODE ANN. § 38-1802.01(b) (2002); MICH. COMP. LAWS ANN. § 380.501 (West 2002); MO. REV. STAT. § 160.400.1 (2002); OR. REV. STAT. § 338.035(6) (2002); PA. STAT. ANN. tit. 24, § 17-1717-A (West 2002); S.C. CODE ANN. § 59-40-100(4) (Law. Co-op. 2002); TEX. EDUC. CODE ANN. § 12.101 (Vernon 2002); WIS. STAT. § 118.40(2m)(am) (2001).

[245] Conversions are only allowed in the case of alternative schools. OR. REV. STAT. § 338.035(6) (2002). Oregon statutes define an "alternative education program" as "a school or separate class group designed to best serve students' educational needs and interests and assist students in achieving the academic standards of the school district and the state." OR. REV. STAT. § 336.615 (2002). These schools may be public or private. OR. REV. STAT. § 336.631 (2002).

[246] Only non-sectarian private schools are eligible for conversion. UTAH CODE ANN. § 53A-1a-504(3) (2002).

[247] Only non-sectarian private schools are eligible for conversion. WIS. STAT. § 118.40(4)(2) (2002).

[248] ARK. CODE ANN. § 6-23-304(d)(1) (Michie 2002); CAL. EDUC. CODE § 47602(b) (West 2002); COLO. REV. STAT. § 22-30.5-106(b) (2002); CONN. GEN. STAT. § 10-66bb(b) (2002); DEL. CODE ANN. tit. 14, § 502 (2002); FLA. STAT. ANN. § 228.056(3)(a)(2) (West 2002); GA. CODE. ANN. § 20-2-2061(2) (2002); HAW. REV. STAT. § 302A-1182(b) (2002); 105 ILL. COMP. STAT. ANN. 5/27A-4(c), 27A-6.5(a) (West 2003); IOWA CODE ANN. § 256F.1(2) (West Supp. 2003); LA. REV. STAT. ANN. § 17:3991(E)(2) (West 2002); MASS. GEN. LAWS ch. 71, § 89(e) (2002); MISS. CODE ANN. § 37-28-1 (2002); NEV. REV. STAT. § 386.505(2) (2002); N.H. REV. STAT. ANN. § 194-B:3(VII) (2002); N.J. STAT. ANN. § 18A:36A-4(a) (West 2002); N.M. STAT. ANN. § 22-8B-2(B) (Michie 2002); N.Y. EDUC. LAW § 2852(3) (McKinney 2003); N.C. GEN. STAT. § 115C-238.29 (2002); OHIO REV. CODE ANN. § 3314.01(A)(2) (Anderson 2002); OKLA. STAT. tit. 70, § 3-134(B) (2002); R.I. GEN. LAWS § 16-77-3(d) (2002); S.C. CODE ANN. § 59-40-100(4) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-106(c)(1) (2002); VA. CODE. ANN. § 22-1-212.5(B) (Michie 2002); WYO. STAT. ANN. § 21-3-302(a)(ii) (Michie 2002).

Statute Does Not Address This Issue	5 states and Puerto Rico[249]	Alaska, Indiana, Kansas, Minnesota, Nevada, Puerto Rico

[249] ALASKA STAT. § 14.03.250 (Michie 2002); IND. CODE ANN. § 20-5.5-11-1 (Michie 2002); KAN. STAT. ANN. § 72-1901 (2002); MINN. STAT. § 124D (2002); NEV. REV. STAT. § 386.505(2) (2002); 18 P.R. LAWS ANN. § 1902 (2002).

TABLE 3: CHARTER SCHOOLS AS HOME SCHOOLS

Permissibility of Charter Schools as Home Schools	Number of States	States
Charter Schools as Home Schools Permitted	14 states, the District of Columbia, and Puerto Rico[250]	Alaska, Arizona, Arkansas, California, District of Columbia, Hawaii, Idaho, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Puerto Rico, Texas, Wisconsin
Charter Schools as Home Schools Prohibited	25 states[251]	Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, Nevada, Oklahoma, Oregon, Pennsylvania,[252] Rhode Island, South Carolina, Tennessee, Utah, Virginia, Wyoming

[250] ALASKA STAT. § 14.03.250 (Michie 2002); ARIZ. REV. STAT. § 15-181 (2002); CAL. EDUC. CODE § 47600 (West 2002); D.C. CODE ANN. § 38-1702.01 (2002); HAW. REV. STAT. § 302A-1182 (2002); IDAHO CODE § 33-5201 (Michie 2002); MASS. GEN. LAWS ch. 71, § 89(e) (2002); MICH. COMP. LAWS § 380.500 (2002); MO. REV. STAT. § 160.400.1 (2002); N.J. STAT. ANN. § 18A:36A-1 (West 2002); N.Y. EDUC. LAW § 2850 (McKinney 2003); OHIO REV. CODE ANN. § 3314.01 (Anderson 2002); 18 P.R. LAWS ANN. § 1902 (2002); TEX. EDUC. CODE ANN. § 12.101 (Vernon 2002); WIS. STAT. § 118.40 (2002).

[251] COLO. REV. STAT. § 22-30.5-104(1) (2002); CONN. GEN. STAT. § 10-66bb(b) (2002); DEL. CODE ANN. tit. 14, § 502 (2002); FLA. STAT. ch. 228.056(3)(a)(2) (2002); GA. CODE. ANN. § 20-2-2061(2) (2002); 105 ILL. COMP. STAT. ANN. 5/27A-5(a) (West 2002); IND. CODE § 20-5.5-8-2(5) (2002); IOWA CODE ANN. § 256F.2(3)(4a) (West Supp. 2003); KAN. STAT. ANN. § 72-1901 (2002); LA. REV. STAT. ANN. § 17:3991(E)(2) (West 2002); MINN. STAT. § 124D.10(8)(d) (2002); MISS. CODE ANN. § 37-28-1 (2002); NEV. REV. STAT. § 386.505(2) (2002); N.H. REV. STAT. ANN. § 194-B:3(VIII) (2002); N.M. STAT. ANN. § 22-8B-4(H) (Michie 2002); N.C. GEN. STAT. § 115C-238.29 (2003); OKLA. STAT. tit. 70, § 3-136(A)(9) (2002); OR. REV. STAT. § 338.035(6) (2002) PA. STAT. ANN. tit. 24, § 17-1717-A(a) (West 2002); R.I. GEN. LAWS § 16-77-1 (2002); S.C. CODE ANN. § 59-40-40(1) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-106(c)(1) (2002); UTAH CODE ANN. § 53A-1a-504(3) (2002); VA. CODE. ANN. § 22-1-212.5(b) (Michie 2002); WYO. STAT. ANN. § 21-3-303(c) (Michie 2002).

[252] Pennsylvania law permits cyber charter schools but provides that the state's home schooling regulations, PA. STAT. ANN. tit. 24, § 13-1327.1 (West 2002) are not applicable to these cyber charter schools. PA. STAT. ANN. tit. 24, § 17-1745-A(a) (West 2002).

TABLE 4: APPEALS PROCESSES

Type of Appeals Process	Number of States	States
No Appeals Process Described in Statutes	14 states and Puerto Rico[253]	Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Kansas, Massachusetts, New York, Ohio, Puerto Rico, Rhode Island, Texas, Utah, Virginia
Appeals allowed to: County Board of Education	1 state[254]	California
State Board of Education	19 states[255]	California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Tennessee,[256] Wyoming
State Educational Agency	1 state[257]	Wisconsin

[253] ALASKA STAT. §§ 14.03.250–.03.290 (Michie 2002); ARIZ. REV. STAT. §§ 15-181 to -189.03 (2002); ARK. CODE ANN. §§ 6-23-101 to -23-601 (Michie 2001); CONN. GEN. STAT. § 10-66aa–gg (2002); DEL. CODE ANN. tit. 14, § 511(k) (2002); HAW. REV. STAT. §§ 302A-1182 to -1188 (1999); KAN. STAT. ANN. §§ 72-1903 to -1910 (2001); MASS. GEN. LAWS ANN. ch. 71, § 89 (West 2003); N.Y. EDUC. LAW §§ 2850–2857 (McKinney 2001); OHIO REV. CODE ANN. §§ 3314.01–.20 (West 2002); 18 P.R. LAWS ANN. § 1902 (2002); R.I. GEN. LAWS §§ 16-77-1 to -77-11 (2001); TEX. EDUC. CODE ANN. §§ 12.101–.118 (Vernon 2002); UTAH CODE ANN. §§ 53A-1a-501 to -516 (2002); VA. CODE. ANN. § 22.1-212.10 (Michie 2002).

[254] CAL. EDUC. CODE § 47605(j)(1) (West Supp. 2003).

[255] *Id.*; COLO. REV. STAT. § 22-30.5-107(3) (2002); FLA. STAT. ANN. § 228.056(4)(b) (West 2002); GA. CODE ANN. § 20-2-2064 (2002); IDAHO CODE § 33-5207(1) (Michie 2002); 105 ILL. COMP. STAT. 5/27A-9(e) (2002); IOWA CODE ANN. § 256F.3(5) (West Supp. 2003); LA. REV. STAT. ANN. § 3983(2) (West 2002); MISS. CODE ANN. § 37-28-11 (2002); MO. ANN. STAT. § 160.405.2(3) (West 2002); NEV. REV. STAT. ANN. § 386.525 (Michie 2002); N.H. REV. STAT. ANN. § 194-B:3(IV) (2002); N.J. STAT. ANN. § 18A:36A-4(d) (West 2002); N.M. STAT. ANN. § 22-8B-6(G) (Michie 2002); N.C. GEN. STAT. § 115C-238.29C(c) (2002); OR. REV. STAT. § 338.055(4) (2001); S.C. CODE ANN. § 59-40-70(D) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-108 (2002); WYO. STAT. ANN. §§ 21-3-301 to -3-314 (Michie 2002).

[256] Appeals are only available to schools seeking conversion to charter school status after failing to make adequate yearly progress. *See* TENN. CODE ANN. § 49-13-108 (2002).

[257] WIS. STAT. § 118.40(2)(c) (2002). In general, no appeals process is available. Only those charters denied by the school board of the MPS may appeal to the Department of Public Instruction. *Id.*

State Superintendent	2 states[258]	Idaho, Minnesota
Special Charter Appeals Board	2 states[259]	Indiana, Pennsylvania
Mediation/ Arbitration	1 state[260]	Oklahoma
Voter Initiative	1 state[261]	Michigan
Court of Law	7 states and the District of Columbia[262]	District of Columbia,[263] Florida, Illinois, Missouri, New Hampshire, Oregon, Pennsylvania, South Carolina

[258] IDAHO CODE § 33-5207(1) (Michie 2002); MINN. STAT. ANN. § 124D.10(4)(a) (West 2002).

[259] IND. CODE § 20-5.5-3-10 (Michie 2002); PA. STAT. ANN. tit. 24, § 17-1717-A(f) (West 2002).

[260] OKLA. STAT. ANN. tit. 70, § 3-134(f) (West 2002).

[261] MICH. COMP. LAWS § 380.503(2) (2002).

[262] D.C. CODE ANN. § 38-1802.03(j)(2) (2002); FLA. STAT. ANN. § 228.056(4)(b) (West 2002); 105 ILL. COMP. STAT. 5/27A-9(e) (2002); MO. ANN. STAT. § 160.405.2(3) (West 2002); N.H. REV. STAT. ANN. § 194-B:3(IV) (2002); OR. REV. STAT. § 338.055(4) (2001); PA. STAT. ANN. tit. 24, § 17-1717-A(f) (West 2002); S.C. CODE ANN. § 59-40-70(D) (Law. Co-op. 2002).

[263] Appeals are also allowed to the District of Columbia Council. D.C. CODE ANN. § 38-1702.01(c) (1996).

TABLE 5: STANDARDS FOR REVOCATION OF A CHARTER SCHOOL CONTRACT

Reasons for Revocation	Number of States	States
Violation of the Charter Contract/ Application	33 states and the District of Columbia[264]	Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Wisconsin, Wyoming
Violation of the State's Charter School Law or other Laws Generally	32 states and the District of Columbia[265]	Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri,

[264] ARIZ. REV. STAT. § 15-183(I) (2002); ARK. CODE ANN. § 6-23-105 (Michie 1999); CAL. EDUC. CODE § 47607(b) (Deering 2000); COLO. REV. STAT. § 22-30.5-110(3),(4) (1995); CONN. GEN. STAT. § 10-66bb(h),(i) (2003); DEL. CODE ANN. tit. 14, § 516 (1999); D.C. CODE ANN. § 38-1802.13 (2001); GA. CODE ANN. § 20-2-2068(b)(1) (2001); IDAHO CODE § 33-5209(2) (Michie 2001); 105 ILL. COMP. STAT. 5/27A-9(c) (2000); IND. CODE ANN. § 20-5.5-9-4 (Michie Supp. 2002); IOWA CODE ANN. § 256F.8 (West Supp. 2003); KAN. STAT. ANN. § 72-1907 (Supp. 2001); LA. REV. STAT. ANN. § 3992(C) (West Supp. 2001); MASS. GEN. LAWS ch. 71, § 89(kk) (West 2003); MICH. COMP. LAWS ANN. § 380.507 (West 2003); MISS. CODE ANN. § 37-28-9(a),(b) (2002); MO. REV. STAT. § 160.405.7(1) (West 2002); NEV. REV. STAT. § 386.535 (2002); N.H. REV. STAT. ANN. § 194-B:16 (2002); N.J. STAT. ANN. § 18A:36A-17 (West 2003); N.M. STAT. ANN. § 22-8B-6(G) (Michie 2002); N.Y. EDUC. LAW § 2855 (McKinney 2003); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OR. REV. STAT. § 338.105(1) (2001); 24 PA. CONS. STAT. § 17-1729-A (2002); R.I. GEN. LAWS § 16-77-8(b) (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-122(a) (2002); TEX. EDUC. CODE ANN. § 12.063(a) (Vernon 2002); VA. CODE ANN. § 22-1-212.12(B) (Michie 2003); WIS. STAT. ANN. § 118.40(5) (West 2003); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

[265] ARIZ. REV. STAT. § 15-183(I) (2002); ARK. CODE ANN. § 6-23-105 (Michie 1999); CAL. EDUC. CODE § 47607(b) (Deering 2000); COLO. REV. STAT. § 22-30.5-110(3),(4) (1995); D.C. CODE ANN. § 38-1802.13 (2001); FLA. STAT. ANN. § 228.056(11)(a),(b) (West Supp. 2003); GA. CODE ANN. § 20-2-2068(b)(1) (2001); IDAHO CODE § 33-5209(2) (Michie 2001); 105 ILL. COMP. STAT. 5/27A-9(c) (2000); IND. CODE ANN. § 20-5.5-9-4 (Michie Supp. 2002); IOWA CODE ANN. § 256F.8 (West 2000); KAN. STAT. ANN. § 72-1907 (Supp. 2001); LA. REV. STAT. ANN. § 3992(C) (West Supp. 2001); MASS. GEN. LAWS ch. 71, § 89(kk) (West 2003); MICH. COMP. LAWS ANN. § 380.507 (West 2003); MINN. STAT. ANN. § 124D.10(23) (West 2002); MO. REV. STAT. § 160.405.7(1) (West 2002); NEV.

		Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Wisconsin, Wyoming
Fiscal (Mis)Management	32 states and the District of Columbia[266]	Alaska, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming

REV. STAT. § 386.535 (2002); N.H. REV. STAT. ANN. § 194-B:16 (2002); N.M. STAT. ANN. § 22-8B-6(G) (Michie 2002); N.Y. EDUC. LAW § 2855 (McKinney 2003); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OKLA. STAT. tit. 70, § 3-137 (West 2002); OR. REV. STAT. § 338.105(1) (2001); 24 PA. CONS. STAT. § 17-1729-A (2002); R.I. GEN. LAWS § 16-77-8(b) (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TEX. EDUC. CODE ANN. § 12.063(a) (Vernon 2002); UTAH CODE ANN. § 53A-1a-510 (2002); VA. CODE ANN. § 22-1-212.12(B) (Michie 2003); WIS. STAT. ANN. § 118.40(5) (West 2003); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

[266] ALASKA STAT. § 14.03.255(c)(12) (Michie 2002); ARK. CODE ANN. § 6-23-105 (Michie 1999); CAL. EDUC. CODE § 47607(b) (Deering 2000); COLO. REV. STAT. § 22-30.5-110(3),(4) (1995); D.C. CODE ANN. § 38-1802.13 (2001); FLA. STAT. ANN. § 228.056(11)(a),(b) (West Supp. 2003); GA. CODE ANN. § 20-2-2068(b)(1) (2001); IDAHO CODE § 33-5209(2) (Michie 2001); 105 ILL. COMP. STAT. 5/27A-9(c) (2000); IND. CODE ANN. § 20-5.5-9-4 (Michie Supp. 2002); IOWA CODE ANN. § 256F.8 (West 2000); KAN. STAT. ANN. § 72-1907 (Supp. 2001); LA. REV. STAT. ANN. § 3992(C) (West Supp. 2001); MASS. GEN. LAWS ch. 71, § 89(kk) (West 2003); MICH. COMP. LAWS ANN. § 380.507 (West 2003); MINN. STAT. ANN. § 124D.10(23) (West 2002); MO. REV. STAT. § 160.405.7(1) (West 2002); NEV. REV. STAT. § 386.535 (2002); N.H. REV. STAT. ANN. § 194-B:16 (2002); N.M. STAT. ANN. § 22-8B-6(G) (Michie 2002); N.Y. EDUC. LAW § 2855 (McKinney 2003); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OKLA. STAT. tit. 70, § 3-137 (West 2002); 24 PA. CONS. STAT. § 17-1729-A (2002); R.I. GEN. LAWS § 16-77-8(b) (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-122(a) (2002); TEX. EDUC. CODE ANN. § 12.063(a) (Vernon 2002); UTAH CODE ANN. § 53A-1a-510 (2002); VA. CODE ANN. § 22-1-212.12(B) (Michie 2003); WIS. STAT. ANN. § 118.40(5) (West 2003); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

Failure of Students to Meet Educational Achievement/ Performance Goals or Educational Goals Generally	29 states and the District of Columbia[267]	Alaska, California, Colorado, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming
Fraud	2 states[268]	Delaware, Pennsylvania
Financial Insolvency/ Instability	3 states[269]	Nevada, New Hampshire, Oregon
2/3 of the Licensed Teaching Staff Request Revocation	2 states[270]	Arkansas, North Carolina
Majority of Parents Request Revocation	2 states[271]	Georgia, Mississippi[272]

[267] ALASKA STAT. § 14.03.255(c)(12) (Michie 2002); CAL. EDUC. CODE § 47607(b) (Deering 2000); COLO. REV. STAT. § 22-30.5-110(3), (4) (1995); D.C. CODE ANN. § 38-1802.13 (2001); FLA. STAT. ANN. § 228.056(11)(a), (b) (West Supp. 2003); GA. CODE ANN. § 20-2-2068(b)(1) (2001); IDAHO CODE § 33-5209(2) (Michie 2001); 105 ILL. COMP. STAT. 5/27A-9(c) (2000); IND. CODE ANN. § 20-5.5-9-4 (Michie Supp. 2002); IOWA CODE ANN. § 256F.8 (West 2000); KAN. STAT. ANN. § 72-1907 (Supp. 2001); LA. REV. STAT. ANN. § 3992(C) (West Supp. 2001); MICH. COMP. LAWS ANN. § 380.507 (West 2003); MINN. STAT. ANN. § 124D.10(23) (West 2002); MO. REV. STAT. § 160.405.7(1) (West 2002); N.M. STAT. ANN. § 22-8B-6(G) (Michie 2002); N.Y. EDUC. LAW § 2855 (McKinney 2003); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OKLA. STAT. tit. 70, § 3-137 (West 2002); 24 PA. CONS. STAT. § 17-1729-A (2002); R.I. GEN. LAWS § 16-77-8(b) (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-122(a) (2002); TEX. EDUC. CODE ANN. § 12.063(a) (Vernon 2002); UTAH CODE ANN. § 53A-1a-510 (2002); VA. CODE ANN. § 22-1-212.12(B) (Michie 2003); WIS. STAT. ANN. § 118.40(5) (West 2003); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

[268] DEL. CODE ANN. tit. 14, § 516 (1999); MASS. GEN. LAWS ch. 71, § 89(kk) (West 2003); 24 PA. CONS. STAT. § 17-1729-A (2002).

[269] NEV. REV. STAT. § 386.535 (2002); N.H. REV. STAT. ANN. § 194-B:16 (2002); OR. REV. STAT. § 338.105(1) (2001).

[270] ARK. CODE ANN. § 6-23-105 (Michie 1999); N.C. GEN. STAT. § 115C-238.29G (2002).

[271] GA. CODE ANN. § 20-2-2068(b)(1) (2001); MISS. CODE ANN. § 37-28-9(a) (2002).

[272] Mississippi allows staff and parents to request revocation by majority vote. *See* MISS. CODE ANN. § 37-28-9(a) (2002).

Continued Operation of the School Would be Contrary to the Best Interests of Students or Community	2 states[273]	Georgia, Virginia
Failure to Fulfill Conditions Imposed by the State Education Agency ("SEA") or Chartering Authority	2 states[274]	Massachusetts, New Jersey
Failure of School on Probationary Status to Correct Problems Identified in a Remedial Plan	2 states[275]	New Jersey, New York
Official Misappropriation Funds	1 state[276]	Delaware
Failure to Submit Required Reports	1 state[277]	Idaho
Failure to Pay for Services Provided by a Non-Authorizing School District	1 state[278]	Minnesota
Failure to Maintain Insurance	1 state[279]	Oregon

[273] GA. CODE ANN. § 20-2-2068(b)(1) (2001); VA. CODE ANN. § 22-1-212.12(B) (Michie 2003).

[274] MASS. GEN. LAWS ch. 71, § 89(kk) (West 2003); N.J. STAT. ANN. § 18A:36A-17 (West 2003).

[275] N.J. STAT. ANN. § 18A:36A-17 (West 2003); N.Y. EDUC. LAW § 2855 (McKinney 2003).

[276] DEL. CODE ANN. tit. 14, § 516 (1999).

[277] IDAHO CODE § 33-5209(2) (Michie 2001).

[278] MINN. STAT. ANN. § 124D.10(23) (West 2002).

[279] OR. REV. STAT. § 338.105(1) (2001).

Endangering the Health and Safety of Students	1 state[280]	Nevada
Intentional Violation of Civil Service Laws Related to Discrimination	1 state[281]	New York
Failure to Begin School by the Date Specified in the Charter	1 state[282]	Indiana
Failure to Have Students in Attendance by the Date Specified in the Charter	1 state[283]	Indiana
Other Good Cause	8 states[284]	Alaska, Connecticut, Florida, Minnesota, North Carolina, Ohio, Oklahoma, Utah
Not Specified	2 states and Puerto Rico[285]	Hawaii, New Mexico, Puerto Rico

[280] NEV. REV. STAT. § 386.535 (2002).
[281] N.Y. EDUC. LAW § 2855 (McKinney 2003).
[282] IND. CODE ANN. § 20-5.5-9-4 (Michie Supp. 2002).
[283] *Id.*
[284] ALASKA STAT. § 14.03.255(c)(12) (Michie 2002); CONN. GEN. STAT. § 10-66bb(h),(i) (2003); FLA. STAT. ANN. § 228.056(11)(a),(b) (West Supp. 2003); MINN. STAT. ANN. § 124D.10(23) (West 2002); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OKLA. STAT. tit. 70, § 3-137 (West 2002); UTAH CODE ANN. § 53A-1a-510 (2002).
[285] HAW. REV. STAT. ANN. § 302A-1186(b) (Supp. 1999); N.M. STAT. ANN. § 22-8B-12(D) (Michie 2002); 18 P.R. LAWS ANN. § 1902 (2002).

TABLE 6: STANDARDS FOR NON-RENEWAL OF A CHARTER SCHOOL CONTRACT

Standard for Non-Renewal	Number of states	States
Material Violation of the Charter Contract	16 states and the District of Columbia[286]	Arizona, Arkansas, Colorado, District of Columbia, Illinois, Iowa, Kansas, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Wyoming
Failure to Show Student Progress or Meet Educational Goals	14 states and the District of Columbia[287]	Colorado, District of Columbia, Florida, Illinois, Iowa, Kansas, Minnesota, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Wyoming
Violations of Charter Law or Other Laws	17 states[288]	Arizona, Arkansas, Colorado, Florida, Illinois, Iowa, Kansas, Minnesota, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas,

[286] ARIZ. REV. STAT. § 15-183(I) (2003); ARK. CODE ANN. § 6-23-105 (Michie 2002); COLO. REV. STAT. § 22-30.5-110(3),(4) (West 2002); D.C. CODE ANN. § 38-1802.12 (2002); 105 ILL. COMP. STAT. 5/27A-9(c) (West 2003); IOWA CODE ANN. § 256F.8 (West Supp. 2003); KAN. STAT. ANN. § 72-1907 (2001); MINN. STAT. § 124D.10(23) (West 2002); N.M. STAT. ANN. § 22-8B-12(D) (Michie 2002); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); 24 PA. CONS. STAT. § 17-1729-A (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-122(a) (2002); TEX. EDUC. CODE ANN. §§ 12.111, 12.115 (2001); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

[287] COLO. REV. STAT. § 22-30.5-110(3),(4) (West 2002); D.C. CODE ANN. § 38-1802.12 (2002); FLA. STAT. ch. § 228.056(11)(a) (West 2003); 105 ILL. COMP. STAT. 5/27A-9(c) (West 2003); IOWA CODE ANN. § 256F.8 (West Supp. 2003); KAN. STAT. ANN. § 72-1907 (2001); NEV. REV. STAT. § 386.530 (2002); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OKLA. STAT. ANN. tit. 70, § 3-137(A) (West 2002); 24 PA. CONS. STAT. § 17-1729-A (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-122(a) (2002); TEX. EDUC. CODE ANN. §§ 12.111, 12.115 (2001); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

[288] ARIZ. REV. STAT. § 15-183(I) (2003); ARK. CODE ANN. § 6-23-105 (Michie 2002); COLO. REV. STAT. § 22-30.5-110(3),(4) (West 2002); FLA. STAT. ch. § 228.056(11)(a) (West 2003); 105 ILL. COMP. STAT. 5/27A-9(c) (West 2003); IOWA CODE ANN. § 256F.8 (West Supp. 2003); KAN. STAT. ANN. § 72-1907 (2001); MINN. STAT. § 124D.10(23) (West 2002); NEV. REV. STAT. § 386.530 (2002); N.M. STAT. ANN. § 22-8B-12(D) (Michie 2002); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); OKLA. STAT. ANN. tit. 70, § 3-137(A) (West 2002); 24 PA. CONS. STAT. § 17-1729-A (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TEX. EDUC. CODE ANN. §§ 12.111, 12.115 (2001); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

		Wyoming
Fiscal (Mis)management	16 states[289]	Arkansas, Colorado, Florida, Illinois, Iowa, Kansas, Minnesota, Nevada, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Wyoming
Endangering the Health and Safety of Students	1 state[290]	Nevada
Financial Insolvency/ Instability	1 state[291]	Nevada
Failure of School on Probationary Status to Correct Problems Identified in a Remedial Plan	1 state[292]	Hawaii
2/3 of the Licensed Teaching Staff Request Revocation	1 state[293]	North Carolina
Fraud Conviction	1 state[294]	Pennsylvania
Not in the Interest of the Pupils Residing in the District	1 state[295]	Colorado

[289] ARK. CODE ANN. § 6-23-105 (Michie 2002); COLO. REV. STAT. § 22-30.5-110(3), (4) (West 2002); FLA. STAT. ch. § 228.056(11)(a) (West 2003); 105 ILL. COMP. STAT. 5/27A-9(c) (West 2003); IOWA CODE ANN. § 256F.8 (West Supp. 2003); KAN. STAT. ANN. § 72-1907 (2001); MINN. STAT. § 124D.10(23) (West 2002); NEV. REV. STAT. § 386.530 (2002); N.M. STAT. ANN. § 22-8B-12(D) (Michie 2002); N.C. GEN. STAT. § 115C-238.29G (2002); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002); 24 PA. CONS. STAT. § 17-1729-A (2002); S.C. CODE ANN. § 59-40-110(C) (Law. Co-op. 2002); TENN. CODE ANN. § 49-13-122(a) (2002); TEX. EDUC. CODE ANN. §§ 12.111, 12.115 (2001); WYO. STAT. ANN. § 21-3-309(c) (Michie 2002).

[290] NEV. REV. STAT. § 386.530 (2002).

[291] *Id.*

[292] HAW. REV. STAT. § 302A-1186(b) (Michie 2002).

[293] N.C. GEN. STAT. § 115C-238.29G (2002).

[294] 24 PA. CONS. STAT. § 17-1729-A (2002).

[295] COLO. REV. STAT. § 22-30.5-110(3),(4) (West 2002).

Instructional Staff and Parents Fail to Vote in Favor of Renewal	1 state[296]	Mississippi
Other Good Cause	2 states[297]	Florida, Ohio
Not Specified	19 states and Puerto Rico[298]	Alaska, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Louisiana, Michigan, Missouri, New Hampshire, New Jersey, New York, Oregon, Puerto Rico, Rhode Island, Texas, Utah, Virginia, Wisconsin

[296] MISS. CODE ANN. § 37-28-13 (2002).

[297] FLA. STAT. ch. § 228.056(11)(a) (West 2003); OHIO REV. CODE ANN. § 3314.07(B)(1) (West 2002).

[298] *See* ALASKA STAT. § 14.03.250-290 (Michie 2002); CAL. EDUC. CODE § 47600 (West 2003); CONN. GEN. STAT. ANN. § 10-66bb(h) (West 2003); DEL. CODE ANN. tit. 14, § 512 (2002); GA. CODE ANN. § 20-2-2060 (2003); IDAHO CODE § 33-5201 (Michie 2002); IND. CODE § 20-5.5-9-4 (West 2002); LA. REV. STAT. ANN. § 3992 (West 2003); MICH. COMP. LAWS § 380 (West 2003); MO. REV. STAT. § 160.400 (West 2002); N.H. REV. STAT. ANN. § 194-B:1 (2002); N.J. STAT. ANN. § 18A:36A-1 (West 2003); N.Y. EDUC. LAW § 2850 (McKinney 2003); OR. REV. STAT. § 338.105 (2001); 18 P.R. LAWS ANN. § 1902 (2002); R.I. GEN. LAWS § 16-77-1 (2002); TEX. EDUC. CODE ANN. §§ 12.111, 12.115 (2001); UTAH CODE ANN. §§ 53A-1a-508, 510 (2002); VA. CODE ANN. § 22-1-212.12(C) (Michie 2002); WIS. STAT. § 118.40(5) (West 2003).

ARTICLE

TAXING THE POOR: INCOME AVERAGING RECONSIDERED

LILY L. BATCHELDER*

This Article presents an original empirical analysis demonstrating the disproportionate burden taxation of annual income places upon low-income families. The author proposes two simple income averaging devices to redress this effect: averaging the Earned Income Tax Credit over a two-year period and carrying back the standard deduction and personal and dependent exemptions.

INTRODUCTION

Over the past twenty-five years, tax relief for low-income workers has gained deep bipartisan and scholarly support.[1] The Earned Income Tax

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[1] The Tax Reform Act of 1986 removed over six million low-income Americans from the tax rolls, and between 1986 and 1996, spending on the Earned Income Tax Credit ("EITC") grew by 1191%. Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (1986); I.R.C. § 32 (2001). Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit*, *in* MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICAN'S FAMILIES 15, 33–34 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001). In 2001, Congress enacted further tax relief for low-income families by reducing part of the lowest 15% bracket to 10% and permitting partial refundability of the Child Tax Credit. I.R.C. § 24(a)(2) (2001). Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 101, 201(c), 115 Stat. 38, 41–44, 45 (2001). As Professor Dennis Ventry writes, since the mid-1980s, legislators on both sides of the aisle have identified the tax system as both the cause of and the solution to poverty and mounting inequality. *See* Ventry, *supra* at 33. In the scholarly arena, even Professors Walter Blum and Harry Kalven's seminal and exhaustive critique of progressive taxation considered the desirability of exemptions for low-income taxpayers as requiring no justification, WALTER J. BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION 4 (1953) ("It is almost universally agreed that some exemption keyed to minimum subsistence is desirable."), while Milton Friedman has proposed a negative income tax for the poor. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 190–93 (1969). Optimal tax theory similarly finds that a "demogrant" (a fixed, lump-sum transfer for all families regardless of whether they have any tax liability) best maximizes social welfare, and under some assumptions it implies progressive marginal rates above the demogrant as well. *See, e.g.*, Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1966 (1987); Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*,

Credit ("EITC")[2] is now the largest anti-poverty program for the non-aged in the country,[3] and the Bush Administration has made tax cuts for low-income workers an important element of its legislative agenda.[4] Despite good intentions on both sides of the aisle, however, tax relief for low-income workers is being undermined by a structural feature of the Internal Revenue Code so commonplace that no one has noticed the harm it does: the taxation of annual income.[5]

Under a progressive federal income tax system, annual income measurement imposes higher burdens on taxpayers with fluctuating incomes because a portion of their income in more affluent years is subject to higher marginal rates than if their income were spread more evenly over time.[6] In the past, scholars and policymakers criticized this feature for generating inequity between taxpayers with similar average incomes. They failed, however, to see that taxation of annual income could also distort the distribution of tax burdens between different income classes.[7] This oversight was unimportant at a time when the income tax was largely irrelevant to the poor.[8] Since the early 1970s, however, two forces have combined to render the annual accounting period—which itself is grounded in administrative convenience and government's need for regular revenue rather than

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53 TAX L. REV. 51, 56–57 (1999).

[2] I.R.C. § 32 (2001). The Earned Income Tax Credit provides a refundable tax credit for low-income working families of up to $4,008 for a family with two qualifying children, $2,428 for a family with one qualifying child, and $364 for a family with no qualifying children. *Id.* It is refundable because qualifying families may receive the credit as a refund from the Internal Revenue Service even if they owe no federal income tax. *Id.* The amount of the credit initially rises, then plateaus, and finally declines ultimately to $0 as earned income rises. *See id.*

[3] MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICAN'S FAMILIES 1 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001).

[4] *See, e.g.*, 147 CONG. REC. H431–05 (Feb. 27, 2001) (George W. Bush, Address of the President to the Joint Session of Congress) ("A tax rate of 15 percent is too high for those who earn low wages"); Sue Kirchhoff, *Tax Relief for Poor Gaining Advocates*, BOSTON GLOBE, Feb. 25, 2001, at A1 (quoting Bush as saying that his tax cut plan would "unlock the door to the middle class" for low-income families). Many question President Bush's substantive commitment to tax relief for the poor. *See, e.g., id.* (noting criticism that Bush's proposal would shut out millions of working poor families); Editorial, *The Real Tax Plan*, WASH. POST, Feb. 11, 2001 (criticizing the Bush tax plan for providing half of its savings to the top 5% and a third of its savings to the top 1% of the population by income).

[5] I.R.C. § 441 (2001). The Internal Revenue Code specifically requires taxation of annual income, and some case law suggests that significant deviations from the regularity of annual income measurement could be subject to constitutional challenge. *See, e.g.*, Burnet v. Sanford & Brooks Co., 282 U.S. 359, 365 (1931) ("The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals.").

[6] I.R.C. § 1 (2001).

[7] *E.g.*, Jay Soled, *A Proposal to Lengthen the Tax Accounting Period*, 14 AM. J. TAX POL'Y 35, 62 (1997) ("There is no apparent reason why [lengthening the tax accounting period] . . . would have any bearing on the vertical equity of the tax system."). *See also infra* notes 68–69 and accompanying text.

[8] Prior to introduction of the EITC in 1975, many low-income taxpayers neither owed taxes nor were eligible for a refund.

fundamental principles of fairness—especially inaccurate and unfair for low-income families. First, low-income taxpayers now face steep marginal tax rates as a result of the tenfold expansion of the EITC between 1986 and 1996.[9] These high marginal rates magnify the tax penalties associated with income fluctuations. Second, low-income families experience higher income volatility from year to year than middle- and high-income families, and income volatility has been increasing for all income levels over time.[10]

As a result of these two forces, this Article finds that the taxation of annual income disproportionately burdens low-income families. Annual income measurement increases the tax burden on poor taxpayers by an average of 2.0 percentage points compared to long-term income averaging—a tax penalty four times greater than that experienced by high-income families.[11] The stakes are especially large for some low-income families. For example, the after-tax income of a single mother with two children earning $35,000 in one year and none in the second would be $8,980 higher if she averaged her income over two years.[12]

Fairness demands change. Tax law has regularly breached the annual accounting period to mitigate the harshness of the taxation of annual income for high-income taxpayers and corporations.[13] Low-income individuals deserve no less. Accordingly, this Article proposes redressing the heaviest burdens of the annual accounting period on the less affluent through two simple and focused "Targeted Averaging" devices. Under Targeted Averaging, taxpayers could smooth their income over two years for the purpose of calculating the EITC. In addition, they could carry back for one year their unused standard deductions and personal and dependent exemptions.

Targeted Averaging is focused on alleviating the burden of taxation of annual income on low-income families. An evaluation of the distributional impact of Targeted Averaging using longitudinal data reveals that it is highly progressive[14] and that there is a strong correlation between those

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[9] Ventry, *supra* note 1, at 34.

[10] *See infra* notes 61–67 and accompanying text, tables and figures. *See also* Peter Gottschalk & Robert Moffitt, *The Growth of Earnings Instability in the U.S. Labor Market*, *in* 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 217 (1994) (finding that earnings volatility grew for white men between the 1970s and 1980s and that earnings volatility is higher absolutely, and has risen more as an absolute value and as a percentage, for white men with less education and for those in lower quartiles of average earnings); Ann Huff Stevens, *Changes in Earnings Instability and Job Loss*, 55 INDUS. & LAB. REL. REV. 60, 60 (2001) (finding that male earnings instability increased between 1970 and 1991).

[11] *See infra* Table 4. "Long-term" averaging refers to averaging over ten to twenty-five years of income data. "High-income taxpayers" refers to those in the top quartile of the lifetime income distribution. "Low-income taxpayers" and "poor taxpayers" refers to those in the bottom quartile. For a discussion of why the bottom quartile is defined as poor, see *infra* notes 45, 72.

[12] *See infra* notes 42–46 and accompanying text.

[13] *See infra* notes 25–28, 74–83 and accompanying text.

[14] The most common definition of progressivity (and the one employed here) is that

who benefit from it and those most hurt by the annual accounting period.[15] Conversely, there is a small and negative correlation between the families who are hurt most by annual income measurement and those who benefit most from an alternative with roughly the same cost, cutting the bottom tax bracket.[16]

In addition, Targeted Averaging minimizes administrative and compliance costs for participating taxpayers and for the government. Past comprehensive income averaging provisions were poorly structured and inordinately complex,[17] an inherent problem when averaging across the tax law's multitudinous credits and deductions. Targeted Averaging sidesteps this complexity by limiting its benefits to two provisions of the Internal Revenue Code, the EITC and standard and personal deductions.[18] Moreover, the vast majority of its beneficiaries—EITC recipients—now employ tax preparers.[19] The marginal compliance costs of Targeted Averaging would be even smaller for them, entailing only a few additional calculations or steps in a computer program.

Finally, and most broadly, Targeted Averaging offers the potential to make credible policy makers' claims that the EITC and welfare reform "make work pay" and reduce work disincentives for low-income workers, claims that are increasingly suspect amidst a rapidly changing occupational paradigm. The "new economy" has been accompanied both by an increase in earnings volatility and by a dramatic rise in voluntary and involuntary contingent, part-time, and temporary work.[20] In the face of these vast changes, social policies have not adjusted. Making work pay today requires not just enhancing earnings when they are received but also during frequent periods of unemployment that accompany low-wage work. Targeted Averaging offers this potential. By refunding penalties for fluctuating earnings in lean years when low-income families are most in need, it would mitigate one of the strongest work disincentives: the vast

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average tax rates rise when moving up the income scale. RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FNANCE IN THEORY AND PRACTICE 356 (5th ed. 1989).

[15] *See infra* notes 121–122 and accompanying text.

[16] *Id.*

[17] *E.g.*, Martin David et al., *Optimal Choices for an Averaging System—A Simulation Analysis of the Federal Averaging Formula of 1964*, 23 NAT'L TAX J. 275, 275 (1970) ("We find the current averaging provision . . . to be unnecessarily complex, excessively restrictive, and generally inadequate in conception and execution."). *See also infra* notes 80–89 and accompanying text.

[18] I.R.C. §§ 32, 63(c), 151 (2001).

[19] Jennifer L. Romich & Thomas S. Weisner, *How Families View and Use the Earned Income Tax Credit: Advance Payment Versus Lump-Sum Delivery*, *in* MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICAN FAMILIES, 366, 376 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001) (finding that only 10% of EITC recipients prepare their returns themselves).

[20] Gottschalk & Moffitt, *supra* note 10, at 250–51 (noting studies showing that temporary work grew sevenfold between 1970 and 1992 and now exceeds employment in the auto and steel industries combined and that contingent work broadly defined may now encompass 25% of the workforce).

uncertainty that parents face when they leave the stable income of welfare and other social programs for the increasingly unstable income of work and its associated costs.

This Article proceeds in two Parts. Part I presents the normative argument for measuring income over a longer time period. It examines the theory and evidence of how annual income measurement overtaxes the poor and considers the effectiveness of previous income averaging provisions. Part II explains the goals and structure of Targeted Averaging and assesses its merits relative to two alternatives, two-year averaging of all income and a cut to the lowest tax bracket of the same cost. The conclusion briefly explores the relative advantages of addressing income volatility through tax-based programs.

I. WHY ANNUAL INCOME MEASUREMENT OVERTAXES LOW-INCOME FAMILIES

A. *The Case for Measuring Income over a Longer Period*

Two traditional goals of tax policy—horizontal and vertical equity[21]—require decisions about the time period over which people should be compared. If the accounting period is inaccurate, equally situated taxpayers will not be treated equally, and the tax system will not redistribute between the more and less affluent as intended by the tax rate structure. The normative case for income averaging thus turns, in large part, on whether income averaging promotes horizontal and vertical equity because measuring income over a longer period is a more accurate gauge of ability to pay and well-being than the annual method.

Few scholars have systematically analyzed the merits of taxation of lifetime income relative to the annual perspective,[22] despite the impor-

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[21] "Horizontal equity" is the principle that people with the same income should pay the same tax. *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 31 (3rd ed., 1995); Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607, 610 (1993). "Vertical equity" requires that income be appropriately redistributed between unequals, generally by people with greater income paying greater amounts of tax. *Id.* Some scholars have argued that horizontal equity is not an independent norm but rather a by-product of one's theory of vertical equity, which is in turn based upon one's economic assumptions and theory of justice. *See* Louis Kaplow, *A Note on Horizontal Equity*, 1 FLA. TAX REV. 191, 192 (1992); McDaniel & Repetti, *supra*, at 610–12. Others contend that horizontal equity is not derivative of vertical equity, but rather the pervasiveness of the principle under the different formulations of distributive justice suggests that it is a stronger primary rule. *See* Richard A. Musgrave, *Horizontal Equity: A Further Note*, 1 FLA. TAX REV. 354, 355 (1993); Richard A Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113, 116–17 (1990). Either way, the combination of horizontal and vertical equity requires a decision about the length of time over which income should be measured.

[22] *But see* Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 DUKE L.J. 509 (1984) (analyzing under what assumptions averaging improves horizontal equity); Wilbur A. Steger, *On the Theoretical Equity of an Averaging Concept for Income Tax Purposes*, 13 TAX L. REV. 211 (1958) [hereinafter

tance of the differences between taxation of annual and lifetime income and the fact that economists increasingly employ lifetime analysis.[23] This inattention to equity stems from the lack of a principled foundation for the annual accounting period itself. From the outset, tax law adopted the annual accounting period out of administrative and revenue concerns rather than out of principles of fairness.[24] As a result, tax law has long recognized that annual income measurement can be problematic. It has breached the annual accounting period when it was deemed unfair or inefficient through four main devices: carryovers,[25] judicially created doctrines,[26] deferral,[27]

Theoretical Equity] (summarizing arguments for income averaging).

[23] For studies using lifetime income to analyze the distributional burdens of taxation of annual income, see, for example, JOHN CREEDY, THE DYNAMICS OF INEQUALITY AND POVERTY: COMPARING INCOME DISTRIBUTIONS 7–8 (1998); DON FULLERTON & DIANE LIM ROGERS, WHO BEARS THE LIFETIME TAX BURDEN? (1993); James B. Davies, *Tax Incidence: Annual and Lifetime Perspectives in the United States and Canada*, *in* CANADA-U.S. TAX COMPARISONS (John B. Shoven & John Whalley eds., 1992); James Davies et al., *Some Calculations of Lifetime Tax Incidence*, 74 AM. ECON. REV. 633 (1984); Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 651–52 (1995) (noting Congressional Budget Office and Joint Committee on Taxation studies); M. Kevin McGee, *The Lifetime Marginal Tax Rate*, 44 PUB. FIN. 51 (1989); Gilbert E. Metcalf, *The Lifetime Incidence of State and Local Taxes: Measuring Changes During the 1980s*, *in* TAX PROGRESSIVITY AND INCOME INEQUALITY 59 (Joel Slemrod ed., 1994). The rise in lifetime analysis may be due in part to the relatively recent availability of longitudinal data on the United States population. For example, the Panel Survey of Income Dynamics ("PSID") began collecting data in 1968 and the National Longitudinal Survey ("NLS") series began in 1966. *See infra* notes 61, 154–157 and accompanying text.

[24] *Burnet v. Sanford & Brooks*, which established that the annual accounting period is a foundational element of the federal income tax, did so by arguing "[i]t is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals." 282 U.S. 359, 365 (1931).

[25] Examples include I.R.C. § 1212 (2001) (permitting carryovers of capital losses indefinitely for individuals and a three-year carryback and five-year carryover of capital losses for corporations) and I.R.C. § 172 (2001) (authorizing a three-year carryback and fifteen-year carryover of business net operating losses). *See also* Libson Shops, Inc. v. Koehler, 353 U.S. 382, 386 (1957) (justifying the business net operating loss deduction as necessary "to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis").

[26] Such judicially created doctrines are typically codified subsequently in whole or in part. Examples include the claim of right doctrine, *see* United States v. Lewis, 340 U.S. 590 (1951) (holding that if a taxpayer received earnings under a claim of right and without restrictions as to its disposition, he has received income subject to tax even if his right to the money is later successfully disputed and he is forced to restore its equivalent); North American Oil Consolidated v. Burnet, 286 U.S. 417 (1932) (holding a company has earned no income where a company might never receive it and has no right to demand payment); I.R.C. § 1341 (2001) (permitting a carryback of deductions for items previously included in income when the taxpayer subsequently discovers that he or she did not have an unrestricted right to such item), and the tax benefit rule, *see* I.R.C. §§ 111, 186 (2001); Hillsboro Nat'l Bank v. Comm'r of Internal Revenue, 460 U.S. 370, 372 (1983) ("[T]he tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction.").

[27] Examples include the numerous tax expenditures for private pensions that permit deferral of compensation over time, *see, e.g.*, I.R.C. §§ 401, 402, 403(b), 404, 412 (2001), and the realization principle, which permits deferral of taxation on capital gains until they are "realized" by the sale, exchange, or disposal of the underlying property, *see* BITTKER, MCMAHON & ZELENAK: FEDERAL INCOME TAXATION OF INDIVIDUALS § 28.01 (2003). It is worth noting that proposals to improve the accuracy of income measurement by lengthen-

and traditional income averaging.[28] The annual accounting period, however, raises fairness concerns similar to the underlying reasons behind existing provisions for low-income families. Professors Gilbert Metcalf and Don Fullerton explain that "[t]he low-annual-income group may include four very different kinds of individuals: those with volatile annual income who merely had a bad year, those who are young and just beginning a high-income career, those who are old and just finished a high-income career, and those who are truly poor."[29] More careful consideration of what makes an accounting period "accurate" is necessary, therefore, in order to weigh the burdens of the annual accounting period for low-income taxpayers.

Accurate income measurement depends upon people's economic horizons, including their foresight, credit constraints, and planning abilities. For example, lifetime income would be the best gauge of whether two people are similarly situated if they could save and borrow without constraint, perfectly foresee their future income for the rest of their lives, and plan their savings and spending over their lifetimes.[30] Conversely, annual accounting would be most accurate if they could not save or borrow for more than a year, had no ability to predict next year's or recall last year's income, or could only take into account one year of income when making economic decisions. In reality, neither of these situations holds, and the most "accurate" accounting period is person-specific.

Nevertheless, three considerations suggest that, as a general rule, a longer-than-annual accounting period is more precise. First, although there is no firm consensus regarding the period over which people adjust consumption to income, the fairest characterization of the vast economic literature on the subject is that this adjustment occurs over a period of

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ing the accounting period do not in fact run counter to Professor Jeff Strnad's proposal to shorten the assessment period for capital income. Jeff Strnad, *Periodicity and Accretion Taxation: Norms and Implementation*, 99 YALE L.J. 1817, 1823 (1990). Strnad is concerned that taxpayers take advantage of the realization principle by realizing losses (and the concomitant deductions) in early periods, while deferring taxation on accumulated gains by not selling such assets until later. *Id.* at 1819–21. To reduce this bias in favor of risky assets and capital income in general, he advocates including capital gains as they accrue in the definition of income. *Id.* As he points out, this is possible under lifetime taxation—one's tax rate would depend upon one's lifetime income, which would in turn include the present discounted value of accrued capital gains. *Id.* at 1843–44. Thus, his concerns turn more on what income is measured than the period over which it is measured.

[28] Examples include the provisions for "bunched income" prior to 1964, I.R.C. §§ 1301–1309 (1954). *See infra* note 78 and accompanying text. *See also* Leslie C. Smith, *How to Become Miss America Without Achieving Any "Major Accomplishment"—Some Thoughts on the Income Averaging Provisions of the Internal Revenue Code*, 54 MARQ. L. REV 329, 331 (1971). More comprehensive income averaging provisions were in place from 1964 to 1986. I.R.C. §§ 1301–1305 (1964).

[29] GILBERT E. METCALF & DON FULLERTON, THE DISTRIBUTION OF TAX BURDENS: AN INTRODUCTION 19 (Nat'l Bureau of Econ. Research, Working Paper No. 8978, 2002).

[30] One may, of course, want to take other factors into account in levying a tax on that income, such as whether the taxpayer has children.

time somewhere between a year and a lifetime.[31] Some hypothesize a life-cycle approach, in which people adjust their consumption to their predicted lifetime income.[32] Most scholars reject this view as a perfect model of consumption behavior, while admitting that it has some explanatory power.[33] Others posit shorter economic horizons because of people's high discount rates for future income, their uncertainty about their future earnings, the imperfection of capital markets, and the failure of people to consume as much of their assets after retirement as the life-cycle model predicts.[34] Still others contend that the fact that many do not spend down their assets in retirement in order to leave bequests, even small ones, actually implies multigenerational economic horizons.[35] While this debate will not be settled here, the economic literature does suggest that, for most purposes, taxpayers' economic horizons are indeed much longer than annual.

Second, and reinforcing this argument, past and future income can impact current consumption possibilities through savings and capital markets. Although capital markets are imperfect and offer few opportunities for borrowing against future labor income, savings is unrestricted and borrowing against future capital income is widespread. As a result, people can and do spread their income to some degree, rendering annual income measurement imprecise. Moreover, even if capital markets are not employed to spread income, the opportunity to use them may still be relevant when determining ability to pay. For example, consider two women, one who earns $100,000 each year for thirty years, and one who earns $10,000 every year until the thirtieth year when she earns $100,000 as well. The first woman will probably own a home and many other assets. Even if the first woman squandered all her money, some may believe that her decision not to save is normatively significant and that she should pay slightly more taxes in the thirtieth year. As Professor Michael Graetz notes, the "lifetime perspective finds substantial support in certain fundamental philosophical concepts, including the idea that people should be responsible for their actions throughout their lives."[36]

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[31] *See, e.g.*, Michael Landsberger, *Consumer Discount Rate and the Horizon: New Evidence*, 79 J. POL. ECON. 1346, 1347 (1971) (finding support for a time horizon of roughly three years); Steger, *Theoretical Equity*, *supra* note 22, at 211 (concluding that empirical studies on the time context of economic decisions do not deny the merits of income averaging but do reject it for all but relatively short periods).

[32] MILTON FRIEDMAN, THE THEORY OF THE CONSUMPTION FUNCTION 220–21 (1957) (introducing the permanent income hypothesis).

[33] *See generally* Marjorie A. Flavin, *The Adjustment of Consumption to Changing Expectations About Future Income*, 89 J. POL. ECON. 974 (1981) (finding that data significantly reject the permanent income hypothesis); Chulsoo Kim, *Measuring Deviations from the Permanent Income Hypothesis*, 37 INT'L ECON. REV. 205 (1996) (finding that postwar U.S. consumption deviates from the permanent income hypothesis by less than 4%, which indicates a reasonably good fit).

[34] HENRY J. AARON, ECONOMIC EFFECTS OF SOCIAL SECURITY 10, 19 (1982).

[35] *Id.* at 10–11.

[36] Graetz, *supra* note 23, at 653.

Finally, and most importantly, as a result of credit constraints and imperfect foresight, utilitarian theory and social insurance theory both suggest that families with volatile incomes should actually pay less, not more, taxes. First, if one accepts the declining marginal utility of money, persons with fluctuating incomes will have less total utility since the extra income they receive in their lush years is worth less to them than if it were received in a lean year.[37] Second, families with volatile incomes will likely incur additional expenses connected with changes in their standard of living.[38] For instance, they may move more often or incur high-interest-rate debt in order to keep up with payments for consumer durables.[39] Third, they will have less ability to plan their expenditures, which may also result in utility losses.[40] Lastly, volatile incomes are one of the inherent risks of working and living in a market economy that social insurance seeks to address.[41] As a result, families with volatile incomes actually should bear a relatively smaller tax burden.

Ultimately, however, the normative case for income averaging does not depend on arguments that low-income families with fluctuating incomes should pay relatively less taxes or that income should be measured over a lifetime or longer. Instead it simply rests on the proposition that families should not be penalized by the tax system for short-term income fluctuations

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[37] Steger, *Theoretical Equity*, *supra* note 22, at 212. These utilitarian arguments are subject to the conventional critique that utility cannot be compared interpersonally. In addition, whether the declining marginal utility of money should imply lower taxation for people with fluctuating incomes depends on one's social welfare function. The contention holds if one aims to maximize the sum of utilities, but if one believes that individuals should sacrifice the same proportion of their utility to taxes, averaging is indicated only if one measures social utility more than annually. *See* Schmalbeck, *supra* note 22, at 551–52 (providing an example); Soled, *supra* note 7, at 61. As discussed, however, people's economic horizons should be understood as longer than annual, and, therefore, social utility should be measured over a longer time period.

[38] WILLIAM VICKREY, AGENDA FOR PROGRESSIVE TAXATION 166 (1947).

[39] *See* COMMUNITY REINVESTMENT ASS'N OF N.C., TOO MUCH MONTH AT THE END OF THE PAYCHECK: PAYDAY LENDING IN NORTH CAROLINA 37 (2001) (describing the rapid growth of payday lenders charging an average annual percentage rate ("APR") 460%), *available at* http://www.cra-nc.org/paycheck.pdf. One borrower recounted:

> I was behind in my car payment. It was just that one time I didn't have the money. But I never did have the $300 to go on and pay the payday lender, so I kept renewing—just for that one time. Now I know that I spent more than $2,000 over a two-year period, just for that one $261 loan.

Id. at 7.

[40] VICKREY, *supra* note 38, at 166.

[41] *See* MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY 8 (1999) (arguing that social insurance programs are necessary to buffer the inherent risks of working and living in a market economy and are a critical underpinning for a vibrant market economy itself). *See generally* Mark J. Mazur, *Optimal Linear Taxation with Stochastic Incomes*, 44 PUBLIC FINANCE 31 (1989) (suggesting that optimal tax theory may imply a more progressive rate structure under increasing income uncertainty as a form of insurance against income fluctuations when private markets fail).

and that, for all the reasons outlined above, it is generally more accurate to measure their income over periods somewhat longer than one year.

Although such a goal smacks of compromise, tax law routinely makes such compromises in current averaging devices and the annual accounting period itself. Moreover, even if the perfectly tailored accounting period for each taxpayer is unknown, we should at least seek a more accurate measure of income than we have achieved. To this end, the previous discussion illustrates three goals for a new income averaging provision: it should mitigate the most dramatic differences between measuring income annually versus over a longer period; it should provide a form of social insurance against earnings fluctuations by targeting benefits to lean years when utility losses are greatest; and finally it should minimize complexity so that its benefits are not absorbed by compliance expenses but are realized by those hurt most by the annual income measurement.

With these objectives in mind, the next Section examines which groups actually suffer the greatest income volatility and the greatest losses as a result of the annual accounting period.

B. The Dynamics Generating Overtaxation of the Poor

The annual accounting period can have a profound effect on the well-being of low-income families relative to the more affluent. In order to understand the mechanics of how and why this occurs, two stylized examples are helpful. Consider Lisa, a single mother of two whose income varies by 100%. She earns $35,000 in year one and $0 in year two, for an average of $17,500, only slightly above the official poverty line.[42] If she calculates her federal income taxes annually, she will pay an average of $624 per year, because her income is too high to receive the EITC in year one and too low in year two.[43] If she averages her income, however, she will pay no taxes and receive $3,866 each year from the EITC and the refundable child tax credit, a difference of $8,980.[44] Because many believe

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[42] In 2001, the official poverty line was $14,630 for a family of three. 66 Fed. Reg. 10,695–97 (Feb. 16, 2001).

[43] In the years when her income is $35,000, she will claim a standard deduction of $6,650, I.R.C. § 63(c)(2) (2001), and exemptions totaling $8,700, I.R.C. § 151(c)–(d) (2001), leaving her with taxable income of $19,650. Of this, the first $10,000 is taxed at the 10% rate, I.R.C. § 1(i)(1)(B)(ii) (2001), and the remaining $9,650 at the 15% rate, I.R.C. § 1(b) (2001), producing an initial tax liability of $2,448. She will then claim $1,200 in child tax credits, I.R.C. § 24(a)(2) (2001), so her net tax liability will be $1,248. She is not eligible for the EITC, I.R.C. § 32(b) (2001). In the years when her income is $0, she pays no taxes and is eligible neither for the EITC nor the Child Tax Credit ("CTC").

[44] If her income were $17,500, Lisa would again claim a standard deduction of $6,650 and exemptions totaling $8,700, I.R.C. §§ 63(c)(2), 151(c)–(d) (2001), so her taxable income would be $2,150, all taxed at the 10% rate, I.R.C. § 1(i)(1)(B)(ii) (2001), for an initial tax liability of $215. Lisa would then take a $215 child tax credit, I.R.C. § 24(a)(2) (2001), and claim a refundable child tax credit of $750, I.R.C. § 24(d)(1)(A)(i) (2001). Finally she would be eligible for an additional refundable tax credit of $3,116 under the EITC, I.R.C. § 32(b) (2001). Her net tax liability is therefore –$3,866.

that at least 150% of the official poverty line is a more realistic measure of poverty[45]—$21,945 in her case as a single mother with two children—averaging has also brought Lisa and her children out of poverty.[46]

TABLE 1: STYLIZED EXAMPLE OF INCOME AVERAGING

	Lisa		**Heidi**	
	Year One	Year Two	Year One	Year Two
Income	$35,000	$0	$200,000	$100,000
Annual Tax	$ 1,248	$0	$ 51,815	$ 18,248
Average Post-Tax Income, Annual Income Measurement	$16,876		$114,968	
Average Tax Rate, Annual Income Measurement	4%		23%	
Averaging Tax	– $3,866	– $3,866	$ 33,615	$ 33,615
Average Post-Tax Income, Income Averaging	$21,366		$116,385	
Average Tax Rate, Income Averaging	– 26%		22%	
Averaging Rate Cut Under Averaging	30%		1%	

[45] *See, e.g.*, PATRICIA RUGGLES, DRAWING THE LINE: ALTERNATIVE POVERTY MEASURES AND THEIR IMPLICATIONS FOR PUBLIC POLICY 7–8 (1990). The official poverty line was created using consumption data from 1955. *Id.* at 4, 36. At the time, the average family spent one third of its budget on food, and the poverty line was thus set at three times the cost of a subsistence food basket. *Id.* Since then, the share of the average family's budget allocated to food has fallen considerably, from about one-third to one-fifth, in part due to the rapid rise of health and housing costs relative to food. *Id.* at 50. Under one of the less controversial proposals to update the poverty line, the original approach would be followed. *Id.* Instead of multiplying the current cost of a subsistence food basket by three, it would be multiplied by the inverse of the current share of food in the average family budget. *Id.* This methodology would have yielded a 1987 poverty line that was 1.68 times the official one. *Id.* Presumably, the difference between the official and proposed poverty line would be even greater today.

[46] It has also dramatically increased her incentive to work, augmenting her take-home pay by 27%. This figure is derived from the difference in taxes divided by her take-home pay without averaging ($8,980/$33,752). It is worth noting that although Lisa receives $8,980 in the second year when she is not working, that refund is not something for nothing. Instead, it is contingent on her having worked in the past year. The precise timing of her receipt of $8,980 depends on the structure of the averaging provision.

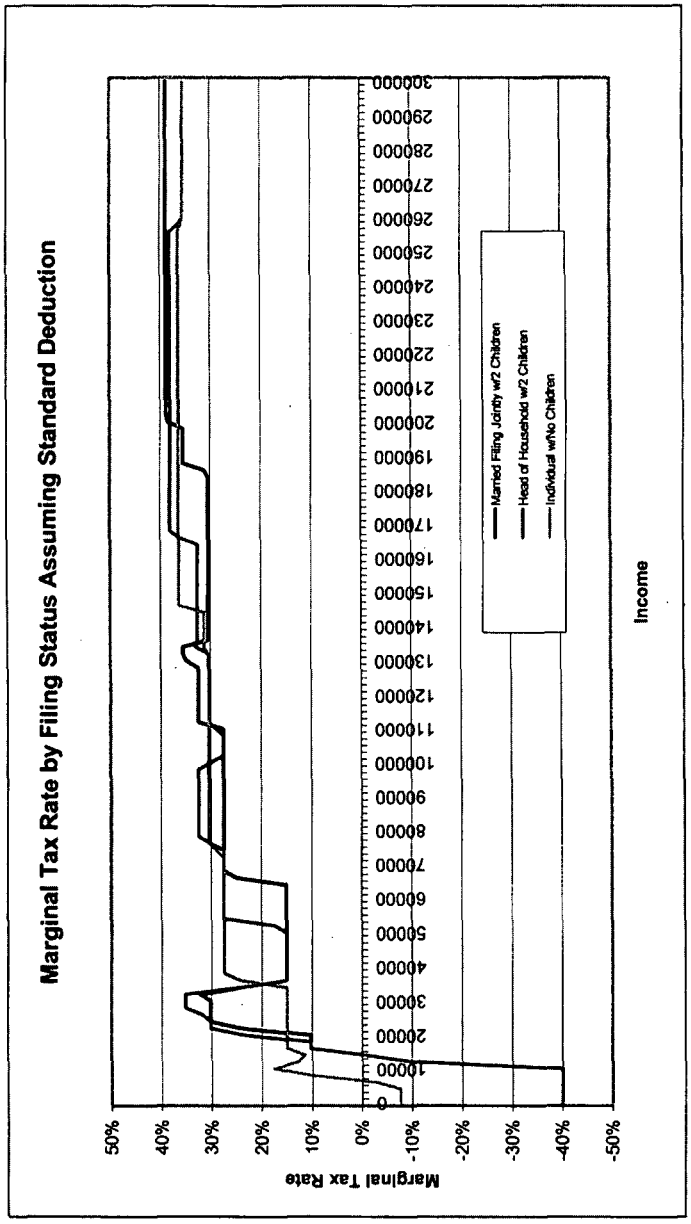
In contrast, Heidi, a second, higher-income single mother with two children is not affected nearly as much by annual income measurement. Her income varies by only 50%, from $200,000 in year one to $100,000 in year two. Assuming that she does not itemize and calculates her tax liability on an annual basis, she will pay an average of $35,032 in taxes per year.[47] If she averages, her tax liability will fall by only $1,416.[48] As illustrated in Table 1, another way to understand the difference between Lisa and Heidi is that over time Lisa's "average rate cut" is much greater.[49] While Lisa's effective tax rate falls from 4% under annual accounting to –26% under averaging, a huge average rate cut of 30 percentage points, Heidi's falls from 23% to 22%, only a one percentage point reduction.

[47] In the years when she earns $200,000, Heidi will claim a standard deduction of $6,650 and exemptions totaling $3,946 (she is in the phase-out range for personal and dependent exemptions), I.R.C. §§ 63(c)(2), 151(c)–(d) (2001), leaving her with taxable income of $189,404. This income is taxed at rates ranging from 10% to 35.5% for a tax liability of $51,815, I.R.C. § 1(b), (i)(1)(B)(ii) (2001). Heidi is not eligible for the EITC or CTC in those years, since both phase out at higher incomes. I.R.C. §§ 24, 32 (2001). In the years when Heidi earns $100,000, she claims a $6,650 standard deduction and $8,700 in exemptions, resulting in $84,650 in taxable income. I.R.C. §§ 63, 151 (2001). Her taxable income is subject to rates ranging from 10% to 27.5%, for an initial tax liability of $18,248, I.R.C. § 1(b), (i)(1)(B)(ii) (2001). Again she is ineligible for the EITC and CTC. I.R.C. §§ 24, 32 (2001). The average of $18,248 and $51,815 is $35,032.

[48] If she earned $150,000, Heidi would claim a standard deduction of $6,650 and exemptions totaling $7,426, I.R.C. §§ 63(c)(2), 151(c), (d) (2001), since she is again in the phase-out range for personal and dependent exemptions. Her taxable income is thus $135,924. After her taxable income is taxed at rates ranging from 10% to 30.5%, I.R.C. § 1(b), (i)(1)(B)(ii) (2001), her tax liability is $33,615. She is ineligible for the EITC or CTC. I.R.C. §§ 24(b)(2), 32(b) (2001).

[49] See *infra* note 70 for the derivation of average rate cuts.

FIGURE 1



Lisa and Heidi are not typical taxpayers. Their examples, however, highlight two reasons why low-income taxpayers may be more vulnerable to fluctuation penalties. Lisa is overtaxed either because her income fluctuates more widely or because marginal tax rates rise more steeply in the range in which her income fluctuates. To determine whether either of these propositions hold in reality, it is necessary to explore the marginal

rate structure under current law and income volatility patterns among the population in general.

The first issue in predicting the distributional impact of income averaging is whether the current tax structure generates greater tax penalties for a low-income taxpayer experiencing the same dollar value of income fluctuations as a taxpayer who is more affluent. This is generally the case, as Figure 1 illustrates. In large part as a result of the introduction of the EITC in 1975 and its dramatic expansion over the past fifteen years, the marginal tax rate facing a married family with two children that does not itemize rises sharply from –40% on its first dollar earned[50] to 35% when it earns $32,000.[51] Thereafter, it drops slightly and then rises gradually to a peak of 43% at $310,000.[52] A full 90% of the rise in marginal rates thus falls roughly upon the bottom quartile of married families.[53]

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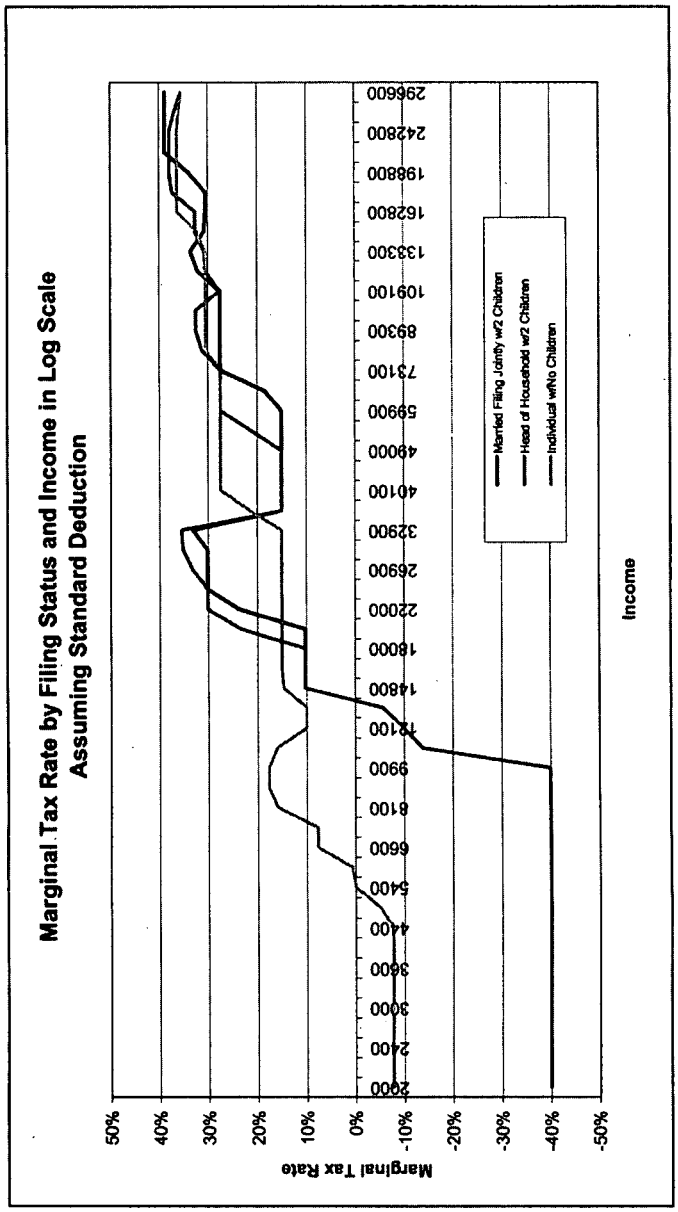
[50] I.R.C. § 32(b) (2001).

[51] At $32,000, the family will claim a standard deduction of $7,600 and exemptions totaling $11,600, leaving $12,800 in taxable income, I.R.C. §§ 63(c)(2), 151(c), (d) (2001). Its highest nominal marginal rate is therefore 15%, I.R.C. § 1(b), (i)(1)(B)(ii) (2001). The family will also be in the phase-out range of the EITC, however, which reduces its EITC by 20.2% for every dollar earned. I.R.C. § 32(b) (2001). Consequently, its implicit marginal rate is 35.2%.

[52] At $310,000, each new dollar the family earns is taxed at a marginal rate of 39.1%, I.R.C. § 1(b), (i)(1)(B)(ii) (2001). In addition, for every $2,500 earned, its exemptions are reduced by 2% from its original $11,600, or by $232, I.R.C. §§ 63(c)(2), 151(c)–(d) (2001). This produces an implicit marginal rate of 43% ((2500+232)*.391)/2500=.43).

[53] Ninety percent is derived from dividing the rise under $32,000 from the total rise (75/83). In 1998, 27% of married taxpayers filing jointly had adjusted gross income of less than $30,000. INTERNAL REVENUE SERV., PUB. NO. 1304, STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS 1998, at tbl. 1.2 (May, 2001) [hereinafter INDIVIDUAL INCOME TAX RETURNS 1998], *available at* http://www.irs.gov/taxstats/article/0,,id=96586,00.html. Roughly half of the rise is attributable to the EITC.

FIGURE 2



These steep marginal rates facing low-income families mean that these families generally suffer the largest penalties for a given dollar value of income fluctuations. Intuitively this occurs because income volatility pushes taxpayers into relatively high tax brackets in their peak earning years,

brackets to which they would never be subject if they earned their income evenly over time. The more rapidly tax brackets rise, the greater the fluctuation penalty, and at the beginning of the income scale, tax brackets include shorter income ranges than higher up on the income scale. It is worth noting that under a strictly progressive tax system where marginal rates are always higher with higher income, taxpayers will always pay the same or less under income averaging if their income fluctuates at all. Conversely where a tax system is not strictly progressive, falling marginal rates create the possibility of fluctuation bonuses. Theoretically some low-income families may therefore benefit from the annual accounting period because marginal tax rates fall as the EITC phases out for families earning between $32,000 and $36,000.[54] As will be discussed, in practice, however, the number of families receiving such bonuses is quite small, and fluctuation penalties remain the norm.[55]

Although low-income families should generally experience greater fluctuation penalties for a given dollar value of income volatility, it is also important to determine whether the tax structure generates greater fluctuation penalties for low-income taxpayers experiencing the same percentage income fluctuations as their more affluent counterparts. A $20,000 fluctuation represents much greater income volatility for a family earning $20,000 than for one earning $200,000, and, therefore, income volatility is better understood (and hereinafter defined) as the percentage, not the dollar value, by which income tends to vary from its mean. Although Figure 1 illustrates that marginal rates tend to rise less steeply over a $20,000 increment if one's income is higher, it does not address whether they rise less steeply over the same percentage fluctuation. In order to correct for this, Figure 2 presents the same graph in log scale.[56]

Figure 2 reveals that for a given percentage change in income, marginal tax rates do rise most steeply for low-income families, specifically those earning roughly $10,000 to $25,000. For example, if a married family's income moves from $12,100 to $18,000 on the chart, a 50% increase, its marginal tax rate rises by twenty percentage points. But if its income moves from $89,300 to $133,300, also a 50% increase, its marginal tax rate only rises by six percentage points. Marginal tax rates rise more smoothly for individual filers.

At first glance, Figure 2 also suggests that, for a given level of income volatility, that marginal tax rates rise relatively steeply for upper-middle income families earning between roughly $50,000 and $70,000. While important, this effect is moderated by some necessary simplifications in the model that exaggerate the steepness of the marginal tax rates fac-

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[54] I.R.C. § 32 (2001).

[55] *See infra* note 73 and accompanying text and Table 5 (in the Appendix).

[56] Each number on the income axis represents a 22% fluctuation from the previous point.

ing higher-income taxpayers. For example, Figures 1 and 2 include the most common deductions and credits—the standard deduction, personal and dependent exemptions, the EITC and the Child Tax Credit ("CTC")[57] but exclude the value of itemized deductions, which most middle- and upper-income taxpayers claim, as well as the regressive payroll tax.[58] A more nuanced understanding of marginal rates thus implies that, even given the same level of income volatility, low-income families pay larger fluctuation penalties than more affluent families.

Low-income families do not, however, experience the same level of income volatility. Instead a second force intensifies the burden of the annual accounting period on low-income families—the fact that income volatility differs systematically by income class. In previous empirical research, Professor Ann Huff Stevens found that male earnings instability increased between 1970 and 1991.[59] Professors Peter Gottschalk and Robert Moffitt documented a similar rise in white male earnings instability and found the rise to be most rapid among the lowest quartile.[60] These studies, however, neither assess how income volatility varies by income level at a given point in time, nor whether the rise in income volatility holds on a family basis (instead of an individual basis) and for families of all races. Accordingly, in order to expand upon their research, income vola-

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[57] I.R.C. §§ 1, 24, 32, 63, 151 (2001). The CTC provides a partially refundable tax credit of up to $600 for each qualifying child of the taxpayer. I.R.C. § 24 (2001). It is partially refundable because families whose income falls within a certain range may receive the credit as a refund from the Internal Revenue Service even if they owe no federal income tax. *Id.*

[58] In 1999, 32% of all taxpayers itemized. INTERNAL REVENUE SERV., PUBLICATION 1304, STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS 1999, at tbls. 1.4, 2.1 (Oct. 2001), *available at* http://www.irs.gov/pub/irs-soi/99indtr.pdf. Roughly 76% of taxpayers with adjusted gross income over $50,000 itemized, and approximately 91% with income over $100,000 did. *Id.*

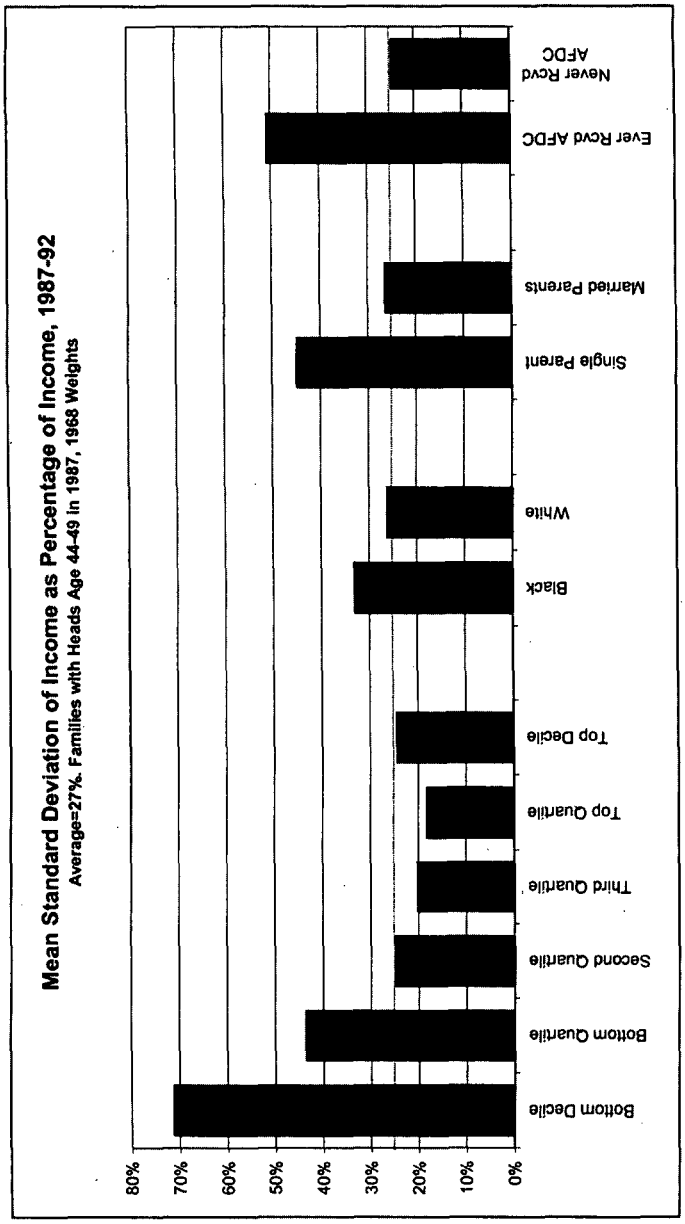
[59] Stevens, *supra* note 10, at 60–61, 68, tbl.2 (citing also other studies finding a general upward trend in earnings instability in the United States and Canada). Professor Ann Huff Stevens finds the rise is due in part to an increasingly strong effect of job loss upon earnings volatility. *Id.* There is an ongoing and unresolved debate regarding whether job loss rates have been increasing in the United States. *Compare* Annette Bernhardt et al., *Trends in Job Instability and Wages for Young Adult Men*, 17 J. LAB. ECON. S65 (1999) (finding a significant increase in job instability among young adult men), *and* David A. Jaeger & Ann Huff Stevens, *Is Job Stability in the United States Falling? Reconciling Trends in the Current Population Survey and Panel Study of Income Dynamics*, 17 J. LAB. ECON. S1 (1999) (finding no trend in the share of workers with less than one year of job tenure but an increase in the share of men with less than ten years of tenure since the late 1980s), *with* Peter Gottschalk & Robert Moffitt, *Changes in Job Instability and Insecurity Using Monthly Survey Data*, 17 J. LAB. ECON. S91 (1999) (finding no increase in job turnover in the 1980s and 1990s for married males), *and* David Neumark et al., *Has Job Stability Declined Yet? New Evidence for the 1990s*, 17 J. LAB. ECON. S29, S52, S58 (1999) (finding no trend in job stability for white women in the 1990s, modest declines for white men, the sharpest declines for blacks, and no significant long-term trend overall).

[60] Gottschalk & Moffitt, *supra* note 10, at 217, 223 tbl.1, 242 (finding while male earnings instability rose by about 33% between the 1970s and 1980s, controlling for changes in the unemployment rate and the type of jobs available).

tility patterns and trends for families of all races are examined using the Panel Survey on Income Dynamics ("PSID").[61]

[61] The PSID is the best data set available for this purpose since most publicly available tax and income data is cross-sectional and therefore does not track individual taxpayers over time. The other major longitudinal data set, the NLS series, tracks only certain age cohorts and consequently does not permit analysis of the population across the age distribution. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NLSY79 USER'S GUIDE 3, tbl.1.1.1 (1999), *available at* http://www.bls.gov/nls/ 79guide/1999/nls79g0.pdf (last visited Mar. 29, 2003). Specifically the NLS Older Men Survey Group tracked men aged forty-five to fifty-nine from 1966 to 1990. *Id.* The NLS Mature Women Survey Group has followed women aged thirty to forty-four from 1966 to the present. *Id.* The NLS Young Men and the NLS Young Women Survey Groups followed individuals aged fourteen to twenty-four beginning in 1966 and 1968, respectively, but stopped tracking the young men in 1981. *Id.* Finally, the NLSY79 has followed individuals aged fourteen to twenty-one from 1979 to the present. *Id.* As throughout the Article, further details on methodology are included in the Appendix.

FIGURE 3



As Figure 3[62] suggests, incomes of disadvantaged families fluctuate far more than incomes of more advantaged families, whether disadvan-

[62] Married parents are those who were married and had a child under age eighteen at any point during the six-year period. Single parents are those who had a child under eighteen at some point between 1987 and 1992 and were unmarried throughout the period. The sample is confined to families with heads aged forty-four to forty-nine to prevent differ-

tage is defined as having less income, having less education, being of minority status, or receiving Aid to Families with Dependent Children ("AFDC") while an adult. Figure 3 (and Table 2 in the Appendix) shows the percentage by which families' yearly incomes tends to vary from their average income between 1987 and 1992. It demonstrates that the annual income of families in the bottom decile of average incomes typically fluctuates by 71% from its six-year mean, while the annual income of the average family fluctuates by only 27%. The annual income of families in the top decile fluctuates even less, by only 24%. Similarly, blacks' income varies by 33%, while whites' varies only by 26%.

In order to determine whether the differences in Figure 3 are statistically significant, Table 3 (in the Appendix) presents the results of an ordinary least squares regression.[63] As the first regression shows, higher average income is significantly associated with lower income volatility for all income deciles relative to the poorest. The coefficients rise fairly consistently with income class, in line with the theory that earnings fluctuations fall as income rises. In addition, other groups facing significantly greater income volatility, such as single parents and taxpayers who have received welfare as adults, also tend to be among the poorest and most disadvantaged.

Finally, to understand the trends over time, the second and third regressions in Table 3 (in the Appendix) confirm (on a family basis and for all races) Gottschalk and Moffitt's findings that earnings instability has increased over time and that the increase is strongest for the less affluent. Using PSID data on different families with heads aged forty-four to forty-nine[64] in four time periods, these regressions examine the relationship between income volatility and time, controlling for other variables including income quartile. The coefficient on the variable "time" in the second regression implies that income volatility has indeed been rising

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ences in the age composition of different groups from biasing the results and because previous research indicates that the age-earnings profile is flattest when workers are in their late forties. *See, e.g.*, FULLERTON & ROGERS, *supra* note 23, at 117 tbl.4-2.

[63] Ordinary least squares regression ("OLS") is a method for describing the statistical relationship between two variables, typically in order to predict or explain the effects of changes in one or more explanatory variables (the "independent variables") on another variable (the "dependent variable"). If one imagines a scatterplot graph with an independent variable on one axis and the dependent variable on the other axis, an OLS regression identifies the "line of best fit" between those two variables—the line that minimizes the sum of the squared deviations of each point from the line. The method can also "control" for other variables by determining how the "line of best fit" between an independent variable and the dependent variable changes depending on the value of another independent variable. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMETRIC MODELS & ECONOMIC FORECASTS 3–9 (3d ed. 1991). The coefficient of an independent variable (the top number in the regressions in Table 3) determines the intercept or slope of the "line of best fit" between that independent variable and the dependant variable (here, income volatility). The "significance" or p-value of a coefficient is the probability that there is actually no relationship between the dependent variable and the independent variable in question.

[64] See *supra* note 62 and Appendix for an explanation.

significantly over time for all groups, while the coefficients on quartiles confirm that more affluent families experience significantly less income volatility than poorer families.

In order to ascertain whether the rise in income volatility has been more rapid for any particular group, the third regression employs interaction terms between time, on the one hand, and income quartile, education, race, and family structure, on the other. A positive and significant coefficient on an interaction term implies that income volatility grew more rapidly over time for that group compared to a single, white, childless, high school dropout in the bottom quartile of income who received AFDC at some point as an adult.[65] As such, the third regression suggests that taxpayers in the second quartile, AFDC recipients, and parents faced especially sharp growth in income volatility from the late 1960s through the early 1990s. Black taxpayers experienced relatively weak growth in income volatility (controlling for other characteristics) but remained subject to broader earnings fluctuations than whites in general.[66] In short, these findings confirm and extend past research, indicating that income volatility is significantly and negatively correlated with income, that it has increased significantly over time for all, and that it may have been increasing most rapidly for families with below average earnings who have children.[67]

C. How Much Does the Annual Accounting Period Overtax?

The predictable result of the working poor facing sharply rising marginal tax rates and significantly higher income volatility than more affluent taxpayers is that annual income measurement systematically should impose greater burdens on low-income families. Since the advent of the federal income tax, however, virtually no scholars have examined this possibility empirically,[68] and only a few have noted it as a theoretical possibility.[69] Ac-

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[65] The choice of the default group is an arbitrary decision about what to use as a basis for comparison and does not affect the findings.

[66] It is worth noting that the insignificant coefficient on time does not imply that families falling outside these categories experienced no income volatility growth. Instead the statistical significance of such growth may be muted by the inclusion of so many independent variables.

[67] *See supra* notes 59–60.

[68] *See* Wilbur A. Steger, *Averaging Income for Tax Purposes: A Statistical Study*, 9 NAT'L TAX J. 97 (1956). Steger used data from the 1929 to 1935 Wisconsin averaging program to estimate the effect of different averaging proposals and found that permitting the carryover of exemptions was the only averaging option that was more progressive than annual income measurement. *Id.* at 112. Unfortunately his work is no longer particularly relevant, both because it relies on data from seventy years ago and because the data was from the Depression, when nominal incomes were falling. *Id.* at 102, 107. Jeffrey Liebman examines the conditions under which Vickery-style lifetime cumulative taxation would raise social welfare and includes empirical estimates of the impact of such lifetime taxation on the lifetime consumption budget constraint. Jeffrey Liebman, Should Taxes Be Based on Lifetime Income? Vickrey Taxation Revisited (July, 2002) (unpublished manuscript, on file with author). No other work quantifies the distributional impact of averaging.

cordingly, this Section discusses simulations employed to obtain a rough estimate of the size and distribution of the annual accounting period's penalties. The benchmark against which these simulations measure taxation of annual income is "lifetime taxation." Under lifetime taxation, taxpayers pay taxes annually based on their long-term average annual income. These simulations use a ten- to twenty-five-year period for which data exists.[70] Lifetime taxation is not a practical proposal,[71] but it still provides

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[69] *See, e.g.*, Richard Goode, *Long-Term Averaging of Income for Tax Purposes*, *in* THE ECONOMICS OF TAXATION 159 (Henry J. Aaron & Michael J. Boskin eds., 1980) (arguing that averaging only entails vertical equity implications if provisions are confined to high-income taxpayers); Schmalbeck, *supra* note 22, at 564 (noting that the 1964 averaging provisions significantly eroded progressivity but not considering whether they would have been progressive if the $3,000 minimum had been repealed); Soled, *supra* note 7, at 62 ("There is no apparent reason why [averaging] . . . , if uniformly applied to all taxpayers, would have any bearing on the vertical equity of the tax system."). *But see* Anne L. Alstott, *The Earned Income Tax Credit and the Limits of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 579 (1995) (discussing how shorter accounting periods tend to favor those with fluctuating incomes under the regressive marginal tax rate structure characteristic of the EITC); Michael R. Asimow & William A. Klein, *The Negative Income Tax: Accounting Problems and a Proposed Solution*, 8 HARV. J. ON LEGIS. 1, 7 (1970) (noting the potential for those with fluctuating incomes to receive benefits to which they otherwise would not be entitled under a negative income tax if accounting periods were short); William A. Klein & Edward A. Wiegner, *Income Averaging for Tax Purposes—Sources of a Statutory Solution*, 60 NW. U. L. REV. 147, 158–59 (1965) (noting that averaging may have its greatest significance for incomes ranging between $0 and $25,000 because rates rise slowly thereafter); Steger, *Averaging Income*, *supra* note 68, at 110, 112.

[70] Specifically, in order to estimate the differences between annual income measurement and lifetime taxation, a sub-sample of the PSID was constructed covering families in years in which they exhibited their most common family structure for tax purposes (married, single with children, single without children), provided this yielded ten to twenty-five years of continuous data for each family when the head was aged eighteen to sixty-five. The data was weighted to reflect the United States population demographics in 1968 and adjusted to 2001 dollars. The amount of taxes that a family owed on its annual income in 2001 was then calculated using a simple model, including the tax brackets, standard deduction, personal and dependent exemptions, EITC, and CTC. Simultaneously, the same model was used to calculate the amount of taxes a family would have owed if its income had not fluctuated and it had received its average income each year. The sum of its taxes paid calculated on its annual income, over the sum of its income including transfers, was its "average rate under annual income measurement." (Transfer income includes, among other things, Aid to Families with Dependent Children ("AFDC"), Social Security, Unemployment Insurance, Worker's Compensation, Supplemental Security Income ("SSI"), child support payments, alimony and gifts.) The sum of its taxes paid calculated on its average income, over the sum of its income including transfers, was its "average rate under lifetime taxation." The difference is its "average rate cut" under lifetime taxation. One could argue that the sum of taxes paid and transfer income in the numerator would be a better measure of the extent to which government in general imposes fluctuation penalties. The Article does not examine this measure because of data limitations and because it is interested in isolating the effect of the federal income tax system. The implications of using a more comprehensive measure of tax and transfer income are indeterminate. On one hand, it might modify the effect of income volatility on the poor because programs such as AFDC and food stamps generally reach families with little or no income. On the other hand, it would also include regressive elements of the tax-transfer system, such as the payroll tax, the preferential treatment of capital gains, and itemized deductions like the home mortgage interest deduction, all of which moderate fluctuation penalties for the more affluent.

[71] Lifetime taxation involves averaging across many years of one's past and future in-

an important comparison for how well taxation of annual income measures lifetime well-being and ability to pay, a benchmark against which one can examine more practical policy alternatives. As Figure 4 (and Table 4 in the Appendix) suggests, the annual accounting period imposes substantially greater burdens upon disadvantaged families compared to affluent families. If families are ranked by their average annual income, the bottom quartile's effective tax rate is 2.0 percentage points higher under annual income measurement than it would be if income were fully averaged, whereas the top quartile's rate is only 0.5 percentage points higher. This difference is especially significant given that the bottom quartile's effective tax rate is 0.2% before averaging, indicating that the impact of averaging is ten times the magnitude of the effective tax rate for the bottom quartile. Averaging thus moves the working poor[72] from paying no taxes to a slight employment subsidy of −1.8%. Similarly, the rate increases that blacks, single mothers, and current and former welfare recipients face due to annual income measurement are also much greater.

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come and would be difficult to implement. It is possible if one adopts Professor William Vickrey's proposal to calculate tax liability based on cumulative average income and then apply the appropriate discount rate to the pattern of income received and taxes already paid. *See* VICKREY, *supra* note 38, at 172–74. In addition, as Professor Jeffrey Liebman has argued, the Social Security system is implicitly based on lifetime income, Liebman, *supra* note 68, at 1, although one's net "taxes" (taxes paid minus benefits received) are not determined annually but rather upon retirement when benefits are calculated. *See* 42 U.S.C. §§ 402 – 434 (2003)

[72] As discussed above, many scholars believe the official poverty line should be adjusted upward by 70% or more to compensate for changes in the cost of food relative to other household expenses. *See supra* note 45. If their proposals were adopted, roughly one quarter of Americans would be defined as living in poverty. *See* U.S. CENSUS BUREAU, CPS ANNUAL DEMOGRAPHIC SURVEY, MARCH SUPPLEMENT tbl.22 (2001) (finding that 24.9% of persons lived below 175% of the poverty line in 2000), *available at* http://ferret.bls.census.gov/macro/032001/pov/new22_000.htm.

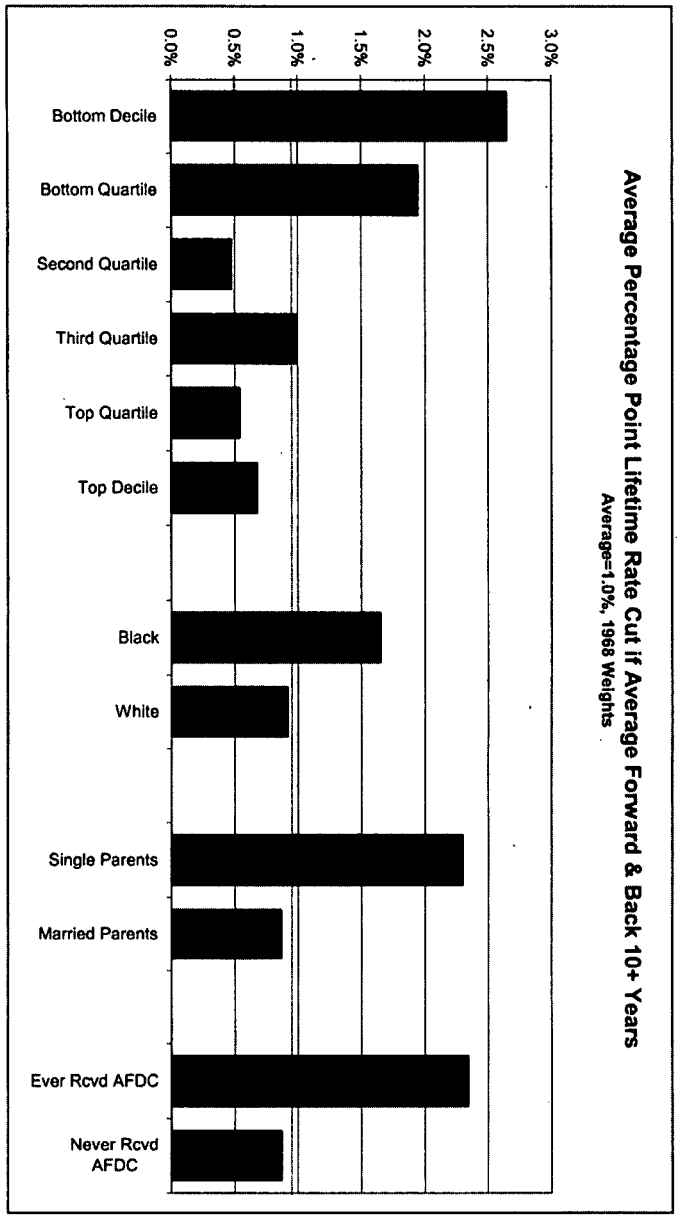

FIGURE 4

Taxation of annual income, however, does not hurt all families within each income class equally. Instead, some families within the lowest deciles bear dramatic tax penalties due to their volatile incomes, while many others in all deciles essentially bear no extra burden under annual income

measurement.[73] For example, Table 5 (in the Appendix) shows that the average effective tax rate of 5% of families in the bottom decile is over 9.4 percentage points higher under taxation of annual income than under lifetime averaging. Similarly, 5% of families in the bottom quartile experience at least a 7.6 average percentage point penalty. These averages imply even greater tax rate penalties in the specific years in which such families experience income fluctuations. In short, the tax system severely mismeasures income for some low-income families and imposes penalties upon them when they are economically most unstable.

D. The Failure of Past Income Averaging Efforts

A logical response to these burdens upon the disadvantaged is to implement a new form of income averaging. Past experience with averaging, however, does not provide very useful models. Most notably, current and historical income averaging provisions have systematically excluded low-income families. As discussed, the Internal Revenue Code currently contains numerous provisions that implicitly permit averaging but generally reach only the affluent. For example, the carryover of capital losses applies only to taxpayers with capital income.[74] Because the average financial wealth of the bottom 40% of individuals ranked by wealth is –$5,900, these provisions are of little use to the working poor.[75] Similarly, the numerous tax expenditures for private pensions that permit deferral of compensation over time[76] provide virtually no benefits for taxpayers in the bottom two quartiles.[77]

Historical efforts at averaging current labor income fare no better on distributional grounds. The provisions for "bunched income" prior to 1964[78] were available only to taxpayers with particular forms of income characteristic of the affluent, such as patent infringements, breach of contract and fiduciary duty damages, and certain compensation for artists and

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[73] Another group of taxpayers actually benefits from annual income measurement, though only 5% receive a fluctuation bonus of more than 0.2 percentage points and, in all income classes, no more than 5% of families experience a fluctuation bonus of more than one percentage point. *See* Table 5 (in the Appendix).

[74] I.R.C. § 1212(b) (2001).

[75] EDWARD N. WOLFF, RECENT TRENDS IN WEALTH OWNERSHIP, 1983-1998, at tbl.3 (Jerome Levy Econ. Inst., Working Paper No. 300, Apr. 2000).

[76] *E.g.*, I.R.C. §§ 219, 401, 402, 403(b), 404, 408, 412, 1042 (2001).

[77] *See* PETER ORSZAG & ROBERT GREENSTEIN, TOWARD PROGRESSIVE PENSIONS, A SUMMARY OF THE U.S. PENSION SYSTEM AND PROPOSALS FOR REFORM 6 – 7 tbl. 2 (Sept. 2000) (noting a study by the Office of Tax Analysis showing that the bottom 40% of workers receive 2.1% of the value of employer-sponsored pensions plans, IRAs and Keough plans, while the top 20% receive 66.4%); JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 26 (3d ed. 2000). For other examples of current averaging devices that disproportionately benefit corporations and the affluent, see *supra* notes 25–27.

[78] I.R.C. §§ 1301–1305 (1954).

inventors.[79] Moreover, the more comprehensive income averaging provisions in place from 1964 to 1986[80] also largely excluded low-income taxpayers. They required that "averageable income" exceed $8,150 in 2001 dollars in order for taxpayers to take advantage of the provisions.[81] In practice, this provision meant that a taxpayer earning $110,000 in 2001 dollars would need an increase of 28% in taxable income to be eligible, whereas a taxpayer with $27,000 in income in 2001 dollars would need a 71% increase in taxable income to qualify for the benefits of the provision.[82] Taxpayers with even less income had no hope of reaping averaging benefits. As a result, the benefits were highly concentrated in the richest decile.[83]

In addition to excluding low-income taxpayers, past income averaging provisions failed to meet other tax policy objectives. Although the 1964 provisions were enacted without controversy or close scrutiny,[84] by the time of their repeal,[85] averaging had fallen into disrepute. Some criticized the provisions' complexity,[86] others their denial of benefits for downward fluctuations,[87] and still others their poor targeting on the penalties imposed by income volatility.[88] Professor Martin David's assessment of averaging is typical:

> Drafters of the 1964 averaging provisions did not strain to achieve equity; they taxed their ingenuity for introducing complexity into the law. We find the current averaging provisions . . . unnecessarily complex, excessively restrictive, and generally inadequate in conception and execution. They violate virtually every standard for desirable qualities that an averaging

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[79] M. Carr Ferguson & Edwin T. Hood, *Income Averaging*, 24 TAX L. REV. 53, 54 (1968); Arthur L. Goldberg, *Income Averaging Under the Revenue Act of 1964*, 74 YALE L.J. 465, 466 (1965).

[80] I.R.C. §§ 1301–1305 (1964).

[81] "Averageable income" was defined as the portion of current year taxable income that exceeded 120% of average taxable income over the past four years. Averageable income was then taxed at the marginal rate that would have applied if only one-fifth of averageable income were earned in the current year. I.R.C. §§ 1301–1305 (1964). *See also* Eugene Steuerle et al., *Who Benefits from Income Averaging?*, 31 NAT'L TAX J. 19, 19–20 (1978).

[82] *Id.* at 21. Eugene Steuerle's figures are adjusted for inflation.

[83] Schmalbeck, *supra* note 22, at 561.

[84] Klein & Wiegner, *supra* note 69, at 152 (quoting one witness at the House Hearings on the Revenue Act of 1964 as saying that "nobody is going to come here and say he is against averaging").

[85] Tax Reform Act of 1986, Pub. L. 99-514, Title I, § 141(a), 100 Stat. 2085, 2117 (1986).

[86] *E.g.*, David, *supra* note 17, at 275.

[87] *E.g.*, Ferguson & Hood, *supra* note 79, at 93 ("[T]he most serious inadequacy of the 1964 legislation is the lack of provision for downward fluctuations in income.").

[88] Schmalbeck, *supra* note 22, at 517 (criticizing the provisions' lack of focus on fluctuation penalties since the percentage that could be recouped varied from 0% to 100%). Experiences with other averaging provisions were also considered failures for their arbitrary exclusions and generation of liquidity crises. *See* David, *supra* note 17, at 293; Ferguson & Hood, *supra* note 79, at 54.

> scheme should possess. The drafters of the 1964 provisions labored mightily and brought forth a monstrous mouse.[89]

Given such appraisals, the previous averaging provisions were justifiably repealed. The need, however, is now greater,[90] and a new income averaging provision need not make the same mistakes. To this end, Part II takes a fresh look at income averaging by outlining and considering the merits of Targeted Averaging.

II. A Fresh Look at Income Averaging

A. A Proposal for Targeted Averaging

Three goals should drive any income averaging proposal.[91] It should be targeted on the group of taxpayers whose income currently is measured least precisely by the taxation of annual income, which empirical analysis suggests is low-income families. To the extent possible, it should focus on unforeseen declines in income because they generate the largest utility losses and most credible claims for social insurance.[92] Finally, it should minimize administrative and compliance costs. Among these objectives, the goals of accuracy and simplicity may appear to be in tension as policymakers are caught between the complexity of long-term averaging, on the one hand, and the unfairness and inaccuracy of annual income measurement, on the other. But a more nuanced understanding of the federal tax structure and the dynamics of income volatility reveals that Targeted Averaging provides a relatively simple, yet accurate, way to resolve this conflict.

The Targeted Averaging proposal has four main features. Under Targeted Averaging, taxpayers could average their income across the current and previous year for the purpose of calculating the EITC. They also could carry back unused standard deductions and personal and dependent exemptions for one year.[93] In addition, participation in each component would be optional and restricted to families with the same marital filing status in the past year; taxpayers who were full-time students, dependents, or retirees would be excluded in order to channel the benefits to low-

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[89] David, *supra* note 17, at 275.

[90] *See supra* notes 63–67 and accompanying text.

[91] *See supra* note 25 and accompanying text.

[92] *See supra* notes 37–40 and accompanying text.

[93] Vickrey proposed carrying back exemptions in the 1940s, Vickrey, *supra* note 38, at 190–92, and Steger in the 1950s, Steger, *Averaging Income*, *supra* note 68, at 112, but the idea has not been considered seriously since then. Essentially, Targeted Avergaing would make the standard deduction and personal and dependent exemptions partially refundable. Fred Goldberg, a practitioner and former IRS Commissioner, has long made the point that carryovers and refundable credits are related. Interview with Fred T. Goldberg, Jr., Partner, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, in Washington, D.C.

income taxpayers whom the annual accounting period impacts the most. Finally, Targeted Averaging would maintain annual filing.

Lisa's example illustrates the mechanics of this policy.[94] She earns $35,000 in the first year and then is laid off and remains unemployed for the entire second year. Her tax burden under annual accounting is $1,248 in the first year and $0 in the second. Under Targeted Averaging, however, she first calculates her EITC based on her average income over two years and is eligible for a $3,116 refundable credit in each year instead of $0.[95] Next she carries back her standard deduction and personal and dependent exemptions, which she cannot use in the second year. These total $15,350.[96] If her taxable income had been reduced by that amount the prior year, she would not have owed any taxes.[97] Therefore she also gets back the $1,248 she paid in taxes in year one. In total, Lisa will receive $7,480 more than under the taxation of annual income, paid in the second year. Although not nearly enough to support herself and her two children comfortably, it may bring her up to the official poverty line when combined with any unemployment compensation, welfare, or food stamps she receives.

Each element of the Targeted Averaging proposal is designed to meet the three objectives for any new form of income averaging. In order to achieve the first goal of focusing benefits on taxpayers hurt most by the annual accounting period, Targeted Averaging only permits averaging of three provisions of the Code specifically designed for low-income taxpayers: the EITC, standard deduction, and personal and dependent exemptions.[98] In addition, unlike past provisions, Targeted Averaging does not exclude taxpayers who would only receive relatively small benefits. Although some endorse such a strategy to reduce administrative costs,[99] it could instead increase costs by requiring an extra step to weed out claims for small dollar amounts, and experience with such limitations in the 1964 averaging provisions suggests that they tend to exclude the poorest taxpayers.[100] On the other hand, the proposal does exclude full-time students, dependents, and retirees. Most scholars advocate such restrictions because the personal income of such persons is not generally representative of their economic situation.[101] Finally, Targeted Averaging employs a

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[94] *See supra* notes 42–46 and accompanying text.

[95] I.R.C. §§ 32(b), 151 (2001).

[96] I.R.C. §§ 63(c), 151 (2001).

[97] *Id.*

[98] Restricting Targeted Averaging to the EITC was an option, but I included the standard deduction and personal exemptions as well to ensure some relief for lower-middle-income families and taxpayers without children because only 2.2% of EITC benefits go to the childless. Meyer & Holtz-Eakin, *supra* note 3, at 5 tbl.1.4.

[99] *Cf.* Schmalbeck, *supra* note 22, at 518–19 (arguing that since all incomes fluctuate to some degree, eliminating all fluctuation penalties is a cumbersome way to distribute a tax cut).

[100] *See infra* notes 80–83 and accompanying text.

[101] Klein & Wiegner, *supra* note 69, at 164 (noting that dependents and children were

two-year time frame in order to balance the goals of accuracy and simplicity.

Although the choice of time period is inherently arbitrary and easily could be three years, a short time period is simpler because it requires fewer calculations and records of income from past years. Moreover, two-year averaging probably can address most of the inaccuracies of the annual income measurement. Research by Moffit and Gottschalk suggests that most income volatility (which they term "transitory variance") is short-lived.[102] Three quarters of income volatility is gone after one year and nearly all after three to four years.[103] Accordingly, even if a longer period better represents ability to pay, each year after the first two should have a relatively small impact.

In addition to improving accuracy, Targeted Averaging addresses the second goal of cushioning downward income shocks through carrybacks, EITC averaging, and annual filing. As Lisa's example reveals, carrybacks provide tax benefits in relatively low-income years, whereas carryforwards provide benefits during upward fluctuations. Carrybacks do require taxpayers to recompute prior tax returns, but their countercyclical properties merit this complexity. The inter-temporal effects of EITC averaging are a bit more complicated but also provide a form of social insurance.[104] As illustrated in Figure 5, a family with exceedingly low income in year one, for example $6,000, will benefit from averaging in year two if it earns enough to bring its average income beyond the phase-in range of the EITC. Meanwhile, a family with low to moderate incomes in year one—for example $20,000 to $30,000—will benefit from the proposal in year two if its income falls, thereby bringing its average income into the range of a full or partial credit.[105] Essentially, Targeted Averaging strengthens incentives for families with weak labor force attachment to increase their work participation, while providing those who are probably working

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excluded from the 1964 averaging provisions because they realistically cannot be thought of as having zero income); Schmalbeck, *supra* note 22, at 523. The one-time downward fluctuation in income of retirees does not necessarily imply a lower standard of living because, to the extent that retirees live off of assets not qualified as a pension plan, they are only taxed on the assets' appreciation and likely at the lower long-term capital gains rates. I.R.C. §§ 1(h), 1001(a) (2001).

[102] William T. Dickens, *The Growth of Earnings Instability in the U.S. Labor Market: Comments and Discussion*, *in* 2 BROOKINGS PAPERS ON ECON. ACTIVITY 262, 265 (1994) (citing ROBERT MOFFITT & PETER GOTTSCHALK, TRENDS IN THE COVARIANCE STRUCTURE OF EARNINGS IN THE UNITED STATES: 1969–1987, 1001–93 (Inst. for Research on Poverty, Univ. of Wisconsin Discussion Paper, 1993)).

[103] *Id.*

[104] *See* Timothy M. Smeeding et al., *The EITC: Expectation, Knowledge, Use, and Economic and Social Mobility*, *in* MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICAN'S FAMILIES 311–14 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001). Many currently use the EITC as a form of social insurance. *Id.* Paying overdue bills, especially for utilities and rent, is the single largest form of use for the credit. *Id.* Many also save the EITC or use it to invest in education or transportation. *Id.*

[105] I.R.C. § 32(b) (2001).

full-time with some insurance against downward shocks. As such, it adjusts the traditional tension in the design of the EITC between creating work incentives and mitigating shocks in a modest way, but only for taxpayers who have been workers.

Targeted Averaging enhances social insurance further by maintaining annual filing. Although some commentators have argued that biennial filing under any income averaging provision would reduce compliance and administrative costs,[106] the EITC has already been criticized for not being responsive enough to changes in need because it operates on an annual time frame.[107] In addition, biennial filing probably would be simpler only if coupled with averaging of all income across two years, which this Article does not propose. For these reasons, delaying the receipt of needed tax relief for low-income taxpayers with volatile incomes is too steep a price to pay for biennial filing's potential minor reduction in administrative expenses.

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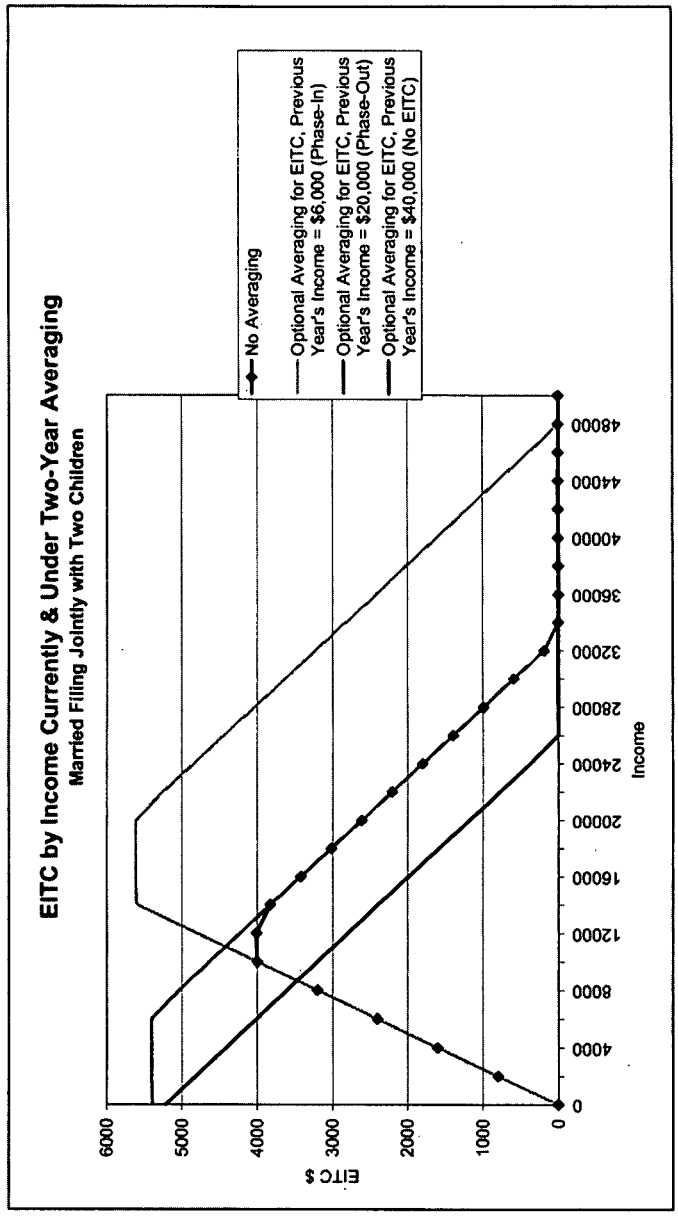
[106] Soled, *supra* note 7, at 36–37.

[107] Alstott, *supra* note 69, at 575–80 (arguing also that this mismeasurement of need is not large but not insignificant).

FIGURE 5



Finally, Targeted Averaging achieves the third objective of minimizing administrative and compliance costs through several elements beyond its two-year time frame. The proposal is restricted to taxpayers whose marital filing status does not change. Under the previous income averaging provisions in the Code, some of the most complex sections were

those allowing averaging across different marital statuses.[108] In addition, Targeted Averaging is elective. Although a compulsory provision would be more accurate by mandating that families return any fluctuation bonuses they receive, it would also force some people to average when compliance costs were greater than tax savings and even when averaging provided no savings at all.[109] Imposing such compliance costs is not warranted given that fluctuation bonuses are relatively small and rare[110] and that mandatory averaging could create severe liquidity crises during a recession.[111] Lastly, and most importantly, Targeted Averaging avoids complexity by focusing upon EITC recipients. Ironically, like most wealthy taxpayers, almost all EITC recipients employ tax preparers to negotiate the complexity of the credit. Only roughly 10% prepare their returns themselves.[112] As a result, the marginal compliance costs for these taxpayers who would benefit the most from Targeted Averaging should be relatively small, entailing only a few additional calculations or steps in a computer program.[113]

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[108] Ferguson & Hood, *supra* note 79, at 79. This element of the proposal should, however, be considered in more detail before enactment, in light of recent research finding that family income falls 30 to 45% the year after divorce but that the decline is substantially recouped within five years. MARIANNE E. PAGE & ANN HUFF STEVENS, WILL YOU MISS ME WHEN I AM GONE? THE ECONOMIC CONSEQUENCES OF ABSENT PARENTS 6, 17–18, 36 tbl.2 (Nat'l Bureau of Econ. Research, Working Paper No. 8786, 2002).

[109] David, *supra* note 17, at 276.

[110] *See supra* note 73 and accompanying text and Table 5 (in the Appendix).

[111] In Wisconsin compulsory averaging left many families with high tax liabilities and no current income after the Depression. David, *supra* note 17, at 278, 293. The Wisconsin experience highlights that the elective character of Targeted Averaging creates the potential for allowing some taxpayers with volatile incomes to pay less taxes than families with identical average incomes. Under Targeted Averaging, this is not the case. For example, if a married couple with two children earns $0 in even years and $12,000 in odd years, it will probably average in even years and choose not to average in odd years. One could calculate its EITC in even years then to be $2,400 on income of $6,000, and $4,008 in odd years on income of $12,000. I.R.C. § 32(b) (2001). Over time it would then receive more EITC benefits than a similar family earning $6,000 each year. This difference can be corrected easily by requiring that, when it files for averaging in even years, the amount of its EITC is the difference between its previous year's EITC and how much it would have received over the two years if its income did not fluctuate. As such, it would receive no more than a family with the same average income that does not fluctuate. In even years, it would receive $792, the difference between the $4,008 it received the previous year and the $4,800 it would receive if its income were $6,000. All simulations in this Article use this methodology.

[112] Romich & Weisner, *supra* note 19, at 376 (finding that 10% of EITC recipients completed forms themselves, 60% used commercial services, 15% relied on nonprofits or governmental assistance, and 15% relied on friends or relatives to whom they often paid a small sum of $15 to $20).

[113] Some may fear that the focus on EITC recipients may increase compliance costs given the historically high rates of non-compliance for the EITC. *See infra* note 148. For example, Targeted Averaging creates incentives for taxpayers to alternate $35,000 of reported income in one year with $30,000 of income "under the table" in the second year. This is unlikely to be a significant problem for two reasons. First, due to various reforms, EITC rates of non-compliance are now approaching those for the tax system in general. Jeffrey B. Liebman, *The Impact of the Earned Income Tax Credit on Incentives and Income Distribution*, *in* 12 TAX POLICY AND THE ECONOMY 83, 112 n.39 (James M. Poterba ed.,

Any outstanding concerns about the complexity of Targeted Averaging diminish further with a greater understanding of the types of complexity in the Internal Revenue Code and the efficacy of simpler options. As a preliminary matter, there are better and worse varieties of complexity and the forms that Targeted Averaging entails are among the most benign. Professor David Bradford distinguishes three types of complexity: "compliance complexity," which involves record-keeping and performing calculations; "transactional complexity," which includes the costs incurred in order to engage in tax-preferred behavior; and "rule complexity," which refers to the problem of interpreting written and unwritten rules.[114] Targeted Averaging, with its straightforward rules, should increase only compliance complexity, which imposes the least costs on administrators and taxpayers.

1998) [hereinafter Liebman, *EITC Impact*]. Second, historically the most common form of non-compliance among EITC recipients is, through error or fraud, claiming a child who is not one's own or who does not live with the taxpayer for the majority of the year. Jeffrey B. Liebman, *Who Are the Ineligible Earned Income Tax Credit Recipients?*, *in* MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICAN'S FAMILIES 274, 277–78 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001) [hereinafter Liebman, *Ineligible EITC*]. There is little evidence of complicated forms of fraud such as manipulating one's earnings in order to maximize the credit. *See* Liebman, *EITC Impact*, *supra*, at 105–08.

[114] DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 266–67 (1986).

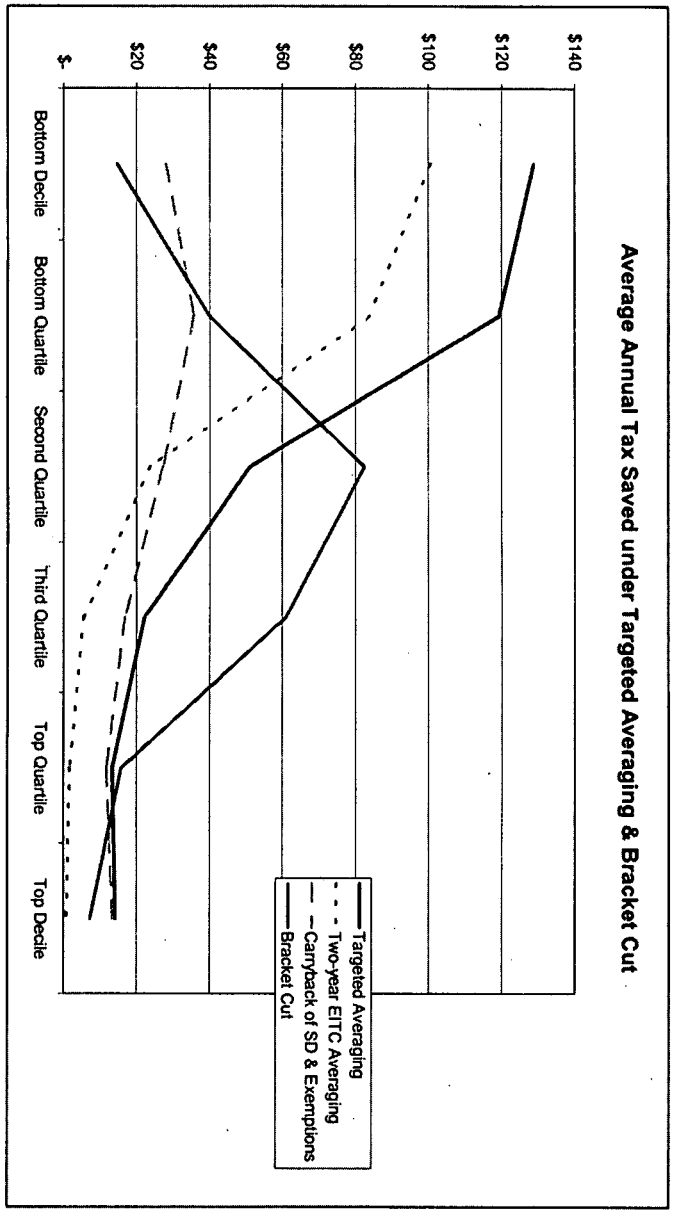

FIGURE 6

Furthermore, if one objects to the overtaxation of low-income families under annual income measurement, the real question is whether there are simpler options that still address the problem. The most obvious alternative is to provide relief by increasing the progressivity of the annual rate structure instead. Accordingly, as the next Section turns to estimating the specific impact of Targeted Averaging, it consistently compares

the predicted effects of Targeted Averaging with the predicted effects of cutting the first tax bracket from 10% to 9%, a proposal with roughly the same monetary cost as Targeted Averaging.[115]

B. Accuracy Improvements Under Targeted Averaging and a Bracket Cut Compared

Although a bracket cut would be simple, it would not be a solution to the inequities caused by the taxation of annual income. In order to assess the relative merits of Targeted Averaging and a bracket cut, the same model and sample of families over ten to twenty-five years was used when analyzing the burdens of annual income measurement.[116] These simulations reveal that, while Targeted Averaging directly and effectively addresses the burdens of taxation of annual income, a bracket cut would help little and might instead exacerbate such burdens.

As Figure 6 (and Table 6 in the Appendix) illustrates, the EITC component of Targeted Averaging is strongly progressive, providing much less relief to the second quartile and virtually none to the top half of the income distribution. Because the annual accounting period burdens all families, albeit low-income families the most heavily, EITC averaging alone may be underinclusive by remedying the effects of the annual accounting period only for low-income families eligible for the EITC. The second component of Targeted Averaging balances out the proposal and is more broad-based. Permitting taxpayers to carry back unused standard deductions and personal and dependent exemptions for one year provides mildly progressive but fairly equal benefits across the remainder of the income distribution. When these two components are combined, the bottom decile would receive a rebate of roughly $130 on average per year, whereas the top decile would receive only $14. Thus, like lifetime averaging, Targeted Averaging offers the most relief to low-income families and some benefits for all. In sharp contrast, a bracket cut directs the bulk of its benefits to the middle class and provides very small benefits to low-income families—an average of only $15 per year for families in the bottom decile—because the percentage reduction has less of an effect on smaller incomes.

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[115] As a very rough approximation, both proposals should cost about 0.7% of individual income tax revenues or $6 billion if implemented in the 2003 tax year. *See* CONG. BUDGET OFFICE, CURRENT BUDGET PROJECTIONS (2003) (estimating $869 billion in individual income tax revenues for 2003), *available at* http://www.cbo.gov/showdoc.cfm?index=1944&sequence=0 (last visited Mar. 30, 2003). Explanations of these cost estimates are in the Appendix.

[116] *See supra* note 70 and accompanying text.

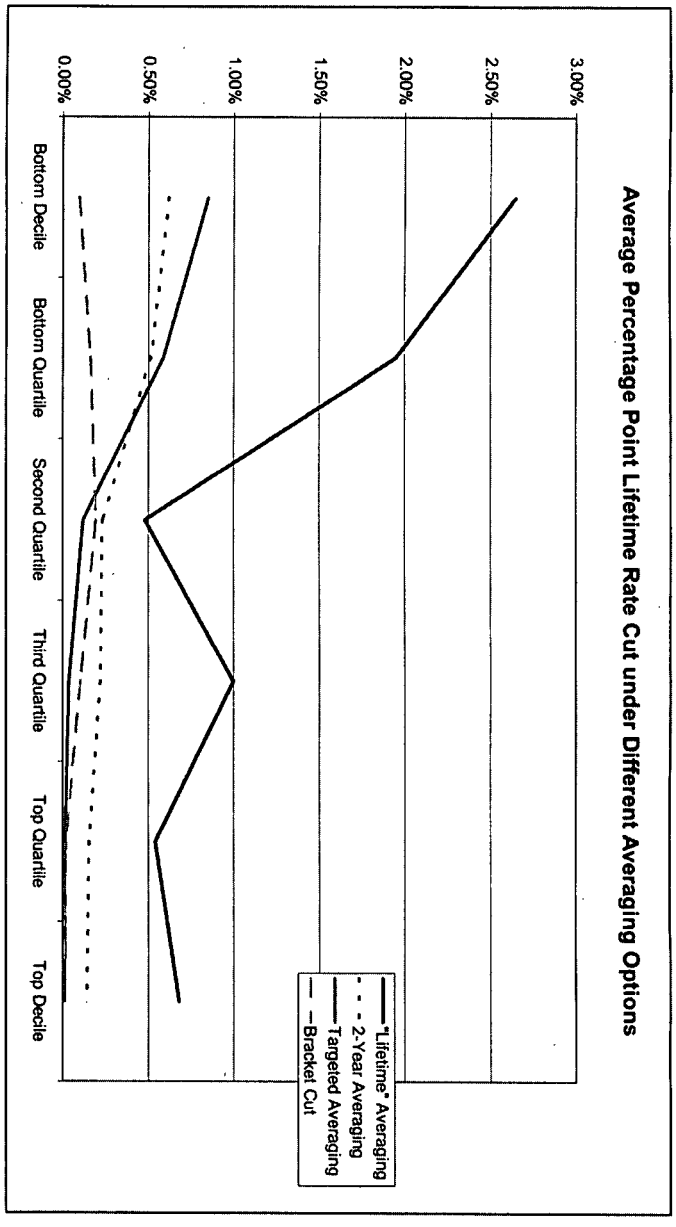

FIGURE 7

The ultimate benchmark for assessing the two alternatives, however, is not the dollar value of benefits but how well the average rate cuts families receive under each alternative mirror the average rate cuts they would receive from averaging all income over a longer period. To this end, Fig-

ure 7[117] (and Table 4 in the Appendix) examines which sections of the income distribution benefit the most from each option and how this compares to a comprehensive "lifetime" averaging program over ten to twenty-five years. As demonstrated, Targeted Averaging is substantially more progressive than a bracket cut and the distribution of its benefits more closely tracks that of long-term averaging, though at a lower level because of its shorter averaging period.

Like lifetime averaging, Targeted Averaging cuts the average lifetime tax rate of families in the bottom decile of average income the most, by roughly 0.9%. Although it does not provide proportionately as many benefits to the third quartile and bottom decile as lifetime averaging would, lifetime averaging and Targeting Averaging otherwise provide a roughly similar distribution of benefits.[118] By contrast, a bracket cut reduces the average tax burden on the bottom decile by only 0.1%. A bracket cut counterproductively provides relatively greater benefits to the top three quartiles whose income is more stable.

Underlying these general figures is an important difference that further strengthens the case for Targeted Averaging. While the benefits received under a bracket cut are distributed fairly evenly within each income class, under targeted and lifetime averaging they are not—averaging directs relief only to the specific families experiencing fluctuation penalties.

As Table 7 (in the Appendix) shows, many families in each category of the income distribution actually receive no benefits under targeted and lifetime averaging, while others, whose income is more volatile, receive quite sizable benefits. For example, 5% of families in the bottom decile receive an average annual tax cut of over 3.8 percentage points (more than $575) under Targeted Averaging, and 10% of families in the bottom quartile receive a cut of over 1.6 percentage points (more than $350).[119] Considering that these groups' average lifetime tax rates are –2.6% and 0.2% respectively,[120] these cuts are substantial. They are even greater if one does not look at each family's average long-term tax rate but rather at the change in its tax rate in a specific year when the family experienced an income shock. Conversely, a bracket cut does not provide a single family with a rate cut of more than 0.5 percentage points and provides no specific relief to a family that has suffered fluctuation penalties.

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[117] The average lifetime rate cut as employed in this Article is the difference between (1) the sum of taxes paid calculated on annual income divided by lifetime income and transfers, and (2) the sum of taxes paid calculated on average income divided by lifetime income and transfers.

[118] In Figure 7, the slope of the Targeting Averaging and lifetime averaging lines are roughly consistent except for the third quartile and bottom decile.

[119] *See* Table 7 (in the Appendix).

[120] *See* Table 4 (in the Appendix).

The improved accuracy of Targeted Averaging is perhaps best captured by examining the correlation[121] between the effective rate cuts that families would receive under lifetime averaging and the two alternatives. The results are striking. The rate cuts families receive under Targeted Averaging are strongly correlated, at .57, with those they would receive in an ideal world of lifetime income averaging. The correlation between the average rate cuts families receive under a bracket cut and lifetime income averaging is small and negative, at –.06. As discussed, this negative relationship occurs because a bracket cut provides greater benefits to the middle class than to the poor, while the incidence of the benefits of lifetime averaging is the reverse. In short, a bracket cut would ignore or exacerbate the burdens imposed by annual income measurement on the poor, while Targeted Averaging would effectively redress this burden.[122]

C. Incentive-Related Benefits

Targeted Averaging offers additional rewards beyond correcting the distortions of annual income measurement. Theoretically, it could heighten economic risk-taking, thereby improving economic outcomes. More importantly, it should strengthen incentives to work and take economic risks and promote individual choice in structuring one's pattern of employment.

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[121] Correlation is a mathematical measure of the degree to which two variables move in the same direction from their mean. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMETRIC MODELS & ECONOMETRIC FORECASTS 22 (3d ed. 1991). Because it is normalized and scale-free, it can correct for the fact that lifetime averaging provides far more benefits overall, and costs far more, than either alternative. These correlations were derived from Table 4 (in the Appendix).

[122] Interestingly, Targeted Averaging is not only better targeted to the burdens of annual income measurement than a bracket cut but it also appears to be better targeted than some more comprehensive averaging alternatives. For example, when a two-year model that averaged all income was employed, the correlation between it and lifetime averaging is actually lower, at .48, than that between lifetime averaging and Targeted Averaging. The correlation is derived from Table 4 (in the Appendix). Figure 6 suggests that this occurs because full two-year averaging delivers proportionately smaller benefits to the families in the bottom quartile. The weaker accuracy of full two-year averaging may be due to higher-income families' income fluctuating more in smaller increments and low-income families' income fluctuating more in longer cycles, a hypothesis that this Article does not examine. If these two suppositions are correct, then low-income families would not benefit as much from averaging restricted to two-year periods, a phenomenon for which Targeted Averaging partially corrects by limiting averaging to Internal Revenue Code provisions that disproportionately benefit low-income families. This explanation seems plausible if one imagines that the source of income volatility for high-income families tends to be a windfall in business profits or a large bonus one year, while the source of fluctuations for low-income families is more often losing a relatively well-paying union job to a plant closing and, for several years thereafter, finding only part-time or less lucrative employment. It also seems to run counter to the findings that low-income families experience higher volatility in general. Another possible explanation is the use of slightly different denominators in calculating average tax rates under Targeted Averaging and two-year averaging. *See infra* note 166. Regardless of the cause, this finding suggests that one may actually achieve more accurate income measurement under Targeted Averaging than under more comprehensive alternatives, despite the greater complexity of the latter.

These potential effects of Targeted Averaging assume that low-income families alter their behavior in response to changes in tax policy. Experience with the EITC suggests this assumption is plausible if a policy change effected through a new Internal Revenue Code provision is sustained over time.[123]

Promoting economic risk-taking is widely considered a desirable goal,[124] especially because people tend to be risk averse.[125] Risk-taking is associated with individual wage growth.[126] For instance, one study found that those willing to take above average risks have expected three-year wage growth of 10.8% versus that of 5.2% for the risk averse.[127] Yet, by imposing fluctuation penalties, the taxation of annual income currently creates incentives for low-income families to secure jobs with stable earnings (beyond the general benefits associated with a stable income), even if more lucrative but riskier opportunities exist. As such, theoretically it should compound low-income families' tendency to be more risk averse than the general population and experience depressed wages as a result.[128] Although the magnitude of this effect is uncertain because it is not clear either whether low-income taxpayers understand fluctuation penalties or how strongly they respond to them,[129] over time Targeted Averaging may, at the margin, lead to increased wages for the poor.

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[123] *See infra* note 134 and accompanying text.

[124] *E.g.*, Evsey D. Domar & Richard A. Musgrave, *Proportional Income Taxation and Risk-Taking*, 58 Q. J. ECON. 388, 391 (1944) ("There is no question that increased risk taking . . . is highly desirable.").

[125] *See, e.g.*, Michael Haliassos & Carol C. Bertaut, *Why Do So Few Hold Stocks?*, 105 ECON. J. 1110, 1111 tbl. 1 (finding that almost 70% of individuals in the lowest income quartile are unwilling to trade risk for higher expected returns, a percentage that declines to 6% as income rises).

[126] Kathryn L. Shaw, *An Empirical Analysis of Risk Aversion and Income Growth*, 14 J. LAB. ECON. 626, 626, 641–42 (1996) (finding that individual wage growth is positively and significantly correlated with preferences for risk-taking and that the average risk taker earns 23% more than non-risk-takers, controlling for other factors).

[127] *Id.* at 636.

[128] LINDA F. ALWITT & THOMAS D. DONLEY, THE LOW-INCOME CONSUMER: ADJUSTING THE BALANCE OF EXCHANGE 89–90 (1996) (noting studies indicating that the percentage of people who gamble is positively correlated with income, though poor people who do gamble spend a larger proportion of their resources); Haliassos & Bertaut, *supra* note 125, at 1111 tbl. 1 (1995) (finding that approximately 65% of individuals in the lowest income quartile are unwilling to trade risk for higher expected returns, a percentage that declines almost perfectly to 6% as income rises); Shaw, *supra* note 126, at 626 (noting that more educated workers are more likely to be risk takers).

[129] The closest evidence from corporate behavior suggests that tax incentives to hedge risk are likely to induce behavioral responses. *See* Deana Nance et al., *On the Determinants of Corporate Hedging*, 48 J. FIN. 267, 267, 280 (1993) (finding cautious evidence that firms that hedge face more progressive tax functions). *Cf.* John R. Graham & Clifford W. Smith, Jr., *Tax Incentives to Hedge*, 54 J. FIN. 2241, 2250–52 (1999) (using simulations to estimate the tax savings firms receive by hedging); Clifford W. Smith & Rene M. Stultz, *Determinants of Firms' Hedging Policies*, 20 J. FIN. & QUANTITATIVE ANALYSIS 391, 391 (1985) (noting that small-to-medium-sized firms have the largest tax incentives to hedge). *But see* Schmalbeck, *supra* note 22, at 534 ("It cannot be seriously maintained that income averaging significantly affects the overall characteristics of the income tax with respect to

More importantly, Targeted Averaging should enhance work incentives amidst recent and rapid changes in the employment paradigm. As discussed, income volatility is increasing and, partly linked to this trend, contingent, part-time, and temporary work have increased dramatically.[130] In the face of these broad shifts, however, social policies designed to strike a balance between creating incentives for work and providing insurance for shocks have not adjusted. Unemployment insurance, for example, was designed in a different era to support employment in traditional, long-term jobs and is reaching fewer and fewer low-wage workers.[131] Even tax-based programs designed to enhance work incentives, like the EITC, are best suited for the working poor receiving low wages consistently rather than receiving moderate wages intermittently. The result is that well-intentioned programs designed to support the working poor in a different era no longer function effectively.

In this new environment, making work pay requires not only enhancing earnings when they are received but also, as Targeted Averaging does, during the frequent periods of unemployment that typically accompany low-wage work. Some critics may object that Targeted Averaging undermines the incentives to work provided by the EITC's minimum income requirements,[132] but instead the reverse is true. For example, Figure 5, which charts current year EITC benefits based on prior year income under current law and under Targeted Averaging, appears to show diminished incentives to work. Unlike the situation under current law, under Targeted Averaging, a family with two children that earned $40,000 in the previous year would receive a relatively large tax refund if its current year income was $0, a refund that would shrink if its income were higher. Upon closer inspection, however, Targeted Averaging only creates work disincentives if one assumes the family does not plan beyond a year. When viewed from a two-year perspective, the benefits and incentives of the EITC under Targeted Averaging are identical to those under current law. Thus, if one agrees that taxpayers' economic horizons are longer than annual, Targeted Averaging should entail no new work disincentives at all.

Instead, Targeted Averaging should enhance existing work incentives. Only families that have worked in the previous year are eligible for the benefits of Targeted Averaging. As a result, it encourages low-income

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stabilization and growth of the economy.").

[130] *See supra* note 20. The rise in contingent, part-time, and temporary work has been, to some extent, involuntary and, to some extent, driven by increased demand for new work arrangements by the vast numbers of women who have entered the labor force. *See generally* Francine D. Blau, *Trends in the Well-Being of American Women, 1970–1995*, 36 J. ECON. LIT. 112 (1998). Female labor force participation rose from 49% in 1970 to 72% in 1995. *Id.* at 118 tbl. 1A.

[131] Gillian Lester, *Unemployment Insurance and Wealth Distribution*, 49 UCLA L. REV. 335, 336 (2001). The percentage of unemployed persons receiving unemployment insurance has declined by about 40% since the 1950s. *Id.* at 337.

[132] I.R.C. § 32 (2001).

families relying on social programs to join the labor force.[133] In addition, low-income families experience among the lowest returns to work currently because their earnings are the most volatile in general and volatile earnings decrease the value of work for risk-averse people. Targeted Averaging's heightened work incentives, therefore, address this disincentive to work prevalent in low-income families. Moreover, experience with the EITC suggests that, while its beneficiaries generally do not understand the mechanics of the program or even its existence, they do understand that the value of their working has increased and have increased their work participation quite strongly as a result.[134] Accordingly, it is likely that Targeted Averaging will increase work participation among low-income families over time by mitigating the disproportionate work disincentives that involuntary income volatility impose on the poor.

Finally, beyond "making work pay," ultimately Targeted Averaging should also promote individual liberty because, by eliminating tax penalties on income fluctuations, it would provide low-income families with the opportunity to affirmatively structure the pattern of their earnings without being penalized by the government. Currently, the Internal Revenue Code permits high-income families to engage in elaborate tax planning strategies, some of which theoretically reduce their effective tax rate to zero,[135] while low-income taxpayers have no similar opportunities because labor income is less amenable to tax planning than investment income. Although Targeted Averaging does not open up new avenues for abuse,[136] it would permit low-income taxpayers to seize their best opportunities and make simple decisions about their lives that the more privileged take for granted. For example, under Targeted Averaging, a low-income taxpayer could hold out for a good job, take a higher-paying job with a less stable employer, or temporarily reduce his or her hours after the birth of a child, all with no further penalty than lost wages relative to a worker with the same average earnings. In sum, Targeted Averaging

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[133] As with the EITC as currently structured, Targeted Averaging should unambiguously increase labor force participation among unmarried people not currently working. Liebman, *EITC Impact*, *supra* note 113, at 97. Theoretically, its effect on the number of hours worked depends on the relative strength of the income and substitution effects. *Id.* at 102–04. Previous research on the EITC suggests that it has little effect on the hours of primary earners, while more general work on labor supply suggests that secondary earners may substitute leisure (or child care) for work in response. *See generally* Liebman, *EITC Impact*, *supra* note 113. There is little direct evidence on the magnitude of the effect for secondary earners. *Id.* at 102–04.

[134] Professor Jeffrey Liebman has found that the expansion of the EITC in 1986 caused approximately 10% of persons who were previously not in the labor force to start working and notes that his results imply that the EITC was responsible for 59% of the increase in labor force participation between 1984 and 1996. *Id.* at 98–101 fig.6.

[135] *See, e.g.*, Douglas A. Shackelford, *The Tax Environment Facing the Wealthy*, *in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 114, 114–27 (Joel Slemrod ed., 1999) (summarizing tax planning strategies available to wealthy taxpayers that permit them to choose effective rates between 0% and 91%).

[136] *But see supra* note 113.

would not only rectify existing inaccuracies in income measurement, it would also increase individuals' freedom to determine for themselves what constitutes "making work pay" and "working with dignity," thereby adapting existing programs of social insurance to America's new family patterns and occupational paradigms.[137]

III. CONCLUSION

This Article has documented the greater income volatility facing low-income families relative to their more affluent counterparts, identified the heavier burdens taxation of annual income imposes upon them, and proposed Targeted Averaging as a response. Targeted Averaging addresses a hidden burden upon the poor: their overtaxation under annual income measurement. It also should yield other benefits, such as adapting the work incentive and social insurance features of the EITC to the changing and increasingly contingent nature of work.

The Article has not considered, however, how Targeted Averaging compares with other potential policies designed to achieve these objectives that do not operate exclusively through the tax system. Accordingly this Conclusion offers a few thoughts in this direction and some broader reasons why, at this time, addressing the insecurity engendered by income fluctuations is so imperative.

If one's primary goal is mitigating the burdens of income instability, the two traditional responses are unemployment insurance ("UI") and welfare. Both programs theoretically could offer an equal or stronger response to income instability if thoughtfully reformed. Welfare is commonly thought of as the paradigmatic safety net. UI was originally intended as a mechanism for smoothing workers' income over time, given the difficulties of borrowing against future earnings and the stigma of welfare.[138] As such, expanding welfare to cover workers without requiring asset depletion, or extending UI coverage to more low-wage workers with shorter employment tenures seems a logical alternative to Targeted Averaging.[139]

On both structural and pragmatic grounds, however, UI and welfare are less attractive options. Several structural features of UI militate against

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[137] *Cf.* Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 971, 980 (1999) (arguing that liberalism implies giving primacy to individuals' decisions about their own lives and that unconditional cash grants would allow the poor greater freedom to structure their working lives to meet personal and family needs).

[138] Lester, *supra* note 131, at 341.

[139] For example, Professors Michael Graetz and Jerry Mashaw have proposed expanding coverage for UI through relaxed eligibility requirements and inclusion of 100% of the wage base to address the dramatic declines in UI coverage. GRAETZ & MASHAW, *supra* note 41, at 199. In 1947, 80% of workers in covered employment received UI benefits during spells of unemployment. *Id.* at 76. By 1995, the proportion had fallen to only 38%. *Id.*

using it to cushion income shocks among low-income families.[140] First, since UI is based on individual wages and not family income,[141] expanding UI would bring in many young adults and secondary earners in households where the primary earner is affluent, benefiting those who are not particularly needy. Perhaps more importantly, because UI is only available for the unemployed[142] it inherently excludes many low-income families whose earnings fluctuations were not triggered by involuntary job loss but, for example, by involuntary job changes or child care needs.[143] As a result, expanding UI would be both overinclusive and underinclusive.[144] Moreover, unless the funding base for UI is changed, it could have the perverse effect of hurting those it strives to help. Because UI is funded by a tax on employment,[145] it reduces employers' incentives to invest in labor relative to capital and, in the long run, could potentially reduce employment, wages, and benefits for low-income workers.

In contrast to UI, welfare historically has been well-targeted on those in need, examining not only family income but also assets before granting benefits. It thereby sidesteps some of the overinclusivity of UI. Although welfare has also been essentially contingent on unemployment, one could imagine a new welfare program to subsidize households with low, volatile earnings. In addition, as Professor Anne Alstott has argued, welfare can more accurately measure need than the EITC or the tax system in general because it includes a more comprehensive definition of income and responds more quickly to changes in earnings.[146] Moreover, such a program could entail less non-compliance[147] than Targeted Averaging—Professor Jeffrey Liebman's work suggests that traditional transfer programs have lower official non-compliance rates than the tax system, although their administrative costs for government and beneficiaries are much higher.[148]

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[140] *See* 42 U.S.C. §§ 501–504, 1101–1108 (1994 & Supp. V 1999); 26 U.S.C. §§ 3302, 3304 (1994 & Supp. V 1999).

[141] *See* 42 U.S.C. §§ 501–504, 1101–1108 (1994 & Supp. V 1999); 26 U.S.C. §§ 3302, 3304 (1994 & Supp. V 1999).

[142] *See* 42 U.S.C. §§ 501–504, 1101–1108 (1994 & Supp. V 1999); 26 U.S.C. §§ 3302, 3304 (1994 & Supp. V 1999).

[143] Lester, *supra* note 131, at 338.

[144] *Id.* at 338, 377.

[145] *See* 42 U.S.C. §§ 501–504, 1101–1108 (1994 & Supp. V 1999); 26 U.S.C. §§ 3302, 3304 (1994 & Supp. V 1999).

[146] Alstott, *supra* note 69, at 575.

[147] Non-compliance is a technical term for the percentage of recipients under a program who receive benefits to which they technically are not entitled under ther rules of the program. Non-compliance can be due fraud or mistake on the part of the recipient or the program administrator.

[148] *See* Liebman, *Ineligible EITC*, *supra* note 113, at 274, 292, 296 n.35 (noting that roughly 21% of EITC payments are made in error, compared to officially 6% for AFDC); Liebman, *EITC Impact*, *supra* note 113, at 111 (noting that the administrative costs of AFDC are 16% of benefits paid, while those of the EITC are roughly 1%). Liebman is, however, suspicious of the official non-compliance rates (rates of fraud) for welfare programs. Liebman, *Ineligible EITC*, *supra* note 113, at 293 n.3, 296 n.35. *See also* KATHRYN

Despite these advantages, however, the case for a new form of welfare is less compelling when one's focus is, as here, upon addressing the new burdens imposed upon the working poor by the taxation of annual income. Unlike welfare, Targeted Averaging does not entail dignitary and expressive harms and would likely boast much higher participation rates among families who are eligible.[149] Moreover, it does not require families to exhaust their assets, which can have long-term implications for their economic well-being.[150] Further, pragmatically, tax-based social policies are easier to enact because decisions to forego potential revenue tend to draw less public attention than direct expenditure programs, especially given the hostile attitude toward welfare in the current political climate. Finally, only Targeted Averaging can directly target the overtaxation engendered by annual income measurement. For all these reasons, Targeted Averaging is a superior response.

In the end, however, this Article does not seek to criticize welfare or UI, but rather to take seriously the question of what social policies best address the insecurity that income instability generates, precisely because this question is so crucial at this moment. The uncertainty of the current recession[151] heightens all Americans', especially vulnerable low-income families', economic insecurity.

In addition, while the United States experienced sustained economic growth during the 1980s and 1990s, that growth was not widely shared: 47% of the total real income gain accrued to the top 1% of income recipients and only 12% to the bottom 80% of income recipients.[152] The income gains the poor did reap were less valuable to them because they entailed greater instability. Moreover, it is possible that much of the economic growth that did occur was largely driven by structural changes—such as deregulation, increasing trade, more flexible labor markets, and closer links between

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EDIN & LAURA LEIN, MAKING ENDS MEET 150 tbl.6-1, 172–78 (1997) (documenting how 46% of welfare reliant mothers engage in unreported or underground work to supplement their incomes). The non-compliance rate for the EITC may also have fallen in the wake of recent reforms. *See* Liebman, *EITC Impact*, *supra* note 113, at 115–16.

[149] Only 66% of AFDC-eligible families receive AFDC, while between 80% and 86% of EITC-eligible families receive the EITC. Liebman, *EITC Impact*, *supra* note 113, at 109.

[150] *See, e.g.*, COMMUNITY REINVESTMENT ASS'N OF N.C., *supra* note 39 (discussing the high interest rates charged to families without assets to use as collateral); DEBORAH PAGE-ADAMS & MICHAEL SHERRADEN, WHAT WE KNOW ABOUT EFFECTS OF ASSET HOLDING 2–4 (Washington Univ. Ctr. for Social Dev., Working Paper No. 96-1, 1996) (reviewing studies finding a positive relationship between assets and objective economic security, life satisfaction, self-efficacy, social status, and child self-esteem and education).

[151] *See, e.g.*, Paul Blustein, *War Spurs Fears of Another Recession; Some Economists Discount Worries*, WASH. POST, Mar. 28, 2003, at E01 (stating that "[t]he world's major economies have been sluggish for some months, and although that may be partly attributable to the lingering effects of the bursting of the stock market bubble, nervousness about the ramifications of the war is undoubtedly contributing to the low level of consumer confidence, a falloff in home sales, and reluctance among corporations to invest in plants and equipment).

[152] EDWARD N. WOLFF, TOP HEAVY 37 (2002).

pay and individual and firm performance—that simultaneously compounded low-income families' economic insecurity.[153] Given these structural trends in the United States economy, tax policy should reflect compassion for the hard-working low-income Americans who are experiencing income instability. Furthermore, if the fruits of the "new economy" are built upon a rise in earnings volatility for such Americans, those who benefit the most from the "new economy" must bear some responsibility for mitigating the increasing economic uncertainty that low-income Americans face. Targeted Averaging offers this potential. It simultaneously would provide a degree of economic security for the working poor with volatile incomes and affirm the legitimacy of the changing economic system by helping to ensure that its benefits are spread among all Americans.

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[153] *See* ALAN B. KRUEGER & JORN-STEFFEN PISCHKE, OBSERVATIONS AND CONJECTURES ON THE U.S. EMPLOYMENT MIRACLE 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 6146, 1997) (arguing that labor market flexibility in the United States contributed to its strong job growth relative to European countries but is not the sole explanation); DOUGLAS KRUSE & JOSEPH BLASI, EMPLOYEE OWNERSHIP, EMPLOYEE ATTITUDES, AND FIRM PERFORMANCE 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 5277, 1995) (finding substantial growth in employee ownership over the past twenty years and a positive association between employee ownership and firm performance); R. Scott Hacker, *The Impact of International Capital Mobility on the Volatility of Labor Income*, 34 ANNALS REGIONAL SCI. 157 (2000) (developing a model under which higher levels of trade generate increases in workers' income volatility); Jeffrey D. Sachs & Andrew M. Warner, *Fundamental Sources of Long-Run Growth*, 87 AM. ECON. REV., May 1997, at 184, 187 (finding that growth is significantly correlated with open economies).

APPENDIX

A. Data Sources and Methodology

1. Data Sources

All empirical analysis in this Article is based on data from the Panel Survey of Income Dynamics ("PSID"), a longitudinal survey of a representative sample of individuals and families in the United States.[154] The data was collected annually between 1968 and 1997 and biennially starting in 1999. The PSID has only released income information through 1993. My sample is confined to 1968 to 1992 because data on income relates to the past calendar year. It is weighted to represent the United States population in 1968. The other main longitudinal survey of United States families is the National Longitudinal Survey ("NLS") series.

I selected the PSID for four reasons. First, the NLS surveys track specific cohorts and therefore are not representative of the entire population at a given point in time.[155] This could bias the results of tax simulations and variance regressions due to the aging of the sample. Second, the NLS surveys start and stop in different years, several become biennial rendering them less useful for estimating income volatility patterns, and the longest one includes only twenty years of data instead of twenty-five under the PSID.[156] Third, both the PSID and NLS have patchy data on exemptions, dependents and filing status so, as I will discuss, I had to impute these variables with either survey. Finally, the PSID has generally been the choice of other studies of income volatility and lifetime taxation in the United States.[157] One relative strength of the NLS surveys is their fairly consistent data on whether an individual was a dependent. This advantage, however, did not seem to outweigh its other shortcomings.

2. Income Measure

Unfortunately, no publicly available survey tracks ordinary income of individual families over time as defined by the Internal Revenue Code, and therefore one must choose between second best options. Ultimately I selected the PSID variable for "taxable income" (which should not be

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[154] Longitudinal or panel data surveys the same set of individuals or families at set periods over time. The more common alternative is to survey a different snapshot of individuals or families in each period.

[155] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NLSY79 USER'S GUIDE 3 tbl.1.1.1 (1999), *available at* http://www.bls.gov/nls/79guide/1999/nls79g0.pdf.

[156] CTR. FOR HUMAN RESOURCE RES., OHIO STATE UNIV., NLS OF MATURE WOMEN USER'S GUIDE 5 (2001).

[157] *See, e.g.*, FULLERTON & ROGERS, *supra* note 23; Gottschalk & Moffit, *supra* note 10; Stevens, *supra* note 10.

confused with the term of art) [158] as the unit of analysis. This variable includes income from wages, overtime, bonuses, professional practice, unincorporated businesses, renters, dividends, interest, royalties and alimony. It excludes income from transfers, capital gains, inheritances, and other lump sum windfalls such as large insurance settlements. As such, it should track ordinary income almost exactly for all families except high-income families with complicated returns. The other two options were focusing on labor income or taxable income plus lump sum payments. I decided against the latter because it could include a substantial amount of income subject to preferential capital gains treatment. Similarly, the former seemed less pertinent since its definition of income is narrow and involved some questionable imputations of, for example, unincorporated business income between its labor and asset portions. I did try analyzing income volatility using the labor income variable and obtained directionally similar results.

One important drawback to the PSID is its top coding of a variety of income variables in certain years and its bottom coding of income at zero in others.[159] This dampens income variance at the bottom and top of the distribution. I was not able to correct for bottom coding because I could not differentiate between those with no income and those with negative income.[160] I corrected for top coding by recoding all top coded data to the mean taxable income of taxpayers earning above the top coded amount for that year, as reported in the Internal Revenue Service ("IRS") *Statistics of Income*.[161] The number affected in any given year was small, peaking between 0.2% and 0.4%.

3. Methodology for Income Volatility Analysis

In order to assess income volatility patterns over time, I examined the standard deviation of families' income normalized to their average income (also known as the coefficient of variation) over six-year increments. In order to prevent differences in the age distribution of, for example, the first quartile and fourth quartile, from biasing the results, I confined the sample to families with heads aged forty-four to forty-nine at the beginning of each period. This choice was based on the fact that age-earnings trajectories tend to be flattest in one's late forties.[162] My re-

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[158] I.R.C. § 63 (2001).

[159] Topcoding, for example at 999, means that any variables with actual values above that number are entered as 999.

[160] For consistency I did recode negative income as zero in years that the PSID allowed the variable to be negative.

[161] *See generally* INTERNAL REVENUE SERV., PUB. NO. 1304, STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS 1999 (Oct. 2001), *available at* http://www.irs.gov/pub/irs-soi/99indtr.pdf.

[162] *See* FULLERTON & ROGERS, *supra* note 23, at 117 tbl.4-2.

sults did not change substantially if I used larger age brackets or ones slightly earlier or later in life.

The regressions in Table 3 (in the Appendix) require further explanation. They are based on the normalized standard deviation of the natural log of income. Mathematically, when a family has earnings in only one of the six years this variable is necessarily the same regardless of its income level. Thus there was a spike in the variable's distribution. My findings, however, did not change appreciably when I confined the sample to families with income in at least two of the six years. The results also did not change directionally when I used the log of this variable and employed a Heckman selection model[163] to correct for the selectively of the data.

4. Methodology for Tax Simulations

The sample for the tax simulations in this Article is different from the above. Instead I limited the sample to families for whom I had income data for all twenty-five years. Next I identified their most common imputed filing status, and recoded income as missing in years in which they had a different filing status or in which the heads were under eighteen years of age or over sixty-five. Finally, I confined the analysis to families for whom I had at least ten continuous years of income data, given these restrictions. I tried several simulations using NLS data and obtained roughly similar results.

In estimating tax burdens, several PSID variables were not ideal for my purposes. From 1968 to 1977, the PSID defines a "wife" as a woman cohabiting with the head of the household for more than one year and does not distinguish whether the head and the woman are legally married or not. In those years I assumed all "wives" and "heads" were married. In addition, although the PSID has at times included questions about dependents, exemptions and filing status, this data is not always consistent with itself or with my imputations of these variables where they were absent. As a result and for consistency, I decided to impute all three variables. Dependents and exemptions are the number of children of the head age eighteen and under. Filing status is based on whether the head is married and has any children eighteen and under.[164] Families' EITC benefits

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[163] For an explanation of the Heckman selection model, see JACK JOHNSTON & JOHN DINARDO, ECONOMETRIC METHODS 447–449 (4th ed. 1997).

[164] I assume that no families file as "married filing separately" due to the generally adverse effects upon their joint tax burden under this filing status. *See* Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145, 150 n.9 (1998). "Children" includes children, step-children, children-in-law, foster children, adopted children, grandchildren and great grandchildren. It does not include the children of a "wife" who is not legally married to the "head," when I could differentiate. For 1968 it also includes nieces, nephews and other relatives under eighteen because they were grouped with grandchildren.

are calculated based on how many children of the head are age eighteen and under and reside in the household and whether the head meets the EITC age requirements. Families' CTC is based upon how many such children are age sixteen and under.[165] Using these variables, I then calculated each family's tax burden under 2001 law for the brackets, standard deduction, personal and dependent exemptions, EITC, and CTC. The cost estimates are based on the percentage by which the mean annual taxes paid under each alternative differ from the mean annual taxes paid under current law.

The critical variable upon which I focus is the "average lifetime tax cut" under different proposals. This is the difference between a family's "average lifetime tax rate" under annual accounting and each of the four alternatives I examine: lifetime averaging, two-year averaging of all income, Targeted Averaging, and a bracket cut. "Average lifetime tax rate" is the sum of a family's estimated taxes paid under each specification (and over the ten to twenty-five years for which I have data on them) divided by the sum of the family's income and transfers over those years.[166] Thus, if Heidi's "average lifetime tax rate" under annual accounting is 10% and her "average lifetime tax rate" under Targeted Averaging is 9%, the "average lifetime tax cut" that she received due to the proposal would be 1%.

The above definition of "average lifetime tax cut" is based on two important decisions. First, I considered looking at the percentage reduction in taxes instead of the rate cut. In the previous example Heidi's percentage cut would be 10% (1%/10%). This option seemed misleading. As Table 7 (in the Appendix) shows, many low-income families currently have an average lifetime tax rate that hovers around 0%. On net, they pay nothing because they pay taxes in some years but receive an EITC refund in others. If such families' average lifetime rate were cut from 0.1% to 0.0%, the families would receive a percentage reduction of their lifetime tax rate of 100%. This overstates the extent to which they benefit from a proposal compared to, for example, a high-income family whose average lifetime tax rate is cut by 50% when its average lifetime tax rate drops from 20% to 10%.

Second, my choice to include pre-tax transfer and non-transfer income in the denominator when calculating families' average lifetime tax rate is important. On one hand, I considered including only lifetime income subject to taxation in the denominator. This seemed to be an inac-

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[165] I.R.C. § 24(a)(2) (2001).

[166] To be more specific, for simulations of taxation of annual income, Targeted Averaging, and the bracket cut, the denominator in calculating the average lifetime tax rate is the sum of current year income and transfers over the ten to twenty-five years for which I have data for a given family. In simulating two-year averaging of all income, the denominator is the sum of income and transfers over those same years, but income is actually the average of the current and previous year's income because that is the income upon which all taxes were calculated.

curate representation of the change in families' economic well-being under different tax alternatives because many families receive substantial transfer income.[167] On the other hand, while including post-tax transfer and non-transfer income in the denominator would be a fair representation of families' ultimate economic status, it is circular and confusing. I am interested in how taxes change families' economic status, not how they change families' behavior in response to different incentives.[168]

Finally, I should acknowledge several caveats to the simulations. First, I have not employed a general equilibrium model to project the impact of different proposals. Such a model is favored by some analysts and government agencies for its ability to incorporate the ways in which tax changes can alter behavior and business practices, thereby expanding or reducing tax revenues indirectly through their effect upon economic growth.[169] General equilibrium analysis is, however, speculative and unlikely to alter estimates for my proposal given that Targeted Averaging does not entail fundamental shifts, for example, from an income to a consumption tax.

In addition, the simulations may overstate the number of families receiving the EITC and earning low incomes. Although all income information is adjusted for inflation to 2001 dollars, my work does not account for the rise in real incomes over time that some have experienced. Moreover, the EITC excludes taxpayers who are dependents of other taxpayers,[170] and I was not able to identify these individuals. This implies, for example, that the proportion of families currently falling into, for example, my bottom decile of average income may be less than 10%. Although this does not affect the validity of my estimates for a given level

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[167] The three agencies producing distributional analyses of tax proposals—the Treasury Department, the Joint Committee on Taxation ("JCT"), and the Congressional Budget Office ("CBO")—all include some transfer income in their income measure. Graetz, *supra* note 23, at 635. The Treasury measure is the most comprehensive, including imputed rent on owner-occupied housing and earnings on pension assets. JULIE-ANN CRONIN, U.S. TREASURY DISTRIBUTIONAL ANALYSIS METHODOLOGY 11 (U.S. Treasury, OTA Paper No. 85, 1999).

[168] The Treasury, JCT, and CBO all use different methods for analyzing changes in tax burdens, and their methodologies change over time, often with shifts in political party control. *See* Graetz, *supra* note 23, at 625–32, 681. My focus on rate cuts based on pre-tax income generates roughly comparable results to focusing on the change in post-tax income, though the results of the latter tend to attribute a slightly greater effect of tax changes to high-income taxpayers. For example, consider a family earning $20,000 with an average tax rate of 5% and one earning $50,000 with an average tax rate of 10%. If their average rates were cut to 4% and 9%, respectively, then both would experience a 1% rate cut, but their change in post-tax income would be 10.5% and 11.1% respectively. The Treasury currently uses the change in post-tax income and changes in tax burdens (a general equilibrium approach) for its distributional analysis. CRONIN, *supra* note 167, at 33–34.

[169] *See, e.g.*, Graetz, *supra* note 23, at 625–32. Graetz also notes that static revenue estimates tend to overstate changes in tax burdens and dynamic revenue estimates tend to understate them. *Id.* at 626.

[170] I.R.C. § 32(c)(1)(A)(ii)(III) (2001).

of income, my cost estimates may need to be altered accordingly. Cutting the other way, the EITC estimates are simultaneously understated due to my exclusion of all children over eighteen years of age even though some older students or disabled children still qualify families for the EITC.[171]

Finally, and most importantly, all estimates of families' tax burdens are rough approximations. While I incorporated the most commonly used provisions of the Internal Revenue Code, data constraints prevented me from including scores of others. The lack of complete data on families' ordinary income and of any data on capital income further limits the precision of estimates. The simulations presented should, therefore, be considered relevant for understanding the general distribution of tax burdens and benefits under annual income measurement and averaging but not highly specific estimates.

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[171] *Id.* § 32(c)(3)(C).

B. Tables

TABLE 2: INCOME VOLATILITY, 1987–1992, FAMILIES WITH HEADS AGE 44–49, 1968 WEIGHTS

	Standard Deviation of Income	Standard Deviation of Income as % of Average Income
All	$16,375.03	27%
Bottom Decile	$ 6,604.78	71%
Bottom Quartile	$ 6,716.95	44%
Second Quartile	$11,442.85	25%
Third Quartile	$15,264.36	20%
Top Quartile	$32,227.69	18%
Top Decile	$58,378.86	24%
Black	$ 6,132.48	33%
White	$17,388.20	26%
Single Parent	$ 8,509.80	45%
Married Parents	$18,646.87	26%
Ever Rcvd AFDC	$14,417.28	51%
Never Rcvd ADC	$16,541.78	25%
HS Dropout	$ 8,169.07	35%
HS Grad	$11,555.62	27%
Some College	$17,764.76	29%
College Grad	$26,594.63	26%

TABLE 3. INCOME VOLATILITY REGRESSIONS, FAMILIES WITH HEADS AGED 44–49

Dependent Variable	(Standard Deviation of Log Income as Percentage of Regression)			
	1		2	3
2d Decile	**0.019**** 0.007	**Time**	**0.002**** 0.001	**0.003** 0.003
3d Decile	**0.026***** 0.008	**2d Quartile**	**–0.016***** 0.002	**–0.022***** 0.004
4th Decile	**0.015**** 0.008	**3d Quartile**	**–0.021***** 0.002	**–0.022***** 0.004
5th Decile	**0.030***** 0.008	**4th Quartile**	**–0.021***** 0.002	**–0.021***** 0.004
6th Decile	**0.030***** 0.008	**HS Grad.**	**0.002** 0.002	**0.001** 0.003
7th Decile	**0.031***** 0.008	**Some College**	**0.004**** 0.002	**0.000** 0.004
8th Decile	**0.034***** 0.008	**College Grad.**	**0.001** 0.003	**–0.006** 0.004
9th Decile	**0.037***** 0.008	**Black**	**0.000** 0.003	**0.010**** 0.004
10th Decile	**0.026***** 0.008	**Single Parent**	**0.006*** 0.003	**–0.004** 0.006
HS Grad.	**0.008**** 0.004	**Married Parent**	**0.001** 0.002	**–0.005*** 0.003
Some College	**0.006** 0.004	**Never Rcv'd ADC as Adult**	**–0.006*** 0.003	**0.004** 0.006
College Grad.	**0.006** 0.005	**Time * 2d Q.**		**0.004**** 0.002
Black	**–0.014**** 0.006	**Time *3d Q.**		**0.002** 0.002
Single Parent	**0.017***** 0.006	**Time *4th Q.**		**0.001** 0.002

TABLE 3 (CONT.)

Married Parent	**0.006*** 0.003	**Time *HS Grad.**		**0.001** 0.002
Never Rcv'd ADC as Adult	**–0.025***** 0.007	**Time * Some College**		**0.002** 0.002
Constant	**0.066***** 0.009	**Time * College Grad.**		**0.004*** 0.002
		Time * Black		**–0.008***** 0.003
		Time * Single Parent		**0.006**** 0.003
		Time * Married Parent		**0.004**** 0.001
		Time * Never Rcv'd ADC as Adult		**–0.007**** 0.003
		Constant	**0.039***** 0.004	**0.036***** 0.007
Obs.	366		1495	1495
Time period	1987–1992		1968–1992	1968–1992

OLS regression, 1968 weights. Coefficients are indicated in bold, robust standard errors in normal script.

*** denotes p-values at the 1% level or lower; ** denotes 5% level; * denotes 10% level.

TABLE 4: LIFETIME RATE CUTS UNDER AVERAGING ALTERNATIVES

		Avg. Lifetime Tax Rate	Percentage Point Change in Lifetime Tax Rate			
	Average Income	Annual Income Measurement	"Lifetime" Averaging	2-Year Averaging	Targeted Averaging	Bracket Cut
All	$ 55,887.51	8.29%	-0.99%	-0.28%	-0.19%	-0.12%
Bottom Decile	$ 7,645.80	-2.60%	-2.65%	-0.62%	-0.85%	-0.10%
Bottom Quartile	$ 17,810.90	0.16%	-1.95%	-0.52%	-0.59%	-0.16%
Second Quartile	$ 41,020.01	6.41%	-0.48%	-0.23%	-0.12%	-0.19%
Third Q.	$ 59,481.47	10.12%	-1.00%	-0.22%	-0.04%	-0.10%
Top Q.	$105,295.50	16.49%	-0.54%	-0.15%	-0.01%	-0.02%
Top Decile	$140,449	20.05%	-0.68%	-0.14%	-0.01%	-0.01%
Black	$ 29,664.18	1.71%	-1.65%	-0.44%	-0.53%	-0.13%
White	$ 59,039.25	9.10%	-0.92%	-0.26%	-0.15%	-0.12%
Single Parent	$ 16,085.67	-4.44%	-2.30%	-0.60%	-0.85%	-0.11%
Married Parents	$ 64,050.28	8.64%	-0.87%	-0.29%	-0.16%	-0.12%
Ever Rec'd ADC	$ 20,802.13	-2.20%	-2.34%	-0.71%	-0.82%	-0.12%
Never Rec'd ADC	$ 58,991.35	9.22%	-0.87%	-0.24%	-0.13%	-0.12%
HS Drop-out	$ 32,536.74	2.99%	-1.43%	-0.31%	-0.36%	-0.15%
HS Grad.	$ 47,653.24	6.77%	-0.90%	-0.28%	-0.20%	-0.14%
Some College	$ 58,251.02	9.32%	-0.92%	-0.30%	-0.15%	-0.11%
College Grad	$ 79,210.65	13.00%	-0.83%	-0.26%	-0.08%	-0.07%

TABLE 5: DISTRIBUTION OF "LIFETIME" AVERAGING RATE CUTS BY INCOME CATEGORY

	Section of the Lifetime Income Distribution						
Percentile	Bottom Decile	Bottom Quartile	Second Quartile	Third Quartile	Top Quartile	Top Decile	All
1	-14.0%	-11.9%	-3.8%	-3.8%	-3.1%	-3.1%	-8.3%
5	-9.4%	-7.6%	-2.4%	-2.6%	-2.0%	-2.1%	-3.8%
10	-7.7%	-5.1%	-1.8%	-2.1%	-1.3%	-1.6%	-2.4%
25	-4.2%	-2.6%	-0.8%	-1.4%	-0.7%	-0.9%	-1.3%
50	-1.4%	-1.1%	-0.2%	-0.8%	-0.3%	-0.4%	-0.5%
75	-0.2%	-0.2%	0.0%	-0.4%	-0.1%	-0.2%	-0.1%
90	0.0%	0.0%	0.4%	-0.1%	0.0%	0.0%	0.0%
95	0.1%	0.2%	0.7%	0.0%	0.0%	0.0%	0.2%
99	2.0%	1.0%	1.1%	0.1%	0.1%	0.1%	0.8%

TABLE 6: AVERAGE ANNUAL TAX SAVED

	Targeted Averaging	Two-year EITC Averaging	Carryback of SD & Exemp-tions	Bracket Cut
All	$ 51.46	$ 28.62	$ 22.83	$ 49.79
Bottom Decile	$128.72	$100.76	$ 27.97	$ 14.66
Bottom Quartile	$119.25	$ 83.59	$ 35.66	$ 39.90
Second Quartile	$ 50.97	$ 23.80	$ 27.16	$ 82.53
Third Quartile	$ 22.19	$ 5.41	$ 16.78	$ 60.91
Top Quartile	$ 13.36	$ 1.63	$ 11.72	$ 15.81
Top Decile	$ 14.15	$ 0.79	$ 13.36	$ 7.16
Black	$ 95.66	$ 70.95	$ 24.71	$ 42.32
White	$ 45.77	$ 23.48	$ 22.28	$ 50.52
Single Parent	$152.32	$134.40	$ 17.92	$ 30.18
Married Parents	$ 51.23	$ 27.91	$ 23.33	$ 56.86
Ever Rec'd ADC	$165.03	$137.39	$ 27.64	$ 37.43
Never Rec'd ADC	$ 41.41	$ 19.00	$ 22.41	$ 50.89
HS Dropout	$ 79.94	$ 46.89	$ 33.05	$ 53.24
HS Graduate	$ 58.31	$ 33.93	$ 24.38	$ 59.91
Some College	$ 45.76	$ 23.61	$ 22.15	$ 51.72
College Graduate	$ 28.69	$ 13.93	$ 14.76	$ 35.50

TABLE 7: DISTRIBUTION OF TARGETED AVERAGING RATE CUTS BY INCOME CATEGORY

	Section of the Lifetime Income Distribution						
Percentile	Bottom Decile	Bottom Quartile	Second Quartile	Third Quartile	Top Quartile	Top Decile	All
1	–6.4%	–5.5%	–1.3%	–0.6%	–0.3%	–0.2%	–2.9%
5	–3.8%	–2.5%	–0.6%	–0.2%	–0.1%	–0.1%	–1.0%
10	–2.4%	–1.6%	–0.4%	–0.1%	0.0%	0.0%	–0.5%
25	–1.0%	–0.7%	–0.1%	0.0%	0.0%	0.0%	–0.1%
50	–0.4%	–0.2%	0.0%	0.0%	0.0%	0.0%	0.0%
75	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
90	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
95	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
99	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%

ESSAY

NON-JUDICIAL REVIEW

MARK TUSHNET*

Professor Mark Tushnet challenges the view that democratic constitutionalism requires courts to dominate constitutional review. He provides three diverse examples of non-judicial institutions involved in constitutional review and examines the institutional incentives to get the analysis "right." Through these examples, Professor Tushnet argues that non-judicial actors may perform constitutional review that is accurate, effective, and capable of gaining public acceptance. Professor Tushnet recommends that scholars conduct further research into non-judicial review to determine whether ultimately more or less judicial review is necessary in constitutional democracies.

If nothing else, familiarity leads us to assume that constitutional review must occur in courts and that non-judicial actors—politicians, said in a disparaging tone of voice—would fail to do a decent job of constitutional review were they given the chance.[1] Courts are said to be distinctively the forum of principle,[2] the legislature and executive the forum of politics. While politics serves a necessary function, constitutionalism requires constraints on politics that politics itself cannot supply. Courts, on the other hand, are said to perform a function of constitutional settlement that is most effective without interference from non-judicial actors engaged in constitutional review.[3]

These familiar ideas can be challenged on a number of grounds. The political question doctrine, for example, is commonly understood as a doctrine that identifies constitutional issues as to which political constraints on political actors are thought more likely to produce conformity to constitutional norms than would judicial review.[4] A number of non-judicial institutions around the world are involved in the process of con-

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[1] "Constitutional review" in this Essay means the assessment of policy proposals with an eye to their consistency with constitutional norms, performed by actors relatively close to taking binding legal action.

[2] The phrase has come to be associated with Ronald Dworkin. *See generally* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

[3] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

[4] For an elaboration, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 1, 16, 104–08 (1999).

stitutional review, without apparently undermining public acceptance of controversial settlements and with seemingly decent performance. Human rights commissions, for example, are often given authority to investigate alleged constitutional violations and sometimes have the power to bring enforcement actions.[5] Ombuds-offices investigate similar allegations and publicize the outcomes.[6] In Estonia, the Legal Chancellor is charged with monitoring enacted laws and is directed to propose new legislation to eliminate any constitutional defect; if such legislation is not adopted, the Legal Chancellor is to bring an action in the constitutional court challenging the statute's constitutionality.[7]

These institutions are, however, quasi-judicial bureaucracies whose mission is to monitor constitutional compliance. Precisely because these institutions resemble courts, their operations may not shed much light on fundamental questions about non-judicial constitutional review. In this Essay, a different set of practices of non-judicial constitutional review will be examined which involve constitutional review conducted by elected officials (or their direct subordinates).[8] The contrasts with judicial behavior are largely implicit: the incentives and structures for judges and quasi-judicial bureaucrats who interpret constitutional norms are briefly identified and compared with those of non-judicial actors.[9] A judge has a disinterested desire to interpret the Constitution correctly according to some normative theory she or he holds.[10] Other interests include advancing public policy goals—namely, ensuring effective government performance—to the extent compatible with the judge's normative interpretive theory, developing a reputation as a good judge among some real or imagined reference group,[11] being an important player in the nation's consti-

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[5] *See, e.g.*, Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1, 1 (2000) (describing the "recent growth of human rights commissions").

[6] For an overview, see HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD (Kamal Hossain ed., 2000).

[7] *See* EST. CONST. ch. XII, *available at* http://www.uni-wuerzburg.de:80/law/en00000_.html (last visited Apr. 8, 2003).

[8] There is a sense that law faculty members and students, newspaper editorialists, and even ordinary citizens perform constitutional review, but in this Essay, only the activities of people close to the formal law-making process are explored.

[9] For the most systematic treatment of this subject, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1994). *See also* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

[10] Alternatively, as the judge would put it, according to the correct normative theory of the Constitution. Likewise, some non-judicial officials also share this interest—a professional and bureaucratic interest in providing disinterested constitutional interpretation.

[11] The reference group may be contemporary—the judge's social circle, or contemporary legal academics—or future, as when a judge is concerned with making a place in history. *See* Schauer, *supra* note 9, at 628–30. For a study of reputation as an intriguing incentive because of its obvious, though implicit, self-referentiality, see generally RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

tutional order,[12] and getting the job done while leaving adequate time for leisure.[13] What the judge does *not* have is an interest in satisfying the demands of some constituency in a position to affect the judge's tenure in the job.[14]

In examining constitutional review by non-judicial officials, this Essay will highlight the effects that different institutional structures and, in particular, different incentives have on the officials' performance, with an eye to comparing the effectiveness of non-judicial constitutional review with that of judicial constitutional review.[15] Each Part of the Essay describes a single practice of non-judicial constitutional review: the use of constitutional points of order in the United States Senate, the constitutional clearance practice of the Office of Legal Counsel in the United States Department of Justice, and the ministerial obligation under the British Human Rights Act 1998 to make a statement regarding the consistency of proposed legislation with the Act.

Why should non-judicial actors take the task of constitutional review seriously? With Human Rights Commissions, ideological commitments and bureaucratic missions presumably provide the answer. One might wonder, however, about the incentives of electoral actors and their subordinates to do so. In particular, would elected officials resist pressure from their constituencies to pursue some policy arguably inconsistent with constitutional requirements? Each Part examines some incentive-based structural questions about the ability of these non-judicial actors to perform constitutional review well: in the case of Senate procedure, the possibility of strategic deployment of constitutional objections; in the case of the Office of Legal Counsel, the possibility of institutional bias independent of particular policy preferences; and in the case of the Human Rights Act 1998, the ability of non-judicial actors to exploit ambiguities in statutory and constitutional texts to support results they desire as a

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[12] This interest gives judges an incentive to develop balancing tests whose results cannot be readily known until the judges themselves perform the balancing. As discussed *infra*, constitutional provisions interpreted to require balancing may be reasonably well-enforced by non-judicial officials. *See infra* text accompanying notes 84–89.

[13] *See* Posner, *supra* note 9, at 1.

[14] Elected judges *do* have electoral interests of this sort, and a judge who desires promotion to some other position—whether elevation to a different judicial post or appointment to a non-judicial one—can be responsive indirectly to the electoral interests of the appointing official. *See* Schauer, *supra* note 9, at 631–33. For a study of judicial responsiveness to administrative discipline, see generally J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

[15] Because the aim is to investigate the incentives, structures, and performance of non-judicial constitutional review, this Essay does not explore the normative literature on the practice, which in general defends its propriety. *See, e.g.*, Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1304 n.1 (2000) (providing citations to most of the relevant normative literature).

matter of policy preference. With respect to each structural question, this Essay will suggest that the problems do not significantly differ from those associated with common judicial review. The conclusion identifies what might be truly distinctive about judicial constitutional review and suggests that the necessary comparative judgment about the relative ability of courts and non-judicial actors to perform constitutional review is harder than our familiar understandings would have it.

I. THE CONSTITUTIONAL POINT OF ORDER IN THE UNITED STATES SENATE

A United States senator may raise a point of order regarding any bill under consideration.[16] Ordinarily the Senate's presiding officer initially rules on points of order, with the possibility of appeal to the Senate as a whole.[17] Senate precedent establishes, however, that points of order addressing the constitutionality of bills are automatically referred to the Senate for disposition by a roll call vote recording the votes of each senator.[18] Points of order are nondebatable under standard rules of parliamentary procedure.[19] Ordinarily, senators therefore have to discuss the constitutional questions raised by the point of order *before* a senator raises it. Of course, a senator can lay out a constitutional argument prior to formally raising a constitutional point of order.[20] In addition, Senate practice gives the presiding officer discretion to allow debate on a point of order,[21] and one precedent indicates that constitutional points of order are debatable.[22] Further, the Senate, invoking its ordinary procedures for regulating debate, can adopt a rule authorizing and specifying the conditions for debate on a constitutional point of order.[23] Debate on the merits of the constitutional issue is therefore possible both before and after the point is raised.

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[16] *See* COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at Rule XX (2000) (addressing questions of order). A point of order is a claim that a Senate rule is being violated. If sustained, the debate moves to another subject.

[17] *See* HENRY M. ROBERT, ROBERT'S RULES OF ORDER art. IV, § 21 (10th ed. 2000).

[18] For a description of the procedure, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 719–20 (1985). On the practice of submitting constitutional points of order to the Senate, see FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 987 (Alan S. Frumin ed., 1992).

[19] *See* Fisher, *supra* note 18, at 719–20.

[20] *See, e.g.*, 131 CONG. REC. S14,613 (daily ed. Nov. 1, 1985) (statement of Sen. Rudman (R-N.H.)). Senator Warren Rudman, after being recognized, opened his comments with the statement, "Mr. President, today I shall raise a point of order challenging the constitutionality" of a pending amendment. *Id.* After outlining the constitutional objection to the amendment, he formally raised the constitutional point of order. *Id.*

[21] *See* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 506 (1989).

[22] *See* RIDDICK & FRUMIN, *supra* note 18, at 987.

[23] *See, e.g.*, 139 CONG. REC. 19,750 (1993) (the Presiding Officer indicating that "[d]ebate on [a constitutional point of order] is limited to 1 hour equally divided and controlled in the usual form").

An important preliminary observation is that formal constitutional points of order are rare.[24] Obviously, constitutional questions can be raised in the ordinary course of debate on the merits of proposals, as they were, extensively, in connection with recently enacted campaign finance legislation.[25] In such discussions, the integration of constitutional concerns and policy questions is present on the surface of the discussions. In contrast, the constitutional point of order at least purports to separate constitutional questions from policy ones.[26]

Fewer than ten constitutional points of order have been raised since 1970.[27] One involved an objection to a proposed constitutional amendment that would have provided for representation of the District of Columbia in Congress.[28] Senator Orrin Hatch (R-Utah) argued that the constitutional amendment would itself be unconstitutional because it would deprive other states of their equal representation in the Senate without their consent, contrary to the limitation built into Article V of the Constitution.[29] Other senators disagreed that the proposed amendment would in fact contravene the requirement of equal representation, and after some procedural confusion was resolved, the Senate rejected the point of order and approved the resolution submitting the proposed amendment to the states for ratification.[30] Another point of order raised an objection to an appropriations bill as violative of the Origination Clause's requirement that "[b]ills for raising Revenue shall originate in the House of Representa-

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[24] Constitutional issues are more often discussed in committee hearings, sometimes with testimony from constitutional "experts." *See, e.g.*, *The Judicial Nomination and Confirmation Process Before the Senate Comm. on the Judiciary*, 107th Cong., S-HRG. 107-463 (2001). In the hearings, however, the discussions are not dispositive because no votes are taken, as they are when a point of order is raised, and hearings are more obviously scripted than the discussions on the Senate floor. In addition, senators on the floor speak by themselves, with staff participating only in helping the senator prepare for the discussion. The point-of-order practice therefore provides a cleaner opportunity for assessing senators' performance than does the discussion of constitutional issues at the committee level.

[25] *See* Bipartisan Campaign Finance Reform Act of 2002, 2 U.S.C. § 431 (2002).

[26] For additional discussion, see *infra* text accompanying notes 60–64.

[27] Research assistant Rachel Lebejko Priester located references to these motions in secondary literature, and the authors are cited with the relevant pages referenced in the Congressional Record.

[28] 124 CONG. REC. 27,249 (1978) (statement of Senator Orrin Hatch (R-Utah)), *cited in* Neil Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1378 n.147 (2001).

[29] For discussions bearing on the merits of Senator Hatch's argument, see LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 111–12 (3d ed. 2000); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 68–70 (1997).

[30] The procedural confusion led to a substantive debate over Senator Hatch's argument before he formally raised the point of order. The Senate first voted to table the point of order by a vote of sixty-five to thirty-two, and then voted in favor of submitting the proposed amendment to the states by a vote of sixty-seven to thirty-two. *See* 124 CONG. REC. 27,249 (1978).

tives."[31] The point of order was withdrawn when another senator pointed out that, under Senate custom, appropriations bills did not have to originate in the House.[32]

The other constitutional points of order raised various objections. Senators raised individual rights claims through constitutional points of order on bills that would ban federal financing of abortions for federal prisoners,[33] that would impose tax liabilities for already completed transactions,[34] and that would enact a new federal ban on flag-burning in the face of a Supreme Court decision holding anti-flag-burning statutes unconstitutional.[35] Other constitutional points of order rested on separation of powers concerns, particularly that proposed legislation would violate the legislature's prerogatives. For example, a senator objected to provisions of the Civil Rights Act of 1991 that would, in his view, make the legislative branch subject to review by executive and judicial authorities.[36] Another senator objected that public financing of presidential elections would violate the constitutional requirement that federal expenditures be made through appropriations statutes.[37] Finally, an extensive debate occurred when a constitutional point of order was raised in 1984 against a proposal to authorize the President to veto particular items in appropriations bills.[38]

Plainly, many bills and enacted statutes raise constitutional questions that are never subject to a constitutional point of order. Senators have no obligation to use the procedure. This points to an important and obvious difference between senatorial and judicial consideration of constitutional questions: subject only to justiciability questions, courts *must* address constitutional questions litigants present to them, while senators have no obligation to raise a constitutional point of order. Conceding, then, that the constitutional point of order is not a substitute for judicial review, the quality of the senators' discussions when they do deal with constitutional points of order will next be examined.[39]

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[31] U.S. CONST. art. I, § 7, cl. 1.

[32] *See* TIEFER, *supra* note 21, at 507 n.107.

[33] *See* Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 360 n.195 (1987).

[34] *See* M. Bryan Schneider, Note, *The Supreme Court's Reluctance to Enforce Constitutional Prohibitions Against Retroactive Income Tax Statutes*, 40 WAYNE L. REV. 1603, 1605 (1994).

[35] For a discussion of the debates, see Charles Tiefer, *The Flag-Burning Controversy of 1989–1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 378–79 (1992).

[36] 137 CONG. REC. D1325–26 (daily ed. Oct. 29, 1991), *cited in* Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1211 n.86 (1995).

[37] *See* Ross, *supra* note 33, at 361 n.198.

[38] *See* Fisher, *supra* note 18, at 719–22.

[39] Senators may well discuss constitutional questions in other forums, such as hearings at which they take testimony about a proposal's constitutionality. Only the constitutional point of order, however, requires each senator to take a recorded, formal position on a

Debates on constitutional points of order contain several elements, the proportions varying with the subject matter and the political context. First, senators discuss whether a proposal is constitutional by referring to relevant judicial decisions. For example, Senator Warren Rudman (R-N.H.) relied on Supreme Court decisions about the government's responsibility for medical care of prisoners to explain his constitutional objection to a proposal that would deny the Federal Bureau of Prisons the authority to pay for federal prisoners' abortions.[40]

Second, senators supplement their use of court decisions by invoking the constitutional principles they believe underlie those decisions. Senator Slade Gorton (R-Wash.), objecting to a provision making tax increases retroactive, cited court decisions casting constitutional doubt on such increases.[41] Senator James Sasser (D-Tenn.) responded that "the Supreme Court has already ruled," referring to another set of decisions.[42] Returning to the debate, Senator Gorton then elaborated on the underlying principle: a retroactive statute is unconstitutional when it is "harsh and oppressive . . . when it is imposed without notice, that is to say when it is imposed retroactively beyond the date in which the Congress and the President have given notice that they intend to pass a tax."[43]

Third, senators rely directly on the Constitution and basic constitutional principles without drawing in any significant way on court decisions. In a constitutional point of order debate raised against a proposal to enact a line-item veto, one senator mentioned the then-recent *Chadha* decision,[44] saying that the line-item veto was "merely a variation on th[e] same constitutionally impermissible theme."[45] That, however, was a rare reference to the courts in the debate. Far more often, senators referred to "the simple language of the U.S. Constitution"[46] and invoked general separation-of-powers principles.[47]

Finally, senators discuss whether they should even make their own independent judgments about the constitutionality of the proposals. In a sense, these debates are about whether a constitutional point of order is itself out of order. A supporter of the line-item veto proposal, for example, said, "I want to pass this amendment, send it to the House, have them pass it, have the President sign it, and let the Supreme Court decide

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question of constitutional interpretation. *See supra* note 24.

[40] *See* 131 CONG. REC. 30,243–44 (1985).

[41] *See* 139 CONG. REC. S19,751 (1993). Several months after the debate the Supreme Court reversed one of the decisions to which Senator Gorton referred. United States v. Carlton, 512 U.S. 26 (1994).

[42] 139 CONG. REC. S19,752 (1993).

[43] *Id.* at 19,757.

[44] I.N.S. v. Chadha, 462 U.S. 919 (1983).

[45] 130 CONG. REC. S10,855 (1984) (statement of Sen. Mark Hatfield (R-Or.)).

[46] *See, e.g., id.* at S10,857 (statement of Sen. Pete Domenici (R-N.M.)).

[47] *See, e.g., id.* at S10,858 (statement of Sen. John Stennis (D-Miss.)).

whether it is constitutional to do this."[48] More often, and not surprisingly, senators assert their constitutional responsibility to interpret the Constitution on their own, sometimes referring to the oath of office they take to uphold the Constitution.[49] Perhaps the most dramatic example of touting independent senatorial responsibility was Senator Jesse Helms's (R-N.C.) position on the constitutionality of denying federal funding for abortions obtained by federal prisoners. Senator Helms argued in part that Supreme Court precedent supported the constitutionality of the proposal, but he also asserted indirectly, but reasonably clearly, that the proposal was constitutional because the Supreme Court's basic abortion decisions lacked an adequate constitutional foundation.[50]

The constitutional arguments made in these debates are usually quite truncated. They contain few quotations from cases or even the Constitution, and, of course, no citations. They are, after all, debates and not judicial opinions. In some ways, too, the debates are telegraphic, with senators making shorthand allusions to more elaborate arguments they do not develop fully. Taking these considerations into account, however, it seems that nearly all the debates contain the skeletons of decent constitutional arguments, and sometimes there is even a bit of flesh on the bones. Although there are no transcripts of the discussions at the closed conferences of Supreme Court Justices, evidence from notes the Justices take suggests that the Senate discussions of constitutional questions differ less than one might expect from the actual face-to-face discussions the Justices have.[51] If Conference discussions set the standard for assessing when deliberation is sufficient—rather than, for example, published Su-

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[48] *Id.* at S10,861 (statement of Sen. Alan Dixon (D-Ill.)). The Supreme Court eventually held a different Line Item Veto Act unconstitutional more than a decade later. *See* Clinton v. City of New York, 547 U.S. 417 (1998). An interesting variant on the argument that constitutionality should be addressed by courts occurred in the 1990 debate on adopting a constitutional amendment on flag-burning. At the time of the Senate debate, the House of Representatives had already failed to adopt a constitutional amendment by the required supermajority. The Senate proceeded to consider adopting the amendment nonetheless. Senator Dale Bumpers (D-Ark.) proposed an amendment that would have enacted another anti-flag-burning statute. Senator Pete Wilson raised a constitutional point of order. 136 CONG. REC. S15,548–49 (daily ed.1990). In response, Senator Bumpers said, "[t]hat is not really a decision . . . for us to make," because, in light of the failure of all other efforts, his statute was "[t]he only thing in the world [that has] a chance of getting before the Supreme Court." *Id.* at S15,549. The Senate upheld the point of order by a vote of fifty-one to forty-eight and proceeded to consider the constitutional amendment. *Id.*

[49] *See, e.g.*, 130 CONG. REC. 10,861–62 (1984) (statement of Sen. Gorton).

[50] *See* 131 CONG. REC. 30,244 (1985) ("I hope that Congress, and certainly the Senate, will not this day embark on a misinterpretation of the Constitution of the United States.").

[51] For a compilation of the notes, see THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed., 2001). *See also* Louis Michael Seidman, *Eavesdropping on the Justices*, 5 GREEN BAG 2D 117 (2001) (book review) (emphasizing the apparently truncated nature of Conference discussions).

preme Court opinions—senators seem to do a decent job of constitutional interpretation.[52]

A skeptic might suggest, however, that these debates on constitutional points of order are no more than sideshows to the main stage: the consideration of the policy wisdom of the proposals before the Senate. The correspondence between votes on constitutional points of order and votes on the merits is extremely close.[53] The Senate accepted the point of order made against the proposed line-item veto by a vote of fifty-six to thirty-four, but, as Louis Fisher notes, the constitutional point of order "was the simplest way to defeat an amendment [the majority] opposed on policy grounds."[54] Professor Stephen Ross's analysis of the votes on the abortion-funding point of order is similar.[55] The Senate was equally divided over whether to adopt the amendment limiting federal funding of abortions for federal prisoners, which meant that the amendment remained on the table.[56] The constitutional point of order was raised. A motion to table *that* point of order was defeated by one vote.[57] Ross notes that "[e]ven though the vote on the motion to table represented a vote on the merits and the point of order vote supposedly involved constitutionality, of the Senators participating in both votes, only two . . . switched their votes between the two motions."[58] The amendment's supporters saw the handwriting on the wall, with one saying "my thought is it is well to vitiate the yeas and nays. We have had a clear vote, though it is disappointing to me."[59] The supporters allowed the amendment to be defeated on a voice vote.[60]

The constitutional point of order's distinctive function is to allow senators to put aside their views on the policy-wisdom of the proposal at hand and to focus solely on its constitutionality. No procedural rule can guarantee that senators will in fact deal solely with the constitutional questions. The correspondence between senators' positions on constitutional points of order and their positions on the merits suggests that the constitutional point of order does not in fact narrow the range of matters sena-

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[52] Professor Beth Garrett suggests that, just as the Justices exchange letters that flesh out their conference positions, so senators also distribute "Dear Colleagues" letters at times. Memorandum to Mark Tushnet (Feb. 11, 2002) (on file with author). To that extent, the analogy between floor debates and Conference discussions might be strengthened.

[53] In oral comments on an earlier version of this Essay, Professor Frederick Schauer reported the preliminary results of a study of Senators' views on campaign finance reform. According to Schauer, every senator who favored campaign finance reform believed it to be constitutional while every senator who thought reform bad policy also believed reform to be unconstitutional.

[54] Fisher, *supra* note 18, at 721.

[55] *See* Ross, *supra* note 33, at 360 n.195.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 360.

[59] 131 CONG. REC. 30,247 (1985) (statement of Sen. William Armstrong (R-Colo.)).

[60] *See* Ross, *supra* note 33, at 360.

tors think about before they vote. It seems as if the constitutional analysis senators engage in actually does no independent work.[61] Senators take the position on the constitutional point of order that matches their position on the merits, and they do so because of their views on the merits.[62]

The suggestion, then, is that senators' votes on constitutional points of order simply reflect, without change, their views on the policy questions raised by the underlying proposals. This suggestion might be bolstered by two related observations. Senators rarely raise constitutional points of order even though many proposals could certainly be the subject of such points.[63] Senators also advert to constitutional questions in ordinary debate without raising constitutional points of order.

Why, then, use the constitutional point of order when policy grounds would arguably suffice? The answer might be something like this: the appearance of identity between policy views and constitutional ones is misleading.[64] Actually, some senators believe that the proposal is *unwise* as a matter of public policy. They also believe that their constituents mistakenly believe that the proposal is a good one. The senators therefore fear adverse electoral consequences from voting according to their policy views. The senators believe as well, however, that their constituents will *not* punish them electorally for voting against a proposal that they believe to be unconstitutional.

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[61] One might note in response that at least sometimes the constitutional analysis drives the policy views. The testing points would be issues that do *not* raise serious constitutional questions; a senator who objects to one of these collateral provisions demonstrates that policy is his or her primary concern.

[62] It might be worth pointing out, however, that some political scientists believe that judges act in precisely this way as well. The so-called attitudinal model they favor holds that the correspondence between Justices' views on the proper interpretation of the Constitution and their views on the policy wisdom of the matters they consider is also quite close. For a presentation of the attitudinal model, see JEFFREY ALAN SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1992).

[63] A senator may raise a point of order only after being recognized, and the senators controlling debate on a particular proposal may refuse to recognize a senator who they know would raise a point of order they do not want to address. *See* ROBERTS RULES OF ORDER, *supra* note 17, at art. I, § 3. It may be that senatorial norms require, or at least generally induce, a senator to notify the senators controlling debate of what they intend to do after being recognized. *See* Riddick, *supra* note 18, at 1091.

[64] Professors Elizabeth Garrett and Adrian Vermeule invoke John Elster's idea of "the civilizing force of hypocrisy" to explain how constitutional arguments might have weight independent of a legislator's policy views:

> Even a wholly self-interested legislator cannot afford to take positions in constitutional argument that are too transparently favorable to his own interests. So legislators who want to invest in credibility will have to adjust their positions to disfavor or disguise their own interests to some degree.

Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1289 (2001) (citing Jon Elster, *Alchemies of the Mind: Transmutation and Misrepresentation*, 3 LEGAL THEORY 133, 176 (1997)).

Why might senators think that voting to uphold a constitutional point of order will insulate them from electoral harm? Consider two possibilities: *timing* and *responsibility*. Professor Nelson Lund's brief discussion of Congress's adoption of a flag-burning statute illustrates the timing explanation.[65] Congress had before it two proposals, a statute (largely supported by Democrats) that sought to conform a prohibition of flag-burning to the Supreme Court's invalidation of a Texas flag-burning statute, and a constitutional amendment (largely supported by Republicans) that would have specifically authorized adoption of flag-burning legislation.[66] By adopting the statute, senators deferred consideration of the constitutional amendment. The deferral would have been permanent had the Supreme Court upheld the new federal statute,[67] but even a temporary deferral might be valuable for senators opposed to anti-flag-burning legislation but facing public demand that something be done.[68] Deferral would be "a delaying tactic meant to divert attention away from a constitutional amendment until after popular interest in the matter subsided."[69] Professor Lund finds support for this explanation from the votes of senators who purported to support a statute but voted against the constitutional amendment.[70]

The reason that timing might matter in this way needs elaboration. Electoral retaliation is always delayed until the next election. On Lund's account, the risk of electoral retaliation evaporates because senators believe that voters' preferences will change: voters who wanted an enforceable flag-burning statute in 1989 would care more about other things by 1990 or 1992, when they would consider whether to re-elect a senator who voted for the statute but against the constitutional amendment.

There are, however, several difficulties with the timing explanation. References to the desirability of letting things cool off pervade the arguments favoring the adoption of an anti-flag-burning statute over amend-

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[65] Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 471–72 (1993).

[66] For a complete account of the flag-burning controversy, see generally ROBERT J. GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY (1996).

[67] It did not. *See* United States v. Eichman, 496 U.S. 310 (1990).

[68] *See* Lund, *supra* note 65, at 470 n.75 ("*Even if one doubts that Senator Biden was sincere* in claiming that he favored legal protection for the Flag, it would not necessarily follow that he was insincere in suggesting that proponents of a constitutional amendment were engaged in 'opportunism.'") (emphasis added). This is not to suggest that no senator believed that adopting a flag-burning statute was bad policy but nonetheless voted for it because of electoral concerns. *Cf.* GOLDSTEIN, *supra* note 66, at 158 (quoting Representatives who asserted that anti-flag-burning legislation was not good policy but who nevertheless voted in favor of it).

[69] Lund, *supra* note 65, at 471. *See also* GOLDSTEIN, *supra* note 66, at 161 ("[T]he prime motivation for overt or tacit support for a statute by many . . . liberals probably was to head off the perceived certain alternative of a constitutional amendment").

[70] *See* Lund, *supra* note 65, at 471.

ing the Constitution.[71] Lund's language seems to suggest that a senator who voted for the statute simply to defer consideration of the constitutional amendment somehow behaved insincerely,[72] but it is hard to see why. Those senators, it might be said, voted in a way that assured the implementation of their constituents' *long-term* preferences rather than of their passing preferences.[73] That senators would gauge the intensity of preferences, it might further be said, was one of the reasons the Framers gave senators six-year terms of office.[74]

There is another reason to discount the timing explanation for the Senate votes in the flag-burning controversy.[75] Notably, the timing explanation does not, by itself, explain why a senator would vote to *reject* the constitutional point of order and adopt a statute the senator believed would be held unconstitutional. The length of time between the vote on the constitutional point of order and the next election is the same no matter how the senator votes. What seems to matter is that the senator might be able to say to constituents, "I tried to get you a flag-burning statute, but the Supreme Court wouldn't let me." The possibility that the senator will also have to explain a vote against a constitutional amendment that would have authorized a flag-burning statute complicates the picture. The senator's response actually assumes that the constituents continue to desire the adoption of an enforceable flag-burning statute. The senator's challenger can point out that, by voting against the constitu-

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[71] *See* GOLDSTEIN, *supra* note 66, at 168–69 (collecting such statements).

[72] *See, e.g.*, Lund, *supra* note 65, at 472–73 n.77 (referring to "a political strategy aimed at derailing a constitutional amendment that would have authorized statutory protection of the Flag").

[73] Perhaps alternatively, they implemented those of their constituents' preferences that are important enough to remain salient over a long term. That is, the constituents may still care about adopting a statute banning flag-burning, but over time that preference becomes less significant relative to other issues on the constituents' agenda.

[74] For a discussion of the Senate, see THE FEDERALIST No. 63 (Edward M. Earle ed., 1976).

> [T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

Id. THE FEDERALIST No. 71 (Edward M. Earle ed., 1976) offers a similar account of the President's role in "withstand[ing] the temporary delusion, in order to give [the people] time and opportunity for more cool and sedate reflection."

[75] Further, the timing explanation does not respond to the staggered nature of Senate elections and the possibility of difference among senators based on how imminently they face an election campaign, particularly for legislation that cannot be timed for an election year.

tional amendment, the senator did not try as hard as he or she could have to get constituents the flag-burning statute they wanted.

Perhaps the complication actually explains how the timing explanation works. The senator may not be able to explain to constituents why the existing Constitution—the one invoked in the constitutional point of order—makes it impossible to enact an enforceable flag-burning statute. The senator *might*, however, be able to explain to constituents why it would be a bad thing to amend the Constitution to authorize such a statute.

In the flag-burning case, senators were presented with two distinct questions: should they adopt a flag-burning statute if consistent with the First Amendment, and should they adopt a constitutional amendment that would ensure the constitutionality of flag-burning statutes. Lund treats these two questions as a single one about the desirability, as a matter of public policy, of having an enforceable flag-burning statute.[76] They are not.

A senator who sincerely wanted a flag-burning statute might think that obtaining one by means of amending the Constitution would leave the nation worse off than it would be without a flag-burning statute.[77] The senator's concern might be two-fold. An apparently narrow constitutional amendment directed solely at authorizing flag-burning statutes might be taken by future Congresses and Supreme Courts as expressing a broader policy about the basic principles of free expression,[78] thereby authorizing larger incursions on free expression than the senator believes appropriate. The senator might also be concerned about setting a precedent—not about free expression—but about amending the Constitution. The senator might believe that proponents of unwise constitutional amendments (as the senator sees the proposals) would be emboldened were the Constitution amended to authorize flag-burning statutes. The cost of forgoing an enforceable flag-burning statute after constitutional amendment might be lower than the costs associated with amending the Constitution. Making sense of the timing explanation requires consideration of the possibility that a proposal will be made to amend the Constitution at the moment that the constitutional point of order is raised.

The *responsibility* explanation for invoking the Constitution rather than policy is that the constitutional point of order allows senators to shift responsibility for the proposal's defeat from themselves to the Constitution. Senator David Boren's (D-Okla.) statements in the line-item veto debate illustrate how the responsibility explanation might work.

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[76] Lund, *supra* note 65, at 472–73.

[77] The argument is elaborated in Mark Tushnet, *The Flagburning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39 (1990).

[78] The model for this concern would be the Eleventh Amendment, which the Supreme Court has interpreted to express a basic principle of state immunity from suit that goes well beyond the Amendment's express terms. For decisions articulating this understanding of the Amendment's deeper meaning, see, for example, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Alden v. Maine, 527 U.S. 706 (1999).

Many opponents of the line-item veto statute thought it was bad policy. Senator Boren, a former governor who had exercised a line-item veto over his state's budget, clearly did not.[79] He expressed his willingness to co-sponsor a constitutional amendment creating a line-item veto power. But, he said, "as much as I favor the line-item veto, I feel I have no choice but to vote that it does not comply with the Constitution of the United States."[80] This sense of compulsion makes the Constitution, and not the senator, responsible for the proposal's defeat.

Interestingly, Justice Anthony Kennedy alluded to precisely the same responsibility-shifting function of the Constitution in the Supreme Court's initial flag-burning decision.[81] Justice Kennedy voted with the five-justice majority to find unconstitutional a state's ban on flag-burning as a means of political protest. He observed, "[s]ometimes we must make decisions we do not like" because "the law and the Constitution, as we see them, compel the result."[82] Justice Kennedy suggested as well that this effort to shift responsibility can never be entirely successful: when "we are presented with a clear and simple statute to be judged against a pure command of the Constitution . . . , [t]he outcome can be laid at no door but ours."[83] Precisely the same thing could be said about senators who attempt to shift responsibility for the defeat of a proposal their constituents favor from themselves to the Constitution: the constituents could *still* lay responsibility at the senators' doors.

To the extent that electoral constitutional responsibility is attenuated, why might senators take the Constitution seriously? To answer that question, reasons for senators' preferences must be examined. Political scientists' studies of legislative behavior suggest that legislators seek to develop what they personally believe to be good public policy within the constraints imposed by their constituents' desires.[84] That is, legislators want to do good as they see it, but they also want to be reelected.

The first thing to note is that a senator might hold a personal belief that good public policy includes compliance with the Constitution. That is, she might think that no policy is a good one that violates what the senator believes to be constitutional requirements. Senators with such a

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[79] 130 CONG. REC. 10,863 (1984).

[80] 130 CONG. REC. 10,863 (1984). Professor Robert Goldstein quotes an aide to a Democratic senator who offered a somewhat weaker version of the responsibility explanation, distinguishing between a desirable statute—"a good thing"—and a constitutional amendment that would "screw[ ] around with a fundamental principle of the democratic system." GOLDSTEIN, *supra* note 66, at 181–82.

[81] Texas v. Johnson, 491 U.S. 397 (1989).

[82] *Id.* at 420–21 (Kennedy, J., concurring).

[83] *Id.*

[84] The classic study is RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973), arguing that members of Congress pursue the goals of reelection, power within Congress, and good public policy. More recently, two authors confirmed the importance of reelection and public policy while down-playing the importance of power within Congress. STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS (1990).

belief take the Constitution seriously just because they take their role in making good public policy seriously, and the problems they may have with their constituents over their personal constitutional views are no different from the problems they may have over ordinary policy questions.

In addition, a senator may gain some freedom to act on his personal constitutional views by delivering the pork to his constituency, building up a reservoir of good will that leads constituents to accept the senator's rejection on constitutional grounds of a policy the constituents favor.[85] As a senator gains seniority, even constituents who vigorously disagree with the senator's constitutional views might be willing to swallow their objections so as to preserve the advantages they gain from the member's seniority.

Finally, constituents themselves may think that complying with the Constitution is a component of good public policy. Such constituents may agree with the senator's constitutional views or may defer to the senator's judgment about what the Constitution requires. In either case, these constituents provide electoral support for the senator.

These considerations suggest why senators' electoral incentives do not necessarily lead senators to ignore their own considered constitutional views when voting on a constitutional point of order. Possibility is not necessity, of course, and the coincidence between constitutional positions and policy positions might be suspicious. It may be wrong, though, to see votes on constitutional points of order as politically expedient reflections of underlying policy views. One might instead see the votes on the constitutional points of order as reflecting considered *constitutional* judgments, influenced but not dictated by policy views.[86]

Consider the following theory of constitutional interpretation. The Constitution should be interpreted in light of text, original understanding, accumulated precedent, and fundamental principle. Often, and particularly in the most contentious cases, those sources will not conclusively establish that a proposal (or enacted statute) is constitutional or unconstitutional. If they do not, one can properly resolve the constitutional question by taking into account whether the proposal or statute would improve the functioning of the government as an ongoing operation. Sometimes senators holding this theory of constitutional interpretation will find themselves in precisely this situation of interpretive openness.[87] When they do, the coincidence between their policy views and their votes on a constitutional point of order indicates a fully responsible exercise of the senators' duty

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[85] To be clear, here "pork" refers not simply to direct material benefits to the constituency but more generally to actions consistent with the constituency's policy preferences.

[86] Obviously this account cannot explain senators' votes with respect to amending the Constitution but only their votes on constitutional points of order against legislative proposals, which are necessarily predicated on the existing Constitution.

[87] Whether senators actually hold this theory is debateable but the theory appears to be something reasonably common-sensical, and one that a senator might well adopt.

to vote on the constitutional point of order solely with reference to their theoretically informed view of the proposal's constitutionality.

Finally, it seems worth emphasizing that the constitutional theory described is a perfectly respectable one that judges could hold as well.[88] In a sense, then, the Senate's practice on constitutional points of order *might* support the proposition that non-judicial constitutional review can be little different from judicial constitutional review—if judicial review is understood in a specific way and if senators in fact adopt the theory of constitutional interpretation that could justify the apparent congruence between policy views and votes on constitutional points of order.

Additionally, senators' incentives may be less mysterious than judges'. To the extent that practice on constitutional points of order can inform judgment, senators stack up reasonably well in comparison to judges, in part because one can understand how senators' incentives might actually lead them to take the Constitution seriously. The limited scope of the practice of the constitutional point of order may be important here as well: politicians who do reasonably well when they occasionally face up to constitutional questions directly might not do as well were they to confront such questions routinely.

II. BILL CLEARANCES AT THE OFFICE OF LEGAL COUNSEL

The Office of Legal Counsel ("OLC") in the United States Department of Justice reviews legislative proposals for constitutionality as the executive branch's legal advisor, acting by delegation from the Attorney General.[89] The OLC is headed by an Assistant Attorney General nominated by the President and confirmed by the Senate.[90] The office staff includes

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[88] Of course, it is not the only reasonable theory of constitutional interpretation. One could believe that proposals or statutes are (necessarily) constitutional when the standard sources for interpreting the Constitution run out, in the sense that they do not conclusively establish the proposals' or statutes' unconstitutionality. Judge Frank Easterbrook has expressly taken that position. *See* Frank Easterbrook, *Alternatives to Originalism*, 19 HARV. J. L. & PUB. POL. 479 (1996).

[89] *See* 28 C.F.R. § 0.25(a) (1999) (assigning the OLC duties of preparing formal and informal opinions and giving legal advice to governmental agencies); Office of Legal Counsel, *Mission Statement*, *at* http://www.usdoj.gov/olc/index.html (last visited Apr. 14, 2003). The OLC also plays a role in developing an administration's posture in litigation, a matter discussed elsewhere in the scholarly literature. *See, e.g.*, Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); David Barron, *Constitutionalism in the Shadow of Doctrine*, 63 LAW & CONTEMP. PROBS. 61 (2000). In addition to published materials, this Part relies on: Telephone Interview with Randolph Moss, Former Attorney General, OLC (Jan. 21, 2001); Interview with Cornelia Pillard, Former Deputy, OLC (Sept. 21, 2001); Telephone Interview with Martin Lederman, Attorney Advisor, OLC (July 9, 2001).

[90] The degree to which the Assistant Attorney General in charge of the OLC regards himself (no women have held the position as of yet) as an essential part of the President's policy team has varied, as has the President's interest in making constitutional law an important component of his policy agenda. DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT (1992), describes Kmiec's service in

several deputies, one of whom has primary responsibility for bill comments.[91] All the deputies are political appointees.[92] The staff lawyers are a combination of young attorneys, including those drawn to serve a particular administration—but who sometimes stay with the Office for at least a few years after the administration they joined has departed—and career civil servants who provide long-term institutional memory.

The bill clearance process, which is only one part of the OLC's role as chief constitutional advisor to the executive branch, involves an attempt to screen *all* legislative proposals for constitutionality.[93] Typically, as bills arrive, a deputy assigns the bill to a staff lawyer, sometimes on the basis of the lawyer's expertise, but sometimes simply because the lawyer is available to do the analysis.[94] The assignment may also include some guidance about the administration's initial reaction to the proposal, and the staff attorney and a deputy may interact as the comment develops.

Assignments based on expertise are not always possible or accurate. There are two relevant kinds of expertise. A lawyer can be an expert in some substantive statutory area, such as pension law or employment law, or the lawyer can be an expert about some general constitutional area, such as religious freedom or economic liberty. Assigning a bill to a staff lawyer based on subject matter may have no relationship to the lawyer's constitutional expertise. The more common practice of assigning a bill based on constitutional expertise, however, may be equally problematic. A proposal may raise red flags with respect to one constitutional question that, on analysis, turns out to be insubstantial, while containing in its de-

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the OLC in an administration that did take constitutional law to be an important element in its policy agenda. Kmiec's account is from the perspective of one who saw himself playing a large role on the constitutional policy team. For an overview of the more general question of the Attorney General's role as neutral expositor of law or political adviser, see Moss, *supra* note 15, at 1308–09.

[91] The description, *infra*, of OLC's organization and operation is based upon the interviews cited, *supra* note 89.

[92] In this respect the OLC differs from the Office of the Solicitor General, where one deputy is understood to be the "political" deputy, while the others are career attorneys. At least two deputies have served across administrations headed by presidents from different parties: Mary C. Lawton, who served from 1972 to 1979, and Larry L. Simms, who served from 1979 to 1985. More recently, however, all the deputies have been political appointees rather than career government lawyers. One reason for the difference in staffing patterns between the OLC and the Solicitor General's office is that the Solicitor General centralizes the administration's litigation in the Supreme Court (and authorizes appeals to courts of appeals), whereas departmental and agency general counsels and the White House Counsel's Office are alternatives to the OLC for advice to executive departments and agencies. People from those departments might avoid asking the OLC for advice if they are not confident that its management is in tune with the administration's agenda.

[93] *See* Office of Legal Counsel, *About OLC*, *at* http://www.usdoj.gov/olc/index.html (last visited Feb. 12, 2003).

[94] A staff lawyer may process between five and ten bills a week while Congress is in session.

tails, an entirely different and more substantial constitutional question with which another staff lawyer may be more familiar.[95]

In theory, the OLC should clear proposals at every stage, from introduction to modification in committee to amendment on the floor. Often, however, the legislative process moves too quickly for the OLC to offer its views on every new development. In practical terms, bills and occasional committee modifications are all that the OLC can actually consider,[96] except for the possibility of screening bills when they reach the President's desk for signature or veto. Turn-around times are typically short, ranging from hours to a few days, with a seven-day deadline being unusually long.[97] In the vast majority of cases, the OLC concludes that the bill raises no constitutional concerns, and indicates that it will have no comment on the bill.[98] Of the remainder, bills likely to move through the legislative process receive more attention than proposals that are not likely to advance.[99]

As a matter of form, the OLC considers the constitutionality of a bill before deciding whether to recommend that the President veto the bill if it is adopted by both houses of Congress. After the staff lawyer responsible for a bill comes to a conclusion and drafts a comment, a deputy assistant attorney general examines and approves the comment. That comment is then sent to the Department's Office of Legislative Affairs ("OLA"), which has responsibility for advancing the administration's legislative agenda.[100] That Office, in turn, compiles the constitutional comments from the OLC and policy-based comments from other components of the Department of Justice, such as the Civil Rights Division or the Criminal Division, whose activities would be affected by the bill. The OLA writes a letter to the Office of Management and Budget ("OMB"), which, after receiving comments from *all* affected departments, compiles and trans-

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[95] Collegial interactions within the Office obviously alleviate this difficulty, but time pressures may limit the extent to which such interactions occur.

[96] The OLC can process modifications made in committee if the committee staff members are willing to continue to notify and work with the Department of Justice regarding significant developments. The OLC also occasionally has the opportunity to comment on floor amendments, depending on the pace of the legislative process and the importance the OLC and the Office of Legislative Affairs ("OLA") attach to the floor amendment.

[97] If more time is needed, the OLC can request that the OLA provide a more realistic assessment of when the proposal is likely to move forward in Congress, or, in extraordinary cases involving either an administration proposal or a bill submitted by someone with whom the administration has close ties, request that the OLA try to slow the legislative process down to enable the OLC to clear the bill.

[98] Of course talented lawyers can always gin up constitutional challenges to any legislative proposal so that the no-comment decision then presumably rests on a judgment that the proposal raises no substantial constitutional questions.

[99] For ease of administration, it might make sense for the OLA to identify for the OLC which bills are more likely to move, but no such screening occurs on a regular or formal basis.

[100] *See* Office of Legislative Affairs, *Mission Statement*, *at* http://www.usdoj.gov/ola/ola.html (last visited Feb. 12, 2003).

mits the administration's comments to the relevant congressional committees.[101] The OMB letter is the only one that is released outside the administration, and the OMB sometimes omits the OLC's constitutional comments from its letter.[102]

OLC comments aim to determine the constitutionality of legislative proposals on a blend of assumptions about constitutional interpretation, and the mix varies over time. Some administrations have distinctive agendas regarding the Constitution and its proper interpretation, and bill clearances will be shaped by those agendas. Other administrations accept Supreme Court doctrine as generally controlling.[103] Even in the former case, however, the OLC's professional orientation appears to be shaped in significant part by judicial doctrine. Professor Nina Pillard argues that the OLC's reliance on judicial doctrine results from strategic calculation as well as professional orientation.[104] The OLC can defend its judgments on constitutionality against challenges from policy-oriented members of the administration by pointing to the Supreme Court as the source of the OLC's interpretation.[105]

The labels the OLC has developed to give its conclusions suggest its reliance on judicial doctrine. The weakest label for a proposal that raises constitutional questions is that the proposal raises a "litigation risk," which means, roughly, that a reasonable judge *might* but probably would not find the proposal unconstitutional if adopted. Stronger labels are that the proposal raises "constitutional concerns" or "serious constitutional concerns." Here a second element of constitutional interpretation can enter, with the OLC offering a constitutional perspective independent of that developed in Supreme Court opinions. Finally, the OLC may assert that the proposal if enacted, would be unconstitutional, which ordinarily amounts

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[101] *See* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 338–39 (1993) (describing the review process for pending legislation).

[102] *See id.* at 339 ("OMB cannot always be relied upon to fully divulge OLC's legal thinking to Congress."). Lund expresses great skepticism about the seriousness with which the OLC's constitutional comments are taken by members of Congress. Lund, *supra* note 65, at 466–67. The concern of this Essay is with the OLC practice itself and not with its effects on enacted legislation.

[103] *See* Memorandum for the General Counsels of the Federal Government (May 7, 1996), *at* http://www.usdoj.gov/olc/delly.htm (last visited Apr. 14, 2003). The memorandum states that

> [The Department of Justice] believe[s] that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be *equated* with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution.

Id.

[104] *See* Nina Pillard, *The Solicitor General and the Office of Legal Counsel: Constitutional Consciences of the Executive Branch?* (manuscript on file with author).

[105] *See id.*

to an OLC recommendation that the President veto the proposal if enacted in its present form.[106]

Each OLC label functions both as a prediction about possible future action, whether in courts or by the President, and as a marker in negotiations over the bill's language and content. Either through the OLA or, with White House permission, by direct contact with a member of the congressional staff, OLC attorneys may suggest revisions that would achieve the drafter's primary goals without presenting even a litigation risk. Of course, the more serious the OLC's constitutional objections, the more leverage it has in these discussions because of the possibility of a veto recommendation.[107]

Of primary interest here, the OLC's constitutional analysis occurs within an executive department by subordinate officials in an administration with its own political agenda. That the OLC is part of a specific administration means that the OLC's constitutional comments might be affected by the administration's interest in moving its agenda through Congress.[108] That it is part of the executive branch means that the OLC typically defends the President's prerogatives against what its attorneys see as threats to the presidency as an institution. Observers suggest that the latter effect is more substantial than the former.

Staff attorneys will usually know the administration's position on major proposals important to the administration. The OLC will interact with the White House in developing the proposals to avoid constitutional difficulties. Sometimes, however, the staff attorneys drafting comments on a particular bill might not be aware that the administration has a position on the proposal. Even more often, the attorneys will rarely know whether a proposal comes from an ally of the administration or is being pushed by someone whose vote the administration needs on other issues. Finally, as a matter of interpretive methodology, courts have often said a great deal about substantive constitutional questions raised by legislative proposals. Judicial decisions as a source for constitutional interpretation thus may

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[106] A provision the OLC regards as clearly unconstitutional may be embedded in omnibus legislation, and the OLC may think it inappropriate to recommend a veto of such a bill merely because it contains an unconstitutional provision. The OLC may then develop a statement for the President to issue when he signs the bill, in which the President will note the provision's unconstitutionality and indicate that the administration will not treat it as binding. *See, e.g.*, Kmiec, *supra* note 101, at 345–46 (noting that at signing statements, "it has fallen to [the OLC] to set forth in a draft signing statement how the unconstitutional feature will be handled").

[107] Lund argues that the OLC comments serve as veto threats, but that the credibility of the threats does not depend on the quality of the OLC's arguments, primarily because members of Congress are accustomed to receiving OLC comments containing "very aggressive advocacy of the interests of OLC's client." Lund, *supra* note 65, at 466–67.

[108] *See* Moss, *supra* note 15, at 1306 (arguing that "the executive branch lawyer should work within the framework and tradition of executive branch legal interpretation and seek ways to further the legal and policy goals of the administration he serves. He should do so, however, within the framework of the best view of the law and, in that sense should take the obligation neutrally to interpret the law as seriously as a court").

weigh against the incumbent administration's policy positions.[109] The OLC's bill comments may therefore be reasonably disinterested relative to the specific legislative agenda of the administration in office.[110]

The OLC has good strategic reasons for being reasonably disinterested. As former Attorney General Randolph Moss observes, "Congress is less likely to take seriously a constitutional objection to proposed legislation if that objection, or the general approach of the Office is seen as policy—as opposed to legally—driven."[111] An administration that seeks political cover by obtaining a statement from the OLC that some proposal is unconstitutional will hardly be helped if the perception becomes widespread that OLC comments simply use constitutional terminology as a way of advancing the administration's policy agenda. Yet, similar to the congruence between senators' constitutional and policy positions, principled constitutional analysis often leaves ample room for policy considerations.[112] Where it does, OLC comments will be consistent with both existing doctrine and the administration's policy agenda.[113]

The flag-burning episode illustrates how the OLC's legal analysis might conflict with an administration's legislative agenda.[114] The OLC's position was that Supreme Court doctrine clearly indicated that no anti-flag-burning statute would be held constitutional.[115] Therefore, the Bush Administration supported adopting a constitutional amendment.[116] The OLC's stance may actually have weakened the Administration's position because it allowed opponents to make the argument that it was unwise to amend the Constitution.[117]

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[109] Disinterestedness may be reinforced by the OLC's focus on determining constitutionality according to current judicial criteria, because the courts—depending on their composition—need not be assumed sympathetic to a particular Administration's legislative agenda.

[110] The OLC may, of course, be disinterested when its analysis leads to a conclusion that an administration proposal is constitutional, but one can identify the independent effect of disinterestedness only by examining situations in which the OLC analysis conflicts with the administration's legislative program.

[111] Moss, *supra* note 15, at 1311.

[112] *See supra* text accompanying notes 86–88.

[113] *Cf.* Moss, *supra* note 15, at 1327 ("[T]he public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in that President's administration").

[114] For another example, see Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 536 n.134 (1998) (describing a decision by the first Bush Administration to forego changing the tax rate on capital gains by executive order, after receiving legal advice that such an action would be unconstitutional).

[115] *See* Lund, *supra* note 65, at 469–70 (describing the OLC analysis and the Administration position).

[116] *See id.*

[117] One can perhaps locate a political motive for the Administration's position: decision-makers oriented to politics might have thought that Democrats would be more vulnerable the longer the issue persisted on the national agenda and that allowing Democrats to pursue an unconstitutional statutory remedy to be followed by consideration of a constitutional amendment would hurt Democrats. *But see id.* at 470 ("[T]he Bush administration had no obvious motive for overstating the vulnerability of the proposed bill to constitu-

The line-item veto controversy provides another example of how OLC legal analyses might conflict with an administration's agenda. The Reagan Administration believed that it could gain greater control over fiscal policy if the President had the power to veto specific items in appropriations bills.[118] The Constitution provides that the President shall have the opportunity to sign or veto "[e]very Bill which shall have passed" both houses of Congress.[119] Conservatives argued that the practice of packaging a large number of unrelated appropriations in a single statute transformed that statute from a single constitutional "Bill."[120] They argued, each sub-unit within these larger packages was a "Bill" within the meaning of the Constitution, and therefore could be vetoed individually.[121] However, Charles Cooper, the OLC head, concluded that the Constitution could not be read in this way.[122] Thus, the OLC's legal analysis appeared to conflict with the Administration's policy agenda, supporting the proposition that the OLC *can* offer legal advice in a reasonably disinterested way.[123]

Administration proposals are likely to be vetted by the OLC for constitutionality before they emerge in the public eye. The OLC's participation in drafting legislation allows it to trim away the most constitutionally problematic features, modifying legislative proposals—thereby altering the administration's initial (politically driven) agenda—in the service of a more disinterested view of the Constitution's requirements.[124]

Yet, here too another complication arises. The OLC interacts with other elements in the Department of Justice, such as the Civil Rights Division; the "White House"; and other parts of the administration. As a proposal is reshaped in response to OLC concerns, those other institutions may contact the OLC and attempt to change the position the OLC has taken, either by directly changing the OLC's views or by downgrading an evaluation from "serious constitutional concern" to "litigation risk." The OLC sometimes resists these concerns, sometimes accommodates

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tional challenge . . . .").

[118] *See* Kmiec, *supra* note 101, at 353–59 (describing the issue and criticizing the OLC's position).

[119] U.S. CONST. art. I, § 7, cl. 2.

[120] For a collection of essays discussing this position, see PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO (1988).

[121] *Id.*

[122] 12 Op. Off. Legal Counsel 128, 159 (1988).

[123] As with the flag-burning controversy, one can offer a more political account, in which the Administration might not have been politically unhappy over being unable to exercise a line-item veto. By keeping the issue alive, the Administration was able to place responsibility for fiscal excess on Congress, and by having no line-item veto power, the Administration was not forced to take responsibility for particular appropriations decisions.

[124] As Randolph Moss puts it, "[o]n almost a daily basis, the Office of Legal Counsel works with its clients to refine and reconceptualize proposed executive branch initiatives in the face of legal constraints." Moss, *supra* note 15, at 1329. This "provides a means by which the executive branch lawyer can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals." *Id.* at 1330.

them, and occasionally is persuaded on the merits that its initial evaluation was incorrect.

When embodied in concrete proposals, an administration's agenda may raise few constitutional red flags within the OLC.[125] In addition, many legislative proposals do no more than pose a "litigation risk," in the OLC's terms, and disinterested advice to that effect is likely to do little to impede the progress of an administration proposal. At the same time, modifying proposals to take into account the OLC's constitutional concerns almost inevitably reduces the degree to which the proposal, if enacted, will advance the administration's policy goals.

Students of the Canadian Charter of Rights have criticized the process of what they call Charter-proofing. That process involves action by the executive branch to modify its proposals in response to constitutional concerns expressed by the civil servants who vet legislation for compatibility with the Charter, but the modifications are more extensive than are strictly required by the Charter.[126] Charter-proofing can be a problem when legally oriented civil servants advise policy-oriented cabinet members. Civil servants may be less attentive to the administration's policy goals and the cabinet member may not realize that the civil servant is over-estimating the risk that the legislation will be held unconstitutional. The OLC's organization, a combination of civil servants and legally trained political appointees, reduces the chance of distortion of the administration's policy agenda. Nonetheless, it is likely that some degree of risk aversion remains and may adversely affect the shape of an administration's legislative proposals.

Further, proposals adversely affecting the prerogatives of the presidency as an institution are different from other legislation. With respect to such

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[125] It therefore seems worth nothing that the specific line-item veto proposal that Charles Cooper, former OLC head, addressed was raised initially *outside* the Reagan Administration, by its conservative allies. *See* PORK BARRELS AND PRINCIPLES, *supra* note 120.

[126] Charter-proofing differs from the unexceptionable practice of attempting to draft legislation that is no more than minimally consistent with constitutional requirements. Charter-proofing is a practice of *excessive* risk-aversion among civil servants and parliamentarians, which takes the form of overestimating the risk that a court will declare a proposal unconstitutional and modifying it to reduce that risk to acceptable levels, again at the cost of the proposal's policy goals. For a defense of Charter-proofing of this sort, see Kent Roach, *The Attorney General and the Charter Revisited*, 50 U. TORONTO L.J. 1, 16 (2000). For the same author's use of the term in the sense of minimal compliance with the Charter, see Kent Roach, *The Effects of the Canadian Charter of Rights on Criminal Justice*, 33 ISR. L. REV. 607, 610 n.8 (1999). Professor Keith Ewing provides examples in which excessive risk-aversion may have led to the withdrawal of proposals, in one case because the civil servants suggested that legislation converting the British rail system back to public control would require an amount of compensation that the government was unwilling to provide. KEITH EWING, THE CASE FOR SOCIAL RIGHTS 19 (Apr. 12, 2001) (manuscript on file with author). Of course, in the case of withdrawn proposals one can always remain uncertain about the degree to which the government was committed to the proposal in the first place; constitutional objections may have provided a convenient excuse for withdrawing a proposal that was made primarily to satisfy some constituency rather than with an eye to enactment.

proposals, the OLC protects the presidency, not the incumbent President.[127] In fact, protecting the presidency sometimes means *opposing* the incumbent.[128] The incumbent may have a different view of the Constitution than the view taken by the OLC,[129] or the President may have political reasons for accepting—in exchange for what he regards as more important immediate policy goals—legislation the OLC regards as incursions on the office.[130] In short, the OLC provides advice that is more interested than disinterested when the presidency's prerogatives are in question.[131]

Judicial guidance on questions regarding the institutional presidency is less available than it is with respect to other constitutional questions. When courts have addressed such questions, the OLC has regularly given "cases unfavorable to executive branch prerogatives vis-à-vis Congress a far more limited reading than cases in other areas and, conversely, give[n] favorable cases a very broad reading."[132]

Because judicial interpretations provide less guidance here than in other areas, historic practice plays a more important role in interpretation.[133] The President may wish to give up some aspect of the presidency's

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[127] As always, the degree to which the OLC advances a view in defense of the institutions of the presidency in tension with the views of the incumbent administration will vary somewhat across administrations. In general, however, the career lawyers will defend the institution of the presidency and the deputies will offer resistance to varying degrees. *See* interviews cited *supra* note 89.

[128] Obviously, opposing here means something like, "forcefully advocating an alternative position within the administration."

[129] A President who had been a senator, for example, might think that the institution of the presidency had fewer prerogatives against congressional investigation than the OLC might believe.

[130] Negotiations over proposals can be particularly complex when the President's prerogatives are at stake. Sometimes OLC's constitutional analysis functions as a bargaining chip, but it may seem peculiar to all participants for the President to offer to accept something the OLC asserts is unconstitutional.

[131] An analysis predicated on institutional interests is compatible with some aspects of fundamental constitutional theory. As Madison wrote in *The Federalist*, in a system of separation of powers, "[t]he interest of the man must be connected to the constitutional rights of the place." THE FEDERALIST No. 51, at 322 (C. Rossiter ed., 1961). A President whose staff provides disinterested interpretation of the President's powers will be at a disadvantage when Congress and the courts interpret the Constitution to advance their institutional interests.

[132] John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 431 (1993).

[133] Supreme Court Justices have sometimes observed that *judicial* interpretation of the Constitution in questions going to the division of power between the President and Congress depends on practice. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature."); Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (relying, in part, on "a history of congressional acquiescence" to support the constitutionality of the practice of presidential settlement of claims against foreign governments); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) (asserting that "long-continued practice, known to and acquiesced in by Congress, would raise a presumption . . . of a recognized administrative power of the Executive . . . ."). Sometimes, however, Justices express doubt about the relevance of long-standing practice to constitutionality. *See, e.g.*, *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("Deeply embedded

prerogatives for reasons of policy or principle. Because constitutional precedent is often set by the executive's course of conduct in this area, relinquishing a constitutional position to gain some other policy advantage[134] undermines the presidency in two ways. It directly sets a precedent about what counts as a permissible incursion on the presidency, and it demonstrates that the presidency can survive and continue to function after a particular prerogative has been limited. Thus, the OLC's position as defender of the institution of the presidency may bring it into conflict with the policy objectives of the President it serves.

Professor Douglas Kmiec describes one example in which the conflict between the OLC's defense of the presidency's prerogatives clashed with the President's political agenda.[135] The Civil Service Reform Act of 1978 created a "Special Counsel" to receive and investigate complaints by federal employees who believed that they had suffered retaliation for disclosing government mismanagement.[136] Under the Act, the presidentially appointed Special Counsel could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[137] In 1986, Congress began to consider revising the Act and expanding the Special Counsel's authority by giving the Office of Special Counsel the power to sue executive branch agencies.[138] The OLC objected to both the limitations on the President's power to remove the Special Counsel and to the new litigating authority.[139] The OLC regarded the Office of Special Counsel as a subordinate component of the executive branch subject to presidential direction and the presidency, not the courts, as the location for resolving disputes within the executive branch.[140] For what Kmiec regards as politi-

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traditional ways of conducting government cannot supplant the Constitution or legislation. . . ."); Powell v. McCormack, 395 U.S. 486, 546–47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."). *See also* Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . , openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.").

[134] *See* Kmiec, *supra* note 101, at 339 ("From OMB's perspective, a constitutional question might need to be sacrificed or horse-traded for an administration policy goal. This, of course, is constitutional blasphemy to OLC, and it has, on occasion, . . . placed the President in the awkward position of later being presented with enacted legislation he could not, at least as a constitutional matter, accept.").

[135] *See* Kmiec, *supra* note 101, at 340–44. Kmiec's account seems colored by his disdain for political considerations that, in other contexts at least, seem entirely defensible. KMIEC, *supra* note 90, at 60–63, provides a somewhat more restrained account.

[136] Civil Service Reform Act of 1978, 5 U.S.C. § 1202 (2000).

[137] *Id.*

[138] *See* Kmiec, *supra* note 101, at 340–44.

[139] *Id.*

[140] For an argument supporting the proposal's constitutionality and suggesting that the constitutional objections described here rest on aggressive readings of the relevant precedents, see Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989).

cal reasons, the OMB "muffled" the OLC's objections, and Congress adopted the new Whistleblower Protection Act of 1988, leaving the OLC "appalled."[141] In the end, the OLC's views prevailed when President Reagan pocket-vetoed the legislation.[142] Notably, the veto occurred during a presidential campaign, but President Reagan was not running for reelection and therefore did not bear any direct political costs arising from his failure to indicate earlier his—or the OLC's—opposition to the legislation.

Despite anecdotal illustrations of the OLC's effects, precise and systematic information about the OLC's bill clearance practice is thin. Nevertheless, several conclusions seem justified. First, the OLC probably presents constitutional analyses as disinterested as those of the courts when it assesses proposals that OLC staff attorneys and deputies do not believe to be part of an incumbent administration's legislative program. That class may be larger than one might initially think because those accustomed to thinking about legislative politics may assimilate proposals by administration allies with administration proposals, while OLC attorneys and even deputies will not. The fact that OLC staff attorneys are civil service bureaucrats weighs against the fact that they also serve particular administrations. Additionally, the disinterestedness of OLC analysis arises in part because the attorneys assess constitutionality with existing court decisions in mind.[143]

Second, OLC analyses of core administration proposals will certainly be slanted to favor the administration's position. The OLC will help shape the proposals to avoid severe litigation risks. It is important to note, however, the aim is to ensure that the legislation, if enacted, would survive constitutional attack, not to ensure that the legislation actually is constitutional according to a disinterested approach to constitutional interpretation.[144] Further, interactions between the OLC and other parts of the administration may affect the OLC's constitutional evaluations. Courts do not engage in such interactions.

Third, OLC analyses of proposals that its attorneys believe will undermine presidential prerogatives aggressively support the presidency, again because of the OLC's self-identified bureaucratic mission to defend the presidency's prerogatives. As indicated earlier, the relevant constitutional law in this area is largely made by practice and much less so by judicial decision. This has two implications. There rarely exist independent criteria by which to assess whether the OLC's position is "correct" in

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[141] Kmiec, *supra* note 101, at 342.

[142] *See id.* at 343.

[143] As indicated above, the contribution of this factor to OLC disinterestedness may vary from one administration to another, depending on whether the administration has an agenda regarding the Constitution and its interpretation.

[144] That the most common evaluation expressing constitutional concern is phrased in terms of litigation risk may generate a cast of mind that operates to offset the pro-administration bias somewhat.

some ultimate sense. Nevertheless, the near-absence of judicial intervention renders difficult, if not impossible, a direct comparison of the OLC's performance as an interpreter of the Constitution with that of the courts. All that may be said is that in this particular area the OLC has incentives that push it away from disinterestedness.[145]

III. MINISTERIAL STATEMENTS OF COMPATIBILITY UNDER THE HUMAN RIGHTS ACT 1998

The British Human Rights Act 1998 makes many provisions of the European Convention on Human Rights enforceable in the British courts.[146] The creation of a form of judicial review in Great Britain has attracted the largest share of attention to the Act because of the tension between judicial review and traditions of parliamentary supremacy. The Act contains an interesting provision not directly connected to judicial review, which is the focus of this Essay's attention here. Section 19 of the Act requires that a minister in charge of a legislative proposal "make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ('a statement of compatibility'); or . . . make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill."[147] The latter type of statement will be called an "inability statement."

The point of these provisions is clear. Just as judges are supposed to interpret statutes to make them consistent with the Convention, ministers are supposed to submit bills to Parliament that are in their view, consistent with the Convention. The problem, as one supporter of the Human Rights Act puts it, is that "governments are rarely, if ever, prepared to own up to violating fundamental rights."[148] How are the statements of compatibility supposed to make governments more likely to do that?[149]

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[145] It seems worth noting that a *more* politically oriented OLC might be more disinterested because, on occasion, the incumbent administration's political interests could offset to some extent the OLC's bureaucratic commitment to protecting the office of the presidency. For example, imagine a situation in which a disinterested analyst would conclude that the President did not have a privilege to resist disclosure. A politically oriented decision-maker might conclude that political circumstances should lead the President to waive the privilege, when the OLC might seek to strengthen the privilege by resisting disclosure.

[146] Human Rights Act, 42 Pub. Gen. Acts and Measures, § 19(1) (1998) (Eng.).

[147] *Id.* These "statements of compatibility" or the inability to make such a statement "must be in writing and be published in such manner as the Minister making it considers appropriate." *Id.* § 19 (2).

[148] *See* FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UK'S NEW BILL OF RIGHTS 166 (2000).

[149] The Bill of Rights Act in New Zealand requires the Attorney General to report whenever a bill is proposed that appears to be inconsistent with the Bill of Rights. *See* Bill of Rights Act § 7 (1990) (New Zealand). It is thought that committing the task to the Attorney General will obtain a more politically disinterested view than that provided by a department's minister because New Zealand's Attorney General is conventionally inde-

The answer combines political and bureaucratic elements. The ministerial statement of compatibility itself can be brief, but members of Parliament might use the statement as a predicate for questions about the reasons the minister has for believing the legislative proposal to be compatible with the European Convention.[150] Further, a minister who introduces a proposal accompanied by an inability statement might be embarrassed at having to face charges of violating fundamental rights (where the proposal is thought to be incompatible with Convention rights) or of incompetence for being unable to do part of the job, that is, to determine compatibility.

Ministers will rely on their departments' civil servants, or on some general "Human Rights Act Compliance Unit," to provide the detailed justifications that they can expect other members of Parliament to demand.[151] The civil servants charged with determining whether a minister can make a statement of compatibility will be committed to ensuring adherence to the European Convention because that is their job.[152] As Francesca Klug indicates, the requirement "has the potential to get the slumbering beast of Whitehall moving in terms of humans rights scrutiny of policies and legislation in the way nothing else ever has."[153] She notes that civil servants have asserted that they already paid attention to the European Convention but she suggests that this is only out of concern for "risk management," that is, simply to avoid having legislation found inconsistent with the

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pendent of the government in power. For a discussion that touches on this aspect of the independence of Attorneys General in Canada, which has a similar convention, see Kent Roach, *The Attorney General and the Charter Revisited*, 50 U. TORONTO L. J. 1, 31–38 (2000).

[150] *See generally* KLUG, *supra* note 148, at 171 ("Although this has got off to a slow start, it is hard to believe that even the more robotic tendency among backbenchers will not use this opportunity in time."). The Parliament now has a Joint Committee on Human Rights, which has taken as part of its mission the examination of statements of compatibility, pursuant to its general authority to "consider . . . matters relating to human rights in the United Kingdom . . . [.]" Joint Committee on Human Rights, *Home Page*, *at* http://www.parliament.uk/commons/selcom/hrhome.htm (last visited Apr. 14, 2003) (describing the Committee's mandate). The Joint Committee has eleven members, six of whom at present are members of the governing Labour Party. *See id.* Two members are Conservatives, two are Liberal Democrats, and one is a cross-bencher (that is, an independent). This composition may partially offset executive domination of the legislative process, and may help expose the reasons a minister has for making a statement of compatibility. For additional discussion of the Joint Committee's role, see *infra* note 204.

[151] The Lord Chancellor's office has a Human Rights Unit, one of whose functions is "[i]mplementing the Human Rights Act 1998 and building a culture of rights and responsibilities . . . ." Human Rights Unit, *at* http://www.lcd.gov.uk/hract/unit.htm (last visited Mar. 20, 2003). For a discussion of the evolution of the Canadian Department of Justice as a centralized bureaucratic mechanism for oversight of compliance by all departments with Canada's Charter of Rights, see generally James B. Kelly, *Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government*, 42 CANADIAN PUB. ADMIN. 476 (1999).

[152] According to Grant Huscroft, in New Zealand, the Attorney General "accepts the advice tendered [by civil servants], word for word." E-mail from Grant Huscroft, Professor, Univ. of Western Ontario, Office Held (Nov. 13, 2001) (on file with author).

[153] KLUG, *supra* note 148, at 170 (referring to the British governmental bureaucracy as "Whitehall").

European Convention by the European Court on Human Rights.[154] The idea is that civil servants' charge had been to ensure that ministers avoid the embarrassment of having legislation criticized by the European Court but that now the charge to civil servants is a positive one—to ensure that ministers can make accurate statements of compatibility.[155]

Klug suggests that the requirement of statements of compatibility "has a farcical element," because ministerial statements will become as routine "as a cry of 'order, order,' from the Speaker, making its value appear somewhat dubious."[156] The problem goes deeper than that, however. Accurate and sincere statements of compatibility and inability statements may both be so easy to issue that they may not place much constraint on a government's ability to advance whatever legislative agenda it has.[157] The reason that inability statements may be easy to make is that a statement that a minister is *unable* to make a statement of a proposal's compatibility with the Convention is not a statement that the proposal *is* incompatible with the Convention. Actual incompatibility is, of course, one reason a minister might have to make an inability statement, but it is not the only reason. As Geoffrey Marshall points out, a minister can make an inability statement for a variety of other reasons—for example, because, in the minister's view, there is insufficient time to determine whether it is possible to make a statement of compatibility, but there is a pressing need for the legislation.[158] A minister might say, in effect, that the question of the proposal's compatibility with the Convention is a quite difficult one, which the minister has been unable to resolve in the time available. Alternatively, the minister might refrain from making a statement of compatibility on the ground that the complex issues are better explored in debate in the House of Commons.[159] Marshall suggests the possibility of ministers taking a position similar to that taken by some senators.[160] The minister

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[154] *See id.* at 170–71.

[155] As the earlier discussion of Charter-proofing suggests, *supra* note 126, it is not clear that Klug's description of the pre-Human Rights Act practice carries with it some critical sting, as she appears to think. It is likely that civil servants should advise ministers to develop policies that minimally comply with the Convention.

[156] KLUG, *supra* note 148, at 170. A sampling of the Parliamentary Questions identified at the Human Rights Unit Web site, *supra* note 150, finds them almost uniformly boilerplate.

[157] An additional difficulty, which the Section 19 procedure shares with judicial review, is that the very making of a statement of compatibility may lull potential opponents into believing that there is no basis in human rights law for challenging the legislation. For a comment to this effect, see HELEN FENWICK, CIVIL RIGHTS: NEW LABOUR, FREEDOM AND THE HUMAN RIGHTS ACT 345 (2000) (suggesting that the Regulation of Investigatory Powers Act 2000 "might not have been put before a Commons dominated by Labour MPs had [it] not been shrouded in human rights rhetoric and accompanied by a statement of [its] compatibility with the European Convention on Human Rights").

[158] Geoffrey Marshall, *The United Kingdom Human Rights Act, 1998*, *in* COMPARATIVE CONSTITUTIONAL LAW: DEFINING THE FIELD 202 (Vicki C. Jackson & Mark Tushnet eds., 2002).

[159] STEPHEN GROSZ ET AL., HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION 30 (2000).

[160] Marshall, *supra* note 158, at 110.

might defend an inability statement by referring to the possibility of judicial consideration of compatibility after the proposal is adopted.[161]

Inability statements may not have the political effect hoped for because they need not be public statements of the government's willingness to violate Convention rights. Further, with the stick of political discipline taken away, civil servants may have less power, and therefore less bureaucratic reason, to insist that only legislation that they can draft statements of compatibility for move forward.

Statements of compatibility may be easy to make as well. First, similar to bill clearance at the OLC, the largest portion of proposed legislation will raise no substantial questions under the Convention. Second, and more important, the Home Office has announced the sensible policy that the mere existence of arguments supporting the conclusion that a proposal is compatible with Convention rights is insufficient to justify issuing a statement of compatibility.[162] Such a statement will be issued when "the balance of argument supports the view that the provisions are compatible" with Convention rights.[163] The Convention simultaneously defines rights at a relatively high level of abstraction and incorporates in the definition of particular rights qualifications suggesting that rights are not violated when a government pursues valuable social objectives.[164] Under such provisions it will not be difficult for a minister to conclude that the "balance of arguments" supports a statement of compatibility.[165]

Third, and probably most important, the Human Rights Act directs that Convention rights are to be interpreted by referring to decisions by the European Court on Human Rights.[166] That Court, in turn, has developed a doctrine of deference that gives nations a "margin of apprecia-

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[161] *Id.*

[162] Hansard 83540 (statement of Home Minister Jack Straw, May 5, 1999), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/vo990505/text/90505w02.htm#90505w02.htm_sbhd0.

[163] *Id.*

[164] For example, the guarantee of freedom of expression in Article Ten of the Convention for the Protection of Human Rights and Fundamental Freedom notes:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention on Human Rights, Nov. 4, 1950, art. 10, § 2, 213 U.N.T.S. 222.

[165] *See* GROSZ ET AL., *supra* note 159, at 30 n.13 (noting that a statement of compatibility has been made even after a lower court found a particular provision incompatible with the Convention, when the government had appealed the lower court decision and had been "advised that the appeal is more likely than not to succeed").

[166] Human Rights Act, 42 Pub. Gen. Acts and Measures, § 2(1)(a) (1998) (Eng.).

tion" in their actions alleged to violate the Convention.[167] The "margin of appreciation" doctrine gives civil servants even more space within which to find proposals compatible with Convention rights. The doctrine has two components.[168] The first is ordinary deference to administrative or executive judgment.[169] British human rights lawyers assert that British courts should not invoke this component of the "margin of appreciation" doctrine in applying the Human Rights Act.[170] Whether or not courts should invoke this component, civil servants attempting to determine compatibility should not. It is simply incoherent for a civil servant to invoke a doctrine of deference to administrative discretion because the question for the civil servant is precisely whether to exercise discretion in a way that violates the Convention as the civil servant sees things.[171]

The "margin of appreciation" doctrine's second component, however, can play a large role in the civil servant's deliberations. The European Court developed the doctrine because it recognized that it was an international court with authority to review legislation adopted by numerous states with distinctive cultures facing varying problems. The court felt these elements should be taken into account in determining whether a particular statute violates Convention rights.[172] The civil servant determining whether a proposal is compatible with Convention rights can sensibly ask, "[d]oes this proposal lie within that portion of the margin of appreciation arising from distinctive national problems and characteristics?"[173] Ministers and their governments always have good reasons, from

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[167] *See* Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737 (1976). For additional discussion, see LOUIS HENKIN ET AL., HUMAN RIGHTS 564–75 (1999).

[168] *See* Michael Fordham & Thomas de la Mare, *Identifying the Principles of Proportionality*, *in* UNDERSTANDING HUMAN RIGHTS PRINCIPLES 27, 54 (Jeffrey Jowell & Jonathan Cooper eds., 2001) (describing the margin as "two-dimensional").

[169] *Id.*

[170] *See, e.g.*, Rabinder Singh, Murray Hunt & Marie Demetriou, *Current Topic: Is There a Role for the "Margin of Appreciation" in National Law After the Human Rights Act?*, 4 EUR. HUM. RTS. L. REV. 16 (1999); Fordham & de la Mare, *supra* note 168, at 82 ("What the domestic judges should not do is to '*read-across*' the 'margin of appreciation' *as applied by the Strasbourg Court* in individual cases."); KEIR STARMER, EUROPEAN HUMAN RIGHTS LAW: THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 190–91 (1999).

[171] For a discussion of a parallel problem in United States constitutional law, see TUSHNET, *supra* note 4, at 1, 16, 104–08 (describing the position taken by the Clinton Administration regarding the proper standard for judicial review of a statute that required military officials to pursue a policy with which they disagreed).

[172] *See Handyside*, *supra* note 167, at ¶ 753–54 ("By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the . . . 'necessity' of a 'restriction' . . . .").

[173] Domestic courts cannot invoke the second component of the "margin of appreciation" doctrine in reviewing civil servants' and ministers' assessment of the nation's distinctive characteristics and problems because the courts are part of the overall domestic system for determining what the nation's distinctive characteristics and problems are. *See* STARMER, *supra* note 170, at 190. The possibility of a judicial declaration of invalidity might temper the civil servants' use of the "margin of appreciation" doctrine. This sort of

their own points of view, for proposing new legislation. A good lawyer will find it relatively easy to find in those reasons some distinctive national characteristics or problems that place the proposal within the margin of appreciation.[174]

Examining several instances in which ministers made statements of compatibility reveals additional problems. The Human Rights Act 1998 had an effective date of October 2, 2000, but the British government announced that it would issue statements of compatibility even before that date.[175] Two skeptics about the utility of statements of compatibility point to the rapid enactment of the Criminal Justice (Terrorism and Conspiracy) Act in 1998[176] to show how politicians can "brush[ ] aside concerns about . . . patent breaches" of Convention rights.[177] The Act was the government's response to a terrorist bombing in Omagh, Northern Ireland, in August 1998.[178] The provisions the critics questioned modified rules of evidence in terrorism cases.[179] Senior police officers can be treated as expert witnesses who can give their opinion that a defendant is a member of a terrorist organization without providing direct evidence of membership, although such an opinion cannot be the sole basis for a conviction.[180] In addition, a defendant's guilt may be inferred from his or her failure to mention a material fact after being given the opportunity to consult a lawyer.[181]

The European Court of Human Rights has held that legislation affecting an accused person's right to remain silent may violate the Convention's provisions guaranteeing a presumption of innocence and a fair trial.[182] The Court assesses the impact of inferences from silence on the particular trial: "The Court must . . . concentrate its attention on the role

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risk assessment would work *in favor* of stricter interpretation of Convention rights, in contrast to the kind of risk assessment Klug thinks inadequate. *See supra* text accompanying notes 154–157.

[174] It is worth noting that this can be true even with respect to proposals to adopt legislation essentially identical to legislation of another nation held by the European Court to violate Convention rights. The European Court of Human Rights has held, however, that the margin of appreciation may be narrow indeed when "there is a general consensus in Europe about how particular issues are to be dealt with." STARMER, *supra* note 170, at 189. In a narrow class of cases, this provides a real limit to a minister's ability to make a statement of compatibility.

[175] *See* Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497, 558 (2000).

[176] Criminal Justice (Terrorism and Conspiracy) Act 1998 c.40 (U.K. 1998), *available at* http://www.hmso.gov.uk/acts/acts1998/98040--a.htm.

[177] *Id.*

[178] *See id.*

[179] For a description of the provisions, see Clive Walker, *The Bombs in Omagh and their Aftermath: The Criminal Justice (Terrorism and Conspiracy) Act 1998*, 62 MOD. L. REV. 879, 883–88 (1999).

[180] *See id.* at 884.

[181] *See* Evidence and Inferences: Northern Ireland, Criminal Justice (Terrorism and Conspiracy) Act 1998, c.40 (2)(30A)(6) (U.K. 1998).

[182] Murray v. United Kingdom, App. No. 18731/91, 22 Eur. H.R. Rep. 29 (1996).

played by the inferences in the proceedings against the applicant and especially in his conviction."[183] Under this sort of balancing test, applying the provisions of the Criminal Justice (Terrorism and Conspiracy) Act "may, at least under certain circumstances, contravene rights" under the Convention.[184]

This does not mean that the legislation contemplates "patent breaches" of the Convention and that a statement of compatibility necessarily must "brush aside" such concerns. Drawing on concepts familiar in United States constitutional law, it can be said that the proposal, as applied, might be unconstitutional. The statement of compatibility, however, refers to the proposal's facial validity. Justices of the Supreme Court have engaged in heated discussions on the standard for determining when to strike down a statute as facially unconstitutional. *United States v. Salerno* appears to hold that, outside the context of free expression, a statute is unconstitutional on its face only if there are *no* circumstances under which it could be applied in a constitutionally acceptable manner.[185] In contrast, other cases indicate that a statute might be unconstitutional on its face if it would be unconstitutional in a substantial number of applications,[186] or in most of its applications.[187] As the United States Supreme Court has said, facial invalidation is "strong medicine."[188] It precludes the people from securing the benefits of the constitutionally permissible applications of a statute that is unconstitutional in only some applications.

Distinguishing between facial validity and "as applied" unconstitutionality clarifies why a minister might find it easy to make a statement of compatibility. It seems unreasonable to deny ministers the opportunity to make such statements merely because one can identify some circumstances under which applying the proposal would violate Convention rights. It follows that it then becomes easier to issue a statement of compatibility in the face of well-founded arguments that the proposal might be applied in a way that violates Convention rights. The minister can reasonably assert that the balance of arguments favor facial validity even though critics are unquestionably right in spinning out scenarios where the proposal would violate Convention rights.[189]

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[183] *Id.* at 61.

[184] Walker, *supra* note 179, at 888.

[185] United States v. Salerno, 481 U.S. 739, 745 (1987) ("[T]he challenger must establish that no set of circumstances exists under which the Act would be valid.").

[186] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 615–18 (1973) (discussing First Amendment overbreadth doctrine and concluding that challenged statute is not substantially overbroad and therefore is not unconstitutional on its face).

[187] *See, e.g.*, Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996) (denying review in an abortion case, with an important exchange on the question of facial invalidation between Justices Stevens and Scalia).

[188] *Broadrick*, 413 U.S. at 613.

[189] The Supreme Court of Canada examines whether a mandatory prison sentence violates the ban on cruel and unusual punishment in the Canadian Charter of Rights and Freedoms by asking whether the sentence would be "grossly disproportionate" not simply in

The statement of compatibility issued in connection with another statute illustrates the way in which interaction between facial validity and the statement of compatibility might work to reduce the constraint imposed by requiring such a statement. The 1999 Immigration and Asylum Act gives ministers broad authority to transmit or receive personal information about asylum seekers and other immigrants to or from other nations.[190] Article 8 of the European Convention creates a "right to respect for . . . private . . . life,"[191] which has been interpreted to cover informational privacy.[192] The authority given ministers might be exercised in a way that violates Article 8. The minister in charge of the legislation made a statement of compatibility, asserting that "those using the Act would not use or disclose information in a way which was incompatible with . . . Article 8 of the Convention."[193] The minister avoided possible facial invalidity by making a commitment to principles of implementation. It would seem easy enough for a minister to assert, with respect to any proposed statute, that it would not be implemented in a manner that violated Convention rights.[194] In United States constitutional law, a court's narrowing interpretation may save a statute from judicial invalidation on overbreadth grounds.[195] Nevertheless, some narrowing constructions may be unconstitutional for other reasons. Consider, for example, a construction to the effect that the statute does not criminalize any activity protected by the First Amendment. Such a statute would not be overbroad; indeed, it would create a defense perfectly congruent with the rights defendants have under the First Amendment. The statute as construed would, however, be unconstitutionally vague.[196]

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the case before it but in "reasonable hypothetical circumstances." R. v. Goltz, 3 S.C.R. 485, 505–06 (1991), *available at* 1991 S.C.R. LEXIS 20, 34–35. That approach seems to be an appropriate one with respect to questions about compatibility as well.

[190] Immigration and Asylum Act 1999, c.33 (U.K. 1999), *available at* http://www.hmso.gov.uk/acts/acts1999/19990033.htm. The Act and the statement of compatibility are discussed in Helen Mountfield, *The Concept of a Lawful Interference with Fundamental Rights*, *in* UNDERSTANDING HUMAN RIGHTS PRINCIPLES 23 (Jeffrey Jowell & Jonathan Cooper eds., 2001).

[191] European Convention on Human Rights, *supra* note 164, art. 8.

[192] *See, e.g.*, Z. v. Finland, App. No. 22009/93, 25 Eur. H.R. Rep. 371 (1997) (involving the disclosure of personal medical records in a criminal trial).

[193] Mountfield, *supra* note 190, at 23.

[194] In some circumstances the minister could later issue binding guidance on enforcement, but it is doubtful that any assertions made in support of a statement of compatibility would themselves be binding.

[195] *See, e.g.*, Osborne v. Ohio, 495 U.S. 103 (1990) (holding, in part, that an Ohio anti-pornography statute, even if facially overbroad, survives a constitutional overbreadth challenge because the Ohio Supreme Court has construed it sufficiently narrowly).

[196] Not surprisingly, it is difficult to come up with a citation supporting this precise proposition. The best, perhaps, is Bouie v. City of Columbia, 378 U.S. 347 (1964) (finding a South Carolina criminal trespass statute, which was facially narrow, to be overly vague as interpreted by the South Carolina Supreme Court and thus in violation of the Due Process Clause).

A ministerial practice allowing a statement of compatibility to be made despite a serious possibility that the statute would authorize many violations of Convention rights, when the statement is supplemented by representations about enforcement, cannot be a serious constraint on ministers. Civil servants will be asked to draft statements of compatibility and the enforcement representations rather than drafting statutes that avoid the underlying questions about rights violations. Just as the statutes would be written with an eye to substantive Convention rights, so the enforcement representations would be written with an eye to avoiding the equivalent of a vagueness challenge—in this context, a challenge that the statute and representations do not satisfy the Convention requirement that limitations on Convention rights be prescribed by law.[197]

The process by which the 2001 Anti-Terrorist, Crime and Security Act was adopted illustrates yet another method by which statements of compatibility can be made without serious impact on the government's agenda. The European Convention on Human Rights allows governments to derogate from its requirements—that is, to eliminate their legal obligation to comply with the Convention—"[i]n time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation . . . ."[198] The Human Rights Act allows ministers to announce a derogation in anticipation of introducing legislation inconsistent with Convention rights (and therefore otherwise incompatible with the Human Rights Act's requirements).[199]

After the terrorist attacks in the United States on September 11, 2001, the Prime Minister Tony Blair's administration wanted to introduce legislation against terrorism. One of the proposed provisions would have authorized indefinite detention of some alleged foreign terrorists who, the government believed, could not be tried expeditiously, deported to a nation where they would be safe while restrained from continuing terrorist activities, or released in the United Kingdom.[200] Such indefinite detentions, the government agreed, would violate the Convention because detention in contemplation of deportation is permissible only where deportation would occur within a reasonably limited time.[201] On November 11, David Blunkett, the Home Secretary, issued an order derogating from the applicable provision of the European Convention.[202] The next day the government introduced its anti-terrorism legislation. Blunkett made a statement of compatibility, taking the position that, the government having derogated

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[197] *See* Mountfield, *supra* note 190, at 23–24.

[198] European Convention on Human Rights, *supra* note 164, art. 15.

[199] Human Rights Act, 42 Pub. Gen. Acts and Measures, §14 (1998) (Eng.).

[200] *See* Mountfield, *supra* note 190, at 23–24.

[201] *See* Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 465 (1996) (interpreting Article 5(1)(f) of the Convention on Human Rights).

[202] Human Rights Act of 1998 (Designated Derogation) Order 2001, (2001) S.I. 3644, *available at* http://www.legislation.hmso.gov.uk/si/si2001/20013644.htm.

from the Convention provision with which the bill's provisions would be inconsistent, the legislation was now compatible with the Convention.[203]

As the anti-terrorism bill quickly moved through Parliament, questions arose about other provisions in the bill. Some critics argued that the derogation itself should be subject to judicial review. The House of Lords adopted an amendment specifying that it would be, but the House of Commons removed the amendment, and the Act was adopted without a specific provision dealing with the reviewability of the derogation order.[204] Still, the order might be reviewable under ordinary principles of administrative law because it was a minister's act and not parliamentary legislation.[205]

Suppose a court found the order unauthorized on the ground that terrorism had not yet been shown to pose a threat to the life of the United Kingdom, despite its proven threat to the United States. Presumably, the provision for indefinite detention would then be incompatible with the Convention, and a court would make a statement to that effect. How might the government respond? The government could then respond by modifying the statute.[206] It might, on the other hand, take the position that

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[203] *See* Mountfield, *supra* note 190, at 23–24. It is worth noting that, given the public attention to the process, it seems unlikely that anything would have been different had the minister issued no derogation order and then made an inability statement.

[204] Other aspects of the legislative process are worth noting. The Joint Parliamentary Committee heard evidence from the Home Secretary two days after the legislation was introduced and issued a report two days after the hearing, JOINT COMM. ON HUMAN RIGHTS, SECOND REPORT (2001), *available at* http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/3702.htm. This report emphasized the Committee's view that the government had not shown that an emergency existed threatening the life of the nation and that several provisions in the proposed legislation were incompatible with Convention rights. Using its standard locution, the Committee drew these "matter[s] to the attention of each House." *Id.* para. 37. The government made some modifications in the bill, which was then the subject of another report by the Joint Committee a few weeks later, JOINT COMM. ON HUMAN RIGHTS, FIFTH REPORT (2001), *available at* http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/51/5102.htm. Again the government made a few modifications in the bill, which was then approved by the House of Commons. It faced more problems in the House of Lords, which rejected ten provisions in the bill, an extraordinary action. The bill was sent back to the House of Commons, which insisted on retaining the provisions. The legislation went back to the House of Lords, which acceded to the House of Commons on all but one of the provisions, a section extending hate-crime laws to cover religion. Its continued insistence on deleting that provision might have provoked a constitutional crisis by making it impossible for the government to get the legislation adopted promptly, but the government receded, withdrawing the provision and proposing to submit it separately. For the statement by the Home Secretary doing so, see http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/vmo011213/debtext/11213-36.htm. *See generally* Andrew Evans, *Terror Bill Clears Lords*, PRESS ASS'N, Dec. 11, 2001; Amanda Brown, Joe Churcher & Andrew Evans, *New Setback as Peers Reject Religious Hatred Offence*, PRESS ASS'N, Dec. 13, 2001; Ian Craig, *Lords Pass Anti-Terror Law*, MANCHESTER EVENING NEWS, Dec. 14, 2001, at 4; Michael Zander, *The Anti-terrorism Bill—What Happened?*, 151 NEW L.J. 1880 (2001).

[205] The Parliamentary Joint Committee asserts that "no court in this country will be able to decide whether the derogation is justified against the criteria of Article 15" of the Convention. JOINT COMM. ON HUMAN RIGHTS, SECOND REPORT, *supra* note 204, para. 30. For recent developments, see Mark Elliott, *United Kingdom*, 2 INT'L J. CON. L. 334 (2003).

[206] The Human Rights Act authorizes the government to modify primary legislation on

the court erroneously exercised judicial review, or mistakenly found no threat to the life of the nation. This disagreement would not produce anything like action inconsistent with the court's determination of the derogation's invalidity because the Human Rights Act requires nothing in the face of a declaration of incompatibility. The government could leave the indefinite detention provisions in effect and face whatever public disapproval doing so might generate.

Having argued that ministers and civil servants will have little difficulty in making and drafting inability statements and statements of compatiblity, it is wrong to conclude that the Human Rights Act strategy for securing non-judicial enforcement of fundamental rights must fail. The reason is simple. The statements of compatibility are just that: statements that the proposal is in fact compatible with Convention rights. The arguments about how easy it may be to make such statements are not arguments that the statements are inaccurate. Ministers will, in fact, be complying with fundamental rights when they conclude that the balance of arguments support a statement of compatibility. The problem is not that ministers and civil servants will disingenuously evade their obligation to determine whether a proposal violates Convention rights. The problem, if there is one, is that the European Convention defines fundamental rights in a way that may be insufficient.

IV. CONCLUSION

This Essay helps illuminate several controversies. Professors Larry Alexander and Frederick Schauer have suggested that non-judicial constitutional review introduces a degree of uncertainty inconsistent with the idea of law, at least where non-judicial constitutional review supplements rather than displaces judicial review.[207] According to Alexander and Schauer, it is the distinctive characteristic of law that decisions issuing from authoritative bodies settle conflicts, in the sense that they replace disagreement over what the right outcome is with a decision that, while perhaps wrong from some point of view, nonetheless introduces stability into a situation of conflict.[208]

In the face of criticism they conceded that their case was, despite their earlier claims, empirical rather than conceptual.[209] For Alexander and Schauer, the analysis turns on whether supplementing judicial constitu-

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its own through a fast-track legislative procedure, or in the course of introducing legislation. Human Rights Act, 42 Pub. Gen. Acts and Measures, §§ 10(2) and 2(b) (1998) (Eng.) (showing the Minister's power to alter primary legislation); *id.* at § 2(a) (fast-track procedure).

[207] *See generally* Alexander & Schauer, *supra* note 3.

[208] *Id.*

[209] Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455, 464 (2000) ("[T]he empirical dimension is one that cannot be avoided.").

tional review with non-judicial constitutional review contributes in the long run to the stability of the rule of law.[210] That, in turn, depends on the degree to which courts and non-judicial institutions adhere to relatively stable constitutional interpretations.[211] They ask for a "careful examination" of the range of judicial variation "compared to the range of variation for the other branches."[212] This Essay is hardly comprehensive, but it contributes something to that examination.

First, it shows that non-judicial constitutional review is simply a fact of life, a characteristic of reasonably stable constitutional systems. In the face of this fact, the only way to sustain Alexander and Schauer's arguments is to show that existing practices actually introduce more instability than they eliminate.[213]

Second, examining non-judicial constitutional review shows that non-judicial institutions have incentives that provide some "insulation from political winds."[214] Because courts are not fully insulated from those winds, and have other institutional characteristics that reduce the value of the settlements they impose,[215] this Essay suggests that the empirical case against non-judicial constitutional review remains to be established.[216]

As Alexander and Schauer point out, the real questions are comparative: how well do non-judicial and judicial institutions of constitutional review stack up against each other?[217] Professors Elizabeth Garrett and Adrian Vermeule have implicitly endorsed such a comparative inquiry in their suggestions for enhancing Congress's capacity to evaluate the constitutionality of legislative proposals. Garrett and Vermeule describe a framework with several components: "constitutional impact statements," a professional staff office charged with constitutional review, and enhanced

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[210] *Id.*

[211] *Id.* at 476–77.

[212] *Id.* at 476.

[213] In their initial presentation, which argued that their inquiry was conceptual and not empirical, Alexander and Schauer argued briefly against the consideration by non-judicial institutions of constitutional questions prior to enactment of law. Alexander & Schauer, *supra* note 3, at 1384–85 ("[I]f the argument from authoritative settlement counsels the avoidance of constitutional dissonance, does this mean that a legislator does something improper in going beyond existing judicial decisions in the name of the Constitution? . . . . Part of our answer to this question is, simply, yes."). Their later article does not address this question. Alexander & Schauer, *supra* note 209.

[214] Alexander & Schauer, *supra* note 209, at 476.

[215] In particular, courts, particularly supreme courts, must construct doctrine that is easily administrable by lower courts and other addressees of the courts' doctrines. Concerns about ease of administration may produce doctrine that is different from what would be done if one were concerned solely with the directly relevant constitutional interests. For a general discussion, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

[216] For related criticisms of Alexander and Schauer, see Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 788–808 (2002).

[217] Alexander & Schauer, *supra* note 209, at 476.

points of order protected from rules thwarting their use.[218] These proposals would support a "Thayerian Congress," that is, a Congress whose processes would support judicial deference to policy decisions that implicate constitutional values.[219] Implicit in the argument for a Thayerian Congress is a comparison with what we might call a Thayerian Court, that is, one whose decisions deserve deference because of the Court's special characteristics. This Essay has highlighted the actual performance of non-judicial institutions in conducting constitutional review to bring out the dimensions along which those non-judicial institutions differ from actual courts, emphasizing in particular the incentives affecting non-judicial performance.[220]

The activities examined suggest that non-judicial constitutional review may have different characteristics from judicial constitutional review. The Senate's constitutional point of order highlights that, unlike non-judicial institutions, courts have a general obligation to address questions litigants present to them, subject only to the relatively minor restrictions imposed by justiciability requirements.[221] The OLC's bill-clearance practice shows that courts are likely to be marginally more disinterested in assessing the constitutional implications of the sitting administration's legislative program,[222] and that courts may be substantially more disinterested in assessing the constitutionality of legislation affecting the President's prerogatives.[223] The likely shape of statements of compatibility suggests that courts will do a better job in assessing constitutionality as applied in particular cases, unless (as is often the case) the most reasonable approach to constitutionality calls for balancing the competing interests implicated in the range of cases to which the statute applies.[224]

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[218] Garrett & Vermeule, *supra* note 64, at 1277.

[219] *See id.*

[220] Garrett and Vermeule are sensitive to the important incentive issues implicated by non-judicial constitutional rules. *Id.* Indeed, they are more sensitive to incentive issues than are scholars of the judicial process, who have almost no real insight beyond the banal into the incentives affecting judges. *See, e.g.*, Posner, *supra* note 9; Schauer, *supra* note 9.

[221] As noted earlier, scaling up the Senate's limited practice might reduce its quality. *See supra* text accompanying notes 88–89.

[222] Garrett and Vermeule's proposal for developing a parallel bill-clearance process in Congress, by means of "constitutional impact statements" developed by an office staffed by civil servants, might run into difficulty precisely because there is no equivalent to the administration in a Congress divided along party lines. This is particularly true if the partisan division is ideological and no party clearly dominates the legislative process. To adapt the formulation used by the Home Office in describing statements of compatibility, having a staff determine that the balance of reasons supports unconstitutionality would be particularly difficult.

[223] Justiciability requirements often reduce courts' opportunities to address the constitutionality of such laws, however.

[224] Courts sometimes adopt a rule-like rather than balancing approach because rules are the best way for courts to enforce constitutional values, given a variety of institutional limitations on judicial capacity. *See generally* FALLON, *supra* note 215. Where the courts use rules for institutional reasons rather than because rules best implement constitutional values, the case for judicial constitutional review is weaker relative to the case for non-

Non-judicial constitutional review stacks up against judicial constitutional review reasonably well. Non-judicial institutions can balance competing constitutional interests, and they do so because they have incentives guiding them toward balancing. Non-judicial institutions may do a reasonable job in assessing legislation that is not central to an administration's policy agenda.[225] Judicial constitutional review may be distinctively valuable when courts make only as-applied rulings invoking rules that the Constitution itself dictates, rather than balancing competing interests. As-applied rulings might be quite common,[226] but the situations in which the Constitution generates rules rather than balancing tests seem far less so.[227]

In the end, deeper commitments most likely drive scholars' views on whether they think a constitutional democracy can persist with more non-judicial constitutional review and less judicial review. The discussion will be informed by knowing what happens when non-judicial institutions actually engage in constitutional review. Therefore, this Essay ends with the unsatisfying but always accurate observation that this is an area where we need more empirical investigation.[228]

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judicial constitutional review.

[225] One could raise questions about the ability of courts to find unconstitutional central elements of an administration's legislative agenda, based on the United States Supreme Court's experience during the New Deal and the more general proposition supported by political scientists that the Supreme Court cannot hold out for long against a sustained consensus in the political branches favoring a set of policies. For a discussion, see generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policy-Maker*, 50 EMORY L.J. 583 (2001); Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's* Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 50 EMORY L.J. 613 (2001).

[226] The United States Supreme Court seems more attracted than necessary to broader holdings.

[227] Again, it is important to emphasize that the Essay's concern here is with rules flowing from the Constitution itself rather than from courts' institutional characteristics. Justice Scalia's prominent argument for the rule of law as a law of rules rests primarily on institutional concerns, and so does not confute this argument. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[228] The obvious candidate for exploration, beyond a more extensive examination of the OLC, is practice in Canadian government offices when the possibility of invoking Section 33 of the Charter of Rights to "override" a court decision arises. It has been said that, although Section 33 has not been invoked in response to controversial decisions regarding gay rights and tobacco advertising, more consideration was given to its use than the public record reveals. *See* JANET HEIBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE (2002). Finding out why there was consideration of using Section 33 and why it was not used would illuminate non-judicial constitutional decision-making in the shadow of judicial review. For a brief description of one important instance of non-use (and subsequent use) of Section 33, see KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 195–96, 199–200 (2001). *See also* Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CANAD. PUB. ADMIN. 255 (2001).

Another area for research, suggested by Beth Garrett, is the practice of some state attorneys general and legislative drafting offices in rendering advice on the constitutionality of proposed state laws.

ESSAY

CLASS ACTION "FAIRNESS"—A BAD DEAL FOR THE STATES AND CONSUMERS

REPRESENTATIVE JOHN CONYERS, JR.*

The House of Representatives has repeatedly considered bills that would expand federal diversity jurisdiction to include class actions in which only minimal diversity exists between plaintiffs and defendants. Though three such bills have failed, members of Congress will probably propose another. In this Essay, Representative John Conyers Jr. (D-Mich.) argues that enacting this legislation would be a mistake. Such a change would add to the already heavy burdens of the federal court system and would obstruct state courts' application of both the substantive and the procedural law of their states. Expanding diversity jurisdiction in this manner would impose unfair disadvantages on class action plaintiffs, threatening suits against the tobacco and firearms industries, among others.

Class action procedures establish a mechanism to aggregate claims against a single defendant, offering access to courts to plaintiffs who would otherwise be barred because their claims are too small to justify the expense of a lawsuit. Last year, the House of Representatives passed a bill that, if enacted, would have undercut the very purpose of these procedures by making it far more burdensome, expensive, and time-consuming for groups of injured persons to mount class action claims.[1] Though the 107th Congress adjourned before the Senate voted on the bill, in effect killing it, the issues underlying this legislation are far from dead: even though the 107th Congress was the third consecutive Congress to refuse to enact this type of bill,[2] new versions have been introduced in the 108th Congress.[3]

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* Member, United States House of Representatives (D-Mich.). Wayne State University, 1957; L.L.B., 1958. Portions of this Article appeared as Dissenting Views in the House Committee on the Judiciary's report concerning the Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002). *See* H.R. REP. NO. 107-370, at 123–34 (2002). I was the ranking signatory of the Dissenting Views. *See id.* at 134.

[1] *See* H.R. 2341. The House Committee on the Judiciary passed this bill, introduced by Representative Bob Goodlatte (R-Va.), on March 7, 2002 by a 16-10 vote. *See* H.R. REP. NO. 107-370, at 22 (2002). The Act passed the House on March 13, 2002 by 233-190 vote. *See* 107 Cong. Rec. H885 (daily ed. Mar. 13, 2002).

[2] The first bill appeared during the 105th Congress, when the Judiciary Committee marked-up and reported out the Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. (1998). *See* H.R. REP. NO. 105-702, at 10 (1998). The full House never considered that bill. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15-12 vote, the Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999). *See* H.R. REP. NO. 106-320, at 12 (1999). On September 23, 1999, the House passed House Bill 1875 by a vote of 222-207, but the measure was not considered on the Senate floor. *See* 106 CONG. REC. H8594 (daily ed. Sept. 23, 1999).

[3] The Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003), was introduced on March 6, 2003 by Representative Bob Goodlatte (R-Va.). *See* 149 CONG. REC.

These bills would make it more difficult to enforce fraud, civil rights, consumer health and safety, and environmental laws, to name but a few. They even go so far as to prevent state courts from considering class action cases that involve only violations of state laws.

The Class Action Fairness Act of 2002, the most recent version of such legislation,[4] would have allowed defendants to remove state class action claims to federal court in cases involving violations of state law whenever any member of the plaintiff class and any defendant were citizens of different states, a situation known as minimal diversity.[5] This change would have overturned a nearly 200-year-old principle requiring that all plaintiffs be citizens of different states from all defendants—known as complete diversity—before a state law case can be heard in federal court.[6] Under the Act, only three circumstances would keep a typical minimal diversity case out of federal court: federal courts would not have jurisdiction where (1) a "substantial majority" of the members of the proposed class were citizens of the same state of which the primary defendants were citizens, and the claims asserted would be governed primarily by laws of that state ("an intrastate case"); (2) all matters in controversy did not exceed $2,000,000 or the proposed class included fewer

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E405 (daily ed. Mar. 7, 2003) (statement of Rep. Goodlatte). This bill is similar to the 107th Congress's House Bill 2341, but the new bill does not include the following requirements present in the old one: (1) the disclosure of attorney's fees, (2) public records, and (3) a report from the Judicial Conference of the United States on class action fees and settlements. *Compare* H.R. 2341, §§ 3(a), 7, *with* H.R. 1115. The Senate's version of the new bill, The Class Action Fairness Act of 2003, S. 274, 108th Cong. (2003), was introduced on February 4, 2003 by Senator Charles Grassley (R-Iowa) and others. *See* 149 CONG. REC. S1873 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley). As introduced, Senate Bill 274 differed from House Bill 1115 only in that it required disclosure of proposed class action settlements to state and federal officials. *Compare* 249 CONG. REC. S1875 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley), *with* H.R. 2341. However, on April 11, the Senate Judiciary Committee reported the bill favorably with two substantial amendments. First, the amount in controversy was increased to $5,000,000. *See Washington in Brief*, WASH. POST, Apr. 12, 2003, at A6. The second amendment provided that a case must remain in state court if two-thirds of the plaintiffs are from the same state as the defendant, and it must be removed to federal court if fewer than one-third of the plaintiffs are from the same state as the defendant. *See* James Politi, *Senate Moves to Curb Class Action Lawsuits*, FIN. TIMES, Apr. 12, 2003, at 7. In cases in which more than one-third but fewer than two-thirds of plaintiffs are from the same state as the defendant, the federal judges to whom the actions would be removed will decide whether to accept removal. *See id.* This provision replaced general language that barred removal when a "substantial majority" of plaintiffs are not diverse from the defendant. *See* 149 CONG. REC. S1875 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley). While these changes afford some protection to class action plaintiffs, most cases will still be subject to removal and to all of the attendant problems discussed in this Essay.

[4] The three recent proposals have been substantially the same. *Compare* H.R. 2341, § 4(a), *with* H.R. 3789, § 2(a) *and* H.R. 1875, § 3(a).

[5] *See* H.R. 2341, § 4(a).

[6] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting predecessor to the diversity jurisdiction statute, 28 U.S.C. § 1332). The Supreme Court has also limited opportunities for removal to federal court by holding that the citizenship of unnamed plaintiffs cannot create the required diversity. *See* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 364–66 (1921).

than 100 members ("a limited scope case"); or (3) the primary defendants were states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief ("a state action case").[7]

Under the bill, when a suit filed as a class action in state court was removed to federal court, the court would have been required to dismiss it if it did not satisfy the federal class action requirements.[8]

The Judiciary Committee majority that approved the bill apparently intended this provision to bar refiling the case in state court as a class action. The Committee rejected an amendment to the bill offered by Representative Barney Frank (D-Mass.) that provided that if, after removal, the federal district court determined that a case did not meet the federal class action requirements, the court would remand the action to the state court and permit the state court to certify the class under state law.[9] The majority's refusal to adopt this amendment suggests that it believed the unamended language would have produced a contrary result, that is, that denial of certification under federal law would bar certification under state law.[10]

The Class Action Fairness Act of 2002 and legislation like it would harm both the federal and the state court systems.[11] As a result of Con-

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[7] H.R. 2341, § 4(a). The legislation also excluded securities-related and corporate governance class actions from coverage and made a number of other procedural changes, such as easing removal procedures, *see id.* § 5(a)–(b), and, where federal courts dismiss class actions and plaintiffs later bring them as individual actions in state court, deeming statutes of limitations tolled for the time the case was in federal court. *See id.* § 4(a)(2). The bill also contained a so-called "Consumer Class Action Bill of Rights," H.R. 2341, § 3(a), which included judicial scrutiny of coupon and other noncash settlements; protection against a settlement that would result, after payment of attorneys' fees, in a net loss to a class member; protection against discrimination based on geographic location; prohibition of class representatives' receiving a greater share of an award than other class members; and "plain English" requirements. *See id.* It failed, however, to do anything at all to address one of the greatest consumer abuses to occur in class action lawsuits: "sweetheart" deals, which pay off one class to eradicate future claims that are not yet before the court. For example, a federal court in New Jersey approved a settlement protecting the defendant insurance company from all future claims related to any deceptive sales practice, even though the final version of the complaint charged only three specific types of deceptive sales tactics. *See In re* Prudential Ins. Co. of Am. Sales Practice Litigation, 148 F.3d 283, 326 (3d Cir. 1998) (affirming approval of the settlement).

[8] *See* H.R. 2341, § 4(a).

[9] *See* H.R. REP. No. 107-370, at 22–23 (2002).

[10] *See* Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 96 (1935) (describing the fact that Congress rejected an amendment to a bill that would have excluded gas stations from the definition of "store" as "a circumstance to be weighed along with others" in favor of interpreting the unamended bill, subsequently enacted, to include gas stations within the definition of "store"). *See also* Gambardella v. G. Fox & Co., 716 F.2d 104, 109 n.5 (2d Cir. 1983) (following *Fox* in similar situation); Donovan v. Hotel, Motel and Rest. Employees and Bartenders Union, Local 19, 700 F.2d 539, 544–45 (9th Cir. 1983) (same); Nat'l Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 706 (D.C. Cir. 1971) (reaching the same conclusion in similar situation without reference to *Fox*).

[11] *See infra* Part I.

gress's increasing propensity to federalize state crimes,[12] the federal courts are already facing a dangerous workload crisis.[13] Bringing resource-intensive class actions into federal court would further aggravate this problem. At the same time, if these cases return to state court because federal class certification is denied,[14] the legislation would apparently permit only case-by-case adjudication of many similar claims, draining away precious state court resources.

House Bill 2341 and other legislation like it would also obstruct state law.[15] It would prevent states from implementing both their substantive tort law and their procedural class action law. In the case of procedural law, this change would harm plaintiffs disproportionately because many states have chosen to grant class action certification more frequently than has the federal government.[16]

Before considering a fourth version of this legislation, the House should insist on receiving objective and comprehensive data justifying the proposed intrusion into state court jurisdiction. Currently, no such data exist.[17] In short, the changes to class action adjudication that have been proposed have little evidence in their favor and offer numerous reasons for judges, consumers, and legislators to call for their rejection.

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[12] *See* Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1278–82 (1995).

[13] *See infra* text accompanying notes 20–25.

[14] *See* H.R. 2341, § 4(a).

[15] *See infra* Part II.

[16] *See infra* text accompanying notes 75–89.

[17] The most comprehensive study completed was the 1994–95 Federal Judicial Center review of class actions, which rebutted claims that class actions constituted frivolous "strike" suits and that attorneys were unreasonably benefiting from class action cases. *See* WILLGING, ET AL., FED. JUD. CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 90 (1996). The other studies cited by supporters of class action legislation are incomplete and inconclusive. The Stateside Associates study cited in the congressional testimony of representatives of Ford Motor Company and the United States Chamber of Commerce, *see Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 100 (1998) [hereinafter *Mass Torts and Class Action Lawsuits*] (prepared statement of John W. Martin Jr., Vice President General Counsel, Ford Motor Co.); *id.* at 133–34 (prepared statement of John B. Hendricks, President, Alabama Cryogenic Engineering, Inc., representing Chamber of Commerce of the U.S.), covered only six Alabama counties. *See* STATESIDE ASSOCIATES, CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA (1998), *reprinted in Mass Torts and Class Action Lawsuits*, *supra*, at 140. A more recent study conducted in part by Stateside Associates evaluated just three counties: one each in Florida, Illinois, and Texas. *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 158–59 (2001).

I. EXPANDING DIVERSITY JURISDICTION UNNECESSARILY BURDENS THE FEDERAL AND STATE COURT SYSTEMS

The Class Action Fairness Act of 2002, House Bill 2341, and other measures like it would burden both the federal and state court systems by increasing the number of class action cases heard in the former and the number of individual suits heard in the latter. Proponents of this legislation argue that enduring these hardships is the only way to protect defendants against biased local courts, but the Constitution provides other methods for guarding against the few vestiges of parochial prejudice that remain with us today.

Expanding federal diversity jurisdiction to include more class actions will inevitably result in a significant increase in the federal courts' workload. Class action cases require more money and attention than almost any other type of litigation.[18] If more of these cases moved to the federal system, addressing them "could require substantial additional Federal resources."[19] The workload problem in the federal courts is currently at an acute stage. The most recent available statistics, covering 2001, indicate that federal district courts are seeing 377 civil filings per authorized judgeship each year.[20] This figure underestimates the problem, because it includes all authorized judgeships, ignoring the fact that many remain unfilled.[21]

Chief Justice Rehnquist has criticized Congress and President Clinton for exacerbating the courts' workload problem with legislation that brought more cases into the federal system.[22] If the trend continued, he said, "just filling the vacancies [on the courts] will not be enough. We will need additional judgeships."[23] Even Judge Richard A. Posner, who believes federal courts have responded well to their growing caseload,[24] describes the courts today as "a defending army that has used up all its ammunition repelling an attack and is nervously waiting to see whether

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[18] *See* Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to Representative Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 1 (June 18, 1998) (on file with the House Judiciary Committee Democratic staff).

[19] *Id.* at 1.

[20] *See* 2001 JUDICIAL BUSINESS OF UNITED STATES COURTS, ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 21 (2001).

[21] As of April 11, 2003, fifty judicial seats were vacant, accounting for nearly six percent of federal judicial positions. Office of Legal Policy, U.S. Dep't of Justice, Judicial Nominations, *at* http://www.usdoj.gov/olp/judicialnominations.htm (last visited Apr. 11, 2003).

[22] *See* Chief Justice William Rehnquist, Is Federalism Dead?, Address Before the American Law Institute (May 11, 1998), *in* LEGAL TIMES, May 18, 1998, at 12.

[23] *Id.*

[24] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM xiii (1996) (noting "[t]he success of the federal courts in coping with a caseload that ten years ago I would have thought wholly crippling").

the attack will be renewed."[25] There can be no doubt that expanding federal jurisdiction through House Bill 2341 would have brought a new onslaught of cases to federal court.

In addition to its impact on the federal courts, House Bill 2341 would also burden state courts. In cases where the federal court fails to certify a class action, the legislation apparently prohibits states from using their own class action procedures to resolve the underlying state causes of action.[26] It is important to consider the context in which this legislation would apply. Imagine that a class action suit has been filed in state court involving numerous state law claims, each of which, if filed separately, would not be subject to federal jurisdiction.[27] The defendants remove the case to federal court because there is minimal diversity between them and the plaintiff class, and the federal court denies class certification under the federal rules. Because the minimal diversity rules of House Bill 2341 would apply only to class action cases, the federal court no longer has jurisdiction and the case returns to state court.[28] As a result, hundreds, if not thousands, of potential new cases will be unleashed because plaintiffs apparently would not be able to seek class certification under state law.[29]

Arguments by proponents of the Bill that undermining both state and federal courts in these ways is justified because state courts are "biased" against out of state defendants in class action suits[30] lack foundation. First, the Supreme Court has made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co. v. Shutts*,[31] the Supreme Court held that in class action cases, state courts must ensure that (1) the defendant receives notice and an opportunity to be heard and participate in the litigation, (2) an absent plaintiff is provided with an opportunity to remove himself or herself from the class, (3) the named plaintiff at all times adequately represents the interests of the absent class members, and (4) the forum state has a significant relationship to the claims asserted by each member of the plaintiff class.[32] Federal courts

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[25] *Id.* at 187.

[26] *See supra* text accompanying notes 9–10.

[27] *See* 28 U.S.C. § 1332(a) (Supp. 2002).

[28] *See* Class Action Fairness Act of 2002, H.R. 2341, § 4(a), 107th Cong. (2002).

[29] *See supra* text accompanying notes 9–10.

[30] *See, e.g.*, H.R. 2341, § 2(a)(5)(b) (finding that county and state courts "sometimes act[ ] in ways that demonstrate bias against out-of-State defendants"); Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 484 (2000) ("State courts often express bias against out-of-state corporate defendants . . . ."). It is worth noting that any claim that state courts are biased as compared to federal courts is in fact a charge that state court judges are biased because in both state and federal court juries are derived from citizens of the state where suit is brought.

[31] 472 U.S. 797 (1985).

[32] *See id.* at 806–10.

already have ways of exercising oversight if state courts fail in these duties.[33] Most critically, federal courts need not grant state court decisions full faith and credit where parties do not receive the due process required in *Shutts*; that is, they can allow defendants to launch collateral attacks in federal court against judgments awarded in such cases.[34]

Second, the assumption that out-of-state defendants will be victims of prejudice in state courts—the principle underlying diversity jurisdiction[35]—may have been valid once, but it is no longer. Today many large businesses have a substantial commercial presence in more than one state, through factories, business facilities, or employees. If General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees,[36] it does not seem reasonable to expect them to face any great risk of bias simply because their principal places of business are in Michigan and they are incorporated in Delaware.[37] Nevertheless, under the proposed class action legislation, these hypothetical cases would be subject to removal by the defendant to federal court.[38] The Judicial Conference recently determined that fear of local prejudice by state courts was no longer justified and that keeping the federal judiciary's efforts focused on federal questions was a more significant issue.[39] The Conference's conclusion prompted Congress to cut back diversity jurisdiction by increasing the amount in controversy needed before a federal court can hear a diversity case from $50,000 to $75,000.[40]

Moreover, interest in limiting diversity jurisdiction is not new; calls to do so date back at least to the 1920s.[41] This interest has grown as fears

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[33] *See* Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93, 110–20 (2001).

[34] *See id.* at 111–15.

[35] *See* AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969).

[36] Jim Weiker, *State Feels Weight of Retailer in Many Ways*, COLUMBUS DISPATCH, Mar. 30, 2003, at 1G (noting that General Motors has approximately 24,000 employees in Ohio); Christopher Jensen, *New-Car Sales Downshift in NE Ohio*, PLAIN DEALER, Jan. 22, 2003, at C4 (noting that Ford has approximately 10,000 employees in northeast Ohio).

[37] *See* Grimes v. General Motors Corp., 205 F. Supp. 2d 1292, 1292 (M.D. Ala. 2002); Ford Motor Co. v. Meredith Motor Co., Inc., 257 F.3d 67, 68–69 (1st Cir. 2001). Similarly, if the Walt Disney Corporation—headquartered in California and incorporated in Delaware, *see* Walt Disney Co. v. Nelson, 677 So. 2d 400, 402 (Fla. Dist. Ct. App. 1996), and one of Florida's largest employers, *see* Robert Johnson, *Disney Cuts Workers' Hours; Schedules Trimmed*, ORLANDO SENTINEL, Feb. 21, 2003, at C1 (noting that Disney World has 54,000 employees in central Florida)—were to face a class action brought by a class of plaintiffs in a Florida court, it would make little sense to involve the federal courts because of a concern for local prejudice.

[38] *See* H.R. 2341, § 5(a).

[39] *See* THE JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 30–31 recommendation 7 (1995).

[40] *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (codified at 28 U.S.C. § 1332(a) (Supp. 1998)).

[41] *See* Felix Frankfurter, *Distribution of Judicial Power Between United States and*

of local court prejudice have subsided[42] and concerns about diverting federal courts from their core responsibility—deciding federal questions—have increased.[43] More than three decades ago the American Law Institute concluded that "none of the significant prejudices that beset our society today begins or ends when a state line is crossed."[44] In 1978, the House passed legislation that would have abolished diversity jurisdiction.[45] The most recent Federal Courts Study Committee report on the subject concluded that local bias was no longer a compelling justification for retaining diversity jurisdiction.[46] The Committee concluded that diversity jurisdiction should be eliminated, with only "narrowly defined exceptions."[47]

State Courts, 13 CORNELL L.Q. 499, 523 (1928).

[42] As Judge J. Skelly Wright wrote, his and other federal judges' suspicions of state courts in the early postwar years were driven by the fact that "if one examined the judgments of state courts anywhere during the first half of this century, and even a little beyond, the trumpet of liberty would seldom be heard, especially on behalf of the poor, the unpopular, and the unconventional." *See* J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 173 (1984).

[43] *See* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35 (Apr. 2, 1990) ("One purpose of these recommendations is to improve the federal courts' capacity to resolve disputes that most need federal court attention by relieving them of some functions that involve federal rights or interests only marginally if at all.")

[44] *See* AM. LAW INST., *supra* note 35 at 99, 106.

[45] *See* 124 CONG. REC. H5008–09 (daily ed. Feb. 28, 1978) (approving House Bill 9622, a bill for "the abolition of diversity of citizenship jurisdiction in federal courts"). The legislation was not considered in the Senate. For more information on the bill, see generally H.R. REP. NO. 95-893 (1978).

[46] FED. COURTS STUDY COMM., *supra* note 43, at 40.

[47] *Id.* at 39. For calls to reduce or eliminate diversity jurisdiction, see HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 149–50 (1973); ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 38 (1955); George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 377–78 (1933); Robert H. Bork, Dealing with the Overload in Article III Courts, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 1976), *in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 231, 236–37 (1976); M. Caldwell Butler & John D. Eure, *Diversity in the Court System: Let's Abolish It*, 11 VA. B. ASS'N J. 4, 9 (1985); Frank M. Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 BROOKINGS REV. 34, 34 (Winter 1992); David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 6 (1968); Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 N.Y. ST. B.J. 14, 14 (1989); Elmo B. Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. REV. 347, 355–56 (1978); Robert J. Sheran & Barbara Isaacman, *State Cases Belong In State Courts*, 12 CREIGHTON L. REV. 1, 68 (1978); Clement F. Haynsworth Jr., Book Review, 87 HARV. L. REV. 1082, 1089 (1974) (endorsing Judge Friendly's proposal to abolish diversity jurisdiction).

Ironically, during the 105th Congress, the Republican leadership was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in federal court. At that time Representative Henry Hyde (R-Ill.), then Chairman of the Judiciary Committee, said:

> I simply say the State judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest . . . when the judge raises his hand, [in] State court or Federal

The expansion of diversity jurisdiction promoted by the supporters of House Bill 2341 ignores decades of scholarly and judicial thought. It addresses problems of bias long since overcome and exacerbates problems of overcrowding that are very much with us.

II. Expanding Diversity Jurisdiction Would Obstruct State Law

In addition to these administrative problems, House Bill 2341 would have created constitutional difficulties. It would have obstructed state law in both procedural and substantive areas, upsetting the fragile balance required by our federal system.

Proponents of House Bill 2341 and similar legislation argue that federal courts should have jurisdiction over more class actions because many of these cases, such as those claiming hundreds of millions of dollars against national corporations, affect interstate commerce and, therefore, issues of national concern.[48] These arguments overlook the fact that where class actions are based in tort—as some of the most frequently scrutinized class actions are—they also raise significant issues of state law. Tort law is one of the classic concerns of state common law,[49] and doctrinal "differences from one state to another are not mere matters of detail, but affect basic issues of duty, standard of care, causation, affirmative defenses, and recoverable damages."[50] In tobacco suits, in particular, issues such as the significance of an alleged tortfeasor's failure to warn, a victim's assumption of risk, comparative negligence, and market-share liability are likely to arise, and states have widely different views on each of these matters.[51] Allowing each state to apply its own law comports with basic federalism principles and allows the states to serve as laboratories of law, testing different approaches and comparing the results.[52]

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court, they [sic] swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604 (daily ed. Apr. 18, 1996).

[48] *See, e.g.*, H.R. Rep. No. 107-370, at 7 (2002); Beisner & Miller, *supra* note 17, at 151; Schwartz et al., *supra* note 30, at 486.

[49] *See* Roger Trangsrud, *Federalism and Mass Tort Litigation*, 148 U. Pa. L. Rev. 2263, 2265–68 (2000).

[50] Robert A. Sedler & Aaron D. Twerski, *State Choice of Law in Mass Tort Cases: A Response to 'A View from the Legislature,'* 73 Marq. L. Rev. 625, 629 (1990).

[51] *See* Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation over Tobacco Injuries*, 33 Ga. L. Rev. 979, 1016–20 (1999).

[52] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Advocates of expanding diversity jurisdiction reply that federal courts regularly interpret state law when they decide diversity cases.[53] In fact, however, federal courts sitting in diversity do something slightly but significantly different from what state courts do. When federal courts decide diversity cases, they try to determine what a state court would decide if faced with the same question,[54] "reducing their role in legal development from making law to forecasting it."[55] Because these forecasts do not carry the force of law beyond the cases in which they are issued, state courts subsequently presented with the same issues have the authority to disregard them and reach their own conclusions.[56] One difficulty with federal forecasting, especially when state law is unsettled, is that federal courts may simply make mistakes;[57] federal courts have even been known to make mistakes in favor of plaintiffs, expanding liability where state courts later contracted it.[58] A related difficulty is that, until a state court rules on the same issue in a subsequent case, no one knows whether a federal court sitting in diversity was right or wrong in its application of state law—a question of law, which could have been resolved if a state court had decided the case, remains open.[59] Worst of all, because of the difficulties of predicting how a state court will decide a question, federal judges put "laborious, often onerous[ ]" efforts into reaching these undesirable results.[60]

House Bill 2341 and similar measures would obstruct state law even in some consumer protection cases that are not class actions. For instance, some states have laws that protect consumers by prohibiting de-

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[53] *See* Beisner & Miller, *supra* note 17, at 153.

[54] JAMES WM. MOORE ET AL., 17A MOORE'S FEDERAL PRACTICE CIVIL § 124.22 (3d ed. 1997) ("When state law is unsettled, the federal court must attempt to predict how the state's highest court would rule if confronted with the issue.") (citing Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967); Bernhardt v. Polygraphic Co., 350 U.S. 198, 205 (1956)). For data suggesting that federal courts may be violating this doctrine and thereby exacerbating the problems with diversity jurisdiction, see POSNER, *supra* note 24, at 218 tbl.7.2.

[55] Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 224 (1994).

[56] *See* Moore v. Sims, 442 U.S. 415, 428 (1979) (observing that a federal court's interpretation of state law "is not binding on state courts and may be discredited at any time"); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1395 (7th Cir. 1992) (Posner, J.) ("State courts are not bound by federal courts' interpretations of state law."); Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969) ("In a diversity case neither this Court nor the District Court make any declarations of law. . . . Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties.").

[57] *See* Weber, *supra* note 55, at 230–31 (describing state court decisions that federal courts probably would not have predicted).

[58] *See id.* at 231 n.101.

[59] *See* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 322–23 (1967) (citing examples).

[60] *Id.* at 321.

ceptive business practices.[61] These laws may be enforced by the state attorney general or, if the state attorney general does not act, by state citizens.[62] The Bill might have forced such cases into federal court because plaintiffs in them represent the interests of the "general public," the language in House Bill 2341 that would have triggered the new diversity rule.[63] For the same reason, the Bill might have reached some claims filed by municipalities, such as the city of Newark's suit against gun makers, distributors, and retailers now pending in state court in New Jersey.[64] The state appellate court has let stand the city's claims of negligence and creation of a public nuisance,[65] but removal to federal court under House Bill 2341 would have been fatal: a federal district court in New Jersey dismissed similar claims and was affirmed by the Third Circuit.[66]

House Bill 2341 would not only have obstructed the application of substantive state tort law, it would also have stripped state courts of their ability to use the class action procedure.[67] As the Conference of Chief Justices stated, an earlier version of the legislation in essence would have "unilaterally transfer[ed] jurisdiction of a significant category of cases from state to federal courts" and achieved a "drastic" distortion and disruption of traditional notions of federalism.[68]

The Supreme Court has found that efforts by Congress to dictate state court procedures implicate important Tenth Amendment federalism concerns. For example, in *Johnson v. Fankell*,[69] the Court reiterated what it termed "the general rule" that, because states should maintain control over procedures in their courts, "Federal law takes State courts as it finds them."[70] By blocking claims that are denied class certification in federal

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[61] *See, e.g.*, CAL. CIV. CODE §§ 1750–1784 (West 1998); MICH. COMP. LAWS § 445.901–.922 (2001).

[62] CAL. CIV. CODE §§ 1780–1781 (West 1998); MICH. COMP. LAWS §§ 445.907(6)(c), 445.911(3) (2001).

[63] *See* H.R. 2341, § 4(a). Representatives Zoe Lofgren (D-Cal.) and Adam Schiff (D-Cal.) introduced an amendment to limit the bill to affect only consumer class actions. *See* H.R. REP. NO. 107-370, at 95–97 (2002). The House Judiciary Committee rejected this proposal 11 to 17. *See id.* at 107. Like the majority's rejection of Representative Frank's amendment, this vote suggests that House Bill 2341 was indeed intended to bar individual consumer protection actions. *See supra* text accompanying notes 9–10.

[64] *See* Megan Rhyne, *Suit Against Gun Makers Goes Forward*, NAT'L L.J., Mar. 24, 2003, at B1.

[65] *See* James v. Arms Tech., Inc., 2003 WL 942781, at *1 (N.J. Super. Ct. App. Div. Mar. 11, 2003).

[66] *See* Rhyne, *supra* note 64, at B1 (describing Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001)).

[67] *See supra* text accompanying notes 9–10.

[68] Letter from Chief Justice David A. Brock, President of the Conference of Chief Justices, to Representative Henry J. Hyde, Chairman of the Committee on the Judiciary 1 (July 19, 1999) (on file with the House Judiciary Committee Democratic staff).

[69] 520 U.S. 911 (1997).

[70] *Id.* at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)) (holding that federal law did not preempt Idaho procedural rules) (internal quotation marks omitted).

court from being re-filed as class actions in state court, House Bill 2341 would not have left state courts as it found them but instead would have effectively prevented them from hearing one form of case. Professor Laurence Tribe has argued that the principle described in *Fankell* applies to this type of legislation, testifying before Congress that it "would raise serious questions" of federalism.[71]

State rules governing class actions often differ dramatically from federal rules. These differences do not indicate bias in favor of class action plaintiffs, as proponents of House Bill 2341 argue[72]: state courts frequently refuse to certify class actions.[73] Like differences among states' tort laws, differences among states—and between the states and the federal government—in law governing class actions are the result of legislative and judicial choices that the federal government must respect.

Class actions filed in federal court must meet the requirements of Federal Rule of Civil Procedure 23.[74] Under the current version of the rule, all class actions must meet each of four primary requirements:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[75]

Every class action must also meet one of three secondary requirements.[76] These are generally viewed as establishing three categories of class action. The first category includes actions in which litigation of individual suits by or against the proposed class members would risk creating "inconsistent or varying adjudications," or would dispose of other members'

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[71] *The Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 165 (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

[72] *See* Schwartz et al., *supra* note 30, at 484.

[73] *See generally* Linda S. Mullenix, *Abandoning the Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709 (2000) (arguing that courts in Alabama, Louisiana, and Texas are becoming more hostile to class action certification); Melodie C. Hahn, Comment, *Smokers' Chances of a Fair Fight against the Tobacco Companies Go Up in Flames: A Study of* Philip Morris v. Angeletti *and its Effect on the Viability of Class Action Lawsuits in Maryland Tobacco Litigation*, 31 U. BALT. L. REV. 103 (2001) (arguing that certification of plaintiff classes suing tobacco-industry defendants is nearly impossible to obtain in Maryland state courts). Federal district courts have certified their share of inappropriate classes, and the Supreme Court has established some of its most significant precedents by striking down their certifications. *See* Ortiz v. Fireboard Corp., 527 U.S. 815 (1999); Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

[74] *See* FED. R. CIV. P. 23.

[75] *Id.* at 23(a).

[76] *See id.* at 23(b).

interests or "substantially impair or impede" the ability to protect those interests.[77] The second category includes cases in which the party opposing the class has acted or failed to act on grounds "generally applicable" to all class members.[78] The third category—known as 23(b)(3) actions because of the subsection in which they are described—includes classes for which common questions of law or fact "predominate" over individual questions and "class action is superior to other available methods for the fair and efficient adjudication of the controversy."[79]

Ten states and Puerto Rico have explicitly rejected the modern formulation of Rule 23 and chosen a certification procedure far less imposing. California, Nebraska, and Wisconsin have adopted the Field Code, which primarily inquires whether an ascertainable class and well-defined community of interest exist.[80] Georgia, Mississippi, North Carolina, West Virginia, and Puerto Rico have adopted versions of the original Rule 23 enacted in 1938.[81] This rule allowed certification more often than the current rule does: the highest court of North Carolina concluded that its legislature adopted the original version "to simplify class action procedures in North Carolina and to give our courts greater flexibility in permitting such actions than had been allowed previously."[82] Iowa and North Dakota have adopted the Uniform Class Action Rules, which permit class action certification when "joinder is impracticable and when there is a common question of law or fact."[83] Finally, Virginia has no class action statute at all, though it allows the transfer and joining of six or more civil cases.[84] Because of the greater flexibility of the class action requirements in these states, plaintiffs are much more likely to be able to certify classes in their courts than in federal court.

In addition, even where states have enacted a version of Rule 23, the federal courts are likely to represent a far more difficult forum for class certification. Many of these states have made the rule more lenient either through the text of the rule itself or through court interpretation of it. For example, several jurisdictions either do not require notice to class members[85] or grant courts extreme latitude in requiring the defendant to pay

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[77] *Id.* at 23(b)(1).

[78] *Id.* at 23(b)(2).

[79] *Id.* at 23(b)(3).

[80] *See* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 13.2 (4th ed. 2002). *See also* STATE LAWS SUBCOMM., AM. B. ASS'N, SURVEY OF STATE CLASS ACTION LAW 51, 401 (Thomas Grande ed., 2002) [hereinafter STATE SURVEY].

[81] *See* CONTE & NEWBERG, *supra* note 80, § 13.3.

[82] Crow v. Citicorp Acceptance Co., 354 S.E.2d 459, 463 (N.C. 1987). Today, a class will be certified in North Carolina "when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 464.

[83] *See* CONTE & NEWBERG, *supra* note 80, § 13.12.

[84] *See* VA. CODE ANN. §§ 8.01-267.1 to -.9; STATE SURVEY, *supra* note 80, at 652.

[85] *See* STATE SURVEY, *supra* note 80, at 326–27 (describing Massachusetts).

the costs of notice.[86] Because the median noticing costs are in the six-figure range in some federal districts,[87] looser notice requirements make class actions available to a wider group of citizens in state court than in federal court. In another example, Indiana grants class action certification more freely than federal courts in the Seventh Circuit do.[88] In still another example, Ohio courts evaluating whether Ohio's equivalent to a 23(b)(3) claim meets the predominance requirement have focused on the ability of a class action to permit people with small claims to have their day in court, an approach friendly to class claims.[89]

In the substantive law of tort and the procedural law of class actions, proposals to expand diversity jurisdiction would intrude on the powers and responsibilities of the states. This intrusion would, in most cases, redound to the detriment of plaintiffs because of the choice many states have made to establish easier certification requirements than those of the federal government.

III. EXPANDING DIVERSITY JURISDICTION WOULD RESTRICT LIABILITY ACTIONS IN A BROAD RANGE OF CASES

Even where state law is similar to federal law, House Bill 2341 and legislation like it would harm class action plaintiffs by allowing defendants to bring their cases into federal court. Litigating in federal court is more expensive than in state court.[90] Given the backlog in the federal courts and the fact that federal courts are obligated to resolve criminal mat-

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[86] *See, e.g., id.* at 136, 427–28 (quoting D.C. SUPER. CT. R. CIV. P. 23-I(c)(3); N.J. R. CIV. P. 4:32-2(b)).

[87] *See* WILLGING ET AL., *supra* note 17, at 48.

[88] *See* STATE SURVEY, *supra* note 80, at 214 (discussing Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001)). *See also id.* at 257 ("Kansas courts have broader authority to change an individual petition to a class action than is allowed under F.R.C.P. 23.").

[89] *See id.* at 498 (citing Hamilton v. Ohio Savings Bank, 694 N.E.2d 442 (Ohio 1998)). Loosening of predominance requirements in state courts is particularly significant when compared to recent tightening of those requirements in federal courts. *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 622–24 (1997) (holding that the "benefits [putative class members] might gain from the establishment of a grand-scale compensation scheme . . . is not pertinent to the predominance inquiry" and that putative class members' exposure to asbestos supplied by defendants did not fulfill the predominance requirement, "[g]iven the greater number [and significance] of questions peculiar to the several categories of class members, and to individuals within each category"); Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (holding that in considering predominance, court must look beyond the pleadings to "the claims, defenses, relevant facts, and applicable substantive law"); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (holding that predominance requirement is not met by putative class of plaintiffs who used penile prostheses manufactured by the same company because "the products are different, each plaintiff has a unique complaint, and each receives different information and assurances from his treating physician").

[90] *See Class Action Fairness Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong. 38–39 (2002) (prepared statement of Andrew Friedman, Partner, Bonnett, Fairburn, Friedman & Balint, PC).

ters before civil matters where doing so is reasonable,[91] even when plaintiffs are able to certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court. These effects would harm plaintiffs disproportionately because of the nature of the claims class actions allow: those lodged collectively by many people who have suffered small injuries. Because their potential return is so small, these are precisely the people who will be deterred by procedures that require more time and money.

The vague terms used in the legislation may also work to the disadvantage of plaintiffs. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws[92] are new and undefined, with no precedent in the United States Code or case law. It will take many years of conflicting decisions before these critical terms can begin to be sorted out. The vagueness problems will be particularly acute for plaintiffs: if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred.[93] If, however, a defendant guesses wrong and jurisdiction does not lie in the federal courts, the defendant will be no worse off and will have benefited from the delays caused by the failed removal motion.

The cases affected by this legislation range from consumer fraud and health and safety to environmental and civil rights actions. Take, for example, the numerous class action lawsuits filed across the country against Bridgestone/Firestone Incorporated and Ford Motor Company claiming that the companies' negligence led to the production and use of tires that caused roll-over accidents.[94] As discussed above, certification of the proposed classes in these cases could be more difficult under federal law.[95] Some federal courts have already denied class standing in tire cases upon a finding that the proposed class could not meet Rule 23(b)(3)'s predominance requirement.[96] This fact is particularly troubling when the suits arise in states that have more flexible certification requirements, such as California,[97] where it is estimated that more than 150 cases are pending against Bridgestone/Firestone.[98] California has a much less re-

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[91] *See* Speedy Trial Act of 1974, 18 U.S.C. § 3165(b) (2000).

[92] H.R. 2341, § 4.

[93] *See supra* text accompanying notes 9–10.

[94] *See* Barnaby J. Feder, *Unusual Line of Business for Lawyers*, N.Y. TIMES, Aug. 16, 2000, at C1.

[95] *See supra* text accompanying notes 72–89.

[96] *See, e.g., In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable. . . . [W]e add that this litigation is not manageable as a class action even on a statewide basis"); Feinstein v. Firestone Tire and Rubber Co., 535 F. Supp. 595 (D.C.N.Y. 1982).

[97] *See supra* text accompanying note 80.

[98] *See* Christopher Whalen, *Consumers Turn to Trial Lawyers*, INSIGHT ON THE NEWS, Sept. 2, 2002.

strictive requirement for "permissive joinder" than the federal system does,[99] as well as additional statutes providing more procedural options for bringing class actions.[100] Even if the federal courts ultimately remand the cases back to state court—and many have because plaintiffs failed to meet diversity, amount in controversy, or federal question requirements[101]—the delay and its attendant costs could be debilitating for plaintiffs.

House Bill 2341 would also allow tobacco companies to remove state class actions involving state causes of action to federal court. In fact, since the major tobacco companies are all domiciled in states where class actions are not being brought, minimal diversity as required by this Bill[102] will always exist between the plaintiffs and tobacco companies. The Bill, therefore, would have effectively granted the tobacco industry a free pass to federal court, where it would be much more difficult for plaintiffs to prevail in class action cases.[103]

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[99] *See* CAL. CIV. PROC. CODE § 382 (West 2003) (allowing for class action status "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.").

[100] *See* CAL. CIV. CODE § 1781 (West 2003); CAL. BUS. & PROF. CODE § 17204 (West 2003).

[101] *See* Carden v. Bridgestone/Firestone, Inc., 2000 WL 33520302, at *1–*4 (S.D. Fla. Oct. 18, 2000); Dorian v. Bridgestone/Firestone, Inc., 2000 WL 1570627, at *1–*4 (E.D. Pa. Oct. 19, 2000); Lennon v. Bridgestone/Firestone Inc., 2000 WL 1570645, at *1–*4 (E.D. Pa. Oct. 19, 2000); Beatty v. Bridgestone/Firestone, Inc., 2000 WL 1570590, at *1–*3 (E.D. Pa. Oct. 19, 2000); Miller v. Bridgestone/Firestone, Inc., 2000 WL 1570732, at *1–*4 (E.D. Pa. Oct. 19, 2000). *But see In re* Bridgestone/Firestone, Inc., 2001 WL 876921, at *1 (S.D. Ind. May 11, 2001) (denying motion to remand); Trujillo v. Bridgestone/Firestone, Inc., 2000 WL 1690308, at *1 (N.D. Ill. Nov. 1, 2000) (same).

[102] *See* H.R. 2341, § 4(a)(2).

[103] The Bill is opposed by the Tobacco Products Liability Project, *see Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing Before the House Comm. on the Judiciary*, 106th Cong. 171–80 (1999) [hereinafter *Interstate Class Action Hearing*] (statement of Richard A. Daynard, Professor of Law, Northeastern University School of Law and Chairman, Tobacco Products Liability Project); Americans for Nonsmokers' Rights, *see* Letter from Julia Carol and Robin Hobart, Co-Directors, Americans for Nonsmokers' Rights, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with the House Judiciary Committee Democratic staff); the National Center for Tobacco-Free Kids, *see* Letter from Matthew Meyers, Executive Vice President and General Counsel, National Center for Tobacco-Free Kids, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with the House Judiciary Committee Democratic staff); and Save Lives, Not Tobacco, a coalition that includes the American Lung Association and the American Medical Woman's Association, *see* Letter from Paul G. Billings, American Lung Association; Michele Bloch, American Medical Women's Association; Joan Mulhern, Public Citizen; & William Godshall, SmokeFree Pennsylvania to House Judiciary Committee Member[s] (July 15, 1998) (on file with the House Judiciary Committee Democratic staff); and the Coalition for Workers Health Care Funds, which represents non-profit trust funds established jointly by labor and management to provide medical care to approximately 30 million workers, retirees, and their families. *See* Letter from David Mallino, Legislative Director, Coalition for Workers Health Care Funds, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 15, 1998) (on file with House Judiciary Committee Democratic staff).

The Campaign for Tobacco-Free Kids argued that a predecessor version of the Bill "correspond[ed] perfectly with the industry's litigation strategy, and further[ed] the industry's goal of avoiding liability" by shifting cases to federal court, where tobacco companies prefer to litigate.[104] Similarly, Professor Richard Daynard has observed that allowing tobacco companies to move suits into federal court "would have the almost-certain effect of extinguishing all class actions against tobacco companies" because "the federal courts have been unwilling to permit individual tobacco victims to band together in class claims."[105] As a Florida court has observed, if the law bars these plaintiffs from joining together as a class, the cost of bringing suit will be prohibitive and most will never obtain a remedy.[106] By effectively erecting this barrier, House Bill 2341 would have blocked these suits.

The Bill would also benefit companies marketing gun products that are dangerous and defective and have no reasonable use in self-defense. As M. Kristen Rand, the legislative director of the Violence Policy Center, has testified, "Litigation is the only mechanism available to consumers and victims of firearms violence to hold the gun industry accountable when it acts negligently or recklessly."[107] Several suits have succeeded in holding the gun industry accountable: a state class action brought in Texas, for example, resulted in a $31 million settlement against gun manufacturer Remington.[108] This case could easily have failed in federal court because, as the general counsel for Handgun Control has written, "federal courts tend to be very reluctant to extend state law or apply it to new situations. With gun litigation, however[,] many cases require courts to extend the laws, or to apply established law to a new situation."[109] In cases against the gun industry, then, House Bill 2341 would give defendants an unfair advantage by allowing them to transfer cases based on state law to federal court simply because there is minimal diversity between the plaintiffs and defendants.

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[104] Letter from Matthew Meyers to Representative John Conyers, *supra* note 103, at 2.

[105] *Interstate Class Action Hearing*, *supra* note 103, at 176–77 (prepared statement of Richard A. Daynard, Professor of Law, Northeastern University School of Law and Chairman, Tobacco Products Liability Project) (citing Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996)).

[106] *See* Broin v. Phillip Morris Cos., 641 So. 2d 888, 891–92 (Fla. Dist. Ct. App. 1994).

[107] *Protection of Lawful Commerce in Arms Act: Hearing Before the House Committee on Energy and Commerce*, 107th Cong. 76 (2002) (prepared statement of M. Kristen Rand, Legislative Director, Violence Policy Center). The Bill is opposed by Handgun Control, *see* Letter from Dennis Henigan, General Counsel, Handgun Control, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 16, 1998) (on file with House Judiciary Committee Democratic staff), and the Coalition to Stop Gun Violence. *See* Letter from Michael K. Beard, President, Coalition to Stop Gun Violence, to Representative John Conyers, Ranking Member, House Judiciary Committee (July 21, 1998) (on file with House Judiciary Committee Democratic staff).

[108] *See* Garza v. Sporting Goods Properties, Inc., No. CIV. A. SA-93-CA-108, 1996 WL 56247, at *9 (W.D. Tex. Feb. 6, 1996).

[109] Letter from Dennis Henigan to Representative John Conyers, *supra* note 107, at 1.

Finally, the class action legislation would undermine a series of recent suits against health maintenance organizations ("HMOs") resulting from their alleged fraud, over-billing, and failure to provide coverage.[110] The Bill would threaten suits like that of Harold Katlin, who filed a class action in Pennsylvania state court against his HMO, alleging that the HMO had failed to verify that Katlin's psychiatrist was licensed, failed to supervise him, and, nonetheless, referred patients to him.[111] The court certified a variety of class claims.[112] In general, class action suits against HMOs have achieved greater success in state court than they have in federal court.[113] We should not handicap these important suits before they have even begun by allowing defendants to bring them into federal court.

CONCLUSION

House Bill 2341 would allow defendants to remove class actions involving state law issues from state courts—the forums most convenient for the victims of wrongdoing and most familiar with the substantive law involved—to federal courts, where the class is less likely to be certified and the case will take longer to resolve. This shift would seriously undermine the delicate balance between federal and state courts. Just as it would threaten to overwhelm federal courts by causing the removal of resource-intensive class action cases to federal district courts, so would it increase the burdens on state courts, as class actions rejected by federal courts metamorphosized into numerous individual state actions. It would also block state courts from enforcing both the substantive and procedural law of their states.

The proposed legislation cannot be seen as merely prohibiting nationwide class actions filed in state court, as some of its proponents suggest it should be.[114] This legislation goes much further and bars state

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[110] By effectively denying patients access to state courts, House Bill 2341 would run counter to Congress's efforts to expand patient access to state courts in other contexts. *See Smarter Health Care Partnership for American Families: Making Federal and State Roles in Managed Care Regulation and Liability Work for Accountable and Affordable Health Care Coverage: Hearing Before the Subcomm. on Health of the House Comm. on Energy and Commerce*, 107th Cong. 6 (2001) (statement of Rep. John D. Dingell (D-Mich.)).

[111] Katlin v. Tremoglie, 43 Pa. D. & C.4th 373, 374–76 (Pa. C.P. Philadelphia County 1999).

[112] *Id.* at 374–75.

[113] *See* Edith M. Kallas et al., *Class Actions in the Healthcare Context*, *in* HEALTH CARE LITIGATION: WHAT YOU NEED TO KNOW AFTER *PEGRAM* 14 (Practising Law Institute ed., 2000) (collecting cases).

[114] *See, e.g.*, *Interstate Class Action Hearing*, *supra* note 103, at 56 (statement of Walter E. Dellinger III, former Solicitor General, Department of Justice) ("The upshot of the legislation is therefore to allow federal courts to exercise jurisdiction over truly interstate class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state's own laws.") (referring to a predecessor bill to House Bill 2341).

class actions filed solely on behalf of residents of a single state, involving only matters of that state's law, so long as one plaintiff resides in a different state from one defendant—an extreme and distorted definition of diversity that does not apply in any other legal proceeding.

RECENT DEVELOPMENTS

DEPARTMENT OF HOMELAND SECURITY

On November 25, 2002, fourteen months after the devastating September 11, 2001 attacks on New York and Washington, D.C., exposed the vulnerability of American borders to terrorism, President George W. Bush signed into law the Homeland Security Act of 2002 ("HSA") to create the Department of Homeland Security ("DHS").[1] Among other functions, the HSA establishes the DHS to "(A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; [and] (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States."[2] On the same day he signed the HSA into law, President Bush nominated Office of Homeland Security ("OHS") Director Tom Ridge to be Secretary of Homeland Security.[3] The Senate unanimously confirmed Ridge as Secretary on January 22, 2003.[4]

The HSA divides DHS into four units: information and infrastructure protection, border and transportation security, science and technology, and emergency response.[5] The legislation then transfers the functions of existing federal agencies and departments that touch on homeland security to various DHS units.[6] In addition, the Department will work alongside the existing OHS[7] to coordinate national security measures that fall outside the scope of the functions transferred to the new Department by the HSA.[8] In accomplishing the transition to a consolidated DHS, the HSA grants discretion to the President and Secretary of

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[1] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified in scattered titles of U.S.C.). The Senate and House had previously passed the bill on November 19 and 22, 2002, respectively. *See* 148 CONG. REC. D1167 (daily ed. Nov. 19, 2002); 148 CONG. REC. D1186 (daily ed. Nov. 22, 2002).

[2] Homeland Security Act of 2002 § 101. Representative Dick Armey (R-Tex.), joined by 112 original cosponsors, introduced House Bill 5005 on June 24, 2002. 148 CONG. REC. H3859 (daily ed. June 24, 2002). The bill passed the House on July 24, 2002, by a vote of 295 to 132. Office of the Clerk, U.S. House of Representatives, *Final Vote Results for Roll Call 367, at* http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=367. House Bill 5005 was then received in the Senate. *See* 148 CONG. REC. S8036 (daily ed. Sept. 3, 2002). Following its introduction, House Bill 5005 was amended to add new duties to DHS's mission, including ensuring "that the overall economic security of the United States is not diminished by" homeland security efforts and monitoring "connections between illegal drug trafficking and terrorism." *See* Homeland Security Act of 2002 § 101(b).

[3] *See* Richard W. Stevenson, *Signing Homeland Security Bill, Bush Appoints Ridge as Secretary*, N.Y. TIMES, Nov. 26, 2002, at A1 (quoting Bush's remarks before signing the HSA).

[4] *See* Philip Shenon, *With Warnings on Needs, Ridge is Confirmed, 94–0, to Lead New Department*, N.Y. TIMES, Jan. 23, 2003, at A13.

[5] Homeland Security Act of 2002 § 1.

[6] *See infra* note 50 and accompanying text.

[7] *See* Exec. Order No. 13,228, 3 C.F.R. 796 (2001).

[8] *See infra* text accompanying notes 47–48.

Homeland Security to appoint upper-level Department officials and to waive civil service protections for Department employees.[9]

Although some consolidation of the myriad agency components that are charged with homeland security is needed, the HSA is too broad in scope and transfers too much power to the President. The new Department should concentrate its efforts on border security, information analysis, and infrastructure protection. These areas, included in the first two prongs of the Department's statutory mandate, involve the unique responsibility of preventing another terrorist attack. In contrast, the entities charged with effectuating the third prong of DHS's mission—reacting to a terrorist attack—do not belong in DHS. Because responding to a terrorist attack is not organizationally different from responding to a natural or other man-made disaster, keeping all types of emergency response under the direction of a single agency would be more efficient.[10] Moreover, while the President and the new Secretary of Homeland Security should have increased flexibility in hiring, pay, and workforce decisions, depriving DHS employees of collective bargaining and civil service rights[11] is both unfair and counterproductive. Instead of improving homeland security, such a move will likely demoralize an already fragile and declining federal workforce.[12]

President Bush's move to create the DHS to oversee homeland security goes beyond previous recommendations for change. Prior to September 11, the Department of Justice acted as the "lead agency" for domestic counterterrorism,[13] but two federal commissions had examined the structures and processes employed by the federal government to determine if the nation was adequately prepared for homeland defense.[14] Both the

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[9] *See* Homeland Security Act of 2002 §§ 103, 841.

[10] *See infra* note 21 and accompanying text.

[11] *See infra* notes 59–63 and accompanying text.

[12] *See infra* note 137 and accompanying text.

[13] *See* ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, TOWARD A NATIONAL STRATEGY FOR COMBATING TERRORISM 13 (2000) [hereinafter GILMORE COMM'N 2D ANN. REP.], *available at* http://www.rand.org/nsrd/terrpanel/terror2.pdf. The Advisory Panel has come to be known as the Gilmore Commission after its chair, then-Governor James Gilmore (R-Va.). The Commission was established to assess federal preparedness and response programs for incidents involving weapons of mass destruction and to integrate federal, state and local efforts. *See* National Defense Authorization Act for Fiscal Year 1999 § 1405, 50 U.S.C. § 2301 note (2000).

[14] *See* GILMORE COMM'N 2D ANN. REP., *supra* note 13, at ii–xi; U.S. COMM'N ON NAT'L SEC./21ST CENTURY, ROAD MAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE 10 (2002) [hereinafter HART-RUDMAN COMM'N], *available at* http://www.nssg.gov/phaseIII.pdf. The Commission on National Security/21st Century—commonly known as the Hart-Rudman Commission after its co-chairs, former Senators Gary Hart (D-Colo.) and Warren Rudman (R-N.H.)—was established by the Defense Department to "redefine national security . . . in a more comprehensive fashion than any other similar effort since 1947." HART-RUDMAN COMM'N, *supra*, at iv. The Hart-Rudman Commission's goal was to reexamine United States national security policies in light of post–Cold War geopolitics. *See id.* at v.

Gilmore Commission and the Hart-Rudman Commission concluded that the United States lacked a clear strategy to prevent terrorism or manage the aftermath of terrorist attacks,[15] in large part because responsibility for homeland preparedness was "spread among too many agencies without sufficient coordination."[16] Nevertheless, the two commissions came to very different conclusions about how to make the federal government more responsive. The Hart-Rudman Commission strongly recommended that Congress create a Cabinet-level National Homeland Security Agency ("NHSA") devoted to preventing and responding to terrorist attacks.[17] In contrast, the Gilmore Commission urged the White House to create the National Office for Combating Terrorism ("NOCT") within the Executive Office of the President to coordinate homeland security activities that involve various federal, state, and local agencies.[18]

By giving the individual head of NHSA, the Director of National Home-land Security, the power "not only to coordinate the making of policy, but also to oversee its implementation," the Hart-Rudman Commission had hoped to create a more uniform approach to the creation and execution of homeland security policy.[19] The Director would have had direct planning and budgetary authority over those agencies and programs responsible for securing the nation's borders and responding to a terrorist attack.[20] The Federal Emergency Management Agency ("FEMA") would have been the "key building block" in the response component of the effort.[21] In addition, to bolster the preventive aspect of homeland se-

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[15] *See* GILMORE COMM'N 2D ANN. REP., *supra* note 13, at iii; HART-RUDMAN COMM'N, *supra* note 14, at viii.

[16] *Responding to Homeland Threats: Is Our Government Organized for the Challenge?: Hearings Before the Senate Comm. on Governmental Affairs*, 107th Cong. 2 (2001) [hereinafter *Responding to Homeland Threats Hearings*] (statement of Sen. Lieberman (D-Conn.)) (citing this as one of three key points of agreement between the Gilmore and Hart-Rudman Commissions). More than one hundred different government organizations have some responsibility over homeland security. H.R. REP. No. 107-609, at 67 (2002).

[17] *See* HART-RUDMAN COMM'N, *supra* note 14, at viii. The NHSA would have "responsibility for planning, coordinating, and integrating various U.S. government activities involved in homeland security." *Id.* at viii. *See also* Katherine McIntire Peters, *The War at Home*, GOVEXEC.COM, Nov. 1, 2001, *at* http://www.govexec.com/features/1101/1101s2.htm (arguing that federal agencies are poorly organized to protect Americans against terrorism).

[18] GILMORE COMM'N 2D ANN. REP., *supra* note 13, at v.

[19] HART-RUDMAN COMM'N, *supra* note 14, at 15.

[20] *Id.* Members of the Hart-Rudman Commission rejected less comprehensive strategies, such as the OHS approach, which lack the line and budgetary authority of a federal agency. *See Responding to Homeland Threats Hearings*, *supra* note 16, at 11 (statement of former Sen. Hart) ("No homeland 'Czar' can possibly hope to coordinate the almost hopeless dispersal of authority that currently characterizes the [forty] or more agencies or elements of agencies with some piece of responsibility for protecting our homeland.").

[21] HART-RUDMAN COMM'N, *supra* note 14, at 15. The Commission praised FEMA's response to natural disasters in recent years and recommended that the agency coordinate future crisis management and emergency planning efforts. *See id.* The Commission also emphasized the virtues of FEMA's decentralized organizational model. *See id.* at 15, 17. *See generally Response to 9/11 and the Federal Role in Recovery: Hearing Before the Sen. Comm. on Env't and Pub. Works*, 107th Cong. (2002) (statement of Sen. James Inhofe (R-

curity, the Customs Service, the Border Patrol, and the Coast Guard would have been transferred to the NHSA.[22] Each entity would have remained distinct and retained its own missions and responsibilities, which "go well beyond terrorism."[23] Creating a single entity, however, allows for consolidation and more efficient use of equipment and information technology.[24] It also gives the federal official in charge of that entity the resources and authority necessary to control the flow of people and goods across American borders.[25]

The Gilmore Commission rejected the proposal for a new federal department in favor of the NOCT model.[26] One reason for rejecting the departmental model was to prevent competition from other agencies and Cabinet secretaries.[27] Unlike most federal initiatives, homeland security draws upon the capabilities of a range of executive departments.[28] Other Cabinet secretaries would likely not appreciate having homeland security activities involving their departments "coordinated by one of their own."[29] The Commission was also concerned with ensuring that the nation's domestic security structure remained largely free of the bureaucratic confusion that could result from merging every aspect of homeland defense into one department.[30] In place of a new agency, the Gilmore Commission recommended the establishment of a strong administrator in the White

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Okla.)) (commending FEMA on its response to the Oklahoma City bombing and September 11 terrorist attacks).

[22] *See* HART-RUDMAN COMM'N, *supra* note 14, at 15. Prior to its incorporation in the DHS, the Customs Service was housed within the Treasury Department, the Border Patrol was located within the Immigration and Naturalization Service ("INS"), and the Coast Guard was part of the Transportation Department. *See* Peters, *supra* note 17.

[23] Peters, *supra* note 17. *See* HART-RUDMAN COMM'N, *supra* note 14, at 15 ("In each case, the border defense agency is far from the mainstream of its parent department's agenda and consequently receives limited attention from the department's senior officials.").

[24] HART-RUDMAN COMM'N, *supra* note 14, at 16 ("Consolidating overhead, training programs, and maintenance of the aircraft, boats, and helicopters that these three agencies employ will save money, and further efficiencies could be realized with regard to other resources such as information technology, communications equipment, and dedicated sensors.").

[25] *Id.* at 14.

[26] *See Responding to Homeland Threats Hearings*, *supra* note 16, at 13–14 (statement of Governor Gilmore); GILMORE COMM'N 2D ANN. REP., *supra* note 13, at v.

[27] *See Responding to Homeland Threats Hearings*, *supra* note 16, at 13–14 (statement of Governor Gilmore).

[28] *See Protecting the Homeland: The President's Proposal for Reorganizing Our Homeland Defense Infrastructure: Hearings Before the Subcomm. on Tech., Terrorism and Gov't Info. of the Sen. Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Protecting the Homeland Hearings*] (statement of Ivo H. Daalder, Senior Fellow, Foreign Policy Stud., Brookings Inst.), *available at* http://judiciary.senate.gov/testimony.cfm?id=294&wit_id=666.

[29] *Id. See also Responding to Homeland Threats Hearings*, *supra* note 16, at 29 (statement of Governor Gilmore) (expressing his fear of "turf battles" among agencies); *infra* note 148 and accompanying text.

[30] *Responding to Homeland Threats Hearings*, *supra* note 16, at 29 (statement of Governor Gilmore).

House who would have budget authority[31] over federal terrorism programs.[32] Notably, during an actual crisis, the NOCT would not be "in charge" or have any operational role but would solely help facilitate the flow of information and intelligence between agencies and individuals responsible for data intake and analysis and those charged with response and policymaking functions.[33] The Gilmore Commission concluded that a "bottom up" approach "developed in close coordination with local, state, and other federal entities" would be superior to plans that allowed the federal government to dictate policy.[34] Instead of recommending the creation of a new bureaucracy, the Commission hoped to create a coherent national counterterrorism strategy that revolved around better coordination with state and local entities.

In the immediate aftermath of September 11, President Bush crafted the OHS largely based on the Gilmore Commission's NOCT model.[35] Contrary to the Commission's recommendations, however, he did not give the OHS budget authority over federal terrorism programs or call for it to be strengthened and made permanent by legislation.[36] In part as a result of these decisions, questions over the effectiveness of the Office began to arise. On the one hand, Director Ridge evidently had access to powerful decision-makers such as the President, Vice President, and Attorney General.[37] Moreover, the force of Director Ridge's personality gave

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[31] The Gilmore Commission, as well as others, argued that the Director of NOCT must have authority to review agency and department spending proposals to ensure their compliance with homeland defense priorities. *See Legislative Options to Strengthen Homeland Defense: Hearings Before the Sen. Comm. on Governmental Affairs*, 107th Cong. 19 (2001) (statement of Rep. Jane Harman (D-Cal.)); GILMORE COMM'N 2D ANN. REP., *supra* note 13, at 9. *See also infra* notes 35–38. A bill introduced in the House by Representative Jim Gibbons (R-Nev.) immediately after September 11, 2001 would have established an Office of Homeland Security whose director could certify or reject those portions of federal agencies' budgets related to homeland security; the bill died in committee. *See* H.R. 3026, 107th Cong. § 4(5) (2001).

[32] *See Responding to Homeland Threats Hearings*, *supra* note 16, at 13 (statement of Gov. Gilmore).

[33] GILMORE COMM'N 2D ANN. REP., *supra* note 13, at 13.

[34] *Id.* at 8. The Gilmore Commission, unlike the Hart-Rudman Commission, included state and local officials, Peters, *supra* note 17, including Raymond Downey, Deputy Chief of the New York City Fire Department, *see* D.C. Raymond Downey Scholarship Charity Fund, *About Chief Ray Downey: A History of Commitment, Courage and Compassion*, *at* http://www.chiefraydowney.org/about_chief.html, and George Foresman, Deputy Assistant to Virginia Governor Mark Warner for Commonwealth Preparedness, *see* Office of the Assistant to the Governor for Commonwealth Preparedness, *Staff and Contact Info*, *at* http:// www.commonwealthpreparedness.state.va.us/CommPrepInfo/staff.cfm. The Gilmore Commission criticized the federal government for creating and implementing some federal programs without consulting local and state authorities and for failing to create a legitimate federal focal point for intergovernmental coordination. *See* GILMORE COMM'N 2D ANN. REP., *supra* note 13, at 7.

[35] *See* GILMORE COMM'N 2D ANN. REP., *supra* note 13, at 7; Thomas Cmar, Recent Development, *Office of Homeland Security*, 39 HARV. J. ON LEGIS. 455, 466 (2002).

[36] *Compare* GILMORE COMM'N 2D ANN. REP., *supra* note 13, at v–vi, *with* Exec. Order No. 13,228, 3 C.F.R. 796 (2001).

[37] Sen. Bob Graham & Paul C. Light, *A New Job for Tom Ridge*, WASH. POST, Apr. 24,

him clout, at least temporarily, over budgetary and personnel aspects of homeland security.[38] For example, Director Ridge successfully lobbied for increased spending and personnel for the Immigration and Naturalization Service ("INS") and Coast Guard.[39]

Nevertheless, without being granted additional authority by Congress, Director Ridge did not have sufficient power to bring about the sweeping reorganization of the nation's homeland security agencies deemed necessary by the Hart-Rudman and Gilmore Commissions.[40] For example, Director Ridge's effort to convince important Cabinet members of the value of merging the INS, the Customs Service, the Coast Guard, and the Animal and Plant Health Inspection Service ("APHIS") was rebuffed by colleagues at the Departments of Justice, Treasury, and Transportation, who would have been most immediately affected by such a merger.[41] Additionally, he had no independent power to spend, obligate, or monitor the use of funds for which he had lobbied.[42] Instead agencies still had to rely on their supervising department heads and the President's budget office for the funds they needed.[43] This, in turn, reduced Director Ridge's power to ensure that those funds were spent in a manner consistent with his overall plan for homeland security.[44] Some commentators also pointed out that Director Ridge had only a limited role in selecting top officials, such as the nominees for Surgeon General and the Director of the National Institutes of Health, who are both essential figures in the fight against bioterrorism.[45]

2002, at A29.

[38] *See id.*

[39] *Id.* Under President Bush's initiative, "Smart Borders for the 21st Century," the Coast Guard would see a funding increase of $282 million, to an overall level of $2.9 billion, the biggest one-year spending increase in the history of the agency. *See* Press Release, White House Office of the Press Secretary, Border Security: Smart Borders for the 21st Century (Jan. 25, 2002), *available at* http://www.whitehouse. gov/news/releases/2002/01/20020125.html. The INS's enforcement budget would be raised by $1.2 billion, to an overall level of $5.3 billion. *See id.*

[40] *See, e.g.*, *supra* note 36 and accompanying text. Without budget authority and programmatic oversight, Director Ridge has not been able to influence the allocation of resources to agencies charged with some aspects of homeland security; consequently, he has failed to incorporate relevant departments and agencies into a unified national strategy, as envisioned by the NOCT model. *See* GILMORE COMM'N 2D ANN. REP., *supra* note 13, at 12.

[41] *See Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder) (noting that "over 100 U.S. government agencies are in some way involved in the homeland security effort").

[42] *See* Graham & Light, *supra* note 37, at A29.

[43] *See id.*

[44] *See id.* Senator Rudman criticized such an arrangement by noting that, "without budget authority, command authority, accountability, and responsibility to the Congress and to the President, nothing in this government ever works very well." *See Responding to Homeland Threats Hearings*, *supra* note 16, at 8 (statement of Sen. Rudman). *See generally* PRESIDENT GEORGE W. BUSH, SECURING THE HOMELAND, STRENGTHENING THE NATION 8–25 (2002), *available at* http://www.whitehouse.gov/homeland/homeland_security_book.pdf (outlining the President's fiscal year 2003 budget request).

[45] Graham & Light, *supra* note 37, at A29.

As the OHS model came under criticism for, among other things, not equipping Director Ridge with clear authority over the budgets of agencies charged with homeland security, momentum built on Capitol Hill behind a Democratic proposal for a permanent executive department independent of OHS.[46] Aside from criticizing the OHS model and the impediments imposed upon its Director, some policymakers began to see the creation of a homeland security department as "not mutually exclusive" with OHS.[47] A new cabinet-level agency could streamline federal responsibilities among agencies devoted largely to homeland security purposes, while a smaller office within the Executive Office of the President like OHS could provide the necessary coordination among those counterterrorism components that remained outside DHS.[48]

Adopting such an approach, the HSA creates a comprehensive Department of Homeland Security that works alongside OHS. The Act includes four non-administrative Under Secretaries, one each for Information Analysis and Infrastructure Protection; Science and Technology; Border

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[46] Mike Allen & Bill Miller, *Bush Seeks Security Department*, WASH. POST, June 7, 2002, at A1. The Senate Governmental Affairs Committee, chaired by Senator Joseph Lieberman, voted along party lines on May 22, 2002, for legislation to create a Homeland Security Department. *See* S. 2452, 107th Cong. (2002); Press Release, Senate Governmental Affairs Committee, Lieberman Pleased Bush Plan Tracks His Own: Hopes to Work with President for Rapid Passage of Legislation (June 6, 2002) [hereinafter Lieberman Pleased Bush Plan Tracks His Own], *available at* http://www.senate.gov/~gov_affairs/060602press.htm. Senator Lieberman's plan would create a National Office for Combating Terrorism ("NOCT") to develop and coordinate homeland security strategy with the Secretary of DHS. S. 2452, 107th Cong. § 201 (2002). The NOCT would have presumably assumed the functions of OHS, but unlike OHS would also have had budgetary and funding authority. *Compare id.*, *with* Exec. Order No. 13,228, 3 C.F.R. 796 (2001). Although ideas for departmental consolidation were already on the table, *see* H.R. 1158, 107th Cong. (2001); HART-RUDMAN COMM'N, *supra* note 14; Alison Mitchell, *Officials Urge Combining Several Agencies to Create One that Protects Borders*, N.Y. TIMES, Jan. 12, 2002, at A8, Senator Lieberman's bill was the first to receive bipartisan legislative support. *See* Lieberman Pleased Bush Plan Tracks His Own, *supra*; Press Release, Office of Rep. Mac Thornberry, Thornberry, Lieberman Mount Bipartisan, Bicameral Push for Homeland Security Reorganization: New Legislation Would Formally Establish Both a White House Office and Cabinet-level Department to Better Coordinate and Carry Out Homeland Security Policy (May 2, 2002), *available at* http://www.house.gov/thornberry/news_releases/ May2200202.htm.

[47] *Responding to Homeland Threats Hearings*, *supra* note 16, at 15 (statement of Ambdr. Paul Bremer). Ambassador Bremer chairs the National Commission on Terrorism ("Bremer Commission") and is a member of the Gilmore Commission. *See id.* (statement of Sen. Lieberman); NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM iii (2000), *available at* http://www.access.gpo.gov/nct. The Bremer Commission was created by Congress in the aftermath of the 1998 embassy bombings in Dar-es-Salaam, Tanzania, and Nairobi, Kenya, to "review counter-terrorism policies regarding the prevention and punishment of international acts of terrorism directed at the United States." Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 591, 112 Stat. 2681, 2891 (1998); *see generally* Press Release, Steven L. Pomerantz, American Jewish Committee, Findings of the National Commission on Terrorism (Aug. 24, 2000) (summarizing findings of Bremer Commision), *available at* http://www.ajc.org/Terrorism/BriefingsDetail.asp?did=221&pid=739.

[48] *See Responding to Homeland Threats Hearings*, *supra* note 16 (statement of Ambdr. Bremer) (arguing for the compatibility of a department and office of homeland security).

and Transportation Security; and Emergency Preparedness and Response.[49] The HSA then transfers and consolidates functions now housed in existing agencies and departments to the corresponding DHS Under Secretary. The new Department includes components from the Departments of Treasury, Justice, Agriculture, Commerce, Health and Human Services, Energy, and Defense.[50]

In addition, the Act authorizes DHS to establish several new programs that do not currently belong to any of the agencies that would be transferred to the new Department.[51] Responding to recent revelations about data sharing problems within the FBI and between it and the CIA, the HSA includes in DHS an information analysis unit that would facilitate the fusion of disparate pieces of intelligence, law enforcement, and other information data.[52] As first introduced in the House, the HSA gave

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[49] Homeland Security Act of 2002, Pub. L. No. 107-296, § 103(a), 116 Stat. 2135 (to be codified in scattered titles of U.S.C.).

[50] The following is a non-exhaustive list of the sub-agency entities that will be transferred to DHS: the Undersecretary of Information Analysis and Infrastructure Protection will receive the National Infrastructure Protection Center of the FBI (other than the Computer Investigations and Operations Section) and entities from the Departments of Defense, Commerce, and Energy, and the General Services Administration. *See id.* § 201. The Under Secretary for Science and Technology will adopt the National Bio-Weapons Defense Analysis Center from the Department of Defense and entities from the Departments of Agriculture and Energy. *See id.* §§ 303, 310. The United States Customs Service and Federal Law Enforcement Training Center of the Department of Treasury, the Transportation Security Administration of the Department of Transportation, and entities from the General Services Administration and Departments of Justice and Agriculture will be transferred to the Under Secretary for Border and Transportation Security. *See id.* §§ 403, 421. The HSA also abolishes the INS and creates the Bureau of Citizenship and Immigration Services in its place; the Bureau falls under the authority of the Deputy Secretary. *See id.* §§ 451, 471. Finally, the Under Secretary for Emergency Preparedness and Technology will assume control over FEMA and entities from the National Oceanic and Atmospheric Administration and Departments of Justice and Health and Human Services. *See id.* § 503. In addition, the Coast Guard will become part of DHS, but it will be maintained as a distinct entity. *See id.* § 888.

[51] H.R. REP. No. 107-609, at 80 (2002). Senator Lieberman had previously proposed a similar but less comprehensive reorganization plan. *See* S. 2452, 107th Cong. (2002); *supra* note 46. Taking the Hart-Rudman proposal as his model for establishing DHS, *see* 148 CONG. REC. S3875 (daily ed. May 2, 2002) (statement of Sen. Lieberman), Senator Lieberman's bill included in the Department the following primary components: FEMA; the Customs Service; the law enforcement components of the INS; the Coast Guard; the Critical Infrastructure Assurance Office of the Department of Commerce; the National Infrastructure Protection Center and National Domestic Preparedness Office of the Department of Justice; and APHIS of the Department of Agriculture. *See* S. 2452 § 102. The proposal called for the transfer of the "authorities, functions, personnel, and assets" of these entities to the new Department, with the exception of the Customs Service and Coast Guard, which would remain distinct entities. *Id.* Lieberman's proposal organized most agency components into three directorates within the new Department: the Directorates of Border and Transportation Protection; Critical Infrastructure Protection ("CIP"); and Emergency Preparedness and Response. *See id.* § 103. Additionally, the proposal included an Office of Science and Technology ("OST") to be housed within the new Department, which would act as an advisory agency. *Compare id.* § 103(b), *with* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 231–232, 116 Stat. 2135, 2159–61 (to be codified at 6 U.S.C. §§ 161–162).

[52] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 201, 116 Stat. 2135,

DHS access to FBI and CIA "reports, assessments, and analytical information relating to threats of terrorism in the United States"[53] but not to any of the raw data on which these analyses and assessments are based.[54] Without access to raw intelligence and law enforcement data, the new unit would not be able to produce accurate threat and vulnerability assessments.[55] It would not be able to recognize when FBI and CIA analyses were based upon faulty data or understand how its own data complements data from the FBI and CIA.[56] Recognizing this shortcoming, the Senate modified the HSA to provide the Secretary of DHS with "unevaluated intelligence" on terrorist threats and infrastructure vulnerabilities and with other information relating to homeland security from other federal government agencies.[57]

The HSA also grants the President and Secretary of DHS unprecedented flexibility in shaping DHS's personnel structure. The new Department is the largest federal government reorganization since 1947, in terms of both total employees and number of agencies affected.[58] The HSA grants to the President and the Secretary of Homeland Security the ability to rescind civil service protections that currently govern hiring,

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2145 (to be codified at 6 U.S.C. § 121); *Homeland Security: Should Consular Affairs Be Transferred to the New Department of Homeland Security: Hearings Before the Subcomm. on Civil Serv., Census and Agency Org. of the House Comm. on Gov't Reform*, 107th Cong. (2002) [hereinafter *Homeland Security: Should Consular Affairs Be Transferred Hearing*] (statement of Paul C. Light, Vice President and Director, Governmental Studies, Brookings Inst.), *available at* http://reform.house.gov/civil/light626testimony.htm. Currently, there is no single entity in the federal government that has access to all the data collected by the intelligence community (through wiretapping, spying, and other means abroad), by the FBI and law enforcement community (through interrogation, conducting surveillance, bugging, and cybersurfing at home), and by the various border agencies (through visa screening, manifest recording, and various other data-gathering activities). *See id.*

[53] H.R. 5005, 107th Cong. § 203 (2002) (as introduced in the House).

[54] *Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivan Eland, Dir., Defense Policy Studies, Cato Inst.).

[55] *Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivan Eland).

[56] *Id.* (statement of Ivan Eland).

[57] Homeland Security Act of 2002 § 202(a)(1) (to be codified at 6 U.S.C. § 122). Under the HSA, the Secretary is "granted access" to raw data on infrastructure and other vulnerabilities but will "not normally receive 'raw' or unprocessed intelligence data" relating to terrorist threats against the United States. H.R. REP. NO. 107-609, at 89–90 (2002). Although the Secretary is not specifically given access to law enforcement data, the Under Secretary for Information Analysis and Infrastructure Protection will be able "to access, receive, and analyze law enforcement information . . . ." Homeland Security Act of 2002 § 201(d)(1). Primary responsibility for evaluating foreign intelligence will remain with the CIA. *See Nomination of the Honorable Tom Ridge to be Secretary of the Department of Homeland Security: Hearings Before the Senate Comm. on Gov't Affairs*, 108th Cong. (2003) [hereinafter *Ridge Nomination Hearing*] (statement of Dir. Ridge). "Turf battles" among competing agencies are "endemic and epidemic," 148 CONG. REC. S11,013 (daily ed. Nov. 14, 2002) (statement of Sen. Arlen Specter (R-Pa.)), and the HSA language appears to represent a compromise over the type of information that the DHS Secretary will receive from other intelligence agencies.

[58] *Homeland Security: Should Consular Affairs Be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

pay, and workplace decisions.[59] Under section 841 of the Act, the Secretary may waive or modify certain civil service provisions embodied in part III of title 5 of the United States Code.[60] The Act gives the Secretary increased flexibility in adjusting pay, performance evaluation, and discipline systems,[61] but it specifically prohibits abridgment of such government-wide employee rights and protections as merit-based promotions, whistleblowing protections, and veterans benefits.[62] Section 841 also allows the Secretary of DHS to regulate the procedures governing employee appeals,[63] which may result in the denial of workers' access to formal mechanisms to protest promotion and discharge decisions. These powers, however, are governed by a sunset provision,[64] so that they expire five years after the transition period to DHS.[65]

Section 842 of the HSA allows the Administration to waive DHS employees' collective bargaining rights[66] by authorizing the President to issue an executive order excluding DHS from coverage under the Federal

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[59] Homeland Security Act of 2002 §§ 841–842. Section 841 of the HSA governs the establishment of a human resource management system ("HRMS"). *Id.* § 841. Section 842 deals with labor-management relations at DHS. *Id.* § 842.

[60] *See* Homeland Security Act of 2002 § 841; 148 CONG. REC. S11,416–19 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman).

[61] *See id.*; Press Release, The American Federation of Government Employees, AFL-CIO, The Relentless Assault on Federal Workers and Their Rights to Union Representation (Feb. 27, 2003), *available at* http://www.afge.com/Index.cfm?Page=Legislation&file=2003_02_27_AFL-CIOStatement.htm. Most federal employees are "career civil servants," entitled by law to established "pay, health insurance and retirement systems, merit-based hiring, firing appeal rights, whistle-blower protections, and rights to organize and bargain collectively." Milt Zall, *Diminishing Civil Service*, FED. COMP. WK., Aug. 5, 2002, *available at* http://www.fcw.com/fcw/articles/2002/0805/mgt-milt-08-05-02.asp. Career federal employees are divided into different pay bands based upon experience and years of service with the federal government. *See generally* U.S. OFFICE OF PERS. MGMT., SALARIES AND WAGES: 2003 SALARY TABLES AND RELATED INFORMATION, *at* http://www.opm.gov/oca/payrates/index.asp (last visited Apr. 14, 2003) (listing 2003 federal salary tables). As workers are promoted into higher bands, their pay increases in pre-determined increments. *See id.*

[62] *See* Homeland Security Act of 2002 § 841; 148 CONG. REC. S11,416–18 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman). The bill stipulates which rights and protections may be abridged only through exclusion—i.e., it says which rights and protections of part III of title 5 may *not* be abridged. *See* Homeland Security Act of 2002 § 841. Additionally, section 841 prohibits waiver of provisions implementing those protections through "affirmative action" or through any right or remedy. *Id.* For an outline of merit-based promotions, see 5 U.S.C. § 2301 (2002); whistleblowing protections are outlined in 5 U.S.C. § 2302(b)(8) (2002). For a description of the veterans benefits affected, see generally 38 U.S.C (2002).

[63] *See* Homeland Security Act of 2002 § 841. The Secretary does not have this power in a case where the employee alleges a discrimination, retaliation, or reprisal covered and referred to by 5 U.S.C. § 2302(b)(1), (8), (9) (2002). *See id.*

[64] *See id.* Under the sunset provision, five years after the conclusion of the transition, the Secretary will no longer have authority to issue regulations modifying the HRMS. *Id.*

[65] *See id.* The transition period expires on January 24, 2004, twelve months after the effective date of the HSA. *See id.* § 1501; Press Release, White House Office of the Press Secretary, Ridge Sworn in Friday as Secretary of Homeland Security (Jan. 24, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/20030124-5.html.

[66] *See id.* § 842.

Sector Labor-Management Relations Statute ("FSLMRS").[67] Although section 841 allows employees to organize within unions and bargain collectively,[68] the President may withdraw these rights under section 842 if he or she concludes that they would impair national security.[69]

The President also enjoys a unique degree of personnel control in the appointment of upper-level Department officials.[70] As first introduced in the House, the HSA provided that fewer than half of the presidential appointments to DHS would be subject to the advice and consent of the Senate.[71] Proponents of this approach claimed that allowing the President to appoint most of the management of the new Department without Senate review would streamline the reorganization process without significantly diminishing congressional oversight powers.[72] Some members of Congress were skeptical of this argument, however, seeing Senate review of presi-

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[67] *See id.* § 842. The FSLMRS grants federal employees "the right to form, join, or assist any labor organization" and "to engage in collective bargaining." 5 U.S.C. § 7102 (2002).

[68] *See* Homeland Security Act of 2002 § 841.

[69] *See id.* § 842. *See also* Press Release, White House Office of the Press Secretary, Director Ridge Addresses U.S. Conference of Mayors (Sept. 26, 2002) (arguing for granting the President power to rescind collective bargaining rights when necessary to ensure national security), *available at* http://www.whitehouse.gov/news/releases/2002/09/20020926-3.html. To issue an executive order excluding any agency from coverage under the FSLMRS, the President must determine that (1) the agency has as a primary function in intelligence, counterintelligence, investigative, or national security work; and (2) the provisions of the FSLMRS cannot be applied to the agency consistent with national security. 5 U.S.C. § 7103(b)(1) (2002). *See also* 148 CONG. REC. S11,417 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman). Section 842 expands these protections as applied to agencies transferred to DHS. *See* Homeland Security Act of 2002 § 842. In addition to satisfying the two criteria above, the President must also determine that (1) the mission and responsibilities of the agency have materially changed; and (2) a majority of the employees in the agency have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation. *Id. See also* 148 CONG. REC. S11,416–19 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman). Section 842, however, allows the President to override this exclusion if he both determines that it would have a substantial adverse impact on the Department's ability to protect homeland security and provides Congress with a detailed written finding explaining the reasons for the determination. *See* Homeland Security Act of 2002 § 842; 148 CONG. REC. S11,416–19 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman). Although the President "must make the case for stripping workers of their right to bargain collectively before issuing an Executive Order," 148 CONG. REC. S11,416–19 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman), it does not appear that he needs congressional approval.

[70] *See Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light) (arguing that Congress should not allow the President to appoint under secretaries without Senate confirmation).

[71] *See* H.R. 5005, 107th Cong. § 103 (2002) (as introduced in House); *Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

[72] *See, e.g.*, 148 CONG. REC. S8531 (daily ed. Sept. 12, 2002) (statement of Sen. Fred Thompson (R-Tenn.)) ("We cannot approach [the reorganization in] the same old way. We have to have a 21st century paradigm in order to address a 21st century problem."). Many Republicans went further, arguing that the President needed expanded powers in order to combat terrorism effectively. *See, e.g.*, 148 CONG. REC. S9191 (daily ed. Sept. 25, 2002) (statement of Sen. Phil Gramm (R-Tex.)).

dential appointments as one of the fundamental checks and balances that maintains the constitutional separation of powers between the legislative and executive branches.[73] In the end, the latter group prevailed in the legislative debate, and the HSA was amended to require advice and consent for most upper-level DHS officials.[74] The President, however, continues to have unchecked authority over five named DHS appointees,[75] and during the transition phase to DHS, he can make temporary appointments pending advice and consent of the Senate.[76]

In addition to the creation of DHS, President Bush[77] and Congress[78] have indicated their desire to maintain the existing OHS as part of the Executive Office of the President. Although DHS merges twenty-two federal agencies involved in the homeland security effort, over three quarters of all homeland security agencies would remain outside of the new structure.[79] Consequently, there will continue to be a need for some entity to coordinate the multiple agencies and programs involved in homeland security policy. Before the creation of DHS, the task was managed by the Homeland Security Council ("HSC"),[80] composed of the President, his senior national security advisors, and OHS, whose Director advised the

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[73] *See* U.S. CONST. art. II, § 2 (The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . public Ministers . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of the Departments"). For example, Senator Byrd (D-W. Va.), one of the most vocal critics of the HSA, questioned whether the Act was necessary at all:

> September 11 was a shock to this Nation, and the fear, anger, and alarm it engendered have not, as yet, vanished. My concern is that in our zeal to see to it that terrorists never again defile our homeland, we will unwittingly cede some of our precious freedoms and blur the constitutional safeguards that have been the basis for our liberties and the check against an overreaching executive for 215 years . . . . How terribly ironic it would be if it were our response to the treachery of Al-Qaida [sic] which dealt our constitutionally guaranteed freedoms the most devastating blow of them all.

148 CONG. REC. S8646 (daily ed. Sept. 17, 2002) (statement of Sen. Byrd).

[74] *See* Homeland Security Act of 2002 § 103(a).

[75] *See id.* § 103(d) (stating that the President can appoint the Director of the Secret Service, Chief Information Officer, Chief Human Capital Officer, Chief Financial Officer, and Officer for Civil Rights and Civil Liberties without the Senate's advice and consent).

[76] *See id.* § 1511(c). As required by the HSA, on November 25, 2002, President Bush submitted his Department of Homeland Security Reorganization Plan, which described his administration's timetable for executing the reorganization. President George W. Bush, *Department of Homeland Security Reorganization Plan* (Nov. 25, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/11/reorganization_plan.pdf.

[77] *See Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder).

[78] *See, e.g.*, Press Conference, Senate Governmental Affairs Committee, Responding to Homeland Threats (Oct. 11, 2002) (statement of Sen. Lieberman) ("I foresee the Secretary of National Homeland Security working closely with the Director of the Office of Homeland Security").

[79] *See id.*

[80] The HSC was set up by executive order in October 2001. *See* Exec. Order No. 13,228, 3 C.F.R. 796 (2001); Cmar, *supra* note 35, at 464.

President and served as a liaison to other agencies.[81] The HSA maintains the HSC in most important respects, but it does alter the compulsory membership of the Council, replacing the OHS Director with the DHS Secretary and deleting several department heads.[82]

Despite widespread support for the creation of a department to oversee homeland security, many believe the HSA goes too far. Narrowing DHS's focus to prevention—through border security, information analysis, and infrastructure protection—would improve homeland security without compromising essential emergency tasks.[83] To the extent that the HSA reaches beyond this central policy goal in incorporating unrelated federal agency components and programs into the new Department, the Act overreaches and should be more narrowly tailored by future legislation.[84] Moreover, the provisions in the Act concerning civil service protections and presidential appointment authority arguably do not serve and are unrelated to the mission of DHS,[85] and opponents of these provisions have charged that they were included in the Act primarily for political reasons.[86]

Critics of the HSA point to three primary ways in which the Act overreaches. First, it may not follow from the fact that multiple agencies' functions fall under the aegis of "homeland security" that all of these functions belong in the same organization.[87] Following the Hart-Rudman Commission's proposal, President Bush proposed and Congress created a department charged with both preventing and responding to terrorist at-

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[81] *See Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder).

[82] *Compare* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 901–906, 116 Stat. 2135, 2258 (to be codified at 6 U.S.C. § 491), *with* Exec. Order No. 13,228, 3 C.F.R. 796 (2001). The HSA also contains provisions that establish the HSC on a legislative basis. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 901, 116 Stat. 2135, 2258 (to be codified at 6 U.S.C. § 491).

[83] *See Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

[84] *See* 148 CONG. REC. H5651 (daily ed. July 25, 2002) (statement of Rep. Vic Snyder (D-Ark.)) (expressing concern that "this huge consolidation" diminish the "focus on the gaps in intelligence and the gaps in specific funding and the gaps in specific coordination personnel needs" that were exposed by the events of September 11).

[85] *See* 148 CONG. REC. S11,008 (daily ed. Nov. 14, 2002) (statement of Sen. Richard Durbin (D-Ill.)) (noting that congressional debate over DHS failed to address some important substantive questions of homeland security policy); 148 CONG. REC. S8739 (daily ed. Sept. 18, 2002) (statement of Sen. Lieberman) (arguing that civil service protections would make DHS workers more, not less, accountable).

[86] *See, e.g.*, H.R. REP. No. 107-609, at 218 (2002) (Minority Views) ("Some Republican leaders have long wanted to gut America's civil service system, but it is shameful that they would try to use homeland security as an excuse to do it."); 148 CONG. REC. S8067 (daily ed. Sept. 3, 2002) (statement of Sen. Byrd) ("I am concerned that these changes mask the [A]dministration's larger hidden agenda, an agenda that would have the Federal Government function more like a big corporation.").

[87] *See* Paul C. Light & James M. Lindsay, *Homeland Security: Calibrating Calamity*, WASH. TIMES, July 25, 2002, at A19 ("Military force and diplomacy both contribute to national security, yet no one argues for placing them in the same agency").

tacks.[88] Central to this robust vision for DHS is the transfer of FEMA to the new Department.[89] Supporters of including FEMA in DHS argue that the agency has a successful track record of working with state and local governments.[90] Moreover, the existing decentralized organizational framework of FEMA[91] obviates the need to design a completely new homeland security apparatus.[92] Furthermore, supporters argue, making FEMA part of a streamlined federal structure responsible for all of the government's emergency response efforts can only make the agency more effective in responding to natural disasters.[93]

Nonetheless, government affairs experts contend that merger and acquisition reorganizations should only combine agencies whose missions overlap by at least fifty percent.[94] Under the HSA, this is not always the case. For example, the overwhelming majority of DHS's personnel and funding would go toward border and transportation infrastructure protection.[95] The Office of the Under Secretary for Border and Transportation Security would account for ninety percent of all employees housed in DHS and nearly sixty-five percent of DHS's budget.[96] In contrast to the Border and Transportation Security Directorate's emphasis on prevention, FEMA's organizational focus is on responding to disasters.[97] In fact, in the 1990s, FEMA abolished its homeland security function to concentrate on natural disasters.[98] Thus, including FEMA and other entities such as the Science and Technology and Emergency Response Offices in DHS violates the fifty percent guideline for effective merger.[99]

Critics argue that limiting the focus of DHS to prevention would improve homeland security without compromising essential emergency tasks.[100] Preventing a terrorist attack is an activity largely unique among govern-

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[88] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified as amended in scattered titles of U.S.C.).

[89] *See id.* §§ 503, 507.

[90] *See* HART-RUDMAN COMM'N, *supra* note 14, at 15.

[91] FEMA has ten regional offices. *Id.* Each region serves several states, and regional staff work directly with their state counterparts to coordinate disaster preparation, mitigation, and relief programs. *See* FEMA, U.S. DEP'T OF HOMELAND SEC., REGIONAL OFFICES, *at* http://www.fema.gov/regions/index.shtm (last visited Apr. 13, 2002).

[92] *See* HART-RUDMAN COMM'N, *supra* note 14, at 15.

[93] *See id.* at 21.

[94] *Homeland Security: Should Consular Affairs Be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light) (stating position as a "general rule of thumb").

[95] *Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder).

[96] *Id.*

[97] *Id.* Even supporters of including FEMA in DHS admit that "FEMA has very little experience with [preventing terrorist attacks]: its role has always been to respond after an event occurs." 148 CONG. REC. S11,405–57 (Nov. 19, 2002) (statement of Sen. Judd Gregg (R-N.H.)).

[98] *See id.*

[99] Homeland Security Act of 2002, Pub. L. No. 107-296, § 503, 116 Stat. 2135, 2213 (to be codified at 6 U.S.C. § 315).

[100] *See Homeland Security: Should Consular Affairs Be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

ment functions, but responding to a disaster, whether natural or man-made, is already a regular function of FEMA.[101] Natural disasters are frequent occurrences that some critics of DHS argue could easily overburden the Secretary of Homeland Security and strain resources.[102] OHS may be in a better position to take on the task of incorporating FEMA and other disaster response agencies left out of DHS into the overall homeland security strategy because OHS could act as a liaison between these independent agencies and DHS.[103]

Regardless of FEMA's location inside or outside DHS, the department's preventative agencies need a decentralized structure to ensure their effective partnership with state and local first-responders. To its credit, the HSA establishes an Office for State and Local Government Coordination to bolster DHS's preventative capabilities.[104] Nonetheless, the HSA does not place DHS liaisons in each state. Consequently, there is a fear that DHS will not coordinate and communicate effectively with state and local first-responders.[105] On the other hand, FEMA has worked well with state and local governments.[106] If DHS builds upon FEMA's decentralized framework, placing DHS liaisons in each state may not even be necessary.

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[101] *See* FEMA, U.S. DEP'T OF HOMELAND SEC., ABOUT FEMA: FEMA HISTORY, *at* http://www.fema.gov/about/history.shtm (last visited Apr. 13, 2002).

[102] *See Homeland Security: Should Consular Affairs Be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light); 148 CONG. REC. S11,186 (daily ed. Nov. 15, 2002) (statement of Sen. Barbara Boxer (D-Cal.)) (wondering how DHS will respond to an earthquake in California).

[103] *Cf.* H.R. 4660, 107th Cong. (2002). Under House Bill 4660, introduced by Representative William M. "Mac" Thornberry (R-Tex.) and co-sponsored by Representative Ellen Tauscher (D-Cal.), DHS would have included fewer components than under President Bush's proposal but would have established liaisons to other agencies. *See id.* Representative Tauscher noted that

> in the President's proposal, the entire Lawrence Livermore National Laboratory would become part of the new agency, even though only a small fraction of the work they [sic] do is relevant to homeland security. In our bill, as it currently stands, there would be a liaison in the new agency who would know all about the labs' work, like the anthrax killing foam they invented a decade ago, and all that they are capable of.

Combating Terrorism: Improving the Federal Response: Hearings Before the Subcomm. on Nat'l Sec., Veterans Affairs and Int'l Relations of the House Comm. on Gov't Reform, 107th Cong. (2002) (statement of Rep. Tauscher). One expert goes even further, arguing that the OHS Director should serve as an "architect" of homeland security strategy, first identifying needed capabilities and then assigning resources to the various agencies to build those capabilities. *A Review of the Relationship Between a Department of Homeland Security and the Intelligence Community: Hearing Before the Senate Comm. on Governmental Affairs*, 107th Cong. 10 (2002) [hereinafter *Intelligence Community Hearing*] (statement of Ashton B. Carter, Co-Director, Preventive Defense Project).

[104] Homeland Security Act of 2002, Pub. L. No. 107-296, § 801, 116 Stat. 2135, 2220 (to be codified at 6 U.S.C. § 361).

[105] *Ridge Nomination Hearing*, *supra* note 57 (statement of Sen. Susan Collins (R-Me.)).

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

A second criticism levied against the reorganization is that the information analysis unit[107] will not be equipped to do its assigned task. Currently, both the Federal Bureau of Investigation ("FBI") and the Central Intelligence Agency ("CIA") collect intelligence and other information on international terrorist activities. The CIA has primary responsibility for collecting, analyzing, and disseminating intelligence on foreign terrorist groups and individuals.[108] Pursuant to the Foreign Intelligence Surveillance Act ("FISA"),[109] the FBI is charged with collecting intelligence and other information on international terrorist activities inside the United States.[110] The HSA does not consolidate intelligence collection and analysis in DHS. Moreover, while it directs other federal government agencies to provide DHS with all information relating to homeland security, it does not give DHS the authority to compel access to or submission of specific pieces of data from other agencies.[111] Some policymakers disagree with this approach, arguing instead for having a single agency, such as DHS or CIA, analyze all intelligence collected both within and outside the United States.[112] This argument is based on the concern that the CIA and FBI will treat DHS as a "rival bureaucracy" and not provide it with the data it needs to perform well.[113] Some have argued that consolidation of information in a single entity would address this concern with agency rivalries, and President Bush proposed the creation of a Terrorist Threat Integration Center ("TTIC") under the aegis of the CIA.[114] Placing the

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[107] *See* text accompanying *supra* note 52.

[108] *See* DIRECTOR OF CENTRAL INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY, FREQUENTLY ASKED QUESTIONS, *at* http://www.cia.gov/cia/public_affairs/faq.html#1 (last visited Mar. 31, 2003); National Security Act of 1947, 50 U.S.C. § 403-3(d) (2000).

[109] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

[110] *See* ADVISORY PANEL TO ASSESS DOMESTIC REPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, FOURTH ANN. REP. TO THE PRESIDENT AND THE CONGRESS iii–iv (2002) [hereinafter GILMORE COMM'N 4TH ANN. REP.], *available at* http://www.rand.org/nsrd/terrpanel/terror4txt.pdf.

[111] *See* Homeland Security Act of 2002 § 202.

[112] *See Ridge Nomination Hearing*, *supra* note 57 (statement of Sen. Carl Levin (D-Mich.)) (arguing that the government cannot effectively analyze intelligence in two separate locations).

[113] *Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivan Eland, Dir., Defense Policy Studies, Cato Inst.). A similar concern exists that structural and organizational differences between intelligence and local law enforcement agencies can lead to miscommunication and even "anti-sharing" cultures within the agencies. *Intelligence Community Hearing*, *supra* note 103, at 24 (statement of Chief William B. Berger, Pres., Int'l Ass'n of Chiefs of Police).

[114] In his 2003 State of the Union Address, President Bush proposed that the CIA, FBI, and Departments of Homeland Security and Defense develop a Terrorist Threat Integration Center ("TTIC") in the CIA, which would merge and analyze all threat information, foreign and domestic. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109, 113 (Jan. 28, 2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdo3c.cgi?dbname=2003_presidential_documents&docid=pd03fe03_txt-6.pdf. The CIA director would be in charge of the new office. David Ensor & John King, *Bush Proposes New Intelligence Agency*, CNN.COM, *at* http://www.cnn.com/2003/ALLPOLITICS/01/28/new.agency/index.html (last visited Jan. 29, 2003).

TTIC in DHS, on the other hand, would "shake up the turf-conscious intelligence community."[115]

Opponents of consolidating intelligence collection and analysis in DHS criticize the idea from two angles. Some argue that creating another agency with intelligence capability will only lead to redundancy and duplicative effort.[116] The HSA already ensures that the Secretary of DHS has access to all the information he or she may need. Not only does the Secretary receive "all reports, assessments, and analytic information" on terrorist threats, but the heads of the CIA and Department of Defense are required to include the DHS Secretary in any collaborative counter-terrorism efforts.[117] The DHS Secretary will also receive "raw" intelligence data concerning terrorism threats when the President deems it necessary.[118] Consequently, rather than merge intelligence capabilities in a new agency, opponents argue that DHS should have the authority to access the existing resources of other departments and agencies.[119]

On the other hand, some opponents argue that the current structure under HSA, where more than one agency analyzes the same data, is the most productive approach.[120] "[C]ompetitive analysis" done by multiple sets of experienced individuals might lead to different conclusions and thus take intelligence efforts in new directions.[121] Third, critics contend that the appointment authority the HSA provides to the President impinges upon congressional prerogatives.[122] Although this criticism was largely neutralized by amendments made to the final version of the HSA that curtailed the authority granted in the initial version of the bill, the President still enjoys full appointment power over five of the twenty-seven

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While this move will consolidate information gathering and analysis, some maintain that its location in the CIA does not adequately address the intelligence community's historic opposition to sharing information. *See* Press Release, Office of Sen. Lieberman, Lieberman Notes Homeland Security Shortcomings as Agencies Merge Into New Department: Intelligence Unit Undercut (Feb. 28, 2003), *available at* http://lieberman.senate.gov/~lieberman/press/03/02/2003228A58.html.

[115] *Id. See also* GILMORE COMM'N 4TH ANN. REP., *supra* note 110, at iv (recommending that the FBI's FISA responsibilities be transferred to DHS).

[116] *See Intelligence Community Hearing*, *supra* note 103, at 14 (statement of Lt. Gen. Patrick M. Hughes (Ret.), U.S. Army).

[117] H.R. REP. NO. 107-609, at 89–90 (2002).

[118] *Id.* at 90. The DHS Secretary will not automatically receive all "raw" data because the sheer amount of data involved would overwhelm DHS. *See Department of Homeland Security: Hearings Before the House Select Comm. on Homeland Sec.*, 107th Cong. (2002) [hereinafter *Department of Homeland Security Hearing*] (statement of Governor Ridge). Hence, the primary intelligence agencies, including the CIA, will continue to act as a "filter" for the pieces of information data sent to DHS. *Id.*

[119] *Intelligence Community Hearing*, *supra* note 103, at 14 (statement of Lt. Gen. Patrick M. Hughes (Ret.), U.S. Army).

[120] *See Department of Homeland Security Hearing*, *supra* note 118 (statement of Governor Ridge).

[121] *Id.*

[122] *See Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

upper level DHS officials named in the HSA.[123] Furthermore, unlike the three most recent bills that created new departments,[124] the Homeland Security Act allows the Secretary of Homeland Security to set the parameters of the assistant secretaries' positions, including duties and hiring credentials.[125] Critics allege that granting the Secretary of DHS, an administrative appointee, such wide discretion to shape the new department upsets the balance of power between the legislative and executive branches of government.[126]

Finally, a fourth reason many believe the DHS reorganization plan goes too far is that it allows the President or the Secretary, for a period of five years, to abrogate civil service protections of DHS employees.[127] The stated goal of allowing the Administration to rescind provisions that govern hiring, pay, and workplace decisions is increased employee performance and effectiveness; for example, flexibility in adjusting pay scales would enable the Secretary to attract and retain key personnel.[128] On the other hand, establishing congruent pay scales across executive branch agencies could create resentment among employees accustomed to an established pay and promotion system.[129] For example, pay parity does not exist between equally experienced agents and inspectors from the Customs Service and INS.[130] The Transportation Security Administration's salary structure provides higher pay to experienced employees than either the Customs Service or the Border Patrol.[131] Bringing all of these

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[123] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 103, 116 Stat. 2135, 2144 (to be codified at 6 U.S.C. § 113).

[124] *See Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light). The Departments of Energy (1977), Education (1979), and Health and Human Services (1980) are the three most recently created departments. *See* Department of Energy Organization Act, 42 U.S.C. § 7253(a) (2000) (granting the Secretary limited authority to reorganize organizational units within the Department); Department of Education Organization Act of 1979, 20 U.S.C. 3441 (2000) (transferring from the Department of Health, Education and Welfare to the Department of Education "all offices of the Assistant Secretary for Education" and other assistant secretaries dealing with education and redesignating the Department of Health, Education and Welfare as the Department of Health & Human Services).

[125] *See* Homeland Security Act of 2002 § 102(b)(1); *Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

[126] *See, e.g.*, *Homeland Security: Should Consular Affairs be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

[127] *See* Homeland Security Act of 2002 § 841(a)(2).

[128] *See Department of Homeland Security Hearing*, *supra* note 118 (statement of Kay Cole James, Dir., Off. of Personnel and Management).

[129] *See* GEN. ACCOUNTING OFF., REP. NO. GAO-02-886T, HOMELAND SECURITY, PROPOSAL FOR CABINET AGENCY HAS MERIT, BUT IMPLEMENTATION WILL BE PIVOTAL TO SUCCESS 30 (2002) (discussing the difficulty DHS will face in balancing the creation of a common organizational culture against granting the flexibility and autonomy necessary for the Department's component parts to remain effective); Stephen Barr, *Details Scarce on How Homeland Security Reorganization Will Affect Jobs, Pay Scales*, WASH. POST, June 10, 2002, at B2.

[130] Barr, *supra* note 129, at B2.

[131] *Id.*

different labor structures into a single bureaucratic unit will create natural rivalries between agencies; regardless of whether DHS pay scales are made uniform or kept distinct, some employees will likely see themselves being treated less favorably than employees at other agencies. Moreover, many see the Secretary's option to waive civil service protections and collective bargaining rights as code for "no civil service protection for homeland employees."[132] Proponents argue that presidents have long had the authority to suspend collective bargaining and other civil service protections if a central mission of the government is threatened,[133] and, in their view, counterterrorism is just such a mission.[134] Nonetheless, criticism of the nation's homeland security preparedness has largely been directed at the lack of coordination and accountability of federal agencies, not at the level of pay or performance of workers in the agencies merged into the new DHS.[135] Thus it makes little sense to strip workers of collective bargaining rights when the problems presaging September 11 were organizational, not fiscal. While the final version of the HSA is far more protective of civil service rights than earlier versions, fair and independent procedures must be established for employees with grievances, and that change to the HRMS must be carefully crafted through consultation with DHS employees and their representatives.[136] Absent changes to these provisions, the HSA could both decrease morale and deviate from the policy in place for the vast majority of federal, state, and local workers, including those whose heroism was extolled following September 11.[137]

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[132] Zall, *supra* note 61. These concerns are based in part upon President Bush's decision in January 2002 to bar unions from five sections of the Department of Justice—including the United States Attorney's offices and the Criminal Division—citing national security concerns. *See* Exec. Order No. 13,252, 67 Fed. Reg. 1601 (Jan. 7, 2002). Because federal employees may not strike or participate in lockouts, civil service protections represent an important mechanism for balancing power between labor and management. *See* Stephen Barr, *White House Is Moving in Ways That Make Unions Uneasy*, WASH. POST, Jan. 10, 2002, at B2.

[133] *See* 5 U.S.C. § 7103(b) (2000) (granting the President authority to suspend civil service protections for any agency that "has as a primary function intelligence, counterintelligence, investigative, or national security work" or to which civil service protections "cannot be applied . . . in a manner consistent with national security requirements and considerations"). Both Democratic and Republican presidents have exempted the Secret Service, the Defense Mapping Agency, the Naval Special Warfare Development Group, and parts of the Drug Enforcement Agency from federal labor law. *See* Barr, *supra* note 132, at B2 (quoting White House Spokeswoman Anne Womack).

[134] *See* David Jackson, *House OKs Homeland Department: Job Protection Debate Expected to Continue in Talks with Senate*, DALLAS MORNING NEWS, July 27, 2002, at 1A. House Republicans contended that the President needs maximum flexibility to act in an emergency situation. *See id.* (quoting Representatives Tom DeLay (R-Tex.) and Mac Thornberry).

[135] *See* 148 CONG. REC. H8590 (daily ed. Nov. 13, 2002) (statement of Rep. Albert Wynn (D-Md.)) (arguing that the employees of the new Department will be no greater security risks than they were at their former jobs while performing essentially the same tasks).

[136] 148 CONG. REC. S11,417 (daily ed. Nov. 19, 2002) (statement of Sen. Lieberman).

[137] *See* 148 CONG. REC. H8590 (daily ed. Nov. 13, 2002) (statement of Rep. Wynn); 148 CONG. REC. S11,002 (daily ed. Nov. 14, 2002) (statement of Sen. Lieberman) ("We often

Arguments in favor of civil service protections for DHS employees become even stronger when situated within the context of the impending federal workforce shortage. Within the next five years, before the HSA sunset provision expires, up to fifty percent of the federal workforce will be eligible for retirement.[138] In particular, the five major federal agencies that would be combined into DHS are projected to lose nearly one-third of their employees during this time span.[139] Reorganization will only accelerate retirements, especially among valuable longtime employees.[140]

Against this impending wave of retirements, proponents of increased civil service flexibility argue that DHS needs the ability to adjust pay scales and job assignments to "right-size" individual offices within and outside of the Department.[141] Because of the inherent uncertainty of future counterterrorism needs, proponents assert that DHS must have the ability to hire and reassign workers quickly as new threats emerge and technologies change.[142] Moreover, proponents contend that providing employees with financial incentives to perform well will increase worker productivity and give high-achieving employees the recognition they deserve[143] and desire.[144] Better organization of people and resources will reduce the

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in our debate referred to the events of September 11 and the fact that those firefighters and police officers who we honored for their heroism, who we mourned for the ultimate sacrifice that they gave, were all members of unions, were all governed by civil service rules.").

[138] *See* GEN. ACCOUNTING OFF., REP. NO. GAO-01-509, FEDERAL EMPLOYEE RETIREMENTS: EXPECTED INCREASE OVER THE NEXT FIVE YEARS ILLUSTRATES NEED FOR WORKFORCE PLANNING 4 (2001) [hereinafter GAO RETIREMENTS]. Of those eligible to retire, the GAO projects that fifteen percent will retire within the next five years. *Id.* at 6. A 2003 government-wide survey confirms GAO's findings. According to the Federal Human Capital Survey, more than one third of surveyed federal employees said they were considering leaving their jobs. *See* Christopher Lee, *Survey Finds Federal Workers Are Restless*, WASH. POST, Mar. 26, 2003, at A15 (citing the Federal Human Capital Survey). A little less than one half of those considering leaving reported that they are planning to retire within the next three years. *Id.* A shift in workforce demographics as many members of the "baby boom" generation reach retirement age is causing the projected increase in retirements. *See id.* at 8; Press Release, Office of Rep. James P. Moran, Moran Bill Would Provide FERS Redeposit Option (May 22, 2001) (discussing a bill introduced by Rep. James Moran (D-Va.) that would create an incentive for former federal employees hired since 1984 to return to government work by allowing them to keep their accrued retirement annuity upon reentry), *available at* http://www.house.gov/moran/20010522.htm.

[139] Stephen Barr, *A Major Danger for Department of Homeland Security: Retirement*, WASH. POST, June 17, 2002, at B2. In the next five years, 33% of APHIS employees, 42% of Coast Guard employees, 36% of Customs Service employees, 48% of FEMA employees, and 24% of INS employees will be eligible for retirement. *Id.*

[140] *See id.*

[141] *See Plan to Create a Department of Homeland Defense: Hearing Before the Senate Comm. on Gov't Affairs*, 107th Cong. 40 (2002) (statement of Governor Ridge).

[142] *See Department of Homeland Security Hearing*, *supra* note 118 (statement of Dir. James).

[143] *See id.* (statement of Dir. James).

[144] *See* Lee, *supra* note 138, at A15. According to the 2003 Federal Human Capital Survey, fewer than half of all federal employees said they were satisfied with the recognition they received for doing a good job, with only thirty percent saying awards programs provide real incentives for workers to do their best. *Id.*

inefficiencies and overlap that undermined America's terrorism preparedness prior to the September 11 attacks.

Advocates of the traditional civil service system respond that merely shifting money and people around will neither attract new recruits to the federal government nor increase worker productivity. Although a mass departure of employees in the private sector would create a worker-friendly market, budget constraints prevent the federal government from proactively addressing its human capital needs through an overall increase in pay.[145] Additionally, confidence in government and perceptions of government jobs have plummeted since the Kennedy Administration[146] due to congressional investigations of abuse and mismanagement.[147] Consequently, the burden is on the Bush Administration to take all available measures to attract and retain federal employees. Adjusting the current pay structure may indeed provide needed incentives to attract new workers and increase performance. Nevertheless, any deviation must be accompanied by an explanation for the change and by a transparent pay and promotion system. Moreovoer, to prevent a mass exodus among those workers who would be transferred to the new DHS, the Bush Administration must make every effort to maintain continuity for transferred workers, including making a commitment to the principles underlying the civil service system.

Finally, many policymakers support President Bush's intention to maintain OHS as part of the Executive Office of the President but urge Bush to seek formal authority for OHS. Having the DHS Secretary take on the task of coordinating the outside agencies and programs involved in homeland security would be inherently problematic, some argue. The DHS Secretary's counterparts at other federal departments likely would not look favorably on seeing activities within their departments coordinated by a fellow Cabinet secretary.[148] The OHS Director is in a unique position to manage the task, but only if President Bush fully employs the

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[145] The Federal Employees Pay Comparability Act of 1990 was intended to provide for pay parity between federal employees and similarly skilled and experienced non-federal workers on a locality basis. *See* Federal Employees Pay Comparability Act of 1990, 5 U.S.C. § 5301 note (2000). This law has never been fully implemented, though, because of concerns about its cost and the reliability of its methodology for comparing federal and non-federal jobs in the individual labor markets. Stephen Barr, *Well into 2003, Government Employees to Receive Their Raises*, WASH. POST, Mar. 24, 2003, at B2. Consequently, many college graduates forego government service in favor of higher-paying private sector jobs. *See* Stephen Barr, *Retirement Wave Creates Vacuum*, WASH. POST, May 7, 2000 [hereinafter Barr, *Retirement Wave*], at A1.

[146] Government service likely enjoyed its highest popularity during President Kennedy's tenure, when many of the baby boom generation were drawn to the federal government by Kennedy's famous invocation to "[a]sk not what your country can do for you, ask what you can do for your country." Barr, *Retirement Wave*, *supra* note 145, at A1.

[147] Barr, *Retirement Wave*, *supra* note 145, at A1. Various events, including the Vietnam War, Watergate, the Iran-Contra scandal, and President Clinton's impeachment drama have also helped create a sense that government is "no longer accountable to the taxpayers." *Id.*

[148] *Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder).

capabilities of OHS and, more generally, HSC.[149] Since much of Secretary Ridge's authority as OHS Director came from his personal relationships with President Bush[150] and other members of the Bush Administration,[151] future OHS Directors will need Congress to give OHS formal authority if they hope to exercise similar power.[152]

Reorganization within the federal government is an ongoing process, and as Congress reconsiders its work it will need to make changes long after passage of the first reorganization bill.[153] In the rush to show the public that the federal government is actively working to ensure that another tragedy like September 11 does not take place,[154] elected officials should ensure they have not created the massive DHS for its own sake. Instead, the Department's components should have been limited to those agencies that will be directly involved in achieving the Department's essential mission of preventing terrorist attacks. Moreover, if they are to do their jobs well, the Department's employees need to have the basic guarantees of fair treatment embodied in traditional civil service protections and enjoyed by their fellow federal employees. Finally, the Senate should have

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[149] *See id.* In the months leading up to the passage of the HSA, President Bush never fully backed the HSC inter-agency process. *See id.* For example, in assembling a team to design a proposal for DHS, the President did not consult HSC officials, even though they were the most qualified experts in that area of government policy. *See id.*

[150] Secretary Ridge's close relationship to President Bush goes back to 1994, when they were elected governors of Pennsylvania and Texas, respectively. *See* Dan Balz, *Bush Quietly Considers Running Mate; Candidate, Adviser Meet but Tell Little*, WASH. POST, July 4, 2000, at A6.

[151] *See* Cmar, *supra* note 35, at 464.

[152] *See Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder); Cmar, *supra* note 35, at 468, 473–74; Gary Hart, *A Security Agency With More Muscle*, N.Y. TIMES, Feb. 10, 2002 ("So long as Tom Ridge, the Director of Homeland Security, is dependent solely on his personal relationship with the President, he will never have the authority required to guarantee bureaucratic response."). Numerous entities within the Executive Office of the President, such as the Directors of the Office of National Drug Control Policy (the so-called "drug czar") and the Office of Management and Budget, exist pursuant to statutory authority. *See* 21 U.S.C. §§ 1701–1713 (2000) (creating the Office of National Drug Control Policy); 31 U.S.C. §§ 501–522 (2000) (creating the Office of Management and Budget). Moreover, if OHS will continue to play a major role in drawing up an integrated homeland security budget—as it did for the President's 2003 budgetary request—allowing it to exist solely as a creature of the executive branch could present difficulties for congressional oversight of the budgetary process. *See Protecting the Homeland Hearings*, *supra* note 28 (statement of Ivo H. Daalder).

[153] *Homeland Security: Should Consular Affairs Be Transferred Hearing*, *supra* note 52 (statement of Paul C. Light).

[154] *See, e.g.*, 148 CONG. REC. S8718–46 (daily ed. Sept. 18, 2002) (statement of Sen. Byrd). Senator Byrd noted:

> I understand the eagerness to pass a strong bill in order to make a strong statement. We all want to assure the public that we are acting decisively to secure the public's safety. No one wants to be portrayed as standing in the way of greater security on American soil.

Id.

full powers of confirmation over upper-level officials in the Department to make it accountable and transparent.

The debate over homeland security presents an opportunity to re-evaluate the functions and responsibilities of the federal government, but it also opens the door for individuals to use the rhetoric of national security as a means of advancing other political and philosophical goals in the guise of security measures. The debate over civil service protections demonstrates this point, as those opposed to union protections for federal employees before September 11 were the strongest advocates for granting the President more flexibility in shaping DHS's personnel structure. Similarly, those in favor of maintaining the current assortment of civil service rights in DHS have rejected attempts in the past to modify the system, however minor. Achieving homeland security involves not only the organizational difficulty posed by the confluence of several federal, state, and local agencies and interests, but also maintaining a tenable balance between freedom and security. Organizational reform of the country's homeland security structure is the first step toward better protecting America, but it must not be the last.

—Jonathan Thessin

AMERICAN SERVICEMEMBERS' PROTECTION ACT OF 2002

On July 1, 2002, the Rome Statute of the International Criminal Court ("ICC") entered into force, establishing the first permanent international criminal tribunal.[1] Although seventy-six countries had ratified the Rome Statute by that date, the United States was not among them.[2] Instead, Congress responded to the creation of the ICC by passing a bill sponsored by House Majority Whip Tom DeLay (R-Tex.) that Republican legislators had been trying to get through the House and Senate for several years.[3] On August 2, 2002, the American Servicemembers' Protection Act of 2002 ("ASPA") became law.[4] The Act was designed to prevent United States participation in the ICC and to discourage other members of the international community from participating in the Court or assisting it in any way.[5]

Even before the bill's passage, commentators, diplomats, and legislators had debated whether ASPA was a beneficial new tool of American diplomacy or a coercive element of American policy that could ultimately harm United States interests. Arguments on behalf of the Act focus on concerns about the ICC, which its detractors view as an illegitimate international body that could target American citizens for prosecution based on political motives and deprive them of their constitutional rights.[6] Critics of ASPA counter that these fears are unfounded and that the ICC's founding statute protects against any such outcome.[7] They also argue from a normative standpoint that, as the first permanent international tribunal with jurisdiction over the gravest international crimes, the ICC is a positive development in international law that the United States ought to support.[8] Once ASPA became law, these debates continued even as the Bush Administration used ASPA as a tool to compel other nations to join America in its opposition to the international tribunal.[9]

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[1] *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9th (2002) [hereinafter *Rome Statute*]. *See also* U.N., 18 STATUS OF MULTILATERAL TREATIES DEPOSITED WITH SECRETARY-GENERAL 10, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Apr. 5, 2003).

[2] *See* Julia Preston, *U.S. Rift With Allies on World Court Widens*, N.Y. TIMES, Sept. 10, 2002, at A6.

[3] *See infra* text accompanying notes 49–62.

[4] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001–2015, 116 Stat. 820, 899–909 (to be codified at 22 U.S.C. §§ 7421–7432). ASPA was passed as Title II of this legislation. *See id.* §§ 2001–2015.

[5] *See generally id.*

[6] *See infra* text accompanying notes 85–126.

[7] *See infra* text accompanying notes 85–126.

[8] *See infra* text accompanying notes 127–135.

[9] *See infra* text accompanying notes 136–138.

The vehement opposition expressed by ASPA appears to run counter to the current goals of United States foreign policy.[10] With America increasing its involvements overseas in the wake of September 11, 2001,[11] a bill that redefines military aid and antagonizes potential future allies is not in America's national interest. While most commentators admit that the ICC is far from perfect, ASPA seems to go to extreme and unnecessary lengths to assert American opposition to the court.

The Rome Statute that created the ICC was drafted at the Rome Diplomatic Conference of 1998.[12] After negotiations involving delegations from 160 countries and 250 non-governmental organizations,[13] the final vote on July 17, 1998 counted 120 countries voting for the Rome Statute, seven voting against it, and twenty-one abstentions.[14] The seven countries opposed to the Statute were Libya, Israel, Qatar, Yemen, Algeria, China, and the United States.[15] Almost all of the United States' traditional allies,[16] including all fifteen members of the European Union ("EU") and three of the five permanent members of the United Nations ("U.N.") Security Council, voted for the Statute.[17]

The Rome Statute established the ICC, which is composed of the following units:[18] the Presidency;[19] three Divisions (Appeals, Trial, and

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[10] *See infra* text accompanying notes 145–148.

[11] These involvements include military engagements in Afghanistan and Iraq, as well as coordinated efforts with other countries as part of the Bush Administration's "War on Terror." *See, e.g.*, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 38 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) ("Our war on terror begins with Al Qaeda, but it does not end there.").

[12] The creation of the ICC marks the culmination of a move toward international criminal justice that began after World War II. Four international criminal courts preceded the ICC: the tribunals established after World War II in Tokyo and Nuremberg, and the International Criminal Tribunals established in Yugoslavia and Rwanda in the 1990s. *See generally* John E. Noyes, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 224–25 (1999) (placing the ICC in a historical context). The jurisprudence of these courts helped to establish the idea of individual responsibility for crimes such as genocide, and the ICC follows in this tradition by focusing entirely on individual criminal responsibility. *See Rome Statute*, *supra* note 1, art. 24. The ICC differs from these predecessors in two key respects. First, whereas previous tribunals had geographically limited jurisdictions, the ICC is global in its scope. *See* Noyes, *supra*, at 225. Second, the ICC is a permanent court as opposed to an ad hoc tribunal of limited tenure. *See Rome Statute*, *supra* note 1, art. 1.

[13] Leila Sadat Wexler, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 242 (2002).

[14] *See* 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2002, 116 Stat. 820, 900 (to be codified at 22 U.S.C. § 7421) (listing voting history).

[15] *See* Wexler, *supra* note 13, at 243. This grouping is striking given that the six countries joining the United States have been widely criticized for their human rights records.

[16] "Traditional allies" here refers to fellow members of the North Atlantic Treaty Organization, as well as countries perceived as sharing United States support for international *jus cogens*.

[17] *See* Wexler, *supra* note 13, at 243.

[18] *See Rome Statute*, *supra* note 1, art. 34.

[19] *Id.* art. 38. The Presidency is made up of the President and First and Second Vice-Presidents, and it is primarily responsible for the "proper administration of the Court, with

Pre-Trial);[20] the Office of the Prosecutor;[21] the Registry;[22] and an Assembly of States Parties made up of all member states.[23] The seat of the Court is at the Hague.[24]

Under the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression.[25] This jurisdiction is based on the principles of nationality and territoriality[26] and can be exercised when either a state party or the U.N. Security Council refers a crime to the Prosecutor, or when the Prosecutor initiates an investigation *proprio motu* (on the Prosecutor's own initiative).[27] The Rome Statute nevertheless severely limits the Court's jurisdiction by holding it to the principle of complementarity, which does not permit the ICC to hear a case that has been, or is being, investigated or prosecuted by a state with jurisdiction over it.[28] The ICC can therefore only rule on cases that the state in whose jurisdiction they fall has chosen not to pursue.

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the exception of the Office of the Prosecutor." *Id.*

[20] *Id.* art. 39. The Pre-Trial and Trial Divisions are each composed of at least six judges, most of whom must have criminal trial experience. *Id.* The Appeals Division is composed of the President and four other judges. *Id.* These Divisions in turn make up the Chambers, which are responsible for the Court's judicial functions. *Id.* The Appeals Chambers is composed of all the judges in the Appeals Division, while the Pre-Trial and Trial Chambers are each composed of three of their respective judges (although the Pre-Trial Chamber can be composed of only one Pre-Trial Division judge in certain circumstances). *Id.*

[21] *Id.* art. 42. The Office of the Prosecutor is made up of the Prosecutor; Deputy Prosecutors, who must be of different nationalities than the Prosecutor; and advisers appointed by the Prosecutor with legal experience on specific issues. *Id.* The Prosecutor, who is entirely independent of the other organs of the Court, is responsible for initiating and pursuing investigations and charging suspects. *Id.* arts. 42, 53, 61.

[22] *Id.* art. 43. The Registry, made up of the Registrar and Deputy Registrar, is "responsible for the non-judicial aspects of the administration and servicing of the Court" and the maintenance of a Victims and Witnesses Unit. *Id.*

[23] *See id.* art. 112; *infra* text accompanying notes 32–35.

[24] *Rome Statute*, *supra* note 1, art. 3.

[25] *Id.* art. 5.

[26] *See id.* art. 12. The Court has jurisdiction when a state party (or a non-party state that has accepted the Court's jurisdiction) is either "the State on the territory of which the conduct in question occurred" or "the State of which the person accused of the crime is a national." *Id.* art. 12(2). While this means that territorial jurisdiction can be extended over the citizens of a non-party state, this is not universal jurisdiction, which was explicitly rejected at the Rome Conference. *See* Ambassador David Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (stating that Article Twelve "is not an article that grants the Court universal jurisdiction over the list of crimes in Article [Five]" because "[a] proposal to that effect was defeated at Rome"), *available at* http://www.iccnow.org/documents/otherissues/DavidSchefferAddressOnICC.doc. This jurisdiction can extend to the heads of state of non-party states. *See Rome Statute*, *supra* note 1, art. 27.

[27] *See Rome Statute*, *supra* note 1, arts. 13, 15. The Prosecutor's power to initiate investigations or prosecutions is limited, however. The Prosecutor first requires the authorization of the Pre-Trial Chamber to go forward with an investigation or prosecution. *See id.* art. 15. This in turn requires the Prosecutor to notify all state parties and all states that would normally exercise jurisdiction over the crimes concerned. *See id.* art. 18. The Prosecutor's independence is further limited by the provision that the U.N. Security Council can defer investigation or prosecution. *See id.* art. 16.

[28] *See id.* art. 17. The only exception to this principle is that the ICC can exercise ju-

The three Divisions of the ICC are made up of a total of eighteen judges, each of whom must be a national of a state party.[29] Judgeships on the Court are full-time positions, and judges are expected to be independent and impartial; the Rome Statute includes provisions for the disqualification of biased judges.[30] The Prosecutor is a separate organ of the Court, independent of the judges and all other organs.[31] Above these organs lies the Assembly of States Parties, which is made up of one representative from each state party.[32] This group oversees the administration of the Court, decides the Court's budget, determines the number of judges, and generally shapes the ICC as a whole.[33] After July 1, 2009, this Assembly may also consider amendments to the Rome Statute,[34] including proposals for a definition of the currently undefined crime of aggression.[35]

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risdiction over a case if the state that would otherwise be able to prosecute the case "is unwilling or unable genuinely to carry out the investigation or prosecution." *Id.* art. 17(1)(a). The Rome Statute defines "unwillingness" as when a state initiates proceedings for the purpose of shielding a person, engages in unjustified delay, or conducts proceedings that are not independent and impartial. *Id.* art. 17(2). It defines "inability" as when a state is unable to carry out its proceedings "due to a total or substantial collapse or unavailability of its national judicial system." *Id.* art. 17(3).

[29] *See id.* art. 36. These judges both decide the cases before the court and vote for the President and First and Second Vice-Presidents. *See id.* art. 38.

[30] *See id.* arts. 40–41. Impartiality is defined as judges "not engag[ing] in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence." *Id.* art. 40(2). The disqualification of a judge is determined by an absolute majority of the Court's other judges. *See id.* art. 41(2)(c).

[31] *See id.* art. 42.

[32] *See id.* art. 112. The Assembly also consists of a Bureau of a President, two Vice-Presidents, and eighteen elected members. *Id.* Each state party has one vote. *Id.* State parties that are significantly in arrears in their required financial contribution to the Court may not vote, nor may observers vote. *Id.* The Assembly may establish necessary subsidiary bodies such as an independent oversight mechanism. *Id.*

[33] *See id.* art. 112.

[34] *See id.* art. 121. After this date, amendments may be proposed by any state party. *Id.* The Assembly then votes on amendments, which require a two-thirds majority to pass. *Id.* Upon passage, amendments enter into force for all state parties one year after ratification. *Id.* Amendments regarding the crimes under the Court's jurisdiction, however, only enter into force for those state parties that have agreed to them. *Id.*

[35] *See id.* art. 5(2) (foreseeing the definition of the crime of aggression under Article 121). Before the Rome Statute entered into force, countries were already proposing various definitions of the crime of aggression. *See, e.g.*, Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/1999/INF/2 (1999) (compiling the proposed definitions of aggression before the Preparatory Commission for the International Criminal Court). Once the Court came into existence, the Assembly of States Parties began accepting proposals for definitions of the crime of aggression to be considered after July 1, 2009. *See* Assembly of States Parties to the Rome Statute, 1st Sess., U.N. Doc. ICC-ASP/1/L.4 (2003). Cuba proposed the following definition for the crime of aggression:

> an act committed by a person who, being in the position of effectively controlling or directing the political, economic or military actions of a State, orders, permits or participates actively in the planning, preparation, initiation or execution of an act that directly or indirectly affects the sovereignty, the territorial integrity or the political or economic independence of another States, in a manner inconsistent with the Charter of the United Nations.

Since the ICC depends on international cooperation at all points during a case to ensure the just adjudication of a trial, the Rome Statute specifies provisions for requests for cooperation sent out by the Court.[36] Although state parties are generally required to comply with such requests, the Rome Statute provides for certain exceptions. If the disclosure of information or documents would threaten national security, for example, the Statute does not require disclosure.[37] Also, if requests for cooperation would require a state party either to act inconsistently with respect to the immunity of the person or property of a third state or to violate an agreement requiring a third state's consent for cooperation, Article 98 of the Rome Statute frees the state party from cooperating with the court.[38]

Once a case has reached the trial level, the Rome Statute provides for many procedural due process protections;[39] these do not include a right to a jury trial.[40] A criminal convicted by the ICC can be fined[41] or sentenced to imprisonment, including life imprisonment for crimes of

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Id.

[36] *See id.* art. 87. If state parties do not comply with such requests, the Court may refer the matter to the Assembly of States Parties, or to the Security Council if the Security Council referred the matter to the Court. *See id.* art. 87(7). The Court may also make requests to a non-party state if this state has entered into an ad hoc agreement with the Court. *See id.* art. 87(5). Such requests for cooperation can relate to the arrest and surrender of a person or other forms of cooperation such as the provision of documents, the protection of victims and witnesses, and the taking of evidence. *See id.* arts. 89–93.

[37] *See id.* art. 72. While the threat to national security is to be determined by the state itself, the Rome Statute calls for the ICC to request further consultations to determine the validity of the state's concern. *See id.* If this fear is found to be unwarranted, and the state is thus "not acting in accordance with its obligations," the Court may refer the matter to the Assembly of States Parties or to the Security Council if the Security Council referred the matter to the Court. *Id.*

[38] *See id.* art. 98 (prohibiting the Court from "proceed[ing] with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law," regarding both diplomatic immunity and agreements requiring the consent of a sending state).

[39] *See generally id.* Rights provided by the Rome Statute include: protection against double jeopardy, *id.* art. 20; protection from ex post facto crimes (here referred to as "nullum crimen sine lege"), *id.* art. 22; protection from warrantless search and seizure, *id.* arts. 57(3)(e), 58; protection against self-incrimination, *id.* arts. 55, 67(1)(g); right to a written statement of charges, *id.* art. 61(3); protection against trials in absentia, *id.* arts. 63, 67(1)(d); presumption of innocence, *id.* art. 66; speedy and public trials, *id.* arts. 67(1)(a), (c); right to counsel, *id.* arts. 67(1)(b), (d); right to cross-examination of witnesses at trial, *id.* art. 67(1)(e); right to remain silent, *id.* art. 67(1)(g); and exclusion of illegally obtained evidence, *id.* art. 69(7). *See also* Monroe Leigh, Editorial Comment, *The United States and the Statute of Rome*, 95 AM. J. INT'L. L. 124, 130–31 (2001) (cataloguing the above protections).

[40] *See infra* text accompanying notes 108–109. One of the many arguments for the United States joining the ICC is that United States negotiators contributed to the framing of these protections during the drafting of the Statute. *See* Christopher L. Blakesley, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 237–38 (1999) (arguing that the United States should take an active role in the creation of the ICC).

[41] *Id.* art. 77.

"extreme gravity."[42] Appeals are permitted on any grounds affecting "the fairness or reliability of the proceedings or decision."[43]

Although the Rome Statute creating the ICC was drafted at the Rome Diplomatic Conference in 1998, it could not enter into force for any signatories until it had been ratified by sixty countries,[44] a requirement that was met on July 1, 2002.[45] On September 3, 2002, with seventy-six members in attendance, Zeid bin Raad, Jordan's envoy to the U.N., was elected to the Presidency, and the Court was expected to start operating in the spring of 2003.[46] The United States, though arguably the strongest potential member of the Court, remained outside the list of state participants.[47]

American opposition to the ICC goes back to the Rome Diplomatic Conference itself, when the United States delegation refused to sign the Rome Statute because it claimed that negotiations had not produced an institution with sufficient protections for United States interests.[48] When President Clinton eventually signed the Statute on December 31, 2000,[49] he qualified his position by stating, "I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."[50] Senator Jesse Helms (R-N.C.), Chairman of the Committee on Foreign Relations, went even further in his opposition to the Rome Statute, arguing that the signature of the United States was "as outrageous as it is inexplicable," and vowing that it "will not stand."[51] Responding to this sentiment, President Bush

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[42] *Id.* art. 77. For most crimes, sentences are limited to imprisonment of thirty years or less. *See id.*

[43] *Id.* art. 81.

[44] *See id.* art. 126.

[45] *See* U.N., *supra* note 1.

[46] *See World Briefing United Nations: Criminal Court Moves Ahead*, N.Y. TIMES, Sept. 4, 2002, at A5; Preston, *supra* note 2, at A6. The Court was inaugurated on March 11, 2003, when eighteen judges were sworn in. Ian Black, *International Criminal Court Sworn in*, GUARDIAN (LONDON), Mar. 12, 2003, at 16.

[47] *See* U.N., *supra* note 1.

[48] *See* Leigh, *supra* note 39, at 124–25. One of the Clinton Administration's primary objections to the ICC at the time was the jurisdiction over citizens of non-party states permitted under Article 12 of the Rome Statute, which the United States opposes out of the belief that it could lead to the "unwarranted exposure of U.S. personnel to the ICC's jurisdiction." Scheffer, *supra* note 26. *See also* Barbara Crossette, *U.S. Accord Being Sought on U.N. Dues and on Court*, N.Y. TIMES, Dec. 7, 2000, at A6.

[49] Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 132 (2001). Clinton's action made the United States a signatory to the treaty, but the United States must ratify the treaty in order to become a party. *See* U.N., *supra* note 1.

[50] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2002, 116 Stat. 820, 900 (to be codified at 22 U.S.C. § 7421).

[51] Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV: The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381 (2002).

strengthened American resistance to the ICC by retracting the signature of the United States on the Rome Statute on May 6, 2002.[52]

Even prior to this retraction, congressional opponents of the ICC had already devised numerous legislative responses to its imminent creation. Legislators such as Representatives Ron Paul (R-Tex.) and Henry Hyde (R-Ill.) proposed resolutions that recommended withdrawing the United States' signature[53] or offered more general recommendations for withholding support from the ICC.[54] While one bill prohibiting United States financial assistance to the ICC passed in 2001,[55] most of this proposed legislation was never voted into law.

As these legislative responses to the ICC were being debated, the American government was simultaneously turning to forceful diplomatic tactics to exempt itself from the reach of the ICC. After the Rome Statute came into effect in July 2002, the United States demanded that the U.N. Security Council grant it a renewable one-year provision for blanket immunity from the ICC.[56] When the other members of the Council balked, the United States threatened not to renew the mandates of two U.N. peacekeeping missions in Bosnia and Croatia.[57] On July 12, 2002, the Security

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[52] *See* 148 CONG. REC. E775 (daily ed. May 9, 2002) (statement of Rep. Paul (R-Tex.)) (applauding President Bush's renunciation).

[53] *See, e.g.*, H.R. Con. Res. 23, 107th Cong. (2001). House Concurrent Resolution Twenty-Three, "[e]xpressing the sense of the Congress that President George W. Bush should declare to all nations that the United States does not intend to assent to or ratify the International Criminal Court Treaty, also referred to as the Rome Statute of the International Criminal Court, and the signature of former President Clinton to that treaty should not be construed otherwise," was introduced in the House in February 2001, *see* 147 CONG. REC. H254 (daily ed. Feb. 8, 2001), but received no floor debate.

[54] *See, e.g.*, H. Amdt. 408, 107th Cong. (2001); H.R. 4169, 107th Cong. (2002). House Amendment 408, an amendment sponsored by Representative Hyde to the Department of Defense Appropriations Act of 2002, H.R. 3338, 107th Cong. (2001), that would have prohibited "any funding to provide support or assistance to the United Nations International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court," was offered on November 28, 2001. 147 CONG. REC. H8441–03 (daily ed. Nov. 28, 2001). The amendment was agreed to in the House but not included in the final appropriations act. *See* Department of Defense Appropriations Act of 2002, Pub. L. No. 107-117, 115 Stat. 2229 (2002). House Bill 4169, introduced by Representative Paul on April 11, 2002 and forwarded to the House Committee on International Relations, advocated the formal rescission of the United States' signature to the Rome Statute, a prohibition on using United States government funds to assist the ICC, and the taking of "such steps as are necessary to prevent the establishment of the International Criminal Court." H.R. 4169, 107th Cong. § 3 (2002).

[55] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, § 624, 115 Stat. 748, 803 (to be codified at 16 U.S.C. § 1856) ("None of the funds appropriated or otherwise made available by this Act shall be available for cooperation with, or assistance or other support to, the International Criminal Court or the Preparatory Commission"). This provision, which was added by amendment, was sponsored by Senator Larry E. Craig (R-Id.). *See* S. Amdt. 1536, 107th Cong. (2001).

[56] *See* Serge Schmemann, *U.S. Peacekeepers Given Year's Immunity From New Court*, N.Y. TIMES, July 13, 2002, at A3.

[57] *See Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L. 706, 726 (Sean D. Murphy ed., 2002) [hereinafter *Contemporary Practice*].

Council arrived at a compromise that granted a one-year exemption from the court's jurisdiction to U.N. peacekeeping personnel from non-party states to the ICC.[58]

Even as legislative responses to the Rome Statute aimed directly at the ICC were being considered, a new breed of proposed bills developed focusing instead on the other countries considering ratification of the Rome Statute. In 2000, 2001, and 2002, Congress considered withholding military aid from any country that signed on to the Court, thereby attempting to deprive the ICC of enough members to make it effective. The first of these bills, the American Servicemembers Protection Act of 2000,[59] was introduced by Senator Helms on June 14, 2000 but never made it into law.[60] In 2001, both Senator Helms and Representative DeLay proposed new versions of the American Servicemembers Protection Act,[61] but, again, neither attempt succeeded.[62]

In 2002, Representative DeLay again proposed the American Servicemembers Protection Act, this time as an amendment to the 2002 Supple-

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[58] Resolution 1422, U.N. Security Council, 4572d Mtg., S/RES/1422 (2002). This compromise struck some members of the diplomatic community as unusual. *See* Schmemann, *supra* note 56, at A3 (quoting the Canadian ambassador to the U.N. as being "extremely disappointed with the outcome" and an international justice specialist at Amnesty International who viewed the compromise as "an unlawful Security Council resolution"). Nevertheless, this was not the first time a country had negotiated immunity from the ICC. In 1998, even before the Court came into effect, France used a provision of the Rome Statute to arrange for immunity for its soldiers on U.N. peacekeeping missions for seven years. *See* U.N., *supra* note 1. Article 124 permits parties to the ICC not to accept the Court's jurisdiction for war crimes for seven years after the Rome Statute enters into force for those states. *See* Rome Statute, *supra* note 1, art. 124. *See also* John Tagliabue, *More Nations Said to Back World Court Exemptions*, N.Y. TIMES, Sept. 1, 2002, § 1, at 16. The French compromise was based on an agreement to ratify the Rome Statute in the future. *See* Crossette, *supra* note 48, at A6. The American agreement, by contrast, was based on a threat to block future U.N. peacekeeping missions. *See Contemporary Practice*, *supra* note 57, at 726.

[59] S. 2726, 106th Cong. (2000).

[60] Leigh, *supra* note 39, at 130. The 2000 version of the American Servicemembers Protection Act, which was sent to the Senate Committee on Foreign Relations, prohibited any cooperation either with the ICC, *see* S. 2726, 106th Cong. § 4 (2000), or with U.N. peacekeeping missions that would put United States military personnel at risk of ICC prosecution, *see id.* § 5; prohibited transfer of national security information to the ICC, *see id.* § 6; forbade military assistance to ICC state parties (except allies), *see id.* § 7; and permitted the United States to free "persons held captive by or on behalf of the International Criminal Court," *id.* § 8.

[61] *See* S. Amdt. 1690 to National Defense Authorization Act for Fiscal Year 2002, S. 1438, 107th Cong. (2001); H. Amdt. 31 to Foreign Relations Authorization Act, H.R. 1646, 107th Cong. (2002).

[62] *See Respect for a World Court*, BOSTON GLOBE, Dec. 21, 2001, at A22; Adam Clymer, *House Panel Approves Measures to Oppose New Global Court*, N.Y. TIMES, May 11, 2002, at A3. Senator Helms' proposal for the American Servicemembers Protection Act of 2001 passed both houses of Congress but was then removed in conference before final passage into law. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1011 (2002). The DeLay amendment was agreed to in the House, but was not included in the final bill. *See* Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1349 (2002).

mental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States.[63] On August 2, 2002, the appropriations bill became law, and, in Title II of the Act, after two years of trying, Congress had finally passed ASPA.[64] Only one month after the ICC came into being, the United States had passed a strong legislative response.

Following the lead of many of the earlier proposed bills, ASPA forbids any United States government entity from providing support for the ICC. Specifically, this bill prohibits any such body from cooperating with a request for cooperation from the ICC, including transmitting any letters rogatory from the ICC, aiding in the transfer of a United States citizen or permanent resident alien to the ICC, or assisting in the extradition of any person to the ICC.[65] Furthermore, no federal funds may be used to assist in any actions against a United States citizen or permanent resident alien before the Court,[66] and the President must establish appropriate safeguards to prevent national security information from being transferred, either directly or indirectly, to the ICC.[67] In order to ensure that these provisions are met, United States courts and government bodies may limit their interpretation of any mutual legal assistance treaties to comply with ASPA.[68]

ASPA further expresses American opposition to the ICC by restricting American actions abroad. Members of the United States Armed Forces are prohibited under the Act from participating in any U.N. peacekeeping or peace enforcement operation unless such an operation permanently

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[63] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001–2015, 116 Stat. 820, 899–909 (to be codified at 22 U.S.C. §§ 7421–7432).

[64] *See id.* As an amendment to an appropriations bill, the legislation went through the Appropriations Committee rather than the International Relations Committee, which would most likely have had a greater understanding of the foreign policy implications of both ASPA and the ICC. *See* Clymer, *supra* note 62, at A3.

[65] 2002 Supplemental Appropriations Act § 2004.

[66] *See id.* § 2004(f).

[67] *See id.* § 2006 (requiring the President to "ensure that appropriate procedures are in place to prevent the transfer of classified national security information and law enforcement information to the International Criminal Court" or a party to the ICC).

[68] *See id.* § 2004(g) (requiring the United States to "exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance . . . to which the United States is a party"). The President is permitted to waive Sections 2004 and 2006, and thereby permit cooperation with the ICC, if he or she determines that the investigation or prosecution is in the United States' national interest and that the person charged is not a current or former "covered" United States or allied person. *See id.* A covered United States person is defined as a member of the United States Armed Forces, an elected or appointed official of the United States government, or any other person employed by or working on behalf of the United States government. *Id.* § 2013. Covered allied persons are military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a North Atlantic Treaty Organization ("NATO") member country, a major non-NATO ally, or Taiwan as long as that government is not a party to the ICC. *Id.* §§ 2003(c), 2013. *See infra* note 75 (listing countries defined as major non-NATO allies).

exempts participating Americans from any assertion of jurisdiction by the ICC.[69] For other joint command operations, where a member of the United States Armed Forces could be under the control of allied states that are under the jurisdiction of the ICC, ASPA requires the President to suggest modifications to reduce the risk of Americans being subjected to this jurisdiction.[70] Effective July 1, 2003, ASPA also forbids the United States from granting military assistance to the government of an ICC state party.[71] While this provision could theoretically end United States military aid to dozens of countries,[72] ASPA exempts many countries from this harsh prohibition: waivers are permitted if the President deems assistance to be in the national interest;[73] if the country receiving assistance has signed an Article 98 agreement preventing the country from aiding in the investigation or prosecution of United States citizens and permanent resident aliens;[74] or if the country receiving assistance is a North Atlantic Treaty Organization ("NATO") member country, a major non-NATO ally, or Taiwan.[75]

Moreover, if any covered United States or allied person is detained or imprisoned by the ICC, ASPA authorizes the President to use "all means necessary and appropriate" to bring about that person's release.[76] Despite the fact that this provision earned ASPA the nickname the "Hague Invasion Act,"[77] such means are not limited to military actions but can also include the provision of legal assistance.[78]

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[69] *See id.* § 2005. One exception to this provision is ASPA's grant to the President of permission to assign forces to a U.N. mission that does not provide for such an exemption if United States national interest would justify participation in the operation. *See id.* § 2005(c). Additionally, if the ICC enters into a binding agreement not to assert jurisdiction over any current or former covered United States or allied person, ASPA permits a waiver on its prohibition against participation in U.N. peacekeeping missions. *See id.* § 2003(a).

[70] *See id.* § 2009 (referring to all "military alliance[s] to which the United States is party").

[71] *See id.* § 2007. This provision is a break from many of the previous proposed bills opposing the ICC. *See supra* notes 54–55 and accompanying text.

[72] *See* BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 797 tbl.1293 (2001) (calculating United States economic and military aid to foreign countries as $15.987 billion in 1999).

[73] *See* 2002 Supplemental Appropriations Act § 2007(b) (permitting the President to waive the prohibition of military assistance "if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition").

[74] *See id.* § 2007(c). *See also supra* note 38 and accompanying text.

[75] *See* 2002 Supplemental Appropriations Act § 2007(d). ASPA defines major non-NATO allies to include Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand. *Id.*

[76] *Id.* § 2008.

[77] *See The Hague Invasion Act*, ST. LOUIS POST-DISPATCH, Oct. 24, 2001, at B6 (describing European fears of American aggression in defiance of international legal institutions).

[78] *See* 2002 Supplemental Appropriations Act § 2008(c).

Along with provisions for waivers of and exemptions from particular provisions, ASPA also provides a general exemption, specifying that none of its provisions should act to prohibit the United States from participating in any way in international efforts to bring foreign nationals accused of genocide, war crimes, or crimes against humanity to justice.[79] The section providing this exemption expressly refers to Saddam Hussein, Slobodon Milosevic, Osama bin Laden, other members of Al Qaeda, and leaders of Islamic Jihad as such foreign nationals.[80]

Now that ASPA has passed into law, the ability of the United States to coerce other countries into Article 98 agreements, and thereby partially insulate itself from the Court's jurisdiction, increases significantly.[81] The Act allows the United States to threaten to withhold military assistance from ICC state parties,[82] giving American officials a new statutory tool to wield in their efforts to exempt their country from the Court's reach.[83] Although ASPA limits the countries from which the United States can withhold military aid,[84] its passage still served as a warning to much of the international community since American military aid, in the form of education, training, and monetary aid, is sent to a wide range of countries.[85]

Much of the domestic support for ASPA grows out of general opposition to the ICC.[86] In the text of the Act itself, President Clinton's United States Ambassador at Large for War Crimes Issues, David Scheffer, is quoted as describing the Rome Statute as leaving the United States "with consequences that do not serve the cause of international justice."[87] Legislators such as Senator Helms have referred to the ICC as an "'interna-

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[79] *Id.* § 2015.

[80] *Id.*

[81] *See supra* note 38 and accompanying text. For more on the United States exercising this ability, see *infra* notes 136–138 and accompanying text.

[82] *See* 2002 Supplemental Appropriations Act § 2007. *See also supra* text accompanying notes 71–75.

[83] *See* Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1 (reporting United States threats to withhold military aid from countries that do not agree to shield United States peacekeepers from the ICC).

[84] *See supra* text accompanying notes 71–75.

[85] *See supra* note 72.

[86] *See, e.g.*, John R. Bolton, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21 (responding to President Clinton's signing of the Rome Statute). John R. Bolton is now the Bush Administration's Undersecretary of State for Arms Control and International Security. American opposition to the ICC was succinctly explained by Marc Grossman, United States Undersecretary of State for Political Affairs, in the notice that the Bush Administration sent to the U.N. regarding its intention not to make the United States a state party. *See Contemporary Practice*, *supra* note 57, at 724. The notice gave several arguments against joining the ICC: "(1) it undermined the role of the U.N. Security Council in maintaining international peace and security; (2) it created a prosecutorial system that is an unchecked power; (3) it purports to assert jurisdiction over nationals of states that have not ratified the treaty; and (4) it is therefore built on a 'flawed foundation.'" *Id.*

[87] 2002 Supplemental Appropriations Act § 2002.

tional kangaroo court,'"[88] and New York Times columnist William Safire dubbed it a "globocourt."[89]

One of the primary concerns driving American opposition to the ICC is the fear that the Rome Statute will lead to Americans being brought before the Court, despite American non-participation in the institution.[90] Given that the ICC's jurisdiction is not limited to any specific set of individuals, however, the ICC could also exercise jurisdiction over American civilians abroad.[91] This general concern about Americans being prosecuted before the ICC is based on a belief that the Court will pursue politically motivated prosecutions and treat citizens of a global superpower differently than other suspects due to the political motives of parties to the Court.[92] Opponents of the Court argue that the Prosecutor can easily act on such motivations because of his or her ability to initiate investigations independently.[93]

As reflected in the references within the Act to protecting "senior officials of the United States government,"[94] ASPA supporters particularly fear that high-ranking government officials could be brought before the ICC. Threatened legal actions against former Secretary of State Henry Kissinger regarding his involvement in the 1973 Chilean coup that led to Augusto Pinochet's rise to power have helped to highlight this concern.[95]

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[88] Amann & Sellers, *supra* note 51, at 385.

[89] William Safire, *Enter the Globocourt*, N.Y. TIMES, June 20, 2002, at A25.

[90] *See* 2002 Supplemental Appropriations Act § 2002(8) ("Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court."). This concern applies most directly to American soldiers abroad, either in combat or conducting a peace-keeping mission. *See* Press Release, Office of the House Majority Whip, DeLay Calls ICC "Threat to America's Soldiers and Leaders"; Those Who Protect Us Deserve Protection (May 14, 2002) [hereinafter DeLay Threat Press Release] ("Under the ICC, our soldiers fighting in terrible conditions at far corners of the globe will now be at a risk of politically motivated prosecutions and imprisonment by a rogue court."), *available at* http://www.tomdelay.com/html/prelease.cfm?release_id=244.

[91] *See* Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 24–33 (2001) (foreseeing the prosecution of non-combatant civilian employees working alongside the military). Commentators have also voiced concern regarding former military combatants later being brought under the ICC's jurisdiction when traveling abroad as civilians. *See* Guillory, *supra* note 49, at 132.

[92] *See* Amann & Sellers, *supra* note 51, at 389 ("Opponents have maintained that because a majority of the Assembly of States Parties will select and may fire the prosecutor, the character and motivations of the prosecutor will reflect the character and motivations of a majority of states parties.").

[93] *See Rome Statute*, *supra* note 1, arts. 13(c), 15 (granting Prosecutor authority to conduct investigations *proprio motu*).

[94] 2002 Supplemental Appropriations Act § 2002(9). The Rome Statute makes explicit provisions for trying both members of government and civilians as individuals with criminal responsibility, which highlights the recent move away from head of state immunity. *See Rome Statute*, *supra* note 1, art. 27 ("This Statute shall apply equally to all persons without any distinction based on official capacity."). For a discussion of the shift away from head of state immunity, see Gilbert Sison, Recent Development, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583 (2000).

[95] *See generally* CHRISTOPHER HITCHENS, TRIAL OF HENRY KISSINGER (2001) (detail-

The text of the Rome Statute, however, reveals many of these fears to be unfounded. First, it is unlikely that any United States personnel would be subject to politically motivated prosecutions given the limited types of crimes covered by the Statute.[96] Second, the principle of complementarity protects against the specter of politically motivated prosecutions.[97] Since a case will only come before the ICC if the national courts of the defendant are unwilling or unable to prosecute it, an American would only be brought before the ICC if not tried by American prosecutors before an American court. Thus, the ICC can be seen as a default jurisdiction, taking cases only when other possible courts have refused them.[98] Third, the Rome Statute requires that biased judges be excused[99] and restricts the Prosecutor's ability to initiate investigations.[100] The Prosecutor has no independent power to begin an investigation or legal process[101] and can be barred from continuing with an investigation or prosecution throughout the process.[102] Since the ICC Prosecutor arguably has less authority than a United States district attorney or county prosecutor,[103] the claim that the ICC will pursue politically motivated prosecutions appears quite weak.

A further concern of ASPA supporters focuses on specific provisions of the Rome Statute that the American government finds particularly offensive. First on this list is the lack of rights provided to defendants before the Court. Members of Congress and other public officials who oppose the Court have repeatedly voiced their fears of Americans being denied a jury trial, the right to cross-examine witnesses, and protection from

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ing the crimes against humanity with which Kissinger could potentially be charged were universal jurisdiction asserted over his official acts); Michael J. Kelly, *Kissinger's World: A Cautionary Tale Through a Cold War Lens*, 3 SAN DIEGO INT'L. L.J. 133, 142–43 (2002) (stating that Kissinger has been served with orders to appear in courts in France, Argentina, and Chile to testify regarding his involvement in such crimes).

[96] *See supra* text accompanying note 25 (describing the four crimes over which the ICC exercises jurisdiction). *See also* John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 101–02 (quoting a member of the United States delegation to the Rome Conference as saying that "politically motivated international prosecutions . . . of U.S. military personnel would be quite improbable").

[97] *See supra* note 28 and accompanying text. The principle of complementarity was first implemented at the Nuremberg tribunal. Wexler, *supra* note 12, at 249. Since the Nuremberg tribunal only tried major war criminals, minor offenders were tried where their crimes had occurred. *Id.*

[98] *See id.* at 250.

[99] *See Rome Statute*, *supra* note 1, art. 41. Judges can either be excused at their own or the Prosecutor's request or disqualified from a case if their "impartiality might reasonably be doubted on any ground." *Id.*

[100] *See supra* note 27 (describing limits on investigations proprio motu). *See also* Leigh, *supra* note 39, at 129–30; Amann & Sellers, *supra* note 51, at 389 (emphasizing limits on Prosecutor's independence).

[101] *See supra* note 27.

[102] *See supra* note 27.

[103] Leigh, *supra* note 39, at 128.

self-incrimination.[104] As Senator Robert F. Bennett (R-Utah) stated, one common reaction to the ICC is a fear of Americans losing "any rights [they] currently have under the U.S. Constitution."[105]

Despite these claims, however, the ICC protects many rights equivalent to those found in the federal Constitution, with the Rome Statute delineating a list of rights more detailed than that in the American Bill of Rights.[106] Moreover, while ASPA supporters are correct that the ICC does not provide for trial by jury, Fifth and Sixth Amendment rights would not be permitted under the American military justice system in any case.[107]

A further weakness envisioned by opponents of the ICC is the Court's lack of accountability to individual nations. American opponents of the Court fear that the power of the United States on the world stage will not be enough to sway this "unaccountable new international legal bureaucracy,"[108] making strong countermeasures such as ASPA necessary to tame this uncontrollable new entity. Not only are judges nominated from different member states,[109] but the United States will not be able to veto whatever decision these international judges hand down.[110]

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[104] *See, e.g.*, Press Release, Office of the House Majority Whip, DeLay Amendment to Protect American Service Members Passes Overwhelmingly (May 10, 2001) [hereinafter DeLay Amendment Press Release] (on file with author). According to Representative DeLay, "[Americans] could be denied a jury trial. They could be denied cross-examination of hostile witnesses. Americans could even be forced to give self-incriminating testimony." *Id.*

[105] 148 CONG. REC. S7847 (daily ed. Aug. 1, 2002) (statement of Sen. Bennett). This rights-based argument is closely tied to the fear of politically motivated prosecutions. Although all constitutional rights may not be provided for Americans currently tried overseas, ICC opponents fear that Americans whose rights were not protected would be particularly susceptible to differential treatment before the ICC. *See* DeLay Amendment Press Release, *supra* note 104. For further discussion of the underlying concern about politically motivated prosecutions, see *supra* text accompanying notes 96–97.

[106] *See supra* note 39. Legal scholars have argued that these rights are "in general very similar to, and to some extent can be traced back to, those required by the U.S. Constitution, and arguably are even somewhat superior to those." Paul C. Szasz, *The United States Should Join the International Criminal Court*, 9 USAFA J. LEG. STUD. 1, 15 (1998–99).

[107] *See* Leigh, *supra* note 39, at 130 ("Trial by jury . . . is not available to service members under the Fifth Amendment. They are excepted from coverage by the test of the Fifth Amendment. And the same exception is generally assumed to be applicable under the Sixth Amendment."). *See also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955) (upholding distinction between military tribunals and civilian courts and guaranteeing jury trials only for the latter). This rebuttal does not, however, address the concerns of civilians being deprived of a jury trial by the Court. *See supra* notes 91, 94–95 and accompanying text.

[108] DeLay Threat Press Release, *supra* note 90.

[109] *See Rome Statute*, *supra* note 1, art. 36(4)(b) ("Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.").

[110] *See* Turner, *supra* note 91, at 33 (noting that the United States will not have the power to veto the rulings of the ICC, as it can do with decisions made by the U.N. Security Council). This argument is again closely tied to the fear of America having no remedy if its citizens are targeted by the Court.

This argument, however, supports the United States joining the ICC. Since the Rome Statute permits each state party to nominate a judge,[111] one way for the United States to render the court more accountable would be to ratify the Rome Statute and nominate its own judge. In addition, were the United States a party to the ICC, it would become party to the Assembly of States Parties, thereby acquiring a voice in shaping the Court more to its liking.[112] By not ratifying the Rome Statute, the United States may be missing an important opportunity to influence the development of the ICC in its formative stages.

A further line of criticism of the ICC is that the Statute of Rome is not compatible with international law. As legal scholars have pointed out, combining international law and criminal law is still a fairly new task.[113] The strongest argument against the international legal aspect of the statute is that a treaty should be binding on its parties only.[114] Since the jurisdiction of the ICC extends to citizens of states that are not members of the court,[115] members of the United States government have argued that the entire statute is unlawful.[116]

This claim is debatable, however. While international law may prevent a treaty from having jurisdiction over a non-party state, this prohibition does not extend to citizens of that non-party state who are charged with committing an offense within the territory of a party to the treaty.[117]

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[111] *See Rome Statute*, *supra* note 1, art. 36(4)(b).

[112] *See* Leigh, *supra* note 39, at 124–25 (arguing that United States' non-participation in the ICC means it "will not become a member of the Assembly of States Parties and thus will not participate in shaping the court in its early formative years"); *Overwrought on the Criminal Court*, N.Y. TIMES, Aug. 13, 2002, at A18 (advocating United States involvement in the Court).

[113] *See* Louise Arbour, J., *Access to Justice: The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13, 17 (1999) (arguing that it is of "critical importance that we define appropriately the role of international criminal justice, that we fully empower the courts to do what they are designed to do, and that we resist the temptation to use them as inadequate substitutes for the many other ways in which civil societies must be reconsidered after war and sustained in their search for peace"). Justice Arbour, who sits on the Ontario Court of Appeals, was appointed the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda by the U.N. Security Council in 1996. *Id.* at 13 n.a1.

[114] *See* Scheffer, *supra* note 26 (arguing that the Rome Statute "runs counter to some serious norms of international law if it purports to empower the Court to exercise jurisdiction over non-party nationals").

[115] *See Rome Statute*, *supra* note 1, art. 12 (granting jurisdiction to the Court if either the state of which the accused is a national or the state in which the conduct occurred is a party to the ICC).

[116] *See* U.S. Department of Defense, Background Briefing on the International Criminal Court (July 2, 2002) (arguing that the Rome Statute "claims to apply even to countries that are not parties" and deeming that this is "a deviation from hundreds of years of international legal practice"), *available at* http://www.defenselink.mil/news/Jul2002/t07022002_t0702icc.html.

[117] *See* Leigh, *supra* note 39, at 127. According to one commentator, under customary international law,

> the national who commits an offense within the territory of any state is subject to

Under territorial jurisdiction, American citizens can currently be tried in the court of a country in whose territory an alleged crime occurred.[118] While being sent to an international court for trial differs from being tried in the country in which an alleged offense was committed, this difference does not appear to render the ICC's jurisdiction invalid.[119] In fact, some legal scholars have suggested that the jurisdiction of the ICC, far from violating customary international law, is more advantageous to suspects than traditional territorial jurisdiction.[120] A court that is accountable to multiple countries and whose laws and administration are the result of multilateral negotiations would appear better situated to protect suspects' interests than would a national court.

Other legal concerns about the ICC focus on the crimes over which the Rome Statute authorizes the Court to exercise jurisdiction.[121] Critics have attacked the Statute for redefining genocide, crimes against humanity, and war crimes, whose definitions had been well-established in previous treaties, and for including the crime of aggression without defining it.[122] As the Statute cannot be amended to define the crime of aggression

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> that state's territorial jurisdiction—and would be so subject if there were no treaty at all. No rule of customary international law prohibits the territorial sovereign from exercising its jurisdiction directly over the offender, even if acting under the direction of a nonparty state; nor from extraditing the offender to another country—even to a country of which the accused is not a national.

Id.

[118] *See* Research in International Law of the Harvard Law School, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. 435, 445 (1935). The first of five general principles of jurisdiction is "the territorial principle, [which] determin[es] jurisdiction by reference to the place where the offence is committed, [and] is everywhere regarded as of primary importance and of fundamental character." *Id.*

[119] It is difficult to see how such jurisdiction could be invalid when even the broader principle of universal jurisdiction, based on the belief that certain crimes are so universally condemned that all states have a jurisdictional interest in them, is gaining more support in the international community. *See* RESTATEMENT (THIRD) OF INT'L L. § 402 (permitting universal jurisdiction over genocide and war crimes, among others). In fact, the United States itself has taken tentative steps toward accepting universal jurisdiction in certain areas. *See* Torture Convention Implementation Act of 1994, Pub. L. 103-236, § 506(a), 108 Stat. 382, 463 (codified at 18 U.S.C. § 2340 (1994)) (establishing jurisdiction over torture beyond United States borders if "(1) the alleged offender is a national of the United States, or (2) the alleged offender is present in the United States, regardless of the nationality of the victim or alleged offender").

[120] *See* Leigh, *supra* note 39, at 127 (positing that an offender extradited from an ICC state party to the court by the territorial sovereign "might receive a fairer trial than in the courts of the country where the offense was committed").

[121] *See supra* text accompanying note 25.

[122] *See, e.g.*, Malvina Halberstam, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 233 (1999) (criticizing the definitions of Article 5 crimes). Given concerns about including the crime of aggression at all in the Rome Statute, the United States and others arranged a compromise at Rome such that aggression would be included as one of the Article Five core crimes, but would not be defined for seven years following ratification. *See generally* Benjamin B. Ferencz, *Getting Aggressive About Preventing Aggression*, 6 BROWN J. WORLD AFF. 87 (1999).

for seven more years,[123] the possibility still exists that this crime could be defined in opposition to the will of the United States.[124] Supporters of the ICC, however, argue that the crime of aggression, with its historical foundations in the International Military Tribunal at Nuremberg, is sufficiently important in an international criminal court to remain in the Rome Statute and, they hope, to be defined at the end of seven years.[125] Given that the Court can now only prosecute war crimes, genocide, and crimes against humanity, and that the principle of complementarity permits prosecutions only after no court in the defendant's state of nationality has exercised jurisdiction, many of the ICC abuses predicted by ASPA proponents, from asserting jurisdiction over Americans for purely political reasons to depriving Americans of their rights under both United States and international law,[126] seem effectively impossible.

Whereas supporters of ASPA focus on the negative elements of the ICC, opponents point to the positive aspects of the Court, as embodied in the goals laid out in the preamble to the Rome Statute, to question whether these supposed negatives truly justify ASPA.[127] The ICC is not only significant for what it will do in the future; the Court's mere existence has been celebrated as historically significant.[128] The Rome Statute itself establishes the ICC "for the sake of present and future generations,"[129] and observers have lauded the Court as a representation of a new step forward in international law.[130] Supporters of the ICC applaud its focus on individual responsibility,[131] which, in the words of one legal scholar, "would make it possible to bring to justice those who engage in the most heinous crimes—genocide, crimes against humanity, war crimes, and terrorism—even if the perpetrator is a national of a state that condones, encourages,

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[123] *See supra* note 34 and accompanying text.

[124] *See* Ferencz, *supra* note 122, at 92. The United States State Department argued that "with respect to individual culpability the crime of aggression should be excluded [from the Rome Statute] at this stage." *Id.*

[125] *See id.* (stating that the American prosecutors at Nuremberg "considered . . . the most important achievement of the Nuremberg trials [to be] the outlawry of aggressive war").

[126] *See supra* text accompanying notes 85–124.

[127] *See Rome Statute*, *supra* note 1, pmbl. The Rome Statute's preamble "[affirms] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," and "[resolves] to guarantee lasting respect for and the enforcement of international justice." *Id.*

[128] *See, e.g.*, U.N., Secretary-General Says Establishment of International Criminal Court is Gift of Hope to Future Generations, U.N. Doc. SG/SM/6643/L/2891 (1998) (quoting U.N. Secretary General Kofi Annan calling the Rome Statute "a gift of hope to future generations"), *cited in* Arbour, *supra* note 113, at 17 n.13.

[129] *Id.*

[130] *See* Szasz, *supra* note 106, at 24 (arguing that the ICC "represents a major step in advancing international law, in particular international humanitarian law, in helping to implement laws and principles that the United States has always stood for").

[131] *See supra* notes 12, 94.

or supports the conduct."[132] With the United States standing alone amongst its traditional allies in not signing the Rome Statute, one rationale for the United States becoming a party to the Court is that its underlying principle of international justice deserves strong international support.[133]

A further argument contesting ASPA focuses not on the ICC but rather on the coercive elements of the Act itself, which many opponents deem unnecessarily harsh. Some commentators have charged that ASPA is another element in a recent trend toward unilateralism and non-coopera-tion by the United States government.[134] Other commentators challenge specific provisions of the Act, particularly those prohibiting military aid or permitting the President to use any means necessary to retrieve Americans brought before the Court.[135]

The coercive nature of ASPA can best be seen in its use immediately after its passage. In the late summer of 2002, America used the threat of ASPA to encourage other nations to join it in bilateral Article 98 agreements, under which nations would not be permitted to extradite United States citizens to the ICC.[136] Article 98 agreements thus allow the United States to oppose the Court while still falling within the letter of the Rome Statute.[137] By mid-August, Romania and Israel had signed such agreements, and the Bush Administration was pushing for additional signatories.[138]

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[132] Halberstam, *supra* note 122, at 232–33. As U.N. Secretary-General Kofi Annan stated, the entry into force of the Rome Statute marked "'a great victory for justice and for world order . . . [and] a turn away from the rule of brute force, and towards the rule of law.'" European Parliament Resolution on the Draft American Servicemembers' Protection Act (ASPA), EUR. PARL. DOC. P5 TA-PROV 1367 (2002) [hereinafter European Parliament Resolution]. The ICC is "the first permanent body with international jurisdiction able to judge individuals . . . responsible for war crimes, genocide, and crimes against humanity." *Id.*

[133] *See* Blakesley, *supra* note 40, at 237–38 (referring to the Rome Conference as "an opportunity to do something right—to create a tribunal that is fair and just," and arguing that "[m]aybe there still is a chance to do so").

[134] *See, e.g.*, James Carroll, *US Should Back Tribunal*, BOSTON GLOBE, Sept. 12, 2000, at A23; European Parliament Resolution, *supra* note 132, at § 5 (calling "on the US Congress to reject the unilateralism which the ASPA represents, and to embrace in deeds as well as rhetoric the reality that only the common endeavour of the international community will bring to justice tyrants and perpetrators of genocide or other crimes against humanity, including terrorists"). Bush Administration officials such as Secretary of State Colin Powell, however, have rejected this accusation of unilateralism as overly simplistic. *See* Colin L. Powell, *Threats and Responses: Perspectives*, N.Y. TIMES, Sept. 8, 2002, § 1, at 26.

[135] *See* European Parliament Resolution, *supra* note 132, at § 4 (noting that ASPA "explicitly denies the US itself . . . military and intelligence cooperation" and referring to a resolution adopted by the Netherlands on June 13, 2002 "expressing its concern over ASPA, which would give the US President the right to authorise [sic] the use of force against the Netherlands to free members of the US armed forces, civilians and allies held captive by the ICC"). European opponents fear that ASPA could lead to the United States using force to free an American citizen from the Court. *See* Joshua Rozenberg, *Will Bush Invade Cambridgeshire?*, DAILY TELEGRAPH (London), Sept. 5, 2002, at 23.

[136] *See supra* note 38 and accompanying text. Christopher Marquis, *U.S. Is Seeking Pledges to Shield Its Peacekeepers From Tribunal*, N.Y. TIMES, Aug. 7, 2002, at A1.

[137] *See supra* note 38 and accompanying text.

[138] *See* Marquis, *supra* note 136, at A1.

In response to these American threats, the international community immediately charged the Bush Administration with heavy-handedness.[139] The EU warned its thirteen candidate countries[140] against signing coerced Article 98 agreements, charging that the agreements were inconsistent with international law and unnecessary for the countries signing them.[141] On August 13, 2002, Switzerland went further, announcing its refusal to sign any exemption agreement.[142] Other critics argued that these agreements were a misuse of Article 98.[143] The angry response sparked by its initial use bodes poorly for ASPA as a positive addition to the tools available to American diplomats.

The various arguments against the ICC do not justify the extremity of ASPA.[144] As shown by the international outrage that met the coercive use of ASPA, the ICC is a priority to many of the United States' allies.[145]

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[139] *See* Elizabeth Becker, *U.S. Presses for Total Exemption from War Crimes Court*, N.Y. TIMES, Oct. 9, 2002, at A6 (citing the frustration of European and Canadian officials at United States use of ASPA).

[140] These thirteen candidate countries, which are vying for accession to the EU in the future, are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey. *See* E.U., EUROPEAN UNION AT A GLANCE, *at* http://europa.eu.int/abc-en.htm (last visited Apr. 11, 2003) (listing the candidate countries).

[141] *See* Press Release, Coalition for the International Criminal Court, EU Council Approves Common Position Rejecting US Bilateral Agreements (Sept. 30, 2002), *available at* http://www.iccnow.org/pressroom/ciccmediastatements/2002/09.30.02EUAdoptsCP.pdf.

[142] *See* Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, N.Y. TIMES, Aug. 26, 2002, at A10. There were also charges that the United States had threatened the candidacy of prospective NATO countries who refused to sign such agreements, but this charge has been contested by the United States. *See id.*

[143] *See* Becker, *supra* note 142, at A6 (reporting the criticisms of senior Canadian and European officials); Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, N.Y. TIMES, Aug. 26, 2002, at A10. In mid-October, the EU and the United States reached a compromise on the Article 98 agreements. *See* Becker, *supra* note 142, at A6. The EU granted permission to individual member states to sign bilateral agreements with the United States, but these agreements could exempt only American military personnel and diplomats from prosecution. *See* Becker, *supra* note 142, at A6. Following this allowance—which acted as an effective international acknowledgment, if not outright approval, of the Article 98 agreements—close to twenty countries have signed exemption agreements with the United States. Sanjay Suri, *Rights: A Brave New Court with Little Real* Power, INTER PRESS SERVICE, Mar. 12, 2003, LEXIS, Nexis Library, INPRES File.

[144] One further argument against the ICC not addressed here—or in much of the literature or debates surrounding the Court—is that perhaps the whole idea of a permanent international tribunal is misguided. As suggested in Hannah Arendt's study of trial of Adolf Eichmann after World War II, one danger of such a court is that it could perhaps excuse political responsibility by effectively transforming the few prosecuted individuals into scapegoats for the many who may have been involved in an offense. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (Penguin Books, 1976) (1964).

[145] *See* Letter from Kofi Annan, U.N. Secretary-General, to Colin Powell, U.S. Secretary of State (July 3, 2002), *available at* http://www.igc.org/icc/html/SGlettertoSC3July2002.pdf. According to Secretary-General Annan,

> the establishment of the ICC is considered by many, including [America's] closest allies, as a major achievement in our efforts to address the impunity that is also a major concern for the United States . . . . I fear that the reactions against any at-

Passed almost one year after September 11, 2001, ASPA exists in an international context in which the support of other countries is recognized as a necessary element in the war against terrorism,[146] yet the Act itself contradicts the goal of establishing allied support. By drafting a bill designed not only to oppose the ICC but to actively thwart it, America seems to be going in the exact opposite direction and alienating its allies just when it claims to need them most.[147]

From an analysis of the Rome Statute and the diplomacy surrounding the ICC and ASPA, it does not seem that the arguments against the ICC warrant blocking the Court as vehemently as the American government has done in passing ASPA. Instead, given American negotiating power, the United States should keep open the possibility of changing the ICC from within—or at least not bar this possibility entirely.[148] In becoming a party to the Court, the United States could have a say in, among other things, nominating judges, defining the crime of aggression, and determining which crimes are prosecuted. Although the United States has now missed the opportunity to be involved in the first round of judicial appointments and administrative decisions affecting the Court, it could still address many of its concerns as a party to the court rather than as the Court's strongest opponent. Such involvement better protects United States interests than does ASPA.

As the EU has highlighted, ASPA acts in opposition to American interests in that the United States is directly hindering its war against terrorism by "explicitly den[ying] itself two of the principal weapons—military and intelligence cooperation—of the global coalition against terrorism."[149] Whereas military aid has traditionally been believed to be in America's interest, ASPA views it as a mere gratuity that can be revoked at will. Under ASPA, the education, training, and monetary aid that the United States provides is no longer seen as creating a more stable inter-

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tempts at, as they perceive it, undermining the Rome Statute will be very strong.

Id. See also European Parliament Resolution, *supra* note 132.

[146] *See* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 38 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) (requesting "the help of police forces, intelligence services, and banking systems around the world").

[147] *See* European Parliament Resolution, *supra* note 132, § 2 (arguing that "ASPA goes well beyond the exercise of the US's sovereign right not to participate in the Court, since it contains provisions which could obstruct and undermine the Court and threatens to penalise [sic] countries which have chosen to support the Court").

[148] Before ASPA was passed, Senator Christopher J. Dodd (D-Conn.) proposed a bill that exemplified such an approach. *See* American Citizens' Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong. (2001). Instead of advocating immediate ratification of the Rome Statute or barring all future involvement with the Court, this bill encouraged the United States to remain involved in setting up the ICC and foresaw the Senate ratifying the Rome Statute only after the Court had established a strong track record. *See id.*

[149] European Parliament Resolution, *supra* note 132, at § 4.

national community and thus providing greater safety for America itself. Instead, military aid is now viewed as something from which only other countries gain.[150] While ASPA permits the President to waive its ban on military aid to ICC members when such assistance is in the national interest,[151] this approach presumes that much of the military aid now provided by the United States would not fall under such a waiver provision. With the passage of ASPA and the implication that threatening to withhold such aid is in America's interests, the United States views its national interests as being such that opposition to the ICC outweighs all other security and diplomacy concerns. Given the current international climate and the minimal dangers currently posed by the ICC, this seems unlikely.

ASPA may have responded to many of the criticisms of the ICC within the United States, but its use after August 2, 2002 has led to international outcry. In the current international situation, where America's interests are not well-served by antagonizing potential allies and withholding military aid, such a coercive tool appears not only unnecessary but potentially harmful.

—Lilian V. Faulhaber

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[150] *See* 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2007, 116 Stat. 820, 905 (to be codified at 22 U.S.C. § 7426) (prohibiting the United States from providing military aid to parties to the ICC).

[151] *See id.* § 2007(b).

FIRE SAFE CIGARETTES

Approximately nine hundred people die yearly in the United States from fires started by cigarettes.[1] Most such fires occur when a cigarette falls accidentally (often as the smoker falls asleep) onto a mattress or another piece of furniture.[2] Tobacco companies have long been aware of the death rate due to fires caused by their cigarettes, but the industry has not widely introduced fire safe cigarettes to the market despite having done years of research on a cigarette that would stop burning when not actively smoked.[3] A fire safe cigarette is simply a cigarette that either has a low probability of igniting upholstered furniture and mattresses or a cigarette that will extinguish when left unpuffed for an extended period.[4]

In April 2002, proponents of fire safe cigarette regulation in the 107th Congress introduced the Joseph Moakley Memorial Fire Safe Cigarette Act of 2002 ("Moakley Act"), named for the late Congressman Joseph Moakley (D-Mass.). The Act aims to reduce deaths and injuries caused by cigarette fires by mandating that tobacco companies produce fire safe cigarettes.[5] Two months later, Representatives Edolphus Towns (D-N.Y.)

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[1] AM. BURN ASS'N, FACT SHEET ON FIRE SAFE CIGARETTES, *at* http://www.ameriburn.org/advocacy/fireSafeCig.htm (last visited Feb. 11, 2003). In 1998 there were 903 deaths, 2453 civilian injuries, and $411.7 million in property damage caused by cigarette-ignited fires. H.R. 4607, 107th Cong. § 2 (2002).

[2] AM. BURN ASS'N, *supra* note 1.

[3] *See, e.g.*, Henry B. Merritt, Philip Morris U.S.A., *Activities During April–June 1978* (June 26, 1978), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/1003402438-2442.html?ocr_position=hide_ocr. *See, e.g.*, Philip Morris, Co., *The Self-Extinguishing Cigarette* (Jan. 1974, est.), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/1000279493-9494.pdf (last visited Feb. 12, 2003); Alan Rodgman, RJR Tobacco Co., *Modification of the Burn Rate of Unpuffed Cigarette* (Sept. 10, 1979), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/508511155-1156.pdf; Philip Morris, Co., *Cigarette, Patented by* M.X.C. Weinberger (Apr. 30, 1935), *in* TOBACCO DOCUMENTS ONLINE, *at* http:// tobaccodocuments.org/product_design/1000279546-9548.pdf (last visited Feb. 12, 2003). As part of the Master Settlement Agreement in 1998, the tobacco industry agreed to release internal documents. To find a copy of the Master Settlement Agreement ("MSA"), see http://caag.state.ca.us/tobacco/pdf/1msa.pdf. The MSA was an agreement between forty-six states and the five largest tobacco manufacturers (Philip Morris, R. J. Reynolds, Brown and Williamson, Lorillard, and Commonwealth Tobacco) that ended a four-year legal battle between the states and the tobacco industry. *See generally* JOY JOHNSON WILSON, NAT'L CONF. OF STATE LEGISLATURES, SUMMARY OF THE ATTORNEYS GENERAL MASTER TOBACCO SETTLEMENT AGREEMENT (1999), *available at* http://academic.udayton.edu/health/syllabi/tobacco/summary.htm. The agreement settles all claims between the states and the tobacco industry for twenty-five years. *Id.* Under the MSA, the tobacco industry must pay the states $206 billion over twenty-five years, plus attorneys' fees. *Id.* The tobacco industry also agreed to release internal tobacco documents, stop advertising directed toward children, and fund anti-smoking campaigns. *Id.*

[4] *See* AM. BURN ASS'N, *supra* note 1.

[5] *See* Joseph Moakley Memorial Fire Safe Cigarette Act of 2002, H.R. 4607, 107th Cong.; S. 2317, 107th Cong. (2002). On April 25, 2002, the Moakley Act was introduced in the House by Representative Edward J. Markey (D-Mass.). 148 CONG. REC. H1673 (daily ed. Apr. 25, 2002). An identical bill was introduced the same day in the Senate by Senator Richard J. Durbin (D-Ill.). 148 CONG. REC. S3435 (daily ed. Apr. 25, 2002).

and Cliff Stearns (R-Fla.) introduced the Fire-Safe Cigarette Act of 2002 ("Towns-Stearns Act") as competing legislation in the House.[6] The Towns-Stearns Act contains many provisions similar to those of the Moakley Act but is different from the Moakley Act in that it also creates the possibility that fire safe cigarettes would never be introduced into the market.[7]

The Moakley Act would require that all cigarettes sold in the United States be fire safe, defined as extinguishing seventy-five percent of the time in laboratory testing.[8] The Towns-Stearns Act duplicates many of the provisions of the Moakley Act, but it does not mandate the manufacture of fire safe cigarettes unless the Consumer Product Safety Commission ("CPSC") is able to agree to a testing protocol.[9] Given that New York has already adopted one fire safety standard in passing a state fire safe cigarette law, and other states are considering a variety of other proposals, a federal law requiring fire safe cigarettes and imposing a singular nationwide standard is appropriate and desirable for both the tobacco companies and society as a whole.[10]

Congress may be reluctant to pass fire safe cigarette legislation because it does not see the lack of fire safe cigarettes as a problem. While the number of deaths each year due to cigarette-caused fires is relatively small, however, it is troubling that most victims are blameless for the fires.[11] The property damage and overall cost to society of these fires is also significant, with almost $6 billion in total costs each year.[12] Those admitted to the hospital in cigarette fires are five times more likely to die than other patients and survivors of cigarette fires stayed in the hospital sixty percent longer than survivors of other fires.[13] Cigarette fire admis-

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[6] Fire-Safe Cigarette Act of 2002, H.R. 5059, 107th Cong. (2002). Representative Stearns introduced House Bill 5059 on June 27, 2002. 148 CONG. REC. H4325 (daily ed. June 27, 2002).

[7] *See infra* text accompanying notes 44–47. *Compare* H.R. 4607 §3(c), *with* H.R. 5059 § 7A(a) (2002).

[8] *See* H.R. 4607, § 3(a)(2)(D).

[9] *See infra* text accompanying notes 44–49.

[10] Tobacco companies, especially, do not want to have to create different products to comply with different state laws. *See infra* notes 86–89.

[11] Press Release, William Corr, Executive Vice-President, Campaign for Tobacco Free Kids, Campaign Applauds Sen. Durbin, Sen. Brownback and Rep. Markey for Carrying out Rep. Joe Moakley's Fight to Reduce Fires Caused by Cigarettes (Apr. 25, 2002), *available at* http://tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=482. Of the approximately nine hundred people that die yearly, approximately one hundred are children. *Id.*

[12] *See* AM. BURN ASS'N, *supra* note 1. Costs include: property damage, pain and suffering to victims, and the costs of treating their injuries—"[s]tudies by the National Public Services Research Institute show that each cigarette-fired death costs $2.1 million, hospitalized injuries cost $875,000 and other medical injuries cost $15,000." Kevin James, *Big Tobacco Fights Plan to Snuff Fire Safety*, NEWSDAY, Aug. 14, 2002, at A30.

[13] BURN FOUNDATION, THE FIRE SAFE CIGARETTE: THE SEARCH FOR A STANDARD [hereinafter SEARCH FOR A STANDARD], *available at* http://www.burnfoundation.org/firesafecig.html (last visited Apr. 15, 2003).

sions also are thirty-three percent more costly in terms of per diem resources when they are in the hospital.[14]

Federal fire safe cigarette legislation is now more necessary than ever, but it is extremely important that Congress make the right decision in choosing between the two fire safe bills in Congress. Congress should accept the Moakley Act and reject the Towns-Stearns Act because the Moakley Act would be both socially beneficial and save cigarette manufacturers money in the long run. On the other hand, the Towns-Stearns Act does not guarantee that a fire safe standard will be implemented, because the Towns-Stearns may preempt state legislation.[15]

Fire safe cigarette legislation has a decades-long history in the United States. In 1979, after a fire caused by cigarettes killed a family of seven in his district,[16] Congressman Moakley introduced a fire safe cigarette bill, the Cigarette Safety Act,[17] in Congress for the first time. No federal or state legislative body adopted any sort of fire safe cigarette legislation until Congress passed the Cigarette Safety Act of 1984.[18] The 1984 Act established a fifteen-member Technical Study Group ("TSG"), made up of representatives of the tobacco industry and the public health community,[19] to evaluate the feasibility of creating a cigarette with "a reduced propensity to ignite upholstered furniture and mattresses."[20] After an intensive three-year study, the TSG found that it was technically and economically feasible to develop fire safe cigarettes.[21] The TSG also found the economic impact of manufacturing fire safe cigarettes on tobacco companies would be minimal and the price of cigarettes would not need to increase due to the manufacture and marketing of fire safe cigarettes.[22]

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[14] *Id.*

[15] *See infra* notes 44–46 and accompanying text.

[16] Myron Levin, *Company to Test-Market Cooler-Burning Cigarette Tobacco*, L.A. TIMES, Jan. 12, 2000, at A1.

[17] Cigarette Safety Act, H.R. 5504, 96th Cong. (1979). If enacted, the Cigarette Safety Act would have directed the Consumer Product Safety Commission to prescribe regulations to ensure that cigarettes would stop burning within five minutes if not smoked. *Id.* § 3(a)(1). The Act would have prohibited the sale of cigarettes that were not in accordance with those regulations. *Id.* § 3(a)(2).

[18] Cigarette Safety Act of 1984, 15 U.S.C. § 2054 (2002).

[19] Members of the TSG included representatives from tobacco manufacturers R. J. Reynolds, Brown and Williamson, Philip Morris, and Lorillard, as well as representatives from the National Cancer Institute, American Medical Association, American Public Health Association, U.S. Consumer Product Safety Commission, International Association of Fire Chiefs, and the American Burn Association, among others. TECH. STUDY GROUP ON CIGARETTE & LITTLE CIGAR SAFETY, U.S. CONSUMER PROD. SAFETY COMM'N, TOWARD A LESS FIRE-PRONE CIGARETTE: FINAL REPORT OF THE TECHNICAL STUDY GROUP ON CIGARETTE AND LITTLE CIGAR FIRE SAFETY 1 (Oct. 1987) [hereinafter TECH. STUDY GROUP], *available at* http://www.bfrl.nist.gov/pdf/TSG_Final_Report.pdf.

[20] Cigarette Safety Act of 1984 § (b)(3)(A). The task of the TSG was to determine whether a fire safe cigarette was technically and commercially feasible and to study the economic impact of a fire safe cigarette. *Id.* § (b)(3)(A).

[21] TECH. STUDY GROUP, *supra* note 19, at 7.

[22] *Id.* Specifically, the TSG found "the overall effects of the cigarette modifications considered may result in only small changes in the price of cigarettes, unemployment in

Furthermore, the TSG report added that it would take only a few minor changes—including reducing cigarette circumference, reducing the amount of citrate added to cigarettes, and packing cigarette tobacco a little looser—to make cigarettes more fire safe.[23]

The 1987 TSG report recommended that another group be convened to conduct a study on a proper fire safe test methodology.[24] In response to this recommendation, Congress passed the Fire Safe Cigarette Act of 1990, which created the Technical Advisory Group ("TAG") to establish a method by which cigarettes could be tested for fire safety.[25] Without a standardized test method, tobacco companies argued, there would be no way to truly determine which cigarettes were fire safe.[26] The TAG's 1993 report devised two different tests for determining fire safety,[27] but tobacco companies claimed that neither accurately predicted ignition propensity.[28] Because the public health community and the tobacco industry could not agree on a fire safe testing method, no federal fire safe legislation gained significant support in Congress after the TAG report.[29]

After years of frustration punctuated by small gains, 2000 was a breakthrough year for advocates of fire safe cigarettes. Unveiling the result of years of research, in 2000 cigarette manufacturer Philip Morris created PaperSelect, a fire safe cigarette paper, proving that a fire safe cigarette is technically and economically possible to manufacture and

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the tobacco industry, health care costs, life expectancy, and the financial status of the affected industries and professions." *Id.* The TSG went on to recommend that a standard test method be developed to test current and future cigarettes for fire safety. *Id* at 7–8.

[23] *Id.* at 14.

[24] *Id.* at 7–8.

[25] Fire Safe Cigarette Act of 1990, Pub. L. No. 101-352, 101 Stat. 405. The TAG was directed to work with the CPSC to "develop a standard test method to determine cigarette ignition propensity." *Id.* § 2(a)(1). The Commission was also charged with compiling cigarette performance data on fire safety and using computer modeling to attempt to predict the fire safety of different cigarettes. *Id.* § 2(a)(2)–(3).

[26] R. J. Reynolds Tobacco Co., *Status of Research Regarding Low Ignition Propensity Cigarettes: A Discussion of Three Unresolved Issues that Make Cigarette Ignition Performance Standards Presently Infeasible* (May 5, 1993), *in* TOBACCO DOCUMENTS ONLINE, [hereinafter *Status of Research Regarding Low Ignition Propensity Cigarettes*] *at* http://tobaccodocuments.org/product_design/2021302717-2743.html?ocr_position=hide_ocr (last visited Feb. 11, 2003).

[27] U.S. CONSUMER PROD. SAFETY COMM'N, PRACTICABILITY OF DEVELOPING A PERFORMANCE STANDARD TO REDUCE CIGARETTE IGNITION PROPENSITY 9 (Aug. 1993), *available at* http://bfrl.nist.gov/pdf/Overview_Cigarette_Report.pdf. The two tests were the mock-up ignition test method and the cigarette extinction test method. *Id.* The mock-up test method measured the number of ignitions when cigarettes were placed on three different types of fabrics with differing levels of ignition susceptibility. *Id.* The cigarette extinction test method did not use furniture mock-ups and instead substituted layers of filter paper for the furniture. *Id.*

[28] *See Status of Research Regarding Low Ignition Propensity Cigarettes*, *supra* note 26, at 2–3.

[29] Congressman Moakley introduced fire safe cigarette legislation in the House in 1994 and 1999, but neither bill made much progress. Fire Safe Cigarette Act of 1994, H.R. 3885, 103d Cong. § 2 (1994); Fire Safe Cigarette Act of 1999, H.R. 1130, 106th Cong. (1999).

market.[30] On the legislative front, in the years after the TAG report, state legislatures in Pennsylvania, California, Oregon, Massachusetts, and Vermont introduced fire safe cigarette legislation throughout the 1990s.[31] These state bills were no more successful than federal proposals, however, until 2000, when the New York state legislature passed a fire safe cigarette law.[32] The law requires that all cigarettes sold in the state of New York be fire safe according to standards promulgated by the state's office of fire prevention and control by July 2003.[33]

The momentum generated by the passage of the New York bill gave public health officials new hope for the success of the 2002 Moakley Act on the federal level.[34] This hope seemed well-founded when Philip Morris initially supported the Moakley Act on the ground that it would prefer to meet one federal standard for ignition propensity and fire safety as opposed to multiple state standards.[35] After the Towns-Stearns Act was introduced, however, Philip Morris withdrew its support for the Moakley Act and joined the rest of the tobacco industry in supporting the Towns-Stearns Act.[36]

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[30] *See infra* notes 79–83 and accompanying text.

[31] *See* H.B. 1862, 175th Gen. Assem., Reg. Sess. (Pa. 1991) (requiring the State Secretary of Labor and Industry to specify fire safety standards for cigarettes by 1993, exempting "technically not feasible" methods); A.B. 2200, 1997 Assemb., Reg. Sess. (Cal. 1997) (directing state fire marshal to set fire safety standards by 2000); H.B. 2687, 69th Leg., Reg. Sess. (Or. 1997) (requiring state fire marshal to promulgate fire safety standards within six months); H. 251, 1999 Leg., 65th Biennial Sess. (Vt. 1999) (mandating that all cigarettes sold, offered for sale, or manufactured comply with fire safety standards adopted by state Commissioner of Public Safety); S.B. 2314, 182nd Gen. Ct., Reg. Sess. (Mass. 2000) (requiring state Department of Public Health, along with state fire marshal, to set fire safety standards). *See* TRAUMA FOUNDATION, FIRE SAFE CIGARETTE BILLS IN STATES ACROSS AMERICA (2002) (providing additional information on state fire safe cigarette bills), *at* http://www.tf.org/tf/injuries/firsafe.html.

[32] N.Y. EXEC. LAW § 156-c (McKinney 2000). The New York law is set to go into effect in July of 2003. *Id.* This was the first state fire safe cigarette law that passed. TRAUMA FOUNDATION, FACT SHEET, *at* http://www.tf.org/tf/injuries/cigar5.shtml (last visited Feb. 12, 2002).

[33] N.Y. EXEC. LAW § 156-c, (2)(a) (McKinney 2000).

[34] Brian MacQuarrie, *State Told to Require Safer Cigarettes*, BOSTON GLOBE, Sept. 7, 2000, at B3.

[35] *See* Press Release, Philip Morris U.S.A., Philip Morris U.S.A. Supports Uniform National Standard for Cigarette Ignition Propensity (Apr. 25, 2002), *available at* http://www.philipmorrisusa.com/pressroom/content/press_release/articles/pr_April_25_2002_PMUSUNSFCIP.asp; Andrew Miga, *Congress Hears Bill Mandating Self-Extinguishing Cigarettes*, BOSTON HERALD, Apr. 26, 2002, at 37.

[36] *See* PHILIP MORRIS USA, PM USA'S DETAILED POSITION ON REDUCED IGNITION PROPENSITY LEGISLATION, *available at* http://www.philipmorrisusa.com/policies_practices/legislation_regulation/reduced_ignition/pm_usa_position_reduced_ignition_propensity.asp (last visited Apr. 15, 2003); James, *supra* note 12, at A30; *Federal Legislation by U.S. Rep. Towns Would Overturn NY's Law Aimed at Reducing Cigarette-Caused Fires*, U.S. NEWSWIRE, Aug. 22, 2002, 2002 WL 22070720 [hereinafter *Towns Would Overturn N.Y.'s Law*]. Some in the public health community have accused Philip Morris of switching its support to the Towns-Stearns Act because Philip Morris would be able to claim support for legislation, while actually supporting a bill that may not ultimately require the manufacture of fire safe cigarettes. *See, e.g.*, Press Release, Campaign for Tobacco Free-Kids, Stearns-Towns

Although they contain many of the same provisions, there are crucial differences between the Moakley and Towns-Stearns bills. The Moakley Act mandates that the CPSC prescribe a fire safety standard for cigarettes within eighteen months of the bill's passage.[37] Then, within thirty months of the new standard's promulgation, all cigarettes sold in the United States would have to comport with the CPSC requirement.[38] The methodology used to test the cigarettes would be that recently studied by the National Institute of Standards and Technology ("NIST"), which recommended that forty replicate tests be conducted on ten layers of filter paper.[39] A cigarette would not meet fire safety standards unless it extinguished on more than seventy-five percent of the NIST test trials.[40] If the CPSC (because of internal dissension) were unable to agree upon an appropriate fire safety standard, state fire safe laws would not be preempted[41] and testing would proceed under the standard prescribed developed by the TSG and TAG.[42]

The Towns-Stearns bill also requires the CPSC to develop a fire safety standard within eighteen months, and it mandates use of the NIST test methodology,[43] but there are significant differences between the two bills. First, the Towns-Stearns bill preempts state legislation, whereas the Moakley Act allows states to retain tobacco control authority.[44] This means that, had the Towns-Stearns bill been enacted it would have overridden the New York fire safe cigarette legislation and prevented the fire safety standards in New York from going into effect in 2003.[45] While such preemption would be a federal standard of sorts (insofar as the lack of a standard would be federally mandated), it does not provide an affirmative benchmark to which tobacco companies and public health advocates could refer. Second, the Towns-Stearns bill would not create any fire safe stan-

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Fire Safe Cigarette Bills Good For Tobacco Industry, NOT Health of America's Children and Families (July 12, 2002) [hereinafter Stearns-Towns Good For Tobacco Industry], *available at* http://tobaccofreekids.org/Script/DisplayPressRelease. php3?Display=520.

[37] Joseph Moakley Memorial Fire Safe Cigarette Act of 2002, H.R. 4607, 107th Cong. § 3(a)(1).

[38] *Id.*

[39] *Id.* § 3(a)(2).

[40] *Id.* § 3(a)(2)(D).

[41] *Id.* The CPSC has not been able to come to an agreement thus far on a fire safety standard for cigarettes, though the TAG and the TSG did create testing methodologies. *See* SEARCH FOR A STANDARD, *supra* note 13.

[42] H.R. 4607, § 3(a)(5). *See supra* text accompanying notes 19–27 (describing the TAG and TSG proceedings).

[43] Fire-Safe Cigarette Act of 2002, H.R. 5059, 107th Cong. § 7A(a).

[44] Joseph Moakley Memorial Fire Safe Cigarette Act of 2002, H.R. 4607, 107th Cong. § 4(a); H.R. 5059, § 2(d).

[45] H.R. 5059, § 7A. The Towns-Stearns Act would preempt the New York law because the Towns-Stearns Act designates eighteen months for the CPSC to study the issue of fire safety and create a standard, and in that time no state law would be allowed to be passed and any existing law would be blocked. *Towns Would Overturn NY's Law*, *supra* note 36. Public health officials argue that a federal standard would be preferable only if it takes an affirmative stance on fire safety. Stearns-Towns Good For Tobacco Industry, *supra* note 36.

dard if the CPSC were not able to come to an agreement on a standard.[46] Third, while both bills grant the CPSC authority to update its fire safe standards, the Moakley Act only allows changes to the standard that will increase fire safety.[47] The Towns-Stearns Act, in contrast, would allow any "reasonable" changes to the standard.[48]

Proponents of the Moakley Act argue that it offers many benefits for both the public health community and the tobacco industry over both the Towns-Stearns Act and the status quo. The differences between the two bills are not large in terms of the ignition propensity or the testing methodology required.[49] Both bills call for the same testing methodology and require that cigarettes extinguish seventy-five percent of the time.[50] The only important difference between the two bills is whether fire safe cigarettes will be required at all.[51] For the public health community, the most important benefit of the Moakley Act is that, if the CPSC does not agree on a fire safety standard for cigarettes after eighteen months of discussion, the Act will still impose an enforceable standard.[52] Unlike the Moakley Act, the Towns-Stearns Act preempts state legislation and does not provide a federal standard in the event that the CPSC does not come to an agreement.[53] As such, if the CPSC does not agree on a standard, New York's fire safety law could not be enforced, and the country would be left without fire safe legislation.[54]

Neither the Moakley Act nor the Towns-Stearns Act is likely to pass in the 108th Congress for two primary reasons. First, neither bill generated hearings or testimony in the 107th Congress, and neither has yet been reintroduced in the current session of Congress.[55] Second, the tobacco lobby has traditionally been very strong in fighting against most tobacco legislation.[56] On the issue of fire safe cigarettes, the tobacco in-

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[46] H.R. 5059, § 2(a); *Towns Would Overturn NY's Law*, *supra* note 36.

[47] H.R. 4607, § 3(c)(2)(B).

[48] H.R. 5059, § 2(b). Three years after the enactment of the bill, the CPSC would be able to weaken the fire safety standard under the Towns-Stearns Act, while the Moakley Act would explicitly prevent this from occurring. *Id.* It may be unreasonable for fire safety standards to be weakened, but under the Towns-Stearns Act, the possibility of a weaker standard remains if the CPSC feels a weaker standard would be reasonable. *Id.*

[49] *See* Michael Pfeil, *Smoking Safety Standards*, NEWSDAY, Sept. 16, 2002, at A25. In a letter to the editor of *Newsday*, the Vice President of Communications and Public Affairs for Philip Morris agreed that the differences between the two bills were not large. *Id.*

[50] *Compare* Joseph Moakley Memorial Fire Safe Cigarette Act of 2002, H.R. 4607, 107th Cong. § 2, *with* Fire-Safe Cigarette Act of 2002, H.R. 5059, 107th Cong. § 2(a)(2).

[51] *See* text accompanying *supra* note 46.

[52] *See* H.R. 4607, § 2.

[53] H.R. 5059, § 7A.

[54] *Id.*

[55] Representative Markey's (D-Mass.) office is planning on reintroducing the Moakley Act this term, though no timetable was set. Interview with Kendra Brown, Legislative Assistant in Representative Markey's Office, in Washington D.C. (Mar. 31, 2003).

[56] *See generally* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S ONE-HUNDRED YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS (Vintage Books 1997) (1996) (describing the influence of Philip Morris and the tobacco

dustry has been particularly active; the co-sponsors of the Towns-Stearns Act received an average of $16,700 per year in campaign contributions from the tobacco industry over the last six years, whereas the co-sponsors of the Moakley Act in Congress averaged $83 during the same period.[57] The tobacco industry has helped lobby successfully for years to defeat federal and state fire safe cigarette legislation.[58] While tobacco companies have endorsed the Towns-Stearns Act, presumably because there is a chance that fire safety standards will not be implemented, the industry would be better off if the Moakley Act passes.

Among its strategies to defeat fire safe cigarette legislation, the tobacco industry has attempted to deflect attention from fire safe cigarettes to other issues. In an internal corporate presentation, one Philip Morris executive said of the company's strategy to defeat fire safe legislation: "we try to change the focus on the issues . . . . Cigarette related fires become an issue of prudent fire safety programs."[59] In trying to deflect public attention from the issue of fire safe cigarettes, the industry has also focused lobbying efforts on co-opting the support of potential proponents of fire safe cigarettes.[60] For example, realizing that firefighters would be natural advocates for fire safe cigarettes, the Tobacco Institute, a tobacco industry lobbying group, focused fire safe spending on encouraging fire departments to create programs directed at alerting the public to the dangers of fires caused by cigarettes.[61] The tobacco industry has successfully

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industry on tobacco legislation); STANTON GLANTZ & EDITH BALBACH, THE TOBACCO WAR: INSIDE THE CALIFORNIA BATTLES (2000) (describing the influence of the tobacco industry in California). The nonpartisan, nonprofit Center for Public Integrity found that four tobacco companies were among the ten most active lobbyists in the country. CENTER FOR PUBLIC ENTITIES, FOURTH BRANCH: MOST ACTIVE LOBBYING ENTITIES IN 2000, *at* http://www.public-i.org/dtaweb/SP_FB_NN_MALE.asp?L1=20&L2=10&L3=30&L4=10&L5=30&State=&Display=FBMostActiveLE (last visited Apr. 13, 2003).

[57] Stearns-Towns Good For Tobacco Industry, *supra* note 36.

[58] *See* Myron Levin, *Big Tobacco's Dollars Douse Push for Fire Safe Cigarettes Lobbying: Firms Bankroll Experts, Alliances with Safety Groups to Resist Product Changes, Papers Show*, L.A. TIMES, Jan. 1, 1998, at A1.

[59] Tina Walls, Philip Morris, Co., *Grasstops Government Relations*, (Mar. 30, 1993), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/pm/2024023252-3265.html?ocr_position=hide_ocr.

[60] *See, e.g.*, J. Blake et al., Philip Morris Inc., *Workshop—Dealing with the Issues Indirectly: Constituencies* (Sept. 13, 1984), *in* TOBACCO DOCUMENTS ONLINE ("You have to try to understand whom you have to neutralize in advance, who is a potential threat to you and then how do you make common cause with that category of individuals or companies or group . . . so that you can neutralize them."), *at* http://tobaccodocuments.org/pm/2025421934-2000.html?ocr_position=hide_ocr.

[61] Tobacco Institute, *The Tobacco Institute Public Affairs Division Proposed Budget* (1991), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/state_strategies/1886.html?pattern=TIMN0390579#images. In 1990, the Tobacco Institute also spent $320,000 on grants to local fire safety organizations and other fire safety associations, while also spending $480,000 on consulting and public relations firms for fire safety issues. Tobacco Institute, *Appendix B: Elements of Positive Strategy—New Initiatives for Industry Action*, *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/usc_tim/04330334-0378.html?ocr_position=hide_ocr.

attempted to deflect the issue of cigarette-caused fires from its cigarettes to a general issue of fire safety.

For years, the tobacco industry claimed that it was not possible to make a fire safe cigarette acceptable to consumers.[62] Tobacco companies based these claims on a variety of grounds, including that the technology did not exist to make fire safe cigarettes, consumers would not find the fire safe cigarettes acceptable, fire safe cigarettes would be more toxic than regular cigarettes, and no testing method properly predicted ignition propensity.[63]

Recent events reveal, however, that a fire safe cigarette acceptable to consumers is indeed possible to create at little private cost to cigarette manufacturers. As a result, cigarette manufacturers would be able to comply with the Moakley Act. First, as discussed above, the results of the 1984 TSG and 1990 TAG studies showed that a fire safe cigarette can be manufactured with minimal economic impact on the tobacco industry.[64] Second, as part of the Tobacco Master Settlement Agreement in 1998,[65] the tobacco industry agreed to release some of its internal documents.[66] These documents reveal that tobacco manufacturers have created several fire safe cigarette prototypes at acceptable costs in recent decades[67] through experimentation with successful papers and cigarette models.[68]

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[62] *See, e.g.*, H. Wakeham, Comments on the Cranston Bill, Philip Morris, Co., (Feb. 15, 1980), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/1000279660-9662.pdf.

[63] *See Status of Research Regarding Low Ignition Propensity Cigarettes*, *supra* note 26; Mushtaq Gunja et al., *The Case for Fire Safe Cigarettes Made Through Industry Documents*, 11 TOBACCO CONTROL 346 (2002).

[64] *See supra* text accompanying notes 21, 27.

[65] *See* WILSON, *supra* note 3.

[66] *Id. See also* Neil Buckley, *A Growing Fire Around Big Tobacco*, FIN. TIMES, Nov. 4, 2002, at 16.

[67] *See generally* Gunja et al., *supra* note 63, at 347 (arguing that tobacco companies have been able to manufacture fire safe prototypes since the mid-1990s and citing tobacco industry documents). Philip Morris began its program in 1974, R. J. Reynolds and Brown and Williamson in 1979, and Lorillard by 1980. *Id.*

[68] *See id.* For instance, R. J. Reynolds experimented with several papers which lowered the ignition propensity of its cigarettes. Letter from G. Robert Di Marco, R. J. Reynolds Tobacco Co., to William Owens, Ecusta Paper Division of Olin (July 30, 1984), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/504750971-0972.html?ocr_position=hide_ocr. By the middle of the 1980s, Philip Morris realized that mass burn rates ("MBRs") were the key to controlling ignition propensity. R. W. Dyer, Philip Morris, Co., *Project Tomorrow—Status and Plans*, (Nov. 25, 1987), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/1002816087-6088.html?ocr_position=hide_ocr. One 1987 document states,

> in light of the fact that it is now public knowledge that ignition propensity is related to MBR, we might want to bring all of our products to MBR targets in stages. We can go quite a way in reducing MBRs by making relatively innocuous changes such as tobacco cut-width, paper permeability, and the type and amount of additives.

Id.

Tobacco industry representatives nevertheless continue to argue that no testing methodology accurately predicts the fire safety of their cigarettes.[69] Indeed, some of the early testing methodologies yielded inconsistent results.[70] In 1993, the TAG published a report creating two testing methodologies, but the tobacco industry criticized the methodologies on the grounds that the tests were often inaccurate.[71] The industry claimed that the fabrics chosen in the testing did not properly represent the range of fabrics in the real world, and as a result, the industry worked on its own to create a testing methodology.[72] For instance, Philip Morris had been researching alternative testing methodologies, and by the mid-1990s the company had developed a reliable method for testing ignition propensity using computer modeling.[73] Since the industry has made so much progress in creating their own test standards for determining fire safety, the issue should not present an obstacle to cigarette manufacturers attempting to comply with the Moakley Act.

The tobacco industry also fears that fire safe cigarettes will not be acceptable to consumers, either because fire safe cigarettes have a different taste from non-fire safe cigarettes or because consumers will not like a cigarette that extinguishes when not puffed frequently.[74] Indeed, cigarette manufacturers were able to create a cigarette that self-extinguished (and was thus fire safe) early in their research programs, but the changes to the cigarette necessary for fire safety made the cigarettes unacceptable to consumers.[75]

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[69] *See, e.g.*, Press Statement, R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company's Position on "Fire Safe" Cigarettes [hereinafter RJR Position on "Fire Safe" Cigarettes], *available at* http://www.rjrt.com/TI/TIFireSafety.asp; *Status of Research Regarding Low Ignition Propensity Cigarettes, supra* note 26.

[70] *See Status of Research Regarding Low Ignition Propensity Cigarettes, supra* note 26, at 1. Using less precise early methods, tests predicted that cigarettes would either extinguish 100% of the time or not at all. *Id* at 15. Furthermore, the fabrics and conditions used in these tests were not predictive of real world situations. *Id.* at 10.

[71] U.S. CONSUMER PROD. SAFETY COMM'N, *supra* note 27.

[72] *See Status of Research Regarding Low Ignition Propensity Cigarettes, supra* note 26, at 5–6.

[73] B. E. Waymack, Philip Morris, Co., *Individual Accomplishments, January to June 1994* (June 29, 1994), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/2051202450-2451.html?ocr_position=hide_ocr. A 1992 Philip Morris document notes, "[c]onsistent relationships/trends have been determined for [ignition propensity] test outcome with cigarette parameters and very importantly with fabric properties." *Id.* Philip Morris also developed a computer model that helped predict ignition propensity. R. W. Dwyer & K. H. Shafer, Philip Morris, Co., *Project Tomorrow, Second Quarter 1992* (June 1992), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/2022153668-3673.html?ocr_position=hide_ocr.

[74] *Status of Research Regarding Low Ignition Propensity Cigarettes, supra* note 26.

[75] *See, e.g.*, L. K. Templeton, Brown and Williamson Tobacco Corp., *Evaluation of Ecusta's Self-Extinguishing Cigarette Paper* (Nov. 28, 1983), *in* TOBACCO DOCUMENTS ONLINE (evaluating a cigarette that self-extinguished but was unacceptable to consumers due to increased irritation and less impact), *at* http://tobaccodocuments.org/product_design/955015.pdf.

Over the past two decades, however, the industry has made progress in the field of consumer acceptability and has experimented with different flavors and additives that would make fire safe cigarettes pleasing to smoke.[76] By the middle of the 1990s, tobacco manufacturers Philip Morris, Brown and Williamson, and R. J. Reynolds had all made significant progress in making fire safe cigarettes that were acceptable to consumers. For instance, in experiments done on fire safe prototypes of its popular Camel brand, R. J. Reynolds found "no significant difference" between regular Camels and fire safe prototypes.[77] Similarly, in 1993, Brown and Williamson did experiments with its popular Kool brand and found a fire safe model that was essentially similar in consumer acceptability to regular Kools.[78]

Along with the TAG and TSG feasibility reports and the release of the decades of research undertaken on fire safe cigarettes, the third recent event that suggests Congress should pass the Moakley Act is Philip Morris's release of a fire safe cigarette paper that the company announced it would use for its Merit brand cigarettes.[79] The company dubbed its fire safe paper "PaperSelect," and it is the only fire safe cigarette paper that is currently on the market.[80] In testing done on PaperSelect, Philip Morris found that cigarettes wrapped with the new paper were thirty to ninety percent less likely than control cigarettes to ignite test fabrics.[81] Moreo-

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[76] *See, e.g.*, R. K. Greene, Philip Morris, Co., *Project Hamlet, Graham's Salt* (Aug. 21, 1985), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/2020356664-6671.html?ocr_position=hide_ocr. For example, some companies experimented with adding different types and levels of salts to their cigarette paper or with changing the types of tobacco in their cigarettes. *See id.*

[77] Stacey Charles, R. J. Reynolds Tobacco Co., *Project IP—Sensory Acceptance* (Aug. 6, 1993), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/508539091-9106.html?ocr_position=hide_ocr. In 1987, Philip Morris did experiments under the name Project Hamlet and created a fire safe prototype that was not significantly different than the control cigarette. *See* A.D. Smith, Philip Morris, Co., *Hamlet Test* (Apr. 29, 1987), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_design/2051023053-3054.html?ocr_position=hide_ocr.

[78] *See* P. A. Goodman, Brown & Williamson Tobacco Corp., *Dupont Sensory Results* (June 21, 1993), *in* TOBACCO DOCUMENTS ONLINE, *at* http://tobaccodocuments.org/product_ design/356227.html?ocr_position=hide_ocr; Gunja et al., *supra* note 63, at 349.

[79] *See* Press Release, Philip Morris & Co., Philip Morris U.S.A. to Launch New Cigarette Paper Nationwide on All Merit Cigarettes (July 12, 2000) [hereinafter Philip Morris U.S.A. to Launch New Cigarette Paper], *available at* http://www.philipmorrisusa.com/pressroom/press_releases/default.asp.

[80] Nancy Zuckerbrod, *Fire Standard Sought for Cigarettes*, AP ONLINE, Apr. 25, 2002, 2002 WL 19260837. PaperSelect is manufactured with "speed bumps," which control the rate at which cigarettes burn. Philip Morris U.S.A. to Launch New Cigarette Paper, *supra* note 79. PaperSelect uses ultra-thin paper on top of its regular cigarette paper, which acts to slow down the speed at which the cigarette burns. *Id.*

[81] Philip Morris U.S.A. to Launch New Cigarette Paper, *supra* note 79; Press Release, Philip Morris Co., What is PaperSelect? (July 12, 2000), *at* http://www.philipmorrisusa.com/pressroom/content/press_release/articles/pr_j uly_12_2000_pmutlncpnoamc.asp (last visited Apr. 13, 2003). John Nelson, Vice President of Operations at Philip Morris, proclaimed that "[w]ith PaperSelect paper, we believe that we may have achieved our goal of providing a cigarette acceptable to consumers that may be less likely to start fires if care-

ver, the new Merit cigarette performed very well in test market surveys: nine out of ten current Merit smokers, and one out of three smokers of competitors' cigarettes, preferred the Merit with PaperSelect to the old Merit.[82] Philip Morris also reported that the PaperSelect cigarette was no more toxic than the previous Merit cigarette.[83] The company said it was conducting research on mass producing the paper and using it on other brands,[84] though it has yet to unveil any results of such research. Although this represents an important step in the evolution of fire safe cigarettes, the public health community has criticized Philip Morris for only placing PaperSelect on its Merit brand, which is not one of Philip Morris' largest brands and has a low market share nationally.[85]

If one accepts that fire safe cigarettes are socially desirable, the next logical question is whether fire safe cigarette legislation is necessary on the federal level now that New York has shown state action is a feasible alternative.[86] New York's adoption of its own fire safe cigarette legislation gives tobacco companies a compelling reason to support a federal standard. If another state were to adopt a fire safe cigarette bill with fire safety standards even slightly different from New York's, the tobacco industry would have to manufacture different cigarettes for different states.[87] Assuming such a burden would, in turn, create huge production and distribution problems for tobacco companies that would drive up their costs dramatically.[88]

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lessly handled." Philip Morris U.S.A. to Launch New Cigarette Paper, *supra* note 79.

[82] *Id.*

[83] *See* Philip Morris U.S.A. to Launch New Cigarette Paper, *supra* note 79.

[84] *Id.*

[85] *See, e.g.*, Miguel Bustillo, *Bill to Boost Fire Safety in Cigarettes Dies*, L.A. TIMES, Aug. 22, 2000, at A3; Cara Beardi, *PM Pushes Paper with New $20 Mil Merit Effort*, ADVERTISING AGE, July 17, 2000, at 4. Before the introduction of Paper Select, Merit had a national market share of 1.84%. *Id.*

[86] N.Y. EXEC. LAW § 156-c (McKinney 2000). *See* Press Release, National Association of State Fire Marshals, National Association of State Fire Marshals Policy Regarding "Fire Safe" Cigarettes (Apr. 2001), *available at* http://www.firemarshals.org/issues/home/cigarette_fires.html.

[87] PHILIP MORRIS USA, *supra* note 36. In testimony before the 2001 Minnesota committee examining the fire safe cigarettes issue, James Goold, an attorney representing R. J. Reynolds, Brown and Williamson, and Lorillard, said that his three clients favor a single federal standard for fire safety over responding to a patchwork of various state standards. David Hanners, *Minnesota House Panel Rejects 'Fire Safe' Cigarette Bill*, KNIGHT-RIDDER TRIB. BUS. NEWS, Mar. 28, 2001, *available at* 2001 WL 17606459.

[88] *See* Zuckerbrod, *supra* note 80. Philip Morris argues that

> because state and local initiatives will inevitably lead to conflicting standards, they would likely impose substantial burdens on interstate commerce. Cigarettes are manufactured for nationwide distribution in a small number of factories; it simply won't be practical to try to make a number of different versions of each brand to satisfy differing performance standards.

PHILIP MORRIS USA, *supra* note 36.

Fire safe cigarette legislation in states other than New York is a real possibility. Massachusetts, New Jersey, and Washington are currently considering or have recently considered fire safe cigarette bills.[89] In March 2001, a fire safe cigarette bill in Minnesota was narrowly defeated in the Commerce, Jobs, and Economic Development Committee by a fourteen to twelve vote.[90] In 2000, a fire safe cigarette bill passed the California Senate but was defeated in the Governmental Organization Committee in the California State Assembly.[91] A similar bill in Massachusetts is having more success: it was overwhelmingly passed by the State Senate in June 2001 by a thirty-four to one margin, and it also had the support of more than half of the members of the State House.[92] Although the bill died in the State House Ways and Means Committee when the legislative term expired, the bill has been reintroduced this year.[93] The highly publicized death of a young girl due to a discarded cigarette in October 2002,[94] as well as a highly publicized nightclub fire in Rhode Island in March 2003,[95] may re-energize the forces that support the fire safe cigarette bill. The bill was reintroduced in the Massachusetts Senate with twenty-three of the forty Senators signing on as co-sponsors.[96] In addition, eighty-one out of 160 state representatives co-sponsored the bill.[97] Thus, if the bill can survive any lobbying efforts that may be used to keep it in committee, it has the support of the majority of the members of both houses and would probably be voted into law. On the other hand, various states have tried to pass fire safe cigarette bills for a decade with only

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[89] An Act to Reduce the Loss of Lives Due to Fires Caused by Cigarettes, S.B. 1329, 183d Gen. Ct, Reg. Sess. (Mass. 2003) (requiring fire safe cigarettes that are no more toxic than non-fire safe cigarettes); Cigarette Fire Safety Act, A.B. 1174, 210th Leg. (N.J. 2002) (requiring fire safe cigarettes, motivated in part by the fact that Philip Morris created its PaperSelect paper); An Act Relating to Cigarette Fire Safety, H.B. 1410, 57th Leg., Reg. Sess. (Wash. 2001) (requiring fire safe cigarettes according to standards set by Washington State Patrol).

[90] Hanners, *supra* note 87.

[91] Press Release, Adam Schiff, Senate Approves 'Fire Safe' Cigarette Legislation (June 29, 2000), *available at* http://www.sen.ca.gov/ftp/sen/SENATOR__20-__20OLD/SCHIFF/PRESS-RELEASES/0714D.TXT. *See* Bustillo, *supra* note 85. Members of the Governmental Organization Committee reportedly have been among the top recipients of tobacco industry campaign contributions in the California legislature. Miguel Bustillo, *Tobacco Companies Attack Fire Safety Bill*, L.A. TIMES, Aug. 21, 2000, at A3.

[92] Kay Lazar, *Fire Safe Butts Urged in Wake of Tragedy*, BOSTON HERALD, Nov. 3, 2002, at 2.

[93] An Act to Reduce the Loss of Lives Due to Fires Caused by Cigarettes, S.B. 1329, 183d Gen. Ct, Reg. Sess. (Mass. 2003).

[94] Lazar, *supra* note 92, at 2.

[95] Ken Maguire, *'Safe' Cigarette Backers Give it Another Go*, ASSOCIATED PRESS, Mar. 14, 2003, *available at* http://www.tobacco.org/news/119928.html. The sponsoring State Senator of fire safe legislation in Massachusetts hoped that the increased publicity of fire safety in Massachusetts following the nightclub fire may have led to increased awareness of the need to prevent fires caused by cigarettes. *Id.*

[96] Cheryl Jacques, Legislative Co-Sponsors to the Moakley Bill (2003) (on file with author and Sen. Jacques' office).

[97] Maguire, *supra* note 95.

New York actually passing a bill.[98] Ultimately, given the number of state legislators that are interested in fire safe cigarettes and the progress of bills in Massachusetts and Minnesota, there is a reasonable chance that over the next few years an additional state fire safe cigarette bill will pass.

The possibility of litigation on the issue of fire safety may also push the tobacco industry to support federal legislation in the form of the Moakley Act. A person burned or killed in a fire caused by cigarettes may sue the tobacco company under a products liability theory for not creating a fire safe cigarette.[99] Products liability holds a manufacturer responsible for a product when it performs in a manner unreasonably dangerous to the consumer.[100] A person burned in a fire could claim that when cigarettes cause fires, the cigarettes are not acting according to their intended design.[101] Without fire safe cigarette legislation, litigation on the issue is not likely to decrease because the number of fires started by cigarettes will probably remain at or near its current level.[102]

On the other hand, an examination of the relatively brief history of fire safe cigarette litigation[103] suggests that the tobacco industry may have little to fear if products liability litigation increases. The tobacco industry has an excellent record in past fire safe cigarette cases, never even having to go through a trial on the issue of fire safety.[104] Most of plaintiffs' arguments in these cases have proceeded on products liability and breach of implied contract theories.[105] In *Sacks v. Philip Morris*,[106] for example, the plaintiffs claimed that a non-fire safe cigarette is defective in design and that the tobacco industry has a duty to warn consumers of the risk of fire posed by cigarettes.[107] The plaintiffs also contended that cigarette

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[98] *See, e.g.*, H.B. 747, 65th Adj. Sess. (Vt. 1997); H.B. 1862, 175th Gen. Ass., Reg. Sess. (Pa. 1991).

[99] *See generally* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 769–851 (7th ed. 2000) (citing cases and doctrine on when a person can sue a products manufacturer for a defective product).

[100] *Id.* at 772–74.

[101] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1966).

[102] *See* Terry Halbert, *The Fire Safe Cigarette: The Other Tobacco War*, 102 BUS. SOC'Y REV. 25, 32–33 (1999) (arguing that unless cigarette manufacturers are forced to produce fire safe cigarettes, fire safe cigarettes will not be manufactured and marketed)

[103] The first fire safe cigarette case was *Lamke v. Futorian Corp.*, 709 P.2d 684 (Okla. 1985) (holding that plaintiff, burned in a fire caused by a cigarette, was unable to prove the cigarette was dangerous to a degree not contemplated by the ordinary consumer). Only about five fire safe cigarette cases have been filed since the first case was decided in 1985. *See, e.g.*, Griesenbeck v. Am. Tobacco Co., 897 F. Supp. 815, 817 (D.N.J. 1995); Kearney v. Philip Morris, 916 F. Supp. 61 (D. Mass. 1996).

[104] *See, e.g.*, *Griesenbeck*, 897 F. Supp. at 817; Halbert, *supra* note 102, at 29–31 (detailing the facts of some of the cases in which claims have been dismissed).

[105] *See, e.g.*, *Griesenbeck*, 897 F. Supp. at 817–18 (involving claim under a negligence theory for failure to design a fire safe cigarette, as well as under a strict liability theory for product defect and breach of implied warranty).

[106] 1996 WL 780311, at *1 (D. Md. 1996) (involving claim under Maryland Consumer Protection Act alleging misrepresentations about technical feasibility of fire safe cigarettes and under negligence theory for defective design).

[107] *Id.* at *2. Generally, a plaintiff can recover damages against a manufacturer if the

manufacturers had breached an implied warranty with consumers by failing to incorporate a "reasonable measure of safety" in their cigarettes' designs.[108]

On their face, the legal arguments for the tobacco industry appear strong and it would seem that the industry need not fear increased litigation. The *Sacks* plaintiffs needed to prove the claim that the cigarette was defective in design under either a consumer expectation test or a risk-utility test.[109] The consumer expectation test requires the plaintiff to show that the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer."[110] Under this test, the industry persuaded the court that ordinary consumers know that a cigarette is made to burn and that dropped cigarettes can cause fires; thus, the cigarette at issue was no more dangerous than the ordinary consumer would expect.[111]

Anticipating such difficulties in meeting the consumer expectation test, the plaintiffs in *Sacks* instead urged the court to apply the risk-utility test, which takes into account many different factors—including the usefulness of the product, the availability of safer products, and the obviousness of the danger—and asks whether the risks posed by the product design outweigh its benefits.[112] The court followed the plaintiffs' urging and used that test to determine whether a non-fire safe cigarette had a defective design.[113] Relying heavily on the issue of the obviousness of the danger, the court found that the cigarette was not defective in design.[114] The court found "the potential for a cigarette to ignite fabric and start fires is well known and part of the community's common knowledge."[115] The

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manufacturer has designed a defective product or if a manufacturer has failed to properly warn a consumer of a product's risks. RESTATEMENT (THIRD) OF PRODS. LIAB. § 2 (1998). In *Sacks*, the plaintiffs claimed that, had the defendants fully informed the public of the possibility of creating a fire safe cigarette, the public would have pressured Philip Morris into creating and marketing that cigarette. *Sacks*, 1996 WL 780311, at *2. Thus, the failure to warn the public created the design defect. *Id.*

[108] *Sacks*, 1996 WL 780311, at *6. Plaintiffs claimed that there was an implied warranty in the sale of cigarettes that the product was safe when used in a reasonable manner. *Id.* Defendants countered by stating that cigarettes that cause fires are not used in the manner intended by the manufacturer. *Id.* at *5.

[109] *Id.* at *3.

[110] *Id.* at *2 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1966)).

[111] *Id.* at *4–*5.

[112] *Id.* at *3–*4; KENNETH S. ABRAHAM, FORMS AND FUNCTIONS OF TORT LAW 195–98 (2002). In the fire safe cigarette cases in the 1980s and 1990s, it was unclear whether a fire safe cigarette was technically and commercially feasible. *See, e.g.*, *Griesenbeck*, 897 F. Supp. at 823 (noting that the record was not developed on whether a fire safe cigarette was technically feasible). In a state with particularly consumer-friendly laws and judges, the fact that a fire safe cigarette is now technically and commercially feasible may be an important factor in determining whether a cigarette will pass the risk-utility test.

[113] *Sacks*, 1996 WL 780311, at *3–*6.

[114] *Id.* at *5 ("Courts have consistently found that the danger that a cigarette can start a fire is both obvious and commonly known to the general public. It is equally certain that injury can be avoided if a smoker exercises reasonable care").

[115] *Id.* at *6.

usefulness and the availability of safer products were not explicitly considered by the court.[116]

The *Sacks* court was unreceptive to the argument that tobacco companies have a duty to warn consumers that their cigarettes are not fire safe.[117] Applying Maryland law, the district court found no liability for negligence in design or for failure to warn "where the defect is open and obvious to the consumer."[118] The industry argued that the potential for its cigarettes to ignite fabric is clearly open and obvious, and the plaintiffs offered no counterargument that the court accepted.[119]

The *Sacks* plaintiffs also argued that cigarette manufacturers breached an implied warranty by failing to include a "reasonable measure of safety" in their cigarettes' design.[120] The court held that an implied warranty should only apply when a product is used in a normal manner and "cannot be extended so broadly as to protect against every instance of the purchaser's careless use of the product."[121]

Notwithstanding their success in past fire safe cases, tobacco companies may have reason to fear further litigation, and this should provide them an incentive to support federal legislation. First, the advent of PaperSelect and its use on the Merit cigarette for the past three years proves that tobacco companies can manufacture and market fire safe cigarettes, whereas in the previous fire safe cigarette cases it was questionable whether a fire safe cigarette was feasible. In *Kearney v. Philip Morris*,[122] the Massachusetts district court relied heavily on the idea that there was no good test methodology, and thus it was not possible for the industry to create a fire safe cigarette.[123] Now that Philip Morris has created a testing methodology that it is satisfied with and has claimed that its Merit cigarettes are fire safe, there is reason for a court to believe that an alternative design would have prevented a fire.

Tobacco companies also have reason to fear litigation because not all courts find that the doctrine of open and obvious risks is always a complete bar to plaintiff recovery.[124] The Kansas Supreme Court in *Delaney v.*

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[116] *Id.* at *3–*4.

[117] *Id.*

[118] *Id.* at *5 (quoting Mazda Motor of Am., Inc. v. Rogowski, 659 A.2d 391, 396 (Md. Ct. Spec. App. 1995)).

[119] *Id.* Plaintiffs argued that the average consumer did not truly understand the potential of cigarettes to cause fatal fires. *Id.* Plaintiffs also argued that it is not common knowledge that cigarettes burn hot enough to ignite fabrics. *Id.*

[120] *Id.* at *6.

[121] *Id.*

[122] 916 F. Supp. 61 (D. Mass. 1996).

[123] *See id.* at 68. In holding that there was no design defect in a non-fire safe Marlboro Light cigarette, the court found plaintiffs had failed to establish that an alternative design identified by the NIST as potentially being fire safe "more probably than not . . . would have prevented the fire and that a 'defect' in the design . . . was a cause-in-fact of the fatal fire." *Id.* at 69.

[124] *See* RESTATEMENT (THIRD) OF PRODS. LIAB. § 2 cmt. d (1998) ("The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessar-

Deere and Company reasoned that a manufacturer can be found liable when a danger is open and obvious because the openness and obviousness of the danger is only one factor to consider in the reasonableness of the design of the product.[125] *Delaney* indicates that it is not clear that the tobacco industry will be able to count on every court extending the open and obvious rule to non-fire safe cigarettes, especially given that judges have discretion as to how to interpret products liability doctrine.[126] While this reasoning did not win a majority of judges in *Lamke v. Futorian Corporation*,[127] the dissent in that case said that it may be unclear to the common cigarette smoker that some cigarettes burn longer than others.[128] Given that some cigarettes are now fire safe and some not, it is possible that a court may find that non-fire safe cigarettes are an unexpected danger to consumers.

In addition, courts have been moving toward using risk-utility analysis over the consumer expectation test in determining whether non-fire safe cigarettes are defective in design.[129] The risk-utility test asks the court to weigh the social utility of a product against the safety risk it presents, regardless of whether that risk is open and obvious.[130] The risk-utility test only allows manufacturers of products to escape liability if there is utility in the product not being the safest it can be.[131] If a plaintiff is able to successfully point to the PaperSelect as evidence that a fire safe cigarette is possible, then the tobacco industry would need to argue that there is some utility in a non-fire safe cigarette.[132]

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ily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff").

[125] Delaney v. Deere & Co., 999 P.2d 930, 939 (Kan. 2000).

[126] *Id.* The *Delaney* court cited *Kearney* and stated that some states limit the rule of open and obvious to only common, everyday products, which a cigarette would be. *See id.* at 939 (citing *Kearney*, 916 F. Supp. at 68). Other courts, however, have said that the rule only applies to simple tools. *See, e.g.*, Inman v. Heidelberg E., 917 F. Supp. 1154, 1158 (E.D. Mich. 1996). The New Jersey statute does not apply the doctrine to industrial machinery, equipment used in the workplace or dangers that can be feasibly eliminated without impairing the usefulness of a product. N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 2002).

[127] 709 P.2d 684 (Okla. 1985).

[128] *Id.* at 689 (Doolin, J., dissenting). The dissent also noted that "[i]f indeed the cigarette manufactured by Philip Morris were designed in a manner which made it dangerous to an extent beyond that which is contemplated by the ordinary consumer, then Philip Morris had a duty to warn consumers of the dangerous characteristics of its product." *Id.*

[129] *See* ABRAHAM, *supra* note 112, at 195–98; EPSTEIN, *supra* note 99, at 795–97 (observing that risk-utility analysis has been used more in recent years than the consumer expectation test).

[130] *See, e.g.*, O'Brien v. Muskin Corp., 463 A.2d 298, 307 (N.J. 1983) (finding that a vinyl-lined pool was defectively designed even though the risk was open and obvious).

[131] *See, e.g.*, Wright v. Brooke Group Ltd., 652 N.W.2d 159, 168–69 (Iowa 2002) ("Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered").

[132] *See* ABRAHAM, *supra* note 112, at 195–96.

It would be in the interests of the tobacco companies to avoid litigation on the issue of fire safety. Losing even one case could result in a large verdict if the court awards punitive damages to the plaintiff(s).[133] Even more problematic for the industry is that losing one case may encourage other victims of fires caused by cigarettes to sue.[134] Endorsing and complying with a federal statute would allow the tobacco companies to claim in court that they are doing what the federal government requires of them.[135] Because the Moakley Act guarantees an affirmative federal standard, it presents a greater chance that tobacco companies have something tangible to point to when making such claims. While complying with a statute is not a complete bar to liability, in many jurisdictions, defendants can use their compliance as proof of reasonable conduct on their part.[136]

The fire safe issue has been in front of Congress frequently over the last two decades, and the tobacco industry has been doing research on fire safe cigarettes for twenty-five years. The negative publicity that comes with each fire started by cigarettes is certainly troubling for the industry.[137] Now that cigarette manufacturers have the means to create fire safe cigarettes, it is important for them to do so. With the advent of the PaperSelect fire safe paper and the passage of New York's fire safety law, the time is ripe for Congress to address the issue. For purposes of litigation, especially since the advent of PaperSelect, a federal standard gives tobacco manufacturers an easily demonstrable benchmark upon which to rest their product safety arguments. If even one state in addition to New York passes a fire safe cigarette law, the industry will face a situation it wants to avoid—being forced to create different cigarettes for different states.[138] Now that it is known that tobacco companies can comply with a fire safe standard from technical, commercial, and economic standpoints, Congress should pass a fire safe cigarette law immediately. The Moakley Act would ensure that a fire safe standard would be implemented, whereas the Towns-Stearns bill does not guarantee the establishment of such a

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[133] Courts have not yet examined the issue of punitive damages in fire safe cigarette cases because plaintiffs have not proven negligence. *See, e.g.*, Lamke v. Futorian Corp., 709 P.2d 684, 684 (Okla. 1985). *But see id.* at 690 (suggesting in dissent that punitive damages may be appropriate in fire safe cigarette cases).

[134] Halbert, *supra* note 102, at 33.

[135] If a statute were enacted, this would, of course, also make it easier for plaintiffs to prove a design defect because legislation would provide a clear standard, and noncompliance with enacted legislation is per se negligence. RESTATEMENT (THIRD) OF TORTS § 12 (1999). If a fire safe statute were passed, the tobacco industry plans to comply with the law. *See, e.g.*, RJR Position on "Fire Safe" Cigarettes, *supra* note 69.

[136] RESTATEMENT (THIRD) OF TORTS § 12 (1999).

[137] Comments of Samuel D. Chilcote, Jr., Executive Committee Meeting, Lorillard Tobacco Company (Oct. 28, 1982), *in* TOBACCO DOCUMENTS ONLINE (noting that fire safe cigarettes are a major public perception concern for the tobacco industry), *at* http://tobaccodocuments.org/product_design/03667148-7173.pdf.

[138] *See* Lazar, *supra* note 92 (quoting a Philip Morris spokesman explaining that the company did not want Massachusetts to pass a state law that conflicted with New York's state law).

standard. That alone is sufficient reason to support passage of the Moakley Act, because it would most effectively reduce the number of lives unnecessarily lost in fires caused by cigarettes.

—*Mushtaq Gunja*

HELP AMERICA VOTE ACT

The controversy and debate generated by the 2000 presidential election led lawmakers of both parties to seek legislation to help make federal elections fairer and more accurate exercises of democracy.[1] The result was the Help America Vote Act,[2] which President George W. Bush signed into law on October 29, 2002.[3] Lawmakers have called the Help America Vote Act the most significant voting rights legislation since the Voting Rights Act of 1965[4] and the first civil rights law of the twenty-first century.[5] The Help America Vote Act passed both houses of Congress with overwhelming bipartisan support.[6]

The outcome of the 2000 presidential election remained undecided for several weeks after Election Day, with only several hundred votes separating Republican Governor George W. Bush and Democratic Vice President Al Gore in official vote tallies in the decisive state of Florida.[7] Confusing ballot designs, computer malfunctions and misplaced ballot boxes made the presidential election in Florida frustrating and controversial.[8] For instance, some Florida voters complained that the poor design of

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[1] *See, e.g.*, 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Christopher Bond (R-Mo.)) (stating that in the Act, Congress "tried to address each of the fundamental problems [it] discovered" from the 2000 election); 148 CONG. REC. H7847 (daily ed. Oct. 10, 2002) (statement of Rep. Corrine Brown (D-Fla.)) (stating that the Help America Vote Act "is the greatest accomplishment of the 107th Congress" because it "make[s] sure that what happened in the 2000 election never happens again in this country").

[2] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1666–1730 (to be codified at 42 U.S.C. §§ 15301–15545).

[3] *See* Press Release, White House Office of the Press Secretary, President Signs Historic Election Reform Legislation into Law (Oct. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/10/20021029-1.html.

[4] *See* 148 CONG. REC. H7841 (daily ed. Oct. 10, 2002) (statement of Rep. Steny Hoyer (D-Md.)). The Voting Rights Act of 1965 sought to protect the right to vote against discrimination on the basis of race or color. *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6 (2000).

[5] *See* 148 CONG. REC. S10,500 (daily ed. Oct. 16, 2002) (statement of Sen. Christopher Dodd (D-Conn.)).

[6] *See* Robert Pear, *Congress Passes Bill to Clean up Election System*, N.Y. TIMES, Oct. 17, 2002, at A1. The Senate passed the bill by a 92 to 2 vote and the House passed the bill by a 357 to 48 vote. *See* U.S. SENATE, ROLL CALL VOTE NUMBER 238, *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00238 (last visited Apr. 14, 2003); U.S. HOUSE, ROLL CALL 462, *at* http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=462 (last visited Apr. 14, 2003).

[7] *See, e.g.*, Associated Press, *The Vote in Florida*, N.Y. TIMES, Nov. 18, 2000, at A1 tbl. (showing Bush's official lead as three hundred votes two weeks after the election). Gore eventually won the popular vote by more than 500,000 votes, but neither he nor Bush could have won the presidency without winning Florida's twenty-five electoral votes. *See* FED. ELECTION COMM'N, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS, *at* http://www.fec.gov/pubrec/2000presgeresults.htm (last visited Apr. 14, 2003). When Bush was declared the winner in Florida, he had 271 electoral votes to Gore's 266. *See id.*

[8] *See* Rick Bragg & Dana Canedy, *Anger and Chagrin after an Oops on a Ballot*, N.Y. TIMES, Nov. 10, 2000, at A1.

"butterfly" ballots[9] caused them to vote mistakenly for Reform Party candidate Pat Buchanan when they had meant to vote for Gore, or to vote for both Buchanan and Gore, thereby disqualifying their ballots.[10] The closeness of the race also magnified controversies over election officials' treatment of absentee ballots from military personnel serving overseas,[11] as well as the treatment of registered voters who were turned away at the polls because their names did not appear on voter registration lists.[12] Some observers pointed out that in Florida the margin of error was likely greater than Bush's margin of victory.[13] Moreover, these problems were not unique to Florida, but were likely present in many other states.[14] With no clear, politically neutral way to determine the election results in Florida, the

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[9] The Palm Beach County butterfly ballot that confused some voters "split candidates into two columns and placed the punch hole for Reform Party nominee Pat Buchanan between those of [Bush and Gore], even though these latter two were listed side-by-side in the column on the left." Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 645 (2002). For a picture of the butterfly ballot, see MARTIN MERZER ET AL., MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE 154 (2001), *cited in* Schwartz, *supra*, at 645 n.90.

[10] *See* Bragg & Canedy, *supra* note 8, at A1 (explaining that voters who had mistakenly voted for Buchanan did not seek to correct their mistakes because they were "embarrassed, ashamed or did not know what to do").

[11] *See* Richard Pérez-Peña, *Absentee Ballots: G.O.P. and Democrats Trading Accusations on Military Votes*, N.Y. TIMES, Nov. 19, 2000, at A1 (reporting Republican charges that Democrats tried to invalidate overseas military ballots that were likely votes for Bush). Democrats acknowledged that preventing the counting of military ballots mailed from overseas without postmarks would benefit Gore. *See* Richard Pérez-Peña, *Military Ballots Merit a Review, Lieberman Says*, N.Y. TIMES, Nov. 20, 2000, at A1. Still, they argued that they were simply following the law in trying to invalidate such ballots without postmarks. *See id.* Without postmarks there was no way to know whether the ballots had been mailed before Election Day. *See* Tim Golden, *Uncounted Overseas Votes Carrying a Pro-Bush Profile*, N.Y. TIMES, Nov. 16, 2000, at A1. Republicans countered that the military often does not postmark mail and that soldiers should not be penalized for a practice that was beyond their control. *See* Richard Pérez-Peña, *Bush Files Suit to Restore Rejected Military Ballots*, N.Y. TIMES, Nov. 23, 2000, at A36.

[12] *See* Mireya Navarro & Somini Sengupta, *Arriving at Florida Voting Places, Some Blacks Found Frustration*, N.Y. TIMES, Nov. 30, 2000, at A1 (reporting one frustrated voter who could not vote as saying, "[I]f you have all your stuff and ID and you're registered and everything is right, why go through that if you still can't vote?"). The difficulty of maintaining accurate voter registration lists was one of the biggest problems revealed in the 2000 election. *See* CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 26–31, 86 (2001) [hereinafter CALTECH/MIT VOTING TECH. PROJECT], *available at* http://www.vote.caltech.edu/Reports/july01/July01_VTP_%20Voting_Report_Entire.pdf. The report, a joint project by the California Institute of Technology and the Massachusetts Institute of Technology, investigated the causes of the equipment and administration problems from the 2000 presidential election. *See id.*

[13] Jason B. Binimow, Annotation, *Challenges to Punch Card Ballots and Punch Card Voting Systems*, 103 A.L.R.5th 417 (2002); Paul S. Herrnson, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?*, 13 STAN. L. & POL'Y REV. 147, 148 (2002) (stating that Florida's popular vote margin was "smaller than the number of uncounted votes"). Over two thousand ballots were not counted in one Florida county alone; the winner of Florida's electoral votes was decided by 537 popular votes. *See* Schwartz, *supra* note 9, at 625–26.

[14] *See infra* text accompanying notes 53–55.

United States Supreme Court intervened to bring the state's recount processes to a halt, effectively awarding the election to Governor Bush.[15]

By providing federal funds and articulating stricter voting standards, the Help America Vote Act addresses, among other things, incomplete voter registration lists, inaccurate voting machines, inefficient election administration, and the controversy over unmarked military ballots. Title I of the Act makes federal funds available on the basis of each state's voting age population.[16] It also provides for a minimum amount that will be given to each state[17] to replace punch card and lever voting machines with machines that have "feedback" features that allow voters to review and correct their votes.[18] Title I funds are also available for training poll workers, for educating voters on voting procedures and technology, and for other voting administration needs.[19] The Act also establishes the Election Assistance Commission ("EAC") to provide information on federal elections, including information on election equipment.[20] In addition, Title III of the Help America Vote Act specifies uniform election technology and administration requirements for federal elections, including voter notification of "overvotes" and the ability to correct for them;[21] standards for determining what constitutes a vote;[22] standards for provisional voting;[23] new identification requirements for those registering to vote by mail;[24] and procedures for improved voting by overseas military personnel.[25] States are not required to apply for Title I federal funds to replace old

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[15] *See* Bush v. Gore, 531 U.S. 98, 104–07 (2000) (holding that using different standards for counting votes in different counties across Florida violated the Equal Protection Clause). The Supreme Court's role in the controversy was seen by critics as judicial politics at its worst but by defenders as justified judicial intervention. *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (arguing that the Court's conservative majority went against previous positions to rule for Bush); VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001) (calling the Supreme Court's decision a "crime"); Richard A. Epstein, *In Such Manner as the Legislature Thereof May Direct: The Outcome of* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613, 614 (2001) (calling "overheated" the rhetoric against the Supreme Court's decision in *Bush v. Gore* and offering a qualified defense of the decision); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1764 (2001) (arguing that, while the Supreme Court "picked a president" through its *Bush v. Gore* decision, the decision is not likely to harm the Court's public standing much); Richard A. Posner, Bush v. Gore: *Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719, 736 (2001) (arguing that Bush won the Florida vote by 930 votes as there was "no legal basis" for accepting votes from late hand recounts).

[16] Help America Vote Act of 2002, Pub. L. No. 107-252, § 101(d)(3)–(4), 116 Stat. 1666, 1670 (to be codified at 42 U.S.C. § 15301).

[17] *Id.* § 101(d)(2).

[18] *See infra* text accompanying notes 121–125.

[19] Help America Vote Act of 2002 § 101(b)(1)(A)–(H).

[20] *See infra* text accompanying notes 113–119.

[21] *See infra* text accompanying notes 122–123.

[22] *See infra* text accompanying notes 126–128.

[23] *See infra* text accompanying notes 131–133.

[24] *See infra* text accompanying notes 150–152.

[25] *See infra* text accompanying notes 160–163.

voting machines[26] or improve election administration,[27] but all states must comply with the provisions of Title III.[28] As Title I funds can also be used to meet the mandatory obligations of Title III,[29] the vast majority of states are likely to accept Title I funds and their concomitant obligations.

The Help America Vote Act is a civil rights act for all Americans, seeking to improve voting access and fairness for all. Its technical provisions on voting equipment and election administration may be mundane compared to the groundbreaking efforts of civil rights legislation in the 1960s. The right to vote has little meaning, however, if that promise is lost to old voting machines that cannot read properly cast ballots or ill-trained poll workers who incorrectly inform a citizen that he or she has not registered to vote. Arguably the most important responsibility of a well-functioning democracy is making sure that elections are fairly administered. If the peoples' will is not accurately reflected in and manifested through elections people will lose faith in the legitimacy of democracy. The Help America Vote Act is a balanced, bipartisan law that combines federal monetary assistance and standards with state-level implementation to achieve fairer federal elections. Significantly, the Act respects principles of federalism in following the tradition of local and state administration of elections.[30]

While the regulation of elections has largely been a state and local responsibility in America, it has not completely escaped the influence of Congress and federal agencies. In 1975, the General Accounting Office and the National Institute of Standards and Technology ("NIST") issued a report that recommended greater use of audit mechanisms and security and accuracy for computerized voting systems.[31] Until then, there had never been any federal standards, voluntary or involuntary, regulating voting systems.[32] In response to the report, Congress gave the Federal Election Commission ("FEC") and the NIST the task of studying the feasibility of developing voluntary standards and testing procedures for voting systems,[33] but it did not give "explicit responsibility" to any fed-

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[26] *See* Help America Vote Act of 2002, Pub. L. No. 107-252, § 102(b)(1)(A), 116 Stat. 1666, 1671 (to be codified at 42 U.S.C. § 15302) (stating that funds are awarded to states on a voluntary basis for use in replacing voting machines).

[27] *See id.* § 101(a). Appropriate use of funds include complying with Title III requirements, improving administration of elections for federal office, educating voters about voting technology, training election officials, and upgrading voting technology. *Id.* § 101(a)(1)(A)–(D), (F).

[28] *Id.* § 401.

[29] *Id.* § 101(b)(1)(A).

[30] *See, e.g.*, H.R. REP. No. 107-263, at 4 (2001) ("The [Federal Election Commission] standards are voluntary, in recognition of the tradition that States take responsibility for administering elections."). *See also infra* text accompanying notes 200–204.

[31] *See* H.R. REP. No. 107-263, at 4 (2001). For descriptions and pictures of different voting equipment, see NAT'L SCIENTIFIC CORP., 2 VOTING SYSTEMS 55–77 (1977).

[32] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 71–72.

[33] *Id.* at 72. The FEC and NIST completed their report in 1984. *See* CLEARINGHOUSE ON ELECTION ADMIN., VOTING SYSTEM STANDARDS: A REPORT ON THE FEASIBILITY OF

eral agency to develop and maintain voting equipment standards.[34] Instead, the FEC acted on its own and developed and issued voting equipment standards in 1990.[35] These standards are voluntary, "in recognition of the tradition that States take responsibility for administering elections" in our system of federalism.[36] Over the last decade, they have been the standards by which most states have certified their voting systems.[37] The FEC did not begin to update its 1990 standards until 1999.[38] It could not complete the task of updating in time for the 2000 election.[39]

One major source of voter registration errors in the 2000 election was, ironically, a law passed to make the voting registration process more accessible and convenient. The National Voter Registration Act of 1993 (also known as the "Motor Voter Act") requires states to provide three specific voter registration mechanisms.[40] First, states must implement "Motor Voter" registration that allows people to file their voter registration simultaneously with their driver's license application or renewal.[41] Second, states must offer registration opportunities through all government offices that provide public assistance.[42] Through these offices, applicants must have access to registration forms and assistance in completing the forms.[43] Third, states must develop mail-in voter registration systems.[44] These convenient ways to register to vote have led to a dramatic increase in voter registration. Between 1994 and 1998, the size of the eligible voting population grew by 4.3%, or 8.3 million people, while the number of registrants grew by 19.6%, or 25.7 million people.[45] The Motor Voter Act also makes it more difficult to remove inactive voters from registration lists. The Act prohibits removal for not voting, instead allowing removal only because of criminal convictions, death or mental incapacity, change of address, or the request of the voter.[46]

The combination of easier registration and greater difficulty in removing names from registration lists has created an enormous task for each state of managing a "massive, complex database."[47] Thousands of

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DEVELOPING VOLUNTARY STANDARDS FOR VOTING EQUIPMENT (1984).

[34] *See* H.R. REP. No. 107-263, at 4 (2001).

[35] *Id.*

[36] *Id.*

[37] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 72.

[38] *See* H.R. REP. No. 107-263, at 5 (2001).

[39] *Id.* at 6.

[40] 42 U.S.C. § 1973gg-5(a), (b) (2000).

[41] *Id.* § 1973gg-3.

[42] *Id.* § 1973gg-5.

[43] *Id.*

[44] *Id.* § 1973gg-4.

[45] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 26.

[46] 42 U.S.C. § 1973gg-2(b).

[47] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 28. For a discussion of the Help America Vote Act's provisions that address states' database management problems, see *infra* text accompanying notes 134–148.

counties and localities manage the decentralized registration system.[48] With little coordination among local governments, duplicate registrations appear.[49] When a voter moves, unless the voter changes the registration in both counties, then his or her address information is not updated and the voter may not be able to vote.[50] There are approximately 200,000 polling stations across the United States, and most do not have direct access to county registration lists to resolve problems that arise when properly registered voters find out at the polling station that they are not on the polling station's list of the voters in its precinct.[51] The lack of a centralized, coordinated database can cause numerous problems for voters and poll workers on Election Day.

While Florida was at the center of national media coverage with its much-criticized punch card voting machines,[52] other states could just as easily have shared Florida's spotlight in 2000 had they represented as many electoral votes as Florida or had their statewide margins of victory been as narrow as Florida's. In fact, Georgia, Idaho, Illinois, South Carolina and Wyoming had higher rates of uncounted ballots than Florida.[53] In addition, Gore won Iowa by only 4949 votes out of more than 1.2 million votes cast and Wisconsin by only 6099 votes out of more than 2.4 million votes cast.[54] A study by the California Institute of Technology and the Massachusetts Institute of Technology estimates that between four and six million votes for president across the country were not counted in the November 2000 election.[55] Lost votes stemmed from people who could not vote because of registration problems or other polling place obstacles like long lines and waits.[56] They also occurred because of spoiled ballots and vote recording machines with high rates of error.[57]

In the 2000 elections, almost one-fifth of all counties nationally used punch card voting machines, and more than fifteen percent of precincts

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[48] *Id.* at 28.

[49] *Id.* Nevertheless, there is little evidence that duplicative registrations have produced widespread fraud in the form of multiple voting. *Id.*

[50] *Id.*

[51] *Id.* at 28–29.

[52] *See, e.g.*, Leslie Wayne, *Close Vote Illuminates Hodgepodge of Ballots*, N.Y. TIMES, Nov. 10, 2000, at A24 (noting that punch card voting systems use "decades-old" technology no longer available on the market).

[53] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 17.

[54] *See* Associated Press, *The Other Close Calls*, N.Y. TIMES, Nov. 11, 2000, at A15. The residual vote rate in Iowa's 2000 presidential election was 0.9%. *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 89. There was insufficient data to calculate Wisconsin's residual vote rate. *Id.* The residual vote rate measures the percentage of ballots that are uncounted (for whatever reasons), undervotes (either the voter abstained from voting for a particular office or because the vote recording device did not register a vote) and overvotes (ballots that record a vote for more than one candidate for a single office). *Id.* at 20.

[55] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 8.

[56] *Id.* at 8–9, 86.

[57] *Id.*

still used them in 2002.[58] First introduced in 1964,[59] punch card machines suffer from high rates of ballot error stemming from machine malfunction caused by wear and tear,[60] human mistakes in punching holes in the ballot,[61] and incorrect placement of the ballot into the vote reading machine.[62] In contrast, almost forty-two percent of all counties used optical voting machines[63] that are more accurate than punch card voting.[64] With optical voting technology, a voter uses a pencil to fill in an oval on a paper ballot that is then run through a machine that reads the marked oval.[65] In 2000, Florida punch card machines had an error rate that was more than four times greater than optical scanning equipment with feedback features[66]: 3.93% of all ballots cast, or 145,928 ballots, using punch card machines did not record a vote for president when they were run through the vote recording machines, while only 0.83% of all ballots cast, or 17,172 ballots, using optical voting did not register a vote for president.[67]

Statistics from two adjoining Florida counties magnify the startling potential of error rate differentials produced by different voting technology. Voters in Florida's Gadsden County had a chance of having their votes not counted sixty-eight times greater than voters in adjoining Leon County,[68] which used more advanced voting equipment. While both counties used

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[58] *See* William McNulty & Hugh K. Truslow, *How It Looked Inside the Booth*, N.Y TIMES, Nov. 6, 2002, at B9 tbl.

[59] Herrnson, *supra* note 13, at 149.

[60] *See* Schwartz, *supra* note 9, at 638.

[61] *See* Black v. McGuffage, 209 F. Supp. 2d 889, 892–94, 902 (N.D. Ill. 2002) (finding that African American and Latino voters presented valid claims under the Due Process Clause, the Equal Protection Clause, and the Voting Rights Act of 1965 in their challenge that punch card voting systems producing a disproportionate number of undervotes abridged their right to vote).

[62] *Id.*

[63] *See* McNulty & Truslow, *supra* note 58, at B9 tbl.

[64] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 21 tbl.1. Out of ballots cast for president on different voting systems between 1988 and 2000, optical voting machines failed to read 1.5%, while punch card machines failed to read 2.5%. *Id.* Out of ballots cast for governor and senator over the same period, optical voting machines failed to read 3.5%, while punch card machines failed to read 4.7%. *Id.*

[65] Schwartz, *supra* note 9, at 635.

[66] *Id.* at 633 tbl.A. *See also* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 7 (stating that in Chicago almost one out of ten ballots for president did not register a vote). According to the CalTech/MIT Voting Technology Project, Illinois had the highest residual vote rate of any state for which data was available. *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 89. Not surprisingly, Cook County, which encompasses the city of Chicago, had the second highest residual vote rate among the forty largest counties in the country. *See id.* at 90. Only Palm Beach County in Florida had a higher rate. *See id.* Illinois's very high residual vote rate can most likely be attributed to the state's almost exclusive reliance on relatively inaccurate punch card and lever voting machines. *See id.* at 19. Only one county in Illinois (not Cook County) uses optical scanning voting machines. *See id.* Other counties with residual vote rates greater than three percent of all votes cast include the following: Kings County (Brooklyn), Miami-Dade County (Miami), Queens County (Queens), New York County (Manhattan), and Bronx County (Bronx). *See id.* at 90.

[67] Schwartz, *supra* note 9, at 633 tbl.A.

[68] *Id.* at 625.

optical scanning technology, only Leon County utilized "precinct tabulation," wherein a polling place uses a scanner to test whether a ballot will be read by the machine.[69] By telling whether voters cast a proper ballot, precinct tabulation allows voters to correct the ballot if they have not completed it properly.[70] Without precinct tabulation, voters do not know whether their ballots will be read by the scanner.[71] By the time the ballot is transported to a central tabulation center, it is too late for voters to correct their ballots if they are rejected by the scanner.[72]

Error-prone voting machines in Florida publicized by the media were only one source of uncounted votes. The CalTech/MIT Voting Technology Project estimates that between one-and-one-half and three million votes were not counted due to voter registration problems.[73] Although more empirical study of vote tabulation error rates is needed, any margin of victory in the hundreds or even thousands of votes is now shadowed by the possibility that the margin of error is greater than the margin of victory, even in a state that uses optical vote reading machines.[74] These problems stemmed from errors in the lists of eligible voters and would-be voters' carelessness in filling out registration forms and failing to update their registration information.[75] The Reverend Jesse Jackson also raised the possibility of voter intimidation by police officers[76] and irregularities with the registration lists that resulted in hundreds of voters being turned away from the polls.[77] As a result of these problems, many voters across the nation were unable to vote because their names did not appear on their precinct's list of registered voters.[78] Another 500,000 to 1.2 million voters did not vote due to long lines and inconvenient hours and locations of polling stations.[79]

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[69] *Id.* at 635–41.

[70] *See id.* at 635.

[71] *See id.* at 638–39.

[72] *See id.* at 636.

[73] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 8.

[74] *See, e.g.*, 148 CONG. REC. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Robert Ney (R-Ohio)) ("[Initially], we just simply did not know [that other states experienced problems similar to Florida's] because there was not an election of the magnitude of the presidential that brought all of this to light through the national media.").

[75] CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 9.

[76] *See* Lynette Holloway, *Democrats Now Back Jackson's Role in Voting Concerns*, N.Y. TIMES, Nov. 13, 2000, at A26 (describing a NAACP hearing where people described problems they encountered at the polls, including incomplete voter registration lists, incorrect information about who had already voted, and police intimidation of voters).

[77] *See* David Gonzalez, *Jesse Jackson Demands Inquiry on Florida Vote*, N.Y. TIMES, Nov. 10, 2000, at A27. According to Reverend Jackson, one polling station turned away voters because there was no elections supervisor to address problems with registration lists. *See id.*

[78] *See* Dirk Johnson, *Judge Delays Closing of Polls in St. Louis Amid Unexpectedly Heavy Turnout*, N.Y. TIMES, Nov. 8, 2000, at B10. One St. Louis voter was told that her name was not included on the list of eligible voters and that she therefore had to register again. *Id.* Other voters had been mistakenly placed on the list of inactive voters. *Id.*

[79] CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 9.

A more malicious source of voting problems was voter fraud. In the 2000 election, almost 700,000 people were registered to vote in more than one state, and Republicans claim that over three thousand people voted twice.[80] One of the more publicized charges of voter fraud in the 2000 presidential election occurred in Missouri, where Republicans criticized a state judge's order that polling stations in heavily Democratic St. Louis remain open after other polls in the state had closed.[81] The judge's decision to keep the polls open to accommodate the heavy voter turnout was overruled by the state appellate court, which ordered the polls in St. Louis closed forty-five minutes after the previously scheduled closing time.[82] The Missouri case raised the concern that judges could prevent polls from closing to give candidates from their party a chance to win or close polls early to prevent candidates from other parties from having a chance to catch up to an early frontrunner.[83]

The military was another institution that was embroiled in the election controversy. The validity of some absentee military ballots was an issue during the 2000 presidential election.[84] An unknown number of absentee military ballots were lost[85] or not counted because they lacked postmarks.[86] Republicans accused Democrats of trying to systematically invalidate military votes, which tended to favor Bush.[87] They pointed out that military mail is often sent without a postmark to argue that military voters should not be penalized for a practice that they cannot control.[88]

Some states have already embarked on electoral reforms. Indiana, North Carolina, and Texas have stopped using punch card voting machines and Georgia, Maryland, and Minnesota have purchased new voting equipment.[89] Certain states have also instituted improved voter regis-

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[80] 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond). *But see* Jim Drinkard, *Dems Blast GOP Efforts on Voter Fraud*, USA TODAY, Oct. 24, 2002, at 8A (reporting allegations by Democrats and Connecticut state officials that the Republican-compiled data is "'highly flawed'"). Another aspect of the problem is duplicate registrations within a state. In Michigan, state officials updating voter files found one million duplicate registrations in a state with only nine million registered voters. CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 28.

[81] *See* Johnson, *supra* note 78, at B10. Senator Bond called the extension of voting hours the "biggest fraud on the voters in [Missouri] and [the] nation that we have ever seen." *Id.*

[82] *See id.*

[83] *See id.*

[84] *See* Michael Cooper, *Lawyers for Bush Want a Judge to Reinstate Military Ballots That Were Disqualified*, N.Y. TIMES, Nov. 25, 2000, at A13 (reporting that several counties reinstated absentee military ballots, which tended to favor Bush, that they had previously disqualified because they lacked postmarks or proper signatures).

[85] CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 9.

[86] Michael Cooper, *G.O.P Drops a Suit: Tactics Shift on Military Ballots, With Eye on Specific Counties*, N.Y. TIMES, Nov. 26, 2000, at A1.

[87] *See supra* note 11 and accompanying text.

[88] *See id.*; Richard Pérez-Peña, *Review Military Votes, Florida Attorney General Says*, N.Y. TIMES, Nov. 21, 2000, at A18.

[89] *See* NAT'L CONF. OF STATE LEGISLATURES, 2001 STATE ELECTION REFORM, *at* http://

tration list maintenance and centralization procedures.[90] Maryland and Vermont have adopted provisional ballots, through which a voter whose registration is suspect can cast a vote and have his or her registration verified later by election officials.[91] For its part, Florida enacted the Florida Election Reform Act of 2001 ("Florida Reform Act") on May 10, 2001.[92] The Florida Reform Act implements many of the reforms that the Help America Vote Act supports, including provisions for replacing punch card voting machines with touch screen voting systems, creating provisional voting, and providing for the development of a statewide voter registration database.[93]

Despite reforms, however, Florida experienced another chaotic election during its September 2002 Florida Democratic gubernatorial primary.[94] Florida's expenditures of over $32 million to upgrade voting systems did not prevent some poll workers from being unable to activate new touch-screen voting machines, other poll workers from failing to show up at voting stations, and still more workers from closing polling stations before their scheduled closing time.[95] The result was the disenfranchisement of hundreds, perhaps thousands, of voters.[96] Florida's second election controversy in less than two years was a strong admonition to Congress and the states to implement effective voting reforms as soon as possible. When Florida held its general election in November 2002, police supervision of poll workers helped avoid another election full of problems.[97]

Even as states have adopted their own reform measures, Congress debated a federal response to address what is truly a national problem.

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www.ncsl.org/programs/legman/elect/taskfc/overview.htm (last visited Apr. 5, 2003). Georgia has installed touchscreen voting machines in all 150 counties at a cost of about $54 million. *See* Press Release, Georgia Secretary of State Cathy Cox, Georgia's Election Reform Initiative: Chronology of Important Events, *available at* http://www.sos.state.ga.us/pressrel/dretimeline.htm.

[90] *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 89 (listing thirteen states that enacted registration reform measures in 2001).

[91] *See id.*

[92] FLA. STAT. ch. 101.5604 (2002). *See generally* John L. Mills, *Florida on Trial: Federalism in the 2000 Presidential Election*, 13 STAN. L. & POL'Y REV. 83, 94–98 (2002) (describing the Florida statute as one that will increase voting accuracy and voter participation and minimize voter mistakes through training poll workers).

[93] *See* Mills, *supra* note 92, at 94–98.

[94] *See* Dana Canedy, *Vote System Chaos Triumphs Again in Florida Election*, N.Y. TIMES, Sept. 11, 2002, at A28 [hereinafter Canedy, *Vote System Chaos*]; Dana Canedy, *Again, Sunshine State Is in Dark a Day After the Vote*, N.Y. TIMES, Sept. 12, 2002, at A18 [hereinafter Canedy, *Again, Sunshine State Is in Dark*].

[95] *See* Canedy, *Vote System Chaos*, *supra* note 94, at A28; Canedy, *Again, Sunshine State Is in Dark*, *supra* note 94, at A18.

[96] *See* Canedy, *Vote System Chaos*, *supra* note 94, at A28; Canedy, *Again, Sunshine State Is in Dark*, *supra* note 94, at A18.

[97] *See* Katherine Q. Seelye, *In Florida, Police (and Millions of Dollars) Avert Calamity*, N.Y. TIMES, Nov. 6, 2002, at B8 (reporting that Florida avoided another election disaster with the help of the police taking charge of training poll workers and securing ballots).

The Help America Vote Act contains provisions that address election reform problems that include providing funding for states to replace outdated voting machines under Title I, establishing the EAC under Title II, creating voting systems standards, provisional voting and computerized registration lists under Title III, and improving the mechanism for absentee balloting by overseas military personnel in Title VII.

Title I of the Act contains provisions for replacing punch card machines and improving election administration. The Act allocates $3.86 billion[98] to states and localities to, among other things, improve the administration of federal elections, educate citizens about voting rights and procedures, train election officials and poll workers, improve or replace voting technology, and increase the availability of absentee ballots to overseas military voters.[99] For the first time, substantial amounts of federal funds will be used to help finance federal elections.[100] States that choose not to accept federal funds must either certify to the EAC that they have established state administrative complaint procedures[101] or submit to the Attorney General a "compliance plan" that explains how the state will satisfy Title III's requirements.[102]

Congress has earmarked $325 million of the Act's Title I authorization for helping states to replace punch card or lever voting systems by the 2004 federal elections.[103] A state may opt out of this deadline if it certifies by January 1, 2004 that it will not meet the November 2004 deadline for good cause.[104] If these opt-out requirements are met, the state will have until January 1, 2006 to replace punch card or lever voting systems.[105] This opt-out provision raises the question of whether Congress has left open the possibility of another controversy-ridden election like Election 2000.[106] The recurrence of election problems in the 2002 Florida primaries[107] clearly shows the risks of delaying the replacement of punch card machines. In addition to funding to replace voting equipment, Congress has authorized $325 million for improving the administration of elec-

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[98] Help America Vote Act of 2002 §§ 104(a)(1)–(2), 257, 264, 273; Robert Pear, *The 2002 Campaign: Ballot Overhaul*, N.Y. TIMES, Oct. 17, 2002, at A1. As of April 2003, Congress has appropriated $1.5 billion of the authorized funds. *See* Miscellaneous Appropriations Act of 2003, Pub. L. No. 108-7, 117 Stat. 11, 537–38 (2003).

[99] Help America Vote Act of 2002 § 101(b)(1)(B)–(D), (F)–(G).

[100] *See* 148 CONG. REC. H7841 (daily ed. Oct. 10, 2002) (statement of Rep. Hoyer) (stating that the Act "authorizes unprecedented federal assistance . . . to help States improve and upgrade every aspect of their election systems").

[101] *See infra* text accompanying notes 157–158.

[102] Help America Vote Act of 2002 § 402(b)(1)(A)–(B).

[103] *Id.* § 104(a)(2).

[104] *Id.* § 102(a)(3)(B).

[105] *Id.*

[106] *See* 148 CONG. REC. H7846 (daily ed. Oct. 10, 2002) (statement of Rep. David Price (D-N.C.)) (stating that "[t]he problems that plagued us [two] years ago will continue to occur if we do not take action to address them").

[107] *See supra* text accompanying notes 94–96.

tions,[108] which includes educating voters,[109] training elections officials and poll workers,[110] and improving voting systems and technology.[111]

To help states use these funds productively, Title II of the Help America Vote Act creates the EAC, which will serve as the "national clearinghouse and resource for the compilation of information and review of procedures"[112] regarding the administration of federal elections, including testing and certifying voting systems.[113] The EAC is meant to be a bipartisan entity, with the Speaker of the House, the House minority leader, and the Senate majority and minority leaders each submitting a candidate for nomination by the President[114] and Senate confirmation.[115] The four members of the EAC will choose among themselves a chair and vice chair who must belong to different political parties.[116] The EAC does not have the power to issue rules or regulations that are binding on states and localities,[117] but it will oversee the Technical Guidelines Development Committee that will develop voluntary voting system guidelines.[118] The EAC will also have other important duties, including reporting on the most efficient, accessible, and accurate methods of voting.[119]

Arguably the most important provisions of the Help America Vote Act are in Title III, which specifies uniform election technology and administration requirements for voting systems used for federal elections.[120] To comply with Title III, a voting system must enable the voter to review his or her vote selection before the ballot is cast and counted and allow the voter, if necessary, to change or correct his or her vote.[121] In addition,

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[108] Help America Vote Act of 2002 § 104(a)(1).

[109] *See id.* § 101(b)(1)(C). Basic voter education includes the announcement of registration and election dates, distributing voter pamphlets on how to use voting equipment, and mailing confirmation cards to newly registered voters. *See* 1 FED. ELECTION COMM'N, VOTER INFORMATION AND EDUCATION PROGRAMS 3 (1982).

[110] Help America Vote Act of 2002 § 101(b)(1)(D).

[111] *Id.* § 101(b)(1)(F).

[112] *Id.* § 202.

[113] *See id.* §§ 202, 231(a)(1) ("The Commission shall provide for the testing [and] certification . . . of voting system hardware and software by accredited laboratories.").

[114] *Id.* § 203(a)(2). While this section provides for a recommendation of a candidate "affiliated with the political party" of the recommender, it would not seem to prohibit, for example, a Republican from recommending an Independent, other third party candidate, or even a Democrat. *See id.* In addition, by the terms of this section the President does not seem to have to accept the recommended candidates. *See id.*

[115] *Id.* § 203(a)(1).

[116] *Id.* § 203(c)(1).

[117] *Id.* § 209. *See also* CONG. REC. H7838 (daily ed. Oct. 10, 2002) (statement of Rep. Ney) ("[The Commission] does not . . . have the power to dictate to States how to run their elections . . . [and] will not have rulemaking authority.").

[118] Help America Vote Act of 2002 § 221(b)(1).

[119] *Id.* § 241(a)(1)–(4). The reports will include information on voting technology, ballot designs, and methods of conducting provisional voting. *Id.* § 241(b)(1)–(2), (4). Entities engaged in research and development to improve voting technology are eligible for grants from the Commission. *Id.* §§ 271, 273.

[120] *Id.* §§ 301–312.

[121] *Id.* § 301(a)(1)(A)(i)–(ii).

voting equipment must alert voters of overvotes—ballots with more than one choice of candidate for a single office[122]—and permit voters to correct such mistakes.[123] Each voting system must comply with error rates established by the FEC.[124] Also, the new voting equipment must produce a "permanent paper record" with a manual audit capacity that will serve as the official record for any recount conducted.[125]

Another mandatory federal provision imposed on states under Title III of the Help America Vote Act is a set of "uniform and nondiscriminatory standards" that define what constitutes a valid vote for each type of voting system used in a state.[126] Perhaps the most controversial issue during the Florida recount was whether chads that were not fully punched out, such as "hanging," "swinging," or "pregnant" chads, should count as votes.[127] Bush supporters argued that Democrat-controlled county canvassing boards were "divining" the intent of the voters when they counted pregnant and swinging chads as votes for Gore.[128] The United States Supreme Court cited the lack of uniform statewide standards as grounds to halt the recount in Florida.[129]

While arguments over whether to count pregnant chads may have dominated public attention during the 2000 election, addressing the problem of incorrect and incomplete voter registration lists is arguably the most

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[122] *See* Schwartz, *supra* note 9, at 634.

[123] Help America Vote Act of 2002 § 301(a)(1)(iii).

[124] *Id.* § 301(a)(5). *See* 1 FED. ELECTION COMM'N, VOTING SYSTEMS STANDARDS: PERFORMANCE STANDARDS 21, 51, 90–95 (2002); 2 FED. ELECTION COMM'N, VOTING SYSTEMS STANDARDS: TEST STANDARDS 49–60 (2002).

[125] Help America Vote Act of 2002 § 301(a)(2)(B)(i)–(ii).

[126] *Id.* § 301(a)(6).

[127] *See* Associated Press, *Keeping Tabs: Where the Three Counties Stand*, N.Y. TIMES, Nov. 22, 2000, at A22. Hanging chads have one corner attached to the ballot, swinging chads have two corners attached to the ballot, and pregnant chads are punched or dimpled but have all corners attached. *Id.* Another kind of chad is the "tri-chad," which has three corners attached to the ballot. *Id.*

[128] *See* Don Van Natta, Jr., *Dimpled Votes Are New Hope For Democrats*, N.Y. TIMES, Nov. 22, 2000, at A1. Courts have split on the issue of whether a vote for a particular office is valid where the chad has not been completely detached. *Compare* Delahunt v. Johnston, 671 N.E.2d 1241, 1243 (Mass. 1996) (holding that while voters who failed to completely remove the chad "could have done a better job of expressing" their intent, their votes should be recorded if the "intent of the voter can be determined with reasonable certainty"), *with* Rary v. Guess, 198 S.E.2d 879, 880 (Ga. Ct. App. 1973) (holding that when a "voter's failure to utilize properly the vote recorder by punching out the 'chad' with the instrument provided, the voter has disenfranchised himself with regard to that office.").

[129] *See* Bush v. Gore, 531 U.S. 98, 104–07 (2000) (holding that using different standards for counting votes in different counties across Florida violated the Equal Protection Clause). The Supreme Court noted that

> [a] monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. . . . [Trial testimony] also revealed that at least one county changed its [standards for defining a vote] during the counting process.

Id. at 106.

important obstacle to achieving voting reform.[130] Under the Help America Vote Act, if a person declares that he or she is a registered voter and his or her name is not on the list of registered voters, that person will be allowed to cast a provisional ballot that will later be counted if a state or local election official can verify that the individual is registered.[131] Evidence suggests that the aggressive use of provisional ballots can help reduce by fifty percent the number of votes lost due to faulty registration lists.[132] The Help America Vote Act then guarantees a person who casts a provisional ballot access to a free information service such as a toll-free telephone number or an Internet Web site that notifies the voter whether his or her provisional ballot was counted.[133]

The Act also requires states to create a uniform, centralized and computerized statewide voter registration list that contains the name and registration information of every registered voter and assigns a unique identifier to each registered voter.[134] This list should help election officials verify whether a person is in fact registered when deciding whether to count a provisional ballot.[135] The list will also help remove multiple registrations under a single name that could be used by a person to cast multiple ballots.[136] As with the replacement of punch card and lever voting machines, states may receive an extension to complete the computerized statewide voter registration list from January 1, 2004 to January 1, 2006, for good cause.[137]

Requiring the creation of statewide voter registration lists will pose numerous challenges for states and localities.[138] First, they will need to complete the list well before an election, as it will take time to "de-bug" the system.[139] The FEC recommends that a system be operational for one year before being used in a major election.[140] Second, states face the high cost of developing a statewide system, with costs running up to $8 million,

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[130] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 27.

[131] Help America Vote Act of 2002 § 302(a).

[132] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 30. For example, two-thirds of the provisional ballots cast in Los Angeles County for the 2000 election were later determined to be valid ballots. *Id.* If two-thirds of states that currently do not use provisional ballots adopt them, up to 1.5 million votes can be saved through their aggressive use. *Id.*

[133] Help America Vote Act of 2002 § 302(a)(5)(B).

[134] *Id.* § 303(a).

[135] *See* 148 CONG. REC. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney) ("The [statewide registration system and voter] lists maintained by the State will be the official list used to determine who is registered to vote on Election Day.")

[136] *See id.* (stating that the lists will "ensur[e] that costly duplicates that invite voter fraud are quickly removed").

[137] Help America Vote Act of 2002 § 303(d)(1)(A)–(B).

[138] *See* FED. ELECTION COMM'N, DEVELOPING STATEWIDE VOTER REGISTRATION DATABASE: PROCEDURES, ALTERNATIVES, AND GENERAL MODELS 16–19 (1997).

[139] *See id.*

[140] *See id.*

not including maintenance costs.[141] Third, state and local officials must work together to make the system work. While state officials may be more directly involved in creating registration lists, local officials will actually be the ones who use the statewide list to administer elections.[142] Without cooperation and coordination among state and local officials, a statewide registration system cannot improve the administration of elections.[143]

The Help America Vote Act is not simply about making federal elections more accessible and efficient; it also places an equally important emphasis on preventing voter fraud.[144] One of the Act's voter fraud provisions addresses accusations of fraud that arose out of a state court's order to keep crowded polls open after their scheduled closing time.[145] Under the Help America Vote Act, persons allowed to vote in a federal election because of a federal or state court order extending a previously established poll closing time can cast only provisional ballots.[146]

The Help America Vote Act primarily aims to prevent voter fraud by setting new rules for voter registration.[147] All applications for registering to vote in a federal election must contain either the applicant's driver's license number or the last four digits of the applicant's Social Security number.[148] Citizens without either a driver's license number or Social Security number will be issued a number by the state for purposes of identifying the voter registration application.[149]

Perhaps the most controversial aspects of the Help America Vote Act are the requirements for people who register to vote by mail. These requirements apply to new voters who register by mail or are in a state without a computerized registration list.[150] If the new voter wishes to vote in person at the polling station, the voter must present a valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows his or her name and address.[151] A new voter who wishes to vote by mail must submit a copy

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[141] *See id.*

[142] *See id.*; Wayne, *supra* note 52, at A24 (stating that federal elections "are run mostly by county officials, not by those at the federal or state level").

[143] *See* FED. ELECTION COMM'N, *supra* note 138, at 16–19.

[144] *See* 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("We need to change the [voting] system to make it easier to vote and tougher to cheat."); 148 CONG. REC. H7836 (daily ed. Oct. 10, 2002) (statement of Rep. Ney) (stating that the Act's "fundamental principles" are "that every eligible citizen shall have the right to vote" and "that no legal vote will be cancelled by an illegal vote").

[145] *See supra* text accompanying notes 81–82.

[146] Help America Vote Act of 2002, Pub. L. No. 107-252, § 302(c), 116 Stat. 1666, 1708 (to be codified at 42 U.S.C. § 15482). The Act does not specify the conditions under which these ballots would be counted.

[147] *See* 148 CONG. REC. S10,489–90 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("When creating mail registration, Congress recognized the potential for fraud . . . .").

[148] Help America Vote Act of 2002 § 303(a)(5).

[149] *Id.*

[150] *Id.* § 303(a).

[151] *Id.* § 303(b)(2)(A)(i)(I)–(II).

of one of these identifying documents along with his or her ballot.[152] In addition to the identification requirements, the Help America Vote Act also requires mail-in registrants to check a box indicating their American citizenship status.[153] If the applicant does not answer this citizenship question, he or she will be notified of the failure to answer and have the opportunity to complete the form in a "timely manner."[154]

In implementing the Act's Title III provisions, states and localities have discretion to choose how they will implement them.[155] If state and local authorities fail to comply with voting systems standards, provisional voting rules, statewide voter registration list requirements, and procedures for registering by mail, the Attorney General can bring a civil action against the state or local jurisdiction in federal district court for declaratory and injunctive relief to compel violators to comply.[156] In addition, states receiving federal funds under the Help America Vote Act must establish state-based administrative complaint procedures that can be used by people who feel that there has been a violation of Title III.[157] When a complaint is appropriately lodged, there must be a hearing on the record and the state must provide an appropriate remedy.[158] As there is no private right of action,[159] the Department of Justice and state officials must be vigilant in helping to ensure that states and local governments comply with Title III.

Finally, the Help America Vote Act in Title VII improves the mechanism for absentee voting by overseas military personnel, addressing problems that emerged during the 2000 presidential elections.[160] The Help America Vote Act empowers the EAC, along with the Secretary of Defense, to conduct a study to improve voting by members of the armed

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[152] *Id.* § 303(b)(2)(A)(ii)(I)–(II). People who wish to vote either in person or by mail who cannot furnish the proper identification or documents may cast a provisional ballot under a fail-safe provision that allows a voter who would have been wrongfully prevented from voting to cast his or her ballot and have the ballot counted after verification of registration or identity is made. *See id.* § 303(b)(2)(B)(i)–(ii).

[153] *Id.* § 303(b)(4).

[154] *Id.* § 303(b)(4)(B).

[155] *See id.* § 305 ("The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.").

[156] *Id.* § 401.

[157] *Id.* § 402(a)(1), (a)(2)(B).

[158] *Id.* § 402(a)(2)(E)–(F). The state must make a final decision on the complaint within ninety days from the date of the filing of the complaint, unless the complainant agrees to a longer period for a decision. *See id.* § 402(a)(2)(H). If the state finds that there has been no violation, it must dismiss the complaint and publish the results of the procedures used to reach its conclusion. *See id.* § 402(a)(2)(G).

[159] *See id.* § 401 (providing right of action only to the Attorney General). The Attorney General can bring a civil action against any state that does not comply with sections 301 (voting systems standards), 302 (provisional voting) and 303 (computerized statewide voter registration list and mail registration) of the Act. *Id.*

[160] *See id.* §§ 701–07; 148 CONG. REC. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney) (arguing that the Help America Vote Act will give military voters "assistance and information that they need . . . so they can complete and return their ballots on time").

services serving overseas.[161] The Act also guarantees that military personnel will have access to information regarding absentee ballot application deadlines and registering to vote,[162] and it contains provisions to ensure, "to the maximum extent practicable," that a postmark is stamped on absentee ballots collected from overseas.[163]

Perhaps the most important lesson learned in the aftermath of the 2000 elections was that an election controversy could easily recur if voting systems, registration, and administration are not thoroughly improved on a national basis. While money is not a complete solution to these problems, it is a necessity, if for nothing more than to replace aging and inaccurate punch card voting machines. In fact, elections currently "receive about as low a priority as any government service" in terms of government expenditures.[164]

While states are not required to comply with Title I of the Help America Vote Act, they will likely comply with Title I as Title I funds can be used to comply with the mandatory Title III requirements. All states must comply with Title III,[165] which contains standards for election technology and administration.[166] States and localities have expressed a willingness to comply with Title III, but they have also stressed the importance of federal funds in helping them implement the provisions.[167] By themselves, states and localities are unlikely to spend money for modern voting equipment and to improve the administration of elections, as they tend to see presidential elections as a "once-in-four-year process."[168] Local governments are reluctant to upgrade voting machines because of the high costs of acquisition and competing budgetary needs such as funding

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[161] Help America Vote Act of 2002 § 242(a)(1).

[162] *See id.* § 701(d)(i)(1) ("The Secretary of each military department . . . shall, to the maximum extent practicable, ensure that members of the Armed Forces and their dependents who are qualified to vote have ready access to information regarding voter registration requirements and deadlines, and the availability of voting assistance officers to assist members and dependents to understand and comply with these requirements.").

[163] *Id.* § 701(b). *See* 148 CONG. REC. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney) (stating that the Help America Vote Act requires the military "to mark all ballots so it can be determined when they were mailed, so no valid military ballot will be rejected for lack of a postmark").

[164] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 48.

[165] *See id.*

[166] *See supra* text accompanying notes 120–154.

[167] *See* Letter from Larry E. Naake, Executive Director, National Association of Counties, to Representative Ney and Representative Hoyer (Oct. 9, 2002), *reprinted in* 148 CONG. REC. H7838–39 (daily ed. Oct. 10, 2002); Letter from Oklahoma State Senator Angela Z. Monson, President, National Conference of State Legislatures, and Utah Speaker Martin R. Stephens, President-elect, National Conference of State Legislatures, to Senator Robert Byrd (D-W. Va.) and Representative Bill Young (R-Fla.) (Oct. 7, 2002) ("To ensure proper implementation and avoid imposing expensive unfunded mandates on the states, it is critical that the federal government immediately deliver sufficient funding for states to implement the requirements of this bill."), *reprinted in* 148 CONG. REC. H7839 (daily ed. Oct. 10, 2002).

[168] *See* Wayne, *supra* note 52, at A24.

for computers in schools.[169] The need for federal funds is especially acute since states are facing a combined budget deficit of $58 billion for fiscal year 2003.[170]

The Help America Vote Act's provisions reflect an understanding of the utmost importance of voter participation in a democracy. Doubts as to whether one's vote was counted due to mechanical or human error would likely decrease the already relatively low percentage of eligible Americans who vote in elections.[171] On the other hand, free access systems that notify voters who used provisional ballots whether their votes were counted encourage people to vote and give satisfaction to those who were almost prevented from voting due to an error in the voter registration list.[172] As many as three million people across the country were not able to vote in the 2000 election because their names were removed from the registration list or because of other registration errors.[173] Along with more accurate voting equipment, provisional ballot features will decrease the number of people who will wonder whether or not their votes were counted.[174] The positive effects of greater certainty, such as encouraging greater overall

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[169] *See* CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 67. One solution to the budget shortfall is the use of voting machines whose computing power can be provided by personal computers. *See id.* The use of dual use machines can mean that cities need to buy only one set of computers for both voting and educational needs, thus reducing cost. *See id.* Cities will be able to more frequently update their voting technology as the more advanced personal computers bought for schools can be plugged into voting machines. *See id.*

[170] *See* Letter from Oklahoma State Senator Angela Z. Monson and Utah State Speaker Martin R. Stephens, President and President-elect of the National Conference of State Legislatures, to Senator Robert Byrd (D-W. Va.) and Representative Bill Young (R-Fla.) (Oct. 9, 2002), *available at* http://www.constitutionproject.org/eri/NCSL%20letter.doc.

[171] *See* United States v. Mosley, 238 U.S. 383, 386 (1915) (stating that "the right to have one's vote counted" deserves the same protection as "the right to put a ballot in a box"). In the 2000 presidential election, 51.3% of the voting age population and 67.5% of registered voters voted. *See* FED. ELECTION COMM'N, 2000 VOTER REGISTRATION AND TURNOUT, *at* http://www.fec.gov/pages/2000turnout/reg&to00.htm (last visited Apr. 5, 2003). In the 1994 Congressional elections, 38.78% of the voting age population voted. *See* FED. ELECTION COMM'N, NATIONAL VOTER TURNOUT IN FEDERAL ELECTIONS: 1960–1996, *at* http://www.fec.gov/pages/htmlto5.htm (last visited Apr. 5, 2003). In the 2000 presidential election, 51.3% of the voting age population voted. *See* FED. ELECTION COMM'N, 2000 VOTER REGISTRATION AND TURNOUT, *at* http://www.fec.gov/pages/2000turnout/reg&to00.htm (last visited Apr. 5, 2003). While low voter turnout is commonly considered a weakness of American democracy, some argue that it is the result of Americans feeling that whichever major party wins, there will be no danger to their way of life. *See, e.g.*, Thomas Sowell, *High Stakes Elections and Voter Turnout*, CAPITALISM, Oct. 24, 2002 (arguing that democracy is better served by informed voter turnout than by a high level of uninformed turnout), *at* http://www.capmag.com/article.asp?ID=2098 (last visited Apr. 12, 2003).

[172] *See supra* text accompanying notes 131–133.

[173] *See* Herrnson, *supra* note 13, at 152 (citing CALTECH/MIT VOTING TECH. PROJECT, *supra* note 12, at 8–9).

[174] *See* 148 CONG. REC. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney). Representative Ney argued that "[v]oters will . . . have the opportunity to check for errors and verify the accuracy of their ballot . . . before it is cast. [V]oters will be able to leave the polling place confident and certain that their vote was cast and counted . . . ." *Id.*

voter participation, are certain to outweigh the potential negative effects of the Act emphasized by opponents of its new identification requirements.

On the whole, very few legislators opposed the Help America Vote Act. Despite some controversial provisions, the Act is the product of bipartisan compromise. The main thrust of opposition to the Help America Vote Act centered on the identification requirements for first-time voters who registered by mail.[175] Some lawmakers also objected to requiring mail registrants to check off a box indicating their American citizenship.[176] Perhaps aware of the novelty of the identification requirements, the Act requires the EAC to conduct a study of the impact of the identification provisions on voter registration.[177] Opponents argue identification requirements would have a disenfranchising effect on first-time voters, those without the acceptable forms of identification, and minorities.[178] The Congressional Hispanic Caucus ("CHC") was especially vocal in its opposition to both the identification requirements and the citizenship check-off requirement.[179] The CHC argued that the check-off will have "detrimental consequences, intended or not" on the Hispanic and Asian American communities.[180] The CHC was not satisfied with the provision that requires state registrars to notify in a timely way those applicants who failed to check the citizenship box because the notification process is left to the states, allowing state or local registrars to "target voters with Spanish surnames and summarily deny them registration for failure to check the citizenship box."[181] In addition, the Leadership Conference on Civil Rights ("LCCC") argued that "elderly voters and voters with low levels of liter-

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[175] *See supra* text accompanying notes 150–152. The following groups, among others, sent letters to Congress opposing the Help America Vote Act in its entirety and specifically opposing the identification requirements: American Civil Liberties Union; Mexican American Legal Defense and Educational Fund; National Council of La Raza; National Association of Latino Elected and Appointed Officials Education Fund; Lawyers' Committee for Civil Rights Under Law. Copies of these letters are available at CONSTITUTION PROJECT, ELECTION REFORM INITIATIVE—PENDING LEGISLATION, *at* http://www.constitutionproject.org/eri/legislation.htm (last visited Apr. 5, 2003). *See also* 148 CONG. REC. H7844 (daily ed. Oct. 10, 2002) (statement of Rep. Charlie Gonzalez (D-Tex.)) (arguing against the provision because "[f]or the first time in the United States election history, an ID requirement is mandated").

[176] *See supra* text accompanying notes 153–154.

[177] Help America Vote Act of 2002, Pub. L. No. 107-252, § 244(a)–(b), 116 Stat. 1666, 1689 (to be codified at 42 U.S.C. § 15384).

[178] 148 CONG. REC. S10,499 (daily ed. Oct. 16, 2002) (statement of Sen. Hillary Rodham Clinton (D-N.Y.)). Senator Clinton has argued that the provisions would "disproportionately affect ethnic and racial minorities, . . . the poor, the homeless, and the millions of eligible New York voters who do not have a driver's license . . . ." *Id. See also* Letter from Raul Yzaguirre, President of the National Council of La Raza, to Members of Congress (Oct. 10, 2002), *available at* http://www.constitutionproject.org/eri/Nat.%20Council%20of%20La%20Raza.pdf.

[179] *See* Letter from the Congressional Hispanic Caucus of the House of Representatives, to Dennis Hastert, Speaker of the House of Representatives (Oct. 9, 2002), *available at* http://www.constitutionproject.org/eri/Congressional%20Hispanic%20Caucus.pdf.

[180] *Id.*

[181] *Id.*

acy, who find filling out forms difficult, will be likely to inadvertently fail to check the boxes and will . . . disproportionately be kept off the registration rolls."[182] The Act's identification requirements could thus have the unintended consequence of decreasing voter turnout, presumably by both discouraging people from voting or registering in the first place and by preventing those who actually come to polling stations from voting.[183]

Many critics of the Help America Vote Act's mail-in registration provisions still supported the passage of the Act as a whole. Some legislators who opposed the identification and citizenship check-off requirements nonetheless voted for the Act.[184] Representative Robert Menendez (D-N.J.) said that the "new [identification] requirements add burdensome responsibilities in the process of voter registration and ultimately discourage voters."[185] Representative John Conyers (D.-Mich.) vowed to take "corrective action" with respect to these requirements if necessary.[186] The National Association for the Advancement of Colored People ("NAACP") said that while it was "respectful of the anti-fraud intent of" the provision, such a requirement has had a "disparate negative impact on voters with disabilities, African Americans, Hispanic Americans, Asian Americans and Native Americans."[187] Nevertheless, the NAACP also supported the Act,[188] despite opposing the identification requirement for first-time voters who register by mail.[189] Other critics joined their stance, despite

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[182] *See* Letter from Dr. Dorothy I. Height, Chairperson, and Wade Henderson, Executive Director, Leadership Conference on Civil Rights, to Members of Congress (Oct. 9, 2002), *available at* http://www.constitutionproject.org/eri/legislation.htm.

[183] 148 CONG. REC. S10,499 (daily ed. Oct. 16, 2002) (statement of Sen. Clinton) (arguing that "this provision will repress voter participation among those New Yorkers who are in fact eligible to vote").

[184] *See, e.g.*, 148 CONG. REC. H7843 (daily ed. Oct. 10, 2002) (statement of Rep. John Conyers (D-Mich.)). Representative Conyers, stating that "voter ID provisions, citizen check-offs, [and] Social Security number[ ]" requirements made the Act "not a perfect bill," vowed "to watch it carefully in the next Congress." *Id.*

[185] *Id.* at H7844–45 (statement of Rep. Menendez). Representative Menendez added,

> I intend to vote for the bill because there are many good provisions in it . . . but we want to wave our sabers now and let it be understood that we intend to follow this process every step of the way . . . to make sure that no citizen, particularly citizens of Hispanic descent, enter this democratic process with greater difficulty . . . .

Id.

[186] *Id.* at H7843 (daily ed. Oct. 10, 2002) (statement of Rep. Conyers).

[187] *Id.*

[188] *See* Letter from Hilary O. Shelton, Director, National Association for the Advancement of Colored People, to Members of the Senate (Oct. 8, 2002) (stating that the Act contains "many of the elements we saw as essential to addressing several of the flaws in our Nation's electoral system" and vowing "to remain vigilant and review the progress of this new law at the local and state levels to ensure that no provision, especially the voter identification requirements, are [sic] being abused to disenfranchise eligible voters"), *reprinted in* 148 CONG. REC. H7840 (daily ed. Oct. 10, 2002).

[189] *See* Letter from Hilary O. Shelton, Director, National Association for the Advancement of Colored People, to Members of the Senate (Feb. 22, 2002) (on file with

their concerns that identifi-cation requirements would burden vulnerable groups disproportionately, because they believed that the bill overall was a positive force for improving election standards and administration.[190]

On the other hand, supporters of the identification requirements for mail-in registrants argued that such rules were necessary to protect against election frauds such as "ghost voting."[191] Ghost voting occurs when a person votes multiple times by using fictitious names to register non-existent people to vote.[192] Supporters of the Act also argued that the acceptable pieces of identification were widely available and that the identification requirements were no tougher than identification requirements to receive food stamps.[193] In addition, they noted that the identification requirements apply to all people seeking to register by mail, regardless of race or income level.[194]

Identification rules meant to ensure fairness and transparency should not be seen as insidious obstacles to voter participation.[195] Voting is perhaps a citizen's most important civic duty and privilege.[196] In return for the privilege of exercising this important right, it is not too burdensome to ask citizens to adhere to basic identification requirements that seek to

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author).

[190] *See supra* notes 184–185.

[191] *See* 148 CONG. REC. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

[192] *See id.* According to Representative Ney,

> People should not be permitted to register by mail and then vote by mail without ever having to demonstrate . . . that they are the actual human being who is eligible to vote . . . . This provision will help to end the practice of ghost voting . . . . [A] person whose vote is cancelled out by an illegal vote has been disenfranchised every bit as much as an individual who has simply also been turned away from the polls.

Id.

[193] *See* 148 CONG. REC. S10,489–90 (daily ed. Oct. 16, 2002) (statement of Sen. Bond). Senator Bond further argued that if identification requirements were justified to prevent welfare fraud, they were all the more justified to prevent voter fraud. *See id.* at S10,490.

[194] *Id.* at 10,489–90 (arguing that "[t]he required pieces of identification include items widely available to all citizens, including the disabled, the poor, new citizens, students and minorities").

[195] *Compare* Tom Fiedler, *Who's Responsible for a Tainted Ballot?*, 13 U. FLA. J. L. & PUB. POL'Y 63, 67 (2001) (arguing that a legal challenge of the Florida legislature's mandate that every precinct post a list of voter responsibilities was "nonsense"), *with* 148 CONG. REC. S10,499 (daily ed. Oct. 16, 2002) (statement of Sen. Clinton) (arguing that comparing "[the identification] provisions to poll taxes and literacy tests" of the Jim Crow era was not "an unfair analog because . . . [the provisions] may indeed reduce voter participation"). The Florida Equal Voting Rights Project, which filed the Florida lawsuit challenging the voter responsibilities list, made just such a comparison. *See* Fiedler, *supra*, at 67. Its complaint argued that the list—which included knowledge of how to operate the voting machine and an admonition to ask questions if confused—could intimidate voters and was analogous to literacy tests. *See id.*

[196] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[S]ince the right to [vote] . . . is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

make voting fairer for everyone. In fact, it seems that, in exercising the right to vote, citizens should expect to incur some costs, such as physically going to a community polling station, waiting in line if necessary, presenting proper identification, and thoroughly reading directions before voting.[197] The "solemnity of the occasion" requires voters to take care and conscientiously exercise the right to vote.[198] It should be the citizen's responsibility to carefully follow the directions on a registration application and to make sure to check the citizenship box. It seems reasonable to assume that most citizens know that if they make a mistake with a ballot, they can obtain a new one.[199] These minor tasks can hardly be called burdens; rather, they should be seen as simple, yet profoundly important, responsibilities that citizens must fulfill to be able to participate in the democratic system.

An additional objection that has been raised against the Help America Vote Act is that it tramples on the principles of federalism by stripping states of their traditional authority to administer elections. It is true that the Help America Vote Act imposes uniform standards on states regarding: (1) using voting machines that allow voters to review and correct ballots they cast;[200] (2) using voting machines that produce a paper record for audit purposes;[201] and (3) using voting machines that comply with error rates established by the FEC.[202] Nevertheless, each state may comply with these provisions in a way that it sees fit. None of the standards put forward under the Help America Vote Act will fundamentally alter the decentralized character of the administration of federal elections. For example, while all states must adopt a "uniform definition of what constitutes a vote,"[203] this provision does not establish a single, federally mandated definition of a vote. Instead, the Act only requires uniformity within a state and allows for the possibility of fifty different standards for what constitutes a vote.[204] This allowance reflects Congress's desire to

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[197] In *Nelson v. Robinson*, a Florida court dismissed the claim of a group of candidates' challenging an election where an arguably confusing ballot design had been used. Nelson v. Robinson, 301 So. 2d 508, 511–12 (Fla. Dist. Ct. App. 1974). The court said that while several voters were confused by the ballot, "mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out," as the state constitution "assumes [a voter's] ability to read and his intelligence to indicate his choice with the degree of care commensurate with the solemnity of the occasion." *Id. See also* Sowell, *supra* note 171 ("Can people who can't be bothered to register in advance, or to mark their ballots correctly in the voting booth, be trusted with preserving a nation and a heritage for which many Americans before them have fought and died?").

[198] *See Nelson*, 301 So. 2d at 512.

[199] *Cf.* Bragg & Canedy, *supra* note 8, at A1 (reporting that some Florida voters did not know they could receive a new ballot after mistakenly punching the wrong hole).

[200] Help America Vote Act of 2002, Pub. L. No. 107-252, § 301(a)(1)(A)(i)–(ii), 116 Stat. 1666, 1704 (to be codified at 42 U.S.C. § 15481).

[201] *Id.* § 301(a)(2)(B)(i).

[202] *Id.* § 301(a)(5).

[203] *Id.* § 301(a)(6).

[204] *Id.* ("*Each* state shall adopt uniform and nondiscriminatory standards . . . .") (em-

disperse responsibility for election administration to make it "impossible for a single centrally controlled authority to dictate how elections will be run and thereby be able to control the outcome."[205] Decentralization also places accountability for election failures on local authorities.[206]

Alternatively, perhaps the problem is too much federalism. Maybe it is time for states to obey uniform federal rules without any discretion in implementing them. Creating a uniform federal scheme for regulating elections would raise difficult constitutional problems, however, given that recent Supreme Court decisions have restricted federal authority to oblige states to participate in federal regulatory schemes[207] and that the Constitution expressly gives states a role in the administration of federal elections.[208] Moreover, local governments will be more, or at least equally, responsive to the anger and frustration of voters than the federal government.[209] Local officials are in much closer proximity to potentially angry voters than federal officials are, and thus they have the incentive to improve election administration.

Citizens need to have common experiences to become bonded together as a nation,[210] and voting should be one of those experiences. There is something solemn and meaningful about citizens going to their local precinct, waiting in line with others, and casting a ballot for President of the United States or the local school superintendent. The Help America Vote Act will justly improve the way federal elections are carried out, but it can only facilitate the voting process for Americans. The willingness to take the time to vote and care in exercising that right must come from the people themselves.

—*Brian Kim*

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phasis added).

[205] 148 CONG. REC. H7838 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

[206] *See id.* (arguing that the provision will mean that "local authorities . . . cannot . . . point the finger of blame at some distant, unaccountable, centralized bureaucracy").

[207] *See, e.g.*, Printz v. U.S., 521 U.S. 898, 907 (1997) (holding that Congress has no power "to impress the state executive into its service").

[208] *See* U.S. CONST. art. I, § 4 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."); U.S. CONST. art. II, § 1 (stating that presidential electors shall be appointed by the states "in such manner as the Legislature thereof may direct," and giving Congress authority only to "determine the time of choosing the electors, and the day on which they shall give their votes").

[209] *Cf.* N.Y. v. U.S., 505 U.S. 144, 168 (1992) ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

[210] *See* Garrison Keillor, *Who Do They Think They Are?*, TIME, Dec. 2, 2002, at 110 (arguing that the current generation lacks common experiences that past generations of all social classes experienced).