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ARTICLE

THE SLEEPER SCENARIO: TERRORISM-SUPPORT LAWS AND THE DEMANDS OF PREVENTION

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September 11 gave rise to a number of new and significant issues, many of which present serious challenges for federal criminal law enforcement. In this Article, Professor Robert Chesney explores how the Department of Justice has used terrorism-support laws to respond to these challenges. In Part I, he describes the evolution of these laws from the early 1980s to 9/11 and beyond. In Part II, he situates these laws in context with the emerging emphasis on prevention within the Justice Department and the related phenomenon of competition from the Defense Department with respect to the incapacitation of potential terrorists in the United States. Part III then critiques the support laws from a civil liberties and a national security perspective. Professor Chesney concludes in Part IV by proposing several legislative reforms designed to remedy these flaws.

> Our biggest problem is we have people we think are terrorists. They are supporters of al Qaeda . . . . They may have sworn jihad, they may be here in the United States legitimately and they have committed no crime . . . . And what do we do for the next five years? Do we surveil them? Some action has to be taken.[1]

September 11 has had a significant but largely unnoticed impact on the substance of federal criminal law. In cases involving potential terrorists who cannot be linked to specific plans to commit violent acts—i.e., suspected "sleepers"[2]—prosecutors have evolved a capacity for preventive

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[1] Robert Mueller, Federal Bureau of Investigation, Director, *quoted in FBI Chief: 9/11 Surveillance Taxing Bureau*, WASH. POST, June 6, 2002, at A1.

[2] This Article assumes that a "sleeper cell" can consist of citizens or of non-citizens within the United States. *Cf.* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 263 (2004) [hereinafter 9/11 COMM. REP.] (implying a distinction between a "sleeper cell" and a group consisting of "foreigners who had infiltrated into the United States"), *available at* http://www.9-11commission.gov/

criminal prosecutions. In particular, prosecutors have creatively interpreted existing laws banning the provision of assets and other forms of support to terrorist organizations and individuals in order to make it a crime to be an active member of or to receive training from such groups.

This development goes to the heart of one of the central dilemmas generated by the demands of prevention in post-9/11 America: Are terrorists criminals who should be incapacitated through the civilian law enforcement process? Are they enemy belligerents engaged in war crimes who should be incapacitated through military detention, even when operating within the United States? Or are they something in between for which we lack both a legal framework and an adequate vocabulary?

Potential sleepers reside in the grey area between crime and war, revealing the ambiguity of these familiar concepts. Until these ambiguities are resolved, a degree of institutional competition between the Justice and Defense Departments will persist as both strive to satisfy the prevention imperative. The Justice Department's effort to establish grounds to prosecute in the sleeper context reflects that reality.

Starting from the premise that it is undesirable to encourage the expansion of the military's counterterrorism role within the United States in circumstances where the criminal justice system can act effectively,[3] this Article has three aims: (1) to demonstrate the nature and significance of the impact of 9/11 on federal criminal law enforcement; (2) to appraise the terrorism-support laws that provide the foundation for the Justice Department's terrorism-prevention efforts (focusing in particular on 18 U.S.C. § 2339B, the law banning the provision of "material support or resources" to "designated foreign terrorist organizations");[4] and (3) to propose constructive reforms designed both to ameliorate the civil liberties concerns associated with the support laws and to close significant gaps in their existing coverage. These proposals would not entirely resolve the dilemma posed by potential sleepers; even with them, situations may arise in which concerns about gathering intelligence or protecting sources thereof tempt policymakers away from the civilian alternative. These reforms would substantially improve the status quo from both the civil liberties and national security perspectives, however, and by doing

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report/index.htm.

[3] This Article is not intended to suggest that the military paradigm should not be applied or should be disfavored with respect to terrorists outside the United States. The use of military force to deal with al Qaeda in Afghanistan, for example, is a wholly appropriate and necessary measure. By the same token, Northern Command serves an essential function with respect to situations within the United States that exceed the capacities of civilian authorities, as may arise in the aftermath of an incident involving a weapon of mass destruction or a hijacking. *See Interview: General Bernard Trainor Explains the Pentagon's New Northern Command* (NPR Morning Edition, Apr. 18, 2002), *available at* 2002 WL 3187844.

[4] 18 U.S.C. § 2339B (Supp. 2001).

so would provide a more stable foundation for the use of the criminal justice system for terrorism prevention within the United States.

Parts I and II lay the groundwork for these arguments. Part I provides the reader with a thorough review of the origins and evolution of the terrorism-support laws. This legislative history provides the backdrop for Part II, which describes the impact of 9/11 in terms of two changes: the adoption of a prevention paradigm within the Justice Department and the emergence of institutional competition, albeit of a coordinated variety, between prosecutors and the military with respect to the incapacitation of suspected terrorists within the United States. With the help of a comprehensive survey of charging decisions in post-9/11 terrorism-related cases (attached as an online appendix to this Article), this Article contends that these factors have led federal prosecutors to adopt creative interpretations of terrorism-support laws enabling them to act in the sleeper scenario.

Part III critiques the terrorism-support laws from both a civil liberties and a national security perspective. A review of the constitutional issues that have been raised by courts over the past three years illustrates that some, but not all, of the many civil liberties arguments have exhibited sufficient traction in the courts to render the support laws somewhat unreliable as grounds for prosecution. At the same time, these laws also can be criticized from a national security perspective on the grounds that they are too narrow and fail to account for emerging trends in the nature of the terrorist threat.

Having reviewed these weaknesses, this Article concludes in Part IV with a battery of legislative reform proposals. Among other things, this Article recommends that Congress:

- make it a crime for a person subject to U.S. jurisdiction to receive firearms or explosives training while outside the United States from any source without an ex ante license;
- make it a crime for a person subject to U.S. jurisdiction to join a designated foreign terrorist organization as an active member with the specific intent to further the illegal ends of the organization; and
- incorporate a panoply of safeguards into the existing terrorism-support laws, including the adoption of a graduated scale of punishment corresponding to the defendant's mens rea in material support cases.

Congress and the Justice Department have begun to attend to the problems associated with the status quo, but existing reform proposals fall short of what is needed to accommodate the demands of prevention in a sustainable manner. In order for the criminal justice system to continue to play an effective role as an alternative to military detention in the sleeper scenario, more substantial changes along the lines suggested in this Article are required. Better to consider them now, moreover, than to await what might follow in the aftermath of another attack.

I. THE ORIGINS AND SCOPE OF THE TERRORISM-SUPPORT LAWS

The material support law is one part of a matrix of terrorism-support laws that have accrued over many years through the painstaking efforts of individuals in the executive and legislative branches intent on putting a stop to the phenomenon of U.S. persons providing support, well-intentioned or otherwise, to foreign terrorist organizations. The history of how these authorities evolved provides indispensable context for understanding their scope and the distinctive quality of their use in post-9/11 terrorism-related cases.

A. Presidential Emergency Powers

America's terrorism-support laws have evolved out of the more general category of laws enabling the executive branch to use economic sanctions or embargoes as instruments of foreign policy and national security, a practice traceable to the earliest days of the republic.[5] The modern form of this practice originated with a World War I-era statute known as the Trading With the Enemy Act (TWEA), which provided the basic legal framework for this practice.[6] During wartime, TWEA both made it a crime to engage in specified forms of commerce with America's enemies,[7] and delegated to the President the power to regulate or prohibit a variety of other economic transactions with both enemies and allies.[8] But this power did not stay confined to wartime for long. In 1933, President Roosevelt purported to invoke TWEA as the authority for his "bank holiday" order,[9] notwithstanding the fact that the United States was then at peace. Congress promptly ratified his action by amending TWEA to permit the President to exercise delegated powers whenever an "emergency" arose, whether in wartime or not.[10]

Subsequent events, particularly those relating to World War II and the Cold War, provided ample occasion for recognition of emergencies and the corresponding imposition of sanctions on foreign states.[11] Reacting to a perception that TWEA authority had gotten out of hand, the reform-minded Congress of the mid-1970s attempted to rein in executive emergency powers through a series of measures. The National Emergen-

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[5] *See, e.g.*, An Act Laying an Embargo on all Ships and Vessels in the Ports and Harbors of the United States, 2 Stat. 451 (1807).

[6] *See* Trading With the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1–44 (2000)).

[7] 50 U.S.C. app. § 3

[8] *Id.*

[9] *See* Proclamation No. 2039, 48 Stat. 1691 (Mar. 6, 1933).

[10] Act of March 9, 1933, Pub. L. No. 73-1, 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. §§ 1–44 (2000)).

[11] *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1401 (1989).

cies Act (NEA), for example, peremptorily ended all existing declarations of national emergency, and set forth procedural requirements involving congressional notification and review for new declarations going forward.[12] And in 1977, Congress deleted the portion of TWEA that gave the President broad authority to impose sanctions during peacetime emergencies, replacing it with a somewhat similar but more specifically defined authority when it enacted the International Emergency Economic Powers Act (IEEPA).[13]

IEEPA has a two-step structure. First, in a marginal improvement over the old TWEA approach, it specifies that the President can exercise IEEPA powers only under certain circumstances. Under § 1701(a), the President may use IEEPA powers upon a formal declaration of a national emergency (complying with NEA procedures)[14] stemming from "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[15] Second, IEEPA specifies that upon a properly declared emergency, the President may seize certain assets of foreign states or individuals and may regulate or expressly prohibit a wide array of economic transactions with foreign states or individuals.[16] IEEPA, in short, authorizes the President to impose whole or partial economic embargoes during emergencies.

B. Initial Proposals To Criminalize Assistance to Terrorism

The question soon arose whether IEEPA might be useful in connection with the emerging problem posed by terrorist attacks against U.S. interests. In the context of state-sponsored terrorism—the dominant form in the 1980s—the answer clearly was yes. In 1986, for example, Presi-

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[12] *See* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1978) (codified as amended at 50 U.S.C. §§ 1601–1651 (2000)). Among other things, NEA requires public disclosure of the declaration of emergency (via publication in the Federal Register) and periodic reporting to Congress regarding activities and spending undertaken pursuant to the emergency.

[13] *See* International Emergency Economic Powers Act, 50 U.S.C. § 1705 (2000); *see* Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philosophy*, 45 WM. & MARY L. REV. 1341, 1356–57 (2004).

[14] *See* National Emergencies Act, 50 U.S.C. § 1631 (2000) (requiring a President acting under statutory authorities granted by a declaration of national emergency to specify the source of such authorities).

[15] 50 U.S.C. § 1701(a) (2000).

[16] *See* 50 U.S.C. § 1702 (2000) (amended 2001). IEEPA carves out limited exceptions to this embargo power, however, for personal communications that do not transfer value, humanitarian donations (to a limited extent), the exchange of informational materials not already subject to restrictions from other laws, and transactions incident to travel. *See* 50 U.S.C. at § 1702(b) (2000). Willful or attempted violations of IEEPA regulations subject the offender to a maximum sentence of ten years' imprisonment. *See* 50 U.S.C. § 1705 (2000).

dent Reagan invoked IEEPA on multiple occasions to sanction Libya in connection with its sponsorship of terrorist attacks.[17] The next question was whether IEEPA could also be used to target terrorist organizations or individuals directly.

This issue arose in the early 1980s as part of a broader examination of U.S. criminal laws relating to U.S. citizens providing support to terrorists. This topic initially reached the national agenda as a result of revelations about the activities of former CIA agents Edwin Wilson and Frank Terpil.[18] Wilson had extensive experience smuggling arms and other equipment, and along with Terpil eventually became involved in shipping a variety of dangerous materials to Libya, including plastic explosives. Their activities grew to include the provision of former special forces members to train Libyan commando units. When the FBI became aware of these activities, it was initially unclear whether there were grounds to prosecute the rogue ex-agents.[19] Ultimately Wilson was prosecuted and convicted on a variety of grounds,[20] but in the meantime the idea had taken hold that there might be a gap in the coverage of federal law relating to support for terrorism.[21]

The first legislative consequence was the International Security and Development Cooperation Act,[22] a 1981 law requiring the Reagan Administration to submit a report to Congress within six months describing and assessing the sufficiency of "all legislation . . . and administrative remedies . . . which can be employed to prevent the involvement, service, or participation by United States citizens in activities in support of terrorism or terrorist leaders."[23]

The administration eventually responded in the form of a letter from Powell A. Moore, Assistant Secretary of State for Congressional Relations.[24] The Moore letter began by defining "involvement, service, or par-

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[17] *See* Exec. Order No. 12,543, 3 C.F.R. 181 (1986), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001); Exec. Order No. 12,544, 3 C.F.R. 183 (1986), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

[18] Except as otherwise indicated, this account of Wilson's story derives from PETER MAAS, MANHUNT (1986).

[19] *Antiterrorism and Foreign Mercenary Act: Hearing Before the Subcomm. on Security and Terrorism of the S. Comm. on the Judiciary*, 97th Cong. 2 (1982) [hereinafter *Antiterrorism and Foreign Mercenary Act Hearing*] (statement of Rep. Rinaldo) (describing Rinaldo's surprise when he learned of Wilson's activities, and his concern that such activities might not be illegal).

[20] *See* United States v. Wilson, 721 F.2d 967 (4th Cir. 1983) (outlining convicted offenses and affirming convictions on charges of violating the Arms Export Control Act).

[21] *See, e.g., Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 2–5 (statements of Rep. Rinaldo and Sens. Denton and Humphrey).

[22] International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519 (1981) (codified as amended in scattered sections of 22 U.S.C.).

[23] *Id.* § 719. Section 719 also expressed Congress's concern that "the United States should take all steps necessary to ensure that no United States citizen is acting in the service of terrorism or of the proponents of terrorism." *Id.*

[24] *See Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 70–77 (letter from Asst. Sec'y for Cong. Relations Powell A. Moore, U.S. Dep't of State, to Sen.

ticipation" to include—in addition to actual participation in an attack or conspiracy to carry out an attack—the provision of "weapons, training, or other technical assistance with the likelihood that such assistance will be used in a terrorist attack."[25] It then described three clusters of laws that might apply in such circumstances.

The first was the Arms Export Control Act (AECA),[26] which delegated authority to the Executive branch to enact regulations concerning the export of military materials and services, including through the use of ex ante licensing procedures.[27] Under this authority, the Department of State had promulgated a set of licensing and embargo rules relating to military materials and services—the International Traffic in Arms Regulations (ITAR)[28]—pursuant to which exports of specified military equipment and services could be denied on national security or foreign policy grounds.[29] Moore noted that the administration at that time was considering whether to amend ITAR so that the definition of prohibited "services" might be "broadened to encompass the training of foreign military forces and the participation of U.S. nationals in foreign military activities generally," thus subjecting such activity to an ex ante licensing requirement backed by criminal and civil penalties.[30]

Notably, Moore next drew attention to the potential applicability of IEEPA regulations to terrorist organizations. He argued that IEEPA in theory could be used to impose "a virtually total ban on activity supportive of foreign terrorists [or] terrorist groups . . . by persons subject to U.S. jurisdiction."[31] But he cautioned that "because IEEPA properly can be used only in extraordinary emergency situations, it does not provide a reliable means to regulate such activities by U.S. citizens under most circumstances."[32]

Charles H. Percy, Chairman of the S. Comm. on Foreign Relations (Sept. 14, 1982)) [hereinafter *Moore Letter*].

[25] *Id.* at 71.

[26] Arms Export Control Act of 1968, 22 U.S.C. §§ 2751–2799 (2000). AECA authority supplanted similar authority once given to the president under § 414 of the Mutual Security Act of 1954. Mutual Security Act of 1954, 22 U.S.C. § 1755 (1958) (repealed 1961). The AECA was one of several laws ultimately used to prosecute Edwin Wilson. *See* United States v. Wilson, 721 F.2d 967 (4th Cir. 1983).

[27] *See* 22 U.S.C. § 2751 (2000).

[28] 22 C.F.R. § 120.1 (2004).

[29] *Id.*

[30] *Moore Letter*, *supra* note 24, at 72–73. ITAR subsequently was amended to impose an ex ante licensing requirement on any "[m]ilitary training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad . . . . training aid, orientation, training exercise, and military advice." 22 C.F.R. §§ 120.9(a)(3), 124.1(a) (2004). Note that this prohibition does not address the receipt of training by U.S. persons, in keeping with the concerns of the pre-9/11 era.

[31] *Moore Letter*, *supra* note 24, at 74.

[32] *Id.*

Next, Moore addressed TWEA. He acknowledged that since IEEPA's enactment, the President's authorities under TWEA arose only during time of war.[33] With that caveat, however, he observed that TWEA, when applicable, also could be used "for preventing and combating involvement or participation by U.S. persons in activities in support of international terrorism or terrorist leaders."[34]

After discussing other, more tangential statutory authorities,[35] Moore's letter turned to the subject of what new legislation might be desirable to close remaining gaps.[36] Pending legislation in the House (House Bill 5211)[37] and Senate (Senate Bill 2255),[38] he noted, "appear[ed] to provide a starting point."[39]

Those bills called for enactment of the Antiterrorism and Foreign Mercenary Act, which among other things would make it a crime

> for an American, on behalf of a foreign state, faction, or international terrorist group named by the President in a proclamation, to serve in its armed forces or intelligence agency; provide training to persons so serving; provide any logistical, maintenance or similar support; conduct any research, manufacturing or construction project directly related to its military functions; or recruit any other person to do any of the above.[40]

When the Senate Judiciary Committee's Subcommittee on Security and Terrorism[41] held hearings on the proposal on September 23, 1982, representatives of the Justice and State Departments objected to certain details

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[33] *See supra* note 14.

[34] *Id.*

[35] *Id.* at 74–75 (discussing the Export Administration Act, 50 App. U.S.C. § 2401 (2000), the Hostage Act, 22 U.S.C. § 1732 (2000), and the Neutrality Laws, 18 U.S.C. §§ 951–70 (2000)).

[36] The Justice Department, Moore indicated, "believes that while existing laws are workable, there are some gaps which should be closed in order to facilitate a better federal investigative and prosecutive response to the problems caused by international terrorism." *Id.* at 76.

[37] H.R. 5211, 97th Cong. (1982).

[38] S. 2255, 97th Cong. (1982).

[39] *Id.*; *see also Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 12–15 (letter from Asst. Att'y Gen. Robert A. McConnell, Office of Legis. Affairs, to Rep. Matthew J. Rinaldo (Feb. 16, 1982)) (indicating that numerous statutory authorities existed for charging Wilson and Terpil in connection with their aid to Libya, but also noting that it might be useful to enact a "regulatory scheme similar to the Arms Export Control Act" to fill any gaps). *Id.* at 15.

[40] *Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 3 (statement of Rep. Thomas Rinaldo) [hereinafter *Rinaldo Statement*].

[41] Some critics were quite disturbed by the establishment of this subcommittee in 1981, questioning the significance of the terrorist threat. *See* Tom Wicker, *In the Nation; The Great Terrorist Hunt*, N.Y. TIMES, May 5, 1981, at A23 (drawing a connection between this committee and the House Un-American Activities Comm.).

of the legislation but endorsed the bill at a general level.[42] Nonetheless, no further action was taken on the bill during the 97th Congress.[43]

In 1984, the Reagan Administration urged Congress to return to this issue in response to the onslaught of bombings and kidnappings in the Middle East that followed in the wake of American intervention in Lebanon. In April, President Reagan transmitted a package of legislative proposals including the Prohibition Against the Training or Support of Terrorist Organizations Act of 1984,[44] later introduced as Senate Bill 2626[45] and House Bill 5613.[46] These bills expanded somewhat on the 1982 initiatives, proposing a ten year maximum sentence for "serv[ing] in, or act[ing] in concert with, the armed forces or any intelligence agency of any foreign government, faction, or international terrorist group" designated as a national security threat by the Secretary of State, or for providing training, support, or services thereto.[47]

In contrast to the qualified support given to the 1982 legislation, the Justice Department fully endorsed this administration-sponsored measure.[48] But the bills nonetheless drew intense opposition from other quarters.[49] Senator Howard Metzenbaum, for example, denounced the bill as "a throwback to the McCarthy era,"[50] suggesting that the bill might apply

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[42] *See generally Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19 (statements of Mark Richard, Deputy Asst. Att'y Gen., Crim. Div., Just. Dept., and Jeffrey Smith, Asst. Legal Adviser, Law Enforcement and Intelligence, State Dept.).

[43] Representative Rinaldo, sponsor of the House bill, expected as much. *See Rinaldo Statement*, *supra* note 40, at 2 ("Certainly we understand that we are in the waning days of this session. But, if not in this session, at least in the next session . . . .").

[44] *See* Ronald Reagan, President's Message to the Congress Transmitting Proposed Legislation to Combat International Terrorism (Apr. 26, 1984), *available at* http://www.reagan.utexas.edu/resource/speeches/1984/42684a.htm). The President's message also referenced the proposed revisions to the ITAR regulations, mentioned in the Moore Letter, designed to preclude U.S. persons from providing military training to foreign persons. *See id.*

[45] S. 2626, 98th Cong. (1984).

[46] H.R. 5613, 98th Cong. (1984).

[47] Legislative Initiatives to Curb Domestic and International Terrorism: Hearing Before the Subcomm. on Security and Terrorism of the S. Comm. of the Judiciary, 98th Cong. 28–36 (1985) [hereinafter Legislative Initiatives] (text of S. 2626, 98th Cong. (1984)). As Deputy Assistant Attorney General of the Criminal Division at the Justice Department Victoria Toensing explained in her testimony in support of the bill, the legislation not only would make it "a crime for an American to serve as a member of a terrorist group" but also would reach those who "participate in terrorist groups which are not tightly organized" and whose "association may at times be more in the nature of affiliation." *Id.* at 53 (June 6, 1984) (statement of Victoria Toensing).

[48] *See id.* at 52 ("S. 2626 is the most important bill in the package.") (statement of Victoria Toensing).

[49] *See id.* at 142–55 (statement of Joseph M. Hassett). *See also* John M. Goshko, *Shultz Seeks Penalty for Aiding Terrorists*, WASH. POST, June 14, 1984, at A7 (describing opposition to the bill from "many members of the House Foreign Affairs Committee"); Stuart Taylor Jr., *Reagan Sends Congress Four Bills Aimed at International Terrorism*, N.Y. TIMES, Apr. 27, 1984, at A1 (describing objections stated by ACLU Chief Legis. Counsel Jerry J. Berman).

[50] *Legislative Initiatives*, *supra* note 47, at 37.

to speech supporting the lawful aims of a designated group, that it might make fundraising for a designated group illegal, and that it might not be possible to challenge the Secretary's designation.[51] Others questioned the discretion afforded to the Secretary of State in the designation process, and the extent to which the bill might apply to protected expression.[52] When Secretary of State George Shultz testified before a House committee in June 1984, representatives "peppered [him] with problematic cases .... What definitions would distinguish between Afghan rebels and Nicaraguan contras on one hand, and Salvadoran rebels on the other?"[53] Leading newspapers weighed in on the same point on their editorial pages:[54]

> If—use your imagination—a President Mondale were to appoint a Jesse Jackson Secretary of State, is it not possible that the Nicaraguan rebels might be designated terrorists? Wouldn't it be reasonable to conclude that supplying food and military uniforms is a service in support of those terrorists? Such acts are not now criminal, but they might be if the administration's own anti-terrorism bill becomes law without amendment.[55]

Congress eventually passed the other aspects of President Reagan's 1984 antiterrorism initiatives, but the support provision died in committee.[56] One of the bill's original Senate sponsors, Jeremiah Denton, had come to the conclusion that the bill was "too loosely written" in that it "seemed to

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[51] *Id.*; *see also id.* at 38 (warning that the bill might apply to those sympathetic to Irish republicanism or the abolition of apartheid in South Africa). *But see Legislative Initiatives*, *supra* note 47, at 54–55 (statement of Victoria Toensing) (denying that the language covered First Amendment activities, and noting that the designation process paralleled the discretion delegated to the Executive by the Arms Control Export Act, 22 U.S.C. §§ 2751–2799 (2000), the Export Administration Act, 50 App. U.S.C. §§ 2401 et seq. (2000), International Emergency Economic Powers Act, 50 U.S.C. § 1705 (2000), and various other statutes).

[52] *Legislative Initiatives*, *supra* note 47, at 100–01, 103–04 (statement of Sen. Patrick Leahy).

[53] *A Question of Definition*, TIME, June 25, 1984, at 19. The implicitly positive reference to Afghan rebels is, of course, somewhat ironic.

[54] Much of the following discussion of the legislative history appeared originally in testimony I gave to the Senate Judiciary Committee in May 2004. *See Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute, Before S. Judiciary Comm.*, 108th Cong. (May 5, 2004) [hereinafter *Aiding Terrorists Hearing*] (statement of Robert M. Chesney).

[55] Editorial, *One Man's Freedom Fighter . . .*, WASH. POST, July 20, 1984, at A20. *See also* Editorial, *Anti-Terrorism (Cont'd.)*, WASH. POST, May 9, 1984, at A30; Editorial, *Bad Legislation*, WASH. POST, May 1, 1984, at A14; Editorial, *Resisting Terror—And Lawlessness*, N.Y. TIMES, Apr. 29, 1984, at E20.

[56] *See* Editorial, *A Crime to Aid the Contras?*, WASH. POST, Dec. 18, 1984, at A18; Larry Margasak, *Denton To Push for Law Against Americans Helping Terrorists*, ASSOC. PRESS, May 19, 1985, *available at* 1985 WL 2861924.

include even speech if you advocated support of, say, the PLO . . . or the IRA."[57]

Several years later, the support-for-terrorism concept reemerged in the context of immigration law, this time with more success.[58] Section 212 of the Immigration and Nationality Act[59] already required exclusion of aliens who had engaged in terrorist activity, but the Immigration Act of 1990 expanded the meaning of "engage in terrorist activity" to include activity the alien knew or reasonably should have known would provide "material support" to a person, group, or government engaged in terrorist activity.[60] "Material support" in turn was defined to include not only lethal items such as weapons and explosives, but also the provision of safe houses, transportation, communication, funds, false identification, and training.[61]

In 1991, two bills were introduced in the Senate—one sponsored by Democrats, the other by Republicans—renewing the attempt to criminalize support for terrorist groups.[62] Each proposal would have made it a felony to provide material support—defined to include money, weapons, equipment, and personnel—*with knowledge* that the recipient intended to use the support in connection with particular acts of terrorism. The bills received considerable backing from the State Department,[63] and eventually became folded into the bipartisan omnibus crime bill proposal for

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[57] Margasak, *supra* note 56. Nonetheless, Senator Denton revived the proposal the next year when he introduced substantially identical language in the International Terrorism Control Act. S. 1940, 99th Cong. (1985); 131 CONG. REC. 36420 (1985). With less fanfare, the proposal again died in committee.

[58] For the view that measures hostile to civil liberties tend to be enacted in the immigration context before being extended to citizens, see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 36 (2003). *Cf.* Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1429–30 (2003) (critiquing this view).

[59] Immigration and Nationality Act, 8 U.S.C. § 1182 (Supp. I 2001).

[60] Immigration Act of 1990, 8 U.S.C. § 1182(a)(3)(B)(iii) (2000) (current version at 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (Supp. I 2001)).

[61] *Id.*

[62] The process began when Senator Biden introduced Senate Bill 266, Title II of which criminalized material support. S. 266, 102d Cong. § 2 (1991); 137 CONG. REC. S1159 (1991). House Bill 769 had identical provisions. H.R. 769, 102d Cong. § 2 (1991); 137 CONG. REC. H839 (1991). In March 1991, Senator Biden introduced a new version as Senate Bill 618, Title V of which contained the same material support provision. S. 618, 102d Cong. § 5 (1991). A few days later, Senator Thurmond introduced the administration's crime bill, Senate Bill 635 (House Bill 1400 in the House), which contained a slightly broader material support provision. S. 635, 102d Cong. § 734 (1991); H.R. 1400, 102d Cong. § 734 (1991). Hearings were held on both bills in April and in June, but the discussion this time did not focus on the support concept. *Violent Crime Control Act of 1991: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 102–480 (1991). Senator Thurmond's bill was discharged from consideration by the Judiciary Committee on June 6, the same day that Biden introduced a compromise bill. *See* S. 1241, 102d Cong. § 5 (1991).

[63] *See* 139 CONG. REC. 17577 (1994) (reprinting letter from Wendy R. Sherman, Asst. Sec'y of State for Legis. Affairs, to Rep. Lee Hamilton, Chairman, Comm. on Foreign Affairs, House of Rep. (May 16, 1994)).

1991.[64] Despite initial approval by both the Senate and House, however, the Senate could not come to agreement on the conference version and the material support provision died once again.[65]

C. The First Material Support Law

But it would soon become law at last. Shortly after the first bombing of the World Trade Center in 1993, the material support concept emerged yet again in a series of bills introduced during the spring and summer of that year.[66] Finally, bills introduced in the fall of 1993 succeeded in pushing a form of material support ban through to enactment in September 1994.[67] The result was 18 U.S.C. § 2339A.[68]

Section 2339A is a narrow law, much narrower than the anti-support proposals introduced unsuccessfully in the 1980s. Most notably, it avoids the criticisms associated with empowering the executive branch to identify specific terrorist organizations and individuals to be sanctioned. Instead, it punishes the provision of material support or resources[69] to any-

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[64] *See* Biden-Thurmond Violent Crime Control Act of 1991, H.R. 3371, 102d Cong. (1991).

[65] Senator Thurmond attempted to reintroduce material support legislation in March 1992, but Senate Bill 2305 died in committee. S. 2305, 102d Cong. (1992). For an interesting perspective from this period on the topic of banning terrorist organizations and criminalizing support for them, see Editorial, *When Will the Terror Stop*, BOSTON HERALD, Aug. 15, 1992, at 14 (arguing that "[t]o Americans, the idea of 'banning' an organization . . . is anathema," and asking readers to "[t]ry imagining a decree forbidding [them] to donate, say, to Northern Irish Aid—the Sinn Fein front widely seen as a fundraiser for Irish Republican Army terrorists").

[66] At least eight bills containing material support provisions were introduced in this period during the 103rd Congress: H.R. 1301, 103d Cong. (1993); H.R. 2217, 103d Cong. (1993); H.R. 2321, 103d Cong. (1993); S. 1281, 103d Cong. (1993); H.R. 2847, 103d Cong. (1993); H.R. 2872, 103d Cong. (1993); S. 1356, 103d Cong. (1993); S. 1488, 103d Cong. (1993).

[67] H.R. 3355, 103d Cong. (1993); S. 1607, 103d Cong. (1993). While these bills were pending, in an interesting aside, Representative Lee Hamilton wrote a letter on March 18, 1994, to Secretary of State Warren Christopher asking why no action had been taken to stop two groups designated by Israel to be terrorist organizations—Kach and Kahane Chai—from raising funds in the United States. The State Department responded with a letter from Wendy Sherman on May 16, 1994, describing the efforts by the department over the past several years to enact a material support provision (one that would be consistent with the First Amendment). *See* 139 CONG. REC. E1519-01 (daily ed. July 21, 1994) (statement of Rep. Hamilton and accompanying reprint of letter from Asst. Sec'y of State Wendy Sherman to Rep. Lee Hamilton (May 16, 1994)).

[68] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[69] As amended, the statute defines "material support or resources" to include the provision of a comprehensive array of items and services that may be grouped into four categories: (1) funding (currency, monetary instruments, financial securities, and financial services); (2) tangible equipment (weapons, lethal substances, explosives, false documentation or identification, communications equipment, and other physical assets, except medicine or religious materials); (3) logistical support (lodging, expert advice or assistance, safehouses, facilities, training and transportation); and (4) personnel. *See* 18 U.S.C. § 2339A(b) (Supp. II 2002).

one, regardless of the identity of the recipient, so long as the provider "know[s] or intend[s] that [the aid is] to be used in preparation for, or in carrying out, a violation" of any of more than two dozen crimes of violence specified in the statute.[70] It is, in short, a type of aiding-and-abetting statute.

Because of its limited scope, the enactment of § 2339A did not satisfy those interested in criminalizing all forms of aid to foreign terrorist organizations.[71] Critics of the new law emphasized that it would not prevent the flow of support to terrorist organizations in situations in which the government could not prove the donor intended or knew the aid would facilitate the commission of a particular crime.[72] A person could donate thousands of dollars to Hamas or Hezbollah, for example, so long as he or she thought the money might be spent on the political or social services those groups provided. As the staff of the 9/11 Commission observed in their monograph on terrorism financing, under this regime "prosecuting a financial supporter of terrorism required tracing donor funds to a particular act of terrorism—a practical impossibility."[73]

D. Closing the Loophole

The § 2339A loophole did not last for long. Implicitly recognizing that § 2339A would not effectively embargo foreign terrorist organizations, and apparently unwilling to wait for Congress to take further action, the Clinton Administration turned at last to its IEEPA authority. Approximately four months after § 2339A became law, President Clinton declared a national emergency in connection with efforts by foreign terrorist organizations to sabotage the Middle East peace process.[74] He then broke new ground under IEEPA by ordering sanctions targeting not a

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[70] 18 U.S.C. § 2339A(a) (Supp. II 2002).

[71] *See, e.g.*, Tommy Baer, *Political Motivations of Murders Make No Difference to* Victims, RICHMOND TIMES-DISPATCH, Nov. 1, 1994 at A11 (arguing that § 2339A does not suffice to cut off funding to terrorist groups); Martin Sieff, *U.S. Aims at Hamas' Pocketbook*, WASH. TIMES, Oct. 26, 1994, at A1 (reporting that the administration was looking into new legislation to deal with domestic fundraising by terrorist organizations under the guise of charity).

[72] *See, e.g.*, Todd J. Gillman, *FBI Looks Into Islamic Fund Raising: Muslim Officials Deny Supporting Terrorism*, DALLAS MORNING NEWS, Nov. 18, 1994, at 29A (citing unnamed diplomatic and law enforcement sources).

[73] STAFF OF NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 31–32 (2004), *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf, [hereinafter MONOGRAPH ON TERRORIST FINANCING]; *see also* JEFF BREINHOLT, COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE, Office of Legal Education, Executive Office for United States Attorneys 272, 285–86 (2004) (describing difficulty of using § 2339A, with its "exacting intent requirement," to suppress flow of support from U.S. persons to foreign terrorist organizations).

[74] Exec. Order No. 12,947, 3 C.F.R. 319 (1995), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

state and its citizens but, instead, terrorist organizations and their members.[75] The order identified twelve groups (including Hamas, Palestinian Islamic Jihad, and Hezbollah) and eighteen individuals associated with them as "Specially Designated Terrorists" ("SDTs"), and delegated to the Secretary of Treasury authority to add to this list in the future, in consultation with other departments, pursuant to certain criteria relating to the use of violence to disrupt the Middle East peace process.[76]

The SDT designations had several consequences. First, the assets of SDTs subject to U.S. jurisdiction were blocked.[77] Second, all U.S. persons were forbidden from dealing in the SDT's assets.[78] Third, all U.S. persons were barred from "making or receiving of any contribution of funds, goods, or services to or for the benefit of [SDTs]."[79] In support of this last prohibition, IEEPA required that President Clinton issue a finding to the effect that even humanitarian donations to the embargoed foreign entity would impair his ability to respond to the underlying emergency.[80]

The United States had at last imposed what amounted to an embargo on foreign terrorist organizations, approximately thirteen years after the concept first received an airing. But this use of IEEPA was not intended by the Administration to be the final resolution of the problem of domestic support for foreign terrorist organizations.[81] As the Moore Letter had cautioned in 1982, an IEEPA embargo had to be tied to the particular emergency invoked.[82] To embargo groups that could not plausibly be linked to interference with the Middle East peace process, then, the Administration would have to declare a new emergency or obtain new authority from Congress. Accordingly, at the same time that it issued its January 1995 IEEPA order, the Clinton administration announced plans for new legislation including a measure specifically targeting "fund-raising" within the United States by foreign terrorist groups.[83]

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[75] *Id.*

[76] *Id.* § 1(i)–(iii); *see* Message to the Congress Reporting on Terrorists Who Threaten the Middle East Peace Process, 7/31/95 WEEKLY COMP. PRES. DOC. 1319 (July 31, 1995); *see also* Senior Administration Official, Background Briefing (Jan. 24, 1995), *available at* 1995 WL 6617026 (referring to the eighteen individuals).

[77] Exec. Order No. 12,947, § 1(a), 3 C.F.R. 319 (1995), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

[78] *Id.* § 1(b).

[79] *Id.*

[80] *Id.* § 3; 50 U.S.C. § 1702(b)(2)(A) (2000).

[81] *See* Senior Administration Official, Background Briefing, *supra* note 76 (reporting comments and answers provided by a "senior administration official" regarding the need for new legislation in addition to the existing § 2339A authority and the new IEEPA order).

[82] *Moore Letter*, *supra* note 24, at 74.

[83] *See* Bill Gertz & J. Jennings Moss, *Clinton Puts U.S. Banking Off-limits to Terrorist Groups*, WASH. TIMES, Jan. 25, 1995, at A3 (citing statements by White House spokesman Michael McCurry). Republicans in the Senate had introduced new antiterrorism legislation early in January, but that proposal did not address the fundraising issue. *See* S. 3, 104th Cong. § 601–10 (1995).

E. The Second Material Support Law

The Administration's proposal, introduced in the Senate by Senator Biden[84] and in the House by Representative Schumer[85] in February 1995, included a proposed congressional finding to the effect that "the provision of funds to organizations that engage in terrorism serves to facilitate their terrorist endeavors regardless of whether the funds, in whole or in part, are intended or claimed to be used for non-violent purposes."[86] Building on this finding, the bills proposed enactment of 18 U.S.C. § 2339B.[87]

As originally conceived, § 2339B would grant the President IEEPA-style authority to identify foreign terrorist organizations posing a threat to U.S. national security, as well as those individuals who the President determines raise funds for such organizations or act on their behalf.[88] Once these organizations and individuals were identified, it would become illegal to raise funds for them, provide funds to them, or engage in financial transactions with them.[89] The Treasury Department would establish a licensing scheme, however, pursuant to which would-be donors or fundraisers could apply for permission to engage in these activities.[90] Such licenses would be granted only upon a determination that the aid would "be used exclusively for religious, charitable, literary, or educational purposes" or for other purposes determined by the Secretary to be consistent with the statute, and that procedures were in place to ensure such use.[91] Both the licensee and the would-be recipient, moreover, would be obliged to make available for inspection books and records relating to all sources of funding and expenditure.[92]

The future of this legislation was impacted significantly by the subsequent bombing of the Alfred P. Murrah building in Oklahoma City, an event that generated an immediate surge in the level of attention paid to terrorism proposals.[93] On April 27, 1995, Senate Republicans introduced an alternative antiterrorism bill (Senate Bill 735) combining aspects of the Administration proposal—including the same § 2339B licensing proposal—with an earlier Republican proposal and new proposals for habeas corpus reform.[94] Within the month, however, Senate Republicans moved

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[84] Omnibus Counterterrorism Act of 1995, S. 390, 104th Cong. (1995).

[85] Omnibus Counterterrorism Act of 1995, H.R. 896, 104th Cong. (1995).

[86] S. 390, 104th Cong. § 301 (1995) (proposing 18 U.S.C. § 2339B(a)(1)(G)). Section 301 ultimately became law in Pub. L. 104-132, 110 Stat. 1214 (1996).

[87] 18 U.S.C. § 2339B (Supp. I 2001).

[88] *See* S. 390 § 301 (1995) (proposing 18 U.S.C. § 2339B(c)(1) & (2)).

[89] *See id.* (proposing 18 U.S.C. § 2339B(d)).

[90] *See id.* (proposing 18 U.S.C. § 2339B(e)).

[91] *See id.* (proposing 18 U.S.C. § 2339B(e)(3)(A) & (e)(5)).

[92] *See id.* (proposing 18 U.S.C. § 2339B(e)(4)).

[93] *See, e.g.*, Katharine Q. Seelye, *House Committee Passes Anti-Terrorism Measure*, N.Y. TIMES, June 21, 1995, at B6 ("Although the package had been in the works for several months, the April 19 bombing in Oklahoma City has given the bill added urgency.").

[94] *See* S. 735, 104th Cong. (1995) (sponsored originally by Sens. Brown, Dole, Gramm,

to amend Senate Bill 735,[95] replacing the proposed licensing scheme (which included exceptions for charitable and religious donations) with a direct ban on fund-raising.[96] This change drew criticism for reducing the flexibility available under the Administration proposal,[97] but nonetheless was incorporated into the bill in early June 1995.[98]

House Republicans, meanwhile, introduced House Bill 1710, which was their own alternative to the administration's proposal.[99] This bill proposed a version of § 2339B much wider in scope than the versions in previous bills. Rather than focusing exclusively on the fund-raising problem, House Bill 1710 proposed a flat ban on the provision of all forms of "material support or resources" (as defined in 18 U.S.C. § 2339A) to designated foreign terrorist organizations, with no exceptions specified in the statute.[100]

Regardless of the version at issue, the proposal to enact § 2339B was controversial and raised an array of now-familiar objections.[101] Anthony Lewis wrote in the *New York Times* that the provision would "[p]unish[ ] Americans for the peaceful expression of their political views" in "gross violation of the First Amendment."[102] Others emphasized concerns about

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Hatch, Kyl, Nickles, Simpson, and Thurmond, and later also by Sen. Feinstein); 141 CONG. REC. 14,523 (1995) (statement by Sen. Dole explaining relationship of bill to predecessors). The Republican leadership in the House introduced similar legislation, House Bill 1710, in May 1995. H.R. 1710, 104th Cong. (1995); 141 CONG. REC. H5607 (1995).

[95] *See* 141 CONG. REC. 14,600 (1995) (referring to Amendment 1199 in the nature of a substitute).

[96] *See* 141 CONG. REC. 14,524–25 (1995) (introducing the amendment, Senator Hatch said he had "worked hard to ensure that this provision will not violate the Constitution or place inappropriate restrictions on cherished first amendment freedoms. In fact, we have made significant changes to the original version of this measure proposed by the Clinton administration. For example . . . we have removed troubling licensing requirements that were in the original bill submitted by the [Clinton] administration.").

[97] *See* 141 CONG. REC. 14,532 (1995) (statement of Senator Biden objecting that the new provision "eliminates any opportunity for persons to make donations for proper purposes, in my view increasing the first amendment concerns on that aspect of the bill").

[98] *See* 141 CONG. REC. 15,073 (1995) (reporting approval of amendment).

[99] *See* H.R. 1710, 104th Cong. (1st Sess. 1995). As the 9/11 Commission noted, the interval between February and May 1995 witnessed not only the Oklahoma City bombing, but also the Aum Shirikyo sarin gas attack on the Tokyo subway. *See* 9/11 COMM. REP., *supra* note 2, at 100.

[100] *See* H.R. 1710, 104th Cong. § 102 (1995). As John H. Shenefield of the ABA Standing Committee on Law and National Security observed, "[n]o doubt the problems of policing and enforcement inherent in any such licensing regime persuaded the drafters that it was essentially unworkable." *The Comprehensive Antiterrorism Act of 1995, Hearing Before the House Comm. on the Judiciary*, 104th Cong. § 4 (1995) (statement of John H. Shenefield).

[101] *Cf.* 142 CONG. REC. 4568 (1996) (statement of Rep. Schumer) ("These may be interesting academic exercises for law professors, but we cannot allow these tortured fantasies to paralyze Congress and the Nation.").

[102] Anthony Lewis, *Abroad at Home; "This is America,"* N.Y. TIMES, May 1, 1995, at A17. Critics also noted that such a law, if in force in the 1980s, in theory could have led to criminal punishment for donations to the African National Congress or for providing money to the Irish Republican Army. *See id.*; David Kopel, *Terrifying Terror Legislation?*, WASH. TIMES, Feb. 6, 1996, at A14.

the discretion involved in the designation process.[103] During hearings in June 1995 before the House Committee for the Judiciary, Gregory Nojeim (legislative counsel for the American Civil Liberties Union) argued that the § 2339B concept was a "fundamentally flawed and unconstitutional approach" that "smack[ed] of McCarthyism at its worst."[104] Questioning the very existence of "the alleged problem of fund raising for terrorist activity,"[105] Nojeim argued that the licensing exception originally proposed by the administration was "wholly illusory" and that efforts to punish donations intended for humanitarian purposes in any event violated the First Amendment.[106] Notably, however, the House proposal to widen the scope of § 2339B from fundraising to all forms of material support did not generate comparable criticism or discussion.

The opposition to § 2339B and various other controversial aspects of the antiterrorism proposals was bipartisan,[107] and at one point this coalition succeeded in removing § 2339B altogether from the House version of the legislation.[108] But with the informal deadline of the first anniversary of the Oklahoma City bombing fast approaching, Congressional leaders struck an agreement that reinserted the broad material support ban.[109] In the end, 18 U.S.C. § 2339B became law along with the rest of the Antiterrorism and Effective Death Penalty Act on April 24, 1996,[110] in what

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[103] Criticisms along these lines led the administration to withdraw its original position that there could be no judicial review of the decision to designate a group as a foreign terrorist organization. *See* Kenneth J. Cooper, *Clinton Tempers Anti-Terrorist Bill; Power to Bar Fund-Raising for Designated Groups Is Dropped*, WASH. POST, May 4, 1995, at A28.

[104] *The Comprehensive Antiterrorism Act of 1995, Hearing Before the House Comm. on the Judiciary*, 104th Cong. 322 (1995) (statement of Gregory T. Nojeim, Legis. Counsel for American Civil Liberties Union).

[105] *Id.* at 323.

[106] *Id.* at 321–22 & n.8. Similar sentiments were expressed during the hearings by representatives of the National Association of Arab Americans and the American Muslim Council. *See The Comprehensive Antiterrorism Act of 1995, Hearing Before the House Comm. on the Judiciary*, 104th Cong. 422 (1995) (statement of Khalil E. Jahshan, Executive Dir., National Ass'n of Arab Americans) (arguing that "[c]utting off fundraising to the legitimate non-terrorist and non-violent activities of such groups will deprive Palestinian society of vital services that cannot easily be provided by the Palestinian National Authority or any outside source at this time"); *id.* at 455 (statement of Azizah Y. al-Hibri, National Advisory Board, American Muslim Council) (arguing that "in the absence of convincing proof that the funds are being used to support terrorism, lawful humanitarian activities should not be criminalized"). *See also* H.R. REP. NO. 104-383, at 176–80 (1995) (reporting criticisms of § 2339B from dissenting members of the House Comm. on the Judiciary).

[107] *See, e.g.*, *Anti-Terrorism Bill Won't Happen This Year, Lawmakers Say*, WASH. POST, Dec. 19, 1995, at A10 ("The bill . . . has been stalled in the House by a coalition of some of its most liberal and conservative members").

[108] *See* 142 CONG. REC. 4603 (1996) (recording passage of the "Barr Amendment," which removed the authority to designate foreign terrorist organizations).

[109] *See* Michael Wines, *G.O.P. Has Tentative Deal on Terrorism Bill*, N.Y. TIMES, Apr. 13, 1996, at A10; Helen Dewar, *Hill Negotiators Agree on Anti-Terrorism Bill*, WASH. POST, Apr. 16, 1996, at A7.

[110] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

has been described as the "watershed legislative development of terrorist financing enforcement."[111]

Section 2339B, as enacted, is both narrower and broader than its predecessor, § 2339A. It is narrower in the sense that § 2339B applies only to aid given to "designated foreign terrorist organizations" publicly identified as such by the Secretary of State, whereas § 2339A theoretically could apply to aid given to anyone.[112] Section 2339B is broader than its predecessor, however, in a different sense. Section 2339A forbids aid only when the provider knows or intends it will be used to commit one of the crimes specified in the statute.[113] The new proposal, in contrast, would seem on its face to prohibit the provision of the same kinds of aid under any circumstances irrespective of the provider's intent or belief about how the recipient will use it.[114]

F. The Terrorism-Support Laws in Practice Before and After 9/11

Since April 1996, then, the federal government has had a two-track system for cutting off support from U.S. persons to foreign terrorist organizations, one drawing on the material support statutes (§§ 2339A and 2339B) and the other on IEEPA orders.[115] But notwithstanding the effort it took to establish them, these powers resulted in very few prosecutions

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[111] *Hearing on Tools to Fight Terrorism Act, Before the Subcomm. on Terrorism, Technology, and Homeland Security, of the S. Judiciary Comm.*, 108th Cong. (2004) (statement of Barry Sabin, Chief of the Counterterrorism Section of the Crim. Div., Dep't of Just.).

[112] *See* 18 U.S.C. § 2339B(g)(6) (2000) (incorporating by reference 8 U.S.C. § 1189(a)(1) (Supp. I 2002)). The Secretary of State makes the designation, with input from the CIA and other relevant agencies, based on determinations that the organization is "foreign" and engages in "terrorist activity," and that such activity threatens the security of U.S. nationals or the United States itself. For a good primer on the designation process, see Audrey K. Cronin, Congressional Research Service, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, Oct. 21, 2003, *available at* http://fpc.state.gov/documents/organization/25996.pdf.

[113] 18 U.S.C. § 2339A (Supp. II, 2002).

[114] As discussed in more detail below, § 2339B's only mens rea requirement is that the provision be "knowing." Early drafts of the legislation elaborated to an extent on precisely what it is the defendant must know, whereas the final language simply states that the provision must be "knowing." *See infra* note 336.

[115] There is a military analog to the material support law in the form of Article 104 of the Uniform Code of Military Justice, which punishes one who "(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly." Uniform Code of Military Justice Art. 104 (codified at 10 U.S.C. § 904 (2000)) ("Aiding the Enemy"). In September 2004, for example, Specialist Ryan G. Anderson was convicted by a court-martial of attempting to violate Article 104 by seeking to provide information to persons he believed to be associated with al Qaeda related to vulnerabilities of U.S. M1-A1 Abrams tanks. *See* Mike Barber, *Guardsman Convicted of Trying to Help Al-Qaida*, SEATTLE POST-INTELLIGENCER, Sept. 3, 2004, at A1.

prior to 9/11.[116] Section 2339A may have been used on as few as two occasions as a predicate for criminal prosecution, one of which involved a domestic militia rather than a foreign terrorist organization.[117] Meanwhile, § 2339B was used on only four occasions, two involving support to Hezbollah[118] and two for an Iranian opposition group, the Mujahedin-e Khalq (MEK).[119] In each of these instances, moreover, the application of the law was relatively uncontroversial; the defendants were charged with providing funds, equipment, or false identification to designated groups.

Activity under IEEPA similarly was limited. In August 1998, on the recommendation of an interagency committee led by National Security Council staff, President Clinton issued a second IEEPA order that expanded the list of SDTs to include Osama bin Ladin and al Qaeda, among other individuals and groups.[120] Unfortunately, "few funds were frozen" under IEEPA's blocking requirements as a consequence of this order because the Treasury Department had few leads relating to al Qaeda or bin Ladin-related assets.[121] In July 1999, President Clinton resolved an internal debate regarding U.S. policy toward the Taliban by exercising his IEEPA powers against them,[122] thereby seizing substantial funds.[123] There appear

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[116] *See* MONOGRAPH ON TERRORIST FINANCING, *supra* note 73, at 32 (noting that prior to 9/11 "there was little impetus to focus on prosecuting material support cases or committing resources to train prosecutors and agents to use the new statutory powers. As a result, the prospect of bringing a criminal case charging terrorist financing seemed unrealistic to field agents.").

[117] *See* United States v. Looker, 168 F.3d 484 (4th Cir. 1998) (describing a § 2339A conviction relating to militia activity); United States v. Haouari, 2001 WL 1154714 (S.D.N.Y. Sept. 28, 2001) (referring to a § 2339A indictment against two men arising out of the millennium bombing plot involving the Los Angeles International Airport).

[118] *See* David E. Kaplan & Monica M. Ekman, *Homegrown Terrorists: How a Hezbollah Cell Made Millions in Sleepy Charlotte, N.C.*, U.S. NEWS & WORLD REP., Mar. 10, 2003, at 30 (describing prosecution of a cigarette smuggling ring using its proceeds to buy equipment for and to send funds to Hezbollah); John Mitz & Michael Grunwald, *FBI Terror Probes Focus on U.S. Muslims*, WASH. POST, Oct. 31, 1998, at A1 (discussing prosecution of Fawzi Mustapha Assi for sending equipment including night vision goggles and infrared cameras to Hezbollah).

[119] *See* David Rosenzweig, *Man Convicted of Assisting Terrorist Group*, L.A. TIMES, Oct. 27, 1999, at B1 (describing conviction of Bahram Tabatabai in connection with supplying false immigration documents to members of MEK). Interestingly, the issue of MEK's status has become a considerable foreign policy issue in the aftermath of the Iraq war, as the United States has dealt with the MEK forces quartered in Iraq. Although the United States initially attacked the MEK units and subsequently held them confined to their base, the United States recently declared them to be "protected persons" under the Geneva Conventions, signaling an unwillingness to cooperate with Iranian requests for their rendition. *See* Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian Opposition "Terror" Group Being Held in Iraq*, N.Y. TIMES, July 27, 2004, at A8.

[120] *See* Exec. Order No. 13,099, 3 C.F.R. 208 (1998), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001); 9/11 COMM. REP., *supra* note 2, at 185.

[121] *See* 9/11 COMM. REP., *supra* note 2, at 185.

[122] *See* Exec. Order No. 13,129, 3 C.F.R. 200 (1999), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

[123] *See* 9/11 COMM. REP., *supra* note 2, at 185 (describing the blockage of "$34 million in Taliban assets held in U.S. banks," along with "$215 million in gold and $2 million in demand deposits" at the Federal Reserve Bank of New York belonging to the Afghan Cen-

to have been no criminal prosecutions in this period, however, under this or any other IEEPA order.

The attacks on 9/11 ended this pattern of relative inactivity. Prosecutors have made extensive use of the terrorism-support laws since 9/11.[124] Fifty-six individuals have been charged with violating § 2339B in the three years since 9/11,[125] thirty-six have been charged under § 2339A,[126] and thirty-seven have been charged with violating IEEPA regulations.[127] Within two weeks of the attacks, moreover, President Bush issued an Executive Order declaring a national emergency under IEEPA in connection with the 9/11 attacks and the continuing threat of additional terrorist attacks against the United States.[128] The order identified fifteen foreign terrorist organizations and twelve individuals as "Specially Designated Global Terrorists" ("SDGTs") whose assets would now be blocked and as to whom it would now be illegal to provide "funds, goods, or services."[129] Like the Clinton order establishing the list of proscribed SDTs in 1995, Bush's order delegated authority to update the list of proscribed SDGTs pursuant to an inter-agency process.[130] As a result, a total of twenty-two organizations (each also is a designated foreign terrorist organization for purposes of § 2339B) and 361 individuals were designated as SDGTs by the summer of 2004.[131]

Today we have a robust legal framework for the suppression of aid provided by U.S. persons to foreign terrorist organizations. That frame-

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tral Bank).

[124] Statistics on the specific charging decisions federal prosecutors have made in the post-9/11 period are difficult to obtain. To remedy that problem, I have compiled my own data set on charging decisions in the three-year period from 9/11 through the end of September 2004, relying primarily on the actual indictments in these cases. The results of my charge survey are *available at* http://www.wfu.edu/~chesner/NationalSecurityLaw/Prosecution%20Charts/TerrorismProsecutionStatistics.htm [hereinafter Terrorism Prosecution Statistics website].

[125] This figure derives from the data posted on the Terrorism Prosecution Statistics website. *See id.* at Table 3.2 (noting thirty-two individuals charged); Table 4.2 (three individuals); Table 5.2 (ten individuals); and Table 6.2 (eleven individuals).

[126] *See id.* at Table 3.2 (noting twenty-one individuals charged); Table 4.2 (four individuals); Table 5.2 (six individuals); and Table 6.2 (two individuals). As one counterterrorism specialist at the Justice Department has observed, § 2339A "will never be as powerful as 8 U.S.C. § 2339B, nor will it generate as many prosecutions." BREINHOLT, *supra* note 73, at 286.

[127] *See id.* at Table 3.2 (noting twenty-three individuals charged); Table 4.2 (zero individuals); Table 5.2 (twelve individuals); and Table 6.2 (two individuals). There is some degree of overlap among these charges: Sections 2339A and 2339B have been charged simultaneously in some instances, as have § 2339B and IEEPA. In fact, in a few cases all three statutes have been charged simultaneously. Prosecutors have not used § 2339A and IEEPA alone, however. *See id.*

[128] Exec. Order No. 13,224, 3 C.F.R. 786 (2001), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

[129] *Id.* § 2(a).

[130] *Id.* § 1(b)–1(d).

[131] *See Hearing Before S. Banking, Housing, and Urban Affairs Comm.*, 108th Cong. (Apr. 29, 2004) (statement of R. Richard Newcomb, Dir., Office of Foreign Assets Control, Dep't of the Treasury).

work is the product of bipartisan efforts by both the executive and legislative branches across a span of two decades to address a problem that seemed to evolve in conjunction with the changing nature of terrorism itself. In the early 1980s, when the availability of state sponsorship meant that terrorist organizations had relatively little need for funds but could benefit from expertise, the original terrorism-support law proposals tended to focus on cutting off that particular form of aid. As state sponsorship withered in subsequent years, the significance of funding increased, and the scope of terrorism-support law proposals reflects this change. Initially these proposals (including that which became § 2339A) sought a middle course between ill-intentioned and well-intended donations. By the time § 2339B was enacted in 1996, however, mounting concerns about the problem of terrorism led to adoption of a broad embargo approach that limited itself neither to purposeful attempts to support violence nor to aid in the form of funding. The question explored in the next Part is whether the current framework is sufficiently broad to provide the Justice Department with a device to take action against potential sleepers in circumstances that might otherwise seem to involve no grounds for prosecution.

II. The Terrorism Prevention Paradigm and Institutional Competition Between the Departments of Justice and Defense

Policy changes sparked by 9/11 provide necessary context for a discussion of how prosecutors have dealt with the problem of potential sleepers. Two changes in particular stand out. The first is relatively obvious: since 9/11 the Justice Department has prioritized the prevention of future terrorist attacks above other institutional objectives, giving prosecutors significant internal incentive to expand their capacity for prevention. The second is less obvious, but closely related: after 9/11, the Defense Department emerged as an institutional competitor of the Justice Department regarding incapacitation of potential terrorists within the United States. This institutional competition is subject to management by senior policymakers and in many respects may be essentially cooperative, but the existence of the parallel institutional alternatives nonetheless provides an external spur to the Justice Department's prevention efforts, particularly in the context of suspected sleepers.

A. Institutional Competition from the Defense Department

Prior to 9/11, the Defense Department played a limited role in U.S. counterterrorism efforts. According to the 9/11 Commission Report, "[t]he experience of the 1980s had suggested to the military establish-

ment that if it were to have a role in counterterrorism, it would be a traditional military role—to act against state sponsors of terrorism."[132] Operations under this rubric in 1986 against Libya and in 1993 against Iraq exemplified and reinforced the understanding that the military's role should involve "limited retaliation with air power, aimed at deterrence."[133] But this paradigm shifted after 9/11.

Several factors contributed to the change. First, the 9/11 attacks were widely perceived as acts of war, albeit unlawful ones.[134] Equally significant, most of al Qaeda's leaders and a substantial portion of its members at that time were entrenched in Afghanistan and could not be reached effectively other than through military force.[135] This necessity removed any lingering questions that might have arisen about the proper role of military force if, for example, al Qaeda leadership had at the time been dispersed throughout the world in locations amenable to covert or diplomatic measures.

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[132] 9/11 COMM. REP., *supra* note 2, at 97; *see also id.* at 73 ("Legal processes were the primary method for responding to . . . early manifestations of a new type of terrorism."); *id.* at 348 ("The existing mechanisms for handling terrorist acts had been trial and punishment for acts committed by individuals; sanction, reprisal, deterrence, or war for acts by hostile governments.").

[133] *Id.* at 98; *see also id.* at 121 (describing resistance to proposals emanating from the Office of the Assistant Secretary for Special Operations and Low-Intensity Conflict); *id.* at 130, 136–37, 351 (discussing the institutional memory of the failed Desert One operation in Iran in 1980, and the cautious attitude of senior officers regarding the use of troops in Afghanistan in clandestine actions prior to 9/11, notwithstanding interest from Special Operations officers); Richard H. Shultz, Jr., *Showstoppers*, WEEKLY STANDARD, Jan. 26, 2004, at 18 (arguing, based on a report Dr. Shultz prepared for the Pentagon in 2001, that the defense establishment rebuffed efforts by Special Operations Forces to carry out more offensive operations). Speaking with respect to requests by the Bush Administration in the summer of 2001 for more aggressive options for dealing with Afghanistan, National Security Advisor Condoleezza Rice testified to the 9/11 Commission that "[t]he military didn't particularly want this mission." 9/11 COMM. REP., *supra* note 2, at 208. The 9/11 Commission Report also describes a disagreement between officers in the CIA's bin Ladin unit who were "eager" for covert paramilitary efforts and more senior officials who, conscious of the trouble such operations had generated for the CIA in the past, viewed the task as best left to the military. *Id.* at 351.

[134] *See, e.g.*, 9/11 COMM. REP., *supra* note 2, at 326 (describing the use of the word "war" to characterize the attacks during the initial conferences of senior national security officials on 9/11); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as 50 U.S.C. § 1541 (Supp. I 2001)); Counsel to the President Alberto R. Gonzales, Remarks at the Meeting of the American Bar Association Standing Committee on Law and National Security 5 (Feb. 24, 2004), *available at* http://www.fas.org/irp/news/2004/02/gonzales.pdf (last visited Nov. 23, 2004) (stating that "our conflict with al Qaeda is clearly a war," and noting that the United Nations Security Council, NATO, and the signatories to the Rio and ANZUS treaties all recognized that 9/11 triggered America's right to use military force in self-defense).

[135] *See* 9/11 COMM. REP., *supra* note 2, at 108–43 (discussing failed efforts during the pre- and post-9/11 period to capture bin Ladin and other al Qaeda leaders through covert means and diplomatic measures, as well as limited attempts to use military force). The 9/11 Commission report captured the impotence of the purely criminal justice approach in this particular context when it cited FBI agents for the proposition that "the FBI and the Justice Department do not have cruise missiles. They declare war by indicting someone." *Id.* at 82.

Once in Afghanistan under the banner of Operation Enduring Freedom, the U.S. military found itself—and still finds itself at the time this Article went to press—involved in relatively traditional combat operations against Taliban and al Qaeda forces. This meant that the military was engaged in the killing, capture, detention, and interrogation of terrorists as (unlawful) belligerents.[136] In this traditional combat context, military detention of al Qaeda members was perfectly natural;[137] it served to prevent captured persons from rejoining the fight and "enabl[ed] the collection of intelligence about the enemy."[138]

The military role in post-9/11 counterterrorism, however, has not been limited to the traditional combat context of Afghanistan. In addition to al Qaeda members captured in the Afghanistan combat zone, the military has detained an indeterminate number of suspected terrorists captured elsewhere under circumstances less clearly resembling traditional notions of a zone of combat operations.[139] Several key arrests leading to military detention have been made in Pakistan, including those of Abu Zubaydah, Ramzi Binalshibh, Khalid Shaykh Mohammed, and Mustafa Ahmed al-Hawsawi.[140] In another example, a Pakistani citizen and U.S. permanent

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[136] The CIA's paramilitary role should not be discounted in this context. Within days of 9/11, President Bush signed a Memorandum of Notification authorizing the CIA to "'use all necessary means' to destroy bin Laden and Al Qaeda." Col. Kathryn Stone, All Necessary Means—Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces 2 (2003) (unpublished manuscript, on file with author). This order contrasted, or so it seems from the 9/11 Commission Report, with previous memoranda relating to al Qaeda which emphasized and prioritized the capture rather than the killing of al Qaeda's leadership. *See* 9/11 COMM. REP., *supra* note 2, at 90, 110, 112–14, 120, 126, 131–33, 139 (describing a succession of memoranda and plans related to the capture of bin Ladin and others, as well as conflicting recollections and interpretations between White House and CIA officials); *id.* at 115 (discussing diplomatic efforts to have bin Ladin expelled to the U.S. or elsewhere for trial). *But see id.* at 116 (describing consensus at principals' meeting to strike an al Qaeda meeting in Afghanistan with cruise missiles with the "purpose . . . to kill Bin Ladin and his chief lieutenants" after the 1998 embassy bombings); *id.* at 142 (noting that in 1999 President Clinton "reportedly also authorized a covert action under carefully limited circumstances which, if successful, would have resulted in Bin Ladin's death.").

[137] *See, e.g.*, CHRIS MACKEY & GREG MILLER, THE INTERROGATOR'S WAR: INSIDE THE SECRET WAR AGAINST AL QAEDA 208 (2004) (describing capture of Abdulsalam al-Aimi in the context of combat in Tora Bora). Significant issues about the propriety of military detention of these individuals did not arise until some were transferred to facilities at Guantanamo Bay, Cuba, where the original linkage between these persons and combat became obscured, and they became intermingled with detainees captured in other contexts.

[138] Gonzales, *supra* note 134, at 8.

[139] Military-style lethal force also has been employed in nontraditional contexts on at least one occasion. On November 3, 2002, a CIA-operated Predator unmanned aerial vehicle fired a Hellfire missile that destroyed a car carrying a number of al Qaeda members, killing all on board. *See* Even Thomas & Mark Hosenball, *The Opening Shot*, NEWSWEEK, Nov. 18, 2002, at 48.

[140] *See* David E. Kaplan, *Playing Offense*, U.S. NEWS & WORLD REP., June 2, 2003, at 18 (summarizing the arrests in Pakistan); YOSRI FOUDA & NICK FIELDING, MASTERMINDS OF TERROR: THE TRUTH BEHIND THE MOST DEVASTATING TERRORIST ATTACK THE WORLD HAS EVER SEEN 15–21 (2003) (narrating the capture of Binalshibh). Again, the convergence between Defense Department and CIA activity should be noted in this context. *See*

resident Saifullah Paracha (father of Uzair Paracha, indicted in the U.S. on terrorism-related charges) appears to have come into U.S. custody at some point during an international flight to Bangkok, and as of November 2003 was held at Bagram Air Force Base in Afghanistan.[141] Likewise, the military obtained custody of Abd al Rahim al Nashiri—mastermind of the failed attack on the *USS The Sullivans* and the successful attacks on the *USS Cole* and the French tanker *Limburg*—after his capture in 2002 by security forces in the United Arab Emirates.[142]

The expansion of military detention beyond the Afghanistan combat zone to non-citizens captured in non-combat contexts abroad has generated relatively little debate within the United States. But another aspect of the expansion of the military detention model has sparked tremendous controversy: military detention of persons captured within the United States. There have been two such detainees since 9/11,[143] one involving an American citizen (Jose Padilla) which has garnered extensive attention, and the other involving a Qatari man, Ali Saleh al Marri, which has gone relatively unremarked.[144] In contrast to the capture of al Qaeda members in Afghanistan in the context of Operation Enduring Freedom, the detentions of Padilla and al Marri bear close resemblances to civilian law enforcement and little resemblance to combat.[145]

Kaplan, *supra*, at 26 (describing CIA detention centers in Jordan, Afghanistan, and Diego Garcia); Editorial, *The CIA's Prisoners*, WASH. POST, July 15, 2004, at A20 (editorializing against alleged CIA practice of holding terrorism suspects abroad in secret interrogation facilities).

[141] *See* HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS 9 (2004) (describing Saiffulah Paracha's detention); United States v. Paracha, No. 03 CR. 1197, 2004 WL 1900336 at *1 (S.D.N.Y. Aug. 24, 2004) (denial of motion to suppress) (describing relationship between Saiffulah and Uzair Paracha); *see also* 9/11 COMM. REP., *supra* note 2, at 153 (describing capture of Abd al Rahim al Nashiri in the United Arab Emirates in November 2002); MACKEY & MILLER, *supra* note 137, at 331–40 (describing interrogation of "Hadi," a young man brought to Afghanistan after being "captured in a choreographed U.S.-Indonesian snatch [in Indonesia]").

[142] *See* 9/11 COMM. REP., *supra* note 2, at 153.

[143] A third military detainee in the U.S.—Yaser Esam Hamdi—was captured in Afghanistan and only later transferred here. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635–36 (2004). Hamdi has since been released. *See* Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sept. 23, 2004, at A1.

[144] Al-Marri initially was prosecuted on a variety of fraud charges in New York and Illinois (prosecutors alleged that he engaged in credit card fraud for the benefit of al Qaeda), but just before trial was designated an enemy combatant and transferred to the Consolidated Naval Brig in Charleston, where he remains today. *See* Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (dismissing habeas petition for improper venue), *aff'd*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 34 (2004); Patricia Hurtado, *Qatari Linked to al-Qaida*, NEWSDAY, Jan. 14, 2003, at A26 (describing the al Qaeda allegation). Al-Marri has since re-filed his petition in the proper court. *See* Al-Marri v. Hanft, No. 2:04CV57, Petition for a Writ of Certiorari (D.S.C. July 8, 2004), *docket sheet available through* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp.

[145] Indeed, Padilla originally was arrested by the FBI on a material witness warrant, assigned counsel, and held for several weeks at the Metropolitan Correctional Center in Manhattan. *See infra* note 205 and accompanying text. Al-Marri was also arrested under ordinary, civilian circumstances in December 2001. *See* Hurtado, *supra* note 144 (referring

Their cases mark the emergence of institutional competition between the Justice and Defense Departments with respect to the incapacitation of potential terrorists within the United States.[146] This competition could have ended in the summer of 2004 when the Supreme Court considered the constitutionality of the military's detention of Jose Padilla.[147] A panel of the Second Circuit had held that the administration lacked authority to use the military to detain Padilla in light of his U.S. citizenship.[148] The Court vacated the Second Circuit's decision, but not on grounds that clarified the propriety of the military's role in detaining potential terrorists within the United States. Instead, the Court ruled that Padilla's habeas petition ought to have been filed in a different district, and declined to address the merits.[149] Padilla has now re-filed in the proper district,[150] but judging from his own past experience at least two years will pass before a definitive Supreme Court decision on the merits.[151]

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to December 2001 arrest).

[146] By referring to the overlap between Justice and Defense Department responsibilities as "institutional competition," this Article does not mean to imply that the senior officials in each bureaucracy necessarily view one another in adversarial terms or that they do not engage in cooperative behavior when cases arise in that shared area. There is political science literature addressing the effects of competition when government agencies have overlapping jurisdictions and mandates. *See, e.g.*, Richard S. Higgins et al., *Dual Enforcement of the Antitrust Laws*, *in* PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 154 (Robert J. Mackay et al., eds., 1987) (analyzing impact of institutional competition between the Federal Trade Commission and the Justice Department Antitrust Division); COMPETITION AMONG INSTITUTIONS (Luder Gerken, ed.) (1995) (surveying institutional competition in other fields).

[147] *See* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

[148] *See* Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003).

[149] *See Padilla*, 124 S. Ct. at 2715 and 2724 (declining to reach the merits and stating that Padilla should have filed in South Carolina, not New York). Those willing to cross-count the four-vote dissent in *Padilla* and Justice Scalia's dissent in its companion case, *Hamdi*, might argue that a majority of the Supreme Court take the view that the military lacks authority to detain a U.S. citizen captured in the United States in Padilla's circumstances. In the text of *Padilla*, the dissent remains noncommital as to whether Padilla "is entitled to immediate release." *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting). A much-discussed footnote at that point contains a statement in the first person to the effect that the author, Justice Stevens, agrees with the Second Circuit panel majority that the Non-Detention Act precludes Padilla's detention notwithstanding the September 18, 2001 Authorization for Use of Military Force. *Id.* at 2735 n.8. To the extent that one can presume that this first-person footnote reflects the views of all four dissenting justices, one might then derive a fifth vote by looking to Justice Scalia's dissent in *Hamdi*. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660 (2004) (Scalia, J., dissenting) (arguing that the government may use criminal prosecution or seek suspension of the writ, but may not otherwise use military detention with respect to a citizen). Particularly in light of the uncertainty surrounding footnote eight in the *Padilla* dissent, however, it would be exceedingly rash to presume five votes on the merits in Padilla's favor.

[150] *See* Padilla v. Hanft, No. 2-04-2221-26-AJ (D.S.C. habeas petition filed July 2, 2004), *available at* http://www.scd.uscourts.gov/Padilla/Images/00000001.pdf.

[151] Padilla's amended habeas petition was filed in the United States District Court for the Southern District of New York on June 19, 2002. *See* Rumsfeld v. Padilla, No. 03-127, Petition for a Writ of Certiorari at 3.a. The District Judge's final ruling on the petition came on March 11, 2003. *See id.* at 3.c. The Second Circuit reversed the District Court on December 18, 2003. *See* Padilla v. Rumsfeld, 352 F.3d 695, rev'd 124 S. Ct. 2711. The

In the interim (and perhaps afterward), institutional competition between the Justice and Defense Departments with respect to the incapacitation of potential terrorists will continue. The playing field in this competition, however, is uneven. From the perspective of a policymaker interested in prevention, the military option has significant advantages over the incumbent criminal justice approach. The law of armed conflict presupposes the right of a belligerent to detain the enemy's personnel for the duration of hostilities,[152] whereas criminal law permits extended detention only upon trial and conviction.[153] Moreover, military detention since 9/11 has been far less transparent than criminal detention, allowing for interrogation without the presence of an attorney and providing decidedly fewer procedural safeguards and rights for the individual detained. Military detention also has not required the public disclosure of classified information. The military option, in short, vests the government with considerably more control and freedom of action than the criminal justice alternative.[154]

So long as the military detention alternative remains available, then, policymakers who decide to take action against a potential terrorist in the United States will be tempted to resort to it if the Justice Department cannot provide a plausible alternative. What alternative can federal prosecutors offer? This question draws our attention to the second major impact of 9/11 on U.S. counterterrorism law and policy: the Justice Department's adoption of a terrorism-prevention paradigm.

B. Prevention as the Highest Priority of the Justice Department

The second significant change in U.S. counterterrorism policy wrought by 9/11 concerns a change in priorities within the Justice Department (and, by extension, the FBI). Whereas in the past the priority with respect to terrorism was to prosecute suspected terrorists in a traditional manner,[155] the

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Supreme Court granted certiorari on February 20, 2004, held oral argument on April 28, 2004, and issued its ruling on June 28, 2004—two years and nine days after the filing of the amended petition. *See* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

[152] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004).

[153] *But see* Kansas v. Hendricks, 521 U.S. 346 (1997) (permitting preventive detention of sexually violent predators).

[154] The ongoing proceedings in the prosecution of Zacarias Moussaoui undoubtedly have reinforced policymakers' concerns about the adequacy of the criminal justice system when dealing with potential terrorists. *See* Susan Schmidt, *Prosecution of Moussaoui Nears a Crossroad*, WASH. POST, Jan. 21, 2003, at A8 (describing the possibility that Moussaoui would be transferred to military custody in light of persistent problems arising out of his desire to depose al Qaeda members in military custody).

[155] The pre-9/11 approach was traditional and post hoc-oriented in the sense that most law enforcement actions relating to terrorism tended to focus on completed acts or attempts and conspiracies to commit specific acts. *See, e.g.*, United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) (affirming convictions related to 1993 World Trade Center bombing and plot to blow up airliners over the Pacific); United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) (affirming convictions in prosecutions relating to plot to destroy bridges and

overriding priority of the Department since 9/11 is to prevent attacks before they occur using all available tools.[156]

The precise moment when this shift occurred may have been captured in Bob Woodward's account of policymaking within the Bush Administration in the days and weeks immediately following 9/11.[157] Woodward describes a meeting of the National Security Council shortly after the attack, during which new FBI Director Robert Mueller mentioned the need to take care that evidence not be tainted in the event of subsequent arrests and prosecutions. This reference to the traditional role of federal law enforcement prompted Attorney General John Ashcroft to interrupt. Woodward provides the following account: "Let's stop the discussion right here, [Ashcroft] said. The chief mission of U.S. law enforcement . . . is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can't bring them to trial, so be it."[158]

That moment symbolized a dramatic change in priorities not only for the FBI but for the Justice Department as a whole.[159] As Ashcroft explained to the Senate Judiciary Committee a few weeks later, "[o]ur fight against terrorism is not merely [or] primarily a criminal justice endeavor[.] [I]t has to be a defensive and preventi[ve] endeavor . . . . [w]e must prevent first; prosecute second."[160] It is one thing to declare prevention to be

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tunnels in New York and to assassinate the President of Egypt). *See also* 9/11 COMM. REP., *supra* note 2, at 72 (describing the post-1993 "impression that the law enforcement system was well-equipped to cope with terrorism"). But it should be acknowledged that law enforcement leaders did recognize the need to attempt to prevent terrorism as well as punish it after it occurred. *See, e.g.*, *id.* at 76 (noting that FBI Director Louis Freeh "urged agents not to wait for terrorist acts to occur before taking action"); *id.* at 78 (discussing prevention emphasis under Director Mueller).

[156] For an authoritative and comprehensive overview of the Justice Department's approach to counterterrorism enforcement, see BREINHOLT, *supra* note 73.

[157] *See* BOB WOODWARD, BUSH AT WAR 42 (2002).

[158] *Id.* Woodward's narrative of this particular exchange conspicuously lacks quotation marks, in contrast to other, quoted, passages in the book. This would seem to indicate that his account is a reconstruction either from notes or the partial recollection of a participant in the meeting.

[159] *See Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 310 (2001) (statement of John Ashcroft, Attorney General) (testifying that "[f]rom that moment, at the command of the President of the United States, I began to mobilize the resources of the Department of Justice toward one single, overarching and overriding objective: to save innocent lives from further acts of terrorism"). President Bush reiterated the prevention mandate at a National Security Council meeting held in the Cabinet Room on the morning of September 17. *See* WOODWARD, *supra* note 157, at 97 (reporting that the "new policy would stress preemption of future attacks, instead of investigation, gathering evidence and prosecution").

[160] *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 9 (2001) (statement of John Ashcroft, Attorney General). *See also* Assistant Attorney General for the Office of Legal Policy Viet Dinh, Life After 9/11: Issues Affecting the Courts and the Nation, Panel Discussion at U. of Kan. L. Sch., discussing the "massive legislative, administrative, and executive reorganization of our legal authorities and the way we do business, with one overriding goal: to prevent another terrorist attack and to disrupt terrorist activities before they can be effectuated into another mass, catastrophic attack," *in* 51 U.

an overriding priority, but quite another to operationalize that concept. What precisely has the Justice Department done to translate these words into action, and do any of these changes provide policymakers with a plausible alternative to military detention of potential sleepers within the United States? These questions require a survey of the multi-tiered law enforcement strategy[161] adopted by the Justice Department in response to the prevention imperative.

1. Tier One: Inchoate Crime Prosecution

The first tier of the prevention strategy involves traditional inchoate crime prosecutions. Under this heading, the Justice Department relies on the laws of attempt and conspiracy to prosecute defendants who can be linked to plans to commit specific terrorist acts. Such prosecutions occurred before 9/11,[162] of course, and they remain an important component of the Justice Department's prevention strategy today.[163] The sleeper scenario, however, often will not be amenable to this solution; the essence of the sleeper dilemma is that the suspect cannot be linked to plans to commit a particular harmful act.

2. Tier Two: Diffused Prevention

The second tier of the prevention strategy addresses the opposite end of the threat spectrum. In contrast to the scenario where the government suspects a particular individual in connection with a specific plan of attack, there are times when the government is aware of a terrorist threat at a general level but has no particular suspect in mind. It is inherently difficult for the Justice Department to act in its law enforcement capacity in that context.[164] Nonetheless, it is possible to use law enforcement measures to

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KAN. L. REV. 219, 223 (2003).

[161] The Justice Department's law enforcement function is one of two that pertain to the prevention mission. The other is the Department's role (primarily exercised through the FBI) in gathering and analyzing intelligence in the domestic arena. For an overview of this role, see 9/11 COMM. REP., *supra* note 2, at 74–82. *See also Oversight Hearing on the Recommendations of the 9/11 Commission Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (Aug. 23, 2004) (statements of Christopher Kojm, Deputy Exec. Dir., National Committee on Terrorist Attacks upon the United States; John S. Pistole, Exec. Asst. Dir., Counterterrorism Div., FBI; John O. Brennan, Dir., Terrorist Threat Integration Center).

[162] *See, e.g.*, United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).

[163] *See, e.g.*, United States v. Reid, 369 F.3d 619 (1st Cir. 2004) (describing conviction of Richard Reid for attempting to destroy a transatlantic flight with a bomb hidden in his shoe).

[164] The government as a whole can of course engage in target-hardening measures (jersey barriers, metal detectors, and the like) as a form of passive defense in that scenario. *See* PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 49–53 (2003).

interfere at a systemic level with the ability of terrorist organizations or individuals to commit harmful acts.[165]

One such method involves enhanced enforcement on a systemic basis of laws that relate to the logistical prerequisites for terrorist activity.[166] To the extent that a terrorist threat emanates from overseas, for example, strict enforcement of immigration laws may hinder the capacity of terrorists to enter or remain in the country even in the absence of individualized suspicion.[167] By the same token, aggressive enforcement of document and identity card fraud laws may make operations more difficult,[168] as may similar enforcement of laws relating to financial transfers.[169] The net impact could generate logistical chokepoints capable of derailing or at least delaying undiscovered plots.[170]

In addition to raising the transaction costs for would-be terrorists, the Justice Department also can attack the logistical prerequisites of terrorist

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[165] *See* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 80, 82–83 (1998) (discussing "untargeted" prevention methods).

[166] *See, e.g.*, *Hearing Before S. Fin. Comm.*, 108th Cong. (June 15, 2004) (statement of Patrick P. O'Carroll, Acting Inspector Gen., Soc. Sec. Admin.) (describing connection of social security number fraud to terrorism).

[167] Consider, for example, the unlawful immigration status of several of the 9/11 hijackers. According to a monograph produced by the staff of the 9/11 Commission, at least two and perhaps as many as eleven of the hijackers used doctored passports to gain entry into the country; one of the pilots, Ziah Jarrah, reentered the United States six times after violating the conditions of his visa by attending flight school; another pilot, Hani Hanjour, entered the United States on a student visa but never appeared at the school; and ringleader Mohammed Atta and two other hijackers at various times overstayed their visas as well. *See* STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 AND TERRORIST TRAVEL 138–39 (2004), *available at* http:// www.9-11commission.gov; *see also* 9/11 COMM. REP., *supra* note 2, at 384 (concluding that "the routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting against terrorism" provided at least some hurdles for al Qaeda's operational planning).

[168] *See, e.g.*, Richard Raysman & Peter Brown, *New Legal Weapons to Fight Online Identity Theft*, N.Y.L.J., Aug. 10, 2004, at 3 (describing enactment of Identity Theft Penalty Enhancement Act).

[169] In January 2004, for example, a joint investigation by the Department of Homeland Security, Immigration and Customs Enforcement, the Drug Enforcement Agency, the IRS, and an FBI Joint Terrorism Task Force led to charges against a group of men operating an "illegal money transmitting business" between Lackwanna, New York, and Yemen. *See* United States v. Mohamed Albanna, (W.D.N.Y.) (indictment) (on file with author).

[170] Some critics have derided the government's efforts in this area, implying that they amount to a waste of resources. *See, e.g.*, *Moving of Goalposts Increases U.S. Terror Prosecutions Tenfold*, CANADIAN PRESS, Feb. 13, 2003 (quoting one Senator as asking "whether too many resources are being tied up on minor cases that have nothing to do with terrorism"). Such criticisms miss the point of the diffused prevention strategy. By the same token, however, prosecutions undertaken with only this indirect link to terrorism should not be categorized alongside cases that do have a direct connection for purposes of government statistics, lest there be confusion as to the nuanced nature of prosecutorial efforts. *Cf.* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE ("TRAC"), CRIMINAL TERRORISM ENFORCEMENT SINCE THE 9/11/01 ATTACKS, Dec. 8, 2003 (criticizing case classification practices employed by federal prosecutors on ground that the inclusion of diffused prevention prosecutions under terrorism headings creates a misleading impression), *available at* http://trac.syr.edu/ tracreports/terrorism/report031208.html.

activity by using the terrorism-support laws discussed above, particularly 18 U.S.C. § 2339B, to prosecute those who provide logistical assistance to identified terrorist groups or individuals, even when that aid is given with no specific goal (or with an innocent goal) in mind.[171] As noted above, prosecutions under this heading have been frequent since 9/11.[172] Although few if any foreign terrorist organizations would entirely lose their capacity to cause harm as a result of losing access to money, equipment, or other resources obtained from American supporters, any decrease in that capacity helps to prevent at least some harm.

The diffused prevention strategies make it considerably more difficult for terrorist organizations to employ sleepers. Resources become more scarce. Would-be sleepers who are not citizens have more difficulty entering and remaining in the country. It becomes harder to obtain false identification or access to sensitive locations or materials. But these indirect impacts will not suffice on their own to address the sleeper scenario; other strategies are required in order for the Justice Department to take more direct action.

3. Tier Three: Potentially Dangerous Persons

The third tier of the Justice Department strategy relates most directly to the prevention imperative because it speaks to the problem posed by potentially dangerous persons who have been specifically identified, but who cannot be prosecuted using a traditional inchoate crime charge. The Department has emphasized two methods of incapacitating such persons: preventive charging and material witness detention. Both have advantages, as well as significant limitations. As argued below, prosecutors have turned to terrorism-support laws to plug the resulting gap.

a. Preventive Charging

In October 2001, Attorney General John Ashcroft issued a stark declaration:

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[171] *See supra* note 115.

[172] *See* Terrorism Prosecution Statistics website, *supra* note 124; *see also* Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y 389, 409 (2004):

> Regulating capital flows prompts greater transparency in fund-raising and accounting, denting the secrecy and deception central to violent organizations. Regulation of capital flows can encourage transnational communities that support such organizations to become more vigilant, asking probing questions about the activities funded by their contributions. When organizations cannot furnish satisfactory answers, underwriting communities may start new organizations that promote nonviolent reform.

> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage . . . .[173]

Assistant Attorney General Viet Dinh later elaborated that "[w]e do not engage in preventive detention. In this respect, our detention differs significantly from that of other countries, even our European partners . . . . What we do here is perhaps best described as preventative prosecution."[174] Combined with the similar use of immigration charges, this law enforcement strategy can be described as "preventive charging."[175]

The preventive charging strategy is innocuous in the abstract.[176] It recognizes the fortuitous circumstance that some persons suspected of involvement in terrorism happen also to have violated unrelated criminal or immigration laws, and calls for the exercise of prosecutorial discretion to enforce these laws against these individuals.[177] As Justice Department officials have pointed out, it is much the same strategy reflected in Attor-

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[173] Attorney Gen. John Ashcroft, Address to the U.S. Conference of Mayors (Oct. 25, 2001) (transcript available at 2001 WL 1288394). *See also* OFFICE OF THE INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 13 (2003) (describing statements by then Assistant Attorney General Michael Chertoff, who told OIG investigators that it was Justice Department policy to "use whatever means legally available," whether involving immigration or criminal charges, to thwart potential threats).

[174] *See* Dinh, *supra* note 160, at 224; *see also id.* at 224–25 ("If we suspect you of terrorism, beware. We will stick on you like white on rice. And if you do anything wrong, we will arrest you and remove you from the streets."). *See also Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 159, at 310 (statement of John Ashcroft).

[175] In practice, the preventative charging strategy dovetails with the diffused prevention strategy described previously. Both methods tend to focus on enforcement of the same laws, particularly document fraud, identity theft, and immigration laws. From an outsider's perspective, it often will not be possible to determine which of the two descriptions best applies to a particular prosecution.

[176] For a thorough discussion of the general phenomenon of "pretextual prosecutions," see Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge, An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. (forthcoming April 2005) (manuscript on file with author). Richman and Stuntz recognize that such prosecutions "are a widely accepted feature of our criminal justice system . . . widely, albeit not quite universally, understood to be both legally and ethically permissible." *Id.* at 3. They argue, however, that such prosecutions involve hidden social costs in the sense that pretextual prosecutions prevent outside observers and supervisors from accurately assessing the quantity and nature of enforcement activity. *See id.* at 3, 18, 20, 40, 63. Notwithstanding this criticism, Richman and Stuntz acknowledge that "there may be no realistic alternative" to the "Al Capone approach" in the particular context of terrorism. *See id.* at 45.

[177] *See* UNITED STATES DEPARTMENT OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 10 (July 2004) [hereinafter REPORT FROM THE FIELD], at 9 ("The Department aims to use its prosecutorial discretion—investigating, prosecuting, and punishing crimes that in the past might have been overlooked—in order to incapacitate suspected terrorists and thereby prevent terrorist attacks.").

ney General Robert F. Kennedy's famous declaration that he would prosecute mobsters for spitting on the sidewalk.[178] Indeed, this strategy played an important role in terrorism-related prosecutions even prior to 9/11.[179]

In its practical application, however, the preventive charging strategy has generated controversy. This is true especially with respect to the manner in which the strategy was executed against non-citizens in the immediate aftermath of 9/11.[180] According to a report issued by the Justice Department's Office of the Inspector General, 762 non-citizens were detained for immigration violations in connection with the post-9/11 investigation.[181] These were legitimate immigration charges (with one possible exception),[182] and in this context it was not unreasonable to marshal scarce enforcement resources in this manner.[183] But however reasonable these enforcement actions were in theory, their actual execution raised issues ranging from the problematic (e.g., significant delays in the processing of the detainees, combined with a no-bond mandate and an overarching policy of holding non-citizens until affirmatively cleared by the FBI)[184] to the criminal (e.g., abuse of the detainees by prison guards).[185] Had

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[178] *See* Attorney Gen. John Ashcroft, Press Conference (Oct. 31, 2001) [hereinafter Ashcroft Press Conference] (*available at* http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm). During World War II, Attorney General Frank Murphy made a similar declaration concerning communists in the United States, stating that "every possible effort is being made to indict any Communist who has violated the criminal laws in any respect." William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 S. CT. REV. 375, 402 (2001) (citing HAROLD ICKES, THE SECRET DIARY OF HAROLD ICKES 97 (1953)).

[179] In its comprehensive monograph on terrorism financing, the staff of the 9/11 Commission observed that rather than bring charges directly related to terrorism in the pre-9/11 era, "[i]t was far easier for agents to find a minor charge on which to convict a suspect, thereby ultimately immobilizing and disrupting the operation." *See* MONOGRAPH ON TERRORIST FINANCING, *supra* note 73, at 32. For a specific example, consider the fact that Zacarias Moussaoui was detained on immigration charges on August 16, 2001, after his flight instructor reported suspicions about him and some FBI officials concluded that he might be a terrorist. *See* 9/11 COMM. REP., *supra* note 2, at 247, 273.

[180] *See* OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 13.

[181] Twenty-four of these detainees already were in INS custody at the time. *See id.*

[182] The OIG Report concludes that the immigration detainees "were held on valid immigration charges," although it noted one instance in which a detainee for whom there was no valid charge was held for seventy two hours before being released. *See id.* at 15 & n.22; *see also id.* at 5 ("It is . . . important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation").

[183] Officials at the time were aware that the 9/11 attacks were al Qaeda operations carried out by non-citizens and had every reason to believe that more attacks might be pending. *See* 9/11 COMM. REP., *supra* note 2, at 6 (describing awareness of government officials of hijacker identities based on information supplied by flight attendants).

[184] On average, it took the FBI eighty days to issue a clearance letter (the median wait was sixty-nine days, and for more than a quarter of the detainees the wait exceeded three months). *See* OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 51. The maximum wait was 244 days. *See id.* For a discussion of the no-bond mandate, *see* Margaret Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004); *see also* OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 25.

[185] These abuses are chronicled in a series of investigative reports by the Inspector

the detainees been processed with dispatch, and particularly had they been treated properly, the episode would not have given such a black eye to the preventive charging concept.

A degree of controversy also arose in connection with the statistical footprint of the preventive charging and diffused prevention strategies. As noted above, both of these approaches further the goal of preventing terrorism through enhanced enforcement of relatively minor laws such as document fraud and immigration statutes (the former does this in a targeted manner, the latter on a systemic basis). To the extent that the Justice Department has in fact adopted these strategies, we can expect to see a relatively large number of prosecutions that result in relatively short sentences—as compared to the quantity and consequences of indictments charging terrorist offenses directly. And this is just what the data demonstrates. A series of widely publicized reports by the Transactional Records Access Clearinghouse at Syracuse University compiling Justice Department data reveals a sharp increase in the number of post-9/11 prosecutions classified as terrorism-related, contemporaneous with a sharp drop in the average length of sentence in such cases.[186] Notably, the former INS and the Social Security Administration are among the most active referring agencies in these cases, as one would expect when document and immigration fraud enforcement were on the rise.[187]

The government's inclusion of the preventive charging and diffused prevention cases under the general rubric of terrorism for purposes of data-tracking, however, proved controversial. Some perceived the practice as an attempt to give an inflated impression of government successes in the war on terrorism, or at least as a practice that ran that particular risk

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General of the Justice Department, beginning with OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 142–56, 177–80; and continuing with OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUST., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003); OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUST., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003); and OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUST., ANALYSIS OF THE SECOND RESPONSE BY THE DEPT. OF JUST. TO RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL'S JUNE 2003 REPORT ON THE TREATMENT OF SEPTEMBER 11 DETAINEES (2004).

[186] *See* TRAC, *supra* note 170; TRAC Special Report, "Criminal Enforcement Against Terrorists" (June 17, 2002), *available at* http://trac.syr.edu/tracreports/terrorism/supp.html; TRAC Special Report, "Criminal Enforcement Against Terrorists and Spies in the Year After the 9/11 Attacks" (Feb. 13, 2003), *available at* http://trac.syr.edu/tracreports/ terrorism/fy2002.html; TRAC Special Report, "Criminal Enforcement Against Terrorists" (Dec. 2001), *available at* http://trac.syr.edu/tracreports/terrorism/report011203.html.

[187] TRAC Special Report, "Criminal Enforcement Against Terrorists" (June 17, 2002), *available at* http://trac.syr.edu/tracreports/terrorism/supp.html; TRAC Special Report, "Criminal Enforcement Against Terrorists and Spies in the Year After the 9/11 Attacks" (Feb. 13, 2003), *available at* http://trac.syr.edu/tracreports/terrorism/fy2002.html; TRAC Special Report, "Criminal Enforcement Against Terrorists" (Dec. 2001), *available at* http://trac.syr.edu/tracreports/terrorism/report011203.html.

whether intended or not.[188] This criticism fairly points out that there is a substantial difference between a prosecution for conspiracy to commit some terrorist act and a prosecution for undifferentiated document fraud that contributes to the diffused prevention strategy. It would be a mistake, however, to interpret the relatively low sentences indicated by the data as showing that terrorism prevention efforts are off-track or misguided. Prosecutions of relatively minor crimes ought not to be classified as if they were major terrorism cases, to be sure, but they do nonetheless make a contribution to the overall prevention effort.[189]

Notwithstanding the problems discussed above, the preventive charging strategy offers policymakers a relatively straightforward basis for employing criminal law enforcement to incapacitate suspected sleepers within the United States. But preventive charging depends in the first instance on the target's commission of a collateral criminal act or immigration violation. Where a suspect has not engaged in such conduct—and al Qaeda tradecraft encourages operatives to avoid this to the extent possible[190]—the preventive charging strategy is simply unavailable.

b. Material Witness Detention

When preventive charges cannot be brought, the sleeper scenario puts policymakers in a dilemma. FBI Director Mueller captured the problem when he noted that "[o]ur biggest problem is we have people we think are terrorists. They are supporters of al Qaeda . . . . They may have sworn jihad, they may be here in the United States legitimately and they have committed no crime."[191] In such a case, Mueller explained, the question

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[188] *See, e.g.*, Nora Demleitner, *How Many Terrorists Are There? The Escalation In So-Called Terrorism Prosecutions*, 16 FED. SENT. REP. 38 (2003). Such criticisms were enhanced by contemporaneous accounts of questionable case classification decisions by particular U.S. Attorneys' Offices. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *Report to the Hon. Dan Burton, House of Representatives, Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics* (Jan. 2003). The same data, on the other hand, has also led some to criticize certain prosecutors for insufficient zeal in pursuing diffused prevention or preventive charges in this manner. *See, e.g.*, Stephen Dyer, *Is Ohio Failing the War on Terror? Feds Declining to Prosecute 4 of 5 Criminal Immigration Cases, 1999–2003 Data Show*, AKRON BEACON J., Sept. 12, 2004.

[189] *Cf.* Statement of Mark Corallo, Dir. of Public Affairs, Regarding TRAC Study, U.S. Dep't of Just. (Dec. 7, 2003) (arguing that criticisms based on the TRAC data fail to account for the important role played by preventive charges based on relatively minor crimes), *at* http://www.usdoj.gov/opa/pr/2003/December/03_opa_670.htm.

[190] *See generally* U.S. Dep't of Just., *Al Qaeda Training Manual*, *at* http://www.usdoj.gov/ag/trainingmanual.htm. This manual was discovered during a police raid in Manchester, England, and contains instructions on al Qaeda tradecraft. *Id.*, *at* http://www.usdoj.gov/ag/manualpart1_1.pdf.

[191] *FBI Chief*, *supra* note 1. *See also* COLE, *supra* note 58, at 36 ("The hardest cases, from the government's perspective, are those individuals whom it suspects but cannot charge with either an immigration or a criminal infraction.").

arises as to what we should "do for the next five years? Do we surveil them? Some action has to be taken."[192]

Notably, Director Mueller did not mention the military detention alternative in describing the dilemma. But it is the elephant in the room. Where the Justice Department cannot provide a risk-averse policymaker with any alternative, that policymaker will be left to balance the risk, uncertainty, and expense associated with continuing surveillance against the temptations of the military detention option.

The Justice Department has, however, found what amounts to a short-term solution to the problem: the statute authorizing the detention of "material witnesses" for purposes of securing their testimony in a criminal case.[193] This power has been part of federal law since the First Judiciary Act of 1789,[194] and exists today in the form of 18 U.S.C. § 3144.[195] Section 3144, better known as the Material Witness Statute, provides that a warrant may be issued for the arrest and detention of a person upon proof by affidavit that the person's testimony is "material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena."[196] The statute adds that "[r]elease of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."[197] To enforce this provision, Federal Rule of Criminal Procedure 46(h) authorizes federal district judges to supervise the detention of material witnesses within their district and requires the government to make biweekly reports to the supervising judge justifying the continued detention of the individual.[198]

Although the statute clearly intended to serve a testimony-preserving function, it has not escaped the government's notice that those suspected of involvement with terrorism often may have testimony material to a criminal proceeding, and additionally that material witness detention happens to incapacitate the witness for the duration of the detention. Indeed, in late October 2001, Attorney General Ashcroft emphasized that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks [since i]t is difficult for a person

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[192] *FBI Chief*, *supra* note 1; *see also* COLE, *supra* note 58, at 36 (describing the FBI's surveillance of one potential terrorist).

[193] For an overview of material witness detention, see Roberto Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY'S L. J. 401 (2003); Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483 (2002).

[194] Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 73, 88–90 (1789).

[195] 18 U.S.C. § 3144 (2000).

[196] *Id.*

[197] *Id.*

[198] *See* FED. R. CRIM. P. 46(h).

in jail or under detention to murder innocent people or to aid or abet in terrorism."[199]

The practice of using material witness detention for non-testimonial purposes has, however, been sharply criticized as a distortion of statutory intent.[200] These criticisms gained momentum after the much-publicized use of a material witness warrant to detain an Oregon lawyer named Brandon Mayfield in connection with the March 2004 Madrid bombings on grounds that shortly proved to be mistaken.[201]

Regardless of the merits of these criticisms, the material witness statute is not a long-term solution to the problem posed by potential sleepers. The basic problem is that the incapacitation provided by material witness detention is quite temporary, all the more so if the government in fact has little or no actual interest in the person's testimony. Indeed, depending on the judge involved and the circumstances of the investigation, material witness detention in a particular instance might provide very little in the way of incapacitation. Indeed, the real utility of the material witness statute for prevention purposes may be its role as a time-buying device; while the "witness" is detained, the government gains time to develop the foundation for preventive charges or perhaps even a traditional inchoate crime charge.[202] When no such charge is forthcoming, however, the sleeper dilemma is bound to reemerge once again.

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[199] Ashcroft Press Conference, *supra* note 178. *See also* Viet Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 402 (2001) (noting role of material witness detentions). It is not known precisely how often the government has made use of the material witness statute in terrorism investigations since 9/11, and even less is known regarding the underlying circumstances when the statute was used. According to the *Washington Post*, by November 2002 at least forty-four individuals had been detained on material witness warrants in connection with grand jury investigations. Of these, the *Post* reported, approximately half were actually asked to provide testimony. *See* Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1. More recently, the *New York Times* reported that fifty-seven persons have been held in connection with terrorism investigations on a material witness warrant. *See* Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, at A1.

[200] *See, e.g.*, Studnicki & Apol, *supra* note 193; Laurie L. Levenson, *Detention, Material Witnesses, & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002). Critics also argue that material witness detention provides an opportunity for interrogation and indirect coercion, and when exercised in connection with grand jury proceedings, permits all of the above to be done with considerable secrecy. *See, e.g.*, COLE, *supra* note 58, at 35–39.

[201] For an overview of Mayfield's detention, including a detailed discussion of the fingerprint evidence that led to his arrest, see Jennifer L. Mnookin (Editorial), *The Achilles' Heel of Fingerprints*, WASH. POST, May 29, 2004, at A27. *See also* Dan Eggan, *Justice to Probe FBI Role in Lawyer's Arrest; Faulty Fingerprint Analysis Linked American to Madrid Terrorist Bombings*, WASH. POST, Sept. 14, 2004. *See generally* Liptak, *supra* note 199 (criticizing the material witness statute).

[202] *See, e.g.*, John Riley, *Held Without Charge; Material Witness Law Puts Detainees in Legal Limbo*, NEWSDAY, Sept. 18, 2002, at A6 (pointing out that Zacarias Moussaoui was held as material witness under his indictment in connection with 9/11); 9/11 COMM. REP., *supra* note 2, at 220 & n.31 (describing use of material witness statute to detain Mohdar Abdullah—a Yemen citizen in San Diego who assisted two 9/11 hijackers in obtaining driver's licenses and filling out flight school applications—followed by immigration

c. A Third Alternative Emerges

When there is no basis for a preventive or inchoate crime charge, and when material witness detention fails, the Justice Department would seem to be out of ammunition. In that circumstance, the temptation to resort to military detention is at its strongest. But it appears that prosecutors may yet be able to offer policymakers a criminal justice alternative in at least some circumstances involving potential sleepers, thanks to a creative reading of the terrorism-support laws. A review of how the government responded to two recent cases illustrates how prosecutors have found a new way to use the support laws to take action against persons who have trained with, or become members of, foreign terrorist organizations.

i. Jose Padilla and Military Detention

The fate of Jose Padilla, as described through the lens of the government's allegations against him,[203] illustrates the temptations of the military detention alternative. Jose Padilla, an American citizen born in Brooklyn, was in Saudi Arabia in early 2000 when he met a man who discussed the possibility of traveling to Afghanistan for jihad training. Padilla made the trip that summer, enrolling in the basic training course at al Qaeda's al Farooq facility.[204] There he trained with a variety of weapons and explosives, studied tactics, and engaged in physical exercises and religious studies. He also met for the first time with the late Mohammed Atef, al Qaeda's senior "military" operative. Padilla spent several months after graduation in the fall of 2000 as part of a Taliban unit posted somewhere to the north of Kabul, but also stayed in touch with Atef. Eventually, in the summer of 2001, Padilla and Atef began discussing options for operations Padilla could carry out in America, including a plot to cause a natural gas explosion in an apartment building. Padilla received additional explosives training, but ultimately the plot was abandoned prior to the 9/11 attacks.

After U.S. air strikes killed Atef in November 2001, Padilla made his way to Pakistan, along with other al Qaeda members. There he met with Abu Zubaydah, another senior al Qaeda figure, and proposed what would

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charges that led to his deportation in May 2004); *id.* at 272 ("Both Hazmi and Midhar could have been held for immigration violations or as material witnesses in the *Cole* bombing case. Investigation or interrogation of them, and investigation of their travel and financial activities, could have yielded evidence of connections to other participants in the September 11 plot. The simple fact of their detention could have derailed the plan.").

[203] Except as otherwise indicated, this account derives from the summary of declassified information relating to Padilla released by the Departments of Defense and Justice on June 1, 2004, *available at* http://news.findlaw.com/hdocs/docs/padilla/pad52804dodsum.html.

[204] For a remarkable overview of day-to-day life in an Afghanistan training camp pre-9/11, see David Rohde & C. J. Chivers, *The Jihad Files: Life in bin Laden's Army*, N.Y. TIMES, Mar. 17, 2002, at 1.

later become notorious as the "dirty bomb" plot. Later, however, al Qaeda leader Khalid Shaykh Muhammed persuaded Padilla to revert to the apartment building plot as a more plausible operation. He and an accomplice were provided $15,000, travel documents, a phone, and e-mail protocols to facilitate the operation.

On May 8, 2002, FBI agents detained Padilla as he disembarked at Chicago O'Hare from an international flight. After some initial questioning, they arrested him pursuant to a material witness warrant issued in connection with the Southern District of New York grand jury investigation into the 9/11 attacks. He was taken to Manhattan, and by May 14, 2002 was incarcerated on the high security floor of the Metropolitan Correctional Center.[205] On the 15th, Padilla appeared before Chief Judge Michael Mukasey of the Southern District of New York, and received appointed counsel. His attorney, meeting frequently with Padilla during this period, promptly moved to have the material witness warrant vacated on the ground that such warrants could not be used in connection with a grand jury proceeding rather than a trial.[206]

According to Padilla's attorney, a ruling on the motion was expected at a conference scheduled for June 11, 2002. But the conference never came. On June 9, 2002, President Bush declared Padilla an enemy combatant and ordered Secretary of Defense Donald Rumsfeld to take him into custody immediately. On this basis, Padilla was taken to the Consolidated Naval Brig in Charleston, South Carolina, where he remains in military custody as of the fall of 2004.[207]

The precise details of the interagency process leading to the decision to switch Padilla from civilian to military custody have not been disclosed, although White House Counsel Alberto Gonzales has described at a general level the means by which such decisions are made.[208] First, representatives from agencies including the Department of Justice, the Department of Defense, and the CIA develop options ranging from "criminal prosecution, [to] detention as a material witness, [to] detention as an

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[205] *See* Donna Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 41 (2004) (providing the date and location of Padilla's incarceration).

[206] The Second Circuit has since rejected this argument in another case. *See* United States v. Awadallah, 349 F.3d 42 (2003).

[207] In the summer of 2004, rumors began to circulate that Padilla might soon be indicted by a grand jury in the Miami area in connection with the existing case against a former Padilla associate named Adham Amin Hassoun. *See* Dan Christensen & Vanessa Blum, *U.S. May Indict Terror Suspect Held as Enemy*, LEGAL TIMES, July 5, 2004, at 13. At the time of this writing, no such indictment has been made public. On September 16, 2004, however, federal prosecutors indicted a pair of individuals on material support charges relating to their fundraising and recruiting activities on behalf of al Qaeda; the unindicted co-conspirator described in the indictment is widely thought to be Padilla. *See* Press Release, Dep't of Just., Two Defendants Charged in Florida with Providing Material Support to Terrorists (Sept. 16, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/September/04_crm_625.htm; Dan Eggan, *2 Indicted on Charges Related to Terrorism; Financial Support of al Qaeda Alleged*, WASH. POST, Sept. 17, 2004, at A3.

[208] *See* Gonzales, *supra* note 134, at 13.

enemy combatant."[209] Policymakers then assess the prospects for each option, taking account of factors such as the person's "threat potential and value as a possible intelligence source," or whether prosecution would require disclosure of intelligence sources.[210] When this review suggests that "criminal prosecution and detention as a material witness are, on balance, less-than-ideal options as long-term solutions to the situation," the government then focuses on "whether an individual might qualify for designation as an enemy combatant."[211]

In Padilla's case, two factors appear to have been particularly influential in the decision to remove him from the criminal justice system. First, the government's interest in interrogating Padilla without the interference of his lawyer may have become a belated priority.[212] Second, and more clearly, the government believed it might soon be forced to release Padilla because of the classified nature of the government's grounds for suspecting him. Deputy Attorney General James Comey, then-United States Attorney for the Southern District of New York, has stated that "at that time" he could not bring a criminal prosecution against Padilla "without jeopardizing intelligence sources," and that "it would have been derelict to allow him to come into the country and to hope to follow him."[213]

The Padilla example would seem to illustrate the outer bounds of the Justice Department's capacity to use law enforcement for prevention in the sleeper scenario. But it does not, actually. Without fanfare, prosecutors have developed a new strategy for dealing with potential sleepers, one that provides a surprisingly robust alternative to military detention.

ii. Lackawanna and Material Support Charges

This new strategy has been used most clearly in connection with the prosecution of a group of seven Yemeni-American men from Lackawanna,

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[209] *Id.*

[210] *Id.*

[211] *Id.* Judge Gonzales went on to describe an interagency assessment process involving the Office of Legal Counsel, the Director of Central Intelligence, the Secretary of Defense, the Attorney General, and the White House Counsel, all of whom collaborate in presenting the President with information to make the enemy combatant designation determination. *See id.* at 13–15.

[212] *Cf.* Deputy Att'y Gen. James Comey, Press Conference Concerning Jose Padilla (June 1, 2004) (transcript *available at* 2004 WL 1195419 (F.D.C.H.)) ("Had we tried to make a case against Jose Padilla through our criminal justice system . . . he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right.").

[213] *Id.* Comey also noted that "[t]he challenge of the Padilla case, for me as the United States attorney, was the absence of a hammer. If I can't credibly threaten criminal charges, no lawyer in the world is going to tell their client to talk to me, because a good lawyer would know, what I'm sure Mr. Padilla's lawyers knew, that if you just clam up, they can't do anything with this." *Id.* The government has not ruled out a subsequent criminal prosecution of Padilla, although it recognizes that it could not use any of the information derived from its military interrogation for that purpose. *See id.*

New York. Their story, even more so than that of Jose Padilla, epitomizes the dilemma generated by the sleeper scenario.[214]

The Lackawanna story begins with Kamal Derwish, an American citizen born in Buffalo but raised in Saudi Arabia. In the 1990s, Derwish trained at an al Qaeda camp in Afghanistan and fought in Bosnia. The Saudi government jailed him when he returned home in 1997, but released him within a year. Derwish next appeared in the close-knit Yemen-American community just outside Buffalo, in Lackawanna, New York, where he made an immediate impression. He gave frequent talks at the mosque and held informal gatherings for young men at his apartment, during which he would discuss jihad and the obligation to defend oppressed Muslims elsewhere in the world.

This message was reinforced in April 2001 with the arrival of Juma al Dosari, a traveling imam who had fought alongside Derwish in Bosnia and had also trained in al Qaeda camps in Afghanistan. Al Dosari delivered a fiery sermon at the mosque and then reinforced Derwish's call to arms during smaller gatherings with the young men in Derwish's circle. The combined effort seems to have had the desired effect. In May, seven men from the group informed family and friends that they were going to Pakistan to pursue Islamic studies with the group Tablighi Jamaat. This was merely a cover story, however. The men actually were destined for Afghanistan, where they planned to receive military training at al Farooq, the same al Qaeda facility at which Jose Padilla had trained just one year earlier.

They arrived in Pakistan in two groups, and under Derwish's care they progressed onward to Afghanistan. After encountering Osama bin Ladin at a guesthouse there, the men enrolled in the basic training course at al Farooq. Again like Padilla, their daily schedule consisted of prayers and a combination of training in firearms, explosives, and tactics. Bin Ladin at one point addressed the entire camp to announce the alliance between al Qaeda and Ayman al Zawahiri's Egyptian Islamic Jihad organization, a speech that included passionate denunciations of America and Israel and an assurance that dozens of men were prepared to "become martyrs for the cause."[215] At least one of the Lackawanna men appears to have become sufficiently disturbed by this speech to leave the camp shortly afterward. Three other men from the group left just a week shy of completing the six-week course, and three remained until the end. By the end

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[214] Except where otherwise indicated, the following account derives from the joint investigation conducted by the *New York Times* and the PBS documentary program *Frontline*. *See* Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at 1; *Frontline: Chasing the Sleeper Cell*, (PBS television broadcast), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper (last visited Nov. 23, 2004).

[215] Press Release, U.S. Dep't of Just., Defendant Yahya Goba Pleads Guilty to Providing Material Support to al Qaeda (Mar. 25, 2003) (quoting from plea agreement of defendant Yahya Goba), *available at* 2003 WL 1524584.

of June, all but one of the men had returned to their homes in Lackawanna, while Jaber Elbaneh remained abroad along with Derwish.

The FBI, meanwhile, had received an anonymous letter describing Derwish's recruiting activities in Lackawanna and identifying the men who had traveled to Afghanistan to receive training. Ed Needham, the agent in Buffalo responsible for counterterrorism, followed up by contacting one of the men, Sahim Alwan, upon Alwan's return from Afghanistan. Alwan stuck to the cover story regarding religious training in Pakistan, but did not wholly convince Needham. Nonetheless, the investigation made little progress until the spring of 2002, when two developments cast a sinister light on the Lackawanna situation. First, the government obtained communications intercepts establishing Derwish's connection to senior al Qaeda operatives (including Khallad bin Atash, a figure associated with the organization and planning of the 9/11 attacks), increasing suspicion that Derwish had recruited the Lackawanna men as a sleeper cell. Second, the Defense Department captured Juma al Dosari along the Afghan-Pakistan border and learned of his activities in Lackawanna while interrogating him at Guantanamo Bay. Government officials now considered this a sleeper cell.

From that point forward, the possible Lackawanna sleeper cell held the attention not only of FBI Director Mueller, but of President Bush himself. Director Mueller received twice-daily written reports of the status of the investigation, and frequently discussed the issue with the President during his daily briefing.

The problem was that the men simply gave no indication of planning to cause any harm, other than having surreptitiously attended al Farooq. Intensive physical and electronic surveillance showed the men to be engaged in ordinary lives. Meanwhile, the burdens of incessant surveillance continued to mount,[216] as did the level of apprehension caused by increasing concerns about an al Qaeda strike on or near the first anniversary of 9/11. Policymakers were on the horns of the dilemma necessarily posed by the sleeper scenario.

> Were they on their way to committing mass murder? Were they a bunch of harmless guys who had blundered unwittingly into a terrorist training camp while on a religious quest without ever intending to become terrorists? Nobody really knows. If we throw all such suspects into military brigs, we risk becoming more like a police state. If we let those who cannot be prosecuted roam free, some might pull off catastrophes dwarfing 9/11.[217]

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[216] *Cf. FBI Chief, supra* note 1 (describing the burdens imposed by FBI's use of round-the-clock surveillance teams to monitor potential terrorists).

[217] Stuart Taylor, Jr., *The Fragility of Our Freedoms in a Time of Terror*, NAT'L J., May

Some FBI officials felt that, for the moment, it was too soon to act. But CIA officials thought that the FBI focused too closely on the narrow question of whether the men could be linked to a crime and thus missed the broader issue of whether the men posed a danger. CIA analysts were disturbed in particular by an e-mail sent by one of the suspects—Mukhtar al Bakri—from Bahrain, where he had traveled to get married. In a message titled "Big Meal," Bakri wrote:

> How are you my beloved, God willing you are fine. I would like to remind you of obeying God and keeping him in your heart because the next meal will be very huge. No one will be able to withstand it except those with faith. There are people here who had visions and their visions were explained that this thing will be very strong. No one will be able to bear it.[218]

The CIA analysts eventually produced a report concluding not only that the men constituted a sleeper cell, but that the cell was the most dangerous threat in the United States. Faced with this assessment, senior policymakers asked whether the FBI could guarantee that the men would not be able to cause harm while under surveillance. The FBI responded that it could not give an absolute guarantee, although it was ninety-nine percent sure that it could prevent any harm from occurring. In the words of Dale Watson, then Chief of the FBI's Counterterrorism Division, "under the rules that we were playing under at the time, that [was] not acceptable. So a conscious decision was made, 'Let's get 'em out of here.'"[219]

It remained to be determined, though, just *how* to incapacitate the potential sleepers. Should they be arrested by the FBI as criminals or detained by the military as unlawful belligerents? The jurisdictional question went to the heart of the new institutional competition between the Justice and Defense Departments, which at this point found literal expression at the highest level of government.[220] Secretary of Defense Rumsfeld, supported by Vice President Cheney, urged the President to classify the men as enemy combatants subject to immediate detention by the military.[221] Attorney General Ashcroft warned against that approach, insisting

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5, 2004.

[218] *See Frontline*, *supra* note 214. Notably, al Bakri later admitted that he was in fact referring to an explosion, albeit one about which he had no personal knowledge. He explained to investigators that while in a mosque in Saudi Arabia he heard of "people having visions of an explosion that only those with faith could withstand." Purdy & Bergman, *supra* note 214.

[219] Purdy & Bergman, *supra* note 214.

[220] *See* Michael Isikoff & Daniel Klaidman, *The Road to the Brig; After 9/11, Justice and Defense Fought Over How to Deal With Suspected Terrorists. How a New System was Hatched*, NEWSWEEK, Apr. 26, 2004, at 26.

[221] *Id.*

that the men could be dealt with instead through the criminal justice system.[222] In the end, Ashcroft prevailed.[223]

One might fairly ask how the Justice Department found a way to act in this context. The men could not be linked to any particular plan, so a traditional inchoate crime prosecution was out of the question. There is no indication that the Justice Department was tempted to employ material witness detention either. Nor did there seem to be grounds for a preventive charge, since the men were citizens and did not appear to have committed any collateral crimes.

Or had they? The men clearly had received training from al Qaeda and at least arguably had provided themselves to al Qaeda as personnel. Perhaps, then, the men could be prosecuted for violating the terrorism-support laws ordinarily used as a method of diffused prevention.[224] Specifically, prosecutors could argue that by *receiving* training and by providing *themselves* as personnel, the men had provided "material support or resources" to al Qaeda, in violation of 18 U.S.C. § 2339B.[225] The government had made a similar argument previously with the so-called "American Taliban," John Walker Lindh, based on his training at al Farooq during the same period.[226] In the Lindh case there had been grounds for other charges as well,[227] but here the material support law would have to stand alone as the sole ground for prosecution.

Just days after the first anniversary of 9/11, the Justice Department announced the discovery and arrest of the "sleeper cell."[228] Eventually, five

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[222] *Id.*

[223] *Id.*

[224] *Cf.* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure after September 11*, 84 B.U. L. REV. 383, 418–19, 439 & n.276 (2004) (identifying material support prosecutions as an alternative to enemy combatant designation).

[225] *See, e.g.*, BREINHOLT, *supra* note 73, at 284 (describing prosecutions "premised on the notion that, by providing their own bodies to [foreign terrorist organizations, defendants] are both providing personnel to an FTO (in violation of 18 U.S.C. § 2339B) and illegally providing services to an SDGT (in violation of IEEPA, 50 U.S.C. §§ 1701–1707)); *Hearing Before House Comm. on Judiciary*, 108th Cong. 41 (2003) (statement of John Ashcroft, Att'y Gen.) ("We think that going and joining the operation is providing material support."); *Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (statement of Chris Wray, Asst. Att'y General) ("In our view . . . the definition of material support includes personnel, in the form of one's own personal services."); *id.* (describing the fact that "[t]ens of thousands have attended training camps," and concluding that the "material support statute enables prosecutors to take such persons off the streets and into court").

[226] *See* Purdy & Bergman, *supra* note 214 ("Prosecutors had determined that the suspects' presence in the camp was enough to charge them with providing 'material support' to a terrorist organization. This was based mainly on one previous case—the prosecution of John Walker Lindh, the American who joined the Taliban.").

[227] *See* United States v. Lindh, 212 F. Supp. 2d 541, 545–47 (E.D. Va. 2002) (describing allegations and charges against Lindh).

[228] At a press conference, Deputy Attorney General Larry Thompson said that "United States law enforcement has identified, investigated, and disrupted a Qaeda-trained terrorist

of the six Lackawanna men who returned to the United States in the summer of 2001 would plead guilty on the material support charge, while the sixth pled guilty to a related violation.[229]

iii. Terrorism-Support Charges After 9/11

The Lackawanna case has not been the only occasion in which the material support law provided the Justice Department with a basis to take action against a suspected sleeper when other options seemed to be lacking, nor has it been the last occasion on which policymakers debated whether to pursue military detention or detention through the civilian criminal justice system.[230]

The Justice Department has emphasized that the material support law provides an important capacity to act in the sleeper scenario. As As-

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cell on American soil." Deputy Att'y Gen. Larry D. Thompson, Press Conference (Sept. 14, 2002), *available at* http://www.usdoj.gov/dag/speech/2002/091402dagremarks.htm (last visited Nov. 23, 2004).

[229] *See* REPORT FROM THE FIELD, *supra* note 177, at 3. The seventh man, Jaber Elbaneh, may be in custody in Yemen. *See Man Allegedly Linked to "Lackawanna Six" Held*, L.A. TIMES, Jan. 30, 2004, at A9. Derwish, who never returned to the United States, was killed in November 2002 when a CIA-operated Predator unmanned aerial vehicle fired a Hellfire missile into his car in Yemen. *See* Thomas, *supra* note 139.

[230] *See* Isikoff and Klaidman, *supra* note 220, at 26. Administration officials also debated whether to designate as enemy combatants a group of would-be jihadists in Portland, Oregon, who ultimately were prosecuted for seditious conspiracy, and whether Zacarias Moussaoui should be prosecuted as a 9/11 co-conspirator or, instead, held in military custody with an eye toward trial by military commission. *See id.* (referring to the defendants in United States v. Battle, No. 02-399 (D. Or.) (prosecution for seditious conspiracy)); STEVEN BRILL, AFTER 237–38, 266–67 (2003) (describing successful effort by senior Justice Department officials to retain civilian jurisdiction over Moussaoui). White House Legal Counsel Alberto Gonzales, moreover, "has acknowledged as well that the Administration would have designated more American citizens as enemy combatants if the Justice Department had not been serving as a brake on the Administration." Benjamin Wittes, *Enemy Americans*, ATLANTIC MONTHLY, July/Aug. 2004, at 132. Conversely, there also are examples of this debate in which the government has, for the moment, elected the military detention route (including but not limited to the Padilla case). One such example involves Juma al-Dosari, the al Qaeda recruiter who seems to have "closed the deal" in recruiting the Lackawanna men to Afghanistan. *See Frontline*, *supra* note 214 (reporting that "the Justice Department and the Pentagon are discussing whether Juma al Dosari's case should be handled as a criminal matter in the civilian courts or by a military tribunal"). Another possibility is Saiffulah Paracha. *See* HUMAN RIGHTS FIRST, *supra* note 141, at 9; United States v. Paracha, No. 03 Cr. 1197, 2004 WL 1900336, at *1 (S.D.N.Y. Aug. 24, 2004) (describing criminal prosecution of Saiffulah Paracha's son Uzair Paracha, and noting that the FBI believed Uzair "and his father might have information relating to" al Qaeda). *Cf.* Michael Isikoff & Mark Hosenball, *Terror Watch: The Enemy Within; How the Pentagon Considered Extending Its Controversial "Enemy Combatant" Label in a Bid to Prove Links Between Iraq and Al Qaeda*, NEWSWEEK WEB EXCLUSIVE, Apr. 21, 2004, *available at* 2004 WL 72544033 (reporting that Deputy Secretary of Defense Paul Wolfowitz urged the President to declare Ramzi Yousef—the convicted mastermind of the 1993 World Trade Center bombing—an enemy combatant in order to subject him to military interrogation regarding allegations of his links to Iraq, and that the proposal died after attorneys in the Office of Legal Counsel concluded that Yousef would not qualify for such treatment).

sistant Attorney General Christopher Wray recently testified, "it is very difficult to know exactly when these sleeper agents may go operational."[231] The material support laws, he said, "enable prosecutors to take such persons off the streets."[232] But it is difficult to parse out the role of the material support law in the specific context of potential sleepers from its equally important role in other terrorism-related cases involving persons who are not themselves potentially dangerous.[233]

In the three-year period from September 11, 2001, to September 2004, there have been at least forty-seven terrorism-related prosecutions involving a total of 130 individual defendants.[234] These prosecutions, however, are by no means all alike. On the contrary, the underlying fact patterns suggest these cases can be grouped into distinct clusters including: (1) pure support scenarios in which the defendants do not appear to constitute a *personal* threat of harm, however much their actions may contribute to harm caused by others;[235] (2) classic inchoate crime scenarios in which the defendants have attempted or conspired to commit harm;[236] (3) a variation on the previous scenario in which the defendants conspired to travel abroad to engage in combat against U.S. armed forces or those of our allies;[237] and (4) potential sleepers.[238]

Material support charges under 18 U.S.C. § 2339B have been brought against fifty-six of these individuals, accounting for 43.1% of all the defendants.[239] Material support charges under § 2339B have played a particularly significant role in the pure support category. Indeed, such charges have been brought against thirty-two out of sixty-nine individuals in this category.[240] Prosecutors also have used § 2339B against three of the nineteen defendants in the traditional inchoate crime category (in addition to more conventional charges),[241] and against ten of the twenty-one defendants in the would-be combatant category.[242]

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[231] *Aiding Terrorists Hearing*, *supra* note 54 (statement of Christopher Wray, Asst. Att'y Gen.); *see also id.* at 5 (testimony of Daniel Bryant, Asst. Att'y Gen.) ("[T]he material support statutes are a valuable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause death and destruction.").

[232] *See Aiding Terrorists Hearing*, *supra* note 54 (statement of Christopher Wray).

[233] *See Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant) ("The chronology of a terrorist plot is a continuum from idea, to planning, to preparation, to execution and attack. The material support statutes help us strike earlier on that continuum—we would much rather catch terrorists with their hands on a check than on a bomb.").

[234] *See* Terrorism Prosecution Statistics Website, *supra* note 54, at Table 1.

[235] *See id.* at Table 3.1.

[236] *See id.* at Table 4.1.

[237] *See id.* at Table 5.1.

[238] *See id.* at Table 6.1.

[239] *See supra* note 125.

[240] *See* Terrorism Prosecution Statistics Website, *supra* note 124, at Table 3.2.

[241] *See id.* at Table 4.2.

[242] *See id.* at Table 5.2.

What about the sleeper scenario? Prosecutors have brought charges against twenty individual defendants—including the seven Lackawanna men—in circumstances that can be characterized as involving a potential sleeper cell.[243] Eleven of them have been charged with violating § 2339B.[244] But even within this category we find variation.

In some instances—accounting for three of these eleven defendants—the nature of the support charge looks quite similar to the nature of the support charges one sees in the ordinary "pure support" cases; that is, the government charges that the defendant provided logistical support of some kind to a designated organization.[245] In these relatively uncontroversial instances, it is fair to say that the material support charge functions as a basis for preventive charging against a potential sleeper.

The same cannot be said, however, for the six original Lackawanna defendants. As described above, the material support charges against them rested not on the claim that they provided some traditional form of logistical support but, instead, that they provided themselves as personnel to and received training from al Qaeda.

That leaves two sleeper defendants unaddressed. The material support charges against at least one, Mohammed Warsame, seem at this point to be similar in kind to the approach taken in the Lackawanna and Lindh cases.[246] The government has charged Warsame with providing material support to al Qaeda under circumstances where it appears that the charge may rely on his attendance at an Afghani training camp.[247] And the creative approach to material support may also play a role in the prosecution of the other unaddressed sleeper defendant, former Ohio truck driver Iyman Faris, who pled guilty to providing al Qaeda material support based on a series of actions that included some logistical assistance (such as research into a plot to cut the cables on the Brooklyn Bridge) in addition to Faris's involvement with an al Qaeda training camp.[248]

d. Summary

Senior policymakers unwilling to tolerate the risks and burdens associated with indefinite surveillance of potential sleepers may insist upon

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[243] *See id.* at Table 6.1.

[244] *See id.* at Table 6.2.

[245] *See id.* at Table 6.1 (describing the Ujaama, Mustafa, and Elbaneh prosecutions).

[246] Although the Lindh case falls under the heading of would-be-combatant rather than potential sleeper, the fact remains that the government used the material support law and IEEPA in his case in much the same manner that it did against the Lackawanna defendants.

[247] *See* Terrorism Prosecution Statistics Website, *supra* note 124, at Table 6.1.

[248] *See* United States v. Faris, 107 Fed. Appx. 308, 311–13 (4th Cir. 2004) (unpublished opinion affirming denial of motion to withdraw plea agreement). Faris admits visiting but denies receiving training from an al Qaeda camp. *See id.* at 312. Not coincidentally, one of the other instances in which we know that the Justice and Defense Departments disputed custody of a potential sleeper involved Faris. *See* Isikoff & Klaidman, *supra* note 220 at 26.

action to incapacitate the suspects in such cases. When they do, they must choose between criminal justice and military modes of detention. In many instances, policymakers will have a clear criminal law enforcement option available to them. At times, however, the Justice Department may be unable to mount a plausible inchoate crime prosecution to link the suspect to a collateral violation of criminal or immigration law, or to make reliable use of the material witness detention statute. In the few instances when this situation has arisen since 9/11, prosecutors have closed this gap through creative use of the material support law.

Should we be concerned? One can ask that question from a civil liberties perspective, wondering if the material support law unduly infringes constitutional rights. One can also ask it from a national security perspective, inquiring whether the support-law framework truly suffices to address the ever-evolving nature of the terrorist threat. The following Part explores the question from both angles.

III. CRITIQUING THE JUSTICE DEPARTMENT'S CURRENT APPROACH TO INCAPACITATING SLEEPERS FROM BOTH THE CIVIL LIBERTIES AND NATIONAL SECURITY PERSPECTIVES

The use of § 2339B (and potentially IEEPA as well) to enable prosecutors to incapacitate potential sleepers raises both civil liberties and national security concerns.[249] On one hand, critics of the material support law have raised a range of constitutional and statutory objections to it. Some of these objections—that it denies due process, that it violates expressive and associational rights, and that it is vague and overbroad—are raised without respect to the novel application of the statute in the sleeper scenario. Other objections—that the statutory language does not extend to persons who provide themselves as personnel or trainees, and that if it does the law raises additional due process concerns relating to its mens rea element—are specific to the sleeper context. Many of these concerns are overstated, but not all of them.

On the other hand, the material support law also can be criticized from a national security perspective on the ground that it fails to provide a sufficient basis to prosecute potential sleepers. First, neither it nor any other current provision in U.S. law sufficiently addresses the conduct that tends to generate concern about potential sleepers: U.S. persons traveling to foreign countries to obtain military-style training. Second, the evolving nature of the terrorist threat tends to erode the utility of § 2339B because that statute depends on the ability of prosecutors to link a defendant to an organization already identified and designated by the Secretary

[249] The following discussion focuses on the material support law, 18 U.S.C. § 2339B, because that statute plays the primary role in sleeper prosecutions and in terrorism-related cases in general. Most if not all of the criticisms, however, apply equally to IEEPA.

of State. Although previously identified organizations will continue to pose a significant threat in the future, since 9/11 a new generation of decentralized networks has emerged in which previously unknown and transient groups and individuals with loose or even no affiliation to already-designated organizations constitute a growing part of the threat environment.

Regardless of one's perspective, then, there are several reasons to believe that reliance on the material support law—though a creative short-term fix—does not provide the Justice Department with a dependable long-term solution to the problem of potential sleepers.

A. Criticizing the Material Support Law from the Civil Liberties Perspective

Civil liberties criticisms of the material support law come in several varieties. Some take issue with the law at a general level, irrespective of how it has been applied in the sleeper cases. Others are specific to the creative, new use of the law in sleeper cases. All of them, however, have a bearing on the sustainability of the Justice Department's current effort to establish a plausible, but tolerable, alternative to military detention for domestic terror threats.

1. Due Process and the Designation Process

The procedures pursuant to which the government identifies groups as foreign terrorist organizations subject to the material support law have generated considerable controversy.[250] Those procedures, like the material support statute itself, originated in the Antiterrorism and Effective Death Penalty Act of 1996.[251] They authorize the Secretary of State to designate a group as a "foreign terrorist organization" upon three findings: (1) that the group is a "foreign organization,"[252] (2) that the group "engages in terrorist activity . . . or terrorism" or at least has the capacity and intent to do so,[253] and (3) that the group's terrorist activity threatens the security

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[250] *See, e.g.*, COLE, *supra* note 58; Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125, 140–66 (2003–2004) (arguing that the designation process associated with the material support law denies due process to designated organizations and to those charged with providing them with material support).

[251] Pub. L. 104-132, Title III, subtitle A, § 302(a), 110 Stat. 1248 (enacting 8 U.S.C. § 1189).

[252] 8 U.S.C. § 1189(a)(1)(A) (Supp. I 2001). The phrase "foreign organization" is not defined.

[253] *Id.* § 1189(a)(1)(B). The statute defines "terrorist activity" or "terrorism" to include illegal activity involving hijacking or sabotage of a conveyance; capture of a person to compel a person or government to take or abstain from an action as a condition of release; violent attack upon an internationally protected person; assassination; the use of biological, chemical, or nuclear weapons; the use of explosives or firearms not for monetary gain

of U.S. nationals or U.S. national security.[254] The Secretary of State may rely on classified information in making the designation, and is directed by the statute to produce an administrative record supporting the determination.[255]

The statute also requires the Secretary of State to provide seven days advance notice to Congressional leaders of an impending designation,[256] but does not provide for advance notice to the designated organization. The group instead learns of the designation under this scheme, if at all, through its publication in the Federal Register.[257] Publication in the Federal Register triggers a thirty-day window within which the organization can petition for review of the designation in the United States Court of Appeals for the District of Columbia Circuit.[258] That review considers whether the designation was: (1) arbitrary; (2) unconstitutional; (3) ultra vires; (4) "lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court" on an ex parte, in camera basis; or (5) inconsistent with the statutory procedures.[259]

In 1997, two designated foreign terrorist organizations—the People's Mojahedin Organization of Iran (PMOI)[260] and the Liberation Tigers of Tamil Eelam (LTTE)—initiated the first challenges to this statutory scheme.[261] Both organizations argued that the designation process denied them due process of law in violation of the Fifth Amendment because it effectively outlawed them without giving them advance notice and an opportunity to be heard.[262] In its opinion, the D.C. Circuit avoided the constitutional issue by observing that neither PMOI nor LTTE at that time had any presence in the United States and, hence, lacked any due process rights.[263]

Undaunted, PMOI returned to the D.C. Circuit in 1999 after it was redesignated as a foreign terrorist organization upon expiration of the two-

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but with the intent to cause harm to persons or substantial harm to property; or the threat, attempt, or conspiracy to do any of these things. *See id.* (incorporating by reference 8 U.S.C. § 1182(a)(3)(B) (Supp. I 2001) and 22 U.S.C. § 2656f(d)(2) (2000)).

[254] 8 U.S.C. § 1189(a)(1)(C). The phrase "national security" includes the "national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1182(c)(2).

[255] *See* 8 U.S.C. § 1182(a)(3).

[256] *See id.* § 1182(a)(2)(A)(i).

[257] *See id.* § 1182(a)(2)(A)(ii).

[258] *See id.* § 1182(b)(1).

[259] *See id.* § 1182(b)(3).

[260] PMOI also is known as the Mujahedin-e Khalq or MEK. *See* People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 20 n.3 (D.C. Cir. 1999) [hereinafter *PMOI I*].

[261] *See id.* (dealing jointly with both organizations' petitions).

[262] *See id.* at 22.

[263] *See id.* The Court determined that the groups thus had only those rights granted to them by the statute itself, and that the Secretary had complied with the statutory procedures. *See id.* at 23–25; *see also* 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797 (D.C. Cir. 2002) (reaffirming the *PMOI I* ruling in the context of Northern Irish organizations lacking presence in the United States).

year term of the original designation.[264] This time, it was joined by the National Council of Resistance of Iran (NCRI), which the Secretary of State had designated as an alias of PMOI. NCRI, it turned out, had office space and a bank account in the United States, and thus the court was obliged to confront the due process issue directly.[265] First, the Court concluded that the designation process deprived designated organizations of a protected property interest insofar as it resulted in the blocking of all the organization's assets on deposit with any U.S. financial institution.[266] It then proceeded to the questions of when and what process is due in connection with the designation decision.[267]

Applying the *Mathews v. Eldridge* formula, which takes into account the nature of both the individual and the government interests at stake, the risk that existing procedures will result in an erroneous deprivation, and the prospect that additional or other procedures will reduce that risk, the Court held that organizations with a presence in the United States are entitled by due process in most circumstances to advance notice of the impending designation and an opportunity to respond to the administrative record by presenting at least written material to rebut the assertion of terrorist activity.[268] The Court specified that the government need not disclose to the organization any classified material underlying the designation, however, and that, upon an appropriate showing of need, the designation could still be carried out without advance notice.[269]

Although the Court thus concluded that PMOI and NCRI had been designated in violation of their due process rights,[270] it did not revoke their designation.[271] Instead, it remanded the matter to the Secretary with

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[264] *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001) [hereinafter *NCRI*].

[265] *See id.* at 201–03.

[266] *See id.* at 204–05 (the blocking results from 18 U.S.C. § 2339B(a)(2)).

[267] *See id.* at 205–09.

[268] *Id.* at 208–09.

[269] *Id.*

[270] This determination precipitated a new line of defense for a group of individual criminal defendants in California charged in 2001 with violating the material support law by providing financing and financial services to PMOI/MEK. *See* United States v. Rahmani, 209 F. Supp. 2d 1045 (C.D. Cal. 2002). After the *NCRI* decision, the Rahmani defendants successfully argued that the support prosecution could not continue if based upon an unconstitutional designation process. *See id.* at 1053–55. The government has appealed that determination, and in the meantime two district courts confronted with similar arguments by material support defendants have rejected the reasoning in *Rahmani*. *See* United States v. Sattar, 272 F. Supp. 2d 348, 363–68 (S.D.N.Y. 2003) (emphasizing that "it is for [the designated organization and] not the defendants to raise [the organization's] due process concerns"); United States v. al-Arian, 308 F. Supp. 2d 1322, 1346 (M.D. Fla. 2004) (holding that defendants lacked standing to attack collaterally the designation of Palestinian Islamic Jihad).

[271] *NCRI*, 251 F.3d at 209. *Cf.* 8 U.S.C. § 1189(b)(4) (Supp. I 2001) (providing that a designation remains effective despite a review petition until the D.C. Circuit issues a "final order setting aside the designation").

instructions to permit the petitioners to challenge the determination.[272] This the Secretary did, and after reviewing the material submitted by PMOI, the organization was re-designated again.[273] PMOI once more petitioned for review, just as NCRI would petition again soon thereafter, but the D.C. Circuit has consistently upheld the designation process against their due process challenges since the Secretary of State adopted the new procedures.[274]

One commentator has cautioned that it is not actually known whether the Secretary of State has employed the notice procedures required by the D.C. Circuit in the context of organizations other than PMOI/NCRI.[275] A recent example from the analogous context of IEEPA designations, however, provides at least some reason to believe that he has.

As noted previously, the President has twice acted under IEEPA to promulgate executive orders establishing analogous designation procedures for terrorist organizations and individuals, first in 1995 in response to terrorist interference with the Middle East peace process and again in 2001 in response to the 9/11 attacks.[276] Like the material support procedures, the IEEPA designation procedures, which identify group and individuals as Specially Designated Terrorists (SDT's) and Specially Designated Global Terrorists (SDGT's) subject to blocking and embargo, do not on their face require ex ante notice and an opportunity to be heard.[277] Accordingly, in 2001, when the government designated the Holy Land Foundation for Relief and Development (HLF) an SDGT based on its ties to Hamas, it did not provide the group with ex ante notice. Shortly thereafter, however, the D.C. Circuit issued its *NCRI* holding that ex ante procedures were required as a default rule in the material support context. Apparently recognizing that the rationale of *NCRI* applied equally to the IEEPA context, the government notified HLF not long thereafter that it

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[272] *NCRI*, 251 F.3d at 209. The Court concluded by noting its expectation that the Secretary would follow similar procedures in other cases in the future. *See id.*

[273] *See* People's Mojahedin Organization of Iran v. Dep't of State, 327 F.3d 1238, 1241 (D.C. Cir. 2003) [hereinafter *PMOI II*].

[274] *See id.* at 1242–43; Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152, 158 (D.C. Cir. 2004).

[275] *See* Jonakait, *supra* note 250, at 147–48.

[276] *See supra* notes 75 and 128 and accompanying text.

[277] *See* 50 U.S.C. § 1701 (Supp. I 2001). Indeed, the Seventh Circuit recently held that an organization with a clear presence in the United States was not constitutionally entitled to such procedures before it was subject to designation and asset seizure in connection with its alleged funding for terrorist organizations: "Although pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies. Risks of error rise when hearings are deferred, but these risks must be balanced against the potential for loss of life if assets should be put to violent use." Global Relief Found., Inc. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) (citations omitted). This holding is consistent with the *PMOI II* decision in which the D.C. Circuit pointed out that pre-designation notice need not be given upon a showing of necessity by the government. *See PMOI II*, 327 F.3d at 1242.

had decided to reopen the designation process, giving HLF thirty-one days to respond and present contrary evidence.[278]

Ultimately, the government affirmed its designation of HLF as an SDGT, but the episode indicates that the D.C. Circuit's holding has had an impact beyond the confines of the PMOI/NCRI case.[279] On the other hand, the fact remains that neither the material support statute nor its IEEPA analogue on their face require the procedural safeguards identified by the D.C. Circuit as necessary to satisfy due process for organizations with a U.S. presence in circumstances not requiring delayed notification.

2. *Freedom of Expressive Association*

First Amendment objections to the material support law have been at least as frequent as due process complaints, but have met with less success in the courts.[280] The first such challenge occurred in the spring of 1998, not long after Secretary of State Albright promulgated the first batch of foreign terrorist organization designations in 1997.[281] In *Humanitarian Law Project v. Reno*, a coalition of eleven organizations and three individuals brought a declaratory judgment action in a California district court arguing, among other things, that the material support law violated their First Amendment right of expressive association.[282] In particular, the plaintiffs argued that the law impermissibly infringed freedom of association because it criminalized the donation of financial or material aid to

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[278] *See* Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 163–64 (D.C. Cir. 2003) (upholding the constitutionality of this procedure in that case).

[279] Some critics have argued that even with ex ante notice and an opportunity to respond, organizations are denied due process because they are not permitted access to the classified information underlying the determination and because of the loose standards governing the Secretary's determination of whether a group threatens U.S. national security. *See, e.g.*, David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10 (2003) (describing Secretary's authority as "a virtual blank check"). The D.C. Circuit has held that the government "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute," reasoning that secrecy of such information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *NCRI*, 251 F.3d 192, 208–09 (D.C. Cir. 2001). The D.C. Circuit also has held that the determination of whether a group's activities pose a threat to U.S. national security is not justiciable. *See PMOI I*, 182 F.3d 17, 23 (D.C. Cir. 1999); *PMOI II*, 327 F.3d at 1244. Other courts have so held as to the question of whether the group engages in terrorist activity. United States v. Rahmani, 209 F. Supp. 2d 1045, 1051–52 (C.D. Cal. 2002).

[280] I have written previously in some detail about First Amendment challenges to the material support law. The details of my views on that subject, consistent with the analysis in this section, are set forth in Chesney, *supra* note 58.

[281] Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650–51 (Oct. 8, 1997) (designating a total of thirty organizations).

[282] Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1184 (C.D. Cal. 1998) [hereinafter *HLP I*].

designated groups even when intended to facilitate only the humanitarian or political ends of such groups.[283]

Ruling on the plaintiffs' motion for a preliminary injunction, the district court agreed that the material support law impacted expressive association (at least insofar as financial contributions were concerned)[284] but rejected the claim that this impact was unconstitutional.[285] This determination turned primarily on the court's finding that the material support law is a content-neutral statute that impacted the plaintiffs' First Amendment interests only incidentally; Congress prohibits material support to designated organizations not to silence their lawful expression but to decrease their capacity to harm U.S. nationals or the national security interests of the United States.[286] The court accordingly applied intermediate scrutiny in its review of the statute, concluding that (1) Congress had authority to promulgate the law; (2) the government purpose involved is substantial and unrelated to suppressing expression; and (3) the statute is sufficiently tailored.[287]

A panel of the Ninth Circuit affirmed this holding on identical grounds.[288] Writing for the panel, Judge Kozinski emphasized that the material support law "does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group."[289] Instead, the law "prohibits . . . the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives required to carry out their grisly missions."[290] Likewise, Judge Kozinski wrote, there is no "right to provide resources with which terrorists can buy weapons or explosives."[291] In a subsequent appeal during the course of the same litiga-

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[283] *Id.* at 1186. The plaintiffs desired in particular to provide various forms of aid—including financial contributions, educational materials, and training related to international law—to members of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). *See id.* at 1180–84. For a thorough discussion of First Amendment issues arising at the intersection of material support, speech, and the attorney-client relationship, see Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 201–03 (2003).

[284] *See HLP I*, 9 F. Supp. 2d at 1186 (noting that "Plaintiffs' ability to provide false documentation or identification, weapons, lethal substances, or explosives to the PKK or LTTE is not protected by the right to freedom of association").

[285] *See id.* at 1196–97. A week later, the district court reinforced its opinion in HLP I with findings of fact and conclusions of law. *See* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1205 (C.D. Cal. 1998).

[286] *See id.* at 1188.

[287] *See id.* at 1192–97.

[288] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000) [hereinafter *HLP II*].

[289] *Id.* at 1133.

[290] *Id.*

[291] *Id.* In support of its conclusion, the Ninth Circuit drew parallels between the material support law's impact on the ability of U.S. persons to interact with designated foreign terrorist organizations and laws having a similar impact with respect to foreign states, noting that such laws had been upheld routinely against similar challenges. *See id.* at 1135

tion, moreover, another panel of the Ninth Circuit reaffirmed these conclusions.[292]

A number of other courts have followed suit. Most notably, the Fourth Circuit, sitting en banc, agreed with the Ninth Circuit in *United States v. Hammoud* that intermediate scrutiny applied to and was satisfied by § 2339B in the context of an expressive association challenge by a defendant convicted of providing funds to Hezbollah.[293] Similarly, in *United States v. Lindh*,[294] the court quoted extensively from the Ninth Circuit's first *Humanitarian Law Project* holding in the course of rejecting John Walker Lindh's freedom of association challenge.[295] Like the Ninth Circuit, the *Lindh* court drew parallels to decisions rejecting First Amendment challenges to foreign state embargoes in the course of upholding the material support law against a First Amendment challenge.[296] When the Seventh Circuit considered a comparable First Amendment challenge in the context of a civil lawsuit premised on a violation of the material support law, it adopted the Ninth Circuit's analysis upholding the constitutionality of the statute.[297] In like fashion, the D.C. Circuit has rejected the argument that IEEPA designations violate the First Amendment.[298]

(citing Regan v. Wald, 468 U.S. 222, 244 (1984) (upholding restrictions on travel to Cuba against Fifth Amendment challenge); Zemel v. Rusk, 381 U.S. 1, 16–17 (1965) (same); DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 295 (D.C. Cir. 1989) (rejecting First Amendment challenge to abortion funding policy); Palestine Info. Office v. Shultz, 853 F.2d 932, 941 (D.C. Cir. 1988) (rejecting First Amendment challenge to order closing office of foreign organization); Teague v. Regional Comm'r of Customs, 404 F.2d 441, 445 (2d Cir. 1968) (upholding foreign exchange restrictions targeting hostile nations against First Amendment challenge). The Ninth Circuit also rejected the argument that the statute's exceptions for the provision of medicine and religious materials fatally undermined the government's claim that the support ban must be sweeping and comprehensive to be effective. *See HLP II*, 205 F.3d at 1136 & n.4 ("Congress is entitled to strike such delicate balances without giving up its ability to prohibit other types [of] assistance which would promote terrorism.").

[292] *See* Humanitarian Law Project v. Ashcroft, 352 F.3d 382, 403 (9th Cir. 2003) [hereinafter *HLP III*], *rehearing in banc granted, vacated by* 382 F.3d 1154 (9th Cir. 2004).

[293] 381 F.3d 316, 329 (4th Cir. 2004) (en banc).

[294] 212 F. Supp. 2d 541 (E.D. Va. 2002).

[295] *See id.* at 571–72.

[296] *See id.* at 570 & nn.72–73 (citing, among others *Regan*, 468 U.S. at 242–43; *Zemel*, 381 U.S. at 16; Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996) (rejecting First Amendment challenge to the Cuban travel ban); Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991) (denying First Amendment challenge to prohibition against payments to Cuba); Veterans and Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs, 459 F.2d 676 (3d Cir. 1972) (upholding Trading with the Enemy Act and Foreign Assets Control Regulations against First Amendment attack). *See also* Chesney, *supra* note 58, at 1143–45 (discussing the embargo-material support analogy).

[297] *See* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026–27 (7th Cir. 2002).

[298] *See* Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 166 (D.C. Cir. 2003) ("Again, we hold as other courts have that there is no First Amendment right nor any other constitutional right to support terrorists, and that the record supports no conclusion that the designation or blocking violated any constitutional right of the HLF.").

The material support law thus has weathered First Amendment challenges with relatively little difficulty. It has encountered considerable problems, however, in a closely related area: the vagueness doctrine.

3. Vagueness or Overbreadth?

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[299] Put another way, a statute must describe prohibited conduct with sufficient clarity so as to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited."[300] And where the statute's prohibition might encompass constitutionally protected conduct—such as expression or expressive association—the combination of due process and First Amendment concerns requires courts to apply the doctrine with extra care.[301]

How does the material support law stack up against these principles? In particular, how do the various terms that constitute the definition of "material support or resources" fare? This question has arisen in a series of cases around the country over the past three years, producing a sharp split of authority. A number of courts, led by the Ninth Circuit, have concluded that certain of these terms are unconstitutionally vague in light of the possibility that they could be construed to encompass constitutionally protected conduct such as advocacy. These are important concerns, but they do not properly sound in vagueness. They are instead the sort of concerns meant to be addressed by a closely related but distinct doctrine: overbreadth. And when analyzed under that rubric, the material support law passes constitutional muster. Genuine vagueness concerns do arise, however, insofar as the terms "training" and "personnel" are interpreted to apply to a person who receives training or provides himself as personnel.

a. The Advocacy Concern

In the same opinion in which it rejected the plaintiffs' expressive association argument in *Humanitarian Law Project*, the Ninth Circuit accepted the plaintiffs' alternative argument that the terms "personnel" and "training" in the Antiterrorism and Effective Death Penalty Act of 1996 are unconstitutionally vague.[302] With respect to the former, the Court con-

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[299] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[300] *Id.* at 108; *see also* United States v. Harriss, 347 U.S. 612, 618 (1954).

[301] *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Grayned*, 408 U.S. at 109; United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights.").

[302] In response to the Ninth Circuit's vagueness concerns, the government argued that a reasonable person would understand the term "personnel" to apply only to a person subject

cluded that a reasonable person might be uncertain of the scope of the term because its plain meaning "blurs the line between protected expression and unprotected conduct."[303] In this view, a person advocating for or promoting a terrorist organization could be seen as supplying personnel.[304] By the same token, the term "training" might be thought to include protected expression such as "teaching international law to members of designated organizations."[305] When the issue arose again in the context of a subsequent appeal in that case, another Ninth Circuit panel reaffirmed these holdings on the same grounds.[306] And when the district court in related litigation considered a vagueness challenge to the portion of the material support definition referring to "expert advice or assistance," it held that this phrase too "could be construed to include unequivocally pure speech and advocacy protected by the First Amendment."[307]

Whether § 2339B might encompass protected advocacy is, of course, an important concern. But the vagueness doctrine is not the proper vehicle for examining whether that concern requires invalidation of the statute. Insofar as one is concerned that the statute might encompass protected advocacy, the question is not the clarity of the definition of material support, but rather, its scope. This concern implicates the doctrine of overbreadth, not vagueness.[308]

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to the direction and control of the organization, thus excluding the plaintiffs. *See HLP II*, 205 F.3d 1130, 1137–38 (9th Cir. 2000); *see also* U.S. DEP'T OF JUST., U.S. ATT'Y'S MANUAL, § 9-91.100 (June 2001) (construing "personnel" in that way). The Ninth Circuit declined to agree, however, arguing that it could not adopt this reading without distorting the plain meaning of the text. *See HLP II*, 205 F.3d at 1137–38. That argument is unpersuasive; the court certainly could have adopted such a reasonable reading of "personnel" if the judges had been so inclined, and indeed had an obligation to do so in order to avoid holding the statute unconstitutional. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (stating the constitutional avoidance doctrine of statutory interpretation). Confusingly, the vagueness debate in other courts has continued to focus unhelpfully on the propriety of adopting the government's direction-or-control limitation without recognition that the advocacy concern sounds more properly in overbreadth. *See, e.g.*, United States v. Sattar, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003) (better known as the Lynne Stewart prosecution) (agreeing with the Ninth Circuit that the "direction-or-control" concept could not be read into "personnel," at least insofar as that term is used with respect to § 2339B). Other cases, however, have taken a different view. *See* United States v. Sattar, 314 F. Supp. 2d 279, 299–301 (S.D.N.Y. 2004) (holding that "personnel" in the context of § 2339A is not unconstitutionally vague due to § 2339A's heightened mens rea requirement); United States v. Lindh, 212 F. Supp. 2d 541, 573–74 (E.D. Va. 2002) (adopting the government's "direction-or-control" reading of "personnel" and rejecting *Humanitarian Law Project* in the case against John Walker Lindh); United States v. Goba, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (magistrate judge ruling on the personnel issue in connection with a pretrial motion in the Lackawanna case chose to follow the *Lindh* court rather than the Ninth Circuit).

[303] *HLP II*, 205 F.3d at 1137.

[304] *Id.*

[305] *Id.* at 1138.

[306] *See HLP III*, 352 F.3d 382, 403–05 (9th Cir. 2003).

[307] Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1198–1200 (C.D. Cal. 2004) [hereinafter *HLP IV*] (quoting *HLP III*, 352 F.3d at 404).

[308] *See Aiding Terrorists Hearing*, *supra* note 54, at 10–11 (statement of Paul Rosenzweig, Senior Legal Research Fellow, Ctr. for Legal & Judicial Studies, Heritage

Whereas vagueness doctrine polices the clarity and precision of statutory language to ensure reasonable notice to the affected population and to constrain the discretion of enforcing officials, overbreadth doctrine polices the potential chilling effect of insufficiently tailored laws irrespective of their clarity.[309] In particular, overbreadth doctrine polices the scenario in which a statute may be applied constitutionally in some instances, but would be unconstitutional in a substantial percentage of other scenarios in which it could be applied.[310] This precisely describes the issue that arises when one argues that the material support definition might be understood to encompass advocacy or other activity protected by the First Amendment. In substance, that argument consists of the claim that the statute might apply to a range of regulable or proscribable conduct but nonetheless should be struck down because it also extends to protected activity. The potential problem, in other words, is not that the definition of "material support or resources" may be too unclear, but rather that it may be too sweeping.

Because overbreadth doctrine is "strong medicine," it is proportionally difficult to invoke.[311] In recognition that "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct," a law should be invalidated on this basis only when its unconstitutional application is "substantial . . . relative to the scope of the law's plainly legitimate applications."[312] The party objecting to the law, moreover, has the burden of demonstrating this substantial overbreadth.[313]

Not surprisingly, in light of these obstacles, overt overbreadth challenges to the material support law have all failed. Most recently, for example, the Fourth Circuit, sitting en banc, held that a defendant convicted of providing $3,500 to Hezbollah had "utterly failed to demonstrate . . . that any overbreadth is substantial in relation to the legitimate reach of § 2339B."[314] Similarly, the district court in the *Humanitarian Law Project* litigation declined to find that the statute was overbroad when expressly

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Found.) (concluding that the Ninth Circuit has conflated the vagueness and overbreadth doctrines).

[309] *Cf.* Virginia v. Hicks, 539 U.S. 113, 119 (2003).

[310] *See id* at 118–20.

[311] *Id.*

[312] *Id.* (emphasis in original).

[313] *See id.* at 122.

[314] United States v. Hammoud, 381 F.3d 316, 381 (4th Cir. 2004) (en banc); *see also* United States v. Lindh, 212 F. Supp. 2d 541, 572 (E.D. Va. 2002) (rejecting an overbreadth challenge both to § 2339B and to executive orders promulgated pursuant to IEEPA). Note that the decisions rejecting overbreadth challenges resonate with the answer courts uniformly have given to the closely related determination of whether the statute is sufficiently tailored to withstand intermediate scrutiny for purposes of ordinary First Amendment analysis.

confronted with an overbreadth argument.[315] These holdings are correct; the wide range of circumstances in which the statute constitutionally could be applied—including the provision of guns, funds, and equipment—make it difficult to see how the proportion of potentially improper applications could be substantial.[316]

Stripped of the advocacy-driven concern more properly addressed by the overbreadth analysis, the vagueness argument against the material support law loses most of its vigor.[317] But not all of it. Creative attempts by the government to apply the material support law to various circumstances can create genuine problems of foreseeability. For example, when prosecutors argued that the phrase "communications equipment" could be applied to criminalize the use of communications equipment as opposed to the physical transfer of such equipment, a district judge held the interpretation barred on vagueness grounds.[318] And so the question arises whether the creative use of the terms "personnel" and "training" in potential sleeper prosecutions would raise similar concerns.

b. Vagueness and Sleeper Prosecutions

Could a reasonable person have anticipated that the term "training" would be applied not only to those who provided the group with training but also to those who received training from the group?[319] And could a reasonable person have anticipated that the term "personnel" would be applied to those who provide themselves as personnel to a group? If the

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[315] *See HLP IV*, 309 F. Supp. 2d 1185, 1201–03 (C.D. Cal. 2004).

[316] It does not follow that the government thus can use the material support law to run roughshod over First Amendment interests. If the government were to attempt a prosecution under the material support law based on advocacy falling short of the *Brandenburg* standard, for example, the defendant would be able to invoke his or her First Amendment rights to defeat the attempt. *Cf.* Patrick Orr, *Sami Al-Hussayen Not Guilty of Aiding Terrorist Groups*, IDAHO STATESMAN, June 11, 2004, at 1 (describing prosecution and acquittal of Saudi student on charges of providing material support to designated foreign terrorist organizations by operating a jihadist website through which they engaged in recruiting and fundraising); Harvey Silverglate, *Opinion, Free Speech in an Age of Terror*, BOSTON GLOBE, June 28, 2004, at A11 (arguing that prosecution of Saudi student Sami Omar Al-Hussayen raised free speech concerns). The overbreadth analysis merely establishes that the law should not be struck down on its face in other circumstances.

[317] *Cf. Hammoud*, 381 F.3d at 330–31 (rejecting vagueness challenge to the term "currency" in the material support definition). The foregoing discussion applies with equal force to the analogous provisions of the IEEPA framework. *See, e.g.*, *Lindh*, 212 F. Supp. 2d at 573–75 (rejecting vagueness challenge to the IEEPA ban on providing "services" to the Taliban).

[318] *See* United States v. Sattar, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2004) ("The defendants were not put on notice that merely *using* communications equipment in furtherance of [a designated organization's] goals constituted criminal conduct.") (emphasis added).

[319] The first question was implicit in the original *Humanitarian Law Project* lawsuit, although the second question was not (the plaintiffs did wish to provide training, not receive it). *See HLP I*, 9 F. Supp. 2d 1176, 1204 (C.D. Cal. 1998).

answer to either question is no, then the strategy of using the material support law to incapacitate potential sleepers will require revision.

Consider the training issue first. It is understandable that the government would wish to incapacitate those who have received training at, for example, al Farooq in Afghanistan. The fact that a person has received training from al Qaeda in the use of firearms or explosives makes them unusually capable of inflicting harm, and further suggests an unusual willingness to inflict such harm against U.S. interests. Indeed, for these reasons the potential sleeper cases since 9/11 for the most part have focused on persons who have received training from al Qaeda camps.[320]

It bears emphasizing, however, that § 2339B on its face punishes only a person who "knowingly provides material support or resources" to a designated organization.[321] Read plainly, this language describes a dynamic in which the defendant is providing value to the proscribed group, not vice-versa.[322] Section 2339B thus plainly would punish the knowing provision of training to a designated group.[323] Indeed, this was a significant part of the motivation for the original proposal for criminalizing terrorism support (prompted by revelations about Edwin Wilson, Frank Terpil, and the training they provided to Libyan agents).[324] But it is difficult to see how a reasonable person would have anticipated that this language also makes it a crime to receive training from a designated group.[325] A defendant charged with rendering material support by receiving training from a designated organization accordingly should have a persuasive argument that these laws are unconstitutionally vague as applied in that circumstance—not because the receipt of training could not be criminalized, but because the material support law fails to do so with sufficient clarity to satisfy due process.[326]

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[320] *See* Terrorism Prosecution Statistics Website, *supra* note 124.

[321] 18 U.S.C. § 2339B(a)(1) (Supp. I 2001).

[322] *Cf.* Terry Frieden, *Three Sentenced in Virginia "Jihad" Case* (Nov. 7, 2003), *available at* http://www.cnn.com/2003/LAW/11/07/virginia.jihad/index.html (describing sentencing decision by Judge Leonie Brinkema rejecting an enhancement for "providing military services," reasoning that the defendants were "absorbing resources, not providing them" in connection with military-style training).

[323] The prosecution of Mohamad Elzahabi, resting in part on his role as a sniper instructor at an al Qaeda training camp, would seem to fall within this category. *See* Margaret Zack, *Terror-Probe Figure Pleads Not Guilty; Lawyer Likens Lying Charges to Stewart Case*, MINNEAPOLIS-ST. PAUL STAR-TRIB., July 10, 2004, at 1B (describing allegations). Because Elzahabi at that time may not have been a person subject to U.S. jurisdiction, however, it may not be possible to apply the material support law to him. The law's extraterritorial applicability in these circumstances warrants further consideration. *Compare* 18 U.S.C. § 2339B(a)(1) (referring to persons "within the United States or subject to the jurisdiction of the United States") *with* 18 U.S.C. § 2339A(a) (Supp. II 2002) (containing no similar limitation).

[324] *See supra* notes 18–43 and accompanying text.

[325] Much the same thing can be said of the IEEPA-based ban on providing "services" to designated SDT's or SDGT's such as the Taliban, to the extent that this language is used to encompass the receipt of training.

[326] Thus far, no court has squarely confronted the vagueness issue raised by the appli-

The use of the material support law (or executive orders under IEEPA) to prosecute those who provide themselves as "personnel" to a designated group raises a more difficult question for vagueness doctrine. Like training, personnel can be both provided and received. And if the government somehow brought a prosecution based on the defendant's receipt of personnel from a designated group, a vagueness issue comparable to the one described above with respect to training would arise. But the government's post-9/11 use of "personnel" has not functioned in this way. Potential sleepers are prosecuted not for receiving personnel, but for providing personnel. The vagueness question thus focuses on whether reasonable persons could have foreseen that providing personnel would include self-provision.

This question is further complicated by the legislative history of the material support statute. As discussed above, the decades-long effort to create a material support law had stalled repeatedly in the face of First Amendment concerns, including concerns about freedom of association. More specifically, the House Report accompanying the material support law stated unequivocally that the statute "does not attempt to restrict a person's right to join an organization."[327] Assuming that this statement accurately reflects congressional intent, how could the law be understood to make it a crime to provide one's self as personnel to a designated group?

The district court in *Lindh* sought to resolve this tension by distinguishing the broad category of "members" of an organization from what it took to be the subset of that category involving "personnel." The distinction, the court explained, was that "personnel" referred to the subset of members actually subject to the direction-or-control of the organization or otherwise in an employment-like relationship with it.[328] By way of example, the court asserted that "one can become a member of a political party without also becoming part of its 'personnel'" and "one can visit an organization's training center, or actively espouse its cause, without thereby becoming 'personnel.'"[329]

The key analogy here is the political party one.[330] It certainly is possible to distinguish, for example, between the body of people who are mem-

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cation of "training" to trainees rather than trainers. The closest treatment of the issue occurred in connection with John Walker Lindh's motion to dismiss the indictment in his case, including in particular the charges that he violated § 2339B by providing material support (including training) to two designated terrorist organizations—al Qaeda and Harakat ul-Mujahideen (HUM)—and that he violated executive orders issued pursuant to IEEPA by providing "services" to al Qaeda and the Taliban. *See* United States v. Lindh, 212 F. Supp. 2d 541, 573–76 (E.D. Va. 2002). Lindh did not challenge the term "training" on vagueness grounds, but did argue that the indictment failed to actually allege that he had provided training to al Qaeda or HUM. *See id.* at 573–74, 76. The court rejected this argument as premature. *See id.* at 576–78.

[327] H.R. REP. No. 104-383, at 43–45 (1995).

[328] *Lindh*, 212 F. Supp. 2d at 572.

[329] *See id.*

[330] The other comparison is not helpful. No doubt it is true that those who visit a group's

bers of a political party and those directed, controlled, or employed thereby. More importantly, a law that regulated the activities of actual employees of a political party would not necessarily be understood by a reasonable person to apply also to the party's general membership.

But is this a good analogy for terrorist organizations? In some instances it would seem to be an exceptionally good one. Several designated foreign terrorist organizations function also as political parties with membership rolls distinct from their personnel.[331] Others lack this quality, however, including al Qaeda.[332]

These variations dilute the impact of the political party analogy, leaving uncertainty as to the merits of the vagueness argument regarding the self-provision of personnel. So long as that uncertainty remains, it will cast a shadow over the Justice Department's use of the material support statute in sleeper cases.[333] Even if Congress had clearly articulated its intent to prohibit persons from supplying themselves as personnel to a designated organization, further questions relating to the statute's mens rea element remain to be addressed.

4. Due Process and Mens Rea

The material support law's mens rea element raises a pair of interrelated issues: (1) how should the element be interpreted, and (2) what constitutional restraints arise when § 2339B is used to prohibit persons from providing themselves as personnel?

With respect to a defendant's mental state, § 2339B on its face requires nothing more than proof that the person "*knowingly* provide[d] material support or resources" to a designated organization.[334] This knowledge requirement has itself been the cause of some confusion.[335] Is it enough if the defendant knew the identity of the recipient? Must the defendant also know that the recipient engages in terrorist activity? Must the defendant

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training camp or espouse a group's cause do not automatically become "personnel" as a result, but it equally is true that they do not thereby become "members" either.

[331] Hezbollah in particular comes to mind. For a thorough overview of Hezbollah's origins and evolution, see Adam Shatz, *In Search of Hezbollah (Part I)*, N.Y. REV. BOOKS, Apr. 29, 2004, at 41; Adam Shatz, *In Search of Hezbollah (Part II)*, N.Y. REV. BOOKS, May 13, 2004, at 26.

[332] *Cf.* Robert Killebrew, *Al Qaeda, the Next Chapter*, WASH. POST, Aug. 8, 2004, at B1 (predicting that al Qaeda will develop political and social services fronts in the coming years, following in the path of prior movements that initially focused on the commission of terrorist acts).

[333] *Cf.* Michael Chertoff, *Why Is this Ball in Our Court?*, WALL ST. J., June 17, 2004, at A18 (arguing, in connection with the effort to balance liberty and security in dealing with terrorism, that "[a] murky legal climate only obscures our options, and hamstrings our forces").

[334] *See* 18 U.S.C. § 2339B(a) (Supp. I 2001).

[335] *See, e.g.*, United States v. Al-Arian, 329 F. Supp. 2d 1294, 1304 n.24 (M.D. Fla. 2004) (describing dispute over this element).

further know that the Secretary of State has formally designated the group as a foreign terrorist organization?

The legislative history on this point is unclear. Earlier drafts of the legislation that became § 2339B in the House contained a second knowledge requirement, punishing the "knowing provision" of material support only where the support goes to an organization "which the person *knows or should have known* is a terrorist organization" or, in another variation, "which the person *knows or has reasonable cause to believe* is a terrorist organization."[336] Neither formulation survived the conference process that produced the final text of § 2339B, however, and there are no statements from the conferees explaining why they were dropped.

The courts have begun to address this uncertainty. Most notably, the Ninth Circuit spoke to this issue recently in its second opinion in the *Humanitarian Law Project* litigation. It concluded that the knowledge requirement of § 2339B can be satisfied either by proving that "the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated."[337] The government has expressed some concerns about how the latter option might be interpreted, but has signaled its general willingness to live with this approach.[338]

But what about the defendant's intent, as opposed to the defendant's knowledge? The statute is silent on this point. Should an intent requirement nonetheless be read into the law as a matter of statutory interpretation? Must an intent element be read into the law in order to avoid constitutional concerns?

a. Statutory Interpretation and Anticipatory Crimes

The Supreme Court's 1952 decision in *Morissette v. United States*[339] provides a helpful framework for considering whether an intent requirement ought to be read into § 2339B (or related IEEPA regulations) as a

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[336] *Compare* H.R. 1710, 104th Cong. § 102 (as introduced in the House on May 25, 1995) (proscribing knowing provision of material support to any designated organization) (emphasis added), *with* H.R. 1710, 104th Cong. § 102 (as reported in the House by the Comm. on the Judiciary on Dec. 5, 1995) (same), *and with* H.R. 2703, 104th Cong., § 102 (as introduced) (same), *and* 142 CONG. REC. H2137-93 (1996) (describing amendment by Rep. Hyde to change "should have known" to "reasonable cause to believe").

[337] *HLP III*, 352 F.3d 382, 403 (9th Cir. 2003).

[338] *See Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant, Asst. Att'y Gen.). The Justice Department has cautioned that the second option identified by the Ninth Circuit—proof of the defendant's knowledge of the organization's unlawful activities causing it to be so designated—might be construed to mean that the government would have to prove the defendant was aware of information in the classified portions of the record upon which the Secretary bases his or her decision. The government has asked the Ninth Circuit to amend its opinion to eliminate such a construction. *See id.*

[339] 342 U.S. 246 (1952).

matter of statutory interpretation. *Morissette* concerned a federal statute criminalizing "embezzle[ment], steal[ing], purloin[ing] or knowingly convert[ing]" government property,[340] and in particular addressed the defendant's argument that an intent requirement should be read into the text of this law.[341] The Supreme Court agreed that it should.[342]

The Court's opinion, by Justice Jackson, began by discussing the importance historically attached to intent requirements for criminal prohibitions at common law.[343] It also identified a more recent and contrary trend, however, involving crimes that "depend on no mental element but consist only of forbidden acts or omissions."[344] Jackson attributed this new species of intent-less crime to the impact of industrialization, urbanization, and the mass market, noting that the confluence of these factors has "engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."[345] Such "public welfare offenses" often involve situations of "neglect" rather than "positive aggressions or invasions."[346] Justice Jackson explained that "[m]any violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it . . . ." Since the harm that results in these instances exists regardless of the actor's intent, Jackson wrote, it follows that legislation application to public welfare offenses need not require proof of intent.[347]

Jackson went out of his way to emphasize that there is not a "precise line or . . . comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not."[348] It sufficed to say, for purposes of the charge against Morissette, that the federal statute relating to theft of government property sufficiently resembled crimes for which intent traditionally had been required so as to require such an element to be read into the federal statute as well.[349]

Morrisette was decided in 1952. Since that time, the trend in favor of statutes involving a reduced or absent intent requirement has accelerated considerably, reflecting what Professor Carol Steiker has described as the shift from the "punitive state" to the "preventive state."[350] This develop-

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[340] 18 U.S.C. § 641 (2000) (amended 2004).

[341] *Morissette*, 342 U.S. at 246.

[342] *Id.* at 263–64, 273.

[343] *Id.* at 250–52.

[344] *Id.* at 252–53.

[345] *Id.* at 254.

[346] *Id.* at 255.

[347] *Id.* at 256; *see also id.* at 259–60 (citing United States v. Dotterweich, 320 U.S. 277, 280–81 (1943), for the proposition that "[i]n the interest of the larger good," some regulatory laws "put[ ] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger").

[348] *Morissette*, 342 U.S. at 260.

[349] *Id.* at 261–67.

[350] Carol Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMI-

ment goes hand-in-hand with the recognition of ever-greater numbers of "anticipatory" crimes—statutes that criminalize conduct not because it is harmful in itself, but because it is a useful proxy for the occurrence of future harm.[351] Examples abound. It is a crime for a dealer or manufacturer to sell a gun to a minor, for example, irrespective of the provider's intent.[352] It is a crime to drive a car while intoxicated, irrespective of the driver's intent.[353] It is a crime to engage in transactions with a foreign country subject to an embargo, irrespective of intent.[354] And by the same token, both § 2339B and corresponding IEEPA orders make it a crime to engage in transactions with a designated foreign terrorist organization, irrespective of intent.

To the extent that an anticipatory law involves lengthy prison sentences, however, it breaks with the model traditionally associated with public welfare offenses. In *Morissette*, Justice Jackson emphasized that the concerns generated by the lack of an intent element in public welfare crimes were offset to a degree by the fact that the penalties associated with such crimes "are relatively small, and conviction does no grave damage to an offender's reputation."[355]

Seen in this light, § 2339B has elements of both types of crime. It resembles the public welfare/anticipatory crime model insofar as it punishes activity that is not harmful in itself but instead threatens to lead to future harm. On the other hand, its penalties are harsh. A conviction under § 2339B not only tars the offender with involvement in terrorism but subjects the individual to a maximum fifteen-year sentence (or life, if the government can demonstrate that a death resulted from the support).[356] Similarly, an IEEPA violation exposes an individual defendant to a maximum ten-year sentence.[357] Penalties of this magnitude do not coexist comfortably with the absence of an intent requirement.[358]

If this were the end of the inquiry, the question of whether an intent requirement should be read into § 2339B as a matter of statutory inter-

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NOLOGY 771, 773–74 (1998); *see also* Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, *in* APPRAISING STRICT LIABILITY (A. P. Simester, ed.) (Oxford) (forthcoming).

[351] *See* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 54–58 (2003).

[352] 18 U.S.C. § 922(b)(1) (2000).

[353] *See, e.g.*, FLA. STAT. ANN. § 316.193 (West 2004).

[354] *See, e.g.*, Farrakhan v. Reagan, 669 F. Supp. 506 (D.D.C. 1987) (upholding executive order imposing embargo on Libya pursuant to IEEPA).

[355] *Morissette*, 342 U.S. at 246.

[356] *See* 18 U.S.C. § 2339B(a)(1) (Supp. I 2001).

[357] *See* 50 U.S.C. § 1705(b) (2000). Note that incarceration is available where the violation was willful, whereas an unintended violation of the statute triggers civil sanctions instead. *See id.* (setting a maximum civil penalty of $10,000). Intent to violate the statute differs, of course, from intent to cause some particular harm or result by doing so.

[358] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 71–72 (1994) (emphasizing the statute's ten-year maximum sentence in connection with determination that it amounted to a traditional rather than a public welfare-type crime).

pretation under the *Morissette* framework would be a close one. But the legislative history of the statute precludes such a reading.[359]

As discussed in the survey of the material support law's origins, § 2339B was enacted in part out of dissatisfaction with the limits imposed by the intent requirement of its older sibling, § 2339A.[360] It was, moreover, enacted with express congressional findings to the effect that any support provided to terrorist organizations, however well intentioned, would tend to increase the capacity of such groups to cause harm to U.S. nationals or to the national security of the United States. The bills that eventually created § 2339B, including the original administration bill which was focused solely on the issue of fundraising, contained similar proposed findings. There were, to be sure, efforts in the House to amend the language of the prohibition to clarify § 2339B's knowledge requirement, and there were complaints that the law lacked an exception for aid rendered for humanitarian purposes. But there is little question that the concept behind § 2339B was to embargo foreign terrorist organizations without respect to the good intentions of would-be donors. A contrary intent cannot plausibly be attributed to Congress.

b. Constitutional Avoidance

The *Morissette* rule, however, is not the only basis upon which a court might conclude that an intent requirement must be read into § 2339B. The canon of statutory interpretation requiring avoidance of constructions that would render a law unconstitutional can produce the same outcome. And it has, actually, in at least one instance.

The district judge overseeing the prosecution of a group of Florida men linked to Palestinian Islamic Jihad invoked this canon of construction to impose a specific intent requirement on both § 2339B and IEEPA in all their various applications.[361] Specifically, the Court in *United States v. Al-Arian* held that a specific intent requirement must be read into the statute in order to avoid four separate constitutional problems.[362] Three of these concerns—vagueness, advocacy, and associational—have been discussed previously. They are not recapped here, except to note that the *Al-Arian* holding provides further evidence of the uncertainty surrounding the use of the material support law (and IEEPA regulations) in light of these constitutional issues.

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[359] *Cf. Morissette*, 342 U.S. at 263–70 (searching the legislative history of the theft statute for indications that Congress wished it to have no intent element); *X-Citement Video*, 513 U.S. at 73–78 (emphasizing lack of clear congressional desire to exclude an intent requirement).

[360] *See supra* Part I.

[361] *See* United States v. Al-Arian, 308 F. Supp. 2d 1322, 1338–40 (M.D. Fla. 2004); United States v. Al-Arian, 329 F. Supp. 2d 1294 (M.D. Fla. Aug. 4, 2004) (denying motion for reconsideration).

[362] *Al-Arian*, 308 F. Supp. 2d at 1338–39.

The *Al-Arian* decision raises a fourth issue, however, that has not previously been discussed. Must a specific intent requirement be read into the support law in order to avoid violating due process principles relating to personal guilt? The *Al-Arian* court thought so. In support, it cited the Supreme Court's 1961 decision in *Scales v. United States*, a landmark in the development of both due process and expressive association.[363]

i. Scales v. United States

The most direct way to suppress a dangerous organization (if not necessarily the most effectual) is to proscribe it outright, including by making membership in the organization a crime. But such measures carry profound constitutional implications, as they impinge on both expressive association and due process concerns relating to personal guilt. During the Cold War, the Supreme Court had occasion to address these concerns in *Scales v. United States*.[364]

Junius Scales was a regional chairman of the Communist Party (for North and South Carolina) when he was arrested on charges of violating the Smith Act. The Smith Act, officially titled the Alien Registration Act of 1940, contained an array of measures designed to suppress communist party activity in the United States.[365] In relevant part, it provided:

> Whoever organizes . . . any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of [the federal or state governments] by force or violence; or becomes or is a *member of, or affiliates with*, any such society, group, or assembly of persons, knowing the purposes thereof [commits a felony subject to a twenty year sentence].[366]

Scales was the first person convicted under the Smith Act's membership provision. After the Fourth Circuit affirmed his conviction,[367] he petitioned successfully for certiorari. Years would pass before the Supreme Court at last passed on the merits of the case,[368] and ultimately it too affirmed the conviction. In the course of doing so, however, the Court established the modern constitutional parameters for criminalizing association.

Justice Harlan's majority opinion began by emphasizing that the trial judge had instructed the jury that it must find that Scales "[1] was an 'active' member of the Party, and not merely 'a nominal, passive, inactive or

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[363] *Al-Arian*, 329 F. Supp. 2d at 1299–1300.
[364] 367 U.S. 203 (1961).
[365] 18 U.S.C. § 2385 (2000).
[366] *Id.* (emphasis added).
[367] Scales v. United States, 260 F.2d 21, 46 (4th Cir. 1958).
[368] *See Scales*, 367 U.S. at 206 n.2 (describing convoluted procedural history).

purely technical' member, [2] with knowledge of the Party's illegal advocacy and [3] a specific intent to bring about violent overthrow 'as speedily as circumstances would permit.'"[369] Justice Harlan conceded that the requirements of "active" membership and "specific intent" did not appear in the text of the statute, but wrote that these glosses could and should be read into it.[370]

Having thus affirmed the trial judge's narrowing construction of the statute,[371] Justice Harlan then turned to whether punishing active membership violated due process. "In our jurisprudence guilt is personal," Harlan began,

> and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.[372]

Emphasizing the "active member" and "specific intent" elements, Harlan concluded that Scales's relationship to the Communist Party sufficed to satisfy this concern.[373] Harlan recognized that this relationship was less direct and substantial than that of a conspirator to a conspiracy, but wrote that this distinction was tolerable for due process purposes so long as the "active member" and "specific intent" requirements were met.[374]

Harlan next deemed the membership provision consistent with the First Amendment. Though, he conceded that a "blanket prohibition on association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be

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[369] *Id.* at 220.

[370] *Id.* at 220–23. Note the inconsistency between this approach to statutory interpretation and the Ninth Circuit's refusal in *HLP II* to adopt the government's proposed limitation on the meaning of "personnel." *See HLP II*, 205 F.3d 1130, 1137–38 (9th Cir. 2000).

[371] Similarly, the Court rejected a vagueness challenge to the term "active membership," explaining that there is a clear distinction between "active" and "nominal" membership. 367 U.S. at 223–24.

[372] *Id.* at 224–25.

[373] *Id.* at 226–27 (writing that "we can perceive no reason why one who actively and knowingly works in the ranks" of an organization engaged in criminal activity, who also "intend[s] to contribute to the success of those [activities]" ought to be "any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act").

[374] *Id.* at 228 (holding that due process concerns relating to personal guilt "are duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent." Harlan went on to write that such a statute "therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.").

impaired,"[375] he again cited the "active membership" and "specific intent" requirements in concluding that the law avoided that danger. "Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute," he wrote.[376] Such a member "lacks the requisite specific intent to bring about the overthrow of the government as speedily as circumstances would permit."[377] Justice Harlan concluded that "[s]uch a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal."[378]

Scales thus identified two constitutionally required elements that must be present in order to criminalize membership itself. The government must prove that the defendant was not merely a passive but an active member of the organization, and it must prove that the defendant not only knew of but also specifically intended to facilitate the organization's unlawful ends.

ii. Scales and Terrorism-Support Legislation

How do § 2339B and IEEPA fare under *Scales*? Insofar as these laws are interpreted to criminalize affiliation with a designated organization, they squarely implicate the *Scales* precedent. In that limited circumstance, both an active membership and a specific intent requirement should be read into them.

No obstacles preclude a court from adopting such a reading. These laws do not speak expressly in terms of "active membership," of course, but then again neither did the Smith Act membership provision at issue in *Scales* itself. If anything, the term "personnel" comes closer on its face to the "active" member concept than does the bare term "member" used in the Smith Act. The government's direction-or-control understanding of the term further reinforces that connection. Courts can and should interpret § 2339B and the IEEPA regulations to reach only active membership in this sense.

Similarly, with regard to mens rea, neither § 2339B nor the IEEPA regulations on their face require an intent greater than knowledge.[379] This limitation was not fatal in *Scales*; the Supreme Court did not hesitate there to read a specific intent requirement into the statute in order for it to comply with the demands of due process and associational concerns. Courts can and should do much the same with § 2339B and IEEPA regulations when they are applied to punish membership alone.

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[375] *Id.* at 229.

[376] *Id.*

[377] *Id.* at 230 (internal citation omitted).

[378] *Id.*

[379] There has been some recent debate about precisely what it is that the material support defendant is supposed to know. *See supra* note 338.

In other circumstances—when, for example, these laws are used to punish the provision of money, equipment, or professional services—it is much more difficult to make the case that *Scales* controls. Nonetheless, the district court overseeing the *Al-Arian* prosecution has taken this position.

The court in *Al-Arian* reasoned that *Scales'* due process holding is concerned not with membership prohibitions per se but with any prohibition—whether targeting status or conduct—that subjects one person to criminal liability based on concerns about the conduct of others. Justice Harlan had introduced his due process analysis, after all, with the statement that "imposition of punishment on a status *or on conduct*" based only on the relationship of that status or conduct to other illegal activity triggered the personal guilt concern.[380] In the view of the *Al-Arian* court, § 2339B and IEEPA are precisely that kind of law even when applied to fundraising and the like.

This stretches *Scales* too far. The Supreme Court did not in that case establish a bright line rule to be applied to all crimes that are not *malum in se*. On the contrary, Justice Harlan wrote that the personal guilt issue required "an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis for criminal liability."[381] In the context of the Smith Act membership provision, the answer was "no," at least so long as courts understood the statute to include a specific intent requirement. It does not follow, however, that the same answer applies automatically to all laws that aim to suppress conduct that could lead to harmful consequences from other sources.

With respect to the non-membership applications of the support statutes, *Scales* suggests that courts must consider the nature of the relationship between the banned activity—providing funding, equipment, etc.—along with the harm that might be inflicted by the recipient organizations. In particular, courts must ask whether that relationship is sufficiently strong if based just on the donor's knowledge of the identity of the recipient and its unlawful activities, or if instead the relationship must also be supported by proof of the donor's intent to further the unlawful ends of the organization.

Because a relationship based on the provision of money, equipment and services differs in kind from a relationship based exclusively on mere membership, courts are not obliged to impose an intent requirement outside the latter context. As noted previously, the legislation creating § 2339B

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[380] 367 U.S. at 224–25 (emphasis added). It is possible too that Justice Harlan meant the same thing when he referred both to "conduct" and "status": becoming a member, and being a member. *Cf. id.* at 227 (referring to the "act" of "becom[ing] a member of an illegal organization") (internal quotation marks omitted).

[381] *Id.* at 226.

expressly stated a congressional finding that all forms of aid—but especially financial aid—given to foreign terrorist organizations enhanced their capacity to cause harm, irrespective of the donor's intent;[382] from this perspective, even facially innocuous aid can facilitate the group's capacity to do violence by enhancing the group's standing or popularity. Contrast this with the observation by Justice Harlan in *Scales* that membership alone might do "nothing more than signify[ ] [the member's] assent to [the group's] purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing."[383] The distinction suggests that while specific intent is required to satisfy due process where nothing more than membership is present, lesser mental states (such as knowledge) might suffice for laws that premise liability on conduct that makes a more affirmative contribution to the ultimate harm. These are fine but consequential distinctions, and they were not given their due by the *Al-Arian* court.

The *Al-Arian* approach would, in practice, open a significant loophole for foreign terrorist organizations to obtain funding and other forms of aid from U.S. persons. True, an intent requirement would pose little additional obstacle where the support took the form of weapons or explosives.[384] But what about the vast category of "dual use" support, including money? Consider the scenario in which an American citizen, deeply concerned about the plight of Palestinians in the Gaza Strip, decides to write a check for $10,000 to a fundraiser working on behalf of Hamas. The donor is told that the money will be used exclusively for the support of orphans, and receives assurances that the money will not be spent in connection with violent activities of any kind. The donor adamantly opposes violence, and believes that his support of Hamas will help that organization focus more on social services than on the use of violence. Is the donation legal? Under *Al-Arian*, the result depends on whether the donor specifically intended to facilitate the illegal ends of the organization. On these facts, the donor had no such intent and could not be prosecuted.

The *Al-Arian* court was sensitive to this hypothetical, and responded to it by suggesting that it had in mind something less demanding than a specific intent requirement. The court argued that in the above hypothetical, the jury could infer the requisite intent if the government proved the donor understood that money is fungible and that the organization would be free to use the money as it saw fit.[385] This suggests a mens rea element closer to recklessness than to specific intent.

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[382] *See supra* note 86. Through its support for and enactment of this legislation, and its comparable use of IEEPA powers, we can attribute similar views to the executive branch.

[383] *Scales*, 367 U.S. at 227.

[384] *See Al-Arian*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

[385] *Id.*

A recklessness standard interferes less with the purpose behind § 2339B and IEEPA than would a true specific intent standard, but still makes possible the good faith provision of support to foreign terrorist organizations in some circumstances despite the congressional finding that such organizations are "so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct."[386] The *Al-Arian* court points out that juries can "peer through . . . facades" such as an ill-intentioned donor who tries to disguise the purpose of the funding through a misleading statement on the memo line of a check.[387] Where the deceit is on the part of the organization and not the donor, however, the jury would be obliged to acquit the donor, and funds could flow to the terrorist group.

The distinction in culpability among the intentional, reckless, and deceived donors is not irrelevant. But it suggests the need for differential punishments, not for outright toleration of good faith support for foreign terrorist organizations.[388]

B. Criticizing Reliance on the Material Support Law from the National Security Perspective

The foregoing survey of civil liberties criticisms generated by the material support law suggests that the current statutory structure may be overly aggressive in some respects, particularly as applied in the potential sleeper cases. Tailoring problems, can run in both directions, however, and in this instance they do. The current framework can also be criticized from a national security perspective.

1. Foreign Military Training

When an individual obtains training in firearms or explosives, that individual's capacity to cause harm increases. And depending on the identity of the provider, the fact that the individual sought out such training may provide additional reason to suspect that the individual actually will use those skills in harmful ways. Training in weapons and explosives, in short, can serve as a proxy for future dangerousness. This is precisely why the government views those who have trained in al Qaeda camps as potential sleepers who must be incapacitated.[389]

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[386] *Id.* at 1339 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214) (emphasis added).

[387] *Al-Arian*, 308 F. Supp. 2d at 1339.

[388] The rationale of *Al-Arian* would seem also to require a similar mens rea requirement to be read into laws and regulations imposing embargoes on foreign states. *See* Chesney, *supra* note 58, at 1444 & n.149 (arguing that there is no meaningful distinction between foreign terrorist organizations and foreign states for purposes of embargoes or transactional restraints).

[389] The vast majority of training camp attendees, of course, were not subject to U.S. ju-

Existing laws, unfortunately, fail to address adequately the situation where a U.S. person obtains lethal training abroad. As just noted, the material support law's "training" provision cannot constitutionally be applied to those who received rather than provided training. Likewise, substantial uncertainty surrounds the concept of reaching such persons through the "personnel" alternative under the material support law.

This coverage gap is not a product of historical reluctance to regulate the military activity of U.S. persons abroad. On the contrary, federal criminal law has regulated participation by U.S. persons in foreign military activity from the early days of the republic. Motivated in large part by America's relatively weak position in the international system, at the time it was enacted the Neutrality Act of 1794 contained a provision expressly forbidding anyone within the United States from "enlist[ing]" in a military capacity with a "foreign prince, state, colony, district, or people" irrespective of the enlistee's intent.[390] There are a number of other statutes of like vintage limiting the ability of U.S. persons to engage in private military activities,[391] but the Neutrality Act provision comes closest to approximating the scenario in which U.S. persons travel abroad to, for instance, Afghanistan to learn combat skills from designated foreign terrorist organizations.

It does not come close enough, however, to provide a sound basis for dealing with the problem of potential sleepers who obtain military skills abroad. First, the statute fails to address the receipt of training in circumstances falling short of enlistment. Second, the statute's focus on traditional armed forces is antiquated. The Neutrality Act is a creature of the Westphalian era, a time when private military force posed relatively little threat compared to the capacities of governments. We live in a much different world today. In an era marked by the capacity and willingness of private transnational organizations to inflict vast casualties on civilian populations, there is no longer a sound basis for limiting our regulation of foreign military training to that obtained from states.

2. *The Erosion of the Foreign Terrorist Organization Model*

Unfortunately, the material support law's capacity to make up for this coverage gap is eroding. Like some other components of U.S. counterter-

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risdiction at the time of their training. Or were they? *See infra* note 452 (discussing the potential for the material support and training provisions to be applied to persons who were not in the United States at the time that the conduct in question occurred).

[390] *See* 18 U.S.C. § 959(a) (2000).

[391] *See, e.g.*, 18 U.S.C. § 958 (2000) (prohibiting U.S. citizens from accepting a military commission from a foreign state to serve against another state with which the United States is at peace); 18 U.S.C. § 960 (2000) (prohibiting U.S. persons from initiating military expeditions against states with which the U.S. is at peace); 18 U.S.C. § 2390 (2000) (prohibiting anyone within U.S. jurisdiction from enlisting to serve in armed hostilities against the United States).

rorism law,[392] the utility of the material support law depends on the government's ability to link a suspect to a known group already designated as a foreign terrorist organization. This focus is understandable. For the past twenty years, actual organizations with identifiable leaders, hierarchies, and members—from Hezbollah to the Real I.R.A. to al Qaeda—have dominated our perception of terrorism. Focusing on the problem of terrorism in organizational terms has helped us craft tools such as the material support law that originally were well-calibrated to the nature of the problem.

A number of problems flow from a statutory structure that relies on the formal, ex ante identification of foreign terrorist organizations. First, occasions will arise in which a person provides material support to a foreign terrorist organization before the Secretary of State formally designates the group, triggering criminal penalties.[393] Second, notwithstanding efforts to account for aliases in the designation process, targeted organizations may resort to name-changes and related subterfuges in an effort to circumvent the impact of a designation.[394] But the most pressing concern is less obvious than these.

As we try to determine how to deal effectively with terrorism in the 21st century, it is critical that we recognize that the source of the threat is evolving. Familiar organizations such as al Qaeda will remain a potent threat, to be sure, but the next generation of terrorism seems likely to emanate just as often from unfamiliar and transient groups that do not maintain a discrete identity for the length of time required to allow our organization-focused laws to have some effect.[395] Making matters worse, the next generation of terrorist threats also is likely to include decentralized networks of like-minded but loosely affiliated individuals who come together sporadically and on an ad-hoc basis.[396] Indeed, this may

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[392] *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(aa) (2000) (requiring exclusion of aliens who represent foreign terrorist organizations); *id.* § 1182(a)(3)(B)(i)(V) (excluding members of foreign terrorist organizations).

[393] Consider, for example, the fact that the Secretary of State did not designate Jama'at al-Tawhid wa'al-Jihad (the organization associated with Abu Musab al Zarqawi in Iraq) until October 15, 2004, notwithstanding the fact that the group's activities in Iraq had been the cause of serious concerns and extensive media coverage for many months prior to the designation. *See* Richard Boucher, State Dep't Spokesman, Press Statement, *Foreign Terrorist Organization: Designation of Jama'at al-Tawhid wa'al-Jihad and Aliases*, Oct. 15, 2004 at http://www.state.gov/r/pa/prs/ps/2004/37130.htm.

[394] *See, e.g.*, JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 108 (2003) (describing efforts by the Pakistani group Lashkr e Taiba to "change[ ] its formal name to Pasban-e-Ahle Hadith after it was banned in Pakistan and America").

[395] *See, e.g.*, *Debasing the Base: Rounding Up al-Qaeda*, ECONOMIST, Aug. 5, 2004, at 35 (describing attempt to assassinate Pakistan's prime minister-designate by a "previously unknown group calling itself the Islambouli Brigades of al-Qaeda"). For an overview of the emerging problem of unaffiliated terrorism, see M. E. Bowman, *Some-Time, Part-Time, and One-Time Terrorism*, 13 INTELLIGENCER: J. U.S. INTELLIGENCE STUD. 13 (2003).

[396] *See* Bruce Hoffman, *Al Qaeda, Trends in Terrorism, and Future Potentialities: An Assessment*, 26 STUD. IN CONFLICT & TERRORISM 429, 439 (2004) (describing the increasing significance of lone wolves and small cells); Lawrence Wright, *The Terror Web*, NEW

already be an accurate description of many threats that we currently face.[397]

Just as the U.S. once had to adjust its counterterrorism laws and policies from a focus on state-sponsored terrorism to accommodate the emergence of a second generation of relatively independent transnational organizations,[398] so too it must now adjust to account for the third generation threat posed by less identifiable groups and networks.[399] In a limited sense, the U.S. is the victim of its own success with respect to this emerging problem. At the time of 9/11, al Qaeda was a hierarchical organization led by a shura council (in which bin Ladin held the top position), along with a series of subcommittees focused on matters such as operational planning, financing, and propaganda, and a body of operatives and agents filling out the organization.[400] Efforts by the U.S. and its allies after 9/11 to crush al Qaeda—particularly but not only in connection with Operation Enduring Freedom in Afghanistan—had considerable effect, but al Qaeda has not been destroyed. On the contrary, it seems not only to have regenerated some of its prior functionality,[401] but also to have spawned or

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YORKER, Aug. 2, 2004, at 40, 44–45 (describing layers of networks associated to varying degrees with al Qaeda). Even such notable al Qaeda-related figures as Ramzi Yousef and his uncle Khalid Sheikh Mohammed were "not necessarily formal members" of the organization. 9/11 COMM. REP., *supra* note 2, at 59, 145–50; *see also id.* at 67 (noting that a "looser circle of adherents might give money to al Qaeda or train in its camps but remained essentially independent").

[397] *See Terrorist Financing: Hearing before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statement of Matthew A. Levitt, Senior Fellow in Terrorism Studies, Wash. Inst. for Near East Policy) ("Too often people insist on pigeonholing terrorists as members of one group or another, as if such operatives carry membership cards in their wallets. In reality, much of the 'network of networks' that characterizes today's terrorist threat is informal and unstructured."). As Bruce Hoffman of RAND explains, "[t]he traditional way of understanding terrorism and looking at terrorists based on organizational definitions and attributes in some cases is no longer relevant." Hoffman, *supra* note 396, at 439.

[398] *See* 9/11 COMM. REP., *supra* note 2, at 92 (noting that terrorism in the 1970s and 1980s tended to focus on regional conflicts, with most organizations either having a state sponsor or themselves aspiring to statehood); *id.* at 108 ("Although the 1995 National Intelligence Estimate had warned of a new type of terrorism, many officials continued to think of terrorists as agents of states . . . or as domestic criminals . . . .").

[399] This Article does not mean to suggest that the Intelligence Community (as opposed to current counterterrorism statutes) lacks sensitivity to this phenomenon. On the contrary, as early as the summer of 1995 the Intelligence Community produced a National Intelligence Estimate in 1995 warning that the most significant terrorist threats facing the U.S. emanated from "transient groupings of individuals" who had only "loose affiliations." *See* 9/11 COMM. REP., *supra* note 2, at 341 & n.2 (quoting from CENTRAL INTELLIGENCE AGENCY, NATIONAL INTELLIGENCE COUNCIL, THE FOREIGN TERRORIST THREAT IN THE UNITED STATES v, vii–viii, 10–11, 13, 18 (1995)).

[400] *See id.* at 56, 67 (describing the organizational structure of al Qaeda).

[401] *See, e.g.*, Interview by Renee Montagne with Bruce Hoffman, NPR: Morning Edition (Aug 11, 2004) (discussing Hoffman's view that al Qaeda lost around seventy-five percent of its leadership after 9/11, but continues to function and even to "replenish its ranks"), *available at* 2004 WL 56914247; *see also* Dan Eggan & John Lancaster, *Al Qaeda Showing New Life; U.S. Surprised by Signs of Regrouping*, WASH. POST, Aug. 14, 2004, at A1.

at least encouraged a variety of transient imitators and collaborators.[402] Al Qaeda today poses a threat in its inspirational capacity as an icon for the global militant jihadist movement, in addition to the more direct threat it poses in its own right.[403]

Counterterrorism law and policy can and should account for the emergence of the threat posed by transient groups and decentralized networks, in addition to the old threat posed by the traditional core of al Qaeda.[404] But the existing framework of terrorism-support laws, calibrated as it is toward linking individuals to already-identified-and-designated organizations, unfortunately is not well-calibrated for the new task.[405] As a result of this coverage gap, there will be circumstances in which policymakers simply lack plausible, long-term criminal justice alternatives to military detention.

IV. LEGISLATIVE REFORM OF COUNTERTERRORISM LAW

In the aftermath of the 9/11 Commission Report, the attention of lawmakers, the media, and the public is riveted on proposals to reform laws and policies relating to the gathering and analysis of intelligence. This is, unquestionably, a timely and critically important task. But three years removed from the exigencies of 9/11, the time also is ripe to devote attention to the role played by criminal law in counterterrorism efforts and to the possibility of legislative reform.[406]

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[402] *See Special Report: Plots, Alarms, Arrests—Chasing al-Qaeda*, ECONOMIST, Aug. 12, 2004, at 22, 24 (arguing that "in its second coming, as the battle-standard and the ideology for a generation of militant Muslim youth, al-Qaeda is scoring nightmarish success"); Dan Eggan and John Lancaster, *Al Qaeda Showing New Life; U.S. Surprised by Signs of Regrouping*, WASH. POST, Aug. 14, 2004, at A1 (describing al Qaeda "breakaway cells" emerging after 9/11); *see also* Interview by Mary Louise Kelly with George Tenet, NPR: Morning Edition (Mar. 18, 2004) ("The steady growth of Osama bin Laden's anti-American sentiment through the wider Sunni extremist movement and the broad dissemination of al-Qaeda's destructive expertise ensure that a serious threat will remain for the foreseeable future with or without al-Qaeda in the picture."), *available at* 2004 WL 56912017.

[403] *Cf.* Xavier Raufer, *Al Qaeda: A Different Diagnosis*, 26 STUD. IN CONFLICT & TERRORISM 391 (2003) (arguing for a conception of al Qaeda not as a discrete organization but instead as a decentralized network).

[404] *See* David Johnston & David E. Sanger, *New Generation of Leaders Is Emerging for Al Qaeda*, N.Y. TIMES, Aug. 10, 2004 (noting that "new evidence suggests that Al Qaeda has retained some elements of its previous centralized command and communications structure," contrary to the view adopted by many experts after Operation Enduring Freedom who argued that "the group had been dispersed and had been trying to re-form in a loosely affiliated collection of extremist groups").

[405] The inability of FBI agents to obtain a FISA order prior to 9/11 in connection with Zacarias Moussaoui—because of uncertainty that his links to certain Chechen rebels sufficed to establish a tie to a "foreign power"—may illustrate another manifestation of this same problem. *See* 9/11 COMM. REP., *supra* note 2, at 274.

[406] *Cf.* Michael Chertoff, *Law, Loyalty, and Terror*, WEEKLY STANDARD, Dec. 1, 2003 (writing about the uncertainty regarding rules for detention of enemy combatants, Judge Chertoff noted that "[t]wo years into the war on terror, it is time to move beyond case-by-

Judge Michael Chertoff, who helped orchestrate the Bush administration's response to 9/11 in his capacity as Assistant Attorney General in charge of the Criminal Division, made this point recently with respect to the difficult issues raised by the problem of potential terrorists within the United States.[407] Judge Chertoff noted that the "traditional way to incapacitate dangerous individuals" is through the criminal justice system, and that the use of "traditional battlefield rules" as an alternative to system even within the United States raises difficult issues.[408] Emphasizing that the passage of time has given us both breathing room and perspective since 9/11, Judge Chertoff called for Congress and the Administration to begin to engage these issues more assertively by "systematically sketch[ing] the legal framework for the demands of this new kind of war."[409]

In this spirit, this Article concludes with a battery of legislative proposals designed to address both the civil liberty and national security criticisms raised by the Justice Department's post-9/11 strategy for dealing with sleepers. Specifically, the Article proposes a trio of statutory reforms:

- Congress should regulate or even wholly prohibit the act of receiving training in the use of weapons or explosives outside the United States.
- Congress should expressly confront the membership issue, making it a crime to become an active member of a designated foreign terrorist organization where the government can prove that the defendant had the specific intent to facilitate the organization's unlawful purposes.
- Congress should revise § 2339B and IEEPA substantially. To begin with, it should codify the D.C. Circuit's holdings with respect to the designation process; it should make clear that protected advocacy or expression cannot be the basis for prosecution (although it might be an investigative predicate); and it should clarify the type of knowledge required for prosecution. But Congress also should undertake more substantial reforms. One option would be to trisect these laws, linking a hierarchy of mens rea requirements to corresponding levels of maximum punishment. Alternatively, Congress should reformulate these provisions into ex ante licensing schemes (somewhat along the lines originally proposed for § 2339B).

These proposals all have their own weaknesses, and certainly will not resolve the underlying tension between the criminal justice and military detention alternatives within the United States. Regardless of how the grounds for prosecution may be extended or contracted, for example, the

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case development.").

[407] Chertoff, *supra* note 333, at 18.

[408] *Id.*

[409] *Id.* Judge Chertoff also asks whether we should "set up specialized courts to deal with terrorist detentions" like those of the English and French legal systems. *Id.*

constitutional safeguards of the criminal justice process will ensure that when policymakers view interrogation as the overriding priority they will be inclined to elect an option other than prosecution.[410] And there will remain instances when the government simply cannot prosecute because the information upon which it relies cannot be disclosed without exposing sources or methods of collection.[411] Indeed, in light of these realities the question will continue to arise whether the United States should adopt a special purpose legal regime for terrorism cases blending some of the safeguards of the criminal justice system with some of the flexibility of the military alternative.[412] In the absence of such a system, however, and with these caveats in mind, the criminal law proposals outlined below would provide a substantial improvement over the status quo from both a civil liberties and a national security perspective. And certainly we are better off considering such measures now than in the heated aftermath of the next attack.

A. An Ex Ante Licensing Regime for Foreign Military Training

Congress should immediately close the loophole that permits U.S. persons to obtain training in the use of weapons and explosives[413] while

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[410] *See* Gonzales, *supra* note 134, at 13. The government's overriding interest in preventive intelligence gathering in some circumstances suggests the need to give thought to hybrid approaches that embody some of the transparency and accountability of the criminal justice system while at the same time permitting extensive interrogation for non-prosecutorial purposes.

[411] *See id.* ("We could have abundant information that an individual has committed a crime—such as material support for terrorism—but the information may come from an extremely sensitive and valuable intelligence source. To use that information in a criminal prosecution would mean compromising that intelligence source and potentially putting more American lives at risk."). *Cf.* Chertoff, *supra* note 333, at 18 (noting that "[i]ntelligence information, especially foreign intelligence, is highly sensitive—almost always hearsay inadmissible in criminal courts. Indeed, foreign sources routinely pass us intelligence that they not only will never permit to be aired in open court, but advise us they will publicly deny if ever exposed."); *see also* 9/11 COMM. REP., *supra* note 2, at 127 (discussing the fact that al Qaeda leaders ceased using certain means of communication after a leak to the *Washington Times* that may have revealed that the National Security Agency was listening to their communications). The uncertainties surrounding the prosecution of Zacarias Moussaoui testify to the difficulties that can arise, although the Fourth Circuit's most recent ruling in that proceeding suggests that it may yet be possible in that case to reconcile the government's interest in preserving the interrogation environment for certain high value al Qaeda detainees with Moussaoui's interest in obtaining exculpatory testimony from them. *See* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) (holding that Moussaoui's Sixth Amendment right to compulsory process could be reconciled with the government's national security interest in not producing certain witnesses held as combatants by substituting written summaries of statements made by those witnesses).

[412] For an example of such a proposal, see Paul Rosenzweig and James J. Carafano, *Preventive Detention and Actionable Intelligence*, Heritage Foundation Legal Memorandum No. 13 (Sept. 16, 2004), *at* http://www.heritage/org/research/HomelandDefense/lm13/cfm.

[413] Reaching beyond weapons and explosives training to other types of training carried on at al Qaeda-style camps would tend to raise difficult definitional issues; a statute fo-

abroad.[414] The fact that a person has obtained such training frequently lies at the heart of government concerns about potential sleepers,[415] and adoption of a training ban with significant penalties would provide a firm basis for using the criminal justice system in such cases. In the Lackawanna case, for example, there would have been no need to reach for controversial interpretations of the material support law's "training" and "personnel" provisions in order to initiate a successful prosecution; the men could have been prosecuted simply on the basis of their activities at the al Farooq camp. Likewise, such a law would have provided a clear foundation for prosecuting Jose Padilla and many other individuals who had received training at foreign terrorist camps.[416] Focusing on the receipt of training, moreover, avoids the difficulties associated with proving membership in an era in which the terrorist threat often will emanate from "groups or individuals who may not be formal members but were trained at Al Qaeda's camps and are willing to work as freelancers."[417]

The current training loophole could be closed in a number of ways. First, Congress could craft a provision modeled on the existing material support law structure, banning the knowing receipt of training in arms or explosives from a designated foreign terrorist organization. This ap-

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cused on the relatively clear categories of weapons and explosives, on the other hand, is likely to encompass almost any of the trainees that would be of interest as terrorism suspects.

[414] In testimony to the Senate Judiciary Committee, Assistant Attorney Gen. Daniel Bryant explained that under current law, "training to commit terror, under certain circumstances, may not be a crime, which just stands logic on its head." *Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant). Bryant also observed that under current law, "usually, we would go in the direction of showing that the person provided himself as personnel" in order to pursue a material support charge. *Id.*

[415] *See, e.g.*, *Aiding Terrorists Hearing*, *supra* note 54 (question by Sen. Hatch describing his concern with potential sleepers in the United States in terms of persons who have received training at terrorist camps abroad).

[416] *See* Glenn R. Simpson, *Man Says He Told of Hijacking Plot in 2000*, WALL ST. J., June 4, 2004, at A4 (indicating that FBI released Niaz Khan for lack of grounds to hold him in 2000 despite fact that he confessed to receiving hijacking training at a camp in Pakistan); 9/11 COMM. REP., *supra* note 2, at 73 (indicating that Ahmed Ajaj, one of the 1993 World Trade Center bombing conspirators, left his home in Texas in 1992 to learn to make explosives at a camp near the Afghanistan-Pakistan border); *id.* at 177, 180 (indicating that Ahmed Ressam, who planned to attack Los Angeles International Airport at the millennium before his fortuitous arrest, received training at an Afghan camp, although his connection to al Qaeda was informal); *id.* at 180 (indicating that the cell arrested in Jordan prior to the millennium also trained in Afghanistan); *id.* at 226 & n.60 (describing allegations that two men who associated with future hijacker Hani Hanjour in Arizona in the 1990s also trained in Afghanistan); David E. Kaplan, *Anticipating the Unfathomable*, U.S. NEWS & WORLD REP., June 7, 2004, at 24 (describing government interest in Adam Yahiye Gadahn, a.k.a. Adam Pearlman, a Californian who traveled to Pakistan in 1998 and eventually undertook military training at an al Qaeda camp in Afghanistan). The 9/11 hijackers and their associates, of course, also were veterans of the Afghan camps. *See, e.g.*, 9/11 COMM. REP., *supra* note 2, at 156–57 (Midhar, Hazmi, Khallad, Abu Bara); *id.* at 164–66 (Atta, Jarrah, Binalshibh); *id.* at 226 (Hanjour); *id.* at 232–35 (describing the training of the "muscle" hijackers); *id.* at 275 (Moussaoui).

[417] STERN, *supra* note 394, at 254.

proach has the virtue of making clear that the ban would not apply to innocuous activity such as receiving advice in the context of hunting or shooting at a gun club. But it also has a significant weakness in that it depends on establishing that an already-designated organization provided the training. Prosecutors often will be unable to identify the specific sponsoring organization, and even when they can, in the future the sponsoring organizations may not yet have been designated (particularly in light of the trend toward long-term decentralization).[418] Tying the training ban to the designation process accordingly would result in an unduly narrow prohibition.

At the other end of the spectrum, Congress might consider a flat prohibition barring all firearms and explosives training outside the United States regardless of the circumstances.[419] Standing alone, this blunderbuss approach merely reverses the virtues and vices of the designation-linked approach; it would ensure coverage of unanticipated providers, but at the same time would sweep in a wide array of innocuous activity. If paired with a carefully crafted intent requirement, however, the flat ban might strike a better balance.

The difficulty lies in defining the requisite intent. Requiring proof of intent to use the training in connection with a specific unlawful act would in most circumstances preclude prosecution in light of the practical impossibility of establishing such a specific linkage. Intent would instead have to be defined in more general terms, such as intent to take up arms against the United States. Alternatively, intent could be an affirmative defense pursuant to which defendants could avoid liability by establishing that they obtained the training solely for sporting or professional reasons.

As opposed to the flat ban approach, Congress could instead adopt an ex ante licensing scheme closely regulating, but not always prohibit-

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[418] *See, e.g.*, MONOGRAPH ON TERRORIST FINANCING, *supra* note 73, at 32 (observing that criminal prosecutions for terrorism financing related to al Qaeda "could not be considered" prior to the belated designation of al Qaeda in 1999); 9/11 COMM. REP., *supra* note 2, at 66–67 (indicating that the al Qaeda camps in Afghanistan were but one part of a "broad infrastructure of such facilities in Afghanistan made available to the global network of Islamist movements").

[419] In this respect, the proposal tracks approaches already enacted by a number of other states. *See, e.g.*, Antiterrorism Act, 2004, c. 104, (Austl.) ("An Act to amend the law relating to foreign incursions and recruitment, terrorism offences and proceeds of crime, and for related purposes"), at paragraph 20 (replacing Section 102.5 of the Criminal Code with a ban on receipt of training from terrorist organizations), *available at* http://scaleplus.law.gov.au/html/comact/browse/TOCN2004.htm) (last visited Nov. 23, 2004); Criminal Code, R.S.C., ch. C-46, § 83.18(3)(a) (2004) (Can.) (defining support for a terrorist group to include "receiving . . . training"). The United States would be wise to press its allies to follow suit. The difficulties Germany has had prosecuting suspected 9/11 plotter Mounir Motassadeq, for example, might have been lessened if he could have at least been prosecuted for receiving weapons training in Afghanistan. *Cf.* Shannon Smiley, *Al Qaeda Figures Say 9/11 Defendant Was Unaware of Plot, U.S. Tells Court*, WASH. POST, Aug. 12, 2004, at A14 (describing the poor prospects for the prosecution during the Motassadeq retrial, and noting that the defendant had trained in Afghanistan).

ing, the ability of U.S. persons to obtain weapons and explosives training abroad. Under this approach, a would-be trainee would be obliged to apply for a license—explaining the purpose of the training and the identity and location of the provider—before obtaining the training. The government agency administering the regime would determine whether the proposed training posed a threat to the security of U.S. nationals or to U.S. national security (much as the Secretary of State must do in connection with the terrorist organization designation process). The process could be streamlined by generating lists of pre-approved providers for legitimate purposes (such as scientific exchange or business purposes) and of pre-denied providers (such as any designated foreign terrorist organization or certain hostile foreign governments).

The concept of an ex ante licensing scheme for these purposes is by no means a new or unprecedented concept. On the contrary, as noted previously during the survey of the origins of the terrorism-support laws, the Reagan Administration in the early 1980s considered promulgating a similar regulatory scheme. Specifically, it considered amending the International Traffic in Arms Regulations ("ITAR") to govern not only the export of certain military equipment and services but also to bar the unlicensed "participation of U.S. nationals in foreign military activities generally."[420] In the end, the regulations were amended only to limit the ability of U.S. persons to provide, not receive, military training.[421] This narrow approach may have been consistent with the scope of ITAR, but it left open a significant gap in the law that Congress can and should now close.

Although providing more flexibility than the flat ban proposal discussed above, the licensing approach still might be criticized on the ground that it too could encompass innocuous conduct. One can easily imagine circumstances, after all, where a person travels abroad without expecting to participate in activities that might be characterized as firearms training but nonetheless ends up on a hunting trip or at a sports club with a firing range. Although prosecutorial discretion should come in to play at this point, one might wish to see more concrete limitations included in the statutory scheme to account for this possibility. One option, similar to that mentioned above, would be to provide defendants with an affirmative defense based on their innocuous intent in such cases.

One way or another, the training scenario must be addressed. A vast number of would-be jihadists—including many U.S. persons—cycled through foreign military camps operated by al Qaeda and other anti-Western organizations in the 1990s.[422] The training that has already occurred can-

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[420] *See supra* notes 30, 44. Given the limitations of IEEPA authority and the concerns about possible abuse of that power, it would be best not to precisely follow the model of the Reagan proposal. Instead, Congress should enact new legislation specifically authorizing the ex ante licensing regime.

[421] *See supra* notes 30, 44.

[422] *See, e.g.*, Craig Whitlock, *Moroccans Gain Prominence in Terror Groups*, WASH.

not be undone, but such training continues in many countries notwithstanding U.S. efforts in Afghanistan and elsewhere.[423] The single most useful step Congress can take in reforming our criminal counterterrorism laws is to close this loophole as soon as possible.[424]

B. Confronting the Membership Issue Within Constitutional Bounds

The licensing scheme or ban on weapons and explosives training will resolve the vagueness problem that arises when prosecutors use the material support law's "training" provision in a sleeper case. But what about the problems caused by prosecutors' use of the "personnel" provision? This practice may not be unconstitutionally vague, but it does implicate the landmark holding in *Scales v. United States* that the government may not prosecute on the basis of membership alone except upon a showing that the defendant was an active member of the organization and was aware of and intended to further the illegal ends of the organization.[425]

In light of *Scales*—which requires courts to read these saving elements into any ban on mere membership—one could argue that there is no need for a formal amendment of the support laws to address the associational and due process concerns raised by the government's post-9/11 use of the "personnel" concept. But a clarifying amendment nonetheless would provide several advantages. First, if membership in terrorist organizations is to be criminalized, we should confront and debate the issue directly. Second, a carefully crafted amendment would help to avoid a situation in which a court might go beyond the minimums set forth in *Scales* to impose a more demanding mens rea requirement (such as requiring proof of a specific intent to facilitate a particular unlawful act). Third, addressing the membership issue separately from the other aspects of the material support definition would help to avoid a situation in

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POST, Oct. 14, 2004, at A01 (reporting that the "Moroccan government has acknowledged it does not know the whereabouts of about 400 of its citizens who allegedly trained at al Qaeda camps in Afghanistan, Bosnia and Chechnya, some of whom are now thought by the Moroccan authorities to be in Europe").

[423] *See, e.g.*, Associated Press Wire, *Al Qaeda-Run Camps Found in Saudi Arabia, Official Says*, Jan. 16, 2004 (describing discovery of al Qaeda-operated training camps in Saudi Arabian desert); *Raid on al Qaeda Meet Kills 40; Uzbeks and Arabs Said to Be at "Training Facility,"* CNN, Sept. 9, 2004 (describing attack on training camp discovered by Pakistani military in the Waziristan region), *available at* http://www.cnn.com/2004/WORLD/asiapcf/09/09/pakistan.alqaeda/index.html; STERN, *supra* note 394, at 81 (reporting claims that al Qaeda members had received training in Indonesia at camps operated either by Laskar Jihad or Laskar Jundullah); *id.* at 107–08 (describing claim by the group originally known as Lashkar e Taiba that it "train[s] forty thousand youth[s] per year at its schools and military training camps" in Pakistan).

[424] The author does not mean to suggest that the threat arises only in connection with U.S. persons who have received such training, although the relative freedom U.S. persons enjoy to operate within the U.S. does distinguish them from their non-citizen and non-resident counterparts.

[425] Scales v. United States, 260 F.2d 21, 24 (4th Cir. 1958).

which a court might imply a mens rea requirement not only in the context of the "personnel" provision but also in the context of other parts of the material support definition dealing with guns, funds, and the like.

Congress accordingly should enact a stand-alone provision overtly prohibiting membership in designated foreign terrorist organizations, expressly subject to the *Scales* requirements of active membership (or membership subject to the organization's direction or control), knowledge of the group's illegal ends, and specific intent to further those illegal ends. And having done this, for clarity's sake it should then amend the material support definition to exclude prosecution on the basis of self-provision of personnel.

The specific intent requirement will ensure that in the context of an organization engaged in both legal and illegal activities, membership prosecutions cannot succeed unless the government can prove the person's intent to further those illegal activities. Not all terrorist organizations have such a hybrid nature, however, and the greater an organization's emphasis on illegal activities, the easier it becomes to prosecute its members on that basis alone. It would, for example, be a simple matter to convict Zacarias Moussaoui or Richard Reid under a membership law in light of their frequent assertions of membership in al Qaeda and desire to facilitate al Qaeda's atrocities.[426]

The emergence of third-generation terrorism in the form of decentralized terrorism networks and ad hoc groupings promises to erode the utility of any provision focused on a suspect's formal ties to a previously identified-and-designated organization. But the more traditional organizations will remain a significant, if not preponderate, aspect of the threat for the near term, and prosecutors accordingly will continue to have occasions to employ the "personnel" provision of the material support law in a reflex-ive manner. Congress should reform this practice as soon as possible to place it on a firmer—and constitutionally less-objectionable—ground.

C. Replacing § 2339B with an Ex Ante Licensing Regime

Former Assistant Attorney General Viet Dinh recently observed that "we can all agree that there are certain core activities that constitute material support for terrorists, which should be prohibited, and others which

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[426] *See, e.g.*, Transcript of Arraignment and Motions Hearing at 26–27, United States v. Moussaoui, 2002 U.S. Dist. LEXIS 16566 (E.D. Va.) (Cr. No. 01-455-A) (plea hearing) (Moussaoui stated, "I am a member of al Qaeda . . . . I pledge bayat [fealty] to Osama bin Ladin."), *available at* http://www.washingtonpost.com/wp-srv/nation/transcripts/text_moussaoui.htm; Slobogin, *supra* note 351, at 46 (quoting Moussaoui's declaration that he would "be delighted to come back one day to blow myself into your new W.T.C. if ever you rebuild it") (citations omitted); Richard Reid, Statement at Sentencing (Jan. 31, 2003) (transcript available in *Reid at Sentencing*, L.A. TIMES, Jan. 31, 2003, at A20) (declaring his allegiance to bin Laden and that he is "at war with your country").

would not be prohibited."[427] The trick, he noted, is to ensure that Congress does not "throw out the baby with the bath water" if and when it undertakes to revise the statute.[428]

Section 2339B can in fact be reformed without sacrificing the compelling government interests that generated the law in the first place. Establishing separate statutes to address the receipt of training and the self-provision of personnel along the lines described above, and thus removing the incentive to attempt to apply § 2339B to those scenarios, is a good first step. But many of the concerns previously identified still remain to be addressed even after those changes are made.

First, with respect to due process and the designation process, Congress should amend § 2339B and IEEPA to codify the D.C. Circuit's due process holdings.[429] Specifically, Congress should establish that as a default rule the government must give advance notice of the pending designation to those potential designees who have a presence within the United States, along with a reasonable opportunity to adduce rebuttal evidence before the designation takes effect. The statute should include, however, a procedure whereby the administration can make an ex parte, in camera application to the D.C. Circuit for permission to make a no-notice designation upon a showing that advance notice will harm the national security interests of the United States.[430]

The blend of vagueness and overbreadth concerns that have troubled a number of courts present a more difficult issue. At the very least, Congress should take the simple step of amending the definition of material support or resources to state expressly that advocacy or expression protected by the First Amendment cannot constitute a violation of § 2339B.[431] Such activity may provide a predicate for an investigation, but by definition it would be unconstitutional to prosecute on this basis, and there can be no harm in saying so in the statutes themselves.[432]

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[427] *USA Patriot Act Author Supports Some Modifications of Controversial Law*, VOICE OF AMERICA PRESS RELEASES & DOCUMENTS, Jan. 29, 2004, *available at* 2004 WL 2025680 (reporting comments made by Dinh during panel discussion).

[428] *Id.*

[429] *See supra* Part III.A.1.

[430] The risk that a to-be-designated organization might take harmful steps if aware in advance of pending government action is not speculative. In September 2004, the Justice Department initiated an investigation to determine whether a government employee leaked word to the *New York Times* of the imminent designation and contemporaneous search to seize assets of the Global Relief Foundation under IEEPA, and whether a *Times* reporter's subsequent call to a Global Relief representative "may have led to the destruction of documents there the night before the government's raid." Susan Schmidt, *Reporter's Files Subpoenaed; New Leak Probe Concerns 2001 Raid on Islamic Charity*, WASH. POST, Sept. 10, 2004, at A16.

[431] IEEPA should be amended in corresponding fashion.

[432] *See Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant) (suggesting that Congress enact such a First Amendment carve-out, explaining that "[s]uch a provision would have no effect on current prosecution policy, which does not target conduct protected by the First Amendment . . . .").

As a third measure, Congress should take steps to strike a better balance between the need to wholly embargo foreign terrorist organizations and the qualms raised when the net of criminal liability reaches moral innocents. There are at least two ways of doing this.

First, Congress could amend § 2339B and IEEPA to calibrate punishment to the defendant's particular mens rea, as follows: (1) If the government can demonstrate that the defendant acted with intent to facilitate the illegal ends of the recipient, harsh punishment should result. The existing statutory maximums—fifteen years under § 2339B,[433] ten under IEEPA[434]—would seem to suffice for this purpose, although Congress should also consider adding specialized conditions of post-release supervision for this category of offenders. (2) If the government demonstrates instead that the defendant acted recklessly but without intent—for example, by writing a check to Hamas in good, but foolish, faith—then a lesser penalty would be appropriate. For example, Congress could impose a maximum sentence of five years under both § 2339B and IEEPA for such conduct. (3) Finally, if the government cannot demonstrate recklessness, let alone intent, the penalty should be relatively smaller still. Maximum sentences in the one-year range, along with fines, would be appropriate in this context.

Undergirding these changes, Congress should clarify that the knowledge element common to all these variations means: (1) that the defendant must be aware of the identity of the recipient; and (2) that the defendant must either (a) know of the recipient's designated status or (b) have reasonable cause to know of the recipient's use of violence in furtherance of its aims.

As an alternative to the calibrated mens rea/punishment trisection, Congress instead could revive the licensing approach originally proposed for § 2339B. Specifically, Congress could treat foreign terrorist organizations precisely as hostile foreign states have been treated in the past. Once designated, they would become subject to a comprehensive ex ante licensing scheme precluding U.S. persons from engaging in any transactions or providing any goods or services to them except upon advance notice to and approval from the implementing agency. That agency could streamline the process by generating lists of automatically prohibited assets (e.g., just about anything lethal); for anything else, the agency would make a determination as to whether the proposed activity would pose a risk to U.S. national security.

Such a system concededly would not be expected to grant many licenses, but the point is that in the right circumstances it could do so—unlike the blanket prohibitions of the existing statutes. If the *Humanitarian Law Project* plaintiffs wished to send instructional material on the ad-

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[433] 18 U.S.C. § 2339B(a)(1) (Supp. 2001).
[434] 50 U.S.C. § 1705(b) (2000).

vantages of non-violent methods to the Kurdistan Workers' Party, for example, they could be permitted to do so without fear of subsequent prosecution.

Either way, some combination of the above-described reforms would do much to eliminate the judicial concerns which have rendered § 2339B and IEEPA unstable bases for prosecution in several federal jurisdictions. Even if one believes that some or all of these negative holdings were mistaken, it makes more sense to address quickly the underlying concerns they represent when that can be done without sacrificing the effectiveness of the support laws.

D. Recent Legislative Activity

Congress is not oblivious to the need for some kind of legislative reform in these areas. In May 2004, the Senate Judiciary Committee held a hearing to assess the significance of the material support law to the overall counterterrorism effort, and also to assess the impact of the various judicial opinions critical of it.[435] Representatives of the Justice Department and FBI testified about the use of § 2339B, along with both critics and defenders of the statute.[436] Not long thereafter, in July 2004, Republicans in the Senate and House introduced new legislation aiming to address at least some of the concerns discussed above.

Senate Bill 2679, the Tools to Fight Terrorism Act, would amend the material support law in several ways.[437] It would, for example, resolve the uncertainty surrounding the use of the word "knowingly" in § 2339B by explaining that one violates § 2339B only if he or she has knowledge that a particular organization: "(i) is a terrorist organization; (ii) has engaged or engages in terrorist activity . . . or (iii) terrorism [as those terms are defined elsewhere]."[438]

The more notable changes, however, address the "personnel" and "training" concepts upon which prosecutors have relied in the sleeper scenario.[439] The bill proposes, for example, to clarify the meaning of "per-

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[435] *Aiding Terrorists Hearing*, *supra* note 54.

[436] *See id.* (the witnesses included Chris Wray, Asst. Att'y Gen. (Criminal Division); Daniel Bryant, Asst. Att'y Gen. (Office of Legal Policy); Gary Bald, Asst. Dir. of the FBI; Professor David Cole of the Georgetown Law Center; Paul Rosenzweig of the Heritage Found.; and the author).

[437] In the fall of 2004, Speaker of the House Dennis Hastert introduced an intelligence community reform bill that also contained criminal law measures identical to those appearing in Senate Bill 2679 and House Bill 4942. *See* S. 2679, 108th Cong. (2004); H.R. 10, 108th Cong. Tit. II, subtit. C, §§ 2041–44 (2004). As of this writing, it appears that efforts by the House and Senate conferees to reconcile these bills will fail, and that the proposals will not become law unless and until the 109th Congress takes them up. *See* Mary Curtius, *9/11 Panel Reforms Appear to Be Sunk*, CHI. TRIB., Oct. 31, 2004, at 11.

[438] S. 2679, 108th Cong. § 114(c)(2) (2004).

[439] In this respect, the new bills replicate a proposal introduced in the House in July 2003 by Rep. Mark Green of Wisconsin. *See* Material Support to Terrorism Prohibition

sonnel." It does this in two stages. Initially, it would clarify that the reference to "personnel" in the material support definition refers to "1 or more individuals who may be or include oneself."[440] More importantly, it also would add a new paragraph to § 2339B providing that any prosecution based on the term "personnel" must refer to the provision of

> individuals (who may be or include that person) to work under [the] organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Any person who acts entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction or control.[441]

These changes clearly are a response to the vagueness holdings of the Ninth Circuit and other courts.[442] They would eliminate any uncertainty as to whether the personnel provision could apply to one who provides himself, and as to whether courts should read the term so as not to encompass independent action. But those changes standing alone would not address the more fundamental obstacle posed by *Scales*; § 2339B would remain vulnerable to a due process argument. These changes thus are a step in the right direction, but do not go nearly far enough to stabilize and preserve the capacity of the Justice Department to act on active membership grounds.

The bill's treatment of the training concept also is incomplete, but this time the problem is one of insufficient reach rather than overreach. The changes under this heading again begin with the definition of the term. Under Senate Bill 2679, "training" would be expressly defined for purposes of material support as "instruction or teaching designed to impart a specific skill, rather than general knowledge."[443] This approach seems at first blush to abandon the attempt to make the receipt of training criminal. But the bill goes on in another section to address the training issue in a manner quite similar to what is proposed above.

Specifically, the bill would create a new federal criminal law: 18 U.S.C. § 2339E, "Receiving Military-Type Training from a Foreign Terrorist Or-

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Enhancement Act of 2003, H.R. 2858, 108th Cong. (2003).

[440] S. 2679, 108th Cong. § 114(b).

[441] *Id.* at § 114(e).

[442] *See supra* Part III.A.3.

[443] *Id.* at § 114(b). The bill also defines "expert advice or assistance," presumably in reaction to the recent adverse decision by the district court in the *Humanitarian Law Project* litigation. *See HLP IV*, 309 F. Supp. 2d 1185, 1201–03 (C.D. Cal. 2004). Borrowing from the Federal Rules of Evidence, it defines "expert advice or assistance" to mean "advice or assistance derived from scientific, technical, or other specialized knowledge." S. 2679, 108th Cong., § 114(b); *see also* Fed. R. Evid. 702.

ganization."[444] In a nutshell, § 2339E would make it a crime punishable by ten years' imprisonment to knowingly[445] receive "military-type" training from a designated foreign terrorist organization, with such training understood to mean "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction."[446]

At the same time, § 2339E would make excludable and deportable aliens who have received such training.[447] The immigration portion of the law would be retroactive, but bowing to ex post facto concerns, the criminal portion would not be.[448]

Barry Sabin, chief of the Counterterrorism Section of the Justice Department's Criminal Division, recently emphasized the significance the department attaches to this proposal during congressional testimony.[449] He noted with respect to al Qaeda members in particular that it is much "easier for us to prove and charge" that the suspect attended a training camp than it is to show, for example, that the suspect transferred funds or provided other tangible forms of support.[450] In the absence of an overt training ban, however, the department has relied on the material support law to provide this capacity.[451]

The § 2339E training proposal is on the right track. Indeed, the problem with the proposal is not that such conduct should remain legal but, instead, that the proposal fails to reach far enough. As argued in the previous section, a ban limited to training received from a designated organization fails to account for the scenario in which training is had from a relatively new, as-yet undesignated organization, or from a sponsor whose identity is difficult, if not impossible, to determine. As noted previously, it is increasingly likely that the primary threat will arise from such decentralized sources in the coming years, and a flat prohibition of unlicensed military-type training from any source may be one of the only

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[444] S. 2679, 108th Cong. § 115.

[445] "Knowingly" is defined to require knowledge of the fact of designation or of the fact that the organization engages or has engaged in terrorist activity or terrorism. *See supra* notes 386–388 and accompanying text.

[446] S. 2679, 108th Cong. § 115 (2004) (proposing 18 U.S.C. § 2339E(c)(1)). This definition raises a fascinating issue: Would it apply to a scenario in which the defendant is taught computer hacking methods that could be used to disrupt municipal and other systems that fall under the heading of "critical infrastructure"?

[447] *Id.* (proposing 18 U.S.C. §§ 2339E(b), 2339E(d)).

[448] *Id.* (proposing 18 U.S.C. § 2339E(e)).

[449] *The 9/11 Comm'n Rep.: Identifying and Preventing Terrorist Financing: Hearing Before the House Fin. Servs. Comm.*, 108th Cong. (2004) (testimony of Barry Sabin, Chief of the Counterterrorism Section, Criminal Div., Dep't of Justice).

[450] *Id.*

[451] *See id.* (Sabin explained that, "to get technical," the department currently sought to reach such activity by viewing it as "within the meaning of material support under 2339(b).").

ways the criminal law can come to grips with that phenomenon in the context of potential sleepers.[452]

Judging from the experience of past antiterrorism bills, Senate Bill 2679 most likely is only the opening move in a protracted process of adjusting the substance of federal criminal law to better address the problem of terrorism. The end result may look quite different. It may be more protective of civil liberties, or less. Whether the U.S. experiences another 9/11 in the interim will impact that determination. The important point for now, though, is that Congress has taken up the issue and seems mindful of at least some of the most pressing concerns.

V. CONCLUSION

The time has come to set slogans aside and engage in serious debate about the specifics of U.S. counterterrorism law and policy. This need is widely recognized with respect to the government's domestic investigative powers[453] and capacities for collecting, integrating, and analyzing intelligence both at home and abroad.[454] But until recently there have been curiously few efforts to examine seriously the role played by federal criminal law with respect to terrorism. That effort is now underway at last.

The attempt to customize federal criminal law with respect to terrorism ought to begin with a firm understanding of the impact of 9/11 on counterterrorism law and policy. The United States by and large was reactive and traditional in its use of criminal law prior to 9/11, aiming for the capture and prosecution of those who already had committed harmful acts or those who could be prosecuted on traditional inchoate crime grounds. After 9/11, this approach gave way to a terrorism prevention paradigm in which the Justice Department prioritized ex ante measures using any available legal means. This paradigm resulted in a multi-tiered

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[452] Another sign that someone has thought quite carefully about these issues can be found in the jurisdictional provisions of both § 114 and § 115 of Senate Bill 2679. Under these provisions, both the material support law and the new training law would apply not only to U.S. persons but also to "an offender [who] is brought or found in the United States after the conduct required for the offense occurs, even if such conduct occurs outside the United States." S. 2679, 108th Cong., § 114(d) (2004); *see also id.* at § 115(a) (same). Clearly, the drafter of this language has considered the fact that the vast majority of trainees will not be U.S. persons at the time of their training, and in fact may not even be captured in the U.S.; this remarkable jurisdictional provision lays the groundwork for an extension of the institutional competition between the criminal justice and military detention models beyond our borders. Whether this extension is sustainable is a question that deserves considerable attention.

[453] *See, e.g.*, Susan Schmidt, *Bipartisan Debate on Patriot Act Is Urged; Legal Tools to Fight Terrorism at Issue*, WASH. POST, Nov. 14, 2003, at A11 (describing proposal by former Deputy Attorney General Larry Thompson for a bipartisan panel of experts to assess the expiring provisions of the USA PATRIOT Act, in recognition of the immense amount of rhetoric and partisanship clogging debate on the subject).

[454] *See, e.g.*, 9/11 COMM. REP., *supra* note 2, at 407–10 (describing needed reforms).

strategy involving traditional and preventive charging, diffused prevention measures, and the use of material witness detentions.

In a simultaneous development, the military's unprecedented embrace of the counterterrorism mission began to spill over into the detention of non-traditional belligerents—including citizens and persons captured in the United States. Particularly in the critical category of potential sleepers, this development generated institutional competition between the military and the Justice Department. This competition accentuated the intense pressure on the Justice Department to establish a capacity to act in sleeper cases.

Ultimately, the Justice Department found that capacity not in new legislation but in the already-existing laws designed to embargo foreign terrorist organizations. Through creative readings of terms such as "personnel" and "training," prosecutors provided policymakers with an alternative to the all-too-tempting military detention option. The material support law and IEEPA thus came to play a central role in post-9/11 sleeper cases as well as in the broad run of terrorism related cases.

As currently drafted, however, the material support law and IEEPA do not provide an entirely satisfying basis for these prosecutions. They can be criticized effectively on several constitutional grounds, some of which already have led courts to declare portions of these laws unconstitutional. Complicating matters, the existing framework also can be criticized from a national security perspective on the ground that it is incomplete and ill-suited to meet emerging trends in the nature of the terrorist threat.

In an effort to customize federal criminal law to the demands of the post-9/11 environment, this Article proposes a number of legislative reforms which seek to ameliorate civil liberties concerns while accounting more effectively for security considerations. In doing so, the proposals are mindful of the existence of the ever-tempting military detention alternative. Although the solutions proposed are no panaceas, they would improve the capacity of the criminal justice system to provide an effective alternative to military detention when dealing with the sleeper scenario.

Recent developments in Congress suggest that some, although by no means all, of these concerns have begun to receive the serious attention they deserve. Until then, we can expect the Justice Department to do what it can to satisfy the demands of prevention using the laws at hand.

ARTICLE

RETHINKING THE PRESIDENTIAL VETO

J. RICHARD BROUGHTON*

In this Article, Professor J. Richard Broughton argues that the manner in which modern Presidents have wielded their veto power is at odds with constitutional history and structure. He first explores the textual, historical, and structural elements of the veto power, and then traces the historical usage of the veto power. Professor Broughton proposes a model for presidential veto use that differentiates between constitutional and policy-based objections to proposed legislation, and that tailors application of the veto on this basis. He concludes that the President should readily veto any legislation believed to be inconsistent with the Constitution, but should be much more cautious when vetoing legislation on a policy basis only.

To Daniel Webster and Henry Clay, Andrew Jackson was something of a troublemaker. President Jackson had both constitutional and non-constitutional reasons for exercising his famed veto of the Bank Rechartering Bill of 1832, which would have rechartered the Second Bank of the United States.[1] But none of the arguments persuaded opponents like Senators Webster and Clay. Senator Webster inveighed against the bank veto by claiming that President Jackson had usurped the power of the judiciary to render final and enforceable decisions as to the constitutionality of proposed legislation.[2] The Supreme Court had upheld the constitutionality of the bank in *McCulloch v. Maryland*,[3] and according to Senator Webster, President Jackson had no authority to undermine that holding through an executive veto.[4] Senator Clay also argued that President Jackson's action exceeded the proper scope of the veto power, not just by chal-

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[1] *See* Andrew Jackson, *Veto Message* (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS]; *see also* CARLTON JACKSON, PRESIDENTIAL VETOES 43 (1967) (explaining that President Jackson's constitutional arguments supporting the bank veto were disingenuous, and that "the major reason for his veto was that of political expediency; the Constitution was used as a mask").

[2] *See* 8 REG. DEB. 1221–40 (1832) (statement of Sen. Webster).

[3] 17 U.S. (4 Wheat.) 316 (1819). *McCulloch* upheld congressional incorporation of the Second Bank of the United States under the necessary and proper clause of article I. *See id.* at 424.

[4] *See* 8 REG. DEB. 1221–40 (1832) (statement of Sen. Webster).

lenging the Supreme Court, but also by giving effect to his own policy preferences over those of the representative bodies of Congress.[5] President Jackson's view of the veto power would, in Senator Clay's mind, endow the President with a monarchical prerogative that would prove intolerably dispositive in the legislative process.[6] Still, the bank veto was sustained, and the presidential veto power was forever altered.[7]

Many commentators have described President Jackson's bank veto as the most celebrated and controversial of all presidential vetoes.[8] Indeed, it has become the Footnote Four[9] of presidential vetoes. But although much has been said about the reasons for and criticisms of the bank veto, there is a crucial question regarding President Jackson's action that is largely overlooked in the scholarly commentary but which is highlighted in both Senator Clay's and Senator Webster's opposition to President Jackson. That is, what *should* be the proper scope of the President's discretion to exercise the veto power? More specifically, if the exercise of the veto is wholly a matter of presidential discretion, unfettered by any formal constitutional limitations, then it is important to ask whether he should exercise that discretion against a legislative measure on any grounds he wishes, constitutional or non-constitutional.[10] Bitterly controversial though it was,

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[5] *See id.* at 1265–66 (statement of Sen. Clay).

[6] *See id.*

[7] *See* ROBERT J. SPITZER, THE PRESIDENTIAL VETO 33–39 (1988); RICHARD A. WATSON, PRESIDENTIAL VETOES AND PUBLIC POLICY 15 (1993); Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 226–36 (1999). For his vetoes, and other perceived abuses, the Congress censured President Jackson in 1834. *See* 10 REG. DEB. 58–59 (1834) (statement of Sen. Clay). The resolution of censure was expunged, however, in 1837 on the ground that it was unconstitutional. *See* 13 REG. DEB. 504 (1837).

[8] *See* JACKSON, PRESIDENTIAL VETOES, *supra* note 1, at 29; Magliocca, *supra* note 7, at 230.

[9] *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). Justice Stone's footnote, which implied that a more rigorous standard of judicial scrutiny should apply to statutes directed at certain categories of political minorities, has been described as the "most celebrated footnote in constitutional law." Lewis Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982); *see also* Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (describing Footnote Four as the "great and modern charter for ordering the relations between judges and other agencies of government.").

[10] Commentators have uniformly posited that, as a descriptive matter, the veto power is wholly discretionary. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1306 (1996) ("The veto . . . can be exercised for any reason at all."); Magliocca, *supra* note 7, at 209 ("Hardly anyone bothers to ask what kind of presidential veto is legitimate today since the answer is obvious—any kind."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 265 (1994) (explaining that the veto power and the pardon power "are generally agreed to be plenary. The President may exercise them on any grounds he sees fit."); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 772 (1993) (stating that while the President "has significant discretion in exercising her veto, especially because she may veto on policy grounds, that does not mean that she has discretion to approve unconstitutional bills"). The purpose of this Article, though, is to discern when the President should exercise the veto. Stephen Presser and Cass Sunstein, for example, have suggested concerns about the current veto model. *See*

President Jackson's new and aggressive perspective on the veto helped excite dialogue about the role of the veto in the scheme of presidential authority that demands still greater scrutiny in view of the enormous legislative influence that modern Presidents wield through this negative power.[11]

Questions about the proper use of the veto power, which marked the Bank Veto controversy, also highlight differences in the kinds of vetoes that Presidents exercise: constitutionally based vetoes, through which the President negates legislation because of its nonconformity with constitutional powers or rights, and policy-based (or "non-constitutional") vetoes, through which the President, though he has no constitutional objection to the bill, nevertheless returns it because, in his view, it amounts to bad public policy.[12] These distinctions, and the arguments about them, implicate the very core of structural constitutionalism. If the President may veto legislation only when he possesses constitutional objections to it, then he may be forced to sign into law any number of bills that he personally believes to be unwise or to promote inexpedient or ineffective public policies.[13] He then lacks the full potential to pursue a political agenda, perhaps the very one upon which he was elected, and is placed in the untenable position of having to enforce that same "bad" (in his view) legislation once it becomes law.[14] If, on the other hand, the President can return legislation for any political, economic, or administrative reason, then the President can substitute his judgment regarding policy for the will of the people acting through their representatives in Congress.[15] If the Presi-

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Stephen B. Presser, *Why Bush Should Veto Shays-Meehan*, CHI. TRIB., Feb. 19, 2002, at 15; Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 9–10 (1995). This Article therefore addresses the concerns that some, like Professors Presser and Sunstein, have thoughtfully noted.

[11] *See* ROBERT J. SPITZER, PRESIDENT & CONGRESS 70 (1993); Sunstein, *supra* note 10, at 9–10; *cf.* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126 (1994) (arguing that "In the post-nondelegation world, the presidential veto has served not only to prevent legislation the President deems unconstitutional or unwise, but also to entrench the President's own acts of lawmaking."). *See generally* LOUIS FISHER, THE POLITICS OF SHARED POWER 28–29 (1998).

[12] The distinction between constitutionally based and policy-based vetoes is no doubt often a gray one, not only because Presidents with different policy or philosophical preferences may read provisions of the Constitution differently, but also because one may cloak a policy objection in constitutional clothing. When a President claims he is vetoing legislation on constitutional grounds, it is possible that the true reasons for the veto are political or policy-based, or vice-versa. Nevertheless, the distinction between a constitutional objection and a policy-based objection was arguably understood by the Framers, and the framework is analytically useful—even if occasionally blurry.

[13] *See* THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing use of the veto to reject "bad laws").

[14] *See* WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 16 (1925) (arguing that in considering whether to veto a bill the President "must consider the wisdom of the bill as one of those responsible for its character and effect"); *see also* THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Energy in the executive is a leading character in the definition of good government.").

[15] Senator Clay's criticism of President Jackson's bank veto mirrors this point. *See* 8 CONG. DEB. 1265–66 (1832) (statement of Sen. Clay).

dent's political predilections are enforceable through the veto, or even the threat of a veto, then we must consider to what extent he becomes not merely a player in the legislative process but a legislature all to himself. As the presidential veto can only be overcome by a congressional supermajority, the danger is that the President becomes capable of determining on his own the direction that legislation will take, occupying a preferred position in the deliberative legislative process, and thus potentially undermining the Constitution's vision for lawmaking in a republican government.[16] Seizing upon the political significance of the veto and the absence of any explicit textual limitations upon its use, Presidents from Andrew Jackson to Bill Clinton have steadily increased their use of the veto power, and thus their legislative influence, well beyond the more circumscribed legislative role for the President envisioned by many Framers and early Presidents.[17] Is this use of the veto power appropriate?

This Article seeks not only to provide a descriptive account of the veto power, but also to examine and formulate a normative basis for the exercise of that power in modern American political life. In other words, rather than asking whether the President *can* veto legislation for both constitutional and policy reasons purely as a matter of constitutional law, this Article asks whether he *should* do so as a matter of wise and sagacious presidential and constitutional practice. And because the presidential veto power is a plenary one, objections to the reasons for presidential disapproval are probably non-justiciable.[18] It is therefore the President himself who must determine when and how to exercise the veto power.[19] This Article is intended as a guide in that difficult endeavor.

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[16] *See* Rappaport, *supra* note 10, at 759 (stating that the President "was not intended to occupy a preferred position in the lawmaking process, as he was not even given equal legislative power with the houses of Congress"); Sunstein, *supra* note 10, at 10 ("The founders certainly did not anticipate the current situation, in which the veto power is a well-understood part of all lawmaking, and implies a large and continuous presidential role in lawmaking itself."); *see also* GEORGE F. WILL, *The Coming of Congressional Government*, *in* THE LEVELING WIND 282, 282–84 (1994) [hereinafter WIND] (explaining that congressional supremacy and congressional government are historical norms in America).

[17] *See* JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 221 (1974); Sunstein, *supra* note 10, at 9 (explaining that the modern presidential power to determine the content of national legislation is "surprisingly large" and that the Framers "might well have been alarmed if they had been forewarned" about the current usage of the veto power); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 100–01, 106 (Max Farrand ed., 1966) [hereinafter RECORDS]; 2 RECORDS, *supra*, at 73–79.

[18] *See* Baker v. Carr, 369 U.S. 186, 210 (1962).

[19] There is an additional forum for addressing disputes about the propriety of presidential vetoes: impeachment. As I have argued elsewhere though, Congress should be most reluctant about using impeachment merely as a political weapon or merely to address issues of maladministration that do not rise to the level of high crimes and misdemeanors. *See* J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797, 833–35 (2000); J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 716 n.223 (2001) [hereinafter *War Power*]. Impeachment for illegitimate use of the veto power is thus constitutionally conceivable—if it amounted to an abuse of power, undermined the Congress's constitutional functions, and

Part I analyzes the textual, historical, and structural elements of the veto power and sets forth a normative theory for the exercise of that power among American Presidents. It examines the underpinnings of the veto power in early American political and constitutional thought, tracing the origins of the veto power in the American Constitution, beginning most notably with the debates regarding the proposed Council of Revision at the Philadelphia Convention of 1787, and evaluating other perspectives from the time of the framing and ratification. After placing the veto power in its proper textual, historical and structural context, Part I challenges much of the modern conventional wisdom about the exercise of the veto power. Constitutional text, structure, and history all counsel that the President has an independent obligation to interpret the Constitution. The President should therefore readily veto any legislation that he believes to be inconsistent with the Constitution, including any legislation that in his own judgment interferes with the institutional prerogatives of the executive, that compromises the constitutional powers of another branch of government, or that violates constitutional rights. Part I concludes, however, that the President should be more cautious when he lacks a constitutional objection to a bill. That is, although a President may exercise the veto for non-constitutional, or policy, reasons, he should do so only when he believes that the bill is a product of defects in the deliberative process, that it is so unwise or inexpedient that it would substantially endanger national interests, or that he could not legitimately carry out his Article II obligation to faithfully execute such a law. The veto should not be used merely for legislative tinkering or because a bill proves simply inconvenient or disagreeable as a policy matter.

Part II then traces the historical usage of the veto power from both the pre- and immediate post-Jackson eras into the twentieth century, and through the modern presidencies. It focuses particular attention on Presidents' stated objections to vetoed legislation, distinguishing between constitutional and policy-based reasons for vetoes, and then critiques these practices by analyzing their consistency, or inconsistency, with the Article's proposed model for rethinking the veto power. By exercising the veto power according to the proposed model, the Article argues, the President maintains the strength and energy the Constitution endorses for his office and fulfills his legislative obligations in a manner most consistent with constitutional text, structure, and history.

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undermined public trust in the presidency—but should be reserved for only the most drastic abuses. Congress's veto override power is a more prudent weapon for combating such presidential overreaching.

I. TEXT, HISTORY, STRUCTURE, AND A CALL TO RETHINK THE VETO

"Ambition must be made to counteract ambition," Madison reminds us.[20] Understood in proper historical context (as a device for checking legislative excesses and for improving federal legislation by protecting both the Constitution and deliberative democracy) the presidential veto power serves this important structural function. That function is undermined, however, when a President uses the veto power solely as an agenda-setting mechanism through which he determines on his own the content of federal law, when the presented legislation does not implicate either the Constitution, a defect in the deliberative process, or substantial national interests.[21] This Part explains why constitutional history and structure counsel a more prudent use of the veto.

A. Text and the Veto

Article I, Section 7 of the Constitution provides authority for a presidential veto. Upon passage of any bill in the House and Senate, and presentation of it to the President, if the President "approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . ."[22] If the President fails to return the bill within ten days it becomes law, "unless Congress by their adjournment prevent its Return, in which case it shall not be law."[23] Nothing in this portion of the text describing the veto power appears to fetter a President in the exercise of the veto, including vetoes based solely on disagreements about the wisdom of public policy. The text of Article II also specifically contemplates a role for the President in the creation of public policy by requiring the President to recommend measures to Congress and to give them information as to the State of the Union. Still, early Presidents used the veto power sparingly, and most often when they believed proposed legislation to be unconstitutional.[24] This type of veto—described herein

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[20] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[21] *See* Presser, *supra* note 10, at 15; Rappaport, *supra* note 10, at 759.

[22] U.S. CONST. art. I, § 7, cl. 2.

[23] *Id.* This provision is known as the "pocket veto," and has a controversial history of its own. This Article, however, is limited to a consideration of the "regular" veto, because pocket vetoes need not be accompanied by any presidential message or other formal reasons (though they often are, in the form of a presidential memorandum). The literature, however, contains sufficient interesting and thoughtful treatment of the pocket veto. *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 128–32 (4th ed. 1997); SPITZER, *supra* note 7, at 105–19; John Houston Pope, *The Pocket Veto Reconsidered*, 72 IOWA L. REV. 163 (1986); Benson K. Whitney, Barnes v. Kline*: Picking the President's Pocket?*, 70 MINN. L. REV. 1149 (1986).

[24] *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 877 (1994) (stating that "The veto power that the Framers were willing to confer in only qualified form was principally designed as a safeguard against unconstitutional legislation."); WATSON, *supra* note 7, at 14; SPITZER, *supra* note 11, at 70; *see also* FLEXNER, *supra* note 17, at 221 (explaining

as the "constitutional veto"—appears consistent with the textual provisions mandating the President's obligation to "preserve, protect and defend the Constitution" under the Oath Clause of Article II, Section 1.[25]

The constitutional text thus makes clear that the President plays a critical role in the legislative process,[26] but the text of the Veto Clause is ultimately silent about the true scope and content of that role. We therefore must look beyond constitutional text and consider constitutional history and structure, to ascertain when, as a normative matter, the President should exercise the veto.

B. History and the Veto

As with many other provisions of the original Constitution, the idea embodied in the veto clauses of Article I, Section 7 was hardly universally agreed upon from its inception. The Philadelphia Convention debates reveal serious disagreement about the appropriate mechanism for checking legislative overreaching through the veto power, known well to the Framers because of its Roman, English, and early colonial antecedents.[27] Given this Article's purpose in establishing the normative bases for exercising the veto, we must examine how the Convention and Ratification debates provide insight, not simply regarding the ultimate mechanism for returning a bill, but the true scope, purpose and function of such power.

In early Roman practice, the *intercessio* was used by tribunes, patricians, and consuls.[28] It was an absolute negative designed originally to serve

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Washington's view that the "true object [of the veto] was to enable the President to protect the Constitution").

[25] U.S. CONST. art. II, § 1, cl. 8; *see also* TAFT, *supra* note 14, at 19 ("It is the duty of the President of course to veto a bill no matter how much he approves of its expediency, if he believes that it is contrary to the constitutional limitations upon the power of Congress."); Gary Lawson, *Everything I Need to Know About Presidents I Learned From Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381, 383 (2001) ("[I]f he is presented with a bill that he deems unconstitutional, the President has an obligation, pursuant to his oath, to veto that bill."); Rappaport, *supra* note 10, at 772–76 (1993) (arguing that the President must return unconstitutional bills).

[26] *See* U.S. CONST. art. I, § 7; art. II, §§ 2, 3; *see also* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 39–40, 63 (2002) (explaining the significance of the President's role under the State of the Union and Recommendation Clauses, and explaining that the President has the "first word" on legislation under the Recommendation Clause and the "last word" under the Veto Clauses); *cf.* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 105 n.269 (1994) (discussing the role of the Recommendation Clause in making the President a representative of the people before Congress); Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History,"* 89 MICH. L. REV. 399, 405–06 (1990) ("The constitutional duty to propose legislation, coupled with the lack of constitutional restraints on the President's ability to influence the legislative process, has left the President in an excellent position to participate actively in the lawmaking process and on a regular and fairly uninhibited basis.").

[27] *See* SPITZER, *supra* note 7, at 1–8.

[28] *See id.* at 1–2; WATSON, *supra* note 7, at 2–3; Charles J. Zinn, *The Veto Power of the*

the interests of the plebeians.[29] Ultimately, the political significance of the power was mitigated by Rome's return to monarchy and by Caesarian control of the Roman government.[30]

The English experience was even more significant in influencing American practice. As the Crown's influence in primary lawmaking declined, the Crown's absolute veto power became its most substantial weapon against Parliament.[31] Whether its use was conservative or liberal, Kings and Queens exercised the veto both to protect Royal prerogatives and to check inexpedience on the part of Parliament.[32] Although the Royal veto fell out of favor after the reign of Queen Anne,[33] the precedent lingered with enough significance to shape the executive powers of the early American colonial constitutions, all of which provided for absolute executive vetoes of colonial legislation.[34]

American political leaders, however, ultimately came to view the Royal veto with skepticism.[35] Many associated the absolute veto—and executive authority generally—with corruption and despotism.[36] The first national constitution, the Articles of Confederation, did not even provide for a separate executive, let alone an executive veto.[37] Yet, it is well known that the lack of an independent executive was among the primary causes of the failure of the Articles.[38] When the delegates met in Philadelphia in May of 1787, the problem of executive power was thus central to the dialogue about the formation of a new national charter.[39] And once it was agreed that the American executive needed sufficient power in the new constitutional structure to combat the acknowledged (and feared) strength of the legislative vortex,[40] the Framers, informed by their experience with Eng-

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President, 12 F.R.D. 207, 210 (1951).

[29] *See* SPITZER, *supra* note 7, at 2; WATSON, *supra* note 7, at 3.

[30] *See* SPITZER, *supra* note 7, at 2; WATSON, *supra* note 7, at 3.

[31] *See* William A. Clineburg, *The Presidential Veto Power*, 18 S.C. L. REV. 732, 733–34 (1966); Zinn, *supra* note 28, at 211.

[32] *See* SPITZER, *supra* note 7, at 4–5.

[33] *See id.* at 5; WATSON, *supra* note 7, at 5; Zinn, *supra* note 28, at 211.

[34] *See* WATSON, *supra* note 7, at 6–8; Clineburg, *supra* note 31, at 734–35.

[35] *See* May, *supra* note 24, at 876.

[36] *See* SPITZER, *supra* note 7, at 11.

[37] *See* ARTICLES OF CONFEDERATION (1777).

[38] *See* RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 428 (3d. ed., 1991); SPITZER, *supra* note 11, at 8.

[39] *See* KIRK, *supra* note 38, at 420 (explaining that the Framers had to create a charter that would "arrange for an executive stronger than a mere presiding officer of Congress, but not so all-powerful as to become a king or a dictator"); FORREST MCDONALD, NOVUS ORDO SECLORUM 240 (1985) (explaining that for the Framers, "[r]eaching agreement about the way in which the executive branch would be constituted was quite as difficult as agreeing about the legislative"); JACK N. RAKOVE, ORIGINAL MEANINGS 244 (1996) ("[T]he difficulties the framers encountered owed as much in turn to *ambiguities* in the definition of executive power as to *ambivalence* in its exercise."); May, *supra* note 24, at 882 ("It was critical to the Framers that the American Executive not replicate the English Crown."); THE FEDERALIST No. 69, at 416–22 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the ways in which the President will be different from a monarch).

[40] *See* THE FEDERALIST No. 51, at 322–23 (James Madison) (Clinton Rossiter ed.,

lish parliamentary government and with earlier colonial practice, had to confront the nature and scope of that executive power. A discussion of the veto was a key element of the debates about the structure and limits of the executive branch.

1. The Constitutional Convention and the Council of Revision

It was clear from the outset that the American executive would possess a veto power.[41] What form this power would take was more controversial. Alexander Hamilton of New York, George Read of Delaware, and James Wilson of Pennsylvania had urged an absolute veto like the one enjoyed by the Crown and by colonial executives, but the Convention decidedly favored a more qualified negative.[42] They settled, by a close vote, on the proposal to allow a two-thirds vote in each chamber of Congress to override the veto.[43] A more substantial debate, however, occurred on the proposed Council of Revision, which would have combined veto power in the executive and members of the judiciary.[44] Like the veto power more generally, the concept of joining executive and judicial powers in an advisory council also had a significant historical pedigree in English practice that could be traced back to the *Curia Regis* and the Privy Council of Henry VII.[45] The form of the proposed Council also was known to the Framers through its employment in New York, a state whose constitutional framework, and particularly its provisions for executive authority, was highly influential upon the drafters of the new Constitution.[46]

On May 29, 1787, Edmund Randolph of Virginia thus proposed a Council of Revision as part of the original Virginia Plan.[47] It provided that:

1961); THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[41] *See* MCDONALD, *supra* note 39, at 242 ("Most of the delegates supported a conditional executive veto, subject to overriding by Congress."); SPITZER, *supra* note 7, at 11 ("Despite the stigma surrounding the veto power . . . there was surprisingly little objection to incorporating the veto in some form."); Greene, *supra* note 11, at 180 ("To the Framers, the need for a presidential veto was clear. Again, the problem was how to establish a strong enough executive to combat a strong legislature.").

[42] *See* 1 RECORDS, *supra* note 17, at 98 (describing Wilson's argument for an absolute veto and the motion by Hamilton and Wilson to this effect); 2 RECORDS, *supra* note 17, at 200 (describing Read's position to "give an absolute negative to the Executive—[Read] considered this as so essential to the Constitution, to the preservation of liberty, & to the public welfare, that his duty compelled him to make the motion"); *see also* May, *supra* note 24, at 876–78 (discussing the Convention's rejection of an absolute veto).

[43] *See* 2 RECORDS, *supra* note 17, at 586–87; *see also* SPITZER, *supra* note 7, at 13 (describing the various changes of mind at the Convention regarding the override provisions).

[44] *See* 1 RECORDS, *supra* note 17, at 20–21.

[45] *See* James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 237–43 (1989).

[46] *See id.* at 243–48.

[47] *See* 1 RECORDS, *supra* note 17, at 20–21.

> [T]he Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [ ] of the members of each branch.[48]

The proposal, in short, allowed a combination of the executive and judiciary to veto federal laws and give its approval to Congress's negative of state laws. The debate on this subject began on June 4 and was considered further once there was a formal motion for a Council of Revision that would include a "convenient" number of federal judges.[49] The discussion revealed the primary arguments in favor of such a proposal, whether it provided for merely a negative (which Wilson supported)[50] or revisionary power (which Madison supported).[51] Supporters felt that the proposal would augment executive power, which was necessary to counter the sheer strength of the legislative branch in republican government,[52] and it would bring the legal acumen of judges to the legislative process and thus enhance lawmaking.[53] Opponents of the proposal argued that judges should not be involved in lawmaking, particularly when they would be called upon later to adjudicate cases arising under those very laws.[54] Many delegates believed the courts would have the power of judicial review, and saw their inclusion in the Council as permitting the judiciary to enjoy a double negative on the laws.[55] Also, and more generally, inviting judges to negate or revise legislation was seen as inconsistent with the

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[48] *Id.* at 21.

[49] *Id.* at 104.

[50] *See id.* at 98, 105.

[51] *See id.* at 106, 110.

[52] *See id.* at 108; 2 RECORDS, *supra* note 17, at 74, 76; *see also* RAKOVE, *supra* note 39, at 261 (explaining the proponents' view that the Council would give "firmness" to opposition to the legislature, an opposition that required substantial political resources); *cf.* THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) ("In republican government, the legislative authority necessarily predominates.").

[53] *See* 1 RECORDS, *supra* note 17, at 139; *see also* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 773–74 & n.300 (2002) (explaining that even in its present form, the veto power serves to "filter good legislation from bad"); Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 57 (2003) (stating that the convention and ratification debates reveal that "the veto power could be used creatively to alter and refine (and not just impede) legislation").

[54] *See* 1 RECORDS, *supra* note 17, at 97–98, 108, 109, 139; 2 RECORDS, *supra* note 17, at 75, 76.

[55] *See* 1 RECORDS, *supra* note 17, at 97, 109; 2 RECORDS, *supra* note 17, at 76.

principles of republican government and of preserving in each department separate and distinct powers.[56]

Madison rose most forcefully in defense of the Council. Madison argued that inviting judges into the legislative process would protect the judiciary and, when joined with the executive,

> render their Check or negative more respectable . . . . We must introduce the Checks, which will destroy the measures of an interested majority . . . . The independent condition of the Ex. who has the eyes of all Nations on him will render him a just Judge—add the Judiciary and you increase the respectability.[57]

He further argued that there was no danger to judicial independence by involving both judges and the President in the revision of the laws.[58] Although Madison acknowledged the force of the argument that judges would be biased in adjudicating laws that they participated in making, Madison believed this concern was mitigated by the infrequency of such a circumstance, and by the added infrequency of reviewing a law that was so ambiguous as to leave room for the judge's individual biases.[59] As Madison explained, "How much good on the other hand [would] proceed from the perspicuity, the conciseness, and the systematic character [which] the Code of laws [would] receive from the Judiciary talents."[60] Finally, Madison argued, there was little weight in the objection that such a combination would improperly mix powers because English practice had sanctioned such intermixtures.[61]

Elbridge Gerry of Massachusetts, however, countered that the judiciary's power to interpret the laws would be sufficient to resist congressional encroachments upon the third branch.[62] In addition, John Dickinson of Delaware suggested that maintaining a responsible executive could only be preserved by allowing the President alone to discharge executive functions.[63]

The proposal for the Council was soundly defeated on each consideration.[64] So, too, was a proposal to permit a suspension of legislation

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[56] *See* 1 RECORDS, *supra* note 17, at 110.

[57] *Id.* at 108.

[58] *See id.* at 138–39; *see also* 2 RECORDS, *supra* note 17, at 77 (arguing that the mixture was necessary to protect the judicial branch).

[59] *See* 1 RECORDS, *supra* note 17, at 138–39.

[60] *Id.* at 139.

[61] *See id.* Madison's point was somewhat stronger on July 21 when he spoke of the need for an "auxiliary precaution" to protect the judiciary. *See* 2 RECORDS, *supra* note 17, at 77.

[62] *See* 1 RECORDS, *supra* note 17, at 97.

[63] *See id.* at 140.

[64] *See id.* at 104, 140; 2 RECORDS, *supra* note 17, at 80; *see also* Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 902 (1990) ("The debates over the Council of Revision suggest that the proposal was not rejected because it violated principles of legislative supremacy, but rather because it violated

(though a time period was never specified)[65] and another proposal that would have allowed a federal veto of state legislation.[66]

Significantly, the debates over these proposed mechanisms for checking legislative power suggest something about the Framers' views of the purpose of the power to return legislation with stated objections—the power ultimately provided in the text of Article I, Section 7. Despite disagreement as to the form of the veto, there appears to have been general agreement among the delegates who supported a negative or revisionary power that it should be used rarely and to resist legislative encroachments upon the other branches.[67] Madison, for example, viewed a veto power as necessary for the safety of the executive, and of the judiciary, and his defense of the Council arose from his concern about the tendencies of the legislature to "absorb all power into its vortex."[68] Wilson similarly suggested that "there might be tempestuous moments in which animosities may run high between the Executive and Legislative branches," at which time the veto would enable the executive to defend himself.[69] George Mason of Virginia said that the executive power "ought to be well secured [against] Legislative usurpations on it,"[70] and had earlier suggested that the executive should be tertiary, rather than unitary, so as to enhance executive power to "defend[ ] itself against the encroachments of the legislature."[71] Thus, for those who supported some form of veto power, the debates demonstrate that they viewed it primarily as a method for preserving the constitutional separation of powers.[72]

It is unclear, however, the extent to which particular delegates believed the veto power should extend beyond a President's structural constitutional objections or his perceived need to protect the constitutional turf and prerogatives of the executive and judicial branches. Wilson, Madison, and Mason offered what were seemingly the broadest defenses of the power. Wilson, defending the Council of Revision, acknowledged that judges would

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principles of separation of powers by uniting the executive and judicial departments in one government agency.").

[65] *See* 1 RECORDS, *supra* note 17, at 104; *see also* May, *supra* note 24, at 877–78 (discussing the Convention's rejection of a suspension power for the President).

[66] *See* 2 RECORDS, *supra* note 17, at 27–28.

[67] *See* 1 RECORDS, *supra* note 17, at 100; 2 RECORDS, *supra* note 17, at 75.

[68] 2 RECORDS, *supra* note 17, at 74; *see also* THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.").

[69] 1 RECORDS, *supra* note 17, at 100.

[70] *Id.* at 139.

[71] *Id.* at 112.

[72] *See* Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 89 (1976) ("The prime original purpose for the inclusion of this power was that it was thought to give the President the means of protecting his own office from Congressional encroachment."); May, *supra* note 24, at 877 ("The veto power that the Framers were willing to confer in only qualified form was principally designed as a safeguard against unconstitutional legislation."); Sunstein, *supra* note 10, at 9 ("The framers' principle goal was to allow the President to veto laws on constitutional, rather than policy, grounds.").

have the power to review laws for their constitutionality.[73] But, he observed, some laws may be constitutional and yet be "unjust," "unwise," "dangerous," or "destructive."[74] Wilson also recognized the power of the mere existence of an executive veto, arguing that its "silent operation would therefore preserve harmony and prevent mischief."[75] Madison also saw the Council as possessing the power to guard the people against "unwise and unjust measures which constituted so great a portion of our calamities."[76] And Mason, echoing Wilson's observations, commented that "defense of the Executive was not the sole object of the Revisionary power."[77] Rather, it would extend to those laws that were not plainly unconstitutional but were nonetheless "unjust and pernicious."[78] These passages demonstrate that influential delegates like Madison, Mason, and Wilson anticipated a negative on some laws that did not violate the Constitution or otherwise encroach upon the two other branches or the rights of the people. They do not explain, however, how far this power should extend.

Overall, the Convention debates provide a useful historical and structural guide for evaluating the normative bases for exercise of the presidential veto. Had the arguments for a Council of Revision succeeded, the revisionary power would certainly have given the President a more sweeping role in determining the content of national legislation, as Madison urged.[79] But the Council's defeat suggests that the Convention envisioned a more limited use of the negative by the President. The record indicates that some influential Framers believed the veto should extend to both constitutional and non-constitutional objections, but there was a palpable sense at the Convention that the veto would be used rarely, and primarily to protect the Constitution. And although the secondary, or policy-based, reasons for employing a veto were acknowledged, the Convention's provision for a well-defined separation of powers, its disdain for the accessories of kingly authority, and its preference for enumerated legislative powers in a republic all suggested that the constitutional structure of the new government would be best served by a prudent and cautious view of the presidential veto.

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[73] *See* 2 RECORDS, *supra* note 17, at 73.

[74] *Id.*

[75] 1 RECORDS, *supra* note 17, at 100.

[76] *Id.* at 74.

[77] *Id.* at 78.

[78] *Id.*

[79] *See id.* at 138–39. Of course, it would also have given the Judiciary a substantial role in substantive policy making, and this was among the primary reasons for its defeat. *Cf.* Barry, *supra* note 45, at 255–61 (describing the arguments against the Council and noting that the Framers' "conception of a limited judicial role stemmed from concerns of democratic accountability").

2. The Veto in the Ratification Debates

To leaders of the founding generation, there was no neat distinction between issues of constitutional structure and individual liberty. Sound constitutional structure—a prudent separation of powers and division of authority between the federal and state governments—was necessary to protect public liberty.[80] Fearing that the new Constitution had enabled a central government with too much power, opponents of the Federalists criticized the document as dangerous to, and insufficiently protective of, liberty.[81] Critics of the Constitution further charged that the document improperly mixed executive, legislative, and judicial powers, contributing to the potentially oppressive might of the federal government.[82] While some of these Anti-Federalists viewed the veto as a violation of the principle of legislative supremacy, many others generally supported the provision for the executive veto to the extent that it helped secure the President's independence from the Congress and assisted the President in resisting congressional encroachments.[83] To this end, most Anti-Federalists viewed the veto as a necessary safeguard for the President's constitutional powers, and thus necessary to preserve liberty.[84] Still, the historical record indicates that little else was said by the Anti-Federalists about the precise scope of the veto power or what would amount to its proper usage, beyond the power to negate legislation that encroached upon presidential power.

From the Federalist perspective, a detailed, though perhaps still ultimately incomplete, explanation of the veto power during the ratification period came from Alexander Hamilton in The Federalist No. 73. Hamilton detailed his persuasive call for "energy" in the executive in The Federalist No. 70, in which he explained that such energy contained four ingredients: unity, duration, adequate provisions for support, and compe-

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[80] *See* THE FEDERALIST NO. 1, at 35 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 37, at 241–47 (James Madison) (Isaac Kramnick ed., 1987); THE FEDERALIST NO. 47, at 302–08 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 48, at 308–10 (James Madison) (Clinton Rossiter ed., 1961).

[81] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 521–23 (1998); *see also Selections from Debates in the Virginia Ratifying Convention*, *in* SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764–1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 329–31 (Samuel Eliot Morison ed., 2d ed. 1929) (statement of Patrick Henry) (arguing that the new Constitution is insufficiently protective of liberty and that the new President will enslave America by becoming a monarch); *"Brutus," Essay I, Oct. 18, 1787*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 270–80 (Ralph Ketcham ed., 1986).

[82] *See* WOOD, *supra* note 81, at 522–23.

[83] *See* SPITZER, *supra* note 7, at 21; *see also* RAKOVE, *supra* note 39, at 274 (explaining that during the ratification period, the Anti-Federalists had little to say about the executive power). *But cf.* Letter of "William Penn," PHILA. INDEPENDENT GAZETTEER, Jan. 3, 1788, *reprinted in* THE ANTIFEDERALIST PAPERS 210 (Morton Borden ed., 1965) (arguing that giving the executive a negative was a "political error of the greatest magnitude").

[84] *See* SPITZER, *supra* note 7, at 21.

tent powers.[85] He identified the veto as falling within the fourth category of ingredients, competent powers.[86] Like Madison in The Federalist No. 48,[87] Hamilton in Number 73 acknowledged the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments," and thus remarked upon the "insufficiency of a mere parchment delineation of the boundaries" of the three branches.[88] The veto power was therefore designed as protection for the presidency, and for the President's protection of constitutional government.[89] Thus, as Hamilton argued, veto power serves not merely as a shield for the executive, but "furnishes an additional security against the enaction of improper laws," and is "calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of [Congress]."[90]

Hamilton also discussed how the veto power would be used to counter the passage of "bad laws, through haste, inadvertence, or design."[91] His meaning of a "bad law" is not entirely clear on its face, but because he distinguished encroaching laws from "bad laws," it can be deduced that Hamilton meant to refer to something other than a law that aggrandizes congressional power at the expense of the Executive. Thus, Hamilton appeared to envision a veto that in addition to protecting the Constitution would also encourage better use of the deliberative processes by the Congress.[92]

Presumably, Hamilton believed that the President had unfettered discretion to decide on his own what laws are bad and thus are subject to a veto. However, Hamilton, like his Convention colleagues, also seemed to believe the President would exercise caution in the use of the veto power, explaining that the President will employ the veto rarely because of "the superior weight and influence of the legislative body in a free government."[93] This is consistent with other views from the framing that legislative power predominates in a republic.[94] Hamilton also compared the executive veto to the power of the British monarchy, noting that the monarch would ex-

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[85] THE FEDERALIST No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[86] *See* THE FEDERALIST No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[87] *See* THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (stating that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.").

[88] THE FEDERALIST No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[89] *Id.* at 443.

[90] *Id.*

[91] *Id.*

[92] *See* RAKOVE, *supra* note 39, at 285.

[93] THE FEDERALIST No. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[94] *See* THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* 1 RECORDS, *supra* note 17, at 65 (explaining Connecticut delegate Roger Sherman's view that the legislature is "the depositary of the supreme will of Society"); *cf.* GEORGE F. WILL, *The Miniaturized Presidency: A Casualty of Peace*, *in* WIND, *supra* note 16, at 312 [hereinafter *Miniaturized Presidency*] (describing that "when viewed against the sweep of American history," congressional supremacy is the norm).

ercise veto power only "in a case of manifest propriety, or extreme necessity."[95] With this comparison, Hamilton seemed to suggest that if a monarch could be expected to use such power with caution, surely similar or greater caution could be expected of the American President, given his shorter term in office in a republican government.[96] Finally, Hamilton envisioned substantial influence arising from the mere threat of the veto, which could serve to restrain legislators who would otherwise rush into passing bad laws, absent the "external impediment" of the veto power.[97]

Overall, it is evident from Hamilton's defense of the veto power that while he perceived it to apply whether a President had constitutional objections or non-constitutional objections, its primary use was for constitutionally based presidential self-defense against legislative encroachments.[98] It can be inferred from Hamilton's reasoning that because the veto was to be used rarely and only in cases of great necessity, a veto based on a President's desire to effectuate his own political agenda, or a veto based on a mere dislike for legislation produced through the normal deliberative process, would be inappropriate.[99]

In the end, Hamilton and other Framers believed that constitutional structure and the preservation of the separation of powers demanded an energetic executive and this, in turn, required a sufficient negative power.[100] But structuralism and the separation of powers also demanded prudent limits on the use of the negative. The veto was envisioned as a conservative device for promoting safe government—to be used energetically when protecting the Constitution, but cautiously when facing disagreements solely about the wisdom of public policy.

C. Structure and the Veto

Just as there are historical bases for viewing the veto power with restraint, there are also structural reasons to believe that Presidents should be wary of wielding a veto so powerful that it transforms the President

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[95] THE FEDERALIST No. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[96] *See id.*

[97] *See id.* at 446.

[98] *See id.*; *see also* THE FEDERALIST No. 66, at 402 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that a negative "in the executive upon the acts of the legislative body is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former").

[99] *See* THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* RAKOVE, *supra* note 39, at 285 (explaining that Hamilton in The Federalist No. 73 "portrayed the veto as a feeble weapon that would rarely be used, and then largely to promote additional deliberation in Congress").

[100] *See* THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST No. 66, at 402 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 775–77 (explaining that an additional virtue of the veto power is that it helps protect the President's ability to execute the law).

into the primary, or worse, only, policymaker. This is the potential danger that omnipotent use of the veto, particularly the policy-based veto, presents.

Although the executive power lies in the President,[101] the Constitution clearly gives the President two essential legislative powers: the power to recommend measures for congressional consideration and the power to veto legislation.[102] Recommending and vetoing legislation, however, are constitutionally distinct from the broad legislative powers, including dictating or "making" law, vested in the Congress under Article I.[103] Were it otherwise, Article I's Vesting Clause and the specific limitations on the President's legislative powers would be meaningless. As Michael Rappaport explains, "The President . . . was not intended to occupy a preferred position in the lawmaking process, as he was not given equal legislative power with the houses of Congress."[104] However, the veto power is not an executive power; it is a legislative power, placed in Article I, given to the executive to mitigate congressional tendency to enlarge its legislative vortex. Indeed, it is one of multiple instances in which the Constitution specifically enumerates powers that, by their character, seemingly belong to one department but are nonetheless vested in another department.[105] This structural arrangement suggests that the Constitution envisions a crucial but still limited legislative role for the President; thus there are important structural reasons for exercising the veto cautiously when issues other than constitutionality are at stake.

President William Howard Taft's explanation of veto theory is compelling, both textually and structurally, and is perhaps the most detailed explanation given by a President. In a series of lectures published shortly after he left the presidency but before his appointment to the Supreme Court, Taft explained the President's imperative role in interpreting the Constitution and in effectuating that interpretation through the veto.[106] He also, however, explained that "[i]t has been contended that the President may not exercise the veto power except when the bill presented to him is

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[101] *See* U.S. CONST. art. II, § 1, cl. 1; *see also* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (explaining that Article II's vesting clause "does not mean *some of* the executive power, but *all of* the executive power") (emphasis in the original); Prakash, *supra* note 100, at 820 (explaining that the "core" meaning of "the executive power" is that it provides the President with power to execute the laws).

[102] *See* U.S. CONST., art. I, § 7; *id.* art. II, § 3. Article II also gives the President power to make treaties, with Senate advice and consent. *Id.* art. II, § 2. This may also be characterized as a legislative power. *See* John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1967 (1999).

[103] *See* U.S. CONST. art I, §§ 1, 8.

[104] Rappaport, *supra* note 10, at 759.

[105] For example, trial and judgment are generally powers vested in the judiciary, yet trial and judgment in cases of impeachment are vested in a portion of the legislative branch. *See* U.S. CONST. art. I, § 3, cl. 6–7.

[106] *See* TAFT, *supra* note 14, at 14–28.

unconstitutional . . . . It cannot be said, however, that the provision for the Executive veto as adopted in the Constitution implies any such limitation."[107] Taft further explained his view that the veto is "legislative in nature," and "a very important part of the machinery for making laws."[108] Seizing upon the text, Taft argued that "approve" in Article I, Section 7 "is much too broad to be given the narrow construction" of allowing a veto only when the law is constitutionally invalid.[109] Rather, the President "must consider the wisdom of the bill as one of those responsible for its character and effect."[110] Taft also defended his broad view of the veto power politically, explaining that the President "more truly represents the entire country than does the majority vote of the two Houses."[111] Thus, because the President is elected by all of the people, there is no danger that the exercise of the veto will make him a monarch.[112]

Overall, while his defense of the constitutionally based veto is persuasive, Taft's defense of the policy-based veto is less so. It is clear that the text of the Constitution empowers the President to judge the wisdom of otherwise constitutionally valid legislation, but that is far from proof that exercise of this power is always required, or always beneficial. And although the President is elected by the country as a whole, it does not follow that his determination about the permissible content of a bill is necessarily more representative of the public interest than that of a majority of Congress.[113] Indeed, Taft's understanding of the "representative" presidency appears somewhat at odds with the structural underpinnings of the Constitution. As a structural matter, presidential appeals to popular sentiment as a basis for lawmaking form an extraconstitutional, indeed arguably anticonstitutional, intrusion into the deliberative processes.[114]

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[107] *Id.* at 15–16.

[108] *Id.* at 16.

[109] *See id.*

[110] *Id.*

[111] *Id.* at 17–18.

[112] *Id.* at 19.

[113] Indeed, leaders at the Convention and some early Presidents, particularly the Whigs, adhered to this view of congressional predominance in fulfilling the function of representation. *See, e.g.*, 1 RECORDS, *supra* note 17, at 65, 99 (describing Sherman's view that the legislature "was the depositary of the supreme will of society" and that the Executive should not be allowed "to overrule the decided and cool opinions of the Legislature"); SPITZER, *supra* note 7, at 39 (describing President William Henry Harrison's view that it would be "'preposterous' that the President would presume to have a keener sense of popular sentiment than members of Congress"); WATSON, *supra* note 7, at 14–15 (citing the views of Presidents Washington and Jefferson that the President should give deference to the legislative judgments of the Congress); Zachary Taylor, *First Annual Message*, *in* 5 MESSAGES & PAPERS, *supra* note 1, at 23 (stating that the veto power should be cautiously confined so that "the will of the people, legitimately expressed on all subjects of legislation through their constitutional organs, the Senators and Representatives of the United States, will have its full effect").

[114] *See* Peter Augustine Lawler, *The Constitutional Presidency of George Bush*, *in* AMERICA THROUGH THE LOOKING GLASS 80 (Roger M. Barrus & John Eastby eds., 1994) (noting the Framers' understanding that popular leadership was not synonymous with good

The Constitution avoids direct popular election of the President but ensures popular election (after adoption of the Seventeenth Amendment) of both houses of Congress.[115] Moreover, this Article's survey of the framing suggests that the veto was viewed as a way to filter out the passions and prejudices of the people and their legislators, not as a method for expressing the true will of the people.[116] The President's textual and structural independence from the legislature enables him to be more detached from such passions and prejudices than the Congress, and thus puts him in a better position to act as a relatively objective filter to negate bills that would be dangerous to the Constitution or the public interest.[117] Thus, constitutional structure makes it difficult to justify the "man of the people" rationale for an omnipotent veto.[118]

Overall, the Constitution envisions the President as one who enjoys limited legislative powers under the Recommendation Clause and the Veto Clause, but it does not make him the preferred actor in the deliberative process. Rather, as Madison explained, the factious spirit and uninformed

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government, but rather, could be antithetical to it); *see also* GEORGE F. WILL, *The Veep and the Blatherskite*, *in* WIND, *supra* note 16, at 286 (describing the Framers distaste for "leaders" and the perniciousness of presidential appeals to public opinion); Will, *supra* note 16, at 312 (explaining that a prerequisite for "an ambitious presidential program" is a "national fixation on the presidency, and a predisposition to think there should be a national 'agenda' and that the president should write it").

[115] *See* U.S. CONST. art. I, § 2; *id.* amend. XVII.

[116] *See* McGinnis & Rappaport, *supra* note 53, at 773–74; *see also* THE FEDERALIST NO. 73, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the veto could serve to restrain "men, engaged in unjustifiable pursuits").

[117] *See* JAMES W. CEASAR, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 31 (1979). Professor Ceasar makes the point well,

> [T]he Founders saw their system as consistent with maintaining the "independence" of the executive. Choice by electors avoided dependence on Congress (except in the event of recourse to the auxiliary plan); and election by reputation would foreclose the need to make specific commitments to voters. The Founders also understood that the executive would often have to withstand popular demands. For this, too, selection on the basis of reputation along with some degree of indirectness respecting the popular vote would provide the president with the necessary degree of insulation.

Id.; *see also* RAKOVE, *supra* note 39, at 259 (stating that the appeal of the electoral college was that it would "give the executive an important incentive to maintain his independence"); THE FEDERALIST NO. 71, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the importance of securing an executive that is independent from the legislature); WILL, *supra* note 16, at 312 (describing the "players on the other side of the constitutional line from the president—in the legislative branch, which is not supposed to be part of the president's team").

[118] *See* CEASAR, *supra* note 117, at 51 (stating that the Framers "wanted to prevent the president from defining himself and from being looked upon as a popular favorite. The president might earn the people's respect, but he was not to solicit their favor."); THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the Electoral College and noting that it produces a "detached and divided situation" that would "expose [the electors] much less to heats and ferments").

sentiments of the people will be "refine[d] and enlarge[d],"[119] given form and reason, through the institutional medium of representation in the Congress. The President is only a final filter (one of several in the constitutional design) through which a bill must pass.[120]

In the end, as the Framers understood, the President's legislative role is necessary because we cannot trust that the legislative branch will act at all times within constitutional bounds or in keeping with broad public, as opposed to narrow private, interests.[121] Similarly, however, we cannot trust the President alone to dictate the content of national legislation, which is precisely the danger the veto creates.

D. Rethinking the Veto

1. A More Robust Constitutional Veto

To protect constitutional government, as well as executive energy, the President should aggressively veto any legislation that, in his view, violates the Constitution. The President, as an independent interpreter and enforcer of the Constitution,[122] has a duty to "preserve, protect and defend the Constitution."[123] The Convention and ratification debates on the veto reveal that its primary function was to protect the Constitution, particularly against legislative encroachments upon the executive and judicial branches.[124] Early Presidents endorsed the Framers' intentions for use

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[119] *See* THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

[120] *See* McGinnis & Rappaport, *supra* note 53, at 773–74.

[121] *See* 2 RECORDS, *supra* note 17, at 75 (describing Gouverneur Morris's view in discussing the veto that "[s]ome check [was] necessary on the Legislature"); *id.* at 79 (recounting Nathaniel Ghorum's statement in discussing the veto that "[a]ll agree that a check on the Legislature is necessary"); *id.* at 78 (relating the view of Mason that because the legislature could be "expected frequently to pass unjust and pernicious laws," the "restraining power [of the revision] was therefore essentially necessary").

[122] *See, e.g.*, Lawson, *supra* note 25, at 383; Lawson & Moore, *supra* note 10, at 1280, 1286; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Paulsen, *supra* note 10, at 221; Michael Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law*, 15 CARDOZO L. REV. 137, 138 (1993); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 114 (1993).

[123] U.S. CONST. art. II, § 1, cl. 8; *see also* Rappaport, *supra* note 10, at 772 ("The President's obligation to return an unconstitutional bill derives from the same source as her obligation not to enforce such a bill.").

[124] *See* 1 RECORDS, *supra* note 17, at 100, 108; 2 RECORDS, *supra* note 17, at 75; THE FEDERALIST No. 73, at 442–43 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Black, *supra* note 72, at 89 ("The prime original purpose for the inclusion of this power was that it was thought to give the President the means of protecting his own office from Congressional encroachment."); May, *supra* note 24, at 877 ("The veto power that the Framers were willing to confer in only qualified form was principally designed as a safeguard against unconstitutional legislation."); Presser, supra note 10, at 15 ("[T]he framers chose to give the president the power to refuse to carry out a policy, through use of the veto, when errors in Congress caused its members to violate the Constitution."); Sunstein, *supra* note 10, at 9 ("[T]the framers' principal goal was to allow the President to veto laws on constitutional, rather than policy, grounds.").

of the veto,[125] and, though the constitutional veto has played a minor role among modern vetoes, Presidents have consistently exercised the veto to negate a bill because it violated a specific provision, or the structure, of the Constitution.[126]

The President ought to defend his own office, the government he administers, and the rights that he is obliged to protect, in order to avoid the feebleness that Hamilton feared would result absent an energetic executive.[127] An aggressive constitutional veto is among those "competent powers" that the President must possess and use to maintain energy and avoid feeble—that is, bad—government.[128] Beyond merely protecting the Constitution (protecting the separation and allocation of powers as well as constitutional rights), an aggressive constitutional veto has two additional advantages for maintaining a strong and energetic presidency. First, consistent with the Framers' design as described earlier in this Article, the constitutional veto enables the President to contribute to the national constitutional dialogue and thus play a more active role in the scheme of constitutional deliberation outside the courts. Second, the veto can advance a President's vision of constitutional government.

Too often, constitutional deliberation is distorted by the mistaken notion that the courts are, or should be, the exclusive expositors of the Constitution.[129] Scholars have rejected this proposition, explaining that the Constitution does not make the federal courts supreme (it makes the Constitution supreme) and does not exclude political actors in either the executive or legislative branches from participating in constitutional deliberation and interpretation as part of their official responsibilities.[130]

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[125] *See* FLEXNER, *supra* note 17, at 221; SPITZER, *supra* note 7, at 30; WATSON, *supra* note 7, at 14–15.

[126] *See, e.g.*, JACKSON, *supra* note 1, at 1–44 (describing the constitutional bases for vetoes among early Presidents); WATSON, *supra* note 7, at 139–41 (evaluating vetoes among twentieth-century Presidents and demonstrating that some were used for constitutional objections).

[127] *See* THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[128] *See* THE FEDERALIST No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[129] Much of this is a result of Chief Justice Marshall's famous language in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." The notion was given further fuel by the Supreme Court's decision in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), which stated the "basic principle [from *Marbury*] that the federal judiciary is supreme in the exposition of the law of the Constitution."

[130] *See* J. Richard Broughton, *Boerne Down the House: The Religious Liberty Protection Act and the Separation of Powers*, 2000 L. REV. MICH. ST. U. DET. C.L. 317; Broughton, *War Power*, *supra* note 19, at 720; *see also*, Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 421 (1997) (desiring greater constitutional debate outside the judiciary); Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217, 218 (stating that the Framers' "understanding of representation included serious scrutiny of the Constitution"); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1351 (2001) (explaining the importance of congressional inter-

Those arguments need not be rehashed here. It suffices for purposes of this Article to state simply that much constitutional deliberation appropriately occurs in the political branches, as well as in the courts.[131] That said, the veto decision—or, more specifically, the veto message—can spark, maintain, and promote constitutional dialogue, and is thus a key element of the President's role as a constitutional deliberator and interpreter outside the judiciary.[132]

In addition, a President's constitutional vision is often viewed through the lens of judicial appointments.[133] And it is true that judicial appointments serve as a powerful signal of a President's perspectives on the Constitution and his hopes for the development of constitutional law.[134] However, the veto message as a constitutional dialogue can also serve as a highly useful mechanism for expressing a President's views about the separation and allocation of governmental powers and the scope of constitutional rights.[135] Thus, regardless of the scope of the President's use of the policy-based veto, the constitutionally based veto is essential to the maintenance of presidential strength and legitimacy, and ought to be used aggressively.

That the President should veto a bill that violates the Constitution seems a trite—even obvious—observation, hardly worthy of explanation. Remarkably, though, modern Presidents routinely sign into law legislation that, even in their own view, is or may be unconstitutional.[136] Presidents some-

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pretation); Lawson & Moore, *supra* note 10, at 1279–1312 (explaining the various sources for presidential interpretive powers).

[131] A recent example is Congress's debate over the constitutional propriety of legislation to strip federal courts of jurisdiction over cases involving same-sex marriage challenges. *See generally* 150 CONG. REC. H6580–602 (daily ed. July 22, 2004). For other recent examples, see 150 CONG. REC. S3124-202 (daily ed. Mar. 25, 2004) (discussing legislation to impose criminal penalties for a federally prohibited act of violence against a pregnant woman); President Clinton's Message to the House of Representatives Returning Without Approval Partial Birth Abortion Legislation, 1 PUB. PAPERS 568 (Apr. 10, 1996).

[132] *See* Lawson & Moore, *supra* note 10, at 1304–06.

[133] *See generally* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS (1999) (providing an excellent historical explanation of the ways in which Presidents express constitutional views through judicial appointments).

[134] *See* Broughton, *War Power*, *supra* note 19, at 722; Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 481 (1998); John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 657–58 (1993); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1506 (1992).

[135] For example, the vetoes of Presidents Madison, Monroe, Jackson, and Tyler over internal improvements, such as financing and building of roads and canals, certainly reflected their views of congressional constitutional power and helped better define their understanding of constitutional structure. *See* JACKSON, *supra* note 1, at 13–27, 81–85.

[136] *See, e.g.*, President Clinton's Statement on Signing the National Defense Authorization Act for Fiscal Year 1998, 2 PUB. PAPERS 1612 (Nov. 18, 1997) (explaining that portions of the bill "raise serious constitutional issues"); President George H. W. Bush's Statement Upon Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, 2 PUB. PAPERS 1768 (Oct. 6, 1992) (noting that a provision unconstitutionally interfered with the President's recess appointment

times approve the constitutionally flawed legislation and lodge constitutional objections in the signing statements.[137] They often justify the acceptance of such constitutionally questionable legislation by noting the political expediency of approving the bill or by expressing a confidence that the federal courts will subsequently right any constitutional wrongs.[138] Christopher May provides a useful guide regarding this growing trend, showing, particularly in the modern era, the many bills that Presidents have signed into law despite constitutional concerns about the legislation.[139] Of particular interest is that Presidents most frequently objected, according to this study, to the signed legislation based on a violation of separation of powers, and almost always because the bill encroached upon the authority of the executive branch.[140] This objection is notable because the importance of the separation of powers was a primary reason for giving the President a negative over proposed legislation during the founding.[141]

When signing laws they find constitutionally flawed, Presidents sometimes note in the signing statement, in concert with lodging their objections, that the objectionable provisions will be disregarded, not enforced, or treated as advisory.[142] Yet Professor May's study shows that between

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powers); *see also* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 917 (1989–90) ("Presidents often sign bills despite [constitutional] objections to some portions of them, because the remainder is beneficial or even necessary.").

[137] *See id.*

[138] *See, e.g.*, President George W. Bush's Statement on Signing H.R. 2356, the Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517 (Mar. 27, 2002) ("Certain provisions present serious constitutional concerns . . . . I expect that the courts will resolve these legitimate legal questions as appropriate under the law."); President Clinton's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630–32 (Apr. 24, 1996) (expressing confidence that federal courts would construe the bill to maintain federal judicial power to say what the law is); President Reagan's Statement on Signing a Veterans Benefits Bill, 2 PUB. PAPERS 1558 (Nov. 18, 1988) (finding a provision unconstitutional but noting that the problem did not "impair the fulfillment of the bill's principal objectives").

On occasion, Presidents will sign the bill with the unconstitutional provision and then admonish the Congress. *See, e.g.*, President Reagan's Statement on Signing the Department of Housing and Urban Development–Independent Agencies Appropriation Act, 1985, 2 PUB. PAPERS 1057 (July 18, 1984) (urging Congress to cease the use of mechanisms that violate the bicameralism and presentment requirements, pursuant to INS v. Chadha, 462 U.S. 919 (1983)).

[139] *See* May, *supra* note 24, at 933–37.

[140] *See id.* at 936–37.

[141] *See supra* text accompanying notes 67–72.

[142] *See, e.g.*, President George W. Bush's Statement on Signing the Consolidated Appropriations Act, 2004, 40 WEEKLY COMP. PRES. DOC. 137 (Feb. 2, 2004) (explaining that certain provisions were inconsistent with presidential power under Article II and would be construed as advisory); President George W. Bush's Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 WEEKLY COMP. PRES. DOC. 226 (Feb. 20, 2003) (noting that certain provisions were unconstitutional and thus would be considered merely advisory and not necessarily enforced by the executive branch); President Clinton's Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 227 (Feb. 10, 1996) (directing the Attorney General to refuse enforcement of provision that would have required discharge of military personnel with HIV, declaring that

1789 and 1981, only twelve laws viewed by the signatory President as constitutionally dubious were actually disregarded by the President.[143] The issue of the legitimacy of presidential non-enforcement is beyond the scope of this Article.[144] Reliance on this doctrine further points out that modern Presidents are not protecting the Constitution with the kind of robustness and consistency that the Constitution envisions for, and in fact requires of, them.

Since Professor May published his study, the practice of signing into law legislation notwithstanding constitutional concerns has not abated. President Clinton cited constitutional concerns in a number of vetoes, but also in signing statements.[145] To highlight one example, in signing the Antiterrorism and Effective Death Penalty Act of 1996, President Clinton stated his concern that the state court deference provisions of the bill would undermine the constitutional powers of the federal courts to "say what the law is" with regard to federal constitutional claims of state prisoners, pursuant to *Marbury v. Madison*.[146] Still, President Clinton expressed his confidence that the federal courts would interpret the bill in such a way as to correct any constitutional difficulty.[147] There seems to be an inconsistency between the President's willingness to protect the Constitution himself with regard to some bills and his reliance on the federal courts to repair any constitutional damage with regard to others. Most recently, President George W. Bush, who has been reluctant to exercise the veto power at all (a reluctance made more understandable by the existence of a politically friendly Congress), signed into law the controversial Bipartisan Campaign Reform Act of 2002 (BCRA) despite his belief that certain

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provision unconstitutional); President Clinton's Statement on Signing the Telecommunications Act of 1996, 1 PUB. PAPERS 190 (Feb. 8, 1996) (noting that the Department of Justice would refuse to enforce provisions that applied to abortion-related speech).

Professor Rappaport argues that this practice is itself unconstitutional, and offers persuasive reasons why. *See* Rappaport, *supra* note 10, at 767–76. Others, however, defend the practice. *See* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 452–60 (1990).

[143] *See* May, *supra* note 24, at 937.

[144] For a good discussion of the issue, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); Lawson & Moore, *supra* note 10, at 1304–06; Paulsen, *supra* note 10, at 322; Rappaport, *supra* note 10, at 766–71.

[145] *See, e.g.*, President Clinton's Statement on Signing the Consolidated Appropriations Act, FY 2001, 3 PUB. PAPERS 2777 (Dec. 21, 2000) (noting the unconstitutionality of provision creating a Center for Russian Leadership Development because the Center is not administered by the executive branch under the bill); President Clinton's Statement on Signing the Department of Transportation and Related Agencies Appropriations Act, 2001, 3 PUB. PAPERS 2282 (Oct. 23, 2000) (stating that certain provisions violated the decision in INS v. Chadha, 462 U.S. 919 (1983) and would be considered merely advisory); President Clinton's Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 2 PUB. PAPERS 1847 (Oct. 23, 1998) (noting that several provisions unconstitutionally restrained presidential authority).

[146] President Clinton's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, *supra* note 138, at 630–32.

[147] *See id.*

provisions of the bill "present serious constitutional concerns."[148] Yet, the President's statement simply concluded with the same confident pose that has become predictable: "I expect that the courts will resolve these legitimate legal questions as appropriate under the law."[149] One might ask why the President did not himself act on what he thought was appropriate under the law.

When a President signs into law legislation that he believes is unconstitutional, absent some action on his part to avoid the implementation of the constitutionally harmful sections of the bill, he does something troubling and unacceptable.[150] Few things can be more damaging to presidential legitimacy and strength than a President's acquiescence and complicity in violating the Constitution. It is a practice that, although rare historically, is increasingly common, and it should be brought to an end. Thus, the veto should be used aggressively against unconstitutional legislation.

2. *A Rare and Judicious Policy-Based Veto*

While the constitutional veto is rarely, if ever, improper, veto decisions are significantly more difficult when a President lacks a constitutional objection to the bill. In these instances, the President is no longer acting to preserve, protect, or defend of the Constitution.[151] Rather, he is a political actor, acting to protect against legislation he thinks unwise or inexpedient; he is, in a very real sense, correcting the propriety of Congress's policy judgments, not its view of the Constitution.[152] The text of the Constitution[153] and the Convention and Ratification debates[154] indicate that this type of veto is permissible, even desirable in certain instances. Thus, the difficulty lies not in deciding whether a policy-based veto is

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[148] President George W. Bush's Statement on Signing H.R. 2356, the Bipartisan Campaign Reform Act, 38 WEEKLY COMP. PRES. DOC. 517 (Mar. 27, 2002). The President said that the BCRA went too far by limiting the ability of individuals to contribute to political parties, noting, "when individual freedoms are restricted, questions arise under the First Amendment." He also stated that he had "reservations about the constitutionality of the broad ban on issue advertising."

[149] *Id.*

[150] *See* Rappaport, *supra* note 10, at 774 ("Approval of an unconstitutional bill diminishes the importance of the Constitution.").

[151] *See* U.S. CONST. art. II, § 1, cl. 8.

[152] *See* FISHER, *supra* note 23, at 122 (describing the Framers' positions on the use of the veto for reasons other than constitutionality and concluding that "[t]his larger view of Madison and Hamilton prevailed").

[153] *See* U.S. CONST. art. I, § 7, cl. 3.

[154] *See* 2 RECORDS, *supra* note 17, at 73, 78; THE FEDERALIST NO. 73, at 443 (Clinton Rossiter ed., 1961); Presser, *supra* note 10, at 15; Sunstein, *supra* note 10, at 9–10; *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 534 (1992) (stating that "The Framers did not expect the President to have an active role in lawmaking and in changing the law; the executive's role, reflected in the veto power, was only reactive, protecting the presidency against congressional usurpation or the status quo against immediate popular change.").

permissible in the constitutional scheme, but rather lies in determining when such a veto should be exercised and the extent to which its repeated use to express policy disagreement involves an affirmative act of presidential lawmaking beyond what the Constitution prescribes and envisions. As Senator Webster described when responding to President Jackson's bank veto, the problem is that the President may ultimately claim "not the power of approval, but the primary power, the power of originating laws."[155] But if the President need not be deferential to congressional or even judicial interpretation when exercising a constitutional veto, one might question whether the President should be any more deferential to the legislative branch when exercising a non-constitutional veto. Here, too, the answer has less to do with the notion of deference and more to do with the constraints of structure and history upon the presidency as an institution for preserving sound and safe government.

There are compelling reasons, both historical and structural, to view the policy-based veto with caution.[156] With regard to the historical considerations, first, the Convention specifically and soundly rejected an absolute veto,[157] which suggests that they expected the President's legislative authority to be circumscribed and subjected to institutional checks. Second, while it is true that the Framers as a group particularly feared the aggrandizement of legislative, rather than executive, power,[158] there was general agreement that the more truly representative legislative institutions would predominate in lawmaking in a republican government.[159] Finally, nothing in the historical record of the framing and ratification indicates a preference for a legislatively strong President who is intimately involved with the shaping of legislation to satisfy his own political prerogatives beyond his constitutional duty of giving information and

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[155] 8 REG. DEB. 1239–40 (1832) (statement of Sen. Webster). Of course, to some degree, the Recommendation Clause envisions the President as having a role in originating the laws. *See supra* note 26. But, to the extent that Senator Webster's argument is that the President may not legitimately dictate the laws as an original matter, then his point is accurate.

[156] *See* discussion *supra* Part I.B–C.

[157] *See* 2 RECORDS, *supra* note 17, at 200; *see also* May, *supra* note 24, at 876–78 (describing the Convention's rejection of an absolute veto power in the President); RAKOVE, *supra* note 39, at 258 (noting that the proposal for an absolute veto was "so offensive that only its movers [Wilson and Hamilton] and [Rufus] King voted in its favor").

[158] *See, e.g.*, 2 RECORDS, *supra* note 17, at 74 (describing Madison's view that the legislature had a "powerful tendency . . . to absorb all power into its vortex"); *id.* at 76 (citing Gouvenor Morris's view that public liberty was in "greater danger from Legislative usurpations than from any other source"); *id.* at 79 (describing Nathaniel Ghorum's statement that "[a]ll agree that a check on the Legislature is necessary"); THE FEDERALIST NO. 49, at 315–16 (James Madison) (Clinton Rossiter ed., 1961) ("The tendency of republican government is to an aggrandizement of the legislative at the expense of the other departments.").

[159] *See* THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* Presser, *supra* note 10, at 15 (explaining the Framers' view that the veto was meant to protect the Constitution and that "congressional action should generally be deferred to by the other branches of government, unless Congress went too far").

recommending measures to the Congress and then completing the original process with his signature or veto.[160] Even those who argued for a comparatively broad negative viewed it primarily as a conservative device, a shield but not a sword, to be used on rare occasions.[161] Those who argued for an even broader power, which would have permitted an extra-congressional revisionary power, did not prevail.[162]

Regarding the structural considerations that warrant a prudent approach to the policy-based veto, the Constitution provides an important yet limited role for the President in the policy-making process. It does not place him in a preferred position legislatively nor permit him to unilaterally dictate the content of national legislation.[163] The President's limited legislative role is reinforced by the structural features of the constitutional design that place even greater distance between the President and the people, reaffirming the structural dominance of the Congress in making law.[164]

The policy-based veto should thus be subject to greater prudential limits. The Constitution does not affirmatively require such limits, but considerations of constitutional structure—such as respect for the defined powers and judgment of the legislature in a representative government—and the history of the adoption of the veto provisions in Article I, Section 7, suggest that the veto should be exercised with prudence when the President is not acting specifically to protect the Constitution, but only to promote good policy (or good politics, as the case may be). The President should therefore exercise a veto on non-constitutional grounds only when the legislation results from defects in the deliberative process that render the legislation pernicious, when it substantially implicates a national public interest, or in circumstances where the legislation is so unwise or inexpedient that the President could not fulfill his constitutional obligation to faithfully execute it.

As previously noted, energy is essential to a strong executive, which the Constitution envisions,[165] and the veto is essential to maintaining that

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[160] *See* Sunstein, *supra* note 10, at 10 ("The founders certainly did not anticipate the current situation, in which the veto power is a well-understood part of all lawmaking, and implies a large and continuous presidential role in lawmaking itself."); *see also* Kesavan & Sidak, *supra* note 26, at 10–11 (arguing that the state of the union and recommendation clauses impose a duty on the President to participate in the lawmaking progress and provide Congress with information).

[161] *See* THE FEDERALIST No. 73, at 443–44 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the veto "not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws," and that it would be used rarely); 1 RECORDS, *supra* note 17, at 100 (explaining Wilson's expectation that the negative "would seldom be used").

[162] 1 RECORDS, *supra* note 17, at 104, 140; 2 RECORDS, *supra* note 17, at 80; *see also supra* text accompanying notes 47–79.

[163] *See supra* text accompanying notes 101–120.

[164] *See supra* text accompanying notes 114–118.

[165] *See* THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* 1 RECORDS, *supra* note 17, at 109 (citing Wilson's view that a unitary executive would produce "vigor and activity"); *id.* at 112–13 (citing Mason's observation that

energy. But presidential overreaching is no better than congressional overreaching simply because one may desire an energetic President or fear interested majorities in Congress. In the quest to maintain a vibrant and effective President, one must not forget Congress's predominant role in the lawmaking process. Moreover, the country need not choose between a weak President and a weak Congress. The executive and legislative branches can be simultaneously strong, each exercising exclusive control over its respective constitutional functions without interference from the other, except where subject to the institutional checks that the Constitution places upon them. Indeed, because institutional design matters more to the constitutional scheme than the persons who rule,[166] the separation of powers requires such vigor to assure that "ambition counteracts ambition."[167]

II. Evaluating and Rethinking the Presidential Vetoes

From the preceding examination of the veto's framing and ratification, one can see the theoretical bases for the executive veto and some indication of the types of legislation to which it should apply, from the perspective of the Framers. Regardless of its structural and historical roots, however, the actual exercise of the veto among American Presidents has changed dramatically from the time of the Washington administration. As this section explains, although early use of the veto was relatively conservative, limited mainly to legislation that was believed unconstitutional, the frequency of the veto and the justifications for its employment have increased with the evolution of the presidency and the nation, with the affirmation of party politics, and with the growth of both federal power and federal legislation. Consequently, presidential practice has produced a virtually omnipotent veto power that has often been used to dictate the content of legislation to conform to a President's own political program. In contrast, presidential use of the veto to protect the Constitution, particularly in the presidencies from the late 1800s to the present, has been less frequent. Consistent with the model proposed above, Presidents should realign their priorities regarding proper use of the veto to ensure that its exercise better comports with constitutional text, structure, and history by aggressively exercising constitutional vetoes and more cautiously exercising policy-based vetoes.

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the "great advantages" of the executive are secrecy, dispatch, vigor, and energy, and his opinion that "a strong Executive is necessary."); *see generally* Terry Eastland, Energy in the Executive (1992) (making the case for a strong and energetic President).

[166] *See* Ceasar, *supra* note 117, at 52.

[167] *See* The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

A. Veto Theory and Practice in the Early Presidencies

If it was the vision of the Convention and of Publius that the veto should be used sparingly and primarily to safeguard the Constitution, then the veto practices of early Presidents were largely consistent with that vision.[168] President Washington, whose restrained view of the veto power[169] was consistent with his restrained view of the presidency in legislative matters more generally,[170] vetoed only two bills. His first, on April 5, 1792, rejected a bill that would have allowed some larger northern states a representative in Congress for more than thirty thousand people.[171] President Washington, on Thomas Jefferson's counsel, vetoed the bill because he believed it violated the Constitution's provisions for apportionment in Article I, Section 2.[172] His second veto came in the final days of his presidency, and rejected a bill that contained a provision that would have eliminated two dragoon companies from the military.[173] His reasons for the second veto appear to have been solely based on a policy disagreement, rather than a constitutional objection.[174] Still, as Charles Black argues, and as evident from the veto message to the House, the veto could have been based on President Washington's effort to effectively protect his authority as Commander-in-Chief by maintaining the strength of the army.[175] Whether one views this second veto as a disguised constitutional veto or one grounded in a conclusion that the bill was simply unwise, reducing the size of an already minimal army would have had significant negative implications for the young nation's security and welfare.[176] Thus, even if this is viewed as a pure policy-based veto, it arguably fits the Madi-

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[168] *See* WATSON, *supra* note 7, at 15.

[169] *See* FLEXNER, *supra* note 15, at 221. Washington explained in a letter to Edmund Pendleton, "You do me no more than justice when you suppose, that, from motives of respect to the legislature (and I might add from my interpretation of the constitution), I gave my signature to many bills, with which my judgment is at variance." WATSON, *supra* note 7, at 14–15.

[170] *See* FLEXNER, *supra* note 15, at 221 (stating that Washington "did not mobilize congressional support for programs he favored . . . once the legislative debates began, he meticulously kept hands off."); RICHARD NORTON SMITH, PATRIARCH 35 (1993) (explaining that Washington "was understandably hesitant about entering the legislative arena"); *id.* at 131 (Washington "strictly interpreting the Constitution on presidential prerogatives, distanced himself from most legislative business, so he expected similar deference from Congress").

[171] *See* Washington, *Veto Message* (Apr. 5, 1792), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 124 (James D. Richardson ed., 1897).

[172] *See id.*

[173] *See* Washington, *Veto Message* (Feb. 28, 1797), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 211–12.

[174] *See id.*; *see also* SPITZER, *supra* note 7, at 29 ("[A]s Washington's second veto shows, he considered the president's policy judgment to be an acceptable rationale for use of the veto.").

[175] *See* Black, *supra* note 72, at 90; *see also* Washington, *supra* note 173, at 212 (explaining President Washington's view that some cavalry was necessary and that a regular cavalry would be more useful than a militia in maintaining peace with the Indians).

[176] *See* Black, *supra* note 72, at 90.

son/Wilson/Hamilton view, and that herein, of a bill so potentially injurious to the public good that its substantial inexpediency demanded the rare exercise of an executive veto.

Neither John Adams nor his son, John Quincy Adams, exercised the veto,[177] nor did Thomas Jefferson, who, like George Washington, viewed the veto with caution.[178] James Monroe vetoed a single bill, and did so on constitutional grounds, rejecting a bill to appropriate money for internal improvements by arguing that Congress had no constitutional power to do so.[179] James Madison employed the veto most often among the first six Presidents,[180] having vetoed seven bills, four of which were for constitutional reasons.[181] Of the other three, only one was a regular veto (Madison pocket vetoed two, including a naturalization bill),[182] and it involved Congress's highly controversial attempt to establish the Second Bank of the United States.[183] Madison eventually acknowledged the constitutionality of the bank,[184] but, because the country was still technically at war, Madison was skeptical of the bank's ability to produce economic growth. In his veto message Madison argued that it might have significant consequences for the country absent a circulation of Treasury notes to further the war effort.[185] Congress revised the proposal to satisfy Madison's concerns and he signed a new bill establishing the bank the following year.[186] Madison's use of the regular veto shows that, like his predecessors, he was committed to returning legislation only when he believed it to be unconstitutional or to be so detrimental to the public good that a veto was warranted.

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[177] *See* SPITZER, *supra* note 11, at 71.

[178] *See* SPITZER, *supra* note 7, at 30 (quoting Jefferson's view that "Unless the president's mind on a view of everything which is urged for and against a bill is tolerably clear that it is unauthorized by the Constitution, if the pro and con hang so even as to balance his judgment, a just respect for the wisdom of Legislature would naturally decide in favor of their opinion.").

[179] *See* James Monroe, *Veto Message* (May 4, 1822), *in* 2 MESSAGES AND PAPERS, *supra* note 1, at 142.

[180] *See* SPITZER, *supra* note 11, at 71.

[181] *See* Madison, *Veto Message* (Feb. 21, 1811), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 489–90; Madison, *Veto Message* (Feb. 28, 1811), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 490; Madison, *Veto Message* (Apr. 3, 1812), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 511; Madison, *Veto Message* (Mar. 3, 1817), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 584. Madison was also the first to veto legislation that was inconsistent with a provision of the Bill of Rights. *See* Madison, *Veto Message* (Feb. 21, 1811), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 489–90 (vetoing a bill to incorporate the Protestant Episcopal Church in Alexandria on the ground that it was inconsistent with the Establishment Clause).

[182] *See* Madison, *Veto Message* (Nov. 5, 1812), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 523.

[183] *See* Madison, *Veto Message* (Jan. 30, 1815), *in* 1 MESSAGES AND PAPERS, *supra* note 1, at 555.

[184] *See id.*; *see also* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 506 (1990) (stating that Madison in 1791 had argued that the bank was unconstitutional).

[185] *See* Madison, *supra* note 183, at 555–57.

[186] *See* JACKSON, *supra* note 1, at 10.

Overall, early Presidents exercised the veto sparingly and most often for constitutional reasons. None appear to have exercised the veto on less than significant policy grounds, or when there was a less than substantial danger to the public interest posed by the presented legislation. This appears to be consistent with the sense of prudence that the majority of Convention delegates and Publius envisioned for the exercise of the veto, and with the model veto practice outlined in this Article.

B. Veto Theory and Practice from the Jackson Administration into the Twentieth Century

As mentioned earlier, it is commonly understood that President Jackson changed the face of the presidential veto.[187] He vetoed twelve bills, more than the first six Presidents combined.[188] Indeed, on three occasions during Jackson's tenure members of Congress introduced constitutional amendments that would have provided for a simply majority, rather than a two-thirds vote of each chamber, to override a veto.[189] Additionally, in 1834 the Senate, led by Senator Clay, approved a motion to censure the President based on what was perceived as his kingly approach to executive power.[190] Still, arrogant and expansive as President Jackson's use of the veto may seem (and was, particularly at that time), all five of President Jackson's regular vetoes—and even his seven pocket vetoes—were justified, at least in part, by constitutional objections to the presented legislation.

His veto of the Bank Rechartering Bill, of course, exposed his well-established view about the evils of the bank and the view that Congress lacked power to charter it.[191] President Jackson also followed the reasoning of Presidents Madison and Monroe by vetoing several internal improvements bills on the ground that Congress had no constitutional authority to allocate money for such projects unless they were truly national in their scope.[192] But President Jackson also used the veto to protect the consti-

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[187] *See supra* text accompanying notes 1–7; *see also* SPITZER, *supra* note 7, at 33; WATSON, supra note 7, at 15; Magliocca, *supra* note 7, at 226–36.

[188] *See* SPITZER, *supra* note 11, at 71.

[189] SPITZER, *supra* note 7, at 38. These occurred in 1833, 1835, and 1836. *Id.*

[190] *See* 10 REG. DEB. 58–59 (1833) (statement of Sen. Clay); Magliocca, *supra* note 7, at 236–45 (describing the bases for and debate on the resolution); *cf.* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 669–70 (2003) (explaining that several Presidents, beginning with Jackson, succeeded in expanding the powers of the President, and noting Henry Clay's explanation of presidential power during this period).

[191] *See* Jackson, *Veto Message* (July 10, 1832), *in* 2 MESSAGES AND PAPERS, *supra* note 1, at 576–82.

[192] *See* JACKSON, *supra* note 1, at 15–27. These included President Jackson's famed Maysville Road veto, which would have provided funding to extend the National Road between Maysville and Lexington, Kentucky (Henry Clay's home state). *Id.* at 44. The President argued that the project for the Maysville Road was purely local and thus beyond the power of Congress to fund through its appropriations powers. *See* Jackson, *Veto Mes-*

tutional prerogatives of the executive. He vetoed a bill in 1835 that would have settled claims by American merchants against the King of the Two Sicilies, stating that Congress had no authority to define the scope of the President's negotiating power with foreign governments.[193] And in 1836, he vetoed a bill that would have set a day for the adjournment of congressional sessions, arguing that it was inconsistent with the language of both Article I, Section 5 and Article II, Section 3; by fixing a date of adjournment for future Congresses, the bill would have interfered with the President's power to settle disagreements about congressional adjournment.[194]

There is no question that President Jackson altered the practical exercise of executive power with his use of the veto, and that in doing so he emphasized and affirmed his vision of democracy.[195] There is also no question that President Jackson had significant political enemies in Congress with whom he had substantial policy disagreements.[196] But his vetoes appear, at least on their face, not to have stemmed solely from political animus toward an unfriendly Congress, but rather, at least partially from a fidelity to his strongly held belief in the power of presidential constitutional interpretation.[197] Right or wrong in his interpretations, President Jackson sought to protect the Constitution through the veto. In this sense, the reasoning of his veto messages was on most occasions and in most respects consistent with the veto vision espoused by the Convention and by Publius, and was not as radical as it may otherwise appear.

Notwithstanding the more aggressive veto model of the Jacksonian era, his immediate successors did not make expansive use of the veto. Martin Van Buren, a Democrat and Jackson ally, exercised only a single pocket veto in his four years as President.[198] Three succeeding Whig Presidents—William Henry Harrison, Zachary Taylor, and Millard Fillmore—never vetoed a single bill, espousing a restrained view of the veto power akin to

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sage (May 27, 1830), *in* 2 MESSAGES AND PAPERS, *supra* note 1, at 487; *see also* Magliocca, *supra* note 7, at 226–30 (discussing the significance of the Maysville Road veto).

[193] *See* Jackson, *Veto Message* (Mar. 3, 1835), *in* 3 MESSAGES AND PAPERS, *supra* note 1, at 146.

[194] *See* Jackson, *Veto Message* (June 9, 1836), *in* 3 MESSAGES AND PAPERS, *supra* note 1, at 232. The relevant Constitutional provisions state that: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," U.S. CONST. art. I, § 5; and, "[The President] may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper," *id.* art. II, § 3.

[195] *See* JACKSON, *supra* note 1, at 54–55.

[196] *See* JACKSON, *supra* note 1, at 36–39; SPITZER, *supra* note 7, at 34–39.

[197] His rejection of the Supreme Court's *McCulloch* decision is the paradigmatic example. *See* Jackson, *Veto Message* (July 10, 1832), *in* 2 MESSAGES AND PAPERS, *supra* note 1, at 581–82.

[198] *See* SPITZER, *supra* note 11, at 71.

that of President Washington.[199] Indeed, President Harrison's inaugural address devoted substantial attention to veto theory:

> I consider the veto power . . . solely as a conservative power, to be used only, first, to protect the Constitution from violation; secondly, the people from the effects of hasty legislation where their will has been probably disregarded or not well understood, and thirdly, to prevent the effects of combinations violative of the rights of minorities.[200]

President Taylor's first annual message to Congress followed suit: "The check provided by the Constitution in the clause conferring the qualified veto will never be exercised by me except in the cases contemplated by the fathers of the Republic."[201] He continued, "I view it as an extreme measure, to be resorted to only in extraordinary cases, as where it may become necessary to defend the executive against the encroachments of the legislative power or to prevent hasty and inconsiderate or unconstitutional legislation."[202]

John Tyler, who succeeded President Harrison after Harrison died in office less than a month after his inauguration, also defended the conservative Whig view of veto authority, saying it should be "most cautiously exerted, and perhaps never except in a case eminently involving the public interest or one in which the oath of the President, acting under his convictions . . . imperiously requires its exercise."[203] It would be an act of moral turpitude, President Tyler believed, to assent to legislation that violated the Constitution.[204]

Accordingly, among his six regular vetoes in his single term, President Tyler most often had constitutional objections to the legislation that he returned. Indeed, President Tyler's constitutional vetoes reflected his views of American federalism.[205] He was the first President to actively and affirmatively assert the veto for the express purpose of maintaining the structural divisions of authority between the states and the federal government, at a time in American history when sectional strife was on the rise.[206] He vetoed two national bank bills,[207] two provisional tariff bills,

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[199] *See* JACKSON, *supra* note 1, at 56, 99; SPITZER, *supra* note 7, at 39, 57. As Professor Spitzer explains, Presidents Taylor and Fillmore "both subscribed to Whig principles by refraining from any use of the veto." *Id.* at 57.

[200] William Henry Harrison, *Inaugural Address* (Mar. 4, 1841), *in* 4 MESSAGES AND PAPERS, *supra* note 1, at 9–11.

[201] Taylor, *supra* note 113, at 23.

[202] *Id.*

[203] John Tyler, *Veto Message* (Sept. 9, 1841), *in* 4 MESSAGES AND PAPERS, *supra* note 1, at 68.

[204] *See id.*

[205] *See* JACKSON, *supra* note 1, at 75–85.

[206] *See id.*

[207] *See id.* at 57–63.

which Tyler believed would produce a chain reaction that would dim the lines between state and federal power;[208] and a bill to appropriate $340,000 for improvements to eastern harbors, which Tyler viewed as outside the bounds of the congressional commerce power and thus a threat to state sovereignty.[209] Tyler's actions and his reasoning, however, proved wildly unpopular among many, including his fellow Whigs, who felt he had been unfaithful to Whig notions of a restrained and judicious executive.[210] Tyler was the first President to have a veto overridden by Congress[211] and congressional criticism based on his alleged abuse of the veto power was so unrelenting that he was ultimately expelled from the Whig Party.[212] Though his interpretations of the federal Constitution are debatable, President Tyler employed the negative primarily, although aggressively, for the stated purpose of preserving federalism, a critical element of American constitutional structure.

The use of the veto for non-constitutional, or strictly policy-based, reasons did not mature fully until after the Civil War. President Lincoln, who issued only two regular vetoes, adhered to the restrained view of the veto that gave deference to legislative judgments about policy; he preferred legislative compromises.[213] His successor Andrew Johnson, however, faced a particularly hostile Congress and made substantially greater use of the veto than any President before.[214] Like previous chief executives, President Johnson often relied upon constitutional law and theory as a justification for return of legislation.[215] President Johnson was, like Tyler, "a high-minded constitutionalist who prided himself on his invocation of constitutional principles and precedents; in fact, he defended his constitutional interpretations 'as though they had been transmitted from Sinai.'"[216] Indeed, perhaps President Johnson's most infamous constitutional veto was his return of the Tenure of Office Act, which the Congress subsequently overrode and which resulted in a chain of events that led to President Johnson's impeachment.[217]

By the tenure of Ulysses S. Grant, however, the constitutional veto was increasingly rare, and more rare than the policy veto.[218] President Grant vetoed 93 bills, 45 of which were regular vetoes.[219] Additionally, in his first term, President Grover Cleveland vetoed 414 bills, 304 of which were

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[208] *See id.* at 73.
[209] *See id.* at 80–81.
[210] *See* Calabresi & Yoo, *supra* note 190, at 682–88; JACKSON, *supra* note 1, at 60–61.
[211] *See* SPITZER, *supra* note 11, at 71.
[212] *See id.* at 70; Calabresi & Yoo, *supra* note 190, at 685.
[213] *See* JACKSON, *supra* note 1, at 116; SPITZER, *supra* note 7, at 58.
[214] *See* SPITZER, *supra* note 7, at 58.
[215] *See id.*
[216] *See* SPITZER, *supra* note 7, at 58.
[217] *See* Johnson, *Veto Messages* (Mar. 2, 1867), *in* 6 MESSAGES AND PAPERS, *supra* note 1, at 492–98; *see also* Calabresi & Yoo, *supra* note 190, at 746–58.
[218] *See* JACKSON, *supra* note 1, at 132–41.
[219] *See* SPITZER, *supra* note 11, at 71.

regular vetoes. In his second term, he employed 170 vetoes, including 42 regular vetoes.[220] Most of these bills—many of which were private pension and relief bills related to the Civil War—were returned solely on grounds of inexpediency or lack of wisdom, not unconstitutionality.[221]

Simultaneously, the types of congressional objections to the nature and scope of the veto power—previously voiced, for example, during the Jackson and Tyler administrations—subsided.[222] As Professor Spitzer explains, by 1889 arguments for a rare and circumscribed veto power were "anachronistic."[223] The trend toward more frequent, and more varied, use of the veto, and the change in theoretical and practical perspectives regarding it, became even more apparent among the Presidents of the early twentieth century.

Consistent with his theory of the veto,[224] President Taft exercised thirty regular vetoes in his term.[225] Some, like his veto of the 1913 Webb-Kenyon bill and of various dam bills, were based on concerns over constitutional structure, such as maintaining a healthy division of authority between the states and the federal government.[226] But most often President Taft used the veto to express a disagreement over public policy, usually to fight the emergent Progressive movement.[227] For example, he vetoed a bill in 1911 that would have lowered the tariff rate on wool to the revenue level of twenty-nine percent, stating that the bill was inconsistent with the 1908 Republican platform.[228] Like his predecessor Rutherford B. Hayes who also faced a politically hostile Congress, President Taft waged policy battles against legislative riders.[229] He vetoed, for example, a 1912 appropriations measure that included a rider that would have altered the procedures in the District of Columbia Civil Service, as well as a rider to abolish the Commerce Court, and vetoed another appropriations bill in 1913 that contained a rider that exempted from prosecution under antitrust laws businesses which had increased wages, reduced hours, and improved working conditions.[230] In fact, President Taft's policy objections to the 1912 appropriations measure resulted in congressional passage of a final bill that omitted each rider, and that was signed by the President.[231]

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[220] *See id.*

[221] *See* JACKSON, *supra* note 1, at 149.

[222] *See* SPITZER, *supra* note 7, at 59.

[223] *Id.*

[224] *See* TAFT, *supra* note 14, at 14–28.

[225] *See* SPITZER, *supra* note 11, at 71.

[226] *See* JACKSON, *supra* note 1, at 177, 179.

[227] *See id.* at 168.

[228] *See id.* at 169.

[229] *See* FISHER, *supra* note 23, at 121; SPITZER, *supra* note 7, at 60; *see also, e.g.*, Rutherford B. Hayes, *Veto Messages* (Apr. 29, 1879), *in* 7 MESSAGES AND PAPERS, *supra* note 1, at 523–32 (vetoing a bill that included a rider to repeal a law providing federal troops to keep the peace at polling places during national elections).

[230] *See* JACKSON, *supra* note 1, at 174–75.

[231] *See id.*

Such a result is a testament to a President's ability to determine the ultimate content of federal legislation simply by exercising the veto aggressively, yet is problematic when it produces the kind of legislative presidency that dominates congressional lawmaking authority.

Woodrow Wilson echoed President Taft's view of the veto's influence. Prior to his presidency, Wilson wrote that the veto was the President's "most formidable prerogative," and that with it, the President "acts not as the executive but as a third branch of the legislature."[232] President Wilson used the veto forty-four times;[233] to this point, only Presidents Grant, Cleveland, and Theodore Roosevelt had vetoed more bills.[234] Moreover, President Wilson's vetoes more often reflected his political preferences concerning legislation rather than any particular constitutional viewpoint. For example, he vetoed an immigration bill in 1915 that would have required literacy tests for heads of immigrant families and those over age sixteen, contending (as had President Taft in vetoing a similar bill) that the tests would effectively deny many immigrants the education they sought in America.[235] In the wake of World War I, President Wilson cited economic reasons for vetoing multiple bills to repeal daylight savings time[236] and the Gronna Resolution of 1921, which would have revived the War Finance Corporation and authorized one billion dollars in debentures to stimulate agriculture.[237] This is not to say that President Wilson never articulated constitutional objections to legislation or that his policy-based vetoes did not reflect concerns that the proposed legislation would do substantial harm to national interests—indeed, Wilson exercised a number of vetoes to protect the country from the potentially devastating effects of the war.[238] Still, President Wilson, along with President Taft and their predecessors over the past fifty years, perpetuated a revised veto theory and practice that was at odds with the structural and historical limits on presidential legislative authority. They made it more likely that the veto would be used for non-constitutional grounds and often against legislation that was politically disagreeable, but that did not involve a malfunction in the deliberative process or a significant danger to the public good.

The Presidents of the early to mid-nineteenth century treated the veto much as it had been treated during and immediately after the Framing, mainly as a device to be used sparingly and primarily to protect and defend the Constitution. Conversely, post–Civil War and early twentieth-century Presidents were faced with new political challenges and created an ever-

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[232] WOODROW WILSON, CONGRESSIONAL GOVERNMENT 52 (15th ed., Houghton Mifflin 1900) (1885).

[233] *See* SPITZER, *supra* note 11, at 71.

[234] *See id.*

[235] *See* JACKSON, *supra* note 1, at 179.

[236] *See id.* at 181.

[237] *See id.* at 184.

[238] *See id.* at 181–85.

expanding role for the veto.[239] As a result, and as the presidency grew in comparative strength, Presidents took a more active and influential role in determining the content of federal legislation. By the early twentieth century and thereafter, the presidency became a formidable legislative force.[240] In the process of becoming so, however, the presidency abandoned many of the theoretical and structural constitutional anchors that had previously limited the use of the veto.

C. Veto Theory and Practice from Franklin D. Roosevelt to the Modern Presidents

The trend toward more frequent and expansive use of the veto continued unabated into the middle and late twentieth century. During this period, constitutional vetoes became a relatively rare element in the veto arsenal, particularly when compared against the practices of the early Presidents.

Richard Watson's comprehensive empirical study of the presidential veto from 1933 to 1981 demonstrates the point.[241] His study analyzes the various grounds given for exercising the veto and distinguishes between constitutional and non-constitutional reasoning.[242] Professor Watson's analysis breaks veto messages into five categories of reasons: protection of the executive against legislative encroachment, unconstitutionality, administrative unworkability, fiscal unsoundness, and unwise policy.[243] Because the

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[239] *See* SPITZER, *supra* note 7, at 67. This broader role for the veto became especially pronounced with the onslaught of private relief bills and the use of legislative riders, particularly those attached to appropriations measures. *See* FISHER, *supra* note 11, at 28–29; FISHER, *supra* note 23, at 121; JACKSON, *supra* note 1, at 130–31.

Professors Peabody and Nugent note that from 1789 to 1885, "Presidents cited distinctively constitutional reasons in almost sixty percent of their veto messages," compared to ten percent between 1897 and 1988. *See* Peabody & Nugent, *supra* note 53, at 61 n.229.

[240] *See* Sunstein, *supra* note 10, at 10 (explaining the modern presidency, "in which the veto power is a well-understood part of all lawmaking, and implies a large and continuous presidential role in lawmaking itself").

[241] *See* WATSON, *supra* note 7, at 136–44; *see also* Peabody & Nugent, *supra* note 53, at 61 n.229 (stating that while nearly sixty percent of vetoes between 1789 and 1885 were constitutionally based, only about ten percent between 1897 and 1988 were constitutionally based). For another interesting analysis of executive-legislative relations in the veto arena among modern Presidents, see generally CHARLES M. CAMERON, VETO BARGAINING (2000).

[242] *See* Watson, *supra* note 7, at 137–38.

[243] *Id.* Professor Watson describes protection of the executive against legislative encroachment as: "Objections based on an improper legislative encroachment on the executive through such devices as legislative vetoes that require the president or other executive officials to obtain the approval of one or both houses of Congress or of certain committees before acting on a matter." *Id.* at 137. Unconstitutionality is explained as: "Objections that specifically state that the legislation is unconstitutional because it violates the separation of powers or the division of powers or infringes on the rights of individuals or groups." *Id.* at 138. Objections for legislation that is administratively unworkable are explained as: "[o]bjections that the meaning of the legislation is not clear and hence difficult to administer, that it centralizes authority too much, places responsibility in the wrong agency, un-

bills in the "encroachment" category present constitutional separation of powers concerns, one could include that category within "unconstitutional" bills. As such, out of the 169 regular vetoes of "nationally significant legislation" during the period, only twelve percent were vetoed with constitutional objections included as either the primary or secondary reason for the return.[244] In nearly fifty percent of the vetoes, the President's belief that the bill was unwise was either the first or second reason for the veto; it was the primary reason in over sixty-five percent of these vetoes.[245] In thirty percent of them, the President stated that the bill was fiscally unsound.[246]

Professor Watson also evaluates the primary reason given by each President within these broad categories. Franklin Roosevelt—during whose twelve years in office the executive branch began to take on greater responsibility than in any period in American history[247]—issued 635 vetoes; of those, 372 were regular vetoes.[248] Only President Cleveland used the veto more.[249] As a reminder of his strength as President and his willingness to use his constitutional tools to shape his political agenda, President Roosevelt would encourage Congress to send him legislation that he could veto, though in the vast majority of cases he used the veto against either private bills or nationally insignificant legislation.[250] Among the vetoes, according to the Watson analysis, Roosevelt gave a constitutional basis for his veto only 5.3% of the time.[251] Over ninety percent of the time, President Roosevelt cited a lack of wisdom in the legislation or fiscal unsoundness as his primary reason.[252]

Similarly, President Truman, who issued 180 regular vetoes, cited constitutional reasons as his primary objection to proposed legislation in only 3.3% of the messages analyzed.[253] President Truman's belief that the legislation was unwise accounted for 73.3% of his primary objections; administrative unworkability was the primary reason in another twenty per-

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necessarily creates a new agency, or wastes government time and effort." *Id.* Fiscally unsound reasons are described as: "[o]bjections that the legislation exceeds the president's budget, expands obligations without providing additional revenues, is inflationary, is not needed at the present time, or wastes money." *Id.* Finally, unwise policy is characterized as legislation that unfairly treats certain groups and interests; is a departure from, duplication of, or contrary to existing policies or principles; would set a dangerous precedent whose purposes cannot be accomplished; is contrary to national or public interests; or is enacted improperly. *Id.* at 142–43.

[244] *See id.* at 139.

[245] *See id.*

[246] *See id.*

[247] *See* SPITZER, *supra* note 7, at 66.

[248] *See* SPITZER, *supra* note 11, at 71.

[249] *See id.*

[250] *See* FISHER, *supra* note 11, at 29; RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 71 (1990); SPITZER, *supra* note 11, at 73.

[251] *See* WATSON, *supra* note 7, at 141.

[252] *See id.*

[253] *See id.*

cent of his vetoes.[254] Presidents Eisenhower and Kennedy did not make constitutional objections their primary reason for any of the vetoes included in the study, though President Johnson had constitutional grounds for half of his vetoes in the study.[255] By comparison, President Nixon's primary objection was constitutionally based in 12.5% of the vetoes;[256] President Ford, 11.9%;[257] and President Carter, 27.3%.[258] For each of these Presidents, the most important reason for vetoing the analyzed legislation was that it constituted unwise public policy (69.9% of the time for the Democratic Presidents during the period, 61.6% of the time for the Republicans).[259] By contrast, the most important reason was a constitutional one only 9.6% of the time among the Democrats, and 9.3% of the time among the Republicans.[260]

The Watson analysis stops at the end of the Carter Administration, but the point made by the study applies to the succeeding Presidents as well. President Ronald Reagan, for example, vetoed seventy-eight bills, thirty-nine of which were regular vetoes;[261] President George H. W. Bush vetoed a total of forty-six bills, twenty-nine of which were regular vetoes.[262] And though Presidents Reagan and George H. W. Bush each exercised the veto on occasion to express a constitutional objection,[263] often

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[254] *See id.*

[255] *See id.*

[256] *See id.* Perhaps President Nixon's most well-known constitutional veto was his veto of the War Powers Resolution of 1973 (H.R.J. Res. 542, 93rd Cong. (1973)), in which he gave a strong defense of presidential foreign affairs authority but which was subsequently overridden by Congress (War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973)). *See* President Nixon's Veto of the War Powers Resolution, PUB. PAPERS 893 (Oct. 24, 1973). Professor Spitzer notes that the Nixon Administration's Office of Management and Budget (OMB) also established a legislative watchlist to identify bills that were inconsistent with the President's budget and program, and thus subject to a veto. *See* SPITZER, *supra* note 7, at 85.

[257] *See* WATSON, *supra* note 7, at 141. President Ford, a long-time member of the House of Representatives who had the difficult task of re-legitimizing the presidency after the Watergate scandal, suffered serious congressional criticism for his use of the veto, not unlike President Tyler. *See* FISHER, *supra* note 23, at 122–24; SPITZER, *supra* note 7, at 85–87.

[258] *See* WATSON, *supra* note 7, at 141.

[259] *See id.*

[260] *See id.*

[261] *See* FISHER, *supra* note 11, at 30–31.

[262] *See id. See also* Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 40–64 (analyzing the veto record of President George H. W. Bush).

[263] *See, e.g.*, President George H. W. Bush's Message to the Senate Returning Without Approval the Congressional Campaign Spending Limit and Election Reform Act of 1992 (S. 3, 102nd Cong. (1992)), *in* 1 PUB. PAPERS 736–37 (May 9, 1992) (explaining that the bill "contains several unconstitutional provisions," including a provision for aggregate spending limits); President George H. W. Bush's Message to the Senate Returning Without Approval the National Voter Registration Act of 1992 (S. 250, 102nd Cong. (July 2, 1992)), *in* 1 PUB. PAPERS 1072 (1992) (explaining that the bill violates federalism and is "constitutionally suspect"); President Reagan's Message to the House of Representatives Without Approval a Bill Concerning Apartheid in South Africa (H.R. 4868, 99th Cong. (1986)), *in* 2 PUB. PAPERS 1278–80 (Sept. 26, 1986) (objecting on constitutional grounds); President Reagan's Message to the Senate Returning Without Approval the Fairness in

the vetoes fell into other categories and very often merely to express simple policy or fiscal differences. For example, in 1982, President Reagan vetoed a bill that would have amended the Contract Disputes Act of 1978 by requiring the payment of interest to contractors on claims exceeding $50,000.[264] The President objected to the bill because it required interest on a claim to run from the time the claim was submitted, irrespective of the date of certification of the claim.[265] In 1985 President Reagan vetoed a health research bill that, in his view, made biomedical research less cost-effective and increased administrative burdens upon biomedical research authorities under the National Institute of Health (NIH).[266] That same year, he vetoed a bill that would have authorized emergency relief for African famine and established additional farm credit programs, saying that the bill would substantially increase the deficit and "benefit banks at the expense of farmers and taxpayers."[267] Similarly, in 1989 President George H. W. Bush, who promoted constitutional views in his vetoes with somewhat more vigor than his predecessor,[268] vetoed a bill that he believed would have increased the minimum wage too substantially.[269] In 1990, he vetoed the Amtrak Reauthorization and Improvement Act because it included a regulatory review requirement that he believed to be unnecessary.[270] On multiple occasions, he vetoed bills that would have permitted the use of federal or local funds to pay for abortions, expressing his personal views opposing abortion and urging protection of the unborn.[271]

Broadcasting Bill (S. 742, 100th Cong. (June 19, 1987)), *in* 1 PUB. PAPERS 690–91 (1987) (objecting based on First Amendment concerns).

[264] *See* President Reagan's Message to the House of Representatives Returning Without Approval an Amendment to the Contract Disputes Act of 1978 (H.R. 1371, 97th Cong. (1981)), *in* 2 PUB. PAPERS 1333–34 (Oct. 15, 1982).

[265] *See id.*

[266] *See* President Reagan's Message to the House of Representatives Returning Without Approval the Health Research Extension Bill (H.R. 2409, 99th Cong. (1985)), *in* 2 PUB. PAPERS 1360 (Nov. 8, 1985).

[267] President Reagan's Message to the House of Representatives Returning Without Approval the Farm Credit and African Famine Relief Bill (H.R. 1096, 99th Cong. (1985)), *in* 1 PUB. PAPERS 250–51 (Mar. 6, 1985).

[268] *See* Lund, *supra* note 262, at 40–43. Professor Lund also explains that the George H. W. Bush administration had a "hyperlegalistic," bordering on "comical," attention to detail in analyzing the separation of powers issues that appeared in his statements on presented legislation. *See id.* at 44–45; *see also* Lawler, *supra* note 114, at 79, 84 ("Bush made better use of the veto than any of his predecessors . . . . Bush's uncharacteristically clear explanations of his self-defense vetoes are accounts of the president's rights and responsibilities under the Constitution.").

[269] *See* President George H. W. Bush's Message to the House of Representatives Returning Without Approval the Fair Labor Standards Amendments of 1989 (H.R. 2, 101st Cong. (1989)), *in* 1 PUB. PAPERS 724–26 (June 13, 1989).

[270] *See* President George H. W. Bush's Message to the House of Representatives Returning Without Approval the Amtrak Reauthorization and Improvement Act of 1990 (H.R. 2364, 101st Cong. (1990)), *in* 1 PUB. PAPERS 718–19 (May 24, 1990).

[271] *See* President George H. W. Bush's Message to the House of Representatives Returning Without Approval the District of Columbia Appropriations Act, 1990 (H.R. 3026,

Finally, President Clinton, known as something of a "policy wonk" who savored involvement in legislation,[272] made particularly powerful use of the veto to complement his political agenda and method of governing.[273] As Louis Fisher explains, although President Clinton issued no vetoes during his first two years in office, "when the 1994 elections gave Republicans control of Congress, the veto strategy changed . . . . And for legislative ideas that happened to emerge from Congress, President Clinton was ready with his veto."[274] His repeated vetoes of welfare reform legislation by a Republican-held Congress, for example, indicated his willingness to use the veto as a policy-building weapon.[275] This political strategy was also particularly apparent in one of his late vetoes, an appropriations bill that would have provided funding for the legislative and executive branches:

> The Congress's continued refusal to focus on the priorities of the American people leaves me no alternative but to veto this bill. I cannot in good conscience sign a bill that funds the operations of Congress and the White House before funding of our classrooms, fixing our schools, and protecting our workers.[276]

101st Cong. (1989)) *in* 2 PUB. PAPERS 1403–04 (Oct. 27, 1989); President George H. W. Bush's Message to the House of Representatives Returning Without Approval the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990 (H.R. 3566, 101st Cong. (1989)), 2 PUB. PAPERS 1373–74 (Oct. 21, 1989).

[272] *See* CHARLES O. JONES, SEPARATE BUT EQUAL BRANCHES 272 (2d. ed. 1999).

[273] *See id.*; *see also* Eric Pianin & Juliet Eilperin, *Clinton Will Submit Social Security Plan; He Assails GOP as Final Budget Showdown Looms*, WASH. POST, Oct. 24, 1999, at A01 ("Assuming the Democrats in Congress stay united, Clinton hopes to use his veto pen to extract new concessions on education, hiring more police, foreign aid and the environment."); Bill Nichols, *A Clinton Veto Poses Both Risk, Opportunity*, USA TODAY, May 25, 1995, at 4A (commenting that, with regard to legislation on Medicare, education, and welfare reform, President Clinton "tried to protect his priorities by threatening to veto," but that "[t]he president, however, doesn't really want to veto any of those bills, but rather hopes to shape legislation into a form he can accept").

[274] FISHER, *supra* note 11, at 31.

[275] *See* President Clinton's Message to the House of Representatives Returning Without Approval Legislation on the Welfare System (Personal Responsibility and Work Opportunity Act, H.R. 4, 104th Cong. (1995)), 1 PUB. PAPERS 22–23 (Jan. 9, 1996). The first welfare reform veto insisted that the final bill contain better provisions for child care and health care, and that "deep" budget cuts be removed. *Id.*; *see also* President Clinton's Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (H.R. 3734, 104th Cong. (1996)) and an Exchange With Reporters, 2 PUB. PAPERS 1325–28 (Aug. 22, 1996). President Clinton also battled Congress with a policy-based veto in a number of other politically divisive issue areas, including tax relief. *See, e.g.*, President Clinton's Message to the House of Representatives Returning Without Approval Marriage Tax Relief Legislation (H.R. 4810, 106th Cong. (2000)), 2 PUB. PAPERS 1563–64 (Aug. 5, 2000).

[276] President Clinton's Statement on Returning Without Approval to the House of Representatives Legislative Branch, Treasury, and General Appropriations Legislation (H.R. 4516, 107th Cong. (2001)), 3 PUB. PAPERS 2389 (Oct. 30, 2000).

Thus, the veto weapon became especially important in preserving President Clinton's "permanent campaign" style of governing, which was designed to provide him with an active role and edge in the legislative process, and as a method for expounding, advancing, and implementing his own federal policy program.[277]

There is no dispute that each of these actions was designed to articulate and promote policy goals that the Reagan, Bush, and Clinton Administrations believed to be important and in the public interest. But this cannot itself be sufficient justification for negating legislation. Presumably, majorities of both congressional houses believed their actions, passed through the plural and deliberative environment of the legislative branch, to be important and in the public interest as well. The vetoed bills do not appear to be the type of "unwise" or "bad" laws—hasty or inadvertent, or products of a defective process—that Madison and Hamilton had in mind when they envisioned the veto's exercise,[278] nor do these vetoes appear consistent with a prudent view of presidential veto power. Instead, they are further examples of the modern Presidency's potential for playing an overzealous role in the legislative process.

This historical description is highly useful for more than simply providing insight into the reasons for presidential vetoes. Rather, for purposes of this Article, it demonstrates that the veto has unfortunately become primarily an instrument for achieving political or public policy goals of a sitting President. As wielded in the post–Civil War era, and especially the post-nineteenth-century presidencies, the veto power gives the President a favored position in the legislative process and has the potential to make the President the preferred legislative actor in the constitutional system. It is a device with enormous constitutional significance and, potentially, dangerous constitutional consequences.

Many pieces of legislation are now vetoed because of disagreements about line items in appropriations, because the legislation would prove administratively burdensome, or simply because the President has taken a different political position on the legislation.[279] The offending provisions of proposed legislation often do not implicate substantial national interests, thus contributing to the more generous use of the veto. Moreover, protection of the Constitution through the veto has become a secondary, perhaps even tertiary, function of the power.[280]

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[277] *See* JONES, *supra* note 272, at 247.

[278] *See* 2 RECORDS, *supra* note 17, at 74; THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[279] *See* SPITZER, *supra* note 7, at 76–94; WATSON, *supra* note 7, at 136–44.

[280] *See id.*; *see also* Peabody & Nugent, *supra* note 53, at 61 ("Whereas Presidents used to invoke constitutional arguments with great frequency and salience in their explanations for vetoing bills, this is a relatively rare occurrence today.").

The modern presidential veto looks very different from the one envisioned by the Convention, by Publius, and by the early Presidents.[281] Of course, so do the nation and the federal government more generally. Realistically, one must account for the practical realities of political life that attend the exercise of a veto specifically, and the governing of a large commercial republic in general.[282] Vetoes are more likely when the federal government's power is at its highest ebb, when different political parties hold the Presidency and the Congress, and when the President has not previously served in Congress.[283] Still, the principle remains: the veto power, wielded as it is today, has the potential to turn the President not simply into a "legislator-in-chief,"[284] but into a unitary legislature, to which the Congress serves as a mere attendant to the President's wishes rather than exercising the independent judgment for the public good that its members were elected to exercise.[285] As demonstrated by the veto model urged in this Article, it is possible to rethink the application of the veto, to make it more consistent with constitutional text, history, and structure while still preserving it as an effective and meaningful element of the President's legislative arsenal.

CONCLUSION

The Constitution provides for a strong President, but not an omnipotent one. At the time of the framing, ratification, and the formative years of the Republic under the new Constitution, American political leaders understood that the veto was necessary to check legislative encroachments, protect the Constitution, and improve legislation by negating laws that were products of defects in the deliberative process or contrary to substantial national interests. However, after a series of transformative presidencies, and transformative events in the life of the Republic, modern practice asserts a broader and less anchored role for the veto. This has enabled modern Presidents to use the veto not simply to protect the Constitution or national interests, but as a policy-making device for dictating the content of national legislation. Presidents now occupy a potentially favored position in the creation of national legislation, a position at odds with constitutional text, history, and structure. While Congress should reassert its dominant role in the deliberative process, Presidents themselves should rethink the veto by exercising it consistent with its function and

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[281] *See supra* text accompanying notes 80–100, 168–186.

[282] *See* FISHER, *supra* note 11, at 28–31; FISHER, *supra* note 23, at 121.

[283] *See* SPITZER, *supra* note 11, at 72.

[284] *Id.* at 41; *see also* Kesavan & Sidak, *supra* note 26, at 3.

[285] *See* THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (explaining that in the American republic, the representative will "refine and enlarge the public views" by passing them through the institutional medium of a larger elected body of representatives).

purpose: aggressively to protect the Constitution, and to promote constitutional dialogue and deliberation; but more prudently to negate legislation that is, in the President's view, simply contrary to his political program.

In the end, it is unlikely that any President will adhere to these guidelines. Presidents often will feel there is too much to gain by signing a bill that is politically popular or that is part of the President's political agenda, despite its unconstitutionality. Similarly, Presidents are apt to conclude that there is too much to lose politically by allowing a politically disagreeable bill to become law simply because it does not violate the Constitution, reflect defects in the deliberative process, or implicate significant national interests. The modern presidency offers an institutional advantage in the lawmaking process, and therefore the person who holds that office will very likely opt to use that advantage. Of course, there are sincere, and less cynical, reasons for keeping the veto as it has become. As the Congress, the Senate in particular, became less deliberative, the development of a legislatively strong President who appeals to popular opinion was probably inevitable. Further, electoral realities, the growth of the federal government and its responsibilities, and the sheer passage of more laws all suggest that wielding the veto as a political weapon is not just advantageous but necessary. Additionally, the "veto-as-political-and-legislative-weapon" rationale has more profound consequences when we have politically divided government.

As President Washington understood, the mere existence of power is not a sufficient justification for its exercise in any given circumstance. Prudence is chief among the virtues for the statesman, particularly necessary for appreciating and battling the complexities of political life. But, Madison was right: enlightened statesmen will not always be at the helm.[286] A prudent separation of constitutional powers is thus a safer and necessary refuge. A more prudent exercise of the presidential veto, in turn, will better preserve the institutional arrangements that define the American constitutional order.

[286] *See* THE FEDERALIST No. 10, at 80 (James Madison) (Clinton Rossiter, ed., 1961).

ARTICLE

IN DEFENSE OF THE DEBT LIMIT STATUTE

ANITA S. KRISHNAKUMAR*

The debt limit statute is a critical feature of the federal budget process and prompts frequent legislation to increase the government's borrowing authority. In this Article, Professor Anita S. Krishnakumar examines the history of the debt limit statute as well as its function in the fiscal constitution. The Article deconstructs several popular criticisms of the debt limit statute, arguing that the criticisms exaggerate and that the statute in fact serves two important roles: first, the statute is the last remnant of congressional control and accountability over the national debt; second, it acts as an important institutional check on party and interest group politics. The Article ends by suggesting several reforms to the existing debt statute framework, aimed at increasing congressional accountability for the debt consequences of federal spending and taxing choices, as well as at curbing some of the dangers associated with the current framework.

The federal Constitution unequivocally vests power over fiscal matters in the hands of Congress.[1] But the Constitution provides no specific guidance as to how the nation's fiscal policymaking should be conducted. Accordingly, Congress has shaped its own implicit "fiscal constitution" of statutes, internal rules, and legislative and administrative procedures that govern the fiscal policymaking process.[2] One key feature of this fiscal constitution is the debt limit statute, originally passed as part of the Second Liberty Bond Act of 1917.[3] Prior to the statute's passage, Congress, pursuant to its constitutional power "to borrow Money on the credit of the United

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[1] *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . . ."); *id.* art. I, § 8, cl. 1–2, 5 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . To borrow Money on the credit of the United States . . . To coin Money, regulate the Value thereof, and of foreign Coin . . . ."); *id.* art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."); *see also* THE FEDERALIST No. 48 (James Madison).

[2] *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 597 (1988).

[3] Second Liberty Bond Act of 1917, Pub. L. No. 65-43, 40 Stat. 288 (codified as amended at 31 U.S.C. § 3101 (2000)).

States,"[4] approved each individual issuance of debt made on the nation's behalf.[5] The debt limit statute delegates some of this borrowing power to the Secretary of the Treasury, granting the Secretary standing authority to issue debt without individual congressional approval, up to a specified limit.[6] The statute is an enduring element of the congressional budget process and the frequent subject of legislation, as perennial deficits repeatedly cause the Treasury to hit the prescribed limit and thereby necessitate legislative action to increase the Treasury's authority to borrow.

Yet the dynamics of the debt limit statute in the federal budget and fiscal policymaking process have been virtually unstudied by legal scholars. This is despite the fact that the size of the national debt has become one of the key political issues of our time,[7] and despite increasing scholarly attention to the legislative process in general[8] and congressional budgeting in particular.[9]

This Article examines the function of debt and the debt limit statute in the fiscal constitution. It argues that the debt limit statute serves two important roles with respect to legislative deliberation over fiscal matters.

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[4] U.S. CONST. art. I, § 8, cl. 2.

[5] *See, e.g.*, PHILIP D. WINTERS, CONG. RESEARCH SERV., No. IB93054, THE DEBT LIMIT (2001), *available at* http://www.ncseonline.org/NLE/CRSreports/economics/econ-55.cfm.

[6] *See* Second Liberty Bond Act, 40 Stat. at 288 ("[T]he Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States . . . not exceeding in the aggregate $7,538,945,460.").

[7] *See, e.g.*, Jeannine Aversa, *Growing U.S. Debt Will Soon Hit Limit / Treasury Urges Congress To Raise Borrowing Ability Beyond $6.4 Trillion*, HOUSTON CHRON., Feb. 6, 2003, at 3 (discussing size of national debt and politics surrounding need to raise the debt limit); John M. Berry, *Treasury Issues Warning On Debt; Congress Asked To Raise Ceiling*, WASH. POST, Feb. 6, 2003, at E1 (discussing political debate over size of national debt and wisdom of raising taxes while debt continues to expand); David S. Broder, *Our Children Will Pay For Our Free Lunch; Federal Debt*, MIAMI HERALD, Oct. 18, 2004, at 21 (discussing projection that federal debt will increase by $5 trillion in the next ten years and criticizing Congress's fiscal irresponsibility); *Federal Deficit; Bush Blindly Spends As Burgeoning Debt Puts Country's Fiscal Future In Jeopardy*, DETROIT FREE PRESS, Sept. 19, 2004, *available at* 2004 WL 90643892 (lamenting the growth and size of the national debt).

[8] *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–56 (1992) (using positive political theory models to conceptualize lawmaking dynamics between the House, Senate, and the President); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 *passim* (1990) (examining passage of 1981 and 1986 tax legislation as case studies from which to extrapolate and understand how and why Congress legislates); Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 427–47, 456–77 (2001) (discussing congressional uses of internal structural rules to facilitate the enactment of otherwise controversial legislation in 2001, including a $1.3 trillion tax cut, fast-track trade legislation, and disapproval of an OSHA ergonomics rule).

[9] *See, e.g.*, Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 390; Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-In-Government*, 100 COLUM. L. REV. 702, 715–17 (2000); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998); Charles Tiefer, *Budgetized Health Entitlements and the Fiscal Constitution in Congress's 1995–1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411 (1996).

First, the statute is the last remnant of congressional control or accountability over the national debt—and the primary vehicle through which Congress fulfills its constitutional obligations under Article I, § 8 to oversee the borrowing[10] and payment[11] of the public debt. Second, the debt limit statute encourages legislators to consider the interests of the general public and future generations, rather than those of special interests, and thus acts as an important institutional check on party and interest group politics.

As this Article details, the general budget process is party- and interest-group dominated, and involves numerous competing concerns and aggregate figures, among which the annual deficit (borrowing) figure and the status of the national debt are only one of many concerns. Within this framework, debt limit increase bills provide an independent and focused opportunity for Congress to step back and consider the consequences of its deficit-spending decisions, to evaluate its fiscal policies, and even to implement fiscal reform if it decides that it has been borrowing too much too fast.

Such congressional accountability and periodic fiscal reform concerning national borrowing and the debt are crucial features of the fiscal constitution because although the United States is at this time capable of servicing its enormous national debt, recent trends towards inefficient and excessive borrowing portend future economic difficulties if left unchecked. Specifically, whereas the United States once borrowed only occasionally, in order to finance emergencies or its own expansion—i.e., to fund wars, pull itself out of economic depression, or invest in its own infrastructure[12]—in the last several decades it has been borrowing on a consistent annual basis simply to pay the overall cost of programs authorized by Congress and the President. Thus, the last thirty years have seen sustained growth not only in the size of the national debt, but in its proportion relative to the Gross National Product (GNP) and the Gross Domestic Product (GDP).[13] As the proportion of debt to GNP/GDP has increased,

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[10] *See* U.S. CONST. art. I, § 8, cl. 2 ("The Congress shall have Power . . . To borrow Money on the credit of the United States . . . .").

[11] *See* U.S. CONST. art I, § 8, cl. 1 (giving Congress power "to pay the Debts . . . of the United States").

[12] *See infra* text accompanying notes 24, 27–28, 31–32, 34, 36–38, 40, 43–48, 81–82.

[13] In 1974, the national debt was equal to 34.24% of the United States' GNP/GDP; by 1994 it had risen to 68.91%; and in 2004, despite a period of budget surpluses in the late 1990s, it has climbed back up to 38.6% and is projected to reach 40% in 2007. *See* JOHN STEELE GORDON, HAMILTON'S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT 210 (1997); *see also On the Fiscal Year 2005 Budget Proposal: Hearings Before the House Ways and Means Comm.*, 108th Cong. 27 (2004) (statement of Joshua B. Bolten, Director of the Office of Mgmt. and Budget). This is the figure that economists care about, even more than the absolute dollar amount of the debt, because the ratio shows how much debt the nation can afford to carry, "just as the size of a mortgage that a family can safely carry is determined by that family's income." GORDON, *supra*, at 197; *see also On the Economic Outlook and the Fed. Budget: Hearings Before the House Budget Comm.*, 108th Cong. 24 (2004) [hereinafter *2004 Hearings on the Economic Outlook*] (statement of Alan Greenspan, Chairman, Fed. Reserve) ("[T]he dangers begin to arise when the ratio of

so too has the "debt servicing burden"—i.e., the percentage of the GDP and government revenue spent servicing the national debt.[14] If this trend continues, the American people will be forced to give up more and more of their income in order to pay interest to their (in many cases overseas)[15] creditors, which in turn will lead to a persistent decline in the dollar's international value and, therefore, purchasing power.[16] Indeed, no less an authority than Federal Reserve Chairman Alan Greenspan has expressed concern about future debt-to-GDP ratios and a consequent decline in living standards if national borrowing continues on its current path.[17] The debt limit statute plays a vital role in this context because although its existence has not stopped the trend towards increased borrowing, it has slowed that trend by acting as a catalyst for budget-reform and budget-balance measures aimed at reducing national borrowing.

But despite its virtues, the debt limit statute is far from perfect. Indeed, inside the Beltway it is much-maligned as an unnecessary anachronism and, worse, as a dangerous "weapon" used by Congress to force the President to make uncomfortable compromises on issues unrelated to the debt.[18] For this and other reasons, the Government Accountability Office

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debt to GDP begins to rise").

[14] *See, e.g., 2004 Hearings on the Economic Outlook, supra* note 13, at 27 (testimony of Alan Greenspan) ("[T]he debt servicing burden obviously increases because the interest payments have got to be paid out of the GDP, or out of the income which is generated by the GDP"). Thus, in 1974, when the national debt was 34.24% of GDP, the percentage of GDP spent repaying interest on the national debt was 1.5%, while in 1994, when the debt rose to 68.91% of GDP, the proportion of GDP spent repaying interest on the debt rose to 2.9%, and in 2004, with the debt at 38.6% of GDP, the percentage of GDP spent repaying interest is estimated at 1.4% and is projected to reach 1.9% in 2007, when the percentage of debt relative to GDP is expected rise to 40%. *See* U.S. OFFICE OF MGMT. AND BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005 48, 51–52 [hereinafter U.S. BUDGET FY 2005 HISTORICAL TABLES] (Table 3.1, Outlays By Superfunction and Function: 1940–2009).

[15] The share of the United States' national debt held by foreigners has risen steadily over the last several decades, from 15% in the 1970s to 24% in the 1990s to 37% by 2003. *See* DEP'T OF THE TREASURY/FEDERAL RESERVE BD., MAJOR FOREIGN HOLDERS OF TREASURY SECURITIES (2004), *available at* http://www.ustreas.gov/tic/mfh.txt; CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2004–2015 130, *available at* http://www.cbo.gov/ftpdocs/49xx/doc4985/AppendixF.pdf (Table F-2); OFFICE OF MGMT. AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005 235, *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/spec.pdf (Table 15-6).

[16] *See* ALFRED L. MALABRE, JR., BEYOND OUR MEANS: HOW AMERICA'S LONG YEARS OF DEBT, DEFICITS AND RECKLESS BORROWING NOW THREATEN TO OVERWHELM US 5 (1987).

[17] *See 2004 Hearings on the Economic Outlook, supra* note 13 (testimony of Alan Greenspan) ("And all I can say about the current outlook is that the implicit growth rate . . . creates debt-to-GDP levels which I would find of great concern . . . . [W]e could be in a situation in the decades ahead in which rapid increases in the unified budget deficit set in motion a dynamic in which large deficits result in ever-growing interest payments that augment deficits in future years. The resulting rise in the federal debt could drain funds away from private capital formation and thus over time slow the growth of living standards.").

[18] *See, e.g.*, Stephen Gettinger, *The Budget: The Debt Ceiling "Hammer,"* 20 CONG. Q. WKLY. REP. 1400, 1400 (May 23, 1995) (reporting the House of Representatives' purpose-

(GAO) and Congressional Budget Office (CBO), as well as many economists and budget commentators, have recommended its repeal.[19] This Article evaluates the criticisms leveled against the statute and argues that they are both exaggerated and misdirected. The statute is a necessary component of Congress's power to borrow and has proved capable of serving as a useful catalyst for budgetary reform aimed at debt reduction. Rather than be repealed it should be amended, along with certain internal legislative rules and budget procedures, to improve its ability to make Congress more accountable for its borrowing decisions and for the size of the national debt.

In order to appreciate the enduring need for the debt limit statute, it is necessary first to understand the evolution of Congress's borrowing and debt repayment practices—i.e., the evolution of our national debt. Part I of this Article briefly explores the nation's history of debt incurrence and repayment, including adoption of the debt limit statute in 1917 and subsequent modifications to its operation. Part II elucidates the constitutional and institutional role played by the debt limit statute in the deliberative process concerning national borrowing and debt. Part III discusses criticisms leveled at the debt limit and demonstrates that they both exaggerate actual experiences under the debt limit statute and fail to appreciate the statute's beneficial effects. Part IV suggests procedural changes to the statute—and House and Senate rules governing its implementation—designed to facilitate greater congressional deliberation concerning the national debt.

I. THE HISTORY OF THE NATIONAL DEBT AND THE DEBT LIMIT STATUTE

Since the inception of the United States in 1789, Congress has given the Secretary of the Treasury substantial authority over monetary policy, including the issuance and repayment of debt instruments.[20] But while Congress initially maintained significant control over the conditions under which national debt could be incurred, over time it increasingly has

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ful withholding of debt limit increase legislation in reserve as a "weapon" with which to force President Clinton to accept legislation that he could otherwise freely veto).

[19] *See, e.g., Increase in Federal Debt Limit: Hearing Before the Sen. Comm. On Fin.*, 107th Cong. (2002) (statement of Bruce R. Bartlett, Senior Fellow, National Center for Policy Analysis); CONG. BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE 48–54 (1995); GEN. ACCOUNTING OFFICE, A NEW APPROACH TO THE PUBLIC DEBT LEGISLATION SHOULD BE CONSIDERED (1979); Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 578–79 (1997) (arguing that debt limit is dangerous and calling for reformation of the statute); *see also* Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What it is Supposed to Do (And No More)*, 106 YALE L.J. 1449, 1516–17 (1997) (discussing dangers of using debt ceiling increases as the enforcement mechanism for a balanced budget amendment to the Constitution).

[20] *See, e.g.*, GORDON, *supra* note 13, at 24–28 (describing Secretary Alexander Hamilton's role in shaping the terms under which the new United States government would redeem the debts of the old Articles of Confederation government).

delegated even this authority to the Treasury Secretary.[21] Further, although Congress and the Executive followed a careful fiscal policy of balanced budgets and peacetime debt repayment for the first 150-odd years of the nation's history, they have allowed serial deficits and continuing debt expansion for the last sixty-plus years. The historical evolution of the United States' debt can be broken down into roughly three periods: 1789–1917, when debt was incurred exclusively to pay for wars and to sustain the economy during a recession, but paid down immediately upon return to peace and prosperity; 1917–1946, when Congress passed the debt limit statute granting the Treasury standing borrowing authority, but continued to manage debt incurrence and repayment in substantially the same manner as before; and 1946 to the present, when changed attitudes towards debt and the debt limit have produced sustained peacetime deficits and virtually no debt reduction.

Section A of this Part describes Congress's approach to debt issuance and payment prior to 1917. Section B examines the Second Liberty Bond Act (the debt limit statute) and the manner in which it delegates some of Congress's control over borrowing to the Treasury Secretary. Section C explores the shift in how Congress and the nation have used debt since the 1960s as well as the changing role of the debt limit statute in fiscal policymaking over the past forty years.

As the following historical analysis reveals, the details and philosophy of congressional management of the national debt have changed dramatically in the course of our nation's history. But significantly, even as our national economy, debt incurrence, and repayment practices have developed, the debt limit statute has given Congress a forum for periodic assessment, criticism, and reform of national borrowing policy, and has forced Congress and the President to be publicly accountable for their borrowing decisions.

A. National Borrowing and Debt Payment Before 1917

The federal government began in 1789 with a public debt of $78 million,[22] inherited from the old national government and the governments of several states.[23] Most of this debt had been incurred in fighting the Revolu-

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[21] *See* discussion *infra* Part I.B.1 and text accompanying notes 122–124 and 128–130.

[22] Adjusted for inflation, this is equivalent to approximately $1.6 billion in 2004. *See* ROBERT C. SAHR, INFLATION CONVERSION FACTORS FOR YEARS 1665 TO ESTIMATED 2014, at 5, *at* http://oregonstate.edu/dept/pol_sci/fac/sahr/sahr.htm (last visited Nov. 27, 2004) (using conversion factor of .049 for comparison of 1789 dollars to 2004 dollars; $78 million divided by .049 equals $1.6 billion).

[23] *See* GEN. ACCOUNTING OFFICE, GAO-03-134, REPORT TO THE SECRETARY OF THE TREASURY: ANALYSIS OF ACTIONS DURING THE 2002 DEBT ISSUANCE SUSPENSION PERIODS 2 (2002). Approximately $18 million came from the assumption of state bonds still in circulation, and $60 million from the redemption of the old national debt. *See* GORDON, *supra* note 13, at 28.

tionary War.[24] From the first, Congress made it a national priority to pay down the country's debt.[25] In fact, it quickly passed a series of tariffs and excise taxes and, by 1811, managed to cut the nation's debt down to $48 million.[26]

Congress did not cause the nation to incur debt again until 1812, when the still-fledgling United States once more went to war with England.[27] By the time the war ended, the national debt had risen to over $99 million.[28] Once peace returned, the government again made it a priority to pay down the debt,[29] running significant surpluses in all but a few of the years between 1816 and 1836.[30]

In 1836, on the heels of President Andrew Jackson's decision to close down the National Bank, the nation experienced its first serious depression.[31] The depression lasted until 1843 and caused the debt to rise to $32 million.[32] Once the depression ended, Congress and the President again began paying down the debt, managing to reduce it to $15.5 million within three years.[33]

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[24] *Cf.* GORDON, *supra* note 13, at 11, 24, 54.

[25] *See* Act of Aug. 4, 1790, ch. 34, 1 Stat. 138 (repealed) (making a provision for the payment of the debt of the United States). Some eleven other acts were passed in the 1790s directing the Treasury to use surpluses to pay down debt contracted during the Revolutionary War. *See id.* at note (a) (listing other acts); *see also* Act of April 29, 1802, ch. 32, 2 Stat. 167 (repealed) (making appropriations for the extinguishment of the public debt, to be paid to the commissioners of a "sinking fund" established to repay the government's bond issues); Act of Feb. 11, 1807, ch. 12, 2 Stat. 415 (making provisions for the redemption of the whole public debt of the United States).

[26] *See* GORDON, *supra* note 13, at 48; U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1118 (1976) [hereinafter HISTORICAL STATISTICS TABLES] (Federal Debt Statistics Tables for 1836–1843). Adjusted for inflation, that $48 million debt in 1811 is equivalent to $658 million in 2004. *See* SAHR, *supra* note 22, at 6 (using conversion factor of .073 for comparison of 1811 dollars to 2004 dollars; $48 million divided by .073 equals $658 million).

[27] *See* Act of Mar. 24, 1814, ch. 29, 3 Stat. 111 (repealed) (authorizing a loan for a sum not exceeding $25 million); *see also* GORDON, *supra* note 13, at 47–48. In 2004 dollars, that is the equivalent of authorizing the nation to borrow $255 million. *See* SAHR, *supra* note 22, at 6 (using conversion factor of .098 for comparison of 1814 dollars to 2004 dollars; $25 million divided by .098 equals $255 million).

[28] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1118. Adjusted for inflation, that is equivalent to approximately $1 billion in 2004 dollars. *See* SAHR, *supra* note 22, at 6 (using conversion factor of .098 for comparison of 1814 dollars to 2004 dollars; $99 million divided by .098 equals $1 billion).

[29] *See, e.g.*, Act of Mar. 3, 1817, ch. 87, 2 Stat. 379 (repealed) (directing commissioners of the sinking fund to use surpluses above a certain amount to purchase or redeem the public debt); Act of Apr. 24, 1830, ch. 78, 4 Stat. 396 (authorizing Treasury Secretary to apply sums greater than $10 million to the payment or purchase of the principal of the public debt).

[30] *See* GORDON, *supra* note 13, at 53, 207 (Federal Debt Statistics Table).

[31] *See id.*, at 62–64.

[32] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1118 (Federal Debt Statistics Tables for 1836–1843). In inflation-adjusted dollars, this is equal to approximately $780 million in 2004. *See* SAHR, *supra* note 22, at 6 (using conversion factor of .043 for comparison of 1846 dollars to 2004 dollars; $15.55 million divided by .043 equals $362 million).

[33] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1118 (Federal Debt Statistics Tables for 1846). This is equivalent to approximately $362 million in 2004 dollars. *See* SAHR, *supra* note 22, at 6 (using conversion factor of .043 for comparison of 1846 dollars

The Mexican War in 1847 led Congress to create its first "automatic" appropriation—authorizing the Treasury to pay interest and principal on the debt as it became due, without obtaining specific congressional approval.[34] Within a few years of the war's end, Congress again began running surpluses and paying down the debt.[35]

In the 1860s, the Civil War erupted, taking military outlays and the national debt to unprecedented heights.[36] To help fund the war, Congress authorized Treasury Secretary Jay Cooke to issue debt in the form of "five-forty" bonds, so-named because they could not be redeemed before five years, or after forty.[37] Cooke employed newspaper advertising to persuade a vast number of average citizens to purchase war bonds, thereby inventing the modern bond drive.[38] Congress also imposed an array of new wartime taxes—including excise taxes, stamp taxes, transportation taxes, advertising taxes, and a federal tax on income—and created a Bureau of Internal Revenue to supervise the assessment and collection of these taxes.[39]

By the end of the Civil War, the national debt had risen over forty-fold, from a pre-war level of approximately $58.5 million, to $2.75 billion in 1866, the first year of peace.[40] But once peace returned, Congress again ran surpluses and pared down the debt.[41] In fact, from 1866 to 1893, Congress ran eighteen straight surpluses.[42]

In 1917, American involvement in World War I again raised government expenditures to new levels. With former Treasury Secretary Jay Cooke's Civil War bond drive as a model, the Treasury began a series of

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to 2004 dollars; $15.55 million divided by .043 equals $362 million).

[34] *See* Act of Feb. 9, 1847, ch. 7, 9 Stat. 123 (providing for the payment of any interest on the public debt); *see also* GORDON, *supra* note 13, at 65.

[35] *See* GORDON, *supra* note 13, at 66.

[36] *See id.* at 68. When the war began in April 1860, federal spending for all departments totaled only $172,000 a day, paid for almost entirely by tariff and land sale revenue; within three months, war spending alone was costing $1 million a day. *See id.* In inflation-adjusted 2004 dollars, that is the equivalent of going from spending $3.7 million a day to $21.3 million a day in just three months. *See* SAHR, *supra* note 22, at 7 (using conversion factor of .047 for comparison of 1860 dollars to 2004 dollars; $172,000 divided by .047 equals $3.7 million and $1 million divided by .047 equals $21.3 million).

[37] *See* Act of Mar. 3, 1864, ch. 27, 13 Stat. 13 (repealed 1864) (supplementing the act entitled "An Act to provide Ways and Means for the Support of the Government"). In the meantime, the bonds paid six percent interest, in gold. *See id.*

[38] *See* GORDON, *supra* note 13, at 78.

[39] *See* Act of July 1, 1862, ch. 119, 12 Stat. 432 (providing internal revenue to support the government and to pay interest on the public debt).

[40] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1118. In inflation-adjusted 2004 dollars, this is the equivalent of an increase in the national debt from $1.2 billion to $31 billion. *See* SAHR, *supra* note 22, at 7 (using conversion factor of .047 for comparison of 1859 dollars to 2004 dollars; $58.5 million divided by .047 equals $1.2 billion; and a conversion factor of .089 for comparison of 1866 dollars to 2004 dollars; $2.75 billion divided by .089 equals $31 billion).

[41] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1118 (post-1866).

[42] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1118. The official total debt figures printed in these tables appear to rise in small amounts during some years in this period, but that is because of accounting technicalities. *See id.*

World War I bond drives to raise revenue for military outlays.[43] The government also sharply increased federal income taxes to assist with war-time funding, dropping the exemption level to encompass much of the middle class as well as ratcheting up the marginal rates.[44] As a result of the war, the national debt increased by a factor of twenty, leaping from $1.2 billion in 1916[45] to a high of $25.48 billion in 1919,[46] and federal revenues soared from $761 million in 1916[47] to $5.1 billion in 1919.[48]

Thus, from 1789 to 1917, Congress's approach to debt was conservative. Although the government was unafraid to incur debt, it preferred to meet its expenses with tariff and tax revenue, and borrowed only when faced with the exigent circumstances of war or economic recession. Moreover, once these exigencies abated, Congress immediately began to pay down and reduce the debt it had incurred.

B. The Second Liberty Bond Act of 1917 and Its Initial Use

1. Provisions of the Original Debt Limit Statute

Prior to World War I, Congress separately authorized each issuance of bonds, notes or other securities made to finance government activities.[49] This included determining the interest rate and term for the debt instruments to be used.[50] During the war, however, Congress passed the

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[43] *See, e.g.*, First Liberty Bond Act, Pub. L. No. 65-3, 40 Stat. 35 (1917) (authorizing the issue of $2 billion in war bonds "to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes"); *see also* GORDON, *supra* note 13, at 103.

[44] *See* ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY, 58–78 (2004); *see also* GORDON, *supra* note 13, at 104.

[45] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1117. Adjusted for inflation, this translates to approximately $20.65 billion in 2004. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS' CONSUMER PRICE INDEX, *available at* http://www.bls.gov/cpi/home.htm (last visited Oct. 20, 2004) [hereinafter CPI] (numbers calculated using average annual index for 1913–2003, and average semi-annual index number for the first half of 2004, with the following formula (old dollar value X (2004 first semi-annual index/old year avg. index)), so that for 1916, formula was (($1.2 billion) X (2004 semi-annual avg. index of 187.6/1916 avg. index of 10.9))).

[46] *See* HISTORICAL STATISTICS TABLES *supra* note 26, at 1117. This is the equivalent of approximately $276.3 billion 2004 dollars. *See* CPI, *supra* note 45 (using consumer price index of 17.3 for 1919).

[47] *See* HISTORICAL STATISTICS TABLES *supra* note 26, at 1117. This is the equivalent of approximately $1.31 billion 2004 dollars. *See* CPI, *supra* note 45 (using consumer price index of 10.9 for 1916).

[48] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1106 (showing Federal Debt Statistics Tables for 1916–1919). This is equivalent to $55.3 billion in 2004. *See* CPI, *supra* note 45 (using index of 17.3 for 1919).

[49] *See, e.g.*, *supra* notes 25 and 29; *see also* WINTERS, *supra* note 5; 7 CONG. AND THE NATION: 1985–1988 42–43 (Colleen McGuiness ed., 1989).

[50] *See, e.g.*, Act of July 26, 1886, ch. 265, 14 Stat. 255 (specifying that bonds authorized under a previous act, for the purpose of aiding in railroad and telegraph line construction from the Missouri River to the Pacific Ocean, "may be issued in denominations greater than one thousand dollars"); Act of Mar. 31, 1848, ch. 26, 9 Stat. 217 (authorizing borrow-

Liberty Bond Acts[51] to facilitate fulfillment of the government's rapidly increasing financing needs. The Second Liberty Bond Act, passed in September 1917,[52] is widely known as the basis for the modern debt limit statute.[53] The first section of the Act provides that:

> [T]he Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law, not exceeding in the aggregate $7,538,945,460 and to issue therefore bonds of the United States . . . .
>
> The bonds herein authorized shall be in such form or forms and denomination or denominations and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate or rates of interest, not exceeding four per centum per annum, and time or times of payment of interest, as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe.[54]

The Act thus gave the Secretary of the Treasury standing authority to borrow as and when he deemed appropriate (i.e., "from time to time,") to meet national expenses, up to a maximum limit of $7.538 billion.[55] The Act also expanded the Secretary's discretion over the form, denomination, and terms and conditions of the bonds to be issued, although Congress refused to relinquish complete control over the rates of interest to be paid.[56]

In addition to the bonds authorized in section 1, the Act granted the Treasury Secretary general authority to borrow, from time to time, "such sum or sums as in his judgment may be necessary" in the form of (1) certificates of indebtedness, up to an aggregate limit of $4 billion;[57] and (2) war-

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ing of up to $16 million, at a six percent rate of interest, reimbursable after twenty years).

[51] First Liberty Bond Act, Pub. L. No. 65-3, 40 Stat. 35 (1917); Second Liberty Bond Act, Pub. L. No. 65-43, 40 Stat. 288 (1917); Third Liberty Bond Act, Pub. L. No. 65-120, 40 Stat. 502 (1918); Fourth Liberty Bond Act, Pub. L. No. 65-192, 40 Stat. 844 (1918); Victory Liberty Loan Act, Pub. L. No. 65-328 40 Stat. 1309 (1919).

[52] *See* 40 Stat. at 288 (subtitled "An Act to authorize an additional issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend additional credit to foreign Governments, and for other purposes").

[53] *See, e.g.*, WINTERS, *supra* note 5.

[54] *See* § 1, 40 Stat. at 288.

[55] This translates to approximately $110.48 billion in 2004. *See* CPI, *supra* note 45 (using consumer price index of 12.8 for 1917).

[56] *See* § 3, 40 Stat. at 289–90.

[57] *See* § 5, 40 Stat. at 290. This translates to $58.625 billion in 2004. *See* CPI, *supra* note 45 (using consumer price index of 12.8 for 1917).

savings certificates, up to a limit of $2 billion.[58] Again, the Secretary was given broad discretion over the offering terms for the certificates, such as price, redemption conditions, and even the rate of interest.[59]

Notably, the Act also authorized the Treasury Secretary, "for the purpose of more effectually providing for the national security and defense and prosecuting the war," to purchase on behalf of the United States the obligations of foreign governments then engaged in war with the enemies of the United States, and appropriated $4 billion for such purchases.[60] This authority was to end upon termination of the war with Germany.[61] Other provisions of the Act dealt in detail with the convertibility of bonds, tax exemptions, the deposit of proceeds from the sale of bonds and certificates, the postal service's obligation to assist in the advertising, sale, and delivery of bonds, and restrictions on the further issue of bonds.[62] Moreover, as a check on the additional authority given to the Treasury Secretary, the Act required the Secretary to submit annual reports to Congress detailing all expenditures made under it.[63]

The Third and Fourth Liberty Bond Acts, passed in 1918, amended the Second Liberty Bond Act to increase the authorized limits on government issuances of bonds, credits to allied governments, and certificates of indebtedness.[64] The Victory Liberty Loan Act, passed in 1919, further amended the statute to authorize the government to issue up to $7 billion[65] in Treasury notes, above and beyond the bonds, certificates, and credits

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[58] *See* § 6, 40 Stat. at 291. This is the equivalent of approximately $29.31 billion in 2004 dollars. *See* CPI, *supra* note 45 (using consumer price index of 12.8 for 1917).

[59] *See* §§ 5, 6, 40 Stat. at 290–91. The only limitations the Act placed on the terms of the war-savings certificates were that (1) no one person could be sold more than $100 worth of certificates at any one time; and (2) no one person could hold such certificates in an aggregate amount exceeding $1,000 at any one time. *See id.*

[60] *See id.* § 2. Again, this is equivalent to approximately $58.625 billion dollars in 2004. *See* CPI, *supra* note 45 (using index of 12.8 for 1917).

[61] *See* § 2, 40 Stat. at 288–89.

[62] *See id.* §§ 3, 4, 7–9, 11.

[63] *See id.* § 10.

[64] Specifically, the Third Liberty Bond Act increased the authorized issue of bonds from $7 billion to $12 billion, the appropriation for purchases of allied governments' obligations from $4 billion to $5.5 billion, and the limit for outstanding certificates of indebtedness from $4 billion to $8 billion. *See* Third Liberty Bond Act, Pub. L. No. 65-120, §§ 1, 2, 4, 40 Stat. 502, 503–04 (1918). In inflation-adjusted dollars, this is equivalent to raising the authorized issue of bonds from $102.6 billion to $149.1 billion, the appropriation for purchases of allied governments' obligations from $58.6 billion to $68.3 billion, and the limit for outstanding certificates of indebtedness from $58.6 billion to $99.4 billion. *See* CPI, *supra* note 45 (using index of 12.8 for 1917 and 15.1 for 1918). The Fourth Liberty Bond Act further increased the limit on authorized issues of bonds to $20 billion and the limit on appropriations for purchases of allied governments' obligations to $7 billion. *See* Fourth Liberty Bond Act, Pub. L. No. 65-192, §§ 1, 2, 40 Stat. 844 (1918). Adjusting for inflation, this is equivalent in 2004 dollars to an increase to $248.5 billion on authorized issues of bonds and to $87 billion on the limit on appropriations for purchases of allied governments' obligations. *See* CPI, *supra* note 45 (using consumer price index of 15.1 for 1918).

[65] This is approximately equivalent to $75.9 billion in 2004. *See* CPI, *supra* note 45 (using consumer price index of 17.3 for 1919).

previously authorized by the Second Liberty Bond Act and its amendments.[66] As in the earlier Bond Acts, Congress in the Victory Liberty Loan Act delegated discretion over the terms of the notes to the Treasury Secretary.[67]

Thus, although the original debt limit statute granted the Treasury Secretary standing authority to borrow and eliminated congressional control over some of the more minute details of debt issuance, Congress continued to maintain a heavy hand in supervising the particulars of national borrowing under this first iteration of the statute.

2. Debt Incurrence and Repayment from World War I to World War II (1920–1946)

Following World War I, Congress and the Treasury resumed the pre debt limit pay-as-you-go-except-during-war-or-depression approach to fiscal policy. To this end, Congress took two steps aimed at reducing its $25 billion post-war debt. The first was to continue the nation's long-standing peacetime practice of controlling spending and using government surpluses to pay down the national debt.[68] As post-war Secretary of the Treasury Andrew Mellon later explained, "Since the war two guiding principles have dominated the financial policy of the Government. One is the balancing of the budget, and the other is the payment of the public debt. Both are in line with the fundamental policy of the government since its beginning."[69] The second step was the passage of the Budget and Accounting Act of 1921.[70] The Budget and Accounting Act required submission of an annual budget from the executive branch, created the Bureau of the Budget (now the Office of Management and Budget), and established the General Accounting Office.[71] All of these changes were designed to create cohesion in the national budget and to facilitate budget balance.[72] In all, the post-war government managed to cut federal spending by fifty percent between 1920 and 1927, and to reduce the national debt from $24.3 billion to $16.9 billion by 1929.[73]

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[66] *See* Victory Liberty Loan Act, Pub. L. No. 65-328, § 1, 40 Stat. 1309 (1919) (creating a new "Sec. 18. (a)" in the Second Liberty Bond Act).

[67] *See id.*

[68] *See, e.g.*, GORDON, *supra* note 13, at 110.

[69] ANDREW MELLON, TAXATION: THE PEOPLE'S BUSINESS 25 (Macmillan 1924).

[70] *See* Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921).

[71] *See id.* §§ 201, 207, 301.

[72] *See* AARON WILDAVSKY & NAOMI CAIDEN, THE NEW POLITICS OF THE BUDGETARY PROCESS 38–39 (4th ed. 2001).

[73] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1114 (Federal Outlay Statistics Table for 1789–1970); *id.* at 1117 (Federal Debt Statistics Table for 1791–1970). The $24.3 billion in 1920 is the equivalent of $227.9 billion in 2004, and the $16.9 billion in 1929 is equivalent to $185.4 billion in 2004. *See* CPI, *supra* note 45 (using consumer price index of 20 for 1920 and 17.1 for 1929).

With the onset of the Great Depression in 1930, this trend shifted dramatically. As in earlier periods of depression, the collapse of the economic markets caused government revenues to decline substantially, from $4 billion in 1930 to less than $2 billion in 1932 and 1933.[74] The decline resulted in passive deficits, so-called because they derive from falling tax receipts in difficult economic times, rather than from deliberate spending increases.[75] Instead of attempting to balance these passive deficits with tax increases, which they feared would create even greater economic havoc,[76] President Franklin Roosevelt and the Democratic Congress enacted an array of New Deal programs designed to create jobs and provide federal relief to the working class.[77] As a result, federal government outlays increased from $4.6 billion to $9.06 billion during the eight-year period from 1933 to 1940.[78] During this same period, the national debt climbed from $22.5 billion to $43 billion.[79] Shortly thereafter, in early 1941, Congress made an important procedural change to the debt limit statute: It replaced the different limits set for different types of debt instruments (i.e., bonds vs. certificates of indebtedness vs. war-savings certificates vs. notes) with one aggregate limit for all types of debt issued by the Treasury.[80]

The depression of the 1930s was followed almost immediately by American involvement in the Second World War. The war years added

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[74] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1106 (providing Federal Government Administrative Budget Receipts Statistics Table for 1789–1939). Four billion in 1930 is the equivalent of $44.93 billion in 2004, and less than $2 billion in 1932–1933 translates to less than $28 billion in 2004 ($27.39 billion using a 1932 index of 13.7, and $28.86 billion using 1933 consumer price index of 13.0). *See* CPI, *supra* note 45.

[75] *See* GORDON, *supra* note 13, at 122.

[76] Experiences with the Smoot-Hawley Tariff and other tax increases under the Hoover Administration had backfired in just such a fashion. *See* GORDON, *supra* note 13, at 117–19.

[77] These included programs creating Social Security, providing conditional agricultural aid to farmers, and funding new federal agencies such as the National Labor Relations Board. *See* Social Security Act of 1933, Pub. L. No. 74-271, 49 Stat. 620 (1935); Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281–1393); National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–169).

[78] *See* GORDON, *supra* note 13, at 123; HISTORICAL STATISTICS TABLES, *supra* note 26, at 1117 (providing Federal Debt Statistics Table for 1791–1970). Adjusted for inflation and measured in 2004 dollars, this is the equivalent of an increase from $66.38 billion to $121.4 billion. *See* CPI, *supra* note 45 (using consumer price index of 13.0 for 1933 and 14.0 for 1940).

[79] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1117 (providing Federal Debt Statistics Table for 1791–1970). Adjusted for inflation and measured in 2004 dollars, this is the equivalent of an increase in the national debt from $324.69 billion in 1933 to $576.2 billion in 1940. *See* CPI, *supra* note 45 (using consumer price index of 15.2 for 1931, 13.4 for 1934, and 13.7 for 1935).

[80] *See* Public Debt Act of 1941, Pub. L. No. 77-7, § 2, 55 Stat. 7 (1941) (amending section 21 of the Second Liberty Bond Act to provide that "[t]he face amount of obligations issued under the authority of this Act shall not exceed in the aggregate $65,000,000,000" and terminating the specific authority granted in other sections of the Act with respect to certificates of indebtedness, war savings certificates, and the retirement of defense obligations).

$220 billion to the national debt, bringing the cumulative total to $269 billion in 1946.[81] In response to the funding demands of the war, Congress increased the debt limit set in the Second Liberty Bond Act (as amended) several times[82] and raised taxes on the middle class.[83] By the time the war ended, the United States government had run straight deficits for sixteen years.[84]

Despite this unprecedented string of deficits, congressional action under the debt limit statute from World War I through World War II remained substantially similar to its previous approach to national borrowing. Although the absolute amount and duration of debt incurrence during this period was staggering, such borrowing remained consistent with the old consensus that debt could and should be incurred in times of war and economic depression. In fact, the only deviation from prior norms was the government's creation of new program spending in the midst of the depression (although it was not new for outlays to increase during a depression, such increases never before had been so steady and sharp,[85] nor had they been the result of deliberate government expansion of program spending).

C. National Borrowing and the Debt Limit Statute Since World War II

The post–World War II era has been marked by three periods of shifting priorities and politics regarding the national debt and the debt limit statute. From 1946 to 1960, the government slowly moved away from its focus on balanced budgets and debt reduction as the "first object" of fed-

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[81] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1117 (providing Federal Debt Statistics Table for 1791–1970). This cumulative total is equivalent to approximately $2.59 trillion in 2004 dollars. *See* CPI, *supra* note 45 (using 1946 consumer price index of 19.5).

[82] *See* Public Debt Act of 1942, Pub. L. No. 77-510, § 2, 56 Stat. 189 (1942) (increasing limit to $125 billion); Public Debt Act of 1944, Pub. L. No. 78-333, § 2, 58 Stat. 272 (1944) (increasing limit to $260 billion); Public Debt Act of 1945, Pub. L. No. 79-28, § 2, 59 Stat. 47 (1945) (increasing limit to $300 billion). Adjusting for inflation, this amounts to debt limits in 2004 dollars of $1.44 trillion in 1942, $2.77 trillion in 1944, and $3.13 trillion in 1945. *See* CPI, *supra* note 45 (using index of 16.3 for 1942, 17.6 for 1944, and 18.0 for 1945).

[83] *See* BROWNLEE, *supra* note 44, at 112.

[84] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1105 (showing Federal Finances Statistics Table for 1929–1970).

[85] During the depression of the 1830s, for example, outlays rose from a range of $17 million to $23 million from 1832 to 1835 to between $24 billion and $37 billion from 1836 to 1842. *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1114–15 (Federal Outlays Statistics Table for 1789–1970). Similarly, during what some historians have termed the depression of the 1890s, *see* Gordon, *supra* note 13, at 90, outlays increased from a range of $318 million to $383 million from 1890 to 1893 to between $352 million and $605 million from 1894 to 1899. *See id.* Compare this with the depression of the 1930s, during which outlays increased from a range of $3.1 billion to $4.6 billion from 1929 to 1933 to between $6.5 billion and $9.06 billion from 1934 to 1940. *See id.*

eral fiscal policy in a post-war period.[86] In the 1960s and 1970s, American politicians embraced the philosophy of British economist John Maynard Keynes,[87] resulting in nearly uninterrupted deficits and debt expansion, as well as in congressional use of the debt limit statute to criticize executive fiscal policy. This trend continued and expanded in the 1980s and 1990s, when votes to increase the debt limit began to be used by some as vehicles for budget reforms aimed at debt reduction and by others as a legislative weapon in congressional-executive battles over fiscal policy.

1. National Debt in the 1940s and 1950s

As with previous wars, the end of World War II brought back national surpluses,[88] but now the government no longer was committed to balancing the budget and paying down the debt. Increasingly influenced by British economist John Maynard Keynes, American politicians had begun to abandon their focus on debt reduction as the key to economic prosperity. Keynes' macroeconomic model characterized government debt as "borrowing from oneself"—with the nation's debits canceled out by its citizens' credits—and justified deliberate peacetime deficits when government spending was deemed necessary to ensure stable economic growth.[89] Also contributing to the political shift away from absolute insistence on balanced budgets and debt repayment were national experiences during the Great Depression, when: (1) the Hoover Administration's efforts to balance the budget by increasing tariffs and taxes only further destabilized the economy[90] and (2) an array of new government programs requiring substantial peacetime federal spending took root.[91]

This is not to suggest that budget balance and debt reduction played no role in post-World War II federal fiscal policy; in fact, the government ran surpluses for four of the first six years following the war, and reduced the debt in three of those years.[92] And in 1946, Congress inaugurated the

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[86] *See* GORDON, *supra* note 13, at 129.

[87] 7 CONG. AND THE NATION, *supra* note 49, at 42; *see also* GORDON, *supra* note 13, at 129.

[88] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1105 (providing Federal Finances Statistics Tables for 1929–1970) (showing an annual surplus in 1947 after sixteen straight years of deficits).

[89] *See* 7 CONG. AND THE NATION, *supra* note 49, at 42; *see also* JAMES M. BUCHANAN & RICHARD E. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES 134–42 (1977) (providing a straightforward discussion of Keynes's economic philosophy as applied to political governance regarding the national debt); GORDON, *supra* note 13, at 129–41.

[90] *See* discussion *supra* Part I.B.2.

[91] *See id.*

[92] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1105 (providing Federal Finances Statistics Tables for 1929–1970). The three post-war years in which the debt decreased were 1947, 1948, and 1951. *See id.* at 1118 (showing a decrease from $271 billion in 1946 to $257 billion in 1947 and $252 billion in 1948, and a decrease from $257 billion in 1950 to $255 billion in 1951).

post-war period by decreasing, rather than increasing, the debt limit.[93] Significantly, three of the government's post-war surpluses occurred during years when the United States was involved in fighting the Korean War.[94]

In the eight years from 1953 to 1960, however, this trend began to shift, as the government ran an almost equal number of deficits and surpluses[95] and Congress, in response to requests from Treasury and the President, enacted several increases to the statutory debt limit.[96] During the 1950s, Congress began passing a portion of these increases as "temporary" extensions that expire on a particular date, in the hope of limiting long-term debt growth and encouraging the debt to shrink in the future.[97] Congressional-executive interactions with respect to the debt limit remained, for the most part, harmonious during this period,[98] although Congress did not always increase the debt limit by as much as the President requested.[99]

2. *National Debt in the 1960s and 1970s*

In the 1960s, the Keynesian economic philosophy that had begun to influence American politicians in the 1940s and 1950s took firm root, and came to dominate American fiscal policy as well as to provide political justification for continued federal spending on New Deal programs and spend-

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[93] *See* Public Debt Act of 1946, Pub. L. No. 79-455, 60 Stat. 316 (1946). This amendment lowered the limit from $300 billion to $275 billion. *Id.* In 2004 dollars, that is a decrease from $2.89 trillion to $2.65 trillion. *See* CPI, *supra* note 45 (using average consumer price index of 19.5 for 1946).

[94] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1105 (providing Federal Finances Statistics Table for 1929–1970).

[95] *See id.* (demonstrating three surpluses, in 1956, 1957, and 1960 versus five deficits, in 1953 to 1955, 1958, and 1959).

[96] *See, e.g.*, Act of July 9, 1956, Pub. L. No. 84-678, 70 Stat. 519; Act of June 30, 1955, Pub. L. No. 84-124, 69 Stat. 241; Act of Aug. 28, 1954, Pub. L. No. 83-686, 68 Stat. 895; *see also* CONG. AND THE NATION: 1945–1964 394 (Thomas N. Schroth ed., 1965).

[97] *See* WINTERS, *supra* note 5.

[98] One interesting exception to this general inter-branch cooperation occurred in 1953, when the Senate tabled a bill responding to the Treasury's request for an increase in the debt ceiling, and then adjourned without further action. *See* CONG. AND THE NATION, *supra* note 96, at 394. Given Congress's failure to act, the U.S. Treasury eventually used $500 million of its "free gold" supply to stay within the debt ceiling. *See id.*

[99] In 1958, for example, although the President requested an increase of $10 billion in the permanent debt ceiling, plus a $3 billion increase in the temporary limit for two years, Congress authorized a permanent increase of only $8 billion, plus a $5 billion increase in the temporary ceiling for *one* year. *See* Act of Sept. 2, 1958, Pub. L. No. 85-912, 72 Stat. 1758 (1958); CONG. AND THE NATION, *supra* note 96, at 394. Similarly, in 1959 the President asked for a permanent ceiling of $288 billion with a one-year increase in the temporary ceiling to $295 billion, but received a $285 billion raise in the permanent limit plus a $10 billion increase in the temporary limit; in 1962, the President requested a ceiling of $308 billion through fiscal 1963 but received a temporary increase to $300 billion for fiscal 1962 (although Congress later relented and passed a temporary increase to $308 billion). *See* Act of July 1, 1962, Pub. L. No. 87-512, 76 Stat. 124; Act of Mar. 13, 1962, Pub. L. No. 87-414, 76 Stat. 23; Act of June 30, 1959, Pub. L. No. 86-74, 73 Stat. 156; CONG. AND THE NATION, *supra* note 96, at 394–95.

ing on new programs, without increasing taxes.[100] Thus, although the economy grew and government revenues increased throughout the decade (going from $92.5 billion in 1960 to $193.7 billion in 1970),[101] outlays consistently consumed all of the extra funds. Indeed, the 1960s produced what arguably are the biggest sources of backdoor spending in the federal budget—i.e., "entitlements" including Social Security, Medicare, and Medicaid, which obligate the government to pay benefits, without limit, to all who qualify for program benefits.[102] During this decade, Congress raised the debt limit several times[103] and the national debt grew by nearly one-third, from $286 billion in 1960 to $371 billion in 1970.[104] To be sure, some of this increase in outlays was caused by the Vietnam War—but the war, which cost approximately $173.2 billion,[105] accounted for less than 8% of the total $1.4 trillion in outlays spent by the government from 1961 to 1970,[106] and less than 7% of the total $2.5 trillion in outlays spent from 1965 to 1976 (the budgetary period for which the costs of the war have been measured).[107]

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[100] *See* BUCHANAN & WAGNER, *supra* note 89, at 134–42; GORDON, *supra* note 13, at 140. Indeed, by the end of the 1960s, Republican President Richard Nixon declared with confidence that, "We are all Keynesians now." *See* GORDON, *supra* note 13, at 140.

[101] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1105 (providing Federal Finances Statistics Table for 1929–1970). This is equivalent, in 2004 dollars, to an increase from $586.25 billion in 1960 to $936.55 billion in 1970. *See* CPI, *supra* note 45 (using consumer price index of 29.6 for 1960 and 38.8 for 1970).

[102] *See* BROWNLEE, *supra* note 44, at 129; GORDON, *supra* note 13, at 152.

[103] *See, e.g.*, Act of June 30, 1967, Pub. L. No. 90-39, 81 Stat. 99 (raising the permanent limit to $358 billion, with provision for future temporary increases of $7 billion annually); Act of June 29, 1964, Pub. L. No. 88-327, 78 Stat. 225 (increasing temporarily to $324 billion); Act of May 29, 1963, Pub. L. No. 88-30, 77 Stat. 50 (increasing temporarily to $309 billion); Act of Mar. 13, 1962, Pub. L. No. 87-414, 76 Stat. 23 (increasing temporarily to $300 billion); Act of June 30, 1961, Pub. L. No. 87-69, 75 Stat. 148 (increasing temporarily for one year to $298 billion).

[104] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1117 (providing Federal Debt Statistics Tables for 1791–1970); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 322 (2003) [hereinafter STATISTICAL ABSTRACT TABLES] (Federal Receipts, Outlays and Debt Statistics Table for 1960–2003). Because inflation was so high during this period, however, the growth of the debt in terms of real dollars was effectively zero. Specifically, once adjusted for inflation, the debt of $286 billion in 1960 translates to approximately $1.8 trillion, which is equal to the adjusted current value of $1.79 trillion for the $371 billion debt of 1970. *See* CPI, *supra* note 45 (using consumer price index of 29.6 for 1960 and 38.8 for 1970).

[105] *See* ANTHONY S. CAMPAGNA, THE ECONOMIC CONSEQUENCES OF THE VIETNAM WAR 96 (1991) (listing the actual budgetary costs of the Vietnam War from 1965 to 1976).

[106] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1116 (Federal Outlays by Major Function Statistics Table for 1940–1970); STATISTICAL ABSTRACT TABLES, *supra* note 104, at 322 (providing Federal Receipts, Outlays and Debt Statistics Table for 1960–2003). Compared with World War II, which cost approximately $288 billion and accounted for 75.5% of the $381.7 billion in total outlays spent by the government from 1941 to 1946, the relative impact of the Vietnam War on the American economy during the 1960s is miniscule. *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1117 (providing Federal Debt Statistics Table for 1791–1970); U.S. POLITICS ONLINE, STATISTICAL SUMMARY, AMERICA'S MAJOR WARS, *at* http://www.uspoliticsonline.com/archives/warcost.htm (listing the financial cost of World War II: 1941–1945).

[107] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 1116 (Federal Outlays by

The 1960s also initiated a new phase in congressional-executive relations concerning the debt limit statute, as Southern Democrats and Republicans in Congress began using votes on debt limit increase requests as occasions to attack the fiscal policy of the Kennedy and Johnson administrations.[108]

The 1970s continued the spending and debt expansion trend of the 1960s, producing an increase in the national debt from $381 billion in 1970 to $909 billion in 1980.[109] Significantly, this 245% increase in the debt occurred despite the fact that rapid inflation bumped numerous taxpayers into higher marginal brackets and caused a 267% growth in revenues during the same period, from $193 billion in 1970 to $517 billion in 1980.[110]

The rapid rise of the debt during the 1970s had two procedural consequences for the fiscal constitution: enactment of the Congressional Budget and Impoundment Control Act of 1974 (the "Budget Act of 1974")[111] and the addition of the "Gephardt Rule" to the standing rules of the House of Representatives.[112] The Budget Act of 1974 was inspired by President Nixon's efforts to curtail congressional spending through the impoundment of funds appropriated by Congress.[113] Its drafters designed it to create a cohesive congressional budget and thereby inspire greater congressional control and responsibility with respect to budget aggregates.[114] The Act's creation of a centralized budget process with aggregate priorities set by a single budget committee, rather than several appropriations subcommittees, increased party control and manipulation of the budget process at the expense of diverse floor deliberation.[115]

Major Function Statistics Table for 1940–1970); STATISTICAL ABSTRACT TABLES, *supra* note 104, at 322 (providing Federal Receipts, Outlays and Debt Statistics Table for 1960–2003).

[108] *See* 3 CONG. AND THE NATION: 1969–1972 64 (Robert A. Diamond ed., 1973).

[109] *See* STATISTICAL ABSTRACT TABLES, *supra* note 104, at 322 (providing Federal Receipts, Outlays and Debt Statistics Table for 1960–2003). This is equivalent, in 2004 dollars, to an increase of $23 billion, from $1.84 trillion in 1970 to $2.07 trillion in 1980. *See* CPI, *supra* note 45 (using consumer price index of 38.8 for 1970 and 82.4 for 1980).

[110] *See* STATISTICAL ABSTRACT TABLES, *supra* note 104, at 322. Adjusted for inflation, this is equivalent in 2004 dollars to an increase in revenues of approximately $246.8 billion, from $933.2 billion to $1.18 trillion. *See* CPI, *supra* note 45 (using consumer price index of 38.8 for 1970 and 82.4 for 1980).

[111] *See* Act of July 12, 1974, Pub. L. No. 93-344, 88 Stat 297 (codified as amended in scattered sections of 2 U.S.C. (2000)).

[112] *See infra* note 120 and accompanying text.

[113] *See* Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7, 35–37 (2000).

[114] *See id.* at 36–37 ("Reformers in 1974 assumed that members of Congress would behave more responsibly if they voted explicitly on budget aggregates and faced up to totals . . . .").

[115] *See* Elizabeth Garrett, *The Congressional Budget Process*, *supra* note 9, at 715–18 (discussing ways in which the 1974 Budget Act increased party control over the fiscal policy agenda); *see also infra* text accompanying notes 160–165 (regarding majority party dominance of the budget process).

The burgeoning of the debt in the 1970s also produced the "Gephardt Rule" in response to the difficult political situation confronting members of Congress, who faced increasingly frequent votes to raise the statutory debt limit.[116] Failure to increase the limit would result in default on the government's loan obligations; but many members refused to vote in favor of an increase, either in protest against the fiscal irresponsibility of serial deficits or for fear of the reelection consequences (political challengers had begun using incumbents' debt limit votes against them in subsequent campaigns).[117] In order to avoid the unpleasantness of perennial debt limit votes and insulate debt limit increases from the political pressures that often caused them to fail in the House,[118] the House of Representatives crafted a change in its standing rules and passed it as part of a temporary extension to the debt limit in 1979.[119] House Rule XXIII (formerly Rule XLIX), known as the "Gephardt Rule": (1) automatically increases the debt limit whenever the concurrent budget resolution sets the limit at a level different from that otherwise in effect for the relevant period; (2) presumes or renders this level approved by the House upon passage of the budget resolution; and (3) provides for enrollment of a bill setting the debt limit at this presumed level to be sent to the Senate without a separate vote by the House.[120]

Thus, whereas Congress in the 1960s came to view legislation increasing the statutory debt limit as inevitable, in the 1970s it came to view such legislation as a painful, if necessary, evil from which political cover was required.

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[116] *See, e.g.*, Act of Aug. 3, 1978, Pub. L. No. 95-333, 92 Stat. 419 (temporarily increasing ceiling to $798 billion); Act of Mar. 27, 1978, Pub. L. No. 95-252, 92 Stat. 185 (extending temporary limit of $752 billion); Act of Oct. 4, 1977, Pub. L. No. 95-120, 91 Stat. 1090 (temporarily extending and increasing limit to $752 billion); Act of June 30, 1976, Pub. L. No. 94-334, 90 Stat. 793 (temporarily increasing limit to $700 billion for fifteen months); Act of Dec. 3, 1973, 87 Stat. 691, Pub. L. No. 93-173 (further increasing and extending the temporary ceiling of $465 billion); Act of Mar. 15, 1976, Pub. L. No. 94-232, 90 Stat. 217 (increasing and extending temporary ceiling to $627 billion); Act of July 1, 1973, Pub. L. No. 93-53, 87 Stat. 134 (extending existing temporary ceiling of $465 billion for five months).

[117] *See* JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 49, 122, 181–82, 267 (2d ed. 1981), *cited in* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 106 (1990); *see also* 40 CONG. Q. ALMANAC 165 (Mary Cohn ed., 1984).

[118] *See, e.g.*, H.R. 12641, 95th Cong (1978) (raising temporary debt ceiling to $849.1 billion defeated by vote of 167-288). *See also* 39 CONG. Q. ALMANAC 239 (Mary Cohn ed., 1983).

[119] *See* Act of Sept. 29, 1979, Pub. L. No. 96-78, 93 Stat. 589 (raising temporary debt limit to $879 billion and creating House Rule XLIX), as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 1066; Act of May 23, 1983, Pub. L. No. 98-34, 97 Stat. 196 (1983) (codified at 31 U.S.C. § 3101 (2000)).

[120] House Rule XXIII; 5 CONG. AND THE NATION: 1977–1980 227 (Martha V. Gottron ed., 1981).

3. Debt and the Debt Limit Statute in the 1980s and 1990s

The 1980s continued the debt expansion trends of the previous two decades, as federal spending on entitlements and the Star Wars program escalated steadily with no correlation to revenues.[121]

The decade also wrought noticeable shifts in Congress's use of the debt limit statute. First, Congress in 1983 eliminated the distinction between permanent and temporary debt ceilings.[122] By this time, it had become clear that the use of temporary debt limit increases not only was failing to restrict the growth of the national debt, but was resulting in the need for multiple debt limit votes, sometimes within a few months of each other.[123] Elimination of the temporary ceiling was designed to ease political pressures associated with the debt limit by reducing the number and frequency of debt limit votes. It also gave the Treasury Secretary greater flexibility, since he or she no longer would face automatic reversion of the debt ceiling to a substantially lower limit upon expiration of the temporary limit, and thus could refinance and shuffle funds to remain technically within the limit for some time even after borrowing hit the permanent debt ceiling.[124]

Second, as deficits spiraled out of control in the early part of the decade, members of Congress resolved to do something about it other than symbolically vote against periodic debt limit increases. Support grew for some kind of legislative reform aimed at reversing the historical trend away from balanced budgets and debt reduction.[125] In 1985, a bipartisan team of senators used a vote on debt limit increase legislation as a vehicle to pass the Gramm-Rudman-Hollings Deficit Reduction Act (GRH).[126] GRH

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[121] *See* STATISTICAL ABSTRACT TABLES, *supra* note 104, at 322 (Federal Receipts, Outlays and Debt Statistics Table for 1960–2003). The national debt more than tripled during the 1980s, going from $994.8 billion in 1981 to $3.21 trillion in 1990, as the government passed an enormous tax cut. *See id.*; GORDON, *supra* note 13, at 166. Adjusted for inflation, the debt still more than doubled, increasing in 2004 dollars from $2.05 trillion to $4.61 trillion. *See* CPI, *supra* note 45 (using consumer price index of 90.9 for 1981 and 130.7 for 1990).

[122] The change was passed as part of a bill raising the debt ceiling to $1.39 trillion. *See* Act of May 26, 1983, Pub. L. No. 98-34, 97 Stat. 196. Notably, the bill was passed by a surprise voice vote in a nearly empty chamber. *See* 6 CONG. AND THE NATION: 1981–1984 43 (Mary W. Cohn ed., 1985).

[123] In 1978 alone, for instance, Congress voted on whether to increase the debt limit three times; in March, May, and August. *See* 5 CONG. AND THE NATION, *supra* note 120, at 226 (citing Act of Mar. 27, 1978, Pub. L. No. 95-252, 92 Stat. 185; H.R. 12641, 95th Cong (1978) (defeated); and Act of Aug. 3, 1978, Pub. L. No. 95-333, 92 Stat. 419). Similarly, in 1981, Congress voted to increase the limit both in February and in September. *See* 6 CONG. AND THE NATION, *supra* note 122, at 42 (citing Act of Feb. 7, 1981, Pub. L. No. 97-2, 95 Stat. 4 (increasing the limit temporarily to $985 billion); Act of Sept. 30, 1981, Pub. L. No. 97-49, 95 Stat. 956 (increasing the limit temporarily to $1.08 billion)).

[124] *See* 39 CONG. Q. ALMANAC, *supra* note 118, at 240.

[125] *Cf.* WILDAVSKY & CAIDEN, *supra* note 72, at 128 (noting that the Gramm-Rudman-Hollings Deficit Reduction Act was passed in an environment of "dismay at ever-rising deficits" and as a rider to the "annual misery of raising the debt ceiling").

[126] *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-

sought to control national borrowing and force budgetary balance by enacting predetermined deficit (i.e., borrowing) maximums for each of the next five fiscal years.[127]

The deliberations over GRH delayed passage of the debt limit increase that year until long after the deadline by which the Treasury Department had indicated that it would hit the permanent ceiling set by the last debt limit bill.[128] As a result, the government experienced a debt limit crisis from September 3, 1985 through December 11, 1985.[129] During the crisis, the Treasury Secretary avoided a default by engaging in a series of financial maneuvers, including redeeming Treasury securities held by the Civil Service Retirement and Disability Fund earlier than scheduled and disinvesting Social Security trust funds to create cash with which to pay pension benefits due to retirees during the crisis period.[130]

In response to the 1985 debt limit crisis experience, Congress in 1986 amended federal trust fund law to expand the Treasury Secretary's authority to stave off default during future crises. Specifically, Congress authorized the Secretary to declare a "debt-issuance suspension period" if he determines that the government has reached a point where additional borrowing would cause it to breach the debt limit.[131] During such "debt-issuance suspension periods" Congress granted the Treasury Secretary permission: (1) to suspend automatic investment in the Civil Service Retirement and Disability Fund, if such investment would cause the government to exceed the legal debt limit; and (2) to sell or redeem securities or other assets held by the Fund before maturity, if necessary to prevent the government from exceeding the public debt limit.[132] Congress also contemplated separate legislation prohibiting the Secretary from disinvesting Social Security trust funds in the future, but failed to pass such a bill.[133]

The national debt continued its steady climb during the 1990s as well, although the government ran a few surpluses from 1998 to 2000.[134]

177, 99 Stat. 1037 (1985) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

[127] *See id.*; Anita S. Krishnakumar, *Note, Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget "Train Wreck,"* 35 HARV. J. ON LEGIS. 589, 598 & n.56 (1998).

[128] *See* 41 CONG. Q. ALMANAC 457 (Mary Cohn ed., 1985).

[129] *See* GEN. ACCOUNTING OFFICE, *supra* note 19, at 3.

[130] *See id.* at 3; 41 CONG. Q. ALMANAC, *supra* note 128, at 457–58. Later legislation required the Treasury to restore to the social security trust funds any disinvested securities. *See* Act of Nov. 14, 1985, Pub. L. No. 99-155, 99 Stat. 814.

[131] *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, tit. VI, § 6002(a)-(c), 100 Stat. 1874, 1931 (amending 5 U.S.C. § 8348(j)(5)(B) (2000)).

[132] *See id.* §§ 8348(j), 8348(k) (added to Title V by Pub. L. No. 99-509 (1986).

[133] *See* H.R. 5050, 99th Cong. (1986); *see also* 42 CONG. Q. ALMANAC 594 (Mary W. Cohn ed., 1986).

[134] The reason for this apparent discrepancy is that the debt subject to limit includes not only debt actually borrowed by the government from the public, but also intra-governmental debt owed by one arm of the government to another, for example, treasury securities held by the Social Security and other retiree trust funds. Intra-governmental debt continues to rise even when the government runs a budget surplus and pays down the debt held by the

During the 1990s, as in the 1980s, members of Congress started viewing votes on debt limit increase legislation less as political suicide and more as a vehicle for passage of budget-reform or other unrelated legislation. Procedurally, the House of Representatives began to waive the Gephardt Rule designed to provide political cover on debt limit votes.[135] And in 1995, the Gingrich-led 104th Congress openly and brazenly sought to use legislation increasing the debt ceiling to force President Clinton to accept sweeping reforms, including a seven-year plan to balance the budget—although the tactic backfired infamously.[136] A popular 1990s proposal for a Balanced Budget Amendment similarly sought to use the debt ceiling as its primary enforcement mechanism.[137]

In 1999–2000, in light of projected surpluses, Congress proposed lowering the debt limit for the first time in fifty-three years.[138] Despite substantial support in the House, however, the proposal never was enacted.[139] Even if the proposal had passed, any reduction in the statutory limit would have been temporary and illusory. This is because intra-governmental debt—generated through the mandatory investment of Social Security and other trust fund surpluses in treasury securities—is included in the amount subject to the statutory limit, which means that the debt subject to limit can rise even while the government is running budgetary surpluses.[140]

It is too early to evaluate meaningfully trends regarding the national debt and the debt limit statute in the first decade of the twenty-first century. But three tentative observations are possible. First, the enormous tax cuts,[141] increased spending,[142] and return of deficits in the last four

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public, because the money invested by the trust funds is wholly separate from that used to fund government appropriations and federal law requires the trust funds to invest in treasury securities irrespective of whether the government runs a surplus or a deficit. *See* PHILIP D. WINTERS, CONG. RES. SERV., No. RS21111 THE DEBT LIMIT: THE NEED TO RAISE IT AFTER FOUR YEARS OF SURPLUSES, CRS-1 (2002); CONG. BUDGET OFFICE, DEBT SUBJECT TO LIMIT, *supra* note 19, at 47.

[135] The Gephardt Rule has been waived in every year from 1995 until 2002. *See* WINTERS, *supra* note 134 (discussing waiver of the Rule from 1995 to 2001); *see also* Norman Ornstein, *Congress Inside Out: The Perils of Misunderestimation*, ROLL CALL, Jan. 27, 2003, *available at* http://www.rollcall.com/pub/features/Welcome_Congress/welcome_congress/263-1.html (discussing revival of Rule in 2002).

[136] *See, e.g.*, 51 CONG. Q. ALMANAC 2-65 (Jan Austin ed., 1995); Gettinger, *supra* note 18, at 1400 (noting comment by House Speaker Newt Gingrich that he was "eyeing" the debt limit bill as a "hammer" to force the President to accept Republican reforms).

[137] *See* S.J. Res. 1, 104th Cong. (1995). *See generally* Seto, *supra* note 19 (providing a thorough discussion of this proposed Amendment and the manner in which it sought to use the debt limit).

[138] *See* H.R. 4601, 106th Cong. (2000); H.R. 4866, 106th Cong. (2000).

[139] *See* 146 CONG. REC. H4722 (daily ed. June 20, 2000) (recording House vote on H.R. 4601 at 419 ayes to 5 nays).

[140] *See* WINTERS, *supra* note 134, at CRS-1.

[141] *See, e.g.*, Economic Growth and Taxpayer Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.).

[142] *See* U.S. BUDGET FY 2005 HISTORICAL TABLES, *supra* note 14, at 22 (Summary of Receipts, Outlays, and Surpluses or Deficits(-): 1789–2009) (showing rapidly increasing annual spending during the period between 2000 to 2004, including annual increases of

years[143] demonstrate that the surpluses of 1998–2001 were not the result of a sustained or pervasive change in government attitudes towards budget balance or debt reduction. Second, Republicans in Congress seem to be returning to the debt limit avoidance tactics of the 1980s by, *inter alia*, resurrecting the Gephardt Rule in 2003 after eight years of disuse.[144] Third, President George W. Bush's efforts to fund a massive war on terror without raising taxes—and while in fact cutting taxes[145]—portend exponential expansion of the national debt, particularly when viewed against the national history and precedent of paying for major wars with a combination of tax increases and federal borrowing, rather than federal borrowing alone.

Thus, the period from 1980 to the present seems to have cemented the trend begun in the 1960s, in which serial deficits and a mounting national debt are the norm, and government surpluses the aberration. Indeed, in the past forty years the Treasury has made almost no effort to pay down the debt, and the national debt figure has not declined once during that period.[146]

II. THE CONSTITUTIONAL AND INSTITUTIONAL ROLES OF THE DEBT LIMIT STATUTE IN THE NATION'S BORROWING AND DEBT REPAYMENT PROCESS

As government attitudes towards debt incurrence and repayment have changed over the last fifty years, so too have attitudes towards the debt ceiling and debt limit statute. The ceiling has gone from being viewed as a statutory fixture to be raised only in times of war or economic depression to being considered more of a legal index that *must* be raised every year or few years—in response to requests from the Treasury or the President—in order to sustain general, unspecified, government spending. Moreover, the debt limit statute as a whole has transformed from a mere dele-

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$150 billion in each year from 2001 to 2004); *see also* Jonathan Weisman, *Conservatives Dispute GOP Budget Claims*, WASH. POST, Dec. 26, 2003, at A6 (observing that President Bush and the Congress had enacted three straight years of double digit increases in federal spending).

[143] *See* U.S. BUDGET FY 2005 HISTORICAL TABLES, *supra* note 14, at 22 (showing return of budget deficits in 2002 and 2003, as well as projected deficits for 2004–2009, following four years of surpluses).

[144] *See* Ornstein, *supra* note 135. There also was some talk about attaching the debt limit increase to the 2002 Supplemental Appropriations Bill in order to insulate it. *See, e.g.*, Bill Ghent, *House Debt Ceiling Passage Clears Way for Supplemental*, CONG. DAILY, June 28, 2002, *available at* http://www.govexec.com/dailyfed/0602/062802cdam1.htm.

[145] *See* Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 52 (2003) (codified at 26 U.S.C. § 1); William Hanley, *Battles Ahead for Whoever is Elected*, FIN. POST, Nov. 2, 2004, at FP1 (noting that George W. Bush is the first President in the nation's history to cut taxes during wartime).

[146] *See* HISTORICAL STATISTICS TABLES, *supra* note 26, at 110 (Federal Debt Statistics Table for 1940–2004); STATISTICAL ABSTRACT TABLES, *supra* note 104, at 322 (Federal Receipts, Outlays and Debt Statistics Table for 1960–2003).

gation to the Treasury Secretary of specific borrowing authority to a general grant of borrowing power that even includes permission/ratification of fiscal maneuvering to circumvent the debt ceiling when Congress delays in increasing it. These developments have led some to label the statutory debt limit a dangerous anachronism that threatens national default, and to call for its repeal.[147]

While such criticism is not entirely without merit, it derives from a superficial understanding of the statute's operation. Upon careful evaluation, it is clear that the statute retains enduring value. First, the statute plays a constitutionally necessary role in effecting congressional control and accountability over borrowing and the national debt. Second, it serves as an important intra-institutional check on special interest and behind-closed-doors party dominance over national fiscal policy.

A. Constitutional Principles of National Borrowing and Debt Payment

Congress's authority over policy concerning the national debt stems from Article I, Section 8, Clauses 1 ("to pay the Debts") and 2 ("to borrow Money on the credit of the United States").[148] On its face, the first imposes a fiscal obligation on Congress while the second confers broad fiscal authority. But as with many provisions in our Constitution of limited federal powers, this is not all that the clauses dictate or demand. Inherent in the clauses' language is a sense of balance, of congressional control and accountability for national borrowing and the debt it creates. From these clauses, we can derive three principles of congressional borrowing and debt payment.

First, a Principle of Regulated Borrowing: Congress has the power to regulate the terms and conditions under which the nation borrows funds. The power to borrow money encompasses power to regulate the terms on which the money will be borrowed—e.g., to fix interest rates, loan format, maturity dates, and to decide from whom the government shall borrow. Indeed, during the early years of our nation's history, it was established that Congress's power to borrow included the incidental power to incorporate a national bank from whom it would borrow, thereby creating conditions under which national borrowing could take place safely and efficiently.[149] The Principle of Regulated Borrowing also entails congressional control over the terms on which the government repays its debt.

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

[148] U.S. CONST. art. I, § 8, cl. 1, 2.

[149] The preamble of the bank legislation broadly stated that the bank was "conceived . . . [to] be very conducive to the successful conducting of the national finances" and "[to] tend to give facility to the obtaining of loans, for the use of the government, in sudden emergencies." Act of Feb. 25, 1791, ch. 10, 1 Stat. 191; *see also* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 605 (citing 2 ANNALS CONG. 1897–1900 (1791) (debates about the constitutionality of the national bank)).

Thus, for instance, one of the first controversies that faced the newly minted Congress in 1790 involved whether the old national debt should be redeemed at face value or present market value.[150]

Second, a Principle of Borrowing and Debt Control: It is Congress's prerogative and duty to decide how much the nation will borrow and for what purposes. The power to borrow money would be merely administrative if it did not entail control over the amount and basis for borrowing. Thus, inherent in the power to borrow is an obligation, as the branch most closely connected to the populous, to exercise judgment in deciding when and under what circumstances to commit the nation and the public to indebtedness.

Third, a Principle of Repayment: Debts incurred on behalf of the United States must be honored, and Congress has the power and obligation to ensure that payments are made on the national debt. This principle derives both from the plain language of Clause 1, empowering Congress to "pay the Debts" of the United States,[151] and from the history of our federal constitution. It is well-established that one of the primary concerns motivating the Constitutional Convention in 1787 was the Framers' frustration with the Articles of Confederation and the fledgling United States' inability to pay its Revolutionary War debts thereunder.[152] Indeed, the Federalist Papers, published with the purpose of convincing the American public to ratify the new constitution, specifically cite the necessity of ensuring repayment of the Union's "debts to foreigners" as a reason for creating the federal government and constitution.[153] Moreover, they specifically tie the need for a federal taxing power to a "plan of extinguishment" for outstanding national debts.[154]

In addition, the structure of Article I, Section 8 implies that Congress is to be accountable to the people regarding its decisions about national borrowing and repayment of the debt with which it saddles the nation. The first clause of Article I, Section 8 confers both the power to tax and the power to pay debts; the power to borrow is conferred immediately thereafter, in the section's second clause. This structure is no accident. The three powers are listed together because they are interrelated. As noted above, the founding fathers created the power to tax with repayment of the national debt in mind, and payments on the debt can be

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[150] *See, e.g.*, GORDON *supra* note 13, at 24–28. The terms of the redemption were controversial because many of the original holders of the old national debt had sold it, at far below face value, to wealthy merchants who would now reap a windfall if the debt were redeemed at its full face value. *See id.*

[151] U.S. CONST. art. I, § 8, cl. 1.

[152] *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28 (First Vintage Books ed. 1997); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 47–49 (W. W. Norton ed., 1987) (1966).

[153] THE FEDERALIST No. 15, at 91 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[154] *See* THE FEDERALIST No. 30, at 190 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

made only if revenue is raised by the federal government. Further, the power to pay debts counterbalances the power to borrow, or incur debt, and the power to tax is both a present alternative to the power to borrow and a future means of raising funds with which to repay monies borrowed in the present.

It is axiomatic that the founders intended for Congress to be directly accountable to the people concerning any tax burdens imposed upon the public—hence the explicit constitutional requirement that all legislation for raising taxes originate in the popularly elected House of Representatives.[155] The side-by-side location of Congress's constitutional powers to tax, pay debts, and borrow money at least implies that the public accountability required of Congress in the tax context also should apply to congressional decisions in the related fiscal contexts of national borrowing and debt repayment.

Finally, the borrowing and debt payment clauses create a limitation on executive power. Congress's power to borrow is a check and a balance against the executive branch and precludes the President from directing the Treasury to issue debt whenever he believes it appropriate. Indeed, Congress's "power to borrow Money" would mean nothing if the President could instigate national borrowing without congressional consent; likewise, congressional authority to pay the nation's debts would be for naught if the executive could redirect funds allocated by Congress for debt repayment.

B. Institutional Benefits of the Debt Limit Statute

As political scientists extensively have theorized, there are a number of institutional dynamics inherent in the legislative process that are exacerbated and can produce less than ideal outcomes in the context of fiscal policymaking. The debt limit statute acts as a check, or counterbalance, that can alleviate some of the problems produced by these institutional dynamics. This Part of the Article first reviews political theories that highlight flaws in the legislative fiscal policymaking process and then examines how the debt limit statute and debt ceiling help counteract some of these flaws.

1. Pluralist or Interest Group-Based Dynamics

Pluralist, or interest group, theories describe the legislative process as driven by organized interests who compete against each other for policies that benefit their members. Legislators act as "brokers" between various interests and enact into law some combination of what different interest

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[155] *See* U.S. CONST. art. I, § 7, cl. 1.

groups request.[156] Some pluralist or public choice theories see government officials as little more than rubber stamps validating policies created by interest groups.[157] Within this framework, not all interests are equal: organized, financially well-supported groups exercise disproportionate influence upon legislators and legislation is said to become skewed in their favor.[158] Average citizens, whose interests are diffuse and outweighed by the costs of interest group formation, lose out as their position goes unrepresented.[159] From a fiscal perspective, these theories suggest that government spending and the national debt will have a tendency to spiral out of control as a result of excessive congressional acquiescence to requests from organized, well-funded interest groups. The diffuse public interest in controlling spending and minimizing national borrowing and debt, meanwhile, will lack advocates and thus will have little effect on fiscal policymaking.

2. Decision Theory and Party Control Dynamics

Decision theories of legislation emphasize the effect of institutional rules and structures on policymaking outcomes. Arrow's Theorem, for instance, asserts that most decisions made by majority vote in Congress are not truly majoritarian, but rather are a function of the rules that govern the presentation, debate, and voting structure of various policy choices.[160] Some decision theorists have focused on majority party control of internal congressional rules as a method of effecting party leaders' interests and policies at the expense of more balanced and representative legislation.[161] In the budget context, scholars have posited that party control of the budget committees, budget resolutions, and rules governing deliberation over budget legislation has led to top-down budgeting based on majority party leaders' priorities.[162] Indeed, negotiations concerning budget priorities some-

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[156] *See* Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343 (1988).

[157] *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 49 (3d ed. 2001).

[158] *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 141–43 (1965); *see also* ELMER SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 31 (1960).

[159] *See, e.g.*, Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265–66 (1982); Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J.L. & POL. 481, 483 (1996).

[160] *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 903 (1987), *cited in* Reynolds, *supra* note 159, at 482.

[161] *See, e.g.*, GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 233–34 (1993).

[162] *See, e.g.*, Neal E. Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993, 994, 997 (1990) (observing that "[a]ppropriations decisions, for example, are made by a handful of powerful legislators who ensure majority passage through 'log rolling'" and the "enormous budgetary power wielded by a select group of legislators"); Garrett, *The Congressional Budget Process*, *supra* note 9 at 715–16; *see also* Charles Tiefer, *supra* note 8, at 435–47 (discussing congressional Republicans' extraordinary use of inter-

times occur outside of Congress, behind closed doors between party leaders, leaving majority preferences and concerns unaccounted.[163]

Further adding to the problems caused by interest group politics and party dominance in the budget process was the switch, in early 1975, from a seniority system for appointment of House committee and subcommittee chairmen, to a system in which committee chairmen are selected by vote of the majority party caucus every two years.[164] While the seniority system allowed experienced committee chairmen, safe in their seats and their chairmanships, to consider the national interest when making budget policy, the new system has put the budget in the hands of legislators with a greater need to please both their constituents at home and fellow party members in order to ensure reelection to Congress and their chairmanships, respectively.[165]

3. Deliberative Theories and Dynamics

By contrast, republicanism, or deliberative, theories offer a less pessimistic view of the legislative process. Such theories derive from the Madisonian vision, expressed in Federalist No. 10,[166] of factions checking factions, and hold that congressional procedure should be structured to encourage deliberation, information gathering and sharing, so as to create careful and considered legislative outcomes.[167] Deliberative theories place significant emphasis on the selection of rules and procedures that provide incentives for individual legislators to develop policy expertise and to share policy-relevant information with fellow legislators.[168] An ideal deliberative legislature is one in which collective benefits are reaped from individual legislators' information gathering and policy expertise, and distributive spending is kept in check by legislative majorities rather than disproportionately doled out to well-funded special interests.[169] In other words, legislative procedure is designed to promote enactment of laws aligned with median chamber preferences, rather than to give something

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nal rules and procedure to effect President George W. Bush's $1.35 trillion tax cut in 2001).

[163] *See* Garrett, *The Congressional Budget Process*, *supra* note 9, at 717 (citing Krishnakumar, *supra* note 127, at 589, 595, 603).

[164] *See* House Rule X, cl. 5(a)(1) ("The standing committees specified in clause 1 shall be elected by the House at the commencement of each Congress, from nominations submitted by the respective party caucuses.").

[165] *See* GORDON, *supra* note 13, at 159.

[166] THE FEDERALIST No. 10 (James Madison).

[167] *See, e.g.*, HENRY HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 154, 695 (William Eskridge, Jr. & Philip Frickey eds., 1994); *see also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

[168] *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 5 (1991).

[169] *See id.* at 6.

to everyone at the expense of the collective good or to allow one party to railroad its preference past the other.[170]

To this end, deliberative theories prefer a multi-layered legislative process that encourages individual legislators to gather information and present policies aimed at the collective, public good, over a system that allows quick and easy enactment of new laws.

C. The Debt Limit Statute as Check and Balance

The debt limit statute plays an important role in the fiscal constitution both by helping Congress to fulfill its constitutional obligations under the borrowing and debt repayment clauses and by ameliorating many of the institutional problems inherent in the legislative process that produce the national budget and fiscal policy.

First, the debt limit statute facilitates congressional fulfillment of the Regulated Borrowing Principle by providing a mechanism through which Congress can maintain control over the terms of national borrowing. Various sections of the statute require Congress, *inter alia*, to prescribe the forms of debt that the Treasury Secretary may issue, set boundaries regarding the debt's maturity period, and provide guidelines for the Secretary to work within when fixing the maximum amount of a particular type of security that any one person may hold.[171] Within limits delineated by Congress, the statute also delegates authority to the Secretary of the Treasury to regulate specific conditions governing the issuance of government debt, including the rate of interest, the conditions for redemption, and the sales price.[172] Thus, the statute enables Congress both to delegate and to check executive branch borrowing authority.

Second, the debt limit statute helps Congress maintain ultimate authority over the amount of national borrowing, thereby enabling Congress to abide by the Principle of Control. It is no longer practically feasible for Congress to approve each individual issuance of government debt, as it did prior to 1917. Although the statute does not preserve the close connection between national borrowing and a specific purpose that once existed—e.g., bonds issued to the public to raise money for war[173]—it at least maintains congressional control over the absolute amount that the nation borrows. Further, debt limit increase bills have inspired additional legislation, such as GRH, that is designed to restore a more direct correla-

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[170] *See id.*

[171] *See* 31 U.S.C.S. §§ 3101–3107 (Law. Co-op 2003 & Supp. 2004).

[172] *See id.* §§ 3105(c)(4)–(5), 3107; *see also* 4 CONG. AND THE NATION: 1973–1976 70 (Patricia Ann O'Connor ed., 1977) (discussing amendments to the statute that increase the dollar limit on the amount of long-term bonds the Treasury is authorized to sell at interest rates above 4.25%).

[173] *See* WINTERS, *supra* note 5.

tion between congressional spending and borrowing and to strengthen congressional control over the annual amount borrowed.[174]

Third, the debt limit statute helps Congress to fulfill its obligation to ensure payment of the nation's debts (the Principle of Repayment) and to be accountable to the public. Most straightforwardly, the statute is the vehicle that Congress uses to appropriate funds for the redemption and retirement of outstanding government debt.[175] But perhaps more importantly, the statute's requirement that Congress vote periodically to increase the debt limit provides public accountability for Congress's borrowing and debt repayment practices.

In addition to facilitating Congress's fulfillment of its constitutional obligations, the debt limit statute counteracts some of the institutional problems inherent in the federal budget process and helps foster the deliberative ideal of congressional operation. Specifically, the necessity of periodic votes to raise the statutory debt limit forces Congress to address the size of the national debt, as well as the need to minimize it for the public and the future generations who ultimately will have to repay it. These are issues that have no interest group advocate and that benefit a diffuse, unorganized class of citizens. Debt limit increase votes compel Congress to face up to the aggregate, collective consequences of its spending concessions to individual interest groups.[176] Compulsion of such aggregate considerations was, of course, one of the goals of the 1974 Budget Act,[177] but the process created by that Act has failed miserably in forcing Congress to reckon with the consequences of its actions. In fact, some have argued that the Act has resulted in "escapist budgeting," whereby members of Congress collude with each other to set spending and other budget targets at high levels and then pass out spending concessions to members and interest groups, all while claiming credit for staying within the targets set

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[174] *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No 99-177, 99 Stat. 1037. GRH operated by fixing specific deficit (i.e., borrowing) targets for the next five years; if, based on CBO and OMB estimates, Congress was unable to reduce deficits to these levels in its annual budget, then an automatic sequestration procedure would kick in and implement across-the-board cuts on various government spending programs in an amount sufficient to cause the annual deficit to meet the predetermined borrowing (deficit) target. GRH was enacted with the idea that sequestration would never have to be used; the deficit (i.e., borrowing) caps and the threat of across-the-board cuts were supposed to force Congress and the President to exercise greater restraint in spending and borrowing on the nation's behalf. *See* Stith, *supra* note 2, at 633–52; Krishnakumar, *supra* note 127, at 598–99 and accompanying citations to the statute.

[175] *See* 31 U.S.C. §§ 3111–3112 (2000) (setting up "sinking funds" for redemption of the public debt).

[176] To be sure, the connection between congressional spending and borrowing highlighted by votes to increase the debt ceiling remains loose and oblique. But the remedy for this is greater congressional accountability, to make Congress explain the reasons or purpose for which it is borrowing, not, as some have suggested, the elimination of the debt ceiling and of congressional involvement in the issuance of national debt. *See infra* Part IV.A.1.

[177] *See, e.g.*, Fisher, *supra* note 113, at 37.

in the budget resolution.[178] Within this framework, publicly visible votes to increase the debt limit have proved one of the few effective media for shaming Congress and for inspiring serious reforms and summits focused on debt reduction.[179]

More specifically, there are a number of ways in which the debt limit increase process motivates members of Congress to behave in a more fiscally responsible manner than they do in the annual budget and appropriations context. First, debt limit increase legislation serves a scolding and "make amends" function. Even if members of Congress do not themselves care about deficits or the growth of the debt, they perceive that the public does care and pays at least some attention to debt limit increase votes, as evinced by Congress members' reluctance to vote in favor of such legislation and the fact that congressional challengers often use an incumbent's "yes" vote against the incumbent in election campaigns.[180] This fear, or attention to public perception, in turn makes members of Congress more likely to think in terms of and vote along with debt reform measures introduced by their more fiscally conservative colleagues, in part as reparations for their prior uncontrolled spending.

Second, debt limit increase legislation falls under the jurisdiction of the Senate Finance and the House Ways and Means Committees, rather than the party-dominated Budget Committees.[181] Thus, the debt limit statute and the passage of debt ceiling increases remove some of the emphasis on majority party priorities from the fiscal policymaking process. As discussed in Part II.B.2, the congressional budget process lends itself to being commandeered by majority party leaders, absent significant input from other members of Congress, and can tend to contain disproportionate concessions to the interest groups favored by that party. Votes to increase the debt limit make majority party members publicly accountable for the consequences of their budget priorities, as highlighted by members' reluctance to take debt limit votes and by inventions such as the Gephardt Rule.[182] Moreover, such votes give average majority party members, minority members, and the traditionally fiscally conservative members of the Senate Finance and House Ways and Means Committees a voice in the national borrowing process as well as a chance to elucidate the link (often

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[178] *See, e.g.*, *id.* at 37–38; LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 206 (2d ed. 1987).

[179] *See infra* Part III.B (discussing specific instances in which debt limit votes inspired legislative reform or summits aimed at debt reduction).

[180] *See, e.g.*, Ghent, *supra* note 144 (discussing political difficulty of debt limit increases and efforts to shield such legislation by passing it along with supplemental appropriations measures); 7 CONG. Q. SERVICE, *supra* note 49, at 42–43; KINGDON, *supra* note 117, at 49, 122, 181–82, 267.

[181] *See, e.g.*, CONG. RESEARCH SERV., No. 96-912 Gov., *A Brief Introduction to the Federal Budget Process*, *available at* http://www.ncseonline.org/nle/crsreports/information/info-6b.cfm (last visited Nov. 22, 2004).

[182] *See* text accompanying note 254; *see also* sources cited *supra* notes 180–181.

intentionally obfuscated by majority party leaders) between government budget policies and the need for national borrowing.[183]

Third, and related to the second, interest groups do not plague, or even truly participate in, the debt limit increase process the way they do in the appropriations and general budget processes. Strategically, it makes sense for special interest groups to lobby members over forcefully concerning annual appropriations bills that immediately affect them, because these bills determine whether there will be money available in the coming months for the programs these groups want.[184] In fact, such interest groups often have special relationships with members of the appropriations committees that hold jurisdiction over the funding of their projects, and thus are able to exert influence effectively during this process.[185] Debt limit legislation, however, raises no immediate concerns about the funding for next month's operations. While interest group lobbyists certainly are capable of recognizing the connection between how much the debt limit is increased and the availability of funding for their operations one or two years down the line, that connection is remote and non-threatening.[186] Hundreds of individual appropriations combine to make up the annual deficit (amount of national borrowing), so no one interest group has any reason to think that its particular appropriations will be cut in order to stay within the new debt limit, even if the limit set for the next year or two dictates an overall cut in expenditures. This is especially true for interest groups that are entrenched with their respective appropriations committee members.

In fact, special interests may well want to distance themselves from the larger debate about the debt limit, for fear of identifying themselves or their programs as related to or even responsible for the deficit and mounting debt. Further, even if a particular interest group believed that the level at which the debt limit was being set would require future cuts in its fund-

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[183] *See, e.g.*, *Treasury Revises Debt Ceiling Deadline to Mid-May*, CONG. DAILY, May 1, 2002, Appropriations (quoting comments by members of Congress regarding the relationship between the Bush Administration's $1.35 trillion tax cut and the need for a $450 billion increase in the debt limit in 2002); *see also It's All In How You Look At It*, CONG. DAILY, May 16, 2002, Budget (describing the statutory debt limit as a "powerful political tool for the minority" and a "powerful reminder" of the necessity for structural reform of Social Security and Medicare).

[184] *See* WILDAVSKY & CAIDEN, *supra* note 72 (explaining that appropriations must be voted each year if program funding, including funding for government agencies, is to continue).

[185] *See, e.g.*, Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 801 (1999) (arguing that "Congress is in its least deliberative cast of mind in the appropriations process, where members routinely auction off government largesse to the interest groups that are best positioned to support members' reelections"); *see also* WILDAVSKY & CAIDEN, *supra* note 72, at 53 (describing the relationship between "specialized publics" and government agencies, and these agencies' ongoing contacts with appropriations committees).

[186] *See* Elizabeth Garret, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 415 (1998) (explaining that interest groups have limited incentives to become actively involved in macrobudgeting legislation because they cannot be certain how such big picture fiscal decisions will affect their particular programs).

ing and wished to lobby against this, the group would not be as well placed to do so: it is the Senate Finance and the House Ways and Means Committees that handle debt limit legislation, not the appropriations committees with whom the interest group may have special influence.[187]

Fourth, the debt limit statute serves a deliberative function, encouraging members of Congress to live up to the deliberative principles expressed in republicanism theories of legislative behavior.[188] Specifically, the single-issue nature of debt limit increase legislation enables those members of Congress who are so inclined to devote greater attention to consideration of the national debt, and the fiscal policy that engendered it, than is possible in the time-pressured annual budget process. In fact, the budget appropriations and reconciliation processes have grown so time-pressured and complicated that adequate deliberation no longer is possible on the myriad provisions of annual funding or entitlement legislation,[189] let alone on "tangential" issues such as the impact that such budget legislation will have on the national debt. Because deliberations about debt limit increases are passed as separate legislation outside the appropriations and reconciliation processes (unless Congress makes the increase part of an omnibus appropriations or reconciliation package), they provide an independent opportunity for discussions about the national debt and the reasons for its growth and give members of Congress who are truly concerned with the size of the debt a forum in which to suggest changes aimed at putting the nation's fiscal house in order.[190]

This Article does not intend to suggest that debt limit increase bills, which are themselves time-sensitive, must-pass legislation, provide a perfect forum for deliberation about the national debt. The point rather is that they provide at least some forum for such deliberation. In fact, debt limit increase bills have served not only as vehicles for bipartisan fiscal reform

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[187] *See, e.g.*, Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1182–83 (1993) (arguing that the broad jurisdiction of the House Ways and Means and Senate Finance committees keeps them freer from interest group influence and capture than committees with jurisdiction over one substantive area, such as the Agriculture Appropriations Subcommittees).

[188] *See supra* Part II.B.3.

[189] *See* Devins, *supra* note 9, at 396–99 (1988); Krishnakumar, *supra* note 127, at 616–18.

[190] *See, e.g.*, *Increase in Federal Debt Limit: Testimony Before the Subcomm. On Long Term Growth and Debt Reduction of the Sen. Comm. On Finance*, 107th Cong. 105 (2002) (statement of Gene B. Sperling, Visiting Fellow, Brookings Institution) (discussing historical trends in debt incurrence and repayment from 1980s to 2002); 145 CONG. REC. H661–701 (daily ed. Feb. 23, 1999) (discussing growth of national debt in past five years alone and advocating repeal of Gephardt Rule); S. REP. NO. 99-144, at 27 (1985) (including statements by Senator Armstrong discussing size of national debt, history of its growth, amount paid in interest on debt each year, and advocating debt reduction plans), *reprinted in* 1985 U.S.C.C.A.N. 979, 985; S. REP. NO. 98-279, at 13 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1475, 1479–80 (including statements by Senator Symms (R-Idaho) that "[i]t is important that the Congress recognize that an increase in the debt ceiling clearly highlights the fiscal problems of our nation" and discussing growth of debt since World War II and need for reducing spending in future).

measures, but as catalysts for subsequent negotiations about debt reduction. As discussed earlier, in 1985, a vote to increase the statutory debt limit produced bipartisan debt reduction legislation in the form of the Gramm-Rudman-Hollings Act.[191] Debate over increases in the debt limit ceiling in 2002 similarly prompted a bipartisan proposal to control government spending and reduce the deficit, although the proposal did not ultimately become law.[192] Likewise, debt limit increase legislation passed in 1979 carried an amendment directing the House and Senate Budget committees to draw up plans for balancing the fiscal 1981 and fiscal 1982 budgets[193] and legislators in 1987 used the debt limit increase bill (in the wake of the Supreme Court's ruling in *Bowsher v. Synar*)[194] to force the Reagan Administration to engage in discussions about a fix for the GRH sequestration procedure and other procedural reforms to the budget process.[195]

III. DEBUNKING POPULAR CRITICISMS OF THE DEBT LIMIT STATUTE

Despite the deliberative benefits it provides, the debt limit statute is far from popular. In fact, it has been the subject of substantial criticism and calls for repeal from a number of political observers and commentators.[196] Such critics level three main charges against the statute: (1) it is an unnecessary anachronism; (2) it functions as a legislative pawn; and (3) it creates threats to the nation's credit rating. These criticisms both exaggerate flaws in the statute's operation and overlook the continuing, constitutionally important, role that the statute plays in the fiscal policymaking process.

A. Reports of the Debt Limit's Irrelevance Are Exaggerated

Critics claim that the evolution of congressional fiscal processes has rendered the statutory debt limit an anachronism, and bills to raise it are no more than retrospective "housekeeping" legislation that serve to effect spending decisions previously made by Congress.[197] In other words, they

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[191] *See supra* text accompanying note 126; *see infra* text accompanying notes 208–209.

[192] *See, e.g., Feingold, Gramm Developing Proposal To Reduce Deficit*, CONG. DAILY, Apr. 8, 2002, Budget.

[193] *See* Act of Apr. 2, 1979, Pub. L. No. 96-5, 93 Stat. 8 (1979) (Long-Muskie amendment, amending the Second Liberty Bond Act (1917)); *see also Congress Uses Debt Limit Measure . . . To Shield Controversial Amendments*, CONG. Q. SERVS., 5 CONG. AND THE NATION, 1977–1980, at 227 (Martha V. Gottron ed., 1981).

[194] 478 U.S. 714 (1986).

[195] *See, e.g.*, Elizabeth Wehr, *Budget Talks Set as Congress Raises Debt Limit*, 45 CONG. Q. WKLY. REP. 985 (1987).

[196] *See, e.g., supra* note 19.

[197] *See, e.g., Use of Trust Funds to Avoid Default, Hearings Before the House Committee on Banking and Financial Services*, 104th Cong. (1995), *available at* 1995 WL 13415405 (testimony of Treasury Secretary Robert E. Rubin) (quoting Congressional Budget Office, *The Economic and Budget Outlook: An Update*, 48, 54 (Aug. 1995) (calling the

argue that the debt limit has become merely a mechanism for allowing government borrowing to catch up to government spending, rather than for creating borrowing policy. This criticism oversimplifies the relationship between government spending and government borrowing and ignores the role that the debt limit plays in checking executive borrowing. First, general government spending decisions never have been tied directly to borrowing decisions, even in the period before the debt limit statute was passed. Rather, during the pre-debt limit era, Congress passed legislation authorizing the Treasury to borrow a specified amount for a given purpose—e.g., to fund war-time spending decisions that either currently were being made or in the near future would be made. Procedurally, this is not much different from what modern debt limit increase legislation does. In fact, the main difference in the two regimes is substantive—i.e., whereas pre-debt limit authorizations of debt issuance arose in connection with a specified purpose, the debt limit statute and modern debt limit increases authorize the Treasury to borrow up to a specified amount, for any, unspecified, purposes.

Further, while the *need* to raise the debt limit might be considered retrospective housekeeping necessitated by prior government spending, the accumulation of which has caused the debt ceiling to be reached, the determination of how high to set the new limit is a prospective one requiring congressional evaluation of how much the nation should be allowed to borrow to meet upcoming spending needs. Nor is the amount by which the debt limit must be increased a foregone conclusion; in fact it is a subject on which Congress and the President have disagreed on a number of occasions, each time with the President advocating higher increases than Congress has been willing to authorize.[198] In this sense, modern debt limit increase decisions are not unlike pre-1917 decisions to authorize

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debt limit an "anachronism")); George Hager, *Debt-Ceiling: Short Term Focus*, 48 CONG. Q. WKLY. REP. 2485, 2485 (1990) (describing debt limit as "simple fiscal housekeeping" that "typically attracts numerous controversial riders").

[198] Congress has, for instance, approved debt limit increases in amounts smaller than that requested by the President in 1958, 1959, 1962, 1973, 1989 and 2002. *See* 4 CONG. AND THE NATION, *supra* note 172, at 62–63 (describing congressional extension of the existing $465 billion limit and subsequent increase of the limit to $475.5 billion despite President's request for a $485 billion ceiling); *GOP Pushes $450 Billion Debt Limit Increase Through*, USA TODAY, June 27, 2002, *available at* http://www.usatoday.com/news/washington/2002/06/28/debtlimit.htm (describing Congress's passage of a $450 billion debt limit increase instead of $750 billion increase requested by President); sources cited *supra* note 93; *see also* 8 CONG. AND THE NATION: 1989–1992 44 (Colleen McGuiness ed., 1993) (stating that Congress extended the limit to $3.12 trillion, $120 billion less than the amount requested by the Treasury); Jackie Calmes, *Debt Bill*, 47 CONG. Q. WKLY. REP. 2767 (1989) (Treasury requested $3.24 trillion limit). In inflation-adjusted dollars, this means that Congress passed an increase that was $40.14 billion less than the President requested in 1973 ($9.5 billion less in 1973 dollars), $312.8 billion less in 2002 ($300 billion less in 2002 dollars), and $165.3 billion less than in 1991 ($120 billion less in 1991 dollars). *See* BUREAU OF LABOR STATISTICS, *supra* note 45 (using index of 44.4 for 1973, 179.9 for 2002, and 136.2 for 1991).

borrowing for upcoming (wartime) spending needs, in an amount determined by Congress.

Second, if the debt limit statute were repealed, and the Treasury Department given permanent, standing authority to incur debt, Congress would abdicate its control over the power to borrow and expand executive branch authority over government borrowing to an extent impermissible in our separation of powers system. For without the debt limit, all control over debt issuance would shift to the Treasury Secretary, a member of the President's Cabinet, leaving the President effectively in command of government borrowing. The suggestion that such a transfer of power would have no noticeable effect on the nation's borrowing policy because it relates to a "housekeeping" matter is at best unconsidered. Indeed, such a transfer of power might well amount to an unconstitutional delegation of legislative power to the executive branch.[199]

There is a reason that those who drafted the constitution located the power to borrow, along with the power to tax, in the legislative rather than the executive branch: they wanted to keep these important fiscal powers close to the American people rather than give the electorally removed President unfettered discretion to make decisions that would affect the people's pocketbooks.[200] Indeed, absent the need for congressional consent to issue debt, the President could cause the government to borrow well beyond anticipated amounts, with little public accountability. The President would have an incentive to underplay or even obfuscate the expected cost of programs or tax policies favored by his party, secure in the knowledge that he controlled the government's ability to issue debt to pay for these policies and that such debt could be incurred with impunity, absent a public vote or debate in Congress. Congress could of course seek to revise

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[199] Because the federal constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. CONST. art. I. § 1, courts have held that Congress generally cannot delegate its legislative power to another branch. *See* Field v. Clark, 143 U.S. 649, 692 (1892). However, modern courts also have recognized the practical necessity of allowing Congress to delegate some of its power, and thus allow such delegation where Congress lays down "intelligible principles" to guide (or cabin) the delegatee's exercise of power. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989). Although its constitutionality does not appear ever to have been questioned, the debt limit statute seems to be a valid delegation of Congress's borrowing authority to the Treasury Secretary because it places several constraints or guidelines on the Secretary's authority, *see supra* Part I.B.1 and text accompanying notes 154–155, as well as maintains congressional control over the absolute borrowing amount through the debt ceiling. If, however, the statute were eliminated, and the Treasury Secretary given unfettered authority to borrow, the "intelligible principles" rule, and the nondelegation doctrine, might well be violated.

[200] *See, e.g.*, THE FEDERALIST No. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that Congress's "power over the purse, may in fact be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people"); 3 THE FOUNDERS' CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987) (debate of Mar. 1, 1793) (reporting comment made by James Madison shortly after ratification of the constitution that "appropriations of money [are] of a high and sacred character; [they are] the great bulwark which our Constitution [has] carefully and jealously established against Executive usurpations").

programs or policies once their true costs became clear down the line, but it would lack the ready-made public forum for calling attention to such costs that currently is provided by deliberation on votes to increase the debt limit.[201]

Third, elimination of the debt limit statute would absolve Congress of its accountability for government borrowing and the size of the national debt and could cause Congress to abandon entirely its duty to manage the level of the nation's indebtedness (the Principle of Control).[202] In fact, Congress could conspire with the President in an effort to hide from the public the consequences of the government's budget policies. In other words, repeal of the debt limit statute could encourage the worst tendencies of interest group politics—i.e., rampant logrolling with little incentive at any level of government to worry about the growth of the national debt and its effect on the diffuse, unorganized general public, let alone on future generations. These potential ramifications of eliminating the debt limit demonstrate that it is much more than an inconsequential "catch-up" mechanism, but in fact an important check against congressional and executive fiscal irresponsibility.

In truth, the reason that debt limit increases appear to constitute mere housekeeping legislation is because they fail to connect the government borrowing they authorize with a purpose, as was the case earlier in the nation's history. But the solution to this problem is to reform the statute to create greater correlation between spending purposes and borrowing, not to eliminate the debt limit statute and congressional control over national borrowing altogether.

B. The Legislative Pawn Myth

There is a pervasive belief among political commentators that Congress regularly uses debt limit increases as a tool or vehicle for enacting numerous unrelated measures that could not garner enough support to pass on their own or to force the President to accept policies he otherwise would veto.[203] But this belief is the product of collective misconception. In fact,

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[201] For instance, when President George W. Bush's enormous and underestimated tax cuts and defense spending necessitated nearly $1.4 trillion in increases to the debt limit in 2002 and 2003, Congress was able to use the debt limit votes to bring to light the true costs of these measures. *See, e.g.*, Press Release, Sen. Tom Carper, Carper Statement on passage of Tax Cut Bill and Debt Limit Hike (May 23, 2003), *available at* http://carper.senate.gov/press/03/05/052303.html (last visited Nov. 16, 2004) (describing Bush tax cut bill as "clouded by smoke and mirrors that mask its true costs" and citing evidence that bill would cost $1 trillion, rather than the $350 billion estimate given by Republicans); 149 CONG. REC. S7092 (daily ed. May 23, 2003) (statement of Sen. Sarbanes). Had these debt limit votes not been necessary, and had President Bush's Treasury Secretary instead had carte blanche to issue debt without congressional review, these costs likely would not have been brought to the public's attention.

[202] *See supra* Part II.A.

[203] *See, e.g.*, Jackie Calmes, *Riders Line Up for Free Trip On Must-Pass Debt Bill*, 47

an analysis of the final version of debt limit increase legislation passed by Congress in the past twenty-five years demonstrates that increases to the limit usually are passed in "clean" form, without unrelated attachments.

Specifically, the statutory debt limit was increased forty-two times in the twenty-five-year period between 1978 and 2002, inclusive.[204] Of the forty-two bills enacted to raise the debt limit during this period, thirty were passed in clean form with no amendments or additional provisions hitching a ride to the must-pass increase.[205] Further, of the remaining twelve bills, five contained only minor amendments implementing procedural changes to the debt limit statute itself—e.g., the Gephardt Rule, and modifications in the amount of long-term bonds that the Treasury can issue.[206]

CONG. Q. WKLY. REP. 2767, 2767 (1989) (describing debt measures as a "vehicle" on which legislators attempt to "hitch rides for pet proposals that otherwise might not pass or be signed into law on their own"); Stephen Gettinger, *supra* note 18, at 1400 (calling the debt limit a "grenade" to be used against the White House); George Hager, *Debt Limit Revisited*, 48 CONG. Q. WKLY. REP. 2030, 2030 (1990) (describing debt limit increases as "a magnet for controversial add-ons"); Wehr, *supra* note 195, at 988 ("Debt bills attract the most troublesome amendments because their authors hope that the essential nature of the legislation will overwhelm [White House] objections to their proposals").

[204] *See generally* PHILIP D. WINTERS, CONG. RESEARCH SERV., NO. 96-110E DEBT LIMIT INCREASES, 1978 TO 1995 FACT SHEET ON USES OF THE DEBT LIMIT FOR OTHER LEGISLATION (1996) (listing 37 instances of increases) [hereinafter DEBT LIMIT INCREASES]; 52 CONG. Q. ALMANAC 2-25 to 2-27 (Jan Austin ed., 1996) (describing passage of three debt limit increases in early 1996); 53 CONG. Q. ALMANAC 2-52 (Jan Austin ed., 1997) (reporting passage of one debt limit increase bill in 1997); 58 CONG. Q. ALMANAC PLUS 6-10 (Jan Austin ed., 2002) (discussing one increase in 2002).

[205] *See* Act of June 28, 2002, Pub. L. 107-199, 116 Stat. 734; Act of Mar. 12, 1996, Pub. L. No. 104-115, 110 Stat. 825; Act of Feb. 8, 1996, Pub. L. No. 104-103, 110 Stat. 55; Act of Oct. 21, 1993, Pub. L. No. 103-12, 107 Stat. 42; Act of Oct. 2, 1990, Pub. L. No. 101-405, 104 Stat. 878; Act of Aug. 9, 1990, Pub. L. No. 101-350, 104 Stat. 403; Act of May 15, 1987, Pub. L. No. 100-40, 101 Stat. 308; Act of Aug. 21, 1986, Pub. L. No. 99-384, 100 Stat. 818; Act of Aug. 13, 1984, Pub. L. No. 98-475, 98 Stat. 2206; Act of July 6, 1984, Pub. L. No. 98-342, 98 Stat. 313; Act of Nov. 21, 1983, Pub. L. No. 98-161, 97 Stat. 1012; Act of Sept. 30, 1982, Pub. L. No. 97-270, 96 Stat. 1156; Act of June 28, 1982, Pub. L. No. 97-204, 96 Stat. 130; Act of Sept. 30, 1981, Pub. L. No. 97-49, 95 Stat. 956; Act of Sept. 30, 1981, Pub. L. No. 97-48, 95 Stat. 955; Act of Feb. 7, 1981, Pub. L. No. 97-2, 95 Stat. 4; Act of Dec. 19, 1980, Pub. L. No. 96-556, 94 Stat. 3261; Act of June 28, 1980, Pub. L. No. 96-286, 94 Stat. 598; Act of May 30, 1980, Pub. L. No. 96-256, 94 Stat. 421; Act of Aug. 3, 1978, Pub. L. No. 95-333, 92 Stat. 419; Act of Mar. 27, 1978, Pub. L. No. 95-252, 92 Stat. 185. Seven more "clean" increases were passed by including the change to the debt limit as part of reconciliation or other omnibus budget legislation. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251; Act of Oct. 28, 1990, Pub. L. No. 101-467, 104 Stat. 1086 (debt limit increase included in continuing resolution on appropriations); Act of Oct. 25, 1990, Pub. L. No. 101-461, 104 Stat. 1075 (same); Act of Oct. 19, 1990, Pub. L. No. 101-444, 104 Stat. 1030 (same); Act of Oct. 9, 1990, Pub. L. No. 101-412, 104 Stat. 894 (same); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (imbedded in Title XIII, § 13411 of omnibus reconciliation bill); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990) (imbedded in Title XI, § 11901 of omnibus reconciliation bill). *See generally* WINTERS, *supra* note 204.

[206] *See* Act of Aug. 7, 1989, Pub. L. No. 101-72, 103 Stat. 182 (debt limit increase bill contains provision for changing the method of accounting for federal debt instruments); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986) (noting debt limit imbedded in omnibus reconciliation bill, and the bill also contains a provi-

Thus, only seven of forty-two debt limit increase bills passed in twenty-five years carried amendments that did not specifically affect the debt limit statute. Three of these seven bills, moreover, contained amendments that did relate to the national debt, although they did not modify the debt limit statute. These were the Long-Muskie amendment to a 1979 debt limit increase, which required Congress and the President to present balanced budgets for fiscal years 1981 and 1982;[207] the Gramm-Rudman-Hollings amendment to a 1985 debt limit bill, requiring deficit (and therefore debt) reduction for the next five years;[208] and the Gramm-Rudman amendment to a 1987 debt limit bill,[209] which reaffirmed GRH and revised the sequestration procedure invalidated by the Supreme Court in *Bowsher v. Synar*.[210]

In other words, only four of forty-two bills passed to increase the debt limit in the past twenty-five years—that is, less than ten percent—have served as vehicles for the enactment of measures wholly unrelated to debt issuance, debt accounting, or the debt ceiling.[211] Of course, these statistics do not account for the number of times that members of Congress offered unrelated amendments to debt limit increase legislation, but only for the number of times they succeeded in attaching amendments to such legislation. There is an institutional cost, in terms of time and deliberation, to the consideration of such would-be amendments even if they ultimately are rejected,[212] and there certainly is room for reform of the debt

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sion requiring restoration of interest lost to trust funds during the debt limit crisis in 1985); Act of May 25, 1984, Pub. L. No. 98-302, 98 Stat. 217 (increasing the amount of long-term bonds that could be issued and providing additional administrative authority to the Treasury Secretary); Act of May 26, 1983, Pub. L. No. 98-34, 97 Stat. 196 (adding provision eliminating the temporary part of the debt limit, making the entire debt limit permanent, and increasing the amount of long-term bonds that could be issued); Act of Sept. 29, 1979, Pub. L. No. 96-78, 93 Stat. 589 (containing an increase in the amount of long-term bonds that could be outstanding and establishing House Rule XLIX to make House approval of increases in the debt limit automatic upon passage of the budget resolution).

[207] Act of Apr. 2, 1979, Pub. L. No. 96-5, 93 Stat. 8.

[208] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037.

[209] Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (1987).

[210] 478 U.S. 714 (1986).

[211] *See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (attaching unrelated measures including an increase in the Social Security earnings limit, an expansion of small-business access to federal courts to challenge federal regulations, as well as the line-item veto conference report); Act of Nov. 8, 1989, Pub. L. No. 101-140, 103 Stat. 830 (attaching unrelated amendment repealing nondiscrimination rules dealing with employee benefit plans in tax code); Act of Nov. 14, 1985, Pub. L. No. 99-155, 99 Stat. 814 (attaching unrelated provision to extend several expiring acts, including a cigarette tax for one month, and a debt-related provision requiring restoration of Social Security Trust Funds); Act of June 6, 1980, Pub. L. No. 96-264, 94 Stat. 439 (attaching unrelated repeal of oil import fee imposed under President Carter under the Trade Expansion Act of 1962; after being vetoed by Carter, this provision became law as a result of a congressional override).

[212] *See, e.g.*, 4 CONG. AND THE NATION, *supra* note 172, at 63 (discussing Senate efforts to attach unrelated measures, including legislation pertaining to federal financing for presidential election campaigns, which although dropped before passage of the final ver-

limit statute to discourage even the offering of such unrelated amendments, as discussed below in Part IV. But even absent reform, the fact that less than ten percent of debt limit increase bills passed between 1978 and 2002 carried non-debt-related amendments demonstrates the lie in the perception that the debt limit statute promotes the undesirable or nonmajoritarian enactment of measures that otherwise would not garner enough votes to pass Congress.

Nor has the debt limit proved an effective vehicle for forcing the President to accept legislation he otherwise would veto. On the contrary, history teaches that presidents are quite willing to veto debt limit increase legislation, despite its must-pass nature, when such legislation contains policy measures that the executive branch cannot stomach. Congressional efforts to blackmail the President into accepting massive fiscal policy reforms by attaching the "Contract with America" agenda to a debt limit increase backfired spectacularly in 1995.[213] A congressional attempt to trap the President into changing a controversial oil import policy in 1980 likewise met with a veto.[214] Significantly, these are the only two times Congress actually has attached to debt limit legislation unrelated measures it knows the President to oppose, rather than merely contemplated such measures but then dropped them from the bill's final version. In fact, aside from the oil import amendment in 1980, the few non-debt-related amendments that Congress has attached to debt limit increase legislation have involved popular measures to which the President had no objection.[215]

Thus, fears or criticisms that debt limit legislation serves as a legislative pawn and a weapon against the President are greatly exaggerated and do not support calls for repeal of the debt limit statute or ceiling. Indeed, to the extent that debt limit increase legislation can be used to in-

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sion of the debt limit bill, stalled enactment of the debt limit increase until two days after the previous limit expired).

[213] *See* 51 CONG. Q. ALMANAC, *supra* note 136, at 2-63 to 2-65 (1995); WILDAVSKY & CAIDEN, *supra* note 72, 325–26.

[214] *See* DEBT LIMIT INCREASES, *supra* note 204, at CRS-2. Congress then overrode the veto, making its preferences law, but it failed in its effort to get the President to acquiesce in the policy change.

[215] *See* 52 CONG. Q. ALMANAC, *supra* note 204, at 2-25–2-27 (characterizing Social Security earnings limit and small business court access amendments to 1996 debt limit bill as "sweeteners"); *id.*, at 2-25 (calling amendment to 1996 debt limit increase bill that increased the Social Security earnings limit "widely popular"); 45 CONG. Q. ALMANAC 19 (Robert W. Merry ed., 1989) (describing 1989 amendment repealing nondiscrimination regulations dealing with employee benefits as "popular"). It is true that debt limit increase legislation helped carry budget reform in 1985 (GRH) and forced promises for budget negotiations and balance in 1987 and 1979, respectively. But those debt limit bills did not "force" anything upon the President; President Reagan favored GRH in 1985, and a promise to negotiate towards deficit reduction was not a substantive concession to which President Carter was opposed in 1979. *See, e.g.*, George Hager, *Reconciliation: Finding Ways Around Disaster*, 37 CONG. Q. WKLY. REP. 2864, 2864 (1995) (observing that Reagan initially supported GRH and "jumped to endorse it publicly").

spire discussions or promises to discuss debt reduction, this is a positive feature and should be encouraged.

C. The Debt Limit and Threats to the Nation's Credit

Finally, the debt limit has been criticized for creating situations that threaten the credit and financial standing of the United States government.[216] Specifically, critics complain that congressional efforts to attach unrelated amendments or fiscal reform packages to debt limit increase legislation bog Congress down and delay enactment of the increase legislation itself, sometimes until after the date when the current limit is reached. This in turn can bring the nation to the "brink" of default on its outstanding obligations, as the Treasury is left without authority to borrow additional funds needed to make timely payments on its loans.[217] The threat of default, even absent actual default, is said to cause market uncertainty regarding the United States' ability to honor its financial obligations and accordingly to cost (or threaten to cost) the nation in elevated premiums and yield rates.[218]

Of the criticisms leveled against the debt limit statute, this is the most legitimate. But it too is exaggerated. While it is true that debt limit increase bills sometimes become delayed, Congress always ultimately has passed them.[219] In fact, in the eighty-six years since the debt limit statute was enacted, the nation never once has defaulted on its obligations. Moreover, debt limit crises, during which a real possibility of default emerges as a result of congressional delays in raising the debt ceiling, have been few and far between.[220] Indeed, the lessons learned from the most infamous such crisis in 1995 will likely discourage future excessive delay in raising the debt ceiling, teaching Congress that there is a public price to pay for holding the debt limit hostage, even in pursuit of budget balance or debt reduction, and that Congress rather than the President would bear the political blame for provoking a debt limit default.[221]

Moreover, if and when a debt limit crisis does occur, Congress has created a safety net by providing the Treasury Secretary with authorization to engage in a number of maneuvers that allow the government to stay

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[216] *E.g.*, Press Release, Dept. of Treasury, Remarks of Assistant Secretary for Financial Markets Brian C. Roseboro to the Bond Market Association's Inflation-Linked Securities Conference New York, NY, No. JS-506 (June 26, 2003) *available at* http://www.ustreas.gov/press/releases/js506.htm (commenting that, in 2002, "the U.S. was placed on 'credit watch' by Moody's").

[217] *See id.*; Abramowicz, *supra* note 19, at 578–79.

[218] *See* Press Release, *supra* note 216.

[219] 58 CONG. Q. ALMANAC PLUS, *supra* note 204, at 6-11.

[220] Such crises have occurred only in 1985 and 1995. *See supra* Part I.C.3, text accompanying notes 128–132 (discussing 1985 crisis); George Hager, *Budget Battle Came Sooner Than Either Side Expected*, 53 CONG. Q. WKLY. REP. 3503, 3508 (1995) (discussing 1995 crisis).

[221] *See* WILDAVSKY & CAIDEN, *supra* note 72, at 330–35.

technically within the debt limit, and thus to prevent default, until a debt ceiling increase is enacted. These maneuvers include delaying auctions of marketable securities, suspending investment in the Civil Service Retirement and Disability Fund, and selling securities or other assets held by the Fund before maturity.[222] Once the limit has been raised, Congress has instructed the Treasury Secretary to undo the effects of its crisis-period maneuvering by restoring investments and paying interest to any affected funds.[223] Thus, little to no harm actually has come to the nation's credit or financial standing even during the limited periods in its history when congressional foot-dragging has raised the spectre of government default.[224]

But although the likelihood of default on government obligations is hypothetical and exaggerated, and although Congress and the Treasury have invented ample maneuvers to stave off default, the situation created by congressional failure to enact a debt limit increase before the prior limit has been reached is undesirable and should be discouraged. The maneuvers engaged in by the Treasury Secretary, with Congress's consent, are essentially accounting tricks designed to enable the Treasury to borrow beyond the statutory limit without specific congressional authorization. This is problematic from both a political and a constitutional viewpoint because: (1) Treasury gimmickry with government trust funds and auctions creates an appearance that the rules governing those entities are manipulable and that Congress views these funds as less than sacred, and (2) such maneuvering circumvents, for a limited period of time, the legislative check on national borrowing. But again, the answer to these problems is not to eliminate the debt limit statute or the debt ceiling; it is to reform the statute so as to remove, or at least minimize, the incentives and opportunity for excessive congressional delay in passing debt limit increases, as discussed in Part IV.

D. State Experiences with Debt Limits

While state debt limits differ in some respects from the federal debt limit statute, they do offer some transferable lessons. Most notably, the state experience demonstrates the inaccuracy of popular criticisms that debt limits serve no useful function and bear no connection to borrowing policy.

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[222] *See* 5 U.S.C. § 8348(j)–(k) (2000) (added to title by Omnibus Budget Reconciliaton Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874; CONG. BUDGET OFFICE, *supra* note 19 at 52–54.

[223] *See* 5 U.S.C. § 8348(j)–(k).

[224] U.S. Treasury maneuverings sometimes can create minor additional interest costs for the government, but these amounts are negligible relative to the size of the national debt. *See, e.g.*, Press Release, *supra* note 216 (discussing $20–30 million interest cost resulting from delay in timing of a note auction—this interest cost amounts to .0003% of the $7.3 trillion national debt).

Most state constitutions contain some form of debt limitation.[225] These limitations take various forms, ranging from outright prohibitions against incurrence of state debt[226] to different forms of caps on the amount of debt that may be incurred[227] to requirements that issuances of state debt be approved by public referendum or legislative supermajority.[228] Many state constitutions, however, also contain amendments that permit debt incurrence, beyond the general limit, for specific purposes.[229] Although there are a number of ways states can and do get around these limits,[230] the limits generally have served as some form of check on borrowing and the growth of state debt.[231]

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[225] *See* Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1315 (1991).

[226] *See id.* at 1315 & n.80 (citing ARK. CONST. art. XVI, § 1; IND. CONST. art. X, § 5; TENN. CONST. art. II, § 24; W. VA. CONST., art. X, § 4). *See also* D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L. ECON. & ORG. 62 (1996) (Table 1 listing type of constitutional debt limitation each state possesses).

[227] Some state constitutions, like the federal statute, limit state debt to a maximum dollar figure. *See* ARIZ. CONST., art IX, § 5 ($350,000 limit); COLO. CONST. art. XI, § 3 ($100,000); NEB. CONST. art. XIII, § 1 ($100,000); OHIO CONST. art. XII, §§ 1, 3 ($750,000); OR. CONST. art. XI, § 7 ($50,000); TEX. CONST. art. III, §49 ($200,000); VA. CONST. art. X, § 9 (setting limit but permitting issuance of revenue bonds, if authorized by two-thirds of the voters). Others limit the incurrence of new debt as a percentage of total revenue or of assessed value. *See* GA. CONST. art. VII, § IV (no new debt if debt service exceeds 10% of total revenue from the preceding fiscal year); HAW. CONST. art. VII, § 13 (debt service may not exceed 18.5% of average general fund revenues in the state over the past three fiscal years); NEV. CONST. art IX, § 3 (debt limited to 1% of assessed value); UTAH CONST. art. XIV, § 1 (debt limited to 1.5% of value of taxable property).

[228] A handful of states set a maximum cap on debt but require a public referendum or legislative supermajority even for the issuance of debt that does not exceed the cap. *See* KAN. CONST. art. XI, §§ 6-7 (referendum), WYO. CONST. art 16, §§ 1, 2 (referendum), S.D. CONST. art. XIII, part 1. Another set of states permits unlimited debt, but only if the incurrence of debt is approved by public referendum. *See* FLA. CONST. art. VII, § 11; IDAHO CONST. art. VIII, § 1; KY. CONST. § 50; MO. CONST. § 37; N.J. CONST. art. VIII, § 3; N.Y. CONST. art. VII, § 11; N.C. CONST. art. V, § 3; PA. CONST. art. VIII, § 7; R.I. CONST. art. of amend. XXXI, § 1. A few states permit unlimited debt without a referendum if the debt is approved by a legislative supermajority. *See* DEL. CONST. art. VIII, § 3 (three-quarters of each legislative chamber must approve); Ill. Const. art. IV, § 9(b) (three-fifths of each chamber must approve); MASS. CONST. art. 62 (two-thirds of each chamber must approve). Another group of states requires both a legislative supermajority and approval by public referendum. *See* CAL. CONST. art. XVI, § 1; ME. CONST. art. IX, § 14; MICH. CONST. art. IX, § 15.

[229] *See* Sterk & Goldman, *supra* note 225, at 1316.

[230] *See, e.g.*, Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 1991 WAKE FOREST L. REV. 925, 936–37 (1991) (describing "inventiveness and creativeness" of state finance officers in circumventing state debt limits and listing some of their methods); Kiewiet & Szakaly, *supra* note 226, at 63–64 (noting that "constitutional debt limitations are not insurmountable obstacles"); Sterk & Goldman, *supra* note 225, at 1330–33 (discussing state debt limit "escape devices," including "special fund" financing for particular projects, leasing arrangements whereby states pay "rent" instead of pay interest on bonds, and the creation of quasi-independent "public authorities" that can borrow to accomplish a specific project).

[231] *See, e.g.*, S. REP. No. 104-5, at 11 (1995), reprinted in U.S.C.C.A.N. (commenting that "continued deficit spending by the States has been a rarity" and that "more States incur

State experiences with debt limitations differ from the federal experience in that state debt limitations effectively require state legislators (supermajority states) or the public (referendum states) to approve specific instances of debt issuance, for specific purposes. Even when states seek to end-run debt limits without submitting to referendum or supermajority votes, such end-runs typically meet with legal challenges and require resolution in court, where judges evaluating the compliance of legislative issuances of debt with the state constitution tend to focus—either overtly[232] or covertly[233]—on the purpose for which debt is used. Thus, state issuance of debt seems to maintain some of the borrowing-purpose connection and accountability that is missing at the federal level, by requiring the functional equivalent of the pre-1917 federal debt issuance system—i.e., individual votes and approval of each and every debt issuance (above the constitutionally established maximum).

Notably, one empirical study of state debt limitations has found that states that prohibit debt incurrence altogether, by placing a dollar limit on debt incurrence, or requiring approval by public referendum before debt may be incurred are particularly effective at controlling or minimizing state debt issuance.[234] The study interestingly also has found that legislative supermajority requirements for raising constitutional debt limitations are ineffective, and in fact tend to lead to greater debt incurrence than does the absence of debt limitations altogether.[235] The authors of the study suggest that this is because supermajority requirements produce borrowing logrolls in which legislators exchange costly favors in order to assemble the higher number of votes necessary to pass a debt limitation increase. They argue that this should serve as a lesson for Congress about the uselessness of balanced budget and other debt reduction proposals that seek to limit debt incurrence through the use of a supermajority voting requirement.[236]

The state experience with debt limits thus indicates that the existence of a borrowing maximum tends to have some minimizing effect on

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general surpluses than incur general deficits"); Goldner, *supra* note 230, at 950–51 (noting that "debt limits serve a very real purpose"); Kiewiet & Szakaly, *supra* note 226, at 63, 93 (empirical study finding that states that certain types of state debt limitations—e.g., referendum requirements—are highly effective at limiting state debt issuance); Sterk & Goldman, *supra* note 225, at 1302 ("Constitutional debt limits, even if often underenforced, have served effectively to protect against the worst sorts of legislative abuse.").

[232] *See, e.g.*, Sterk & Goldman, *supra* note 225, at 1348–51 (describing Virginia Supreme Court's "animating purpose test," which upholds projects it believes fall within the realm of "proper governmental function" and rejects projects that do not).

[233] *See id.* at 1340–48, 1351–58 (arguing that judicial review of Kentucky, Illinois, Virginia, and Florida legislatures' special fund and public authorities borrowing decisions effectively operates as a "second look" at the decision to incur debt, with courts upholding those borrowing decisions whose purpose they approve and invalidating those which they do not approve).

[234] *See* Kiewiet & Szakaly, supra note 226 at 63, 93.

[235] *See id.* at 93.

[236] *See id.*

the amount that legislatures borrow, particularly if there must be public involvement and accountability before the maximum can be exceeded. Analogizing to the federal context, this data suggests that the existence of a statutory debt ceiling acts as a check against excessive executive and congressional borrowing, and that the public accountability associated with debt limit increase votes serves as an incentive for Congress to minimize the overall amount of debt incurred on the nation's behalf.

IV. Proposals for Reforming the Debt Limit Statute and Internal Legislative Procedures

In order to adequately address both the constitutional obligations and the practical criticisms concerning national borrowing discussed in earlier parts of this Article, suggested reforms to the debt limit statute and debt ceiling increase procedures should proceed from a few basic principles: (1) there should be greater congruence between government borrowing and its purpose; (2) Congress should be accountable to the public for its borrowing decisions and for the size of the national debt; (3) incentives for, and the likelihood of, delays in passing debt limit increases that cause the debt ceiling to be breached should be eliminated or at least minimized; and (4) while there is nothing wrong with national debt and some level of debt financing is necessary and even desirable for government projects, congressional debate and deliberation over methods for controlling the size of the debt should be encouraged. To these ends, this Article recommends the following reforms.

A. Changes in Internal Legislative Rules

1. Rule Changes that Promote Congressional Accountability

The following proposals aim to give the debt limit statute additional teeth (or replace some of the teeth that have been removed in the past by resourceful legislators) and prevent members of Congress from using debt limit legislation as a mere catch-up mechanism[237] rather than to face up to the aggregate consequences of their borrowing and spending policies. First, the House of Representatives should repeal the Gephardt Rule providing for automatic increases in the debt limit as stated in the budget resolution. This Rule operates as a legislative sleight-of-hand that enables the House to avoid public accountability for its borrowing choices and, as a result, encourages abdication of Congress's constitutional duty to manage or control the amount of debt incurred. The Principle of Borrowing and Debt Control,[238] derived from the power to borrow and the duty to repay debt, re-

[237] *See supra* Part III.A.
[238] *See supra* Part II.A.

quires more from Congress than the automatic approval of a borrowing figure chosen by the Treasury, President, or even the budget resolution (which after all is crafted by the Budget Committee and party leaders); it requires congressional contemplation of the need and purpose for additional debt incurrence and some evaluation of the debt repayment path on which the nation is headed. The Gephardt Rule allows most members of Congress (435 of 535) to escape this public reckoning by making the amount of debt limit increases seem automatic, inevitable, and technical. Moreover, it closes off opportunities for individual members of the House to bring to the fore any concerns they might have about the reasons for congressional borrowing. In short, the Gephardt Rule makes congressional decisionmaking about debt issuance a veiled rather than publicly visible process and thus serves the needs of majority party leaders, and at times the President, at the expense of the congressional rank and file.[239]

Second, Congress should institute a new procedural rule, perhaps as part of the debt limit statute itself, requiring that increases in the debt limit be passed as a separate piece of legislation, independent of omnibus budget reconciliation bills or continuing resolutions. Inclusion of a debt limit increase in omnibus budget legislation provides even greater insulation and opportunity for shirking accountability on debt limit votes than does the Gephardt Rule. Like the Gephardt Rule, such bundling allows members of Congress to duck their accountability for raising the debt limit by rendering the vote to increase merely a side-note to a much larger measure. Worse, bundling exacerbates the problems of the Gephardt Rule by extending its political insulation to both chambers of Congress, since omnibus budget reconciliation legislation and continuing resolutions shepherd debt limit increases through the Senate as well as the House. Further, bundling of debt limit bills with omnibus budget legislation enables the President, particularly if his party controls Congress, to push through debt limit increases suited to his budget priorities with little public accountability for the correlation between the two.[240]

Third, Congress should implement a rule requiring that all tax and entitlement legislation passed outside the budget process contain a statement of its expected impact on the size of the national debt and the time frame within which the government will hit the existing debt ceiling. Such a rule would require Congress to spell out for the public the conse-

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[239] *See, e.g.*, Ornstein, *supra* note 135, *available at* http://www.rollcall.com/pub/features/Welcome_Congress/welcome_congress/263-1.html (noting that the Gephardt Rule tends to be favored by the party in the majority and citing Republicans' resurrection of the Rule in 2003 following much complaining about it during periods of Democratic control of Congress).

[240] *See, e.g.*, 9 CONG. AND THE NATION, 1993–1996 55 (Ann O'Connor et al. eds., 1997) (discussing how the Clinton Administration and the Democratic leadership circumvented "lengthy debate" and controversial amendments and passed debt limit increase with "virtually no debate" and "little fanfare" by incorporating the increase into the omnibus reconciliation bill).

quences, in debt terms, of tax cuts and expenditures as well as entitlement spending increases. Moreover, it would create some political cover for Congress at times when it raises taxes or cuts spending, by counterbalancing these unpopular legislative acts with an automatic, required report on the beneficial consequences such measures will have on the national debt.

2. Rule Changes that Minimize Delays in the Debt Limit Process

In addition, both houses of Congress should institute a procedural rule requiring that any amendments offered to a debt limit increase bill be germane. "Germaneness," in this context, should mean related to the debt limit statute itself or related to the incurrence or repayment of debt. Thus, the rule should be defined to permit amendments such as GRH and the Long-Muskie amendment implementing deficit (i.e., "debt incurrence") targets and balanced budgets (i.e., a "no debt incurrence" rule), respectively.[241] A germaneness rule of this type would facilitate the timely passage of debt limit increases by removing from the process the prolonged consideration of unrelated measures that sometimes delays enactment of the increase.[242] Such a rule would go further, in a sense, than the germaneness requirement contained in the Gephardt Rule, since it also would apply to the Senate. But, unlike the Gephardt Rule, it simultaneously would encourage, rather than cut off, congressional deliberation and proposals aimed at debt control.

B. Changes to the Debt Limit Statute

1. The Definition of Debt Subject to Limit

Under the current statute, the debt subject to limit—the amount included in the statutory figure Congress periodically must raise—is composed of two types of debt: Treasury-issued debt held by the public (individuals or non-government entities) and intra-governmental Treasury debt held by government accounts (mostly trust funds).[243] This means that the debt subject to limit is both an over- and under-inclusive reflector of how much money the government has borrowed. It is over-inclusive because it

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[241] *See* discussion and legislation cited *supra* Part III.B, & notes 205–207.

[242] *See, e.g.*, 42 CONG. Q. ALMANAC, *supra* note 133, at 562 (discussing how action on debt limit increase was stalled, in part, due to Senate battles over South Africa sanctions and U.S. aid to contra rebels); 40 CONG. Q. ALMANAC, *supra* note 117, at 166 (explaining that delay in passage of third debt limit increase of the year "was due not to objections over the measure itself, but to a dispute over an arcane real estate tax provision"); 4 CONG. AND THE NATION, *supra* note 172, at 62 (describing how Senate filibuster of unrelated campaign finance amendments delayed final approval of a debt limit increase until after the temporary limit had expired).

[243] *See* WINTERS, *supra* note 134, at CRS-1.

counts as federal debt money that is invested in Treasury bonds by government accounts such as the Social Security Trust Fund, even though such money is invested automatically whenever the trust funds run a surplus, and is in fact unrelated to whether the federal budget runs a surplus or a deficit.[244] It is under-inclusive because it omits some debt issued by the Treasury—e.g., silver certificates, as well as almost all federal agency debt.[245]

Although the relative amount of federal debt excluded from coverage under the statutory debt limit is small,[246] this discrepancy should be corrected in order to render the debt subject to limit a more accurate reflector of the amount of money borrowed (and owed) by the government, and to comply with the constitutional requirement that Congress authorize and manage government borrowing. Similarly, intra-governmental debt held by trust funds and the like should be excluded from the debt subject to limit figure, since it does not in any way reflect debt issued to the public. Removal of intra-governmental debt from the debt limit calculus would enable the debt subject to limit to decline in years when the government runs a surplus, resulting in a number of advantages. First, such a structure would reward Congress and the President publicly for keeping the nation's fiscal house in order and thus would create an extra incentive for such debt reduction. Second, such a structure would allow the statutory debt limit to be lowered if the nation were to put itself on a path to debt reduction, something that is not practical under the current system, in which the debt subject to statutory limit can climb (because of trust fund investments) even in years when the amount of debt held by the public falls. Indeed, it is because of trust fund investments that the debt subject to limit continued to rise from 1998 to 2001, despite budget surpluses and a decline in the amount of debt held by the public.[247]

2. *Timing and Statements of Purpose*

Timing is an important external factor in the debt limit process, exerting subtle pressure and influence on the shape that debt limit legislation takes. A debt limit increase that becomes due in April or May will be handled, debated, and presented to the public differently than one that becomes due in September or October. Hence an important question: Where in the budget cycle should debt limit increases ideally be considered? At

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[244] *See id.*

[245] *See* OFFICE OF MGMT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1997, ANALYTICAL PERSPECTIVES 194 (1996).

[246] *See* WINTERS, *supra* note 134, at CRS-1 and n.1 (estimating the amount of federal debt excluded from the debt limit, as of the end of fiscal year 2001, to be approximately $101 billion, and calculating that the debt limit currently accounts for 98.3% of total federal debt).

[247] *See id.* at CRS-2.

first blush, it might seem that increases in the debt limit should be made a fixed or mandatory part of the annual budget, to be debated and discussed at the budget resolution stage and passed as part of appropriations or reconciliation legislation in the fall.[248] After all, if forcing Congress to pay more attention to the correlation between spending and national debt is a primary goal of debt limit reform, then tying debt legislation to spending legislation would appear to be a logical solution. But this Article does not advocate such an approach, for a number of reasons.

First, experience teaches that folding the debt limit into omnibus budget legislation results in less, not more, deliberation about government borrowing. The budget appropriations and reconciliation processes already are complicated and demand congressional attention to a vast array of funding and revenue issues; as it is, members of Congress often do not have enough time to read, let alone deliberate about, all of the provisions in omnibus budget bills.[249] When debt limit increases become part of this mix, they both detract from the time spent on other budget matters and receive less attention than they would as stand-alone legislation. Indeed, congressional leaders sometimes purposely have wrapped debt limit increases in omnibus budget legislation precisely to avoid extended deliberation over.[250] Moreover, enveloping debt limit increases in comprehensive budget legislation can result in "escapist budgeting," as members of Congress use the large legislative vehicle of omnibus bills to barter concessions while collectively looking the other way regarding the effect on the size of the national debt.[251]

In order to avoid these problems while still maintaining some connection between congressional spending and borrowing, debt limit increases should be scheduled so that they become necessary in November or December of each year.[252] This could be accomplished by amending

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[248] The debt limit is already part of the budget resolution in that the resolution lists the anticipated impact of its spending or revenue totals on the limit. And appropriations and reconciliation legislation have sometimes in the past carried debt limit increases. *See, e.g.*, Act of Oct. 19, 1990, Pub. L. No. 101-444, 104 Stat. 1030; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. But that is different from requiring that the budget resolution become a forum for debate about how much the debt limit should be increased (rather than merely listing a figure derived by adding and subtracting other predetermined figures) and from mandating that debt limit legislation always or only be passed as part of an appropriations or reconciliation bill.

[249] *See* Devins, *supra* note 9, at 396–400 (describing limitations on deliberations of continuing resolutions, in particular for the fiscal year 1988 continuing resolution); Krishnakumar, *supra* note 127, at 616–18 (discussing failure by most members of Congress to read the text of the 1995-96 budget reconciliation bill and majority party leader Bob Dole's lack of familiarity with some portions of the legislation).

[250] *See* 9 CONG. AND THE NATION, *supra* note 240, at 55 (noting that the Democratic leadership "got around" threats of budget-related amendments and lengthy deliberations by incorporating the debt-limit increase into the reconciliation bill in 1993 and that "[a]s the leadership hoped, the short-term bill passed with little fanfare").

[251] *See* Fisher, *supra* note 113, at 37–38.

[252] Congress, with the aid of its research organizations, has proved rather apt at calcu-

the debt limit statute to require that Congress increase the debt ceiling by no more than the amount necessary to sustain anticipated government borrowing through the next one year; internal congressional rules could then establish that the increases be structured to last until the following November or December. The purpose of this timing is twofold: first, it places consideration of the debt limit on the heels of appropriations and/or reconciliation legislation, but late enough that in most years, the appropriations and reconciliation processes themselves should not be disrupted; second, it should enable congressional leaders, if consideration of debt limit increase legislation becomes bogged down, to back the vote on such legislation against a congressional recess for Thanksgiving or Christmas in order to force Congress to take timely action. This tactic of using the pressure of a recess to compel finalization of debt limit legislation has proved surprisingly successful in the past.[253] Further, scheduling debt limit increases on the heels of budget legislation requires Congress immediately to account to the public for the consequences of its budget decisions.

Indeed, the passage of debt limit legislation at the end of the budget cycle should be used as a mechanism for explanation, projection, and contemplation of reform regarding the debt. Specifically, the debt limit statute could be amended to require that legislation increasing the limit provide not just a new numerical debt ceiling, but also a statement of how much Congress expects the different categories of government spending—e.g., the thirteen sets of appropriations, entitlements, tax expenditures or cuts, interest on the debt to cost over the next year (based on the budget just passed) and by how much Congress expects revenues to fall short of the sum of these costs (or to exceed costs if the budget is in surplus that year). The debt limit statute should require Congress to spell out the

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lating the dollar amount by which it must raise the debt limit in order to meet the government's borrowing needs until a specific period into the future, so it should be able to calculate the amount of each year's debt limit increase to last until approximately November of the following year. *See, e.g.*, 8 CONG. AND THE NATION, *supra* note 198, at 45 (explaining that increase passed in November of 1990 was estimated to last until spring of 1993); 9 CONG. AND THE NATION, *supra* note 250, at 55 (explaining that next increase in 1993 bill was calculated to last until 1995—which in fact was the next time an increase was needed); 52 CONG. Q. ALMANAC, *supra* note 204, at 2-25 (describing passage of next debt limit increase in March 1996 (heldover from 1995 budget battle), calculated to cover the government's borrowing needs through October 1997); 53 CONG. Q. ALMANAC, *supra* note 204, at 2-53 (describing 1997 passage of next bill debt limit increase, expected to last until December 15, 1997).

[253] *See, e.g.*, 6 CONG. AND THE NATION, *supra* note 122, at 43 (describing passage of debt limit increase in 1983 "hours" before November adjournment and in 1984 in face of October adjournment); *Economics & Finance: Major Legislative Actions of the 101st Congress*, 48 CONG. Q. WKLY. REP. 2648 (1990) (discussing passage of a temporary increase by members "eager to leave town for the August recess" in 1990); Elizabeth Wehr, *Recess Rush Slowed By Debt-Limit Measure*, 45 CONG. Q. WKLY. REP. 1788 (1987) (reporting passage of a temporary increase prior to August recess); Janet Hook, *Hard-Fought Battles Mark Key Votes in 1986*, 44 CONG. Q. WKLY. REP. 2755, 2755–59 (1986) (describing passage of short-term bills in time for Labor Day and October adjournments in 1986).

meaning of these numbers by, for instance, making statements such as, "The nation needs to borrow *X* dollars to keep the Department of Education operating at existing levels"; "We need to borrow *Y* dollars to pay for military spending/war"; or "We need to borrow *Z* dollars to fund health entitlements at the current level because the population eligible is expected to rise." Such required explanations would restore some of the defined connection between congressional borrowing and its purpose that used to exist when Congress specifically authorized each issuance of government debt.

In this vein, the debt limit statute also could be amended to require that legislation increasing the debt ceiling contain a summary explaining the projected national debt for the next five years, assuming continued spending at the current levels. The Treasury Department currently provides Congress with five-year projections for different categories of debt, but not in connection with debt limit increases, and Congress does not share this information with the public.[254] Requiring Congress to include such projections as part of the debt limit increase, it is hoped, would inspire greater congressional deliberation about government borrowing and the size of the national debt and possibly encourage proposals for reform aimed at debt reduction.

CONCLUSION

None of these reform proposals can force Congress to stop running budget deficits or even to make significant efforts to pay down the debt. But the goal of these proposals is to use the existing structural framework of the debt limit statute to make Congress focus more on—and share more with the public regarding—the debt consequences of its spending and taxing choices, rather than allow Congress to hide from these issues as it has sought to do for many of the past thirty years.

[254] *See* 31 U.S.C. § 3130 (2000) ("Annual Public Debt Report").

ARTICLE

CONGRESS'S POWER TO ENFORCE FOURTEENTH AMENDMENT RIGHTS: LESSONS FROM FEDERAL REMEDIES THE FRAMERS ENACTED

ROBERT J. KACZOROWSKI*

Professor Robert Kaczorowski argues for an expansive originalist interpretation of Congressional power under the Fourteenth Amendment. Before the Civil War, Congress actually exercised, and the Supreme Court repeatedly upheld, plenary Congressional power to enforce the constitutional rights of slaveholders. After the Civil War, the framers of the Fourteenth Amendment copied the antebellum statutes and exercised plenary power to enforce the constitutional rights of all American citizens when they enacted the Civil Rights Act of 1866 and then incorporated the Act into the Fourteenth Amendment. The framers of the Fourteenth Amendment thereby exercised the plenary power the Rehnquist Court claims the framers intended to exclude from Congress. The framers also adopted the remedies to redress violations of substantive constitutional rights the Court says the framers intended to reserve exclusively to the states. The Rehnquist Court's Fourteenth Amendment jurisprudence, contradicted by this history, is thus ripe for reevaluation.

If, indeed, the Constitution guarantees the right . . . the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted . . . . The remark of Mr. Madison, in the Federalist, [sic] (No. 43,) would seem in such cases to apply with peculiar force. "A right (says he) implies a remedy; and where else would the remedy be deposited, than where it is deposited by the Constitution?" meaning, as the context shows, in the government of the United States.[1]

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[1] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615–16 (1842).

INTRODUCTION

A forgotten but profoundly important fact of the nation's constitutional history is that the U.S. Congress exercised plenary power to enforce a constitutionally recognized property right as early as 1793.[2] Congress enacted civil remedies to redress violations of a slaveholder's constitutionally secured property right to recapture his runaway slaves.[3] The statute imposed a civil fine and tort damages on anyone who interfered with the slaveholder's constitutional right.[4] In 1842, the U.S. Supreme Court unanimously affirmed Congress's plenary remedial power as a "fundamental principle" of constitutional law in *Prigg v. Pennsylvania*.[5] Justice Story's cited authority for this fundamental principle was *McCulloch v. Maryland*, an opinion written by perhaps the greatest jurist to serve as Chief Justice, John Marshall.[6] Chief Justice Marshall, in turn, derived this "fundamental principle" from James Madison, whose *Federalist 44* Marshall paraphrased, albeit without attribution.[7] Justice Story also relied on Madison in recognizing Congress's plenary remedial powers when he quoted Madison's *Federalist 43* as authority for the "fundamental principle" that rights secured by the Constitution delegate to Congress plenary power to enforce them.[8] Chief Justice Roger B. Taney concurred fully in these views.[9]

According to the Supreme Court today, however, Congress's power to remedy the violation of constitutional rights is anything but plenary. In *City of Boerne v. Flores*,[10] the Rehnquist Court struck down the Religious Freedom Restoration Act[11] (RFRA) and held that Congress's power to enforce the rights secured by the Fourteenth Amendment is limited to remedying state violations.[12] According to the Court, the Fourteenth Amendment does not delegate to Congress the power to define the rights the Fourteenth Amendment secures, to enforce the rights themselves, or even to determine what constitutes a state violation of Fourteenth Amendment rights.[13] Subsequently, in a later case, the Rehnquist Court struck down

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[2] *See* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864).

[3] *See id.*

[4] *See id.*

[5] *Prigg*, 41 U.S. (16 Pet.) at 615.

[6] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[7] THE FEDERALIST No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Explaining the national government's implied powers, Madison wrote: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." *Id.* at 285.

[8] *See* THE FEDERALIST No. 43 (James Madison) (Clinton Rossiter ed., 1961).

[9] *See Prigg*, 41 U.S. (16 Pet.) at 626 (Taney, C.J., concurring in part and dissenting in part).

[10] 521 U.S. 507 (1997).

[11] 42 U.S.C. § 2000bb (1994).

[12] *Boerne*, 521 U.S. at 519.

[13] *See id.* at 519–20.

a provision of the Violence Against Women Act[14] (VAWA) that imposed civil liability on anyone who committed an act of physical violence against a woman because of gender animus.[15] Citing *Boerne*, the Court reasoned that Congress's remedial powers under the Fourteenth Amendment, limited as they are to correcting state violations of constitutional rights, do not authorize Congress to create civil remedies and impose civil liability against a private individual who violates another individual's constitutional rights.[16]

The Rehnquist Court based its recent interpretations of Congress's Fourteenth Amendment remedial powers on its conception of the intent of the Amendment's framers. In striking down the RFRA in *Boerne*, the Court, speaking through Justice Anthony Kennedy, held that the framers of the Fourteenth Amendment intentionally limited Congress's powers under the Amendment to remedying state violations of the rights it secured.[17] According to the Court, the framers intentionally refused to give Congress plenary remedial powers, such as the authority to define Fourteenth Amendment rights, to determine what constitutes a violation of these rights, and to redress violations of Fourteenth Amendment rights committed by private individuals.[18] The framers refused to give such plenary power to Congress, Justice Kennedy opined, because to do so would have given Congress "too much legislative power at the expense of the existing constitutional structure . . . . [and also would have given] Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution."[19]

It is clear that the Rehnquist Court has forgotten the Madisonian first principles of American constitutionalism, as articulated by Chief Justices Marshall and Taney and Justice Story, which recognized plenary congressional power to enforce constitutional rights and to remedy their violation.[20] The Rehnquist Court also seems unaware of the congressional and

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[14] 42 U.S.C. § 13981 (1994).

[15] *See* United States v. Morrison, 529 U.S. 598 (2000).

[16] *Id.*

[17] *See Boerne*, 521 U.S. at 522.

[18] *See id.*

[19] *Id.* at 520–21.

[20] Contrast Chief Justice Rehnquist's statement of Madisonian first principles in *United States v. Lopez*, in which he prefaced his analysis of Congress's enumerated powers under the Commerce Clause with a statement of "first principles" of constitutional federalism and separation of powers:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between

judicial enforcement of slaveholders' constitutionally secured property rights from the nation's founding through the Civil War. This oversight is likely attributable to the constitutional right Congress enforced. For Americans today, the ownership of another human being is morally repugnant and inconceivable as a constitutionally secured right. Nevertheless, the Founders secured this property right when they incorporated the Fugitive Slave Clause in the Constitution.[21] The founding generation enforced it when the Second Congress, comprising many of the political leaders who drafted and ratified the Constitution, enacted a statute in 1793 which conferred on slave owners civil remedies comparable to the civil remedies that the Rehnquist Court held Congress was not authorized to enact for the enforcement of Fourteenth Amendment rights.[22] In 1850, Congress again legislated to enforce slaveholders' constitutionally secured property right in their slaves, adopting additional remedies and an elaborate federal enforcement structure that required federal officials to enforce the statute on penalty of a civil fine payable to the owners of the fugitive slaves, and imposed civil damages and criminal penalties on any party who interfered with the recapture or aided the escape of runaway slaves.[23] The United States Supreme Court, every lower federal court, and, with only one exception, every state appellate court presented with the issue upheld the constitutionality of these statutes and Congress's plenary power to enact them.[24]

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the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

514 U.S. 549, 552 (1995) (citations and internal quotations omitted). The Court held that even Congress's expressly delegated powers, such as its power to regulate interstate commerce, are not plenary and that Congress must exercise all of its powers, both enumerated and implied, subject to "judicially enforceable outer limits" because "it was the Judiciary's duty 'to say what the law is.'" *Id.* at 566 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court thus subordinated Congress to the Supreme Court and established that Congress must exercise its legislative powers subject to the Supreme Court's supervision. In *Boerne*, Justice Kennedy repeated Chief Justice Rehnquist's theory of separation of powers and constitutional federalism and attributed this "federal design central to the Constitution" to the framers of the Fourteenth Amendment, stating: "Under our Constitution, the Federal Government is one of enumerated powers . . . judicial authority to determine the constitutionality of laws . . . is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" *Boerne*, 521 U.S. at 516 (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

[21] *See* U.S. CONST. art. IV, § 2, cl. 3.

[22] *Compare* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864) *with Boerne*, 521 U.S. at 515.

[23] *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

[24] *See* Robert J. Kaczorowski, *Fidelity Through History And To It: An Impossible Dream?* 65 FORDHAM L. REV. 1663, 1677–78 n.64 (1997). The Wisconsin Supreme Court was the only court to deny the constitutionality of the Fugitive Slave Act of 1850. *See In re* Booth, 3 Wis. 49 (1854); Booth and Rycraft, *In re* 3 Wis. 179 (1855). However, the United States Supreme Court forcefully upheld the Act's constitutionality and ordered the Wisconsin court's compliance with its decision. United States v. Booth, 59 U.S. (18 How.) 477, 478 (1855); Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858).

The history of the federal government's enforcement of slaveholders' constitutionally secured property rights was too recent and too traumatic for the framers of the Civil Rights Act of 1866[25] and the Fourteenth Amendment to have overlooked it. Indeed, history presented them with a disturbing moral question of fundamental importance: if the Constitution delegated to Congress plenary power to protect the property rights of slave owners, how can it not have delegated to Congress the same plenary power to protect the fundamental rights of all freemen? The framers answered this question by insisting that Congress had to possess comparable power to enforce the constitutional rights of all Americans.

I. THE HISTORICAL BACKGROUND OF FEDERAL CONSTITUTIONAL RIGHTS ENFORCEMENT IN 1866

When the Senators and Representatives of the Thirty-Ninth Congress legislated to secure the rights of American citizens in 1866, they did so within the context of a seventy-five-year history of federal constitutional rights enforcement, in which Congress exercised plenary power to remedy violations of a constitutionally secured property right.[26]

A. The Fugitive Slave Clause

The first constitutionally secured personal right that the U.S. Congress legislated to enforce was the property right of slave owners to recapture their runaway slaves, a right that was guaranteed by the Fugitive Slave Clause.[27] In 1793, the Second Congress enacted a statute that conferred on slave owners three civil remedies to redress violations of this right.[28] The first civil remedy enabled the owner to go into federal or state court and secure a certificate authorizing him to return the fugitive slave to the place from which she fled.[29] The second and third civil remedies were a civil fine of $500 and tort damages, respectively, recoverable from anyone who obstructed a slave's recapture or aided her escape.[30]

The text of the Fugitive Slave Clause was analogous to that of the Fourteenth Amendment because both prohibited the states from infringing certain constitutional rights. The Fugitive Slave Clause[31] consisted of

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[25] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)) [hereinafter Civil Rights Act of 1866].

[26] *See generally* Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 (2004).

[27] U.S. CONST. art. IV, § 2, cl. 3.

[28] *See* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864).

[29] *See id.* § 3.

[30] *See id.* § 4.

[31] The Fugitive Slave Clause provides:

> No person held to Service or Labour in one State, under the Laws thereof, escap-

two provisions. On its face, the first clause prohibited any state into which a fugitive slave escaped from enacting or enforcing any law or regulation that would interfere with the slave owner's right to the service or labor of the runaway slave.[32] The second provision required that the fugitive slave be delivered to the person to whom the service or labor was owed.[33] However, the clause did not identify whose duty it was to deliver the fugitive slave to the claimant.

In *Prigg v. Pennsylvania*, decided in 1842, the United States Supreme Court upheld Congress's plenary power to enact the 1793 Fugitive Slave Act and the civil remedies it provided.[34] In his opinion for the Court, Justice Joseph Story delineated the Court's duty in interpreting the Constitution, namely, to interpret it "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it."[35] From this duty Story defined the Court's obligation to interpret the Constitution so as to "secure and attain the ends proposed."[36] He thus interpreted the prohibition against state interference with the slaveowner's right to the service or labor of the fugitive slave, that is, a prohibition against state action, as an affirmative guarantee of "a positive, unqualified right on the part of the owner of the slave."[37] The Fugitive Slave Clause therefore secured "all the incidents to that right" and "[put] the right to the service or labor upon the same ground, and to the same extent, in every other state as in the state from which the slave escaped."[38] The Fugitive Slave Clause also required that the fugitive slave "be delivered up on Claim of the Party to whom such Service or Labour may be due,"[39] and the Court held that the constitutional guarantee of this right delegated to Congress the plenary power to enforce it.[40] Story explained, "If, indeed, the constitution guarantees the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is,

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ing into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

[32] *Id.*

[33] *Id.*

[34] 41 U.S. (16 Pet.) 539, 539 (1842).

[35] *Id.* at 612. Today, originalism, as a theory of constitutional interpretation, is generally invoked by constitutional and political conservatives to limit the constitutional powers of the federal government and to restrict the scope of constitutionally protected rights. *Compare* United States v. Lopez, 514 U.S. 549, 549 (1995), City of Boerne v. Flores, 521 U.S. 507, 507 (1997), *and* United States v. Morrison, 529 U.S. 598, 598 (2000), *with* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 539 (1842).

[36] *Prigg*, 41 U.S. (16 Pet.) at 611.

[37] *Id.* at 612.

[38] *Id.* at 613.

[39] U.S. CONST. art. IV, § 2, cl. 3.

[40] *Prigg*, 41 U.S. (16 Pet.) at 615.

that the national government is clothed with the appropriate authority and functions to enforce it."[41]

In explaining Congress's plenary remedial powers to enforce constitutionally secured rights, Story implicitly relied upon Chief Justice Marshall's opinion in *McCulloch v. Maryland* and on James Madison's *Federalist 44* and *43*. Story proclaimed *McCulloch's* general principle of constitutional delegation of Congress's legislative power: "The fundamental principle, applicable to all cases of this sort . . . that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted."[42] Chief Justice Marshall, in turn, had taken this principle from James Madison's *Federalist 44*.[43] Story elaborated how Madison's and Marshall's ends/means principle explained Congress's power to enforce constitutionally secured rights. He asserted that the constitutional recognition of rights, even when the recognition is in the nature of a prohibition on the states from infringing the rights, makes Congressional enforcement of those rights an end and object of the federal government, and thus implies the constitutional authority and duty to enforce the rights and to provide effective remedies to prevent and redress their violation.[44] Story buttressed this principle of Congress's remedial power by quoting Madison's *Federalist 43* as authority for the proposition that a right recognized in the Constitution is a personal right enforceable against any one who may violate it, and that the constitutional right implies a delegation to Congress of remedial power to secure and protect it.[45]

Story advanced another theory, based on the "Arising Under" Clause of Article III,[46] in explaining Congress's plenary power to enforce the property right secured by the Fugitive Slave Clause. He described this constitutional right as a personal property right enforceable by the slave's owner against another private party, constituting a case or controversy arising under the Constitution.[47] The Supreme Court was unanimous in these conclusions.[48] Indeed, the Taney Court twice affirmed its *Prigg* decision

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[41] *Id.*

[42] *Id.*

[43] *See McCulloch*, 17 U.S. (4 Wheat.) 316, 316 (1819); *supra* note 7.

[44] *See Prigg*, 41 U.S. (16 Pet.) at 619.

[45] *See id.* at 616; THE FEDERALIST No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961). Supporters of the Civil Rights Act of 1866 quoted this passage from *Prigg* in arguing that Congress possessed the constitutional authority to protect the civil rights of U.S. citizens. *See infra* notes 97–99 and related commentary. Contrast Chief Justice Rehnquist's articulation of Madisonian first principles in United States v. Lopez, 514 U.S. 549, 552 (1995); *supra* note 20.

[46] Article III, section 2 provides that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2, cl. 1.

[47] *See Prigg*, 41 U.S. (16 Pet.) at 616 (quoting U.S. CONST. art. III, § 2, cl. 1).

[48] Although it was unanimous in Justice Story's interpretation of the Fugitive Slave Clause and its delegation to Congress of plenary power to enact the Fugitive Slave Act of 1793, the Court divided six to three on the questions of whether Congress's power to en-

and upheld the constitutionality of the Fugitive Slave Acts of 1793 and 1850.[49] The Arising Under Clause consequently empowered Congress to provide complete protection of the right.[50]

In an opinion concurring in part and dissenting in part, Chief Justice Taney agreed with the Court's discussion regarding the right of the slaveholder.[51] He declared, "This right of the master being given by the constitution of the United States, neither congress nor a state legislature can, by any law or regulation, impair it or restrict it."[52] Taney also concurred with the opinion's holdings regarding the power of Congress to protect the rights of citizens in slaveholding states to exercise this right, "to provide by law an effectual remedy to enforce it," and inflict penalties on violators.[53] However, the Chief Justice dissented from the Court's holding that the power to enforce this constitutional right and to remedy its violation was "vested exclusively in congress."[54] Taney insisted that the states had concurrent power to enforce property rights secured by the Fugitive Slave Clause.[55]

Taney's defense of the states' constitutional power to enforce the slaveholders' constitutional right actually strengthened Story's theory of congressional delegation as Taney's opinion broadened this theory to include the states. Indeed, the Chief Justice characterized as a well-settled rule of construction the Court's interpretation that the Constitution's prohibition on the states from interfering with a constitutional right implied the power to enforce.[56] In disagreeing with the Court's conclusion that this remedial power was delegated exclusively to Congress, Taney insisted that the words of the Fugitive Slave Clause required "the people of the several states, to pass laws to carry [it] into execution."[57] Taney reasoned that "[t]he Constitution is the law of every state in the Union; and is the paramount law. The right of the master, therefore, . . . is the law of each state; and no state has the power to abrogate or alter it."[58]

Taney reinforced his textual construction with examples of other constitutionally secured rights that the states enforced even though the Consti-

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force the Fugitive Slave Clause was exclusive and whether state and local courts were obligated to exercise the jurisdiction that section 3 of the Act conferred on them to enforce the federal right. *See id.* at 621–25; *id.* at 627 (Taney, C.J., concurring in part and dissenting in part); *id.* at 635–36 (Thompson, J., concurring in part and dissenting in part); *id.* at 636 (Baldwin, J., concurring in part and dissenting in part); *id.* at 648–49 (Wayne, J., concurring in part and dissenting in part); *id.* at 650 (Daniel, J., concurring in part and dissenting in part); *id.* at 673 (McClean, J., concurring in part and dissenting in part).

[49] *See* Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847); Ableman v. Booth, 62 U.S. (21 How.) 506, 508 (1859).

[50] *See Prigg* at 616.

[51] *Prigg*, 41 U.S. (16 Pet.) at 626 (Taney, C.J., concurring in part and dissenting in part).

[52] *Id.*

[53] *Id.*

[54] *See id.* at 627 (Taney, C.J., concurring in part and dissenting in part).

[55] *Id.*

[56] *See id.* at 627–28.

[57] *Id.* at 628.

[58] *Id.*

tution placed the rights "under the protection of the general government."[59] The constitutional clauses the Chief Justice had in mind were the Contract Clause[60] and the Privileges and Immunities Clause.[61]

Analogizing to the right to contract, Taney then acknowledged that Congress had the power to enforce the right to contract and referenced the remedy that Congress enacted to enforce it.[62] He referred to the Judiciary Act of 1789 and stated that "in order to secure [the right to contract], congress have passed a law authorizing a writ of error to the Supreme Court." Nevertheless, Taney insisted that the federal enforcement of the right to contract did not deprive the states of concurrent jurisdiction, noting that "no one has ever doubted, that a state may pass laws to enforce the obligation of a contract, and may give to the individual the full benefit of the right so guaranteed to him by the Constitution." Taney wanted to know why the states may not, in the same way, enforce the "individual right now under consideration."

Using the same reasoning, Taney argued that the states may protect and enforce the rights guaranteed by the Privileges and Immunities Clause even though the Constitution places those rights under the protection of the federal government.[63] Taney thus interpreted the Contract Clause and the Privileges and Immunities Clause, in addition to the Fugitive Slave Clause, as delegating to the national government plenary power to enforce the rights they secured, while the clauses also preserved the states' concurrent power over these rights.

Although the Taney Court differed on the question of whether the power of enforcement was exclusive to the government, it embraced the theory of plenary congressional power, and expressly rejected the states' rights, strict construction theory that Pennsylvania advanced to argue that Congress lacked constitutional authority to enforce constitutional rights and duties "unless the power to enforce these rights, or to execute these duties can be found among the express powers of legislation enumerated in the Constitution."[64] According to this argument, constitutional rights and duties, such as those expressed in the Fugitive Slave Clause, that did not explicitly delegate the power to enforce and perform them were self-executing. The Taney Court rejected this interpretation, using the same theory of constitutional delegation that the Marshall Court affirmed in *McCulloch* when it rejected a similar argument.[65] Story wrote that Penn-

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[59] *Id.* at 629.

[60] U.S. CONST. art. 1, § 10, cl. 1 provides that "[n]o State shall . . . pass any . . . law impairing the Obligation of Contacts."

[61] U.S. CONST. art. IV, § 2, cl. 1 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[62] Except as otherwise noted, the following discussion is taken from *Prigg*, 41 U.S. (16 Pet.) at 629 (Taney, C.J., concurring in part and dissenting in part).

[63] *Id.*

[64] *Id.* at 618.

[65] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

sylvania's strict construction interpretation would effectively nullify constitutional rights and prevent Congress from achieving many of the ends the Constitution delegated to the federal government.[66]

Story noted that "[s]uch a limited construction of the constitution has never yet been adopted as correct, either in theory or practice." To the contrary, Congress "has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby."[67] The crucial point here is that the Taney Court unanimously held that a constitutional prohibition upon the states from infringing a right establishes a constitutional guarantee of the right, and that the constitutional recognition of the right makes its enforcement one of the ends of the federal government, thereby implicitly delegating to Congress plenary power to enforce the right and to remedy all its violations.

B. The Fugitive Slave Acts

The *Prigg* decision gave rise to the need for the 1850 Fugitive Slave Act, as the Court had held that the states were not empowered to enforce the Fugitive Slave Clause and the Fugitive Slave Act of 1793. *Prigg* thus permitted the free states to withdraw their courts and local law enforcement officials from assisting slaveholders and their agents to recapture fugitive slaves. This was one of the reasons Chief Justice Taney insisted that the Constitution delegated such power to the states and imposed on them the duty to enforce the Fugitive Slave Clause and the legislation that Congress enacted to implement it. He objected that "the remedy provided by congress" in the 1793 Fugitive Slave Act would be "ineffectual and delusive . . . if state authority is forbidden to come to its aid."[68] It was simply too dangerous and too expensive to rely on federal courts alone to enforce slaveholders' rights, due to the scarcity and remoteness of federal courts. Taney predicted that, if local authorities were unable to act under state law to assist in the recapture of fugitive slaves, "the territory of [a free] state must soon become an open pathway for the fugitives escaping from [slave] states."[69]

In 1850, Congress strengthened the enforcement of the slaveholders' constitutional right that was weakened by *Prigg* when it enacted the Fugitive Slave Act of 1850, which created a federal enforcement structure, adopted an additional tort remedy, and imposed criminal penalties on anyone who violated it.[70] In doing so, Congress exercised its plenary power to define the scope of the slave owner's constitutional right, to determine

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[66] *See Prigg*, 41 U.S. (16 Pet.) at 618.
[67] *See id.* at 618–19.
[68] *Id.* at 631 (Taney, C.J., concurring in part and dissenting in part).
[69] *Id.* at 632.
[70] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

what constituted a violation of this right, and to provide civil and criminal remedies for the violation of this right. The 1850 statute was more sweeping than the Fugitive Slave Act of 1793 not only because it provided additional remedies, but also because it obligated federal legal officers to enforce it and provided a structure that enabled the federal government to play a prominent role in its enforcement.[71]

The 1850 Fugitive Slave Act contained several important remedial and enforcement provisions. The statute established a federal structure to enforce the slave owners' right that has been analogized to a federal bureaucratic agency.[72] It authorized federal judges to appoint U.S. commissioners with the power "to exercise and discharge all the powers and duties conferred by this act," including the power to authorize the seizure and return of fugitive slaves to the places from which they may have escaped.[73] It imposed on federal marshals and deputy marshals the duty to execute "all warrants and precepts issued under the provisions of this act, when to them directed" under penalty of a $1,000 fine payable to the claimant.[74] Should the fugitive slave escape while in custody of a federal or deputy marshal, the marshal was made liable to the claimant for the full value of the slave. To assist these federal officers, the statute authorized federal commissioners to summon a *posse comitatus* when they deemed necessary, and commanded citizens to assist when their services were required. On a mere affidavit by the claimant or his agent stating that he had reason to believe that a rescue would be attempted by force before he could return the slave to the state from which she fled, the federal officer who made the initial arrest was required to retain as many persons as necessary to overcome such force and to return the slave to the state from which she escaped.[75] The fees and costs incurred in this process were to be paid out of the U.S. Treasury. Congress thus provided for the removal of fugitive slaves by federal force at federal expense whenever the return of fugitive slaves was met with local resistance in a free state.

The 1850 Fugitive Slave Act provided additional and presumably more effective remedies to redress violations of slave owners' constitutional rights than the 1793 Act. Firstly, the 1850 Act substituted the civil penalty of the 1793 Act with criminal penalties.[76] The practical effect of making

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[71] *See id.*

[72] *See* Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161, 181–82 (1921).

[73] Fugitive Slave Act of 1850 §§ 1, 4.

[74] Except as otherwise noted, the following account is taken from *id.* § 5 at 9 Stat. 462–63.

[75] *Id.* § 9 at 9 Stat. 465.

[76] *Id.* § 7 at 9 Stat. 464. The 1850 statute imposed criminal sanctions on any one who knowingly and willingly hindered the claimant from seizing the fugitive slave, who rescued or attempted to rescue the fugitive slave, who aided, abetted or assisted the fugitive slave to escape, or who harbored or concealed the fugitive slave. *See id.* On conviction, the defendant was subject to a fine of up to $1,000 and imprisonment for up to six months. *See id.*

the infringement of the slaveholder's property right a federal crime was to shift the initiative and costs of enforcing the right to the federal government. Nevertheless, the 1850 statute preserved the tort remedy authorized by the 1793 statute and added an additional tort remedy, such that violators were liable for "civil damages" in the amount of $1,000 for each fugitive slave who was lost.[77] These damages were recoverable in an action of debt in a federal district court.[78] The $1,000 fine was double the amount of the civil penalty recoverable in an action of debt under the 1793 Fugitive Slave Act.[79] As a damage remedy for the loss of slaves, the statutory amount of $1,000 was greater than the damages generally awarded for lost slaves in tort actions under the 1793 Fugitive Slave Act.[80] Additionally, the 1793 and 1850 Fugitive Slave Acts offered the slaveholder alternative federal damage remedies, depending upon whether the slaves escaped or were recovered.[81] In *Ableman v. Booth*, the United States Supreme Court upheld the constitutionality of the Fugitive Slave Act of 1850 in a strong, nationalistic opinion written by Chief Justice Taney.[82]

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[77] *See id.*

[78] *See id.* Section 7 provided that persons who prevented or hindered the arrest of a fugitive slave, or who rescued or attempted to rescue a fugitive slave, or who aided a fugitive slave in escaping, or who harbored or concealed a fugitive slave, would "forfeit and pay, by way of civil damages to the party injured by such illegal conduct," in addition to the criminal penalties it imposed. *See id.*

[79] *See* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864).

[80] *See, e.g.*, Oliver v. Weakley, 18 F. Cas. 678, 679 (C.C.E.D. Pa. 1853) (No. 10,502) (awarding damages of $2,800 for twelve escaped slaves, two husbands, two wives and eight children); Ray v. Donnell, 20 F. Cas. 325 (C.C.D. Ind. 1849) (No. 11,590) (awarding damages of $1,500 for one adult woman slave and her four children); Driskell v. Parish, 7 F.Cas. 1095, 1100 (C.C.D. Ohio 1849) (No. 4,088) (fixing value of two escaped slaves at $500); Giltner v. Gorham, 10 F. Cas. 424, 427 (C.C.D. Mich. 1848) (No. 5,453) (fixing value of six escaped slaves at $2,752); Jones v. Van Zandt, 13 F. Cas. 1040 (C.C.D. Ohio 1843) (No. 7,505) (fixing value of escaped slave at $600).

[81] *See* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864). Justice Grier, as circuit Justice, ruled that the 1850 Fugitive Slave Act did not repeal the tort action of compensatory damages under the 1793 Fugitive Slave Act and declared that:

> In case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort.

Oliver v. Kauffman, 18 F. Cas. 657, 660 (C.C.E.D. Pa. 1850) (No. 10,497).

[82] Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858) (declaring that the Fugitive Slave Act of 1850 was constitutional "in all of its provisions" and that it was "fully authorized by the Constitution of the United States"). The Court had earlier enforced the 1850 statute in a case in which its constitutionality was not at issue. *See* Norris v. Crocker, 54 U.S. (13 How.) 429, 439–40 (1851) (holding that the "civil damages" of $1,000 provided in section 7 repealed the civil penalty of $500 provided in the Fugitive Slave Act of 1793, but that the damages applied only if the slave was lost. For injuries other than loss of the slave, the slave owner retained his tort action under the 1793 Act.).

C. The Thirteenth Amendment and the Civil Rights Act of 1866

The Court's *Ableman* decision was handed down just three years before the outbreak of the Civil War. During the Civil War, Congress repealed the 1793 and 1850 Fugitive Slave Acts[83] and adopted and sent to the states for ratification the Thirteenth Amendment, which abolished slavery.[84] When the nation ratified the Thirteenth Amendment in 1865, it negated the Fugitive Slave Clause and the other provisions of the Constitution recognizing slavery.[85] This amendment produced a revolutionary change in the United States Constitution in transforming the document from a fundamental guarantee of slavery to a universal guarantee of liberty.

Republicans, who dominated the Thirty-Ninth Congress, overwhelmingly interpreted the Thirteenth Amendment as a universal guarantee of liberty. The Speaker of the House of Representatives, Schuyler Colfax, proclaimed that one of the principal objectives of the Thirty-Ninth Congress was to make the Constitution's guarantees of freedom and fundamental rights a practical reality.[86] Republicans achieved this objective by

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[83] Congress repealed the Fugitive Slave Acts on June 28, 1864. *See* 3 HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 395–402 (1872); STANLEY CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860, at 194–95 (1968); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861, at 218 (1974).

[84] U.S. CONST. amend. XIII.

[85] Sections 1 and 2 of the Thirteenth Amendment state:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1–2.

[86] Colfax first announced this objective in a speech he delivered in Washington, D.C., on November 18, 1865, shortly before the organization of the Thirty-Ninth Congress. He declared that

> The Declaration of Independence must be recognized as the law of the land, and everyman, alien and native, white and black, protected in the inalienable and God-given rights of life, liberty and the pursuit of happiness. Mr. Lincoln, in that Emancipation Proclamation which is the proudest wreath in his chaplet of fame, not only gave freedom to the slave, but declared that the Government would maintain that freedom. We cannot abandon them and leave them defenseless at the mercy of their former owners. They must be protected in their rights of person and property. These free men must have the right to sue in courts of justice for all just claims, and to testify also, so as to have security against outrage and wrong. I call them free men, not freed men. The last phrase might have answered before their freedom was fully secured, but they should be regarded now as free men of the Republic.

O. J. HOLLISTER, LIFE OF SCHUYLER COLFAX 271 (1886). *See also id.* at 269–70; A. Y. MOORE, THE LIFE OF SCHUYLER COLFAX 284 (1868). Hollister reported the public's reaction to Colfax's speech, much of which was approving. HOLLISTER, *supra* at 272–73. For

enacting the Civil Rights Act of 1866[87] in April and adopting the Fourteenth Amendment and sending it to the states for ratification in June 1866. The framers made it clear that they modeled the Civil Rights Act's civil and criminal remedies and enforcement structure on the Fugitive Slave Acts, especially the Fugitive Slave Act of 1850.[88] Indeed, they incorporated the enforcement structure of the 1850 Fugitive Slave Act into the Civil Rights Act.[89]

The Republican leaders and supporters of the Civil Rights Act of 1866 insisted that Congress possessed as much constitutional authority to protect and enforce human rights and equality as it had exercised to protect and enforce the property right in slaves. Thus, Senator Lyman Trumbull interpreted section 1 of the Thirteenth Amendment as a delegation of plenary power to Congress to define and secure the civil liberties of all Americans, not only the civil rights of the former slaves. Trumbull believed that in prohibiting slavery, the Constitution secures freedom to all Americans. "That amendment declared that all persons in the United States should be free," Trumbull emphasized, and he declared: "[t]his [civil rights] measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom."[90] He admonished that Congress had the same plenary power to enforce the civil rights that inhere in a state of freedom as it had to enforce the constitutional rights of slave owners. Trumbull insisted that

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example, the *Chicago Republican* editorialized that the speech was Colfax's most accurate assessment of the sentiment of the people; the *Indianapolis Journal* described it as "the sentiments of ninety-nine out of every hundred of [the Republican] party, both in and out of Congress," and *The New York Times* acknowledged that Colfax made this speech to announce "the probable course of Congress this coming session. We most heartily endorse all its positions." *See id.* Colfax repeated these themes on being elected Speaker of the House. *See* CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865). The Congressional Globe is now available online at http://memory.loc.gov/ammem/amlaw/lwcg.html.

[87] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[88] *See* Kaczorowski, *supra* note 26, at 205–06.

[89] For example, Senator Lyman Trumbull, the principal author of the Civil Rights Act of 1866 and the bill's Senate floor manager, proclaimed:

> Most of [the Civil Rights Bill's provisions] are copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again. The act that was passed at that time for the purpose of punishing persons who should aid negroes [sic] escape to freedom is now applied by the provisions of this bill to the punishment of those who shall undertake to keep them in slavery.

CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). Trumbull was only one of numerous Senators and Representatives who acknowledged that the Civil Rights Act incorporated the remedies and enforcement structure of the Fugitive Slave Act of 1850. *See* Kaczorowski, *supra* note 26, at 205–06.

[90] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

> under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.[91]

Republican leaders justified Congress's plenary power to protect the civil rights of all Americans by asserting the Marshall Court's theories of broad implied powers and constitutional delegation in *McCulloch v. Maryland* and the Taney Court's application of *McCulloch*'s theories in *Prigg*. For example, the Civil Rights Bill's House Floor Manager, James Wilson, interpreted the Thirteenth Amendment's prohibition against slavery as a positive guarantee of freedom and proclaimed: "[h]ere, certainly, is an express delegation of power" to enact the Civil Rights Bill.[92] Asking rhetorically, "[h]ow shall it be exercised? Who shall select the means?" Wilson answered: "[h]appily, sir, we are not without light on these questions from the Supreme Court." He quoted from *McCulloch v. Maryland* where Chief Justice Marshall stated that, although the powers of the federal government are limited, the Constitution nevertheless allows the legislature the discretion to exercise the powers it confers "'to perform the high duties assigned to it in the manner most beneficial to the people.'"[93] Then Wilson asserted Chief Justice Marshall's famous principle of implied powers, which Wilson quoted: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [sic] with the letter and spirit of the Constitution, are constitutional."[94] Applying Marshall's interpretation of constitutional delegation to interpret the Thirteenth Amendment, which the *Prigg* Court applied to interpret the Fugitive Slave Clause, Wilson asserted that no one can question that the Civil Rights Bill is an appropriate "enforcement of the power delegated to Congress" by the Thirteenth Amendment. "The end is legitimate," he proclaimed, "because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen."[95]

Representative Wilson also offered a detailed explanation of Congress's plenary power to enforce the rights guaranteed in the Bill of Rights, which he grounded in Justice Story's opinion in *Prigg*.[96] "In the case of Prigg v. Commonwealth of Pennsylvania—and this it will be remembered was

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[91] *Id.*
[92] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).
[93] *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819)).
[94] *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 420).
[95] *See* Kaczorowski, *supra* note 26, at 212–13.
[96] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case." Wilson read from Story's opinion in *Prigg*, where Story paraphrased Chief Justice Marshall's opinion in *McCulloch*:

> the fundamental principle applicable in all cases of this sort would seem to be that where the end is required the means are given; and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted,

which is to say, on the federal government.[97] Wilson then quoted Justice Story quoting Madison's assertion that the remedies for constitutional rights violations must be provided by the federal government: "'A right,' says he, 'implies a remedy: and where else would the remedy be deposited than where it is deposited by the Constitution?' meaning, as the context shows, in the Government of the United States.'" Wilson also quoted Story's understanding of *Federalist 43*, stating that the natural conclusion is that the government must carry into effect the rights and duties of the Constitution, barring any provisions to the contrary.[98] Wilson applied Madison's and Story's understanding of Congress's constitutional powers to the Bill of Rights and proclaimed:

> Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy. The citizen is entitled to the right [sic] of life, liberty, and property . . . . The power is with us to provide the necessary protective remedies.[99]

Wilson concluded the point with a statement of the social contract: these protective remedies, he said, "must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the government." The framers of the Civil Rights Act and the Fourteenth Amendment thus affirmed the theories of the Marshall and Taney Courts that attributed to Congress the plenary power and the constitutional duty to enforce the rights secured by the Constitu-

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[97] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Mar. 9, 1866) (quoting *Prigg*, 41 U.S. (16 Pet.) at 615).

[98] *Id.* (quoting *Prigg*, 41 U.S. (16 Pet.) at 616).

[99] *Id.*

tion, theories which also considered the duty to enforce constitutional rights to be one of the ends for which the federal government was established.

The framers' theory of plenary constitutional delegation was also premised on their assumption that equality and the natural rights of life, liberty, and property and rights incident thereto proclaimed in the Declaration of Independence constituted the fundamental rights of all Americans.[100] The framers and supporters insisted that the Constitution recognizes and secures these rights in various provisions, primarily the Thirteenth Amendment, but also in others such as the Privileges and Immunities Clause of Article IV, the Bill of Rights, and the Fifth Amendment's explicit guarantee of life, liberty, and property.[101] They applied to these constitutional provisions the *McCulloch* and *Prigg* theories of broad constitutional delegation of implied congressional power and insisted that these provisions delegated to Congress plenary power to enforce and protect the fundamental rights of all Americans, and that they authorized Congress to enact civil and criminal remedies and a federal enforcement structure to ensure that all Americans are secure in their civil rights. The framers also argued that the principles of the Declaration of Independence, and the social contract that these principles betokened, were incorporated into the Constitution through these provisions and that the Declaration of Independence and the Constitution imposed a duty on Congress to enforce the fundamental rights they recognized and secured as rights of United States citizens.[102]

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[100] *See* Kaczorowski, *supra* note 26, at 223–24.

[101] *Id.* at 57–65.

[102] Representative Wilson introduced the Civil Rights Bill in the House with the following statement of Congress's authority to enact it:

> If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family.

CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866). Wilson elaborated, explaining that Congress's power to enact a bill to enforce and protect the rights of its citizens "depends on no express delegation," that "this power permeates our whole system," because it is a power inherent in the sovereign nature of the federal government. *Id.* at 1119. Congress therefore "possess[es] the power to do those things which Governments are organized to do," such as protect its citizens' rights, and it has the same latitude in selecting the means "through which to exercise this [inherent] power that belongs to us when a power rests upon express delegation." *Id.* Wilson further maintained that Congress's power to enact the Civil Rights Bill emanated from the fact that the rights the bill protected were the natural rights of U.S. citizenship and from the federal government's duty to protect the rights of its citizens—an obligation imposed upon it by the social contract. *See id.* at 1119. Senator Trumbull insisted that Congress had an obligation, not simply the power, to enforce civil rights, an obligation under the social contract proclaimed in the Declaration of Independence, which he maintained was incorporated into the Constitution. *See id.* at 474–75, 573. For additional discussion, see Kaczorowski, *supra* note 26, at 216–24.

II. THE CIVIL RIGHTS ACT OF 1866

Armed with this broad understanding of citizens' rights and of Congress's constitutional power to enforce them, the Thirty-Ninth Congress enacted the Civil Rights Act of 1866.[103] To eliminate opponents' claims that the statute was unconstitutional, the framers of the Fourteenth Amendment incorporated the Civil Rights Act into section 1 of the Amendment.[104] Thus, the scope of Congress's remedial powers to enforce the rights secured by the Fourteenth Amendment are at least as broad as the remedial powers Congress exercised in adopting the Civil Rights Act of 1866. In addition, the framers intended the Fourteenth Amendment to constitutionalize their interpretation of the other provisions of the Constitution, which, they argued, secured the rights of all Americans and thus delegated plenary power to Congress to enforce and protect them.

Because the provisions of the Civil Rights Act of 1866 are central to the meaning and scope of the Fourteenth Amendment, it is necessary to examine the statute's provisions. In brief, the Civil Rights Act of 1866 conferred U.S. citizenship on all Americans.[105] It defined and conferred some of the rights that U.S. citizens, as such, enjoy, and, like the Fugitive Slave Act of 1850, it authorized the lower federal courts to provide civil and criminal remedies to redress violations of these rights.[106] It criminalized only certain violations of citizens' rights.[107] However, it conferred jurisdiction on the federal courts to dispense ordinary civil and criminal justice, traditionally administered by the states, whenever individuals were unable to enforce or were denied their civil rights in the states' systems of justice.[108] To ensure the statute's effective enforcement, it established a federal enforcement structure patterned on the Fugitive Slave Act of 1850.[109]

On its face, the Civil Rights Act of 1866 contradicts the Rehnquist Court's interpretation of the intention of the framers of the Fourteenth Amendment regarding the scope of the remedial powers they intended to delegate to Congress. The Rehnquist Court held that the framers of the Fourteenth Amendment intentionally refused to intrude into traditional areas of state responsibility and therefore refused to give to Congress the power to define constitutional rights, particularly the rights secured by the Fourteenth Amendment, and the power to enact civil remedies to redress violations of Fourteenth Amendment rights committed by private

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[103] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[104] *See infra* notes 397–426 and accompanying text.

[105] Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[106] *Id.* § 3.

[107] Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

[108] *Id.* §§ 2–3.

[109] *Id.* §§ 4–7.

actors.[110] Unquestionably, the framers sought to preserve traditional state jurisdiction over individual rights. However, the Rehnquist Court overlooked the fact that the Constitution, as amended by Republicans in 1865, intruded upon traditional state jurisdiction and assumed traditional state powers, because the Thirteenth Amendment abolished state laws and institutions that recognized, defined, and enforced the status of African Americans as slaves, abolished the property right of slave owners in their slaves, and eliminated the master/slave relationship.[111] More importantly, the framers of the Fourteenth Amendment asserted that the Thirteenth Amendment determined that the status of all Americans, not only that of the former slaves, is that of freemen, which they equated with the status of United States citizenship.[112] The framers of that Amendment also asserted that the Amendment delegated to Congress the power to protect the rights to which Americans are entitled as freemen, that is, the power to define and enforce the rights of United States citizenship.[113]

The framers of the Fourteenth Amendment, many of whom drafted and voted for the Thirteenth Amendment, again intruded into traditional areas of state jurisdiction and exercised plenary power to define and enforce the rights of United States citizens when they enacted the Civil Rights Act of 1866. The framers expressly stated that they intended the Civil Rights Act to make the Thirteenth Amendment a practical reality. The Civil Rights Act therefore defined the constitutionally secured status of all Americans as U.S. citizens, specified some of the constitutionally secured rights that Americans were to enjoy as U.S. citizens, provided civil remedies and criminal penalties to redress violations of these civil rights, and provided a federal enforcement structure to protect and enforce the status and rights of U.S. citizens.[114] Part III of the Article discusses how, within two months of enacting the Civil Rights Act of 1866, the framers adopted the Fourteenth Amendment, in part, to ensure the statute's constitutionality by incorporating it into section 1 of the Fourteenth Amendment. It is to the provisions of the Civil Rights Act and the debate relating to Congress's power to enact them that we now turn.

A. Section 1: Congress Confers United States Citizenship and Some of the Rights of United States Citizens on All Natural Born Americans

As adopted, section 1 of the Civil Rights Act intruded into traditional areas of state responsibility. Indeed, it supplanted the states' police pow-

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[110] *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997); United States v. Morrison, 529 U.S. 598, 598 (2000). *See also supra* notes 10–16 and accompanying text.

[111] U.S. CONST. amend. XIII.

[112] *See supra* note 86 and accompanying text.

[113] *See* Kaczorowski, *supra* note 26, at 212–13.

[114] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

ers relating to citizenship in three ways. First, section 1 of the Civil Rights Act defined the status of "all [native-born] persons" who met specified minimal qualifications as United States citizens and conferred citizenship on such persons in every state and territory of the United States."[115] This was the first time in the nation's history that Congress defined United States citizenship.[116] Second, section 1 defined some of the civil rights Americans were to enjoy as U.S. citizens.[117] Third, section 1 guaranteed that all U.S. citizens were to enjoy these civil rights on the same bases as the most favored class of citizens enjoyed them.[118] These provisions secured the status and civil rights of U.S citizens, state laws to the contrary notwithstanding.

The framers of the Civil Rights Act understood the Citizenship Clause as a definition of the status that the Thirteenth Amendment already secured for all Americans.[119] However, they added the Citizenship Clause to section 1 of the Act for two practical reasons. First, they wanted to ensure that black Americans enjoyed the same civil rights that white citizens enjoyed. Senator Trumbull explained that the Citizenship Clause was necessary because the former slaveholding states denied the civil rights of American blacks on the grounds that they were not citizens and therefore not entitled to all of the civil rights that white citizens enjoyed.[120] The framers intended the Civil Rights Act to define and secure the rights of all Americans, but it was to make doubly certain that it would secure the civil rights of black Americans that the framers added language to section 1 that declared that United States citizens "of every race and color" are entitled to every substantive right enumerated in section 1 on the same basis

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[115] *See id.* § 1. To qualify for United States citizenship, individuals need only be born in the U.S. and not be subject to a foreign power. Indians who were not obligated to pay taxes were presumed to be subject to a foreign power, their tribes. *See id.* § 1.

[116] *See* CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866) (statement of Sen. Hendricks); *id.* at 504 (statement of Sen. Johnson); *id.* at 2764–67 (statement of Sen. Howard); *id.* at 2768–69 (statement of Sen. Wade); *id.* at 1295–96 (statement of Rep. Latham); Edward Bates, *Citizenship*, 10 OP. ATT'Y GEN. 382 (1866); 2 JAMES G. BLAINE, TWENTY YEARS IN CONGRESS 189 (1866); JAMES KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 341 (1978).

[117] Civil Rights Act of 1866 § 1.

[118] *Id.*

[119] CONG. GLOBE, 39th Cong., 1st Sess. 475, 527, 574, 600, 1756 (1866) (statements of Sen. Trumbull); *id.* at 504 (statement of Sen. Johnson); *id.* at 523, 576, 595 (statements of Sen. Davis); *id.* at 570 (statement of Sen. Morrill); *id.* at 571 (statement of Sen. Henderson); *id.* at 602 (statement of Sen. Lane of Indiana); *id.* at 1780 (statement of Sen. Yates); *id.* at 1152 (statement of Rep. Thayer); *id.* at 1157 (statement of Rep. Thornton); *id.* at 1266 (statement of Rep. Raymond); *id.* at 1291 (statement of Rep. Bingham); *id.* app. at 156 (statement of Rep. Delano).

[120] *Id.* at 475. Some senators and representatives also denied that black Americans were entitled to enjoy the rights of citizens for the same reason. *See, e.g.*, *id.* at 42, 476, 477 (statements of Sen. Saulsbury); *id.* at 499 (statement of Sen. Cowan); *id.* at 576 (statement of Sen. Davis); *id.* at 600–01 (statement of Sen. Guthrie); *id.* at 1123 (statement of Rep. Rogers).

"as is enjoyed by white citizens."[121] As shall be seen, the framers did not intend to limit the Civil Rights Act to a guarantee of racial equality by including such guarantees in the Act. In conferring citizenship on all Americans, Congress exercised a plenary power of a sovereign nation and overrode the states' prior determinations of the status of their inhabitants.[122]

The second pragmatic reason motivating the framers to insert the Citizenship Clause in section 1 is that they believed it provided an additional source of congressional power to enforce civil rights. The bill's floor manager in the House of Representatives, James Wilson of Iowa, made this clear when he introduced the amendment to the Civil Rights Bill that added the Citizenship Clause.[123] Section 1 initially applied to all of the "inhabitants" of the United States, but Wilson's amendment restricted the civil rights guarantees of section 1 to U.S. citizens. He stated that the amendment was intended to limit the bill only to citizens rather than all inhabitants of the United States, as there was doubt whether Congress had the power to extend this protection to non-citizens.[124] He explained why Congress necessarily possessed the power to enforce the civil rights of American citizens: "If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect," then Congress "must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family."[125] Senator Trumbull asserted the same position. He insisted that "it is competent for Congress to declare, under the Constitution of the United States, who are citizens."[126] He argued that "certain fundamental rights belong to every American citizen, and among those are the rights to enjoy life and liberty and to acquire property . . . . We would protect a citizen in a foreign nation in those rights. Certainly, then, the Government has power to protect them within its own jurisdiction."[127]

That Republicans understood that the guarantee of citizenship and civil rights of section 1 applied to and protected the civil rights of all U.S.

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[121] *Id.* at 573. *See also infra* notes 137–141 and accompanying text.

[122] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence); *see also infra* note 136 and accompanying text.

[123] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

[124] *Id.*

[125] *Id.* at 1118.

[126] *Id.* at 475.

[127] *Id.* at 1781. The Supreme Court also acknowledged the government's power to protect citizens in foreign lands, but it refused to recognize the government's power to protect them within its own jurisdiction. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873). Conservative Republican Representative Henry J. Raymond, who voted against the Civil Rights Bill but nevertheless proclaimed his support for the federal enforcement of civil rights, acknowledged that Congress had the power to enforce civil rights because these are rights Americans enjoy as U.S. citizens. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866) (arguing that the Civil Rights Act entitles "citizens of the United States . . . to all the rights, privileges, and immunities of citizenship").

citizens is reflected in two proposals introduced in the House to exclude former confederates from its protective guarantees. Representative Ralph Hill of Indiana proposed an amendment to the Citizenship Clause of the Civil Rights Bill that would have excluded "those who have voluntarily borne arms against the Government of the United States or given aid and comfort to the enemies thereof."[128] He explained that, if these persons "are not now entitled to the full rights of citizenship, it at least leaves them without giving them those rights by this bill."[129] Representative Ebenezer Dumont, also of Indiana, offered a similar, but more explicit amendment which stated that nothing in section 1

> shall be construed as re-extending the rights of citizenship to any one who has renounced the same, or acknowledged allegiance to any government or pretended government in hostility to the United States, or held office under the same, nor to any one who voluntarily has borne arms against the United States in the late rebellion, or who has been guilty of any act whatever which by the laws of nations makes a forfeiture of citizenship.[130]

The extensive congressional debate over the question of citizenship evinces the considerable importance congressional legislators attached to citizenship in assessing Congress's power to enforce civil rights. Both supporters and opponents stated that the constitutional authority to define and confer citizenship encompassed the power to define and enforce the rights of citizens. For example, Senator Trumbull maintained that native-born African Americans are citizens of the United States, just as are white Americans.[131] Trumbull further explained that it was necessary to declare native-born Americans, especially black Americans, to be United States citizens, because it is by virtue of their United States citizenship that they were entitled to the Thirteenth Amendment's guarantee of the natural rights of freemen throughout the United States.[132] Trumbull maintained that, if there were any doubt whether black Americans were U.S. citizens and thus entitled to the natural rights of U.S. citizenship, all doubts would be resolved "by passage of a law declaring all persons born in the United States to be citizens thereof. That this bill proposes to do. Then they will be entitled to the rights of citizens."[133] Trumbull expressly defined the civil rights of U.S. citizens as the natural rights of freemen, and stated that "they belong to them in all the States of the Union."[134] Senator

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[128] *Id.* at 1154.
[129] *Id.* at 1154.
[130] *Id.* at 1156.
[131] *Id.* at 475.
[132] *Id.*
[133] *Id. Accord, id.* at 1151–53 (statement of Rep. Thayer).
[134] *Id.* at 1757 (statement of Sen. Trumbull); *see also id.* at 572 (statement of Sen. Wil-

Trumbull restated this natural rights theory of U.S. citizenship in rebutting President Johnson's veto of the Civil Rights Bill.[135] Representative William Lawrence of Ohio, a member of the House Judiciary Committee and the only Representative to speak on the President's veto of the Civil Rights Bill, also asserted this principle in rebuttal to the President's veto message. Lawrence proclaimed that the power to confer citizenship "is an exercise of authority which belongs to every sovereign Power, and is essentially a subject of national jurisdiction. The whole power over citizenship is intrusted to the national Government."[136]

Supporters of the Civil Rights Act therefore amended section 1 by including the clause that defined and conferred United States citizenship on all Americans for the specific purpose of ensuring that all Americans would be entitled to federal protection in their civil rights as citizens.[137] These were the views of the House and Senate floor leaders of the Civil Rights Bill. Other legislators expressed this same understanding. For example, conservative Republican Representative Henry J. Raymond, who was also a founder and editor of *The New York Times*, asserted this view[138] even though he voted to sustain the President's veto of the Civil Rights Act.[139] Raymond proclaimed his desire to raise African Americans to equal status with other persons by giving them the right of citizenship and securing all rights resulting from citizenship.[140] He reasoned that all other rights flow from citizenship and making African Americans citizens would guarantee them the same rights as any other U.S. citizen.[141]

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liams) (declaring that the Civil Rights Bill "confer[s] upon all the inhabitants of every State and Territory all the civil rights that belong to a citizen").

[135] *Id.* at 1756.

[136] *Id.* at 1832.

[137] Courts and scholars have failed to appreciate that the framers of the Civil Rights Act and the Fourteenth Amendment understood the Citizenship Clause of the Civil Rights Act as an exercise of Congress's plenary power to define and protect citizens' rights. They have also failed to understand that the framers believed that in conferring citizenship and defining the rights of U.S. citizens, Congress was entitled to exercise plenary power to protect citizens' rights. Thus, according to the framers' understanding, the Citizenship Clause of the Fourteenth Amendment, in itself, constituted a delegation of plenary congressional authority to define and protect the rights of United States citizens. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 912–13 (1986).

[138] CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866).

[139] CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866).

[140] CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866). *See also infra* note 256.

[141] CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866). During the Fourteenth Amendment debates, Wilson referred to Raymond's comments and agreed that:

> after declaring all persons born in the United States citizens and entitled to all the rights and privileges of citizens, it would be competent for the Government of the United States to enforce and protect the rights thus conferred, or thus declared . . . . That being conceded, the power to protect those rights must necessarily follow . . . as was laid down in the well-known case of [*Prigg*] vs. The Commonwealth of Pennsylvania, where the Supreme Court declared that the possession of the right carries with it the power to provide a remedy.

Senator Garrett Davis of Kentucky, although an ardent opponent of the Civil Rights Act, nevertheless agreed that if African Americans were given citizenship, they would be entitled to the same treatment as white citizens barring any differences authorized "by the express language of the Constitution."[142] However, Davis restricted Congress's power over citizens "to such matters as concern the citizens of different States." The reason, Davis explained, was that the Comity Clause[143] was the sole source of Congress's power to enforce the rights of United States citizens, and it applied only when citizens of one state traveled into another state. The problem with the Civil Rights Bill, according to Davis, was that it protected the civil rights of all U.S. citizens within the states in which they resided. It is significant that Senator Davis, a Democrat with states' rights sympathies, thought Congress possessed the power to enforce the rights secured by the Comity Clause. He proposed a bill to enforce the Comity Clause, which would protect the rights of citizens when in a state other than the state of their residence.

It is the framers' theory of U.S. citizenship and Congress's power to enforce the rights of United States citizens encompassed in the Civil Rights Bill that caused conservative Republican Representative Columbus Delano to oppose its enactment.[144] He feared that the statute would completely supplant state jurisdiction over citizens' rights. Delano accepted the Republicans' principle that United States citizens, as such, are entitled to all of the privileges and rights of citizenship, acknowledging that the Thirteenth Amendment made the former slaves citizens of the United States and therefore entitled to all of the rights and privileges of citizenship.[145] Consequently, he believed no law was needed to give emancipated slaves citizenship.[146] However, Delano was troubled that:

> [I]f we adopt the principle of this bill we declare in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—rights of life, liberty, and property. You render this Government no longer a Government of limited powers; you concentrate and consolidate here an extent of authority which will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens.[147]

Id. at 2512.

[142] Except where otherwise noted, the following account is taken from *id.* at 597 (statement of Sen. Davis).

[143] U.S. CONST. art. IV, § 2, cl. 1.

[144] *See* CONG. GLOBE, 39th Cong., 1st Sess. app. at 156–59 (1866).

[145] *See id.* app. at 156.

[146] *See id.*

[147] *See id.* app. at 158.

He insisted that the Constitution "was never designed to take away from the States the right of controlling their own citizens in respect to property, liberty, and life."[148] Yet, he proclaimed his desire to see the provisions of the law enforced upon the South.[149]

Delano reconciled these two apparently contradictory positions by proposing a constitutional amendment that would require the States to enforce the fundamental rights of life, liberty, and property and also authorize Congress to enforce these rights if the states failed to do so.[150] Delano explained that he wanted Congress to exercise no more power over the states than necessary and "would not allow it to go in the first instance to secure these rights, but allow it to go only when the States refuse to apply and give such security under the fundamental law of the nation."[151]

Thus, Delano did not object to Congress exercising the requisite power to enforce the substantive civil rights of United States citizens. To the contrary, he proposed to give Congress this power. Rather, he sought to preserve concurrent state jurisdiction and state police powers over citizens' civil rights by authorizing the federal government to assume jurisdiction over and enforce civil rights only if the states failed to do so.

It is notable that Delano objected to the Civil Rights Act because it enforced civil rights directly, without the need for any state violation or denial of civil rights. It is also noteworthy that his proposed amendment, which sought to give Congress civil rights enforcement authority only "where the States withheld it,"[152] nevertheless delegated to Congress the power to supplant the states and to enforce citizens' substantive rights. In other words, Delano's conception of Congress's remedial power was not limited to or exclusively directed at remedying a state's denial of a citizen's civil rights; rather, it was directed at enforcing and protecting substantive civil rights, albeit limited to situations in which a state failed to provide this protection itself. Though more moderate and more respectful of states' rights than the remedies Congress adopted in the Civil Rights Act, Delano's conception of Congress's power to enforce civil rights was

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[148] *See id.*

[149] *See id.* app. at 156.

[150] *See id.* app. at 158–59.

[151] *See id.* Representative Delano recommended that Congress adopt Representative John A. Bingham's proposed constitutional amendment, modified to require the states to enforce citizens' fundamental rights and empowering Congress to enforce these rights should the states fail to do so.

> I am still of the opinion . . . that if we do anything upon this subject at all, we had better do it by taking up the amendment to the Constitution offered by my colleague, [Mr. Bingham] (sic) now postponed till April, modifying it in the form I have suggested, and making it the fundamental law, and then proceeding to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land.

Id. app. at 159.

[152] *Id.* app. at 159.

substantive and not "remedial" as the Rehnquist Court defined Congress's power to enforce Fourteenth Amendment rights. Significantly, supporters of the Civil Rights Act rejected Delano's proposal to condition Congress's power to enforce substantive civil rights upon a state's failure to enforce citizens' rights. They chose to enforce substantive civil rights directly.

The debate over citizenship suggests that the Civil Rights Act supplanted state authority over citizens' rights in a second way. The Civil Rights Act overrode any inconsistent state laws and defined some of the rights that Americans possess as U.S. citizens "in every State and Territory in the United States."[153] Senator Trumbull insisted that United States citizenship conferred fundamental rights on all Americans, and he described these rights by paraphrasing Justice Washington's opinion in *Corfield v. Coryell*:[154] "They are those inherent, fundamental rights which belong to all free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union."[155] Senator Trumbull thus declared that U.S. citizens possessed these civil rights independent of state law: "[T]he federal government has authority to make every inhabitant . . . a citizen, and clothe him with the authority to inherit and buy real estate, and the State[s] . . . cannot help it."[156] Just what these rights are had never been determined with any specificity, however. The framers of the Civil Rights Act described the essential rights of free men and citizens in broad, generic terms as the rights to life, liberty, and property.[157] There was some question whether the rights to life, liberty, and property included political rights, such as voting and holding public office, and what the era considered to be social rights, such as nondiscriminatory access to public accommodations and schools. Most of the framers and supporters asserted the view that political and social rights are not among the civil rights and privileges and immunities of citizenship,[158] and so those were not included among the rights specified in section 1.

To avoid uncertainty and ambiguity regarding the rights secured by the Civil Rights Act, the framers explicitly specified in section 1 some of the rights they found essential to U.S. citizenship because those rights were essential to political and economic freedom and individual autonomy in the context of 1866.[159] Section 1 declared that

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[153] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[154] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

[155] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

[156] *Id.* at 500.

[157] *See* Kaczorowski, *supra* note 137, at 922–26; *see also infra* sources cited in notes 301–305.

[158] *See* Kaczorowski, *supra* note 137, at 881–84, 922–26.

[159] *See* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 570 (1989).

> such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[160]

These rights are essentially economic rights and the means of enforcing them in the courts, the right to the protection of the law for the safety of one's person and property, and the right to equal punishments for legal infractions. Thus, Congress exercised the plenary power of a sovereign government by defining and conferring some of the rights that individuals possess as U.S. citizens, "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[161] Section 3 of the Civil Rights Act conferred exclusive jurisdiction on the federal courts to try any civil actions brought by citizens to redress violations of these civil rights, whether attributable to the actions of public officials or private individuals acting in their private capacities.[162]

The United States Supreme Court has asserted this view of the framers' intent in enacting the Civil Rights Act of 1866. As early as 1883, in

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[160] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

[161] Civil Rights Act of 1866 § 1. Scholars disagree over whether the framers understood section 1 as a guarantee of the rights there enumerated as equal rights under state law or as substantive rights of U.S. citizenship. *See, e.g.*, WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 7–10, 110–23 (1988) (arguing that the framers and supporters were divided in their views and that this question was left unresolved until the United States Supreme Court decided the issue); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 66–67 (1990) (arguing that the framers "clearly limited the scope of the [Civil Rights] bill to matters of racial discrimination," leaving the states to determine what rights should be granted to citizens, which created "a potential danger" that "the states could deny the enumerated rights to all citizens, thus defeating the basic purpose of the bill"); John Harrison, *Reconstructing The Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–97, 1402–04 (1992) (arguing that the framers intended to secure equality in state-conferred rights); Kaczorowski, *supra* note 159, at 572–74; Kaczorowski, *supra* note 137, at 912–13 (arguing that the framers intended to secure section 1 rights as the substantive rights of U.S. citizenship, but preserving concurrent state jurisdiction over these rights). However, as the Supreme Court's decisions in The Civil Rights Cases, 109 U.S. 3 (1883), Jones v. Alfred G. Mayer Co., 392 U.S. 409 (1968), and Runyon v. McCrary, 427 U.S. 160 (1976) show, the question whether section 1 conferred equal rights or substantive rights does not have to be resolved for the purposes of this Article. *See infra* notes 163–168 and accompanying text.

[162] *See* Civil Rights Act of 1866 § 1. This provision also conferred exclusive jurisdiction on federal courts to try all criminal prosecutions as provided in section 2 of the Fourteenth Amendment.

The Civil Rights Cases,[163] the Court acknowledged that Congress undertook to enforce the Thirteenth Amendment by

> secur[ing] to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.[164]

The Court recounted the framers' understanding of the Thirteenth Amendment, stating that the framers equated "those fundamental rights which are the essence of civil freedom" to "those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."[165] However, unlike the framers, who emphasized Congress's power under the Thirteenth Amendment to enforce the rights of U.S. citizens, the Court in *The Civil Rights Cases* emphasized Congress's Thirteenth Amendment powers to enforce those rights the denial of which constitutes an incident or badge of servitude.[166] Nevertheless, the Court held that federal legislation enacted pursuant to the Thirteenth Amendment "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."[167] The Court affirmed this view in 1968 when it held that section 1 of the Civil Rights Act of 1866 secured to black and white citizens alike the right to property and the right to make and enforce contracts throughout the United States against violations from any source, "whether governmental or private."[168]

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[163] 109 U.S. 3 (1883).

[164] *Id.* at 22. *Accord* United States v. Rhodes, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) (upholding the constitutionality of the Civil Rights Act of 1866 and Congress's power to enforce the civil rights of U.S. citizens on the grounds that the Thirteenth Amendment made the former slaves United States citizens and secured the personal liberty of "every one, of every race, color, and condition" within the United States); United States v. Given, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (declaring that the "thirteenth, fourteenth, and fifteenth amendments of the constitution have confessedly extended civil and political rights, and . . . have enlarged the powers of [C]ongress" to enforce these rights).

[165] The Civil Rights Cases, 109 U.S. at 22.

[166] *Id.* at 20–21.

[167] *Id.* at 23.

[168] Alfred H. Mayer Co., 392 U.S. at 423–24 (holding that "when Congress provided [in] . . . the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private"). In considering the constitutionality of the present codification of this property right, the Court quoted the Civil Rights Cases and reasserted the constitutionality of the right to property originally secured by the Civil Rights Act, declaring that the fact that it

> operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the

It is because opponents understood that the power Congress exercised in enacting the Civil Rights Act was the plenary power of defining and enforcing the civil rights of all citizens against any violation that opponents objected so vehemently, arguing that Congress usurped the states' police power to determine and regulate the rights of their citizens and thus consolidated the states' police power in the federal government.[169]

> Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.

The Court later interpreted guarantees in section 1 of the right to contract in the same way. *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Runyon, 427 U.S. 160, 170–71 (1976).

[169] For example, Democratic Senator Willard Saulsbury of Delaware objected that the Civil Rights Act was "one of the most dangerous that was ever introduced into the Senate of the United States," insisting that the Constitution "does not of itself declare, and human ingenuity cannot torture it into meaning that the Congress of the United States shall invade the States and attempt to regulate property and personal rights within the States." CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866). Saulsbury explicitly stated that the Civil Rights Act "assumes jurisdiction over subject-matters of which Congress has no jurisdiction" and "positively deprives the State of its police power of government" by determining who shall hold property within the states, "who shall sue and be sued, and who shall give evidence in its courts" by assuming the function of "securing to the citizen the possession of his person and property within the limits of a State" and the "authority over the judicial tribunals in administration of law in the States," which, Saulsbury complained, was "a denial to the States of their police power of regulation." *Id.* at 478. Senator Cowan agreed and admonished that, if "we have the right to pass such a law as this" under the authority of the Thirteenth Amendment, then "we have a right to overturn the states themselves completely." *Id.* at 499. He later clarified that the bill intervened in the states and determined the relationships of inhabitants to one another and to the government. *Id.* at 604. Senator Davis declared that the Civil Rights Act violated "the theory and principle of our Government," because it purported to "interfere with the local concerns of any state [regarding] all of the rights, privileges, and immunities its citizens shall enjoy and their regulation," observing that it conferred the rights enumerated in section 1 "upon all the inhabitants of the United States, of every race and color;" that it interposed federal jurisdiction over the administration of justice, usurping "the reserve [sic] rights of the States, . . . their power to legislate for their own domestic concerns, in relation to their own people, the punishment of their own people, the property and estates and transactions and contracts of their own people." *Id.* at 595–98. Passage of the Civil Rights Act would "utterly subvert our Government," Davis warned, because it was "wholly incompatible with its principles, with its provisions, or with its spirit." *Id.* Should it become law, the Civil Rights Act would produce a perfect and despotic central consolidated Government." *Id.* "Congress by this bill are presuming precisely the power," Davis admonished, "to establish a civil and penal code for all the states of the Union," concluding that section 1 "is a great stride towards the consolidation of all power by Congress than has ever before been taken or conceived." *Id.* at 1414, 1415. Senator McDougall endorsed the views expressed by Senators Cowan and Guthrie. *Id.* at 604.

Opponents in the House of Representatives expressed similar views. Representative Rogers, for example, objected that the Civil Rights Act was intended to extend to black Americans "all the rights to life, liberty, and property . . . [and] every privilege that ought to be guaranteed to any man in the United States for the protection of his life, his liberty, and his property," but he denied that Congress had the authority "to enter in the domain of a State and interfere [in this way] with internal police, statutes, and domestic regulations." *Id.* at 1120. Rogers claimed that the Civil Rights Act "would destroy the foundations of the Government as they were laid and established by our fathers." *Id.* Representative Eldridge

However, the framers of the Civil Rights Act chose not to displace the states completely.

The third way section 1 of the Civil Rights Act supplanted state authority over citizens' rights was by providing that all U.S. citizens shall enjoy and exercise the enumerated civil rights as the most favored class of citizens (white citizens) enjoyed and exercised them. Because it conferred the enumerated civil rights on the same bases "as whites enjoy" them, section 1 expressly prohibited the infringement or denial of citizens'

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characterized the Civil Rights Act as "one of the most insidious and dangerous" measures directed against the American people and said it was "designed to take away the essential rights of the States" by proposing "to enter the States and regulate their police and municipal affairs," and concluded that "[t]here is no doubt it is a measure designed to accumulate and centralize power in the Federal Government." *Id.* at 1154. Representative Thornton argued that "it has uniformly been held that each State has the exclusive right to determine the status of its inhabitants," and he denied the necessity of conferring on freedmen "all the rights necessarily included in the term civil rights and immunities" to protect their freedom. *Id.* at 1566. In doing so, the Civil Rights Bill was "trench[ing] upon the rights of the States, and [was] assuming power which has always belonged to the States of the Union," namely, "the right to determine and fix the legal status of [their inhabitants], the local powers of self government, the power to regulate all the relations . . . between husband and wife, parent and child . . . all the fireside and home rights which are nearer and dearer to us than all the others." *Id.* at 1566–67. Thornton predicted that the Civil Rights Bill was "but a stepping-stone to a centralization of the Government and the overthrow of the local powers of the States. Whenever that is consummated, . . . [t]here will be nothing left but absolute, despotic, central power." *Id.* at 1567. Representative Delano pointedly stated:

> [I]f we adopt the principle of this bill we declare in effect that Congress has the authority to go into the States and manage and legislate with regard to all the personal rights of the citizen—the rights of life, liberty, and property. You render this Government no longer a Government of limited powers, you concentrate and consolidate here an extent of authority which will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens.

Id. app. at 158. Representative Kerr emphasized the outer reach of the power Congress was exercising in enacting the Civil Rights Act. He proclaimed, "This bill rests upon the theory that Congress has the right to declare who shall be citizens of the United States, and then to provide that *such* citizens shall enjoy in the *States* all the privileges and immunities allowed therein to the most favored class of citizens." *Id.* at 1268. (Emphasis in original). Kerr denied that Congress possesses this "right" and warned: "If it exists at all, it exists without limit on its exercise, except the will of Congress." *Id.* at 1268, 1270. Representative Latham accused the Republican supporters of the Civil Rights Act of "interfer[ing] with the internal policy of the several States so as to define and regulate the 'civil rights or immunities among the inhabitants' therein." *Id.* at 1296. The bill would transform American federalism by completely centralizing power in the federal government, it "would change not only the entire policy, but the very form of our Government, by a complete centralization of all power in the national Government," which he believed would be "most dangerous to the liberties of the people and the reserved rights of the States." *Id.* President Johnson voiced the same views in explaining his veto of the Civil Rights Bill. He denied that Congress had the constitutional authority to "abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally." *Id.* at 1680. All of these subjects had hitherto "been considered as exclusively belonging to the States. They all relate to the internal policy and economy of the respective States. They are matters which in each State concern the domestic condition of its people." *Id.*

rights because of racial and other improper animus.[170] The Civil Rights Act again supplanted state law by prohibiting the states from discriminating unreasonably among citizens in their civil rights, especially, but not only, on the basis of race.[171] In addition to defining and conferring the civil

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[170] Civil Rights Act of 1866 § 1. Conservative Republican from Pennsylvania, Senator Edgar Cowan, for example, complained that "[t]his is a proposition to repeal by act of Congress all State laws, all state legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend." CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866); *see also id.* at 474 (statement of Sen. Trumbull) (stating that a purpose of the Civil Rights Bill is to "destroy all these discriminations" in state law, which the Thirteenth Amendment voided); *id.* at 504 (statement of Sen. Howard) (stating that the civil rights bill only contemplates "that in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race"); *id.* at 505–06 (statement of Sen. Johnson) (declaring that "[t]he first section of this bill says that there is to be no discrimination" between whites and blacks, and that it prohibits antimiscegenation laws because "[w]hite and black are considered together, put in a mass, and the one is entitled to enter into every contract that the other is entitled to enter into"); *id.* at 599, 1757 (Sen. Trumbull) (stating that "the very object of the bill is to break down all discrimination between black men and white men . . . it is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights," by declaring "that there shall be no distinction in civil rights between any other race or color and the white race"); *id.* at 601 (statement of Sen. Hendricks) (stating that the Civil Rights Bill provides "that the civil rights of all men, without regard to color, shall be equal"); *id.* at 602 (statement of Sen. Lane of Indiana) (declaring that the objectives of the Civil Rights Bill are to secure to the freedmen "the rights, privileges, and immunities of freemen," and to "give effect to [these objectives] by doing away with the slave codes of their respective States where slavery was lately tolerated," codes that the Thirteenth Amendment nullified); *id.* at 603 (statement of Sen. Wilson) (justifying the need for the Civil Rights Bill to secure "the new-born civil rights we are now about to pass" for the freedmen from "laws . . . so atrocious . . . and so persistently . . . carried into effect by the local authorities, that [Union generals] have issued positive orders forbidding the execution of the black laws that have just been passed"); *id.* at app. 182, 183 (statement of Sen. Davis) (arguing that the Civil Rights Bill proscribed all discriminations against black Americans in favor of white persons); *id.* at 1118 (statement of Rep. Wilson) (declaring that section 1 of the Civil Rights Bill prohibits discrimination in civil rights or immunities among United States citizens and guarantees the same specified rights to "such citizens of every race and color . . . as is enjoyed by white citizens"); *id.* at 1158 (statement of Rep. Windom) (stating that the Civil Rights Bill "declares that hereafter there shall be no discrimination in civil rights or immunities among the citizens of any State or Territory of the United States on account of race, color, or previous condition of slavery, and that every person . . . shall have the same [enumerated] right[s]"); *id.* at 1293 (statement of Rep. Shellabarger) (stating that the bill prohibits the states from discriminating "on account of race color, or former condition of slavery").

[171] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). Political animus was a major problem that Congress sought to address in protecting southern white unionists, federal officials, and military personnel in the South. *See infra* notes 292–310 and accompanying text. Xenophobia and anti-Catholicism were other problems Republicans sought to address. Representative Lawrence explicitly stated that the Bill was intended to "protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law." CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866). Other participants in the Civil Rights Bill debates stated that the bill was intended to prevent prejudice based on country of national origin and religion. *See, e.g.*, *id.* at 1294 (statement of Rep. Shellabarger) (arguing that the Civil Rights Bill would prohibit the state of Ohio from passing a law forbidding U.S. citizens of German extraction from owning property, inheriting property, living in Ohio, or coming to work in Ohio); *id.* at 1415 (statement of Sen. Davis) (objecting that the Civil Rights Bill would authorize Congress "to go into [New Hampshire] and to abrogate" a statute that prohibited Roman Catholics from holding state offices, thus prohibiting "that distinction among her citizens").

rights and immunities of United States citizens, therefore, the Civil Rights Act overrode state laws that discriminated on the bases of race, color, or condition of servitude, and probably on the bases of religion, country of origin, and political affiliation, and it imposed on state officials a federal duty to recognize and enforce the civil rights of all citizens in the same manner that the officials recognized and enforced the civil rights of white citizens.

Not simply a guarantee of racial equality in citizens' rights or of an equality in state-conferred rights, the Civil Rights Act defined a national citizenship consisting of a body of fundamental rights that proponents and opponents understood its framers and supporters expressly intended to secure to all citizens of the United States, white as well as black, native-born as well as the foreign-born.[172] Thus, Representative Wilson proclaimed that the Civil Rights Act was intended "to protect [all] our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."[173] Senator Reverdy Johnson, a leader of the Democratic opposition who was regarded as the foremost authority on the Constitution, confirmed this view, stating that the Civil Rights Act "professes to define what citizenship is, [and] it gives the rights of citizenship to all persons without distinction of color, and of course embraces Africans or descendants of Africans."[174] Consequently, although black Americans were the intended primary beneficiaries of civil rights protection, drafters and supporters of the Civil Rights Act expressed their intention of protecting white citizens as well.[175] This was also the understanding of observers outside of Con-

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[172] *See, e.g.*, *id.* at 41 (statement of Sen. Sherman); *id.* at 474, 599, 1757 (statements of Sen. Trumbull); *id.* at 504–05 (statement of Sen. Johnson); *id.* at 595, 598 (statements of Sen. Davis); *id.* at 603 (statement of Sen. Cowan); *id.* at 3035 (statement of Sen. Henderson); *id.* at 1066–67 (statement of Rep. Price); *id.* at 1117 (statement of Rep. Wilson); *id.* at 1120–21 (statement of Rep. Rogers); *id.* at 1263–65 (statement of Rep. Broomall); *id.* at 1264 (statement of Speaker Colfax); *id.* at 1291, 1292 (1866), 2542 (statement of Rep. Bingham); *id.* at 1833–35 (statement of Rep. Lawrence).

[173] *Id.* at 1118.

[174] *Id.* at 505 (statement of Sen. Johnson).

[175] The Supreme Court has held that the framers intended the Civil Rights Act to secure the rights of whites as well as blacks and the Court has applied it to protect the civil rights of whites. *See, e.g.*, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). The Court also asserted this view shortly after the statute's enactment. Although it noted that it was primarily intended to protect black Americans from racial prejudice and discrimination, the Court declared that the Civil Rights Act "extends to both races the same rights, and the same means of vindicating them." Blyew v. United States, 80 U.S. (13 Wall.) 581, 593 (1872). The congressional debates offer abundant evidence supporting the Supreme Court's holding. *See* CONG. GLOBE, 39th Cong., 1st Sess. 475–76, 599, 1760 (statements of Sen. Trumbull) (proclaiming that "this bill applies to white men as well as black men" because the bill "declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness," and further noting that "[it] protects a white man just as much as a black man"); *id.* at 505 (statement of Sen. Johnson) (stating that "the white as well as the black is included in this first section"); *id.*

gress.[176] The framers obviously intended to protect civil rights against violations beyond those motivated by racial discrimination.

Even the Supreme Court, as early as 1883, recognized that the framers of the Civil Rights Act understood Congress had the power, and that it intended to use this power to intrude upon and supplant traditional state authority over the civil rights of all Americans. The Court observed that the framers undertook to enforce the Thirteenth Amendment by "secur[ing] to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom,"[177] and that they equated these rights to "those fundamental rights which appertain to the essence of citizenship."[178] Indeed, the Court affirmed that legislation enacted pursuant to the Thirteenth Amendment "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."[179]

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at 595, 598, 1415, app. at 184 (statement of Sen. Davis) (complaining that the Civil Rights Bill applies "to a free negro or a white local resident citizen of" any state and that the Civil Rights Bill "was a flagrant, reckless, and enormous usurpation of power by the majority of the two Houses" because it extended the Thirteenth Amendment to protect the civil rights of whites and free blacks); *id.* at 1803 (statement of Sen. Lane of Kansas) (stating that the Civil Rights Bill "secured equal rights to all"); *id.* at 1115 (statement of Rep. Wilson) (reporting the Civil Rights Bill as a bill "to protect all persons in the United States in their civil rights, and to furnish the means for their vindication"); *id.* at 1153 (statement of Rep. Thayer) (claiming "The [Civil Rights] bill . . . extend[s] these fundamental immunities of citizenship to all classes of people in the United States, [and] provides means for the enforcement of these rights or immunities."); *id.* at 1158 (statement of Rep. Windom) (admonishing that "the negro question . . . never will rest until this nation does justice to the negro and every other citizen in it"); *id.* at 1262, 1264 (statement of Rep. Broomall) (exhorting that the Federal Government was duty-bound "to guard the rights of those who in the midst of the rebellion periled their lives and fortunes for its honor, of whatsoever caste or lineage they be," and "that no system of reconstruction ought to be considered unless it shall effectually guaranty the rights of the Union men of the South," insisting that "it is the solemn obligation of this Government to protect the property and the person of every loyal man"); *id.* at 1264 (statement of Speaker of the House Colfax) (stating that the Civil Rights Bill is "very wide in its range, proposing to protect all persons in the United States in their civil rights and furnishing the means of their vindication"); *id.* at 1291 (statement of Rep. Bingham) (characterizing the Civil Rights Bill as "legislation in favor of the rights of all before the law"); *id.* at 1294 (statement of Rep. Shellabarger); *id.* at 1833 (statement of Rep. Lawrence). *See also infra* notes 285–299 and accompanying text.

[176] PHILADELPHIA EVENING BULL., Mar. 30, 1866, collected in Scrapbook on the Civil Rights Bill 47 (E. McPherson ed., n.d.), in Edward McPherson Papers container 99 (collection available in Library of Congress). *See also* PHILADELPHIA AM. & GAZETTE, Apr. 7, 1866, *id.* at 79; PHILADELPHIA N. AM., Apr. 7, 1866, *id.* at 78; N.Y EVENING POST, Apr. 2, 1866, *id.* at 61–62; N.Y. EVENING POST, Mar. 28, 1866, *id.* at 32; BALTIMORE AM., Mar. 23, 1866, *id.* at 4; PHILADELPHIA PRESS, n.d., 1866, *id.* at 25–26; ROCHESTER DEMOCRAT, n.d., *id.* at 37; YONKERS STATESMAN, n.d., *id.* at 53.

[177] The Civil Rights Cases, 109 U.S. 3, 22 (1883).

[178] *Id.*

[179] *Id.* at 23. The Court's view of the scope of the rights Congress could enforce under the Thirteenth Amendment may have been narrower than that of the framers of the Civil Rights Act of 1866. The Court can be read as limiting Congress's rights-enforcement power under the Thirteenth Amendment to those rights the denial of which would constitute a badge of slavery. It is sufficient to recognize that, even on this narrower view of Congress's Thirteenth Amendment power, the Court acknowledged Congress's plenary power to define and

The framers' theory of U.S. citizenship and of constitutional delegation assumed plenary congressional power to enforce the rights of U.S. citizens and to supplant the states' authority over the rights of U.S. citizens; they rejected any intention of displacing the states completely in performing the essential governmental function of enforcing citizens' rights. To the contrary, they wanted to preserve state authority over citizens' rights and therefore drafted the Civil Rights Act in such a way as to preserve concurrent state police powers.[180] They expressed the desire to supplant the states and enforce citizens' rights only to the extent necessary under the circumstances they confronted in 1866.[181] For example, while they could have conferred unconditionally on all U.S. citizens the rights enumerated in section 1, they chose not to do so.

The framers and supporters of the Civil Rights Act gave two reasons for avoiding an outright grant of civil rights to every U.S. citizen. One reason is that an unconditional grant of civil rights would have entitled all citizens to these rights on the same basis as every other citizen. However, the framers did not believe that all citizens are entitled to the same civil rights or to exercise civil rights on the same basis as others. There were, and there continue to be, legitimate and reasonable discriminations among different classes of citizens regarding citizens' rights. For example, minors and the insane do not enjoy the same rights as rational adults.[182] In 1866, married women did not enjoy the same rights as unmarried women or as men, whether married or unmarried.[183]

The framers sought to preserve these distinctions in state law, which they considered to be legitimate discriminations, as they sought to abolish other kinds of discriminations, such as those based on race and political animus. Thus, Representative Wilson explained that

> [T]he words ["as is enjoyed by whites"] were not in the original bill, but were placed there by an amendment offered by myself. And the reason for offering it was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.[184]

Representative Lawrence repeated this explanation when he observed that "distinctions created by nature of sex, age, insanity, &c., are recognized

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enforce those civil rights that are essential to individual liberty.

[180] *See infra* notes 198–213 and accompanying text.

[181] *See id.*

[182] *See infra* notes 184–185 and accompanying text.

[183] *See id.*

[184] CONG. GLOBE, 39th Cong., 1st Sess. app. at 157 (1866).

as modifying conditions and privileges," and may therefore be permitted, "but mere race or color, as among citizens, never can."[185]

The second reason the drafters of the Civil Rights Bill avoided an outright grant of civil rights is that they sought to preserve state jurisdiction over citizens' rights.[186] Preserving state jurisdiction over citizens' rights highlights a significant difference between the rights secured by the Civil Rights Act of 1866 and the Fugitive Slave Act of 1850. The Supreme Court had held that the Constitution created the slave owners' property rights secured by the Fugitive Slave Clause and that the Constitution did not delegate to the states the authority to enforce these rights. Consequently, the power to enforce the slave owners' right of interstate recapture was delegated exclusively to Congress, and Congress could provide for the enforcement of this federal right only in the federal courts.[187]

The power to enforce the personal rights and liberties of citizens was a different matter altogether. Historically, the enforcement and protection of these rights and the administration of civil and criminal justice were core areas of the states' traditional police powers. Except as they affected fugitive slaves, the states had exercised these powers virtually without the federal government's oversight. The framers of the Civil Rights Act sought to preserve the states' concurrent jurisdiction over the personal rights of U.S. citizens and the common law and statutory regulations which determined the manner in which individuals exercised and enjoyed these rights.[188] They thereby avoided the burden of legislating detailed federal codes relating to the various areas of civil law and criminal law.

One must keep in mind, however, that the Fugitive Slave Acts of 1793 and 1850 had supplanted the states' police power to protect and enforce the personal liberties of their inhabitants, regardless of race, in cases involving fugitive slaves. These statutes provided for the enforcement of slave owners' constitutional rights over fugitive slaves through federal tribunals.[189] Following this precedent, congressional Republican leaders proclaimed that

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[185] *Id.* at 1835. *See also id.* at 572, 573 (statement of Sen. Henderson) (arguing that a U.S. citizen takes citizenship rights subject to state regulations, such as contract law prohibiting "lunatic[s]" from making enforceable contracts and drinking laws which "forbid the selling of intoxicating liquors to minors under twenty-one years of age"); *id.* at 1293 (statement of Rep. Shellabarger) (arguing that the Civil Rights Bill leaves undisturbed the state's power to regulate the rights of married women and minors). Nevertheless, Senator Cowan continued to insist that section 1 conferred the same right to contract and property on married women and minors regardless of state law. *Id.* at 1792. In addition, the framers refused to undertake the onerous and complicated task of legislating federal civil and criminal codes to replace those of the states that an unconditional grant of civil rights would have necessitated. *See, e.g., infra* notes 236–238 and accompanying text.

[186] *See infra* notes 236–238 and accompanying text.

[187] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 622–24 (1842). The Court held that state legislatures could prohibit state and local judges from enforcing the Fugitive Slave Act. *See id.* at 622. *See also supra* notes 48 and 54 and accompanying text.

[188] *See infra* notes 236–238 and accompanying text.

[189] *See* Act of Feb. 12, 1793, ch. 7, §§ 3–4, 1 Stat. 302–05 (repealed 1864); *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

citizens of the United States were entitled to the federal protection of their constitutional rights, and they proclaimed their intention of providing that protection by the federal government through the Civil Rights Act. For example, Representative Wilson declared: "citizens of the United States . . . are entitled to certain rights; and . . . I affirm that being entitled to those rights it is the duty of the Government to protect citizens in the perfect enjoyment of them. The citizen is entitled to life, liberty, and the right to property."[190]

The Civil Rights Act posed a problem of constitutional federalism. Asserting that the federal government possessed the constitutional power, and the duty, "to protect citizens in the perfect enjoyment of . . . life, liberty, and the right to property" it threatened to supplant the states' traditional jurisdiction over and constitutional power to administer ordinary civil and criminal justice.[191] Indeed, in conferring the status and rights of citizenship on all Americans and providing remedies to redress their violation, Congress could have completely supplanted the states' jurisdiction over citizenship and citizens' rights.

Opponents of the Civil Rights Act insisted that it did precisely that. For example, Senator Saulsbury accused Republicans of "invad[ing] the States and attempt[ing] to regulate property and personal rights within the States."[192] Saulsbury complained that the states

> find themselves by the bill invaded and defrauded of the right of determining who shall hold property and who shall not within its limits, who shall sue and be sued, and who shall give evidence in its courts. All these things are taken out of the control of the States by the paramount authority of this bill, if it be a constitutional bill, and the power is given to the Federal Congress to determine these things, the will of a State to the contrary notwithstanding."[193]

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[190] CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). *See also id.* at 474–76 (statement of Sen. Trumbull) (arguing that U.S. citizens are entitled to the inalienable rights to life, liberty, and property proclaimed in the Declaration of Independence, and the Civil Rights Act was intended to secure and enforce these rights); *id.* at 1151–53 (statement of Rep. Thayer) (arguing that the Civil Rights Bill merely declared that all native born Americans shall enjoy the fundamental rights of citizenship, which secure life, liberty, and property and equal protection of the law).

[191] CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). *See also infra* notes 192–196 and accompanying text.

[192] CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

[193] *Id.* at 478; *id.* at 602 (statement of Sen. Cowan) (objecting that the Civil Rights Bill intervened in the states and determined the relationships of inhabitants to one another and to the state governments and proclaiming that the Civil Rights Bill was unconstitutional under the original theory of federalism, where "the people of the several States in their domestic and civil and political relations are to be regulated [exclusively] by the States"); *id.* at 1778 (statement of Sen. Johnson) (asserting that "[t]he first section usurps, as I think, what has heretofore been considered as the exclusive authority of the States"); *id.* at 1121 (statement of Rep. Rogers) (insisting that the Civil Rights Bill gives Congress the right "to

He maintained, correctly, that if the Civil Rights Act was constitutional, then Congress could supplant the states' police powers completely. Quoting the *Federalist Papers*, Saulsbury insisted that "all these powers embraced in your bill are reserved to the States and to the States exclusively, because certainly they concern the lives, liberties, and properties of the people," and therefore the internal affairs of the states.[194]

Representative Michael Kerr, a Democrat from Indiana, expressed the same objection in the House, arguing that the theory underlying the Civil Rights Act authorized the federal government to displace the states in regulating citizens' substantive rights. Maintaining that the states possessed the exclusive power to define and regulate citizens' civil rights, Kerr objected that the bill "rests upon a theory . . . [that] asserts the right of Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States, and to determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it."[195] He warned that this theory denied "the right of the

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enter the sovereign domain of a State and interfere with [state] statutes and local regulations," undermines "those solid bulwarks of constitutional liberty erected by our fathers," consolidates power in the Federal Government, and "destroy[s] the foundations of the Government as they were laid and established by our fathers"); *id.* app. at 158 (statement of Rep. Delano) (quoting Madison's *Federalist 45*, which stated that the reserved rights of the states "'extended to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State,'" insisting that the Constitution established the Federal Government as "a Government with limited powers, powers restricted to the necessary objects of its existence and the proper discharge of the great duties devolving upon it" and that it "was never designed to take away from the States the right of controlling their own citizens in respect to property, liberty, and life"). *See also supra* note 169.

[194] CONG. GLOBE, 39th Cong., 1st Sess. 478 (1866). Saulsbury did not identify the specific Federalist Paper he was quoting. *See also id.* at 596, 1414–15 (statement of Sen. Davis) (stating that Congress's powers "are particularly defined in the eighth section of the first article of the Constitution," and that Congress cannot "interfere with the local concerns of any state, such as all of the rights, privileges, and immunities its citizens shall enjoy and their regulation," reasoning that judicial authority holds "the States are sovereign, 'especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction'" and that "this authority expressly lays it down that all these subjects are the distinctive and exclusive subjects of State legislation; that over them the authority, the jurisdiction of the respective States is as though the States were foreign countries") (quoting Abbott v. Bayley, 6 Pick. (23 Mass.) 89, 92 (1827)); *id.* at 601 (statement of Sen. Guthrie) (stating that "[t]he first section of this bill attempts to repeal all the state laws and to enact new laws for them, the enforcement of which is put into new hands" and complaining that "under the pretense of giving effect to the freedom of the slave" Congress had "originated a system that is constantly interfering with the laws of the States, and constantly interfering with the citizens of the States, bringing them before your tribunals and questioning them whenever they attempt to enforce a State law against a black man"); *id.* at 1270 (statement of Rep. Kerr) (stating that the Civil Rights Bill authorized Federal executive officers and Federal courts "to usurp the functions of the State government" in securing citizens' fundamental rights, including Bill of Rights guarantees). *See also supra* note 169.

[195] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1270 (statement of Rep. Kerr).

State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens." Kerr concluded with a warning that the Civil Rights Act tended toward the usurpation of the states' police power that its underlying theory portended: "Congress, in short, may erect a great centralized, consolidated despotism in this capital. And such is the rapid tendency of such legislation as this bill proposes."[196]

Senate opponents also warned that the principles underlying the Civil Rights Act authorized Congress to replace the states' civil and criminal laws with federal laws. For example, Senator Garrett Davis maintained that "[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union."[197] He reasoned that if Congress had the power to require the states to adopt racially uniform laws relating to civil rights and criminal penalties, then it had "the power to occupy the whole domain of local and State legislation."[198] The power Congress attempted to exercise in enacting the Civil Rights Act went much further, Davis warned: "If this congressional power exists to the extent that it is attempted to be exercised in this bill, it is without limit except by congressional discretion and forbearance."[199] Expressing the same view, President Andrew Johnson vetoed the Civil Rights Bill, among other reasons, because its provisions

> interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centraliza-

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[196] Kerr supported his contention that the states possessed the exclusive power to define and regulate the rights of citizens with judicial opinions recognizing this power under the Comity Clause. He maintained that the states' power in this respect was exclusive. *Id.* at 1269–70.

[197] *Id.* at 1414 (statement of Sen. Davis). *See also id.* at 597 (statement of Sen. Davis) (arguing that principles justifying the Civil Rights Bill invested Congress "with the power to establish a civil and penal code for all the States of the Union"); *id.* app. at 158 (Rep. Delano) (warning that, "[I]f we now go on to a system of legislation based upon the assumption that Congress possesses the right of supreme control in [respect to property, liberty, and life]," that "whether we are not assisting to build up a consolidated Government in view of the powers of which we may well tremble . . . the authority assumed as the warrant for this bill would enable Congress to exercise almost any power over a State"); *id.* at 1271 (statement of Rep. Kerr).

[198] *Id.* at 1415 (statement of Sen. Davis). Davis later commented that the Civil Rights Bill would have been named more appropriately "'An act to consolidate all the reserved sovereignty and powers of the several State into the Congress and Government of the United States.'" *Id.* at 182.

[199] *Id.* at 1415.

> tion and the concentration of all legislative power in the national Government.[200]

Opponents thus acknowledged that the theory of constitutional authority proponents argued to support the constitutionality of the Civil Rights Act was a recognition of Congress's plenary power to define, confer, enforce, and protect citizens' civil rights. They therefore argued that the statute usurped the states' sovereign powers reserved to them by the Tenth Amendment.[201]

Significantly, not a single supporter of the Civil Rights Act denied opponents' warnings that its proponents' understanding of Congress's powers to protect citizens' civil rights gave Congress the power to supplant the states in the administration of justice. Nevertheless, supporters did expressly deny that they intended to exercise Congress's plenary power to enforce citizens' rights to the complete annihilation of the states' police power. To the contrary, they expressly stated that they intended to preserve the states' police powers. "The declaration of citizenship does not confer any right the exercise of which on their part cannot be restrained by a State Legislature so as to protect the general peace and welfare of the States. I am sure of that."[202]

This view was echoed outside of Congress. Thus, the New York *Evening Post* responded to President Johnson's veto of the Civil Rights Bill in an editorial stating that Congress did not "usurp the power of the local legislature to prescribe in what manner the rights of person and property shall be secured."[203] Elaborating, the editor explained that Congress did not declare "by what rules evidence shall be given in courts, by what tenure property shall be held, or how a citizen shall be protected in his occupation." Rather, Congress "only says to the states," whatever laws they enact regulating the enjoyment of civil rights, they should "make them

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[200] *Id.* at 1681 (President Johnson's veto message). Senator Johnson defended the President's veto with the same argument. *Id.* at 1777 (reciting the rights secured in section 1 and arguing that, "If Congress can legislate in relation to these rights . . . the States are abolished," because "the further provision in this bill follows . . . that Congress has the authority to constitute its own tribunals for the purpose of granting relief for the enforcement of these rights, then the State courts may be closed up." If Congress's authority to enact section 1 exists, "nothing can be plainer" than that, with respect to these civil rights, "this Government is a consolidated Government . . . it is still more obvious that the result is an entire annihilation of the power of the States").

[201] U.S. CONST. amend. X.

[202] CONG. GLOBE, 39th Cong., 1st Sess. 574 (statement of Sen. Henderson). *See also id.* at 600, 605 (statement of Sen. Trumbull) (arguing that the Civil Rights Act would not operate in a state that performs its constitutional obligation to protect and enforce citizens' rights); *id.* at 1785 (statement of Sen. Stewart) (arguing that the Civil Rights Act's penal section only imposes federal penalties against individuals in states that have discriminatory laws or customs).

[203] The following account is taken from the N.Y. EVENING POST (n.d., n.p.), collected in Scrapbook on the Civil Rights Bill 32 (E. McPherson ed., n.d.), in Edward McPherson Papers container 99 (collection available in Library of Congress).

general; make them for the benefit of one race as well as another." The framers thus drafted the Civil Rights Act to confer and secure civil rights subject to state regulations, which were themselves subject to Congress's power to modify and supplant them as Congress did in the provisions of the Act. They expressly rejected the burden of enacting federal codes regulating areas of private law, such as contract law, property law, and criminal law.[204]

Pragmatism alone would have been a sufficient reason for preserving state police powers over civil rights. The federal government was simply not equipped or prepared to assume completely the administration of civil and criminal justice.[205] In addition, Civil Rights Act proponents were committed to constitutional federalism, a federalism that preserved state police powers but recognized the national government's ultimate responsibility for and power to enforce citizens' civil rights.

Although they expressed their desire to supplant the states' police powers to the extent necessary to secure the civil rights of American citizens, not a single proponent of the Civil Rights Act expressed a desire to prohibit the states from performing these most essential state functions. To the contrary, they clearly expressed their wish that the states exercise concurrent jurisdiction over the rights of U.S. citizens and enforce each citizen's rights impartially.[206] For example, Senator Stewart agreed with opponents that it would be more desirable that the states should "secure to the freedmen personal liberty" but believed that, since they had not, Congress unquestionably possessed the power to do so.[207] It "was the intention of those who amended the Constitution . . . to give the power to the General Government to pass any necessary law to secure to the freedmen personal liberty," Stewart argued. "I believe that was the intention. I believe that is within the legitimate scope of legislation." Stewart insisted that Congress "ought and must exercise it if the States will not do justice to the freedmen," and "that was the intention in framing the [Thirteenth] amendment of the Constitution."[208] Thus, if a state failed to provide justice to an American citizen, Congress provided in the Civil Rights Act the justice that the state withheld.

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[204] *See supra* notes 173–176 and accompanying text.

[205] *See infra* notes 213–216, 228–237 and accompanying text.

[206] *See* CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard); *id.* at 505 (statements of Sens. Johnson, Trumbull, and Fessenden); *id.* at 572, 574 (statement of Sen. Henderson); *id.* at 573–74 (statement of Sen. Williams); *id.* at 1832 (statement of Rep. Lawrence); *id.* at app. 158–59 (statements of Reps. Delano, Wilson, and Niblack).

[207] Except where otherwise noted, the following account is taken from *id.* at 1785 (statement of Sen. Stewart).

[208] Senator Stewart's expressed understanding of Congress's Thirteenth Amendment power to enforce citizens' rights and his expressed desire to exercise this plenary power expressly contradict Justice Kennedy's interpretation of Stewart's objections to the proposed Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 521 (1997).

It bears repeating that the framers and supporters repeatedly asserted that Congress possessed plenary power to enact any law to secure the rights of U.S. citizens, but that they also disclaimed any intention of exercising the full scope of this power to the exclusion of state authority over citizens' rights. Declaring civil rights to be among the constitutionally secured rights of U.S. citizens, the Civil Rights Act authorized federal civil remedies against anyone who discriminated against a citizen and thereby violated any of the rights enumerated in section 1.[209] The statute left the redress of ordinary violations of section 1 rights, such as an ordinary breach of contract claim or the prosecution of a crime not motivated by a discriminatory animus, to the states' systems of civil and criminal justice on the assumption that the states would give appropriate relief. The framers sought to compel state officials and judges to provide impartial justice by imposing criminal penalties on those who did not.[210] However, if a state court failed to redress an ordinary civil claim or to prosecute an ordinary crime and thereby denied to a party one of the civil rights enumerated in section 1, or, more broadly, if a state failed to enforce any legal right recognized by state law or failed to bring criminal offenders to justice, and the failure violated a citizen's section 1 civil rights, the Civil Rights Act authorized the federal courts and legal officers to supplant the states and to administer the civil or criminal justice that the states denied.[211]

Representative Wilson explained this enforcement structure when he asserted the *Prigg*[212] Court's theory of the plenary power and duty of Congress to enforce a citizen's constitutional rights, stating that, "in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy" whenever they are violated.[213] Wilson then noted that the states were depriving American citi-

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[209] The United States Supreme Court has repeatedly so held. *See* The Civil Rights Cases, 109 U.S. 3, 23–35 (1883); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 423–24 (1968); Runyon v. McCrary, 427 U.S. 160, 170–71 (1976); Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Section 3 of the Civil Rights Act conferred exclusive jurisdiction on federal courts to try all violations of section 1 rights. Civil Rights Act of 1866 § 3, ch. 31, 14 Stat. 27 (1866).

[210] Civil Rights Act of 1866 § 2. *See infra* notes 261–291 and accompanying text.

[211] Civil Rights Act of 1866 § 3. *See* United States v. Rhodes, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (No. 16,151) (upholding federal jurisdiction to try all offenses against the Kentucky criminal code involving black victims of crime and black criminal defendants on the grounds that the state's rules of evidence denied black parties affected by the cause of action the same right to testify as was enjoyed by white parties); Blyew v. United States, 80 U.S. (13 Wall.) 581, 593 (1871) (affirming federal jurisdiction to try offenses against state criminal laws, but restricting this jurisdiction to criminal prosecutions against black defendants who were denied or could not enforce under state legal process any right secured by section 1 of the Civil Rights Act of 1866). This enforcement structure is more fully explained at *infra* notes 277–331 and accompanying text.

[212] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

[213] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson).

zens of the rights guaranteed by the Bill of Rights. "When such a case is presented can we not provide a remedy?" he asked rhetorically. He answered, "Who will doubt it? . . . The power is with us to provide the necessary protective remedies . . . . If not, from whom shall they come?" he queried. Adding the principles of the Declaration of Independence to the constitutional theory of *Prigg*, Wilson boomed, "They must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government." Thus, when U.S. citizens needed the federal government to protect their rights and to remedy their violation, the Civil Rights Act authorized federal courts and law enforcement officers to stand in the place of their state counterparts and to give citizens this civil and criminal justice.

But, if the State administered civil and criminal justice impartially in ordinary cases, there would then be no need for federal intervention or for a federal forum to enforce citizens' civil rights.[214] Senator Trumbull explained that the states were not dispensing justice impartially, which necessitated congressional action. However, if everyone recognized that black Americans are entitled to the same civil rights as white Americans, Trumbull opined, "and would act upon [this recognition], the States would do it, and there would be no occasion for the passage of the bill."[215] Since the states were unwilling to secure the rights of all Americans, "and Congress has authority to do it under the [thirteenth] constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution?" Representative Wilson made the same point in the House. Explaining that the states were refusing to protect the rights of some Americans, he declared that "the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny."[216]

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[214] *See id.* at 600 (statement of Sen. Trumbull). Senator Trumbull paraphrased and answered Senator Davis's accusation that the Civil Rights Bill "breaks down the local legislation of all the States; it consolidates the power of the States in the Federal Government," by stating:

> Why, sir, if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky. Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations.

See id.

[215] Except where otherwise noted, the following account is taken from *id.* at 605 (statement of Sen. Trumbull). Senator Stewart made the same argument specifically in reference to the penal sanctions of the bill's second section. *See id.* at 1785.

[216] *Id.* at 1118 (statement of Rep. Wilson). Senator Thomas Hendricks, Democrat from Indiana and a member of the Senate Judiciary Committee, stated that the Civil Rights Bill

> provides, in the first place, that the civil rights of all men, without regard to color, shall be equal; and, in the second place, that if any man shall violate that principle by his conduct, he shall be responsible to the court; that he may be prosecuted

Scholars disagree whether the framers of the Fourteenth Amendment sought to enforce substantive rights or merely equality in state-conferred rights.[217] Most studies approach this question with the assumption that the framers considered only two alternative courses of action: either the framers intended to supplant state jurisdiction over citizens' rights, or they intended to preserve state jurisdiction.[218] Scholars have equated the first course of action to enforcing substantive rights and the second to enforcing an equality in state-conferred rights against discriminatory state action.[219] They have failed to consider a third course of action, namely, that the framers sought to enforce substantive civil rights and to preserve concurrent state jurisdiction over citizens' substantive rights, though subject to congressional oversight and modification.

This Article argues that the framers adopted this third approach and asserted plenary power to enforce substantive rights of U.S. citizens and, at the same time, preserved state concurrent power over those rights, albeit a significantly diminished state power. The Article maintains that this third alternative most accurately explains the framers' understanding of the Civil Rights Act. The least one can say with certainty is that proponents of the Civil Rights Act said that they intended to assert Congress's power to enforce the substantive rights of all American citizens, whites as well as blacks, that they asserted Congress's power to enforce substantive civil rights, and that opponents acknowledged and objected that supporters exercised such plenary power in enacting the Civil Rights Act. The enforcement structure established in the remaining sections of the Civil Rights Act clearly demonstrates that the framers authorized federal law enforcement officials and the federal courts to administer ordinary civil and criminal justice when Americans were unable to get justice within the states' systems of civil and criminal justice.[220]

Senator Trumbull regarded section 1 as "the basis of the whole bill."[221] Having explained this section, he declared that the only question was: "will this bill be effective to accomplish the object, for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect."[222] Stating that he intended to make the bill effective in protecting the civil rights of all Americans, Trumbull explained that "[t]he other provisions of the bill

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criminally and punished for the crime, or he may be sued in a civil action, and damages recovered by the party wronged.

Id. at 601

[217] *See, e.g.*, sources cited in *supra* note 161.

[218] *See id.*

[219] *See id.*

[220] *See infra* notes 277–331 and accompanying text.

[221] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

[222] *Id.* at 475 (statement of Sen. Trumbull) (referring to the Thirteenth Amendment as the "declaration in the Constitution").

contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section."[223]

B. Section 2: Violating Citizens' Rights Is Made a Federal Crime

Like the framers of the Fugitive Slave Act of 1850, the framers of the Civil Rights Act of 1866 imposed criminal sanctions on persons who violated the civil rights secured by section 1. Asserting that "A law is good for nothing without a [criminal] penalty," Senator Trumbull characterized section 2 as "the valuable section of the bill."[224] However, Congress did not exercise its full penal powers, for section 2 limited federal criminal sanctions to civil rights violations committed under color of law or custom and motivated by racial animus. Viewed from the perspective of the twenty-first century, section two establishes that one of the remedies the framers of the Fourteenth Amendment adopted to correct racially discriminatory state action was to compel state judges and law enforcement officials to enforce federally secured civil rights by threatening them with criminal prosecution should they fail to do so.

This penal section defined two federal crimes against citizens' civil rights. The first provided that "any person" who subjected or caused to be subjected "any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act" was "guilty of a misdemeanor," but only if he acted "under color of any law, statute, ordinance, regulation, or custom" and because the person whose right was being deprived had been "held in a condition of slavery or involuntary servitude . . . or by reason of his color or race."[225] The second crime consisted of imposing "different punishments, pains, or penalties" on any such persons.[226] These crimes were punishable by a fine of up to $1,000 or imprisonment for up to one year, or both, at the discretion of the court.[227]

C. Congress Asserts Plenary Power To Punish Civil Rights Violators While Preserving Concurrent State Police Powers

Although the drafters of the Civil Rights Act limited criminal sanctions to persons who acted under color of law or custom and out of racial animus, they asserted that Congress possessed plenary power to redress violations of citizens' rights by imposing criminal sanctions on anyone who violated a citizen's civil rights.[228] Referring to section 2, Senator Trum-

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[223] *Id.* at 474.

[224] *Id.*

[225] Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27.

[226] *Id.*

[227] *Id.*

[228] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 475 (statement of Sen. Trumbull); *id.* at 1758; *id.* at 1155 (statement of Rep. Thayer).

bull explicitly declared that "[t]he right to punish persons who violate the laws of the United States cannot be questioned."[229] Indeed, he argued that, under the Thirteenth Amendment, "we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States." Trumbull explained that criminal penalties would stop civil rights violations when everyone understands "that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment." But, Senator Trumbull contended, it was not necessary to prosecute all wrong-doers, but only to prosecute a few, particularly the leaders of local communities, to put an end to the racially motivated civil rights violations that pervaded the southern states after the Civil War.[230]

Not a single supporter of the Civil Rights Bill denied that Congress possessed the plenary penal powers that its principal author attributed to Congress. Indeed, opponents argued that the bill represented the exercise of such plenary power.[231]

That there was little debate on this issue is understandable for at least two reasons. First, it had been long established that Congress has implied power to impose criminal penalties on anyone who violates federal statutes.[232] Second, the criminal penalties of section 2 were intended principally

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[229] Except where otherwise noted, the following account is taken from *id.* at 475. Senator Trumbull illustrated this point by analogizing to Congress's penal powers under the Comity Clause. It is noteworthy that Senator Garrett Davis, a strong opponent of the Civil Rights Act, believed that Congress had the power to enact legislation to enforce the Comity Clause against anyone who violated a privilege or immunity secured by this provision. *See supra* note 142 and accompanying text. Chief Justice Taney also believed that Congress possessed the power to enforce the rights secured by the Comity Clause, which, he asserted, authorized Congress to punish anyone who deprived another of a right secured by the Clause, and even to authorize federal authorities to call out the Army and Navy to protect the rightholder. *See supra* note 63 and accompanying text.

[230] Members of the Forty-Second Congress shared this view and included in the Ku Klux Klan Act of 1871, which was by its title was designed "to enforce the Provisions of the Fourteenth Amendment," a section that imposed third-party civil liability on members of local communities who were aware of and could have prevented, but failed to try to prevent, personal injuries and property damage by mobs, such as the Ku Klux Klan. *See* Ku Klux Klan Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (1871). Their strategy was to force local community leaders publicly to oppose Klan violence in the expectation that community leaders could bring the violence to an end. *See* Robert J. Kaczorowski, *Reflections on Monell's Analysis of the Legislative History of § 1983*, 31 URB. LAW. 407, 412–13 (1999).

[231] *See supra* notes 146–151, 169–171, 192–200 and *infra* notes 288–291, 311–318 and accompanying text. Civil Rights Act proponents did not deny that it supplanted state civil and criminal systems. Indeed, they defended these invasions of state police powers as necessary to enforce and protect the rights of United States citizens. *See supra* notes 198–199 and *infra* notes 250–252, 277, 319–323 and accompanying text.

[232] Chief Justice John Marshall proclaimed that Congress's penal powers are essentially implied powers. In justifying the broad theory of implied powers the Court adopted in *McCulloch v. Maryland*, Marshall proclaimed that:

> Everyone acknowledges that Congress possesses the power to punish any violation of federal law, even though this power is not expressly delegated by the Con-

to punish state judges and law enforcement officers who failed to enforce the Civil Rights Act over racially discriminatory state laws and legal process. To the Civil Rights Act's opponents, punishing state judges and legal officers for enforcing state laws was an intolerable and outrageous invasion of states' rights and the independence of state courts.[233]

The drafters of the bill restricted its criminal penalties to persons who acted under color of law or custom for two reasons. They sought to preserve state jurisdiction over criminal justice, so they brought within the federal system of criminal justice only those violations of civil rights that were not being redressed and were not likely to be redressed within the states' criminal justice systems. One of their strategies was to distinguish federal criminal violations of citizens' civil rights from ordinary crimes punishable under state criminal codes by limiting federal criminal penalties to civil rights violations committed under color of law or custom and motivated by racial animus.[234] However, the framers of the Fourteenth Amendment also conferred federal original jurisdiction to try ordinary crimes and civil suits whenever a party was unable to enforce or was denied under state law a civil right secured in section 1.[235]

Senator Trumbull explained that "the words 'under color of law' were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted."[236] Thus, any person punishable under section 2 would already have been subject to federal criminal punishment. Section 2 did not bring the civil rights violator within federal criminal jurisdiction, because the violation of a citizen's civil rights secured by section 1 would have subjected the violator to whatever federal penalties Congress chose to impose. Rather, section 2 limited federal criminal penalties to only a portion of potential civil rights violators upon whom Congress had the constitutional authority to impose criminal penalties.[237]

> stitution. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416, 418 (1819). Senator Trumbull and his supporters applied this principle of sovereign power to justify imposing criminal penalties not simply upon the actions of ordinary citizens but of state judges and other public officials as well. *See supra* notes 228–229 and *infra* notes 247–253 and accompanying text.

[233] *See infra* notes 247–249 and accompanying text.

[234] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (Sen. Trumbull); *id.* at 1120 (Rep. Wilson); *id.* at 1294 (Rep. Shellabarger); *id.* at app. 158 (Reps. Delano, Wilson, and Niblack); Kaczorowski, *supra* note 159, at 581, 588.

[235] Civil Rights Act of 1866 § 3. Section 3 is explained *infra* notes 277–282 and accompanying text.

[236] CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

[237] This analysis deviates from the widely held views of scholars who have interpreted the "under color of law or custom" principle as the outer limits of congressional authority

Representative Wilson similarly explained in the House of Representatives that the Civil Rights Bill was not intended to supplant the states in the administration of criminal justice. Representative Benjamin F. Loan asked Wilson "why the [Judiciary] committee limit[ed] the provisions of the second section to those who act under the color of law. Why not let [the provisions] apply to the whole community where the acts are committed?" Wilson responded, "We are not making a general criminal code for the States."[238] Clearly, the drafters and supporters of the Civil Rights Act sought to preserve state criminal jurisdiction and imposed federal criminal sanctions for civil rights violations only when, in their estimation, federal penalties were needed.

The nation's experience with the Fugitive Slave Acts demonstrated that federal courts and officials were insufficient to enforce citizens' constitutional rights effectively and that state and local courts and officials played an essential role in administering civil and criminal justice.[239]

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to impose criminal sanctions and civil liability on individuals who violate citizens' constitutional rights. They have understood this principle, and the language of section 1, as limiting congressional authority to discriminatory state action. *See, e.g.*, HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 108–40 (1978); HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861–1866, at 157–77 (1976); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869, at 27, 41, 48, 56–69, 122–26, 147–49, 170 (1973); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE, at 1228–29, 1238–42 (1971); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 457, 467–68 (1973); MALTZ, *supra* note 161, at 70–78; PHILLIP PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 58, 261, 274–75 (1975); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 78–80 (1974).

[238] CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866); *see also id.* at 1294 (Rep. Shellabarger stating that section 2 "is meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expanded in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act"). Shellabarger proposed a bill to supplement Trumbull's Civil Rights Bill, which also posited jurisdictional limits to distinguish federal civil rights crimes from ordinary crimes punishable within the states' systems of criminal justice. Shellabarger's proposal was to enforce the privileges and immunities that U.S. citizens enjoy under the Comity Clause by imposing criminal penalties on individuals who violated them, but who were not acting under color of law or custom. Shellabarger recognized Congressional power to punish every violation of a citizen's fundamental rights, but he proposed requiring an intent element, thus limiting federal criminal jurisdiction in a manner similar to that of section 2 of the Civil Rights Act. Shellabarger proposed criminal penalties for any individual who violated another's fundamental right with "the intent to deprive one from another state of the particular right or of all rights" secured by the Comity Clause. Letter from S. S. Shellabarger to Lyman Trumbull (Apr. 7, 1866), collected in 65 Lyman Trumbull Papers (collection available in Library of Congress) (emphasis in original). Although Senator Trumbull believed that Shellabarger's proposal "reenacted [Trumbull's] civil rights bill," Shellabarger attempted to persuade Trumbull that his proposal differed from Trumbull's bill by making it a federal crime to violate the privileges and immunities secured by the Comity Clause "*by one not acting under color of law* and as against one seeking to go from state to state." *Id.* (emphasis added).

[239] *See supra* notes 68–82 and accompanying text.

One, or at most two federal judges sat in a state, and U.S. attorneys and marshals were similarly limited in number.[240] This was one of the reasons Chief Justice Taney dissented from the Court's holding in *Prigg v. Pennsylvania* that the states did not possess constitutional authority to enforce the Fugitive Slave Clause.[241] Congress attempted a partial solution to the problem of insufficient federal courts and legal officers in the 1850 Fugitive Slave Act by authorizing federal judges to appoint U.S. commissioners with powers of justices of the peace to enforce the 1850 statute.[242] Even then, the federal judicial system sometimes remained inadequate to enforce the Fugitive Slave Act without the assistance of the United States military, the state militia, and local law enforcement personnel.[243] The framers of the Civil Rights Act wisely sought to preserve the jurisdiction and role of state systems of criminal justice as they crafted a system of federal criminal justice which included the enforcement structure originally established under the Fugitive Slave Act of 1850.[244]

D. Congress Legislates To Compel State Judges and Law Enforcement Officials To Enforce Federal Civil Rights

On the other hand, state and local judicial and executive officials in the southern states were failing to enforce and often were denying citizens' civil rights. The failure of state and local legal institutions to protect citizens' civil rights presented the drafters of the Civil Rights Act with the second practical problem they attempted to resolve and the sec-

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[240] Senator Cowan commented that giving federal courts exclusive jurisdiction over violations of civil rights was a delusion and no remedy because one, or at most two, federal courts functioned in the former slave states, and they were too few and too remote from most of the claimants intended to use them. He added that black Americans were too poor to gain access to them. These circumstances rendered the federal remedy a virtual nullity. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1782 (1866).

[241] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 630–32 (Taney, C.J., concurring in part and dissenting in part). Taney argued that, because federal courts were too few and too remote, federal remedies would be "ineffectual and delusive" if state authorities did not help in administering them. *Id.* at 631.

[242] Fugitive Slave Act of 1850, ch. 60, §§ 1–4, 9 Stat. 462 (1850) (repealed 1864). The framers of the Civil Rights Bill authorized federal judges to exercise the same power to appoint commissioners to enforce the Civil Rights Act. *See* Civil Rights Act of 1866 § 4 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)).

[243] For example, a company of the United States army, another company of Marines, Massachusetts state militiamen, and Boston police constables assisted federal marshals who took fugitive slave Anthony Burns to a ship in Boston Harbor for his voyage to Charleston, South Carolina. *See* ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON 203–19 (1998). Senator Reverdy Johnson recalled that, because the Fugitive Slave Act of 1850 was "obnoxious to the whole communit[ies]" within the Northern states, it was enforced only "by power, by military or civil power, threatening upon each occasion when resort was had to it to involve the particular community where the attempt was made in civil strife and bloodshed . . . ." Cong. Globe, 39th Cong., 1st Sess. 505 (1866).

[244] *See* Civil Rights Act of 1866 §§ 4–9. These provisions are discussed *infra* notes 333–345 and accompanying text.

ond reason they limited section 2's criminal penalties to persons acting under color of law or custom and out of racial animus: They wanted to compel state judges and law enforcement personnel to enforce the civil rights of all Americans, black as well as white, Unionists as well as southern sympathizers. However, the Supreme Court in *Prigg v. Pennsylvania* and *Kentucky v. Dennison* had ruled that Congress lacked the constitutional authority to compel state officials to enforce constitutional rights and to perform duties that the Constitution imposes on them.[245] According to these precedents, Congress could not command state officials to protect and enforce the civil rights of U.S. citizens. In particular, state judges were free to ignore the Civil Rights Act and to enforce racially discriminatory state statutes and customs with impunity.[246]

Opponents of the Civil Rights Act protested that punishing state officials who performed their duties under state laws, even laws that violated the Civil Rights Act, was a gross violation of Supreme Court precedents and of the states' sovereign powers. Representative Eldridge, for example, asserted that the purpose of section 2 "was to control the judge and prevent his executing the law of the State by his judgment when it operated peculiarly upon the freedman and therefore enforce the execution of the Federal law."[247] In an apparent reference to *Prigg* and *Dennison*, he stated that "[t]he question has been decided over and over again that [Congress] cannot enforce [its laws] through a State judge." Echoing Senator Trumbull, Representative Thayer replied that Congress had the authority to punish "anybody" who violates its statutes "under color or authority of any kind." The bill "imposes on a judge [no] more than to refrain from violation of the law." Eldridge was unmollified by Thayer's protests. Instead, Eldridge insisted, section 2 was an unconstitutional invasion of and attack upon the independence of the states' judiciary.

In the Senate, Garrett Davis of Kentucky also objected that section 2 violated state sovereignty, usurped state police powers, and undermined the independence of the state judiciary. He argued that judicial "authority holds that the States are sovereign, 'especially in regard to'" traditionally local matters such as property, family law, and "'the protection of the persons of those who live under their jurisdiction.'"[248] Imposing criminal penalties on state judges and other officials for failing to enforce the Civil Rights Act was therefore an unconstitutional intrusion.[249]

The framers freely acknowledged that their intention in section 2 was to compel state officials, especially state judges, to enforce the rights

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[245] *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) at 539; Kentucky v. Dennison, 65 U.S. (24 How.) at 76–77.

[246] *Id.*

[247] Except where otherwise noted, the following discussion is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1154 (1866).

[248] *Id.* at 596 (apparently quoting from *Dennison*).

[249] *Id.*

of black citizens by imposing criminal penalties on those officials if they violated the Civil Rights Act in their official capacities. Senator Trumbull defended the bill's imposition of criminal penalties on state judges and executive officers on the principle that anyone who violates a federal law subjects himself to criminal prosecution, and the fact that he committed the violation while acting under color of state law or authority was no defense.[250] Denying Congress this power "places officials above the law," Trumbull admonished. He asserted that Congress possesses the power to punish anyone who violates federal law, even those who violate federal law while acting under color of state law.[251] Trumbull insisted that Congress may compel state officers to enforce constitutional rights secured by federal statute by subjecting them to criminal sanctions if they did not. The doctrine that Congress may not punish those who violate federal law when acting under color of state authority, Trumbull maintained, is "a doctrine from which the rebellion sprung, and in entire harmony with the declaration of Mr. Buchanan, that there was no power to coerce a State."[252]

In the House, Representative Wilson offered a similar explanation of the criminal penalties of section 2.[253] When asked by Representative Loan why section 2 punishes only "those who act under color of law," Wilson explained that the local laws of the states discriminated in reference to civil rights. Penalties were necessary, Wilson asserted, implying the framers' intention of forcing state officials to comply with the civil rights guarantees of the Civil Rights Act: "A law without a sanction is of very little force."

Arguing that Congress did not have the constitutional authority to impose criminal penalties on state officials who failed to enforce constitutional rights without amending the Constitution, Representative John A. Bingham suggested substituting civil liability for section 2's criminal penalties.[254] While he supported the goal of compelling state legal officers to enforce citizens' constitutional rights, he did not believe that Congress possessed this power without amending the Constitution. He reasoned "that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government." Bingham then declared that his proposed constitutional amendment sought to delegate to Congress the power to compel state officers to enforce the Bill of Rights and to punish them if they failed to do so. Bingham thus proposed an amendment to the

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[250] Except where otherwise noted, the following discussion is taken from *id.* at 1758.

[251] *See id.* at 1759. Senator Trumbull's reference was to the Supremacy Clause. U.S. CONST. Art. VI, cl. 2. Clause 3 further requires that all state executive and judicial officers "shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3.

[252] CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866).

[253] Except where otherwise noted, the following account is taken from *id.* at 1120.

[254] Except where otherwise noted, the following account is taken from *id.* at 1292.

Civil Rights Bill, striking out all penal sanctions, "and in lieu thereof" giving to "all citizens injured by denial or violation of any of the other rights secured by" the Civil Rights Bill a civil action for damages and double costs.[255]

Representative Wilson rejected Bingham's amendment to the Civil Rights Bill. He retorted that there was no difference in principle between protecting citizens' rights through a civil remedy and through criminal sanctions.[256] Although, he argued, the principle of Congress's power to provide civil remedies and criminal remedies was the same, Wilson saw a significant practical difference between the costs and effectiveness of civil and criminal remedies. Criminal penalties shifted the cost of rights enforcement to the federal government, thus affording effective protection to "the humblest citizen." Under Bingham's suggested civil remedies, "the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attending thereon. This may do for the rich, but to the poor, who need protection, it is a mockery." Decrying the inadequacy of "a few dollars in the way of damages," even "against a solvent wrong-doer," to protect constitutional rights, Wilson insisted that the government had a duty "to provide proper protection, and to pay the costs attendant on it."

Wilson expected the House to vote for the Civil Rights Bill, either with or without Bingham's amendments, and so Wilson

> shall at least have the consolation of knowing that this intelligent House accepts the conclusion that the Committee on the Judiciary arrived at—that all these rights belong to the citizen and should be protected, the only difference between us being that the committee insists that the protection should be extended at the cost of the government, while those in favor of the instructions believe that we should compel the citizen to seek his remedy at his own cost.[257]

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[255] *Id.* at 1291. Representative Latham also objected that section 2 was "a departure from the principles and practices of the Government." *Id.* at 1296. He reasoned that the Constitution and laws of the United States must be executed by federal officers, and where there is a conflict between federal law and state law, "the legitimate remedy is civil and not penal; or in other words, that the legitimate remedy is by appeal to the United States courts instead of by penalty upon the State officer executing the State law." *Id.*

[256] Except where otherwise noted, the following account is taken from *id.* at 1295.

[257] The "instructions" to which Wilson referred were separate amendments to the Civil Rights Bill offered by Representative Bingham and Representative Raymond which would have eliminated the bill's criminal sanctions. *See supra* notes 254–255 and accompanying text. While Bingham's proposal would have changed the criminal sanctions of section 2 to civil remedies, Raymond's proposal simply declared that all persons born in the United States are "citizens of the United States, and entitled to all rights and privileges as such." CONG. GLOBE, 39th Cong., 1st Sess. 1266–67 (1866). Raymond thought that declaring the freedmen to be citizens entitled them to all of the rights of citizens, including the right to

Nevertheless, it is significant that Bingham stated that he intended his proposed constitutional amendment to compel state officials to enforce citizens' Bill of Rights guarantees and that Congress might do so by imposing civil liability in addition to criminal penalties on those officials who failed to enforce citizens' Bill of Rights guarantees. It is equally significant that Republican leaders and supporters of the Civil Rights Bill expressed their understanding that Congress could compel state officials to enforce federal rights by imposing civil liability and criminal sanctions on them should they fail to do so.[258]

While scholars have understood section 2's "state action" requirement for federal crimes only as a limitation on Congress's power to enforce citizens' rights,[259] the debates on this question demonstrate that it was not so viewed by the Congress that enacted the Civil Rights Act. Opponents of the Civil Rights Act vociferously asserted that imposing criminal sanctions on state officials who violated another person's civil rights when acting under color of law or custom was an unconstitutional expansion of Congress's legislative powers because doing so violated principles of constitutional federalism and Supreme Court precedents by compelling state and local judges and law enforcement officials to enforce federal civil rights.[260] The debate these penalties generated evinces the extraordinary expansion of federal legislative power they represented.[261]

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sue in federal court to enforce their civil rights whenever they were unable to enforce them or were denied them in state court. *Id.*

[258] The exchange between Bingham and Wilson manifests their intention of compelling state officials to enforce federal law by imposing federal civil liability and criminal penalties on the officials' failure to do so. This raises questions regarding recent Supreme Court decisions that have held that Congress lacks the power to impose such sanctions against states, even pursuant to its legislative authority under the Fourteenth Amendment. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). Scalia's majority opinion in *Printz* is based largely on history, which he found to be lacking in any examples of Congress requiring state executive officials to perform federal duties. Scalia obviously overlooked the Civil Rights Act and other Reconstruction enforcement statutes, which contradict his conclusion. The issue of whether the framers of the Fourteenth Amendment intended to compel state officials to enforce the provisions and statutes that Congress enacts in order to implement the amendment warrants fresh investigation.

[259] *See supra* note 237 and accompanying text.

[260] Senator Cowan considered section 2 an "atrocity," because a state judge legitimately may question the constitutionality of the Civil Rights Act, but if deciding against its constitutionality "he subjects himself to a criminal prosecution." If deciding in favor of the Act, however, the judge is likely to "be impeached by [his] own State Legislature." CONG. GLOBE, 39th Cong., 1st Sess. 1783 (1866).

[261] *See, e.g.*, *id.* at 475–76 (Sens. Trumbull and Cowan debating the justice of subjecting state judges to criminal sanctions for enforcing racially discriminatory state laws in violation of the Civil Rights Act); *id.* at 500, 603–04, 1783 (statement of Sen. Cowan) (complaining that section 2 "is the first time I think in the history of civilized legislation that a judicial officer has been held up and subjected to a criminal punishment for that which may have been a conscientious discharge of his duty . . . where a bill of indictment is to take the place of a writ of error, and where a mistake is to be tortured into a crime"); *id.* at 598, 1415, app. 182 (statement of Sen. Davis) (objecting "[t]hat any man or any court or any officer of the law who presumes to inflict upon a negro a different punishment than that to which a white man is subject for the same act, shall himself be regarded as an of-

Thus, by criminalizing civil rights violations committed by persons acting under color of law or custom, the framers of the Civil Rights Act circumvented or ignored Supreme Court precedents which opponents insisted prohibited Congress from compelling state officials to enforce federal rights and to perform federal duties. Through the threat of criminal prosecution, the Act's supporters sought to compel state judges and law enforcement officials to perform the federal duty of enforcing the civil rights of American citizens.

The federal legal officers who were responsible for enforcing the Civil Rights Act interpreted their legislative duty to include the prosecution

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fender against the law," and insisting that "[t]he Congress of the United States have no right to take jurisdiction over such a case or the parties to such a transaction . . . to declare and to denounce such punishment against the State courts and State officers for thus executing the constitutions and penal laws of the States"); *id.* at 1758 (statement of Sen. Trumbull) (denying that criminal sanctions attempt to punish state legislators, but "admit[ting] that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may be and ought to be punished; but if he acted innocently the judge would not be punished"); *id.* at 1778 (statement of Sen. Johnson) (attacking section 2 for destroying the independence of the states' judiciary by making criminals out of state judges who enforced an inconsistent state statute in the good faith belief that the Civil Rights Bill was unconstitutional); *id.* at 1809 (statement of Sen. Saulsbury) (predicting revolution and bloodshed should federal legal officers attempt to enforce the "grossly, palpably, fragrantly unconstitutional" provisions of the Civil Rights Bill against state judges); *id.* at 1119 (statements of Reps. Loan and Wilson) (discussing criminal sanctions imposed on public officers and not on others); *id.* at 1121 (statement of Rep. Rogers) (complaining that section 2 would subject a state judge to federal criminal prosecution for administering a state anti-miscegenation law he was sworn to uphold and was in good conscience enforcing); *id.* at 1154 (statement of Rep. Eldridge) (charging that section 2 is "a most flagrant and tyrannical interference with the independence of the [state] judiciary"); *id.* at 1265 (statement of Rep. Davis of New York) (expressing the fear that section 2 might unconstitutionally subject to federal punishments state judges who performed their duties in obedience to state laws that conflicted with the Civil Rights Act, and state officers who obeyed process issued by state courts under such laws, before a federal court had ruled on the constitutionality of the Civil Rights Act); *id.* at 1267 (statement of Rep. Raymond) (stating it was neither "just" nor "right" to punish a state court judge "for enforcing a State law"); *id. at* 1270 (statement of Rep. Kerr) (declaring that section 2 punishes only "persons acting under State authority in some sort of official capacity," naming county boards, school teachers, and other public officials who discriminated against blacks); *id.* at 1291–92 (statement of Rep. Bingham) (denying that Congress had the authority to impose criminal sanctions on state officers who obeyed and enforced state laws in good faith, recommending that the criminal penalties be changed to civil liability, and declaring that he proposed a constitutional amendment "which would arm Congress with the power to compel [state officials'] obedience to the oath [to uphold the Constitution], and punish all violations by State officers of the bill of rights"); *id.* at 1294 (statement of Rep. Shellabarger) (stating that section 2 punishes only wrongs committed under color of state authority); *id.* at 1680 (President Johnson's veto message) (stating that section 2 "provides for counteracting such forbidden legislation by imposing fine and imprisonment upon the legislators who may pass such conflicting laws, or upon the officers or agents who shall put, or attempt to put, them into execution," thus "invading the immunities of legislators" and "assailing the independence of the judiciary"); *id.* at 1837 (statement of Rep. Lawrence) (responding to President Johnson, stating "it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded.").

of state and local officials and judges who violated citizens' civil rights.[262] Conscientious officers of the Freedmen's Bureau sought to secure an impartial administration of civil and criminal justice in the South by arresting and prosecuting state and local judges and law enforcement officers for failing to provide blacks and white Unionists with the equal protection of the law. Southern judges were prosecuted for declaring the Civil Rights Act unconstitutional, for enforcing racially discriminatory state laws, for imposing racially discriminatory punishments on black criminal defendants, and for refusing to allow black witnesses to testify, whether their actions were authorized by or were in violation of state rules of evidence. Bureau agents prosecuted state law enforcement officers for failing to act on complaints filed by blacks and unpopular whites. Bureau agents also prosecuted state officers for infringing the rights of blacks to carry firearms and for infringing blacks' rights to be protected against unreasonable searches and seizures.[263] State officials were also subjected to federal prosecution for participating in outrages committed against blacks and for prosecuting white Unionists in harassment suits motivated by political animus.[264]

E. Congress Punishes Private Individuals Who Violate Civil Rights Under Color of Law or Custom

There is persuasive evidence that the framers of the Civil Rights Act of 1866 also intended to impose section 2 criminal penalties on private individuals. In a variety of ways, private parties violated civil rights under color of law and custom after the Civil War.[265] Black Americans desperately needed federal protection from Southern whites who refused to accept them as free and equal citizens. Supporters emphasized the existence of the black codes and racially discriminatory administration of justice in southern states to demonstrate the need for congressional legislation that recognized and protected the rights of the former slaves.[266] These supporters also referred to the black codes to explain the kind of protection Congress should provide.[267] The Southern black codes were updated

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[262] Except where otherwise noted, the following account is taken from ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at 27–48 (1985).

[263] *Id.* at 36–38.

[264] *Id.* at 29, 37–38.

[265] *See infra* notes 292–297 and accompanying text for the ways in which private individuals violated the civil rights of white Unionists and federal officers under color of law.

[266] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 91–96 (1866) (statement of Sen. Sumner); *id.* at 1118 (statement of Rep. Wilson); *id.* at 474, 1758–59 (statement of Sen. Trumbull).

[267] For representative statements, see, for example, CONG. GLOBE, 39th Cong., 1st Sess. 39, 603 (1865) (statement of Sen. Wilson) (expressing, during his proposal of the Civil Rights Act, the need for federal civil rights protection because the old slave codes were still "being executed, and in some [states] in the most merciless manner," describing

versions of the antebellum slave codes, and they subordinated Southern blacks to white domination under conditions reminiscent of slavery.[268]

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statutes in Georgia, Louisiana, and Mississippi and admonishing that "these reconstructed Legislatures, in defiance of the rights of the freemen and the will of the nation embodied in the [thirteenth] amendment to the Constitution, have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days"); *id.* at 474, 1759 (statement of Sen. Trumbull) (describing Mississippi and South Carolina statutes that denied the freedmen certain rights, subjected them to severe penalties, and imposed restrictions on them that had been imposed on them during slavery, and stating that "[t]he purpose of the [Civil Rights] bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment"); *id.* at 602 (statement of Sen. Lane of Indiana) (explaining that the Civil Rights Bill is necessary "because we fear the execution of these laws if left to the State courts"); *id.* at 603 (statement of Sen. Cowan) (protesting that "[t]his is a proposition to repeal by act of Congress all State laws, all state legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend"); *id.* at 1785 (statement of Sen. Stewart) (stating that it would be more desirable that the States should "secure to the freedmen personal liberty, but, since they have not, Congress unquestionably possesses the power to do so"); *id.* at 1118–19 (statement of Rep. Wilson) (proclaiming Congress's duty to protect every citizen in the "great fundamental rights which belong to all men" from "[l]aws barbaric and treatment inhuman . . . meted out by our white [Civil War] enemies to our colored friends," and explaining that the criminal sanction provided in section 2 "grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States," for which "we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment"); *id.* at 1123 (statement of Rep. Cook) (stating that the former rebel state legislatures have enacted laws "so malignant in their spirit toward these freedmen, so subversive of their liberties" that the President and military commanders "have set aside those laws and prevented their execution," and now Congress "provide[s] by legislative action precisely the same thing and nothing more" than the orders issued by military commanders under the authority of the President "to protect these people in the enjoyment of their freedom"); *id.* at 1153 (statement of Rep. Thayer) (stating that Congress must protect the natural rights of citizens because at least six southern legislatures "have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen and render the constitutional amendment [abolishing slavery] of no force or effect whatever"); *id.* at 1295 (statement Rep. Latham) (stating that although the wording of section 1 makes no reference "to discriminations by the State or other local law, yet it is very evident from its connections, and from the entire bill, that its reference is to such discriminations"); *id.* at 1293 (statement of Rep. Bingham) (stating that the Civil Rights Bill proposes to "reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws"); *id.* at 1123 (statement of Rep. Cook); *id.* at 1160 (statement of Rep. Windom) *id.* at 1263 (statement of Rep. Broomall); *id.* at 1293 (statement of Rep. Bingham); *id.* at 1295 (statement of Rep. Latham); *id.* at 1785 (statement of Sen. Stewart); *id.* at 1833–36 (statement of Rep. Lawrence) (quoting at length from testimony given before the Joint Committee on Reconstruction, from newspapers, and from correspondence of military commanders in Southern states discussing discriminatory statutes enacted by southern legislatures; the legislatures' failure to enforce the civil rights of blacks; and the actions taken by officers of the military and Freedmen's Bureau to nullify these statutes and to provide tribunals to dispense to blacks the protection and justice that the states denied).

[268] *See, e.g.*, 1865–66 Ala. Acts 86, 98, 100, 112, 116, 120; 1866–67 Ark. Acts 13, 35, 122; 1865–66 Fla. Laws chs. 1465–79; 1865–66 Ga. Laws 3, 43, 101, 108, 233–34, 240, 248, 250–52, 254; 1866 Ga. Laws 38–39, 208, 210, 212, 217; 1865 La. Acts 10–12, 16, 19–20, 34; 1865 Miss. Laws chs. 4–6, 23–24; 1865–66 N.C. Sess. Laws 6, 35, 40, 42, 62, 64, 72; 1865 S.C. Acts 4730 §§ 4–5, 4731, 4733, 4791, 4797; 1865–66 Tenn. Pub. Acts 4, 34, 40, 56; 1866 Tex. Gen. Laws 63, 80, 82, 111, 120, 128, 153–54; 1865 Va. Acts chs. 14–15, 17–19, 21–25, 28, 62, 113, 116, 138, 142, 258. *See generally* THEODORE BRANTNER

However, the black codes were not the only problem, and perhaps they were not the primary problem that Congress needed to address in 1866 because military commanders nullified the codes and ordered their officers to ensure that they were not enforced before the Civil Rights Act was enacted.[269] The Southern states retained the penal codes applicable to slaves except those specifically amended by statute.

An important feature of these Southern black codes is that they legitimated and authorized the practices of Southern whites that subordinated Southern blacks and subjected them to the economic and social control of whites.[270] The black codes gave employers contract rights and methods of enforcing contracts against black laborers that were not available in contracts with white laborers. Further, the black codes gave landowners methods of disciplining black tenants and field hands that they were not legally authorized to use against white tenants and field hands. Black codes authorized employers and landowners, as well as ordinary whites organized into patrols, to enforce an informal, customary system of controls that restricted blacks' freedom to move from place to place. In addition, blacks in the South were denied access to local systems of civil and criminal justice when they sought to redress violations of their rights and punishment for crimes committed against them.

Members of the Thirty-Ninth Congress spoke about these injustices as problems they sought to address and remedy. At the very beginning of the congressional session, for example, Senator Henry Wilson of Massachusetts quoted from a Louisiana vagrancy statute requiring the freedmen, among other things, to "furnish themselves with a comfortable home and visible means of support within twenty days after the passage of this act," on penalty of being arrested and "hired out by public advertisement to some citizen, being the highest bidder, for the remainder of the year in which they are hired."[271] It also required the consent of a freedman's former employer, officially recorded by the parish recorder, before he or she was permitted to change employers. Should his employer die, the freedman was obligated to the deceased's heirs or whoever acquired his property. The statute authorized the employer to enforce these and other provisions, such as a prohibition of general conversation during working hours,

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WILSON, THE BLACK CODES OF THE SOUTH (1965).

[269] *See* General Orders No. 3, Jan. 12, 1866, Adjutant General's Office, *reprinted in* THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 122–23 (Edward McPherson ed., 1875). *See also* General Orders No. 7, Mar. 4, 1866, Headquarters, Dep't of South Carolina, *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 1834 (1866).

[270] Except as is otherwise noted, this discussion is taken from ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 199–201 (1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 292–386 (1979); and WILSON, *supra* note 268.

[271] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 39 (1866).

by a fine for disobedience, defined as failure to obey reasonable orders, neglect of duty, and leaving home without permission. All disputes were to be settled by the employer, with a right of appeal to the nearest justice of the peace and two freeholders, one each selected by the employer and laborer. If the laborer should leave the employ during the term of employment, the employer was authorized to have the laborer arrested and returned to his employ to finish the contract. Senator Wilson also cited a Mississippi black code that authorized "any person" to arrest and return "any freedman, free negro, or mulatto" who leaves the employ of his master and collect a fee of $5 plus 10 cents per mile. Private individuals acting under color of these laws violated the Civil Rights Act and thus rendered themselves criminally liable under section 2. Other supporters of the Civil Rights Bill referred to (and quoted) correspondence among Freedmen's Bureau officials and military officers describing the strategies by which Southern whites subordinated blacks through law and by the actions of private individuals authorized by law and/or custom. Representative William Windom of Minnesota quoted from the correspondence between military officers serving as Freedmen's Bureau agents in the South and General O. O. Howard, the Commissioner of the Freedmen's Bureau.[272] Windom read a letter from a Colonel De Gauss to General Howard concluding that the "'negroes are not yet free'" in some portions of Texas. "'[T]he pass system is still in force, and when a freedman is found at large without a pass, he is taken up and whipped.'"

Lieutenant Stewart Eldridge wrote to General Howard on November 28, 1865 from Vicksburg, Mississippi, informing Howard of a "freedmen's bill" that the Mississippi legislature had just enacted into law. The statute prohibited freedmen from holding, leasing, or renting real estate; it compelled them to marry whomever they were living with and "'to support the issue of what was in many cases compulsory co-habitation'"; it excluded the freedmen's testimony "'in cases all white'"; it authorized mayors and boards of police "'by their sole edict to prevent any freedmen from doing any independent business and to compel them to labor as employes [sic] with no appeal from such decision'"; and it "'gives power to any white citizen over the person of a freedman unknown to any other law, and denies the right of appeal beyond the county court.'" Following the enactment of this statute, Colonel Samuel Thomas, assistant Freedmen's Bureau commissioner in Mississippi, wrote that "'Thousands of acres have been rented from owners of land by freedmen who expected that they would be allowed to cultivate land in this way. They are notified that they must give up their leases by citizens.'" Windom reported that, "In Virginia the laws and customs reduce the negro to vagrancy, and then seize and sell him as a vagrant," evidently to white landowners to work off their punishment for vagrancy. In various states "there are laws com-

[272] Except where otherwise noted, the following account is taken from *id.* at 1160.

pelling the return of the freedman to his master under the name of employer, and allowing him to be whipped for insolence," Windom recounted.

The conditions these legislators described reflected a socio-legal structure that relied on private actors acting under legal authority and/or following customary practices designed to deny civil liberty to Southern blacks and to subordinate them to white domination. Windom detailed these conditions, sardonically characterizing them as "some specimens of protection which [the Freedmen] get from the civil authorities of the States in which they live." He explained that Southern whites used vagrancy laws to keep Southern blacks in a state of virtual slavery. Southern blacks were prohibited from owning or renting a home and from earning a livelihood, and then they were "arrested and sold as vagrants because they have no homes and no business." Planters conspired to "compel" black field workers "to work for such wages as their former master may dictate," and to "deny" blacks the "privilege" of being hired "to any one without the consent of the master."

In response to civil rights opponents who argued that the condition of Southern blacks did not warrant federal legislation, Windom queried,

> Sir, do you at this late day call the whipping-post and the pass system evidences of liberty? Do you call that man free who cannot choose his own employer or name the wages for which he will work? Do you call him a freeman who is denied that most sacred of all possessions, a home? Is he free who cannot bring a suit in court for the defense of his rights?

With as much sadness as sarcasm, Windom concluded, "Sir, if this be liberty may none ever know what slavery is."

As the sole representative to speak in the House of Representatives following President Johnson's veto of the Civil Rights Bill, Representative William Lawrence of Ohio, a member of the House Judiciary Committee, elaborately reported conditions in the South that necessitated the bill's enactment. Lawrence quoted at length from testimony given before the Joint Committee on Reconstruction, which was in the process of drafting the proposal that became the Fourteenth Amendment, from newspapers, and from correspondence of military commanders in the Southern states. He quoted the Cincinnati *Commercial* reporting that, under the "rigidly enforced" Mississippi vagrancy statute, "the freed slaves are rapidly being reenslaved."[273] Lawrence lamented that "No negro is allowed to buy, rent, or lease any real estate; all minors of any value are taken from their parents and bound out to planters; and every freedman who does not contract for a year's labor is taken up as a vagrant." Lawrence proclaimed that it would be "barbarous, inhuman, infamous" to abandon the former

[273] Except where otherwise noted, the following account is taken from *id.* at 1833.

slave "to the fury of their rebel masters, who deny them the benefit of all laws for the protection of their civil rights."

The framers of the Civil Rights Act undoubtedly understood the right to the equal protection of the laws as a personal right citizens possessed in relation to private individuals as well as to the government. They certainly expressed their intention of punishing private parties who violated citizens' civil rights while acting under color of law or custom. Senator Trumbull made this clear in describing the penalties as aimed not at "State officers especially, but everybody who violates the law. It is the intention to punish everybody who violates the law."[274]

One of the reasons Senator Garrett Davis of Kentucky opposed the Civil Rights Act was precisely because of the criminal sanctions imposed by section 2 on public officers and on private individuals who acted under color of discriminatory state statutes. Asserting that the right to marry is a civil right secured by section 1 of the Civil Rights Act, Davis argued that, in states such as Kentucky and Illinois that prohibited interracial marriage, "the clerk who refused a license to a negro to marry a white person, the preacher who would not perform the ceremony," as well as "the officers of the law who would enforce its penalties against persons who had violated it, would themselves become criminals, and subject to punishment under this act."[275] Davis argued that because racially discriminatory practices in public accommodations were established by law, ordinances and customs, proprietors who enforced these discriminatory laws and customs on ships and steamboats, in hotels and saloons, in churches and on railroads, would subject themselves to criminal penalties under the Civil Rights Act. Davis objected to the enforcement structure that the bill established "for the benefit of the favored negro race." It "directs the appointment of legions of officers to prosecute [violators] both penally and civilly . . . at the cost of the United States," and puts at their disposal "the posse comitatus, the militia, and the Army and Navy of the United States, to execute this bold and iniquitous device to revolutionize the Government and to humiliate and degrade the white population . . . to the level of the negro races."[276]

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[274] *Id.* at 500. Echoing Trumbull's rationale, Chief Justice Salmon P. Chase, as circuit justice, held that an apprenticeship contract between a black child and her former master violated the child's right to the full and equal benefit of all laws and proceedings for the security of her person and property secured by section 1 of the Civil Rights Act because it did not grant her benefits that state law required masters to extend to white apprentices. In re Turner, 24 F. Cas. 337, 339 (C.C. Md. 1867) (No. 14,247).

[275] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. app. 183 (1866). *See also supra* note 261 (statements of Senator Davis).

[276] *Id.* at app. 183. Davis's comments regarding the posse comitatus and militia and military provisions refer to the Civil Rights Act's sections 5 and 9 respectively. *Id.* For additional statements expressing the framers' intention of imposing criminal penalties on private individuals, see, for example, *id.* at 475 (statement of Sen. Trumbull) (analogizing Congress's authority to enact the criminal sanctions of the Civil Rights Bill to Congress's

The framers and supporters of the Civil Rights Act discussed a variety of situations in which private individuals infringed citizens' civil rights under color of law and/or custom. In light of the framers' expressed intention of protecting citizens' civil rights from the actions of private individuals, their statements strongly support the view that the "under color of law or custom" qualification of section 2 criminal punishments was not intended to exclude private individuals, but, as the framers said, to distinguish federal crimes from ordinary crimes and explicitly to extend criminal sanctions to include state judges and other state officers, in addition to private individuals.

F. Section 3: Congress Authorizes a Federal System of Civil and Criminal Justice To Enforce Americans' Civil Rights

Section 3 of the Civil Rights Act prescribed the federal legal process that Representative Wilson said Congress was obligated to provide to citizens who were unable to enforce their rights in the state systems of civil and criminal justice.[277] In section 3, Congress exercised plenary power to remedy civil rights violations by conferring jurisdiction on the federal courts to redress, with civil remedies and criminal punishments, violations of citizens' rights committed by private individuals as well as state and local officials. Additionally, Congress explicitly extended federal legal process and remedies to white persons who were unable to enforce or were denied their civil rights in state courts. Thus, said Senator Thomas Hendricks, the Civil Rights Act

> provides, in the first place, that the civil rights of all men, without regard to color, shall be equal; and, in the second place, that if any man shall violate that principle by his conduct, he shall be responsible to the court; that he may be prosecuted criminally

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authority to punish any individuals who violated a citizen's rights under the Comity Clause); *id.* at 1125 (statement of Rep. Cook) (arguing that Congress was obligated to protect the freedmen from "men who are proving day by day, month by month, that they desire to oppress them, for they had been made free against their consent"); *id.* at 1156 (statement of Rep. Eldridge) (acknowledging that the bill's proponents "refer us to individual cases of wrong perpetrated upon the freedmen of the South as an argument why we should extend the Federal authority into the different States to control the action of the citizens thereof"); *id.* at 1156 (statement of Rep. Thornton) (conceding that "Congress has the power to punish any man who deprives a slave of the right of contract, or the right to control and recover his wages. To that extent it may be necessary to have legislation.").

[277] Representative Wilson argued that, since U.S. citizens were entitled to the rights secured by the Bill of Rights, it was the right and duty of Congress "to provide a remedy . . . . The power is with us to provide the necessary protective remedies. If not, from whom shall they come? From the source interfering with the right? Not at all." *Id.* at 1294. Senator Lane of Indiana explained, "We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the [thirteenth] constitutional amendment; but because we believe they will not do that, we give the Federal officers jurisdiction." *Id.* at 602–03.

> and punished for the crime, or he may be sued in a civil action, and damages recovered by the party wronged.[278]

Section 3 of the Civil Rights Act of 1866 provided a federal system of civil and criminal justice and conferred civil and criminal jurisdiction on the federal courts in three distinct situations. First, like the Fugitive Slave Act of 1850, it conferred exclusive criminal and civil jurisdiction on federal district courts to try "all crimes and offences committed against the provisions of this act."[279] This provision conferred exclusive jurisdiction on the federal courts to try all civil actions brought against private parties to remedy violations of the civil rights secured in section 1 and all prosecutions brought under the criminal provisions of section 2.[280]

The other two jurisdictional provisions of section 3 were controversial, extraordinary remedies adopted to redress state action and inaction as well as civil suits filed by private individuals that violated a citizen's civil rights. The second provision conferred concurrent jurisdiction on federal district and circuit courts to try "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."[281] The third provided for the removal of

> any suit or prosecution, civil or criminal, that has been or shall be commenced in any State court against such person [who is denied or cannot enforce rights secured by this act], for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or [the Freedmen's Bureau Acts], or for refusing to do any act upon the ground that it would be inconsistent with this act.[282]

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[278] *Id.* at 601. Senator Hendricks was a member of the Senate Judiciary Committee that drafted the Civil Rights Bill.

[279] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 3; *see* Fugitive Slave Act of 1850 § 3, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

[280] Referring to the civil remedies, for example, Senator Cowan objected that in those states where certain persons are not permitted to make legally enforceable contracts, "this bill is to give them a right to enforce them, to give them a right to go into a court where the judges say they cannot go, and he has no jurisdiction to determine their causes." CONG. GLOBE, 39th Cong., 1st Sess. 1783 (1866).

[281] Civil Rights Act of 1866 § 3.

[282] *Id.*

G. Congress Confers Original Jurisdiction on Federal Courts To Try Cases Arising Under State Law Whenever a Party Is Unable To Enforce or Is Denied Section 1 Civil Rights in the State

On its face, section 3 authorized the federal courts to supplant state and local courts and to try ordinary state civil actions and criminal prosecutions whenever a party was unable to enforce or was denied a civil right in the state's legal system.[283] For example, in a state that prohibited the testimony of black witnesses in cases involving white parties, section 3 authorized a black party wishing to sue a white party under state law to bring his suit in federal court. This jurisdiction applied in criminal prosecutions as well.[284] Section 3 authorized federal courts to try these civil suits and criminal prosecutions according to federal law, to the extent that federal law provided remedies and penalties applicable to these cases. Where federal law did not provide such remedies and penalties, federal courts were to try these civil and criminal cases according to the common law of the states in which they sat, as modified by the state's constitution and statute law, provided they were not inconsistent with federal law.[285] This provision thus afforded persons a federal forum whenever they were unable to enforce or were denied in the states' systems of civil and criminal justice the civil rights secured by section 1 of the statute. Representative Wilson proclaimed that, since the States were failing to enforce and protect the "personal rights" to life, liberty, and property guaranteed by the Bill of Rights to which "every citizen" is entitled, Congress "must do our duty by supplying the protection which the states deny."[286] Wilson later explained that he meant that Congress possesses the power to remedy violations of these rights, and that "the necessary protective remedies . . . must be provided by the Government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government."[287] Section 3 demonstrates that the framers exercised plenary remedial power and authorized displacement of state systems of justice whenever the federal government was required to enforce citizens' civil

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[283] Senator Davis insisted that the Civil Rights Bill was unconstitutional, in part because it transferred "all penal prosecutions and civil suits instituted in the State courts for offenses and trespasses committed under color of it into the Federal courts." CONG. GLOBE, 39th Cong., 1st Sess. app. 184 (1866).

[284] *See infra* notes 288–291 and accompanying text.

[285] Civil Rights Act of 1866 § 3.

[286] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

[287] *Id.* at 1294. Wilson repeatedly insisted that it was Congress's right and duty to provide civil and criminal remedies to redress violations of citizens' civil rights, particularly when the states failed to do so. *See supra* notes 125, 173, 190, 213, 216, 256, 277 and accompanying text. Congress acted on this very theory when it enacted the civil and criminal remedies of the Violence Against Women Act Pub. L. No. 103-322, Title IV, § 40302, 108 Stat. 1941 (1994). The Supreme Court struck down the civil remedy, holding that it exceeded Congress's remedial powers under the Fourteenth Amendment. United States v. Morrison, 529 U.S. 598, 627 (2000).

rights because of a state's failure to do so, even to the extent of giving federal courts jurisdiction to try civil causes and criminal prosecutions arising under state law.

H. Congress Authorizes Federal Courts To Try Criminal Prosecutions Arising Under State Criminal Law

The most startling jurisdiction section 3 conferred on federal courts was the authority to prosecute crimes committed in violation of the criminal laws of the states whenever a party to the "cause" was denied or was unable to enforce in the state courts any of the civil rights secured in section 1.[288] From 1866 to 1871, the federal court in Louisville, Kentucky administered criminal justice to black Kentuckians who were the victims of crimes committed by whites who would have gone unpunished but for the criminal jurisdiction section 3 conferred on the federal courts.[289] Blacks could not get civil or criminal justice in state and local courts because Kentucky rules of evidence prohibited a black person from testifying in any case in which a white person was a party. Since the state's rules of evidence violated section 1 of the Civil Rights Act, the U.S. attorney, Benjamin H. Bristow, simply took over the function of prosecuting whites accused by blacks of having committed crimes against them.[290] The federal court dispensed criminal justice in these cases until the Supreme Court decided *Blyew v. United States*, which restricted section 3 jurisdiction to criminal prosecutions brought against black defendants, and the Kentucky legislature repealed the racially discriminatory testimony statute and permitted black witnesses to testify on the same basis as white witnesses.[291]

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[288] *See supra* note 281 and accompanying text. *See* United States v. Rhodes, 27 F. Cas. 785, 786–87 (C.C.D. Ky. 1866) (No. 16,151) (upholding under section 3 a federal prosecution for a state crime of burglary committed by white defendants who broke into the home of a black woman who was denied the right to testify by Kentucky statutes); Blyew v. United States, 80 U.S. (13 Wall.) 581, 591–93 (1872) (upholding the constitutionality of section 3 but restricting federal criminal jurisdiction over state crimes to those committed by black defendants who are unable to enforce or are denied civil rights secured by section 1).

[289] United States v. Rhodes, 27 F. Cas. at 786–87; KACZOROWSKI, *supra* note 262, at 52; ROSS A. WEBB, BENJAMIN HELM BRISTOW: BORDER STATE POLITICIAN 51–58 (1969); Victor B. Howard, *The Black Testimony Controversy in Kentucky, 1866–1872*, 58 J. NEGRO HIST. 140, 146–53 (1973); Ross A. Webb, *Benjamin H. Bristow: Civil Rights Champion, 1866–1872*, 15 CIVIL WAR HIST. 39, 39–42 (1969); Letter from Benjamin H. Bristow to John Marshall Harlan (Mar. 20, 1866) (collected in John Marshall Harlan Papers container 14 in the Library of Congress); Letter from John Marshall Harlan to William Belknap (Dec. 15, 1869) (collected in John Marshall Harlan Papers available in The Filson Club); Letter from Bland Ballard to Lyman Trumbull (Mar. 30, 1866) (collected in 65 Lyman Trumbull Papers; microfilm collection available in the Library of Congress); Letters from Noah H. Swayne to Rutherford B. Hayes (Jan. 10, 1870 and Apr. 27, 1871) (collected in Rutherford B. Hayes Papers in Rutherford B. Hayes Library).

[290] *See* Webb, *Benjamin H. Bristow: Civil Rights Champion*, *supra* note 289, at 39–42.

[291] 80 U.S. (13 Wall.) 581, 592–93 (1871); KACZOROWSKI, *supra* note 262, at 142, 165; Ross A. Webb, *Kentucky: Pariah Among the Elect*, *in* RADICALISM, RACISM, AND PARTY

I. Congress Confers Jurisdiction on Federal Courts To Enforce the Civil Rights of Whites as Well as of Blacks

The text of section 3, particularly when understood within the context of conditions in the South immediately after the Civil War, demonstrates that the framers and supporters of the Civil Rights Bill intended section 3 to protect the civil rights of white Unionists and Union soldiers in the South from violations committed by private individuals motivated by political animus. The framers repeatedly expressed the need to protect southern white Unionists from civil rights deprivations.[292] They recounted pervasive incidents of southerners persecuting white Unionists and military personnel by bringing vexatious lawsuits and criminal prosecutions for actions they undertook during the Civil War and under authority of federal law.[293] Former Confederates also intimidated Unionists through acts of violence and economic harassment.[294]

The federal systems of civil and criminal justice provided by section 3 offer some of the strongest evidence that the framers and supporters of the Civil Rights Act intended to secure through federal legal process the substantive rights of all Americans, whites as well as blacks, as rights of U.S. citizens. In defending this section, Representative Lawrence quoted a variety of sources that demonstrated not only that the former slaves, but also Union military personnel and "the white Union population" in the South required federal protection "to secure [their] civil rights."[295]

Lawrence read from a letter to Representative William D. Kelley from Governor W. G. Brownlow of Tennessee, dated March 8, 1866, complaining that rebel candidates for local offices "'have made a clean sweep, turning the Union men out and electing their own candidates . . . .'" Since President Johnson's policy of lenient pardons, rebels had become more impudent, "'cursing loyal men, and threatening them with shooting or hanging, boasting that they have the President on their side . . . [L]oyal men cannot travel on a steamboat, or in a railroad car, without being insulted.'" They "'feel that there is no safety for them, unless Congress shall choose to protect them.'" The governor reported that federal troops had to be dispatched "'to protect loyal men and freedmen, who were fleeing for safety'" to the state capital.

REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION 128 (Richard O. Curry ed., 1969); Victor B. Howard, *The Breckinridge Family and the Negro Testimony Controversy in Kentucky, 1866–1872*, 49 FILSON CLUB HIST. Q. 56 (1975); Howard, *supra* note 289; Mary S. Donovan, Kentucky Law Regarding the Negro, 1865–1877 (unpublished M.A. thesis, University of Louisville, 1967).

[292] *See supra* notes 171–176 and accompanying text.

[293] *See* Kaczorowski, *supra* note 137, at 874–79.

[294] *See id.*

[295] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866).

Lawrence quoted the Cincinnati *Commercial* of February 26, 1866, describing "outrages against freedmen" across its southern border in Kentucky and reporting that the criminals boasted of turning out not only blacks but also certain whites. The newspaper's account of the outrages was based on at least six letters it received from U.S. Representative Samuel McKee of Kentucky detailing outrages in various parts of the state. One horrific case involved "a party of white men" who raided the home of a nearly eighty-year-old free black man, kicked him to death, and robbed him of his money. "'They then raked coals from the fire and putting him on them, roasted first one side, then the other.'" The perpetrators "'also burnt two others nearly to death, putting out the eye of one, and boasted that they had not only intended to drive out the negroes, but intended also to drive out certain whites.'"

Lawrence reported the persecution of white Quakers in North Carolina who were native North Carolinians, but who held pro-Union political views. He quoted at length from the Raleigh (North Carolina) *Progress* of March 21, 1866, which described the intimidation and oppression of Quakers that forced them to leave the state. The Quakers believed they were denied "'that equality and protection which they feel they ought as loyal citizens to enjoy.'" The Raleigh newspaper reported that, "'because they would take no voluntary part in the war against the Government, and hailed with joy the coming of their deliverers, they are driven out from the land of their nativity and the homes of their childhood by persecutions and oppressions heaped upon them by the disaffected . . . .'" Lawrence went on to state that "'They tell that they are driven out by persecutions, and that they have been hunted down because of their opposition to the war and their devotion to the Union . . . .'"

Representative Lawrence quoted General George Thomas as saying, in Congressional testimony before the Joint Committee on Reconstruction, that the Union Army should remain in the state "'until the people show that they are themselves willing and determined to execute civil law with impartial justice to all parties.'"[296] If the army and the Freedmen's Bureau were removed from Alabama, the general testified, "'I do not believe the Union men or the freedmen could have justice done them.'" He testified that legal process and other forms of harassment would be used against white Unionists to drive them out of the state. "'Injustice toward [white Unionists] would commence in suits in courts for petty offenses, and neighborhood combinations [would] annoy them so much that they could not reside among them.'" Without a restraining force in the South, state law would force the freedmen "'back into a condition of virtual

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[296] *See also id.* at 1264 (statement of Rep. Broomall) (stating that "citizens of the United States, whether of the North or the South, loyal men who never took part in treason, have had their property confiscated by the State courts, and are denied remedy in the courts of the reconstructed South").

slavery.'" "'[T]hey would be compelled by legislative enactments to labor for little or no wages,'" and these laws "'would assume such form that they would not dare to leave their employers for fear of punishment.'"

Representative Broomall listed ways in which private individuals were infringing the civil rights of white Unionists and Union soldiers under color of state law.[297] He proclaimed, *inter alia*, that he was "ready to prove that white men, citizens of the United States, have been, and are now being punished under color of State laws for refusing to commit treason against the United States . . . ." Union soldiers "have been arraigned in State courts, under State laws, for the crime of shooting down traitors on the field of battle . . . ." They have been convicted of murder and have been "saved from being hanged . . . [only] by the interposition of" the Freedmen's Bureau. Broomall admonished that Southern Unionists "are begging in vain for a redress of wrongs in the courts of the reconstructed South."

J. Congress Protects Unionists and Union Soldiers by Authorizing Them To Remove Vexatious Lawsuits and Prosecutions to Federal Courts for Trial

Representative Lawrence freely quoted the testimony of Major General Alfred H. Terry, Commander of the Department of Virginia, before the Joint Committee on Reconstruction, in which Terry stated that, because of prejudice in Virginia, state and local courts would not afford white Unionists "'any adequate protection for their rights of person and property,'" but that they "'would be persecuted through the machinery of the courts, as well as privately.'"[298]

Former Confederates controlled Southern state governments, and state and local law enforcement officers used their legal systems to sanction and assist individuals in defying federal law and authority and to persecute Unionists and Federal officers, in addition to the freedmen, with violence and economic intimidation.[299] Southerners also filed thousands of

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[297] The following account is taken from *id.* at 1263.

[298] Except where otherwise noted, the following account is taken from *id.* at 1833. Terry believed Unionists would not be safe if the military were removed from the state, a belief "'supported by, as I think, the unanimous feeling of the Unionists themselves.'" Virginians varied in their attitudes toward the freedmen. Although some treated them kindly and justly, many more "'treat them with great harshness and injustice . . . and to reduce them to a condition which will give to the former masters all the benefits of slavery, and throw upon them none of its responsibilities.'" *Id.*

[299] See JOINT COMM. ON RECONSTRUCTION, 39th Cong., 1st Sess. REPORT ON RECONSTRUCTION (1866), and the correspondence sent to senators and representatives in the 39th Congress, e.g., Letter from J. W. Shafter to Lyman Trumbull (Dec. 12, 1865), Letters from T. J. Gretlou to Lyman Trumbull (Jan. 8, 19, 1866), Letter from G. Koerner to Lyman Trumbull (Jan. 11, 1866), Letter from A. A. Smith to Lyman Trumbull (Jan. 18, 1866), Letter from Grant Goodrich to Lyman Trumbull (Feb. 1, 1866) (collected in 63 Lyman Trumbull Papers; available in Library of Congress); Letter from John Dietrich to Lyman Trumbull (July 16, 1866) (collected in 68 Lyman Trumbull Papers, *supra*); Letter from H. S. Parmenter to John Sherman (Jan. 29, 1866) (collected in 92 John Sherman Papers; avail-

civil lawsuits and criminal prosecutions against Union soldiers in revenge for their actions on behalf of the Union, Federal authority, and emancipation.[300] Harassment suits and prosecutions were especially virulent in Kentucky.[301] For example, Senator Garrett Davis, a leading opponent of the Civil Rights Bill in the Senate, and Representative Brutus Clay, who opposed the statute in the House, sued General John M. Palmer for $10,000 and $40,000 respectively for freeing their slaves.[302] Senator Davis may have had his lawsuit in mind when he argued that the Civil Rights Bill was unconstitutional, among other reasons, because it transferred "all penal prosecutions and civil lawsuits instituted in the State courts for offenses and trespasses committed under color of it into the Federal courts."[303]

K. Section 3 Authorizes State and Federal Officials To Remove State Prosecutions for Refusing To Enforce Racially Discriminatory State Laws or for Enforcing Federal Law During and After the Civil War

The text of section 3 demonstrates that politically motivated harassment suits and prosecutions were important evils that the Thirty-Ninth

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able in the Library of Congress); Letter from Brig. Gen. J. W. Sprague to John Sherman (Apr. 4, 1866) (collected in 98 John Sherman Papers, *supra*); Letter from Gen. George A. Custer to Zachariah Chandler (Jan. 4, 1866) (collected in Zachariah Chandler Papers, container 4 in the Library of Congress); Letter from Judge John C. Underwood to Benjamin F. Butler (Jan. 24, 1866)(collected in Benjamin F. Butler Papers, box 37 in the Library of Congress); Letter from William Ware Peck to Charles Sumner (Jan. 1, 1866), Unsigned Letter to Charles Sumner (Jan. 9, 1866) (collected in 76 Charles Sumner Papers in Houghton Library, Harvard University); Letter from Tho. Shankland to Judge Adj. Gen. Joseph Holt (May 19, 1866) (collected in 52 Joseph Holt Papers in the Library of Congress); Letter from George W. Kingsbury to Justin S. Morrill (June 18, 1866) (collected in 10 Justin S. Morrill Papers in the Library of Congress); Letter from H. B. Allis to Benjamin F. Wade (Mar. 21, 1866) (collected in Benjamin F. Wade Papers in the Library of Congress).

[300] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1526 (1866) (Rep. McKee); *id.* at 2021 (Sen. Clark); *id.* at 2054 (Sens. Wilson and Clark); E. MERTON COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY 293 (1926); David Achtenberg, *With Malice Toward Some:* United States v. Kirby, *Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 275–76 (1995) (documenting the various kinds of civil suits and criminal prosecutions that were brought against Unionists and Union soldiers); *see also* United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869) (murder prosecution for killing of anti-Union guerrillas).

[301] Assistant United States Attorney for Kentucky Benjamin H. Bristow informed Attorney General James Speed on February 9, 1866 of how Kentuckians were using state and local legal process to intimidate and harass white Unionists and Union soldiers: "'Suits and prosecutions are being instituted against Federal officers for acts done in the line of duty.'" Unionists were also being sued and prosecuted for giving the federal government "'a hearty and cordial support.'" Bristow informed the Attorney General of "'a concerted movement . . . in every portion of the State . . . to oppress and impoverish Union men, and as far as possible drive them from the State.'" Letter from Benjamin H. Bristow, Assistant United States Attorney to James Speed, Attorney General (Feb. 9, 1866), *in* Papers of the Attorney General of the United States: Letters Received 1809–1870 [hereinafter A.G. Source-Chronological File] folder 1 at 87 (on file at Record Group 60, National Archives), *quoted in* Achtenberg, *supra* note 300, at 302.

[302] Achtenberg, *supra* note 300, at 299.

[303] CONG. GLOBE, 39th Cong., 1st Sess. app. 184 (1866).

Congress legislated to remedy.[304] It also shows that the framers of the Civil Rights Act intended to protect state officials who refused to enforce state statutes that were inconsistent with the proposed statute. For example, Representative Wilson introduced the amendment to section 3 that authorized state officers to remove to federal courts civil and criminal cases commenced against them in state courts "for refusing to do any act upon the ground that it would be inconsistent with this act" with the explanation "that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws."[305]

In providing for the removal to federal courts of civil and criminal cases instituted in the state courts, the framers of the Civil Rights Act claimed they were merely emulating the actions the military took to protect freedmen, white Unionists, and military officials from this oppression. Representative Lawrence quoted at length General Ulysses S. Grant's orders directing military commanders to suspend such civil suits and criminal prosecutions in the state courts and to interpose military authority "to protect [freedmen, Unionists, and military personnel] from any penalties or damages that may have been or may be pronounced or adjudged in said [state] courts in any of said cases."[306] To protect the freedmen from prosecutions under vagrancy laws and criminal statutes that imposed different penalties on blacks and whites for the same offenses, military officers removed such cases for trial in federal courts, or to military or Freedmen's Bureau courts where federal courts were not established.[307] Indeed, all cases in which freedmen were unable to enforce their rights in the state courts of South Carolina were to be removed to federal tribunals.[308] The Freedmen's Bureau was particularly important in assisting the freedmen to enforce their labor contracts, because local tribunals refused to do so.[309] The framers of the Civil Rights Act cited the military's actions as precedents for section 3 jurisdictional provisions which replaced state systems of civil and criminal justice with federal systems in situations just like those described and others in order to enforce citizens' civil rights.[310]

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[304] Professor Achtenberg shows that Congress discussed the problem of vexatious lawsuits and prosecutions in at least three different contexts: the debates on amendments to the Habeas Corpus Suspension Act, the debates on the Civil Rights Act of 1866, and the report and hearings of the Joint Committee on Reconstruction. Achtenberg, *supra* note 300, at 337–42.

[305] CONG. GLOBE, 39th Cong., 1st Sess. 1366–67 (1866).

[306] General Orders No. 3, *quoted in* CONG. GLOBE, 39th Cong., 1st Sess. 1834 (1866).

[307] *See id.*

[308] *See* General Orders No. 7, *quoted in* CONG. GLOBE, 39th Cong., 1st Sess. 1834 (1866).

[309] DONALD NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 179–89 (1979).

[310] *See infra* notes 319–325 and accompanying text.

L. Civil Rights Act Opponents Attack Displacement of State Administration of Justice

Opponents attacked section 3 on federalism grounds, because it completely supplanted state laws in administering civil and criminal justice. Senator Saulsbury, for example, objected that all civil and criminal cases in which a black person might be called as a witness in a state that prohibited black testimony in state courts would have to be tried in federal court.[311] In addition, Saulsbury argued that the removal provision of section 3 "is flagrantly unconstitutional," because it gave to the federal courts exclusive jurisdiction to carry state law into effect. He insisted that this provision violated Article III of the Constitution.[312] He gave as an example an action of ejectment against a free Negro who was forbidden by state law to testify in state court. "In such a case as that, this bill authorizes the circuit or district court of the United States to take cognizance of that action of ejectment, and the state courts are excluded from its consideration." This hypothetical case did not arise under the Constitution, laws, or treaties of the United States, to which "alone the courts of the United States have jurisdiction," Saulsbury insisted. "If there is one principle more clearly recognized than another, it is that the Federal courts will not attempt to administer the State laws, and neither will the State courts attempt to administer the Federal laws." Saulsbury explained further, "a Federal court will not apply to an act a punishment created under the statute of a State. It will not execute the criminal laws of a State, and you cannot confer upon it jurisdiction to do so, because its jurisdiction is defined and limited in the [U.S.] Constitution."[313]

Even worse, section 3's "cause affecting a party" provision potentially deprived state courts of jurisdiction even in cases in which only whites

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[311] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866).

[312] U.S. CONST., Art. III, § 2, cl. 1 (defining the judicial power of the United States).

[313] CONG. GLOBE, 39th Cong., 1st Sess. 480 (1866). President Johnson vetoed the Civil Rights Bill, in part, on this theory of federalism and constitutional delegation. Whenever a black American commits "murder, arson, rape, or any other crime" in states that denied blacks any right secured by the Civil Rights Act, "all protection and punishment through the courts of the States are now taken away," and they are transferred to the federal courts, the President protested. He denied that Congress had the power to confer this jurisdiction on federal courts, insisting that Article III limited federal judicial power to cases arising under the Constitution, treaties, and laws of the United States. *Id.* at 1680. Senator Reverdy Johnson, the leading Senate authority on the Constitution, more broadly complained that section 3 of "the [Civil Rights] bill goes upon the theory that there is but one Government created by the Constitution, having all legislative power and all judicial power within the limits of every State. The whole criminal code of the States, therefore, is hereby abolished." *Id.* at 1778. *See also id.* at 599 (statement of Sen. Davis) (objecting that section 3 provides for the removal of cases from the state courts into the federal courts in cases arising under state law and relating to local transactions); *id.* at 1782 (statement of Sen. Cowan) (objecting that local contract and property disputes that should be settled in state courts under state law must now be resolved in federal courts under section 3, which also transferred to federal courts the prosecution of "ordinary crimes and offenses").

are parties. In a hypothetical assault by a white person against another white person in which the victim introduces the testimony of "twenty white men" to prove it, Saulsbury maintained, the defendant, who "does not want to suffer, and at least if he has to suffer he wishes to put it off as long as possible," will call a black witness, who "knows nothing about the case," just to get the case into federal court.[314] Because in his home state of Delaware blacks were prohibited from testifying in such cases unless there were no white witnesses, the judge would bar the black witness from testifying. Under the Civil Rights Act, Saulsbury complained, the case would be transferred to Federal court. Saulsbury concluded, "The passage of this bill is the last act to convert a Federal Government with limited and well-defined powers into an absolute, consolidated despotism."[315]

In the House, Representative Kerr, speaking for the bill's opponents, agreed that the Civil Rights Act usurped the states' police powers, specifically, the states' power to regulate their own internal affairs, to select their own public policies, to enact and administer their own criminal codes.[316] Kerr insisted that, if Congress had the constitutional authority to enact a law like the Civil Rights Act, Congress could constitutionally dispense with the states entirely. If Congress could determine who could sue and testify in state courts, he argued, it could determine who could not. If Congress could order the transfer of lawsuits and criminal prosecutions from the state courts to federal courts as this bill provided, it could "dispense with the State courts entirely." In fact, Kerr objected, under section 3 "the people of the States are denied all remedy in their own courts, but must seek it at great expense and inconvenience, almost equivalent to its denial, in the Federal Courts."[317] Kerr admonished that Congress was dictating to each state how to protect their citizens' right to life, liberty and property under due process of law and was "usurp[ing] the functions of the State government." In short, if the principles of the Civil Rights

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[314] Legal counsel for two white defendants who were convicted in federal court of a brutal murder of four blacks ranging in age from seventeen to ninety made the same argument to the United States Supreme Court in a challenge to the federal court's section 3 jurisdiction in the case. *See* Blyew v. United States, 80 U.S. (13 Wall.) 581, 586–88 (1871). In a decision based on statutory construction, the Supreme Court affirmed this argument in limiting section 3 jurisdiction in criminal cases to prosecutions involving black defendants. The Court dismissed the case against the white defendants, holding that the language of section 3 did not confer jurisdiction on federal courts in criminal prosecutions of white defendants. Nevertheless, the Supreme Court upheld section 3 jurisdiction in criminal prosecutions brought under state law against black defendants. *See id.* at 592–95.

[315] *Id.* at 481. *See also id.* at 601 (statement of Sen. Guthrie) (warning that "when you overturn the State governments, interfere by your legislation with their laws, supersede their courts, keep up a constant contention between the individuals and the tribunals, you are destroying the unity of this Government, and the purposes for which the States were formed").

[316] Except where otherwise noted, the following account is taken from *id.* at 1270. For Representative Kerr's actual words, see *supra* notes 195–196.

[317] *Id.* at 1271.

Bill were sound, Congress "could erect a great centralized, consolidated despotism in this capital."[318]

M. Civil Rights Act Supporters Defend Replacing State Civil and Criminal Jurisdiction with Federal Civil and Criminal Jurisdiction

The Act's House and Senate supporters not only did not deny opponents' charges that the Civil Rights Act supplanted state civil and criminal process, they defended the incursion into the states' police powers. They asserted that the Civil Rights Act simply authorized federal legal officers to do what President Johnson had authorized the military to do to protect the civil rights of U.S. citizens.[319]

For example, Representative Wilson quoted from military orders issued by General Grant and other field commanders to protect military personnel and white Unionists from retaliatory civil suits and criminal prosecutions and the freedmen from discriminatory prosecutions in the local courts.[320] "By these orders," Wilson summarized, "'State laws,' 'State courts,' municipal ordinances and courts, are crushed and pushed out of the way to make room for the perfect enjoyment by the citizen of a portion of his rights." He noted that these were "some of the very things which this bill proposed to secure through the powerful operations of the courts." Wilson insisted that "we may provide by law for the same ample protection through the civil courts that now depends on the orders of our military commanders."

Senator Trumbull made the same arguments in the Senate to defend Congress's substitution of federal for state civil and criminal process. Trumbull rebutted the President's veto message of the Civil Rights Bill, in which the President objected that section 3 took away from the states the administration of criminal justice as it applied to black Americans in states that denied them any of the rights secured by section 1.[321] The senator argued, in part, that orders issued by military commanders under the President's authority provided the very remedies for civil rights violations that were provided in the Civil Rights Bill.[322] "Adequate remedy can be provided without assailing the independence of the judiciary, says the President," Trumbull remarked. Trumbull read military orders which directed that cases concerning "persons of color" be taken from state and given "'the same rights and remedies accorded to all other persons'" in

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[318] *Id.*

[319] *See id.* at 1759 (statement of Sen. Trumbull); *id.* at 1119 (statement of Rep. Wilson); *id.* at 1124 (statement of Rep. Cook); *id.* at 1153 (statement of Rep. Thayer); *id.* at 1158, 1160 (statement of Rep. Windom); *id.* at 1263 (statement of Rep. Broomall); *id.* at 1833–35 (statement of Rep. Lawrence).

[320] The following account is taken from *id.* at 1119.

[321] *See id.* at 1680.

[322] Except where otherwise noted, the following account is taken from *id.* at 1759–60 (quoting General Sickles's order dated Mar. 4, 1866).

such courts, that judges and other state officials who disobeyed these orders shall be punished, that all laws shall apply equally to all inhabitants in order "[t]o secure the same equal justice and personal liberty to the freedmen as to other inhabitants." Trumbull admonished, "Why, sir, here are the very provisions of this bill embodied in military orders issued under presidential authority." In view of these actions, Trumbull chided, "who is breaking down the barriers of the States, and making strides toward centralization?"[323]

The actions the Union army took to protect the freedmen, white Unionists, and Union soldiers from civil rights violations thus provided the framers and supporters of the Civil Rights Act with another model, in addition to the Fugitive Slave Acts of 1793 and 1850, for enforcement provisions to secure the rights of Americans.[324] The Civil Rights Act authorized federal legal officers and federal courts to displace state systems of civil and criminal justice and to remedy civil rights violations regardless of the source of the violation, not simply to remedy state violations of civil rights. Senator Trumbull explained that, with respect to a black American, federal jurisdiction was not conferred, and a federal cause of action did not arise, simply "because there was on the statute-book of the State a law discriminating against him."[325] If the discriminatory statute or custom "was held valid [the claimant] would have a right to remove [his cause] to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court." Thus, it was the violation of the right, not a particular state statute or custom, that was the wrong the Civil Rights Act was directed to remedy. However, judicial enforcement of a discriminatory state statute or custom provided conclusive evidence of the civil right denial.

The framers' remedy for the denial of the equal protection of the laws was to confer jurisdiction on the federal courts to dispense the protection that was being denied.[326] The state denial of a civil right or its failure to enforce the right served as the prerequisite for section 3 federal jurisdiction to try civil and criminal cases arising under state law and those cases removed from the state courts. The state action did not limit the scope of the federal court's subject matter jurisdiction or its remedial powers. That

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[323] Representative Lawrence similarly replied to President Johnson's veto message complaining that the Civil Rights Bill "invades the judicial power of the State," stating, "I answer it is better to invade the judicial power of the State than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded." *Id.* at 1837.

[324] *See* Achtenberg, *supra* note 300, at 337–42; Kaczorowski, *supra* note 159, at 580–81; Kaczorowski, *supra* note 137, at 875 nn.48–49; Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1987*, 98 YALE L.J. 541, 547–57 (1989).

[325] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866) (statement of Sen. Trumbull).

[326] *See supra* notes 311–318 and accompanying text.

is, Congress did not limit the federal court's jurisdiction or remedial powers to the discriminatory state action. Rather, Congress remedied the civil rights by authorizing the federal courts to adjudicate and decide the substantive issues in the civil suit or criminal prosecution in which the party was unable to enforce or was denied a civil right.[327] The framers of the Civil Rights Act conferred this extraordinary jurisdiction on the federal courts as one of the remedies they adopted to redress civil rights violations attributable to state action or state inaction. This extraordinary civil and criminal jurisdiction was an additional remedy to the exclusive jurisdiction section 3 conferred on federal courts to punish criminal offenses against the statute and to dispense civil remedies to redress violations of the civil rights enumerated in section 1.

Trumbull made this clear when he declared that Congress possessed the constitutional authority under the Thirteenth Amendment to authorize the federal courts to exercise jurisdiction over all cases affecting the freedmen in states where a discriminatory custom or statute prevails, if such jurisdiction were necessary to secure them in their civil rights. Trumbull stated, "I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment]. That clause authorizes us to do whatever is necessary to protect the freedman in his liberty."[328] Of course, racially discriminatory statutes and customs would not have authorized white citizens to bring their claims in the federal courts under section 3.

Declaring the government's obligation to protect its citizens' personal rights, Representative Wilson similarly explained the need for the extraordinary civil and criminal jurisdiction Congress conferred on federal courts to provide federal systems of civil and criminal justice which supplanted those of the states.[329] The need arose because state and local judges and executive officials in the southern states were failing to enforce and often were denying citizens' civil rights. If a state should deprive a citizen "without due process of law, of these rights, as has been the case in a multitude of instances in the past, have we no power to make him secure in his priceless possessions?" Wilson queried. "[W]hen such a case is presented, can we not provide a remedy? Who will doubt it? Must we wait for the perpetration of the wrong before acting? Who will affirm this?" Wilson then made clear that the Civil Rights Act authorized federal courts to replace those of the states and dispense the civil and criminal

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[327] The actions taken by the federal officers who were responsible for enforcing the Civil Rights Act on its enactment evince this understanding of the statute. They prosecuted private individuals for ordinary state crimes, such as murder, manslaughter, assault, and theft, when state or local institutions failed to bring perpetrators to justice because of racial or political animus. *See* KACZOROWSKI, *supra* note 262, at 9–10, 34, 38, 52–53, 135–43; *see also supra* notes 288–291 and accompanying text.

[328] CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866).

[329] Except where otherwise noted, the following account is taken from *id.* at 1294.

remedies to redress substantive civil rights the states were denying. "The power is with us to provide the necessary protective remedies . . . . They must be provided by the government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government." Wilson thus grounded Congress's power and duty to civilly remedy and criminally punish violations of Americans' civil rights in its obligation under the social contract.[330]

Section 3 authorized perhaps the deepest intrusion of federal legal process and displacement of state legal process of any statute Congress has ever enacted. It did not simply confer exclusive jurisdiction on the federal courts to try all civil actions and criminal prosecutions to remedy violations of the civil rights it secured. It conferred jurisdiction on the federal courts to try civil causes of action that arose under state law and to prosecute crimes committed against the penal laws of the states whenever a state failed to enforce or denied any of the civil rights secured by the statute to a party to the civil or criminal cause of action. Significantly, the Supreme Court upheld this section 3 jurisdiction.[331]

N. Sections 4 through 10: Civil Rights Enforcement Structure Adopted from the Fugitive Slave Act of 1850

The drafters of the Civil Rights Act of 1866 copied most of the rest of the "necessary machinery to give effect to" civil rights protection from the Fugitive Slave Act of 1850.[332]

Like the Fugitive Slave Act of 1850, section 4 of the Civil Rights Act of 1866 created a federal structure to enforce the statute more effectively. It authorized federal judges to appoint U.S. commissioners to enforce the provisions of and the rights secured by the statute.[333] Perhaps

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[330] See *supra* notes 99, 213, 254–257, and *infra* notes 388–391 and accompanying text for additional statements of the importance of social contract theory to the framers' understanding of Congress's power and obligation to secure citizens' civil rights by enacting a statute like the Civil Rights Act.

[331] Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871).

[332] Senator Trumbull so informed his colleagues, stating that the Civil Rights Bill's enforcement provisions were "copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again." CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). Senator Trumbull repeated that the genesis of sections 4 through 7 of the Civil Rights Act was in the Fugitive Slave Act of 1850 when Congress was deciding to pass the Civil Rights Act over President Johnson's veto. *See id.* at 1759–60.

[333] Civil Rights Act of 1866 § 4 ordered that, "with a view of affording reasonable protection to all persons in their constitutional rights of equality before the law . . . and to the prompt discharge of the duties of this act, it shall be the duty of" the federal circuit courts and superior courts of the territories of the United States "to increase the numbers of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act." *Compare* Civil Rights Act of 1866, § 4 *with* Fugitive Slave Act of 1850 §§ 1–4. Opponents attacked this provision as deputizing anybody to arrest a state judge who refused to admit the testimony of a black witness or a white man who infringed the civil rights secured to Negroes under this bill and to try them in federal court. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 479–80 (1866).

more importantly, section 4 imposed a duty on all federal officers, "at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act," and to arrest violators for the purpose of trying them in the appropriate federal court.[334]

Emulating the Fugitive Slave Act of 1850, section 5 imposed the duty on all federal marshals and deputy marshals "to obey and execute all warrants and precepts issued under the provisions of this act . . . and to use all proper means diligently to execute the same." If they failed to do so, they were subject to a fine "in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense."[335] Congress thus imposed a $1,000 fine payable to the victim of a civil rights violation on federal officials who failed diligently to execute the statute.

Section 5 of the Civil Rights Act of 1866, like section 5 the 1850 Fugitive Slave Act, also authorized federal commissioners "to summon and call to their aid the bystanders or posse comitatus" of the county as may be necessary to perform their duties under the act. The 1866 statute authorized the summoning of a posse comitatus "to insure a faithful observance of" the Thirteenth Amendment.[336]

Section 6 of the 1866 Act was analogous to section 7 of the 1850 Fugitive Slave Act in that it subjected to federal criminal penalties any one who "shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person" from executing any warrant or process under this act or from "arresting any person for whose apprehension such warrant or process may have been issued."[337] This section also imposed criminal penalties on any one who "shall rescue or attempt to rescue such person from [federal] custody . . . or shall aid, abet, or assist any person so arrested . . . to escape from [federal] custody" or anyone who "shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person."[338] This provision was almost identical to section 7 of the

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[334] Civil Rights Act of 1866 § 4. Senator Davis of Kentucky interpreted section 4 "of this unconstitutional, void, and iniquitous act" as requiring federal legal officers to institute both civil suits and criminal prosecutions on behalf of black victims of civil rights violations. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866). Senator Cowan characterized the U.S. commissioners authorized by the bill as "paid, hired informer[s]" and "public prosecutors" who were commissioned "to pry about, and they are to see that this law is executed and that all lawgivers, all Governors, all judges, all juries, everybody who has anything to do with the administration of the State law are punished if this law be violated." *Id.* at 1784.

[335] *Compare* Civil Rights Act of 1866 § 5 *with* Fugitive Slave Act of 1850 § 5.

[336] *Compare* Civil Rights Act of 1866 § 5 *with* Fugitive Slave Act of 1850 § 5.

[337] *Compare* Civil Rights Act of 1866 § 6 *with* Fugitive Slave Act of 1850 § 7.

[338] *Id.* Referring to the civil fine of section 5 and the criminal fine of section 6, Senator Davis complained that a federal legal officer was subject to the two penalties, noting that the Civil Rights Act "creates two separate penalties on a defaulting officer, . . . one for the benefit of the United States, and the other for the benefit of the free negro . . . [which] is

Fugitive Slave Act of 1850, which imposed penalties on anyone who prevented the arrest or harbored, concealed, rescued, or assisted the escape of fugitive slaves.[339]

Section 7 of the 1866 Act provided that federal attorneys, marshals, and deputy marshals were to be paid their fees for services under the Act.[340] These fees, and the costs of arresting, housing, and feeding prisoners were to be paid out of the United States Treasury.[341]

Section 8 authorized the President of the United States to reassign federal judges and legal officers to locations where they were needed to redress violations of the Civil Rights Act.[342] Section 9 of the Civil Rights Act authorized the President of the United States to deploy the army, navy, or militia "as shall be necessary to prevent the violation and enforce the execution of this act."[343] Although the Fugitive Slave Act of 1850 did not have a comparable military provision, it did authorize federal legal officers to remove fugitive slaves by force and at government expense to the states from which they fled if the claimant made out an affidavit that he had reason to believe that the fugitive would be rescued by force.[344] However,

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assessed in the form of liquidated damages." CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

[339] § 7, 9 Stat. 462, 464.

[340] *Compare* Civil Rights Act of 1866, § 7 *with* Fugitive Slave Act of 1850 § 8.

[341] Civil Rights Act of 1866 § 7.

[342] § 8, 14 Stat. 27, 29. There was no analogous provision in the Fugitive Slave Act of 1850.

[343] Ch. 31, § 9, 14 Stat. 27, 29 (1866). Senator Lane of Indiana defended the authorization of "the power of the military to enforce" the statute because

> [n]either the judge, nor the jury, nor the officer as we believe is willing to execute the law . . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the constitutional amendment; but because we believe they will not do that, we give the Federal officers jurisdiction.

Id.

Senator Lane reminded his Senate colleagues that the military "were called upon to execute the fugitive slave law and to suppress a riot growing out of the attempt to enforce it" in Boston, a reminder of the struggle to return Anthony Burns from Boston to Virginia. CONG. GLOBE, 39th Cong., 1st Sess. 602–03 (1866). When opponents protested that this provision set up a military despotism to enforce the Civil Rights Act, Senator Trumbull answered that the Militia Clause of Article I authorizes Congress to provide for calling out the militia to aid in the execution of the laws of the United States and to prevent their violation, asserting that "the militia may be called out to prevent them from committing an act. We are not required to wait until the act is committed before anything can be done," and citing past precedents, including the Act of Mar. 10, 1838, ch. 31, 5 Stat. 212, 214, § 8 (1838), which he quoted word for word in section 9. *Id.* at 604–05 (1866). Representative Lawrence conceded that in ordinary times it may be better to await the Supreme Court's ultimate decision on questions regarding the constitutionality of discriminatory state law and legal process. But, he noted, "we now employ military power to reach the same results, to secure civil rights," because the need to secure civil rights was so immediate and urgent. *Id.* at 1837. This strategy presaged the tactics Department of Justice lawyers and marshals would use to enforce the 1870 and 1871 Enforcement Acts against the Ku Klux Klan. *See* KACZOROWSKI, *supra* note 262; ALAN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 383–418 (1971).

[344] Section 9 provided that, on affidavit of the claimant that he had reason to believe

the Fillmore and Pierce administrations used the U.S. armed services to enforce the Fugitive Slave Act of 1850.[345] The final section of the Civil Rights Act of 1866 authorized final appeals to the U.S. Supreme Court for all questions of law arising under this statute.[346]

III. THE FOURTEENTH AMENDMENT INCORPORATES THE CIVIL RIGHTS ACT OF 1866

Having thoroughly debated issues relating to citizenship, citizens' rights, Congress's power to enforce citizens' rights, and the remedies and enforcement structure to secure citizens' rights in the Civil Rights Act debates, there was relatively little debate of these issues when the proposal that became the Fourteenth Amendment was before Congress. Nevertheless, supporters and opponents of both of these measures understood that the framers and proponents of the proposed Fourteenth Amendment intended it to achieve the same objectives as the Civil Rights Act: to secure the fundamental rights of U.S. citizens. The following discussion will show that the members of the Thirty-Ninth Congress understood that section 1 of the proposed Fourteenth Amendment was intended to put the guarantees of the Civil Rights Act of 1866 into the Constitution, thereby ensuring its constitutionality and insulating it against repeal. The Act's provisions, as explained in this Article, demonstrate that Congress exercised plenary legislative power to define and enforce the rights of U.S. citizens when it enacted the Civil Rights Act of 1866, giving federal legal officers and federal judges jurisdiction that displaced that of their state counterparts in administering civil and criminal justice. Because the framers of the Fourteenth Amendment intended it to put the guarantees of the Civil Rights Act into the Constitution and thus ensure its constitutionality, they necessarily understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.

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that the fugitive slave would be rescued by force, it became the duty of the federal officer who held the fugitive "to remove him to the State whence he fled, and there to deliver him to said claimant, his agent, or attorney." Fugitive Slave Act of 1850 § 9. This authorization of the use of force to execute the Fugitive Slave Act was in addition to two other authorizations of the use of force: the posse comitatus provision of section 5 and the right of the claimant to seize the fugitive slave without legal process recognized in section 6. *See id.* §§ 5–6.

[345] LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 89–90 (1957); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 119–20 (1988); VON FRANK, *supra* note 243, at 72, 174–75.

[346] Ch. 31, § 10, 14 Stat. 27, 29 (1866).

A. Civil Rights Act Debates and the Proposed Fourteenth Amendment

The original version of the proposed Fourteenth Amendment was worded as a delegation of plenary congressional power to secure the privileges and immunities of U.S. citizens and to secure the equal protection of the rights of life, liberty, and property of all persons.[347] The proposed amendment borrowed language from the Necessary and Proper Clause, the Comity Clause, and the Fifth Amendment and expressly delegated to Congress the "power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[348] Opponents of the proposed amendment and the Civil Rights Bill argued that the Bingham amendment demonstrated that supporters of these measures believed that Congress did not have the power to enact the statute and that the proposed amendment rendered the statute unnecessary.

The House of Representatives took up the original Bingham amendment immediately before it considered the Civil Rights Bill. Representative Andrew J. Rogers, Democrat from New Jersey, led the opposition. Rogers's comments are especially authoritative, because he was a member of the House Judiciary Committee from which the Civil Rights Bill was reported, and he also served on the Joint Committee on Reconstruction which drafted the proposed Fourteenth Amendment.[349] He noted the equivalence between the two measures even before the House of Representatives took up the Civil Rights Bill. Rogers acknowledged that Bingham intended his proposal "so to amend [the Constitution] that all persons in the several States shall by act of Congress have equal protection in regard to life, liberty, and property."[350]

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[347] Representative John A. Bingham introduced the original version of his proposed constitutional amendment in the House of Representatives on February 26, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866). The House debated the proposal for three days in February 1866. It decided to return Bingham's proposal to committee on February 28, and the next day, March 1, it began debate on the Civil Rights Bill. The Senate had debated the Civil Rights Bill from January 29 through February 2, 1866, when it passed the bill and sent it to the House of Representatives. The Senate did not debate the original version of Bingham's amendment. Justice Kennedy acknowledged that the original Bingham proposal delegated plenary power to enforce fundamental rights when he noted that it was replaced with the language that is now in the Constitution. He asserted that, "Under the revised Amendment, Congress's power was no longer plenary but remedial." City of Boerne v. Flores, 521 U.S. 507, 522 (1997).

[348] CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866). The Joint Committee of Fifteen on Reconstruction adopted this version on February 3, 1866. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 61 (photo. reprint 1969) (1914). *Cf.* U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. IV, § 1; U.S. CONST. amend. V.

[349] CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866); KENDRICK, *supra* note 348, at 196–97.

[350] CONG. GLOBE, 39th Cong., 1st Sess. app 133–34 (1866). *See also* Rogers's comments in *id.* at 135.

When the House began debate on the Civil Rights Bill three days later, Rogers maintained that Bingham had offered his proposed amendment to provide Congress with the constitutional authority "to pass this [Civil Rights] bill," because it was intended to grant Congress the power "'to make laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the right of life, liberty, and property.'"[351] He asserted that the Civil Rights Bill and Bingham's proposed amendment were identical in objectives and scope and that Bingham's amendment authorized all of the remedies and guarantees contained in the Civil Rights Bill: "There is no protection or law provided for in that constitutional amendment which Congress is authorized to pass by virtue of that constitutional amendment that is not contained in this proposed act of Congress which is now before us." Rogers claimed that Bingham's amendment implied that the Republican members of the Joint Committee on Reconstruction, including Representative Bingham, believed that a constitutional amendment was necessary to empower Congress to enact the Civil Rights Bill. He claimed that those who supported the Civil Rights Bill were about to enact a statute they knew to be unconstitutional.[352]

Republican supporters of Bingham's proposed amendment, such as Burton C. Cook, Republican from Illinois and member of the House Judiciary Committee, conceded that both measures were intended to protect the freedmen in their civil liberties and that the Bingham Amendment, if adopted, would delegate to Congress the power to enact the Civil Rights Act, but insisted that Congress was empowered to enact the statute even without Bingham's amendment.[353] However, Cook noted that Rogers had opposed Bingham's proposed constitutional amendment, which would have given Congress the power to enact the Civil Rights Act. "[Rogers] is for the protection of these men, but he is against every earthly mode that can be devised for protecting them," Cook chided.[354]

Supporters argued that both the statute and the constitutional amendment were needed to secure citizens' rights. Representative Thayer, for example, explained that Bingham's amendment put the protections afforded by the Civil Rights Act into the Constitution. "I approve of the

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[351] *Id.* at 1120 (quoting Bingham's proposed constitutional amendment). Except where otherwise noted, the following account is taken from *id.*

[352] *See also id.* at 1155 (statement of Rep. Eldridge) (arguing that Bingham "admitted, or seemed to admit, when [his] resolution was under consideration, that there is by the Constitution as it now stands no warrant for the Federal Government to go into a State for the purpose of protecting the citizen in his rights of life, liberty, and property," and "that the majority of this House have urged the necessity of the passage of [Bingham's] resolution to amend the Constitution in order to enable them to attain the purpose sought by this bill").

[353] *See id.* at 1124.

[354] *Id.* Representative Rogers's speech is in *id.* at app. 133–40.

proposition of the gentleman from Ohio, [Mr. Bingham,] in which he offers to put this protection [extended by the Civil Rights Act] substantially into the Constitution of the United States."[355] Although he believed that Congress possessed the legislative authority to enact the Civil Rights Act without Bingham's proposed amendment, Thayer would vote for both the Civil Rights Bill and Bingham's proposed amendment "in order to make things doubly secure."

Bingham, however, argued that Congress did not have the constitutional authority to enact the Civil Rights Act without his proposed amendment. He believed that the Civil Rights Bill and his proposed constitutional amendment sought to achieve the same objective: "to enforce in its letter and its spirit the bill of rights as embodied in [the] Constitution. I know that the enforcement of the bill of rights is the want of the Republic," Bingham opined.[356] However, because of judicial precedents interpreting the Bill of Rights as limitations upon the powers of Congress, but not upon the states, Bingham argued that Congress did not possess the constitutional power to enforce the Bill of Rights without amending the Constitution, and therefore did not possess the power to enact the Civil Rights Act. He intended to give Congress this very power, as well as the power to compel state officials to perform what Bingham said was their constitutionally imposed duty to enforce the guarantees of the Bill of Rights.[357]

Representative Wilson agreed with Bingham that the Civil Rights Bill and Bingham's proposed constitutional amendment sought to secure to U.S. citizens the rights guaranteed by the Bill of Rights. However, applying the *McCulloch/Prigg* theories of constitutional delegation and interpretation, he argued that Congress could enforce the Bill of Rights without Bingham's constitutional amendment. Wilson insisted that the Bill of Rights secured the rights of life, liberty, and property and the rights incident thereto, that these rights are the civil rights of U.S. citizens, and that their enforcement and protection are therefore within the jurisdiction of the United States.[358]

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[355] Except where otherwise noted, the following account is taken from *id.* at 1153.

[356] *Id.* at 1291.

[357] *See id.* at 1292. Bingham insisted that the Constitution required state officials to enforce its provisions. Because he believed that Congress lacked the power to force state officials to perform this duty, Bingham proposed to delegate this power to Congress. *Id.*; *see also supra* notes 254–255 and accompanying text.

[358] Wilson said:

> I find in the bill of rights which the gentleman [Bingham] desires to have enforced by an amendment to the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this [Civil Rights] bill relates.

Id. at 1294 (quoting the Fifth Amendment). Although Wilson directed his comments to the rights guaranteed by the Fifth Amendment's due process clause, he also stated that the

Wilson quoted *Prigg v. Pennsylvania*[359] as authority for the theory of Congress's power to enforce the rights secured by the Bill of Rights and to remedy their violation, where Justice Story said that the constitutional guarantee of a right delegates to Congress plenary power to enforce it:

> Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine of the law as laid down by the courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy.[360]

Thus, both the Republican House leader on the Civil Rights Act, Representative Wilson, and the principal author of the Fourteenth Amendment, Representative Bingham, stated that the proposed constitutional amendment and the Civil Rights Act were intended to achieve the same objective: the federal enforcement of rights secured in the Bill of Rights as rights of United States citizens.

B. House Debates on the Revised Proposed Fourteenth Amendment

The House of Representatives referred Bingham's original amendment back to the Joint Committee on February 28, 1866.[361] On April 28, after the Civil Rights Act was enacted into law, the Joint Committee, on Bingham's motion, substituted a new section for Bingham's original proposal. The substitute, with a citizenship provision added by Senator Howard on the floor of the Senate, was ratified as section 1 of the Fourteenth Amendment.[362] The text no longer explicitly delegated to Congress the power to enforce citizens' privileges and immunities and their right to the equal protection of the laws.[363] The new version was expressed as prohi-

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Civil Rights Bill was intended to remedy violations of rights guaranteed generally by the Bill of Rights. *See supra* notes 257–258 and accompanying text.

[359] 41 U.S. (16 Pet.) 539 (1842).

[360] *Id.* at 1294.

[361] *Id.* at 1095.

[362] *See supra* note 348. Section 1 provided that:

> All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[363] The original language provided that:

> The Congress shall have the power to make all laws which shall be necessary and

bitions upon the states from infringing citizens' privileges and immunities and all persons' rights to life, liberty, and property under due process of law and the right to the equal protection of the law. Nevertheless, the express delegation of legislative power to Congress to enforce the rights secured by section 1, in addition to the power to enforce the other three sections of the Fourteenth Amendment, was moved to a new section 5.[364] The following discussion will show that House members interpreted the new proposed constitutional amendment exactly as they did Bingham's original proposal, and that they understood that the revised amendment incorporated the Civil Rights Act of 1866 and ensured Congress's plenary power to enforce citizens' constitutional rights.[365]

Representative Thaddeus Stevens, Radical Republican from Pennsylvania, co-chair of the Joint Committee of Fifteen on Reconstruction and House floor manager of the proposed amendment, saw no change in Congress's plenary powers to define and enforce citizens' rights between Bingham's original proposed amendment and the revised proposed amendment, and he understood that the final version incorporated the Civil Rights Act of 1866.[366] It is noteworthy that Stevens and other Bingham amendment supporters understood the revised proposed amendment, like Bingham's original proposal, as putting into the Constitution the affirmative guarantees of the Civil Rights Act. Stevens made this assertion on introducing the revised proposal, paraphrasing it as follows: "The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws." Stevens interpreted these prohibitions on the states from infringing fundamental rights as incorporating the Civil Rights Act and as delegating to Congress the plenary power to enact this statute and any other legislation Congress deemed appropriate to protect these rights. This interpretation of the proposed Fourteenth Amendment was analogous to the Supreme Court's interpretation of the Fugitive Slave Clause's prohibitions on the states from interfering with slave holders' right of recapture.[367] Moreover, Stevens equated the guarantees of this proposal to other

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> proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

KENDRICK, *supra* note 348, at 106, 116.

[364] Section 5 declares that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S CONST. amend. XIV, § 5; *see also* KENDRICK, *supra* note 348, at 115–17.

[365] Justice Kennedy failed to consider these debates in the legislative history of the Fourteenth Amendment presented in *City of Boerne v. Flores,* 521 U.S. 507, 520–23 (1997).

[366] Except as otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

[367] *See supra* notes 34–49 and accompanying text.

constitutional guarantees of citizens' rights, such as the Bill of Rights and the Privileges and Immunities Clause of Article IV.[368]

Like the congressional Republican leaders in the Civil Rights Bill debates, Stevens explained the necessity for the constitutional amendment even though the Civil Rights Act had been enacted into law.[369] One of the amendment's purposes, he said, was to prevent a future Congress from repealing the protections afforded to citizens by the Civil Rights Act. Acknowledging that Bingham's proposed constitutional amendment and "the civil rights bill secur[e] the same things," Stevens cautioned that a statute is not as effective a guarantee of individuals' rights as a constitutional amendment, because "a law is repealable by a majority." He predicted "that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed . . . . This amendment once adopted cannot be annulled without two thirds of Congress. That they will hardly get."[370]

Nor did the revised proposed amendment's opponents see any change in Congress's powers to define and enforce the rights of U.S. citizens. House opponents repeatedly attacked the proposal's supporters for unscrupulously enacting the Civil Rights Act and proposing a constitutional amendment to ensure the statute's constitutionality after the fact. Thus, Representative William E. Finck, Democrat of Ohio, replied to Stevens, stating, "Well, all I have to say about this [first] section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional."[371]

Finck's attack brought Republican James A. Garfield of Ohio to the defense of himself and his Republican colleagues who voted for the Civil Rights Act from the imputation that they knowingly acted unconstitutionally. The future President said in rebuttal that section 1 of the proposed amendment was intended to put the Civil Rights Act into the Constitution in order to prevent Finck's party from repealing the statute when they

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[368] CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). Stevens said that the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause "are all asserted, in some form or other in our [Declaration of Independence] or [Bill of Rights]." *Id.*

[369] Except where otherwise noted, the following account is taken from *id.*

[370] *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2506 (1866) (statement of Rep. Eldridge) (acknowledging that Stevens's stated purpose for adopting section 1 of the proposed amendment was to prevent the repeal of the Civil Rights Act by placing the statute into the Constitution); *id.* at 2540 (statement of Rep. Farnsworth) (urging passage of section 1 on the grounds that Democrats will join with representatives of the rebel states when they are readmitted to Congress and that they will repeal the civil rights bill).

[371] *Id.* at 2461; *see also id.* at 2506 (statement of Rep. Eldridge) (insisting that section 1 of the proposed amendment was an admission that the Civil Rights Act is unconstitutional, and that Stevens's stated purpose for adopting section 1 was to prevent the Act's repeal by placing it in the Constitution). Eldridge also made similar statements regarding Bingham's original proposal earlier in the Civil Rights Bill debates. *See supra* note 352.

gained control of Congress.[372] Garfield stated that Finck "undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional." Denying that this was the reason for Republicans' support of section 1, Garfield asserted that "every gentleman knows [the Civil Rights Bill] will cease to be a part of the law whenever the sad moment arrives which [sic] [the Democratic] party comes into power. It is precisely for that reason," Garfield declared,

> that we propose to lift that great and good law above the reach of the plots and machinations of any party, and fix it . . . in the eternal firmament of the Constitution . . . . For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.[373]

Nevertheless, other House Republicans expressed their intention of ensuring the constitutionality of the Civil Rights Act by adopting the revised proposed constitutional amendment. Representative John M. Broomall, Republican from Pennsylvania, observed that Republicans had "voted for this proposition in another shape, in the civil rights bill."[374] It was because Bingham expressed the view that the statute was unconstitutional without a constitutional amendment delegating to Congress the power to enact it, Broomall explained, that "we put a provision in the Constitution which is already contained in an act of Congress." He noted, moreover, that Democrats voted against the Civil Rights Bill on the ground that it was unconstitutional. Although Broomall said he believed the Civil Rights Act was constitutional as enacted, "yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make

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[372] *Id.* at 2462. Justice Kennedy, in his discussion of the Fourteenth Amendment's legislative history, failed to mention Garfield's remarks quoted here, which clearly express Garfield's understanding that the revised language of the proposed Fourteenth Amendment delegated plenary power to Congress to enforce fundamental rights. *See* City of Boerne v. Flores, 521 U.S. 507, 522 (1997). Justice Kennedy instead quoted remarks Garfield made five years later for the proposition that "[t]he revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property. ('The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State[s]')." *Id.* at 523 (citing CONG. GLOBE, 42d Cong., 1st Sess. app. 151 (1871)). This account shows that Justice Kennedy was clearly mistaken in this conclusion. *See also infra* notes 392–396 and accompanying text.

[373] CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866). Representative Thayer joined Garfield in denying that Republicans supported section 1 of the proposed amendment because they believed the Civil Rights Act was unconstitutional without it. Rather, Republicans supported it "in order, as was justly said by [Representative Garfield], that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States." *Id.* at 2465.

[374] Except where otherwise noted, the following account is taken from *id.* at 2498.

assurance doubly sure."[375] He also shared his Republican colleagues' objective of preventing the statute's repeal by a future Congress.[376]

It is significant that no one in the House of Representatives saw any difference in the power delegated to Congress to define and enforce citizens' rights in Bingham's original proposed amendment and the revised proposal that became section 1 of the Fourteenth Amendment. To the contrary, even conservative Republican Representative Henry J. Raymond of New York, who voted to sustain President Johnson's veto of the Civil Rights Bill, explicitly asserted that Bingham's original proposed amendment, the Civil Rights Act, and the revised proposed constitutional amendment expressed the same principle: that declaring persons U.S. citizens entitled them to all of the rights, privileges, and immunities of citizens and delegated to Congress plenary power to secure citizens' rights.[377] In the debates relating to the Civil Rights Act, Raymond had defined the principle of the bill as securing to all Americans "whatever rights, immunities, privileges, and powers [that] belong as of right to all citizens of the United States."[378] Later, in the Fourteenth Amendment debates, he stated that this same principle was again before the House in the form of the proposed constitutional amendment.[379] Raymond acknowledged that, when this principle was before the House in the form of the Civil Rights Bill, he voted against it because he believed the proposed statute was unconstitutional, and he expressed the belief that many who voted for it also believed it was unconstitutional.[380] This principle was again before the House in this revised proposal "so to amend the Constitution as to confer upon Congress the power to pass [the civil rights bill]."[381] Declaring himself "heartily in favor of the main object which that [civil rights] bill was intended to secure," Raymond stated, "I shall vote very cheerfully for this proposed amendment to the Constitution, which I trust may be ratified by States enough to make it part of the fundamental law."[382]

It is because he agreed that these measures were essentially the same that Representative Wilson was skeptical that Raymond voted against the

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[375] *See also id.* at 2511 (statement of Rep. Eliot) (stating, "I voted for the civil rights bill . . . under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.").

[376] *Id.* at 2498 (statement of Rep. Broomall) ("If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people.").

[377] *See id.* at 2512.

[378] *See id.* at 1266.

[379] *See id.* at 2502.

[380] *Id.* Raymond explained in the Civil Rights Act debates that he could not support the bill because he did not believe Congress had the authority to impose criminal penalties on state judges who enforced racially discriminatory state laws in violation of the Civil Rights Act. *See supra* notes 127, 138–141, 257 and accompanying text.

[381] CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866).

[382] *Id.*

Civil Rights Act because he thought it was unconstitutional. He recalled that, earlier in the session, Raymond had introduced his own bill to protect citizens in their civil rights.[383] Raymond's bill simply declared that all native-born persons are "'citizens of the United States, and entitled to all rights and privileges as such.'"[384] Raymond expressly stated that his proposed constitutional amendment would have delegated to Congress the power to secure all citizens in the enjoyment of their citizenship rights and to provide remedies for their violation. It is noteworthy that Raymond's bill and comments reflected the *McCulloch/Prigg* interpretation of Congress's implied power to enforce constitutionally recognized, constitutionally secured, and constitutionally conferred rights. He saw no inconsistency in voting against the Civil Rights Bill because he thought it was unconstitutional and later supporting the principle "of securing to all the rights of citizenship with whatever power we possessed."[385]

Wilson was no more convinced of Raymond's motivation now that the proposed Fourteenth Amendment was before the House than he was in the Civil Rights Act debates.[386] Wilson insisted that section 1 of the Civil Rights Act embodied "its essential and vital principle. All the other sections [of the Civil Rights Act of 1866] provide merely for the enforcement of the principle embraced in the first section, which was simply a declaration that all persons without distinction of race or color should enjoy in all the States and Territories civil rights and immunities."[387] The principle of section 1 of the Civil Rights Act, in other words, was that the federal government would guarantee and enforce the civil rights of all Americans.

As he did in the Civil Rights Act debates,[388] Wilson argued a social contract theory of congressional power to enforce citizens' rights supported by the Supreme Court's decision in *Prigg v. Pennsylvania*.[389] He stated that Congress possessed the power to confer citizenship and to declare citizens entitled to fundamental rights as such, which included the power to enforce the rights of citizens.[390] In thus explaining the principle of the

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[383] *Id.* at 2505.

[384] *Id.* (quoting Rep. Raymond's proposed civil rights bill).

[385] *Id.*

[386] Except where otherwise noted, the following account is taken from *id.* at 2512.

[387] *Id.* at 2505.

[388] *See supra* notes 99, 213, 256, 286–287, 329 and accompanying text.

[389] 41 U.S. (16 Pet.) 539 (1842).

[390] CONG. GLOBE, 39th Cong., 1st Sess. 2512–13 (1866). Wilson reasoned that, "after declaring all persons born in the United States citizens and entitled to all the rights and privileges of citizens," as Raymond's bill provided, "it would be competent for the Government of the United States to enforce and protect the rights thus conferred, or thus declared." "That being conceded, the power to protect those rights must necessarily follow," Wilson continued, "as was laid down in the well-known case of *Prigg vs. The Commonwealth of Pennsylvania*, where the Supreme Court declared that the possession of the right carries with it the power to provide a remedy." He insisted, therefore, that the remedial "sections of the civil rights bill were but the result of that power, affirmed by the Supreme Court in the [*Prigg* case], to protect the rights which the citizen possessed."

Civil Rights Act of 1866 and equating it to the principle of the revised proposed constitutional amendment, Wilson, like the unanimous Supreme Court in its interpretation of the Fugitive Slave Clause in *Prigg*, interpreted the prohibitions against state infringements of individual rights in the revised proposed Fourteenth Amendment as a delegation of plenary power to enforce these rights. Moreover, in defending the criminal penalties the Civil Rights Act imposed on state judges and executive officers who violated citizens' civil rights and arguing that the revised proposed constitutional amendment delegated such power to Congress, Wilson, and through his agreement, Raymond, suggested that the Fourteenth Amendment empowered Congress to compel state officials to enforce federal guarantees of citizens' rights.[391]

It is because the revised version of the proposed constitutional amendment, like Bingham's original proposal, attempted to incorporate the Civil Rights Act into the Constitution that Representative Rogers opposed it. He viewed the Civil Rights Act as a usurpation of the states' police power, and, by incorporating it into the proposed constitutional amendment, all of these measures were attempts by their framers to usurp and consolidate the states' police powers in the federal government. The proposed Fourteenth Amendment "is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill," Rogers stated, "which was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation."[392] At the end of the House debate on the revised proposed amendment one month later, Rogers continued to insist that the Joint Committee's proposed amendment "simply embodied the gist of the civil rights bill . . . and gave authority to Congress to pass appropriate legislation to enforce the amendment."[393] He protested that the revised proposed amendment represented a radical change in American federalism, which intruded upon and consolidated in the federal government traditional state police powers, a view shared by his Democratic colleagues.[394]

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[391] For a discussion of the framers' intent to compel state judges and executive officers to enforce the guarantees of the Civil Rights Act, see *supra* notes 245–264 and accompanying text.

[392] CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866). Rogers's remarks explicitly contradict Justice Kennedy's suggestion that the revised amendment did not raise the federalism concerns that Bingham's original proposal aroused. City of Boerne v. Flores, 521 U.S. 507, 523 (1997). President Johnson stated in his veto message that he could not sign the Civil Rights Bill because of similar federalism concerns. The President's veto message is briefly quoted in *supra* note 200 and accompanying text. For the full text of the President's veto message, see CONG. GLOBE, 39th Cong., 1st Sess. 1679–81 (1866).

[393] CONG. GLOBE, 39th Cong., 1st Sess. app. 229 (1866).

[394] *See, e.g.*, *id.* at 2260–64 (statement of Rep. Finck); *id.* at 2500 (statement of Rep. Shanklin); *id.* at 2538, app. 230–31 (statement of Rep. Rogers); *id.* at 3147 (statement of Rep. Harding of Kentucky).

Opponents of the revised proposed amendment also attacked it because it delegated to Congress the power to define and enforce the rights of U.S. citizens that Congress had just exercised in enacting the Civil Rights Act under the Thirteenth Amendment. Thus, Representative Charles E. Phelps of Maryland declared that "The 'privileges or immunities' of citizens are such as Congress may by law ascertain and define."[395] He "presumed" that "it would be for Congress to define and determine by law in what the 'privileges and immunities' of citizens of the United States consist," just as Congress defined the rights of emancipated blacks under the authority of the Thirteenth Amendment. However, he differentiated between "civil rights" and "privileges and immunities, arguing that the proposed constitutional amendment was a covert Republican scheme to secure Negro suffrage.[396]

C. Senate Debates on the Revised Proposed Fourteenth Amendment

The Senate did not debate the proposed Fourteenth Amendment until after Congress had enacted the Civil Rights Act of 1866. Additionally, the Senate did not debate Bingham's original proposal, but only considered the revised Bingham Amendment. Nevertheless, like members of the House, senators equated the Civil Rights Act and the revised proposed amendment. Senators noted the connection between the two measures as soon as the Fourteenth Amendment debates began. Senator Jacob Howard, a member of the Joint Committee of Fifteen on Reconstruction, opened debate on the revised proposed amendment on May 30, 1866, introducing an amendment to the revised Bingham Amendment that added the Citizenship Clause.[397] The citizenship provision stated that "[a]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[398] Howard declined to discuss this citizenship amendment because "the question of citizenship has been so fully discussed in this body [during the Civil Rights Bill debates] as not to need any further elucidation, in my opinion."[399] He simply asserted, "This amendment . . . is simply declaratory of

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[395] *Id.* at 2398. Phelps's statement directly contradicts Justice Kennedy's conclusion that the revised version of the amendment was intended to deprive Congress of the power to define the substance of citizens' rights. *See Boerne*, 521 U.S. at 523–24.

[396] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2398 (1866).

[397] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). Howard served as the floor manager because Senator William P. Fessenden, co-chair of the Joint Committee, was sick the day the proposed amendment came up for debate in the Senate. KENDRICK, *supra* note 348, at 311.

[398] *Id.* at 2890.

[399] *Id.* As part of the exhaustive congressional debate on the nature and rights of U.S. citizens that had preceded his introduction of the citizenship amendment, Senator Howard had explained his conception of the privileges and immunities of U.S. citizens, as "the ordinary rights of freemen," which "include personal rights guaranteed and secured by the first eight amendments to the Constitution." *Id.* at 2765. *See supra* notes 115–223 and accompanying

what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."[400]

Senator Howard's comment explains why Congress gave so little attention to the Citizenship Clause of section 1 of the Fourteenth Amendment, which the framers understood delegated to Congress plenary power to define and enforce the fundamental rights of U.S. citizens. The framers had also amended section 1 of the Civil Rights Act of 1866 with a Citizenship Clause, which defined and conferred citizenship on all Americans, and limited the protective guarantees of section 1 only to citizens of the United States. They said they made these changes precisely to ensure that Congress possessed the power to enact the Civil Rights Act and to ensure that black Americans would be recognized as U.S. citizens and receive the federal protection of their civil rights that the statute provided to all citizens.[401] Supporters repeatedly proclaimed that U.S. citizenship entitled the individual to the natural rights of all freemen. The citizen being entitled to these rights, Congress possessed plenary power to enforce and protect citizens' rights.[402]

Legislators made the same arguments in the Fourteenth Amendment debates. Thus, Senator John Conness of California supported the addition of the Citizenship Clause to section 1 of the proposed amendment, complaining that "the Mongolian" was a victim of crimes committed with impunity because he was prohibited from testifying in California state courts.[403] He understood the Citizenship Clause as a declaration that persons born in the United States are citizens of the United States, and, as such, they are "entitled to civil rights."[404] Conness expressed his satisfaction that it therefore provided "that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others," as rights conferred by this clause.[405] Senator James R. Doolittle of Wisconsin, on the other hand, wanted an express exclusion of Native Americans from the Citizenship Clause precisely because "citizenship, if con-

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text for an analysis of the framers' understanding of the rights of U.S. citizenship and Congress's power to enforce these rights.

[400] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). *Accord id.* at 3031 (statement of Sen. Henderson) (stating that "this [citizenship] section will leave citizenship where it now is"). The Citizenship Clause produced a debate over what groups were included and excluded from U.S. citizenship, a debate similar to that which ensued in the debates relating to the Civil Rights Bill. While Republicans argued that citizenship was open to all peoples, most Democrats argued that American citizenship should be restricted to white Europeans to protect them from races they regarded as inferior. *See, e.g., id.* at 498–500, 504–07, 523, 528–31, 575, 1776–77, 1780–81.

[401] *See supra* notes 159–162 and accompanying text.

[402] *See id.*

[403] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866).

[404] *See id.*

[405] *Id.*

ferred, carries with it, as a matter of course, the rights, the responsibilities, the duties, the immunities, the privileges of citizens, for that is the very object of this constitutional amendment to extend."[406] In extending these privileges, immunities, and duties of citizenship, the Citizenship Clause delegated to Congress the authority to enforce these privileges, immunities, and duties.[407] Doolittle then equated the proposed Fourteenth Amendment and the Civil Rights Act, stating that the Civil Rights Act "was the forerunner of this constitutional amendment, and to give validity to which this constitutional amendment is brought forward, and which without this constitutional amendment to enforce it has no validity so far as this question is concerned."[408] Senator Henderson, citing various authorities, including Chief Justice Taney's opinion in *Dred Scott*,[409] argued that U.S. citizenship entitles Americans to "all the personal rights, privileges, and immunities guarantied [sic] to citizens of this 'new Government,'" and, when such citizens "desired to remove from one State to another they had a right to claim in the State of their domicile the 'privileges and immunities of citizens in the several States.'"[410]

However, the Constitution had failed to define citizenship and to specify who is entitled to citizens' rights and privileges. Section 1 of the Fourteenth Amendment was intended to fill this constitutional gap. Thus, Senator Reverdy Johnson acknowledged that "very serious questions have arisen, and some of them have given rise to embarrassments, as to who are citizens of the United States, and what are the rights which belong to them as such; and the object of this amendment is to settle that question."[411] Acknowledging this gap, Representative Joseph H. Defrees of Indiana noted that the Citizenship Clause addressed and resolved this problem.

> Section one indisputably fixes the character of those who are entitled to be regarded as citizens of the United States or citizens of the several States, and secures to all life, liberty, and property, and places all persons upon an equality, regardless of their condition or color, so far as equal protection of the law is concerned. Certainly none can take exceptions to the provisions of this section.[412]

The Citizenship Clause of section 1 of the Fourteenth Amendment, which defined and conferred citizenship on all Americans, ensured the constitu-

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[406] *Id.* at 2892–93.
[407] *Id.*
[408] *Id.* at 2896.
[409] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422–23 (1857).
[410] CONG. GLOBE, 39th Cong., 1st Sess. 3032 (1866) (quoting *Dred Scott*).
[411] *Id.* at 2893.
[412] *Id.* at app. 227.

tionality of the Citizenship Clause of section 1 of the Civil Rights Act of 1866. These legislators expressed the understanding that, in securing the status of all Americans as citizens of the United States, the Amendment's Citizenship Clause delegated plenary power to Congress to define and enforce the rights of every U.S. citizen, thus ensuring the constitutionality of all of the provisions of the Civil Rights Act. The Civil Rights Act debates also demonstrate that both proponents and opponents of the Civil Rights Act expressed the view that, in conferring citizenship, Congress entitled individuals to the rights of citizenship and to the protection of the federal government in enjoying and exercising these rights.[413]

Senator Doolittle also equated Bingham's original proposed amendment, the Civil Rights Act, and the revised proposed amendment that ultimately became the Fourteenth Amendment, concluding that the revised amendment was intended, like Bingham's original amendment, to ensure the constitutionality of the Civil Rights Act of 1866.[414] He maintained that the Joint Committee of Fifteen on Reconstruction feared that the Civil Rights Act was unconstitutional "unless a constitutional amendment should be brought forward to enforce it." When Senator William P. Fessenden, co-chair of the Joint Committee, denied this, Doolittle argued that he had the right to infer that the Joint Committee doubted the constitutionality of the Civil Rights Act.[415]

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[413] *See supra* notes 214–220 and accompanying text. Senator Garrett Davis of Kentucky suggested that supporters understood the Citizenship Clause of the proposed amendment to be sufficient to assure the constitutionality of the Civil Rights Act and to secure the civil rights of African Americans. He asserted that

> The real and only object of the [Citizenship Clause], which the Senate added to [section 1], is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle.

CONG. GLOBE, 39th Cong., 1st Sess. app. 240 (1866). In the Civil Rights Act debates Davis conceded that citizenship entitled the individual to all of the fundamental rights that citizens enjoy. *See supra* note 142 and accompanying text. He nevertheless objected that the Comity Clause restricted Congress's power over citizenship "to such matters as concern the citizens of different States," and insisted that Congress "has no power whatever to act in relation to the matters of this bill so far as those matters concern the citizens of a single State." CONG. GLOBE, 39th Cong., 1st Sess. 595 (1866). He objected, therefore, that "[t]he principles involved in this bill, if they are legitimate and constitutional, would authorize Congress to pass a civil and criminal code for every State in the Union." *Id.* at 1414. For additional discussion of Senator Davis's views, see *supra* notes 197–199, 248 and accompanying text.

[414] Except where otherwise noted, the following account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

[415] *See id.* Doolittle asserted that Bingham had "maintained that the civil rights bill was without any authority in the Constitution," and that he proposed "to amend the Constitution so as to enable Congress to declare the civil rights of all persons." Doolittle insisted that he had a "right to infer that it was because of Mr. Bingham," other House Republicans, and members of the Joint Committee of Fifteen, to which the proposed amendment had been referred, "had doubts, at least, as to the constitutionality of the civil rights bill" that they

In the debate that ensued from Doolittle's question, Senate supporters of the Civil Rights Act of 1866 and the proposed Fourteenth Amendment, like their counterparts in the House, stated that they intended section 1 of the amendment to put the statute's guarantees into the Constitution in order to protect those guarantees from future repeal and to remove any doubt about the statute's constitutionality.[416] Senator Howard answered Senator Doolittle, explaining that the revised constitutional amendment was intended to put the Civil Rights Act and federal guarantees of citizenship and citizens' rights into the Constitution, placing those rights beyond the possibility of legislative repeal:

> We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond legislative power of such gentlemen as the Senator from Wisconsin [Doolittle], who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.[417]

The importance of the Citizenship Clause of section 1 of the Fourteenth Amendment for Congress's power to secure the rights of all Americans and the Republicans' political and constitutional theories which defined the scope of this power, has not been fully understood. According to the *McCulloch/Prigg* theory of constitutional delegation, which most congressional Republicans endorsed, in defining and conferring U.S. citizenship on all Americans, the Fourteenth Amendment delegated plenary power to Congress to define and protect citizens' rights.[418] And, in prohibiting the states from infringing the privileges and immunities of U.S. citizens, the Privileges or Immunities Clause implicitly recognized and secured citizens' constitutional rights, which additionally secured citizens' rights

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now proposed "to amend the Constitution" in order "to give [the statute] validity and force." Indignant, Senator James W. Grimes of Iowa, a member of the Joint Committee, denied Doolittle's accusation and characterized it as "an imputation upon every member who voted for the [civil rights] bill, the inference being legitimate and logical that they violated their oaths and knew they did so when they voted for the civil rights bill." *Id.*

[416] Senator Luke P. Poland of Vermont elaborated this intention, stating that the Civil Rights Act and section 1 of the proposed constitutional amendment were intended to enforce the principles of republican government expressed in the Declaration of Independence and secured throughout the Constitution, an implied reference to Bill of Rights guarantees. *See id.* at 2961. Poland observed that Congress had already legislated to advance these principles when it enacted "what is called the civil rights bill." However, he also noted that "persons entitled to high consideration" had doubted and denied Congress's power to enact this statute and "to enforce principles lying at the very foundation of all republican government." Asserting the desirability of leaving no doubt as to Congress's power to enforce these principles, Poland was confident that "every Senator will rejoice" in supporting the proposed constitutional amendment which would "remove all doubt upon this power of Congress." *Id.*

[417] *Id.* at 2896.

[418] *See supra* notes 92–102 and accompanying text.

by creating a self-executing guarantee in addition to delegating plenary power to Congress to enforce the rights thus secured.[419] Under the Republicans' theory of constitutional interpretation, the Due Process and Equal Protection Clauses extended constitutional protection to all persons in the U.S., whether citizens or not, and delegated to Congress plenary power to enforce the rights of life, liberty, and property and the right to the equal protection of the laws for all inhabitants of the United States.[420] Section 5 of the Fourteenth Amendment constituted an explicit delegation of plenary power to Congress to enforce citizens' and non-citizens' rights secured by section 1, thus putting Congress's power to enforce constitutionally secured rights beyond cavil.[421]

Pursuant to this understanding of the Fourteenth Amendment, Congress, after the Fourteenth Amendment was ratified, re-enacted the Civil Rights Act of 1866 in section 18 of the Enforcement Act of 1870.[422] Congress also extended to non-citizens the civil rights secured to U.S. citizens in section 1 of the Civil Rights Act of 1866, except the right to property, in sections 16 and 17 of the Enforcement Act of 1870.[423] The Senate Floor Manager of the 1870 Act was Senator William Stewart, one of the Republican senators who voted for the Fourteenth Amendment. Senator Stewart stated that securing the civil rights of non-citizens was simply extending to all American inhabitants the equal protection of the laws along with the means of enforcing this right in federal courts, just as the Civil Rights Act of 1866 had secured the civil rights of U.S. citizens:

> The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States.[424]

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[419] *See supra* notes 120–151 and accompanying text.

[420] *See supra* notes 31–56, 91–102 and accompanying text.

[421] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866) (statement of Sen. Trumbull) (stating that the framers of the Thirteenth Amendment intended its prohibition of slavery in section 1 as a positive guarantee of liberty which delegated to Congress plenary power to enforce the natural rights of free men, and that they intended section 2 "to put it beyond cavil and dispute").

[422] Ch. 114, § 18, 16 Stat. 140, 144 (1870).

[423] *Id.* §§ 16–17. Recall that the framers amended the original version of section 1 of the Civil Rights Bill by narrowing its application from all inhabitants in the several states to citizens of the United States because they believed that restricting the bill's guarantees to citizens' civil rights would remove doubts over Congress's authority to enact it. *See supra* notes 124–127 and accompanying text.

[424] CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

Stewart added, "The civil rights bill, then, will give the United States courts jurisdiction to enforce it."[425]

The framers of the Fourteenth Amendment understood that it authorized Congress to extend to noncitizens the kinds of guarantees of constitutional rights and remedies to redress their violation that the Civil Rights Act of 1866 secured to U.S. citizens. The Civil Rights Act, in turn, evidences the kind of legislation the framers of the Fourteenth Amendment intended to empower Congress to enact to enforce the constitutional rights of all persons. Senator Stewart explicitly stated that the Senate Judiciary Committee deemed it Congress's duty to put into the 1870 Enforcement Act provisions to secure to aliens the Fourteenth Amendment right to the equal protection of the laws. "For twenty years every obligation of humanity, of justice, and of common decency toward [the Chinese] people has been violated. . . in California and on the Pacific coast . . . . If the State courts do not give them the equal protection of the law," he promised, "if public sentiment is so inhuman as to rob them of their ordinary civil rights . . . we will protect Chinese aliens or any other aliens . . . and give them a hearing in our courts" to ensure they are "protected by all the laws and the same laws that other men are."[426]

CONCLUSION

The Civil Rights Act of 1866 offers a critical insight into the framers' understanding of the Fourteenth Amendment and the power they intended to delegate to Congress to remedy violations of constitutional rights.

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[425] *Id.* For additional statements on the meaning of "equal protection of the laws," see *id.* and *id.* at 3807–08 (statement of Sen. Stewart) (stating that the aliens provisions that became sections 16 and 17 of the 1870 statute "giv[e] all the protection of the laws"). *See also id.* at 1536 (statement of Sen. Pomeroy) (supporting the extension of equal protection to aliens); *id.* at app. 473 (statement of Sen. Carpenter) (suggesting that the Fourteenth Amendment's Equal Protection Clause authorizes the civil remedies and criminal penalties adopted in the various sections of the 1870 statute); *id.* at 3802 (statement of the Vice-President) (stating that "The Senate . . . inserted various propositions to enforce the fourteenth amendment . . . to put down illegal bands of marauders; To protect the equal rights of citizens under the laws; to reenact the civil rights law"); *id.* at 3871 (statement of Rep. Bingham) (stating that the Fourteenth Amendment entitles white immigrants "to the equal protection of the laws," not only of state law but of federal law as well). *But see id.* at app. 473 (May 20, 1870) (statement of Sen. Casserly) (rejecting the understanding of proponents of the Enforcement Act of 1870 that the Fourteenth Amendment authorizes Congress to punish "the criminal or illegal acts of a private person in a State, in depriving another of his life by murder, or of his liberty by false imprisonment, or of his property by stealing it, all 'without due process of law,' . . . . Otherwise Congress might take to itself, under pretense of enforcing the fourteenth amendment, the entire criminal and civil jurisdiction in the States of offenses and trespasses against life, liberty, and property by private persons acting without any color of State authority."). *Accord id.* at 3874 (statement of Rep. Beck) (stating that re-enacting the Civil Rights Act was intended to enforce the Fourteenth Amendment); app. 546 (statement of Rep. Prosser) (agreeing with Beck and the Democrats that re-enacting the Civil Rights Act was intended to enforce the Fourteenth Amendment).

[426] *Id.* at 3658.

This Article has shown that the framers of the Fourteenth Amendment enacted the Civil Rights Act of 1866 to enforce and protect the civil rights of U.S. citizens and then incorporated it into the Fourteenth Amendment to ensure its constitutionality, to insulate it against future repeal, and to put its statutory guarantees of civil rights into the Constitution.

The framers of the Fourteenth Amendment modeled the remedies and enforcement structure of the Civil Rights Act of 1866 on the remedies and enforcement structure earlier Congresses adopted to enforce the slaveholders' constitutionally secured property right in their slaves. They legislated within the context of federal constitutional rights enforcement dating back to the nation's founding. Republicans in 1866 asserted theories of constitutional interpretation and delegation of congressional powers that the Supreme Court had articulated in explaining Congress's plenary power to enforce personal rights secured by the Constitution, theories articulated by jurists such as Chief Justice John Marshall, Chief Justice Roger B. Taney, and Justice Joseph Story and derived from *Federalist Papers* authored by James Madison.

The provisions of the Civil Rights Act demonstrate that the framers of the Fourteenth Amendment exercised plenary power to define and enforce the civil rights of U.S. citizens. But, they exercised this plenary power in a way that preserved the states' concurrent power over civil rights. In section 1 of the Civil Rights Act, the framers exercised the plenary power of a sovereign nation and defined and conferred U.S. citizenship on native-born Americans and declared that all U.S. citizens were to enjoy civil rights on the same bases as the most favored citizens enjoyed them. This provision fixed the status of all Americans as citizens and overrode any states' laws to the contrary. In defining some of the civil rights of U.S. citizens as they did, the framers preserved the state laws that regulated the manner in which these rights were enjoyed and exercised, with the exception that states could no longer discriminate on the basis of race, color, or previous condition of servitude. The framers also required that state crimes and punishments be the same for all citizens.

In section 2 of the statute, the framers adopted a criminal remedy for violations of a person's civil rights by making it a federal crime to violate the rights secured in section 1, but, again, they did so in a way that preserved the states' police power over ordinary crimes against persons and property. The framers distinguished federal crimes from ordinary crimes by restricting federal criminal penalties to persons who violated a citizen's civil rights when acting under color of law or custom and out of racial animus. This provision is one of the remedies for state-action violations of civil rights the framers of the Fourteenth Amendment adopted.

In section 3, the framers conferred exclusive jurisdiction on federal courts to remedy violations of the civil rights secured in section 1. Because section 1 secured civil rights on the basis of equal enjoyment rather than absolute enjoyment, federal civil jurisdiction was limited to viola-

tions that were motivated by some animus the framers regarded as impermissible, such as race, ethnicity, or political affiliation. Thus, ordinary civil violations of civil rights remained within state jurisdiction. Federal criminal jurisdiction was limited to violations motivated by racial animus and committed under color of law or custom. Notwithstanding these restrictions on federal jurisdiction, the framers conferred on federal courts jurisdiction directly to remedy violations of substantive rights.

The framers devised a truly extraordinary remedy for violations of civil rights caused by state action or inaction: they conferred jurisdiction on the federal courts to the exclusion of the states, to administer civil and criminal justice in actions arising under state law. Whenever a party to a civil cause of action, a victim of a crime, or a defendant in a criminal prosecution arising under state law was unable to enforce or was denied by the state any of the rights secured in section 1, the framers granted federal courts original jurisdiction to try the civil action or the criminal prosecution. The remedial structure the framers adopted to remedy violations of civil rights caused by a state's affirmative denial of a section 1 civil right, that is, state action, or by the failure of the state to enforce a section 1 civil right, in other words, state inaction, authorized federal courts and federal legal officers to supplant state courts and state legal officers and to try the underlying action. In addition, the framers provided for the removal to a federal court of any civil or criminal action commenced against a party who was unable to enforce or was denied in the state court a civil right secured by section 1. Federal courts were to try these civil actions and criminal prosecutions according to federal law, unless federal law was not sufficient to furnish suitable civil remedies and criminal punishments. In these situations, federal courts were to try these cases under state law, so long as the relevant state law was consistent with the Constitution and laws of the United States. As this Article has shown, the lower federal courts and the Supreme Court upheld this remarkable assumption by the federal government of the state's authority to enforce its own civil and criminal laws.

The Rehnquist Court has held that the framers of the Fourteenth Amendment intended to withhold from Congress plenary power to define and enforce the substantive rights it secures, and that the framers left to the states the power to enforce Americans' substantive constitutional rights. The Rehnquist Court has also concluded that the Court, not Congress, is authorized to define the rights the Fourteenth Amendment secures and to determine when these rights are violated. In its view, the framers intended to limit Congress's remedial power under the Fourteenth Amendment to correcting unjust state action. The framers thus intended to deprive Congress of the power to remedy violations of Fourteenth Amendment rights caused by the actions of private individuals.

The provisions of the Civil Rights Act of 1866 demonstrate that the Rehnquist Court's understanding of the intent of the framers of the Four-

teenth Amendment is quite wrong. In enacting this statute, the framers exercised the plenary power that the Rehnquist Court said the framers did not want Congress to have, and they adopted the kinds of remedies to redress violations of substantive rights that the Rehnquist Court said they wanted to leave to the states. Whatever justifications one might advance in support of the Rehnquist Court's state-action interpretation of the Fourteenth Amendment, the intent of its framers is not among them. To the contrary, any justification will have to be strong enough to overcome original intent.

RECENT DEVELOPMENTS

NOPEC: THE NO OIL PRODUCING AND EXPORTING CARTELS ACT OF 2004

In 2004, climbing oil prices roiled the stock market[1] and hurt consumers and businesses that rely on oil.[2] The precise causes of these high oil prices are complex, but one factor was likely the Organization of the Petroleum Exporting Countries (OPEC). For the past forty years, by virtue of oil's central role in the global economy,[3] OPEC has been a significant international political actor.[4] As a major consumer of oil, the United States has long been concerned about OPEC. The most recent attempt to confront OPEC's dominance of the oil market is The No Oil Producing and Exporting Cartels Act of 2004 (NOPEC), which Senators Mike DeWine (R-Ohio) and Herb Kohl (D-Wis.) have introduced in the Senate.[5] The bill seeks to rein in

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[1] *Business Digest*, N.Y. TIMES, Oct. 23, 2004, at C3–C4 (describing how oil prices topping $55 sent stocks tumbling); E. S. Browning, *Investors May Be Fixated on Wrong Bogeyman: Rising Oil Prices, By Themselves, Aren't the Threat They Used To Be; The Real Risk Is Broader Inflation*, WALL ST. J., July 12, 2004, at C1 (describing how oil price increases have caused instability in the stock market).

[2] *See, e.g.*, Barbara Hagenbaugh, *Drastic Drops in Gas Prices Not Expected: Feds Keep Eye on Situation*, USA TODAY, June 16, 2004, at 4B (noting that average prices peaked at over $2 a gallon at the end of May); *see also* Nick Bunkley & Karen Dybis, *Pumped-up Gas Prices Sap May Retail Sales*, DETROIT NEWS, June 24, 2004, at 1B (describing how higher gas prices have contributed to a loss of retail sales in Michigan); Dianne Solis, *Sweating It Out: The Surge in Energy Costs Is Testing the Resourcefulness of Small-Business Owners*, DALLAS MORNING NEWS, June 20, 2004, at 1D (describing the price of oil as a source of pressure on small business owners).

[3] For a detailed discussion of the relationship of the world oil economy to the United States, see generally, for example, ROBIN C. LANDIS & MICHAL W. KLASS, OPEC: POLICY IMPLICATIONS FOR THE UNITED STATES (1980). For a discussion of past U.S. attempts to deal with OPEC, see G. JOHN IKENBERRY, REASONS OF STATE: OIL POLITICS AND THE CAPACITIES OF THE AMERICAN GOVERNMENT (1988).

[4] *See generally* JAMIE MARQUEZ, OIL PRICE EFFECTS AND OPEC'S PRICING POLICY (1984); M. A. Ajomo, *An Appraisal of the Organization of the Petroleum Exporting Countries (OPEC)*, 13 TEX. INT'L L.J. 11 (1977) (describing the structure and organization of OPEC and its international legal status). OPEC was founded in 1960. *See* OPEC SECRETARIAT, OPEC GENERAL INFORMATION 5 (2004), *available at* http://www.opec.org/Publications/GI/GenInfo.pdf [hereinafter OPEC SECRETARIAT]. Of course, since its founding, OPEC's power and influence have waxed and waned. OPEC itself acknowledges that it only truly gained international importance in the 1970s. *See* OPEC, HISTORY, *available at* http://www.opec.org/About_OPEC/History.htm (last visited Oct. 17, 2004). Eleven countries currently comprise OPEC: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Saudi Arabia, Qatar, United Arab Emirates, and Venezuela. OPEC SECRETARIAT, *supra*, at 13–14. Ecuador and Gabon were once members but ceased to be such in the mid-1990s. *Id.* at 14. In its own words, OPEC's objective is to "unify petroleum policies among Member Countries . . . to ensure the stabilization of oil prices . . . , the interests of oil-producing nations . . . ; an efficient, economic and regular supply . . . to consuming nations; and a fair return on capital to" investors. OPEC SECRETARIAT, FREQUENTLY ASKED QUESTIONS ABOUT OPEC (2004), *available at* http://www.opec.org (last visited Nov. 22, 2004).

[5] No Oil Producing and Exporting Cartels Act of 2004, S. 2270, 108th Cong. (2004). The House of Representatives version of the bill is the No Oil Producing and Exporting

OPEC by allowing the U.S. government to sue the cartel in U.S. courts under U.S. antitrust law.[6]

As of November 2004, Senate Bill 2270 had passed the Judiciary Committee and was reported to the full Senate[7] where it has continued to gather new co-sponsors but has not received a full vote.[8] The bill's sponsors are

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Cartels Act of 2004, H.R. 4106, 108th Cong. (2004). The original sponsors of the Senate bill in addition to Senators DeWine and Kohl are Senators Grassley (R-Iowa), Feingold (D-Wis.), Specter (R-Pa.), Schumer (D-N.Y.), Leahy (D-Vt.), and Coleman (R-Minn.). *See* 150 CONG. REC. S3569–70 (daily ed. Apr. 1, 2004). Since then seven more Senators have joined as co-sponsors. *See* 150 CONG. REC. S6882 (daily ed. June 16, 2004) (adding Senator Dayton (D-Minn.); 150 CONG. REC. S5950 (daily ed. May 20, 2004) (adding Senator Snowe (R-Me.); 150 CONG. REC. S5079 (daily ed. May 10, 2004) (adding Senator Corzine (D-N.J.); 150 CONG. REC. S4226 (daily ed. Apr. 21, 2004) (adding Senators Levin (D-Mich.) and Boxer (D-Cal.); 150 CONG. REC. S3921 (daily ed. Apr. 7, 2004) (adding Senator Durbin (D-Ill.); 150 CONG. REC. S3792 (daily ed. Apr. 6, 2004) (adding Senator Wyden (D-Or.)). The House sponsors are Representatives Conyers (D-Mich.), Lofgren (D-Cal.), and McIntyre (D-N.C.). *See* 150 CONG. REC. H2018 (daily ed. Apr. 1, 2004).

[6] *See* S. 2270 § 2. Whether antitrust laws apply to OPEC even without NOPEC remains something of an open question. *See* Andreas Rueda, *Price-Fixing at the Pump—Is the OPEC Oil Conspiracy Beyond the Reach of the Sherman Act?*, 24 HOUS. J. INT'L L. 1, 7 (arguing that "although the judicial bias against [antitrust litigation against OPEC] is clear, there is no fundamental legal reason why it may not ultimately be successfully pursued"). In particular, one can argue that the jurisdictional principles of the Foreign Sovereign Immunities Act, 28. U.S.C.A. §§ 1330, 1391(f), 1441(d), 1602–11 (West 1994 & Supp. 2004) [hereinafter FSIA], permit suit against OPEC and that courts have been incorrect to decide otherwise. *See* Andrew C. Udin, Comment, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U. L. REV. 1321, 1360–61 (2001) ("[B]y sitting together in collusion to limit their oil production with the overriding goal of increasing prices, OPEC and its member nations are engaging in a commercial activity."); *see also* Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 107, 119–22 (2002) (suggesting that "[t]he actions of OPEC would most likely be characterized as 'commercial activity' permitting jurisdiction under the Foreign Sovereign Immunities Act" and criticizing contrary court decisions); Joel Brandon Moore, Note, *The Natural Law Basis of Legal Obligation: International Antitrust and OPEC in Context*, 36 VAND. J. TRANSNAT'L L. 243, 244 n.4 (2003) (noting that the FSIA argument accords with United Nations dictates on trade and development). One of the bill's sponsors also has argued that the FSIA's commercial activity provisions do not exclude OPEC. *See* 150 CONG. REC. S3570 (statement of Sen. Kohl) (daily ed. Apr. 1, 2004) ("[FSIA] already recognizes that the 'commercial' activity of nations is not protected by sovereign immunity . . . . [Senate Bill 2270] will correct one erroneous . . . court decision and establish that sovereign immunity doctrine will not divest a U.S. court from jurisdiction to hear a lawsuit alleging that members of [OPEC] are violating antitrust law."). The erroneous court decision to which Senator Kohl refers is *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd* 649 F.2d 1354 (9th Cir. 1981), *cert. denied* 454 U.S. 1163 (1982) [hereinafter *International Machinists*], which held that OPEC nations are not engaged in commercial activity under the FSIA. *See also* 150 CONG. REC. S2569 (daily ed. Apr. 1, 2004) (statement of Sen. DeWine) ("NOPEC would effectively reverse these decisions by making it clear that OPEC's activities are not protected by sovereign immunity and that the Federal courts should not decline to hear such a case based on the 'act of state' doctrine."); *see also generally* Mark R. Joelson & Joseph P. Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L LAW. 617 (1975) (discussing the application of antitrust law to international cartels).

[7] *See* 150 CONG. REC. S4300 (daily ed. Apr. 22, 2004) (Sen. Hatch (R-Utah) submitting bill without amendment).

[8] *See supra* note 5 (listing sponsors).

a mix of Republicans and Democrats.[9] In the House of Representatives, the companion bill to Senate Bill 2270, House Bill 4106, remains in committee and has not garnered as much support as the Senate bill has.[10] While NOPEC has progressed further in this Congress than in previous legislative sessions, the bill's future is still uncertain because historically it has stagnated and maintained a low profile.[11]

The impetus behind NOPEC seems to be the general concern about high oil prices and their effect on the American economy and consumers,[12] which can partially be blamed on OPEC.[13] On a more theoretical level, the bill can be viewed as part of the tradition of legislating to fight restraints on trade.[14] These general concerns, rather than any particular event—such an

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[9] *See id.* This bipartisan support does not mean that the parties support the bill for the same reason. It may be an example of incompletely theorized agreement, where two sides reach similar conclusions through different avenues. *See* Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1733–36 (1995).

[10] House Bill 4106 has been referred to the Committee on the Judiciary. *See* 150 CONG. REC. H2018 (daily ed. Apr. 1, 2004). However, it has neither passed committee nor continued to gather co-sponsors. The language of House Bill 4106 is identical to that in Senate Bill 2270. References to "NOPEC" refer to both bills, which are identical.

[11] The 108th Congress marks the third consecutive Congress in which Senators DeWine and Kohl have introduced NOPEC. *See* 147 CONG. REC. S3216 (daily ed. Mar. 30, 2001) (statement of Sen. Kohl introducing the bill in the 107th Congress); 146 CONG. REC. S5663 (daily ed. June 22, 2000) (statement of Sen. Kohl introducing the bill in the 106th Congress); *see also supra* note 7 (detailing Senate Bill 2270's report to the full Senate by the Judiciary Committee).

[12] *See* 150 CONG. REC. S3569 (daily ed. Apr. 1, 2004) (testimony of Sen. DeWine (R-Ohio)) ("Every consumer in America knows . . . [OPEC has] ripped off American consumers by raising gas prices . . . . It is time that we . . . assure that oil is subject to the principles of the free market. The bill that we are introducing today would do just that . . . ."); 150 CONG. REC. S3570 (daily ed. Apr. 1, 2004) (statement of Sen. Kohl (D-Wis.)) ("Real people suffer real consequences every day in our nation because of OPEC's actions. Rising gas prices are a silent tax that takes hard-earned money away from Americans every time they visit the gas pump."); *see also id.* ("Higher oil prices drive up the cost of transportation, harming thousands of companies throughout the economy from trucking to aviation. And those costs are passed on to consumers in the form of higher prices for manufactured goods. Higher oil prices mean higher heating oil and electricity costs.").

[13] *See supra* notes 1–4 (describing some of these negative economic effects and OPEC's role in creating them).

[14] Thus, the bill would be in the tradition of the Sherman Act, 15 U.S.C. §§ 1–7 (2000), and similar legislation, the purpose of which is to ensure the free functioning of the market economy. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); United States v. Aluminum Co. of America, 148 F.2d 416, 427–28 (2d Cir. 1945) (opinion of Learned Hand, J.) ("[T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition."). Some commentators have viewed antitrust laws as having a broader purpose than just economic. *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 72–85 (1954) ("[Antitrust doctrine] in this country was . . . clearly influenced by the oft-noted animosity of Americans to all kind of 'unjustified' privilege . . . . Antitrust is also in harmony with long-cherished ideas of equality of opportunity and freedom of enterprise and with widespread concepts of individualism and capitalist democracy."). Congressional testimony supports the understanding of NOPEC as part of the fight against trade restraints. *See* 150 CONG. REC. S3569 (daily ed. Apr. 1, 2004) (statement of Sen. DeWine (R-Ohio)) ("OPEC

oil crisis or significant shock to world oil markets—seem to have precipitated the bill's introduction.[15]

NOPEC's language is relatively simple. The bill makes it unlawful for any foreign state, or agents of a foreign state, to limit the production of oil, set the price of oil, or take any other action restraining the trade of oil when such action has a foreseeable effect on the oil market in the United States.[16] The bill's two major provisions are a waiver of sovereign immunity protection for foreign nations engaged in restraint of the oil trade[17] and an elimination of the "act of state" defense in suits arising under the act.[18]

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is probably the most notorious example of an illegal cartel in the world today, even at a time when it is widely understood that such conduct is counterproductive and ill-suited for our global economy. Supreme Court Justice Scalia . . . described collusion among competitors as 'the supreme evil of antitrust.'") (quoting Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872, 879 (2004)); 150 CONG. REC. S3570 (daily ed. Apr. 1, 2004) (statement of Sen. Kohl (D-Wis.)) ("The most fundamental principle of a free market is that competitors cannot be permitted to conspire to limit supply or fix price. There can be no free market without this foundation. And we should not permit any nation to flout this fundamental principle.").

[15] The fact that the bill has been introduced in two Congresses prior to the current one supports the conclusion that it is motivated by general market concerns and not any specific instances of OPEC's conduct. *See supra* note 11 (listing the previous Congressional sessions in which NOPEC was introduced).

[16] *See* S. 2270, 108th Cong. § 2 (2004).

[17] *See id.* For a general discussion of sovereign immunity in the international antitrust context, see WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 3.10 (5th ed. 1998); SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 10.02 (Release No. 11, 2003). The jurisdictional reach of U.S. law over foreign governments in U.S. courts is governed by the FSIA, which "codified the trend in the United States and other countries towards the adoption of the restrictive theory of sovereign immunity." WALLER, *supra* at § 10.02. Under the FSIA, a U.S. court only has jurisdiction over a foreign state when that state has waived its immunity, conducted commercial activity, violated international law in the taking of property, acquired property in the United States, committed certain torts within the United States, or agreed to arbitration. *See* FSIA. Thus, to the extent that OPEC is considered an agent of a foreign sovereign, it is immune from suits under U.S. antitrust law except where it falls under one of the above-enumerated exceptions. Importantly, courts have held that OPEC nations are not engaged in commercial activity. *See supra* note 6.

[18] *See* S. 2270 § 2. The "act of state" doctrine "is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government." O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 452–54 (2d Cir. 1987) (applying the act of state doctrine to bar private antitrust suit against Colombian tariffs). The doctrine originates in the common law and prevents suits against foreign governments in U.S. courts for engaging in activity that is customarily within the purview of sovereign governments. *See* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corporation, 493 U.S. 400, 405–07 (1990) (discussing the boundaries and evolution of the act of state doctrine as arising from international law and having its basis in the separation of powers between the executive and judiciary); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (holding that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory") (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)); FUGATE, *supra* note 17, at § 2.26; WALLER, *supra* note 17, at § 10.02; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965) ("A court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests."). For an argument that the act

Additionally, it authorizes the Attorney General and the Federal Trade Commission to sue those who violate the provisions of the bill.[19] This Recent Development does not focus on the details of these provisions and is not a full discussion of the accompanying concerns.

Instead, this Recent Development argues that in order for NOPEC to be effective, the bill would need to be interpreted broadly enough to encompass tariffs as actionable restraints on trade. Under the act of state doctrine, current U.S. antitrust law does not apply to tariffs set by foreign governments.[20] Because tariffs and quotas are economically symmetrical restraints on trade,[21] only a legal regime that treats them symmetrically will be effective.[22] Applying NOPEC only to quotas would ignore the potential use of tariffs to accomplish the same economic results and thus provide OPEC with the means to avoid NOPEC's intent. This broad interpretation is the most direct textual understanding of the bill, which explicitly waives the act of state defense. However, applying U.S. antitrust law to OPEC-

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of state doctrine ought to be eliminated and a criticism of both the district and appeals courts in *International Machinists*, see Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 350–57 (1986), which notes that "OPEC is a good example of judicial misuse of the [act of state] doctrine, and with its wide acceptance it is a major contributor to existing confusion in this area."

[19] S. 2270 § 2. Note, however, that only the government is authorized to bring suit under the statute, not private individuals, making abuse of the jurisdictional expansion under NOPEC less likely.

[20] *See, e.g.*, S. W. O'Donnell, *Antitrust Subject Matter Jurisdiction Over State Owned Enterprises and the End of Prudential Prophylactic Judicial Doctrines*, 26 SUFFOLK TRANSNAT'L L. REV. 247, 248 (2003); Waller, *supra* note 6, at 120, n.77 (describing what qualifies as a commercial activity and various court decisions on that subject); *see also* Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1441–43 (1983). Tariffs would fall under the act of state doctrine, since the setting of tariffs is something governments and only governments do. *See* FSIA (bringing only commercial activities of foreign governments under the ambit of U.S. antitrust jurisdiction); Waller, *supra* note 6, at 119–20 (noting that "[t]he legislative history [of the FSIA] suggests that conduct that private persons normally perform should be regarded as commercial, even where the object of the activity is to fulfill a governmental purpose" and illustrating that "contracting to buy provisions for the armed services or to repair an embassy building are . . . commercial, since private parties normally negotiate and sign contracts," but distinguishing those activities from those "normally done only by governments—such as imposing a *tariff* or issuing export licenses—[for which] immunity is available.") (emphasis added).

[21] The reason for this is as follows: in a market, because of the interrelationship between price and quantity, control over one variable yields control of both variables. *See* Martin Weitzman, *Price v. Quantity*, 41 REV. ECON. STUD. 477, 477 ("[A] basic theme of resource allocation theory emphasizes the close connection between these two modes of control [prices and quantities]. No matter how one type of planning instrument is fixed, there is always a corresponding way to set the other which achieves the same result when implemented."). Production quotas correspond to controls of quantity and tariffs correspond to controls of price. In a particular setting, one mode of control might be preferable to the other for various reasons, but neither mode is systematically preferable and theoretically the modes are identical. *See id.* at 477. OPEC might prefer controlling quantity through quotas, but OPEC could achieve a very similar outcome through tariffs.

[22] If two economically symmetrical methods of restraining trade exist and one is made illegal or more costly while the other is not, a rational foreign actor seeking to restrain trade would simply use the legal or less costly method of restraining trade.

set tariffs would require venturing into uncharted legal waters and would likely entail broad international political consequences, making an expansive reading of NOPEC practically difficult.[23]

The most obvious argument in favor of the bill is that the American economy would benefit if oil prices were brought down because high oil prices negatively affect the United States, both by increasing the costs to business and the direct costs borne by consumers.[24] But beyond this argument, notions of normative fairness also favor NOPEC, since not subjecting OPEC to the antitrust laws to which both American and foreign corporations are subject is inequitable. A corporation limiting production in the manner OPEC does would be subject to U.S. antitrust laws even if that corporation were owned by a foreign nation.[25] However, current judicial doctrine exempts OPEC from U.S. antitrust jurisdiction because it is a conglomerate of sovereign nations.[26] These types of fairness concerns implicitly seem to underlie some of the Congressional support for NOPEC.[27] The counter to this argument is that OPEC is quite different from a nor-

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[23] For example, if the United States were to expand its antitrust jurisdiction to cover tariffs, what would prevent other nations from reciprocally doing the same? Principles of trade reciprocity dictate that, since the United States levies its own tariffs, it likely would not sue a foreign nation for engaging in that conduct because it would fear retaliatory antitrust suits against its own tariffs. Analogizing from the phenomenon of foreign nations imposing retaliatory tariffs in response to U.S. tariffs, it is quite plausible that other nations would engage in retaliatory suits. *Cf., e.g.*, Neil King, Jr., & Tom Hamburger, *Bush Holds White House Meeting to Weigh Scrapping Steel Tariffs*, WALL ST. J., Dec. 3, 2003, at A2 (describing the threat of the European Union's response to steel tariffs by "impos[ing] duties of as much as 30% on U.S. exports" and noting that "[t]here is also a risk that a looming trade war with Europe would dent the U.S. economic recovery so crucial to President Bush's re-election bid"); Todd Zaun, *Japan Threatens Retaliation Against U.S. Over Steel Tariffs*, WALL ST. J., Nov. 28, 2003, at A2 (describing Japan's threat to "impose retaliatory duties on a range of American products" in response to new U.S. steel tariffs). Of course, the United States would engage in some sort of cost-benefit analysis to determine whether the economic or political benefits of suing foreign nations outweighed the costs of being sued in return, but such a threat at the least would make the United States less likely to allow suit against foreign tariffs. These political realities might well render NOPEC ineffective *even if* it applies to both tariffs and quotas.

[24] *See supra* notes 1–2.

[25] *See supra* notes 17 and 20 (describing the scope of U.S. jurisdiction over foreign countries under the FSIA). Of course, this liability would only accrue if those foreign actors and their monopolistic activities had minimum contacts with the United States sufficient for personal jurisdiction. *See* Argentina v. Weltover, 504 U.S. 607, 619 (1992) (finding that Argentina had sufficient "minimum contacts" to satisfy the Fifth Amendment's due process requirements); *see also* F. Hoffman-La Roche Ltd. v. Empagran, S.A., 124 S. Ct. 2359, 2363 (2004) (requiring anticompetitive activity to have a direct, substantial, and reasonably foreseeable effect on the U.S. market before U.S. antitrust law can apply); Asahi Metal Industry v. Superior Court, 480 U.S. 102, 109 (1987) (emphasizing the importance of an alien defendant's minimum contacts with forum state for personal jurisdiction to be proper).

[26] *See supra* note 6.

[27] *See* 150 CONG. REC. S3569 (daily ed. Apr. 1, 2004) (statement of Sen. DeWine (R-Ohio)) ("Until now, however, OPEC has effectively received special treatment under U.S. antitrust laws—despite the fact that oil is a commodity that touches the lives of nearly every American consumer. It is time that we take steps to assure that oil is subject to the principles of the free market.").

mal company and thus equitably can (and, indeed, should) be subject to different legal requirements.[28]

But it could be—and one could perhaps support the bill on the notion—that NOPEC actually is not expanding the reach of U.S. antitrust law, but instead is only clarifying the Congressional intent behind earlier laws like the FSIA, which codified the reach of U.S. jurisdiction over foreign states.[29] While the FSIA brought the commercial actions of foreign states under U.S. jurisdiction, courts have interpreted the statute as not reaching OPEC.[30] But if the intent of the FSIA truly were to encompass groups like OPEC, then NOPEC should pass if only to clarify FSIA's original intent. However, effectuating the intent behind past laws may not be a sufficient justification for passing a new law unless the current Congress still agrees with the justifications behind the original law.

Even under the narrower understanding of the FSIA's reach, antitrust suits still may be sustainable against OPEC under existing legal doctrines,[31] perhaps making NOPEC superfluous and providing an argument against the bill. Of course, if NOPEC is superfluous, passing it would cause little harm,[32] especially since there are substantial legal barriers to bringing suit against OPEC even if a suit is possible on some theories.[33] Thus, those who believe existing law applies to OPEC should not object to Congress clarifying the situation.

Stronger arguments against NOPEC might deny the utility of expanding antitrust jurisdiction to OPEC. In the most extreme form, one could claim that the existence of OPEC might benefit the United States.[34] If oil

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[28] A similar logic underlies the very existence of the act of state and sovereign immunity doctrines, that is, states should be treated differently than private actors. A full treatment of this notion's wisdom is beyond the scope of this Recent Development.

[29] *See supra* note 17 (discussing how the United States exercises jurisdiction over foreign nations through the FSIA).

[30] *See supra* note 17.

[31] For elaborations of this argument and discussions of the various legal theories that could be applied to a suit against OPEC, see O'Donnell, *supra* note 20, at 248–49; and Udin, *supra* note 6, at 1358–73.

[32] A superfluous law would cause harm to the degree that such a bill would waste Congressional time and other resources and to the degree that unnecessary laws are inherently undesirable. *See, e.g.*, Patrick K. Hetrick, *Legislative Kudzu and the New Millennium: Opportunity for Reflection and Reform*, 23 CAMPBELL L. REV. 157, 202 (2001) ("To clutter the statute books with . . . unnecessary laws serves to . . . add unnecessary expense to the process.").

[33] *See* Udin, *supra* note 6, at 1347–57 (discussing the doctrinal constraints on bringing suit against foreign nations).

[34] Higher oil prices might lead to less driving or to driving of more fuel-efficient vehicles. That could lead to lower pollution and a better environment. *See, e.g.*, Richard Chapman, *Gas Guzzlers Pay the Price*, CHI. SUN TIMES, Mar. 5, 2000, at 35. Moreover, because short-term costs are more readily ascertainable, consumers may act to the long-term detriment of society through excess consumption. *See* David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw. U. L. REV. 1315, 1320–26 (2003) (describing the difficulties cognitive bias produces in making "environmental policy choices" and noting that "in some subset of the choices between avoidance of economic losses and avoidance of health and environmental losses, decisionmakers will opt for avoidance of the

consumption's social costs exceed a private individual's costs at the pump, society will consume an excessive amount of oil. Consequently, one could view OPEC's productions quotas, which raise prices and decrease consumption, as positive from a social or environmental perspective.[35] This notion has two central weaknesses. First, the United States government should make decisions on what is socially beneficial for itself[36] rather relying on OPEC's external monopolistic decisions to determine the "right" oil price.[37] Moreover, U.S. government policies likely would be more responsive to domestic needs than OPEC's production choices, because the U.S. government clearly is in a better position to monitor and understand the complete American economic situation than OPEC is. Second, the current situation funnels excess profits to OPEC rather retaining them domestically. If the U.S. government received the excess profits, that revenue could be used to improve conditions domestically whereas if the money is sent abroad it obviously cannot be so used. Therefore, if one truly believes high oil prices benefit the United States, one should favor creating high prices through taxation and removing OPEC from the equation entirely.

Shifting from American welfare to that of OPEC member nations, the argument could be made that Congress should be reluctant to fight OPEC through an extension of antitrust laws because the oil cartel makes OPEC countries and their citizens better off. But this notion rests on the ques-

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[immediate costs] even though, in the absence of biases, they would have opted for avoidance of the [long-term losses]").

[35] *See id.* Of course, whether the United States is actually better or worse off because of OPEC's production quotas is an empirical question.

[36] *See* U.S. CONST. pmbl. However, there may be reasons to believe that American representative democracy is ill equipped to make wise social choices on issues such as the appropriate oil taxation level. *See* Richard H. Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 99 & n.347 (1995) (noting "[d]emocratic failures are well-documented"); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 200 (1997) (observing, in the context of the Clean Air Act, that "the pluralist legislative process that led to this language was fraught with democratic failures"). When the costs are immediate and easily recognizable (e.g., higher gas prices) and the benefits are more long-term and less tangible (e.g., reductions in smog-caused lung disease), democracy seems to be one of the worst possible systems for effectuating social goals. Of course, the United States does employ a gasoline tax, but as long as the political process has difficulty setting that tax efficiently, this argument maintains some force. Voters might tolerate a higher gasoline tax, since they understand some of driving's external costs (e.g., road construction, congestion). However, voters might neither fully understand nor believe all of driving's true external costs. *See, e.g.*, Chapman, *supra* note 34, at 35. In that situation, they might tolerate a higher, but still inefficient, taxation level.

[37] OPEC plainly is not making its pricing decisions with America's best interests in mind; instead, it makes decisions with its own best interests in mind, like any other rational actor would. *See, e.g.*, Chris Jones, *OPEC Output Cut to Raise Petrol Prices*, COURIER MAIL (QUEENSLAND, AUSTRALIA), Jan. 16, 2001, at 5; *Oil Producers Make a Show of Strength*, Reuters, ORLANDO SENTINEL, Sept. 26, 2000, at C1; Dave Shellock, *Oil Price Concerns Dominate Sentiment*, FIN. TIMES, May 26, 2004, at 50. Therefore, there is no reason to think that OPEC's pricing decisions will lead to the socially optimal oil consumption level. However, the pricing still might be more socially efficient than gasoline prices otherwise would be.

tionable assumption that the United States should value the welfare of OPEC member nations over that of its own citizens.[38] On a practical level, even if the United States should consider foreign utility in its policy decisions, a true international utilitarian calculus would take into account OPEC's adverse effects on all foreign nations, greatly increasing the costs OPEC imposes.[39] Even if the United States has a duty to benefit oil-pro-ducing countries, maintaining OPEC likely is not the most efficient way to accomplish that goal, particularly since whether OPEC benefits its member nations and their citizens is unclear.[40] If the United States truly wanted to help those nations, it could provide direct assistance to OPEC members and better tailor its aid both in quantity and quality. In this way, the United States could best balance the needs of OPEC nations against its own notions of which foreign nations and peoples are worthy of support and of what type of support to give them.[41]

A more plausible way to tie the interests of the United States to the continued support of OPEC is that OPEC maintains stability in volatile

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[38] The United States government was formed to "provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. pmbl. The rational actor model of decision-making is widely used in political science analysis and assumes that nation-states and other international actors operate as "unitary value-maximising actors." *See* Lawrence Freedman, *Logic, Politics, and Foreign Policy Processes: A Critique of the Bureaucratic Politics Model*, 52 INT'L. AFF. 434, 435 (1976); *see also, e.g.*, Louis René Beres, *Guerillas, Terrorists, and Polarity: New Structural Models of World Politics*, 27 W. POL. Q. 624, 624–36 (1974); Martin Hollis & Steve Smith, *Roles and Reasons in Foreign Policy Decision Making*, 16 BRIT. J. POL. SCI. 269, 269–73 (1986); Miles Kahler, *Rationality in International Relations*, 52 INT'L. ORG. 919, 919–39 (1998). The "rational actor" assumption applies to both the United States and OPEC.

[39] In addition to the obvious costs that accrue to developed nations that consume oil, OPEC may also have adverse effects on developing nations. *See* PAUL HALLWOOD & STUART W. SINCLAIR, OIL, DEBT, AND DEVELOPMENT: OPEC IN THE THIRD WORLD 1–191, 177 (1981) (describing the relationship between OPEC and less-developed countries and concluding that "initially OPEC countries were reluctant to admit that their action in swiftly increasing the price of oil had seriously affected the welfare of [less-developed countries]").

[40] *See* M. A. ADELMAN, THE GENIE OUT OF THE BOTTLE: WORLD OIL SINCE 1970, at 329 (1995) (arguing that OPEC member nations use their income to fund wars and concluding that "the less hard currency [in OPEC's] hands, the better off is the rest of the world"); JAHANGIR AMUZEGAR, MANAGING THE OIL WEALTH: OPEC'S WINDFALLS AND PITFALLS 50 (1999) ("[U]nwise allocation and wrong policy choices were [the critical] determining factors in the overall performance of [OPEC] member economics"); Daniel Pipes, *The Curse of Oil Wealth*, ATLANTIC, July 1982, *at* http://www.danielpipes.org/article/163 (last visited Nov. 27, 2004) (detailing the perverse, paradoxical adverse effects of oil wealth on the member nations and their citizens).

[41] Currently, OPEC effectively determines oil prices and the United States has no control. If the matter were determined through legislative appropriation, the United States would be able to better weigh its own interests. Moreover, the United States has instituted direct foreign assistance when it thought the goal was worthwhile. For example, as part of the Camp David Accords establishing peace between Israel and Egypt, the United States agreed to provide substantial foreign aid to Egypt. *See* Joel Beinin, *The Cold Peace*, *in* MERIP REPORTS: EGYPT AND ISRAEL TODAY 3, 4 (1985).

foreign regions and in the trade of an important resource.[42] That is, so long as oil money continues to flow to the ruling powers of OPEC nations, perhaps those rulers will be better able to limit insurgency in their countries.[43] As a result, while NOPEC may appear to make the United States better off on a superficial economic level, it might make the United States worse off in the broader sense if it weakens foreign governments that the United States would prefer to remain stable. Indeed, bringing OPEC nations into court and telling them that they are being sued could quickly erase whatever goodwill that exists in those countries toward the United States, meaning that NOPEC could be viewed not only as an economic attack on OPEC, but also as an affront to the member nations' dignity.

Moreover, for Congress to entangle the U.S. judicial system in the vicissitudes of international relations, as NOPEC would require, may be politically inappropriate as a matter of separation of powers or of institutional competencies.[44] Foreign policy of this sort might best be viewed as the province of the executive, since having a single executive in control of foreign policy rather than a deliberative legislative body has obvious benefits.[45] However, NOPEC simply may place more foreign policy power

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[42] *See, e.g.*, Andrew Jose Rossell, *The Future of U.S.-Cuba Relations, A Policy Shift From the Helms-Burton Act*, 7 L. & BUS. REV. AM. 235, 240 (2001) (noting that "the United States is critically aware of the need for stability among the [OPEC] member countries."); *cf.* Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235, 291–92, 294–95 (1989) (noting the importance of "secure[ing] Persian Gulf oil imports against risk").

[43] *See* ANTHONY H. CORDESMAN, GEOPOLITICS AND ENERGY IN THE MIDDLE EAST 5–11 (1999), *available at* http://www.csis.org/mideast/reports/MEenergy.pdf (describing the effect of oil prices on political stability and a wide range of economic and social factors in Middle Eastern countries).

[44] *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 606 (2001) ("[The separation of powers] . . . seeks to match the exercise of particular powers—legislative, executive, judicial—with corresponding institutions that are best suited to exercise those powers."); *see also* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1189 (1989) (noting that the President's "'minimum obligational authority' to expend public funds in the absence of appropriations" can "be justified 'in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President'") (quoting *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 OP. OFF. LEGAL COUNS. 1, 6–7 (1981)); *cf.* Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 145 (1995) ("[T]he longevity of the [executive's discretionary spending power as commander-in-chief] may indicate that Congress believes that the flexibility this discretion affords in matters of national security is worth its cost in congressional control and the risk of abuse by the executive.").

[45] *See* Magill, *supra* note 44, at 629 n.76 ("[T]he President as a single head of state is most suited to take a dominant role in foreign relations."). Various reasons might explain that position: negotiating with a single figure is much easier; the executive may well be more decisive and more responsive to foreign concerns, especially in view of the executive's broad constituency when compared to that of a member of either chamber of Congress; and the executive can present a unified purpose, which is essential when dealing with foreign nations. *See id.*; *see also, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton); THE FEDERALIST NO. 64 (John Jay). However, one need not adopt this executive-

in the executive's hands by vesting the power to sue in the Justice Department and the Federal Trade Commission.[46] Therefore, NOPEC can be viewed not as an infringement on executive power, but rather as providing an additional weapon for the executive's foreign policy arsenal.

Ultimately, the foregoing arguments against NOPEC are not particularly convincing. However, the implications of waiving sovereign immunity and of the broad interpretation necessary to make NOPEC effective,[47] an interpretation that would represent a substantial and uncharted expansion of U.S. antitrust jurisdiction into tariffs set by foreign governments, might be strong barriers to passage. Rather than executing such sweeping changes through a very specific bill designed to fight a single problem, perhaps Congress and the rest of government should consider more fully the general consequences of such an expansion of U.S. antitrust law before making such changes.

The reason NOPEC would need to represent an expansion of U.S. antitrust law to tariffs as well as quotas is that, in economic terms, tariffs can achieve any result that production quotas can.[48] That is, tariffs and quotas are symmetrical in terms of their economic effects. However, they generally are not treated the same in legal terms.[49] Past legislation allows the application of U.S. antitrust law to foreign countries that engage in some types of monopolistic activity, such as quota-setting.[50] However, countries are immune from liability for decisions about tariff levels because those

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centric view of foreign affairs. It is possible that vesting all foreign policy in the executive's hands would be unwise. Dispersing that power might make the government more responsive or effective. *See* Stephan A. Riesenfeld, *The Powers of Congress and the President in International Relations: Revisited*, 75 CAL. L. REV. 405, 407 (1987) ("[In foreign relations] there exists a built-in stage for conflict of authority between Congress and the President which was deemed necessary to prevent abuse."); Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 91 (1984) ("Presidents are served by officials who, for a variety of understandable reasons, sometimes find it difficult to express frank and forceful disagreement with the President's views. Presidents, despite themselves, sometimes have difficulty separating national security considerations from domestic political considerations in assessing proposed military actions. And Presidents, mired in the executive responsibilities of government, sometimes lose touch with the tide of domestic political opinion. The unadorned views of wise individuals outside the executive branch can play an important and useful role.").

[46] S. 2270, 108th Cong. § 2.

[47] *See supra* notes 21–23 and accompanying text.

[48] Although "tariff" generally refers to an "import tariff"—a tariff imposed by a country on goods entering the country—the term refers here to an "export tariff," which is imposed by a country on goods exiting the country. Thus, a tariff is simply a price control, whereas a quota is simply a control of quantity. *See supra* note 21 (explaining the functional similarity of these modes of control).

[49] *See supra* note 6 (describing how Sen. Kohl views NOPEC as overruling *International Machinists*, which held that OPEC's activities were outside the scope of the "commercial activity" exception in the FSIA); *see also supra* note 23 (describing the potential political consequences of expanding antitrust jurisdiction to encompass tariffs).

[50] *See* FSIA (including commercial activities within the scope of U.S. jurisdiction over foreign nations).

decisions are exclusively the province of the state[51] and states are given nearly complete freedom in this area.[52] Thus, although there is economic symmetry between tariffs and quotas, there is an asymmetry in how they are treated by the current legal regime.

With NOPEC, this asymmetry can be remedied either by abandoning the bill and allowing equally all restraints on trade or by interpreting the bill broadly enough to encompass both tariffs and production quotas. But acknowledging that NOPEC would need to be read broadly to accomplish its goals does not answer the larger question of what should be done to rectify this legal asymmetry more generally. Although applying NOPEC to tariffs might be viable with regard to OPEC specifically, in the broader context of current attitudes toward trade and the tariffs, applying antitrust laws to tariffs generally may not be a viable policy.[53] This means that the practical way around the legal asymmetry in the general context would be to allow foreign nations to restrain trade in whatever way they wish.

From a rational policy standpoint, expanding U.S. antitrust laws to encompass tariffs might be more desirable, since the elimination of tariffs worldwide should increase overall welfare and make the world and individual nations better off.[54] However, despite trade's benefits,[55] protectionists

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[51] *See* Waller, *supra* note 6, at 120 (noting that immunity is available with regard to tariffs); *see also supra* note 18 (discussing the application of the act of state doctrine).

[52] Although this is true with regard to antitrust, countries may enter into other agreements to limit tariffs. *See, e.g.*, The North American Free Trade Agreement, 19 U.S.C. §§ 3301–3473 (2000). The enforceability and effect of these agreements are beyond the scope of this Recent Development, but they perhaps provide an alternative avenue for antitrust to fight trade restraints. *See* Sergio Garcia-Rodriguez, *Mexico's New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149, 1193–95 (1995) (explaining how NAFTA coordinates the antitrust policies of its signatories).

[53] Free trade remains a contentious issue and trade restraints continue to have some political traction with important segments of the electorate. *See, e.g.*, Michael M. Phillips & Jeanne Cummings, *Political Fabric: In Textile Country, Free Trade Tears Party Loyalties—One Carolina Republican Flirts With Protectionism; Another Doesn't Budge—Losing Roger Milliken's Vote*, WALL ST. J., May 12, 2004, at A1 (describing how "free trade poses a volatile political dilemma" for Republicans who for decades "have championed free trade" on principled grounds, yet are concerned about a popular backlash against that support); Bob Davis & John Harwood, *Kerry Targets Job Outsourcing With Corporate-Tax Overhaul*, WALL ST. J., Mar. 26, 2004, at A1 (describing 2004 Democratic presidential candidate John Kerry's proposal to stop outsourcing of jobs through corporate tax breaks, thereby "feeding an election-year fight over outsourcing jobs"); Jacob M. Schlesinger, *Edwards Wagers On Trade—Stab at Globalization Could Risk Voters from Coasts, Borders*, WALL ST. J., Feb. 23, 2004, at A4 (examining the political effectiveness of the "trade-bashing message" and "political attacks on globalization" of 2004 Democratic vice-presidential candidate John Edwards).

[54] For theoretical expositions of the proposition that trade is welfare enhancing in most circumstances, see generally W. MAX CORDEN, TRADE POLICY OF ECONOMIC WELFARE (2d ed. 1997); PAUL R. KRUGMAN & MAURICE OBTSFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY (6th ed. 2003). The notion of trade being mutual beneficial can be traced back at least as far as David Ricardo's theory of comparative advantage in his treatise PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817). Of course, this analysis abstracts from the difficult practical questions of how jurisdiction would function and how judgments would be enforced by one nation against another nation.

[55] *See supra* note 54. Perhaps trade is an area where the democratic political process

seem to have the upper hand politically,[56] and bringing other countries into U.S. courts to answer for their tariff policies seems improbable when the United States maintains its own tariffs.[57] Consequently, an expansion of U.S. antitrust law to encompass tariffs seems unlikely.

With this limitation squarely in mind, the question becomes: Why expand U.S. antitrust law to foreign countries at all? Assuming a reluctance to apply antitrust laws to tariffs, the symmetry between tariffs and quotas suggests that countries will simply evade expansions of U.S. antitrust law by using tariffs. This evasion might increase litigation costs, potentially embroil the courts in foreign policy, and create difficult sovereign immunity questions that could be avoided by not applying antitrust law abroad.

A better, long-term solution would be for the United States to overcome its protectionist bent and expand antitrust law to fight against all global trade barriers. This policy could have substantial benefits.[58] However, it also would be difficult to achieve politically[59] and would involve serious questions about the value of sovereign immunity as compared to global economic wellbeing resulting from trade.[60]

Ultimately the value of sovereign immunity versus economic wellbeing is the issue that NOPEC forcefully addresses. The bill's premise is that sovereign immunity should not provide a shield behind which OPEC

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fails to create the best result and leaves everybody worse off because of the political branches being beholden to a few special interest groups looking out for their own short-term wellbeing rather than the broader good of the nation over the long-term. *See* RAYMOND BAUER, AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE 323–99 (1972) (examining the role of pressure groups in foreign relations); *see generally* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 27–29 (1956) (discussing how in some cases "the 'representative principle' would not be sufficient to protect a majority against the deprivations imposed by a minority"). *Cf. supra* note 36 (discussing failures of representative democracy).

[56] For general discussions of the fight over and politics behind U.S. tariffs, see, for example, STEVE DRYDEN, TRADE WARRIORS: USTR AND THE AMERICAN CRUSADE FOR FREE TRADE (1995) (discussing tariffs from the late 1940s through the early 1990s); F. W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES (8th ed. 1931) (discussing tariffs up through the early 20th century); Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 287 (1986) (examining "how the long-standing norm of legislative tariff-making was transformed in the 1930s into a norm of unreviewable executive discretion . . . which . . . is the starting point for today's controversies").

[57] *See supra* note 23.

[58] *See supra* note 54.

[59] *See supra* note 56.

[60] Many scholars have questioned the wisdom of sovereign immunity doctrine. *See, e.g.*, Jeffrey S. Dehner, *Vessel-Source Pollution and Public Vessels: Sovereign Immunity v. Compliance, Implications for International Environmental Law, Against Sovereign Immunity*, 9 EMORY INT'L L. REV. 507, 511 (1995) (claiming that sovereign immunity for warships is "outmoded"); Erwin Chemerinsky, *Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (criticizing sovereign immunity in the federalism context). Criticism of sovereign immunity seems particularly salient when it comes to international trade policy in an increasingly integrated world.

can hide and continue to restrain trade.[61] If the bill's supporters are serious about that goal, they should recognize that NOPEC needs to encompass tariff restraints on the oil trade to be effective. Although including tariffs within NOPEC would not solve the general asymmetry in U.S. antitrust law between tariffs and quotas, it would allow NOPEC to fight all restraints on the oil trade. More generally, if read broadly, NOPEC could become a starting point for a careful reconsideration of U.S. policy toward global trade restraints.

—*Kenneth S. Reinker*

[61] *See* S. 2270, 108th Cong. § 2 (2004).

THE MEDICAL MALPRACTICE LIABILITY LIMITATION BILL

Over the last decade, no issue has incited more enmity and disdain between the medical and legal communities than medical malpractice liability reform.[1] The public has been inundated with statistics and anecdotes signaling that medical malpractice liability has created a healthcare crisis in the United States: in 2002, The St. Paul Companies, one of the largest insurers in the country, stopped writing medical malpractice insurance policies;[2] between 2001 and 2002, medical malpractice premiums increased across the nation by 23%,[3] and by over 100% for specialists in some states.[4] Concerned that their livelihood is being threatened, the medical community has responded to this purported crisis by seeking to shift some of the malpractice burden onto victims and the legal community.[5]

Congress has repeatedly adopted the medical community's view on medical malpractice liability reform. Since 2002, the House of Representatives has passed legislation limiting medical malpractice liability in state and federal courts on three occasions.[6] Most recently, on May 12, 2004, the House attempted to limit medical malpractice liability by passing the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2004.[7] Although the Senate has not passed any medical malpractice

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[1] *See, e.g.*, Laura Parker, *Medical Malpractice Battle Gets Personal*, USA TODAY, June 14, 2004, at 1A (reporting that some doctors are refusing to treat attorneys and their families in response to soaring medical malpractice premiums); *see also Malpractice Debate Takes Ugly Turn*, ABC 7 NEWS, June 15, 2004, *available at* http://www.wjla.com/news/stories/0604/153449.html (last visited Nov. 4, 2004) (detailing instances where physicians' frustrations over increasing premiums have resulted in their refusal to treat attorneys).

[2] *See* Kenneth E. Thorpe, *The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms*, HEALTH TRACKING, Jan. 21, 2004, at 20–21.

[3] *See id.*

[4] *See* U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 1 (2003) [hereinafter GAO-03-836] ("Between 2001 and 2002, premium rates for the specialties of general surgery, internal medicine, and obstetrics/gynecology (OB/GYN) increased by about fifteen percent on average nationally, and over 100% for certain of these specialists in some states.").

[5] *See* AM. MED. ASS'N, *U.S. House Passes Medical Liability Reform*, May 27, 2004, *available at* http://www.ama-assn.org/ama/pub/category/print/ 6087.html (last visited Nov. 4, 2004). The American Medical Association (AMA) posted a press release on their website expressing strong support for the HEALTH Act of 2004, which caps noneconomic damages, punitive damages, and attorney contingency fees resulting from medical malpractice lawsuits. *See id.*

[6] *See* HEALTH Act of 2004, H.R. 4280, 108th Cong. (2004); HEALTH Act of 2003, H.R. 5, 108th Cong. (2003); HEALTH Act of 2002, H.R. 4600, 107th Cong. (2002). On May 12, 2004, the House of Representatives voted 229-197 to enact the HEALTH Act of 2004. *See* 66 CONG. REC. H2873–2874 (daily ed. May 12, 2004). On March 13, 2003, the House of Representatives passed the HEALTH Act of 2003 by a vote of 229-196. *See* 41 CONG. REC. H1870–1871 (daily ed. Mar. 13, 2003). On September 26, 2002, the House of Representatives voted 217-203 to enact the HEALTH Act of 2002. *See* 124 CONG. REC. H6743 (daily ed. Sept. 26, 2002).

[7] *See* 66 CONG. REC. H2873–2874 (daily ed. May 12, 2004). The HEALTH Act of

liability reform legislation, three bills similar to the HEALTH Act garnered a plurality of votes within the Senate during the 108th Congress.[8]

The central provision of the HEALTH Act is a $250,000 cap on noneconomic damages.[9] Additionally, the HEALTH Act constrains punitive damages awards, implements a fair share rule, caps attorney contingency fees, establishes a more restrictive statute of limitations, and eliminates the collateral source rule.[10] Together, these reforms embody the HEALTH Act's primary objective: to lower medical malpractice premiums.[11] Although the HEALTH Act reforms also apply to lawsuits against healthcare insurers and medical product companies, this Recent Development focuses on the legislation's most disputed target: medical malpractice liability.[12]

The highly partisan debate surrounding the HEALTH Act centers on the bill's two basic premises: (1) exorbitant medical malpractice premi-

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2004 is also known as the Medical Malpractice Liability Limitation bill. *See* H.R. 4280, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR04280:@@@T (last visited Nov. 4, 2004).

[8] *See* Pregnancy and Trauma Care Access Protection Act of 2004, S. 2207, 108th Cong. (2004); Healthy Mothers and Healthy Babies Access to Care Act of 2003, S. 2061, 108th Cong. (2004); Patients First Act of 2003, S. 11, 108th Cong. (2003). The provisions of S. 2207 were similar to the HEALTH Act of 2004, but were limited to liability claims related to obstetrical, gynecological, emergency, or trauma care goods or services. *See* S. 2207 § 10(10). *Compare* S. 2207 *with* H.R. 4280. A cloture motion for S. 2207 was denied by a 49-48 vote. *See* 48 CONG. REC. S3894 (daily ed. Apr. 7, 2004). The provisions of Senate Bill 2061 were also similar to the 2004 HEALTH Act, but were limited to claims related to obstetrical and gynecological goods or services. *See* S. 2061 § 10(7)–(10). *Compare* S. 2061 *with* H.R. 4280. Senate Bill 2061 was denied cloture by a 48-45 vote. 20 CONG. REC. S1506 (daily ed. Feb. 24, 2004). The provisions of Senate Bill 11 closely mirror the HEALTH Act of 2004 provisions. *Compare* S. 11 *with* H.R. 4280. A cloture motion for S. 11 was defeated by a 49-48 vote. *See* 100 CONG. REC. S9083 (daily ed. July 9, 2003).

[9] *See* H.R. 4280 § 4(b). Noneconomic damages are defined as "damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life . . . and all other nonpecuniary losses of any kind or nature." H.R. 4280 § 9(15).

[10] *See* H.R. 4280 §§ 3–7.

[11] *See* H.R. 4280 § 2(b)(1), (2), (4):

> It is the purpose of this Act to implement reasonable, comprehensive, and effective health care liability reforms designed to . . . (1) improve the availability of health care services in cases in which health care liability actions have been shown to be a factor in the decreased availability of services; (2) . . . lower the cost of health care liability insurance . . . ; (4) . . . reduc[e] uncertainty in the amount of compensation provided to injured individuals . . . .

Id. See also infra note 13.

[12] *See* H.R. 4280 § 9(7). The HEALTH Act of 2004 applies to "health care lawsuits":

> The term "health care lawsuit" means any health care liability claim concerning the provision of health care goods or services or any medical product affecting interstate commerce, or any health care liability action concerning the provision of health goods or services . . . brought in a State or Federal Court . . . against a health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product.

Id.

ums have created a healthcare accessibility crisis and (2) limiting damages and lawsuits will lower those premiums.[13] The HEALTH Act's first premise concerning the purported healthcare crisis, however, has not manifested itself to the extent that the medical community contends.[14] With respect to the second premise, while limitations on noneconomic damages appear to impact premium growth,[15] studies indicate that the HEALTH Act's other reforms do not affect malpractice insurance rates.[16] Moreover, the debate over premiums ignores the HEALTH Act's effects on deterrence, which is the ultimate goal of tort liability.[17] When assessing the legislation from the perspective of deterring unreasonable risk, one glaring concern emerges: the HEALTH Act may underdeter physicians from committing malpractice. Since the medical malpractice liability reform legislation possesses limited benefits and may increase medical malpractice, other reforms that do not create such tradeoffs merit substantial consideration.

Medical malpractice insurance is a unique sector within the insurance industry. Accurate predictions of future losses on medical malpractice claims face greater difficulties than other insurance practices.[18] Over seventy percent of medical malpractice claims take more than five years to resolve, while many exceed eight years.[19] Insurers are therefore forced to estimate costs many years in advance, creating greater volatility than exists in other insurance markets.[20] Additional peculiarities develop from

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[13] *See* H.R. REP. NO. 108-32, pt. 1, at 7–13 (2003). Since there is no House Report for the HEALTH Act of 2004, the views of the bill's opponents and proponents are largely based on the House Report for the HEALTH Act of 2003. In the "Purpose and Summary" portion of the House Report for the HEALTH Act of 2003, proponents of the legislation assert that "[m]edical professional liability insurance rates have skyrocketed, causing major insurers to drop coverage or raise premiums to unaffordable levels. Doctors and other health care providers have been forced to abandon patients and practices . . . ." *Id.* at 8. Supporters further contend that implementing damages caps and other litigation reforms "will make medical malpractice insurance affordable again [and] encourage health care practitioners to maintain their practices . . . ." *Id.* at 13.

[14] *See infra* text accompanying notes 28–33. A General Accounting Office [GAO] examination of the implications of rising medical malpractice premiums on healthcare access "determined that many of the reported provider actions taken in response to malpractice pressures were not substantiated." GAO-03-836, *supra* note 4, at 5. "[R]eported physician departures and hospital unit closures . . . were not substantiated or . . . did not widely affect access to healthcare." *Id.* at 16. Also, reports of physicians cutting back on high-risk services in order to reduce their malpractice exposure to litigation were not confirmed by an analysis of Medicare beneficiaries. *See id.* at 20.

[15] *See infra* text accompanying notes 47–50.

[16] *See infra* text accompanying notes 51–77.

[17] *See infra* notes 79–83.

[18] *See* U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 33–36 (2003) [hereinafter GAO-03-702].

[19] *See* Thorpe, *supra* note 2, at 22. Data from a medical malpractice insurance carrier indicated that almost 70% of claims were paid within five years of being filed and nearly 12% took eight years to resolve. *See id*; *see also* GAO-03-702, *supra* note 18, at 8 ("[M]ost medical malpractice claims take an average of more than 5 years to resolve . . . .").

[20] *See* GAO-03-702, *supra* note 18, at 8.

the wide range of potential losses, as well as the poor predictive value of historical data due to the small pool of relevant policyholders.[21]

Partly because of these idiosyncrasies, a number of medical malpractice insurance crises have developed over the past three decades. The first crisis began in the mid-1970s when rising premiums forced many malpractice carriers out of the market.[22] Every state but one responded by attempting to provide alternative sources of insurance and reduce claim volume and cost.[23] In the mid-1980s, a second malpractice insurance crisis led to liability reform efforts in numerous states.[24] At present, although disagreement persists, some healthcare industry analysts purport that the country is experiencing a third crisis, as premiums have surged again since the late 1990s.[25]

Although a multitude of statistics indicate that medical malpractice premiums have increased, contentions that there is a crisis are discredited because healthcare accessibility has yet to be compromised. Several studies reveal that insurance rates have increased. One analysis concluded that for states in their study, beginning in 1999 and 2000, medical malpractice premiums rose faster than they had since at least 1992.[26] The National Association of Insurance Commissioners reported that medical malpractice premiums increased by over 23% in 2002, compared with less than 4% in 1999.[27] An examination by the Department of Health and Human Services (DHHS) of premium growth numbers across all states in three medical specialties discovered that average premium increases among those specialties were above 20% in 2002, which was higher than in either 2000 or 2001.[28] The statistical evidence of premium increases over

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[21] *See id.* "Relevant policyholders" refers to physicians in a specialty within a specific state or geographic area. *See id.*

[22] *See, e.g.*, Thorpe, *supra* note 2, at 20.

[23] *See* H.R. REP. NO. 108-32, pt. 1, at 243 (2003); *see also* Rawle O. King, *Medical Malpractice Insurance*, CONGRESSIONAL RESEARCH SERVICE.

[24] *See, e.g.*, Thorpe, *supra* note 2, at 20; *see also* H.R. REP. NO. 108-32, at 244.

[25] *See* King, *supra* note 23 ("While there is considerable dispute about whether a medical malpractice insurance 'crisis' exists, there is a consensus that physicians' concerns about the lack of affordable insurance has threatened the availability of health care services in some medical specialties and practice locations."); Frank A. Sloan, *Limiting Damages for "Pain and Suffering" in Medical Malpractice*, 64 N.C. MED. J. 191, 191 (2003) ("Medical malpractice is once again in a state of crisis, the third such crisis in about the past three decades. The most direct reason for the crisis is the recent substantial rise in medical malpractice premiums . . . .").

[26] *See* GAO-03-702, *supra* note 18, at 9. The states isolated by the GAO were California, Florida, Minnesota, Mississippi, Nevada, Pennsylvania, and Texas. *See id.* at 2. The GAO analyzed general surgery, internal medicine, and obstetrics/gynecology because they were the only specialties for which data was available; those specialties were chosen since they represent low-, medium-, and high-risk specialties, respectively. *See id.* at 9 n.19. The insurance rate comparison was restricted because 1992 was the earliest year for which comprehensive data could be obtained. *See id.* at 9.

[27] *See* Thorpe, *supra* note 2, at 21.

[28] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTH CARE 17 (Mar. 3, 2003) [hereinafter Reforming Medical Litigation]. Medical

the past few years thus appears incontrovertible. These statistics, however, do not necessarily signify that there is a crisis.

A healthcare crisis does not exist when physicians are forced to pay more for insurance coverage, but rather when such insurance payments affect patient healthcare access.[29] Such accessibility issues, however, are unconfirmed. A report conducted by the General Account Office (GAO) analyzed the effects of rising premiums on healthcare access in states deemed by the American Medical Association (AMA) to be medical liability "crisis" or "problem" states, as well as non-problem states.[30] The study concluded that many reported physician departures and hospital unit closures in response to rising insurance premiums were unsubstantiated or did not widely affect access to healthcare.[31] The GAO could only confirm that, in "crisis" or "problem" states, reduced access to services due to malpractice insurance pressures was limited to two medical specialty areas, emergency surgery and newborn deliveries, and these reductions were typically confined to rural areas.[32] Moreover, the report noted that long-standing factors unrelated to malpractice insurance influenced these access issues, such as low Medicare reimbursement rates and rural locations.[33] These findings, which seemingly belie the contention that the coun-

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malpractice insurance premiums for internists, general surgeons and OB/GYNs increased from 12 to 18% in 2000, 9 to 10% in 2001, and 20 to 25% in 2002. *Id.*; *see also supra* note 26 (explaining why these three specialties were isolated).

[29] In discussing the purported healthcare crisis, the AMA focuses on patients' reduced access to healthcare:

> America's patients are losing access to care because the nation's out-of-control legal system is forcing physicians in some areas of the country to retire early, relocate or give up performing high-risk medical procedures . . . . In crisis states, patients continue to lose access to care. In some states, obstetricians and rural family physicians no longer deliver babies. Meanwhile, high-risk specialists no longer provide trauma care or perform complicated surgical procedures. That is why medical liability reform is the AMA's top legislative priority.

AM. MED. ASS'N, *Medical Liability Crisis Map*, June 14, 2004, *available at* http://www.ama-assn.org/ama/noindex/category/11871.html (last visited Nov. 4, 2004) [hereinafter Map].

[30] *See* GAO-03-836, *supra* note 4, at 3. The five "crisis" or "problem" states were Florida, Mississippi, Nevada, Pennsylvania, and West Virginia; the four non-problem states were California, Colorado, Minnesota, and Montana. *Id.* at 3 n.3. The AMA maintains that twenty states are in a medical liability "crisis," twenty-four have a medical liability "problem," and the remaining six have no malpractice insurance problems. *See* Map, *supra* note 29.

[31] *See* GAO-03-836, *supra* note 4, at 16–21. Within the five "crisis" or "problem" states, the GAO contacted forty-nine hospitals and sixty-one physician practices or clinics and analyzed utilization rates among Medicare beneficiaries for three specific services (spinal surgery, joint revisions and repairs, and mammography) in order to corroborate reports of service reductions. *See id.* at 3, 16–21. The GAO concluded that non-problem states exhibited no access reductions. *See id.* at 5.

[32] *See id.* at 12–16.

[33] *See id.* In Mississippi, health care providers identified low Medicaid reimbursement rates and insufficient reimbursement for trauma services as additional factors influencing physician decisions to remain in practice. *See id.* at 14. Providers in Nevada noted that

try is in the midst of an accessibility crisis, at minimum suggest that anecdotal evidence of malpractice insurance compromising healthcare is overstated.

Despite the uncertainty over whether there is a healthcare crisis, Congress has responded to the medical community's plea for relief from soaring malpractice insurance rates. The HEALTH Act's $250,000 cap on noneconomic damages in a medical malpractice lawsuit is directly modeled on California's Medical Injury Compensation Reform Act of 1975 (MICRA),[34] which bill proponents credit for reducing premium growth rates in California over the past three decades.[35] The medical malpractice liability limitation legislation further imitates MICRA by not capping economic damages.[36]

The HEALTH Act also restricts punitive damages. First, the claimant must prove by "clear and convincing evidence," which is a higher standard than exists in most states, that the defendant acted with malicious intent to injure the claimant or that the defendant deliberately failed to avoid unnecessary injury he or she knew was substantially certain to occur.[37] Second, if the claimant meets this heightened standard for recovery, punitive damages are limited to the greater of $250,000 or two times the economic damages awarded.[38]

The bill's limitations on medical malpractice liability extend beyond damage restrictions. The legislation imposes a fair share rule mandating that each party to a lawsuit is only liable for the amount of damages directly proportional to the party's percentage of responsibility, essentially eliminating joint and several liability from medical malpractice proceed-

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population growth was contributing to emergency room staffing shortages. *See id.* at 14–15. A hospital in Pennsylvania identified the hospital's rural location as well as the area's large Medicaid population and low Medicaid reimbursement rates as contributing to physicians' decisions to leave the hospital. *See id.* at 15. Provider groups in West Virginia reported that rural location, low Medicaid reimbursement rates, and the state's tax on physicians were factors that have made it difficult to attract and retain physicians. *See id.* at 15–16.

[34] *See* HEALTH Act of 2004, H.R. 4280, 108th Cong. § 4(b) (2004); CAL. CIV. CODE § 3333.2 (Deering 2003).

[35] *See* H.R. REP. NO. 108-32, pt. 1, at 36 (2003). According to the National Association of Insurance Commissioners, since 1976, California has experienced a 167% rate of increase in medical malpractice liability premiums, while the rest of the United States has experienced a 505% rate of increase. *See id.* at 11; *see also* Sloan, *supra* note 25, at 19 ("California's 1975 medical malpractice law has often been cited as a solution to the 'medical malpractice problem.' The most notable feature of this law was a ceiling on awards for nonpecuniary loss . . . [which] did decrease premiums in the longer run."). *But see* H.R. REP. NO. 108-32, at 251–52. Bill opponents maintain that any discernible reduction in California's insurance premiums is due to Proposition 103, which passed the California legislature in 1988 and imposed significant regulations on insurance companies. *See id.*

[36] *See* H.R. 4280 § 4(a).

[37] *See* H.R. 4280 § 7(a). Since 1986, twenty-three states have enacted a burden of proof for punitive damages higher than a preponderance of the evidence, such as clear and convincing evidence. *See* CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 8 (2004) [hereinafter Effects of Tort Reform].

[38] *See* H.R. 4280 § 7(b)(2).

ings.[39] Furthermore, attorney contingency fees are capped between 15 and 40% of the amount awarded to the claimant, depending on the amount that the claimant recovered.[40] To further limit malpractice claims, the statute of limitations for malpractice lawsuits is set at three years after the date of manifestation of the injury or one year after the claimant discovers, or should have discovered, the injury, whichever comes first.[41] The only exception to this limitation concerns minors under the age of six who are protected from an expiration of the statute of limitations until they reach eight years of age.[42] The proposed legislation also eliminates the collateral source rule, permitting defendants to introduce evidence of collateral source (third-party) benefits, such as payments from health and disability insurance.[43] Subsequently, third-party benefit providers are prohibited from recovering any money from a claimant's damage award.[44] Abolishing the collateral source rule limits defendants' liability since admitting these previously inadmissible outside payments could influence juries to reduce the amount awarded to claimants.[45]

While the HEALTH Act ostensibly demonstrates Congress's clear intent to lower premiums by limiting malpractice liability, an empirical examination of the bill's provisions provides only modest support for such an effect. Statistical analysis indicates that the only provision that will impact insurance rates is caps on noneconomic damages.[46]

Several sources confirm that the HEALTH Act's most notable provision, noneconomic damages caps, stems insurance rate growth. A GAO report examining factors that have increased medical malpractice insurance rates concluded that increases in medical malpractice damages "appeared to be the greatest contributor to increased premium rates."[47] Additionally, numerous studies have confirmed the link between noneconomic damages caps and related reductions in premiums, including a DHHS study that determined that states with noneconomic damages caps between $250,000 and $350,000 experienced premium increases that were

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[39] *See* H.R. 4280 § 4(d).

[40] *See* H.R. 4280 § 5(a). Contingency fees are limited by the HEALTH Act of 2004 to the following: 40% of the first $50,000 recovered by the claimant(s); one-third of the next $50,000 recovered by the claimant(s); 25% of the next $500,000 recovered by the claimant(s); and 15% of any amount in excess of $600,000 recovered by the claimant(s). *See id.*

[41] *See* H.R. 4280 § 3.

[42] *See id.*

[43] *See* H.R. 4280 § 6. The collateral source rule is a common law rule that prohibits defendants from introducing evidence at trial to show that the plaintiff has received injury compensation from other sources. *See* Effects of Tort Reform, *supra* note 37, at 5.

[44] *See* H.R. 4280 § 6.

[45] *See* H.R. Rep. No. 108-32, pt. 1, at 49 (2003) (quoting Barme v. Wood, 689 P.3d 446, 450 (Cal. 1984)) (stating that the purpose of eliminating the collateral source rule is that "by redistributing the financial impact of malpractice among the different types of insurers involved in the health field, the costs would be spread over a wider base").

[46] *See infra* text accompanying notes 47–77.

[47] GAO-03-702, *supra* note 18, at 4.

30% less than states without caps.[48] Moreover, between 2001 and 2002, premium rates for physician specialties in states with noneconomic damages caps were consistently lower than in states that lacked such caps.[49] Although the previous studies did not account for the multitude of other reforms that vary between states, two independent studies that isolated noneconomic damages caps from these reforms found that restricting noneconomic damages reduced either premium rates or insurer losses by 12 to 17%.[50]

Although the relationship between noneconomic damages caps and premiums is widely documented, the HEALTH Act's other liability limitations have an ambiguous premium effect. According to empirical evidence, these other provisions manifest no impact on insurance rates.

Statistical research provides tenuous support for the claim that punitive damages caps reduce malpractice insurance rates. Caps on punitive damages are often disparaged as a means of reducing insurance rates because such damages are only awarded in approximately one percent of medical malpractice trials where the plaintiff prevails.[51] Moreover, large punitive damages are often reduced on appeal.[52] Such arguments, however, fail to account for the significant impact that the possibility of punitive damages has on settlements.[53]

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[48] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 14–15 (July 24, 2002) ("States with limits of $250,000 or $350,000 on non-economic damages have average combined highest premium increases of twelve to fifteen percent, compared to forty-four percent in states without caps on non-economic damages.").

[49] GAO-03-836, *supra* note 4, at 31 (reporting that from 2001 to 2002, the average premium increase for general surgery, internal medicine, and OB/GYN in states with noneconomic damages caps between $250,000 to $500,000 was 9%, while rates in states without these reforms increased by 29%). Contrarily, HEALTH Act opponents reported that damages caps did not affect premiums for certain specialties:

> Data from the 2001 Medical Liability Monitor showed that in the practice of internal medicine, states with caps on damages had higher premiums than states without caps. For general surgeons, insurance premiums were 2.3% higher in states with caps on damages. On average, malpractice premiums were no higher in the 27 States that have no limitations on malpractice damages, than in the 23 States that do have such limits.

H.R. REP. No. 108-32, at 237.

[50] *See* Effects of Tort Reform, *supra* note 37, at 17 (finding that limits on noneconomic damages enacted in 1986 and 1987 reduced losses for medical malpractice insurers by 14.7%); Thorpe, *supra* note 2, at 26 (reporting that premiums for states with either noneconomic or noneconomic and economic damages caps were 17.1% lower than states without caps, while loss ratios were 11.7% lower).

[51] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 179769, TORTS TRIALS AND VERDICTS IN LARGE COUNTIES 7 (2000) (determining that in 1996, within the seventy-five largest counties in the United States, only 1.1% of plaintiffs in medical malpractice lawsuits who prevailed at trial were awarded punitive damages).

[52] *See* H.R. REP. No. 108-32, at 51.

[53] *See id.*

Despite the ostensible effect of punitive damages on settlements, statistical analysis of punitive damages caps evidences that caps do not affect insurance rates. One study that isolated punitive damages caps held that such limitations actually increased the likelihood that a claim would be filed.[54] The analysis also held that such caps increased economic damages by almost ten percent.[55] Another report concluded that no statistical correlation existed between caps on punitive damages and either lower premiums or loss ratios.[56] Restricting punitive damages consequently does not appear to lower insurance rates.

Similar to punitive damages, research disclaims the assertion that instituting a fair share rule reduces premiums. By apportioning liability based on the defendant's proportion of responsibility, the fair share rule seeks to protect physicians and healthcare providers who are forced to pay a share of damages for which they are not responsible.[57] While such fairness arguments are appealing, the fair share rule is also intended to limit lawsuits. Bill proponents contend that the common law rule of joint and several liability galvanizes attorneys to bring frivolous lawsuits against wealthy defendants, since claimants only have to prove partial fault to expose defendants to full liability.[58] By restricting the amount for which a party is liable, the fair share rule places the onus on the victim to identify and bring suit against all responsible parties.[59] Additionally, if certain parties cannot be located or lack financial resources, the victim is forced to absorb those parties' respective shares of damages. HEALTH Act supporters maintain that by shifting the burden of these missing or financially insufficient tortfeasors onto claimants, insurance companies bear a smaller percentage of the overall claim, while the claimants' expected benefits from litigation decrease, resulting in fewer lawsuits.[60] Despite this burden-shifting, whether abolishing joint and several liability actually reduces the burden on insurance companies is debatable. The results of several studies indicated that eliminating joint and several liability did not reduce lawsuits filed, damages, premium rates, or loss ratios.[61] One hypothesized

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[54] *See* Mark J. Browne & Robert Puelz, *The Effect of Legal Rules on the Value of Economic and Non-Economic Damages and the Decision to File*, 18 J. RISK & UNCERTAINTY 189, 208–09 (1999). The threat of punitive damages encourages insurance companies to make a more generous offer, which may explain the increase in claims. *See* Effects of Tort Reform, *supra* note 37, at 15. The study only focused on motor vehicle accidents, and thus conclusions for the medical malpractice industry are attenuated. *See id.*

[55] *See* Browne & Puelz, *supra* note 54, at 207 (concluding that punitive damage caps increased the value of economic damage claims by 9.5%, regardless of whether the claims were insurable, while the value of noneconomic claims rose 0.8%).

[56] *See* Thorpe, *supra* note 2, at 26.

[57] *See, e.g.*, H.R. REP. No. 108-32, at 47; Thorpe, *supra* note 2, at 26.

[58] *See* Effects of Tort Reform, *supra* note 37, at 4.

[59] *See, e.g.*, H.R. REP. No. 108-32, at 258–59.

[60] *See* Effects of Tort Reform, *supra* note 37, at 4.

[61] *See* Browne & Puelz, *supra* note 54, at 207–08 (estimating that modifying joint and several liability rules increased noneconomic claims by thirty-four percent and had no statistically significant effect on the probability that a lawsuit would be filed); Effects of

reason for these primarily negligible effects is that plaintiffs inflate the size of their claims to offset reductions in expected damages due to the fair share rule.[62] Empirical evidence thus suggests that abolishing joint and several liability will not necessarily further the aims of HEALTH Act proponents.

The HEALTH Act's caps on attorney fees are another attempt to reduce the number of malpractice lawsuits. The unrestricted contingency fee arrangements that pervade the tort system, bill proponents contend, create incentives for attorneys to litigate too many cases with a low probability of success, since the successful cases will more than compensate for the unsuccessful ones.[63] Supporters maintain that contingency fees are therefore a primary cause of frivolous lawsuits.[64] Since many plaintiff attorneys bear a portion of a lawsuit's financial risk, restricting the expected benefits of a claim would undoubtedly influence which cases are pursued.[65] Moreover, such a restriction could inhibit low-income victims from participating in the tort process, again reducing lawsuit volume.[66] While the effects of caps on attorney fees have not been widely examined, one study found no statistical correlation between fee restrictions and either premiums or insurance loss ratios.[67] Although the ability of such caps to reduce the number of lawsuits filed appears well-founded, the relationship between limiting attorney fees and insurance rate reduction is unconfirmed.

The effects of restricting the statute of limitations for medical malpractice claims have been inadequately analyzed. Although the HEALTH

Tort Reform, *supra* note 37, at 17 (reporting that the effects of modifications to joint and several liability on loss ratios were mixed, reducing losses in some years and having no effect in others); Han-Duck Lee et al., *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts*, 61 J. RISK & INS. 295, 311 (1994) (concluding that there is only weak support for the contention that reforming joint and several liability reduces the number of claims filed); Thorpe, *supra* note 2, at 26–27 (finding that reforming joint and several liability did not affect loss ratios or premiums).

[62] *See* Effects of Tort Reform, *supra* note 37, at 14.

[63] *See id.* at 8.

[64] *See id.* at 4 ("[C]aps on legal contingent fees make it less lucrative for attorneys to accept 'long shot' cases.").

[65] *See* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43 (1989). Professor Brickman asserts:

> The most commonly cited historic justification for the contingent fee is its function as a financing device that enables a client to assert and prosecute an otherwise unaffordable claim . . . . The contingent fee functions as a hedge: the client's exposure to loss is limited by the attorney's assumption of the fee risk, while the client's potential gain is also limited by the "sale" of a percentage of the claim to the attorney.

Id.

[66] *See* Effects of Tort Reform, *supra* note 37, at 8 ("Limiting contingent fees removes [the incentive to bring frivolous lawsuits] but may, in the view of supporters of [contingency fees], foreclose a means for low-income victims to get legal representation.").

[67] Thorpe, *supra* note 2, at 26–27.

Act appears to limit the statute of limitations to three years from the date when the injury is manifested, bill opponents argue that the limitation is really only one year.[68] The statute of limitations begins three years after injury manifestation or one year after injury discovery, whichever comes first.[69] According to opponents, since manifestation and discovery are typically the same, a plaintiff has one year to bring suit.[70] Statutes of limitations generally protect defendants from judicially stale claims by ensuring the availability of evidence and encouraging patients to check themselves for ailments.[71] The HEALTH Act's restrictive limitations, however, intimate motives beyond protection from stale claims. The limitations are, in fact, a conspicuous vehicle to limit the exposure of physicians to malpractice lawsuits.[72] While constricting the statute of limitations will prevent some patients from bringing claims, the extent of the claim reduction and impact on insurance rates have not been extensively researched and thus are unknown.

The final HEALTH Act provision intended to lower insurance rates is permitting the introduction of collateral source benefits at trial. Admitting third-party benefits into evidence should seemingly reduce a claimant's award by preventing double recovery, whereby a claimant receives overlapping compensation from the defendant and a third-party insurer for a particular set of damages.[73] The extent of this double recovery problem is often exaggerated since most insurers have a right to subrogation, which means that the third-party insurer has a right to recoup the benefits that they initially paid to a claimant from damages received in the claimant's lawsuit.[74] Whether double recovery is a problem or not, this reform is intended to reduce defendants' liability exposure since the judge or jury would now see evidence that the claimant may recover a portion of damages twice.

Although researchers have held that eliminating the collateral source rule lowers damages and loss ratios, a subsequent reduction in premiums is unsubstantiated. One investigation found that reforming the collateral source rule decreased noneconomic and economic damages by 14.4% and 15.3%, respectively.[75] A second study concluded that reforming the col-

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[68] *See* H.R. REP. No. 108-32, pt. 1, at 262–63 (2003).

[69] *See* HEALTH Act of 2004, H.R. 4280, 108th Cong. § 3 (2004).

[70] *See* H.R. REP. No. 108-32, at 262–63.

[71] *See id.* at 59.

[72] *See id.* at 262 (deriding the three-year statute of limitations as "a sham" and "harmful to patients").

[73] *See, e.g.*, H.R. REP. No. 108-32, at 49.

[74] *See* Effects of Tort Reform, *supra* note 37, at 6 n.15. Although insurers may have a right to subrogation, "insurers often do not exercise that right for at least three reasons. First, it can be difficult to establish that a certain award covers the same damages as an insurance benefit; second, administrative costs are large; and third, those actions may contribute to ill will among customers." *Id.*

[75] *See* Browne & Puelz, *supra* note 54, at 207. Browne and Puelz also concluded that eliminating the collateral source rule had no impact on the probability that a lawsuit would

lateral source rule lowered insurance loss ratios by over 13%.[76] Even though the correlation between damages and introducing collateral source benefits appears strong, these studies discovered no statistical relationship between introducing collateral source benefits and premiums.[77] Collateral source reforms thus represent another provision that will not lower insurance rates.

Given that the objective of the HEALTH Act is to lower premiums by limiting both damages and lawsuits, bill supporters can claim moderate success since noneconomic damages caps seemingly decrease insurance rates. Nevertheless, the elusive benefits of the other provisions ostensibly belie the medical community's contention that this bill is a panacea.[78]

In addition to providing limited benefits, the barometer that bill proponents use to measure the HEALTH Act's success, premium reductions, is incomplete. Although the goal of lowering premiums is laudable, such assessments ignore that tort law's primary objective is to deter unreasonable risk taking.[79] Since this bill seeks to achieve reform through the tort system, one cannot comprehend the legislation's precise benefit until its effects are assessed from a deterrence perspective.[80]

The medical malpractice liability limitation bill may undermine the deterrence function of tort law. From the deterrence perspective, tort liability forces an actor who causes harm to pay for the full cost of the harm "in order to generate a financial motive for future actors to adopt appro-

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be filed. *See id.* at 208. A review by the Office of Technology Assessment of six empirical studies on the impact of various reforms on medical malpractice costs identified two studies that found that mandatory collateral source offsets greatly reduced claim payments, although there was no impact on claim frequency. *See* Effects of Tort Reform, *supra* note 37, at 16–17.

[76] *See* Thorpe, *supra* note 2, at 26. Only discretionary collateral offsets, as opposed to mandatory collateral offsets, reduced loss ratios. *See id.*

[77] *See id.* Thorpe's analysis found no statistically significant relationship between discretionary collateral offsets and insurance rates. *See id.* Additionally, no relationship was reported between mandatory collateral offsets and both premiums and loss ratios. *See id.* A CBO review of the major recent studies that evaluated state-level tort reforms similar to the medical malpractice liability limitations in the HEALTH Act did not identify any study which discovered a statistically significant relationship between repealing the collateral source rule and premiums. *See* Effects of Tort Reform, *supra* note 37, at 12–13.

[78] *See supra* note 5.

[79] *See, e.g.*, AMERICAN LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE LIABILITY FOR PERSONAL INJURY, VOLUME I: THE INSTITUTIONAL FRAMEWORK 30–31 (1991) ("For at least the last decade the focus of most tort scholars has turned from the compensation of past injuries . . . to the creation of liability incentives for the prevention of future injuries."); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 268 (2004) ("Reduction of risk through deterrence of harm is the true purpose of liability today . . . ."); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840 (2002) ("[E]x ante, the individual would rationally prefer a legal system that allocates enforcement resources to prevent unreasonable risk rather than merely compensate it.").

[80] *See, e.g.*, Thorpe, *supra* note 2, at 28 (acknowledging the importance of evaluating medical malpractice liability reforms in the context of their effects on deterrence and compensation).

priate safety precautions."[81] Whenever tortfeasors do not face liability for the total economic and noneconomic damages, underdeterrence occurs.[82] By failing to internalize the full cost of harm, future actors engage in unreasonably risky behavior, leading to an increase in negligent conduct.[83]

All of the HEALTH Act reforms affect the deterrence capability of the tort system. Although noneconomic damages caps may reduce premiums, they may also underdeter physicians and healthcare operators. If negligent physicians cause noneconomic damages that exceed $250,000, and yet are only liable for $250,000, then insurance companies, physicians, and healthcare providers burdened with the liability costs will have fewer incentives to regulate physicians who commit malpractice. Moreover, since the resulting insurance rates will not reflect the true cost of physicians' negligent conduct, more malpractice-committing physicians will be able to continue practicing medicine.

Healthcare operators may also be underdeterred by punitive damages caps. Punitive damages serve a different deterrence function than either economic or noneconomic damages. Since punitive damages are not damages actually suffered by victims, they should only be awarded in limited circumstances, such as when there is a high probability that an injurer will escape liability for the harm he or she caused.[84] Such damages are necessary to "offset the deterrence-diluting effect of the chance of escaping liability."[85] If a defendant can occasionally avoid liability, then solely holding the defendant liable for harms caused on a particular occasion will give "injurers' [inadequate] incentives to take precautions . . . and their incentive to participate in risky activities will be excessive."[86] These inadequate precaution incentives are present in medical malpractice since studies indicate that roughly ninety percent of all medical negligence victims do not file a claim.[87] Moreover, the Institute of Medicine estimates that between 44,000 and 98,000 people die each year from medical error.[88] The awarding of punitive damages in some malpractice lawsuits is

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[81] *See* AMERICAN LAW INSTITUTE, *supra* note 79, at 31.

[82] *See* SHAVELL, *supra* note 79, at 242 ("Because both pecuniary and nonpecuniary losses reduce social welfare . . . parties will be led to act appropriately under liability rules only if damages equal the sum of pecuniary and nonpecuniary losses. If damages do not fully reflect nonpecuniary losses, parties' incentives to reduce risk may be inadequate.")

[83] *See id.*

[84] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–900 (1998).

[85] *Id.* at 870.

[86] *Id.* at 887–89.

[87] *See* Reforming Medical Litigation, *supra* note 28, at 15 ("Most victims of medical error do not file a claim—one comprehensive study found that only 1.53% of those who were injured by medical negligence even filed a claim."); Thorpe, *supra* note 2, at 25 ("[M]ost patients that receive negligent care never receive any compensation. [One study] found that only one malpractice claim was filed for every eight negligent medical injuries.").

[88] *See* COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFE HEALTH SYSTEM 31 (Linda T. Kohn et al. eds., 2000). The Institute

thus quite consistent with the deterrence objective since physicians are occasionally avoiding malpractice liability. Restricting punitive damages, through amount limitations or stringent standards for recovery, therefore hinders the ability of the tort system to deter future malpractice.[89]

Underdeterrence also plagues the HEALTH Act provisions that do not cap damages. Restrictions on the statute of limitations create a clear underdeterrence problem. Since claims are denied based on time rather than merit, some physicians committing malpractice will not be financially burdened by their negligence and thus will be underdeterred. Instituting a fair share rule will also underdeter physicians. Although the fair share rule is designed to equate liability with responsibility, by making lawsuits more difficult and expensive to pursue, some malpractice victims may be dissuaded from bringing suit.[90] Therefore, the medical community will face less liability and likewise less than optimal deterrence. Similarly, by capping attorney fees, lawyers will have fewer incentives to bring suit, reducing the number of meritorious claims that will be pursued, especially those that are more difficult to prove or more costly to bring. Abolishing the collateral source rule further underdeters healthcare providers by likely reducing a defendant's liability by the amount of compensation that the victim receives from third-party sources.[91] The defendant's liability will thus not reflect the full amount of damages, once again underdeterring the healthcare community.[92]

The underdeterrence effect of these reforms directly correlates with their ability to limit legitimate claims. The more meritorious damages

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of Medicine (IOM) estimates are based on studies conducted in New York, Colorado, and Utah, which calculated the percentage of adverse events that led to death. *See id.* at 30–31. The IOM report acknowledges that some people believe that the aforementioned studies underestimated the occurrence of preventable adverse events, and thus the number of deaths due to medical error should be higher, because the studies "(1) considered only those patients whose injuries resulted in a specified level of harm; (2) imposed a high threshold to determine whether an adverse event was preventable or negligent . . . ; and (3) included only errors that [were] documented in patient records." *Id.* at 31.

[89] *Cf.* Polinsky & Shavell, *supra* note 84, at 900. Professors A. Mitchell Polinsky and Steven Shavell contend that punitive damages caps undermine the tort system's deterrence objective:

> Some aspects of legislation governing punitive damages are . . . inconsistent with deterrence theory. Notably, many states have imposed caps of various kinds on punitive damage awards: an absolute ceiling . . . a maximum ratio of punitive damages to compensatory damages . . . or both. Such caps cannot be justified on deterrence grounds because they might preclude the proper award of punitive damages.

Id.

[90] *See supra* notes 59–60 and accompanying text.

[91] *See supra* notes 73–74 and accompanying text.

[92] *See* Effects of Tort Reform, *supra* note 37, at 5–6 ("Advocates of the collateral-source rule emphasize its incentive effects. They contend that a potential injurer facing the entire cost of an accident will exercise an efficient level of care, whereas an injurer facing a smaller payment has less of an incentive to take care.").

and claims are limited, the less the healthcare community will be appropriately deterred from committing malpractice. Thus, since the effect of noneconomic damages caps on overall compensation is substantial, their impact on underdeterrence is significant. While the other reforms' effects on premiums remain ambiguous, their cumulative impact on both damages and lawsuits appears undisputed. The HEALTH Act's efforts to limit medical malpractice liability may therefore actually increase medical malpractice.

Concern for the HEALTH Act's underdeterrence is seemingly weakened when bill proponents draw attention to the disconnect between actual negligence and medical malpractice lawsuit success. The ability of the tort system to deter is predicated on the ability of the system to identify and punish negligence accurately. If a physician who is not negligent is found liable for malpractice, then the resulting damages would overdeter, since he or she would be financially responsible for damages for which he or she should not be held liable. Bill supporters contend that actual negligence and lawsuit success are often unrelated, referencing a study published in the *New England Journal of Medicine* that held that in medical malpractice cases the level of disability was the only significant predictor of payment, as opposed to negligence.[93] Although other studies have found a correlation between jury and physician assessments of liability, the ability of jurors to identify medical malpractice accurately is appropriately questioned.[94]

To the extent that physicians are unable to predict whether their actions will result in a malpractice lawsuit, the phenomenon of defensive medicine occurs. Defensive medicine is defined as actions taken by physicians that are not medically necessary, but are performed to protect physicians from a charge of malpractice.[95] One study, conducted by Daniel Kessler and Mark McClellan, indicated that such wasteful actions accounted for approximately four percent of hospital expenditures for two ailments.[96] Even though a later Congressional Budget Office analysis that

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[93] *See* Troyan A. Brennan et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 NEW ENG. J. MED. 1963, 1963–67 (1996). The article's authors identified fifty-one litigated medical malpractice claims and followed them for ten years. *See id.*

[94] *See* Catherine T. Struve, *Doctors, The Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 984–86 (2004) (asserting that a number of studies have found a "fair degree of correlation between jury determinations of liability and independent evaluations of case strength"). *But see* Effects of Tort Reform, *supra* note 37, at 18 ("Many analysts argue that medical malpractice is not clearly defined and tends to be inaccurately judged—that is, malpractice lawsuits do not properly reflect providers' actions and too many weak lawsuits are brought.").

[95] *See, e.g.*, Polinsky & Shavell, *supra* note 84, at 880 ("[C]ommentators frequently make reference to 'defensive medicine,' by which is meant physicians' wasteful use of tests and diagnostic procedures in response to the threat of liability.").

[96] Daniel P. Kessler & Mark B. McClellan, *Malpractice Law and Health Care Reform: Optimal Liability Policy in an Era of Managed Care*, 84 J. PUB. ECON. 175, 189 (2002). Kessler and McClellan studied the effects of medical malpractice tort reforms on health-

utilized Kessler and McClellan's methods did not find similar expenditure reductions for a larger set of ailments,[97] the existence of defensive medicine is largely accepted.[98] Defensive medicine, however, does not signify that tort liability cannot be relied upon to deter malpractice. Rather, it exemplifies the medical community's difficulty in predicting what actions will expose them to malpractice liability. Regardless of whether the HEALTH Act is enacted, such difficulty will remain until actions are taken to better correlate malpractice with lawsuit success.[99]

Since the HEALTH Act provides limited benefits at the expense of a possible increase in malpractice, alternative reform measures warrant strong consideration. Although bill opponents favor reducing premiums through greater regulation of the insurance industry,[100] reforms outside the industry also exist.

HEALTH Act opponents deride the ability of damages caps and other liability reforms to lower insurance rates by drawing attention to the impact of changes within the medical malpractice insurance industry on the recent rise in premiums. Investment income is a frequently cited insurance industry factor that has affected insurance rates.[101] After 1998, as interest rates fell and the stock market tumbled, investment income for malpractice insurers declined.[102] The average investment return decreased by almost two percent from 2000 to 2002.[103] Moreover, malpractice insurers are required by state regulations to reflect investment income in

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care expenditures for patients with acute myocardial infarction or ischemic heart disease. *See id.* The researchers concluded that tort reforms such as capping damages, reforming the collateral source rule, and abolishing punitive damages reduced hospital expenditures by over four percent for both ailments, without increasing adverse healthcare outcomes. *See id.*

[97] *See* Effects of Tort Reform, *supra* note 37, at 19.

[98] *See, e.g.*, GAO-03-836, *supra* note 4, at 26–27. The GAO report on rising medical malpractice premiums lists a number of surveys in which physicians admitted to practicing defensive medicine. *See id.* The report, however, acknowledged that low response rates inhibit the results from reliably estimating the prevalence of defensive medicine. *See id.*

[99] If the unpredictability of liability exposure currently overdeters the medical community, then some of the HEALTH Act's deterrence reductions may be beneficial. Yet, given that the legislation will sacrifice some meritorious claims and damages, alternative reforms that lower premiums without reducing valid malpractice lawsuits will yield a more optimal deterrence result.

[100] *See* H.R. REP. NO. 108-32, pt. 1, at 245 (2003). The HEALTH Act of 2003 dissenters identified numerous insurance industry factors that affect insurance rates including changes in state laws, competitiveness within the insurance market, types of policies issued within the industry, interest rates, and losses due to the falling stock market. *See id.*

[101] *See id.* at 237 ("So why are medical malpractice premiums rising? The principal culprit is the insurance industry. Insurers make their money from investment income, which is plummeting right now . . . . When investment income decreases . . . the industry responds by sharply increasing premiums and reducing coverage, creating a 'liability insurance crisis.'").

[102] *See, e.g.*, Thorpe, *supra* note 2, at 23. From 1998 to 2002, the net investment yield for malpractice firms decreased from 8 to 6%. *See id.*

[103] *See* GAO-03-702, *supra* note 18, at 25. An analysis by the GAO found that the average investment returns of the fifteen largest medical malpractice insurers fell from 5.6% in 2000 to 4.0% in 2002. *See id.*

their premiums, forcing rates to rise in order to cover the continuing decline in income.[104] Although the dip in investment income appears minor, disproportionately higher premiums are needed to offset such lost revenue streams. Researchers estimate that a 1% increase in investment returns is associated with a 2% to 4.5% reduction in premiums.[105] Applying these percentages to the investment income drop over the past couple years yields a 2 to 4% annual premium increase.

Reduced competition within the insurance industry is also credited with increasing premiums.[106] During the 1990s, competition was strong within the malpractice insurance segment.[107] High investment returns permitted insurers to offer premiums that did not fully cover their ultimate malpractice losses.[108] Fortunes changed in 1999, however, as the malpractice insurance industry experienced a rapid decline in profitability.[109] Eventually, as profits fell, many insurers were forced out of the medical malpractice market.[110] Since the late 1990s, insurers accounting for almost 14% of the national medical malpractice insurance market have stopped writing policies,[111] and in some states nearly 40% of the market has exited.[112] As insurers leave the market, the supply of medical malpractice insurance declines, reducing the pressure on the remaining insurers to compete.[113] While studies have yet to quantify reduced competition's effect on insurance rates, its potential impact is apparent.

A final insurance industry factor noted for affecting premium rates is rapidly rising reinsurance rates.[114] Insurers purchase reinsurance to protect themselves against large, unpredictable losses.[115] The medical malpractice industry is especially dependent on reinsurance due to the potential of high payouts from malpractice claims.[116] Both the terrorist attacks

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[104] *See id.*

[105] *See* Thorpe, *supra* note 2, at 23; *see also* GAO-03-702, *supra* note 18, at 26–27 (estimating that "the total amount of investment assets relative to premium income determines how much rates need to rise to compensate for lost investment income," and that assets were four times as large as earned premium income in 2001).

[106] *See, e.g.*, GAO-03-702, *supra* note 18, at 28–32.

[107] *See id.* at 28 ("Price competition during most of the 1990s kept premium rates from rising between 1992 and 1998, even though losses generally did rise.").

[108] *See id.*

[109] *See id.* at 28–30.

[110] *See id.* at 3. Even though in 2001 The St. Paul Companies had sold medical malpractice insurance in every state, in 2002 they stopped writing medical malpractice insurance due to declining profitability. *See id.* Since 1999, other large insurers have also stopped selling malpractice insurance, including PHICO Insurance Company, MIIX Insurance Company, and Reciprocal of America. *See id.*

[111] *See* Thorpe, *supra* note 2, at 20.

[112] *See id.* at 23–24 (noting that The St. Paul Companies' departure from the medical malpractice market left over thirty-six percent of Nevada's physicians looking for new coverage).

[113] *See* GAO-03-702, *supra* note 18, at 31.

[114] *See id.* at 32.

[115] *See id.*

[116] *See id.*

on September 11, 2001, and higher overall losses from medical malpractice insurers have significantly raised malpractice reinsurance rates over the past few years.[117] Although some insurers have purportedly experienced a rise in reinsurance premiums of 50% to 100% from 1998 to 2002, the impact of these increases on malpractice insurance rates remains largely uncertain.[118]

Due in part to the influence of investment income, competitive pressures, and reinsurance rates on premiums, bill opponents suggest that increasing government regulation of the insurance industry is the most effective way to reduce insurance rates. These HEALTH Act detractors credit California's Proposition 103, which placed greater restrictions on state malpractice insurers,[119] for reducing California's malpractice premiums, as opposed to the implementation of noneconomic damages caps.[120] Although the cumulative impact of reforming the insurance industry has not been ascertained, such regulation would achieve premium reductions independent from the tort system, thereby avoiding any underdeterrence problems. Thus, industry reforms would not lead to the tradeoff of lower premiums for increased malpractice that afflicts the HEALTH Act.

There are also reforms outside of the insurance industry that would reduce premiums without underdeterring physicians. Increasing the medical malpractice standard for recovery, for example, would further the medical community's desire for reduced claims. By raising the standard that claimants must prove in order to succeed, physicians would be faced with fewer lawsuits and reduced premiums. Moreover, a heightened standard would presumably restrain juries from awarding damages in meritless lawsuits, thereby improving the correlation between malpractice and lawsuit success.[121]

Pre-trial screening requirements would also reduce premiums without undermining the deterrence function of the tort system. Instituting a screening process, such as requiring a board of physicians to review and approve all malpractice lawsuits, tends to reduce the number of frivolous lawsuits by weeding out cases wholly lacking in merit.[122] The prospect of

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[117] *See id.*; *see also* Thorpe, *supra* note 2, at 23.

[118] *See* GAO-03-702, *supra* note 18, at 32–33.

[119] *See* CAL. CODE REGS. tit. 10, § 2641.1 (2003).

[120] *See* H.R. REP. NO. 108-32, pt. 1, at 251–52 (2003); Rebecca Porter, *The Truth About Med-Mal Premiums*, TRIAL, May 2004, at 41. Medical malpractice premiums dropped over twenty percent within three years of Proposition 103's passage. *See* H.R. REP. NO. 108-32, at 251–52.

[121] *Cf.* Brennan, *supra* note 93, at 1967 (discussing the inability of the current negligence standard to deter unsafe medical practices).

[122] *See, e.g.*, GAO-03-836, *supra* note 4, at 37 ("In Minnesota, which has no caps on damages but has relatively low growth in premium rates and claims payments, trial attorneys maintain that prescreening requirements reduce claim costs and premiums by preventing some meritless claims from going to trial."); Sean Whaley, *Audit Suggests Bringing Back Medical Panel*, LAS VEGAS REV.-J., Dec. 11, 2003, at 2B (reporting on a Nevada state audit showing that medical malpractice claims "increased dramatically" since the abolish-

fewer lawsuits would ostensibly correlate with a decline in insurance rates.[123] Furthermore, by bolstering the relationship between lawsuit success and actual malpractice, the requirements would better promote the principles of deterrence.

Another possible reform is mandating greater discipline within the medical community, such as forcing state medical boards to suspend physicians who have committed malpractice more than once. According to the National Practitioner Data Bank, from 1990 to 2002, just 5% of doctors accounted for 54% of the malpractice payouts.[124] Moreover, state medical boards disciplined only 8% of physicians with two or more payouts during that period.[125] Although this reform does not directly affect the tort system, it would strengthen the medical community's internal deterrence system, presumably reducing the incidence of malpractice. Such disciplinary measures would also seemingly reduce premiums, as the most negligent physicians would no longer financially burden the medical community.

Whether reforms are made within the insurance industry, the legal system, or the medical community, there are a number of alternatives that would reduce premiums without underdeterring physicians. Although these alternatives may have varying implementation difficulties, they do not possess the tradeoffs evident in the medical malpractice liability limitation legislation.

HEALTH Act proponents disregard the bill's impact on deterrence by focusing exclusively on premium reductions as the measure of legislative success. Despite this focus, when the HEALTH Act's premium effect is assessed, the legislation's benefits appear limited. While noneconomic damages caps will likely reduce premiums, the insurance rate effects of the other reform measures are tenuous. When the analysis is expanded, a possible cost of the medical malpractice liability limitation bill is unearthed: an increase in medical malpractice caused by underdeterrence. The juxtaposition of this limited benefit and overlooked cost opens the discussion to alternative reforms. While insurance rate reductions from insurance industry regulation have not been quantified, the benefits of such reforms do not come at the expense of underdeterring physicians from committing malpractice. Similarly, the resulting premium reductions from heightening the standard for recovery in medical malpractice lawsuits, mandating pre-trial screening, or requiring greater discipline within the medical community are not compromised by a related increase in mal-

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ment of a screening panel in 2002).

[123] *See* GAO-03-836, *supra* note 4, at 37.

[124] *See* Sidney M. Wolfe, *Bad Doctors Get a Free Ride*, N.Y. TIMES, Mar. 4, 2003, at A25. The National Practitioner Data Bank statistics include jury awards and out-of-court settlements. *See id.*

[125] *See id.* Additionally, of the doctors that made payments in five or more cases, only one in six had been disciplined. *See id.*

practice. Moreover, a heightened standard for recovery and pre-trial screening strengthens the relationship between actual malpractice and lawsuit success, directly addressing the problem of defensive medicine. These alternatives thus appear to provide the desired benefits of the HEALTH Act without undermining the tort system. Regardless, legislative efforts to reform medical malpractice liability must account for their effect on deterring malpractice.

—Brandon Van Grack