HARVARD
Journal on Legislation

Volume 44, Number 1 **Winter 2007**

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ARTICLE

RESTORING THE QUID PRO QUO OF VOLUNTARY DEPARTURE

DAVID S. RUBENSTEIN*

"Voluntary departure" is an immigration benefit that permits an otherwise deportable alien a prescribed period of time in which to depart the United States of his own volition. The alien benefits by avoiding the legal and stigmatic ramifications of forced removal while the government benefits from reduced litigation and avoids costs associated with a contested deportation. This Article describes the development of a circuit split on the issue of whether federal circuit courts are authorized to issue stays of voluntary departure periods while an alien appeals his removal. It criticizes the majority rule permitting such stays and questions the wisdom of judicial interference with congressional and executive policymaking in the immigration context. Finally, the Article encourages a return to the "bargain" of voluntary departure that Congress intended—one that is not undermined by judicial overreaching.

The separation of powers in the immigration context is straightforward, at least in theory: the Constitution affords Congress exclusive authority to create laws governing alienage and immigration; Congress has delegated the administration and enforcement of these laws to the Executive Branch; and Congress has conferred limited jurisdiction upon the Judicial Branch to review the Executive's exercise of authority.[1] The Supreme Court has cautioned that any temptation for the respective branches to "exceed the outer limits of [their] power, even to accomplish desirable objectives, must be resisted."[2]

This Article submits that there has been a significant misstep by the Judiciary, on the toes of both Congress and the Executive, in an area of the immigration law called "voluntary departure."[3] Voluntary departure is a form of relief from removal under the Immigration and Nationality Act ("INA")[4] that affords the Attorney General and his delegates the discretionary authority to grant an alien a limited period to voluntarily depart

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* Law clerk in the U.S. District Court for the Southern District of New York; former Assistant U.S. Attorney for the Southern District of New York specializing in immigration matters; J.D., Hofstra Law School, 1998. The views expressed in this Article are the personal views of the author alone and should not be considered in any way to represent the views of the District Court, the U.S. Attorney's Office, or the Department of Justice.

[1] *See infra* Part I.

[2] INS v. Chadha, 462 U.S. 919, 951 (1982).

[3] *See infra* Part IV.

[4] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

the country in lieu of deportation.[5] If the alien abides by the terms of the agreement, voluntary departure affords quid pro quo benefits to both the Government and the alien.[6] For its part, the Government avoids the costs and burdens of forced removal and potentially those associated with protracted litigation.[7] In exchange, the alien: (1) may depart to any destination of his choice; (2) may do so at a convenient time within the prescribed departure period; (3) avoids the stigma of forced removal; and (4) most importantly, avoids an order of removal and the attendant bars to readmission into the United States that would otherwise attach if the alien were removed by the Government.[8] Thus, aliens have real incentives to apply for voluntary departure—incentives designed to "encourage [aliens] to depart without further ado."[9] An alien who is granted voluntary departure but fails to depart within the prescribed period is generally subject to an alternative order of removal,[10] a monetary fine, and other immigration penalties.[11]

When applying for voluntary departure, many aliens also apply to the Attorney General for alternative forms of relief from deportation, such as asylum.[12] If an Immigration Judge and the Board of Immigration Appeals each denies an alien's alternative application, the alien generally has the right to appeal the denial of that application to the federal circuit courts.[13] While an appeal is pending, an alien will frequently request that the court

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[5] *See* INA § 240B, 8 U.S.C. § 1229c (2000).

[6] *See, e.g.*, Ngarurih v. Ashcroft, 371 F.3d 182, 194 (4th Cir. 2004) ("This statutory scheme reveals Congress' intention to offer an alien a specific benefit—exemption from the ordinary bars on subsequent relief—in return for a quick departure at no cost to the government.").

[7] *See, e.g.*, Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir. 2004) ("For the Government, voluntary departure may expedite and reduce the cost of removal."); Ballenilla-Gonzalez v. INS, 546 F.2d 515, 521 (2d Cir. 1976) (stating that voluntary departure exists in part to prevent the practice "of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall [an alien's] departure from the country as long as possible").

[8] *See, e.g.*, Azarte v. Ashcroft, 394 F.3d 1278, 1284 (9th Cir. 2005) ("Voluntary departure serves the practical goals of reducing the costs associated with deporting individuals from the United States and providing a mechanism for illegal aliens to leave the country without being subject to the stigma or bars to future relief that are part of the sanction of deportation."). An alien who departs the United States while under an outstanding order of removal is ineligible for readmission to this country for a period of either five or ten years, depending on the circumstances, unless the alien obtains a waiver from the Attorney General, which may be granted only under certain circumstances. *See* INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

[9] Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1173 (9th Cir. 2003).

[10] *See* 8 C.F.R. § 1240.26(d) (2005).

[11] *See* INA § 240B(d), 8 U.S.C. § 1229c(d).

[12] *See, e.g.*, Desta v. Ashcroft, 365 F.3d 741, 743–45 (9th Cir. 2004) (permitting an alien to apply for asylum and for a stay of voluntary departure in the alternative); Ngarurih v. Ashcroft, 371 F.3d 182, 184 (4th Cir. 2004) (same).

[13] *See* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1). The courts' jurisdiction to review an alien's appeal, however, is subject to certain enumerated exceptions and limitations. *See* INA § 242, 8 U.S.C. § 1252; *infra* notes 57–60 and accompanying text.

freeze his voluntary departure period in the form of a judicial "stay"[14] so that his departure period will not expire during the appeal, and so that if the appeal is ultimately denied, he may still depart the United States voluntarily without the attendant penalties that would otherwise attach.[15]

Since Congress's enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996,[16] all of the courts that have addressed the issue have held that no judicial authority exists to "reinstate"—that is, to begin anew—an alien's departure period at the conclusion of a judicial appeal.[17] These decisions generally rest on the courts' recognition that Congress has vested sole authority over matters of voluntary departure in the Executive Branch, to be exercised by the Attorney General and his delegates, free of judicial interference.[18]

While it would seem that the same considerations should also preclude courts from staying voluntary departure periods, the vast majority of circuits that have addressed the issue have allowed judicial stays. Only the Fourth Circuit, representing the minority view, has held that voluntary departure periods may not be judicially stayed.[19] This Article argues that the minority rule is the correct approach because it most comports with Congress's intent, while respecting the Executive Branch's sole authority to grant and extend voluntary departure deadlines.[20] Conversely, the majority's result-driven rule rests on flawed and illogical reasoning, exceeds the scope of judicial authority set by Congress, encroaches on the Executive's power, and promotes poor policy.[21]

Part I of this Article provides an overview of the separation of powers in the immigration context. Part II discusses the former intercircuit split concerning whether, prior to IIRIRA's enactment, judicial authority existed to reinstate voluntary departure periods. Part III explores IIRIRA's impact on the issue of reinstatement, and the ensuing circuit split over whether judicial authority exists to stay an alien's departure period. Part

[14] In examining how a 'stay' of voluntary departure benefits an alien, the Seventh Circuit explained: "Essentially, the alien seeks to ensure that if the voluntary departure period expires before the court reaches a decision on the petition for review (which almost always occurs), [the alien] still will be able to depart voluntarily if the petition for review is denied." Lopez-Chavez v. Ashcroft, 383 F.3d 650, 652 (7th Cir. 2004) (citation omitted).

[15] *See, e.g.*, *id.*; *Desta*, 365 F.3d at 743, 748.

[16] Pub. L. No. 104-208, div. C, 110 Stat. 3009, 546 (1996) (codified in scattered sections of 8 U.S.C.).

[17] *See* Bocova v. Gonzales, 412 F.3d 257, 266 (1st Cir. 2005) ("The matter of reinstatement [of voluntary departure] is open and shut. All of the courts of appeals to resolve the issue thus far have concluded that they no longer may reinstate expired periods of voluntary departure.") (citations omitted); *see also infra* text accompanying notes 125–145.

[18] *See, e.g.*, *Bocova*, 412 F.3d at 267 (stating that "IIRIRA abolished judicial authority to review discretionary grants or denials of orders of voluntary departure; only the Attorney General now has the authority to grant this statutory benefit"); *see also infra* Part III.

[19] *See* Ngarurih v. Ashcroft, 371 F.3d 182, 193–96 (4th Cir. 2004); *see also infra* Part III.

[20] *See infra* Part IV.

[21] *See id.*

IV further analyzes the competing approaches of the courts and argues that the minority rule—that voluntary departure periods may not be stayed—is the correct one. Finally, Part V stresses the need for a judicial or legislative fix, considers current legislation pending in Congress, and recommends a modest revision to the proposed legislation.

I. THE SEPARATION OF POWERS IN THE IMMIGRATION CONTEXT

A. Congress's Plenary Authority over Immigration Law

The Constitution provides that "Congress shall have the Power . . . [t]o establish an uniform Rule of Naturalization."[22] The Supreme Court has long interpreted this so-called "Naturalization Clause" as conferring upon Congress plenary authority over matters of alienage and immigration.[23] Indeed, the Supreme Court has explained that "[o]ver no conceivable subject is the legislative power of Congress more complete" than over the regulation of immigration,[24] which the Court has labeled as a "sovereign prerogative."[25] Congress's plenary authority is generally subject only to constitutional check.[26]

B. The Executive's Administration and Enforcement of Immigration Laws

Congress has delegated and entrusted the bulk of the administrative and enforcement functions of the immigration laws to cabinet-level positions within the Executive Branch.

1. The Delegation and Transfer of Authority

Prior to 1940, the administration and enforcement of immigration laws were assigned to the Departments of Commerce and Labor.[27] In 1940, these immigration responsibilities were transferred to the Department of

[22] *See* U.S. CONST. art. I, § 8, cl. 4.

[23] *See, e.g.*, INS v. Chadha, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens . . . is not open to question."); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 606–07 (1889) ("The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.").

[24] Reno v. Flores, 507 U.S. 292, 305 (1993) (quotation marks and citations omitted).

[25] Landon v. Plasencia, 459 U.S. 21, 34 (1982).

[26] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (explaining that Congress's plenary power to create immigration law "is subject to important constitutional limitations"); *Chadha*, 462 U.S. at 941–42 (explaining that Congress must choose a "constitutionally permissible means of implementing" its plenary power).

[27] *See* Dia v. Ashcroft, 353 F.3d 228, 235 (3d Cir. 2003).

Justice, which largely delegated them to the Immigration and Naturalization Service ("INS"), an agency within that department.[28]

In 1983, the Attorney General established a quasi-judicial agency within the Department of Justice, called the Executive Office for Immigration Review ("EOIR"), to operate independently of the INS.[29] Fifty-three immigration courts exist under EOIR's umbrella throughout the country, housing over two hundred administrative immigration judges charged with the adjudication of removal proceedings.[30] Also within EOIR is the Board of Immigration Appeals ("BIA"), which is a single administrative appellate body that decides appeals from decisions of immigration judges.[31]

In the aftermath of the September 11, 2001, terrorist attacks on the United States, Congress enacted the Homeland Security Act of 2002 ("HSA"),[32] which abolished the INS and transferred its administration and enforcement functions to the newly created Department of Homeland Security.[33] EOIR, still within the Department of Justice, was left un-

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[28] *See* Alien Registration Act of 1940 ("ARA"), ch. 439, § 37, 54 Stat. 670, 675 (repealed 1952); *see also In re* L, 1 I. & N. Dec. 1 n.1 (B.I.A. 1940).

[29] *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8038–40 (1983) (codified as amended at 8 C.F.R. §§ 1.1, 3.0–3.1, 100.2 (2005)); *Flores*, 507 U.S. at 308 ("The immigration judge is a quasi-judicial officer in [EOIR], a division separated from the Service's enforcement staff."). EOIR is headed by a director who reports to the Deputy Attorney General. *See* 8 C.F.R. §§ 1003.0–1003.1 (2005).

[30] *See* U.S. Dep't of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, http://www.usdoj.gov/eoir/ocijinfo.htm (last visited Nov. 4, 2006). For an overview of removal proceedings, see *infra* text accompanying notes 35–48.

[31] *See* 8 C.F.R. § 1003.1 (2005). The BIA currently is authorized and maintained by the Attorney General, *see* 8 C.F.R. § 1003.1(a) (2005), under the general grant of authority bestowed on the Attorney General by Congress in the INA. *See* INA § 103(a)(1), (g), 8 U.S.C. § 1103(a)(1), (g) (2000) (mandating that the Attorney General "shall establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under [the INA]"). While "various sections of the [INA] indicate that Congress did contemplate some form of appellate review of [immigration judge] decisions by the BIA," Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 157 (2d Cir. 2004), the INA itself does not create a statutory right to an administrative appeal. *See, e.g., Dia*, 353 F.3d at 237 (noting that the INA says "absolutely nothing" about "the right" to review by the BIA); Yuk v. Ashcroft, 355 F.3d 1222, 1229 (10th Cir. 2004) ("Administrative appeal rights as exist are created by regulations promulgated by the Attorney General." (quoting Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003))); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003) ("Congress has not given aliens any statutory right to an administrative appeal.").

[32] Pub. L. No. 107-296, 116 Stat. 2135 (2002) (to be codified as amended in scattered sections of U.S.C.)

[33] *See id.* § 471, 116 Stat. at 2205; *see also* INA § 103, 8 U.S.C.A. § 1103 (West 2006) (delegating authority to the Secretary of the Department of Homeland Security). The HSA created three separate bureaus within the Department of Homeland Security to carry out the former functions of the INS: (1) Immigration and Customs Enforcement, responsible for the enforcement of the immigration laws; (2) Citizenship and Immigration Services, responsible for the administration of immigration benefits (e.g., adjudication of immigrant visa petitions); and (3) Border Security, responsible for, among other things, maintaining the integrity of the United States borders. *See* HSA §§ 442, 451 (to be codified at 6 U.S.C. §§ 252, 271).

touched.[34] One of the results of this reorganization is that the agency responsible for the adjudication of removal proceedings, i.e., EIOR within the Department of Justice, is no longer in the same executive department as the agency responsible for the prosecution of the immigration laws, i.e., United States Immigration and Customs Enforcement within the Department of Homeland Security.

2. *Overview of Administrative Immigration Removal Hearings*

Aliens who are illegally in the United States are subject to removal by the Government. Illegal aliens generally fall into one of the following classes: (1) those who are detained at a port of entry or paroled into the country; (2) those who entered the country without authorization or inspection by an immigration official; or (3) those who entered the country legally, but are no longer entitled to remain, either because their time to do so has expired, or because they have committed acts (usually criminal acts) that make them eligible for deportation.[35]

Aliens subject to removal are entitled to quasi-judicial administrative proceedings to determine whether they have a right to remain in the country,[36] with certain exceptions.[37] Removal proceedings are commenced with

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[34] *See* HSA § 1101(a) ("There is in the Department of Justice the Executive Office for Immigration Review, which shall be subject to the direction and regulation of the Attorney General . . . .") (to be codified at 6 U.S.C. § 521).

[35] *See generally* INA § 212(a), 8 U.S.C. § 1182(a) (2000) (providing grounds for inadmissibility); INA § 237, 8 U.S.C. § 1227 (2000) (providing grounds for deportation).

[36] *See* INA § 240, 8 U.S.C. § 1229a. Prior to IIRIRA's enactment in 1996, an alien received one of two types of proceedings, depending on the manner in which the alien entered the United States. Aliens who had legally entered the country, or who entered without inspection, were entitled to a deportation hearing in which the INS bore the burden of demonstrating that the alien was deportable for having violated the immigration laws under former 8 U.S.C. § 1251 (1994) (amended 1996, renumbered INA § 237, and recodified at 8 U.S.C. § 1227 (2000)). By contrast, aliens seeking admission to the United States at a port of entry but denied permission to enter were entitled to an "exclusion" hearing, in which the alien bore the burden of proving admissibility under 8 U.S.C. § 1182. IIRIRA eliminated the distinction between deportation and exclusion proceedings, and established a uniform "removal" proceeding. *See* IIRIRA, Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009, 587 (1996) (codified at 8 U.S.C. § 1229a (2000)). The new removal provisions retain some of the historic distinctions between exclusion and deportation concerning the respective burdens of proof of the alien and the prosecuting agency. *See, e.g.*, INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A) (2000) (requiring an alien applicant for admission to establish "clearly and beyond a doubt" that he or she is not "inadmissible" under INA § 212, 8 U.S.C. § 1182); INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2000) (requiring, in the case of an alien previously admitted to the United States, that the Department of Homeland Security prove by "clear and convincing evidence" that the alien is "deportable" under INA § 237, 8 U.S.C. § 1227).

[37] Certain illegal aliens may be subject to summary or expedited removal proceedings, by which the Department of Homeland Security may remove aliens without a hearing before an immigration judge. *See* INA § 238(b), 8 U.S.C. § 1228(b) (2000) (authorizing the Department of Homeland Security to summarily remove an alien who is not a legal permanent resident of the United States and who has been convicted of an "aggravated felony,"

the filing of a charging document in immigration court. That document contains, among other things, the charge(s) of removal against the alien, the allegations supporting the charge(s), and the date, time, and place of the alien's hearing before an immigration judge.[38]

At the hearing, aliens are afforded the right to an attorney at no expense,[39] the opportunity to present evidence,[40] and the opportunity to examine and object to evidence entered against them.[41] Moreover, an alien may apply for various forms of relief from removal. The most common forms of discretionary relief from removal are asylum,[42] cancellation of removal,[43] adjustment of status,[44] and voluntary departure.[45] Most require both a threshold showing that the alien is eligible for the relief under criteria specified by Congress, and a favorable exercise of discretion by an

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as defined in INA § 101(a)(43)); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2000) (authorizing the Department of Homeland Security to reinstate a previously executed removal order of an alien who has illegally reentered the United States); INA § 241(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2000) (specifying that, where an alien is undocumented or has attempted to gain admission by fraud, an immigration officer "shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution").

[38] Aliens attempting to enter the United States illegally at a port of entry are charged with "inadmissibility" under one or more of the governing provisions in INA § 212(a)(6), 8 U.S.C. § 1182(a)(6), whereas aliens who previously gained legal entry into the United States may be charged with "deportability" under one or more of the governing provisions of INA § 237, 8 U.S.C. § 1227 (2000).

[39] *See* INA § 292, 8 U.S.C. § 1362 (2000); *see also* 8 C.F.R. § 1240.10(a)(1) (2005) (stating that an immigration judge shall "[a]dvise the respondent of his or her right to representation, at no expense to the government . . ."). The courts have generally held that ineffective assistance by an alien's counsel could upset the fundamental fairness of the hearing in a way that violates the alien's Fifth Amendment right to "due process." *See, e.g.*, Reno v. Flores, 507 U.S. 292, 307 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Batanic v. INS, 12 F.3d 662, 667 (7th Cir. 1993) (explaining that the statutory right to counsel is "an integral part of the procedural due process to which the alien is entitled" (citation omitted)).

[40] 8 C.F.R. § 1240.10(a)(4) (2005)

[41] *Id.*

[42] *See* INA § 208(b), 8 U.S.C. § 1158(b) (2000) (providing the Secretary of Homeland Security and the Attorney General with discretionary authority to grant asylum to an alien who qualifies as a "refugee," as the term is defined in INA § 1101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000), i.e., to an alien who has been persecuted or has a well founded fear of future persecution on account of the alien's race, religion, nationality, political opinion, or membership in a particular social group).

[43] *See* INA § 240B, 8 U.S.C. § 1229b (2000) (providing the Attorney General with discretionary authority to cancel the removal of an alien who, prior to being placed in removal proceedings, had been a lawful permanent resident of the United States for five years, resided legally in the United States for seven consecutive years, and has not been convicted of an "aggravated felony," as defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000)).

[44] *See* INA § 245, 8 U.S.C. § 1255 (2000) (providing the Secretary of Homeland Security and the Attorney General with discretionary authority to adjust an alien's status to that of a lawful permanent resident, under certain enumerated conditions and exceptions, without the alien having to obtain a visa from a consular office abroad).

[45] This Article focuses on grants of voluntary departure at the conclusion of an alien's removal proceedings, provided for in INA § 240B, 8 U.S.C. § 1229c(b) (2000).

immigration judge—acting as the Attorney General's delegate—to grant the requested relief.

These forms of relief may be applied for in the alternative.[46] As a result, it is quite common for an alien to apply for asylum and, in the alternative, for voluntary departure. While most forms of relief permit an alien to remain in the country indefinitely, grants of voluntary departure do not, instead expiring upon the date and terms set by the Immigration Judge, or as extended by the BIA or certain authorized immigration officials.[47] At the conclusion of the proceeding, the immigration judge will grant the alien relief, order the alien removed, or grant voluntary departure with an alternative order of removal in the event that the alien does not voluntarily depart.

By regulation, both the alien and the Government generally have the right to administratively appeal the immigration judge's decision to the BIA.[48] If an alien's administrative appeal is denied, he may generally appeal the decision to the federal circuit courts under the terms and conditions provided in the INA.[49] The Government, however, may not appeal to the federal courts.[50]

C. The Limited Jurisdiction in Federal Circuit Courts To Review Final Orders of Removal

The U.S. Constitution, Article III, Section 1, provides that the "judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[51] Congress may define the jurisdictional scope of inferior Article III courts as it sees fit.[52] Indeed, as the Supreme Court has explained on numerous occasions: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts

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[46] With the exception of cancellation of removal, these other forms of relief are generally available to an alien who affirmatively applies for such benefits prior to, and outside of, the alien's removal proceeding. *See generally* INA § 208, 8 U.S.C. § 1158 (2000) (asylum); *id.* § 245, 8 U.S.C. § 1255 (2000) (adjustment of status); *id.* § 240B(a), 8 U.S.C. § 1229c(a) (2000) (voluntary departure).

[47] *See* INA § 240B(a)(2), (b)(2), 8 U.S.C. § 1229c(a)(2), (b)(2) (2000); 8 C.F.R. § 1240.26(e)–(f) (2005).

[48] *See* 8 C.F.R. §§ 1003.38, 1240.15 (2005).

[49] *See infra* text accompanying notes 55–60.

[50] The Department of Homeland Security may seek to have the case certified for review by the Attorney General. *See* 8 C.F.R. § 1003.1(h)(iii) (2005).

[51] U.S. CONST. art. III, § 1.

[52] *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Constitutional power to ordain and establish inferior federal courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.").

of the United States."[53] Stated affirmatively, "[c]ourts created by statute can have no such jurisdiction but such as the statute confers."[54]

In the immigration context, Congress has vested jurisdiction in the federal circuit courts to review final orders of removal issued by the BIA,[55] under the procedures set forth in the Hobbs Act.[56] This general conferral of jurisdiction, however, is limited in several respects. Notably, the circuit courts are precluded from reviewing: (1) most discretionary determinations made by the Attorney General, the Secretary of Homeland Security, or their respective delegates (immigration judges and district directors, respectively);[57] (2) petitions for review filed by aliens who are deportable for having committed certain enumerated criminal offenses;[58] (3) petitions for review not filed by an alien within thirty days of the date a final order was challenged;[59] and (4) claims that were not first administratively exhausted by an alien.[60]

To the extent that judicial authority exists to review the Executive Branch's exercise of authority in immigration matters, the Supreme Court has repeatedly admonished that "judicial deference" to the political branches is "especially appropriate in the immigration context."[61] Impor-

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[53] Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938); *see also Lockerty*, 319 U.S. at 187; Kline v. Burke Constr. Co., 260 U.S. 226, 233–34 (1922). While the issue has been debated as to whether Congress could divest inferior courts of jurisdiction over constitutional claims, it is for the most part agreed that Congress may otherwise limit the jurisdiction of Article III courts. *See* CHEMERINSKY, FEDERAL JURISDICTION 191–207 (4th ed. 2003). The issue of whether Congress can withhold judicial authority from issuing an equitable stay of an alien's voluntary departure period is not one of constitutional dimension. This is in part because aliens have never had a constitutional right to voluntary departure. *See, e.g.*, Cervantes-Ascencio v. INS, 326 F.3d 83, 86–87 (2d Cir. 2002) ("We find no substantial constitutional issue in connection with application of any eligibility requirements for voluntary departure and therefore, deny [the alien's] due process claim.").

[54] Sheldon v. Sill, 49 U.S. 441, 448 (1850).

[55] *See* INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B) (2000) (providing that a deportation order becomes final when the BIA has ruled on the order or when the time for seeking BIA review has expired, whichever is earlier).

[56] The Hobbs Act was originally enacted in 1950 to govern judicial review over certain agency decisions, *see* Hobbs Act, ch. 1189, 64 Stat. 1129 (1950), and was extended to the review of deportation orders in 1961, *see* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651–53. In 1996, Congress extended Hobbs Act review to removal orders (which encompass deportation and exclusion orders), *see* IIRIRA, Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009, 607 (1996) (codified at 8 U.S.C. § 1252 (2000)), and in 2005, made clear that judicial review of removal orders lies solely with the circuit courts and not with the district courts by way of habeas corpus. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 302, 310–11 (2005) (amending INA § 242, 8 U.S.C. § 1252 (2000)); *see also* Zadvydas v. Davis, 533 U.S. 678, 687–88 (2001) (providing historical background of judicial review authority prior to enactment of the REAL ID Act).

[57] *See* INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2000).

[58] *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2000). An exception to this criminal jurisdiction bar exists for review of constitutional issues and questions of law. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(D).

[59] *See* INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

[60] *See* INA § 242(d)(1), 8 U.S.C. § 1252(d)(1).

[61] INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (citation omitted); *see also* Miller v. Albright, 523 U.S. 420, 434 n.11 (1998) ("Deference to the political branches dictates a

tantly, that deference is due to the plenary authority vested in Congress to create the immigration laws, as well as Congress's delegation of authority to the Executive Branch to enforce and administer those laws.[62]

It is within this separation of powers framework that the issue of courts' authority to stay an alien's voluntary departure period arises. The roots of this debate, however, trace to the pre-IIRIRA era, when the issue was whether courts could "reinstate" voluntary departure at the conclusion of a judicial appeal.

II. The Pre-IIRIRA Intercircuit Split Concerning Judicial Reinstatement of Voluntary Departure

A. *Voluntary Departure Under Pre-IIRIRA Law*

The voluntary departure program was formally introduced to the law in 1940.[63] As enacted, and as later reenacted in the INA, voluntary departure was generally available to an alien in deportation proceedings[64] who "proved good moral character for the preceding five years."[65] If granted, voluntary departure enabled the alien to "depart the United States to any country of his choice at his own expense, in lieu of deportation."[66]

In 1990, Congress created statutory penalties for aliens who were granted voluntary departure but failed to depart voluntarily.[67] Specifically,

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narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.") (quotation marks and citation omitted); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[I]t is important to underscore the limited scope of judiical inquiry into immigration legislation. . . . [O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (quotation marks and citations omitted).

[62] *See* INS v. Miranda, 459 U.S. 14, 19 (1982) ("[T]he INS is the agency primarily charged by Congress to implement the public policy underlying these laws . . . . Appropriate deference must be accorded its decisions.") (citations omitted); Dhine v. Slattery, 3 F.3d 613, 619 (2d Cir. 1993) ("The Supreme Court has cautioned against 'improvidently encroach[ing] on the authority which the [INA] confers on the Attorney General and his delegates.'") (citations omitted).

[63] *See* Alien Registration Act (ARA) of 1940, ch. 439, § 20, 54 Stat. 670, 671–73 (codified as amended at 8 U.S.C. § 155). Prior to the formal enactment of the voluntary departure provisions in 1940, such relief was available from administrative immigration officers. *See* 6 Charles Gordon et al., Immigration Law & Procedure § 74.02[1] (rev. ed. 1988).

[64] Congress later made voluntary departure available to aliens who applied for it prior to being placed in deportation proceedings. *See* INA § 242(b), 8 U.S.C. § 1252(b) (1994).

[65] ARA § 20(c); INA § 244(e)(1), 8 U.S.C. § 1254(e) (1994) (repealed 1996). The list of eligibility bars to voluntary departure relief has been both expanded and narrowed over the years. INA § 240B(a)(1), 8 U.S.C. §§ 1229c(a)(1); INA § 237(a), 8 U.S.C. § 1227(a) (2000). For example, voluntary departure is no longer available to aliens removable for having been convicted of an aggravated felony or for security-related grounds. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

[66] ARA § 20; INA § 242(e), 8 U.S.C. § 1254(e) (1952).

[67] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 4978 (1990) (codified at INA § 242B(e)(2)(A)–(B), 8 U.S.C. § 1252b(e)(2)(A)–(B) (1994)) (repealed 1996).

an alien who remained in the United States beyond the prescribed departure date generally became ineligible for the immigration benefits of voluntary departure, suspension of deportation,[68] adjustment of status,[69] change of non-immigrant classification,[70] and registry,[71] for a period of five years following the scheduled departure date or the date of illegal reentry, if any.[72]

Prior to IIRIRA's enactment in 1996, "[n]either the statute nor the regulations contain[ed] any provision limiting the amount of voluntary departure time [able to] be given."[73] Under the agency's implementing regulations, the Attorney General's authority to grant voluntary departure to an alien in deportation was delegated to immigration judges and the BIA.[74] Administrative authority to reinstate or extend a previously granted voluntary departure period, however, was vested in the "sole discretion" of the INS district directors,[75] whose decisions were not administratively reviewable.[76] Under this pre-IIRIRA scheme, voluntary departure periods often exceeded a year and could be tailored to accommodate the alien's needs.[77]

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[68] Suspension of deportation was a form of relief previously available to aliens in deportation proceedings who could demonstrate continuous legal presence in the United States for a period of at least seven continuous years, good moral character, and extreme hardship to themselves or a qualifying family member (such as a spouse or child). *See* INA § 244(a), 8 U.S.C. § 1254(a) (1994) (repealed 1996). In 1996, Congress abolished "suspension of deportation," and created a new, yet similar, form of relief called "cancellation of removal." *See* IIRIRA §§ 304, 308(b)(7) (codified at 8 U.S.C. § 1229b (2000)) (providing the Attorney General with discretionary authority to cancel the removal of an alien who meet certain eligibility requirements prior to being placed in removal proceedings).

[69] INA § 245, 8 U.S.C. § 1255 (2000).

[70] INA § 248, 8 U.S.C. § 1258 (2000) (providing the Secretary of Homeland Security with discretionary authority to change an alien's status from one non-immigrant classification to another non-immigrant classification, under certain circumstances).

[71] INA § 249, 8 U.S.C. § 1259 (2000) (providing the Attorney General with discretionary authority to grant lawful admission for permanent residence to an alien who: (1) entered the United States prior to January 1, 1972; (2) has had a continuous residence in this country ever since; (3) establishes good moral character; and (4) is otherwise eligible for citizenship).

[72] These penalties did not apply to aliens who did not receive prior notice of the penalties or who failed to depart voluntarily due to "exceptional circumstances." *See* INA § 242B(e)(2)(A)–(B), 8 U.S.C. § 1252b(e)(2)(A)–(B).

[73] *In re* Chouliaris, 16 I. & N. Dec. 168, 169 (B.I.A. 1977).

[74] *See* 8 C.F.R. § 244.1 (1995) ("[I]f the alien establishes that he/she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the immigration judge when first authorizing voluntary departure, and under such conditions as the district director shall direct.").

[75] 8 C.F.R. § 244.2 (1995); *see also* Contreras-Aragon v. INS, 852 F.2d 1088, 1094 (9th Cir. 1988) ("It is apparent from these regulations that the [immigration judge] or the BIA may initially grant the voluntary departure, but an extension of the departure period is within the sole jurisdiction of the district director.").

[76] Courts generally found that while the district director's discretionary determination to extend or reinstate voluntary departure was not subject to administrative review, it was subject to judicial review in the district courts. *See, e.g.*, Castaneda v. INS, 23 F.3d 1576, 1580 n.2 (10th Cir. 1994) (recognizing jurisdiction to review a district director's refusal to extend voluntary departure).

[77] *See* AUSTIN T. FRAGOMAN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS

B. Pre-IIRIRA Judicial Review Provisions Bearing on the Issue of Voluntary Departure

Prior to IIRIRA's enactment, INA § 106(a) granted federal circuit courts jurisdiction to review final orders of deportation.[78] This jurisdictional grant extended to review of "all determinations made during and incident to the administrative proceeding conducted by [an immigration judge], and reviewable together by the [BIA], such as orders denying voluntary departure . . . ."[79] Aliens who appealed were afforded an automatic stay of deportation pending disposition of their appeal.[80]

INA § 106(c), however, barred courts from adjudicating a petition for review filed by an alien who departed the country.[81] Thus, an alien who was granted voluntary departure but failed to secure a sufficient departure period from the BIA or district director to complete a judicial appeal was faced with having to choose between (1) voluntarily departing or (2) appealing a removal order at the risk of losing the benefits of voluntary departure.[82] Diverging judicial views emerged to address this issue.

C. Pre-IIRIRA Circuit Court Split over Judicial Authority To Reinstate an Alien's Voluntary Departure upon Completion of the Alien's Appeal

1. Automatic Reinstatement

At one extreme, the Ninth Circuit held in *Contreras-Aragon* that if an alien appealed the BIA's final order to the court, the privilege of voluntary departure automatically "remain[ed] in effect throughout the period of judicial review," and would run anew from the date of the court's mandate.[83] Over an "emphatic[ ] dissent,"[84] the panel majority reasoned

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§ 7:4.6[A] (4th ed. 2004) ("Voluntary departure was often granted for periods exceeding 120 days under [pre-IIRIRA] law, sometimes in one or two-year increments for certain classes of aliens.").

[78] INA § 106(a), 8 U.S.C. § 1105a(a) (1994) (repealed 1996).

[79] Foti v. INS, 375 U.S. 217, 229 (1963).

[80] INA § 106(c), 8 U.S.C. § 1105a(c).

[81] *Id.* ("An order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order.").

[82] *See, e.g.*, Castaneda v. INS, 23 F.3d 1576, 1581 (10th Cir. 1994) ("[B]ecause the usual thirty-day departure period permitted by the [BIA] obviously cannot cover the time expended by a petition for review, voluntary departure is, in effect, conditioned on a waiver of judicial review with respect to the underlying deportation order."); Contreras-Aragon v. INS, 852 F.2d 1088, 1093 (9th Cir. 1988) (explaining that, as a practical matter, the time it takes to conclude an appeal would generally exceed a grant of voluntary departure absent one or more extensions of the departure period by the district director).

[83] 852 F.2d at 1092. The mandate generally issues fifty-two days after judgment is entered, assuming that no motion for reconsideration is filed. *See* FED. R. APP. P. 40(a)(1), 41(b).

[84] *Contreras-Aragon*, 852 F.2d at 1105 (Kozinski, J., dissenting); *see also infra* notes 86–87.

that "when a final order of deportation is before [the court] on appeal, [the court] reviews the order in its entirety," including any award of voluntary departure.[85] Thus, the court explained, an affirmation of a final deportation order also operated as an affirmation of the BIA's grant of voluntary departure.[86] The court also expressed concern that, if the rule were otherwise, aliens would be forced "to abandon the possibility of voluntary departure in order to seek review of the BIA's decision," at "too dear a price on the right to judicial review," which the court viewed as a "protected" right.[87]

In *Safaie v. INS*,[88] the Eighth Circuit adopted the Ninth Circuit's reasoning and held that voluntary departure would, unless otherwise noted, automatically begin to run from the date of the court's mandate, and under the same conditions provided in the BIA's order.[89]

2. *Modified Approaches to Judicial Reinstatement*

The First and Fourth Circuits adopted more flexible approaches than did the Ninth and Eighth Circuits.[90] These courts determined that authority to reinstate voluntary departure existed, given that no statutory provision "depriv[ed]" them of this authority.[91] Unlike the Ninth Circuit's approach, however, a favorable exercise of the court's authority was in these cases governed by circumstance rather than automatically triggered by an alien's appeal.

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[85] *Contreras-Aragon*, 852 F.2d at 1097.

[86] *Id.* at 1092–97. In an attempt to explain that it was not usurping administrative authority, the majority opinion took pains to explain that it was not "reinstating" voluntary departure, but instead was "simply affirming the order of deportation with its provision for alternative discretionary relief." *Id.* at 1092. As Judge Kozinski remarked in his dissenting opinion, however, "saying so [didn't] make it so." *Id.* at 1098; *see also id.* at 1097 ("There is no mystery about what the majority is doing in this case: it is reinstating a grant of voluntary departure that long ago expired."). In the years following the Ninth Circuit's decision, other courts likewise recognized the Ninth Circuit's approach as operating to "reinstate" voluntary departure. *See, e.g.*, Ramsay v. INS, 14 F.3d 206, 212 (4th Cir. 1994); *Castaneda*, 23 F.3d at 1580–81.

[87] *Contreras-Aragon*, 852 F.2d at 1094–95. In his dissenting opinion, Judge Kozinski found the majority's concerns in this regard misplaced, explaining: "Petitioner was not given a choice between giving up voluntary departure and taking an appeal . . . . He need only have sought an extension or reinstatement of his original grant of voluntary departure from the INS district director, a relatively simple and painless procedure." *Id.* at 1101.

[88] 25 F.3d 636 (8th Cir. 1994).

[89] *Id.* at 641 n.1. Prior to the Eighth Circuit's decision in *Safaie*, the court had once declined to consider an alien's application for reinstatement of voluntary departure, without addressing the issue of whether and under what circumstances it might do so in future cases. *See* Alsheweikh v. INS, 990 F.2d 1025, 1028 (8th Cir. 1993).

[90] *See* Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990); *Ramsay*, 14 F.3d 206, 212.

[91] *Umanzor-Alvarado*, 896 F.2d at 16 ("We see nothing in the law . . . that deprives us of the legal power to order the legally appropriate remedy—a remedy already granted by the [BIA]."); *Ramsay*, 14 F.3d at 212 (quoting *Umanzor-Alvarado* approvingly).

In *Umanzor-Alvarado*, the First Circuit held that reinstatement would be granted if the appeal was not frivolous, and where there was no indication that the district director would deny an alien's request for reinstatement (even when no request had been made to the district director).[92] The court explained that "[u]nder these circumstances, to require the petitioner to apply to the district director to pass upon the matter would be pointless, for the director could not lawfully refuse the reinstatement."[93]

Similarly, in *Ramsay*, the Fourth Circuit held that it would "reinstate a voluntary departure . . . only when: (1) the [agency] is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions, or (2) the [agency] does not suggest it will present the district director with any other reason for refusing reinstatement."[94] According to the court, this modified approach was designed to avoid the "undesirable result" that could arise under the Ninth Circuit's automatic reinstatement of voluntary departure in a case where the alien was no longer eligible for such relief.[95]

Along similar lines, but without expressly deciding the issue, the Second Circuit strongly suggested in *Ballenilla-Gonzalez v. INS*[96] that it might reinstate voluntary departure under certain circumstances.[97] The court declared that the agency could not withhold voluntary departure extensions for the sole purpose of "penaliz[ing] an alien in the bona fide, nonfrivolous exercise of a constitutional right."[98] The court also stressed, however, that "our government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure from the country as long as possible."[99] Because the court found that the underlying appeal before it was frivolous, it denied the alien's request for reinstatement but without prejudice to the alien seeking such relief directly from the district director.[100]

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[92] *See* 896 F.2d at 16.

[93] *Id.* The court further stated that "the law would forbid the government to deny a reinstatement solely because the alien brought . . . [a] potentially successful appeal." *Id.* (citations omitted).

[94] 14 F.3d at 213 (quotation marks and citations omitted).

[95] *Id.* ("[U]nder the [Ninth Circuit's] *Contreras-Aragon* rule, a court might reinstate voluntary departure even though, in the interim period between the BIA's and court of appeals' decisions, the alien may have committed acts which would preclude him from eligibility for voluntary departure, *e.g.*, an armed bank robbery.").

[96] 546 F.2d 515 (2d Cir. 1976).

[97] *Id.* at 521.

[98] *Id.*

[99] *Id.*

[100] *See id.*

3. *No Judicial Reinstatement*

In stark contrast, the Seventh, Tenth, and Eleventh Circuits all held that no judicial authority existed—under any circumstance—to reinstate an alien's voluntary departure period.[101] In the first case to so hold, the Seventh Circuit in *Kaczmarczyk* declined to reinstate an alien's voluntary departure period on the ground that the agency's implementing regulations conferred the "sole jurisdiction" to do so upon the district director.[102]

The Tenth Circuit reached the same result in *Castaneda*, albeit on other grounds, by relying on the absence of any statutory provision affording courts the authority to reinstate voluntary departure.[103] As the court explained:

> [F]ederal courts are tribunals of limited jurisdiction with only those powers conferred by Congress. Thus, while the heart of judicial authority is article III [sic] of the Constitution, the lifeblood of the [federal] court[s] is the contents of the Judicial Code. If an act can be performed by a [federal] court, it is because it was permitted and not because it was not prohibited by Congress. Federal courts operate only in the presence rather than the absence of statutory authority.[104]

Thus, unlike the First and Fourth Circuits, which seized upon the perceived absence of any express bar depriving them of the legal power to reinstate voluntary departure, the Tenth Circuit explained that it was this very void in the law that precluded the "affirmative[ ] empower[ment] to act."[105]

The Tenth Circuit also emphasized that nothing precluded an alien from seeking an extension of time from the district director,[106] and that the district director's determination in this regard was judicially reviewable for abuse of discretion.[107] While recognizing the judicial and administra-

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[101] *See* Kaczmarczyk v. INS, 933 F.2d 588, 598 (7th Cir. 1991); Castaneda v. INS, 23 F.3d 1576, 1579–83 (10th Cir. 1994); Nkacoang v. INS, 83 F.3d 353, 356–57 (11th Cir. 1996).

[102] 933 F.2d at 598.

[103] 23 F.3d at 1580 ("[N]one of the pertinent statutes . . . provide any basis whatsoever for this court to assume authority for affording the discretionary, administrative relief of [reinstatement of voluntary departure] sought by petitioner.").

[104] *Id.* (quotation marks and citation omitted).

[105] *Id.* at 1583.

[106] *See id.*

[107] *See id.* at 1579–80. The Seventh Circuit, echoing a concern expressed by the Ninth and Second Circuits—that "the INS might use its power . . . to insulate the BIA's asylum decisions from judicial review"—also discussed the possibility of "abuse of discretion" review: "Should it come to our attention that the INS is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions, our scrutiny of that discretionary exercise might expand." 933 F.2d at 598.

tive economies that could be achieved under the First and Fourth Circuits' approach of granting reinstatement in the absence of any indication that the district director would refuse such relief upon petition, the Tenth Circuit highlighted two shortcomings of this approach. First, it would impermissibly shift the burden from the alien to the Government on the issue of whether the alien is entitled to a reinstatement of voluntary departure.[108] Second, even if the alien were otherwise eligible for an extension of voluntary departure, a district director could properly deny such a request in the exercise of his discretion.[109]

Finally, to alleviate the concern expressed by some of its sister circuit courts that aliens were somehow deprived of judicial review in having to choose between an appeal and voluntary departure, the Tenth Circuit explained: "An alien ordered deported does not lose something when offered the additional opportunity to depart voluntarily. On the contrary, he retains precisely the same right to judicial review he would otherwise have had; it is only that his alternative to continued litigation has been made more attractive."[110]

In *Nkacoang v. INS*,[111] the Eleventh Circuit considered the split in authority and ultimately adopted the reasoning of the Tenth Circuit in *Castaneda*.[112] Thus, the court agreed that it "lack[ed] jurisdictional authority to grant an extension" of the alien's voluntary departure period, and dismissed the case without prejudice to the alien's petition for an extension before the district director.[113]

4. *Courts that Took No Position on Judicial Reinstatement*

While the issue of whether judicial authority to reinstate an alien's voluntary departure period existed under pre-IIRIRA law was twice presented to the Fifth Circuit, it declined to reach the issue on both occasions.[114] In *Farzad*, the court refused to reinstate voluntary departure where an alien waited until the last day to file his appeal and had not first sought rein-

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[108] *See* Castaneda v. INS, 23 F.3d 1576, 1582 (10th Cir. 1994) ("The INS need not somehow disprove the suitability of voluntary departure; it is the alien who bears the burden of proving statutory eligibility for this form of relief and demonstrating that it is warranted." (quotation marks and citation omitted)).

[109] *See id.* ("[I]t reflects a fundamental misapprehension of the nature of discretionary authority to conclude that because the [BIA] once granted voluntary departure, the district director could not lawfully refuse the reinstatement thereof. The very concept of discretion presupposes a zone of choice within which the decisionmaker may go either way." (quotation marks and citations omitted)).

[110] *Id.* at 1581.

[111] 83 F.3d 353 (11th Cir. 1996).

[112] *Id.* at 357.

[113] *Id.*

[114] *See* Faddoul v. INS, 37 F.3d 185, 192 (5th Cir. 1994); Farzad v. INS, 808 F.2d 1071, 1072 (5th Cir. 1987).

statement or an extension of voluntary departure from the agency.[115] In *Faddoul*, the Fifth Circuit again avoided the issue, where the alien had "waited until the last day of the voluntary departure period to file [his] appeal, and there was no indication he ever asked the [BIA] to extend this period beyond thirty days to allow him to appeal."[116] In so holding, however, the court suggested that aliens who wished to appeal without losing the benefits of voluntary departure should include such a request on appeal to the BIA, which could then later be reviewed and, if appropriate, remedied by the courts.[117]

Neither the Third nor Sixth Circuits have published any decision on the issue of whether judicial authority existed to reinstate an alien's voluntary departure period under pre-IIRIRA law.

III. The Courts' Post-IIRIRA Treatment of Aliens' Requests To Reinstate or Stay Voluntary Departure Periods

Against the backdrop of this circuit split, Congress overhauled the nation's immigration laws through IIRIRA's enactment in 1996.[118] This necessitated a reexamination by the courts of their authority—or lack thereof—to reinstate or otherwise extend voluntary departure periods.[119] The ensuing debate produced yet another circuit split, this time as to whether a circuit court may "stay" an alien's voluntary departure period while reviewing the alien's application for alternative relief.

A. *IIRIRA's Amendments Relating to Voluntary Departure*

1. *Substantive Amendments*

Substantively, IIRIRA for the first time imposed a cap on the amount of time allowable for voluntary departure. Under the INA as amended, voluntary departure periods are now statutorily capped at 120 days for any alien granted voluntary departure prior to the conclusion of the alien's removal proceedings,[120] and at 60 days for any alien granted such relief at the conclusion of proceedings.[121] The changes clearly encourage aliens to

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[115] 808 F.2d at 1072.

[116] 37 F.3d at 192.

[117] *See id.*

[118] *See* Pub. L. No. 104-208, div. C, 110 Stat. 3009, 546 (1996) (codified in scattered sections of 8 U.S.C.).

[119] *See* Bocova v. Gonzales, 412 F.3d 257, 266 (1st Cir. 2005) ("IIRIRA worked a sea change in the federal courts' authority over voluntary departure orders."); Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1170 (9th Cir. 2003) (stating that IIRIRA "recast the statutory landscape" concerning voluntary departure).

[120] INA § 240B(a)(2)(A), 8 U.S.C. § 1229c(a)(2)(A) (2000).

[121] INA § 240B(b)(2), 8 U.S.C. § 1229c(b)(2). Within these statutory caps, federal regulations provide "[a]uthority to extend the time within which to depart voluntarily specified initially" by an immigration judge or the BIA "only" to the "district director, the

accept voluntary departure sooner rather than later in the removal process, thus minimizing protracted and unnecessary litigation.

As further incentive for an alien to accept voluntary departure quickly, Congress provided more lenient eligibility criteria for aliens willing to forego a full administrative hearing. Specifically, an alien who applies for voluntary departure prior to the conclusion of proceedings must demonstrate only that he is not deportable for having been convicted of an aggravated felony or for engaging in terrorist activities.[122] By contrast, an alien who opts to challenge removal through a full administrative hearing, and who applies for voluntary departure in the alternative, must also demonstrate that he: (1) has been physically present in the United States for one year prior to being placed in proceedings; (2) is and has been a person of good moral character for at least five years immediately preceding application; and (3) has established by "clear and convincing evidence" the means and intent to voluntarily depart the United States.[123]

Regardless of whether an alien is granted voluntary departure prior to or at the conclusion of proceedings, an alien who violates a voluntary departure order is now subject to a civil fine of up to $5,000, and is barred for ten years (rather than the previous five) from the immigration benefits of voluntary departure, cancellation of removal, adjustment of status, change of non-immigrant classification, and registry.[124] This amendment operates to strengthen the enforcement "stick" for those who accept the voluntary departure "carrot."

2. *IIRIRA's Judicial Review Amendments*

IIRIRA also brought wholesale changes to the judicial review provisions bearing on the issue of voluntary departure. Most significantly, Congress repealed former INA § 106(c), which had barred courts from reviewing appeals filed by aliens who departed the United States.[125] Thus, after IIRIRA's enactment, an alien can now voluntarily depart the United States without forfeiting his right to a judicial appeal of an alternative

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Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs." 8 C.F.R. § 1240.26(f) (2005).

[122] *See* INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1); 8 C.F.R. §§ 1240.26(e)–(f). This threshold requirement is significantly more lenient than under the pre-IIRIRA scheme, where an applicant had been required to demonstrate good moral character for a period of five years preceding his application for voluntary departure, regardless of whether the application was made prior, during, or at the conclusion of the alien's proceedings. *See* INA § 242(b), 8 U.S.C. § 1252(b) (1994) (repealed 1996); *id.* § 244(e)(1), 8 U.S.C. § 1254(e)(1) (1994) (repealed 1996).

[123] *See* INA § 242B(b)(1), 8 U.S.C. § 1229c(b)(1) (2000).

[124] *See id.* § 240B(d), 8 U.S.C. § 1229c(d); *see also supra* text accompanying notes 67–72.

[125] *See* INA § 106(c), 8 U.S.C. § 1105a(c) (1994) (repealed 1996); Ngarurih v. Ashcroft, 371 F.3d 182, 192 (4th Cir. 2004) ("[U]nder pre-IIRIRA immigration law, a court of appeals lost jurisdiction of a petition for review once the alien left the United States.").

removal order.[126] IIRIRA also repealed the automatic stay of removal,[127] instead expressly granting courts equitable authority to issue stays of removal on a case-by-case basis.[128] IIRIRA did not expressly provide for any similar authority to stay an alien's voluntary departure period.

Moreover, Congress expressly withdrew jurisdiction from the courts to review the Attorney General's discretionary decision to grant or deny voluntary departure—an administrative decision previously deemed by the courts to be judicially reviewable.[129] Specifically, INA § 242B(c)(f) now provides that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure."[130] INA § 242(a)(2)(B)(i) further provides that "[n]otwithstanding any other provision of law . . . no court shall have jurisdiction to review . . . any judgment regarding the granting of [voluntary departure relief]."[131]

B. The Courts' Unanimous View that IIRIRA Divested the Judiciary of Authority To Reinstate Voluntary Departure Periods

Following IIRIRA's amendments in 1996, "[a]ll of the courts of appeals to resolve the issue thus far have concluded that they no longer may reinstate expired periods of voluntary departure."[132] Indeed, even the First, Fourth, Eighth and Ninth Circuits—all of which had previously assumed authority to reinstate voluntary departure under pre-IIRIRA law—now agree that no such judicial authority exists.[133]

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[126] *See, e.g.*, Moore v. Ashcroft, 251 F.3d 919, 922 (11th Cir. 2001) ("Based on the clear change in statutory language . . . an alien's deportation or departure from this country no longer forecloses judicial review of removal orders.") (citations omitted); Tapia Garcia v. INS, 237 F.3d 1216, 1217 (10th Cir. 2001) (same).

[127] *See* IIRIRA § 306(b); INA § 106(a)(3) (1994) (repealed 1996).

[128] See IIRIRA § 306(a)(2); INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (2000) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

[129] *See* INA § 240B(f), 8 U.S.C. § 1229c(f) (2000); INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i) (2000); *see also* Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir. 2004) ("IIRIRA abolished judicial authority to review discretionary grants or denials of voluntary departure; only the Attorney General now has authority to grant this statutory benefit.").

[130] INA § 240B(f), 8 U.S.C. § 1229c(f).

[131] *Id.* § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i).

[132] Bocova v. Gonzales, 412 F.3d 257, 266 (1st Cir. 2005) (describing the "matter of reinstatement [as] open and shut" after IIRIRA's amendments) (citing Mullai v. Ashcroft, 385 F.3d 635, 639–40 (6th Cir. 2004); *Rife*, 374 F.3d at 616; Ngarurih v. Ashcroft, 371 F.3d 182, 192–93 (4th Cir. 2004); Reynoso-Lopez v. Ashcroft, 369 F.3d 275, 280–81 (3d Cir. 2004); Sviridov v. Ashcroft, 358 F.3d 722, 731 (10th Cir. 2004); Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1174 (9th Cir. 2003)); *see also* Iouri v. Ashcroft, 464 F.3d 172, 182–83 (2d Cir. 2006).

[133] *Compare* Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990) (holding that court could reinstate voluntary departure under certain circumstances) *with Bocova*, 412 F.3d at 265–66 (holding that voluntary departure cannot be reinstated and expressly abrogating *Umanzor-Alvarado*); *compare* Ramsay v. INS, 14 F.3d 206, 211–13 (4th Cir. 1994) (holding that court could reinstate voluntary departure under certain circumstances) *with* Ngarurih, 371 F.3d at 192–93 (holding that court lacked authority to reinstate voluntary

These courts have all found that IIRIRA's amended judicial review provisions eviscerated the rationale underlying their respective pre-IIRIRA positions.[134] Most notably, because IIRIRA repealed the jurisdictional bar to appeals filed by aliens who departed the country, an alien is no longer faced with having to "choose" between the benefits of voluntary departure and exercising his statutory right to appeal.[135] Moreover, "IIRIRA abolished judicial authority to review discretionary grants or denials of voluntary departure."[136] Thus, "after IIRIRA there is no reason to believe that the voluntary departure period begins after [the court] finish[es its] review."[137]

Further, IIRIRA repealed the automatic stay of removal that had previously been afforded to aliens under the former INA judicial review provisions.[138] This repeal "eliminate[d] the practical need for corresponding automatic stays of the voluntary departure period"[139] and brought conformity to the law as to treatment of aliens who had been afforded voluntary departure and those who had not been granted this relief.[140] In addi-

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departure and expressly abrogating *Ramsay*); *compare* Safaie v. INS, 25 F.3d 636, 641 n.1 (8th Cir. 1994) (holding that voluntary departure is automatically reinstated upon issuance of the court's mandate) *with Rife*, 374 F.3d at 614–16 (holding that voluntary departure cannot be reinstated at any time and expressly abrogating *Safaie*); *compare* Contreras-Aragon v. INS, 852 F.2d 1088, 1097 (9th Cir. 1988) (en banc) (holding that voluntary departure automatically runs from the date of the court's mandate) *with Zazueta-Carrillo*, 322 F.3d at 1170–72 (holding that voluntary departure runs from date of the BIA's decision, and expressly abrogating *Contreras-Aragon*).

[134] *See, e.g.*, *Zazueta-Carrillo*, 322 F.3d at 1170 ("IIRIRA so recast the statutory landscape that the rationale for *Contreras-Aragon* has been eliminated.").

[135] *See Rife*, 374 F.3d at 615 (explaining that the repeal of the jurisdictional bar "eliminates the dilemma of having to choose between judicial review and voluntary departure . . . ."); *Reynoso-Lopez*, 369 F.3d at 282 ("[A]liens may now pursue their appeals from abroad, avoiding their having to choose between exercising their right to appeal and taking voluntary departure."); *Ngarurih*, 371 F.3d at 192 ("[A]n alien may continue to prosecute his appeal of a final order of removal even after he departs from the United States, and there is no longer any prospect that the government could manipulate voluntary departure orders to deprive an alien of judicial review."); *Zazueta-Carrillo*, 322 F.3d at 1171 ("Congress's desire to expedite removal by voluntary assent now does not conflict with the alien's ability to pursue a petition for review."). An alien's ability to appeal from abroad also assuaged a related concern, raised by the Ninth Circuit in *Contreras-Aragon*, 852 F.2d at 1095–96, that an alien could prematurely be put to the choice between departing and appealing, to the extent that the time to voluntarily depart diminished the statutory period in which the alien could file an appeal. *See Zazueta-Carrillo*, 322 F.3d at 1171.

[136] *Rife*, 374 F.3d at 614–15 (citing 8 U.S.C. §§ 1229c(f), 1252(a)(2)(B)(i) (2000)).

[137] *Zazueta-Carrillo*, 322 F.3d at 1172; *see also Reynoso-Lopez*, 369 F.3d at 281 (reasoning that IIRIRA's bars to review of the Attorney General's determination concerning voluntary departure "underscore" Congress's intent "to vest the right to set deadlines . . . solely with the executive branch, and not the courts"); *Bocova*, 412 F.3d at 265 ("The IIRIRA materially changed the ground rules for voluntary departure by stripping the courts of appeals of jurisdiction to review BIA decisions as to whether to grant voluntary departure, and, if so, for how long." (citing 8 U.S.C. §§ 1229c(f), 1252(a)(2)(B)(i))).

[138] *See* 8 U.S.C. 1252(b)(3)(B); INA § 106(a)(3), 8 U.S.C. 1105(a)(3) (1994) (repealed 1996).

[139] *Rife*, 374 F.3d at 615.

[140] *See Zazueta-Carrillo*, 322 F.3d at 1171–72.

tion, all the courts that addressed the issue explained that the substantive voluntary departure provisions—as amended by IIRIRA and implemented by the EOIR—made clear that the courts no longer had any role in setting or extending voluntary departure deadlines, and that such action was strictly in the domain of the Executive Branch.[141]

As the First, Fourth and Ninth Circuits expressly recognized, to reinstate an alien's voluntary departure period would both circumvent Congress's will and encroach upon the Executive's authority.[142] These courts further reasoned on policy grounds that if voluntary departure did not begin to run until after judicial review, it would upset Congress's intent to encourage aliens "to depart without further ado,"[143] while fostering meritless appeals by aliens seeking to gain "months (even years) in the United States in open, judicially sanctioned defiance" of the Attorney General's order.[144] Finally, the Third and Ninth Circuits expressed the view that, to the extent any ambiguity in the relevant statutes exists, deference is owed to the EOIR's interpretation of these statutes as conferring

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[141] *See id.* at 1172 ("It is executive rather than the judicial officers who decide when an alien must depart. Neither the statute nor the regulations give courts any designated role in this process of setting the deadline for departure." (citing 8 U.S.C. §§ 1229c(f), 1252(a)(2)(B)(i) (2000))); *Rife*, 374 F.3d at 615 ("[O]nly the Attorney General now has the authority to grant [the] statutory benefit [of voluntary departure]."); Mullai v. Ashcroft, 385 F.3d 635, 640 (6th Cir. 2004) ("Any judicial order to 'reinstate' at this time would necessarily authorize a *new* opportunity to voluntarily depart, a function assigned to the Attorney General's office by 8 U.S.C. § 1229c . . . ."); Ngarurih v. Ashcroft, 371 F.3d 182, 193 (6th Cir. 2004) ("Under current law, the decision whether to permit an alien to depart the United States voluntarily is committed entirely to the discretion of the Attorney General," and "[b]y regulation, the Attorney General has permitted the INS district director, in the exercise of discretion, to extend the period initially prescribed for voluntary departure." (citing 8 C.F.R. § 240.25 (2004))); *Reynoso-Lopez*, 369 F.3d at 277 ("Based on the plain language of the immigration statutes and regulations, which clearly grant the power to reinstate or extend voluntary departure solely to the Attorney General and his delegates . . . we conclude that we lack the jurisdictional authority to reinstate or extend a voluntary departure order."); *cf.* Banda-Ortiz v. Gonzales, 445 F.3d 387, 390–91 (5th Cir. 2006) (stating, in the context of a motion to reopen removal proceedings, that courts lack authority to extend an alien's voluntary departure period).

[142] *See Bocova*, 412 F.3d at 266 ("Reinstating an expired voluntary departure period is functionally equivalent to fashioning a new voluntary departure period . . . effectively overriding the Attorney General's decision . . . . That would be an impermissible circumvention of Congress's will."); *Ngarurih*, 371 F.3d at 195 ("Because Congress left it to executive officers, not this court, to determine how long an alien should have to exercise voluntary departure, we cannot reinstate voluntary departure or otherwise alter the BIA's order in this respect."); *Zazueta-Carrillo*, 322 F.3d at 1172–73 ("For us to specify in effect a different period starting more than a year later would contravene Congress's scheme and invade the executive branch's authority to specify a deadline for voluntary departure.").

[143] *Zazueta-Carrillo*, 322 F.3d at 1173; *accord Ngarurih*, 371 F.3d at 194 ("The statutory scheme reveals Congress'[s] intention to offer an alien a specific benefit . . . in return for a quick departure at no cost to the government.").

[144] *Zazueta-Carrillo*, 322 F.3d at 1174; *accord Reynoso-Lopez*, 369 F.3d at 284 ("If voluntary departure periods could be extended until after completion of an appeal, it would . . . encourage frivolous appeals in an attempt to continue extending an alien's departure date.").

sole authority to the Attorney General and his delegates to set or extend voluntary departure periods.[145]

C. *Circuit Split over Whether Judicial Authority Exists To "Stay" an Alien's Voluntary Departure Period*

Based on the same considerations underlying the courts' unanimous view that no judicial authority exists to reinstate voluntary departure, it would seem that the courts would likewise find that no judicial authority exists to stay an alien's departure period. Surprisingly, however, only a single court that has addressed the issue has shared this view.[146]

1. *The Majority View that Voluntary Departure Periods May Be Stayed*

According to the majority view (currently shared by the First, Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits), the issuance of a stay neither impermissibly extends the voluntary departure period nor operates as a review of the Attorney General's grant of voluntary departure.[147] Rather, in the majority's view, a stay merely "stops the clock," which operates to preserve the remaining time on an alien's departure period.[148] Thus, these courts have drawn a marked distinction between what they perceive as an impermissible "reinstatement" of voluntary departure and a permissible "stay" of voluntary departure.[149]

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[145] *See Reynoso-Lopez*, 369 F.3d at 281 (noting that where statutes are silent or ambiguous, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" tasked with the enforcement and administration of the statute being interpreted) (quotation marks and citation omitted); *Zazueta-Carrillo*, 322 F.3d at 1173 (same).

[146] *See Ngarurih*, 371 F.3d at 193–96.

[147] *See, e.g.*, Thapa v. Gonzales, 460 F.3d 323 (2d Cir. 2006); Obale v. Att'y Gen. of the United States, 453 F.3d 151, 157 (3d Cir. 2006); *Bocova*, 412 F.3d at 267; Desta v. Ashcroft, 365 F.3d 741, 746 (9th Cir. 2004); Rife v. Ashcroft, 374 F.3d 606, 615 (8th Cir. 2004).

[148] *See Desta*, 365 F.3d at 747 ("[W]hile we are stopping the clock from running on the time the petitioner has to depart voluntarily, we are not adding more time to that clock."); Lopez-Chavez v. Ashcroft, 383 F.3d 650, 652 (7th Cir. 2004) ("[A] stay . . . does [not] change the amount of time granted—it merely preserves the balance of days left in the voluntary departure period."); *Bocova*, 412 F.3d at 269 ("A suspension of a voluntary departure period merely tolls the running of that period; it does not extend it."); Nwakanma v. Ashcroft, 352 F.3d 325, 327 (6th Cir. 2003) ("[I]n granting a stay of voluntary departure, we do not pass on the substance of the decision to grant voluntary departure; we only stay the immediate effectiveness of the relief already granted . . . .").

[149] *Compare* Iouri v. Ashcroft, 484 F.3d 172, 182–83 (2d Cir. 2006) (holding that no authority exists to reinstate expired voluntary departure period), *Bocova*, 412 F.3d at 265–66 (same), *Reynoso-Lopez*, 369 F.3d at 280 (same), *and* Alimi v. Ashcroft, 391 F.3d 888, 892–93 (7th Cir. 2004) (same), *with Thapa*, 460 F.3d at 325 (holding that authority exists to stay unexpired voluntary departure period), *Obale*, 453 F.3d at 157 (same), *Bocova*, 412 F.3d at 266–70 (same), *Lopez-Chavez*, 383 F.3d at 654 (same), *and* El Himri v. Ashcroft, 344 F.3d 1261, 1262–63 (9th Cir. 2003) (same).

As the First Circuit in *Bocova* held:

> Although the IIRIRA eliminated our jurisdiction to review the BIA's decisions granting or denying voluntary departure, there is a meaningful distinction between reviewing a grant or denial of voluntary departure (which entails testing the order's substantive validity) and suspending the running of a voluntary departure period granted by the agency (which entails staying the operation of the order pending judicial review of the validity of the underlying removal decision).[150]

The Ninth Circuit in *Desta* similarly explained:

> [W]e [are not] being asked to extend the period for voluntary departure in contravention of INS regulations . . . . [I]f a stay is granted, the total time period for voluntary departure remains the same as that granted by the BIA. Once the mandate issues, typically 52 days after our decision, the alien will have the same amount of time to depart as when the stay was issued. Some of that time will have been used before the stay is issued, and some of it will remain. But the number of days remaining will be the same. Thus, while we are stopping the clock from running on the time petitioner has to depart voluntarily, we are not adding more time to that clock.[151]

The majority view that voluntary departure may be stayed rests primarily on the related theories that IIRIRA neither: (1) expressly precludes courts from granting such relief;[152] nor (2) displaces the circuit courts' general equitable power to issue injunctive relief.[153] Rather, the

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[150] 412 F.3d at 267 (citing *Lopez-Chavez*, 383 F.3d at 652; *Rife*, 374 F.3d at 615; *El Himri*, 344 F.3d at 1262; 8 U.S.C. §§ 1229c(f), 1252(a)(2)(B)(i) (2000)).

[151] 365 F.3d at 747 (citations omitted); *accord El Himri*, 344 F.3d at 1262 ("We conclude that the District Director's authority to extend voluntary departure does not limit this court's equitable authority to grant a stay of the voluntary departure time period.").

[152] *See Thapa*, 460 F.3d at 329 ("While Congress may restrict our power to grant stays, the restriction must come from some statutory provision.") (citations omitted); *Obale*, 453 F.3d at 156 (finding authority to stay voluntary departure "[i]nasmuch as . . . Congress has not explicitly denied this court jurisdiction over such a motion . . ."); *Bocova*, 412 F.3d at 267 ("We do not find any language in the IIRIRA itself that limits our authority to suspend the running of an unexpired voluntary departure period."); *Lopez-Chavez*, 383 F.3d at 654 ("[N]othing in IIRIRA divests us of the power to grant a stay tolling the time for departure until the completion of judicial review if the other prerequisites to such equitable relief are satisfied."); *Rife*, 374 F.3d at 615 ("Although Congress may restrict our power to grant stays, nothing in IIRIRA expressly precludes us from staying [the] part of the BIA's order [relating to voluntary departure]."). Notably, courts also invoked this reasoning in the pre-IIRIRA context when debating the courts' authority to reinstate voluntary departure. *See supra* Part II.C.

[153] *See, e.g.*, *Obale*, 453 F.3d at 157 ("Unlike the power to extend or reinstate the vol-

courts have explained, the INA's general judicial review provision in INA § 242(a)—which incorporates the provisions of the Hobbs Act[154] by reference[155]—provides sufficient authority to stay voluntary departure periods,[156] notwithstanding the surrounding provisions that might otherwise be construed to divest courts of the authority to do so.[157]

The specific section of the Hobbs Act on which the courts have relied, 28 U.S.C. § 2349(b), provides that "the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the [agency] order pending the final hearing and determination of the petition."[158] While recognizing that judicial review is no longer technically barred by an alien's departure from the United States, some courts have hypothesized that "meaningful judicial review" of the underlying order could nevertheless be vitiated as a practical matter for an alien who may be killed or imprisoned upon return to his home country, thus depriving the alien of the potential benefits of a successful appeal.[159]

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untary departure period, the power to stay it is part of the federal courts' traditional equitable powers."); *Bocova*, 412 F.3d at 266–67; *Lopez-Chavez*, 383 F.3d at 653 ("[C]ourts retain the equitable power to stay voluntary departure orders, notwithstanding the restrictions that exist under IIRIRA, when such an action is taken to preserve meaningful judicial review."); *Rife*, 374 F.3d at 615 ("The grant or denial of a stay pending appeal is a customary part of the judicial function." (citing FED. R. APP. P. 8)).

[154] 28 U.S.C. §§ 2341–2351 (2000).

[155] *See* INA § 242(a); 8 U.S.C. § 1252(a)(1) (2000) ("Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28 [the Hobbs Act] . . . .").

[156] *See, e.g.*, *Obale*, 453 F.3d at 156 ("[IIRIRA's] provisions may suggest that we have no jurisdiction to review a motion for a stay of voluntary departure, but they do not so provide explicitly."); *Bocova*, 412 F.3d at 266–67 (relying on 28 U.S.C. § 2349(b) of the Hobbs Act, as incorporated in 8 U.S.C. § 1252(a)(1)); *Rife*, 374 F.3d at 615–16 (same).

[157] *See Desta*, 365 F.3d at 746 ("[W]e narrowly construe the sections of IIRIRA limiting judicial review and the exercise of courts' traditional equitable powers. . . . The Supreme Court has recently admonished that we should not construe a statute to displace courts traditional equitable authority absent the clearest command, or an inescapable inference to the contrary." (quotation marks and citation omitted)); *see also Bocova*, 412 F.3d at 267 ("[W]e think that if it were Congress's intention to divest the courts of appeals of authority to suspend voluntary departure periods, it would have expressed this intention in a much more direct and pointed fashion."); Thapa v. Gonzales, 460 F.3d 323, 329–30 (2d Cir. 2006) (also holding that the "totality of the legislative scheme" does not preclude the court from issuing a stay of voluntary departure).

[158] Hobbs Act § 9(b), 28 U.S.C. § 2349(b); *see Bocova*, 412 F.3d at 266–67 (expressly relying on Hobbs Act § 9(b)); *Rife*, 374 F.3d at 615–16 (same). In *Obale*, the Third Circuit relied instead on Hobbs Act § 9(a), 28 U.S.C. § 2349(a), which confers jurisdiction over the "proceeding," in conjunction with its general equitable authority to issue injunctive relief in connection with proceedings over which it has jurisdiction. *See* 453 F.3d at 156.

[159] *See, e.g.*, *Lopez-Chavez*, 383 F.3d at 651 ("Although leaving the country no longer moots an alien's appeal . . . departure . . . subjects the alien, at least in an asylum case, to the risk that she will suffer the very persecution at issue in the proceeding (which obviously can include imprisonment or death) before the appeal can be completed."); *Zazueta-Carrillo*, 322 F.3d at 1177 ("Without our equitable authority to stay the availability of voluntary departure periods, . . . [an alien] would be faced with having to leave forthwith to preserve the benefits of voluntary departure, risking nonreturn in spite of a potentially meritorious case."); *see also Desta*, 365 F.3d at 748 (noting the potential dangers facing an asylum applicant who voluntarily departs to his or her home country).

Accordingly, the majority of circuit courts have held that where an alien has made a timely request for a stay of voluntary departure,[160] judicial authority exists to grant this equitable relief. The decision as to whether the court will grant such a stay of voluntary departure generally follows the traditional four-pronged test governing requests for stays of removal. Specifically, an alien must demonstrate: (1) a likelihood of success on the merits of the underlying appeal; (2) irreparable harm absent a stay; (3) that the balance of interests weighs in favor of granting a stay; and (4) that a stay would not be contrary to the public interest.[161]

2. The Minority Position that No Judicial Authority Exists To Stay Voluntary Departure

In *Ngarurih v. Ashcroft*,[162] the Fourth Circuit parted ways from the majority of circuit courts by holding that the same considerations that preclude courts from reinstating voluntary departure likewise preclude courts from staying voluntary departure periods.[163] The *Ngarurih* court clarified

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[160] Within the majority camp, the courts are divided as to whether the alien must make a separate and express request for a stay of voluntary departure. The Sixth, Eighth, and Ninth Circuits have been willing to treat an alien's request for a stay of removal as implicitly encompassing a request for a stay of voluntary departure. *See* Macotaj v. Gonzales, 424 F.3d 464, 466–67 (6th Cir. 2006); *Rife*, 374 F.3d at 616; *Desta*, 365 F.3d at 748. The First, Second, and Seventh Circuits have rejected this view. *See* Iouri v. Ashcroft, 484 F.3d 172, 180–81 (2d Cir. 2006); *Bocova*, 412 F.3d at 268; Alimi v. Ashcroft, 391 F.3d 888, 892 (7th Cir. 2004). The Sixth, Eighth, and Ninth Circuit courts' willingness to construe a motion for a stay of removal as encompassing a stay of voluntary departure (even when no such request has been made by the alien, and even where the Government has not had an opportunity to respond) suggests a strongly results-driven decision-making process.

[161] *See, e.g.*, *Obale*, 453 F.3d at 161; *Bocova*, 412 F.3d at 269–70; *cf. El Himri*, 344 F.3d at 1262–63 (applying a modified version of this test, requiring either "(1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and that the balance of hardships tips sharply in the petitioner's favor." (quotation marks and citations omitted)). Although beyond the scope of this Article, either formulation of the test is somewhat incongruous in the context of voluntary departure orders. First, the more likely it is that an alien is going to succeed on the merits of his asylum appeal, the less need there is for a judicial stay of voluntary departure, as that alien will likely obtain a more favorable remedy. Second, the "irreparable harm" consideration operates differently in motions to stay removal than in the context of motions to stay voluntary departure. An alien seeking to stay removal may be subject to involuntary deportation if the motion is denied. By contrast, if a motion to stay voluntary departure is denied, the alien can separately obtain a stay of removal without having to depart the country. Finally, whereas considerations of hardship and policy generally favor the granting of a stay of removal, the same cannot be said in the context of staying an alien's voluntary departure period. *See infra* text accompanying notes 210–212 (discussing policy considerations in connection with stays of voluntary departure).

[162] 371 F.3d 182 (4th Cir. 2004).

[163] *See id.* at 193–96. In *Hadi v. Att'y Gen.*, No. 03-3343, 152 F. App'x 224 (3d Cir. Oct. 27, 2005), the Third Circuit concluded that it lacked jurisdiction to issue a stay of the alien's departure period, finding that a stay of the voluntary departure period had the "same effect" of extending the alien's time to voluntarily depart. *See id.* at 229–30. However, in the Third Circuit's subsequent decision in *Obale*, a different panel of judges determined that the issue remained one of first impression in the Third Circuit, as *Hadi* was a non-

that "Congress'[s] expressed intention" in IIRIRA was to "preserve the exercise of executive discretion in granting voluntary departure" and that "it is the executive rather than the judicial officers who decide when an alien must depart . . . ."[164]

Having concluded that it lacked statutory authority to reinstate petitioner's voluntary departure period under 8 U.S.C. § 1252(a)(2)(B) (agreeing with the majority of circuits in this respect), the Fourth Circuit also determined, over a dissenting opinion,[165] that it could not issue a stay of voluntary departure by resort to the court's general equitable power under 28 U.S.C. § 2349(b).[166] The court explained that "since we lack jurisdiction over the BIA's order granting voluntary departure, there is nothing before us to stay."[167] Stated otherwise, the court found that 28 U.S.C. § 2349(b) is inapplicable to voluntary departure orders, and thus the orders could not be "operate[d]" upon.[168]

The Fourth Circuit also rejected the notion, advanced under the majority view, that a stay of voluntary departure may be necessary to preserve "meaningful judicial review" over appeals by asylum applicants who may be "killed or imprisoned and thus unable to return to the United States . . . ."[169] The appropriate equitable remedy for these concerns, the court explained, is a stay of removal (which the INA expressly permits on a case-by-case basis),[170] and not a stay of voluntary departure.[171]

Moreover, as a matter of policy, the court reasoned that aliens should not be permitted to "take the benefits of voluntary departure without bearing any of the costs."[172] In this regard, the court explained that "an alien considering voluntary departure must decide whether an exemption from the ordinary bars on subsequent relief is worth the cost of returning to the home country within the period specified . . . . [T]he alien takes all the benefits and all the burdens of the statute together."[173] Accordingly, the

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precedential decision. 453 F.3d at 156–57 n.4. The *Obale* panel went on to hold that voluntary departure periods could be stayed. *See id* at 156.

[164] 371 F.3d at 193 (quoting Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1172 (9th Cir. 2003)).

[165] *Id.* at 197 (Gregory, J., dissenting) (expressing a view consistent with the majority of circuits that "the IIRIRA divests [the courts] of jurisdiction to reinstate [an alien's] voluntary departure period, [but not] from staying [it]").

[166] *See id.* at 193–95.

[167] *Id.* at 194.

[168] *Id.*; *see also id.* at 195 ("We are not at liberty to apply equitable remedies to [the voluntary departure order], certainly not in a way that contravenes the statutory scheme." (citing INS v. Pangilinan, 486 U.S. 875, 883 (1988) ("[C]ourts of equity can no more disregard statutory . . . requirements and provisions than can courts of law.")).

[169] *Id.* at 194 (quoting *id.* at 197–98 (Gregory, J., dissenting)).

[170] *See* INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3) (2000).

[171] *See Ngarurih*, 371 F.3d at 194.

[172] *Id.*

[173] *Id.*

Fourth Circuit held that it lacked authority either to reinstate or stay an alien's voluntary departure period.[174]

D. Courts that Have Taken No Position

To date, the issue of whether judicial authority exists to stay voluntary departure periods remains open in the Fifth, Tenth and Eleventh Circuits. If and when the issue is decided by these courts, they should adopt the minority approach, for the reasons discussed below.

IV. TAKING SIDES: THE MINORITY RULE THAT AN ALIEN'S VOLUNTARY DEPARTURE PERIOD MAY NOT BE STAYED BY THE COURTS IS THE CORRECT APPROACH

For the reasons explained below, the minority rule most comports with congressional intent while respecting the Executive's sole authority over voluntary departure deadlines, and is therefore the correct approach. The majority's rule, by contrast, rests on flawed and illogical reasoning, exceeds the scope of judicial authority set by Congress, encroaches on the Executive's power in the process, and promotes poor policy.[175]

A. The Majority Rule Upsets Congressional Intent To Preclude Judicial Interference with the Voluntary Departure Program

1. No Statutory Authority Exists for Courts To Stay Voluntary Departure

The majority rule draws a rather dubious distinction between the impermissible "extension" of the voluntary departure period and the permissible "staying" of the departure period. This plainly exalts form over substance; the tolling of an alien's departure period is the functional equivalent of an extension of the period. Regardless of the label, a "stay" impermissibly affords the alien substantially more time to remain in the United States without forfeiting the benefits of voluntary departure.

While the Second Circuit has attempted to justify this distinction on the ground that the "same legal considerations [do not] necessarily apply to both [reinstatement and tolling],"[176] it is Congress's intent that must inform both inquiries. Although it is not clear what "legal considerations"

[174] *See id.* at 195 ("Because Congress left it to executive officers, not this court, to determine how long an alien should have to exercise voluntary departure, we cannot reinstate voluntary departure or otherwise alter the BIA's order in this respect.").

[175] *But see* Chelsea Walsh, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 FORDHAM L. REV. 2857, 2891–95 (2005) (promoting the majority view that courts can issue stays of voluntary departure periods).

[176] *See* Thapa v. Gonzales, 460 F.3d 323, 332 (2d Cir. 2006).

the court had in mind, it is simply implausible that Congress intended to preclude reinstatement while allowing tolling, since the result is substantially the same. Under the majority view, an alien could obtain voluntary departure, file a petition for review along with a motion to stay voluntary departure, wait out the appellate review process, and if unsuccessful, still demand the full benefits of voluntary departure—a scenario that is "not at all what Congress intended."[177] Indeed, the statutory scheme strongly—if not unequivocally—demonstrates otherwise.

As a threshold matter, the absence of an express statutory bar to a judicial stay of voluntary departure cannot itself justify the existence of such authority. As discussed above, "federal courts operate only in the presence rather than the absence of statutory authority."[178] Thus, the starting point for the analysis is not whether Congress expressly precluded judicial authority to stay voluntary departure but, rather, whether Congress granted this authority in the first place.

There has been no such conferral. While 28 U.S.C. § 2349(a) generally provides the circuit courts jurisdiction to review final removal orders and § 2349(b) generally provides the courts a degree of equitable authority in connection with their review of such orders, that equitable authority is not boundless.[179] By its plain terms, § 2349(b) grants courts authority to suspend operation only of "the order" under review.[180] Because voluntary departure orders are immunized from judicial review,[181] they cannot properly be deemed "orders" subject to the authority to suspend provided for in § 2349(b).[182]

Moreover, the general Hobbs Act procedures, as incorporated by reference in INA § 242(a)(1), are necessarily subject to the INA's surrounding judicial review provisions.[183] Admittedly, there is no express provision stripping courts of authority to toll voluntary departure. Thus, the approach of viewing each of the relevant INA provisions in a vacuum—as some in the majority camp have done—may reasonably lead to the con-

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[177] *Ngarurih*, 371 F.3d at 195.

[178] Castaneda v. INS, 23 F.3d 1576, 1580 (10th Cir. 1994) (quotation marks and citations omitted); *see also supra* text accompanying notes 51–54.

[179] *See* Seguros Banvenez S.A. v. S/S Oliver Drescher, 761 F.2d 855, 863 (2d Cir. 1985) ("[E]ven where equity jurisdiction exists, it generally is recognized that the equitable remedial powers of the court are not unlimited.").

[180] *See* Hobbs Act § 9(b), 8 U.S.C. § 2349(b) ("[T]he court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the [agency] order pending the final hearing and determination of the petition.").

[181] *See* INA §§ 240B(f), 242(a)(2)(B)(i), 8 U.S.C. §§ 1229c(f), 1252(a)(2)(B)(i) (2000) (withdrawing jurisdiction to review order granting or denying voluntary departure).

[182] *See Ngarurih*, 371 F.3d at 193–95; *see also* Hobbs Act § 9(b), 28 U.S.C. § 2349(b).

[183] *See, e.g.*, Stone v. INS, 514 U.S. 386, 392–401 (1995) (holding that the general rule under the Hobbs Act that a motion to reconsider tolls the time in which to file a petition for review did not apply in light of the surrounding judicial review provisions in the INA).

clusion that Congress has not limited courts' equitable authority with respect to stays of voluntary departure.[184]

This divide-and-conquer approach does not provide the best measure of Congress's intent. Rather, that intent is properly gleaned from consideration of the INA's judicial review and voluntary departure provisions as a whole,[185] as viewed against the backdrop of the pre-IIRIRA circuit split concerning the issue of reinstatement that Congress addressed in the 1996 IIRIRA enactment.

2. *Indicators in IIRIRA that Congress Intended the Minority Approach*

To begin with, IIRIRA's repeal of the former jurisdictional bar applicable to aliens who departed the United States eliminated the pre-IIRIRA concern expressed by some courts that an alien was effectively forced to choose between the benefits of voluntary departure and a judicial appeal. Thus, after IIRIRA's enactment, aliens are no longer forced to make this choice, because they may both voluntarily depart and petition for review from abroad.[186] Congress thus clearly intended to bifurcate an alien's agreement to voluntarily depart from the judicial review process.[187]

Further, IIRIRA's prohibition of judicial review of voluntary departure decisions[188] demonstrates that Congress intended to insulate the Attorney General's determinations concerning voluntary departure periods from judicial intervention.[189]

Moreover, where Congress has intended to confer judicial authority to issue a stay in connection with a removal order, it has done so expressly.[190] Congress explicitly granted courts authority to issue a stay of removal pending resolution of a petition (with a pertinent exception precluding courts from ordering a stay of an alien's removal pending con-

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[184] *See, e.g.*, Thapa v. Gonzales, 460 F.3d 323, 329–32 (2d Cir. 2006).

[185] *See, e.g.*, Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) (noting that inferences of congressional intent should be "drawn from the statutory scheme as a whole"); Richards v. United States, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy." (quotation marks and citations omitted)).

[186] *See* Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1171 (9th Cir. 2003) (stating in the post-IIRIRA reinstatement context that "Congress's desire to expedite removal by voluntary assent now does not conflict with the alien's ability to pursue a petition for review").

[187] *See Ngarurih*, 371 F.3d at 192.

[188] *See* INA § 240B(f), 242(a)(2)(B)(i), 8 U.S.C. §§ 1229c(f), 1252(a)(2)(B)(i) (2000).

[189] *See* Rife v. Ashcroft, 374 F.3d 606, 614–15 (8th Cir. 2004) (explaining in the post-IIRIRA reinstatement context that "IIRIRA abolished judicial authority to review discretionary grants or denials of voluntary departure; only the Attorney General now has authority to grant this statutory benefit"); Reynoso-Lopez v. Ashcroft, 369 F.3d 275, 280 (3d Cir. 2004) (same); *Zazueta-Carrillo*, 322 F.3d at 1171 (same).

[190] *See* INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (2000).

sideration of any claim with respect to voluntary departure).[191] The fact that Congress provided no such express judicial authority to stay voluntary departure periods reflects Congress's intent to draw a distinction between the types of equitable relief available. As the Supreme Court has explained, "where Congress includes particular language in one section of [the INA] but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[192]

Finally, IIRIRA's statutory cap on voluntary departure periods further demonstrates Congress's intent to shorten the time in which an alien may voluntarily depart after agreeing to do so.[193] The descending offers of 120 versus 60 days to voluntarily depart (the former being available only prior to a full hearing before an immigration judge) reflect Congress's intent both to encourage aliens to forego protracted litigation and to limit voluntary departure relief to a measure proportional to the time and effort spent by the Government in litigating an alien's challenge to removal.[194]

In sum, the inescapable inference to be drawn from the legislative scheme as a whole is that Congress intended to preclude the courts from taking any action with respect to voluntary departure orders, including "stopping the clock" on departure periods.

3. *Contrary to the Majority View, Meaningful Judicial Review Is Not Lost*

The majority view's assertion that "meaningful judicial review" cannot be had without a stay of voluntary departure[195] is largely misplaced. In light of Congress's repeal of the former jurisdictional bar found in Section 106(c) of the INA, aliens may now both voluntarily depart and obtain judicial review of their underlying removal order from abroad.[196] Moreover, meaningful judicial review is not vitiated by the possibility, noted by some courts, that an alien may be killed or imprisoned upon return to his or her home country.[197] While these concerns weigh in favor of granting a stay of removal, they do not justify the equitable grant of a stay of voluntary departure for at least two reasons.

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[191] *See id.* § 240B(f), 8 U.S.C. § 1229c(f).

[192] INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (quotation marks and citations omitted)).

[193] *See* INA § 240B(a)(2)(A), (b)(2), 8 U.S.C. § 1229(a)(2)(A), (b)(2) (2000).

[194] *See supra* text accompanying notes 120–121.

[195] *See, e.g.*, Lopez-Chavez v. Ashcroft, 383 F.3d 650, 653 (7th Cir. 2004) ("[C]ourts retain the equitable power to stay voluntary departure orders, notwithstanding the restrictions that exist under IIRIRA, when such an action is taken to preserve meaningful judicial review.").

[196] *See Ngarurih*, 371 F.3d at 192; *Zazueta-Carrillo*, 322 F.3d at 1171.

[197] *See, e.g.*, *Nwakanma*, 352 F.3d at 327; Desta v. Ashcroft, 365 F.3d 741, 748 (9th Cir. 2004).

First, an alien who is granted voluntary departure can depart to any country of his choice (provided that he has the proper travel documents),[198] and thus need not return to a country in which he genuinely fears the type of harm—for example, death or imprisonment—that might render a pending petition meaningless. Second, if the alien genuinely fears death or imprisonment in his native country, and even if that country is the only one that will accept the alien into its borders, the alien may simply choose to let the voluntary departure period lapse.[199] That is, the alien is not "forced" to leave.[200] Although the alien may be subject to the attendant civil penalties if he or she chooses to remain past the voluntary departure deadline,[201] the court's review of the pending petition will not be rendered meaningless.

B. The Judiciary's Encroachment on the Executive's Authority over Voluntary Departure Orders

The majority rule not only oversteps judicial boundaries by ignoring Congress's intent, but it also impermissibly encroaches on the authority and function of the Executive Branch in administering voluntary departure orders. The majority's willingness to issue a stay destroys the essence of the voluntary departure bargain—namely, the alien's exemption from the ordinary penalties of removal in exchange for his agreement to depart quickly at no additional cost to the Government.[202] Several courts have recognized as much in the reinstatement context, in terms fully applicable here:

> The purpose of authorizing voluntary departure in lieu of deportation is to effect the alien's prompt departure without further trouble to the [INS]. Both the aliens and the [INS] benefit thereby. But if the alien does not depart promptly, so that the [INS] becomes involved in further and most costly procedures by his attempts to continue his illegal stay here, the original benefit to the [INS] is lost. And if, after years of delay, he is again rewarded with the opportunity for voluntary departure which he has previously spurned, what incentive is there for any alien simi-

[198] *See* 8 C.F.R. § 1240.26(b)(3), (c)(3) (2005); *see also* Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir. 2004).

[199] *See Ngarurih*, 371 F.3d at 194 n.12 ("[V]oluntary departure is, from beginning to end, voluntary . . . . Even if [an alien] requests the relief and obtains it, the alien may later reject it by overstaying the period specified for departure.").

[200] *Id.*

[201] *See* INA § 240B(d), 8 U.S.C. § 1229c(d) (2000).

[202] *See* Alimi v. Ashcroft, 391 F.3d 888, 892 (7th Cir. 2004) ("The United States offers benefits for voluntary departure; an alien cannot resist to the bitter end and still claim those benefits.") (emphasis omitted).

> larly circumstanced to depart promptly when first given the opportunity?[203]

The answer, of course, is that there is no incentive under these circumstances.

Ultimately, an alien considering whether to apply for voluntary departure must decide whether an exemption from the ordinary bars of removal is worth the cost of departing the United States within the time prescribed by the Attorney General. This may be a difficult choice for some aliens, especially in light of the sanctions that may attach if the alien agrees to voluntarily depart yet fails to do so.[204] But once the alien opts for voluntary departure, the courts should enforce both sides of the bargain to the fullest. Otherwise, aliens will be encouraged to apply for and accept voluntary departure without any incentive or intent to honor their part of the deal, to the Government's detriment. This result is squarely at odds with the "general policy of respect for [the Executive] [B]ranch of the government."[205] Having made the choice to expeditiously depart in exchange for the benefits of voluntary departure, the alien should do so, even if it means having to pursue a judicial appeal from abroad.

C. The Majority Rule Promotes Poor Policy

The majority view also promotes poor policy in at least two other respects. First, if aliens are allowed to remain in the country for far longer than agreed, while conferring no concomitant benefit on the Government, the agency may be more inclined to oppose requests for voluntary departure, resulting in fewer grants of such relief to aliens who may otherwise have had every intention of voluntarily departing. While a decrease in the number of voluntary departure grants is detrimental to both aliens and the Government, the Government for its part should not be expected to simply acquiesce in applications for voluntary departure if it has no reasonable expectation of receiving its end of the bargain.

Equally troublesome is the incentive that the majority rule creates for aliens to file frivolous judicial appeals.[206] The alien can remain in the

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[203] Ballenilla-Gonzalez v. INS, 546 F.2d 515, 521 (2d Cir. 1976) (quoting Fan Wan Keung v. INS, 434 F.2d 301, 304–05 (2d Cir. 1970)); *accord* Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1173 (9th Cir. 2003); Reynoso-Lopez v. Ashcroft, 369 F.3d 275, 283–84 (3d Cir. 2004).

[204] *See Ngarurih*, 371 F.3d at 194 n.12 (indicating that the alien's "choice carries real consequences").

[205] *See Zazueta-Carrillo*, 322 F.3d at 1173 (indicating that reinstatement of voluntary departure would unduly undermine the Attorney General's exclusive authority over voluntary departure).

[206] The Ninth Circuit expressed this concern in the context of deciding that no reinstatement authority exists. *Zazueta-Carrillo*, 322 F.3d at 1174. Yet, the court ignored this concern where it found authority to stay an alien's voluntary departure period. *See* El Himri v. Ashcroft, 344 F.3d 1261, 1262–63 (9th Cir. 2003); Desta v. Ashcroft, 365 F.3d

United States while retaining the full benefits of voluntary departure, i.e., the option to depart at his convenience without the sanctions and stigma associated with a removal order. This incentive exists regardless of how weak the alien's claims may be.[207] And it is of particular concern in today's climate, where the number of judicial appeals filed by aliens has increased dramatically over the past several years, with no slowing in sight.[208]

V. Restoring the Bargain of Voluntary Departure

As it currently stands, aliens in seven circuits are receiving a windfall in the form of a stay of their voluntary departure periods, whereas aliens in at least one circuit are not similarly benefiting.[209] Both judicial views cannot be correct. Either the majority is overstepping its judicial boundaries, or the minority is not going far enough to protect the statutory rights of aliens in this country. A nationwide resolution, therefore, is in order. The two primary vehicles for cure are judicial resolution by the Supreme Court or a legislative fix by Congress. Neither would be unprecedented, as both branches of Government have not hesitated in the past to correct overreaching by the circuit courts in immigration matters.[210]

The author is not aware of any case pending before the Supreme Court that would judicially resolve on a nationwide basis the issue discussed herein, as certiorari was not sought on this issue in any of the cases discussed above in Part III. In the event that the Fifth, Tenth or Eleventh Circuits address the issue, and that certiorari is sought, the Supreme Court should grant certiorari and resolve the issue in line with the minority approach for the reasons discussed above in Part IV.

741, 746–48 (9th Cir. 2004).

[207] *See Zazueta-Carrillo*, 322 F.3d at 1173–74 ("If the voluntary departure period did not begin until after our review . . . aliens would be encouraged to file frivolous petitions for review. An alien granted the privilege of voluntary departure could simply petition this court—however meritless his petition—and thereby gain many additional months (even years) in the United States . . . ."); *cf. Ballenilla-Gonzalez*, 546 F.2d at 521 ("[O]ur government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure from the country as long as possible.").

[208] *See* John R. B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 44 (2005) (noting that five times as many petitions for review had been filed between April 2002 and September 2004 as had been filed during the preceding two-and-a-half-year period).

[209] *See supra* Part III.

[210] *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (amending several provisions of the INA to overturn judicial application of certain laws and standards of review relating to asylum); INS v. Ventura, 537 U.S. 12, 16 (2002) (reversing Ninth Circuit asylum decision in which the court had engaged in a fact-finding role that had been delegated by Congress to the Attorney General and explaining that circuit courts may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency" (quoting SEC v. Chenery Corp., 713 U.S. 80, 88 (1943))).

As a practical matter, then, the debate is more likely to be resolved by Congress, in which case the issue should be resolved in a way consistent with the minority approach. Indeed, a legislative fix appears on the horizon, which, if enacted into law, would not only eliminate the judicially sanctioned delay of voluntary departure now engendered under the majority rule but also the delay occasioned during the administrative review process.[211]

A. *House Resolution 4437*

On December 16, 2005, the House of Representatives passed a bill, H.R. 4437, which would heighten border security and intensify enforcement of the immigration laws.[212] Embedded within this bill are provisions that, if enacted into law, would operate to overhaul the current voluntary departure scheme.[213]

Under the proposed amendments, an alien who applies for and accepts voluntary departure after removal proceedings have commenced must do so by written agreement with the Secretary of Homeland Security.[214] Any such agreement must include, among other things: (1) a maximum grant of forty-five (rather than sixty) days[215] in which to voluntarily depart; (2) an alternative order of removal if the alien fails to depart; and (3) an express waiver by the alien of his right to appeal the alternative order of removal.[216] If the alien nevertheless appeals to the BIA, the appeal would operate to void the voluntary departure agreement in its entirety—eliminating both the privilege of voluntarily departing and the sanctions for failing to do so.[217]

Under the House's proposed scheme, neither the BIA nor the courts would have any role in setting, extending, or tolling voluntary departure. As an initial matter, the BIA would never have occasion to pass on an alien's voluntary departure period because an appeal to the BIA and the right to

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[211] *See generally* H.R. 4437, 109th Cong. (1st Sess. 2005); S. 2611, 109th Cong. (2d Sess. 2006). Whether or not Congress should remove the BIA's authority to toll or extend voluntary departure during an administrative appeal is a related, but separate, policy issue beyond the scope of this Article.

[212] *See generally* H.R. 4437, 109th Cong. (1st Sess. 2005). Included in the bill are provisions that would: (1) make an alien's unlawful presence a felony offense; (2) subject individuals or organizations who knowingly or recklessly "assist" illegal aliens to significant criminal penalties; (3) increase the penalties for immigration related document fraud; (4) authorize state and local police to enforce some of the immigration laws; and (5) require the Department of Homeland Security to erect up to 700 miles of fencing along the Mexican border. *See id.*

[213] *See* H.R. 4437 § 208; *see also* H.R. REP. No. 109-345(I) (2005) (describing the proposed amendments and the reasons for them).

[214] *See* H.R. 4437 § 208(a).

[215] *Compare id. with* INA § 240B(b)(2), 8 U.S.C. § 1229(b)(2) (2000) (providing for a maximum of sixty days to depart voluntarily).

[216] *See* H.R. 4437 § 208(a).

[217] *See id.*

voluntarily depart would be mutually exclusive.[218] Nor would the BIA have any authority to extend or toll an alien's departure period, as the sole authority over voluntary departure would be vested in the Secretary of Homeland Security (rather than the Attorney General or the BIA as his delegate).[219]

The circuit courts, for their part, would be twice-removed from any opportunity to toll or otherwise extend voluntary departure periods. First, courts may review only final orders of removal from the BIA,[220] and such orders, for the reasons just explained, cannot include periods of voluntary departure under the proposed amendments. Second, out of an apparent abundance of caution, the House bill also includes the following provision:

> Notwithstanding any other provisions of law (statutory or nonstatutory), including section 2241 of Title 28, United States Code, or any other habeas corpus provision, and section 1361 and 1651 of such title, no court shall have jurisdiction to affect, reinstate, enjoin, delay or toll the period allowed for voluntary departure under this section.[221]

These amendments were clearly designed as a direct response to the current circuit split. As recognized in the House Report to H.R. 4437:

> In all too many cases, a grant of voluntary departure is merely a prelude to years of further litigation in which the alien continues to benefit from delay of removal. Under current law, an alien who receives voluntary departure may appeal his immigration case first to the Board of Immigration Appeals, and then to the Court of Appeals. Many circuit courts will toll the voluntary departure period pending review. At the end of this process, perhaps years after the original voluntary departure grant, and after denial of every appeal, the alien can then leave the United States in accordance with the original voluntary departure grant.[222]

The House bill would thereby end the practice of staying voluntary departure.

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[218] *See id.*

[219] *See id.*

[220] *See* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2000); *see also* INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B) (providing that a deportation order becomes final upon the earlier of when the BIA has ruled on the order, or the time for seeking BIA review has expired).

[221] H.R. 4437 § 208(b).

[222] H.R. REP. NO. 190-345(I), 109th Cong. (1st Sess. 2005).

B. Senate Resolution 2611

On May 25, 2006, the Senate passed a comprehensive immigration reform bill, S. 2611, a section of which would also expressly preclude the courts from meddling in voluntary departure.[223] Specifically, § 211(a)—like the House version—requires written voluntary departure agreements with Homeland Security, makes the rights of voluntary departure and an administrative appeal to the BIA mutually exclusive, and states expressly that the courts may not "affect, reinstate, enjoin, delay, stay, or toll" voluntary departure periods.[224]

C. The Proposed Legislation Should Be Enacted, with a Minor Revision

The House and Senate bills are now before a joint committee charged with the difficult task of reconciling the bills, which include hotly contested issues concerning, among other things, temporary work status visas for illegal immigrants and citizenship opportunities for certain illegal aliens currently in the country.[225] As such, the fate of the proposed voluntary departure amendments embedded within the bills are very much uncertain. Regardless of whether the respective houses of Congress can reach a compromise consensus on an immigration reform bill—which is looking less and less likely[226]—Congress should, at a minimum, pass laws to resolve issues on which both houses apparently agree, such as with respect to voluntary departure.[227]

The proposed voluntary departure amendments reflect both houses' awareness that the Government is being deprived of much of the benefits of the voluntary departure bargain, by having to expend significant amounts of money and resources litigating appeals taken by aliens who accept voluntary departure yet choose to fight until the "bitter end" on alternative claims for relief from removal.[228] Both houses also seem to agree that the solution, at least in part, is to unequivocally divest authority from the courts to extend or toll voluntary departure periods pending judicial review.

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[223] *See generally* S. 2611, 109th Cong. (2d Sess. 2006).

[224] *Id.* § 211(a).

[225] *Compare* H.R. 4437, *with* S. 2611. For a discussion on the nature and substance of the bipartisan and bicameral debates, see, for example, Carl Hulse & Jim Rutenberg, *Divide Remains as Bush Pushes On Immigration*, N.Y. TIMES, May 17, 2006, at A1; Jonathan Weisman & Jim VandeHei, *Immigration Bill Lobbying Focuses on House Leaders; With Senate in Hand, Bush May Face a Skeptical GOP Base*, WASH. POST, May 1, 2006, at A5; *Frist Says He Will Revive Immigration Bill*, MSNBC.com, Apr. 21, 2006, *available at* http://www.msnbc.msn .com/id/12424473 (last visited Oct. 18, 2006).

[226] *See, e.g.*, Adam Nagourney et al., *Bush's Immigration Plan Stalled as House G.O.P. Grew Anxious*, N.Y. TIMES, June 25, 2006, § 1, at 1 (explaining how the House has effectively sidelined the proposed immigration measures).

[227] *Compare* H.R. 4437 § 208, *with* S. 2611 § 211.

[228] Alimi v. Ashcroft, 391 F.3d 888, 892 (7th Cir. 2004).

While the proposed amendments clearly were drafted with the circuit split in mind, the proposals, remarkably, do not expressly refer to the primary statutory provision upon which the majority of courts have relied in staying voluntary departure: 28 U.S.C. § 2349(b).[229] Perhaps the drafters felt that an express reference to this statute was unnecessary in light of the surrounding provisions; or perhaps the omission was the product of oversight. Regardless, the proposed amendments should be revised to expressly reference 28 U.S.C. § 2349(b), along with the other provisions to which the proposed legislation makes reference.[230] Although it might seem highly unlikely for the courts to construe the omission of section 2349(b) from the proposed amendments as an invitation to continue staying voluntary departure periods, the same might also have been said when IIRIRA was enacted. If any lesson is to be learned, Congress should leave no room for doubt this time around.

VI. CONCLUSION

However commendable their intentions, the majority of circuit courts have overstepped the boundaries of their authority by renegotiating the voluntary departure bargain that Congress intended. Whether by edict of the Supreme Court or Congress, the bargain should be restored. The best and fairest result is the one urged here, whereby the alien voluntarily departs expeditiously at no additional cost to the Government, free and clear of the bars that would otherwise attach if the alien were forcibly removed, while retaining the option to litigate the petition from abroad. This result is most consistent with what the parties bargained for at the time voluntary departure was granted, and it is what Congress intended in making voluntary departure available to aliens in the first place.

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[229] *See* H.R. 4437 § 208(b); S. 2611 § 211(a).

[230] H.R. 4437 § 208(b) (expressly referencing 28 U.S.C. §§ 2241 (habeas corpus), 1361 (mandamus), 1651 (All Writs Act) (2000)); S. 2611 § 211(a) (referencing the same provisions).

ARTICLE

BRINGING BALANCE TO INDIAN GAMING

MATTHEW L. M. FLETCHER*

This Article argues that the national debate on Indian gaming wrongly focuses on the issue of off-reservation gaming and other symptoms of the current imbalance in Indian gaming law, rather than addressing the fundamental reason for the imbalance. The Article first describes the history of Indian gaming law that led to Congress's enactment of the Indian Gaming Regulatory Act ("IGRA") in 1988 and explains the delicate balance that the IGRA created between state and tribal interests. The author suggests that the Supreme Court's Seminole Tribe decision in 1996 ruptured this balance by invalidating the IGRA provision that extended federal jurisdiction to claims against states for failure to negotiate gaming compacts with tribes in good faith. As a result of the imbalance, states have been able to impose revenue-sharing agreements of questionable legality and fairness on tribes. This, in turn, has led tribes to pursue expanded gaming opportunities off-reservation and to invoke a procedure of uncertain validity that allows the Secretary of the Interior to prescribe gaming compacts between tribes and states. The Article proposes a legislative fix designed to restore the intended balance of the IGRA in a politically salable manner. The primary elements of the proposal are ratification of all existing revenue sharing agreements to which the concerned tribes consent, a requirement that all future gaming compacts include revenue sharing, and ratification of the Secretary's procedure for prescribing fair gaming compacts.

The brewing national backlash against off-reservation Indian gaming may result in amendments to the Indian Gaming Regulatory Act ("IGRA" or "the Act")[1] that would prohibit off-reservation gaming. The backlash has resulted from misconceptions that Indian tribes, their "attack-dog" lobbyists,[2] and their "shady" gaming management and development companies[3] could impose Vegas-style casino operations in Middle American

* Assistant Professor, Michigan State University College of Law, and Director, Michigan State University Indigenous Law and Policy Center. J.D., University of Michigan Law School, 1997; B.A., University of Michigan, 1994. Appellate Judge, Hoopa Valley Tribe, Pokagon Band of Potawatomi Indians, and Turtle Mountain Band of Chippewa Indians. Enrolled Member, Grand Traverse Band of Ottawa and Chippewa Indians. The author wishes to thank Kristen Burge, Kirsten Carlson, Brian Kalt, Del Laverdure, John Petoskey, Bill Rice, Angela Riley, Wenona Singel, Alex Skibine, and Kevin Washburn for their comments on earlier versions of this Article.

[1] Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721 (2000).

[2] *See* John Cochran, *Scrutiny on Tribes Keeps Stakes High,* CQ WEEKLY, Jan. 27, 2006, *available at* 2006 WLNR 1939588.

[3] *See, e.g.*, M. Neil Browne et al., *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casinio Gaming?*, 78 NEB. L. REV. 37, 51–52 (1999) (footnotes omitted).

communities that do not want them. The resulting debates over the amendments to the Act distract policymakers from the real imbalance in Indian gaming—the imbalance created by the stronger bargaining position of state governments relative to Indian tribes. This imbalance allows state governments to impose revenue sharing agreements of dubious legal validity on Indian tribes in exchange for the right to commence gaming operations. Indian tribes, in response to their weak bargaining position, have sought off-reservation opportunities to expand the size of a revenue pie that is shrinking as a result of these revenue-sharing agreements.

The agenda of the 109th Congress included hearings on off-reservation gaming, tribal lobbying matters, taking of land into trust for gaming purposes, and the regulation of Indian gaming.[4] All of these issues have legs when it comes to politics—they appear in the national news and inspire a substantial amount of passionate democratic debate.[5]

One could make a strong case that the congressional agenda is a result of a national backlash against Indian gaming.[6] Members of both houses

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[4] *See generally Oversight Hearing Before the S. Indian Affairs Comm. on In re Tribal Lobbying Matters*, 109th Cong. (2005); *Oversight Hearing on the Second Discussion Draft of Legis. Regarding Off-Reservation Indian Gaming Before the H. Resources Comm.*, 109th Cong., (2005); *Oversight Hearing on Draft Legis. to Amend the Indian Gaming Regulatory Act to Restrict Off-Reservation Gaming, and for other purposes Before the H. Resources Comm.*, 109th Cong. (2005).

[5] *See generally* STEVEN ANDREW LIGHT & KATHRYN R. L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 11–13 (2005) (discussing the controversies of Indian gaming); Peter Roper, *Off-Reservation Casinos Shock Congress*, PUEBLO CHIEFTAIN (COLO.), Sept. 25, 2005, *available at* 2005 WLNR 15178554; Jodi Rave, *Governors: Casinos Off Reservation Top Concern*, MISSOULIAN (MONT.), Mar. 31, 2005, at B1, *available at* 2005 WLNR 6020534 (discussing off-reservation gaming); Susan Schmidt & James V. Grimaldi, *Norton Ex-Aides Clash on Lobbyist's Influence; Lawyer Says He Accused Griles of Aiding Abramoff*, WASH. POST, Nov. 3, 2005, at A19, *available at* 2005 WLNR 17731764 (discussing tribal lobbying); Suzanne Gamboa, *Lobbyists Diverted Millions from Tribes; McCain asks Justice to Investigate the Trail of Billing, Money*, CHARLOTTE OBSERVER, June 23, 2005, at 14A, *available at* 2005 WLNR 9901208 (discussing tribal lobbying); Tu-Uyen Tran, *Council Gives Lukewarm Support; Vote Set for Monday*, GRAND FORKS HERALD, Oct. 11, 2005, at A1, *available at* 2005 WLNR 16434974 (discussing fee-to-trust-matters); John Stearns & Suzanne Struglinski, *McCain Aims to Strengthen Oversight of Tribal Gambling*, LAS VEGAS SUN, Sept. 22, 2005, at C3, *available at* 2005 WLNR 15438951 (discussing Indian gaming regulation and *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123 (D.D.C. 2005), where the court invalidated class III gaming regulations implemented by the National Indian Gaming Commission).

[6] *See, e.g.*, 151 CONG. REC. S13389, S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain) (noting a "backlash against Indian gaming generally"). *See generally Oversight Hearing Before the S. Indian Affairs Comm. on the Regulation of Indian Gaming*, 109th Cong. 12–13 (2005) (Statement of Kathryn R. L. Rand & Steven Andrew Light) ("At times, the claims made by tribal gaming's opponents may . . . set the tone of the public conversation about Indian gaming . . . [and] the agenda for public policy."), *available at* http://indian.senate.gov/2005hrgs/042705hrg/rand.pdf [hereinafter Rand & Light Testimony]; *The Impact of the U.S. Supreme Court's Recent Decision in Seminole v. Florida on the Indian Gaming Regulatory Act of 1988*, 104th Cong. 104–513 (1996) (statement of Franklin Ducheneaux) (noting "the distortion of [the right of Indian tribes to game] by the press and opponents of Indian gaming") [hereinafter Ducheneux Testimony].

of Congress have introduced legislation intending to limit off-reservation gaming, limit the taking of lands into trust for gaming purposes, expand regulation of Indian gaming, and increase restrictions on Indian lobbying activities.[7] The current climate on Capitol Hill in relation to Indian gaming is one of reform and may reflect the vast changes and growth in the Indian gaming industry since 1988.[8]

At the time of the enactment of IGRA in 1988, Senator McCain stated, "It is with great reluctance that I am supporting [IGRA]."[9] He lamented that "[t]ribes never banded together and offered their own gaming proposal."[10] When Senator McCain introduced his own legislation, more supportive of tribal sovereignty, he stated, "[u]nfortunately, I received no more than a handful of letters supporting this measure; only more calls for 'no legislation.' I believe Tribes and tribal organizations share part of the burden for the direction that Indian gaming legislation has taken."[11]

Senator McCain's "reluctant" support for IGRA underscores the realities of national politics and Indian affairs. Some legislation is "inevitable," despite efforts by tribes to call for "no legislation."[12]

Tribes and states are in need of a simple legislative fix that benefits both sides and cuts to the heart of the imbalance in IGRA. The solution to these salient political issues is not piecemeal legislative efforts to remedy the alleged problems with Indian gaming. These problems are symptoms of an imbalance in the overarching federal statutory scheme. The Act originally created a balanced and careful relationship between Indian tribes—and to a lesser extent, the federal government—and the various states.[13] The crux of that statutory scheme was a congressional waiver of

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[7] *See, e.g.*, To Amend the Indian Gaming Regulatory Act to Limit Casino Expansion, H.R. 3431, 109th Cong. (2005) (restricting off-reservation gaming and increasing state authority to restrict Indian gaming); Common Sense Indian Gambling Reform Act, H.R. 2353, 109th Cong. (2005) (increasing Indian gaming regulation, limiting off-reservation gaming, increasing regulation of tribal lobbying, and increasing state authority over Indian gaming); Indian Gaming Regulatory Act Amendments of 2005, S. 2078, 109th Cong. (2005) (expanding the National Indian Gaming Commission's regulatory authority and constricting the legal authority for off-reservation gaming expansion); To Amend the Indian Gaming Regulatory Act to Modify a Provision Relating to the Locations in Which Class III Gaming is Lawful, S. 1518, 109th Cong. (2005) (restricting lands where Indian gaming is authorized); National Indian Gaming Commission Accountability Act of 2005, S. 1295, 109th Cong. (2005) (increasing federal regulation of Indian gaming).

[8] 151 CONG. REC. at S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

[9] S. Rep. No. 100-446, at 33 (1988)

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See* Steven Andrew Light & Kathryn R. L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 271–73 (2004) (describing the intent of Congress to balance the interests of the three sovereigns); Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of* Seminole Tribe v. Florida, 29 ARIZ. ST. L.J. 121, 129–32 (1997) (describing the policy considerations of the Act); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 49 (1997) ("In the end, the 1988 Indian Gaming

state sovereign immunity that allowed Indian tribes to sue the states and force their governors to negotiate with tribes over gaming compacts.[14]

The Supreme Court, however, in *Florida v. Seminole Tribe of Florida*,[15] obliterated that balance in favor of the states.[16] In *Seminole Tribe*, the Court ruled that the congressional waiver of state immunity was invalid under the Eleventh Amendment, "significantly limiting the bargaining power of Indian tribes."[17]

Indian tribes and the federal government took several steps in order to alleviate the negative impact of *Seminole Tribe* on Indian gaming. Indian tribes and the states began to negotiate broader revenue sharing agreements,[18] a process some have labeled extortion of Indian tribes by states.[19] Meanwhile, the federal government, through the Secretary of the Interior, proposed an administrative fix to the *Seminole Tribe* problem that would allow the Secretary to promulgate class III gaming procedures for tribes that do not have the opportunity to negotiate a gaming compact.[20]

The fundamental cause of the disputes between tribes, tribal constituents, states, state constituents, private economic interests, and the federal government is the imbalance in the IGRA brought about by *Seminole Tribe*. The congressional agenda, as evidenced by the Senate Committee's hearing schedule and the subject matter of the various bills being debated, ignores the key issue of whether revenue sharing agreements contained in gaming compacts are valid in accordance with IGRA.[21] These

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Regulatory Act represented a political compromise made to protect the same state regulatory interests that the Supreme Court had found unpersuasive in *Cabazon*, while still preserving gaming as a means of tribal economic development, thus alleviating the financial burden that the tribes place on the federal government.") (footnote omitted); Franklin Ducheneaux & Peter S. Taylor, Tribal Sovereignty and the Powers of the National Indian Gaming Commission 26–32 (describing the legislative negotiation and balancing leading up to the enactment of IGRA) (on file with author).

[14] *See* 25 U.S.C. § 2710(d)(7) (2000), *invalidated by* Florida v. Seminole Tribe of Fla., 517 U.S. 44 (1996).

[15] 517 U.S. 44 (1996).

[16] *See* LIGHT & RAND, *supra* note 5, at 49–50; Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 452 (2003); Light & Rand, *supra* note 13, at 274; Steven Andrew Light et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 664–65 (2004); Skibine, *supra* note 13, at 132–33; Wambdi Awanwicake Wastewin, Case Comment, *Federal Courts—Indians: The Eleventh Amendment and* Seminole Tribe*: Reinvigorating the Doctrine of State Sovereign Immunity*, 73 N.D. L. REV. 517, 540 (1997).

[17] *See Seminole Tribe*, 517 U.S. at 47.

[18] *See* LIGHT & RAND, *supra* note 5, at 86–87; Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 440–41 (2001) [hereinafter Washburn, *Recurring Problems*]; Kevin K. Washburn, A.B.A. CTR. FOR CONTINUING LEGAL EDUC., INDIAN GAMING: A PRIMER ON THE DEVELOPMENT OF INDIAN GAMING, THE NIGC AND SEVERAL IMPORTANT UNRESOLVED ISSUES (2002).

[19] *See infra* note 145 and accompanying text.

[20] *See* Class III Gaming Procedures, 64 FED. REG. 17,535 (Apr. 12, 1999) (codified as 25 C.F.R. pt. 291 (2004)).

[21] *See generally* In re Gaming Related Cases, 331 F.3d 1094, 1115 (9th Cir. 2003) (upholding the validity of California tribal-state gaming compact revenue sharing provisions);

revenue sharing agreements are the creaky bridge between the states and the tribes that operates as the de facto *Seminole Tribe* fix. The critical weakness of these agreements is their questionable validity in the light of the IGRA's prohibition on state taxation of Indian gaming revenues.[22] Legal commentators have proposed numerous legislative fixes that would give the upper hand in Indian gaming compact negotiations to the states[23] or to the tribes,[24] or that propose litigation strategies designed to assist the tribes.[25] These proposals are neither salable nor workable in the real world.

Henry Buffalo & Robert Miller, Commentary, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 681, 689 (2004) ("And irrespective of what the Ninth Circuit has said, I still believe that the law prohibits revenue sharing agreements."); Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation*, 5 J. GENDER RACE & JUST. 487, 490 (2003) ("Although states and tribes continue to enter into these agreements with the approval of the Department of the Interior, substantial questions remain as to whether these agreements are valid revenue-sharing or illegal state taxation under the IGRA."); Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 325–26 (2004–2005) ("States that wish to engage in revenue sharing from Indian gaming must formulate their revenue sharing provisions in a manner to bypass the prohibition against tax impositions."); Lent, *supra* note 16, at 461 ("The plain statutory language of IGRA, its legislative history, and relevant case law illustrate that tribal-state revenue sharing is inappropriate under IGRA."); Rubin Ranat, Note and Comment, *Tribal-State Compacts: Legitimate or Illegal Taxation of Indian Gaming in California?*, 26 WHITTIER L. REV. 953, 980 (2005) ("[I]f Congress clarifies the meaning of IGRA or passes legislation allowing tribes to bring suit against states, the Court may hold California's Compact illegal.").

[22] *See* 25 U.S.C. § 2710(d)(4).

[23] *See, e.g.*, Nicolas S. Goldin, Note, *Casting a New Light on Tribal Casino Gambling: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 845 (1999); Jason D. Kolkema, Comment, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. DET. MERCY L. REV. 361, 365 (1996); Edmund F. Leedham III, Note, *The Indian Gaming Controversy in Connecticut: Forging a Balance Between Tribal Sovereignty and State Interests*, 13 BRIDGEPORT L. REV. 649, 693–94 (1993); Blake A. Watson, *Indian Gambling in Ohio: What Are the Odds?*, 32 CAP. U. L. REV. 237, 312 (2003).

[24] *See, e.g.*, Gary W. Donohue, Note, *The Eleventh Amendment: The Supreme Court's Frustrating Impediment to Sensible Regulation of Indian Gaming*, 45 WAYNE L. REV. 295, 324 (1999); Jason Kalish, Note, *Do the States Have an Ace in the Hole or Should the Indian Call Their Bluff?: Tribes Caught in the Power Struggle Between the Federal Government and the States*, 38 ARIZ. L. REV. 1345, 1370–71 (1996); Lent, *supra* note 16, at 471; Anthony J. Marks, Note & Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 LOY. L.A. ENT. L. REV. 157, 198 (1996); Brian P. McClatchey, Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming By Removing the "Governor's Veto" for Gaming on "After-Acquired Lands,"* 37 U. MICH. J.L. REFORM 1227 (2004); Edward P. Sullivan, Note, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 SYRACUSE L. REV. 1107, 1166 (1995).

[25] *See* Joe Laxague, Note, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS. 77, 91 (1999); Lent, *supra* note 16, at 472–73. *Compare* Kathleen M. O'Sullivan, Note, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123, 144–50 (1995) (arguing that IGRA meets the federal trust responsibility to Indian tribes and would likely survive a challenge by tribes based on the trust relationship), *with* Christian C.

This Article proposes a legislative solution to IGRA that would validate both the current revenue sharing agreements and the administrative solution to *Seminole Tribe*, provide all sides with a significant win-win opportunity, and avoid interference by federal courts. This Article's legislative proposal is a pragmatic approach to the enormous and controversial issue of Indian gaming. The proposal recognizes the governmental parties affected by Indian gaming, provides benefits to all of them, and preserves Indian gaming for the long-term by strengthening the operative statute.

Part I of this Article details the original intent of the Act and describes the balance created within it. The Act is based on the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*.[26] Working from this foundation, Congress sought to maintain an equilibrium between its two constituents, the tribes and the states, in enacting the statute. However, state governments soon flexed their muscle in heated response to the decision and to the balancing act Congress implemented in the legislation.

Part II deals with the *Seminole Tribe* case and its aftermath, a wobbly legislative scheme that altered the balance of bargaining power chosen by Congress and disrupted settled expectations. The decision created an impetus for tribes to take extensive political measures to preserve and expand their gaming rights and opportunities while inviting states to seek expanded economic stakes in tribal government revenue streams. Part II then draws the connection between an imbalanced IGRA and the current congressional agenda which seeks to limit and regulate Indian gaming further than IGRA ever intended. It also describes the legal weaknesses of the schemes, including revenue sharing agreements, created by states, tribes, and federal government to further the goals of IGRA in a post–*Seminole Tribe* legal and political landscape.

Part III outlines the legislative response Congress should take in order to bring balance to IGRA once again. The legislation proposed in this Part would ratify all current revenue sharing agreements between tribes and states contained in gaming compacts, with certain limitations. The legislation would also validate the Department of the Interior's class III Gaming Procedures regulations as applied to certain situations.

Part IV analyzes the impacts of the four-part legislative proposal, concluding that re-balancing IGRA will preserve benefits not only for tribes, but also for states and local units of government. Moreover, this rebalancing will make IGRA stronger and more apt to survive the rise and fall of political tides over time. Finally, Part IV defends this legisla-

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Bedortha, Comment, *The House Always Wins: A Look at the Federal Government's Role in Indian Gaming & The Long Search for Autonomy*, 6 SCHOLAR 261, 286 (2004) (arguing that federal and state governments should promote tribal gaming in order to give the federal trust responsibility "teeth").

[26] 480 U.S. 202 (1987).

tive proposal against tribal and state sovereignty critiques and concludes that this proposal best satisfies the political interests of both states and Indian tribes while restoring the inherent balance of the IGRA.

I. BALANCE: *CABAZON BAND* AND IGRA

As early as the 1960s and into the 1970s, a few Indian tribes in California, Florida, Maine, New York, and Wisconsin, desperate for tribal government revenue, opened high-stakes bingo parlors.[27] The theory was straightforward. Federal jurisprudence has long held that state laws have no force in Indian Country, and state criminal laws that might otherwise prohibit high stakes bingo would likely not apply to tribally owned and operated bingo halls.[28] Federal officials saw the potential for Indian tribes to make a significant amount of money in these endeavors.[29] That money could be used to reduce Indian dependence on federal appropriations—a worthwhile political goal. Even local governments often cooperated with tribes to develop gaming operations.[30] In the early part of the 1980s, after

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[27] *See* LIGHT & RAND, *supra* note 5, at 39 (California and Florida); Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL 531, 565 (1994) (New York); Marks, *supra* note 24, at 158–59 (Florida and Maine); Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 69 (1995) (Florida and Wisconsin).

[28] *See* Worcester v. Georgia, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . ."); Bryan v. Itasca County, 426 U.S. 373, 375–76 (1976) (stating that in the area of state taxation "there has been no satisfactory authority for taxing Indian reservation lands . . . .") (citation omitted); Williams v. Lee, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977) (citing 18 U.S.C. § 1152); Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 568 (1976).

[29] *See* Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 772 (1995) ("During this same period, [federal] officials began to realize the potential economic benefits of tribal gaming operations, and a policy emerged which supported tribal bingo enterprises as an appropriate means by which tribes could further their economic self-sufficiency, the economic development of their reservations, and tribal self-determination.") (footnotes omitted); William E. Horwitz, Note, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After* Rumsey v. Wilson*: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS & ENT. L.J. 153, 164 n.75 (1996) ("The federal government actively encouraged bingo as a means of economic development by providing approvals of tribal bingo ordinances and even guaranteeing some eight million dollars in construction loans for bingo facilities." (citing 132 CONG. REC. S12,017–18 (daily ed. Aug. 15, 1986) (statement of Sen. Andrews))).

[30] *See, e.g.*, Worthington v. City Council of City of Rohnert Park, 31 Cal. Rptr. 3d 59, 61 (Ct. App. 2005) (discussing agreement between municipality and tribe on gaming); Ducheneaux & Taylor, *supra* note 13, at 12 ("Some of these municipal governments began to approach Indian tribes with proposals involving acquisition of land near the town or city for transfer to the United States to be held in trust for the tribe. Then, a gaming facility would be located on the land, providing revenue for the tribes and jobs and economic

a series of federal court decisions favoring this exercise of tribal sovereignty,[31] tribes in other states followed the lead of the gaming tribes.[32]

Yet, this new source of revenue for the gaming tribes also had negative consequences. As soon as the bingo halls opened, some state and county law enforcement officials began to suppress the efforts of these early gaming tribes.[33] In 1953, Congress authorized several states, including California and Wisconsin, to exercise criminal jurisdiction over Indian Country.[34] Soon other states, such as Florida, took advantage of the statute.[35] Those states with criminal jurisdiction had a much stronger legal claim than other states in shutting down the tribal bingo halls.[36] States that had not assumed criminal jurisdiction over Indian Country sometimes chose to regulate gaming by arresting bingo hall patrons as they left the reservation borders.[37] At the same time, as the modest revenue potential of bingo halls gave way to more lucrative casino-style gaming, replete with slot machines, poker tables, blackjack, and so on, federal law enforcement agencies began to investigate and prosecute alleged federal criminal violations.[38]

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growth for the non-Indian community."). Senator McCain neglected to mention this fact when he stated that "unscrupulous developers" were to blame for increased proposals for off-reservation gaming. 151 CONG. REC. S13389, S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

[31] *See* Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1189 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986). All of these cases found the state law in question not to apply to Indian reservations because the laws were of a regulatory nature (*see* infra notes 45–59 and accompanying text).

[32] *See* S. Rep. No. 100-446, at 5 (1988).

[33] *See* LIGHT & RAND, *supra* note 5, at 40 ("[T]he local sheriff threatened to shut down the [Barona Group of the Capitan Band of Missions Indians]'s bingo operation and arrest its patrons . . . ."); Cox, *supra* note 29, at 770 ("The opening of the Seminole Tribe of Florida's high stakes bingo hall in 1979 was met with immediate resistance from the Sheriff of Broward County who threatened to arrest anyone playing bingo at the Tribe's gaming hall."); Leedham, *supra* note 23, at 670 ("[T]he Chief State's Attorney, asserting that the state possessed criminal jurisdiction over the reservation, notified the tribe of his intention to enforce Connecticut's bingo laws against its enterprise.").

[34] Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161–1162 (2000); 25 U.S.C. §§ 1321–1322 (2000); 28 U.S.C. § 1360 (2000)). *See generally* CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997).

[35] *See* HON. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 27 (4th ed. 2004).

[36] *See* Sullivan, *supra* note 24, at 1118–20 (comparing the situations in Florida and Wisconsin).

[37] *See* LIGHT & RAND, *supra* note 5, at 40.

[38] *See* Michael Donovan Cox, A.B.A. CTR. FOR CONTINUING LEGAL EDUC., GAMING ENFORCEMENT UNDER THE INDIAN GAMING REGULATORY ACT (Apr. 17–18, 1997) [hereinafter Cox, *Gaming Enforcement*] (citing United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950); United States v. Farris, 624 F.2d 890 (9th Cir. 1980); United States v. Dakota, 796 F.2d 186 (6th Cir. 1986)).

The issue of whether states had jurisdiction to shut down or regulate Indian bingo halls and casinos reached the Supreme Court in *Cabazon Band*.[39] The Cabazon and Morongo Band of Mission Indians operated bingo games on their respective reservations.[40] The Cabazon Band also operated poker and other card games.[41] California, a state with criminal jurisdiction in Indian Country,[42] and Riverside County sought to enforce the state criminal code and county ordinances limiting and regulating bingo games.[43]

Following the text of Public Law 280 and its decision in *Bryan v. Itasca County*,[44] the Court adopted an analysis that distinguished between criminal, prohibitory-civil, and regulatory actions by the state.[45] The two operative provisions of Public Law 280 that give rise to this distinction are sections 2 and 4.[46] Section 2 is a grant by Congress to California and other states of criminal jurisdiction over Indian Country.[47] In section 4, Congress grants a form of civil jurisdiction over Indian Country to California and other states.[48] In *Bryan*, the Court had held that, consistent with the Congressional intent of Public Law 280,[49] Section 4 "grant[s] States jurisdiction over private civil litigation involving reservation Indians in state court, but [does] not . . . grant general civil regulatory authority."[50] In *Cabazon* Band, the Court recognized that "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values."[51]

The rule of *Bryan*, then, is that "it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under section 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court."[52] The Court noted, however, that

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[39] 480 U.S. 202 (1987).

[40] *See id.* at 204–05.

[41] *See id.* at 205.

[42] *See* 18 U.S.C. § 1162 (2000). In 1953, Congress withdrew federal criminal jurisdiction and extended the criminal jurisdiction of California and a few other states to Indian Country located within those states. *See* GOLDBERG-AMBROSE, *supra* note 34, at 1. Congress created a mechanism through which other states could assume criminal jurisdiction if they chose to do so. *See id.* Congress withdrew that procedure in 1968, but allowed the nine states who had chosen to assume jurisdiction to retain it. *See id.* at 2.

[43] *See Cabazon Band*, 480 U.S. at 205–06 (citing CAL. PENAL CODE § 326.5 (1987); Riverside County Ordinance No. 558; Riverside County Ordinance No. 331).

[44] 426 U.S. 373 (1976).

[45] *See Cabazon Band*, 480 U.S. at 210.

[46] *See* 18 U.S.C. § 1162 (Section 2); 28 U.S.C. § 1360 (2000) (Section 4).

[47] *See* 18 U.S.C. § 1162.

[48] *See* 28 U.S.C. § 1360.

[49] *See Bryan*, 426 U.S. at 379 ("The primary concern of Congress in enacting Public Law 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.") (citing Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541–42 (1975)).

[50] *Cabazon Band*, 480 U.S. at 208 (citing *Bryan*, 426 U.S. at 385, 388–90).

[51] *Id.*, 480 U.S. at 208.

[52] *Id.*

the test is not a "bright-line rule"[53]—the test for criminal behavior is whether the activity of the tribe violates the public policy of the state in which the tribe is located.[54] Frank Ducheneaux, former counsel on Indian Affairs to the House Committee on Interior and Insular Affairs from 1973 to 1990, stated the rule as policymakers understand it:

> The rationale of the *Bryan* case, as applied to state regulation of Indian gaming in the *Seminole* and *Barona* case, is quite simple. It holds that, where a state makes gambling a crime and prohibits that activity to all persons or entities within the state, Indian tribes in that state may not engage in such gambling as a matter of Federal-Indian law. The corollary, however, is that, where a state permits gambling as a part of its civil laws, no matter how stringently it may regulate such activity, Indian tribes in that state are free to engage in, or permit and regulate[ ], that activity on their land free of any state regulation.[55]

Applying this analysis, the Court concluded that the state and local laws fit within the civil/regulatory portion of Public Law 280, or Section 4.[56] California had not prohibited "all forms of gambling."[57] The Court reviewed the forms of gaming that California had legalized and, weighing California public policy, concluded that "California regulates rather than prohibits gambling in general and bingo in particular."[58] The Court concluded that Public Law 280 provided no authority for California to enforce its bingo and other gaming laws in Indian Country.[59]

The Court also engaged in a balancing of state, federal, and tribal interests for the purpose of determining whether state laws would be preempted by federal laws and policy.[60] Applying this balancing test, the Court concluded that "[u]nder certain circumstances a State may validly assert authority over the activities of non-members on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."[61] California's asserted interest in preventing the infiltration of organized crime into Indian gambling was insufficient given the lack of any existing criminal involvement in the enterprises, the federal government's shared interest in preventing organ-

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[53] *Id.* at 210.
[54] *Id.* at 213.
[55] Ducheneaux Testimony, *supra* note 6, at 170.
[56] *See Cabazon Band,* 480 U.S. at 211.
[57] *Id.* at 210.
[58] *Id.* at 211.
[59] *See id.* at 212.
[60] *See id.* at 214–22.
[61] *Cabazon Band,* 480 U.S. at 215 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–32 (1983)).

ized crime, and its obvious authority to forbid Indian gambling enterprises if necessary.[62]

On the other hand, the Court identified tribal economic development as an "important" federal interest.[63] The Court relied upon President Reagan's 1983 Statement on Indian policy, which provided that, "[i]t is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government."[64] The Court noted Department of the Interior efforts to promote tribal bingo operations,[65] including the making of "grants and . . . guarantee[ing] loans for the purpose of constructing bingo facilities,"[66] and the provision by the Department of Health and Human Services of "financial assistance to develop tribal gaming enterprises."[67] Finally, the Court married the federal interests to the tribal interests by describing the Indian tribes at issue:

> The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.[68]

The Court downplayed the State's alleged interest in "preventing the infiltration of the tribal games by organized crime" in light of these federal and tribal interests.[69] In fact, the Court poked holes in the State's arguments, suggesting that there was no evidence of involvement by organized crime and it was acting hypocritically: "[t]o the extent that [it sought]

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[62] *See id.* at 220-21.

[63] *Id.* at 217.

[64] *Id.* at 217 & n.20.

[65] *See id.* at 217–18. The Court quoted at length from an affidavit submitted by the Bureau of Indian Affairs Director of Indian Services, which read:

> It is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination. All of these are federal goals for the tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983.

Id. at 217 n.21.

[66] *Id.* at 218.

[67] *Id.*

[68] *Id.* at 218–19.

[69] *Id.* at 220.

to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games . . . ."[70]

The Court ruled 6-3 in favor of the Cabazon Band.[71]

States and local governments responded to *Cabazon Band* by urging Congress to enact legislation to regulate Indian gaming for the (unexpressed) purpose of protecting existing state businesses that engaged in gaming operations and the (expressed) purpose of reducing the influence of organized crime on Indian gaming.[72] Congress had been debating Indian gaming regulatory bills for several years,[73] but *Cabazon Band* created the political impetus to finalize an Indian gaming act.[74]

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act.[75] The Act was a compromise between the interests of Indian tribes that had been recognized and validated by the Supreme Court and the interests of the state and local governments.[76] Congress, authorized to take action in this arena by the Indian Commerce Clause,[77] created a novel scheme for the codification, authorization, and regulation of Indian gaming. As shown below, Congress intended to codify the *Cabazon Band* decision for high-stakes bingo,[78] authorize tribes to conduct casino-style

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[70] *Id.* at 220–21. More recent studies conclude that Indian casinos do not attract either organized or disorganized crime. *See* Renee Ann Cramer, *Perceptions of the Process: Indian Gaming as it Affects Federal Tribal Acknowledgment Law and Practices*, 27 L. & POL'Y 578, 596 (2005).

[71] *See Cabazon Band*, 480 U.S. at 222.

[72] *See* 134 CONG. REC. H5028 (July 6, 1988) (Statement of Rep. Udall); LIGHT & RAND, *supra* note 5, at 42; Brad Jolly, Note, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 297 (1997); Robert B. Porter, *Indian Gaming Regulation: A Case Study in Neo-Colonialism*, 5 GAMING L. REV. 299, 306 (2001); Mark C. Wenzel, Note/Comment, *Let the Chips Fall Where They May: The Spokane Indian Tribe's Decision to Proceed With Casino Gambling Without a State Compact*, 30 GONZ. L. REV. 467, 475 (1994-1995).

[73] *See, e.g.*, Ducheneaux Testimony, *supra* note 6, at 171 ("In 1983, in the 98th Congress, Mr. Udall introduced the first bill to affect[ ] gambling activities by Indian tribes."); Horwitz, *supra* note 29, at 164 (noting legislative history on IGRA as far back as the 98th Congress).

[74] *See* LIGHT & RAND, *supra* note 5, at 43; Porter, *supra* note 72, at 306.

[75] *See* Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2000)).

[76] *See In re* Indian Gaming Related Cases, 331 F.3d 1094, 1096 (9th Cir. 2003) (quoting Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)), *cert. denied*, Coyote Valley Band of Pomo Indians v. California, 540 U.S. 1179 (2004); Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 2d 123, 126 (D.D.C. 2005); Doe v. Santa Clara Pueblo, 118 P.3d 203, 207 (N.M. Ct. App. 2005); Ducheneaux Testimony, *supra* note 6 at 175 ("The concept of a Tribal-State compact was the mechanism through which the Congress attempted to resolve the two opposing extreme positions in a manner which would preserve tribal self-government, yet recognize and accommodate legitimate state interests.").

[77] U.S. CONST. art. I, § 8, cl. 3; *see* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 205 (2000) (describing the Indian Commerce Clause as a "grant of singular authority to Congress to regulate intercourse and trade with Indian tribes, the only minority group explicitly mentioned in the Constitution").

[78] *See* 25 U.S.C. §§ 2701(5), 2702(1); S. REP. No. 100-446, at 22–23 (1988).

gaming in certain states[79] (simultaneously limiting inherent tribal sovereignty to open up casinos in other states)[80] and create a regulatory scheme for Indian gaming.[81] Overall, however, Congress made clear that the purpose of the Act was to benefit Indian tribes, not states,[82] and to expand tribal opportunities for self-determination, self-government, economic development, and political stability.[83]

Congress first established three classes of Indian gaming. Class I gaming includes traditional tribal games, or gaming that would be regulated and authorized *exclusively* by Indian tribes.[84] This class includes games such as *shaymuhkewuybinegunung*, a Minnesota Chippewa game involving dice in the form of sticks marked with turtles and snakes,[85] and *pugasaing*, a Michigan Chippewa bowl game using bone and brass pieces carved in the shapes of snakes, men, and other figures.[86] Class I gaming is not, at this time, a lucrative revenue option for Indian tribes.[87] Congress defined class II gaming to mean high-stakes bingo,[88] the type of games tribes first began in California, Florida, Michigan, and New York, and the type at issue in the *Cabazon Band* litigation.[89] Congress intended to leave the regulation of class II games to Indian tribes, thus codifying the *Cabazon Band* decision, except to the extent that the National Indian Gaming Commission is required to approve class II tribal gaming ordinances and to issue gaming licenses.[90]

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[79] *See* 25 U.S.C. § 2710(d)(1)(B) (authorizing casino-style gaming in certain states "that permit[ ] such gaming for any purpose by any person, organization, or entity").

[80] *See* Jolly, *supra* note 72, at 301; Light & Rand, *supra* note 13, at 270; Naomi Mezey, Note, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 713 (1996); Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 132 (1996); Porter, *supra* note 72, at 306–09; Tsosie, *supra* note 13, at 65–66.

[81] *See* 25 U.S.C. §§ 2701(3), 2702(3), 2704.

[82] *See* LIGHT & RAND, *supra* note 5, at 44–48; Grand Traverse Band of Ottawa and Chippewa Indians, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002).

[83] *See* 25 U.S.C. § 2702(1).

[84] *See* 25 U.S.C. §§ 2703(6), 2710(a)(1).

[85] *See* Stewart Culin, *Games of the North American Indians*, *in* TWENTY-FOURTH ANNUAL REPORT OF THE BUREAU OF ETHNOLOGY 3, 64 (W. H. Holmes ed., 1907).

[86] *See Id.* at 66–67.

[87] *See* CANBY, *supra* note 35, at 306 ("Class I gaming is not of legal or economic significance."); Mark. J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 382 (2004) ("Such games are not regulated by the IGRA and tend to generate insignificant revenues.").

[88] *See* 25 U.S.C. § 2703(7).

[89] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 204–05 (1987); LIGHT & RAND, *supra* note 5, at 39–43.

[90] *See* 25 U.S.C. §§ 2710(b)(2), 2710(c)(1); S. REP. NO. 100-446, at 1 (1988).

Congress defined class III games to include all other gaming.[91] This broad definition includes casino-style gaming, such as slot machines, poker, blackjack, craps, and keno.[92] Class III gaming is the kind of gaming that can be very lucrative for Indian tribes,[93] although some forms of class II gaming can also generate enormous revenues.[94] It is here that Congress's regulatory and authorization scheme became the most creative. Congress created a structure whereby Indian tribes could not conduct class III gaming without entering into a class III gaming compact with the governor of the state where the tribe wished to begin gaming.[95] In the compact, the tribe and the state would decide basic issues about the tribal gaming operations, such as which sovereign would handle the regulation of the facility, what types of games could be played at the facility, and other logistical questions.[96] Congress also prohibited class III gaming in states that prohibited all forms of these games,[97] importing the *Cabazon Band* analysis into the class III scheme.[98] In states such as Nebraska or Texas, where no one was authorized to operate slot machines at any time, Congress did not authorize Indian tribes to engage in class III gaming.[99]

In the arena of class III gaming, Congress anticipated the problem that states might refuse to negotiate a gaming compact with the tribes.[100] First, Congress placed the burden on the states to negotiate in good faith with the tribes.[101] Second, if the state refused to negotiate in good faith, Congress created an enforcement mechanism against the states by extending jurisdiction to the federal courts to hear claims by a tribe with whom a state had refused to negotiate in good faith.[102] Congress intended a scheme under which a tribe could still commence class III gaming operations even if a state stonewalled the tribe.[103] Absent this enforcement

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[91] *See* 25 U.S.C. § 2703(8). The National Indian Gaming Commission later promulgated a more specific definition of class III gaming. *See* 25 C.F.R. § 502.4 (2004).

[92] *See* 25 C.F.R. § 502.4 (2006); LIGHT & RAND, *supra* note 5, at 46.

[93] *See* Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 949–50 (2000); Kathryn R. L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 401 n.118 (1997); Tsosie, *supra* note 13, at 79.

[94] *See* Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 290 (2004) (referencing so-called class II slot machines).

[95] *See* 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3).

[96] *See* 25 U.S.C. § 2710(d)(3)(C).

[97] *See* 25 U.S.C. § 2710(d)(1)(B).

[98] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210–11 (1987).

[99] *See* Op. Neb. Att'y Gen. No. 02001 (2002); Op. Tex. Att'y Gen. No. GA-0278 (2004).

[100] *See* Ducheneaux Testimony, *supra* note 6, at 175-76 ("The problem for the negotiators [of IGRA] was how to permit the state to have a role in regulation of Indian class III gaming, which *Cabazon* precluded, through the requirement for a compact without placing tribes at the mercy of a state which would not act in good faith.").

[101] *See* 25 U.S.C. § 2710(d)(3)(A).

[102] *See id.* at § 2710(d)(7)(A).

[103] *See* S. REP. No. 100-446, at 5–6, 18–19 (1988).

mechanism against the states, Congress might not have been willing to include a compact requirement.[104]

Congress also created the National Indian Gaming Commission ("NIGC") to serve as the federal component of the regulatory scheme.[105] Congress intended for federal and state regulation of Indian gaming to be light, unless the tribe consented to such regulation, and it did not intend the NIGC to act as a massive bureaucratic regulatory body.[106] In fact, for several years, the NIGC's annual budget was limited to a mere $8 million,[107] and Congress did not authorize the NIGC to promulgate substantive regulations.[108] The tribes would be the primary regulator of class II gaming,[109] while Congress left class III gaming to the tribes and the states.[110] As a final and important policy, Congress prohibited states from collecting taxes on Indian gaming operations and revenues.[111]

In summary, the Act created a delicate, yet balanced, structure in relation to class III gaming. Prior to IGRA, the states could do little or nothing to prevent class III gaming because the federal government usually had exclusive jurisdiction over criminal gaming enterprises in Indian Country. After IGRA, the states could prevent class III gaming by prohibiting all class III–style gaming within their borders. Prior to IGRA, the states had no say in the regulation of class III gaming by Indian tribes. After IGRA, the states could force tribes to make concessions on regulation during the compacting process.

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[104] *See* United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300 (9th Cir. 1998); *Hearing on Review of Court Decision on Indian Gambling Before the S. Indian Affairs Comm.*, 104th Cong. (1996) (statement of Alex Tallchief Skibine, Professor of Law, University of Utah) [hereinafter Alex Skibine Testimony] ("Had we known that Congress could not waive the state's sovereign immunity, there is no doubt in my mind that we would have selected the Secretary of the Interior as the recourse in cases where states failed to negotiate in good faith.").

[105] *See* 25 U.S.C. §§ 2702(3), 2704.

[106] *See* Colo. River Indian Tribes v. Nat'l Indian Gaming Comm., 383 F. Supp. 2d 123, 132 (D.D.C. 2005) ("A careful review of the text, the structure, the legislative history and the purpose of the IGRA, as well as each of the arguments advanced by the NIGC, leads the Court to the inescapable conclusion that Congress plainly did not intend to give the NIGC the authority to issue MICS for class III gaming . . . ."); *see also* Ducheneaux & Taylor, *supra* note 13, at 34–54 (analyzing the legislative history and the text of IGRA to conclude that the NIGC lacked authority to promulgate Minimum Internal Control Standards at 25 C.F.R. § 542).

[107] *See* Sandra J. Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545, 546 (2003).

[108] *See Colo. River Indian Tribes*, 383 F. Supp. 2d at 132.

[109] *See* 25 U.S.C. § 2710(b); Ducheneaux & Taylor, *supra* note 13, at 44–48 (describing how the NIGC does not have authority to promulgate Minimum Internal Control Standards at 25 C.F.R. § 542 for class II gaming).

[110] *See* 25 U.S.C. § 2710(d)(1); Ducheneaux & Taylor, *supra* note 13, at 44 ("Except for Commission approval of a tribal gaming ordinance for class III gaming and authority of the Commission to approve any management contract related to such class III gaming, the sole authority for regulation for that activity was to be as agreed upon in the compact.").

[111] *See* 25 U.S.C. § 2710(d)(4).

Casino-style gaming created the possibility of significant government revenues for many Indian tribes, but never before had Congress opened the door to direct state regulation of the activities of Indian tribes through the compacting process. The Act answered most of the unsettled questions of Indian gaming and put the weight of the federal government behind tribal gaming operations development.[112]

Indian gaming exploded after the *Cabazon Band* decision and the subsequent enactment of IGRA,[113] altering the tribal-federal-state relationship in fundamental ways. There were some tribes located far from a large gaming market that were still able to establish successful gaming operations.[114] Indian gaming provided needed job opportunities and revenue for tribes, and many tribes were able to use that revenue to fund important governmental services—both for themselves and for non-gaming tribes—that the federal and state governments had failed to offer.[115] Despite

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[112] *See* Ducheneaux & Taylor, *supra* note 13, at 28 (describing how IGRA answered questions about the legality of class III gaming in light of the Johnson Act, 15 U.S.C. § 1171 (2000), and quelled the state, local, and business political forces arrayed against Indian gaming by offering a federal solution).

[113] *See* LIGHT & RAND, *supra* note 5, at 7–8; *see also* Ranat, *supra* note 21, at 953; Rand & Light, *supra* note 93, at 382 (describing a "tremendous boom in Indian gaming" since enactment of IGRA); Cox, *Gaming Enforcement*, *supra* note 38, at D-1 ("Since IGRA's enactment in 1988, there has been a rapid growth in Indian gaming operations. Today there are 274 Indian gaming facilities owned and operated by 182 Indian tribes.").

[114] *See* Light & Rand, *supra* note 13, at 282 ("The experiences of the Plains Tribes provide empirical evidence for this hypothesis, demonstrating that even modest casino profits strengthen tribal governments and preserve or enhance tribal sovereignty. Such tribes, with large memberships and little access to metropolitan markets, are unlikely to experience dramatic economic and social rejuvenation based solely on casino revenues. Yet from the tribes' perspective, casino employment and even modest revenue fund tribal strategies to overcome reservation poverty and accompanying social ills.").

[115] *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218–19 (1987) ("The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations."); Artichoke Joe's Grand Cal. Casino v. Norton, 353 F.3d 712, 741 (9th Cir. 2003) ("California's regulatory scheme benefits nongaming tribes because they receive distributions from the funds that the State requires gaming tribes to allocate to the Indian Gaming Revenue Sharing Trust."), *cert. denied*, 125 S. Ct. 51 (2004); Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y for the W. Dist. of Mich., 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002) ("In fiscal year 2001, [the casino] provided approximately 89% of the Band's gaming revenue. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans. The casino also provides revenues to regional governmental entities and provides significant side benefits to the local tourist economy.") (citations to record omitted), *aff'd* 369 F.3d 960 (6th Cir. 2004); Chemehuevi Indian Tribe v. Wilson, 987 F. Supp. 804, 808 n.4 (N.D. Cal. 1997) ("Congress recognized that for many tribes, gaming income 'often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.'") (quoting S. Rep. No. 100-446, at 2–3 (1988)); Cramer, *supra* note 70, at 596–97 ("Gaming revenues have allowed some tribes to

perceptions to the contrary, only a few tribes became truly rich from Indian gaming.[116] Many tribes offer no gaming at all, whether due to market conditions, political issues, or cultural reasons.[117]

II. RUPTURE: SEMINOLE TRIBE

A. The End of Equal Bargaining Power

Congress spoke in great detail about its efforts to provide a careful balance between states and tribes in IGRA. The Senate Report notes that the tribal-state compacting process "is a viable mechanism for settling various matters between two equal sovereigns."[118] Congress balanced "the strong concerns of states [regarding] state laws and regulations relating to sophisticated forms of class III gaming . . . against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands."[119] Congress made clear that it had considered state and tribal interests and that, despite state interests, states should not be allowed to preclude Indian tribes from conducting class III gaming in accordance with IGRA:

> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of eco-

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establish or improve their own fully certified police departments; many of them are able to offer specialties such as bomb and drug-sniffing dogs and extra personnel, which are often loaned out to non-Indian police forces in the region.") (citations omitted); Kolkema, *supra* note 23, at 367–68 ("Indian gaming is not regarded as a commercial activity. Unlike commercial activities, IGRA requires that all revenues from gaming operations be reinvested in the tribal community to further economic development.").

[116] *See* LIGHT & RAND, *supra* note 5, at 108; John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J. L. & POL'Y 307, 346 (1999); Kathryn R. L. Rand, *There are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 60–64 (2002).

[117] *See* David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors From Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 187–88 (2004) ("But most reservations, frequently the most impoverished, are too remote to attract many customers, so incurring sizable fixed costs for gaming operations would actually reduce tribal welfare. Thus fewer than half of the tribes participate in any gaming enterprises." (citation omitted)); Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 239–40 (1997) ("Like the Seneca, both the Navajo and the Hopi defeated gaming referenda. These two tribes did so, however, without any strong factional splits and, indeed, with an absence of acrimony." (citations omitted)).

[118] S. REP. NO. 100-446, at 13 (1988) (emphasis added); *see also* AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 916 (9th Cir. 2002) (citing S. REP. NO. 100-446, at 4–5); Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1248 (11th Cir. 1999) (quoting S. REP. NO. 100-446, at 13).

[119] S. REP. NO. 100-446, at 13.

> nomic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.[120]

As might be expected, IGRA's complicated balancing act involving three sovereigns, divisive political and cultural questions, and large amounts of cash and lawyers generated incredible amounts of litigation.[121] The first wave of litigation can be labeled the "constitutional wave," where several tribes and states sought to overturn the statute as an invalid exercise of congressional authority.[122] These lawsuits were unsuccessful and never reached the Supreme Court, although there are some derivative suits regarding the authority of the NIGC that remain open.[123]

The second wave of litigation can be labeled the "bad faith wave," where tribes accused several states, including California, Florida, and Michigan, of refusing to negotiate gaming compacts in good faith.[124] The tribes filed suit in federal courts against the states and, later, their governors.[125] The states responded by asserting their Eleventh Amendment immu-

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[120] *Id.*

[121] *See Seminole Tribe*, 181 F.3d at 1239 (referring to IGRA as a "litigation-spawning juggernaut").

[122] *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 367 F.3d 650 (7th Cir. 2004) (rejecting tribe's claim that the gubernatorial concurrence provision of IGRA violated the Tenth Amendment); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) (rejecting State's claim that IGRA violated the Tenth Amendment); Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990) (rejecting tribe's claim that IGRA violated the trust responsibility of the federal government and the Fifth Amendment).

[123] *See* Col. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 2d 123 (D.D.C. 2005).

[124] *See* Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994) (en banc) (Canby, C.J., dissenting from denial of reh'g en banc), *amended on denial of reh'g*, 99 F.3d 321 (9th Cir. 1996) (en banc), *cert. denied sub nom.* Sycuan Band of Mission Indians v. Wilson, 521 U.S. 1118 (1997); Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995); Ponca Tribe of Okla. v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994); Ysleta del Sur Pueblo v. Texas, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995); Wis. Winnebago Nation v. Thompson, 22 F.3d 719 (7th Cir. 1994); Rhode Island v. Narragansett Tribe, 19 F.3d 685 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 5 F.3d 147 (6th Cir. 1993); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

[125] *See, e.g.*, *Sault Ste. Marie Tribe*, 5 F.3d at 149 ("Plaintiffs have since amended their

nity.[126] When the lower courts split on the effect of the congressional "waiver" of state immunity in light of the Eleventh Amendment,[127] the Supreme Court stepped in and decided *Seminole Tribe of Florida v. Florida.*[128] *Seminole Tribe* ended the "bad faith wave."[129]

In *Seminole Tribe*, the Seminole Tribe of Florida sued the State of Florida and its governor in accordance with IGRA's requirements.[130] The defendants sought to dismiss the suit on the theory that the Eleventh Amendment precluded the suit.[131] The Supreme Court held that IGRA provided an "'unmistakably clear' statement of [congressional] intent to abrogate" state sovereign immunity.[132] However, the Court held that Congress, in enacting IGRA under the Indian Commerce Clause,[133] had no authority to waive state sovereign immunity using its Indian Commerce Clause power.[134] In short, Indian tribes no longer had a legal recourse that would allow them to operate casino-style games where states refused to negotiate in good faith for a gaming compact.[135]

B. Revenue Sharing Agreements

Following *Seminole Tribe*, Indian tribes remained free to exploit their class II gaming opportunities where no gaming compact was required,[136] but where states refused to negotiate for class III gaming, tribes no longer could sue the states to force negotiations. Indeed, "[t]ribes have a right without a remedy."[137] Reports indicate that no tribe was able to finalize a

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complaint and named Governor John Engler as the defendant.").

[126] *See, e.g.*, *id.* at 148.

[127] *See* Response to Petition for Writ of Certiorari 2, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (No. 94-12) ("Respondent agrees that the instant decision [11 F.3d 1016 (11th Cir. 1994)] is in direct conflict with the Eighth Circuit Court of Appeals in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). In the time since the filing of the Seminole Tribe's instant petition for *certiorari*, the Ninth Circuit Court of Appeals has rendered its opinion in *Spokane Tribe of Indian v. Washington State* [28 F.3d 991] (9th Cir. 1994).").

[128] 517 U.S. 44 (1996).

[129] *See, e.g.*, United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1298 (9th Cir. 1998) ("Following the Supreme Court's decision in *Seminole Tribe*, the State invoked its newfound Eleventh Amendment immunity and brought the Tribe's suit to a sudden end.").

[130] *See Seminole Tribe*, 517 U.S. at 51 (also citing 25 U.S.C. § 2710(d)(7)(A)).

[131] *See id.* at 52.

[132] *Id.* at 56–57 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

[133] U.S. CONST. art. I, § 8, cl. 3.

[134] *See Seminole Tribe*, 517 U.S. at 72–73. Congress has authority to waive the sovereign immunity of states using its authority under Section 5 of the Fourteenth Amendment and under the Interstate Commerce Clause, subject to certain limitations. *See generally* LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 936-61 (3d ed. 2000) (Section 5); *id.* at 807–24 (Interstate Commerce Clause).

[135] *See* LIGHT & RAND, *supra* note 5, at 273–74; Light et al., *supra* note 16, at 665; Skibine, *supra* note 13, at 122; Tsosie, *supra* note 13, at 66; Washburn, *Recurring Problems*, *supra* note 18, at 430.

[136] *See* 25 U.S.C. §§ 2710(a), 2710 (b) (2000).

[137] Washburn, *Recurring Problems*, *supra* note 18, at 441.

gaming compact for over two years after the *Seminole Tribe* decision.[138] Some tribes responded by threatening to close down roads in order to force negotiations.[139] Other tribes sought to amend state law via public referendum to force negotiations.[140] These measures, however, were ineffective.[141]

Both states and tribes had reasons to seek agreement. Indian gaming had too much potential to generate government revenue for states to ignore it.[142] While the states could still afford to reject gaming in most instances, Indian tribes could not because they often did not have a sufficient alternative tax base.[143] The financial advantage for the states was obvious—they could generate revenue without doing much to earn it.[144] Additionally, after *Seminole Tribe*, states could dictate terms to the tribes.

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[138] *See* LIGHT & RAND, *supra* note 5, at 50; Light et al., *supra* note 16, at 665–66; *see also* Ron M. Rosenberg, *When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona-Pima Maricopa Gaming Compact*, 4 HARV. NEGOT. L. REV. 283, 294 (1999) ("In August 1998, the Salt River Pima Maricopa Indian Community . . . and the State of Arizona entered into the first post-*Seminole Tribe* compact in the United States.").

[139] *See, e.g.*, Jacob Viarrial, *Remarks of Pojoaque Pueblo Governor Jacob Viarrial*, 14 T. M. COOLEY L. REV. 533, 534 (1996) ("Our thinking was, if the Governor did not have the authority to sign the gaming compacts, then none of the other agreements that he had ever signed with us were legal either. That included any agreements where we granted the state the right to put highways through our land . . . . I might add that because of the road closing, the United States Attorney came back and told us that if we would agree not to close the roads, he would agree not to shut our casinos down. We could all agree to that. So we kept our casinos open.") (footnotes omitted).

[140] *See* K. Alexa Koenig, Comment, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1036 (2002) (describing California's Proposition 1A); Rosenberg, *supra* note 138, at 296–97 (discussing Arizona's Proposition 201).

[141] *See, e.g.*, Bryan J. Nowlin, Note, *Conflicts in Sovereignty: The Narragansett Tribe in Rhode Island*, 30 AM. INDIAN L. REV. 151, 161–64 (2005-2006) (discussing how state referenda were unhelpful to the Narragansett Tribe in Rhode Island).

[142] *See* S. REP. NO. 100-446, at 13 (1988) ("In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming."); LIGHT & RAND, *supra* note 5, at 54 ("[S]tate governments began to view lotteries as well as revenue-sharing agreements with gaming tribes as new revenue sources to combat budgetary crises. . . ."); *see also* Glenn Coin, *Casinomania: A Casino in Every Neighborhood, Hope for Money in Every Coffer*, POST-STANDARD (Syracuse, N.Y.), Jan. 12, 2003, at A1 ("State legislators and the governor are betting that the largest expansion of gambling in state history will help resolve the state's fiscal crunch."); Amy Lane, *State Looks to Indian Casinos to Add Revenue*, CRAIN'S DET. BUS., Apr. 14, 2003, at 6 (discussing how Michigan Governor Jennifer Granholm and the Michigan legislature "are looking to Michigan's American Indian tribes as potential revenue sources").

[143] *See supra* text accompanying notes 114 & 115.

[144] *See, e.g.*, Margaret Graham Tebo, *Betting on Their Future: Flush with Cash, American Indians are Laying the Creative Groundwork for New Ventures*, A.B.A. J., May 2006, at 33, 36 ("For the State, it's a sweet deal. It doesn't have to make any concessions or put up any money to get a large new tax base. At Quil Ceda, for example, all the utility work . . . was paid for by the tribes."). *See generally* Del Laverdure, Shall We Pay Taxes? Pros and Cons, Address at Turtle Mountain Community College Project Peacemaker Indian Law Summit (Aug. 1, 2005) (arguing that state and local governments benefit from tribal economic development without providing additional services, and alleging that state and local governments engage in "taxation without representation" in Indian Country).

Not surprisingly, many states began to extort Indian tribes.[145] For example, they demanded a cut of the profits from class III gaming.[146] Other states demanded treaty rights and tax negotiation concessions.[147] Some compacts written after *Seminole Tribe* contain interesting or unusual provisions that extract money from tribes, yet are theoretically consistent with IGRA. For example, the Eastern Band of Cherokee Indians pays $5 million a year to endow the Cherokee Preservation Foundation.[148] Some states in compliance with IGRA[149] also demanded "pay-as-you-go" revenue sharing provisions, such as the Confederated Tribes of the Grand Ronde Community's agreement to pay the expenses incurred by the Oregon state police in patrolling their gaming operation.[150]

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[145] *See, e.g.*, Edison, *supra* note 21, at 327 ("Jacob Viarrial, governor of the Pojoaque, told lawmakers that 'revenue sharing has become a smokescreen for extortion.'") (footnotes omitted); Koenig, *supra* note 140, at 1059–60 ("The compact tries to avoid potential illegality by expressly stating that revenue percentages were not imposed as a condition to compact negotiations (which would be extortion). . . ."); Light, et al., *supra* note 16, at 666 ("Without the ability to challenge a state's demand for revenue sharing in federal court under IGRA (unless, of course, the state consents to suit, as has California), the danger for tribes is that states can simply charge tribes what, in practice, amounts to a multi-million-dollar fee to conduct Class III gaming, in direct contravention to tribes' sovereign right under *Cabazon* and Congress's intent under IGRA."); Kathryn R. L. Rand & Steven A. Light, *Do "Fish and Chips" Mix? The Politics of Gaming in Wisconsin*, 2 GAMING L. REV. 129, 140 (1998) [hereinafter Rand & Light, *Fish and Chips*] ("Wisconsin is using the compact negotiations in order to extort revenue from the tribes in return for 'allowing' them to maintain their already highly tenuous sovereignty rights."); Robert B. Peacock, *Lawmakers Ignore Facts in Push to Expand Gaming*, DULUTH NEWS TRIB. (Minn.), Mar. 12, 2004, at 9A, *available at* 2004 WLNR 19227073 ("Rep. Jim Knoblach and Sen. Tom Neuville have taken the opposite approach in extorting money from the tribes by introducing legislation to outlaw all video gambling machines in the state beginning Jan. 1, 2006, 'unless the State's Indian tribes agree to renegotiate the current video gaming compacts.'"); Jerry Useem, *The Big Gamble: Have American Indians found their new buffalo?*, FORTUNE, Oct. 2, 2000, at 222, *available at* 2000 WLNR 7913728 ("'[The compacts] haven't been negotiated,' complained Frank Chaves, co-chairman of the New Mexico Indian Gaming Association. 'They were dictated.'").

[146] *See Role and Funding of the National Indian Gaming Commission: Oversight Hearing on the Indian Gaming Regulatory Act Before the S. Indian Affairs Comm.*, 108th Cong. 90 (2003) (prepared statement of Aurene M. Martin, Acting Assistant Secretary-Indian Affairs, Dep't of the Interior), *available at* http://indian.senate.gov/2003hrgs/070903 hrg/martin.PDF [hereinafter Martin Testimony] ("Another consequence of the Supreme Court's 1996 decision is that more states have sought to include revenue-sharing provisions in Class III gaming compacts, resulting in a discernable increase in such provisions in the past seven years.").

[147] *See* KATHRYN R. L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 153–54 (2006).

[148] *See* Second Amendment to Tribal-State Compact Between the E. Band of Cherokee Indians and the State of N.C. ¶ 24 (Jan. 17, 2001), *available at* http://www.ncai.org/ncai/resource/agreements/nc_gaming-easter_band_of_cherokee_indians_second_amendment.pdf.

[149] *See* 25 U.S.C. § 2710(d)(3)(C)(iii) (2000).

[150] *See* Amended and Restated Tribal-State Compact for Regulation of Class III Gaming Between the Confederated Tribes of the Grand Ronde Cmty. of Or. and the State of Or. § XXVI (Oct. 9, 2001), *available at* http://www.ncai.org/ncai/resource/agreements/or_gaming-confederated_tribes_ of_grande_ronde.pdf.

Tribal and state negotiations and compacts after *Seminole Tribe* have one major commonality—revenue sharing with states[151] and state subdivisions.[152] For example, most California tribes operating more than 200 slot machines must contribute seven to thirteen percent of their average net winnings per machine to the State of California's Special Distribution Fund,[153] and must also participate in revenue sharing arrangements with other tribes.[154] As Professors Light and Rand report, "All told, in 2003 alone, tribes provided $759 million to state and local governments . . . ."[155]

Under the post-*Seminole Tribe* regime, revenue sharing is justified as an arm's length transaction in which the state receives a revenue sharing provision and the tribes receive access to exclusive gaming markets.[156] The problem, as the following examples show, is that revenue sharing percentages have increased while exclusive gaming markets have begun to disappear.

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[151] *See, e.g.*, Tribal-State Compact Between the State of Cal. and the Cabazon Band of Mission Indians § 5.1(a) (May 16, 2000), *available at* http://www.ncai.org/ncai/resource/agreements/ca_gaming-cabazon_band_of_mission_indians-5-16-2000.pdf; A Compact between the Pokagon Band of Potawatomi Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Pokagon Band of Potawatomi Indians § 17 (Feb. 18, 1999), *available at* http://www.ncai.org/ncai/resource/agreements/mi_gaming-pokagon_band_of_potawatomi-12-3-1998.pdf; Indian Gaming Compact between the Pueblo of Pojoaque and the State of New Mexico, Revenue Sharing Agreement ¶¶ 2–3 (Aug. 29, 1999), *available at* http://www.ncai.org/ncai/resource/agreements/nm_gaming-pueblo_of_pojoaque.pdf; Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York ¶ 12(b)(1) (2002), *available at* http://www.ncai.org/ncai/resource/agreements/ny_gaming-seneca_nation-4-12-2002.pdf. *See generally* LIGHT & RAND, *supra* note 5, at 69–73; Light, et al., *supra* note 16.

[152] It matters a great deal who benefits from the revenues paid out by tribes. Indian tribes that negotiate payments to the state only, such as in Connecticut, can expect local cities and counties that receive nothing to muster a political fight with the tribes. *See* RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 160–61 (2005) [hereinafter CRAMER, CASH] (describing the political forces mobilized against Connecticut gaming tribes and against federal recognition of other Connecticut tribes). Payments to local units of government help to alleviate that political problem. *See* Cramer, *supra* note 70, at 597. For example, because of the good will engendered payments to local units of government, Michigan Indian tribes such as the Grand Traverse Band of Ottawa have been better able to enter into cross-deputization agreements with local law enforcement. *See* Brief of Non-Federal Appellees 10 n.6, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006) (No. 05-5206) ("[T]he [Little River Band of Ottawa Indians] have entered into cooperative law enforcement agreements with state and local governments and generated significant good will within the surrounding non-Indian communities.") (internal citations omitted).

[153] *See*, Tribal-State Compact Between the State of California and the Hoopa Valley Tribe § 5.1(a) (May 16,2000), *available at* http://www.ncai.org/ncai/resource/agreements/ca_gaming-hoopa_valley_tribe-5-16-2000.pdf.

[154] *Id.* at § 4.3.2.1. Another example is the Coushatta Tribe of Louisiana, which pays $7 million each year to local units of government. *See* Tribal-State Compact for the Conduct of Class III Gaming Between the Coushatta Tribe of La. and the State of La. § 12(C)(1) (Sept. 25, 2001), *available at* http://www.ncai.org/ncai/recourse/agreements/la-gaming-coushatta_tribe-9-25-2001.pdf.

[155] LIGHT & RAND, *supra* note 5, at 87 (footnote omitted).

[156] *See infra* Parts II.B.1 and II.B.2.

1. The New Mexico Experience (1997)

Post-*Seminole Tribe* revenue sharing agreements placed the Secretary of the Interior, charged with approving and publishing gaming compacts,[157] in a bind. In 1997, Interior Secretary Bruce Babbitt declined to approve or disapprove the gaming compact between the State of New Mexico and the Pueblo of Isleta.[158] In accordance with the statute, the refusal to approve or decline meant that the compact was considered approved.[159] However, Secretary Babbitt's letter stated that the compact was approved "only to the extent it [was] consistent with the provisions of IGRA."[160] The compact "require[d] the Pueblo to pay the State 16% of 'net win' . . . as long as the State did not take any action directly or indirectly to attempt to restrict the scope of Indian gaming permitted under the Compact, and did not permit any further expansion of non-tribal class III gaming in the State."[161] Keeping in mind the prohibition on state taxes, assessments, or fees on Indian gaming, Secretary Babbitt wrote:

> To date, the Department has approved payments to a State only when the State has agreed to provide substantial exclusivity, i.e., to completely prohibit non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place . . . . In addition, because of the Department's trust responsibility, we seek to ensure that the cost to the Pueblo—in this case up to 16% of "net win"—is appropriate in light of the benefit conferred on the Pueblo.
>
> In light of the large payments required under the Compact, the Department questions whether the limited exclusivity provided the Pueblo meets the standards discussed in the previous paragraph. The Compact does not provide substantial exclusivity. Indeed, the Compact seems to expand non-Indian gaming by allowing for a state lottery, the operation of a large number of electronic gaming devices by fraternal, veterans, or other nonprofit membership organizations, gaming by nonprofit tax exempt organizations for fundraising purposes, and the operation of electronic gaming devices at horse tracks every day that live or simulcast horse racing occurs.[162]

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[157] *See* 25 U.S.C. § 2710(d)(3)(B) (2000).

[158] Letter from Hon. Bruce Babbitt, Sec'y of Interior, to Hon. Gary E. Johnson, Governor, State of N.M., at 3 (Aug. 23, 1997), *available at* http://www.doi.gov/news/archives/indnmcom.html [hereinafter Babbitt Letter].

[159] *See id.* (citing 25 U.S.C. § 2710(d)(8)(C)).

[160] *Id.*

[161] *Id.*

[162] *Id.*

In addition, the compact required the Pueblo to pay flat regulatory fees to the state.[163] Upon consideration of the terms, the Secretary also stated that the Department "has serious questions about the permissibility of this regulatory fee structure under IGRA."[164] According to Secretary Babbitt, "[u]nlike other tribal-state compacts, this Compact does not require the State to provide an accounting of the regulatory fees in order to ensure that the payments actually match the cost of regulation . . . ."[165]

The Secretary of the Interior saw the advantage of the revenue sharing agreements for tribes, but refused to take an affirmative position that all revenue sharing agreements are valid under IGRA. The Secretary created administrative policy that the department would approve such agreements where a state granted "'substantial exclusivity' for Indian gaming in exchange for the payment."[166] In the case of the seven Michigan Indian tribes that entered into gaming compacts in 1993, for example, the exclusive market they shared as a collective group was the entire State of Michigan.[167] Once the exclusive market gave way to the state's grant of three casino licenses and subsequent opening of the new casinos in the City of Detroit, the revenue sharing provision of the gaming compacts was severed.[168]

2. *The New York Experience (2002)*

Revenue sharing, as tied to exclusive gaming markets, is but a short-term solution. As Indian and non-Indian gaming grows nationwide, the opportunity to create exclusive gaming markets has declined. Each new revenue sharing agreement is based on a smaller exclusive gaming market. At some point, the exclusive gaming market granted will be too small to justify the amount of revenue sharing under the standard created by the Secretary. As Secretary of the Interior Gale Norton pointed out in reference to the gaming compact between the Seneca Nation and the State of New York, if a tribe's exclusive gaming market is four rural counties, how does that justify a twenty-five percent payment of net win to the state and local communities?[169]

Secretary Norton followed Secretary Babbitt's approach by allowing the Seneca gaming compact to take effect without secretarial approval or

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[163] *See* Babbitt Letter, *supra* note 158, at 2.

[164] *Id.*

[165] *Id.*

[166] Martin Testimony, *supra* note 146, at 2.

[167] *See* Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 271 F.3d 235, 237 (6th Cir. 2001) ("[T]he Seven Tribes agreed to make semi-annual payments of eight percent of the net win from their casinos' electronic games of chance, so long as the Seven Tribes collectively enjoyed the 'exclusive right to operate' those types of games within the state.").

[168] *See id.* at 239.

[169] *See* Letter from Gale A. Norton, Secretary of Interior, to Hon. Cyrus Schindler, Nation President, Seneca Nation of Indians (Nov. 12, 2002) [hereinafter Norton Letter].

disapproval.[170] The Seneca compact added a new twist to the "substantial exclusivity" requirement—it created exclusivity in a 10,500 square mile area in western New York State by denying future opportunities to engage in gaming for neighboring tribes.[171] Specifically, the compact granted a twenty-five-mile radius of exclusivity to the Seneca Nation to game in Buffalo, New York, excluding other tribes such as the Tuscarora Nation which had equal claims to that region.[172] The Tuscarora Nation argued that allowing the Seneca Nation to game in Buffalo violated the Secretary's trust responsibility to all Indian tribes,[173] but Secretary Norton rejected that argument by opining that IGRA "did not create an absolute right to off-reservation gaming."[174]

Of particular importance is the portion of Secretary Norton's statement regarding off-reservation gaming. The Seneca Nation compact arose out of a congressionally approved land claims settlement between New York and the Nation: the Seneca Nation Settlement Act.[175] This land settlement statute required the Secretary to acquire parcels in Buffalo and Niagara Falls to be held in trust for the benefit of the Seneca Nation, which would allow the Nation to engage in "off-reservation gaming"[176] because the newly acquired lands were not considered part of the reservation. Most off-reservation gaming proposals require the tribe to petition the Secretary to exercise her discretion to take land into trust in accordance with the general fee-to-trust acquisition statute,[177] but the Seneca proposal was different. For Secretary Norton, this statute, which was a mandatory fee-to-trust acquisition, took away her discretion to refuse to take the land into trust for off-reservation gaming purposes.[178] Secretary Norton made clear that she "believe[d] that IGRA does not envision that off-reservation gaming would become pervasive."[179] This was significant because for the first time, a tribe and a state attempted to solve the problem of dwindling gaming market exclusivity by seeking off-reservation gaming markets.[180]

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[170] *See id.* at 1 ("I have decided to allow this Compact to take effect without [s]ecretarial action.").

[171] *See id.* at 3–4.

[172] *See id.* at 4–5.

[173] *See id.* at 4.

[174] Norton Letter, *supra* note 169, at 5.

[175] *See id.* at 5 (citing 25 U.S.C. § 1774).

[176] *See id.* at 2, 5 (quoting 25 U.S.C. § 1774).

[177] *See* 25 U.S.C. § 465.

[178] *See* Norton Letter at 6 ("I want to emphasize, however, that the analysis regarding off-reservation land as part of a Congressionally approved settlement greatly differs from the analysis the Department engages in when the issue is simply a trust acquisition for off-reservation gaming.").

[179] *Id.* at 2.

[180] Martin Testimony, *supra* note 146, at 3. As former Acting Assistant Secretary of Indian Affairs Aurene Martin testified:

> Since taking office, Secretary Norton has raised the question whether the law provides her with sufficient discretion to approve off-reservation Indian gaming ac-

The previous examples show how the Department of the Interior has implemented *Seminole Tribe* in particular cases in light of competing pressures by states, Indian tribes, and a shrinking number of gaming markets. The following section details the Department of the Interior's more general response to the *Seminole Tribe* decision.

C. The Secretarial Procedure

The United States has long been known both legally and politically as the trustee of Indians and Indian tribes.[181] The Department of the Interior is empowered and obligated by federal statutes to manage Indian affairs[182] and, by extension, act as the trustee on behalf of the federal government.[183] In some areas of law, including Indian gaming, the forms that the trust relationship takes are made explicit.[184] The Department plays an important role in the negotiation of tribal-state compacts. IGRA states:

> If the State does not consent during the 60-day period described in [25 U.S.C. § 2710(d)(7)(B)(vi)] to a proposed compact sub-

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> quisitions that are great distances from their reservations, so-called "far-flung lands." This is further framed by what appears to be the latest trend of states that are interested in the potential of revenue sharing with tribes encouraging tribes to focus on selecting gaming location[s] on new lands based solely on market potential rather than exercising governmental jurisdiction on existing Indian lands.

Id.

[181] *See, e.g.*, Creek Nation v. United States, 318 U.S. 629, 642 (1943) (Murphy, J., dissenting) ("We have held that the Government in its relations with the Indian tribes occupies the position of a fiduciary, that the relationship is similar to that of guardian and ward, and that the duties and responsibilities of the United States toward its wards require a generous interpretation.") (citing Choctaw Nation v. United States, 119 U.S. 1, 27, 28 (1886); Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942)); Seminole Nation v. United States, 316 U.S. at 296–97 ("In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."); CANBY, *supra* note 35, at 35 ("Some form of special relationship between the federal government and the Indian tribes was probably implicit in the decision, made immediately after the Revolution, to keep Indian affairs in the hands of the federal government as a means of protecting the tribes from the states and their citizens (thereby avoiding Indian wars)."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4] (Nell Jessup Newton ed., 2005); U.S. COMM'N ON CIV. RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 2–6 (2003) (describing the trust responsibility as a "civil right").

[182] *See* 25 U.S.C. §§ 2, 9 (2000).

[183] *See* 25 U.S.C. § 13.

[184] *See, e.g.*, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (relying largely on United States v. Mitchell, 463 U.S. 206 (1983) for the conclusion that the trust relationship created in Tucker Act, 28 U.S.C. § 1491 (2000), supplies a waiver of sovereign immunity and thus creates a right of action against the United States); *Mitchell*, 463 U.S. 206 (interpreting Tucker Act to waive sovereign immunity within the trust relationship in Indian affairs).

> mitted by a mediator under [§ 2710(d)(7)(B)(v)], the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures (I) which are consistent with the proposed compact selected by the mediator under [§ 2710(d)(7)(B)(iv)], the provisions of this chapter, and the relevant provisions of the laws of the State, and (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.[185]

In the pre-*Seminole Tribe* world of Indian gaming, Congress gave the Secretary a mandate to enforce and implement gaming compacts selected by a mediator in accordance with Section 2710(d)(7)(B)(iv).[186]

After the decision in *Seminole Tribe*, the Secretary of the Interior sought to reshape the Secretary's role under the new legal regime. Following the understanding of congressional staffers familiar with the negotiations leading up to the enactment of IGRA, such as Alex Skibine, former deputy counsel on Indian Affairs for the House Interior Committee, and citing IGRA and 25 U.S.C. §§ 2 and 9,[187] the Secretary promulgated a rule, now codified at 25 C.F.R. Part 291, that allows a tribe to invoke a secretarial procedure akin to that of 25 U.S.C. § 2710(d)(7)(B)(vii) if a state refuses to negotiate a class III gaming compact in good faith and invokes its Eleventh Amendment immunity from suit.[188] However, the Secretary's authority to promulgate the rule has been challenged.[189]

If Part 291 is a valid exercise of the Secretary's authority, the procedure would be a very effective tool that tribes could use to avoid the intransigence of a state refusing to engage in good faith compact negotiations. However, nothing in the text of IGRA allows the tribe or the Secretary to bypass the requirement of IGRA that a federal court make a determination that the state "has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities. . . ."[190] As the Secretary asserted in promulgating the final rule,

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[185] 25 U.S.C. § 2710(d)(7)(B)(vii).

[186] *See id.*

[187] *See* United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300 (9th Cir. 1998); Alex Skibine Testimony, *supra* note 104.

[188] *See* Class III Gaming Procedures, 64 FED. REG. 17535, 17536–37 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291); *see also* Request for Comments on Establishing Departmental Procedures To Authorize Class III Gaming on Indian Lands When a State Raises an Eleventh Amendment Defense To Suit Under the Indian Gaming Regulatory Act, 61 FED. REG. 21394 (May 10, 1996) ("The Supreme Court's *Seminole* decision does not affect the validity of existing class III gaming compacts, but it does require the United States to consider the effect of a State's refusal to engage in remedial litigation designed to oversee the compacting process.").

[189] *See* Santee Sioux Nation v. Norton, No. 8:05CV147, 2006 WL 2792734 (D. Neb., Sept. 26, 2006); *see also* Martin Testimony, *supra* note 146, at 2 (noting legal challenges to the Secretary's authority to promulgate the rule filed by Florida and Alabama).

[190] 25 U.S.C. § 2710(d)(7)(B)(iii).

Part 291 restores a critical portion of IGRA and fulfills Congressional intent,[191] but is that enough to authorize the rule? The Ninth Circuit suggested, without ruling, that this procedure would not have been valid in the pre–*Seminole Tribe* legal world,[192] but that, in a post–*Seminole Tribe* world, the procedure might be a valid exercise of secretarial discretion in promoting the Congressional intent behind IGRA.[193] Some states and legal commentators, on the other hand, have attacked the procedure as an invalid exercise of secretarial discretion.[194]

The criticisms by states and commentators are not without foundation. Like revenue sharing agreements, nothing in the text of IGRA or even the legislative history expressly authorizes the secretarial procedure. As a result, this proposed solution, like that of revenue sharing agreements, rests on tenuous ground at best.

D. IGRA's Imbalance and a National Backlash Against Indian Gaming

While the Secretary's authority is litigated, the controversy surrounding Indian gaming continues bitterly. The acrimony between states and tribes has intensified as political pressures have mounted and has led, at best, to inefficiency in Indian gaming.

Seminole Tribe made it possible for states to exploit Indian tribes by exacting massive revenue sharing payments. To generate compensating revenue, tribes have had to expand their gaming operations outside of their

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[191] *See* Class III Gaming Procedures, 64 FED. REG. At 17537 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291).

[192] *See* Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994), *vacated on other grounds*, 517 U.S. 1129 (1996).

[193] United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301–02 (9th Cir. 1997) (citing Seminole Tribe of Florida v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994)).

[194] *See* 64 FED. REG. at 17537 ("Nearly all of the comments from the States reiterated or expanded on comments previously submitted arguing that the Secretary lacks legal authority to promulgate these regulations."); Martin Testimony, *supra* note 146, at 2 (identifying legal challenges filed by Florida and Alabama); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 454 (Clay Smith ed., 3d ed. 2004) ("The regulation subsequently was challenged by several states . . . ."); Goldin, *supra* note 23, at 843 ("A unilateral decision by the Secretary to dictate the parameters for tribal gaming would undermine the congressional objective that underlies IGRA."); Rebecca S. Linder-Cornelius, *The Secretary of Interior as Referee: The States, the Indian Nations, and How Gambling Led to the Illegality of the Secretary of Interior's Regulations in 29 C.F.R. § 291*, 84 MARQ. L. REV. 685, 696 (2001) ("The Secretary's new regulations defeat the purpose of the IGRA. The clear intent of the IGRA was to bring the states into the process of tribal gaming. When the state asserts an Eleventh Amendment defense, the tribes are left with no recourse. However, in the new regulations, when a state claims it has negotiated in good faith to no avail, the only recourse it is left with is a biased factfinder who can do what it wants without any state input."); Laxague, *supra* note 25, at 91 ("By placing the adjudication of tribal-state disputes into the hands of an official with a moral and legal duty to pursue the best interests of the tribes, the Secretary's proposed rules do both parties a disservice and badly skew the balance of interests intended by Congress when it wrote the IGRA.").

existing reservation lands to reach more valuable markets.[195] These gaming markets, of course, were created because "restrictive state gaming laws create barriers to entry that provide Indian tribes with an artificial monopolistic market. . . ."[196] Additionally, it has been suggested that the increasing political influence of Indian tribes has induced some state legislators "to act in the interests of these tribal constituents."[197] An explanation that is at least as likely, however, is that non-Indian political leaders see independent political value in encouraging and helping some tribes expand their gaming operations to urban areas.

The expansion or even the mere possibility of expansion of Indian gaming operations into urban areas has contributed significantly to the controversy concerning and resistance towards Indian gaming.[198] Local newspaper articles covering Indian gaming expansion to off-reservation areas describe a potential or actual "backlash" against the tribal interests in most instances.[199] As could be expected, this backlash has spilled into the halls of Congress.[200] The congressional agenda of the 109th Congress was not about tinkering with the Act, but instead was a drastic response to the growing national concern over "reservation shopping," a political code word that links off-reservation Indian gaming expansion to smarmy non-Indian gaming developers and greed.[201] Senator Dianne Feinstein's comment in April 2005 aptly described this concern:

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[195] *See* Washburn, *supra* note 94, at 293.

[196] *Id.* at 295.

[197] *Id.* (footnote omitted).

[198] *See generally* LIGHT & RAND, *supra* note 5, at 63–65.

[199] *See, e.g.*, Editorial, *Still a Lousy Idea; "Advisory" Votes or Not, Madera Casino is a Terrible Choice*, FRESNO BEE (Cal.), Aug. 27, 2005, at B8, *available at* 2005 WLNR 13589669 ("This project, if approved, has the potential to cause a backlash against all Indian gaming. At some point, if casinos blanket urban areas, the public might decide to allow all-out Las Vegas gaming in California open to anyone, not just tribes. That would surely cut into tribal gaming revenues."); *A Worsening Bet; Indian Gaming a Worry for Locals, State and Feds*, SAN DIEGO UNION-TRIB., July 10, 2005, at G2, *available at* 2005 WLNR 10889416 ("Even some tribes already well into the casino/hotel/resort business are looking askance at some newcomers' plans. They are not only competition; they are also fuel for backlash from a public already questioning where gambling saturation begins and Indian sovereignty ends."); Jim Barnett, *Wu Goes Against Governor, Opposes Plan for Gorge Casino*, OREGONIAN (Portland, Or.), Apr. 29, 2005, at A1, *available at* 2005 WLNR 6744537 ("'If we permit this one in Cascade Locks, I don't see a logical stopping point,' [U.S. Rep. David] Wu, [D-Or.] said. 'That ultimately is harmful to the state of Oregon and to the tribes. I don't know at what point there would be a popular backlash about tribal casino gambling.'").

[200] *See* Scott Van Voohris, *"Reservation Shopping" Spurs Casino Backlash*, BOSTON HERALD, Aug. 9, 2005, at 35, *available at* 2005 WLNR 12529798 ("A Capitol Hill backlash against tribal gambling threatens to torpedo the national expansion of Connecticut's two giant Indian casinos, Foxwoods and Mohegan Sun."); *Off-Rez Gaming Finds Growing List of Critics*, ALBUQUERQUE J., July 2, 2005, at A8, *available at* 2005 WLNR 10437598 ("If off-reservation casinos are allowed to proliferate, McCain told the Associated Press, 'we're going to see a backlash against Indian gaming, because that was not the intent of the (1998 Indian Gaming Regulatory Act).'").

[201] *See, e.g.*, Jeffrey Mize, *Oregon Tribal Leader Wants Ban on Off-Reservation Casinos—Cowlitz Say Foes Are "Misleading People,"* OREGONIAN, Nov. 10, 2005, at A1, *avail-*

> Attempts at off-reservation gaming and the practice of "reservation shopping" have increased dramatically in my State over the past five years and it is now estimated that there may be up to 20 proposals to game outside of tribal lands in California.
>
> There is . . . reason to be concerned about off-reservation gaming and its effect on the surrounding communities. I have watched as out-of-state gaming developers have sought out tribes offering to assist them in developing casinos near lucrative sites in urban areas and along central transit routes—far from any nexus to their historic lands.[202]

What is "off-reservation gaming"? In short, "off-reservation gaming" is not gaming itself but any *proposal* to conduct Indian gaming on lands not already located within an Indian reservation or on lands held in trust by the federal government for the benefit of Indian tribes. By definition, Indian gaming cannot occur on off-reservation lands—it must be conducted, in accordance with IGRA, on "Indian lands."[203] "Indian lands" are defined as trust lands or reservation lands.[204] Once land is acquired by the Secretary for the benefit of an Indian tribe, that land is considered "Indian land" and the tribe can conduct gaming operations there. In reality, the term "off-reservation gaming" is oxymoronic and instead refers to an expansion of Indian land to accommodate increased gaming.

The backlash associated with off-reservation gaming is tied to the *Seminole Tribe* decision. Anti-Indian gaming interests regularly turn to the courts to prevent gaming expansion or to strike down gaming compacts under state law.[205] This has politicized and weakened IGRA, an already weak and creaky structure.[206]

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able at 2005 WLNR 18194102 ("Citizens Against Reservation Shopping and other groups have accused the Cowlitz of trying to create a reservation near La Center solely because of its economic potential, not its historical and cultural significance to the tribe."); James P. Sweeney, *Proposal Would Enable Joint Casino Projects; Legislation to Add Barriers to Gaming off of Reservations*, SAN DIEGO UNION-TRIB., Nov. 10, 2005, at A3, *available at* 2005 WLNR 18296809 ("Pombo's draft legislation would place new constraints—including a requirement for local approval—on off-reservation casinos, which have become a national controversy also known as 'reservation shopping.'").

[202] *A Bill to Modify the Date as of which Certain Tribal Land of the Lytton Rancheria of California is Deemed to be Held in Trust: Oversight Hearing on S. 113 Before the S. Indian Affairs Comm.*, 109th Cong. 5–6 (2005) (prepared statement of Sen. Dianne Feinstein), *available at* http://indian.senate.gov/2005hrgs/040505hrg/Feinstein.pdf [hereinafter Feinstein Testimony].

[203] 25 U.S.C. §§ 2710(a)(1), 2710(b)(1), 2710(d)(1) (2000).

[204] 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12.

[205] *See, e.g.*, TOMAC v. Norton, 433 F.3d 852 (D.C. Cir. 2006); City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003); Dewberry v. Kulongoski, 406 F.Supp. 2d 1136 (D.Or. 2005); Citizens Exposing Truth About Casinos v. Norton, No. 02-1754, 2004 U.S. Dist. Lexis 27498 (D.D.C., Apr. 23, 2004); Complaint, Michigan Gambling Opposition v. Norton, No. 1:05CV01181 (D.D.C. June 13, 2005).

[206] *See* Tsosie, *supra* note 13, at 61.

Arising after the "constitutionality" and "bad faith" waves of IGRA-related litigation that culminated in *Seminole Tribe*, the current voracious wave of litigation could be labeled the "state law" wave. In it, Indian tribes and states have negotiated and entered into class III gaming compacts with revenue sharing provisions, complex regulatory schemes, derivative state and tribal legislation, and settled expectations—only to have many of the compacts struck down under state law.[207] These legal challenges, whether upholding or striking down gaming compacts, disrupt gaming operations in a significant way.[208] Many gaming compacts—including those in effect for more than a decade—are vulnerable to challenge as courts reject laches arguments that would protect against such suits.[209] The revenue streams of both states and tribes are accordingly at serious risk in many states. Very little stops anti-gaming organizations or pro-tribal sovereignty interests from suing the states and tribes to invalidate revenue sharing agreements.[210]

A fourth wave of litigation involves Indian tribes that seek to commence gaming operations on lands acquired after IGRA's enactment, or attempts by Indian tribes who did not have federal recognition at the time Congress enacted IGRA to commence gaming on their initial reservations. IGRA includes a prohibition on Indian gaming on lands acquired after the enactment of IGRA in October 1988,[211] but that prohibition is subject

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[207] The compacts have been invalidated on the theory that the state's constitution does not provide authority for the governor to negotiate and execute a compact without authorization from the legislature. *See, e.g.*, Am. Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012, 1069–79 (D. Ariz. 2001) (striking down Arizona compacts), *rev'd*, 305 F.3d 1015 (9th Cir. 2002); Hotel Employees and Restaurant Employees Int'l Union v. Davis, 981 P.2d 990, 1002–09 (Cal. 1999) (striking down California compacts); State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1183–85 (Kan. 1992) (striking down Kansas compacts); Taxpayers of Mich. Against Casinos v. Michigan, 657 N.W.2d 503, 514–17 (Mich. Ct. App. 2002) (upholding Michigan compacts), *rev'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005); Taxpayers of Mich. Against Casinos v. State, 708 N.W.2d 115, 121–26 (Mich. Ct. App. 2005) (striking down amendments to Michigan compacts); State *ex rel.* Clark v. Johnson, 904 P.2d 11, 26–27 (N.M. 1995) (striking down New Mexico compacts); Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1060–61 (N.Y. 2003) (striking down New York compacts); Panzer v. Doyle, 680 N.W.2d 666, 696–97 (Wis. 2004) (striking down Wisconsin compacts).

[208] The Grand Traverse Band of Ottawa and Chippewa Indians sued the United States Attorney for the Western District of Michigan in 1996 to enjoin federal actions to shut down the Turtle Creek Casino. While the suit was pending, the Band was not be able to borrow money for use in support of the Turtle Creek facility except by paying much higher interest rates, stifling the Band's ability to expand its operations. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y., 46 F. Supp. 2d 689 (W.D. Mich. 1999); Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y., 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004). *See* Interview with John F. Petoskey, General Counsel, Grand Traverse Band of Ottawa and Chippewa Indians (Nov. 22, 2005).

[209] *See, e.g.*, *Saratoga County Chamber of Commerce*, 798 N.E.2d at 1055–57; Dairyland Greyhound Park, Inc. v. Doyle, No. 01-2906, 2003 WL 24124290, at *9 (Wis. Cir. Feb. 11, 2003).

[210] *See, e.g.*, cases cited *supra* note 205.

[211] 25 U.S.C. § 2719(a).

to several exceptions.[212] The litigation over these exceptions can be labeled the "after-acquired wave" of litigation.[213] The question of off-reservation gaming derives from the exceptions to the prohibition of gaming on lands acquired after the enactment of IGRA.[214]

IGRA's imbalance served as the catalyst for other alleged problems on the agenda of the 109th Congress. Congress has focused on off-reservation gaming issues, tribal lobbying matters, the taking of land into trust for gaming purposes,[215] and the regulation of Indian gaming.[216] To protect their interests from this agenda, tribes have spent millions of dollars on lobbyists and political donations in efforts to preserve current gaming markets, exclude competing interests from their gaming markets, and expand or create gaming markets.[217]

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[212] 25 U.S.C. §§ 2719(a)(1), 2719(b)(1)(A), 2719(b)(1)(B)(i)–(iii) (exceptions for lands located within or contiguous to the reservation, for secretarial and gubernatorial approval, for settlement of a land claim, for an initial reservation, and for a restored tribe or restored lands).

[213] *See, e.g.*, *TOMAC*, 433 F.3d 852, 856 (restoring tribe exception); *City of Roseville*, 348 F.3d at 1032 (restoring lands exception); Oregon v. Norton, 271 F.Supp.2d 1270, 1280 (D.Or. 2003) (restoring lands exception); *Grand Traverse Band of Ottawa and Chippewa Indians*, 198 F. Supp. 2d at 939-40 (restoring tribe, restoring lands exception); *Citizens Exposing Truth About Casinos*, 2004 U.S. Dist. Lexis 27498, at *13–*15 (restoring tribe, restoring lands exception); TOMAC v. Norton, 193 F. Supp. 2d 182, 193–94 (D.D.C. 2002) (restoring tribe, restoring lands exception); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F.Supp.2d 155, 164 (D.D.C. 2000) (clarifying meaning of "restoration" and remanding for reconsideration of entitlement to restoration of lands exception); Sault Ste. Marie Tribe of Chippewa Indians v. United States, 78 F. Supp. 2d 699, 706–07 (W.D. Mich. 1999) (restoring tribe, restoring lands exception), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002).

[214] *See, e.g.*, Keweenaw Bay Indian Cmty. v. United States, 136 F.3d 469 (6th Cir. 1998); Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688 (9th Cir. 1997); Wyandotte Nation v. Sebelius, 337 F. Supp. 2d 1253 (D. Kan. 2004); Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165 (W.D. Wis. 1996).

[215] The taking of land into trust by the Secretary of the Interior is a method for expanding gaming to off-reservation areas—although one that has limited utility in the real world. This is due in part to the "rigorous" hurdle faced by the tribes in convincing the Secretary to take land into trust, and is evidenced by the small number of instances in which tribes have successfully convinced the Secretary to acquire land in trust for gaming purposes. *See* Letter from James E. Cason, Associate Deputy Secretary, Dept. of the Interior, to Hon. Ron Suppah, Chairman, Confederated Tribes of the Warm Springs Reservation of Oregon 1–2 (May 20, 2005) [hereinafter Cason Letter] (on file with author); *Oversight Hearing on Taking Land Into Trust: Hearing before the S. Comm. on Indian Affairs*, 109th Cong. 2-3 (May 18, 2005) (Prepared Statement of George T. Skibine, Acting Deputy Assistant Secretary of Indian Affairs) [hereinafter George Skibine November Testimony], *available at* http://indian.senate.gov/2005hrgs/051805hrg/skibine.pdf ("During [the George W. Bush] administration, the Secretary has approved eight applications to take land into trust that have qualified under these various exceptions to the gaming prohibition . . ."); Glenn Coin, *Oneida's Request Sizeable; Tribe's Application Wants 17,310 Acres in Federal Trust*, POST-STANDARD (Syracuse, N.Y.), Nov. 13, 2005, at B1, *available at* LEXIS, Allnews ("It's not uncommon for the BIA to take up to 10 years to rule on trust applications, said Donald Laverdure, an Indian law professor at Michigan State University.").

[216] *See supra* notes 1, 4–8 and accompanying text.

[217] *See, e.g.*, *Trial Lobbying Matters: Hearing before the S. Comm. on Indian Affairs*, 109th Cong. 1 (June 22, 2005) (statement of Amy Moritz Ridenour) (describing the lobbying activities of the Mississippi Band of Choctaw Indians), *available at* http://indian.senate.

The focus on off-reservation gaming misses the point. If Indian tribes had the ability to force states to negotiate in good faith, they would not need to expend millions of dollars on lobbyists such as Jack Abramoff and Michael Scanlon.[218] Nor would tribes need to seek quality time with powerful politicians and lobbyists such as former Representative Tom DeLay, Grover Norquist, and Ralph Reed.[219] If Indian tribes could force states to negotiate gaming compacts, they would be less inclined to exploit class II gaming in attempts to expand revenue streams when facing states that stonewall class III gaming compacts.[220] All parties involved would benefit from a more cooperative approach, which would protect and promote the interests of the tribes as well as the interests of state, federal, and local governments.

III. TOWARD BALANCE: A PRACTICAL LEGISLATIVE PROPOSAL

Attempting to amend the Indian Gaming Regulatory Act invites a repeat of the years of feverish lobbying and political games that led up to the 1988 Act.[221] Now that Indian gaming revenues approach $20 billion a year,[222] the stakes are far higher than they were in 1988.[223] As argued above, amending the Act to remedy only the problems in the current law for Indian tribes, namely the *Seminole Tribe* problem, is not a viable political option. Even the Senate Indian Affairs Committee, led by supporters of

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gove/2005hrgs/062205hrg/ridenour.pdf.

[218] *See generally* Plea Agreement & Attachment, United States v. Abramoff, No. 06-00001 (D.D.C. Jan. 3, 2006), *available at* http://news.findlaw.com/hdocs/docs/abramoff/usabrmff10306plea.pdf; Plea Agreement & Attachment, United States v. Scanlon, No. 05-411 (D.D.C. Nov. 17, 2005), *available at* http://www.indianz.com/docs/scanlon112105a.pdf and http://www.indianz.com/docs/scanlon112105b.pdf; *Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (Nov. 2, 2005), *available at* http://www.gpo.gov/congress/ senate/senate13ch109.html; *Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (June 22, 2005), *available at* http://www.gpo.gov/congress/senate/senate13ch109.html; Kathryn R. L. Rand & Steven Andrew Light, *Don't Punish Tribes for Abramoff*, GRAND FORKS HERALD, Jan.18, 2006, at 1, *available at* 2006 WLNR 938601.

[219] *See* Bill Marsh, *In Power and Under Siege*, N.Y. TIMES, Oct. 23, 2005, § 4, at 14.

[220] *See generally Oversight Hearing on In Re Trial Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (Apr. 27, 2005) (statement of Philip N. Hogen, Chairman, Nat'l Indian Gaming Comm.), *available at* http://indian.senate.gov/2005hrgs/042705hrg/hogen.pdf; *id.* (prepared statement of Kevin K. Washburn, Associate Professor, U. of Minn. Law School), *available at* http://indian.senate.gov/2005hrgs/042705hrg/washburn.pdf [hereinafter Washburn April Testimony]; Staudenmeier & Lynch, *infra* note 288.

[221] *See generally* Ducheneaux & Taylor, *supra* note 13.

[222] *See* Press Release, Nat'l Indian Gaming Comm'n, National Indian Gaming Commission Announces Indian Gaming Revenue for 2004 (July 13, 2005), *available at* http://www.nigc.gov/ReadingRoom/PressReleases/PR17072005/tabid/163/Default.aspx (reporting $19.4 billion in revenues).

[223] *See* S. Rep. No. 100-446, at 2 (1988) (In the hearings leading to the enactment of IGRA, "it was determined that collectively, [tribal] games generate more than $100 million in annual revenue to tribes.").

Indian sovereignty such as Senator McCain, does not consider such a *Seminole Tribe* fix to be worth discussing.[224] Accordingly, a major overhaul of the Act to restore the balance of IGRA must include concessions by both Indian tribes and the states to be politically viable. As an example, national power players like the states of California and Connecticut must be persuaded that any re-balancing of IGRA will protect their revenue streams. This Article proposes such a balanced solution.

First, to recognize the practice and reality of tribal-state gaming compacting in the post-*Seminole Tribe* world, Congress should ratify all existing revenue sharing agreements contained in class III gaming compacts through the exercise of the Interstate Commerce Clause[225] where the concerned tribal party consents via a valid tribal legislative resolution. In addition, Congress should authorize tribes, the states, and local units of government to engage in future revenue sharing that meets the broad outlines and limitations articulated by the Department of the Interior. Second, as a concession to tribes, Congress should ratify the current procedure contained in 25 C.F.R. Part 291 and authorize the Secretary of the Interior to promulgate amendments as necessary. Third, as a concession to states and local governments, Congress should mandate that future class III gaming compacts provide for revenue sharing with state and local governments. The revenue sharing should be governed by a formula that allows each government (state, federal, and tribal) to collect an amount equivalent to what it would have collected had the tribal gaming operations been within state jurisdiction. Fourth, as a concession to the federal government and as an acknowledgment of the technological realities of gaming, Congress could create a class II-Plus category of gaming that would include class II gaming aided by technology and that would be subject to the new revenue sharing rules. This modification would reflect the fact that the distinction between class II and class III gaming has become obsolete and superficial.

A. Ratify Current Revenue Sharing Agreements

After *Seminole Tribe*, the tribes and the states entered into revenue sharing agreements that varied state-by-state, with politicians, advocates, and negotiators on both sides relying upon the tenuous legal validity of the agreements[226] to move forward with gaming operations.[227] In the decade that has passed since *Seminole Tribe*, dozens of tribes have been able

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[224] In fact, the last time the Committee discussed *Seminole Tribe* at any length appears to have been in 1996, right after the Court handed down the decision. *See Hearing on Review of Court Decision: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. (May 9, 1996).

[225] U.S. CONST. art. I, § 8, cl. 3.

[226] *See supra* notes 151–155 and accompanying text.

[227] *See* National Congress of American Indians, Gaming Compacts, http://www.ncai.org/Gaming_Compacts.103.0.html (last visited Dec. 6, 2005).

to enter into class III gaming compacts after making significant concessions to states. Some gaming compacts, especially those in Connecticut and Michigan, are even older and are actually the products of litigation,[228] yet are still in jeopardy of being invalidated. Ratifying these compacts would protect the settled expectations of the parties by eliminating the possibility that litigation might upset their arrangements.

For the beneficiaries of these agreements—states, local governments, tribes, tribal members, lenders, and so on—the potential legal invalidity of revenue sharing is an underappreciated concern. Only one court, the Ninth Circuit, has spoken on the legality of these agreements, upholding them on the basis that the State of California offered "meaningful concessions in return for fee demands."[229] Assuming that this standard accords with the purposes of IGRA, which the Ninth Circuit also considered,[230] it is far from clear that all compacts would survive that test. The Wisconsin compacts from the early 1990s, with their set fee structure not expressly tied to a particular purpose,[231] or the New Mexico compacts that Secretary Babbitt criticized[232] might be vulnerable. Compacts in other states, such as Michigan, that relied upon the allowance of a significant exclusive gaming market likely would survive.[233]

But it is not certain that other jurisdictions would adopt such a test in deciding a case challenging the validity of revenue sharing in class III compacts. Some courts could adopt a test that would validate the revenue sharing agreements as long as they follow the purposes of IGRA[234]—a broad test under which many compacts would survive—while other courts could adopt a narrow test relying on the plain language of the statute.[235] Under such a narrow test, it is possible that no revenue sharing provision would survive except the 1993 Michigan compacts entered into through a consent judgment in federal court.[236] This uncertainty regarding the validity

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[228] *See* LIGHT & RAND, *supra* note 5, at 57–58 (noting the gaming compact reached by Connecticut and the Mashantucket Pequot Nation after the Nation successfully sued the State in 1989); Sault Ste. Marie Tribe of Chippewa Indians v. Engler, No. 1:90 CV 611 (W.D. Mich. Aug. 20, 1993) (stipulation for entry of consent judgment), *available at* http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf (noting the compact reached between Michigan and seven tribes as part of the settlement of a "good faith" lawsuit against the State and its governor, John Engler, in 1993).

[229] In re Indian Gaming Related Cases, 331 F.3d 1094, 1112 (9th Cir. 2003).

[230] *See id.* at 1111 (citing 25 U.S.C. § 2702(1) (2000)).

[231] *See* Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 ¶ 6(A) (1998), *available at* http://www.ncai.org/ncai/resource/agreements/wi_gaming-forest_county_potawatomi_community_amendment.pdf.

[232] *See* Babbitt Letter, *supra* note 158.

[233] *See* Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 271 F.3d 235, 237 (6th Cir. 2001).

[234] *See* 25 U.S.C. § 2702 (2000).

[235] *See* 25 U.S.C. § 2710(d)(3)(C) (2000).

[236] *See* Sault Ste. Marie Tribe of Chippewa Indians v. Engler, No. 1:90 CV 611 (W.D. Mich. Aug. 20, 1993) (stipulation for entry of consent judgment), *available at* http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf.

of revenue sharing agreements is destabilizing and detrimental to Indian gaming in many respects.

Given the "trend" of states and tribes locating Indian gaming farther away from Indian Country in order to cater to a lucrative off-reservation gaming market and maximize the revenue for both parties to share,[237] it is more and more likely that the Secretary will decline to approve such compacts—or that gaming opposition organizations will sue to declare such compacts invalid. Secretary Babbitt allowed the New Mexico compacts, which were part of this trend, to go through only because the Pueblos had no other options.[238] Secretary Norton allowed the Seneca Nation compact to go through because it was tied to a Congressional land claims settlement act.[239] Gaming opposition groups have no shortage of funding to contest every off-reservation gaming operation.[240] In the face of such challenges, all gaming compacts, regardless of whether it involves off-reservation gaming, are threatened by the possibility of a court not limiting its decision to its facts.[241]

This Article's proposal would also allow tribes to "opt-out" of ratification protection for their gaming compact revenue sharing arrangement. This provision would protect the choices of the tribal sovereign, especially

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[237] *See* Martin Testimony, *supra* note 146, at 3; George Skibine November Testimony, *supra* note 215, at 3.

[238] *See* Press Release, Statement of Secretary of the Interior Bruce Babbitt on the New Mexico Gaming Compacts (Aug. 23, 1997), *available at* http://www.doi.gov/news/archives/indnmcom.html ("The legislatively mandated compacts appear to put New Mexico tribes in an untenable situation. On one hand, they are expected to agree to a number of burdensome conditions that go well beyond the scope of any of the 161 compacts that are now approved between states and tribes in this country. On the other hand, if the tribes do not agree to these conditions or if the compacts are disapproved, existing gaming establishments may be threatened with closure, causing immediate and enormous economic hardship.").

[239] *See* Norton Letter, *supra* note 169, at 2 ("I have concluded that this Compact appropriately permits gaming on the subject lands because Congress has expressly provided for the Nation to acquire certain lands pursuant to the Settlement Act.").

[240] *E.g.*, Susan Erler, *Michigan Indian Tribe Protest Casino Consultant's Fee*, TIMES (Munster, Ind.), Dec. 1, 2004, *available at* 2004 WLNR 12794117 ("In a show of protest Tuesday, Potawatomi Indian tribe members presented a mock $5 million check to a consultant whose job was to stall the tribe's planned casino in New Buffalo, Mich. Kevin Flynn had been hired as a consultant by Boyd Gaming Corp. as part of a $273.5 million agreement in 1999 for Boyd to buy Blue Chip Casino LLC. The terms of the contract called for Flynn, who'd previously been chief executive officer of Blue Chip, to be paid $5 million, in addition to a $500,000 yearly consulting fee, if the Pokagon Band of Potawatomi Indians failed to open a casino by the time the contract expired on Tuesday."); Brief of Non-Federal Appellees 4, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006) ("This case is one of several protracted efforts by TOMAC, spanning six years, to stall or thwart Indian gaming opportunities in Michigan. In 1999, the same year TOMAC initiated its various litigation efforts to stop the Band's efforts to pursue gaming under IGRA, a large gambling company, facing competitive threats from, the Tribe's New Buffalo casino, initiated an enterprise, involving the payment of over $5 million, to delay the Tribe for five years.").

[241] *See generally* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543 (1985) (discussing the Court's tendency toward a universalist approach in Indian affairs and the benefits of a more tribal-specific approach).

those that have been exploited by the states. Those tribes that choose not to approve the congressional ratification process would continue operating under the current gaming compacts, subject to the current law. It is possible that many tribes would refuse to follow the congressional ratification process. To allow tribes the greatest flexibility in choosing to opt into this procedure, there should be no deadline for adopting resolutions that allow Congress to ratify a compact.

Congress should authorize future compacts that include revenue sharing provisions meeting the "substantial exclusivity" test now followed by the Department of the Interior in analyzing the prohibition on state taxes and fees.[242] The Department has defined "substantial exclusivity" to mean "where a compact provides a tribe with substantial economic benefits in the form of a right to conduct class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the state."[243] Moreover, Congress should adopt the Department's analysis of when a state's regulatory fee structure is too onerous to be valid under the current incarnation of IGRA. That test states that regulatory fees should be audited to ensure that "the payments [to the state or other government] actually match the cost of regulation. . . ."[244] If a tribe and a state cannot negotiate a revenue sharing agreement meeting these criteria, the tribe would be free to invoke the secretarial procedure in Part 291.

B. Ratify the Secretarial Procedure

The Secretary of the Interior intended the secretarial procedure codified at 25 C.F.R. Part 291 after the Court's decision in *Seminole Tribe* to prevent a state's "veto over IGRA's dispute resolution system [and the resulting] stalemate [to] the compacting process."[245] The Department noted that some states had "signaled their intention to assert immunity to any suit in Federal court."[246] The purpose of the secretarial procedure was to "end the stalemate."[247]

Part 291 "tracks IGRA's negotiation and mediation process, adjusted only to the extent necessary to reflect the unavailability of tribal access to

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[242] *See* 25 U.S.C. §§ 2710(d)(3)(A), 2710(d)(4) (2000).

[243] Norton Letter, *supra* note 169, at 3; *see also* Babbitt Letter, *supra* note 158 (defining "substantial exclusivity" to mean "completely prohibit[ing] non-Indian gaming from competing with Indian gaming, or when all payments cease while the State permits competition to take place"); Martin Testimony, *supra* note 146, at 2 (noting that "substantial exclusivity" requires that a state confer a "valuable economic benefit" on the tribe and that payments to the state or local governments are "appropriate in light of the benefit conferred on the tribe").

[244] Babbitt Letter, *supra* note 158.

[245] Class III Gaming Procedures, 64 Fed. Reg. 17535, 17536 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291).

[246] *Id.*

[247] *Id.*

Federal court where a State refuses to waive sovereign immunity."[248] The procedure requires the tribes to follow five major steps. First, where a state raises sovereign immunity as a defense to a tribal suit brought in accordance with IGRA[249] and that suit is dismissed by the court,[250] the tribe must request the Department of the Interior to establish gaming procedures.[251] The request must comply with a host of requirements to be eligible for the issuance of class III gaming procedures[252] and then the Secretary must notify the tribe whether the request met the requirements.[253] Upon a determination by the Secretary that the tribe is eligible for the procedures,[254] the Secretary must seek from the State comments on the proposed procedures and alternative procedures.[255] If the State does not object, then the Secretary may approve the proposed class III gaming procedures.[256] If the State does object, the Secretary must appoint a mediator to mediate the disputes or disagreements between the tribe and the State.[257] The Secretary must then approve the mediated class III gaming procedures or reject the mediator's proposed procedures and adopt his or her own.[258]

As the Secretary intended, these procedures track the current provisions of IGRA as much as possible where the federal court dismisses a tribal claim and removes itself from the process.[259] Congressional authorization and ratification of these procedures would require a state to concede to a class III gaming compact, but the state would retain the discretion to choose whether a federal court will be involved by reserving to the state the choice of whether to invoke sovereign immunity or consent to suit. Where a state chooses to follow the current IGRA dispute resolution track, the court would first make a "good faith" determination.[260] Where a state chooses to raise its immunity defense, the secretarial procedure would dispense with the "good faith" determination[261] and, it appears, shorten

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[248] *Id.*

[249] 25 U.S.C. § 2710(d)(7)(B) (2000); Class III Gaming Procedures, 25 C.F.R. § 291.2(b) (2006).

[250] Class III Gaming Procedures, 25 C.F.R. § 291.3(e) (2006).

[251] *Id.* § 291.3(a).

[252] *Id.* § 291.4.

[253] *Id.* § 291.6.

[254] *Id.* § 291.6(b).

[255] Class III Gaming Procedures, 25 C.F.R. § 291.7 (2006).

[256] *Id.* § 291.8(b)(1).

[257] *Id.* § 291.10.

[258] *Id.* § 291.11.

[259] Class III Gaming Procedures, 64 Fed. Reg. 17535, 17536 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291) ("The rule tracks IGRA's negotiation and mediation process, adjusted only to the extent necessary to reflect the unavailability of tribal access to Federal court where a State refuses to waive sovereign immunity.").

[260] 25 U.S.C. § 2710(d)(7)(B)(iii) (2000).

[261] *See* Class III Gaming Procedures, 64 Fed. Reg. at 17537 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291) ("The final regulation eliminates the requirement that the Secretary make a finding on the 'good faith' issue.").

the process considerably. Both the current IGRA mechanism and the secretarial procedure lead to a mediation process.[262]

Though the secretarial procedure is an onerous, lawyer-intensive venture, it is an effective restoration of the dispute resolution mechanism that Congress intended the tribes and the states to follow when it enacted IGRA. Congress made clear that it "sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years."[263] One of those principles is the "long- and well-established principle of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of state governments and the application of state laws do not extend to Indian lands."[264] An important corollary of this principle is the notion that "tribal governments retain all rights that were not expressly relinquished."[265]

Building upon that principle, Congress intended that the only mechanism in IGRA that would allow a state to exercise its will in Indian Country would be a tribal-state compact that required an affirmative act of consent by the concerned tribe to state authority or jurisdiction.[266] The only "veto" Congress intended states to have is located within the Gubernatorial concurrence provision in the secretarial determination exception to the general prohibition on "off-reservation" gaming.[267] Since *Seminole Tribe* disrupted that scheme, a state—indirectly—can assert its will over an Indian tribe and prevent the tribe from conducting class III gaming if it chooses to raise its Eleventh Amendment immunity. Congressional ratification and authorization of the secretarial procedures restores the original intent of Congress in enacting IGRA.

A contextual view of the legislative history behind IGRA supports this view. *Cabazon Band* involved gaming that Congress would label as class II gaming—high stakes bingo and some card games.[268] Because of the *Cabazon Band* decision, anti-gaming constituencies had conceded the battle over which sovereign would have primary regulatory authority over class II gaming.[269] At the time of the final legislative push toward the passage of

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[262] *See* 25 U.S.C. §§ 2710(d)(7)(B)(iv)–(vii) (2000); 25 C.F.R. §§ 291.10–11 (2006).

[263] S. Rep. No. 100-446, at 5 (1988).

[264] *Id.*

[265] *Id.*

[266] *See id.* at 6 ("The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does [IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.").

[267] *See* 25 U.S.C. § 2719(b)(1)(A); George Skibine November Testimony, *supra* note 215, at 3 ("[Under § 2719(b)(1)(A)], by requiring that the Governor of the affected state concur in the Secretary's determination, the statute acknowledges that in a difference of opinion between a sovereign tribe and a state, the state prevails.").

[268] 480 U.S. 202, 204–05 (1987); *see also* 25 U.S.C. § 2703(7)(A) (2000).

[269] *See* Ducheneaux & Taylor, *supra* note 13, at 28 ("The opposing forces had pretty much concluded that they had lost the class II argument. . . .").

IGRA, Congress had to make a decision on casino-style gaming and the Johnson Act.[270] The Johnson Act prohibited slot machines and other gaming devices on Indian lands.[271] As Frank Ducheneaux and Pete Taylor wrote, "although casino gaming had not yet become a major part of the Indian gaming scene, a few tribes had developed operations [by 1988] that would be class III under the pending legislation and other tribes saw definite possibilities in casino gaming."[272] The tribes sought a waiver from the Johnson Act in the pending legislation that would become IGRA.[273] Congress could have banned class III gaming by simply not providing the Johnson Act waiver the tribes sought. It did not choose this option, but rather provided the waiver and left class III gaming as an option for tribes in eligible states.[274]

The negotiations leading to the final bill "were often tense, volatile, and acrimonious. On more than one occasion, a party would threaten to walk out and the process was near collapse."[275] Given that IGRA was adopted in this strongly contested environment, the original balance fought for and achieved by the parties and intended by Congress to be preserved by the statute, should be maintained.

In Senate Report No. 446, the Committee wrote that it "ha[d] carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives . . . ."[276] The Committee also acknowledged "the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands."[277] Moreover, the Committee recognized that "[a] tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders."[278] This legislative history makes clear that Congress intended to eliminate the federal barriers to class III gaming while allowing the states a role on the class III compacting proc-

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[270] *See* 15 U.S.C. §§ 1171–1178.

[271] 15 U.S.C. § 1175(a) (2000).

[272] Ducheneaux & Taylor, *supra* note 13, at 28.

[273] *See id.* ("Some of the tribes and their congressional supporters thought that it might be possible to include a waiver of the Johnson Act in any legislative compromise.").

[274] *See* 25 U.S.C. § 2710(d)(6) (2000).

[275] *Id.* at 29.

[276] S. Rep. No. 100-446, at 6 (1988).

[277] *Id.* at 13.

[278] *Id.*

ess.[279] The secretarial procedure fulfills this intent and therefore should be ratified.

While the secretarial procedure has been invoked, it has never been concluded due to state challenges.[280] As a result, the tribes and the states cannot have settled expectations concerning this process. No tribe and state have reached an agreement concerning a gaming compact or begun gaming operations after completing the procedure. One could argue that if Congress were to revamp this area, there would be no reason to keep the onerous structure of mediators and proposed gaming procedures. But this suggestion forgets the "tense, volatile, and acrimonious" negotiations leading to the creation of the structure in the first place.[281] It is worthwhile to maintain but modify the existing structure rather than "starting from scratch"—a process that, if the 1980s are any gauge, would take years of difficult and costly negotiation.

The first two elements of this legislative proposal return tribes and states to a situation much like that which existed before *Seminole Tribe*, but that is not the upshot of this proposal. Request for a return to the days of IGRA before *Seminole Tribe* is a common refrain heard from tribal advocates and legal commentators,[282] and it is similar to the calls from tribes heard by Senator McCain in the 1980s for "no legislation."[283] As a political matter, too much time has passed since 1996 for states and even some tribes to accept a "Back to the Future" package of legislation. The following two elements are intended to even the balance in a manner viable to all parties—tribal, state, and federal.

C. Mandate Revenue Sharing in Future Compacts

This element of the proposal requires all class III gaming compacts to include revenue sharing provisions with states *and* local units of government. To address the off-reservation impacts of tribal gaming and the so-called "lost revenue"[284] that state and local governments articulate in

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[279] *See id.* at 13–14.

[280] *See* Martin Testimony, *supra* note 146, at 2.

[281] Ducheneaux & Taylor, *supra* note 13, at 29.

[282] *See supra* notes 24–25 and accompanying text.

[283] See S. Rep. No. 100-446, at 33 (1988). *See generally* 151 CONG. REC. S13389 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

[284] "Lost revenue" refers to tax revenue that states and local units of government expected to generate but for the rights and expressions of sovereignty by tribal governments. *See, e.g.*, Fred Grimm, *Jeb Should've Told Seminoles to Deal Us In*, MIAMI HERALD, June 21, 2005, at B1, *available at* 2005 WLNR 23048561 ("Some seven years (and $1.6 billion in lost revenue) later, Gov. Bush is going into negotiations with a Seminole operation that now takes in a billion dollars a year—a quarter of that pure, sweet profit. Those profits aren't being taxed. Nor does the casino open its books to state auditors or allow pesky state bureaucrats to regulate their games."); Editorial, *Broad Casino Opposition*, GRAND RAPIDS PRESS (Mich.), June 19, 2005, at D12, *available at* 2005 WLNR 9811533 ("Kalamazoo's Economic Development Corporation and the Grand Rapids Chamber of Commerce oppose the casino because of the negative economic impact it will have on West Michigan. This

their opposition to Indian gaming, revenue sharing that alleviates these concerns would be mandated. Congress should place the burden on states and local units of government to prove the "lost revenue" and off-reservation impacts of gaming in measurable monetary amounts. Tribes with gaming facilities that do not generate a significant amount of revenue, a threshold to be determined by Congress, would be exempt from revenue sharing. Tribes with large revenue streams would be required to pay no more than twenty-five percent of "net win," as they presently do in Connecticut.[285]

Such a mandatory revenue sharing provision would eliminate a majority of the negotiating points that currently consume states and tribes in their compact negotiations. This would greatly reduce the transaction costs of reaching agreements and eliminate the nasty "crossover" negotiating tactics, such as making treaty rights and tax agreements contingent upon gaming, which have been employed in some states. The cap on revenue sharing precludes states from recovering an unfair windfall while the floor allows modest gaming operations to continue to benefit reservation communities. States that see Indian gaming as a potential source of revenue for reducing budget shortfalls—creating resentment by tribes—would be less inclined to use that tactic.

A key provision is the requirement that local units of government receive a share of the revenue as well. Some revenue sharing agreements, such as those in Connecticut, shortchange the towns and counties in the revenue sharing formula, creating local resentment against the tribes.[286] It is, after all, the local governments that respond first to emergencies at the tribal casino and feel the impact of increased commercial traffic in the area resulting from successful gaming operations. Tribes sharing revenue with local units of government, as a general matter, have a much better relationship with local government.[287]

'big hurt' will be especially severe in the surrounding counties—particularly Kalamazoo and Kent—which will be the biggest losers due to lost jobs, lost productivity and lost revenue."). *Contra* Tom Wilemon, *Indians Face Steep Odds, Says Keynoter; Former Senator Rails Against Schwarzenegger*, SUN HERALD (BILOXI, MISS.), May 5, 2005, at A1, *available at* 2005 WLNR 22894375 ("[Ben Nighthorse] Campbell expressed his displeasure at having read in newspaper accounts comments about Indians 'not paying their fair share' or 'ripping us off.' 'I would say that's a comment made by somebody who has just got off the boat and doesn't understand the history of what has happened to Indians in California,' Sen. Campbell said. 'They paid for their lifestyle in blood, lost relatives, millions of acres of lost land, untold billions of dollars in lost revenue from what's under the land—oil, gas, coal and so on. . . . They've paid their dues, Mr. Schwarzenegger.'").

[285] *See* LIGHT & RAND, *supra* note 5, at 70.

[286] *See* Jessica Durkin, *Foxwoods Reaches Milestone; It Has Sent More Than $2 Billion to State*, NORWICH BULL. (Conn.), Feb. 16, 2005, at A1 ("The billions may be good news for Hartford and the tribe, but officials from locally affected towns are fighting for a larger share of the slot take. They maintain the two host towns of Montville and Ledyard and three 'impact' towns of Norwich, Preston and North Stonington are not getting a fair distribution of revenue from the highly successful gambling venues outside their back door.").

[287] *See supra* note 152.

An additional benefit to the cap on revenue sharing is that states and tribes would be less inclined to seek gaming markets closer to non-Indian urban communities. The states would not receive the massive windfalls predicted from gaming and would be less inclined to encourage tribes to expand their gaming operations. Similarly, tribes would have less incentive to seek off-reservation gaming opportunities if they were guaranteed a greater minimum share of the gaming revenues generated from their existing lands. This would alleviate a great deal of the resentment building against Indian gaming and thus confer a significant benefit.

D. Reclassify Technology-Aided Class II Gaming as Class II-Plus

Finally, assuming Congress adopts the first three elements of this proposal, there would be no reason not to reclassify technology-aided class II devices. States and tribes would share the revenue from such devices in accordance with a class III compact (or a class II-Plus compact).

The so-called "Class II Gaming Debate"[288] arose out of two types of circumstances that excluded some tribes from class III gaming. First, some states prohibited all forms of class III gaming, rendering tribes located in those states ineligible for class III gaming compacts.[289] Second, some states that did allow class III gaming refused to negotiate compacts.[290] However, no gaming compact is necessary for class II gaming.[291] As a result, the stalemates created by states refusing to negotiate or by states prohibiting all forms of class III gaming encouraged tribes to seek increasingly valuable forms of class II gaming. Today, some technology-aided class II games are practically indistinguishable from class III games.[292]

This trend has created substantial problems that have attracted the attention of Congress. As Professor and former NIGC General Counsel Kevin Washburn testified recently:

> The Department of Justice's persistent, unsuccessful attempts to apply the Johnson Act to Class II 'technological aids' . . . causes prudent gaming companies to stay out of that market . . . . As a

[288] Heidi McNeil Staudenmeier & Andrew D. Lynch, *The Class II Gaming Debate: The Johnson Act vs. the Indian Gaming Regulatory Act*, 74 MISS. L.J. 843 (2004).

[289] *See* 25 U.S.C. § 2710(d)(1)(B) (2000); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994), *reh'g denied*, 99 F.3d 321 (1996) (holding that where the State does not permit other forms of gambling, it need not negotiate gaming compacts with Indian tribes).

[290] *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[291] *See* 25 U.S.C. § 2710(b)(1) (2000).

[292] *See, e.g.*, Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1025 (10th Cir. 2003) ("The video screen depicts a grid that is similar in appearance to that of a slot machine."); United States v. Santee Sioux Tribe of Neb., 324 F.3d 607, 610 (8th Cir. 2003) ("At trial, the following evidence was adduced regarding the Lucky Tab II machines. First, the instruments look and sound very much like traditional slot machines.").

> result, the companies with the largest involvement in Class II tribal gaming are those that are willing to tread close to the thin line separating lawful and unlawful gaming. This approach has rewarded these companies with extraordinary profits that would not be available in a market with full and open competition. These profits have come at the expense of Indian tribes whose choices of business partners are constrained by the Department of Justice's actions and threatened actions.[293]

Classifying class II technological aids as class II gaming allows tribes to sidestep the bargaining process intended to govern the establishment of class III-like gaming and encourages continued federal and state efforts to stop such gaming. Classifying class II technological aids as class II-Plus gaming (or even class III gaming) under a scheme where states could not bar all class III gaming compacts and where states could share in the revenue would solve these problems in a manner sufficient to satisfy all governmental constituents.

E. Summary

The four-part legislative proposal offers notable benefits for the tribes, the states, and the federal government, while preserving the settled expectations of the parties. Moreover, the proposal will serve to stifle a growing backlash against Indian gaming that can be traced to the imbalance within IGRA.

IV. Bringing Balance to Indian Gaming

The four-part legislative proposal would restore balance to the post-*Seminole Tribe* IGRA. The *Seminole Tribe* decision handed down in 1996 generated tribal furor because, in the years following IGRA's enactment in 1988, so many tribes had become accustomed to being able to rely on the Act's federal court remedy when facing states that refused to negotiate in good faith.[294] The proposal in this Article recognizes that both states and tribes have ten years of experience and concrete agreements relating to class III gaming in the post-*Seminole Tribe* world. As a result, this proposal is not intended to disrupt those positive expectations and creative solutions.

This four-part legislative proposal is an experiment in balancing the interests of the two sovereigns with the largest stake in Indian gaming—

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[293] Washburn April Testimony, *supra* note 220, at 9–10.

[294] *See, e.g., Hearing on Review of Court Decision on Indian Gambling Before the S. Comm. on Indian Affairs*, 104th Cong. 364 (1996) (prepared statement of W. Ron Allen, President, National Congress of American Indians) ("The *Seminole* decision will have significant impacts on the conduct of Indian gaming in the short run.").

states and tribes. It is designed both to achieve a middle ground between eviscerating either side's sovereign rights and to ameliorate the national backlash against off-reservation gaming. To achieve the balance, Indian tribal interests would accept reduced authorization to engage in off-reservation gaming in exchange for improved authorization to engage in class III and class II-Plus gaming. Conversely, states would accept increased class III and class II-Plus gaming in exchange for reduced expansion of off-reservation gaming. Overarching these compromises are the benefits both states and tribes will enjoy from explicit authorization and ratification of revenue sharing agreements.

A. Preserving Tribal Sovereignty

Indian gaming is not the product of greed or loose morals. It is the product of desperation on the part of Indian people neglected and abused by centuries of federal, state, and local governments.[295] Indian tribes began gaming operations to raise money to pay for critical governmental services.[296] Congress recognized this in the very language of IGRA.[297] A concomitant goal of IGRA was preserving tribal government revenues in order to support the development of tribal government structures and political stability.[298] Any attorney working in Indian law in 1980 would likely attest that they never expected tribal governments to build and fund their own schools, homes, health clinics, law enforcement and public safety facilities, and other governmental structures. The advances that have been made by tribal governments derive almost exclusively from Indian gaming.[299] The legislative proposal here recognizes and advances the goals of tribal governments and of IGRA by expanding opportunities for class III and class II-Plus gaming.

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[295] *See* PAUL PASQUARETTA, GAMBLING AND SURVIVAL IN NATIVE NORTH AMERICA 163–64 (2003) ("Working within a system that was largely devised to confine, limit, and destroy them, [Indians] have found ways to reclaim lost territories, position themselves in politically advantageous ways, and resist outside dominance. . . . [I]t is important to recognize that gambling is not simply a pathological response to perceived powerlessness, but a natural human response to the inherent chaos of living."); Rand & Light Testimony, *supra* note 6, at 9 ("A gaming tribe simply is not Enron, nor is it MGM Mirage or Harrah's Entertainment.").

[296] *See, e.g.*, Grand Traverse Band of Ottawa and Chippewa Indians v. U. S. Att'y for the W. Dist. of Mich., 198 F. Supp 2d 920, 926 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

[297] *See* S. REP. No. 100-446, at 13 (1988) ("A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents . . . .").

[298] *See* 25 U.S.C. § 2702(1) (2000) (naming Indian gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

[299] *Cf.* Rand & Light Testimony, *supra* note 6, at 7 ("That Native Americans have assumed such a prominent place in non-tribal public and policy discourse is almost entirely an artifact of Indian gaming.").

Indian gaming is also the product of legal and political choices made by the states.[300] One authority has argued that states could have stopped Indian gaming in its tracks at any time but chose not to take that action.[301] Many state and local governments rely upon the revenues derived from Indian gaming.[302] In addition to receiving revenue shares, state and local governments benefit from increased income and sales tax revenues and from decreased welfare burdens.[303] Further, local communities benefit from improved tribal public safety services,[304] and both local and national businesses benefit from expanded market opportunities.[305]

Arguably related to tribal sovereignty concerns is the continued opportunity for tribes to seek "off-reservation" gaming operations. Many tribes located far from urban areas have modest or even failing gaming operations, or no operations at all, due to market conditions.[306] Tribes who fit this category and who are seeking but are currently unable to reach gaming markets will not be helped by this proposal. But, since only a few very fortunate tribes have been able to convince state, local, and federal policymakers to approve an off-reservation gaming operation,[307] these tribes will not effectively have lost much.

Some tribes might object to the mandatory revenue sharing provisions. Any act of Congress that requires Indian tribes to take actions to which they might object raises questions of tribal sovereignty. However, the 1988 class III gaming compact provision was such a derogation of tribal sovereignty, and the tribes learned to accept it. In the twenty-first century, revenue sharing has become a virtual requirement for class III compacts with state governments. Thus, mandatory revenue sharing, under the reasonable terms adopted by the Department of the Interior and in a legal environment where class III gaming is more accessible, would not be a serious derogation of tribal sovereignty.

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[300] *See* Washburn, *supra* note 94, at 295.

[301] *See id.*

[302] *See* Rand & Light Testimony, *supra* note 6, at 13 (noting that "some 30 states and myriad non-tribal communities have [benefited from]" Indian gaming).

[303] *See* Light et al., *supra* note 16, at 658 ("But Indian gaming's beneficiaries are not limited to tribes; non-tribal jurisdictions benefit from tribal casinos, as well. On balance, states with Indian gaming operations, as well as the numerous non-reservation communities located near tribal casinos, have realized extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged. Tribal gaming assists states by promoting economic development in underdeveloped rural areas while leveraging growth and development in surrounding non-tribal communities.").

[304] *See, e.g.*, Letter from Michael Oltersdorf, Sheriff, Leelanau County, Mich. to George Bennett, Chairman, Grand Traverse Band 1–2 (Sept. 1, 1998), *available at* http://www.ncai.org/ncai/resource/agreements/Leelanau%20County%20Sheriff's%20Office%20letter%20Sept.%201,%201998.pdf (noting positive cooperation with tribal police department).

[305] *See* LIGHT & RAND, *supra* note 5, at 83–85.

[306] *See* Washburn, *supra* note 94, at 293.

[307] *See infra* text accompanying notes 342–346.

B. Preserving State Sovereignty

State sovereignty is a powerful tool for protecting state interests. In cases such as *Seminole Tribe*, the Rehnquist Court made clear that Congress has limited authority to waive state sovereignty.[308] States' rights under the Ninth, Tenth, and Eleventh Amendments are at historic levels.[309] Perhaps it is no surprise that tribes—historic adversaries of state governments—fared poorly in the Rehnquist Court in recent tribal-state legal clashes.[310]

Legal commentators and policymakers have voiced numerous objections to Indian gaming since the enactment of IGRA.[311] Many commentators proposed radical revisions of IGRA that would preserve and protect tribal sovereignty.[312] Some have even considered repealing the statute altogether, which would return the state of the law to that which existed immediately after *Cabazon Band*.[313] Others seek a legislative reversal of *Seminole Tribe* that would return the state of the law to something approximating the original intent of Congress in enacting IGRA.[314] Other commentators advocate increased state authority over Indian gaming operations and increased state influence over what kind of gaming is conducted in Indian Country.[315]

No legal commentator has advocated a middle-ground, pragmatic legislative reform of IGRA in the vein of this Article's proposal. Proposals that rearrange the law far to the advantage of either states or tribes amount to little more than shots across the bow by the opposing sides. It is little wonder that the proposals of the legal academic community, with the possible exception of those of Professor Kevin Washburn, do not reach the ears of the national policymakers in the Senate Indian Affairs Committee or the House Resources Committee. [316]

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[308] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); *see also* cases cited *infra* note 317.

[309] *See generally* HERMAN SCHWARTZ, *The States' Rights Assault on Federal Authority*, *in* THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT, 155 (2002); DAVID H. GETCHES, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); DAVID H. GETCHES, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

[310] *See, e.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005).

[311] *See supra* note 23 and accompanying text.

[312] *See supra* note 24 and accompanying text.

[313] *Cf.* Donohue, *supra* note 24, at 325 ("A repeal of IGRA may well result in courts returning to the pre-IGRA *Cabazon* prohibitory/regulatory test, in which case any state that allows any form of gambling, including state lotteries, will be deemed regulatory and thus unable to regulate or prohibit Indian gaming.").

[314] *See supra* note 25 and accompanying text.

[315] *See supra* note 23 and accompanying text.

[316] *See Oversight Hearing on Indian Gaming: Regulation of Class III Gaming Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 13–22 (2005) (prepared statement of Kevin K. Washburn, Associate Professor, U. of Minn. Law School); Washburn April Testimony, *supra* note 220.

1. General States' Rights Objections to IGRA

This Section responds to the common state sovereignty criticisms of Indian gaming as they relate to this Article's legislative proposal. The proposal keeps states' right in mind and preserves them. It provides passive benefits and positive virtues to states. First, by not requiring the states to take any action whatsoever, it avoids a Tenth Amendment challenge.[317] Second, because it does not attempt to repeat the IGRA state sovereign immunity debacle by relying upon the Interstate Commerce Clause to invoke yet another waiver, this proposal avoids Eleventh Amendment difficulties.[318] Third, as a positive benefit, this proposal would preserve the revenue streams created through the post-*Seminole Tribe* compacting process that so often produced revenue sharing agreements. Fourth, as another positive benefit, this proposal reduces the transaction costs of negotiating and litigating class III gaming compacts. States and their subdivisions, as well as tribes, will receive their financial benefits from Indian gaming without having to sit through hundreds of hours of meetings, all billed by attorneys. Fifth, states and local units of government will be compensated for "lost" tax revenues, increased public expenditures, and other impacts they can prove.

What some states will lose is the windfall of tribal money paid to them in exchange for the right to conduct class III gaming. Those states that do not match their demand for revenue sharing to the real cost of tribal gaming will no longer be able to take more than their fair share from the tribes in their states. States that have sought tribal revenues in order to help balance their budgets without a concomitant increase in state expenditures or public services in Indian Country will need to seek other sources of revenue.

States that do not allow gaming and that object to the increased tribal opportunity to engage in class III gaming will remain free to prohibit all forms of gaming within their borders.[319] States that have already opened the door to class III gaming by entering into compacts will likely have missed their chance to shut it.[320]

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[317] *See, e.g.*, Citizens for Safer Cmtys. v. Norton, 541 U.S. 974 (2004); Nance v. Envtl. Prot. Agency, 645 F.2d 701, 716 (9th Cir. 1981), *cert. denied sub nom.;* Crow Tribe of Indians, Mont. v. Envtl. Prot. Agency, 454 U.S. 1081 (1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 259 F. Supp. 2d 783, 798–99 (W.D. Wis. 2003), *aff'd*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005); Carcieri v. Norton, 290 F. Supp. 2d 167, 189–90 (D.R.I. 2003), *aff'd*, 432 F.3d 45 (1st Cir. 2005); City of Roseville v. Norton, 219 F. Supp 2d 130, 153–54 (D.D.C 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied sub nom.*

[318] *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267–68 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 787-88 (1991).

[319] *See, e.g.*, S. REP. NO. 100-446, at 11 (1988) ("There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo.").

[320] *See* Jane Gordon, *Experts Doubt Repeal Can Hold*, N.Y. TIMES, Jan. 12, 2003, § 14

2. *Specific Objections to the Secretarial Procedure*

Nicolas Goldin, predicting that the secretarial procedure would rise in prominence, has made four arguments against the procedure from an anti-Indian gaming point of view.[321] First, "[a] unilateral decision by the Secretary to dictate the parameters for tribal gaming would undermine the congressional objective that underlies IGRA."[322] Second, "[a]llowing the secretary to conclude that a state Governor, attorney general, and court system do not understand the state's public policy would make a travesty of the concept of federalism and in its place substitute a system in which Washington claims it knows best what state laws mean."[323] Third, "[t]he secretary's inherent authority includes a responsibility to protect the interests of Indian tribes, making it impossible for the secretary to avoid a conflict of interest or exercise objective judgment in disputes between states and tribes."[324] Fourth, "the proposed procedure would create a disincentive for tribes to try to resolve disagreements with uncooperative states."[325]

The proposal here answers the concern raised about the balance created by Congress in IGRA. Goldin would have a better point if there was no counterbalance to the imposition of the secretarial procedure. However, under this Article's proposal, a counterbalance is provided in that states and local units of government would receive sufficient revenue sharing from tribal gaming operations to meet any burden that Indian gaming placed on their governments. Goldin's concern about the underlying purpose of IGRA—that "Congress enacted IGRA in the aftermath of *Cabazon* expressly because it wanted to ensure that the states play a role in the tribal gaming regulatory process"[326]—is not only belied by the text of IGRA, which makes clear that IGRA was intended to benefit tribes,[327] but has also been rejected by federal courts.[328]

(Connecticut), at 5 ("'What Connecticut has done is try to close the door after all the horses have escaped,' said Nell Jessup Newtown, dean of the University of Connecticut School of Law and an authority on Indian law. 'The great state of Connecticut permits such gaming by an entity or organization, for any purpose. If we didn't have any tribes or the casinos and they had repealed the Las Vegas Nights ordinance earlier, the game would be over. But they didn't repeal it when they had the chance.'").

[321] *See* Goldin, *supra* note 23, at 843–44.

[322] *Id.* at 843.

[323] *Id.* at 843–44 (quotation marks and footnote omitted).

[324] *Id.* at 844 (quotation marks, footnote, and brackets omitted).

[325] *Id.* (quotation marks and footnote omitted).

[326] Goldin, *supra* note 23, at 843.

[327] *See* 25 U.S.C. § 2702(1) (2000).

[328] Some courts and commentators have asserted that a critical element of congressional intent in passing IGRA was to slow or halt the spread (or proliferation) of Indian gaming. *See* Ponca Tribe of Okla. v. State of Okla., 37 F.3d 1422, 1425 (10th Cir. 1994), *vacated*, 517 U.S. 1129 (1996); Texas v. Ysleta del sur Pueblo, 220 F. Supp. 2d 668, 681 n.6 (W.D. Tex. 2001); Goldin, *supra* note 23, at 824 n.200. However, this is the minority view and has not been upheld by a court of last resort. *See, e.g.*, Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for the W. Dist. of Mich., 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002) (rejecting State of Michigan's argument that the purpose of IGRA

Yet it is certain that, there would have been no IGRA absent strong state political pressure, so Goldin has a point—states did want additional authority over Indian gaming regulation. However, under IGRA, states received no regulatory authority over class I and class II gaming and could only acquire regulatory authority over class III gaming if the tribe consented in a gaming compact. Ironically, given Goldin's position that states would naturally want more regulatory authority, some states have been uninterested in negotiating for more authority.[329] In Michigan, for example, the State expressly disclaimed regulatory duties over Indian gaming.[330] Thus, the objection ultimately rings hollow.

The "Washington can't tell states what state law means" argument appears to misread the terms of the secretarial procedure and IGRA. The argument is also belied by experience. The Secretary has been making— and will continue to make—determinations of state law in approving class III compacts.[331] The Secretary is now charged with making a determination of whether a class III compact violates "any provision of [IGRA],"[332] which would include a determination that the class III gaming "is located in a State that permits such gaming for any purpose by any person, organization, or entity . . . ."[333] Thus, IGRA requires the Secretary to make an interpretation of state law, but this does not mean that the Secretary is deciding or dictating what the state law is.[334]

As for the Secretary's alleged conflict of interest, the final version of the secretarial procedure eliminated the requirement that the Secretary take over the federal court's job of determining whether a state had failed to negotiate in good faith.[335] Instead, the Secretary would proceed without making that determination at all. As for the possibility that the Secretary would propose procedures that benefited its trustee to the detriment of the states, one need only consider the *Cobell v. Norton* litigation,[336] the letter

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was to "limit the proliferation of casinos"), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

[329] *See generally* RAND & LIGHT, *supra* note 147 at 117 (noting that state regulation of tribal gaming varies).

[330] *E.g.*, A Compact Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Grand Traverse Band of Ottawa and Chippewa Indians § 8 (1993) (providing that the following notice be placed in every tribal casino: "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN"), *available at* http://www.michigan.gov/documents/GTB_Compact_70613_7.pdf.

[331] *See* 25 U.S.C. § 2710(d)(8)(B)(i) (2000).

[332] *Id.*

[333] *Id.* § 2710(d)(1)(B).

[334] *See, e.g.*, Joint Letter from Hon. Theodore R. Kulongowski, Governor, State of Or., and Ron Suppah, Chairman, Confederated Tribes of Warm Springs Reservation of Or., 1–2 (May 12, 2005) [hereinafter Kulongowski & Suppah Letter] (on file with author) (noting that the Secretary asked the State of Oregon and the Confederated Tribes of the Warm Springs Reservation for the legal basis to conduct class III gaming in Oregon, to which the parties responded).

[335] *See generally* 25 C.F.R. Part 291.

[336] *See* Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001) ("The Interior Department has failed to discharge the fiduciary duties it owes to [Individual Indian Money trust

from Secretary Norton expressing discomfort at expanding Indian gaming,[337] the fact that there has been a vacancy in the post of Assistant Secretary for Indian Affairs for much of the George W. Bush Administration,[338] or the difficulty that Indian tribes have in convincing the Secretary to exercise her discretion to take land into trust[339] to realize that a legally conflicted Secretary of the Interior is not a serious concern here.

Finally, the argument that the procedure would discourage tribes from negotiating with states is also answered by this proposal. The revenue sharing elements of the proposal create bargaining points for both tribes and states in negotiations over class III gaming compacts. Ratifying the secretarial procedure would simply prevent the negotiations from being completely open-ended. Additionally, by expanding revenue sharing with local units of government, the proposal facilitates expanded negotiation with local units of government over the provision of governmental services and encourages broader state agreements, such as omnibus tax agreements. Equalizing bargaining power expands the opportunities for intergovernmental agreement beyond gaming.[340] Goldin's crabbed view of tribal and state policymakers is belied by the reality of increasing tribal-state cooperation in ever-expanding areas of governance.[341]

3. *The "Problem" of Off-Reservation Gaming*

While off-reservation gaming and "reservation shopping" dominate the national discussion of Indian gaming law and policy, these issues are minor in comparison to the real problems faced by tribes, states, local governments, and the federal government as a result of IGRA's imbalance. As mentioned earlier, the opportunities for off-reservation gaming and "reservation shopping" are foreclosed to all but a few tribes, and even those tribes have extraordinary difficulty in opening new gaming operations. George Skibine recently testified about the hurdles a tribe must clear

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account] beneficiaries for decades.").

[337] *See* Norton Letter, *supra* note 169.

[338] *See Sen. Johnson Meets with Bureau of Indian Affairs Nominee*, U.S. FED. NEWS, Sept. 13, 2006, *available at* 2006 WLNR 15938122 ("The assistant Secretary position to which Mr. Artman is nominated has been vacant for the past 18 months following the departure of Dave Anderson. 'It's been nearly two years since someone has held this post—far too long. We need someone in place that will keep the lines of communication open and consult with our tribes,' Johnson said.").

[339] *See, e.g.*, U.S. Gov't Accountability Office, BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications, GAO-06-781, at 46-49 (July 2006) (listing dozens of non-gaming-related fee-to-trust applications in which the Bureau of Indian Affairs took more than a year to process).

[340] *See* Brief of Non-Federal Appellees 10 n.6, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006).

[341] *See generally* National Congress of American Indians, *Tribal-State Relations*, http://www.ncai.org/State-Tribal_Relations.92.0.html (last visited December 7, 2005) (providing links to numerous agreements between Indian tribes and states and local governments).

before it can start gaming off its reservation.[342] First, it must convince the Secretary to take land into trust.[343] Second, it must satisfy one of the statutory exceptions to the general prohibition of gaming on lands acquired after the enactment of IGRA in 1988.[344] Mr. Skibine testified that "[s]ince 1988, the Secretary has approved 26 trust acquisitions for gaming that have qualified under the . . . exceptions. . . ."[345] He also testified that the Secretary's approval does not necessarily mean that the land has actually been taken into trust: "[f]or instance, the existence of liens or other encumbrances, or litigation challenging the Secretary's decision may delay the proposed trust acquisition, often for years."[346]

Despite the fact that few tribes have been able to benefit from the exceptions to the ban on gaming on after-acquired lands, Senator McCain recently proposed to eliminate one of the exceptions, alleging that there are "unscrupulous developers seeking to profit off Indian tribes" and that a stronger prohibition would "discourage attempts by creative non-Indian developers to turn a tribe's legal rights into a form of extortion." [347] Similarly, former Representative Rick Pombo recently proposed a draft bill that would re-write Section 2719(b) to require gubernatorial concurrence for *all* off-reservation gaming proposals.[348] These proposals may be effective in quelling the backlash against off-reservation gaming and "reservation shopping," but they do little or nothing to quell the real threats to Indian gaming.

Mr. Skibine's testimony that the Secretary agrees to take off-reservation lands into trust only after a tribe has passed two high hurdles belies the need for such a change in IGRA. Off-reservation gaming is simply not a critical problem in the way that revenue sharing agreements are.

C. Ameliorating the Backlash?

This Article's legislative proposal goes a long way toward undermining the arguments made against Indian gaming by opponents, both political and ideological. Professors Light and Rand have shown, in their discussion of popular culture, how mainstream American society misunder-

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[342] *See Oversight Hearing Before the S. Comm. on Indian Affairs on Section 20 of the Indian Gaming Regulatory Act*, 109th Cong. 225-33 (2005) (prepared statement of George T. Skibine), Acting Deputy Assistant Secretary—Indian Affairs for Policy and Economic Development, Department of the Interior.) [hereinafter George Skibine July Testimony].

[343] *See* 25 U.S.C. § 465 (2000); George Skibine July Testimony, *supra* note 342, at 1.

[344] *See* 25 U.S.C. § 2719(a) & (b) (2000); George Skibine July Testimony, *supra* note 342, at 1–2 (identifying five effective exceptions contained within the statute).

[345] George Skibine July Testimony, *supra* note 342, at 2.

[346] *Id.* at 3.

[347] *See* 151 CONG. REC. S13389-90 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

[348] A Bill to Amend the Indian Gaming Regulatory Act to Restrict Off-Reservation Gaming, and For Other Purposes, H.R., 109th Cong. § 1 (Discussion Draft 2005).

stands and misconstrues Indian gaming.[349] Many non-Indians believe that Indian tribes stumbled across a way to acquire massive wealth at the expense of non-Indians through loopholes in federal Indian law,[350] that many tribes are as wealthy and greedy as the worst Mafioso,[351] and that gaming tribes are no more "Indian" than non-Indians.[352] These beliefs demonstrate how many non-Indians are susceptible to what Reinhold Niebuhr called "emotionally potent oversimplification"[353] when it comes to Indian gaming. It is unfortunate but true that non-Indians without an educational background in Indian culture, history, and law are more apt to believe and respond to newspaper stories about tribal corruption and greed than they are to stories about tribal self-governance and recovery from centuries of oppression.[354]

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[349] *See* LIGHT & RAND, *supra* note 5, at 1–2 (describing how Indian gaming operations are depicted in television shows such as *The Simpsons, South Park, The Sopranos,* and *Malcolm in the Middle*); Rand & Light Testimony, *supra* note 6, at 7 ("Indian gaming and 'casino Indian' imagery have become a phenomenon widely visible in popular culture, the mass media, and the discourse used by public policymakers.").

[350] *See, e.g.*, Jörg Blech, *The Benefits of Becoming Indian*, DER SPIEGEL, Jan. 16, 2006, http://www.spiegel.de/international/Spiegel/0,1518,395703,00.html (describing Indian gaming as occurring through a "loophole"); Carolyn Jones, *Legislator Seeks State Probe of Casino's Bingo Machines*, S.F. CHRON., Sept. 6, 2005, at B3, *available at* 2005 WLNR 14089440 (referring to tribes that use class II technological aids as exploiting a loophole); Rick Alm, *Point, Counterpoint: Let Kansas Voters Decide*, KAN. CITY STAR (MO.), July 12, 2005, at D17, *available at* 2005 WLNR 22828732 (asserting that Kansas tribes, in their attempts to begin off-reservation gaming operations, are exploiting a loophole); William E. Schmidt, *Bingo Boom Brings Tribes Profit and Conflict*, N.Y. TIMES, Mar. 29, 1983, at A1, *available at* 1983 WLNR 499339 ("[T]he multimillion-dollar boom in bingo has increasingly brought the Indians into direct conflict with a variety of law-enforcement agencies off the reservation. The authorities say the tribes are taking advantage of loopholes in state and Federal law to run unregulated gambling operations.").

[351] *E.g.*, CRAMER, CASH, *supra* note 152, at 105 (describing the phenomenon of "Rich Indian Racism"); Rand & Light Testimony, *supra* note 6, at 7 ("Somewhat incongruously, [tribal governments] are accused of being too naïve or inexperienced to realize their own best interests, easily corruptible, guilty of seeking to influence the political system to their own benefit, and out for 'revenge.'"); Matt Assad, *One City's Jackpot is Neighbor's Bust; Decade of Casinos Shows Host Town in Iowa Reaps Benefits but Region Shares in Gambling's Woes*, ALLENTOWN MORNING CALL (Pa.), Nov. 6, 2005, at A1, *available at* 2005 WLNR 18002139 ("'That's what they do,' said Pat Loontjer, who directs an Omaha-based group, whose members include the likes of Warren Buffett, that has worked to keep gambling out of Nebraska. 'They get their foot in the door by claiming it's family entertainment, and then they expand, expand and expand to feed their greed.'").

[352] *See* CRAMER, CASH, *supra* note 152, at 105–07.

[353] *See* REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS xv (1932) (Charles Scribner's Sons ed. 1952) ("Contending factions in a social struggle require morale; and morale is created by the right dogmas, symbols and emotionally potent oversimplifications.").

[354] *Cf.* Rand & Light Testimony, *supra* note 6, at 9 ("Sovereignty, in the minds of many Americans, simply means unearned money for tribal members."); Memorandum from John G. Roberts to Fred R. Fielding 1 (Nov. 30, 1983) (on file with author) (referring to a bill restoring lands to the Las Vegas Paiute tribe and asserting that "[t]his bill essentially does nothing more than take money from you, me, and everyone else and give it to 143 people in Nevada (about $10,000 each), simply because they want it.").

Indian tribes thus lose in the media. In the arena of Indian gaming, non-Indian politicians and anti-Indian business interests, both having ready access to major news outlets, exploit tribes' vulnerability to "emotionally potent oversimplification" to generate non-Indian backlash against gaming whenever it suits them.[355] The most recent manifestation of this phenomenon is in the area of off-reservation gaming. Tribes, often with the encouragement and political and financial backing of states, local governments, or gaming development interests, have begun to seek off-reservation gaming markets in urban areas where tribal governmental and jurisdictional presence often is minimal. For example, the City of Rohnert Park in California agreed with the Graton Rancheria to work together to develop a gaming operation on land west of the city.[356] The agreement was summarized as follows by the California Court of Appeals:

> In October of 2003, the Tribe and the City entered into a lengthy Memorandum of Understanding (MOU). It provided that the Tribe intended to submit an application to the Secretary of the Interior requesting the United States to take title to the property in trust for the Tribe, and make a determination that the land shall be eligible for gaming under the IGRA. The MOU recited that the Tribe wished to enter into a voluntary contractual arrangement with the City to make contributions and community investments to mitigate impacts of the casino project. The MOU provided for payments of over $200 million to the City over 20 years. . . . It also provided for termination of the MOU if the land was not accepted in trust for the Tribe or if the tribal-state compact was terminated.[357]

Although this agreement is arguably what anti-Indian gaming opponents would consider a best case scenario for off-reservation gaming, rather than lauding their city for reaching an agreement likely to create millions of dollars in additional revenue for both governments, some citizens urged rejection of the plan.[358] Again, there were news reports describing the proposal in emotional terms like "backlash,"[359] hyping reports of corruption

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[355] *Cf.* Cramer, *supra* note 70, at 598 (noting that "[t]he availability of gaming financing for petitioning groups leads to gross oversimplifications about acknowledgment.").

[356] *See* Worthington v. City Council of City of Rohnert Park, 31 Cal. Rptr. 3d 59, 61 (Cal. Ct. App. 2005).

[357] *Id.* at 63.

[358] *See Worthington*, 31 Cal. Rptr. 3d at 64 ("We emphasize that the issues to be determined in this appeal do not concern the wisdom of allowing Indian gaming in or near California cities or the advisability and ramifications of building a casino and resort complex at the designated location in Sonoma County. These actions undeniably raise emotional issues that have resulted in heated debate and political action throughout the state.") (citation omitted).

[359] *See* Jim Doyle, *Backlash on Betting: Californians Have Second Thoughts About Gambling*, S.F. CHRON., Oct. 24, 2004, at E1, *available at* 2004 WLNR 7628993 ("Four

by gaming developers,[360] and capturing readers' attentions with headlines such as "Gambling, Gambling Everywhere."[361]

Similarly, consider the attempt by the Confederated Tribes of the Warm Springs Reservation and the State of Oregon to seek the Secretary of the Interior's approval of a class III gaming compact on off-reservation lands.[362] The Warm Springs tribes already had land in trust near a lucrative gaming market, but it was "heavily timbered and sloped land, [was] within the boundaries of the Columbia River National Scenic Area, and [had] not been logged or used for other commercial purposes."[363] Rather than exercising their right to open a gaming operation on that land, the Tribes engaged in rigorous compact negotiations with the State that ultimately produced an agreement on a tract that was acceptable to both parties.[364] Despite the fact that the Tribes and the Governor negotiated over the sticking points and reached a decision that protected vast swathes of undeveloped land, the majority of mass media outlets assailed the proposal. One newspaper article depicted the Warm Springs community as more politically powerful than "mining, textile, and environmental groups."[365] An editorial opposed to the proposal predicted with over-the-top sarcasm that its approval would signal a slippery slope of tribal casinos in the area.[366]

This hype attracts Congressional attention, but the attention is misguided. Senator Feinstein's testimony that twenty more tribes are seeking to open off-reservation gaming operations in California[367] ignores a critical factor—the Secretary of the Interior is not approving any gaming compacts where the land is not already in trust, a requirement necessary for

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years after California voters gave the green light to Nevada-style casinos on Indian land, signs of a backlash are forming. Some question whether we're barreling too hard and too fast down the one-lane blacktop to Las Vegas.").

[360] *See* Jim Doyle, *Vegas Firm With a History of Fines Has Big Plans for Indian Casinos*, S.F. CHRON., Mar. 28, 2005, at A1, *available at* 2005 WLNR 4821406.

[361] Editorial, *Gambling, Gambling Everywhere*, S.F. CHRON., May 30, 2004, at E4, *available at* 2004 WLNR 7642222.

[362] *See generally* Cason Letter, *supra* note 215; Kulongowski & Suppah Letter, *supra* note 334.

[363] Kulongowski & Suppah Letter, *supra* note 334, at 5.

[364] *See id.* at 1 ("The Compact represents good faith compromises reached after long and productive negotiations between the parties."); *id.* at 5 ("[T]he Governor has indicated his intention to concur in the taking into trust for gaming purposes . . . land not currently held in trust.").

[365] Jeff Kosseff, *Tribes Buy Into Political Process*, OREGONIAN (PORTLAND), May 9, 2005, at A01, *available at* 2005 WLNR 7337479.

[366] *See* Editorial, *Opinion—In Our View: Make No Gorge Deal; Oregon Governor Should Take a Stand: No Tribal Casinos on Nontribal Land*, COLUMBIAN (Vancouver, Wash.), May 29, 2005, at C, *available at* 2004 WLNR 11724314 ("[I]f Oregon Gov. Ted Kulongowski allows the Warm Springs Indians to put a casino on nontribal land at Cascade Locks, Ore., the Yakama Indians could seek to build a casino on the Washington side. Then the Umatillas and the Nez Perce could join the fun with requests to build casinos along Interstate 84. Think of the marketing possibilities: 'Casinos in the Scenic Area'[;] 'Gambling in the Gorge'[;] 'Four Places to Make a Fortune between Beacon Rock and Biggs.'").

[367] *See* Feinstein Testimony, *supra* note 202, at 6.

these proposals to take effect.[368] And since the Department has approved few such trust acquisitions,[369] and all of those approved required gubernatorial concurrence,[370] the argument rings hollow in terms of on-the-ground reality. But, sadly, the fact that off-reservation gaming is even a legal possibility is enough to provoke a national backlash.[371]

This proposal eliminates many of the political and economic factors that drive Indian tribes to pursue off-reservation gaming. However, many federally recognized tribes still have no land base, while other, unrecognized, tribes may someday achieve federal recognition. IGRA contemplates that both classes of tribes be allowed to open gaming operations on trust lands under IGRA's exceptions. By definition, these lands are called "off-reservation" lands and their use for Indian gaming will be subject to harsh media scrutiny. Although this proposal goes a long way toward reducing the need for off-reservation gaming, it is unlikely to wholly eliminate the backlash.

V. CONCLUSION

Senator McCain's exasperated comments at the time of the enactment of IGRA deserve the attention of the tribes.[372] This Article argues that the congressional agenda, including former Representative Pombo's draft bill on off-reservation gaming, is a response that does not focus on the critical issue: the unbalanced bargaining power of tribes and states in a post-*Seminole Tribe* world, which leads to one-sided revenue sharing agreements that may or may not be illegal under IGRA. Off-reservation gaming is a red herring. The origin of off-reservation gaming and reservation shopping is the imbalance in IGRA.

This Article argues that a legislative package to ratify and authorize revenue sharing, restore the balance of IGRA moving forward, and clarify the law on class II technologic aids would alleviate the major problems in IGRA resulting from the *Seminole Tribe* decision. While *Seminole Tribe* might have looked like a major victory for states in 1996, it

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[368] *See* James P. Sweeney, *Off-reservation Gambling Limited by Interior Policy*, SAN DIEGO UNION-TRIB., May 30, 2005, at A1, *available at* 2005 WLNR 8666297 ("The [Department of the Interior] will no longer consider gambling agreements for sites that are not Indian lands held in trust for a tribe by the federal government . . . ."); Cason Letter, *supra* note 215, at 2 ("Only after the Tribes have acquired the Cascade Locks Land into trust, will the Department consider the terms and conditions of a timely submitted compact pursuant to the applicable provisions of IGRA.").

[369] *See* George Skibine November Testimony, *supra* note 215, at 2.

[370] *See* 25 U.S.C. § 2719(b)(1)(A) (2000).

[371] *See* 151 CONG. REC. S13389–90 (daily ed., Nov. 18, 2005) (statement of Sen. McCain).

[372] Senator McCain's most recent proposal would "eliminat[e] the authority of the Secretary to take land into trust off-reservation pursuant to the so-called 'two-part determination' provisions of Section [2719(b)(1)(A)]." *Id.* at S13390.

ultimately could be the undoing of a once carefully balanced Indian gaming structure.

One aspect of the Indian gaming debate that gets little national exposure is the reality that many state and local governments now depend on Indian gaming revenues. Congress may have intended for IGRA to benefit tribes, but *Seminole Tribe* changed the law in a manner that allowed state and local governments to benefit from Indian gaming as well. Perhaps, then, the current imbalance in IGRA will actually have provided a unique opportunity to strengthen the law and policy of Indian gaming for the long term. But to turn that opportunity into a reality, Congress must rebalance IGRA to benefit tribes *and* state and local governments.

POLICY ESSAY

FROM RENTING TO HOMEOWNERSHIP: USING TAX INCENTIVES TO ENCOURAGE HOMEOWNERSHIP AMONG RENTERS

KENYA COVINGTON*
RODNEY HARRELL**

This Article proposes changes to the federal tax code that would help more renters become homeowners. Currently, the tax code provides three primary benefits to homeowners but no corresponding benefits to the roughly 33.9 million renter households in the United States. The Article analyzes the difficulties facing renters seeking to become homeowners, with a particular focus on the low homeownership rates among black Americans. The Article then explains how renters pay the costs of property taxes and mortage interest but reap none of the tax benefits received by homeowners. The Article proposes a Universal Renter-to-Homeowner tax credit that would partially compensate renters for the portion of rental fees that constitute real property taxes, while requiring that all beneficiaries of the credit complete a homeownership counseling course. The Article concludes that such a credit would not only address inequalities in the tax code but also would substantially lower down payment constraints for first-time homeowners and thus encourage homeownership.

Homeownership occupies a central role in the American economy and culture. A purchase of a home may be the largest and most important investment many Americans make in their lives.[1] For most Americans, housing equity represents a primary source of wealth, and a home is generally a more stable and less volatile investment than the stock market.[2] A home also represents a source of equity against which an owner can borrow at

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* Assistant Professor in the Department of Urban Studies and Planning, California State University, Northridge. Ph.D., University of Maryland, Baltimore County, 2003; M.C.P., University of Maryland, College Park, 2000; M.S., Old Dominion University, 1994; B.A., Kean University, 1992.

** Ph.D. Candidate, University of Maryland, College Park. M.P.A/U.R.P., Woodrow Wilson School, Princeton University, 2002; B.A., Howard University, 2000. Mr. Harrell was a 2005 Summer Research Fellow for the Congressional Black Caucus Foundation.

The authors thank the Annie E. Casey Foundation for directly funding this research and the State Farm Corporation for supporting the Center for Policy Analysis and Research ("CPAR") Research Fellowship Program. The authors also thank Gerald Ford for his original comments on the program.

[1] *See* PRES. GEORGE W. BUSH, A HOME OF YOUR OWN: EXPANDING OPPORTUNITIES FOR ALL AMERICANS 1 (2002), *available at* http://www.whitehouse.gov/infocus/homeownership/homeownership-policy-book-whole.pdf [hereinafter BUSH].

[2] *See* ERIC BELSKY & JOEL PRAKEN, HOUSING WEALTH EFFECTS: HOUSING'S IMPACT ON WEALTH ACCUMULATION, WEALTH DISTRIBUTION AND CONSUMER SPENDING 2 (2004), *available at* http://www.realtor.org/libweb.nsf/pages/fg302 (follow second hyperlink under "Wealth Effect" heading).

favorable rates comparable to other forms of debt.[3] For these and other reasons, owner-occupied housing generally represents a stable long-term investment for families and a means of building wealth.[4]

Survey data suggest that Americans appreciate the benefits of homeownership. Sixty-one percent of Americans believe that homeownership is a safe investment with a great deal of potential.[5] Owner-occupied homes are also indicators of success that provide social and psychological benefits.[6] Eighty-one percent of American homeowners say that homeownership has been a very positive experience, while only thirty-one percent of American renters have the same sentiments about renting.[7]

Homeownership also offers benefits to society at large.[8] Because homeowners have both an economic and an occupancy interest in their homes, they tend to maintain their properties better and to be more involved in their neighborhoods and communities than either renters or landlords.[9] Accordingly, homeownership is associated with greater neighborhood stability, in the form of longer tenure and improved property maintenance.[10] In addition, modest increases in homeownership rates may increase neighborhood property values over time.[11]

Recognizing the benefits of homeownership, millions of Americans have made the transition from renting to owning homes. Since 1994, homeownership in the United States has increased by nearly 5%,[12] reaching a historic high of 69% in 2004[13] before falling slightly, to 68.8%, in 2005.[14] However, tens of millions of American families are still not homeowners. In 2005, there were roughly 33.9 million renter households in the United States, representing 31.2% of all households.[15] There is also a substantial

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[3] *See id.*

[4] *See* HUDUSER.ORG, URBAN POLICY BRIEF NO. 2, HOMEOWNERSHIP AND ITS BENEFITS (1995), *available at* http://www.huduser.org/publications/txt/hdbrf2.txt.

[5] *See* FANNIE MAE, UNDERSTANDING AMERICA'S HOMEOWNERSHIP GAPS: 2003 FANNIE MAE NATIONAL HOUSING SURVEY 4 (2004), *available at* http://www.fanniemae.com/global/pdf/media/survey/survey2003.pdf.

[6] *See* William M. Rohe & Leslie S. Stewart, *Homeownership and Neighborhood Stability*, 7 HOUS. POL'Y DEBATE 37, 71 (1996).

[7] *See* FANNIE MAE, *supra* note 5, at 6.

[8] *See generally* Rohe & Stewart, *supra* note 6, at 37–82 (analyzing the impact of homeownership on property values and other benefits to neighborhoods).

[9] *See* BUSH, *supra* note 1, at 4; Rohe & Stewart, *supra* note 6, at 71.

[10] *See* Rohe & Stewart, *supra* note 6, at 70.

[11] *See id.* at 72.

[12] *See* U.S. CENSUS BUREAU, TABLE 20: HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER: 1994 TO 2005, *in* HOUSING VACANCIES AND HOMEOWNERSHIP, ANNUAL STATISTICS: 2005 (2006), *available at* http://www.census.gov/hhes/www/housing/hvs/annual05/ann05t20.html [hereinafter U.S. CENSUS BUREAU, TABLE 20].

[13] *See id.*

[14] *See* U.S. CENSUS BUREAU, SERIES NO. H-150-05, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005, at 42 tbl.2-1 (2006), *available at* http://www.census.gov/prod/2006pubs/h150-05.pdf [hereinafter U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005].

[15] *See id.* at 42 tbl.2-1.

difference in the homeownership rates of blacks and whites.[16] In 2005, 51.9% of blacks were renters, whereas only 24.2% of whites were renters.[17]

Many renters seeking to become homeowners, particularly blacks and other minorities, face numerous barriers, including poor credit histories, consumer debt, low incomes, inadequate savings, and a lack of information about the homebuying process.[18] Financial hardship, particularly the difficulty of making a downpayment, is generally considered to be the greatest obstacle facing would-be homeowners.[19] Over the past several years, increases in housing prices have outpaced growth in disposable income, effectively pushing many low- and moderate-income potential buyers out of the homebuying market.[20] As a result, many renters who seek to purchase homes are unable to do so. According to one survey, in 2003, thirty-five percent of all renters began the process to purchase a home but did not complete it successfully, compared with only ten percent of the general public who started, but failed to complete, the homeownership process.[21] Although federal policies contributed to modest increases in homeownership during the 1990s,[22] much more can be done to boost homeownership among renters.

One vehicle that can be used to benefit renters is the federal tax code. The current tax code rewards homeowners considerably but contains no similar benefits for renters.[23] The estimated total cost of the three principal homeownership tax benefits—the home mortgage interest deduction, the real property tax deduction, and the exclusion of capital gains on the

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[16] In this Article, "whites" refers to non-Hispanic whites.

[17] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[18] *See* FANNIE MAE, *supra* note 5, at 6–11; BUSH, *supra* note 1, at 1.

[19] *See* FANNIE MAE, *supra* note 5, at 8; BUSH, *supra* note 1, at 18.

[20] *See* Cynthia Angell, *Housing Bubble Concerns and the Outlook for Mortgage Credit Quality*, FDIC OUTLOOK, Spring 2004, at 3, *available at* http://www.fdic.gov/bank/ analytical/ regional/ro20041q/na/t1q2004.pdf ("Strong demand for housing, facilitated by low interest rates, has pushed home prices to their highest rates of appreciation in more than a decade. But this sturdy price appreciation has not been accompanied by equally strong personal income growth. Since 2000, annual home price appreciation has averaged roughly 7%, while disposable per capita personal income gained 4% per year, on average."); Nicolas P. Retsinas, *Priced Out of the American Dream*, BOSTON GLOBE, Feb. 27, 2005, at D12 ("Last year, the median sales price of an existing home in Boston was $445,000 up 7% from last year. While home prices are likely to moderate, job growth and constraints on supply are likely to keep home prices beyond the reach of young families.").

[21] *See* FANNIE MAE, *supra* note 5, at 8.

[22] *See* Eric S. Belsky & Mark Duda, *The Anatomy of the Low-Income Homeownership Boom in the 1990s*, *in* LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 15, 21 (Nicolas P. Retsinas & Eric S. Belsky eds., 2002) (describing factors such as the Community Reinvestment Act, a revitalized Federal Housing Administration, and the Justice Department's enforcement of fair housing laws).

[23] *See infra* Part II.

sale of a principal residence—was $115.1 billion for fiscal year 2005.[24] For homeowners, this yielded an average benefit of $1536 per household.[25]

This Article proposes a tax credit that would reduce inequalities between homeowners and renters and promote homeownership. The credit would partially compensate renters for the portion of rental fees that cover state and local property taxes and would enable many renters to become homeowners and build other assets. Part I describes recent homeownership trends, including the disparity in homeownership rates between whites and blacks. Part II describes the principal tax benefits of homeownership and explains how the Tax Reform Act of 1986 changed the tax treatment of nonmortgage debt to the detriment of renters. Part III presents reasons to provide tax benefits to renters. Part IV reviews several federal and state programs that promote homeownership. Part V proposes and describes a Universal Renter-to-Homeowner program. Part VI concludes that Congress should change the tax code, using the approach presented by this Article or a similar one, to address tax inequalities between homeowners and renters and to increase homeownership and other wealth-building activities.

I. HOMEOWNERSHIP TRENDS

Despite a slight dip in 2005, overall, the U.S. homeownership rate has steadily increased over the past decade.[26] In 2005, the overall homeownership rate was 68.8%,[27] up from 64.0% in 1994.[28] Yet homeownership rates differ significantly by race. In 2005, the homeownership rate was 75.8% for whites but only 48.1% for blacks.[29] While homeownership rates have risen for all racial groups over the past decade, the homeownership gap between whites and blacks has remained.[30] Figure 1[31] illustrates the overall homeownership levels, as well as homeownership rates for whites and blacks, for the past twelve years.

[24] *See* STAFF OF J. COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 33 (Comm. Print 2005), *available at* http://www.house.gov/jct/s-1-05.pdf [hereinafter STAFF OF J. COMM. ON TAXATION].

[25] *See id.*; U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[26] *See* U.S. CENSUS BUREAU, TABLE 20, *supra* note 12.

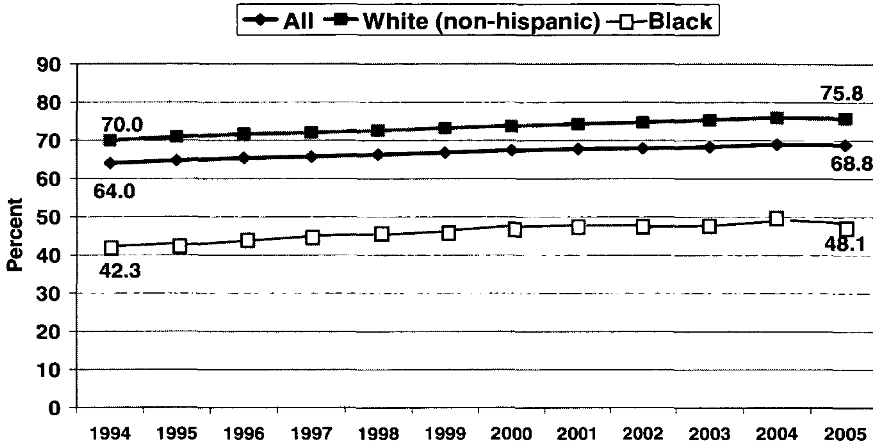
[27] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[28] *See* U.S. CENSUS BUREAU, TABLE 20, *supra* note 12.

[29] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[30] *See id.*

[31] *See* U.S. CENSUS BUREAU, TABLE 20, *supra* note 12 (source of data from 1994–2004); U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14 (source of data from 2005).



The homeownership gap between whites and blacks is not solely attributable to racial disparities in income. In 2005, at every income level, homeownership rates for black households were lower than the overall rates for U.S. households with equivalent incomes.[32] At the highest income levels, the gap was significantly narrower; for example, the gap was 17.1 percentage points for households with annual incomes of less than $5000, but only 0.7 percentage points for households with incomes between $100,000 and $119,999, and 4.8 percentage points for households with annual incomes of $120,000 or more.[33]

In addition to the disparity in overall homeownership rates, the homeownership rates of black households are much less stable from year to year than the homeownership rates of all U.S. households.[34] Figure 2[35] illus-

[32] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 78 tbl.2-12, 286 tbl.5-12.

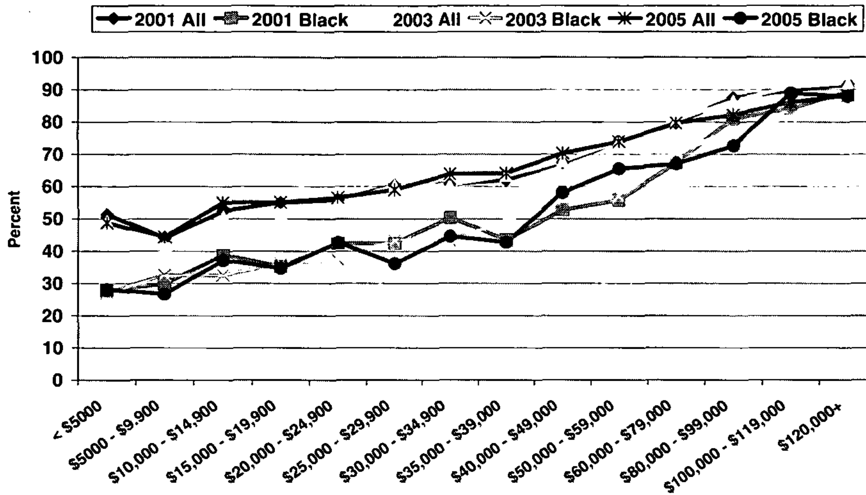
[33] *See id.*

[34] *See id.*; U.S. CENSUS BUREAU, SERIES NO. H-150-03, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2003, at 74 tbl.2-12, 272 tbl.5-12 (2004), *available at* http://www.census.gov/prod/2004pubs/h150-03.pdf [hereinafter U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2003]; U.S. CENSUS BUREAU, SERIES NO. H-150-99RV, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 1999, 72 tbl.2-12, 268 tbl.5-12 (2003), *available at* http://www.census.gov/prod/2000pubs/h150-99.pdf [hereinafter U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 1999]; U.S. CENSUS BUREAU, SERIES NO. H-150-01, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2001, 74 tbl.2-12, 272 tbl.5-12 (2002), *available at* http://www.census.gov/prod/2002pubs/h150-01.pdf [hereinafter U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2001].

[35] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 78 tbl.2-12, 286 tbl.5-12; U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2003, *supra* note 34, at 74 tbl.2-12, 272 tbl.5-12; U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 1999, *supra* note 34, at 72 tbl.2-12, 268 tbl.5-12; U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2001, *supra* note 34, at 74 tbl.2-12, 272 tbl.5-12.

trates homeownership rates for U.S. households overall, as well as the rates for blacks, separated by income level.

Figure 2. Overall and African-American Homeownership Rates by Household Income, 2001 - 2005



The gap between the overall homeownership rate and the black homeownership rate, combined with the greater instability of the black homeownership rate over time, suggest that factors other than income impact the black homeownership rate. In particular, the meager wealth accumulation[36] by blacks in America significantly impairs their ability to become homeowners.[37] Historically, the wealth gap has its roots both in institutionalized discrimination—including slavery, the barring of blacks from certain occupations, the erection of racist housing covenants through local ordinances, and federal exclusionary policies on homesteading and homeownership—and in private market discrimination against blacks in labor, capital, and credit markets.[38] In addition, less formal discrimination, eco-

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[36] In 1999, the median net worth for whites was $82,400, while the median net worth for blacks was $7000. *See* Michael A. Stoll, *African Americans and the Color Line*, *in* THE AMERICAN PEOPLE: CENSUS 2000, at 380, 397 (Reynolds Farley & John Haaga eds., 2005). Whites' wealth is disproportionately held in financial assets, while blacks' wealth is disproportionately held in the value of their homes and in savings and checking accounts. *See id.* at 397–98.

[37] *See* Stoll, *supra* note 36, at 396 (explaining that wealth accumulation enables individuals and families to purchase homes); ZHU XIO DI & XIAODONG LIU, THE IMPORTANCE OF WEALTH AND INCOME IN THE TRANSITION TO HOMEOWNERSHIP 1 (2004), *available at* http://www.huduser.org/Publications/pdf/TheImportanceOfWealthAndIncome.pdf (describing studies that have found wealth constraints to be more important than income constraints in restricting access to homeownership).

[38] *See* Stoll, *supra* note 36, at 397 (explaining the current and historical barriers that may keep many blacks from accumulating wealth). *See generally* MELVIN L. OLIVER &

nomic downturns, natural disasters, and other unforeseen events affect blacks disproportionately and impact their acquisition of wealth, and consequently, their rate of homeownership.[39] Because the majority of blacks are renters,[40] an initiative to help all renters achieve homeownership may reduce the racial gap in homeownership and distribute the benefits of homeownership more equally across racial lines.

II. HOMEOWNERSHIP TAX BENEFITS

A. *Principal Tax Benefits of Homeownership*

Homeownership carries three principal federal tax benefits: the home mortgage interest deduction,[41] the real property tax deduction,[42] and the exclusion from tax liability of capital gains on the sale of a principal residence.[43]

The home mortgage interest deduction allows homeowners to deduct from their gross income all interest paid on a loan securing their home, whether the loan is a first or second mortgage, a line of credit, or a home equity loan.[44] Certain charges paid by a borrower to obtain a home mortgage, known as "points," are also deductible.[45] Home mortgage interest is deductible only if the debt is secured by a main home or second home,[46] and there are limits on the aggregate amount of indebtedness for which interest is deductible.[47]

THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1997) (analyzing the impact of racial inequality on wealth acquisition in the United States).

[39] For example, there is evidence that blacks are among the first to be laid off in periods of economic hardship, *see* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 108 (Ballantine Books 1995) (1992), and that blacks are disproprotionately affected by climate change, *see* CONG. BLACK CAUCUS FOUND., AFRICAN AMERICANS AND CLIMATE CHANGE: AN UNEQUAL BURDEN (2004), *available at* http://www.redefiningprogress.org/publications/2004/CBCF_REPORT_F.pdf (showing that the adverse effects of climate change, including heat waves, air pollution, extreme weather, disease, and economic damage, are disproportionately borne by blacks).

[40] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[41] *See* I.R.C. § 163(h) (2000).

[42] *See id.* § 164(a)(1).

[43] *See id.* § 121 (2000 & Supp. III 2003), *amended by* Pub. L. No. 109-135, §§ 402(a)(3), 403(ee), 119 Stat. 2577, 2610, 2631; Pub. L. No. 108-357, § 840(a), 118 Stat. 1418, 1597.

[44] *See* INTERNAL REVENUE SERV., PUBL'N NO. 936: HOME MORTGAGE INTEREST DEDUCTION 2 (2005), *available at* http://www.irs.gov/pub/irs-pdf/p936.pdf [hereinafter INTERNAL REVENUE SERV. HOME MORTGAGE INTEREST DEDUCTION GUIDE].

[45] *See id.* at 5.

[46] *See id.* at 2.

[47] *See* I.R.C. § 163(h) (2000) (stating that the limits are $1,000,000 ($500,000 if married filing separately) for "acquisition indebtedness" and $100,000 ($50,000 if married filing separately) for "home equity indebtedness"); INTERNAL REVENUE SERV. HOME MORTGAGE INTEREST DEDUCTION GUIDE, *supra* note 44, at 8–12.

The real property tax deduction allows homeowners to deduct state and local real property taxes from their gross income.[48] However, homeowners who receive a refund or rebate of real estate taxes paid in the current year must reduce their deduction by the amount refunded, and homeowners who receive a refund or rebate of real estate taxes paid in a prior year must count the refund or rebate as income in the current year.[49]

The capital gains deduction allows homeowners to exclude from gross income certain capital gains from the sale or exchange of property.[50] Specifically, homeowners may exclude gains of up to $250,000, or up to $500,000 if married and filing jointly, if they sell property they owned and used as a principal residence for at least two years in the five years preceding the sale or exchange.[51] Thus, a homeowner may sell a home for a significant profit without owing tax on the capital gains, whether or not the homeowner uses all or part of that profit to buy a new home.[52]

The estimated total cost of these three homeownership tax benefits is $115.1 billion for fiscal year 2005 and $631.3 billion for fiscal years 2005 to 2009.[53] In 2005, the average homeowner household received an average of $1536 from these three benefits.[54] Table 1[55] shows the breakdown of the cost according to each tax benefit.

[48] *See* I.R.C. § 164(a)(1).

[49] *See* INTERNAL REVENUE SERV., PUBL'N NO. 17: YOUR FEDERAL INCOME TAX 142 (2005), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf.

[50] *See* I.R.C. § 121(a).

[51] *See id.* § 121(a)–(b)(2).

[52] In contrast, before 1997, a homeowner benefited from this tax deduction only if he or she bought another home of equal or greater value within two years of the sale. *See* I.R.C. § 1034 (1994) (repealed 1997).

[53] *See* STAFF OF J. COMM. ON TAXATION, *supra* note 24, at 33. This figure represents the cost of tax benefits which apply specifically to owner-occupied housing, rather than to property owned for rental purposes. For an outline of tax benefits for owners of rental property, see INTERNAL REVENUE SERV., PUBL'N NO. 527: RESIDENTIAL RENTAL PROPERTY (2005), *available at* http://www.irs.gov/pub/irs-pdf/p527.pdf. Like owner-occupiers, such owners can also deduct mortgage interest and property taxes. *See id.* at 3.

[54] *See* STAFF OF J. COMM. ON TAXATION, *supra* note 24, at 33; U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[55] *See* STAFF OF J. COMM. ON TAXATION, *supra* note 24, at 33.

TABLE 1: ESTIMATED COST OF HOMEOWNERSHIP TAX BENEFITS, FISCAL YEARS 2005–2009 (IN BILLIONS OF DOLLARS)

	2005	2006	2007	2008	2009	**Total**
Deduction for Mortgage Interest on Owner-Occupied Residences	72.6	81.1	87.7	93.5	99.4	**434.2**
Deduction for Property Taxes on Owner-Occupied Residences	19.6	15.0	13.4	13.0	13.2	**74.1**
Exclusion of Capital Gains on Sales of Principal Residences	22.9	23.7	24.6	25.4	26.3	**123.0**
Total	**115.1**	**119.8**	**125.7**	**131.9**	**138.9**	**631.3**

Because deductions are more valuable to taxpayers who are in higher tax brackets, the tax benefits of homeownership are greater for homeowners with higher incomes.[56] As a result of this disparity coupled with extant racial disparities in income—on average, black men earn slightly over $10,000 less than white men and black women earn nearly $3,500 less than white women[57]—the distribution of homeownership tax benefits is necessarily racially skewed.

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[56] *See* J. Michael Collins et al., *Towards a Targeted Homeownership Tax Credit* 6 (Joint Ctr. for Hous. Studies, Working Paper No. W98-5, 1998), *available at* http://www.jchs.harvard.edu/publications/homeownership/belsky_collins_retsinas_W98-5.pdf ("As a result of the progressive nature of federal income tax rates, even if lower income owners do itemize their deductions, they receive a smaller deduction as a percentage of income than more affluent buyers.").

[57] *See* U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY FROM THE 2004 AMERICAN COMMUNITY SURVEY 10 (2005), *available at* http://www.census.gov/prod/2005pubs/acs-01.pdf. In 2004, the median income was $32,686 for black men, $42,707 for white men, $28,581 for black women, and $32,034 for white women. *See id.*

B. Changes in the Tax Treatment of Nonmortgage Debt Under the Tax Reform Act of 1986

The Tax Reform Act of 1986[58] ("1986 Act") enacted a major change in the way the federal tax code treats homeowners relative to renters. It eliminated the tax deduction for interest on credit cards and most other types of consumer debt but preserved deductions for interest on home mortgages, home equity loans, and home equity lines of credit.[59] Thus, under the 1986 Act, homeowners could still finance consumer purchases with loans securing their homes and then deduct interest on such loans from their gross income, but renters were no longer permitted to deduct consumer interest.

According to its supporters, the 1986 Act aimed to simplify the tax code and treat all taxpayers more fairly.[60] However, in eliminating the deductibility of interest on nonmortage debt, the 1986 Act advanced the position of homeowners relative to renters.[61] Because blacks and minorities have lower homeownership rates,[62] these changes also served to disadvantage these groups relative to the rest of American society. This example supports research by Beverly Moran and William Whitford that certain aspects of the federal tax code have adverse effects on blacks and minorities.[63] Moran and Whitford examined four broad categories of the tax code—benefits granted to wealth and wealth transfers, homeownership benefits, employee benefits, and the different rate treatment of single and married taxpayers—and concluded that the average white American receives a greater share of these tax benefits than the average black American.[64] Thus, the 1986 Act, in disadvantaging renters, likely helped contribute to the racial gap in homeownership.

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[58] Tax Reform Act of 1986, Pub. L. No. 99-514, § 511(b), 100 Stat. 2085, 2246–48 (codified as amended in scattered sections of 26 U.S.C.).

[59] *See* U.S. GEN. ACCOUNTING OFFICE, SERIES NO. GGD-93-63, TAX POLICY: MANY FACTORS CONTRIBUTED TO THE GROWTH IN HOME EQUITY FINANCING IN THE 1980s 3–4 (1993), *available at* http://archive.gao.gov/t2pbat6/149073.pdf; Charles E. McLure, Jr. & George R. Zodrow, *Treasury I and the Tax Reform Act of 1986: The Economics and Politics of Tax Reform*, 1 J. ECON. PERSP. 37, 46 (1987); *see also* Sue Kirchhoff et al., *Reagan Had Lasting Impact on World's Economic Future*, USA TODAY, June 11, 2004, at A1 (describing the 1986 Act's main provisions and its long-term effects).

[60] *See* McLure & Zodrow, *supra* note 59, at 37.

[61] *See id.* at 46.

[62] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1.

[63] *See* Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996).

[64] *See id.* at 799. Moran and Whitford suggested that this disparate impact results because "black life" is largely unknown to most legislators, and consequently, legislators are largely unaware of the impact of the tax code on blacks. *See id.* at 758 (arguing that because the vast majority of federal legislators are not black and have not experienced "black life," they are less aware of the effects of economic policies on blacks and that "this ignorance is one of the reasons for structural racial subordination in America").

III. Reasons To Provide Tax Benefits to Renters

In providing tax benefits to homeowners but not to renters, the current tax code perpetuates an unequal system that divides America along both economic and racial lines and makes it more difficult for renters to build up savings to become homeowners. Providing tax benefits to renters would not only make the tax code more equitable; it would also promote homeownership and wealth-building by helping remove some of the obstacles that prevent renters, particularly low- and moderate-income renters, from becoming first-time homeowners and amassing wealth.

A. *Remedying Inequities in the Current System*

Under the current federal tax code, homeowners receive federal tax deductions for the costs of mortgage interest payments and state and local property taxes.[65] While renters do not directly pay mortgage interest and real property taxes, they do pay a portion of these costs indirectly through rental fees. A rental fee reflects the market price that users are willing to pay for the right to use rental property for a period of time; it is a function of the property's physical characteristics, available amenities, location, tenant characteristics, and property management arrangements.[66] Because landlords set rental fees to incorporate the ownership costs of property, including property taxes and interest payments, renters effectively pay the costs of mortgage interest and real property taxes, although they do not receive the associated tax deductions.

The resulting situation, in which owners receive federal tax deductions for the costs of mortgage interest and real property taxes but renters do not, creates a discriminatory effect against renters because renters, unlike owners, must use taxable income to pay their full housing costs.[67] While it is arguably appropriate to give homeowners some favorable treatment in order to provide incentives for homeownership given its societal benefits,[68] it is equally appropriate to begin to even the scales for renters, who currently receive no tax deductions despite paying the costs of property taxes and mortgage interest.

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[65] *See supra* Part II.

[66] *See* Marcus T. Allen et al., *Implicit Pricing Across Residential Rental Submarkets*, 11 J. Real Est. Fin. & Econ. 137, 138–39 (1995); G. Stacy Sirmans & John D. Benjamin, *Determinants of Market Rent*, 6 J. Real Est. Res. 357, 359 (1991) (reviewing studies of the effect of location on market rent).

[67] *See* Richard Goode, *Imputed Rent of Owner-Occupied Dwellings Under the Income Tax*, 15 J. Fin. 505, 505–506 (1960); *see also* Donald Krueckeberg, *The Grapes of Rent: A History of Renting in a Country of Owners*, 10 Hous. Pol'y Debate 9, 9–12 (1999) (discussing the historical origins of the bias against renters).

[68] *See supra* text accopmanying notes 1–11.

B. *Promoting Homeownership in Traditional Renter Populations*

Providing renters with a tax credit would also boost renters' saving capacity, thereby permitting more renters to save for homeownership. Down payment costs remain the single most significant barrier to homeownership, especially for low- and moderate-income households.[69] The median household income of renters is $27,051, while the median household income of owners is $55,571.[70] After paying for basic expenses such as rent, food, transportation, and incidentals, low- and moderate-income workers do not have enough saved to make a down payment.[71] As a result, thirty-five percent of all renters have attempted to purchase a home but failed to complete the process, compared with only ten percent of the general public.[72] Without public policy changes, it is unlikely that the homeownership rate among low-income renters will significantly improve.

A tax credit for renters would likely raise inferior homeownership rates among low-income populations by providing renters with an increased ability to save money for a down payment. While the research in this area is limited, studies of government assistance efforts in the United States and abroad indicate that lowering down payment constraints increases homeownership rates.[73] In addition, although providing tax credits to renters, like providing tax benefits to owners, could increase housing demand and thus increase housing prices, such increases are likely to be moderate.[74]

In addition to improving the overall homeownership rate, tax credits for renters could help close the racial gap in homeownership that affects both low- and high-income blacks. Given that 51.8% of blacks are renters,[75] 28.8% of these renters utilize more than half of their monthly income to meet housing costs,[76] almost half have no savings,[77] and the me-

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[69] *See* FANNIE MAE, *supra* note 5, at 8; BUSH, *supra* note 1, at 18.

[70] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 78 tbl.2-12.

[71] *See* Retsinas, *supra* note 20, at D12 (discussing the problems everyday people making less than $40,000 have purchasing a home).

[72] *See* FANNIE MAE, *supra* note 5, at 8.

[73] *See* Patric H. Hendershott & Michael White, *The Rise and Fall of Housing's Favored Investment Status*, 11 J. HOUS. RES. 257, 264–66 (2000) (describing programs in Australia, Canada, Sweden, and the United States providing loans and subsidies for potential first-time homeowners); Steven C. Bourassa et al., *Independent Living and Home Ownership: An Analysis of Australian Youth*, AUSTL. ECON. REV., 3d Quarter 1994, at 29, 33, 38 (describing a successful Australian program that partially subsidized first-time home purchases and resulted in a homeownership rate increase from 28.5% to 37.1% among 21-to-25-year-olds).

[74] *See* Atrayee Ghosh Roy et al., *Housing Tax Deductions and Single-Family Housing Demand*, INT'L J. APPLIED ECON., Mar. 2006, at 48, 56 (showing that for all years from 1994 to 2003, the mortgage interest and state and local property tax deductions increased the quantity of housing purchased moderately, by about ten to twelve percent).

[75] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 286 tbl.5-12.

[76] *See id.* at 288 tbl.5-13.

[77] *See id.* at 286 tbl.5-12.

dian household income of black renters is less than $21,000,[78] programs designed to impact renters will almost certainly benefit blacks. By helping more blacks and minorities become homeowners, a renter's tax credit would help to alleviate the persistent impacts of the policy-induced inequality that have prevented these groups from accumulating wealth.[79] Although this proposed remedy would not reverse the effects of centuries of disparate policies, it has the potential to boost homeownership rates—and the accumulation of wealth—among those renters who are still affected by their impacts.

IV. Examples of Renter-to-Homeowner Programs

Although not an exhaustive list, a number of renter-to-homeowner programs are discussed below to provide guidance for a more complete, national framework. The first set are federal initiatives administered by the Department of Housing and Urban Development ("HUD"). The other two sets of programs are administered at the state level, in California and Massachusetts.

A. *Federal Programs*

The Homeownership Voucher Program, an initiative within the Housing Choice Voucher Program, is dedicated to helping first-time homebuyers meet monthly mortgage payments and other homeownership expenses.[80] It is structured as a voucher that prospective homebuyers can receive through their local public housing authority ("PHA").[81] This voucher can be used to pay housing expenses in excess of thirty percent of the recipient's income.[82] The subsidy can be used for mortgage principal and interest, utilities, maintenance, repairs and insurance.[83] Many of these standards are set by the local public housing authority, which must inspect the home

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[78] *See id.*

[79] *See* Stoll, *supra* note 36, at 397; *see also* Oliver & Shapiro, *supra* note 38. Racial groups other than blacks that continue to suffer the effects of economic injustices could also benefit from such an initiative. *See generally* Wealth Accumulation in Communities of Color in the United States (Jessica Gordon Nembhard & Ngina Chiteji, Eds., forthcoming 2006) (examining asset accumulation and the connection between wealth and well-being among American minority groups, including blacks, Asian Americans and Pacific Islanders, Native Americans, and Latinos); Rebecca Adamson, *Land Rich and Dirt Poor: The Story of Native Assets*, Native Ams., Summer 2003, at 26 (highlighting the effect of lack of control over assets on the economic well-being of Native Americans).

[80] *See* United States Housing Act of 1937 § 8(y), 42 U.S.C. § 1437f(y) (2000); *see also* 24 C.F.R. § 982.625–642 (2005).

[81] *See* 42 U.S.C. § 1437f(y).

[82] *See id.* § 1437f(y)(2); *see also* 24 C.F.R. § 5.611 (adjusting income for dependents and certain permitted medical and child care expenses); 24 C.F.R. § 982.635 (limiting subsidized homeownership expenses to a payment standard defined by a public housing authority).

[83] *See* 24 C.F.R. § 982.635(c)(2).

and deem it appropriate before move-in.[84] A number of requirements must be met in order to participate in the program, including pre-purchase home-ownership counseling;[85] full-time employment;[86] and a minimum annual income equivalent to that which one would earn working 2000 hours at the federal minimum wage[87] (currently $10,300).[88] Additional requirements may also be instituted by local public housing authorities.[89] With the exception of elderly or disabled households, funding through the Homeownership Voucher Program is limited to fifteen years if the initial mortgage incurred to finance the home purchase has a term that is twenty years or longer, or ten years if the mortgage term is less than twenty years.[90]

As of October 2006, over 5500 homes had been purchased under the Homeownership Voucher Program.[91] However, this program alone is not likely to address fully the equity concerns identified above or to significantly boost homeownership rates among renters. The size of the Homeownership Voucher Program is constrained by the limited number of qualified households with acceptable credit ratings, the limited availability of staff resources to assist households in becoming purchase-ready, and the lack of available subsidies beyond the voucher, such as below-market interest rate loans and down payment assistance.[92] Other challenges stem from the demand for vouchers,[93] the difficulties involved in gaining the participation of the local lending community,[94] and the need to prepare families for homeownership.[95]

Section 32 of the Housing Act of 1937 is another program that works to boost homeownership opportunities for low-income households.[96] This

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[84] *See id.* § 982.631.

[85] *See id.* § 982.630.

[86] *See id.* § 982.627(d) (requiring an adult to have averaged thirty hours per week of employment over the previous year before receiving benefits).

[87] *See id.* § 982.627(c)(1)(ii).

[88] *See* 29 U.S.C. § 206(a)(1) (2000).

[89] *See* 24 C.F.R. § 982.629 (allowing local public housing authorities to establish a maximum time to locate and purchase a home and to require progress reports on those tasks).

[90] *See id.* § 982.634(a).

[91] *See* Office of Pub. and Indian Hous., U.S. Dep't of Hous. and Urban Dev., Housing Authorities with a Voucher Homeownership Program, http://www.hud.gov/offices/pih/programs/hcv/homeownership/publiclist_vhosites.xls (last visited Nov. 21, 2006).

[92] *See* 1 ABT ASSOCS., VOUCHER HOMEOWNERSHIP ASSESSMENT, at xi (2003), *available at* http://www.huduser.org/Publications/PDF/MSD_Book_VOL1.pdf. Abt contracted with HUD in 2001 to conduct a study of the early implementation of the Homeownership Voucher Program. *See id.* at iii.

[93] *See* Office of Pub. and Indian Hous., U.S. Dep't of Hous. and Urban Dev., Homeownership Vouchers, http://www.hud.gov/offices/pih/programs/hcv/homeownership/index.cfm (last visited Nov. 21, 2006) (noting that the waiting time to receive a voucher "can vary between several months and several years"). Many public housing authorities in geographic areas that face grave affordable housing problems have stopped taking applicants because their waiting lists are so long. *See id.*

[94] *See* ABT ASSOCS., *supra* note 92, at 6-3.

[95] *See id.* at 6-5.

[96] *See* United States Housing Act of 1937 § 32, 42 U.S.C. § 1437z-4 (2000); *see also*

program does not use a voucher but instead provides PHAs with a flexible way to sell public housing units to low-income families.[97] Under section 32, current residents of the units offered for sale are given preference to purchase them.[98] PHAs are granted explicit authority to sell selected public housing units; while no special funding is authorized, PHAs may use other HUD assistance to help finance the sale.[99]

The section 32 program also authorizes the sale of all or a portion of a public housing development to eligible public or non-public housing residents, provides Capital Fund[100] assistance to families to purchase homes, and provides Capital Fund assistance to acquire homes that will then be sold to low-income families.[101] PHAs are required to reuse the proceeds from the sale of public housing units to meet other affordable housing needs.[102] In 2001, HUD stated that it expected to approve the sale of up to 3000 units per year under the program.[103]

B. State Programs

In addition to federal initiatives, a number of states also administer renter-to-homeowner programs. The following discussion addresses representative programs in two states.

1. California

California's Nonrefundable Renter's Credit is a personal income tax credit that can be used to offset an individual's tax liability.[104] The amount of the credit is $60.00 for individuals and $120.00 for married couples filing jointly, heads of households, and surviving spouses.[105] In order to be eligible

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24 C.F.R. § 906 (2005).

[97] *See* 42 U.S.C. § 1437z-4(a).

[98] *See* 24 C.F.R. § 906.13(a).

[99] *See id* § 906.5.

[100] The Capital Fund provides annual funding to PHAs "for the development, financing, and modernization of public housing developments and for management improvements." Office of Pub. and Indian Hous., U.S. Dep't of Hous. and Urban Dev., Office of Capital Improvements, http://www.hud.gov/offices/pih/programs/ph/capfund/ (last visited Nov. 21, 2006).

[101] *See* Office of Pub. and Indian Hous., U.S. Dep't of Hous. and Urban Dev., Homeownership, http://www.hud.gov/offices/pih/centers/sac/homeownership/index.cfm (last visited Nov. 21, 2006) [hereinafter Office of Pub. and Indian Hous. Section 32 Guide].

[102] *See* 24 C.F.R. § 906.31(a).

[103] *See* Office of Pub. and Indian Hous., U.S. Dep't of Hous. and Urban Dev., Section 5(h) Homeownership, http://www.hud.gov/progdesc/sect5(h).cfm (last visited Nov. 21, 2006). This statistic refers to the program that section 32 replaced, section 5(h). *See* Office of Pub. and Indian Hous. Section 32 Guide, *supra* note 101 ("[T]he final Section 32 rule replaces the Section 5(h) rule.").

[104] *See* CAL. REV. & TAX. CODE § 17053.5 (West Supp. 2005).

[105] *See id.* § 17053.5(a)(1)(A), (B).

for this program, the applicant must be a California resident and meet certain income limits and other requirements.[106]

One notable aspect of this California program is that it is a nonrefundable credit,[107] although it was refundable when first enacted.[108] Thus, in order to receive any benefit from it, a taxpayer must have a positive tax liability.[109] This provision, therefore, provides little or no benefit to low-income individuals and families who have limited or no tax liability.

In addition to the renter's credit, California offers a separate program designed to minimize burdens on senior citizen renters.[110] This program establishes a once-a-year payment from the state to qualified individuals based on the property taxes that they pay indirectly through their rent.[111] The maximum amount of assistance that a claimant may receive is 139% of $250.00, or $347.50.[112] To file a claim under these provisions, the claimant must: (1) be sixty-two years of age or older, blind, or disabled;[113] (2) rent and live in a residence in California that is not exempt from property taxes;[114] (3) pay $50.00 or more per month in rent on that residence;[115] and (4) have a maximum total household income of $40,811.[116]

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[106] *See id.* § 17053.5(a)–(d). The current maximum adjusted gross income for a recipient of the benefit is $30,794 if single or married and filing a separate return; or $61,588 if married and filing jointly, filing as the head of a household, or as a qualified widow or widower. *See* Franchise Tax Bd. of Cal., Nonrefundable Renter Credit, http://www.ftb.ca.gov/individuals/faq/ivr/203.html (last visited Nov. 21, 2006) [hereinafter Franchise Tax Bd. of Cal. Renter Credit Website]. In addition to the income limits, a recipient: (1) must rent and occupy a principal residence in California for at least half of the taxable year; (2) must not live with another person, such as a parent, as a dependent for more than half the taxable year; (3) must not be a minor living with and under the care of a parent, foster parent, or legal guardian; and (4) must rent property for more than half the taxable year that was not exempt from California property tax. Additionally, if married, the applicant's spouse must not have been granted a homeowner's property tax exemption during 2005, unless both the applicant and spouse each maintained a separate residence for the entire taxable year. *See* CAL. REV. & TAX. CODE § 17053.5.

[107] *See* Franchise Tax Bd. of Cal. Renter Credit Website, *supra* note 106.

[108] *See* Klehs-Alquist Tax Conformity Act of 1991, 1991 Cal. Stat. 117, § 12.5 (repealed 1998).

[109] *See* Franchise Tax Bd. of Cal. Renter Credit Website, *supra* note 106.

[110] *See* CAL. REV. & TAX. CODE §§ 20501–20564 (West 2004). These provisions also provide specific benefits to senior citizen homeowners, but for present purposes, this Article focuses on the portion that aids renters. *See also* Franchise Tax Bd. of Cal., Homeowner and Renter Assistance, http://www.ftb.ca.gov/individuals/hra/index.html (last visited Nov. 21, 2006) (describing the renter assistance program) [hereinafter Franchise Tax Bd. of Cal. Renter Assistance Program Website].

[111] *See* Franchise Tax Bd. of Cal. Renter Assistance Program Website, *supra* note 110.

[112] *See id.*

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See* Franchise Tax Bd. of Cal. Renter Assistance Program Website, *supra* note 110.

2. *Massachusetts*

Massachusetts offers an innovative tax credit to benefit both renters and homeowners ages sixty-five and older.[117] For tax years beginning on or after January 1, 2001, an owner or renter of a principal residence in Massachusetts who is age sixty-five or older at the close of the taxable year may be eligible to claim a refundable credit against personal income taxes.[118] Known as the "circuit breaker credit,"[119] this credit is based on the actual real estate taxes or rent paid by a taxpayer eligible to claim the credit.[120]

The credit is equal to the amount by which twenty-five percent of the rent actually paid by the taxpayer for the principal residence exceeds ten percent of the taxpayer's total income for the taxable year, provided that such amount does not exceed the maximum credit amount.[121] The maximum credit amount is $750.00 multiplied by a cost-of-living adjustment factor.[122] In addition to the age requirement, income and other limits also apply.[123] For qualifying taxpayers, the circuit breaker credit is not counted as income for purposes of determining eligibility or benefits under any other means-tested assistance program, such as food stamps or educational subsidies.[124]

V. UNIVERSAL RENTER-TO-HOMEOWNERSHIP PROGRAM

The federal and state program models described above provide a rich set of features from which to draw for creation of new legislation. This Article proposes the basic outline of a federal renter-to-homeowner program. The program has three basic features: (1) it is structured as a one-

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[117] *See* MASS. GEN. LAWS ch. 62, § 6(k)(2) (Supp. 2006).

[118] *See id.*

[119] See Mass. Dep't of Revenue, Guide to Taxes, http://www.dor.state.ma.us/help/guides/abate_amend/personal/issues/realestate.htm (last visited Nov. 21, 2006) [hereinafter Mass. Dep't of Revenue].

[120] *See* MASS. GEN. LAWS ch. 62, § 6(k)(2).

[121] *See id.* Twenty-five percent is used because in Massachusetts, the tax authorities estimate that twenty-five percent of rent goes toward property tax. *See* Mass. Dep't of Revenue, *supra* note 119.

[122] *See* MASS. GEN. LAWS ch. 62, § 6(k)(2), (4).

[123] *See* Mass. Dep't of Revenue, *supra* note 119. The income limits are currently $46,000 if the taxpayer is single and not the head of a household, $58,000 if single and the head of a household, and $70,000 for a married couple filing jointly. *See id.* The Department of Revenue adjusts the income thresholds to reflect inflation. *See* MASS. GEN. LAWS ch. 62, § 6(k)(4). In addition, the following requirements apply: (1) the taxpayer must pay rent on property in Massachusetts under a good faith rental agreement for the right of occupancy of the principal residence during the taxable year or for a portion of the taxable year, *see id.* § 6(k)(1); (2) the housing in which the taxpayer lives must be subject to real estate taxes for the taxable year, *see id.*; (3) the taxpayer may not receive a federal or state rent subsidy for the property, *see id.* § 6(k)(9); (4) the taxpayer may not be the dependent of another taxpayer, *see id.* § 6(k)(2); and (5) married taxpayers must file a joint return, *see id.* § 6(k)(5).

[124] *See* MASS. GEN. LAWS ch. 62, § 6(k)(8).

time, non-refundable tax credit; (2) it is universal--that is, it is not restricted by income level, age, or disability status; (3) it is designed to promote homeownership. The salient features of the program are outlined below.

A. Structure

The federal universal renter-to-homeowner program would be structured as a one-time, non-refundable tax credit, rather than a voucher program. Such a model has a number of advantages. First, a tax credit does not benefit those with no tax liability, and therefore limits its benefits to those who work or are otherwise engaged in activities that promote wealth-building and self-sufficiency. It therefore creates an incentive to engage in these activities. Second, unlike a limited voucher initiative such as the Homeownership Voucher Program, a tax credit would allow all eligible renters to benefit and would not require a dedicated funding source apart from the existing tax base. Finally, a tax credit is more feasible to administer than a voucher program because its implementation would not require the creation of a new bureaucracy to implement the initiative.

The program proposed here would provide a one-time tax credit to all renters who have never owned homes. It would be claimed during the tax year of the renter's choice. Landlords would provide statements documenting rental payments for taxpayers claiming the credit. The amount of the credit would be based on the estimated value of property taxes implicitly paid by the average renter over five years, and would be paid in one lump sum in order to facilitate its use for a down payment on a home. Thus, the value of the credit would be five times twenty-nine percent[125] of the median national rental fee in the tax year when a renter chooses to claim the credit. For 2005, when the median national rent cost was $694.00,[126] the total value of the five-year tax credit would be $12,076. This total credit would further many asset-building activities, such as placing a down payment on a home.

B. Universality

Unlike the state programs described above, the national renter-to-homeowner credit outlined here would be universal and not limited by income level, age, or disability status. Although this approach would cost more than a program targeted at specific subpopulations, a universal pro-

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[125] This program incorporates the Massachusetts estimate that twenty-five percent of rental payments go towards property taxes. *See* Mass. Dep't of Revenue, *supra* note 119. An additional four percent is added to estimate cost of living increases over the next five years.

[126] *See* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 9 tbl.1A-7.

gram is a better model for two reasons. First, a universal program would most comprehensively address the inequalities in the current system that affect all renters.[127] In addition, a universal program is more likely to be embraced by legislators on a national level than a program targeted specifically to low-income or minority renters, given the general hostility to social programs that appear to bear characteristics of a "welfare state."[128] Because the program would be limited to renters who have never owned homes, it could impact persistent race- and income-based disparities in homeownership indirectly, without implicating the political sensitivities that are often triggered by legislation that is explicitly race- and income-conscious.

C. Promoting Homeownership and Wealth-Building

The program outlined here would explicitly promote homeownership and wealth-building, rather than simply alleviating burdens on renters. This would recognize the importance of homeownership to our nation for both economic and cultural reasons,[129] as well as the pressing need to increase homeownerhip rates and overall wealth for low-income Americans and minorities, particularly blacks.[130]

The proposed program promotes homeownership and wealth-building by imposing certain requirements on recipients. First, although the program would be universal in that it would not be limited by age or income level, only families whose heads of household have never bought a home would be eligible. Second, the program contains a minimum work and income requirement. Recipients would be required to earn an annual income of at least the federal minimum wage multiplied by 2000 hours. Those who have no income, but are enrolled full-time in postsecondary education, or work 1000 hours and are enrolled in school part time, would also qualify. These requirements ensure that this program would reward work and education, two activities that are indispensable to building wealth over the long term. Third, the program would require homeownership counseling in order to help beneficiaries understand the benefits of homeownership and the steps involved in the homebuying process. Counseling is an invaluable tool that many first-time homebuyer programs[131] use to

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[127] *See supra* Part III.A.

[128] *See* Michael K. Brown, *Ghettos, Fiscal Federalism, and Welfare Reform*, *in* RACE AND THE POLITICS OF WELFARE REFORM 47–61 (Sanford F. Schram et al. eds., 2003) (explaining the impact of racial policies in public asistance programs on the development of welfare reform); Kathryn M. Neckerman et al., *Family Structure, Black Unemployment, and American Social Policy*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 397, 418 (Margaret Weir et al. eds., 1988) (noting that most voters do not identify with programs focused on low-income populations).

[129] *See supra* text accompanying notes 1–11.

[130] *See* Stoll, *supra* note 36, at 397; *see also* OLIVER & SHAPIRO, *supra* note 38.

[131] *See, e.g.*, 24 C.F.R. § 982.630 (2005).

address the knowledge gap that low-income, young, and minority families and households possess regarding homeownership.[132] In order to collect the benefit, qualifying taxpayers would be required to complete a pre-assistance homeownership and housing counseling program offered through their state or local government, and provide a certificate number on their tax return in the year when they collect the benefit. Finally, the tax credit comes in the form of a one-time, lump-sum payment which is claimed at the time of the taxpayer's choice. This structure, particularly when coupled with the homeownership counseling requirement, increases the likelihood that recipients will claim the credit when they are prepared to purchase a home.

VI. CONCLUSION

This Article highlights the major obstacles that prevent renters, particularly low-income and black renters, from becoming homeowners and building wealth, and outlines a framework for potential changes to the tax code that could begin to address these obstacles and inequalities. The framework presented here is not a comprehensive piece of legislation ready for implementation, but rather an outline of the basic features that such legislation could include. The approach suggested by this Article is a flexible one meant to promote homeownership in particular and asset development in general. While the required funding for a federal universal renter-to-homeowner tax credit may be considerable, these costs will likely amount to only a fraction of the cost of the three principal tax benefits currently received by homeowners.[133]

While the initiative suggested here would have positive implications, it is inevitable that opposition will arise. One potential objection might be that this proposal could be viewed as a first step towards restoring the deductibility of consumer, nonmortgage interest payments that existed prior to the Tax Reform Act of 1986.[134] A similar claim might be that by providing tax credits for renters, this legislation would minimize the incentives in favor of homeownership created by the current tax code. Neither argument, however, would justify opposition to the framework suggested here. The program suggested by this Article is limited to a one-time, five-year credit. Even with such a credit, it would still be far preferable to become a homeowner to take advantage of the three primary tax benefits

[132] *See* FANNIE MAE, *supra* note 5, at 6–8 (discussing the knowledge gap).

[133] The credit suggested here corresponds only to state and local property taxes. Homeowners' deductions for state and local property taxes constitute less than twenty percent of their federal tax deductions. *See* STAFF OF J. COMM. ON TAXATION, *supra* note 24, at 33. Given that there are more homeowners than renters, *see* U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 2005, *supra* note 14, at 42 tbl.2-1, and that renters can only claim the proposed credit once, the cost of the credit suggested here will be significantly less than the cost of homeowners' benefits.

[134] *See supra* Part II.B.

to homeownership[135] as well as the personal and social benefits of home-owning.[136] Furthermore, the program proposed here is specifically designed to promote homeownership and asset development, rather than simply to provide renters with additional income. Thus, the overwhelming advantages to homeownership, coupled with the nature of the proposed program, would prevent unintended consequences.

Homeownership is an effective way to build wealth, and in turn a wealthier, more stable society. The program presented here is meant to advance a more equitable allocation of the advantage that the U.S. tax code bestows on homeowners generally, and specifically to channel the resources provided by federal tax deductions to promote more widespread homeownership and asset development in American society.

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[135] *See supra* Part II.

[136] *See supra* text accompanying notes 1–11.

SYMPOSIUM INTRODUCTION

A NEW CONVERSATION ABOUT THE MIDDLE CLASS

ELIZABETH WARREN*

On March 20, 2006, the Harvard Journal on Legislation *held a public symposium addressing the diminishing social safety net for the middle class. This piece briefly presents some of the issues that were discussed during the symposium, explains their increasing relevance for the middle class, and introduces two articles by symposium panelists that address some of these issue in greater depth.***

Boring words used to describe the middle class. Words like "solid" and "secure." But that steady assurance has begun to fade. The middle class today is more likely to be linked with words like "fragile" and "squeezed." The *Harvard Journal on Legislation* now publishes two papers from its Symposium on the Middle-Class Crunch. Instead of stretching to find speakers with evidence about the difficulties facing middle-class families, the editors of *JOL* enlisted scholars who drew attention to a variety of difficulties facing these once-secure households.

The middle-class crunch is nowhere more evident than in the bankruptcy courts. The families that line up at the doors of the bankruptcy courts day after day are overwhelmingly middle-class. When measured by incomes at the time of filing, about half are between the median income and the poverty level.[1] But when measured by enduring criteria such as education, occupations and homeownership, fully nine out of ten of the men and women filing for bankruptcy would qualify as solidly middle- class.[2]

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* Leo Gottlieb Professor of Law, Harvard University. J.D., Rutgers University, 1976; B.S., University of Houston, 1970. The author served as the moderator for the Harvard Journal on Legislation Symposium.

** The Symposium was made possible, in part, with assistance from the following sponsors: the Fannie Mae Foundation; the HLS Publications Center; the HLS Dean's Office; the HLS Dean of Students Office; BAR/BRI; Westlaw; and the Appellate Law Offices of Steven Temko.

[1] This proportion remained relatively constant over twenty years. Teresa Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 101, 111 (2006).

[2] Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 144 (2003). In 2001, 57.2% of U.S. bankruptcy filers had attended college or graduate school, 58.3% of debtors were homeowners, and 70.3% had occupations that scored in the upper 80% of all occupational prestige scores. More than nine out of ten (91.8%) of all debtors had at least one of these criteria for middle-class status, 66.6% had two criteria, and 27.4% had all three. *Id.* at 143–44 fig.9.

Before Congress chopped away at access to the bankruptcy courts in 2005,[3] the bankruptcy filing rate was on a steep climb, showing little let up.[4] By the early 2000s, more people filed for bankruptcy each year than suffered a heart attack.[5] More filed bankruptcy than were diagnosed with cancer.[6] More filed bankruptcy than graduated from college.[7] And, in an era when traditionalists decry the demise of the institution of marriage, Americans filed more petitions for bankruptcy than for divorce.[8] Heart attacks, cancer, college graduations, divorce: these are markers in the lives of nearly every American family. And yet, most Americans have more friends and coworkers who have gone through bankruptcy than any one of these other life events.

If the bankruptcy filing numbers seem overwhelming, note that standing behind those who file is an even larger group that is in enough trouble to file, but who delay nonetheless. According to economist Michelle White, for each household filing for bankruptcy, there are about fifteen more

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[3] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (to be codified in scattered sections of 11 U.S.C.).

[4] The rise in bankruptcy filings has been extraordinary. In calendar year 1980, bankruptcy filings in the United States stood at 241,450. ADMIN. OFFICE OF THE U.S. COURTS, BUSINESS AND NON-BUSINESS BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 30, 1980. In calendar year 2004, filings were more than six times higher, standing at 1,563,145 non-business bankruptcy filings. ADMIN. OFFICE OF THE U.S. COURTS, BUSINESS AND NON-BUSINESS BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 30, 2004, *available at* http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_dec2004.pdf.

[5] In 2002, for example, there were 1.5 million non-business bankruptcty filings. ADMIN. OFFICE OF THE U.S. COURTS, BUSINESS AND NON-BUSINESS BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDING DECEMBER 30, 2002, *available at* http://www.uscourts.gov/Press_Releases/1202F2.xls. By comparison, 1.1 million Americans were expected to have a first or recurrent coronary attack. AM. HEART ASSOC., TARGETING THE FACTS: OUR QUICK GUIDE TO HEART DISEASE, STROKE AND RISKS 4 (2002), *available at* http://www.americanheart.org/downloadable/heart/1014993119046targetfact.pdf.

[6] Approximately 1,284,900 new cancer cases were diagnosed in 2002. AM. CANCER SOC'Y, CANCER FACTS AND FIGURES 2002, at 1 (2002), *available at* http://www.cancer.org/downloads/STT/CancerFacts&Figures2002TM.pdf.

[7] In 2001, American universities and colleges awarded 1.2 million bachelor's degrees. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TABLE 247, EARNED DEGREES CONFERRED BY DEGREE-GRANTING INSTITUTIONS, BY LEVEL OF DEGREE AND SEX OF STUDENT: 1869–70 TO 2010–11 (2001), *available at* http://nces.ed.gov/programs/digest/d01/dt247.asp.

[8] In 2001, there were 1.1 million divorces in the United States, compared with 1.5 million bankruptcy filings. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2001, (National Vital Statistics Report, Vol. 50, No. 14, Sept. 11, 2002), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_14.pdf (calculating divorces by multiplying the divorce rate by the population); ADMIN. OFFICE OF THE U.S. COURTS, BUSINESS AND NON-BUSINESS BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE TWELVE MONTH PERIOD ENDING DECEMBER 30, 2001, *available at* http://www.uscourts.gov/Press_Releases/ 1201f2.xls. For further discussion of this point, see ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003).

households in sufficiently difficult financial circumstances that they too could profit from filing for bankruptcy—if only they were more savvy.[9] Bankruptcy—or the need for bankruptcy—now marks the lives of millions of Americans.

Bankruptcy is not a happy event for any family. For millions of Americans, the decision to seek formal protection from their creditors is a tangible sign of their abject failure. In a world in which "economic achievement" and "success" have become interchangeable terms, the public declaration of bankruptcy is an intensely painful moment. But for a growing number of middle-class Americans, bankruptcy has become simply the latest and most extreme indicator of the middle-class crunch.

Other data show the same pattern: rising debt levels,[10] increasing income volatility,[11] growing numbers of people behind on mortgage payments or credit card bills.[12] They all signal trouble in the middle class.

I am pleased to be invited to write an introduction for the *Harvard Journal on Legislation*'s extraordinary Symposium on the Middle-Class Crunch. The existence of this symposium marks an important change in attitudes. No longer does the comfortable assumption hold sway that once a family achieves middle-class status, it will be economically secure forever. Instead, the editors of *JOL* have pushed the issue of the vulnerability of middle-class families front and center in policy discussions. *JOL* advances the discussion of the fraying safety net beyond its usual application to the chronically poor and asks how it is affecting the middle class. To pose this question in a well-respected academic journal is a tan-

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[9] Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 702 (1998) (claiming that, when considering the costs of filing, about 15% of all households in the United States would profit from bankruptcy). By comparison, the bankruptcy filing rate in the United States in 1998 was about 1%. *See* ADMIN. OFFICE OF THE U.S. COURTS, 1990-2002 CALENDAR YEAR BANKRUPTCY FILINGS BY CHAPTER AND DISTRICT, *available at* http://www.uscourts.gov/bnkrpctystats/Bk2002_1990Calendar.pdf (calculating bankruptcy filing rates as the number of filings divided by the number of households).

[10] From 1981 to 2001, total outstanding consumer debt (in 2001 dollars) increased from $650 billion to $1,645 billion. *Consumer Installment Credit*, 69 FED. RES. BULL. A42 (1983) (adjusted to 2001 dollars); *Consumer Credit*, 88 FED. RES. BULL. A36 (2002). The savings rate, a solid 10.9% of take-home pay in 1981, shrunk to 1.8% by 2001, while credit card debt climbed from 4% to 12% in the same time period. *See Consumer Installment Credit*, 69 FED. RES. BULL. A42 (1983) (adjusted to 2001 dollars); *Consumer Credit*, 88 FED. RES. BULL. A36 (2002) (calculating credit card debt as revolving credit per adult divided by income per adult); BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, TABLE 2.1. PERSONAL INCOME AND ITS DISPOSITION (Nov. 29, 2006), http://www.bea.gov/bea/dn/nipaweb/SelectTable.asp?Selected=3 (follow "Table 2.1" hyperlink; select "Annual(A)" and "First Year" as "1981-A & Q"; select "Refresh Table") (last visited Dec. 10, 2006).

[11] JACOB HACKER, THE GREAT RISK SHIFT 27–28 (2006).

[12] Currently more than one in every six American families reports being pressured by creditors to pay late bills, a 26% increase in little over a decade. TOM W. SMITH, NAT'L OPINION RESEARCH CTR., TROUBLES IN AMERICA: A STUDY OF NEGATIVE LIFE EVENTS ACROSS TIME AND SUBGROUPS 23 tbl.2 (2005), *available at* http://www-news.uchicago.edu/releases/05/051228.troubles.pdf.

gible sign of the growing concern over the future of middle-class America.

The Symposium was a lively affair, with thoughtful presentations from a diverse group of experts who approached the issues from a number of different perspectives. We are fortunate that two of the most outstanding papers are available here, Patricia McCoy's *Rethinking Disclosure in a World of Risk-Based Pricing* and Deanne Loonin and Elizabeth Renuart's *Life and Debt: A Survey of Data Addressing the Debt Loads of Older Persons and Policy Recommendations*. Both articles pick up on the central theme of the conference: the middle class is in trouble, and current policy positions are not well designed to address this growing vulnerability.

Professor McCoy writes about a world of mortgage debt that has changed profoundly in the past few decades and a regulatory scheme that has not. She details the credit practices that routinely extend high-interest, high-risk mortgages to millions of families. She shows how the regulations that were put in place decades ago to protect home mortgage borrowers have become obsolete in a new world of teaser rates, interest-only, no-income verification, and other exotic mortgage products. She offers a thoughtful list of policy recommendations, mostly focused on better information during the mortgage application process. Although some of the industry profiteers would undoubtedly protest these suggestions quite vigorously, the recommendations are actually quite conservative in tone. Each is aimed toward making mortgage markets work better, something that should be a long-term win for customers and lenders alike.

Deanne Loonin and Elizabeth Renuart offer another approach to understanding the middle-class squeeze. By focusing on a series of both industry practices and policy changes over the past few decades, they show how older Americans are having a much more difficult time coping financially. They highlight a critical problem: often, older Americans experience the same difficulties their younger counterparts experience—the elderly simply experience them more intensely. But Loonin and Renuart's finding also has a positive message. Policy changes that are good for older Americans are good for all Americans.

Publication of these articles concludes the *JOL* Symposium on the Middle-Class Crunch. I hope, however, that it is only the beginning of a new conversation about changes to strengthen the middle class.

ARTICLE

RETHINKING DISCLOSURE IN A WORLD OF RISK-BASED PRICING

PATRICIA A. MCCOY*

The residential mortgage market in the United States has changed significantly since the passage of current federal mortgage disclosure laws in the 1960s and 1970s. In this Article, Professor Patricia McCoy advocates for the reform of these traditional disclosure rules. After describing the evolution of the subprime mortgage market and providing a description of current federal disclosure laws, she explores how these new market dynamics cause the traditional disclosure rules to break down in the subprime market. Professor McCoy concludes with proposals to counteract false advertising practices, facilitate meaningful comparison-shopping, and formulate streamlined disclosures addressing loan applicants' greatest concerns in the subprime market.

In recent years, the mortgage debt of ordinary homeowners has mounted, garnering widespread attention and concern. Policymakers exhort consumers to minimize their cost of credit by comparison-shopping for home mortgages. But calls for comparison-shopping ignore the fact that certain consumers—specifically, individuals with poor credit—face informational barriers that make meaningful comparison-shopping for mortgages nearly impossible. In view of these barriers, it is not at all surprising, as a leading scholar noted fifteen years ago, that shopping for credit "remains extremely limited—limited to the same upscale consumers who would manage perfectly well without benefit of legislation."[1]

The system of mandatory mortgage disclosures in the United States was designed for the old world of prime loans. The Truth in Lending Act and the Real Estate Settlement Procedures Act were both enacted to remove informational barriers to consumer search for residential mortgages.[2] These

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* George J. and Helen M. England Professor of Law, University of Connecticut. J.D., University of California at Berkeley, 1983; B.A., Oberlin College, 1976. The author wishes to express heartfelt thanks to Elizabeth Warren, Susan Wachter, Elizabeth Renuart, Jeremy Pearlman, Kathleen Engel, and Alys Cohen for their thoughts and encouragement. The author is also indebted to the staff at the Federal Reserve Board and the Federal Trade Commission for giving her the opportunity to further develop this line of thought. Finally, thanks is given to the University of Connecticut Law School Foundation for its generous funding. In the interest of disclosure, the author has served as an expert witness for plaintiffs in predatory lending litigation. All errors, of course, are the author's alone.

[1] Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 236 (1991).

[2] *See* Truth in Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1693 (2000)); Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2000)); *see also* Rubin, *supra* note 1, at 233.

statutes were written when the sole conventional mortgage market was the prime market and access to home mortgages was limited to customers with strong credit.

Since then, the U.S. residential mortgage market has undergone rapid change. The market has evolved from strictly a prime market based on average-cost pricing (in which comparable mortgages have roughly one price) to a dual market offering both prime loans and subprime loans featuring risk-based pricing (in which the price for a given mortgage varies according to the borrower's risk).[3]

However well traditional mortgage disclosure rules work in prime market conditions, these rules break down in the subprime world of risk-based pricing. Numerous subprime advertisements are tantamount to affirmative misrepresentations for most customers with blemished credit because lenders generally tout only their best rates. Subprime lenders do not provide firm price quotes to customers before application and often not until closing, when it is too late to shop. Similarly, lock-in commitments,[4] which are customary in the prime market, are rarely ever seen in the subprime world.

If comparison-shopping means anything, it means the ability to obtain firm apples-to-apples price quotes from multiple lenders without having to pay large, nonrefundable fees. Unfortunately, most subprime customers lack that ability. Instead, under current federal disclosure laws, subprime lenders can entice customers with rosy prices that are not available to weaker borrowers, hike the price after customers pay a hefty application fee, then raise the price again at closing, often with no advance notice. Under these circumstances, our broken system of federal mortgage disclosures impedes meaningful comparison-shopping and efficient subprime prices.

This state of affairs is not inevitable. Subprime lenders and mortgage brokers have the technology and information they need right now to provide firm price quotes to consumers at minimal cost without extracting large application fees. Requiring lenders and brokers to use this technology to provide firm quotes would revolutionize consumer search in the subprime world. Similarly, minor changes to federal regulations governing subprime mortgage advertising could help alleviate the current state of rampant misrepresentations and misleading omissions in the subprime market. Advance disclosure of legitimate changes in loan terms at least a

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[3] Subprime loans are designed for borrowers with weaker credit and for borrowers who want low-documentation or no-documentation loans. *See* Elizabeth Renuart, *An Overview of the Predatory Mortgage Lending Process*, 15 HOUSING POL'Y DEBATE 467, 474 (2004), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1503_Renuart.pdf.

[4] A lock-in commitment is "a lender's promise to hold a certain interest rate and a certain number of points for [a loan applicant], usually for a specified period of time, while [the applicant's] loan application is processed." BD. OF GOVERNORS OF THE FED. RESERVE SYS., A CONSUMER'S GUIDE TO MORTGAGE LOCK-INS 2 (2005), *available at* http://www.federalreserve.gov/pubs/lockins/default.htm.

week before closing would further constrain bait-and-switch tactics. Finally, revamped disclosure rules for variable-rate[5] loans would help consumers understand their worst case payment scenario, which is the biggest risk presented by these loans.

This Article proceeds as follows: Part I describes how the residential mortgage market has evolved from a prime market based on average-cost pricing to a dual market that also uses risk-based pricing. Part II provides a thumbnail description of the relevant provisions of federal mortgage disclosure law. Part III explains why the market dynamics of the subprime market cause the traditional disclosure rules to break down. Part IV sets forth this Article's proposals for reforming the disclosure rules to permit meaningful comparison-shopping in the subprime market.

I. THE OLD WORLD AND THE NEW

In the 1960s and 1970s, when current federal mortgage disclosure laws were enacted, the mortgage world was a different place. Individuals with poor credit were systematically excluded from conventional credit, lenders gave free price quotes, lock-in commitments were common, and mortgages with comparable features went for approximately the same price. Congress designed federal disclosure laws with these market conditions in mind. In subsequent decades, when market conditions evolved and credit became available to weaker borrowers at higher, risk-adjusted prices, the disclosure laws began to show their age.

A. The Old World Of Average-Cost Pricing

Before 1990, mortgage lenders generally restricted home loans to prime borrowers, who are individuals with strong credit. Lenders rationed credit because demand exceeded supply.[6] People who banks categorized as risky could not get conventional home mortgages.[7] Furthermore, many lenders stereotyped blacks, Hispanics, and members of other minority groups as inherently risky and categorically denied them loans.[8]

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[5] In a variable-rate loan "[t]he interest rate fluctuates over the life of the loan based on market conditions, but the loan agreement generally sets maximum and minimum rates." BD. OF GOVERNORS OF THE FED. RESERVE SYS., LOOKING FOR THE BEST MORTGAGE: SHOP, COMPARE, NEGOTIATE (2004), *available at* http://www.federalreserve.gov/pubs/mortgage/mortb_1.htm.

[6] *See* Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM. ECON. REV. 393, 393–95 (1981) (providing a theoretical justification for credit rationing at market equilibrium).

[7] *See id.*

[8] *See, e.g.*, PATRICIA A. MCCOY, BANKING LAW MANUAL: FEDERAL REGULATION OF FINANCIAL HOLDING COMPANIES, BANKS AND THRIFTS § 8.04[1] nn.1–8 (2d ed. 2000 & Supps.).

In this market, known as the "prime market," lenders price mortgages based on average cost. Prime borrowers have narrow differences in credit risk. Lenders do not adjust the price for prime mortgages, however, based on these differences in risk. Instead, under average-cost pricing, a lender aggregates individual credit risks and computes one price for all of its prime borrowers based on the average. As a result, for any given loan product, such as a thirty-year fixed-rate mortgage with no points, a lender will charge all of its prime borrowers an identical price.[9]

Under average-cost pricing, not every loan applicant will qualify for and receive a loan. Instead, average-cost pricing amounts to a pass-fail system. If the applicant qualifies, she receives the standard price. If she does not, the lender denies the loan outright.[10]

Average-cost pricing has two important implications for efficient pricing. First, prices for prime mortgages with comparable features are highly competitive and trade within a relatively narrow band.[11] Similar mortgages have roughly homogeneous prices. Second, this price competition gives prime borrowers leverage to demand concessions from lenders in the form of lock-in commitments, interest rate reductions in exchange for points, and the general absence of prepayment penalties.[12]

B. The New World of "Risk-Based" Pricing

Starting in the late 1970s and continuing through the early 1990s, a confluence of legal, technological, and market forces caused the residential mortgage market in the United States to undergo wholesale transformation.[13] These changes resulted in the emergence of the subprime mortgage market, which is designed for borrowers with poor credit and charges higher interest rates and fees than the prime market. The subprime market charges different borrowers different prices for the same product, ostensibly based on their individual risk.

In theory, such "risk-based pricing" pigeonholes borrowers according to risk and calibrates prices accordingly. This leads to multiple prices for the same loan. The price of the loan goes up as the borrower's credit-

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[9] *See* Arnold S. Kling, *Get Set for Loan-Level Pricing*, SMM MAG. (ANNUAL MORTGAGE MARKET TRENDS ISSUE), July 1997, at 17, *available at* http://www.freddiemac.com/finance/smm/july97/pdfs/kling.pdf.

[10] *See id.* at 17–18, 20.

[11] *See id.*

[12] *See, e.g.*, CTR. FOR RESPONSIBLE LENDING, BORROWERS GAIN NO INTEREST RATE BENEFITS FROM PREPAYMENT PENALTIES ON SUBPRIME MORTGAGES 2–3 (2005), *available at* http://www.responsiblelending.org/pdfs/rr005-PPP_Interest_Rate-0105.pdf; CONG. BUDGET OFFICE, EFFECTS OF REPEALING FANNIE MAE'S AND FREDDIE MAC'S SEC EXEMPTIONS 24 & nn.48–49 (2003), *available at* http://www.cbo.gov/ftpdocs/41xx/doc4199/05-06-03-GSEs.pdf; David Reed, *Understanding Mortgage Rates, Points, and Fees*, REALTY TIMES, Mar. 31, 2006, http://www.realtytimes.com/rtcpages/20060331_understanding.htm.

[13] *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1273–80 (2002).

worthiness goes down.[14] A subprime lender, for example, may differentiate prices according to a complex matrix of factors, including credit scores, loan-to-value ratios, debt ratios, and prepayment risk.[15]

At this point, it is important to add a caveat: in reality, "risk-based pricing" is a misnomer. "Risk-based pricing" implies that pricing is accurately calibrated to credit risk. In reality, prices in the subprime market are only partly based on differences in borrowers' risk. Other factors, including mortgage broker compensation, discrimination, and rent-seeking can and do push up subprime prices.[16] This phenomenon has resulted in well-publicized abuses in the subprime market.[17] Accordingly, this Article uses the term "risk-based pricing" in its weak sense to refer to individualized pricing that may or may not be accurately tailored to a borrower's risk.

II. Federal Law Governing Price Revelation in the Home Mortgage Markets

In thinking about whether comparison-shopping is feasible in the subprime market, it is necessary to analyze how prices are revealed to consumers. In both the prime and subprime markets, price revelation is the result of interaction between market forces and federal (as well as state) disclosure laws. Such interaction varies, often dramatically, depending on whether a consumer is shopping in the world of average-cost or risk-based pricing.

This Article focuses on federal disclosure laws governing closed-end residential mortgages (other than reverse mortgages),[18] which are often associated with subprime lending abuses. Two major federal disclosure laws—the Truth in Lending Act ("TILA")[19] and the Real Estate Settle-

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[14] *See* Kling, *supra* note 9, at 17–18; Howard Lax et al., *Subprime Lending: An Investigation of Economic Efficiency*, 15 Housing Pol'y Debate 533, 556–63 (2004), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1503_Lax.pdf.

[15] *See* Alan M. White, *Risk-Based Mortgage Pricing: Present and Future Research*, 15 Housing Pol'y Debate 503, 509–12 (2004).

[16] *See, e.g.*, Lax et al., *supra* note 14, at 565 (finding that "some borrowers end up with subprime loans for reasons other than risk" and calling that finding "disturbing").

[17] *See, e.g.*, Engel & McCoy, *supra* note 13, at 1259–70, 1280–98.

[18] Closed-end mortgages are loans that finance fixed amounts of principal. Open-end mortgages, in contrast, are lines of credit in which the amount financed varies between zero and a dollar limit stated in the loan contract, at the borrower's option. *See generally* Elizabeth Renuart & Kathleen Keest, Nat'l Consumer Law Ctr., Truth in Lending § 4.1.2 (5th ed. 2003 & Supps.) (discussing open-end and closed-end credit); Bd. of Governors of the Fed. Reserve Sys., What You Should Know About Home Equity Lines of Credit, *available at* http://www.federalreserve.gov/pubs/equity/equity_english.htm (comparing traditional mortgages with home equity lines of credit). Reverse mortgages are "transactions in which payments are due only upon transfer of the dwelling in which the security interest is taken or when the consumer dies or moves." Renuart & Keest, *supra*, § 4.1.2.

[19] 15 U.S.C. §§ 1601–1693 (2000). One section of TILA, the Home Ownership and Equity Protection Act ("HOEPA"), mandates stricter disclosures for the most expensive subprime loans. For a description of HOEPA's disclosure rules, see *infra* notes 66–72 and

ment Procedures Act ("RESPA")[20]—mandate disclosures about the costs associated with most residential mortgages. RESPA requires standardized disclosures about the settlement costs of residential mortgages.[21] TILA requires lenders to disclose the cost of credit in two standardized formats: the finance charge and the annual percentage rate ("APR").[22] The finance charge seeks to capture the total dollar cost that a borrower will pay for credit, including interest payments, points, origination fees, and private mortgage insurance. The APR provides a different metric of the total cost of credit by converting the finance charge into an effective interest rate per year.[23] The Federal Reserve Board promulgates regulations implementing TILA, while the Department of Housing and Urban Development ("HUD") implements RESPA.[24]

A. Regulation of Price Revelation in General Advertising

Often, consumers shop for products by comparing prices in general advertisements. Neither TILA nor RESPA requires lenders to advertise prices. Consequently, when lenders advertise the cost of credit, they do so voluntarily.

TILA lightly regulates the content of loan advertisements, while RESPA does not regulate advertisements at all. TILA's provisions require lenders to make standardized disclosures whenever other price terms are advertised. Specifically, any advertisement that states an interest rate must state the annual percentage rate.[25] Written advertisements may also state a simple, periodic, nominal interest rate to be applied to an unpaid balance so long as that rate is no more conspicuous than the APR.[26] Oral responses to consumer inquiries about rates for closed-end loans, in contrast, may only state the APR.[27] Finally, any advertisement that quotes any of four types of loan terms—a down payment by percentage or amount, the amount of any monthly loan payment or finance charge, the number

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accompanying text.

[20] 12 U.S.C. §§ 2601–2617 (2000).

[21] *See infra* Part II.B.2.

[22] *See infra* Part II.B.1.

[23] *See generally* BD. OF GOVERNORS OF THE FED. RESERVE SYS. & DEP'T OF HOUS. & URBAN DEV., JOINT REPORT TO THE CONGRESS, CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT, at I–II (1998) [hereinafter HUD-FED JOINT REPORT], *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf.

[24] *See* 15 U.S.C. § 1604(a); 12 U.S.C. §§ 2602(6), 2617(a).

[25] 15 U.S.C. § 1664(c); 12 C.F.R. § 226.24(b) (2005).

[26] 15 U.S.C. § 1664(c); 12 C.F.R. § 226.24(b).

[27] 15 U.S.C. § 1665(a); *see also* 12 C.F.R. § 226.26(b) (creating an exception providing "that a simple annual rate or periodic rate also may be stated if it is applied to an unpaid balance"); *cf. id.* § 226.26(a) (governing open-end credit).

of payments, or the period of repayment—must also state the APR, the terms of repayment, and the amount or percentage of any down payment.[28]

Other provisions of TILA prohibit specific types of misrepresentations or misleading omissions in advertising. Thus, lenders may not advertise specific credit terms, such as APRs or minimum down payments (such as "zero down payment" or "only 5% down") unless they actually offer those terms.[29] However, neither TILA nor its regulations require subprime lenders to offer their best, advertised terms to every customer. Indeed, the statute and the regulations do not even require lenders to provide disclaimers stating that availability depends on creditworthiness.[30]

Advertisements featuring low introductory rates on variable-rate loans—known as "teaser rates"—raise other difficulties that TILA fails to fully resolve. Under TILA, an advertisement touting a teaser rate must state how long the teaser rate lasts and advise readers that the APR could rise after consummation.[31] However, nothing in TILA requires an ad to describe the rate increase, its limits, or how it would affect the payment schedule.[32] This allows lenders to entice borrowers with promises of low interest without revealing how high their interest rate could eventually go.

Other aspects of TILA regulation weaken the effect of even these few restrictions on home loan advertisements. For instance, there are "no specific rules for the format of the necessary [advertising] disclosures."[33] While advertising under TILA is supposed to display information "clearly and conspicuously,"[34] the spirit of that standard is often honored in the breach. In fact, the Official Staff Interpretations of TILA's regulations advise that the "credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement."[35] What is

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[28] 15 U.S.C. § 1664(d); 12 C.F.R. § 226.24(c); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.24(c); *cf.* 12 C.F.R. § 226.16(d) (governing open-end home equity plans).

[29] 15 U.S.C. § 1662(2); 12 C.F.R. § 226.24(a); *cf. id.* § 226.16(a) (governing open-end credit).

[30] Congress also recently amended TILA to provide that when a lender advertises a loan in which the amount lent may exceed the fair market value of a principal residence that secures the loan (either in paper format or on the Internet), the lender must clearly and conspicuously state that the interest on any principal that exceeds the home's fair market value is not deductible for federal income tax purposes and advise consumers to consult a tax adviser. *See* 15 U.S.C.S. § 1664(e) (LexisNexis 2005); *see also id.* § 1638(a)(15), (b)(3); Truth in Lending, 70 Fed. Reg. 60,235, 60,244 (Fed. Reserve Sys., advance notice of proposed rulemaking, Oct. 17, 2005). This provision does not take effect, however, until twelve months after the date of publication of implementing regulations by the Federal Reserve Board. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. XIII, § 1302(c), 119 Stat. 23, 209 (2005) (to be codified at 15 U.S.C. § 1637a note). As of November 19, 2006, no such regulations had yet been adopted.

[31] 15 U.S.C. § 1664(d); 12 C.F.R. § 226.24(c); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, §§ 226.17(c), 226.24(b)–(c).

[32] Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.24(c).

[33] *Id.* § 226.24.

[34] 15 U.S.C. § 1632(a).

[35] *Id.*; 12 C.F.R. § 226.17(a)(1); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp.

more, consumers cannot sue lenders or the publications that run their ads under TILA for advertising violations.[36] As a result, enforcement of TILA's advertising rules is weak or nonexistent.

In sum, TILA's provisions on mortgage advertising are silent on two key issues that affect truth in advertising for subprime loans. First, TILA allows subprime lenders to tout their best rates, without disclaimers and regardless of the fact that numerous subprime customers will not qualify for those rates. Second, TILA permits lenders to dangle alluring teaser rates before consumers without notifying them how high their interest rates might go following rate reset. Weak enforcement of TILA's few advertising provisions further increases the likelihood of misleading disclosures.

B. Subsequent Disclosures

When consumers shop for credit, they often inquire into the terms of specific loans. For the most part, however, TILA and RESPA do not regulate disclosures in response to these consumer inquiries at or before the application stage.[37] When a loan officer or broker takes an application, for instance, she will usually make representations to the customer about the nominal interest rate, the loan product (e.g., fixed, adjustable rate, hybrid, interest-only), and the loan term (e.g., thirty years) by entering that information on the application form (Figure 1). These entries are not binding, however, under TILA or RESPA.[38] The lender is free, at least under these statutes, to change the loan product or the final terms of the loan for any reason after taking the loan application so long as the lender satisfies all subsequent disclosure requirements. Entries on the application form only become binding if the borrower and the lender privately negotiate a lock-in commitment, which is common in the prime market but not in the subprime market.[39]

After a consumer submits a loan application, TILA and RESPA impose disclosure requirements.[40] As discussed below, the content of those

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I, § 226.17(a); *cf.* 12 C.F.R. §§ 226.5(a)(1), 226.16(b) (governing open-end credit).

[36] *See, e.g.*, Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir. 1971) (finding that "it was the intent of Congress not to provide private civil relief for violations of the credit advertising provisions [of TILA]"), *cert. denied*, 404 U.S. 870 (1971); Fidelity Mortgage Corp. v. Seattle Times Co., 304 F. Supp. 2d 1270, 1273–74 (W.D. Wash. 2004) (holding that a party who does not rely on misleading advertisements does not have standing to sue under the credit advertising provisions of TILA); *see also* 15 U.S.C. §§ 1640(a), 1665 (describing the civil liability of creditors and the non-liability of advertising media).

[37] The main exception concerns disclosures about variable-rate features, which on rare occasions require earlier disclosures under TILA. *See infra* notes 50–61 and accompanying text.

[38] *See infra* notes 39–49, 62–65, 75–80 and accompanying text.

[39] See Brooke A. Brower, *On Focus: HUD Chief's RESPA Fix Looks Less Sure as Critics Multiply*, AM. BANKER, Mar. 3, 2003, at 1; *Q4 2004 Impac Mortgage Holdings, Inc. Earning Conference Call-Final*, FD (FAIR DISCLOSURE) WIRE, Feb. 15, 2005.

[40] These requirements of TILA are subject to criminal and civil government enforcement. *See* 15 U.S.C. §§ 1607, 1611. Willful and knowing violations are punishable by a

disclosures and their timing vary depending on the loan product and the statute.

1. The Truth in Lending Act

a. In General

Except for variable-rate disclosures, TILA does not require disclosures about loans that elicit consumer inquiries until sometime after application. At that point, TILA requires written disclosure of the APR, the amount financed, the finance charge, and certain other features of the loan (Figure 2).[41] The deadline for these disclosures depends on the loan type. For first-lien, closed-end purchase money mortgages (i.e., loans used to buy homes) that are governed by RESPA,[42] the lender normally must deliver or mail good faith estimates of these TILA disclosures within three business days after receiving a written loan application.[43] For most closed-

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fine of up to $5000 and imprisonment for up to one year. *Id.* § 1611. In addition, borrowers can sue for actual damages, statutory damages, and attorneys' fees—either individually or in class actions—for violations of TILA's loan-specific provisions. 15 U.S.C. § 1640(a).

In certain closed-end, cash-out refinance home mortgages, borrowers can rescind their loan transactions for any reason within three business days following consummation of the loan or the delivery of correct TILA disclosures, whichever is later. 15 U.S.C. § 1635(a). At closing, lenders must provide such borrowers with written notice of the right to rescind under TILA. *Id.*; 12 C.F.R. §§ 226.5(a), 226.23(b). In addition, borrowers with closed-end, cash-out, home refinance loans who receive inaccurate material disclosures (or who never receive disclosures) concerning the APR, any variable-rate features, the finance charge, the amount financed, total payments, or the payment schedule, can rescind their mortgages for up to three years following consummation. 15 U.S.C. §§ 1602(u), 1635(e)–(f). *See generally* RENUART & KEEST, *supra* note 18, § 6.4.2.5. When a borrower qualifies for this extended right of rescission, the rescission period usually lasts until the sale of the property or three years after consummation of the loan, whichever is earlier. 15 U.S.C. § 1635(f). Furthermore, five states—Connecticut, Massachusetts, Maine, Oklahoma, and Wyoming—have adopted TILA as a matter of state law and thus have an exemption from the federal act. Therefore, if the laws of these states recognize the doctrine of recoupment, borrowers defending themselves against foreclosure or a collection suit can arguably rescind at any time, not just within three years. *See* RENUART & KEEST, *supra* note 18, §§ 2.6.1, 2.6.2, 6.2.10.

[41] 15 U.S.C. § 1638(a)(2)(A), (a)(3)–(a)(4); 12 C.F.R. § 226.18(b)–(r); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.18. The required disclosures include, but are not limited to, descriptions of the payment schedule, any demand feature, the total sale price, the presence of a prepayment penalty, late fees, the security interest, and certain other fees. 15 U.S.C. § 1638(a)(5)–(a)(14), *amended by* Act of Apr. 20, 2005, 15 U.S.C.S. § 1638(a)(15) (LexisNexis 2005); 12 C.F.R. § 226.18. For loans not subject to RESPA, the lender must also provide a separate written itemization of the amount financed. 12 C.F.R. § 226.18(c)(1); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.18(c).

[42] 15 U.S.C. § 1638(b)(2); 12 C.F.R. § 226.2(a)(19), (a)(24); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.2(a)(24), *amended by* 63 Fed. Reg. 16,669 (Apr. 6, 1998). RESPA applies to "federally related mortgage loans," which include loans that have a federal nexus (defined broadly) and are secured by residential real estate designed principally for the occupancy of one to four families. 12 U.S.C. §§ 2602(1), 2603(a), 2604(a), 2605(a), 2607, 2608(a), 2609(a)–(c), 2610 (2000); 24 C.F.R. § 3500.5 (2005).

[43] 15 U.S.C. § 1638(b)(2); 12 C.F.R. §§ 226.17(c)(2), 226.19(a)(1); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.19(a)(1)–(a)(2). Alternatively, if the creditor

end refinance mortgages, however, a lender can postpone making TILA disclosures until any time "before the credit is extended,"[44] which the Federal Reserve Board construes to mean any time "before consummation."[45] Thus, for most refinance mortgages, a lender can delay providing TILA disclosures until the closing, so long as the customer signs the TILA disclosures before signing the loan agreement. "Theoretically, at least, disclosures could be given one second or thirty days *before* consummation without violating this requirement."[46]

This loophole for refinance loans hobbles borrowers in the subprime market, where refinance loans have been rife with abuses.[47] Even for loans requiring disclosures within three business days after receipt of application, most borrowers do not receive TILA disclosures before paying their application fees.[48] These fees usually are nonrefundable and cost several hundred dollars.[49] Accordingly, unless a lender volunteers the information required by TILA before taking an application, the customer must pay several hundred dollars in order to learn the price of the loan. Even then, under TILA, many refinance customers may not learn the price of the loan until closing.

The only time lenders must provide individual disclosures under TILA before customers pay application fees is for variable-rate disclosures. When a customer is considering a closed-end variable-rate loan[50] secured by her principal residence, the creditor must supply her with a generic government handbook that provides an overview of how adjustable-rate mortgages work.[51] The lender must also provide the customer with copi-

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determines within three days after receipt of a written application that the application will be turned down on the terms requested, no disclosures are necessary. Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.19(a)(1)–(4).

In the rare event that the borrower consummates the loan before the three-day period elapses, the lender must make the disclosures before consummation. 12 C.F.R. § 226.19(a)(1). This could occur, for example, if a lender or broker fraudulently induced a consumer to sign a loan note unknowingly before the three-day period expired.

[44] 15 U.S.C. § 1638(b)(1). High-cost, closed-end refinance home loans that are governed by the Home Ownership Equity and Protection Act ("HOEPA") are subject to more stringent timing requirements. *See infra* notes 66–72 and accompanying text.

[45] 12 C.F.R. § 226.17(b). The regulation defines "consummation" as "the time that a consumer becomes contractually obligated on a credit transaction" under state law. 12 C.F.R. § 226.2(a)(13); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.2(a)(13)-1.

[46] RENUART & KEEST, *supra* note 18, § 4.3.2.

[47] *See* Engel & McCoy, *supra* note 13, at 1263, 1275, 1279 n.104, 1282 n.118.

[48] *See* HUD-FED JOINT REPORT, *supra* note 23, at 39–42.

[49] *See, e.g.*, Stef Donev, Getting a Mortgage: Find the Best Loan (Sept. 13, 2006), http://mortgages.interest.com/content/articles/mortgage_story.asp?story_id=1000034867&ID=interest ("Most lenders charge a non-refundable application fee that can range from less than $250 to as much as $500.").

[50] This Article uses "variable-rate" and "adjustable-rate" interchangeably.

[51] BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER HANDBOOK ON ADJUSTABLE RATE MORTGAGES (ARM) (2005), *available at* http://www.federalreserve.gov/Pubs/arms/armstext_cover2005.pdf (quirkily known as the "charm book," after its acronym). In an adjustable-rate mortgage "the interest rate changes periodically, usually in relation to an

ous generic disclosures about every variable product in which the customer expresses an interest. These disclosures, among other things, notify the customer that she has inquired about a variable-rate loan.[52] A creditor who deals directly with the customer must furnish these disclosures whenever it provides the application form or before the customer pays a nonrefundable fee, whichever is earlier.[53] When a creditor solicits a loan application by phone or through an intermediary agent or broker, however, it may deliver the disclosures or put them in the mail no later than three business days following receipt of the application.[54]

While the timing rules for variable-rate disclosures represent a modest improvement over the general disclosure rules, the content of those disclosures do not. The disclosures, twelve in number, range from a generic explanation of the index and the margin to obscure disclosures about the potential payment shock once the interest rate resets.[55] These profuse and bewildering disclosures amount to information overload (see example at Figures 3a–3c). Furthermore, some courts have construed TILA to deny statutory damages liability for failing to give the variable-rate disclosures.[56]

Perhaps as a consequence of this case law, which discourages compliance, one major consumer advocacy organization reported that "[f]ew of our clients ever get these initial disclosures."[57] Later, at the closing, the final relevant TILA disclosure simply states that "[y]our loan contains a variable-rate feature. Disclosures about the variable-rate feature have been provided to you earlier" (Figure 2). Consequently, if the creditor fails to deliver the initial variable-rate disclosures, the consumer will receive no advance disclosures about the maximum payment, the maximum interest rate, or the index used.

The variable-rate disclosure of greatest importance to most consumers is the worst case payment scenario under the loan—i.e., how high their

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index, and payments may go up or down accordingly." *Id.* Alternatively, the lender may provide the borrower with a "suitable substitute" to the charm book. 12 C.F.R. § 226.19(b)(1); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.19(b)(1)-1.

[52] 12 C.F.R. § 226.19(b) (containing disclosure rules for closed-end, variable-rate, home-secured loans with terms of over one year); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.19(b)(2); *cf.* 12 C.F.R. § 226.18(f).

[53] 12 C.F.R. § 226.19(b).

[54] *Id.* For discussion of when a mortgage broker qualifies as an "intermediary agent or broker" for purposes of this provision, see Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.19(b)-3. If a mortgage broker does sufficient business with the creditor, the broker no longer qualifies as an "intermediary agent or broker," thus requiring the creditor to treat all applications solicited by that broker as applications made directly to the creditor. *See id.*

[55] 12 C.F.R. § 226.19(b).

[56] *See, e.g.*, Baker v. Sunny Chevrolet, 349 F.3d 862 (6th Cir. 2003); Brown v. Payday Check Advance, Inc. 202 F.3d 987 (7th Cir. 2000); *see also* RENUART & KEEST, *supra* note 18, § 8.6.5.3.

[57] Letter from the Nat'l Consumer Law Ctr. to Vice Chairman Roger W. Ferguson, Jr., and Governors Susan Schmidt Bies, Donald L. Kohn, and Mark W. Olson of the Fed. Reserve Bd. 2 (Jan. 17, 2006) (on file with the author).

monthly principal and interest payments could go if the loan hits its interest rate cap. Presumably consumers would like to know the actual dollar amount of their highest possible monthly payment. Instead, TILA allows lenders to provide a hypothetical involving payment shock on a $10,000 mortgage and let the borrowers do the math (Figure 3c, ¶ 4).[58] Alternatively, lenders may provide a historical example, again based on a $10,000 mortgage, explaining how high the payments would have gone under the terms of that loan based on the historical high for the past fifteen years (Figure 4).[59] Lenders cling to the $10,000 hypotheticals, which are arcane in the extreme, precisely because many consumers, particularly vulnerable ones, cannot calculate the payment shock for variable-rate mortgages.[60] The $10,000 hypotheticals are so badly outdated that *The New York Times* recently advised borrowers with exotic adjustable-rate mortgages to figure out their maximum monthly payments by consulting "mortgage payment calculators on the Web"[61]—not their TILA disclosures.

If initial disclosures, whether variable-rate or otherwise, turn out to be inaccurate, TILA sometimes requires redisclosure. If the lender denies the original application and the consumer then amends it, the amendment is treated as a new application and the three-day period starts anew.[62] If a variable-rate feature is added to the loan, new disclosures are necessary, but only immediately before consummation.[63] Finally, if the actual APR at closing varies from the APR that was originally disclosed by more than one-eighth of one percent, usually the creditor must disclose the actual

[58] *See* 12 C.F.R. § 226.19(b)(2)(viii)(B), (ix)(B) (stating that the lender may provide at its option the "maximum interest rate and payment for a $10,000 loan originated at the initial interest rate (index value plus margin, adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure assuming the maximum periodic increases in rates and payments under the program," along with an "explanation of how the consumer may calculate the payments for the loan amount to be borrowed based on" the $10,000 hypothetical).

[59] *See* 12 C.F.R. § 226.19(b)(2)(viii)(A) (providing that the lender may alternatively disclose a "historical example, based on a $10,000 loan amount, illustrating how payments and the loan balance would have been affected by interest rate changes implemented according to the terms of the loan program disclosure"). Lenders must also explain how consumers can apply the historical example to calculate the maximum payment on their own loans. 12 C.F.R. § 226.19(b)(2)(ix)(A).

[60] A 2004 study by the Consumer Federation of America found that over one-third of all Americans surveyed who preferred ARMs could not estimate a hypothetical payment increase. The percentages were even worse for respondents who were young adults age 18 to 24 (46%), Hispanics and blacks (43%), people with incomes under $25,000 (44%), and people without a high school degree (50%). Press Release, Consumer Fed'n of Am., Lower-Income and Minority Consumers Most Likely to Prefer and Underestimate Risks of Adjustable Mortgages (July 26, 2004), *available at* http://www.consumerfed.org/pdfs/072604_ARM_Survey_Release.pdf. *See also infra* notes 127–128 and accompanying text.

[61] Damon Darlin, *Keep Eyes Fixed on Your Variable-Rate Mortgage*, N.Y. TIMES, July 15, 2006, at C1.

[62] Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.19(a)(1)-4.

[63] Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.17(f)-2. *See supra* notes 50–59 and accompanying text for the content of these disclosures.

APR by the settlement or consummation.[64] These last two rules place applicants who lack lock-in commitments at the mercy of lenders, who can change the loan terms and even the loan products behind the scenes and then spring the new loan terms on the borrowers at closing.[65]

b. High-Cost Loans Governed by the Home Ownership and Equity Protection Act

Under the Home Ownership and Equity Protection Act ("HOEPA"),[66] federal disclosure law imposes stricter disclosure requirements on certain high-cost residential mortgages. HOEPA applies to most high-cost, closed-end, refinance residential mortgages. HOEPA defines high-cost loans in two ways: (1) loans with APRs of at least eight percent over the yield on Treasury securities of comparable maturity for first-lien loans (or ten percent for subordinate-lien loans); or (2) loans with total points and fees exceeding eight percent of the total loan amount or $400 (indexed annually), whichever is greater.[67]

These so-called "HOEPA loans" require added disclosures at least three days before closing.[68] The advance disclosures include the final APR, the amount of individual monthly payments, the amount of any balloon payment, the principal borrowed, and fees for any credit insurance or debt-cancellation policy.[69] Lenders must notify borrowers in writing that they could lose their homes upon default.[70] Similarly, borrowers must be advised that they do not have to accept the loans just because they submitted loan applications or received disclosures.[71] For variable-rate HOEPA loans, lenders must also advise borrowers that their interest rates and monthly payments could increase and provide them with their maximum monthly payment if the loan becomes fully indexed.[72]

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[64] 15 U.S.C. § 1638(b)(2) (2000); 12 C.F.R. §§ 226.17(f), 226.19(a)(2), 226.22(a); Official Staff Interpretations, 12 C.F.R. pt. 226, Supp. I, § 226.17(f)-1(i)(A).

[65] *See* HUD-FED JOINT REPORT, *supra* note 23, at 43; Renuart, supra note 3, at 483.

[66] Pub. L. 103-325, 108 Stat. 2190 (1994) (codified as amended in scattered sections of TILA, 15 U.S.C. §§ 1601–1667).

[67] 15 U.S.C. § 1602(w), (aa)(1)–(4); 12 C.F.R. § 226.32(a), (b)(1). HOEPA does not apply to high-cost reverse mortgages. 15 U.S.C. § 1602(aa)(1), (bb); 12 C.F.R. § 226.32(a)(2). The federal government has civil enforcement powers for violations of HOEPA. In addition, willful and knowing violations of HOEPA are subject to criminal prosecution. 15 U.S.C. § 1611; *see* discussion *supra* note 40. HOEPA affords borrowers the same private right of action available under TILA. 15 U.S.C. § 1640(a); *see supra* note 40. In addition to TILA's standard remedies, borrowers who recover under HOEPA have a right to special enhanced damages consisting of all finance charges and fees paid by the borrower, 15 U.S.C. § 1640(a)(4), plus expanded rights of rescission. 15 U.S.C. §§ 1635, 1639(j); 12 C.F.R. § 226.23(a)(3). *See generally* RENUART & KEEST, *supra* note 18, §§ 9.4.9, 9.6 (discussing remedies for HOEPA violations).

[68] 15 U.S.C. §§ 1601, 1602(aa), 1639(a)–(b).

[69] *Id.* § 1639(a)(2); 12 C.F.R. § 226.32(c).

[70] 15 U.S.C. § 1639(a)(1)(B).

[71] *Id.* § 1639(a)(1)(A).

[72] 15 U.S.C. § 1639(a)(2)(B); 12 C.F.R. § 226.32(c). *See generally* RENUART & KEEST,

The disclosure requirements for HOEPA loans represent marginal improvement over TILA's woefully inadequate disclosures for refinance loans. However, HOEPA does not cover subprime purchase money mortgages.[73] As a result, and because HOEPA's triggers are set so high for refinance loans, HOEPA disclosures apply at most to five percent of subprime first-lien home loans.[74] In any case, it is doubtful that a three-day warning is enough to dissuade a cash-strapped borrower who is desperate enough to pay the stiff rates on HOEPA loans.

2. *Real Estate Settlement Procedures Act*

RESPA requires lenders who make federally related mortgage loans[75] to provide borrowers with disclosures about their closing costs at two different points in the mortgage process. First, within three business days after application, the lender or mortgage broker must provide an applicant with a good-faith estimate of the settlement costs ("GFE") (Figure 5) and certain other disclosures concerning settlement costs and servicing.[76] This three-day period usually coincides with the three-day period for TILA disclosures (which only applies to purchase money mortgages).[77] Because the GFE only contains limited pricing terms—those related to origination fees—and does not list, for example, the APR, the payment schedule, or the prepayment penalty, it does not remedy the lack of mandatory three-day TILA disclosures for most home refinance loans.[78]

Later, at the closing for all federally related mortgage loans (including refinance loans and reverse mortgages), the settlement agent must furnish the borrower with a standardized form listing the actual settlement costs paid at closing, known as a HUD-1 settlement statement (Figure 6), plus an initial escrow statement.[79] Borrowers have the right to inspect the HUD-1 upon request the day before closing.[80] Like the GFE, the HUD-1

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supra note 18, § 9 (discussing high-cost home equity loan protections). "The fully indexed rate equals the index rate prevailing at origination plus the margin that will apply after the expiration of an introductory interest rate." Interagency Guidance on Nontraditional Mortgage Product Risks: Final Guidance, 71 Fed. Reg. 58,609, 58,614 n.5 (Dep't of the Treas. et al. Oct. 4, 2006). Lenders must also advise HOEPA borrowers in advance of the loan closing that the total amount borrowed may be substantially higher than the amount requested due to the financing of insurance, points, and fees. *See* Truth in Lending, 66 Fed. Reg. 65,604, 65,610–11 (Fed. Reserve Sys. Dec. 20, 2001) (codified at 12 C.F.R. § 226.32(c)(5)).

[73] *See* HUD-FED JOINT REPORT, *supra* note 23, app. D, at 1.

[74] *See* Truth in Lending, 66 Fed. Reg. at 65,606–10.

[75] For the meaning of this term, see *supra* note 42.

[76] 12 U.S.C. §§ 2603–2605(a) (2000); 24 C.F.R. §§ 3500.6(a)(1), 3500.7, 3500.21(b) (2005); *id.* pt. 3500 app. C.

[77] *See* RENUART & KEEST, *supra* note 18, at 172 n.244.

[78] *See supra* notes 44–46 and accompanying text.

[79] 24 C.F.R. § 3500.8; *id.* pt. 3500 app. A. The lender may also need to make servicing disclosures at closing. *Id.* § 3500.21(c); *id.* pt. 3500 app. MS-1.

[80] 24 C.F.R. § 3500.10(a).

will only disclose origination costs, not the APR or certain other key disclosures mandated by TILA. Accordingly, lenders who extend home refinance loans (other than the limited set of HOEPA loans) do not have to disclose the APR until the closing.

Under RESPA, injured borrowers have little recourse for false disclosures except to petition HUD for government enforcement.[81] Specifically, borrowers cannot recover damages unless they can prove that lenders: (1) failed to inform them that their loans could be transferred;[82] (2) received illegal kickbacks as defined by RESPA;[83] or (3) steered them to title companies.[84] Lenders have no liability to borrowers under RESPA for errors in GFEs or HUD-1 settlement statements, thereby dampening their motives to ensure accuracy.[85]

RESPA's timing rules have the same faults as TILA's timing rules. Lenders do not have to provide GFEs until after consumers have paid a nonrefundable application fee and, while borrowers can request a HUD-1 the day before closing, nothing requires lenders to notify borrowers of that right and borrowers are generally ignorant of it.[86] Furthermore, GFEs may have scant resemblance to actual closing costs because lenders are allowed to provide meaningless estimated ranges and do not face suit for inaccurate GFEs.[87] This problem is of particular concern in the subprime market, where settlement costs range from high to plainly exorbitant.[88] As a result, GFEs are not helpful to consumers for comparison-shopping.

In sum, federal disclosure laws are problematic for subprime mortgage customers in four key respects. First, federal law does not require accurate disclosures of the cost of subprime loans before a customer pays a nonrefundable application fee (except for certain variable-rate disclosures). Indeed, under TILA, subprime lenders may advertise their best rates, even if those rates only apply to sterling customers. Second, TILA's variable-rate disclosures are too complex and obscure the information that is most critical to consumers—their worst case payment scenario. Third, for most closed-end home refinance loans other than HOEPA loans, lenders can legally postpone making TILA disclosures on the APR

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[81] Agency enforcement authority for RESPA is vested in HUD. 12 U.S.C. §§ 2602(6), 2617(a).

[82] *Id.* § 2605(f) (authorizing actual damages, statutory damages, costs, and attorneys' fees).

[83] *Id.* § 2607 (authorizing treble damages and attorneys' fees).

[84] *Id.* § 2608. The defendant is liable for up to three times the fee for the title insurance. *Id.* § 2608(b).

[85] *See* HUD-FED JOINT REPORT, *supra* note 23, at XIX, 21.

[86] *See id.* at 43.

[87] *See id.* at XI. In a survey of GFEs, one author concluded that numerous GFEs were off by "a fair amount" and that some borrowers received "large underestimates." Mark Shroder, *The Value of the Sunshine Cure: Efficacy of the RESPA Disclosure Strategy* 12 (HUD Working Paper, 2000) (on file with the author).

[88] *See, e.g.*, Engel & McCoy, *supra* note 13, at 1266–67 & n.30; Renuart, *supra* note 3, at 467, 475–76, 482; Shroder, *supra* note 87, at 14–15, tbl.4.

and other key price terms until the closing. Lastly, binding cost disclosures are usually not required until closing (except for borrowers who have HOEPA loans or request their HUD-1s the day before closing), which means that lenders can change the loan terms at the eleventh hour with no advance notice to borrowers.

III. CONSUMER SEARCH AND PRICE REVELATION: THE EFFECT OF MARKET FORCES

As the previous discussion suggests, federal disclosure laws do not ensure that consumers get accurate information sufficiently early in the mortgage process to permit low-cost, meaningful comparison-shopping. To the extent that consumers do get timely, accurate information, it is due to market forces, not federal disclosure law.

A. Search in the Prime Market

In the prime market, pricing is highly competitive, lenders market mortgages as commodities, and the market results in roughly homogeneous prices. Prime customers know that identical mortgages[89] go for about the same price and that lenders with competitive rates will prominently advertise discounts. Consequently, consumers will gravitate toward lenders who post prices. Prime lenders know this, which gives them strong incentives to advertise accurate prices in order to attract customers. Today, it is easy to comparison-shop for prime mortgages on the Internet, where standardized price information abounds (Figure 7).

These market forces mean that consumers who shop in the prime market do not have to pay application fees in order to get price quotes. Lenders reveal prices for free. Furthermore, because prices are highly competitive and mortgages are commodities, lenders have to offer consumers an added bonus to get them to apply. This gives consumers leverage to negotiate lock-in commitments and insist on "buy downs" on prices, in the form of interest rate reductions in exchange for points or other fees (Figure 7).[90]

When TILA was enacted in 1968,[91] the prime market was the only conventional mortgage market. That was the market that TILA was designed for. There, market forces ensure that lenders reveal critical price terms—including interest rates, lock-in commitments, and points—upfront

[89] Of course, mortgages with identical terms (such as a 30-year fixed mortgage or a 2/28 hybrid adjustable-rate mortgage) may carry different interest rates depending on the number of points. Each of those pricing structures is a separate product and should be advertised as such.

[90] *See supra* note 12 and accompanying text.

[91] Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1693 (2000)).

and for free. In tandem with those forces, TILA was designed to standardize voluntary price disclosures. TILA does this relatively effectively for consumers who are prime-eligible and shopping for prime loans.

To be sure, price revelation could stand improvement in the prime market. Problems with RESPA's timing rules and lack of private enforcement for GFEs make closing costs a continued problem. Hidden transaction costs can be substantial in residential loan transactions and can haunt customers at closing, whether they are in the prime or subprime market.[92] Furthermore, guaranteed closing cost packages are still uncommon even in the prime market, although some lenders do offer them (at least for settlement costs within the lender's control).[93] The prime market is sufficiently competitive and prime customers are sufficiently savvy that closing cost abuses are less of a problem than in the subprime market. Nevertheless, all home mortgage applicants—prime and subprime—pay too much because of lack of transparency in closing costs. This problem is especially severe with respect to yield spread premia,[94] which are a pernicious form of broker compensation, but it pervades closing costs across the board.

B. Search in the Subprime Market

Consumer search is entirely different in the subprime world, where market forces impede meaningful comparison-shopping. In the subprime market, the market conditions on which TILA was based—lock-in commitments and free and early price revelation—break down. Instead, subprime lenders do not reveal prices until consumers pay to play.

In risk-based pricing, a lender cannot determine the actual price for a loan until the customer reveals information about his or her creditwor-

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[92] *See, e.g.*, Kenneth Harney, *Guaranteed Closing Costs Are Approaching*, DETROIT FREE PRESS, Oct. 9, 2005, at 2F.

[93] *See, e.g.*, Amerisave, Guaranteed Closing Costs in Writing, http://www.amerisave.com/why_amerisave/writingcosts.cfm (last visited Oct. 8, 2006); E-Loan, Guaranteed Closing Costs, http://www.eloan.com/s/show/guarantee (last visited Oct. 8, 2006); Harney, *supra* note 92, at 2F.

[94] A yield spread premium is a reward paid by a lender to a mortgage broker for persuading the borrower to pay a higher interest rate than the lowest interest rate that the lender would be willing to accept. As such, yield spread premia are per se anticompetitive and hurt consumer welfare. *See, e.g.*, DEP'TS OF THE TREASURY & HOUS. & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING 40 (2000), *available at* http://www.huduser.org/Publications/pdf/treasrpt.pdf (stating that consumer advocates believe yield spread premia encourage brokers to increase interest rates); *Predatory Mortgage Lending Practices: Hearing on Abusive Uses of Yield Spread Premia Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 56 (2002), *available at* http://banking.senate.gov/02_01hrg/010802/jackson.htm (statement of Howell E. Jackson, Prof. of Law, Harvard Univ.) (concluding that yield spread premia "serve only to [benefit] mortgage brokers," not consumers, and levy "implicit interest rates [that] are absolutely outrageous"). *See generally* Howell E. Jackson & Jeremy Berry, Kickbacks or Compensation: The Case of Yield Spread Premiums (Jan. 8, 2002) (unpublished manuscript), http://www.law.harvard.edu/faculty/hjackson/pdfs/january_draft.pdf (arguing that yield spread premia exploit less sophisticated borrowers).

thiness.[95] Today, lenders use the loan application process for that purpose, even though there are other, cheaper ways to research a customer's creditworthiness. As a result, the subprime market requires a customer to apply for a loan, pay a nonrefundable application fee, and go through underwriting to learn the price. Even then, subprime lenders often do not reveal the true price until closing.

1. Lack of Firm Price Quotes Before Application

In the prime market, consumers are able to obtain firm price quotes without charge on interest rates, APR, and points, by consulting advertisements or price lists posted by lenders. In the subprime market, this is virtually impossible because pricing mechanisms are hidden and advertisements usually tout only the lender's best price.

In the subprime market, lenders use their own internal price lists (known as "rate sheets") to determine what price to charge a given borrower for a specific loan.[96] A subprime rate sheet is a grid containing different prices for a specific loan. (Figure 8). This information would be useful to consumers in shopping for loans. Consumers cannot get this information, however, because subprime lenders protect rate sheets as proprietary secrets and only share them with their employees and mortgage brokers (Figure 9, asterisk footnote).[97] Nothing in federal disclosure law prohibits withholding the information on rate sheets from consumers.

Consequently, to comparison-shop before the application stage in the subprime market, consumers must rely on general advertisements or oral representations by mortgage brokers or loan officers. Even though subprime lenders and brokers keep rate sheets secret, that does not hinder them from running advertisements with price quotes. Indeed, it is a common practice for them to quote their best price, whether or not the loan applicant qualifies for it and often without disclaimers.[98] In effect, this operates as an affirmative misstatement for consumers with weaker credit profiles and can induce them to apply for loans that turn out to be higher-priced at closing.

Some advertisements and websites that quote low rates cater specifically to subprime borrowers. Figure 10, for instance, illustrates an Internet site that allowed consumers to shop for mortgages based on their personal credit score. Here, a search on July 4, 2006, for a thirty-year fixed-rate mortgage for a borrower with a weak credit score of 590[99] resulted in

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[95] *See* HUD-FED JOINT REPORT, *supra* note 23, at 40.

[96] *See* White, *supra* note 15, at 509–12.

[97] *See id.* (providing examples of subprime rate sheets).

[98] *See, e.g.*, Michael Hudson, *Popular Mortgage Web Site Under Scrutiny*, WALL ST. J., July 12, 2006, at D1 (describing a lawsuit against Bankrate.com for allegedly "allowing its website to become a haven for 'bait-and-switch' loan practices").

[99] Generally, Fair Isaac Company ("FICO") scores below 660 are considered to be poorer

quotes ranging from 6.1% with 1.5 points to 6.5% with 2 points. That week, average rates on thirty-year fixed-rate mortgages were 6.78% with 0.5 points, meaning that the rates quoted on the website appeared to be prime rates.[100] Only if readers clicked on the link "More info" and scrolled down a long page would they find a disclaimer stating: "*Rate/APR and terms may vary based on the creditworthiness of the individual* . . . ."[101] Given this disclaimer, it is not clear why the website allowed consumers to type in low credit scores at all unless the website was designed to give the misleading impression that a borrower with a 590 credit score would in fact receive the quoted prime rates.

In sum, subprime borrowers who do not qualify for a lender's best rates do not have the ability to obtain firm quotes before they apply for loans. Making matters worse, consumers with weak credit are likely to be misled by advertising featuring low subprime rates unless they actually qualify for those rates.

2. *Lack of Firm Price Quotes After Application*

With the exception of HOEPA loans, TILA and RESPA normally do not require firm price disclosures until the closing.[102] Neither statute regulates the price terms that a loan officer or broker may enter on the application form. Similarly, neither statute requires firm price terms to be disclosed within three business days after receipt of an application. Instead, if the disclosures on GFEs or preliminary TILA disclosures prove inaccurate, the only cure is accurate disclosure at the closing. By then, however, disclosure is too late. By the closing, the average customer is psychologically invested in the loan and has too much riding on it—such as purchasing a house or refinancing unmanageable debts—to walk away.[103]

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quality, subprime credit scores. White, *supra* note 15, at 509 n.2. *See generally* ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N OF AM., EXOTIC OR TOXIC? AN EXAMINATION OF THE NON-TRADITIONAL MORTGAGE MARKET FOR CONSUMERS AND LENDERS 25–26 (2006), *available at* http://www.consumerfed.org/pdfs/Exotic_Toxic_Mortgage_Report 0506.pdf (discussing the distribution of borrower FICO scores for newly prevalent loan products).

[100] Freddie Mac, Weekly Primary Mortgage Market Survey (June 29, 2006), http://www.freddiemac.com/dlink/html/PMMS/display/PMMSOutputYr.jsp (last visited Oct. 8, 2006).

In general, subprime interest rates are at least 200 basis points—two percentage points—above prime rates for comparable products. *See* White, *supra* note 15, at 512–13. In contrast, assuming that the borrower takes out a $200,000 loan, the APR on the 6.1% loan with 1.5 points is 6.24% and on the 6.5% loan with 2 points is 6.691%, while the APR on the 6.78% loan with 0.5 points is 6.829% (assuming no other closing costs for the loan). This means that the rates quoted on the website were probably better than prime rates.

[101] In the search, the link "more info" appeared at http://www.myfico.com/LoanCenter/Results.aspx?Fire=11&States=22&Markets=257&LoanTypes=4&LowerLimit=&Upper Limit=&Score=590 (last visited July 4, 2006). Clicking on the link led to the disclaimer. Subsequently, this website took down these pages and changed its search methodology.

[102] *See supra* notes 37–49, 62–65, 75–88 and accompanying text.

[103] *See, e.g.*, Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 351–52 (2005) (stating that on the day of the loan closing "a borrower has psycho-

Subprime lenders can take advantage of legally sanctioned late disclosures to turn the terms and prices of subprime loans into a moving target and thereby achieve monopolistic pricing. A lender or broker might direct a customer to apply for one type of loan at Price *A*—say, a fixed-rate loan—change the loan during underwriting to an adjustable-rate mortgage at Price *B*, and change the loan again at closing to something different, such as an interest-only adjustable-rate mortgage, at Price *C*. Not surprisingly, the final price is often higher than the original quoted price.

The moving target problem is even worse for refinance loans that are not governed by HOEPA. In these cases, lenders do not even need to provide three-day TILA disclosures and can wait until closing to make their first loan-specific disclosures about the loan's APR.[104] The case of Lucy Brown is instructive.[105] In 1998, Ms. Brown applied for a thirty-year fixed-rate refinance loan at a nominal interest rate of 10.75%. Her preliminary TILA disclosure stated an 11.013% APR and a finance charge of $189,903.90. The disclosure said that her loan had no variable rate feature or prepayment penalty. During underwriting, the lender rated Ms. Brown as an "A" grade borrower who presumably qualified for a prime-rate loan.

Nevertheless, with no advance notice, the lender presented Ms. Brown at closing with a high-fee variable-rate loan carrying a large prepayment penalty and an initial nominal interest rate of 11.25%. The final TILA disclosure, first presented to her at closing, revealed that her APR had risen 27.64% to 14.085% and her finance charge had jumped 38.56% to $263,133.60. If Ms. Brown had received a prime loan, it would have cost her far less: at the time, the average prime-rate fixed thirty-year home mortgage carried a nominal interest rate of 7.00% and one point. The mortgage broker's file on Ms. Brown contained four different loan applications, each for a fixed-rate loan on different terms. She only signed two of the applications and none was for the variable-rate loan she ultimately got.

Sometimes lenders have legitimate reasons to change the loan terms during underwriting. For instance, the lender may decide that the applicant could not qualify for the loan requested, either on the face of the application or because the application was incomplete and subsequent facts revealed underwriting problems. Even legitimate reasons to change the loan terms, however, do not justify allowing lenders to wait until the closing to reveal the change in terms, as TILA and RESPA usually permit.

Other times, lenders and brokers have underhanded motives for switching the loan terms and springing them on the borrower at closing. For instance, behind the scenes, brokers may negotiate a yield spread pre-

logically committed herself to the loan").

[104] *See supra* notes 44–46 and accompanying text.

[105] This information was reviewed confidentially by the author. The facts are real but the name has been changed to protect the identity of the borrower.

mium in exchange for higher interest payments to the lender.[106] In Ms. Brown's case, the lender paid the broker a $2373 yield spread premium as a reward for increasing the interest rate on the loan from 10.75% to 11.25% and for changing the loan from a fixed-rate loan to a riskier adjustable-rate loan with a large prepayment penalty. Before the closing, the broker did not tell Ms. Brown that it would receive a large yield spread premium in exchange for driving up the cost of her loan. In Ms. Brown's case, the result was a bait-and-switch.

Of course, if customers could negotiate lock-in commitments with subprime lenders, they could largely avoid the moving target problem. Subprime customers with weak credit, however, have reduced leverage to insist on those commitments because lenders know these customers have fewer options and cannot qualify for prime credit. Subprime customers, moreover, tend to be less well-educated and less sophisticated about the mortgage market.[107] Subprime lenders, knowing that that they can usually delay firm price quotes until closing under TILA and RESPA, have no legal compunction to offer lock-in commitments. This leaves subprime borrowers vulnerable to nasty surprises at closing.

3. Problems with Variable-Rate Disclosures

Variable-rate loans are now the dominant first-lien loan product in the subprime market.[108] Recently, two new types of adjustable-rate mortgages ("ARMs") have cropped up in the subprime market: interest-only ("I-O") ARMs and option ARMs. These mortgages present substantially greater risks of payment shock than traditional ARMs. This heightened risk, especially to subprime borrowers, underscores the urgency of reforming variable-rate TILA disclosures.

In I-O mortgages, borrowers only pay interest for an initial period lasting anywhere from six months to five years. Once the introductory period expires, the borrowers' payments go up, often substantially, for up to four distinct reasons. First, the loan begins to amortize and borrowers start paying principal as well as interest. Second, the principal payments are higher than they would be under a fully amortizing loan because there are fewer years left to pay off the principal. Thus, in a thirty-year I-O ARM with a three-year introductory period, the principal will normally be paid off in twenty-seven years, not thirty. Third, if interest rates are rising, the variable-rate on the loan will go up on the reset date. Finally, numerous I-O ARMs offer introductory teaser rates that are below the in-

[106] *See supra* note 94 and accompanying text.

[107] *See* Lax et al., *supra* note 14, at 544–56.

[108] *See, e.g., id.* at 543; Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments* 23, 29–30 (Center for Community Capitalism Working Paper, 2005), *available at* http://www.kenan-flagler.unc.edu/assets/documents/foreclosurepaper.pdf.

dexed rate. Accordingly, when the teaser rate expires and the rate resets, the interest rate could jump higher than it would from an indexed rate.[109]

Option ARMs are cousins of I-O ARMs and potentially even riskier. During the introductory period for an option ARM, a borrower can choose among four payment options: accelerated amortization of principal (over fifteen years), normal amortization (over thirty years), interest-only payments, or a low minimum payment that does not even pay off the interest due that month.[110] If a borrower opts for the minimum payment—as do up to seventy percent of option ARM borrowers[111]—the unpaid interest will be added to principal, causing the loan balance to grow.[112] This negative amortization makes the initial monthly payments enticing. Once the introductory period expires, however, the borrower must start making regular principal and interest payments for the remainder of the loan. Option ARMs present the same risks of payment shock as I-O ARMs, plus the risk that the principal may grow over time due to negative amortization, further increasing the eventual payments. Even before the introductory period expires, payments can also go up if negative amortization boosts the balance on the loan above a specified level, generally 110% to 125% of the original loan amount.[113] For all of these reasons, option ARMs "are the most likely" of all nontraditional mortgages "to default."[114]

Both types of loans have made inroads into the subprime market. By the third quarter of 2005, over one-quarter of new subprime loans were I-O loans.[115] Similarly, a recent study found that option ARM borrowers had "lower credit scores than borrowers overall" and often had subprime

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[109] *See, e.g.*, CHRISTOPHER L. CAGAN, FIRST AM. REAL ESTATE SOLUTIONS, MORTGAGE PAYMENT RESET: THE RUMOR AND THE REALITY 17, 25 (2006), *available at* http://www.firstamres.com/pdf/MPR_White_Paper_FINAL.pdf (discussing the burden of higher payments when teaser rates reset); MICHAEL FRATANTONI ET AL., MORTGAGE BANKERS ASS'N, HOUSING AND MORTGAGE MARKETS: AN ANALYSIS 55 (2005), *available at* http://www.mortgagebankers.org/files/Bulletin/InternalResource/38151_MBA_Monograph_No1.pdf (describing I-O loan repayment); Jody Shenn, *ARM Lenders Prep for Wave of Teaser-Rate Expirations*, AM. BANKER, Jan. 18, 2006, at 1, 11 (discussing the anticipated consequences of the first significant wave of ARM payment shock); Ruth Simon, *Home Rundown: A Look at the Pros and Cons of Different Types of Mortgages—and Which One May Be the Best for You Now*, WALL ST. J., Jan. 16, 2006, at R4 (informing readers about the drawbacks of I-O loans).

[110] *See* FISHBEIN & WOODALL, *supra* note 99, at 7; FRATANTONI ET AL., *supra* note 109, at 56.

[111] *See* FISHBEIN & WOODALL, *supra* note 99, at 7.

[112] *See* FRATANTONI ET AL., *supra* note 109, at 56.

[113] When this happens, the loan "recasts." *See* Cagan, *supra* note 109, at 17; Simon, *supra* note 109, at R4.

[114] Cagan, *supra* note 109, at 29.

[115] Doug Duncan, Mortgage Bankers Ass'n, MBA Nonprime Conference 18 (May 22, 2006), http://www.mbaa.org/files/Conferences/2006/Non-Prime/MarketOutlook.ppt#397 (last visited Oct. 19, 2006). In the first quarter of 2006, originations of I-O loans dropped thirty percent from the previous quarter but still remained substantial. Standard & Poor's, *Sector Report Card: The Heat Is On For Subprime Mortgages* 3 (July 10, 2006) (S&P Ratings Direct).

credit scores (usually defined as FICO scores below 660).[116] The same study found that African American and Latino borrowers were more likely to receive I-O and option ARMs than non-minority borrowers even after controlling for income, debt loads and credit scores.[117]

There are substantial reasons for concern about the payment shock associated with I-O and option ARMs, particularly for cash-strapped subprime borrowers. One industry commentator warned that when interest rates reset from teaser rates, monthly payments could double on both types of loans, placing the affected borrowers in financial jeopardy:

> It is important to note that a household facing a doubling of mortgage payments will be in difficulty, whether that increase is applied in a single month or in a series of incremental steps spread over two years . . . . [A] loan with an initial [teaser] rate of 1 percent that resets to a market rate of 6.3 percent will experience a substantial increase in payments, all the more so if negative amortization has increased the total principal amount subject to interest. That type of loan will experience *reset payment sensitivity*. An option-payment loan with a minimum payment *below* that of a 1 percent loan will face even greater reset sensitivity.[118]

These dynamics can and do lead to increased subprime default rates. A recent Fannie Mae analysis of subprime ARMs that underwent rate reset and were originated between March 2003 and March 2004 found, for instance, that sixteen percent of the borrowers had defaulted or were late making payments by mid 2006.[119]

The prevalence of I-O and option ARMs in the subprime market suggests that these loans are often underwritten for the wrong reason. Due to

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[116] *See* FISHBEIN & WOODALL, *supra* note 99, at 25–26; *see also* White, *supra* note 15, at 509 n.2.

[117] *See* FISHBEIN & WOODALL, *supra* note 99, at 22, 24.

[118] Cagan, *supra* note 109, at 19 (emphasis in original); *see also id.* at 21, 25 (noting that when "[teaser-rate] loans finally adjust to fully-amortizing market-rate levels, the payments will have increased by more than fifty percent from their initial amounts. Often the payments will have doubled, or more than doubled."); Simon, *supra* note 109, at R8 ("If rates go up by two percentage points, monthly payments could nearly double."). While Cagan discounted the presence of teaser rates and thus of the severity of reset adjustments for subprime loans, Cagan, *supra* note 109, at 21, Fitch Ratings reported in 2006 that the "current environment" was of "deeply teased short-term subprime hybrid ARMs combined with an interest-only affordability feature." Fitch Ratings, Rating Subprime RMBS Backed By Interest-Only ARMs 1 (Mar. 9, 2006); *see also* Interagency Guidance on Nontraditional Mortgage Product Risks: Final Guidance, 71 Fed. Reg. 58,609, 58,613–14 (Dep't of the Treas. et al. Oct. 4, 2006).

[119] *See* Vikas Bajaj & Ron Nixon, *Variable Loans Help to Put Off Mortgage Pain*, N.Y. TIMES, July 23, 2006, at A21. Fitch Ratings estimates that 30% of all subprime loans will undergo rate reset in 2006 and another 22% in 2007, many of which are I-O ARMs. Fitch Ratings, *supra* note 118, at 13.

the potential for large payment shock, these products are best suited for borrowers who have large disposable incomes, receive bonuses, or expect their income to rise sharply during the introductory period.[120] None of these conditions normally hold for subprime borrowers. Rather, subprime borrowers usually take out these loans to minimize their monthly payments on large loan balances. Sometimes they do so to buy a larger house or refinance large debts. Other times, they do so to buy a starter home in regions where payments on a fixed-rate loan on a starter home would exceed their means.[121] This is particularly common in overheated coastal real estate markets such as California.[122] Many lenders approve these loans to subprime borrowers based solely on a household's ability to pay the initial monthly payments, not on the possible maximum payments.[123] As Fitch, a leading credit rating agency, has warned, however, when lenders qualify financially strapped borrowers for loans only "at the initial rate and IO payments," not the larger eventual payments, "payment shock is exacerbated."[124] When the loans reset and the payments go up, many of these borrowers will find that they can no longer afford the payments.[125] At that point, borrowers will either have to refinance (which likely will be difficult), sell their homes, or go into default. Fitch predicts that as "home prices stabilize and interest rates rise, . . . subprime IO delinquency rates [will] increase."[126]

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[120] *See* Cagan, *supra* note 109, at 17 (commenting that "[t]hese loans . . . may be useful to homeowners who anticipate substantial increases in their income (such as recent graduates from law school), and to those who have low incomes for most of the year but receive high lump sum payments from time to time (such as people who are self-employed or professionals who receive much of their income in the form of a yearly bonus)"); FRATANTONI ET AL., *supra* note 109, at 55–56 (describing the types of borrowers I-O loans were designed for); Simon, *supra* note 109, at R4.

[121] *See* Cagan, *supra* note 109, at 14, 17 (observing that "many adjustable-rate mortgage borrowers . . . bought recently and stretched their financial abilities to acquire a home with a low down payment and a low monthly payment"); *see also* FRATANTONI ET AL., *supra* note 109, at 56, 58 (stating that some borrowers use I-O loans to "extend their purchase power as house prices have increased"); Ruth Simon, *Option ARMs Remain Popular In Spite of Risks*, WALL ST. J., Aug. 15, 2006, at A2 (stating that "borrowers seeking to lower their monthly payments have few other choices" than option ARMs).

[122] *See* FISHBEIN & WOODALL, *supra* note 99, at 4; FRATANTONI ET AL., *supra* note 109, at 50.

[123] *See* Shenn, *supra* note 109 (reporting that lending "standards loosened throughout 2004 and 2005, particularly through the increased use of 'stated' incomes, higher debt-to-income ratios, and low down payments"). In 2006, federal banking regulators issued an interagency guidance that requires federally insured depository institutions who make I-O and option ARM loans to "address the effect of a substantial payment increase on the borrower's capacity to repay when loan amortization begins." Interagency Guidance on Nontraditional Mortgage Product Risks: Final Guidance, 71 Fed. Reg. at 58,613 (Oct. 4, 2006). The regulators issued the proposed guidance out of concern that these products "are now offered by more lenders to a wider spectrum of borrowers who may not otherwise qualify for more traditional mortgage loans and may not fully understand the associated risks." *Id.*

[124] Fitch Ratings, *supra* note 118, at 11.

[125] *See id.* at 10–11.

[126] *Id.* at 13; *see also* Interagency Guidance on Nontraditional Mortgage Product Risks: Final Guidance, 71 Fed. Reg. at 58,609, 58,616 (expressing concern that "interest-only

Consequently, it is essential that all borrowers, including subprime borrowers, understand the worst case payment scenario before they take out I-O and option ARMs. Current TILA disclosures—based on an unrealistic, hypothetical $10,000 loan—are impossible for most consumers to comprehend. Even a sophisticated borrower would need to locate the hypotheticals in the sea of variable-rate disclosures and take the time to do the math. Thus, it comes as no surprise that residential borrowers with adjustable-rate mortgages "appear to underestimate the amount . . . their interest rates can change."[127] "Borrowers with less income or education seem especially likely not to know their mortgage terms," making them "more vulnerable to an increase in interest rates."[128]

IV. What To Do?

For all of these reasons, federal mortgage disclosures break down in a world of risk-based pricing. TILA and RESPA do not mandate reliable information for meaningful comparison-shopping in the subprime market before application and the subprime market does not provide it. In fact, TILA unwittingly countenances affirmative misrepresentations to subprime customers by permitting lenders to tout their best rates and nothing else. Similarly, in most cases, nothing in TILA or RESPA requires lenders to provide firm price disclosures until the date of closing. These problems are compounded for variable-rate loans because current variable-rate disclosures obscure what is most important to subprime borrowers—the worst payment case scenario. While revamped disclosures are not a panacea for price revelation problems in the subprime market, they are an important part of the solution.

A. Counteracting False Subprime Advertising

Currently, virtually all subprime ads that publicize rates only quote the best rates (and, for variable-rate loans, often these are teaser rates).[129] For everyone except customers who actually qualify for the advertised rates, these ads are patently misleading. If comparison-shopping is to be mean-

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mortgages can carry a significant risk of payment shock and negative amortization that may not be fully understood by consumers"); Simon, *supra* note 121, at A2 (describing a 2006 Credit Suisse Group report finding that "[o]ption ARMs are going into foreclosure an average of 10 months after the loan is made, earlier than for other types of loans").

[127] Brian Bucks & Karen Pence, *Do Homeowners Know Their House Values and Mortgage Terms?* 2 (Fed. Reserve Bd. Working Paper, 2006), *available at* http://www.federalreserve.gov/pubs/feds/2006/200603/200603pap.pdf; *see also supra* note 60.

[128] Bucks & Pence, *supra* note 127, at 26.

[129] Assuming, that is, that the advertisement is truthful. Some subprime advertisements list low rates that the lender does not in fact offer. *See, e.g.*, Letter from Donald S. Clark, Fed. Trade Comm'n, to Jennifer L. Johnson, Bd. of Governors of the Fed. Reserve Sys. 2–4 (Sept. 14, 2006), *available at* http://www.ftc.gov/os/2006/09/docketop-1253commentfedreservehomeeqlendimagev.pdf.

ingful, it is critical to eliminate false advertising that is designed to lead consumers down the primrose path to higher, hidden prices. Concomitantly, improved oversight could help make subprime advertising a vehicle for accurate price revelation.

Achieving truth in subprime advertising requires four distinct measures. First, any lender who advertises an APR for a subprime product should be required to advertise the full range of APRs that it charges for that product. Immediately next to this price range, a warning needs to appear stating that customers with weak credit will not qualify for the best price. Second, both of these disclosures need to be prominent, in boldface, and in a large font.[130] Third, for ads marketing adjustable-rate mortgages, the text should conspicuously state the maximum APR cap for the highest-priced version of the loan to inform consumers of the worst case payment scenario. Finally, Congress should amend TILA and RESPA to provide a private right of action to borrowers who enter into detrimental loans in reliance on misleading subprime advertisements. The first three measures fall well within the regulatory authority of the Federal Reserve Board to interpret TILA.

B. Providing Firm Price Quotes to Subprime Customers Before Application

In an ideal world, subprime customers could get firm quotes for free without paying for a mortgage application and could then shop those quotes with other lenders. The wrinkle, of course, is that subprime customers have to reveal their creditworthiness before lenders can compute a price. Today, that is accomplished through the loan application process, complete with a large nonrefundable application fee. However, given the prevalence of rate sheets, automated credit scores, and automated underwriting, there is no reason why subprime customers should have to make costly formal applications in order to obtain firm price quotes.

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[130] In December 2003, the Federal Reserve Board laudably proposed rules to standardize the meaning of the "clear and conspicuous" standard. *See* Truth in Lending, 68 Fed. Reg. 68,793 (Fed. Reserve Sys. proposed Dec. 10, 2003). In June 2004, under intense fire from lenders, the Board withdrew the proposed rule. Equal Credit Opportunity, Electronic Fund Transfers, Consumer Leasing, Truth in Lending, Truth in Savings, 69 Fed. Reg. 35,541 (Fed. Reserve Sys. June 25, 2004). The following year, in the bankruptcy reform law, Congress required the Board, in consultation with other federal banking regulators and the Federal Trade Commission, to promulgate new regulations on the meaning of the "clear and conspicuous" standard for open-end credit plans. For example, the disclosure requirements for credit card plans should result "in disclosures which are reasonably understandable and designed to call attention to the nature and significance of the information in the notice." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. XIII, § 1309, 119 Stat. 23, 213 (2005) (to be codified at 15 U.S.C. § 1637 note). The Board issued a second advance notice of proposed rulemaking on the topic in October 2005. Truth in Lending, 70 Fed. Reg. 60,235 (Fed. Reserve Sys., advance notice of proposed rulemaking, Oct. 17, 2005).

The costs of subprime mortgages fall into two broad categories: price terms and closing costs.[131] Price terms include interest, points, origination fees, broker fees, yield spread premia, and prepayment penalties. Under risk-based pricing, these terms can be computed by consulting a lender's rate sheet and determining where customers fall on that rate sheet, depending on their credit scores and loan-to-value ratios. Alternatively, lenders who determine prices using more sophisticated automated underwriting systems could interview the customer for the key underwriting variables, enter those variables in the system, and obtain a price quote in seconds.[132] With the customer's permission, a lender can obtain the customer's credit report and credit scores online for no more than ten to fifteen dollars.[133] Similarly, the loan-to-value ratio can be estimated using the proposed down payment and the purchase price of the home.

Consequently, it is now feasible for lenders and brokers to provide firm, upfront price quotes to subprime customers at minimal cost. Indeed, HUD reached that conclusion in 1998, when it proposed requiring lenders and brokers to provide firm price quotes before application in exchange for giving lenders and brokers immunity from RESPA's anti-kickback provisions.[134] Eight years have elapsed since then and automated underwriting systems have become prevalent in the subprime industry.[135] By

[131] *See generally* HUD-FED JOINT REPORT, *supra* note 23, at 40–41.

[132] For descriptions of automated underwriting for applicants with weak credit, see generally Susan Wharton Gates et al., *Automated Underwriting in Mortgage Lending: Good News for the Underserved?*, 13 HOUSING POL'Y DEBATE 369 (2002); Susan Wharton Gates et al., *Automated Underwriting: Friend or Foe to Low-Mod Households and Neighborhoods?* (Freddie Mac Working Paper, 2003); and John W. Straka, *A Shift in the Mortgage Landscape: The 1990s Move to Automated Credit Evaluations*, 11 J. HOUSING RES. 207 (2000).

[133] *See* HUD-FED JOINT REPORT, *supra* note 23, at 28–29, 39–42; Credit InfoCenter, What Do Credit Bureaus Charge for Credit Reports?, http://www.creditinfocenter.com/credit reports.reportcost.shtml (last visited Oct. 22, 2006).

[134] *See* HUD-FED JOINT REPORT, *supra* note 23, at 28–29, 39–42; Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, 67 Fed. Reg. 49,134 (Dep't of Hous. & Urban Dev. July 29, 2002) [hereinafter HUD Guaranteed Package Rule].

The anti-kickback provisions of section 8 of RESPA prohibit referral fees, fee splitting, and unearned fees in residential mortgage transactions. Real Estate Settlement Procedures Act § 8, 12 U.S.C. § 2607 (2000). When HUD originally proposed guaranteed closing cost packages, it recommended immunizing yield spread premia from section 8 as an inducement to the lending industry to embrace the proposal. *See* HUD-FED JOINT REPORT, *supra* note 23, at 22, 29–30; HUD Guaranteed Package Rule, *supra*, at 49160–61. The inducement did not work and, more importantly, is economically perverse. Provisions in TILA and RESPA that allow lenders to change most loan terms until the last minute promote anticompetitive practices by allowing lenders and brokers to negotiate yield spread premia in exchange for higher rates behind the scenes and then spring costlier loans on borrowers at closing. *See* Jackson, *supra* note 94, at 3; Jackson & Berry, *supra* note 94. Accordingly, any proposal for a guaranteed closing cost package should ban the use of yield spread premia in exchange for higher interest rates, points, fees or prepayment penalties.

[135] According to Fitch Ratings, automated "compliance systems have become a critical component of the underwriting and quality control process" in the subprime residential mortgage industry. Press Release, Fitch Ratings, Fitch Revises RMBS Guidelines for Antipre-

now, there is no doubt that lenders and brokers have the technical capability to provide firm, written price quotes to subprime customers, if not for free, then for the cost of pulling the credit report. Lenders should be required to provide such quotes for all loans using risk-based pricing, according to a fee schedule regulated by law, instead of demanding large nonrefundable application fees in order to reveal prices.

Critics have argued that lenders cannot provide firm price quotes before verifying customer representations or entering into lock-in commitments.[136] While sometimes these are legitimate concerns, neither poses an insuperable bar. Price quotes are always contingent on verification in the prime market and the same would be true in the subprime market.[137] In the subprime context, moreover, the only information that requires verification on numerous rate sheets is the loan-to-value ratio (calculated from the down payment and the property value), because the credit history and score are available from a trusted third party online. In any event, the surge of low-documentation and no-documentation loans in the subprime market belies a strict need for many types of verification. And as for the issue of lock-in commitments, HUD proposed a satisfactory resolution of that issue in 1998:

> The [price term] guarantee would stand for a reasonable time to permit the consumer to shop. And unless the borrower chose to formally apply and "lock" the interest rate, any subsequent change in interest rate and points (but not closing costs) would be permitted, so long as any change to the consumer's guaranteed rate was solely attributable to, and commensurate with, changes in the financial markets.[138]

HUD's language similarly underscores the need for lenders to offer lock-in commitments as a standard option in the subprime market.

As for closing costs, the time has come to require legally binding quotes on guaranteed closing cost packages in advance of payment of a nonrefundable application fee.[139] This reform is long overdue in the prime market, but it takes on special urgency in the subprime market, where closing costs are substantially higher on average, relative to the amount

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datory Lending Laws (Feb. 23, 2005), *available at* http://www.findarticles.com/p/articles/mi_m0EIN/is_2005_Feb_23/ai_n10020637.

[136] *See* HUD-FED JOINT REPORT, *supra* note 23, at 40–41.

[137] *See id.* at 42.

[138] *Id.* In addition to interest rate and points, the lock-in commitment should also cover origination fees and prepayment penalties.

[139] HUD and the Federal Reserve Board advanced a similar proposal in 1998. *See id.* at 32–33. HUD formally proposed a guaranteed closing cost rule in 2002 but eventually put the proposal on the back burner due to industry and consumer group opposition. *See* HUD Guaranteed Package Rule, *supra* note 134; Semiannual Regulatory Agenda, 71 Fed. Reg. 22,733, 22,751 (Dep't of Hous. & Urban Dev. Apr. 24, 2006).

financed, than in the prime market. Guaranteed packages would include numerous settlement costs associated with subprime mortgages, including fees for services provided by creditors and third-party vendors, plus official filing and recording fees. Examples of these costs include broker compensation and fees for appraisals, surveys, credit reports, underwriting, recording, legal representation, title insurance and title searches.[140] Guaranteed packages would need to go hand-in-hand with firm price quotes to prevent lenders from undermining the closing cost quotes by increasing the price terms after the fact.[141] Lenders would continue to have to provide borrowers with HUD-1s at closing to permit borrowers to verify that guarantees were honored. Providing customers with guaranteed closing cost packages before application would enable them to comparison-shop intelligently for closing costs.

The Federal Reserve Board and HUD have full authority to accomplish firm price quotes through notice-and-comment rulemakings. TILA requires disclosures "before the credit is extended,"[142] which gives the Board ample latitude to require firm price term disclosures early in the shopping process. Similarly, HUD felt confident enough about its authority to mandate a guaranteed closing cost package under RESPA that it proposed a rule to that effect in 2002.[143] Thus, firm price quotes could be attained without additional congressional authorization.

C. Addressing the Moving Target Problem

Requiring firm price quotes and guaranteed closing cost packages would go a long way toward addressing the moving target problem in the subprime market. It would not entirely eliminate the problem, however. The price quotes just proposed would be subject to verification and could be raised if the customer's creditworthiness turned out to be worse than originally portrayed. Similarly, lenders would have latitude, absent lock-in commitments, to increase price terms to account for interest rate movements. Accordingly, the need for verification and financial market movements create openings for the moving target problem and the potential for surprise price hikes at closing.

While the moving target problem cannot be wholly eliminated, it can be substantially constrained. First, the reasons for any price hike should be strictly regulated. Lenders should only be allowed to alter price quotes

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[140] *See* HUD-FED JOINT REPORT, *supra* note 23, at 23–25. Note that some cost items overlap the categories of prime terms and closing costs. The cost of homeowners' insurance and transfer taxes would be excluded from guaranteed closing cost packages because these items depend on consumer choices unrelated to the credit transaction. *See id.* at 24. For discussion of other operational issues in implementing guaranteed closing cost packages, see *id.* at 25–31.

[141] *See id.* at 22, 28–29.

[142] 15 U.S.C. § 1638(b)(1) (2000).

[143] *See* HUD Guaranteed Package Rule, *supra* note 134.

for three reasons: (1) good faith subsequent discoveries or events resulting in a downgrade of a customer's creditworthiness; (2) lower-than-expected appraisals affecting loan-to-value ratios; and (3) prevailing interest rate movements after application (barring any lock-in commitment), and only on the condition that any price changes be commensurate. With respect to (1), lenders would be barred from raising prices with respect to information (such as prior delinquencies or bankruptcies) that was already available from the customer's online credit report on the date of the price quote. Furthermore, no price changes would be allowed that result from behind-the-scenes compensation negotiations for mortgage brokers, loan officers, or other lending personnel.

Second, if legitimate reasons did exist for price changes, only the nominal interest rate, discount points, or origination fees could be changed. The lender could not unilaterally change any closing costs (including yield spread premia if they were regrettably still permitted)[144] that were guaranteed in the closing cost package. Limiting price increases to the nominal interest rate, discount points, or origination fees would help promote transparency in pricing.

Lastly, lenders who raise price quotes should be required to deliver to the affected borrowers written disclosures announcing any new nominal interest rate, points, origination fees, finance charge, and APR. These disclosures should be made no later than seven days before the closing.[145] In cases where the lender also changes the loan product (such as from a fixed-rate loan to an adjustable-rate loan), the new variable rate disclosures discussed in the next section would be required, where applicable. Delivery of such disclosures would be automatic and would not require a prior request by the borrower. The accuracy of all new disclosures and price terms should be legally binding on the lender and should entitle the borrower to damages if breached.[146] In addition, any unilateral change in terms at closing by the lender should entitle the borrower to a three-year right of rescission.[147]

All of these changes except the expanded right of rescission under TILA could be jointly accomplished by HUD under RESPA and the Federal Reserve Board under TILA without additional congressional authority. Indeed, HUD embraced many of these changes in its proposed guaranteed closing cost package rule in 2002.[148]

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[144] *See supra* note 94.

[145] Tolerances could be used to excuse lenders from redisclosure for minor changes in the APR. Tolerances of one-eighth of one basis point for regular transactions and one-quarter of one basis point for irregular transactions would be appropriate. *See supra* note 64 and accompanying text. Tolerances refer to margins "within the TILA's 'tolerance' for error." *See* RENUART & KEEST, *supra* note 18, § 4.6.3.2.1.

[146] *See* HUD-FED JOINT REPORT, *supra* note 23, at 44.

[147] *See supra* note 40.

[148] *See* HUD Guaranteed Package Rule, *supra* note 134.

D. Fixing Variable-Rate Disclosures

Currently, variable-rate disclosures under TILA must recite most of the individual moving parts that drive the worst case payment scenario, such as the index, the margin, reset dates, individual reset caps, and lifetime maximum and minimum interest caps (Figures 3a-3c). These drivers of the worst case payment scenario are also found in the loan note at closing. What most consumers care about, however, is not the moving parts, but how high their principal and interest payments could go if the loan becomes fully indexed (and becomes fully amortizing, in the case of I-O and option ARM loans).[149] Moreover, consumers want the actual worst case dollar figures for their own loans, not extrapolations from a $10,000 hypothetical. Today, automated programs make tailored disclosures such as these cheap and easy for lenders to provide.

Accordingly, variable-rate disclosures should be pared down and revised to contain just four things. First, these disclosures should make it unmistakably clear that the borrower has an adjustable-rate loan. Second, the disclosures should state the number of months or years until the first reset date and the maximum interest rate and monthly principal and interest payment on that date for the actual loan in question. Third, the disclosures should state the earliest date on which the loan could become fully indexed and the maximum interest rate and monthly payment on that date. Finally, the disclosures should state whether the loan will contain a prepayment penalty, and if so, the maximum dollar value of that penalty and how long it would last. The disclosures would look something like this:

> You have asked for information about a variable-rate loan. With this loan, your interest rate and monthly payments would likely increase over time.
>
> - In *two years* from the closing, your principal and interest payments could rise as high as $1,950 per month and your annual percentage rate could rise as high as 9.50%.
> - In *six years* from the closing, your principal and interest payments could rise as high as $2,572 per month and your annual percentage rate could rise as high as 14.00%. This is the highest your principal and interest payments could go under this loan.
>
> ***Warning***: If you pay off most or all of your loan within two years of the closing, you will have to pay your lender a penalty of as much as $9,000.

Lenders would have to provide these disclosures in writing along with the initial firm quotes (or, for prime loans, before provision of an application form or payment of a nonrefundable fee, whichever is earlier). In cases where the lender later changed the price terms or loan product

[149] *See supra* notes 58–61, 109–114 and accompanying text.

for permissible reasons, it would need to make new, written variable-rate disclosures (where applicable) no less than seven days before closing.

No congressional authorization would be needed to make this change. The Federal Reserve Board has full authority under TILA to implement these changes.[150]

CONCLUSION

Currently, the prime market and subprime markets are segmented. The prime market uses average-cost pricing and the subprime market uses risk-based pricing. But there is every reason to think that risk-based pricing will eventually pervade the prime market and lead to the demise of average-cost pricing. The residential mortgage market has already started down this road with the invention of the "A-" customer (with slightly weaker credit than the typical prime market borrower) and the "Alt-A" customer (who looks strong on paper, but provides little or no documentary support of income or employment). Eventually it is likely that we will have other shades of "A" borrowers, each of whom receives an individualized price.

Current federal mortgage disclosures have broken down in the face of risk-based pricing. This Article advances proposals to repair mortgage disclosures and, in the process, to make it truly possible to meaningfully comparison-shop for residential mortgages in a world of risk-based pricing.

[150] *See* 15 U.S.C. § 1604(a), (d) (2000).

Uniform Residential Loan Application

This application is designed to be completed by the applicant(s) with the Lender's assistance. Applicants should complete this form as "Borrower" or "Co-Borrower," as applicable. Co-Borrower information must also be provided (and the appropriate box checked) when ☐ the income or assets of a person other than the Borrower (including the Borrower's spouse) will be used as a basis for loan qualification or ☐ the income or assets of the Borrower's spouse or other person who has community property rights pursuant to state law will not be used as a basis for loan qualification, but his or her liabilities must be considered because the spouse or other person has community property rights pursuant to applicable law and Borrower resides in a community property state, the security property is located in a community property state, or the Borrower is relying on other property located in a community property state as a basis for repayment of the loan.

If this is an application for joint credit, Borrower and Co-Borrower each agree that we intend to apply for joint credit (sign below):

Borrower ______________________ Co-Borrower ______________________

I. TYPE OF MORTGAGE AND TERMS OF LOAN

Mortgage Applied for:	☐ VA ☐ FHA	☐ Conventional ☐ USDA/Rural Housing Service	☐ Other (explain):	Agency Case Number	Lender Case Number

Amount $	Interest Rate %	No. of Months	**Amortization Type:**	☐ Fixed Rate ☐ GPM	☐ Other (explain): ☐ ARM (type):

II. PROPERTY INFORMATION AND PURPOSE OF LOAN

Subject Property Address (street, city, state & ZIP)	No. of Units
Legal Description of Subject Property (attach description if necessary)	Year Built

Purpose of Loan	☐ Purchase ☐ Refinance	☐ Construction ☐ Construction-Permanent	☐ Other (explain):	Property will be: ☐ Primary Residence ☐ Secondary Residence ☐ Investment

Figure 1 (partial view):
http://www.mortgage101.com/partner-scripts/pdf/loanapp.pdf

TRUTH IN LENDING DISCLOSURE STATEMENT

Creditor	Applicant(s)
Mailing Address	Property Address
Loan Number	Preparation Date

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
E %	E$	E$	E$

PAYMENT SCHEDULE:

NUMBER OF PAYMENTS	* AMOUNT OF PAYMENTS	MONTHLY PAYMENTS ARE DUE BEGINNING	NUMBER OF PAYMENTS	* AMOUNT OF PAYMENTS	MONTHLY PAYMENTS ARE DUE BEGINNING

* Includes mortgage insurance premiums, excludes taxes, hazard insurance or flood insurance.

DEMAND FEATURE: ☐ This loan does not have a Demand Feature ☐ This loan has a Demand Feature.

ITEMIZATION: You have a right at this time to an ITEMIZATION OF AMOUNT FINANCED.

I/We ☐ do ☐ do not want an itemization.

REQUIRED DEPOSIT:

☐ The annual percentage rate does not take into account your required deposit.

VARIABLE RATE FEATURE:

☐ This Loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier.

SECURITY: You are giving a security interest in:

ASSUMPTION: Someone buying this property

☐ cannot assume the remaining balance due under original mortgage terms.

☐ may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

FILING / RECORDING FEES: $

PROPERTY INSURANCE:

☐ Property / hazard insurance is a required condition of this loan. Borrower may purchase this insurance from any insurance company acceptable to the lender.

Figure 2 (partial view): http://www.mortgage101.com/partner-scripts/pdf/til.pdf

1 MONTH PAYMENT OPTION ARM (1 MONTH LIBOR INDEX)
MORTGAGE PROGRAM DISCLOSURE

This payment option adjustable rate mortgage program disclosure describes the features of the payment option adjustable rate mortgage (ARM) program you are considering. The interest rate and payment amount of your loan are subject to change. Monthly payments may not be enough to cover the interest due, and any difference will be added to your principal balance. Therefore, the principal amount to repay the loan could be greater than the amount originally borrowed. This is known as negative amortization. The loan will have a term of 30 years. Information on other ARM programs is available upon request.

This disclosure is not a contract or commitment to lend. Only your promissory note, security instrument, and other documents will establish your rights under the loan. This disclosure addresses how you will repay the principal and interest on your loan. It does not address any other payments that may be required under the terms of your loan, for example, monthly escrow payments.

How Your Interest Rate is Calculated

1. **Index.** The "Index" is the average of interbank offered rates for one month U.S. dollar-denominated deposits in the London market ("LIBOR") as published in The Wall Street Journal. The most recent Index figure available as of the first business day of the month immediately preceding the month in which your Interest Rate could change is called the "Current Index." If the Index is no longer available, we will choose a new Index that is based upon comparable information. We will give you notice of this choice.

2. **Margin.** The "Margin" is the amount added to the Current Index to establish your interest rate. It is expressed in percentage points. Ask us about our current Margin.

3. **Interest Rate.** Starting with the first interest rate adjustment on your loan, the "Interest Rate" (the interest rate applicable to your loan) will be calculated by adding the Current Index to the Margin. We will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). This rounded amount will be your new Interest Rate until the next date on which your Interest Rate could change. Your Initial Interest Rate will be established and disclosed to you prior to closing. Ask us for our current interest rate.

Figure 3a (p.1, partial view):
http://www.thornburgmortgage.com/thornburg/portals/0/Lend_Media/1MonthLIBOROptionARMDisclosure.pdf

Ask us about our current interest rate and the amount of any Premium or Discount. If you choose an interest rate commitment option that provides for a floating rate, your Initial Interest Rate at closing may be different than the interest rate in effect at the time you apply for your loan. The amount of the Premium or Discount may change as a result.

How Your Interest Rate Can Be Adjusted

1. **Calculation of the Interest Rate Adjustment.** The first adjustment to your Interest Rate will occur in approximately 1 month on the due date of your first monthly payment. After that, your Interest Rate will be scheduled to change on the same date every month. Each date on which your Interest Rate is scheduled to change is called an "Interest Rate Change Date." The Index used to calculate your new Interest Rate is the one that was in effect on the first business day in the month before the month of the applicable Interest Rate Change Date. Your Interest Rate will be determined by adding the Current Index to the Margin and rounding the total to the nearest one-eighth of one percentage point. The Interest Rate may change monthly, but the monthly payment is recalculated as described below.

2. **Interest Rate Caps.** Over the term of the loan, your Interest Rate cannot be greater than 9.95%.

How Your Payment is Calculated

1. **Amount of Payment.** Your initial monthly payment will be based on the Initial Interest Rate. Beginning with the 13th payment in the loan documents and every 12 months thereafter (the "Payment Change Date"), we will calculate the amount of the monthly payment that would be sufficient to repay the unpaid principal balance in full by the maturity date in substantially equal payments at the interest rate in effect during the month preceding the payment change date. This payment is called the "Full Payment." Except as otherwise provided in the loan documents, your "Limited Payment" will be the payment amount for the month preceding the payment change date increased by no more than 7.5% of such payment ("Payment Cap"). Your new "Minimum Payment" will be the lesser of the Limited Payment and the Full Payment. You also have the option to pay the Full Payment for your new monthly payment. If you pay less than the Full Payment, then the payment may not be enough to cover the interest due, and any difference will be added to your principal balance. **This means the balance of your loan could increase. This is known as "negative amortization."** During the loan term, we may provide you with other monthly payment options that are greater than the Minimum Payment, such as interest only payments, fully amortizing payments or 15 year amortized payments ("Payment Options"). Please ask us about these Payment Options.

Figure 3b (p.2, partial view): http://www.thornburgmortgage.com/thornburg/portals/0/Lend_edia/1MonthLIBOROptionARMDisclosure.pdf

How Your Payment Can Change

1. **New Payment Amount.** Your monthly payment every year can increase or decrease substantially based on changes in the interest rate. At every 5th Payment Change Date the Minimum Payment will be the Full Payment until the next Payment Change Date.

2. **Notice of Adjustment.** You will be notified in writing at least 30 days before the due date of a payment at a new amount. The notice will include information about the interest rate, payment amount and loan balance.

3. **Maximum Increase in Principal Amount.** The maximum principal amount of your loan can never exceed 115% (110% in New York) of the original amount borrowed. If your principal amount rises to this point, your monthly payment may change more frequently than annually and the payment change will not be limited by the 7.5% Payment Cap. The new Minimum Payment will be set each Payment Change Date thereafter and will be in an amount that would be sufficient to pay off the unpaid principal balance over the remaining life of the loan at the current interest rate.

4. **Maximum Rate and Payment Examples.** For example, on a $10,000 30 year loan with an initial interest rate of 1.0%* (which is discounted by 5.875% based on the index for March 2006 of 4.823% plus a margin of 2.00%), the maximum amount that the interest rate can rise under this program is to 9.95%. We assume the interest rate will increase to the maximum rate as rapidly as possible. Because of the 7.5% payment cap, the monthly payment would rise from an initial payment of $32.16 to a payment of $34.57 in the 13th month and $37.16 in the 25th month. As a result of the negative amortization, the maximum principal of $11,500 would be reached at the 30th payment. The new fully amortizing principal and interest payment would be $101.70 starting with the 30th payment. To see what your payment might be based upon this example, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the initial monthly payment for a mortgage amount of $100,000 would be: $100,000 divided by $10,000 = 10; 10 x $32.16 = $321.60.)

*This is an interest rate that was in effect in March 2006.

Figure 3c (p.3, partial view):
http://www.thornburgmortgage.com/thornburg/portals/0/Lend_Media/1MonthLIBOROptionARMDisclosure.pdf

Historical Example The example below shows how the ANNUAL PERCENTAGE RATE and the minimum payments for a single $10,000.00 credit advance would have changed based on changes in the Index over the past 15 years. The Index values are from the 1st business day of November of each year. While only one payment per year is shown, payments may have varied during each year.

The table assumes that no additional credit advances were taken and that only the minimum payment was made. It does not necessarily indicate how the Index or your payments would change in the future. It does not include an initial discounted rate and assumes no Locks.

INDEX TABLE				
Year	Index (Percent)	Margin* (Percent)	ANNUAL PERCENTAGE RATE	Monthly Payment (Dollars)
1991	8.000	0.000	8.000	67.95
1992	6.000	0.000	6.000	50.96
1993	6.000	0.000	6.000	50.96
1994	7.750	0.000	7.750	65.82
1995	8.750	0.000	8.750	74.32
1996	8.250	0.000	8.250	70.07
1997	8.500	0.000	8.500	72.19
1998	8.000	0.000	8.000	67.95
1999	8.250	0.000	8.250	70.07
2000	9.500	0.000	9.500	200.00
2001	5.500	0.000	5.500	200.00
2002	4.750	0.000	4.750	200.00
2003	4.000	0.000	4.000	200.00
2004	4.750	0.000	4.750	200.00
2005	7.000	0.000	7.000	200.00

* This is a margin we have used recently; your margin may be different.

Figure 4 (partial view):
http://www.sandyspringbank.com/ab_equity_disclosure.htm

GOOD FAITH ESTIMATE

Lender:	Sales Price:
Address:	Base Loan Amount:
	Total Loan Amount:
Applicant(s):	Interest Rate:
	Type of Loan:
Property Address:	Preparation Date:
	Loan Number:

The information provided below reflects estimates of the charges which you are likely to incur at the settlement of your loan. The fees listed are estimates - actual charges may be more or less. Your transaction may not involve a fee for every item listed.

The numbers listed beside the estimates generally correspond to the numbered lines contained in the HUD-1 or HUD-1A settlement statement which you will be receiving at settlement. The HUD-1 or HUD-1A settlement statement will show you the actual cost for items paid at settlement.

800	ITEMS PAYABLE IN CONNECTION WITH LOAN:		
801	Origination Fee ●	% + $	$
802	Discount Fee ●	% + $	$
803	Appraisal Fee		$
804	Credit Report		$
805	Lender's Inspection Fee		$
806	Mortgage Insurance Application Fee		$
807	Assumption Fee		$
808	Mortgage Broker Fee		$
810	Tax Related Service Fee		$
811	Application Fee		$
812	Commitment Fee		$
813	Lender's Rate Lock-In Fee		$
814	Processing Fee		$
815	Underwriting Fee		$
816	Wire Transfer Fee		$
			$

900	ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:		
901	Interest for	days @ $ /day	$
902	Mortgage Insurance Premium		$
903	Hazard Insurance Premium		$

1100	TITLE CHARGES:	
1101	Closing or Escrow Fee	$
1102	Abstract or Title Search	$
1103	Title Examination	$
1105	Document Preparation Fee	$
1106	Notary Fee	$
1107	Attorney's Fee	$
1108	Title Insurance	$
		$
		$
		$
		$
		$
		$

1200	GOVERNMENT RECORDING AND TRANSFER CHARGES:	
1201	Recording Fee	$
1202	City/County Tax/Stamps	$
1203	State Tax/Stamps	$
1204	Intangible Tax	$
		$
		$

Figure 5 (partial view): http://www.mortgage101.com/partner-scripts/pdf/gfe.pdf

A. Settlement Statement

U.S. Department of Housing and Urban Development

OMB Approval No. 2502-0265 (expires 11/30/2009)

B. Type of Loan	6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:
1. ☐ FHA 2. ☐ FmHA 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.			

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower:	E. Name & Address of Seller:	F. Name & Address of Lender:

G. Property Location:	H. Settlement Agent:	
	Place of Settlement:	I. Settlement Date:

J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due From Borrower		**400. Gross Amount Due To Seller**	
101. Contract sales price		401. Contract sales price	
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)		403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		**Adjustments for items paid by seller in advance**	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due From Borrower		**420. Gross Amount Due To Seller**	
200. Amounts Paid By Or In Behalf Of Borrower		**500. Reductions In Amount Due To Seller**	
201. Deposit or earnest money		501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	

Figure 6 (partial view): http://www.hudclips.org/sub_nonhud/cgi/pdfforms/1.pdf

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New User
Continue Application
Manage Preferences
Calculators
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CURRENT INTEREST RATES

Here are all the programs available, with various points and rates. Choose a program and click "Loan application" below to start a new account. You can also use our email rate alert feature if you would like to be notified when our interest rates match your preferences. Rates and points are only available through Wachovia Mortgage's Internet Channel. Rates and points are only available through Wachovia Mortgage's Internet Channel.

APPLY NOW
Mortgage Application

Program	Principal and Interest Payment	Rate	Points	Origination Fee	APR	Closing Costs	
2 Point Programs (rates nearest to 2 points)							
Jumbo 30 Year Fixed	$3,184	5.875%	2.000%	0.750%	6.270%	$27,556[1]	details
Jumbo 3/1 ARM	$2,889	5.000%	1.500%	0.750%	7.027%	$24,170[1]	details
Jumbo 5/1 ARM	$2,940	5.125%	1.875%	0.750%	6.783%	$26,200[1]	details
1 Point Programs (rates nearest to 1 point)							
Jumbo 30 Year Fixed	$3,281	6.125%	1.000%	0.750%	6.430%	$22,206[1]	details
Jumbo 15 Year Fixed	$4,484	5.750%	0.875%	0.750%	6.112%	$21,425[1]	details
Jumbo 3/1 ARM	$2,982	5.250%	1.000%	0.750%	7.062%	$21,590[1]	details
Jumbo 5/1 ARM	$3,066	5.500%	0.875%	0.750%	6.858%	$21,026[1]	details
0 Point Programs (rates nearest to 0 points)							
Jumbo 30 Year Fixed	$3,380	6.375%	No Points $0 credit	0.750%	6.598%	$18,977[1]	details
Jumbo 15 Year Fixed	$4,557	6.000%	No Points $0 credit	0.750%	6.229%	$18,811[1]	details
Jumbo 3/1 ARM	$3,151	5.750%	0.125%	0.750%	7.127%	$17,087[1]	details
Jumbo 5/1 ARM	$3,184	5.875%	No Points $0 credit	0.750%	6.924%	$18,408[1]	details

Figure 7 (partial view): http://mortgagedirect.wachovia.com

Table 2. IndyMac Bank: Subprime Wholesale Interest Rates *continued*

Stated Income				2/6 LIBOR Rates based on 2-YR PP–30 BE					3/1 Treasury Rates based on 3-YR PP–30 BE					2/6 & 3/1	30-Yr Fixed Rates based on 3-YR PP–30 BE				
Levels	FICO	LTV	DR	99	100	101	102	103	99	100	101	102	103	Margins	99	100	101	102	103
Level I+	600-up	65	55	6.250	6.750	7.250	7.875	8.750	6.500	7.000	7.500	8.125	9.000	4.875	7.250	7.625	8.125	8.750	9.375
		70	55	6.500	7.000	7.500	8.125	9.000	6.750	7.250	7.750	8.375	9.250	4.875	7.500	7.875	8.375	9.000	9.625
		75	55	6.625	7.125	7.625	8.250	9.125	6.875	7.375	7.875	8.500	9.375	4.875	7.625	8.000	8.500	9.125	9.750
		80	55	6.750	7.250	7.750	8.375	9.250	7.000	7.500	8.000	8.625	9.500	4.875	7.750	8.125	8.625	9.250	9.875
		85	50	7.125	7.625	8.125	8.750	9.625	7.375	7.875	8.375	9.000	9.875	4.875	8.125	8.500	9.000	9.625	10.250
Level 1	575-599	65	55	6.625	7.125	7.625	8.250	9.125	6.875	7.375	7.875	8.500	9.375	5.375	7.875	8.250	8.750	9.375	10.000
		70	55	6.875	7.375	7.875	8.500	9.375	7.125	7.625	8.125	8.750	9.625	5.375	8.125	8.500	9.000	9.625	10.250
		75	55	7.000	7.500	8.000	8.625	9.500	7.250	7.750	8.250	8.875	9.750	5.375	8.250	8.625	9.125	9.750	10.375
		80	55	7.125	7.625	8.125	8.750	9.625	7.375	7.875	8.375	9.000	9.875	5.375	8.375	8.750	9.250	9.875	10.500
Level II	550-574	65	55	7.125	7.625	8.125	8.750	9.625	7.375	7.875	8.375	9.000	9.875	5.625	8.250	8.625	9.125	9.750	10.375
		70	55	7.375	7.875	8.375	9.000	9.875	7.625	8.125	8.625	9.250	10.125	5.625	8.500	8.875	9.375	10.000	10.625
		75	55	7.500	8.000	8.500	9.125	10.000	7.750	8.250	8.750	9.375	10.250	5.625	8.625	9.000	9.500	10.125	10.750
Level III	525-549	65	55	8.875	9.375	9.875	10.500	11.375	9.125	9.625	10.125	10.750	N/A	6.375	10.250	10.625	11.125	11.750	N/A

Rate & Margin Adjustments	Rate	Margin	Prepay Penalty Rate Adjustments	2-YR Fixed	30 Fixed/3:1 ARM
Limited Doc—Based on Full Doc	0.250	0.250	0 Years Prepay Penalty	0.500	0.750
			1 Years Prepay Penalty	0.375	0.625
No Ratio—Based on Stated Income	0.375	0.375	2 Years Prepay Penalty	0.000	0.500
			3 Years Prepay Penalty	(0.500)	0.000
2nd Home	0.500	0.500	Credit Score Rate Adjustments		
			Credit Score 620-640	(0.125)	
Non Owner Occupied	0.750	0.750	Credit Score 641-660	(0.250)	
			Credit Score 661-up	(0.500)	
2–4 Units	0.250	0.250	Borrower Paid MI Rate Adjustments		
			LTV 80.01—85%	(0.375)	
Low-rise Condo	0.250	0.250	LTV 85.01—90%	(0.625)	
			LTV 90.01—95%	(0.875)	
Loan Amount ≥ $150k to $500k	(0.250)	(0.250)	Max Price/Yield Spread		
			Max Price with 0-YR PPP	101.0	
Adj from F30, F30/15, or F15	(0.125)	(0.125)	Max Price with 1-YR PPP	101.5	
			Max Price with 2-YR PPP	102.0	
			Max Price with 3-YR PPP	103.0	

Figure 8: Alan M. White, *Risk-Based Mortgage Pricing: Present and Future Research*, 15 HOUSING POL'Y DEBATE 503, 5011 (2004).

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Figure 9:
https://new-e-mits.indymacb2b.com/login/login.asp?goto=eratesheets&msg=rates

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Dana Capital Group	6.10	1.50	6.29	10.00	540-619	More Info
Hometown Lenders	6.38	1.31	6.56	20.00	551-619	More Info
Hometown Lenders	6.38	1.31	6.56	5.00	580-619	More Info
Dana Capital Group	6.38	1.00	6.53	10.00	540-619	More Info
DiTech	6.50	2.00	7.33	20.00	350-850	More Info
Dana Capital Group	6.50	0.00	6.55	10.00	540-619	More Info
First National Mortgage	6.50	1.00	6.63	20.00	540-619	More Info
Hometown Lenders	6.63	0.23	6.71	20.00	551-619	More Info

Figure 10:
http://www.myfico.com/LoanCenter/Results.aspx?Fire=11&States=22&Markets=257&LoanTypes=4&LowerLimit=&UpperLimit=&Score=590 (last viewed July 4, 2006)

ARTICLE

THE LIFE AND DEBT CYCLE: THE GROWING DEBT BURDENS OF OLDER CONSUMERS AND RELATED POLICY RECOMMENDATIONS

DEANNE LOONIN*
ELIZABETH RENUART**

An increasing number of older Americans are falling deeper into debt. A variety of factors, including the proliferation of predatory lending practices, rising living expenses, shrinking incomes, and the erosion of the economic safety net, have all contributed to the rise in elder debt. This Article provides data detailing the magnitude of the problem, analyzes its causes and consequences, and concludes by offering several policy recommendations for easing the debt burden borne by seniors.

Despite coming from a generation considered averse to credit, an increasing number of older Americans are now "aging into debt."[1] For many retirees, Social Security and pension income are no longer sufficient to meet day-to-day needs. In rapidly increasing numbers, elders are using credit to pay for necessities like groceries, prescription drugs, and urgent house repairs.[2] More older consumers are falling deeply into credit card debt, which has fueled a rise in the number of elders filing for bankruptcy.[3] Since elders are disproportionately homeowners,[4] many are tapping into home equity to alleviate financial pressures later in life.[5] The escalating debt burden, which began growing in the early 1990s,[6] seems unlikely to

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* Staff attorney, National Consumer Law Center. J.D., University of California, Berkeley, 1991; B.A., Harvard University, 1986.
** Staff attorney, National Consumer Law Center. J.D., Catholic University Columbus School of Law; B.A., LeMoyne College, 1974. This work was made possible by an academic research grant awarded to the authors by the Borchard Foundation Center on Law and Aging for 2004–05. The authors also thank Carolyn Carter, Professor Kurt Eggert, Professor Karen Gross, Sharon Hermanson, Margot Saunders, and Professor Edward Spurgeon for their valuable suggestions and edits. Julia Devanthery, Lauren Mandel, and Mallory SoRelle provided extensive research and editing assistance.

[1] ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 257 (2000) (coining the phrase "aging into debt"). The terms "elders," "older consumers," and "seniors" are used interchangeably throughout this Article. Unless otherwise indicated, the terms refer to individuals age sixty or older.

[2] *See infra* Part II.B.

[3] *See infra* note 10 and accompanying text.

[4] *See infra* note 31 and accompanying text.

[5] *See infra* Part II.C.4.

[6] *See infra* note 10 and accompanying text.

slow as the steadily increasing number of older Americans[7] continue to face elevated expenses.[8]

Part I of this Article illustrates the scope of the elder debt problem. Part II analyzes the causes and consequences of rising debt loads. In Part III, the Article concludes by proposing several strategies to address the problem.

I. SCOPE OF THE PROBLEM

A. *Overall Debt Levels*

The generation of Americans born during the era of the Depression has traditionally been more averse to debt than its younger counterparts.[9] However, elders are now changing these debt-averse behaviors, often out of necessity, and as a result are going into debt and filing for bankruptcy in record numbers.[10]

Much of this trend has taken the form of substantial increases in credit card debt incurred by the elderly. Average credit card debt for Americans between the ages of sixty-five and sixty-nine rose a staggering 217% between 1992 and 2001, to $5,844.[11] Seventy percent of seniors earn less than $50,000, and of that lower-income group one out of every five with any credit card debt is actually in debt hardship—that is, spends more than 40% of his or her income paying off debt.[12]

Credit card and other unsecured debt is not the only type of debt seniors are carrying. There has also been a steady increase in the number of older homeowners holding mortgages.[13] As discussed in detail later in this Article, such mortgage debt is often comprised of high-rate, predatory loans.[14]

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[7] *See* U.S. CENSUS BUREAU, TABLE 2B: PROJECTED POPULATION CHANGE IN THE UNITED STATES, BY AGE AND SEX: 2000 TO 2050, *available at* http://www.census.gov/ipc/www/usinterimproj/natpro jtab02b.pdf (projecting that between 2000 and 2050 the number of people aged sixty-five to eighty-four will increase by 113.8%).

[8] *See infra* Part II.B.

[9] *See* MANNING, *supra* note 1, at 262–63.

[10] *See* Teresa A. Sullivan et al., *Young, Old, and in Between: Who Files for Bankruptcy?*, 9 NORTON BANKR. L. ADVISOR 1, 5 (2001) (reporting that the number of older consumers filing for bankruptcy more than doubled between 1992 and 2001); *see also* INST. FOR FIN. LITERACY, FIRST DEMOGRAPHIC ANALYSIS OF POST-BAPCPA DEBTORS 5 (2006), *available at* http://www.financiallit.org/news/white/2006-04-16%20First%20Demographic%20Analysis%20of%20 Post%20v.2.pdf (finding that more than 20% of consumers seeking mandatory pre-bankruptcy counseling were over age fifty-five).

[11] HEATHER C. MCGHEE & TAMARA DRAUT, DEMOS: A NETWORK FOR IDEAS AND ACTION, RETIRING IN THE RED: THE GROWTH OF DEBT AMONG OLDER AMERICANS 3 (2005), *available at* http://www.demos.org/pu bs/Retiring_2ed.pdf.

[12] *See id.*

[13] *See infra* note 32 and accompanying text.

[14] *See infra* Part II.C.

B. Consequences of Rising Debt Loads

These trends are alarming on many different levels. First, the problem is not merely that elders have more debt than ever before, but that they are buried in unaffordable debt.[15] The consequences of increased debt include foreclosure, car repossession, collection lawsuits, and debt collection harassment.[16] Second, as elders spend more of their income on debt payments, they inevitably spend less on savings and other resources to preserve income security and financial independence.[17] Finally, researchers are just beginning to quantify and capture the negative psychological, emotional, and other health-related consequences associated with debt.[18]

II. CAUSES AND CONSEQUENCES OF THE ELDER DEBT BOOM

Most consumers, including elders, tend to use credit cards as a plastic safety net, making essential purchases that they cannot otherwise afford.[19] Less clear, but most likely a contributing factor to increases in debt among older consumers is the use of credit cards to make discretionary purchases at a time when the consumers can afford those purchases or at least afford to make minimum payments on their cards. Most such consumers expect to pay back what they borrow.[20] These plans, however, can easily change, often as a result of unexpected adverse events.

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[15] *See, e.g.*, *Tide of Debt is Rising for the Elderly; Medical Costs High; Pensions Meager*, CHI. TRIB., July 8, 2004, at C3 (describing the situation of an eighty-four-year-old widowed retiree who lost her full-time nursing position, could find only short-term jobs, and was struggling to pay back about $11,000 in credit card debt); Suein L. Hwang, *Family Finance: More Seniors Are Piling Up Debt*, WALL ST. J., Feb. 18, 2004, at D2 (relating the story of an eighty-six-year-old former Wal-Mart employee who filed for bankruptcy after running up $83,000 in debt on twelve credit cards).

[16] *See generally* DEANNE LOONIN & JOHN RAO, NAT'L CONSUMER LAW CTR., GUIDE TO SURVIVING DEBT (2006).

[17] *See generally* JOHN GIST & CARLOS FIGUEIREDO, AARP, DEEPER IN DEBT: TRENDS AMONG MIDLIFE AND OLDER AMERICANS (2002), *available at* http://www.aarp.org/research/credit-debt/debt/aresearch-import-339-DD70.html (describing elders' increasing "debt burdens," or the percentage of income spent paying off debt). Moreover, the fewer private resources elders have available to pay expenses as they grow older, the more society has to pay to keep its older citizens from suffering and doing without basic necessities of life. *See* Peter G. Peterson, *Gray Dawn: The Global Aging Crisis*, 78 FOREIGN AFF. 42, 46–47 (1999).

[18] *See, e.g.*, Patricia Drentea & Paul J. Lavrakas, *Over The Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 522–23, 526–27 (2000) (suggesting that high credit card debt-to-income ratios may be significantly correlated with poor physical health); Barbara O'Neill et al., *Financially Distressed Consumers: Their Financial Practices, Financial Well-Being, and Health*, 16 FIN. COUNSELING & PLANNING 73, 83 (2005) (same).

[19] CTR. FOR RESPONSIBLE LENDING & DEMOS, A NETWORK FOR IDEAS AND ACTION, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 12 (2005), *available at* http://www.responsiblel ending.org/pdfs/DEMOS-101205.pdf (reporting that seven out of ten low- to middle-income households rely on credit cards as a safety net to pay for car repairs, basic living expenses, medical expenses or house repairs).

[20] *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON PRACTICES OF THE CONSUMER CREDIT INDUSTRY IN SOLICITING AND EXTENDING CREDIT

In addition, all consumers find themselves forced to navigate an increasingly complex marketplace that requires choosing quickly and often between complicated goods and services.[21] The effects of such market complexities may be especially troublesome with respect to seniors because of pervasive financial illiteracy among older Americans.[22] Finally, elders are particularly affected by shrinking income, increased expenses, easier access to credit, and erosion of the economic safety net.

A. Shrinking Income

Median income on average is much lower for households headed by persons over age sixty-five.[23] Although the percentage of older Americans living in poverty is lower than that of other age cohorts,[24] nearly half of all seniors would be living below the poverty line were it not for Social Security.[25]

The fact that the percentage of people over the age of sixty-two who receive more than half of their income from sources other than Social Security is shrinking "suggests that people are not saving enough to reduce reliance on Social Security in retirement."[26] Elder reliance on Social Security is especially troubling considering the likelihood of future reductions

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AND THEIR EFFECTS ON CONSUMER DEBT AND INSOLVENCY 16 (2006), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/bankruptcy/bankruptcybillstudy200606.pdf.

[21] *See* AARP, BEYOND 50.04: A REPORT TO THE NATION ON CONSUMERS IN THE MARKETPLACE 31 (2004), *available at* http://assets. aarp.org/rgcenter/consume/beyond_50_cons.pdf.

[22] *See* Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement Wellbeing* 3 (Univ. of Mich. Retirement Research Ctr., Working Paper No. 2005-108, 2005), *available at* http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp108.pdf (finding that "financial illiteracy is widespread among older Americans"); *see also* NAT'L CTR. FOR EDUC. STATISTICS, NAT'L ASSESSMENT OF ADULT LITERACY: A FIRST LOOK AT THE LITERACY OF AMERICA'S ADULTS IN THE 21ST CENTURY, NCES 2006-470, at 10 (2005), *available at* http://nces.ed.gov/naal/pdf/2006470.pdf (finding that adults age sixty-five and older had the lowest "quantitative" literacy rate of any age group in 2003).

[23] *See* CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 4 (2005) (reporting that the 2004 median income for elder-headed households was $24,509, compared with $50,923 for households headed by persons under age sixty-five). Furthermore, while median family incomes adjusted for inflation grew more than 10% over the past decade, incomes for those age fifty and older were actually lower in 2003 than in 1999. *See* AARP, THE STATE OF 50+ AMERICA 1 (2005), *available at* http://assets.aarp.org/rgcenter/econ/fif ty_plus_2005.pdf [hereinafter AARP, THE STATE OF 50+ AMERICA].

[24] *See* DENAVAS-WALT ET AL., *supra* note 23, at 10 (reporting that the poverty rate in 2004 was 12.7% for all people and families in the United States but only 9.8% for those age sixty-five and older).

[25] *See* ARLOC SHERMAN & ISAAC SHAPIRO, CTR. ON BUDGET AND POLICY PRIORITIES, SOCIAL SECURITY LIFTS 13 MILLION SENIORS ABOVE THE POVERTY LINE: A STATE-BY-STATE ANALYSIS 1 (2005), *available at* http://www.cbpp.org/2-24-05socsec.pdf ("[L]eaving aside Social Security income, nearly one of every two elderly people . . . has income below the poverty line.").

[26] *See* AARP, THE STATE OF 50+ AMERICA, *supra* note 23, at 7.

in Social Security[27] and the decline in other retirement income, such as private pensions.[28]

B. Higher expenses

Seniors face more and more years of expenses as they live increasingly longer.[29] Rises in housing costs, health care costs, energy costs and property taxes have all contributed to increased expenses among elders.

1. Housing Costs

Older adults devote a larger share of their expenditures to housing than to any other category of goods or services, including health care.[30] This trend is especially significant because elders of all income levels are more likely to be homeowners than are younger people; in 2005, the average homeownership rate for all American households was 68.8%, while the rate for all elder-headed households was 80.3%.[31]

A major reason for rising housing costs is that elders are increasingly likely to hold mortgages later in life.[32] Over the last two decades, it appears that Americans have carried more and more mortgage debt into their older years.[33] Even after accounting for inflation, mortgage debt owed

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[27] *See* CONG. BUDGET OFFICE, THE OUTLOOK FOR SOCIAL SECURITY 1 (2004), *available at* http://www.cbo.gov/showdoc.cfm?index=5530&sequence=1&from=0 (predicting that scheduled Social Security benefits may be reduced because outlays are growing faster than revenues, creating "significant annual deficits in the system").

[28] *See* AARP, THE STATE OF 50+ AMERICA, *supra* note 23, at 7 (reporting that pension income has stagnated, experiencing only a slight net increase over the last two decades and leaving more than half of seniors without coverage).

[29] *See* U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES 35–36 (2005), *available at* http://www.census.gov/prod/2006p ubs/p23-209.pdf (reporting that remaining life expectancy for sixty-five-year-olds had increased from twelve years in 1900 to eighteen years in 2000).

[30] *See* BARBARA A. BUTRICA ET AL., CTR. FOR RET. RESEARCH AT BOSTON COLL., UNDERSTANDING EXPENDITURE PATTERNS IN RETIREMENT 13 (2005), *available at* http://www.bc.edu/centers/crr/pa pers/wp_2005-03.pdf.

[31] U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY 58 (2005) *available at* http://www.census.gov/prod/2006pubs/h150 -05.pdf. The disproportionately high level of homeownership among elders persists for the lowest income households as well. *See id.* at 58, 430 (reporting that in 2005 the homeownership rate for elders living below the federal poverty line was 63.3%, compared with 42.6% for all American households below the poverty line).

[32] *See, e.g.*, GEORGE S. MASNICK ET AL., JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., EMERGING COHORT TRENDS IN HOUSING DEBT AND HOME EQUITY 1, 3 (2005), *available at* http://www.jchs.harvard.edu/publications/finance/w05-1.pdf.

[33] *See* WILLIAM C. APGAR & ZHU XIAO DI, JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., HOUSING WEALTH AND RETIREMENT SAVINGS: ENHANCING FINANCIAL SECURITY FOR OLDER AMERICANS 4–5 (2005), *available at* http://www.jchs.harvard.edu/publications/finance/w05-8.pdf (reporting that only 41.1% of owner households with heads aged fifty-five to sixty-four had paid off their mortgages in 2001, compared with 53.8% of their same-age counterparts in 1989).

by senior households almost quadrupled between 1989 and 2001,[34] by which time home mortgage debt accounted for 70% of the total debt of owners aged sixty-five and older, up nearly 20% from 1989.[35]

2. *Rising Out-of-Pocket Medical Costs*

Medical bills account for a rising proportion of elder consumer debt.[36] Older consumers averaged more than $3,500 in out-of-pocket health care expenses in 2002, an increase of 45% since 1992.[37] Not surprisingly, 22% of those over the age of sixty-five and 18% of those age fifty to sixty-four surveyed by the AARP in 2004 reported difficulty paying their medical bills.[38] On average, out-of-pocket medical spending accounts for 22% of seniors' incomes, with low-income seniors spending an even higher percentage.[39] Thus, medical debt is an important factor in driving seniors into the sort of disadvantageous, predatory financial loan arrangements discussed in detail below.[40]

3. *Energy and Utility Costs*

Evidence suggests that older Americans devote a higher percentage of total spending to residential energy costs than do younger consumers.[41] Nelda Barnett, a member of the AARP board of directors, recently asserted that one of every four low-income elder households spends at least 19% of its entire income on home energy bills, and that at least 10% of

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[34] Jennifer Bayot, *As Bills Mount, Debts on Homes Rise for Elderly*, N.Y. TIMES, July 4, 2004, § 1, at 1.

[35] APGAR & DI, *supra* note 33, at 7. Although mortgage debt rose for homeowners of all ages during this period, it did so at a significantly slower pace. *See id.* at 4–5.

[36] *See* AARP, THE STATE OF 50+ AMERICA, *supra* note 23, at 40. Even seniors with health insurance are not insulated from medical debt problems; in the 2004 AARP survey, 24% of those with Medicare and 13% of those with other coverage reported difficulty paying medical bills. *See id.*

[37] ADMIN. ON AGING, U.S. DEP'T OF HEALTH AND HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2003, at 13 (2003), *available at* http://www.aoa.gov/prof/Statistics/profile/2003/20 03profile.pdf.

[38] AARP, THE STATE OF 50+ AMERICA, *supra* note 23, at 40.

[39] *See* MCGHEE & DRAUT, *supra* note 11, at 6.

[40] *See* Robert W. Seifert, *The Demand Side of Financial Exploitation: The Case of Medical Debt*, 15 HOUSING POL'Y DEBATE 785, 786 (2004) (postulating that the level of medical debt can be used as an indicator of the demand for predatory financial services); *see also infra* Part II.C.

[41] *See The Impact of Energy Prices on Older Americans: Hearing Before the S. Spec. Comm. on Aging*, 109th Cong. 28–40 (2005) (statement of Nelda Barnett, Member, AARP Board of Directors) [hereinafter Barnett Statement]; BUTRICA ET AL., *supra* note 30, at 17 (citing a study of consumption patterns after retirement that found utilities represent the largest spending category, outweighing property taxes, mortgage payments and housing maintenance, insurance, and rent).

elders said they have limited or gone without food, medical services, or prescription drugs in order to pay higher energy bills.[42]

4. *Property Taxes*

Housing prices in the United States increased dramatically between 1995 and 2005.[43] As housing prices surged, so did homeowners' property tax bills.[44] Recent statistics confirm that this trend continues.[45]

Residential property taxes can be regressive, meaning they take a larger percentage out of the income of the poor because home values typically represent a larger percentage of income as incomes decrease.[46] In other words, property tax increases are especially difficult to bear for low-income homeowners because their incomes have not kept pace with the sharp increase in the value of their homes. Because 63.8% of seniors living below the federal poverty line are homeowners,[47] rising property taxes have a particularly negative impact on seniors.[48]

C. Easy Access to Dangerous Credit and Deregulation of the Marketplace

As of the second quarter of 2006, consumer debt in the United States had climbed to $2.4 trillion, an increase of $461.8 billion since 2001.[49] One

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[42] Barnett Statement, *supra* note 41, at 32–34.

[43] *See* FREDDIE MAC, CONVENTIONAL MORTGAGE HOME PRICE INDEX: Q3 2000 RELEASE, *available at* http://www.freddiemac.com/finance/cmhpi/past/2000/q3/census9.xls (reporting that housing prices increased 29.7% between 1995 and 2000); FREDDIE MAC, CONVENTIONAL MORTGAGE HOME PRICE INDEX: Q3 2005 RELEASE, *available at* http://www.freddiemac.com/finance/cmhpi/past/2005/q3/census9.xls (reporting that housing prices increased 55.2% between 2000 and 2005).

[44] *See* MICHAEL LORELLI, TAX FOUND., SPECIAL REPORT: STATE AND LOCAL PROPERTY TAXES 3 (2001), *available at* http://www.taxfoundation.org/publications/show/136.html (stating that between 1980 and 2001 state and local property taxes increased at an average annual rate of 3.2%).

[45] *See* U.S. CENSUS BUREAU, TABLE 1: NATIONAL TOTALS OF STATE AND LOCAL TAX REVENUE, BY TYPE OF TAX (2006), *available at* http://ftp2.census.gov/govs/qtax/table1.xls (reporting that between the beginning of 2001 and the close of 2004, state and local property tax revenue rose 32.5%).

[46] *See* LORELLI, *supra* note 44, at 3 (noting that the combination of the rapid rise in home values and regressive property taxes have pushed up tax burdens "without regard to 'ability to pay'").

[47] *See* U.S. CENSUS BUREAU, *supra* note 31, at 430.

[48] *See, e.g.*, Robert C. Christopherson, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 ELDER L.J. 195, 201 (2005) (describing an elderly Massachusetts woman with only $12,000 in annual income who was struggling to pay property taxes on a house that had increased in value from $173,000 to $289,000 between 1996 and 2003); Yilu Zhao, *Rising Home Values Creating a Tax Bind for Elderly in U.S.*, INT'L HERALD TRIB., May 1, 2003, at 3 (reporting that a retired Connecticut couple with a fixed annual income of $18,000 had difficulty paying their $5,100 annual property tax on a house which had increased in value from $200,000 in 1995 to $380,000 in 2002).

[49] FED. RESERVE BD., FEDERAL RESERVE STATISTICAL RELEASE, G.19 CONSUMER

critical factor driving higher debt loads is the greater availability of credit generally. However, the problem is not just that too much credit is available, but also that the wrong kind of credit is aggressively pushed in the subprime mortgage, small loan, and credit card markets. The following sections explain these markets and discuss their effect upon elder consumers.

1. Causes of Predatory Lending: Preemption and Deregulation of State Credit and Consumer Protection Laws

The National Bank Act of 1864[50] began the regulation of interest rates by setting a ceiling on rates charged by federally chartered banks.[51] The Home Owners' Loan Act,[52] passed during the Depression and intended to bolster the home loan market during periods of great distress, provides a similar ceiling for federal savings associations.[53] These usury caps protected consumers as long as the states retained their historically strong stance against usury.[54] However, in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*,[55] the Supreme Court created the "exportation doctrine," which permits banks to locate in a state with no usury caps and few consumer credit protections and make loans to borrowers beyond its borders under the legal regime of the home state.[56] *Marquette* thus effectively federalized the absence of usury protections in the few states, such as Delaware and South Carolina, that were willing to completely deregulate.

On a parallel track, congressional deregulation of the mortgage marketplace began with the passage of two laws in the early 1980s: the Depository Institution Deregulation and Monetary Control Act of 1980 ("DIDMCA")[57] and the Alternative Mortgage Transaction Parity Act of 1982 ("AMTPA").[58] DIDMCA trumps the usury caps on state interest ceil-

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CREDIT AUGUST 2006, at 1 (2006), *available at* http://www.federalreserve.gov/releases/g19/current.

[50] 38 Cong. Ch. 106, 13 Stat. 99 (1864) (codified in scattered sections of 12 U.S.C.).

[51] Currently, the interest rate caps are the higher of (1) the "interest rate allowed by the laws of the State . . . where the bank is located" or (2) 1% above the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the district where the bank is located. *See* 12 U.S.C. § 85 (2000).

[52] 12 U.S.C. §§ 1461–68 (2000).

[53] *See id.* § 1463(g) (2000).

[54] *See* Margot Saunders & Alys Cohen, *Federal Protection or Consumer Credit: The Cause or the Cure for Predatory Lending?* 4–8 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper Series, Paper No. BABC 04-21, 2004), *available at* http://www.jchs.harvard.edu/publications/finance/babc/babc_04-21.pdf (discussing the history of usury as well as the forces that pushed states to at least partially deregulate interest rates).

[55] 439 U.S. 299 (1978).

[56] *See id.* at 313–14; ELIZABETH RENUART & KATHLEEN E. KEEST, THE COST OF CREDIT: REGULATION, PREEMPTION, AND INDUSTRY ABUSES § 3.4.5.1 (2004 & Supp. 2006) (defining the *Marquette* "exportation doctrine" as permitting a bank chartered in one state to apply that state's usury laws when making loans in other states).

[57] Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of 12 U.S.C.).

[58] 12 U.S.C. §§ 3801–04 (2000).

ings for loans secured by first mortgages on homes and preempts state limitations on a lender's ability to assess points, finance charges, or other charges related to the annual percentage rate.[59] AMTPA eliminated the ability of states to regulate the terms of "alternative" mortgages,[60] resulting in an increase in the use of mortgage terms that had long been seen as dangerous and potentially exploitative of consumers.[61] Negative amortization clauses, variable interest rates, balloon payment provisions,[62] and, until January 2003, prepayment penalties, all could be included in mortgages regardless of state law restrictions.[63]

DIDMCA and AMTPA were passed at a time of record-high interest rates, when lenders were often unable to make market-rate loans because of state usury laws.[64] While the intent behind both of these laws was to loosen the effects of state limits on interest rates and loan terms that were temporarily strangling access to credit necessary to achieve homeownership, the effect of the laws was far more pervasive. Their direct result was to preempt state consumer credit laws applicable to mortgages unless states acted within a short time frame to opt out. Only a small minority of states acted quickly enough to maintain this prerogative.[65]

The pressure on the states to buckle intensified when the federal banking agencies ramped up the preemption rights for their constituent depositories. The Office of the Comptroller of the Currency ("OCC") and the Office of Thrift Supervision ("OTS") have, via administrative fiat, aggressively pushed preemption of state laws for national banks and savings associations, especially since 1996.[66]

The preemption rights accorded federal depositories by the OTS and the OCC make it very difficult for states to protect their consumers from

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[59] *See* 12 U.S.C. § 1735f-7a(a)(1).

[60] *See* 12 U.S.C. §§ 3802–03.

[61] *See* Cathy Lesser Mansfield, *The Road to Subprime "Hel" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. Rev. 473, 527–32 (2000) (discussing the rise of the predatory subprime mortgage market as a result of the freedom allowed by the first lien preemptions in both AMTPA and DIDMCA).

[62] A balloon payment is a large payment that comes due during (usually at the end of) the loan term. *See* DEANNE LOONIN & JOHN RAO, NAT'L CONSUMER LAW CTR., GUIDE TO SURVIVING DEBT 404 (2005 ed.).

[63] Convinced that preempting state restrictions on prepayment penalties was facilitating predatory lending and the bleeding of home equity, the Office of Thrift Supervision rescinded the prepayment rule, effective January 2003. *See* Alternative Mortgage Transaction Parity Act; Preemption, 67 Fed. Reg. 60,542 (Sept. 26, 2002) (codified at 12 C.F.R. pts. 560, 590, 591).

[64] *See* Mansfield, *supra* note 61, at 473–511.

[65] *See* ELIZABETH RENUART & KATHLEEN E. KEEST, THE COST OF CREDIT: REGULATION, PREEMPTION, AND INDUSTRY ABUSES § 3.9.4.1 (3d ed. 2005).

[66] *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System*, 23 ANN. REV. BANKING & FIN. L. 225, 235–37 (2004) (arguing that the OCC's 2004 preemption regulations governing national banks represent an attempt to achieve preemption parity with federal savings associations).

abusive practices in the credit marketplace. For example, OCC and OTS decisions have trumped state anti-predatory lending laws enacted in recent years.[67] Thus, national banks, federal savings associations, and their operating subsidiaries can almost completely ignore these state laws.

2. *Changes in the Tax Code*

In 1986, Congress changed the tax code to permit taxpayers to deduct consumer loan interest only if the loan is secured by the home.[68] This allowed the lending industry to sell its products by advertising to homeowners that borrowing against home equity is sensible economic planning. Unfortunately, such borrowing is often far from sensible for elders for two reasons. First, seniors living on retirement income are likely to pay taxes at the tax system's lowest tax rates and therefore experience only a small benefit from the interest deduction.[69] Second, it is almost never financially sound to transform short-term, unsecured loans into long-term debt secured by the home because this places the home at greater risk of loss.[70]

Allowing deduction of consumer loan interest only on home equity loans has also driven predatory lending. As many now spend more than ever before on interest, mortgage loans are often marketed as a way to pay off credit cards and other unsecured debt by rolling several monthly payments into "one easy" payment.[71] By adding this debt to a mortgage loan, lenders can charge percentage-based fees on a higher principal amount, resulting in increased overall fees. The lender also earns more interest by charging interest on a higher principal over the life of the loan. Meanwhile, the homeowner has lost equity and is left with a higher monthly payment.[72]

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[67] *See, e.g.*, Letter from Carolyn J. Buck, Chief Counsel, OTS, Preemption of New Mexico Home Loan Protection Act (Sept. 2, 2003), *available at* http://www.ots.treas.gov/docs/5/56306.pdf; Notice of OCC Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003) (relating to the law of Georgia); Letter from Carolyn J. Buck, Chief Counsel, OTS, Preemption of New Jersey Predatory Lending Act (July 22, 2003), *available at* http://www.ots.treas.gov/docs/5/56305.pdf; Letter from Carolyn J. Buck, Chief Counsel, OTS, Preemption of New York Predatory Lending Law (Jan. 30, 2003), *available at* http://www.ots.treas.gov/docs/5/56302.pdf; Letter from Carolyn J. Buck, Chief Counsel, OTS, Preemption of Georgia Fair Lending Act (Jan. 21, 2003), *available at* http://www.ots.treas.gov/docs/5/56301.pdf.

[68] *See* Tax Reform Act of 1986, 26 U.S.C. § 163(h) (2000).

[69] *See* JOHN GIST, AARP, PUB. POLICY INST., A PROFILE OF OLDER TAXPAYERS 1 (2002) *available at* http://www.aarp.org/research/economy/taxation/aresearch-import-342-DD76.html.

[70] LOONIN & RAO, *supra* note 16, at 85–86.

[71] Elizabeth Renuart, *An Overview of the Predatory Lending Process*, 15 HOUSING POL'Y DEBATE 467, 480 n.32 (2004).

[72] For example, paying off a credit card bill of $5,000 at 18% APR over sixty months requires a monthly payment of about $125 because this high APR will generate $2,500 in interest. On the other hand, if one adds the $5,000 to a $100,000 mortgage loan for a total principal of $105,000 at a 7% APR for a term of thirty years, the $5,000 generates additional interest of $6,617 and raises the monthly payment on the credit card portion by

3. Prime, Subprime, and Predatory Markets

The home mortgage market is divided into three subparts: prime, subprime, and predatory.[73] The prime or "conventional" lending market serves homeowners with good credit scores, typically above 650,[74] who qualify as "A" borrowers for the best rate offered by the lender.[75]

The subprime mortgage market, for those whose credit is at all blemished and others who are steered to unconventional lenders, can be very different. The subprime market provides credit for "A- to D" borrowers with FICO scores under 650.[76] Refinance mortgages account for about 80% of the subprime market,[77] although in at least some cities the portion of home purchases financed by subprime loans is rising.[78] Subprime lenders charge higher interest rates, points, and fees than do their prime counterparts.[79] Significantly, up to half of all subprime borrowers could qualify for lower cost conventional financing.[80]

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about $30 to $155.

[73] Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1277–78 (2002).

[74] A credit score is a number lenders use to help them decide how likely it is that a borrower will repay the loan in a timely way. *See* FAIR ISAAC CORP., UNDERSTANDING YOUR CREDIT SCORE 3 (2006), *available at* http://www.myfico.com/Offers/myFICO_UYCS%20booklet.pdf. The Fair Isaac Corporation ("FICO") has developed the most widely used credit scoring system, which is based solely on information in consumer credit reports maintained by the credit reporting agencies. *Id.*

[75] *See* U.S. DEP'T OF TREASURY AND U.S. DEP'T OF HOUS. AND URBAN DEV., JOINT REPORT ON RECOMMENDATIONS TO CURB PREDATORY MORTGAGE LENDING 33 (2000), *available at* http://www.huduser.org/publications/pdf/treasrpt.pdf [hereinafter HUD/TREASURY REPORT 2000].

[76] Renuart, *supra* note 71, at 474.

[77] *See* KENNETH TEMKIN ET AL., URBAN INST., SUBPRIME MARKETS, THE ROLE OF GSES, AND RISK-BASED PRICING 4 (2002), *available at* http://huduser.org/Publications/pdf/subprime.pdf.

[78] *See, e.g.*, JIM CAMPEN, MAURICIO GASTON INST. FOR LATINO CMTY. DEV. AND PUB. POLICY, UNIV. OF MASS. AT BOSTON, BORROWING TROUBLE? V: SUBPRIME MORTGAGE LENDING IN GREATER BOSTON, 2000–2003, at 4 (2005), *available at* http://www.masscommunityandbanking.org/PDFs/BorrowingTrouble5.pdf (reporting that subprime home purchase loans accounted for 11.3% of the Boston area subprime loan market in 2003, up from 7.6% in 2002).

[79] *See, e.g.*, ERIC STEIN, COAL. FOR RESPONSIBLE LENDING, QUANTIFYING THE ECONOMIC COST OF PREDATORY LENDING: A REPORT FROM THE COALITION FOR RESPONSIBLE LENDING 8 (2001), *available at* http://www.responsiblelending.org/pdfs/Quant10-01.pdf (reporting that 80% of subprime loans contain prepayment penalties compared with only 2% of loans in the competitive prime market); HUD/TREASURY REPORT 2000, *supra* note 75, at 93 (showing a 70% prepayment penalty rate for subprime loans and only a 2% penalty rate for prime loans).

[80] *See* FREDDIE MAC, AUTOMATED UNDERWRITING REPORT Ch. 5 (1996), *available at* http://www.freddiemac.com/corpo rate/reports/moseley/chap5.htm; *Half of Subprime Loans Categorized as 'A' Quality*, INSIDE B&C LENDING, June 10, 1996, at 7; *see also* Edward Gramlich, *Subprime Mortgage Lending*, NAT'L MORTGAGE NEWS, May 31, 2004, at 4 ("[I]t is noteworthy that about half of subprime mortgage borrowers have FICO scores above [a] threshold [of 620], indicating that a good credit history alone does not guarantee prime status." (quoting Federal Reserve Board Governor Edward Gramlich)).

The predatory market generally exists as a subset of the subprime market. Predatory lending can be described as:

> the use by lenders of deceptive, manipulative, or coercive practices in order to induce borrowers to accept loans that (1) have interest rates or fees significantly above the current market rate given the risk profile of the borrowers or other terms significantly worse than the market norm offered by legitimate lenders, or (2) which leave the borrowers worse off than they would have been without any new loans, or (3) both.[81]

Examples of "onerous" predatory lending practices include: aggressive targeting of neighborhoods that often include older and minority homeowners; steering consumers to higher-rate lenders; paying kickbacks to mortgage brokers to motivate them to push loans involving unnecessary or harmful debt consolidation; refinancing lower-rate mortgages; shifting unsecured shorter-term debt into mortgages, sometimes resulting in the making of loans in excess of 100% loan-to-value ("LTV"); flipping mortgage loans to increase profit through the collection of repeat financed points and fees; and making loans that are simply unaffordable.[82] Furthermore, brokers and lenders sometimes falsify a borrower's information, especially regarding income level, or "qualify" a homeowner for a loan by inflating the value of the home through a partnership with an unscrupulous appraiser.[83] Such predatory lending practices combine to take a severe financial toll on homeowners every year.[84]

Predatory lenders find fuel for their lending primarily through investors and Wall Street.[85] The capital flows to lenders through "securitization," the process of pooling loans and transferring them to an assignee, which holds them and then issues certificates for sale to investors, oversees the servicing, and pays investors.[86] A legal doctrine called the "holder in due

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[81] Kurt Eggert, *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693, 699–700 (2003) (citation omitted); *see also* Engel & McCoy, *supra* note 73, at 1260 (describing predatory lending as "a catalogue of onerous lending practices . . . often targeted at vulnerable populations and result[ing] in devastating personal losses").

[82] *See* Patricia Sturdevant & William J. Brennan, Jr., *A Catalogue of Predatory Mortgage Lending Practices*, THE CONSUMER ADVOCATE (Nat'l Ass'n of Consumer Advocacy, Wash., D.C.), Nov. 1999, at 4 (outlining such practices).

[83] *See id.* Lenders and brokers sometimes even forge necessary signatures. *See id.* In addition, the lure of first-time homeownership helps to fuel "property flipping," the purchase and quick resale of the property at inflated prices. *See* Renuart, *supra* note 71, at 480–85.

[84] *See* STEIN, *supra* note 79, at 2 (estimating that U.S. borrowers lose $9.1 billion annually as a result of predatory lending).

[85] *See* Diana B. Henriques & Lowell Bergman, *Mortgaged Lives: Profiting From Fine Print With Wall Street's Help*, N.Y. TIMES, Mar. 15, 2000, at A1.

[86] *See* Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 535–45 (2002) [hereinaf-

course" rule shields this loan assignee and ultimately the investors against liability for the predatory nature of the loans.[87] Predatory lenders may also get out of the predatory lending business by filing for bankruptcy and thus avoid liability to consumers.[88] Even assuming homeowners can find an attorney to sue for their losses or to defend against a foreclosure, it is very difficult to hold anyone responsible.[89] Moreover, some lenders suppress the consumer's right to a judicial forum by inserting non-negotiable mandatory arbitration clauses in the mortgage documents.[90]

Foreclosures are a key indicator of the health of the home lending market. The foreclosure rates for subprime mortgage loans are much higher than the rates for foreclosure prime loans.[91] After controlling for certain neighborhood demographics and economic conditions, one study found that subprime loans in the Chicago area led to foreclosure at twenty or more times the rate that prime loans did.[92]

Once a homeowner is in distress and facing foreclosure, yet another predatory practice may confront her: a foreclosure "rescue" deal.[93] These take three forms: (1) a "phantom helper" charges outrageous fees either for light-duty phone calls and paperwork the homeowner could have easily performed or for more robust representation that never materializes;[94] (2) a "bailout," under which the homeowner surrenders title to the house

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ter Eggert, *Predatory Lending*].

[87] *See* Kurt Eggert, *Held Up in Due Course: Codification and the Victory of Form Over Intent in Negotiable Instrument Law*, 35 CREIGHTON L. REV. 363, 375 (2002) [hereinafter Eggert, *Codification*] ("[T]he holder in due course doctrine provides that if one who holds an instrument that has been indorsed to him is not chargeable with knowledge of or participation in certain wrongful acts, then most of the defenses that the maker of the note had to the original beneficiary of the note cannot be used against the new holder.").

[88] Eggert, *Predatory Lending*, *supra* note 86, at 592–604 (chronicling the rise and demise of First Alliance's Mortgage and concluding that homeowners victimized by First Alliance predatory lending practices were unlikely to obtain redress because First Alliance had filed for bankruptcy in an effort to "stymie" litigation).

[89] Not only does the holder in due course rule ordinarily eliminate liability for the loan holder, but the lenders or brokers may have no assets or may have disappeared.

[90] F. PAUL BLAND, JR. ET AL., NAT'L CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS § 1.3.1 (2004 ed. & Supp. 2005).

[91] *See* MORTGAGE BANKERS ASS'N OF AM., NATIONAL DELINQUENCY SURVEY, (1998–2004, 2006), *available at* http://www.mortgagebankers.org/ResearchandForecasts/ProductsandSurveys/NationalDelinquencySurvey.htm (reporting that the national subprime foreclosure rate (1) ranged from six to sixteen times higher than the prime foreclosure rate between 1998 and 2004 and (2) was 8.5 times higher than the prime foreclosure rate as of the second quarter of 2006). This Survey, available by subscription only, bases delinquency and foreclosure statistics on a sample of more than 41 million U.S. mortgage loans. *See id.*

[92] *See* DANIEL IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., RISKY BUSINESS: AN ECONOMETRIC ANALYSIS OF THE RELATIONSHIP BETWEEN SUBPRIME LENDING AND NEIGHBORHOOD FORECLOSURES, at i (2004), *available at* http://woodstockinst.org/document/riskybusiness.pdf.

[93] *See* STEVE TRIPOLI & ELIZABETH RENUART, NAT'L CONSUMER LAW CTR., DREAMS FORECLOSED: THE RAMPANT THEFT OF AMERICANS' HOMES THROUGH EQUITY-STRIPPING FORECLOSURE "RESCUE" SCAMS 8–9 (2005), *available at* http://www.nclc.org/news/ForeclosureReportFinal.pdf.

[94] *Id.* at 8.

under the belief that she will be able to remain as a renter and buy it back over the next few years, even though the buyback is usually impossible;[95] and (3) a "bait-and-switch," in which the homeowner does not realize that she is surrendering ownership of the house in exchange for a "rescue."[96]

4. Older Homeowners Are Targeted

Elders' financial problems are often compounded by predatory lenders. As noted above, over 80% of all heads of households over the age of sixty-five are homeowners.[97] Elders as a group are thus sitting on a large amount of home equity. The predatory market is a "push" market, in which the lenders shop for the homeowners, whereas in most markets homeowners actively shop for loans.[98] Thus, lenders target the equity in elders' homes by offering loans to pay for long-neglected home repairs, credit card bills, property and municipal taxes, or even medical bills.[99]

Although publicly available data on the incidence of subprime and predatory lending is sparse,[100] the information gap is closing slightly now because the Home Mortgage Disclosure Act ("HMDA") now requires many lenders to report certain information about their subprime lending portfolios.[101] Nonetheless, it is still difficult to get age-specific information because unlike race, gender, and other classifications, age is not a required data collection category.[102]

Despite these limitations, there is significant evidence supporting the conclusion that subprime and predatory lending disproportionately im-

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[95] *Id.*

[96] *Id.* at 8–9.

[97] *See supra* note 31 and accompanying text.

[98] *See, e.g.*, Conseco Fin. Serv. Corp. v. N. Am. Mortgage Co., 381 F.3d 811, 814–15 (8th Cir. 2004) (describing how Conseco targets particular homeowners who might "benefit" from its debt consolidation loans); *see also Protecting Homeowners: Preventing Abusive Lending While Preserving Access to Credit: H. Hearing Before the Subcomm. on Financial Institutions and Consumer Credit and the Subcomm. on Housing and Community Opportunity of the Comm. on Financial Services*, 108th Cong. 31–33 (2003) (statement of Thomas J. Miller, Att'y Gen. of Iowa) (stating that employees of lenders may be given quotas or incentives to bring in new customers for their employers).

[99] *See Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearing Before the S. Spec. Comm. on Aging*, 105th Cong. 31 (1998) (Statement of "Jim Dough," former employee of predatory lender) ("In fact, my perfect customer would be an uneducated widow who is on a fixed income, hopefully from her deceased husband's pension and Social Security, who has her house paid off, is living off of credit cards, but having a difficult time keeping up with her payments and who must make a car payment in addition to her credit card payments.").

[100] Lenders typically will not provide such data to independent researchers, claiming it is proprietary. In limited circumstances, researchers can pay a high price to obtain data from one company, Loan Performance. For studies based on that data, see, for example, Quercia et al., *Assessing the Impact of North Carolina's Predatory Lending Law*, 15 HOUSING POL'Y DEBATE 573 (2004).

[101] *See* 12 U.S.C. § 2803 (2000); *see also* DEANNE LOONIN & CHI CHI WU, CREDIT DISCRIMINATION § 4.4.5 (4th ed. 2005 & Supp. 2006).

[102] *See* 12 U.S.C. § 2803(b)(4) (2000).

pact seniors.[103] Moreover, a report by the AARP reveals that unscrupulous brokers often steer seniors toward predatory loans.[104] In that study, borrowers with broker-originated loans were more likely to have loans with prepayment penalties, to refinance frequently, and to be dissatisfied with their loans than were borrowers with lender-originated loans.[105]

5. *Payday Loans and Overdraft Loans*

A large number of consumers are without sufficient credit card limits or access to overdraft lines of credit to meet their emergency needs for relatively small, unsecured loans.[106] As a result, the payday and overdraft loan markets have grown significantly in the last two decades.[107]

Nationally, as of 2004, about 22,000 payday storefronts were open for business and collecting about $6 billion in fees from consumers.[108] Payday loans typically range from $100 to $500.[109] The consumer of a payday loan provides the lender with a live or postdated check written on her bank account for the amount borrowed, plus a loan fee.[110] The loan term is usually two weeks, but while the consumer could theoretically pay off the loan at the end of that term, many are unable to do so and instead pay another fee to extend the loan.[111] Lenders market the payday loan as a

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[103] *See* HUD/TREASURY REPORT 2000, *supra* note 75, at 36 (reporting that borrowers over the age of fifty-five make up 35% of subprime borrowers); *see also* Howard Lax et al., *Subprime Lending: An Investigation of Economic Efficiency*, 15 HOUSING POL'Y DEBATE 533, 545, 564 (2004) (noting that borrowers sixty-five and older are five times more likely to obtain a subprime loan than are borrowers under age thirty-five); CONSUMERS UNION S.W. REG'L OFFICE, ELDERLY IN THE SUBPRIME MARKET 3 (2002), *available at* http://www.consumersunion.org/pdf/elderly-sub.pdf (analyzing Texas refinance loans and finding that subprime penetration was greater in tracts with an older population).

[104] KELLIE K. KIM-SUNG & SHARON HERMANSON, AARP PUB. POLICY INST., EXPERIENCES OF OLDER REFINANCE MORTGAGE LOAN BORROWERS: BROKER- AND LENDER-ORIGINATED LOANS 3 (2003), *available at* http://assets.aarp.org/rgcenter/post-import/dd83_loans.pdf (finding that 70% of borrowers with broker-originated loans relied heavily on their brokers to find the best mortgage, compared with just 52% of borrowers with lender-originated loans).

[105] *See id.* at 3–4.

[106] Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Socio-Economic Role of Usury Law in Today's Society*, 51 S.C. L. REV. 589, 625–26 (2000).

[107] *See id.* at 625–26, 639–44; CTR. FOR RESPONSIBLE LENDING, OVERDRAFT LOANS TRAP BORROWERS IN DEBT: SMALL LOAN BUSINESS MODEL MUST BE RESPONSIBLE 1 (2004), *available at* http://www.responsiblelending.org/pdfs/ib018-Overdraft_Loans_Trap-0904.pdf.

[108] *See* JEAN ANN FOX & ANNA PETRINI, CONSUMER FED'N OF AM., INTERNET PAYDAY LENDING: HOW HIGH-PRICED LENDERS USE THE INTERNET TO MIRE BORROWERS IN DEBT AND EVADE STATE CONSUMER PROTECTIONS 6 (2004), *available at* http://www.consumerfed.org/pdfs/ Internet_Payday_Lending113004.pdf.

[109] *See* JEAN ANN FOX, CONSUMER FED'N OF AM., UNSAFE AND UNSOUND: PAYDAY LENDERS HIDE BEHIND FDIC BANK CHARTERS TO PEDDLE USURY 2 (2004), *available at* http://www.consumerfed.or g/pdfs/pdlrentabankreport.pdf.

[110] *See id.* at 2–3.

[111] *See id.* Lenders do not evaluate the consumer's ability to repay when extending this type of credit. *See id.* at 3.

quick and easy way to get cash until the next payday.[112] However, payday loans' high fees, coupled with their short terms and continuous rollovers, as well as the lenders' failure to assess ability to repay, make this product extremely costly for consumers.[113] Nevertheless, payday lending is currently legal in all but about twelve states.[114]

Not to be left out of the revenue stream provided by expensive small loans, a growing number of banks and other financial institutions have jumped on the payday loan bandwagon, calling these loans either "bounce" or "overdraft protection" programs.[115] These banks encourage consumers to overdraw their bank accounts by covering checks when the funds in their accounts are insufficient, allowing overdrafts at ATMs for cash withdrawals, and authorizing purchases made with debit cards using overdrawn funds.[116] Banks then charge high penalty fees for each overdraft, and some also impose a per-day fee until the account's holder regains a positive balance.[117] Moreover, like payday lenders, these banks do not evaluate their customers' ability to repay at the time the funds are extended. Overdraft fees can thus trap borrowers in a cycle of high-cost debt.[118] Bounce loan programs are a large income drain for borrowers, with total costs of more than $10 billion per year.[119]

Small loan products such as payday loans and overdraft loans can have a significant negative effect on older persons because they are often marketed to recipients of federal benefits such as Social Security. Payday and overdraft loans can be "secured" by the steady federal income that is

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[112] *See, e.g.*, USFastCash.com, Need Cash?, https://usfastcash.com/?promo_id=28838&promo_sub_code=cash_overnight (last visited Nov. 19, 2006) (advertising "fast cash" of up to $500 with "no credit checks," "no paper hassles," and a response time of less than an hour for online applications).

[113] KEITH ERNST ET AL., CTR. FOR RESPONSIBLE LENDING, QUANTIFYING THE ECONOMIC COST OF PREDATORY PAYDAY LENDING 2 (2003), *available at* http://www.responsiblelending.org/pdfs/ CRLpaydaylendingstudy121803.pdf (estimating that payday loans cost consumers approximately $3.4 billion annually).

[114] *See* ELIZABETH RENUART & KATHLEEN E. KEEST, NAT'L CONSUMER LAW CTR., THE COST OF CREDIT: REGULATION, PREEMPTION, AND INDUSTRY ABUSES § 7.5.5.5 (3d ed. 2005 & Supp. 2006).

[115] *See* NAT'L CONSUMER LAW CTR. ET AL., COMMENTS ON THE FED. RESERVE BD.'S PROPOSED AMENDMENTS TO REGULATION DD AND PROPOSED OVERDRAFT PROTECTION GUIDANCE 2–3 (2004), *available at* http://www.nclc.org/action_agenda/bounce_loans/content/BounceLoanComments8_6_04.pdf.

[116] *See id.* at 4–5.

[117] *See* NAT'L CONSUMER LAW CTR. ET AL., COMMENTS ON THE FEDERAL RESERVE BOARD'S PROPOSED REVISIONS TO OFFICIAL STAFF COMMENTARY TO REGULATION Z TRUTH IN LENDING REGARDING OPEN END CREDIT AND HOEPA TRIGGERS AND SOLICITATION FOR COMMENTS ON BOUNCE PROTECTION PRODUCTS § IV (2003), *available at* http://www.nclc.org/initiatives/test_and_comm/frb.shtml (documenting overdraft fees ranging from $25 to $35, regardless of the amount of the overdraft, and per day fees of between $2 and $5).

[118] *See* WASH. DEP'T OF FIN. INST., OVERDRAFT PROTECTION PROGRAMS 4 (2003) (finding that about 25% of bounce borrowers are charged loan fees under these programs at least twice a month).

[119] JACQUELINE DUBY ET AL., CTR. FOR RESPONSIBLE LENDING, HIGH COST & HIDDEN http://www.responsiblelending.or g/pdfs/ip009-High_Cost_Overdraft-0505.pdf.

often electronically deposited into seniors' bank accounts. A recent California lawsuit focused on this problem, addressing a major bank's practice of paying itself overdraft fees from accounts containing Social Security or Supplemental Security Income funds.[120] The jury in *Miller* awarded over $75 million to the class of more than one million people who had bank accounts with the defendant bank to compensate for the bank's practice of deducting overdraft fees from accounts holding these funds.[121]

The AARP has been concerned about the use of payday loans by older consumers for several years.[122] In 2000, the AARP released a model payday loan law designed to protect consumers from the exorbitant costs and other problems associated with this product.[123]

D. Deregulation of the Credit Card Industry, Resulting Fee Income, and Credit Card Abuses

Credit card deregulation has not only facilitated predatory lending,[124] but has also contributed to spiraling credit card debt for Americans. As a result of credit card deregulation, which began with the Supreme Court's 1978 decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*,[125] national banks frequently established their headquarters in states, such as Delaware and South Dakota, which had eliminated or raised their usury limits. Doing so enabled them to legally charge

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[120] *See* Miller v. Bank of Am. N.T. & S.A., No. CGC-99-301917, 2004 WL 3153009, at *1 (Cal. App. Dep't Super. Ct. Dec. 30, 2004).

[121] *See id.* at *2.

[122] *See* SHARON HERMANSON & GEORGE GABERLAVAGE, AARP, THE ALTERNATIVE FINANCIAL SERVICES INDUSTRY 6 (2001), *available at* http://www.aarp.org/research/credit-debt/credit/aresearch-import-198-IB51.html (expressing concern over the unfair practices in the payday loan market); *see also* RACHELLE CUMMINS, AARP, PAYDAY LOANS IN SOUTH CAROLINA: WHAT CREDIT COUNSELORS SAY 2 (2005), *available at* http://assets.aarp.org/rgcenter/post-import/sc_credi t.pdf (finding that nine of thirteen credit counselors surveyed in South Carolina reported that up to 20% of their clients who had payday loans were over fifty, and that two counselors noted that up to 60% of their clients were in that category).

[123] *See* ELIZABETH RENUART, AARP, PAYDAY LOANS: A MODEL STATE STATUTE 11–24 (2000), *available at* http://assets.aarp.org/rgcenter/consume/d16954_payday.pdf.

[124] *See supra* Part II.C.1.

[125] 439 U.S. 299, 301 (1978) (allowing banks to charge out-of-state consumers the interest rate permitted in their home states).

interest rates that would have been impermissible in other states.[126] And, from 1978 to 1995, credit card debt increased sixfold to $300 billion.[127]

Moreover, in 1996, the Supreme Court paved the way for credit card banks to increase their fee income stream even more dramatically.[128] In *Smiley*, the Court approved of the OCC's definition of "interest,"[129] which included a number of credit card charges, such as late payment, over-limit, cash advance, returned check, annual, and membership fees.[130] As a result, national banks and other depositories can charge any fee in any amount when conducting inter-state credit card lending, as long as their home states' laws permit the fees and the fees are within the OCC's definition of "interest." Uncapping the amount of fees that credit card banks can charge nationwide greatly diminished the ability of states to enforce their usury laws and paved the way for credit card banks to raise the amount of fees or to impose new fees at their discretion. After *Smiley*, banks rushed to increase late charges and over-limit fees, and these fees more than doubled within a decade.[131]

Americans rely heavily on credit cards. Three-quarters of all households have at least one credit card,[132] and there are now almost 1.5 billion cards in circulation[133]—more than a dozen credit cards for every household in the country.[134] Undoubtedly, credit cards provide a convenient source

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[126] *See, e.g.*, Indep. Cmty. Bankers Ass'n of S.D., Inc. v. Bd. of Governors, Fed. Reserve Sys., 838 F.2d 969, 970 n.1 (8th Cir. 1988) (recognizing that the bank-holding company's purchase of a South Dakota bank was motivated by the desire to move its credit card operations to South Dakota in order to take advantage of an unregulated usury environment when conducting its interstate business); Richard Eckman, *The Delaware Consumer Credit Bank Act and Exporting Interest Under § 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980*, *in* 39 BUS. LAW. 1251, 1264 (Alan S. Kaplinsky ed., 1984). South Dakota's tax revenue from banks increased from $3.2 million in 1980 to almost $27.2 million in 1987; comparable revenue for Delaware during the same period rose from $2.4 million to almost $40 million. *Small Us Usurious*, ECONOMIST, July 2, 1988, at 26.

[127] *See* DIANE ELLIS, FDIC, BANK TRENDS: THE EFFECT OF CONSUMER INTEREST RATE DEREGULATION ON CREDIT CARD VOLUMES, CHARGE-OFFS, AND THE PERSONAL BANKRUPTCY RATE 6 (1998), *available at* http://www.fdic.gov/bank/analytical/bank/bt_9805.pdf.

[128] *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744–45 (1996).

[129] 61 Fed. Reg. 4869 (1996) (codified at 12 C.F.R. § 7.4001(a) (2006)).

[130] *See Smiley*, 517 U.S. at 744–45.

[131] *See* Cardweb.com, Tardy Pain, http://www.cardweb.com/cardtrak/news/2006/january/17a.html (last visited Nov. 19, 2006) (reporting that the average late payment fee soared from just under $14 in 1995 to over $34 in 2006); Cardweb.com, Overlimit Fees, http://www.cardweb.com/cardtrak/news/2004/march/19a.html (last visited Nov. 19, 2006) (reporting that average over-limit fees jumped from about $13 in 1995 to over $30 in 2004); Cardweb.com, Fee Party, http://www.cardweb.com/cardtrak/news/2005/january/13a.html (last visited Nov. 19, 2006) (reporting that penalty fee revenue has increased dramatically, reaching $14.8 billion in 2004 and estimating that total fee income is now more than $50.8 billion).

[132] *See* Ana M. Aizcorbe et al., *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances*, 89 FED. RES. BULL. 1, 25 (2003).

[133] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: BANKING NO. 1190: CREDIT CARDS—HOLDERS, NUMBER, SPENDING, AND DEBT, 2000 AND 2002, AND PROJECTIONS, 2005 (2005), *available at* http://www.census.gov/prod/2004pubs/03statab/banking.pdf.

[134] *See* U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: PROJECTIONS OF

of cash for consumers and may be especially convenient for older Americans because they permit the homebound to purchase goods and services. However, credit card deregulation and the prevalence of credit cards in the American economy have combined to result in the near tripling of credit card debt between 1989 and 2001, from $238 billion to $692 billion,[135] a debt explosion that has had a particularly significant impact on older Americans.[136]

E. Consumer Scams

Predatory lenders are not the only actors seeking to take advantage of elders' assets. Elderly consumers are targets of other fraudulent practices, including telemarketing, sweepstakes schemes, and other scams.[137] The Federal Trade Commission ("FTC") reported fraud losses among the elderly of over $184 million.[138] Although the AARP has found that most elderly consumer scam victims are well-educated, affluent and socially active,[139] it is also true that seniors as a population are uniquely targeted because of their vulnerability to a range of often illegal sales tactics and frauds.[140]

THE NUMBER OF HOUSEHOLDS AND FAMILIES IN THE UNITED STATES: 1995 TO 2010, at 9 (2003), *available at* http://w ww.census.gov/prod/1/pop/p25-1129.pdf (projecting the number of U.S. households to be 108.8 million by 2005).

[135] TAMARA DRAUT & JAVIER SILVA, DEMOS: A NETWORK FOR IDEAS AND ACTION, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S, at 9 (2003), *available at* http://www.demos.org/pubs/borrowing_to_make_ends_meet.pdf.

[136] *See supra* notes 11–12 and accompanying text. McGhee and Draut also reported that the average credit card-indebted family in the fifty-five-to-sixty-four-year-old age group spends 31% of its income on debt payments, 10% more than the same group spent a decade ago. MCGHEE & DRAUT, *supra* note 10, at 1; *see also, e.g.*, Patrick McGeehan, *Soaring Interest Compounds Credit Card Woes for Millions*, N.Y. TIMES, Nov. 21, 2004, at A1, A36.

[137] *See* FED. TRADE COMM'N, FRAUD AND IDENTITY THEFT COMPLAINTS RECEIVED BY THE FEDERAL TRADE COMMISSION FROM CONSUMERS AGE 50 AND OVER 4 (2006), *available at* http://aging.senate.gov/public/_files/ftc.pdf (reporting common fraud complaints among consumers over the age of fifty regarding foreign money offers; prizes, sweepstakes, and lotteries; Internet auctions, Internet services, and computer complaints; shop-at-home and catalogue sales; and telemarketing).

[138] *See id.*

[139] *See* Trent M. Murch, *Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(b), New Hope for Old Victims*, 6 ELDER L.J. 49, 54–55 (1998). For more information about elder fraud victims, see Press Release, Fed. Trade Comm'n, FTC Testimony: Identifying and Fighting Consumer Fraud Against Older Americans (July 27, 2005), *available at* http://www.ftc.gov/opa/2005/seniortest.htm.

[140] *See* Nat'l Ctr. on Elder Abuse, Clearinghouse on Abuse and Neglect of the Elderly: Annotated Bibliography: Financial Abuse, Undue Influence, Scams, Frauds and Protection of Assets 1 (2003), *available at* http://www.elderabusecenter.org/default.cfm?p=cane_finabuse.cfm ("Older individuals may be more susceptible to financial exploitation and fraud simply because many have assets in the forms of savings, stocks, insurance policies, and property. Seniors with dementia or mental health concerns may be particularly vulnerable to financial abuse by friends and family members or court appointed guardians who exert undue influence. They may also be targeted for identity theft or become victimized by predatory lending practices.").

F. Erosion of the Economic Safety Net

Even with the best policies in place, there will be elder consumers who get into debt trouble. Some may be faced with sudden and unavoidable expenses due to family illnesses or personal emergencies. Some may lack the financial skills required to make marketplace decisions, while others will simply make unwise choices. The reasons vary, but the results are the same. There will be at least a subset of elder consumers who will fall behind on credit card, mortgage, or other debt and who will need counseling, flexible repayment options, or bankruptcy to get back on their feet. A viable, strong safety net is essential for these elders; yet, as discussed below, these safeguards are diminishing.

1. The Attack on Consumer Bankruptcy Protection

Congress passed comprehensive bankruptcy reform legislation in 2005.[141] However, the changes to the bankruptcy laws actually make the system less accessible and less helpful for many consumers.[142] Professor Ronald Mann argues that the most important effect of the new law will be to slow inevitable bankruptcy filings by deeply distressed consumers, allowing creditors to earn more revenue from these individuals before they file.[143] The major effect, he concludes, will be to "make it harder, more time-consuming, and more expensive for consumers to file bankruptcy."[144] At least for now, the bankruptcy system will be increasingly difficult for seniors to access and will prevent them from achieving true financial fresh starts.

2. Decline of Exemption Rights

Social Security, Veterans Assistance, and other federal payments to the elderly are not as secure as they used to be. Changes in policy have eroded the assumption that creditors, whether government or private, could not touch these benefits.

Both Social Security and Veterans Assistance protect payments from execution, levy attachment, garnishment, and other legal process.[145] How-

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[141] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L. No. 109-8, 119 Stat. 23 (2005) (codified at 11 U.S.C. § 101 (2000)).

[142] *See generally* JOHN RAO, NAT'L CONSUMER LAW CTR., WHAT'S WRONG WITH S. 256, LET US COUNT THE WAYS (2005), *available at* http://www.nclc.org/action_agenda/bankruptcy/content/KeyProblemswithS256.pdf; HENRY J. SOMMER & JOHN RAO, CONSUMER BANKRUPTCY LAW AND PRACTICE: SPECIAL GUIDE TO THE 2005 ACT (2005).

[143] *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, U. ILL. L. REV. (forthcoming 2007) (manuscript at 101–02) *available at* http://www.utexas.edu/law/faculty/rmann/info/Data/IllinoisPaper2.pdf.

[144] *Id.* at 124.

[145] *See* 42 U.S.C. § 407 (2000) (Social Security); 38 U.S.C.A. § 5301 (2000 & Supp.

ever, recent case law and policy developments have diluted these protections. For example, some courts have allowed judgment creditors to temporarily freeze bank accounts even though they consisted entirely of Social Security payments.[146] In addition, courts have found that the basic protections do not apply to broadly defined "non-judicial" seizure methods.[147]

Banks have also become increasingly aggressive in using the power of setoff in trying to collect fees or other money allegedly owed to them.[148] This practice can be devastating when banks setoff funds that their customers need for household necessities and daily living. For example, in some states an entire month's Social Security check may be taken without warning.[149] Banks may use setoff against a customer's funds without providing prior notice unless a state statute requires such notice.[150]

Similarly, the 1996 Debt Collection Improvement Act strengthened the powers of federal agencies to collect debts owed to those agencies.[151] Among other new tools, federal agencies are now allowed to offset formerly exempt benefits, including Social Security benefits. Supplemental Security Income is exempt, and the first $750 of other Social Security payments is exempt; however, this amount is not indexed to inflation or any other cost of living index.[152]

2006) (Veterans Assistance); *see generally* DEANNE LOONIN, NAT'L CONSUMER LAW CTR., SOCIAL INSECURITY: UNDERSTANDING FEDERAL BENEFITS OFFSETS (2003) (providing information about consumer protections from benefit offsets).

[146] *See, e.g.*, Huggins v. Pataki, No. 01 CV 3016(JG), 2002 WL 1732804, at *4 (E.D.N.Y. July 11, 2002) (holding that the possibility that a customer might experience a temporary loss of access to Social Security benefits did not constitute a violation of the anti-garnishment provision of Social Security Act). *But see* Mayers v. N.Y. Cmty. Bancorp Inc., No. CV-03-5837, 2005 WL 2105810, at *8–9 (E.D.N.Y. Aug. 31, 2005) (allowing plaintiffs to proceed on their claim that state bank account garnishment procedures deny debtors procedural due process by permitting accounts containing only exempt electronically deposited Social Security funds to be frozen).

[147] *See, e.g.*, Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 382, 386–87 (2003) (allowing the state, acting as a representative payee, to use a portion of foster children's Social Security payments as reimbursement for expenditures incurred in administering the program on the foster children's behalf).

[148] In this context, "setoff" refers to a bank's practice of collecting fees or other money owed to it from funds in a different account. *See* Nolo.com, Glossary-Setoff, http://www.nolo.com/definition.cfm/Term/BA35C43E-E381-47DF-8425864A70A45C02/alpha/S/.

[149] *See, e.g.*, Lopez v. Wash. Mut. Bank, F.A., 302 F.3d 900 (9th Cir. 2002), *amended by* 311 F.3d 928 (9th Cir. 2002); Frazier v. Marine Midland Bank, 702 F. Supp. 1000 (W.D.N.Y. 1988). However, the majority rule is that otherwise exempt income is exempt from setoff as well as from private creditor seizure. *See, e.g.*, Marengo v. First Mass. Bank, N.A., 152 F. Supp. 2d 92, 94–95 (D. Mass. 2001) (holding that a banker's setoff is an "other legal process" within the meaning of the anti-alienation provisions of Social Security and Supplemental Security Income law and thus exempt from setoff).

[150] Setoff without prior notice has survived constitutional challenges because there is no "state action." *See* MARK BUDNITZ & MARGOT SAUNDERS, CONSUMER BANKING AND PAYMENTS LAW § 4.3.5 (3rd ed. 2005 & Supp. 2006).

[151] 31 U.S.C. §§ 3701–3720(E) (2000 & Supp. 2006).

[152] *See id.* § 3716(c)(3)(A)(ii).

Homestead exemptions are another insufficient protection for elder homeowners. These exemptions are designed to protect the home of the debtor and the debtor's family.[153] Most states provide for some level of protection through homestead exemptions, and many allow elder-headed households to exempt higher amounts of equity.[154] However, many states set limits so low that elders' homes rarely are actually protected.[155] In addition, states rarely set higher limits or enact automatic increases over time to make adjustments based on inflation or cost of living.[156]

3. Fewer Support Systems To Help Manage Legitimate Debt and To Assist Consumers in Financial Distress

Credit counseling agencies are the main resource for consumers having problems with unsecured debt, since traditional elder assistance agencies, such as state agencies and senior centers, rarely offer direct assistance for older consumers with credit card problems.[157] Elders constitute a significant portion of credit counseling agency clients, representing a disproportionately large segment of these agencies' clienteles when compared to the general population.[158]

There are many legitimate credit counseling organizations, but there has also been widespread abuse in the industry in recent years. For example, although nearly every credit counseling agency in the country has nonprofit status, many are being investigated by the Internal Revenue Service regarding their nonprofit status.[159] Of particular concern is the longtime agency reliance on creditor funding.[160]

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[153] *See* ROBERT J. HOBBS, FAIR DEBT COLLECTION § 12.5.2 (5th ed. 2004 & Supp. 2006).

[154] *See id.* at app. F (providing a summary of state homestead exemptions and revealing that the only states not to provide for any such exemptions are Delaware, Maryland, New Jersey, and Pennsylvania).

[155] In introducing legislation to set a uniform federal floor for homestead exemptions of $75,000 for bankruptcy debtors over the age of sixty-two, Senator Russ Feingold (D-Wis.) noted that the homestead exemption in too many cases is "woefully inadequate." 151 CONG. REC. S1820-03, S1829 (daily ed. Mar. 1, 2005) (statement of Sen. Feingold).

[156] *See* HOBBS, *supra* note 153, at app. F.

[157] *See* NAT'L CONSUMER LAW CTR., THE LIFE AND DEBT CYCLE PART TWO: FINDING HELP FOR OLDER CONSUMERS WITH CREDIT CARD DEBT 4–6 (2006), *available at* http://www.nclc.org/news/content/rising_debt_part2.pdf. These traditional providers tend to refer consumers to credit counseling agencies. *See id.* at 8.

[158] *See id.* at 12–13 (citing a study of counseling agencies finding that 20% of their clients were elders and that this percentage was higher than in previous years). In contrast, elders represent about 16% of the general population. *See* U.S. CENSUS BUREAU, TABLE DP-1: PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS FOR THE UNITED STATES: 2000, *available at* http://www.census.g ov/ipc/www/usinterimproj/natproJtab02b.pdf.

[159] *See* News Release, Internal Revenue Serv., IRS Takes New Steps on Credit Counseling Groups Following Widespread Abuse (May 15, 2006), *available at* http://www.irs.gov/newsroom/article/0,,id=156996,00.html (announcing that the IRS had been auditing sixty-three credit counseling agencies over the past two years, in most cases leading to revocations, proposed revocation or other termination of tax-exempt status).

[160] *See* Memorandum on Credit Counseling Organizations from David L. Marshall,

Despite their promises of debt relief, many of these counseling agencies exploit their customers' vulnerabilities and leave them deeper in financial trouble. For starters, credit counseling agency fees are often excessive, depriving consumers of funds that they could otherwise use to pay off debts.[161] After receiving a superficial financial analysis, many consumers are pushed into debt management plans ("DMPs") that they cannot afford.[162] These DMPs generally are developed through arrangements between credit counseling agencies and creditors.[163] They can help consumers if the concessions offered by the creditors are meaningful, but creditors have persistently cut back on their concessions in recent years.[164]

There are many legitimate credit counseling agencies that offer quality services. Yet, for the most part, these agencies have not yet developed comprehensive programs designed for older consumers.[165] In addition to credit counselors, there are also housing counseling organizations that offer first-time homebuyer programs as well as post-purchase counseling.[166]

III. Recommendations

An important question throughout this Part is whether policies and other interventions should directly address the special needs and vulnerabilities of elders or instead target particular problems that disproportionately impact elders, but may also affect other age groups. In many cases, older consumers would be adequately protected by laws that address problems that disproportionately affect them. For example, there are strong telemarketing laws on the books that are under-enforced.[167] Although the

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Chief Counsel of the Internal Revenue Serv., to Elizabeth S. Henn 3 (May 9, 2006), *available at* http://www.irs.gov/pub/irs-wd/0620001.pdf.

[161] *See* Nat'l Consumer Law Ctr. & Consumer Fed'n of Am., Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants 1 (2003), *available at* http://www.consumerfed.org/pdfs/credit_counseling_report.pdf.

[162] *See id.* at 23.

[163] *See id.* at 20.

[164] *See id.* at 1.

[165] *See* Nat'l consumer law Ctr., *supra* note 157, at 14–15 (describing results of an agency survey demonstrating the lack of a comprehensive approach to elder-focused counseling among most agencies).

[166] *See generally* U.S. Dep't of Housing and Urban Dev., Find a HUD Approved Housing Counseling Agency, http://www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm (last visited Nov. 19, 2006) (identifying and describing sponsored agencies that provide free services to homeowners and prospective homeowners); *see also* Steven P. Hornburg, *Strengthening the Case for Homeownership Counseling: Moving Beyond "A Little Bit of Knowledge"* 5 (Joint Ctr. For Hous. Studies, Harvard Univ., Working Paper No. W04-12, 2004), *available at* http://www.jchs.harvard.edu/publications/homeownership/w04-12.pdf (recognizing that Congress has appopriated $40 million for these services).

[167] *See generally* Neal Shover & Glenn S. Coffey, The Origins, Pursuits and Careers of Telemarketing Predators (2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/197061.pdf (reviewing the ongoing problem of telemarketing fraud and discussing how companies often evade enforcement).

laws generally do not include special penalties when elder victims are involved, aggressively enforcing these laws would greatly alleviate the problem among older populations.

As Professor Eggert points out, there is a risk of falling into "new ageism" or "compassionate ageism" inherent in any attempt to protect the vulnerable elderly.[168] This may occur if policies are overly concerned with the vulnerabilities of elders and thus fail to protect their freedom and autonomy. The key question is whether the benefits of special protections for vulnerable elders outweigh the loss of autonomy for those who are competent and able to make independent decisions.

Generally, we favor policy reforms that apply to the general public unless the problem to be addressed affects only elders. Where an issue rises to the level of public concern and impacts the larger society, we think any regulatory solution should protect the public as a whole and not just a select segment. For the most part, our recommendations are consistent with this principle.

The following discussion considers possible interventions that would address the challenges of increased elder debt. These recommendations include state and federal policy and industry changes, as well as ways to improve prevention, education and counseling programs. The recommendations are intended not only to ease the consequences of hard times and dangerous credit, but also to improve social conditions so that consumers will be in a better position to reject destructive credit alternatives. We must treat the causes as well as the symptoms of the rising debt loads of elders.

A. Eliminate Abusive Credit

The relationship between debtors and creditors is fraught with risks for both sides but is most dangerous for the debtors. The risks for creditors are generally purely economic, with measurable costs and mechanisms available to control those costs.[169] On the other hand, the risks for consumers can include potentially devastating consequences: depletion of funds for necessaries; depletion of savings; loss of important property, such as a car or home; and serious damage to a credit rating.[170] Historically,

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[168] *See* Eggert, *supra* note 81, at 718–19 (citing Richard A. Kalish, *The New Ageism and the Failure Models: A Polemic*, 19 GERONTOLOGIST 398, 398 (1979); Robert H. Binstock, *The Aged as Scapegoat*, 23 GERONTOLOGIST 136, 136 (1983)).

[169] *See* Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do with It?*, 15 HOUSING POL'Y DEBATE 715, 728–40 (2004) (explaining that the economic risk to the lending industry associated with loans made to riskier borrowers is managed so that investors in securities backed by predatory mortgage loans have little or no incentive to police the behavior of the original lenders).

[170] Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 58 (2006) (noting the hardship experienced by a consumer who loses her home and report-

this marketplace imbalance has necessitated governmental regulation. The creditors' power in the market should be balanced by regulation designed to protect consumers from overreaching, unfair or deceptive practices, and other conduct that impedes the overall goals of national policies to promote household savings, homeownership, and economic stability.[171] In 1994, after hearings in both the House and Senate highlighted the recent explosion of destructive high-cost home equity lending,[172] Congress amended the Truth in Lending Act by adding provisions known as the Home Ownership and Equity Protection Act ("HOEPA").[173] In doing so, Congress implicitly recognized that: (1) the market by itself does not always lead to a fair result; (2) the government must intervene to ensure a more even playing field for consumers who inherently possess less bargaining power than corporate lenders; and (3) regulation of all lenders prevents irresponsible lenders from profiting more than responsible lenders.[174]

Seven principles should govern the reform of federal credit law. First, the creditor-debtor relationship should be thoroughly regulated. Consumer protections cannot be left to the whim of lenders or the marketplace. Industry reform alone is insufficient and is unlikely to occur in any meaningful way without significant pressure. If some or even all of the industry were to make changes, the improvements would not be uniform, nor would these policies be enforceable in the event that rogue companies or banks failed or refused to conform to industry custom. Furthermore, the fact that the industry as a whole has fought against legislative changes over the last decade does not bode well for the level of reform that the indus-

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ing that the estimated 3,750 foreclosures in Chicago in 1997 and 1998 lowered the value of nearby homes by an average of $159,000); *see also* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 356–60 (2006) (discussing the costs of predatory lending and foreclosures to neighborhoods and municipalities).

[171] *See, e.g.*, Truth in Lending Act of 1968, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601–66j) (primarily a disclosure law). The need to keep the playing field fair and competitive for responsible lenders was one of the principal reasons for passing the Truth in Lending Act. *See* H.R. REP. No. 90-1040, pt. 3, at 9 (1967), *as reprinted in* 1968 U.S.C.C.A.N. 1962, 1965 (quoting President Lyndon Johnson's statement that the Truth in Lending Act was "urgently needed to . . . [p]rotect legitimate lenders against competitors who misrepresent credit costs").

[172] *See, e.g.*, *Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. (Feb. 3, 17, 24, 1993); *Home Ownership and Equity Protection Act: Hearing on S. 924 Before the S. Banking Comm.*, 103d Cong. (May 19, 1993).

[173] Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (1994) (codified at 15 U.S.C. §§ 1602(aa), 1639)).

[174] HOEPA has succeeded in reducing the costs of mortgage loans because lenders are making fewer and fewer high-cost loans that trigger coverage. *See* NAT'L CONSUMER LAW CTR., COMMENTS TO THE FEDERAL RESERVE BOARD ON THE HOME EQUITY LENDING MARKET 32 (2006), *available at* http://www.nclc.org/action_agenda/predatory_mortgage/content/HOEPACommentsAug06.pdf. However, destructive lending practices and their consequences, as evidenced by high foreclosure rates, continue nonetheless. *See id.* at 18, 33 (discussing the weaknesses of HOEPA and offering suggestions for improvement).

try could achieve on its own. Indeed, the fact that industry abuses have flourished in the deregulated environment that has evolved since 1980 is substantial evidence that legislation may be needed to force a fairer level of performance both on behalf of consumers and those responsible segments of the consumer credit industry.

Second, "effective" regulation of credit is necessary. To be effective, the regulation must provide economic incentives to comply not only with the letter of the law but also with its underlying purposes. Without such incentives, the purposes of the regulations are easily undermined, because players who ignore—or skirt the line of compliance with—the regulations may be economically rewarded.

Third, lenders should make loans only when they are suitable for the consumer's purposes and circumstances,[175] and only after ensuring the consumer's ability to repay the loan from future income. Lenders are generally in the position of understanding the short- and long-term costs and risks of credit to the consumer and should be required to use that knowledge to avoid damaging the consumer. Lenders must realistically evaluate the consumer's ability to afford not just the loan in question, but also all other necessities of life.

Fourth, lenders and all participants in the making, collecting, holding, and buying of debt, and in the repossessing and foreclosure of security for debt, should owe a duty of good faith and fair dealing to the consumer.[176] Imposing such a duty will help to ensure that a consumer is treated fairly throughout the life of a loan by all actors involved in the process.

Fifth, lending and related activities should be conducted in ways that assist consumers in building and preserving assets and wealth. Lenders should not discriminate[177] or engage in lending that perpetuates and exacerbates enduring racial or other social inequities. Nor should lenders steer borrowers into loans costlier than those for which they qualify.

Sixth, consumers and government should be encouraged to rigorously enforce consumer protection laws. These laws must include consumer remedies that can be raised against the lender and the holder.[178]

Seventh, there should be no federal preemption of any aspect of a credit relationship without equivalent, meaningful, and enforceable regulation of that aspect at the federal level. At a minimum, the following state laws should remain in force: (1) laws of general application; (2) banking and lending laws enacted pursuant to federal statutory law; and (3) anti-

[175] Lenders should tailor the loans to the needs of their particular consumers; for example, if a consumer needs a personal loan, the lender should not suggest a refinancing of a first mortgage loan.

[176] This duty should extend to lenders, brokers, appraisers, servicers, debt collectors, assignees, debt buyers, and their agents and employees.

[177] Age is already recognized as a protected category by the Equal Credit Opportunity Act. *See* 15 U.S.C. § 1691 (2000). We think it appropriate to add age to the list of protected categories under the Fair Housing Act of 1968. *See* 42 U.S.C. § 3605 (2000).

[178] *See infra* Part III.B.

predatory lending laws. Federal banking preemption should not apply to non-depository subsidiaries, agents, or affiliates. Depository institutions should not be permitted to cherry-pick parts of state laws and ignore related consumer protection provisions. Preemption should be prohibited if there is no comparable federal statute or regulation other than the National Bank Act or other banking statute that creates or insures the type of depository at issue. If a loan does not carry preemption as a result of the status of the lender at origination, preemption rights should not attach later simply because a depository institution purchases or services it.

These broad principles can be applied to the credit card,[179] mortgage,[180] and small loan[181] contexts to address the problems outlined earlier. Some may argue that added regulation will reduce credit availability. However, additional credit is not beneficial to borrowers if its terms are unfair.[182]

B. Rigorously Enforce Consumer Protection Laws and Provide for Strong Private Remedies

Advancing the goal of consumer protection does not always require passing new laws. There are many consumer protection laws already on the books that would better help elders if they were more aggressively enforced.[183] The Fair Debt Collection Practices Act and state analogs, if used forcefully and appropriately, can deter debt collectors from engag-

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[179] Examples of effective regulation of credit card lending include: (1) capping all periodic interest rates (for example, at prime plus 10%); (2) capping all other charges at an amount the card issuers can show is reasonably related to their out-of-pocket costs; (3) prohibiting lenders from unilaterally changing terms; (4) outlawing penalties for any behavior not directly linked to the specific card account at issue; (5) requiring careful underwriting for the maximum credit permitted under the plan in relation to the total maximum credit permitted under all open credit card accounts plus other consumer debt; and (6) promoting debit card use by leveling the playing field between credit and debit cards. The latter requires that banks be prohibited from allowing overdrafts with ATM or debit cards, that debit card users be granted the same protections against unauthorized use and erroneous charges as credit card borrowers, and that bank fees for debit card use be limited using the same standards as those suggested for credit cards.

[180] Examples of effective regulation of mortgage lending include: (1) strictly limiting (ideally to zero) all points and fees that can be financed by lenders; (2) eliminating the incentives to increase loan prices by prohibiting indirect broker fees when the borrower also pays fees directly; (3) restricting prepayment penalties; (4) adding a comprehensive right to cure defaults to avoid foreclosures; (5) requiring that alternatives to default ("work-out options") be evaluated before a foreclosure can be initiated; and (6) creating a home loan preservation fund to help homeowners save their homes when in default.

[181] Examples of effective regulation of small sum lending include: (1) prohibiting taking a check or using an agreement to debit a bank account in connection with the making of a loan and (2) requiring installment loans if the annual percentage rate exceeds 36% on loans under $25,000.

[182] *See* Comments of the Fed. Reserve Bd., 65 Fed. Reg. 81438, 81441 (Dec. 26, 2000) (codified at 12 C.F.R. pt. 226) ("A borrower does not benefit from . . . expanded access to credit if the credit is offered on unfair terms or involves predatory practices.").

[183] *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2000).

ing in harsh and deceptive debt collection tactics.[184] At a minimum, even if seniors cannot repay their debts, effective enforcement of these laws will help ensure that they will not be subjected to emotional harm from harassment. Unfair and deceptive acts and practices laws also offer strong remedies, in some cases with enhanced damages or other provisions for seniors.[185]

It is also essential to ensure that consumers have access to fair forums to litigate their claims and that strong remedies are available to compensate consumers and deter unscrupulous activity. It is therefore especially important to abolish mandatory arbitration for consumer claims and collection actions,[186] and to ensure that all consumer protection laws have private rights of action.

There are a number of ways to enhance consumer access to fair forums and ensure strong defenses in consumer cases. For instance, consumers should have a private right of action to enforce section 5 of the FTC Act, which prohibits unfair or deceptive practices by businesses, including banks.[187] Currently, protections under state unfair and deceptive practice laws vary significantly by state.[188] Affirming a private right of action under the FTC Act would help ensure fair and equitable access to basic consumer rights regardless of where a consumer lives. Congress should also expand the scope of the FTC Holder Rule,[189] which makes assignees of loans liable to banks for the behavior of the lender.[190]

Additionally, Congress should extend the statutes of limitations for all federal consumer protection laws to three years. It should also expand the opportunities that consumers have to assert a defense to a suit to collect on debt based upon violations of consumer protection laws by the lender, particularly in the foreclosure context. Finally, Congress should enhance the remedies available to elderly and disabled individuals who are victims of unfair business practices.[191]

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[184] *See generally* HOBBS, *supra* note 153.

[185] *See* JONATHAN SHELDON ET AL., NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 10.7.3.7 (6th ed. 2004 & Supp. 2005).

[186] *See generally* Nat'l Consumer Law Ctr., Consumer and Media Alert: The Small Print That's Devastating Major Consumer Rights (July 28, 2003), http://www.nclc.org/action_agenda/model/arbitration.shtml.

[187] *See* 15 U.S.C. § 45(a) (2000). The FTC Act does not explicitly provide for private remedies. *See* 15 U.S.C. §§ 41–51. Private litigants have attempted to bring individual enforcement actions, but judicial precedent, with only a few exceptions, indicates that there is no private right of action under the FTC Act. *See* SHELDON ET AL., *supra* note 185, at § 9.1.

[188] *See generally* SHELDON ET AL., *supra* note 185.

[189] 16 C.F.R. § 433.2 (2006).

[190] *See id.*

[191] *See* SHELDON ET AL., *supra* note 185 (describing the current state laws providing for enhanced remedies for the elderly and the disabled).

C. Expand Legal Representation for Older Consumers

Private enforcement is viable only if there are adequate legal representation resources. Legal surveys of seniors consistently show that consumer and debt problems are among the problems most commonly reported by elders,[192] yet many legal services and pro bono programs have not made consumer law a priority service area. These programs have also been hit with funding cuts and restrictions in recent years that have made it more difficult to take on consumer cases.[193]

As a result of funding cuts, restrictions, and other trends, many legal aid programs for low-income clients offer services that attempt to serve higher volumes of clients, often at the expense of more intensive, direct representation. For example, the Administration on Aging has awarded relatively large grants in recent years to "senior legal hotlines."[194] While these programs can be a useful complement to more intensive legal services, there is often no substitute for direct legal representation.[195]

D. Strengthen Support Systems To Manage Legitimate Debt

1. Clean Up Existing Credit Counseling Networks

We recommend that states enact strong laws to regulate the abusive practices of counseling agencies. Many states already have some type of debt management law, but such laws vary significantly from state to state.[196] These laws should be separate from laws that address the practices of other types of debt relief companies, such as debt settlement companies. In general, we recommend that the credit counseling and debt management laws limit the provision of credit counseling services to bona fide nonprofit organizations. Because many organizations that claim to be nonprofit are truly for-profit companies in disguise, these laws should regu-

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[192] For example, in a legal needs survey of seniors in Utah, 58% of seniors indicated that they had legal difficulties with telemarketers, and 25% had difficulties with salespersons. *See* JILENNE GUNTHER & ALAN ORMSBY, PLANNING FOR THE LEGAL NEEDS OF UTAH'S SENIORS: FINAL REPORT 31 (2004), *available at* http://www.tcsg.org/finalreport 1018_04.pdf. Overall, when asked to name the top three legal issue areas of concern, 25% listed consumer problems. *See id.*

[193] A key restriction affecting consumer cases is the restriction barring lawyers in these programs from claiming attorneys' fees awards. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(13), 110 Stat. 1321, 50 (1996).

[194] *See* Press Release, Admin. on Aging, $1.4 Million in Grants to Enhance Access to Senior Legal Services (Oct. 10, 2005), *available at* http://www.aoa.gov/press/pr/2005/05_oct/10_13_05a.asp.

[195] For a discussion of the limits of hotline programs, see Robert Echols & Julia Gordon, *Recommendations and Thoughts from the Managers of the Hotline Outcomes Assessment Study Project*, MGMT. INFO. EXCHANGE J. 9 (2003), *available at* http://www.clasp.org/publications/hotline_mie.pdf

[196] *See* SHELDON ET AL., *supra* note 185, at § 5.1.2.3 (listing state debt management laws).

late rather than exempt nonprofits. These consumer protection laws must go hand-in-hand with strong enforcement of tax exemption and charity laws by the IRS and state tax agencies.[197]

In addition to enacting and enforcing stronger laws to regulate the industry, it is critical for legitimate agencies to develop programs and outreach efforts that are sensitive to elders' needs. A focus on products and services, such as reverse mortgages, that may benefit elder consumers should also be an integral part of a counseling session for an older consumer. Counselors must be trained not only on the substantive issues related to debt, but also on how to effectively counsel seniors about debt.

These agencies should also tailor housing counseling services for elders and provide those programs with adequate support. We propose increased federal funding to expand the availability of housing counselors. Housing counseling must include not only counseling for first-time home buyers, but also post-purchase counseling regarding the advantages and disadvantages of home equity loans, counseling for homeowners who are in trouble and need sources of funds to repair their homes or deal with other debt, and foreclosure prevention counseling.

2. *Develop New Programs To Counsel Elders with Debt Problems*

Credit and housing counselors should not be the only resources for elders seeking help with debt. Further resources should be developed through senior centers and other nonprofit agencies that have direct connections to elders. Such an expansion would give consumers the option of working with agencies that are not funded by creditors.

Regardless of whether counseling is offered by traditional credit counselors or other agencies, counseling should remain a choice for older consumers. However, the mandatory counseling provisions that have become increasingly popular in recent statutes, most notably in the 2005 bankruptcy reform law, are problematic.[198] Counseling can be extremely useful, but only if it is voluntary. Penalizing debtors for failing to take mandatory education courses can be overly punitive,[199] and may undermine the potential benefits of education.

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[197] *See generally* David Lander & Deanne Loonin, *Restoring "Nonprofitness" and "Quality" to the Credit Counseling Industry*, 4 NORTON BANKR. L. ADVISER 1 (2005).

[198] *See* 11 U.S.C. § 521(b) (2000) (providing that the debtor must file a certificate from an approved credit counseling agency confirming that the debtor received the briefing required by § 109(h) of the Bankruptcy Code and, if a debt repayment plan was developed through the counseling, a copy of that plan).

[199] *See* Susan Block-Lieb, *Mandatory Protections as Veiled Punishments*, 69 BROOK. L. REV. 425, 447 (2004).

3. *Challenge Abuses of Other "Debt Relief" Companies*

Nonprofit credit counselors and for-profit companies should be regulated under separate schemes. Currently, many for-profit companies that pose serious threats to consumers are lumped together with credit counselors in state debt management laws,[200] yet these laws generally are not specifically tailored to address the most common abuses perpetrated by unscrupulous debt settlement companies. In addition to new laws, there are many existing consumer protection laws that can and should be used to challenge abusive practices of all types of debt relief companies.

E. Expand Effective Education and Prevention Measures

There are many ways to prevent serious debt problems before they get out of control. However, it is important to emphasize that prevention, including counseling and education, is never a substitute for strong regulation. Education is not a panacea as long as creditors are allowed to push dangerous, unaffordable credit on the most vulnerable.

Nevertheless, consumer education is both important and necessary—only 4% of Americans have sufficient quantitative literacy skills to compare and contrast credit card offers or to calculate the total amount of interest from a home equity loan advertisement.[201]

It is also important to understand what types of education interventions are most appropriate for elders. Although much money is poured into producing brochures, videos, and websites, few people ever attempt to evaluate what actually works. Dr. Denise Park recently testified before Congress that some warnings and education meant to prevent victimization may actually have the opposite effect.[202]

F. Increase the Availability of Alternative Products

Many seniors understand the high cost of credit but may not know where else to turn. Creating affordable lending alternatives should be a top advocacy priority so that consumers can reject predatory lenders and still find reasonably priced loan products. It is critical for advocates to learn more about affordable sources of credit in their communities and to direct clients to these resources. For example, credit unions, including

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[200] *See* SHELDON ET AL., *supra* note 185, at §5.1.2.3.

[201] *See* Karen Gross, *Financial Literacy Education: Panacea, Palliative, or Something Worse?*, 24 ST. LOUIS U. PUB. L. REV. 307, 308 (2005).

[202] *Old Scams–New Victims: Breaking the Cycle of Victimization Elderly Victimization, Hearing Before the S. Spec. Comm. On Aging*, 109th Cong. 54–55 (July 27, 2005) (statement of Dr. Denise C. Park, a cognitive neurologist at the University of Illinois at Urbana-Champaign and Director of the Royball Center for Healthy Minds).

many community development institutions, often offer small loans at reasonable rates.

Reverse mortgages are a particularly important but potentially dangerous product. A reverse mortgage is a loan against a person's home that does not have be repaid as long as the homeowner lives in that home.[203] Although these can be attractive options for many elders, the reverse mortgage lending field is rife with the opportunity for fraud and financial abuse.[204] The main danger is that reverse mortgages can put borrowers' homes at risk. Also, although reverse mortgages are a solution for some seniors facing debts they would otherwise be unable to pay, reverse mortgages can be much more costly than other types of loans because of their higher up-front fees.[205]

An important safeguard in the reverse mortgage model is that consumers applying for home equity conversion mortgages insured by the Federal Housing Administration are required to speak with a counselor approved by the U.S. Department of Housing and Urban Development.[206] This model may also work in other contexts, such as requiring certain consumers to speak with a housing counselor before taking out a home equity loan. However, it is critical that counselors providing these services receive adequate, ongoing training and that agencies providing these services clearly represent the consumers. This representation may be in doubt when agencies receive substantial funding from creditors.

We also recommend that policy makers explore creating an "Elder Home Equity Loan Instrument" in their jurisdictions, which "would allow . . . senior homeowners to reform any loan documents that contain interest rates or fees above a certain benchmark, or that contain other potentially confusing or harsh terms."[207] Older homeowners could use this instrument to limit the terms of any loan secured by their principal residence that they might subsequently sign.[208]

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[203] *See generally* AARP, REVERSE MORTGAGES, *available at* http://www.aarp.org/money/revmort (offering information for consumers and advocates on reverse mortgages).

[204] *See, e.g.*, VICTORIA WONG & NORMA PAZ GARCIA, CONSUMERS UNION OF U.S., INC., THERE'S NO PLACE LIKE HOME: THE IMPLICATIONS OF REVERSE MORTGAGES ON SENIORS IN CALIFORNIA 1 (1999), *available at* http://www.consumersunion.org/pdf/reverse.pdf.

[205] *See* AARP, HOME MADE MONEY: A CONSUMER'S GUIDE TO REVERSE MORTGAGES 11 (2006), *available at* http://assets.aarp.org /www.aarp.org_/articles/revmort/homeMadeMoney.pdf.

[206] 24 C.F.R. § 206.41 (2006). For more information about the reverse mortgage counseling program, see Letter from John C. Weicher, Assistant Sec'y for Hous., U.S. Dep't of Hous. & Urban Dev., to all approved mortgagees (June 23, 2004), *available at* http://www.hudclips.org/sub_nonhud/html/shortcut.htm (follow "2004" hyperlink under the "Letters" and "Mortgagee" headings, then click on number 25) (specifying HUD policies regarding counseling).

[207] Eggert, *supra* note 81, at 696.

[208] *See id.*

G. Encourage Additional Research and Require Ongoing Evaluation and Data Collection

There are a number of areas where further study and research are critically important. Thus, we recommend that policy makers build into consumer programs and protections mechanisms for their evaluation. This data must be available to consumers and advocates in an easily accessible format.

There are a lot of dots that need to be more explicitly connected in order to fully understand the multiple factors driving increases in elder debt. For example, research that examines income security should take debt loads into account. In looking at consumption patterns, it is important to explore how elders are paying for goods and services. Are they using credit? What purchases are they making with credit? How much are they paying in interest and other costs to service that credit? In addition, research using age as a proxy for retirement is problematic because age cohorts are heterogeneous and a substantial number of people work at least for some time during the year, even at older ages.[209]

The Woodstock Institute, a Chicago organization focusing on bringing economic resources to lower-income and minority families and communities, has studied the ability of families to save and build wealth.[210] These measures are also important to consider, particularly in understanding the extent to which elders are able to build and maintain private safety nets.

Research on debt loads should ideally be conducted both inside and outside of the bankruptcy process. A key problem, however, is that it is often difficult to access this data outside of the bankruptcy process.[211] One way to make data more accessible outside of the bankruptcy process is to require lenders to report age information under HDMA.[212]

There is also a need for a further study on the effects and consequences of increased debt loads, as well as for an unbiased study of existing counseling and education services to determine whether and to what extent these services make a difference in changing behavior and attitudes.

[209] *See* Jonathan Fisher et al., *The Retirement Consumption Conundrum: Evidence from a Consumption Survey* 2–3, 8 (Ctr. for Ret. Research, Boston Coll., Working Paper No. 2005-14, 2005), *available at* http://www.bc.edu/centers/crr/papers/WP_2005-14.pdf (implying that there are problems with the Consumer Expenditure Survey's definition of retirement age).

[210] For a list of Woodstock publications on these topics, see Woodstock Institute, http://www.woodstock inst.org/publications (last visited Nov. 19, 2006).

[211] *See supra* note 100 and accompanying text.

[212] 12 U.S.C. §§ 2801–10 (2000); *see supra* note 101 and accompanying text.

H. Repairing the Safety Net

Unfortunately, major substantive policy changes are not likely to occur any time soon. At best, they will be adopted piecemeal. In the meantime, and even if the policy changes occur, it is critical to ensure that there is a strong safety net to help those who get into trouble. This safety net must be constructed to meet elders' unique needs. The key elements of this safety net are discussed below.

1. Income Security

Elders must have sufficient income to meet their basic needs after retirement and beyond. We note that there are many ways to address this problem, including, as Demos proposes, ensuring the viability of Social Security, expanding health care coverage, bolstering unemployment insurance, increasing scrutiny of defined-contribution plans, erasing inequities for women in Social Security, and developing universal retirement savings accounts.[213]

Aside from these large-scale policy changes, it is also important to promote programs that are effective in increasing savings rates. Savings rates in the United States are very low compared to other advanced economies.[214] Yet households of all income levels save at much higher rates when they are offered appropriate savings vehicles and they develop the practice of saving.[215]

2. Expense and Debt Reduction

a. Expense Reduction Programs

There are many existing and potential programs that could cut seniors' expenses. A full discussion of these programs and their relative merits is beyond the scope of this Article. However, we emphasize that it is important to adequately fund these programs and to ensure that outreach efforts get through to the most vulnerable seniors. Existing programs that are underfunded and under-utilized include property tax relief programs, drug affordability programs, and energy and weatherization assistance.[216]

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[213] *See* McGhee & Draut, *supra* note 11.

[214] *See, e.g.*, Woodstock Inst., Social and Economic Indicators 2 (2005), *available at* http://www.woodstockinst.org/publications/task,doc_download/gid,517.

[215] *See id.* at 1.

[216] For example, there has been a steady decrease over time in the percentage of eligible households receiving assistance through the Low-Income Home Energy Assistance Program ("LIHEAP"). Charles Harak & Olivia Bae Wein, Access to Utility Service §7.1.6 (3d ed. 2004 & Supp. 2006).

In the health care context, ways to move toward universal health care coverage, including prescription drug benefits, should be explored.

b. Broaden and Protect Key Exemptions

Exemption protections for the most important assets and income sources for elders have eroded in recent years. At a minimum, we recommend reforms that: (1) prohibit banks from freezing directly deposited exempt funds; (2) require each state to meet minimum notice and other due process protections whenever bank account assets are threatened; (3) repeal the Debt Collection Improvement Act provision allowing offsets of certain key government benefits to collect debts owed to federal agencies;[217] (4) index homestead and other key exemption amounts to inflation;[218] and (5) increase state homestead exemptions for elder households.[219]

c. Keep the Bankruptcy Option Viable and Accessible

Although the bankruptcy reform law came into effect in October 2005, it is essential to monitor the impact of these reforms on elders. As noted earlier, elders have been filing for bankruptcy in record numbers in recent years.[220] A monitoring project should track whether these numbers decline as the new law takes effect and why. It is also important to monitor whether bankruptcy is less effective for those who are able to access the system. It is especially important that studies of these trends be as objective as possible, and thus they should be funded and carried out by organizations that do not receive large amounts of funding from creditors. Over time, these evaluations should be used to amend the bankruptcy law and restore critical consumer protections.

d. Strengthen Nonbankruptcy Debt Repayment Alternatives

Currently, there are few reasonable options available to consumers who wish to repay debts outside of bankruptcy. This is critical in both the mortgage and credit card markets. If the goal is to allow some consumers to repay debts outside of bankruptcy, they must be given meaningful options to do so. A 1999 nationwide survey of credit counseling agencies

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[217] *See* 31 U.S.C. § 3716 (2000 & Supp. 2006). There are many other ways, including tax offsets and administrative wage garnishment, for the government to collect debts. Even if the Act is not repealed, at a minimum, the $750 exemption amount should be indexed to changes in the cost of living and the rate of inflation.

[218] *See supra* notes 153–156 and accompanying text (discussing homestead exemptions).

[219] *See supra* note 155.

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

found that 34.3% of those who dropped out of DMPs said they would have stayed on if creditors had waived or reduced additional interest or fees.[221] Moreover, 41.8% of the clients who dropped out either had filed or were going to file for bankruptcy.[222]

Creditors must offer reasonable debt repayment plans. In determining a reasonable monthly payment plan, it is important to evaluate the length and total amount of the plan and to review these factors in the context of the consumer's overall economic health.

These flexible repayment options must be made available both to consumers who contact creditors on their own and to those who contact creditors through a third party, such as a credit counseling agency. For example, a new section of the bankruptcy code, § 502(k), allows debtors to negotiate a reasonable alternative repayment schedule through an approved nonprofit credit counseling agency.[223] If the creditor unreasonably refuses to negotiate such a schedule, a debtor who later files bankruptcy may ask the court to reduce the creditor's claim by 20%.[224] This is an important requirement in the bankruptcy context that should also be considered in developing formulas for reasonable repayment plans outside of bankruptcy.

However, these "502(k)" plans are not a magic bullet. Many consumers, particularly those preparing to file bankruptcy, will not have sufficient funds to make a reasonable offer. Furthermore, in a 2006 report, the National Foundation for Credit Counseling noted that this requirement was "nowhere close to implementation."[225]

Creditors must also face pressure to offer meaningful concessions in debt management and other repayment plans.[226] Key concessions might include reductions in the principal and total balance, lowered interest rates, re-aging,[227] and elimination or reduction of fees.

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[221] *See* VISA U.S.A., INC., CREDIT COUNSELING DEBT MANAGEMENT PLAN ANALYSIS 29 (1999) (on file with author).

[222] *Id.* at 21.

[223] *See* 11 U.S.C. § 502(k) (2000).

[224] *See id.*

[225] NAT'L FOUND. FOR CREDIT COUNSELING, CONSUMER COUNSELING AND EDUCATION UNDER BAPCPA: THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: YEAR ONE REPORT 8 (2006), *available at* http://www.nfcc.org/NFCC_Year_One_Bankruptcy_Report2.pdf.

[226] *See* Consumer Fed. of Am. & Nat'l Consumer Law Ctr., Comments to Executive Office of the U.S. Trustee on Pre-Filing Counseling Provisions 3–4 (August 31, 2005), *available at* http://www.consumerlaw.org/initiatives/credit_counseling/content/CommentsAUG31.pdf (recommending requirements that creditors accept reasonable offers and that agencies offering DMPs provide for repayment of at least 60% of the principal).

[227] "Re-aging" is a way of starting over again with a delinquent credit card account. Creditors make a delinquent account current and stop charging late fees. In some cases, the creditor also waives previously owed fees.

IV. Conclusion

Achieving a minimal level of economic comfort over the life cycle is important on many levels. It is essential on a purely human level so that elders can grow old with some peace of mind and some ability to pay for necessary services. It is also critical for our society and economy to help elders to help themselves by building assets and income security prior to retirement. These efforts must be complemented by a strong, expansive safety net, including Social Security and health insurance coverage.

The ability of many elders to get by financially by borrowing often blinds us to their increasing lack of security after retirement. At least for a while, easy credit allows many elders to buy services and products that they need, including food and prescription drugs. They can use credit cards to buy these items even when their monthly income is insufficient to cover the charges.

But there are often latent costs. Creditors have been given a great deal of freedom to charge what they want and to change terms as they want. As a result, the charges mount, and the fees for late payments and high balances accumulate. At the same time, unexpected events such as illnesses, deaths in the family, or other emergencies place many people in even more dire circumstances. At that point, the underlying problem of income insecurity and unaffordable expenses can no longer be hidden by plastic. When this happens, elder consumers have few places to turn and little margin for error in terms of healthy working years to rebuild assets.

Elder consumers need to eat and often take prescription drugs in order to stay healthy. They need heat in the winter and air conditioning in the summer. They also need the other less tangible things in life that are important to all of us—the ability to watch a favorite television show, make a donation to charity or a place of worship, take a grandchild out for a treat now and then, and drive to the senior center. What happens when the money that should be going for these items instead goes to servicing debt? This is the dilemma that many elders now face.

The solutions are complex in many cases. But at the very least, they require a combination of substantive changes that will ban the most dangerous products; behavioral changes that will help increase savings, foster asset development, and lessen reliance on credit; and the development of alternative credit products that are more affordable. This Article includes recommendations that address all of these needs. The recommendations discussed here are wide-ranging and ambitious, but the problems require this sort of multi-faceted effort. There is too much at stake not to try.

RECENT DEVELOPMENT

UPDATING THE ELECTORAL COLLEGE: THE NATIONAL POPULAR VOTE LEGISLATION

The Electoral College is an anomaly of the American democracy. The United States is virtually alone in entrusting the election of its President to a small, largely anonymous group of individuals, rather than to its citizen voters.[1] On February 23, 2006, National Popular Vote ("NPV"),[2] an organization led by several former national legislators of both parties,[3] unveiled the proposed text for legislation ("NPV legislation") that would guarantee a majority in the Electoral College to the winner of the national popular vote for President.[4] The NPV legislation would effectively abolish the Electoral College by having states pass an interstate compact to pledge their electoral votes to the winner of the national popular vote. The NPV legislation promises to revive the centuries-old debate over the method for selecting the President[5] and raise important questions about the foundations of American democracy.

This Recent Development evaluates the National Popular Vote legislation and its likely effect on the Presidential election process. In Part I, this Recent Development discusses the Electoral College—the current system for selecting the President—first by describing its origins at the Constitutional Convention, and then by commenting on the evolution of this institution over time. Part II explains the provisions of the NPV legislation and examines the legislation's progress in several states. Part III presents the views of supporters and critics of the NPV legislation on the likely effects of the legislation's enactment. Ultimately, the Recent Development concludes that the NPV legislation would probably diminish the dis-

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[1] *See* Donald Lutz et al., *The Electoral College in Historical and Philosophical Perspective*, *in* CHOOSING A PRESIDENT 31, 47 (Paul D. Schumaker & Burdett A. Loomis eds., 2002).

[2] National Popular Vote!, http://www.nationalpopularvote.com/npv/ (last visited Nov. 17, 2006).

[3] The legislators included former Representative John Anderson (R-Ill.); former Senator Birch Bayh (D-Ind.); and former Representative John Buchanan (R-Ala.). *See* Hendrik Hertzberg, *Count 'Em*, NEW YORKER, Mar. 6, 2006, at 27.

[4] *See* JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 248–49 (2006) (describing the motivation and legal basis for the NPV legislation), *available at* http://www.every-vote-equal.com/tableofcontents.htm. *See also* Birch Bayh, U.S. Senator from Indiana, Press Conference on Election of the President by Popular Vote (Feb. 23, 2006) (unveiling the NPV legislation with NPV members).

[5] The first resolution to amend the Constitution's Presidential election provisions was introduced in 1797. *See* LAWRENCE D. LONGLEY & ALAN G. BRAUN, THE POLITICS OF ELECTORAL COLLEGE REFORM 42 (2d ed. 1975). Since then, there have been over 1,000 proposed Constitutional amendments concerning the Electoral College. *See* Lutz et al., *supra* note 1, at 45–46.

parity in presidential campaign resources and media attention between battleground and spectator states, eliminate use of the House contingency procedure, and ameliorate sectionalism. However, such benefits would come at the potential cost of increased spending on Presidential campaigns and the introduction of structural precariousness into the Presidential election system.

I. THE ELECTORAL COLLEGE SYSTEM

Selection of the President is governed by a combination of the Constitution (specifically Article II and the Twelfth and Twenty-third Amendments), state law, and customary practice. Article II of the Constitution mandates election of the President through the Electoral College, which is composed of electors appointed by each state and the District of Columbia.[6] The number of electors for each state is equal to the sum of the number of senators and representatives to which that state is entitled.[7] State legislatures have complete discretion over the appointment of electors.[8] The federal Constitution does not guarantee individuals a right to vote for Presidential electors, and only one state grants its citizens a state constitutional right to vote for Presidential electors.[9] Despite freedom to choose the appointment process, virtually every state assigns its entire electoral slate to the winner of that state's popular vote (the "winner-take-all" rule).[10] Only Maine and Nebraska use the district system, which assigns an elector to the winner of each congressional district's popular vote and two electors to the winner of the state's popular vote.[11] However, neither has actually split its electoral slate between two Presidential candidates since instituting the district system.[12] Once appointed, the electors meet in their

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[6] *See* U.S. CONST. art. II, § 1, cl. 2. The District of Columbia receives the number of electoral votes "to which the District would be entitled if it were a State." See U.S. CONST. amend. XXIII, § 1.

[7] *See id.* art. II, § 1, cl. 2.

[8] *See id.* Under the Constitution, the power of the state legislatures is absolute; accordingly, a state may vest the power to select electors "in a board of Bank directors—a turnpike corporation—or a synagogue." LUCIUS WILMERDING, JR., THE ELECTORAL COLLEGE 43 (1958) (quoting Rep. Storrs during a debate in 1826); *see* NEAL R. PEIRCE & LAWRENCE D. LONGLEY, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE 44 (1981) ("The Constitution had given the state legislatures an absolute carte blanche" to shift "the method of choosing Presidential electors from year to year for the benefit of ruling circles in each state").

[9] *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States"). The Colorado Constitution guarantees its citizens the right to vote for President. *See* COLO. CONST. sched., § 20; *see also* KOZA ET AL., *supra* note 4, at 38.

[10] *See* GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 9 (2004) ("Since the advent of Jacksonian democracy, the states have almost exclusively used the winner-take-all method for allocating their electors to candidates.")

[11] *See* ME. REV. STAT. ANN. tit. 21-A, § 802 (2005); NEB. REV. STAT. ANN. § 32-714 (2006).

[12] *See* KOZA ET AL., *supra* note 4, at 54.

respective states on the same day to cast separate ballots for President and Vice President.[13]

After electors cast their ballots, the Vice President of the United States, in his capacity as President of the Senate, opens and counts the electors' votes in the presence of the House and Senate.[14] To be elected outright, a Presidential candidate must have a majority of the electoral votes.[15] If no candidate wins a majority, the House elects the President using the House contingency procedure. Under this procedure, the House chooses among the three candidates with the highest electoral vote totals; when voting, the delegation from each state has one vote.[16] The states' delegations continue to vote until one candidate receives a majority and thus is elected.[17]

The Electoral College can be best understood through an examination of both its origins at the Constitutional Convention and its subsequent development. Like much of the Constitution, the Electoral College was the product of compromise after protracted disagreement.[18] James Wilson, delegate to the Constitutional Convention from Pennsylvania, called the issue of Presidential selection "the most difficult . . . on which we have had to decide."[19]

Under the final formulation, apportionment of electoral votes was essentially population-based, except for the automatic award of two electoral votes to every state.[20] Delegates recognized that the House contingency procedure, which gave each state only one vote, was a major concession to small states.[21] They probably also understood that the Electoral College, which assigns state electoral votes based not on voter turnout but on population alone, would benefit southern states, as slaves could not vote but were still included in the states' population count.[22]

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[13] *See* U.S. CONST. amend. XII.

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] The Constitutional Convention deliberated on Presidential selection process for twenty-two days and held thirty votes on the subject. *See* EDWARDS, *supra* note 10, at 78–79. The idea for an Electoral College may have originated with the Maryland Constitution of 1776, which chose its state senate through a complicated procedure similar to the Electoral College. *See* PEIRCE & LONGLEY, *supra* note 8, at 22. *Cf.* MD. CONST. of 1776, art. XIV–XVII (1776).

[19] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 50 (Max Farrand ed., 1937).

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

[21] *See id.*

[22] *See* Akhil Reed Amar & Vikram David Amar, *Why Old and New Arguments for the Electoral College Are Not Compelling*, *in* AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE 58, 58–59 (John C. Fortier ed., 2004). For example, Pennsylvania, which had a greater free population than Virginia, received fewer electoral votes. The electoral votes attributable to the slave population provided the margin that elected Jefferson over Adams in 1800. As a result of including slaves in population totals, Amar and Amar argue, a white, slave-owning Virginian was President for thirty-two of the first thirty-six years of the nation's existence. *See id.*; *see also* EDWARDS, *supra* note 10, at 87 (explaining

As a result of such compromises, the Electoral College had "something for everyone": roughly population-based apportionment for the large states, equal state influence in the House contingency procedure for the small states, state legislative power over elector selection for the states' rights supporters, and at least the possibility of a popular vote for the direct election proponents.[23]

Despite evidence of careful planning, the Electoral College soon deviated from the Framers' intentions in at least four ways. First, the Framers anticipated that the process would seldom produce an electoral majority, thereby sending most Presidential elections to the House.[24] In practice, however, the House contingency procedure was used infrequently and has not been used once since 1824.[25]

Second, the Framers believed that the states would employ the district system[26] to assign electoral votes, rather than the winner-take-all rule.[27] Yet, while states have used a variety of methods to appoint Presidential electors throughout history,[28] by 1836 all but one had switched to the winner-take-all rule.[29] After switching, a state had a strong incentive not to adopt any other system, because switching while other states retained the

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that Madison believed that including non-voting slaves in population totals protected the southern states).

[23] *See* PEIRCE & LONGLEY, *supra* note 8, at 23; Abner J. Mikva, *Doubting Our Claims to Democracy*, 39 ARIZ. L. REV. 793, 795 (1997).

[24] *See* John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 811 (1961); *see also* Lutz et al., *supra* note 1, at 39 ("Congress was expected to select the President most or even all of the time"). *But see* Gary L. Gregg II, *The Origins and Meaning of the Electoral College*, *in* SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE 1, 2 (Gary L. Gregg II ed., 2001) (questioning whether the Framers really intended to design the Electoral College to "fail" frequently) [hereinafter SECURING DEMOCRACY]; ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 20 (2006) (describing disagreement among the delegates as to whether the Electoral College would probably produce majorities).

[25] *See* L. PAIGE WHITAKER & THOMAS H. NEALE, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 4 (Cong. Res. Serv. Rep. No. RL30804, Jan. 16, 2001), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30804_01162001.pdf; Comm. on Int'l Human Rights & the Comm. on Asian Affairs, *The Rule of Law in Hong Kong "One Person, One Vote": The U.S. Electoral System and the Functional Constituencies Embodied in the Basic Law for the Election of the Chief Executive and of the Legislative Counsel*, 59 REC. 374, 387 n.31 (2004) (describing expected reliance on the House contingency procedure).

[26] *See* WHITAKER & NEALE, *supra* note 25, at 4–5.

[27] *See* PEIRCE & LONGLEY, *supra* note 8, at 46. The district system was one of the earliest proposals to alter the Electoral College. References to such proposals date back to March 14, 1800. *See* LONGLEY & BRAUN, *supra* note 5, at 57.

[28] During the first Presidential election, for instance, five state legislatures directly appointed their electors without reference to the popular vote, two apportioned electors on a district basis, two used the winner-take-all system, one legislature let people choose by district but reserved two electors for itself,; and one could reach no decision and so submitted no electors. *See* PEIRCE & LONGLEY, *supra* note 8, at 32–33; *see also id.* at app. B at 247 (detailing how states chose their Presidential electors between 1788 and 1836).

[29] *See id.* at 46.

winner-take-all rule would diminish that state's influence in the Electoral College.[30]

Third, the Framers did not anticipate that Presidential and Vice Presidential candidates would run on the same ticket. The original constitutional provision had each elector vote for two persons for President;[31] the candidate with the most votes would become President, and the runner-up would become Vice President.[32] After the acrimonious election of 1800,[33] the Twelfth Amendment changed this process by separating the elections for President and Vice President.[34]

Fourth, the Framers erroneously assumed that electors would exercise independent judgment in voting for President.[35] Instead, the modern selection process for electors assures that the electors are already pledged to a Presidential candidate and deviate only rarely.[36]

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[30] *See* JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 23 (1975); WHITAKER & NEALE, *supra* note 25, at 6–7 (describing how the winner-take-all system gives an advantage to states that control large blocs of electoral votes). The system for assigning electors affects the state's strategic importance and a given voter's influence, as evidenced by the following example: a winner-take-all state with fifteen electoral votes will yield a net gain of fifteen electors for its chosen candidate, while a state with the same number of electoral votes but a different elector assignment system will potentially split its electors among several candidates. Thus, a voter in a state with the winner-take-all system will influence more electoral votes. *See id.*

[31] *See* U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

[32] *See id.*

[33] When Thomas Jefferson and Aaron Burr received the same number of electoral votes in the 1800 election, a bitter fight ensued in the House. Jefferson ultimately won after thirty-six rounds of balloting. *See* ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 22–23 (2006).

[34] *See* U.S. CONST. amend. XII.

[35] *See* EDWARDS, *supra* note 10, at 83. The Supreme Court has repeatedly acknowledged the original intent that electors exercise independent judgment in voting for President. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 43–44 (1968) ("The College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large."); Ray v. Blair, 343 U.S. 214, 232 (1952) ("[T]he plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices"); McPherson v. Blacker, 146 U.S. 1, 36 (1892) ("Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive"). *But see* ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 86–87 (1994) (arguing that Hamilton was in the minority in envisioning independent electors and that Madison's support of the Electoral College as "a vehicle for the expression of the people" was more representative of the Framers). Bennett has attacked Hardaway's view, arguing that if "electors were 'intended' to be dependent recorders of decisions made by the electorate," then the office of elector "simply served no purpose." BENNETT, *supra* note 24, at 16.

[36] Most states and the District of Columbia officially bind their electors. *See* WALTER BERNS ET AL., AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE 7–8 (John C. Fortier ed., 2004). While the remaining states do not, their electors still vote as expected the vast majority of the time. *Id.* Of more than 21,000 electors chosen since the first presidential election, only ten have voted for someone other than their pledged candidate. *Id.* *See also* WHITAKER & NEALE, *supra* note 25, at 9–10 (discussing efforts to bind Presidential electors).

From the beginning, the constitutional system for selecting the President has spawned proposals for reform.[37] Of 11,000 constitutional amendments introduced to date, more than 1000 have concerned the alteration or elimination of the Electoral College.[38] Of those resolutions, only one—now the Twelfth Amendment—passed, in 1804.[39] The last major congressional effort to pass an amendment pertaining to the Electoral College came in 1969, when the House of Representatives, alarmed by George Wallace's 1968 Presidential run, passed a direct popular vote amendment.[40] The proposal died the next year when it failed to attract sufficient votes in the Senate.[41] A similar effort in the aftermath of the close 1976 election failed as well.[42] By bypassing the Constitutional amendment process entirely, the NPV legislation may avoid some of the political hurdles encountered by earlier reform proposals.

II. THE NATIONAL POPULAR VOTE LEGISLATION

The NPV legislation proposes a state-based mechanism to achieve direct popular election of the President, without resorting to a constitutional amendment. This Part describes the origins of the NPV legislation, how it would work, and the legal basis of its proposed implementation through interstate compact.

Prior to the NPV legislation, instituting direct popular election of the President seemed achievable only by amending the Constitution, which is an extraordinarily difficult process.[43] Simply to propose a constitutional amendment requires passage of the bill by two-thirds of both houses of Congress or by a Constitutional Convention called by the legislatures of two-thirds of the states.[44] Ratification of any proposed amendments requires approval by conventions or by the legislatures of three-fourths of the states.[45] The innovation of the NPV legislation is that the legislation institutes a direct popular election at the national level, while working within

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[37] The first resolution to amend the Presidential election provisions of the Constitution was introduced on January 6, 1797. *See* LONGLEY & BRAUN, *supra* note 5, at 42.

[38] *See* Lutz et al., *supra* note 1, at 45–46.

[39] *See* PEIRCE & LONGLEY, *supra* note 8, at 131.

[40] *See* H.R.J. Res. 681, 91st Cong. (1970); *see also* PEIRCE & LONGLEY, *supra* note 8, at 188.

[41] *See* CONG. QUARTERLY, INC., POWERS OF CONGRESS 279–80 (1976); *see also* PEIRCE & LONGLEY, *supra* note 8, at 192.

[42] *See* S.J. Res. 26, 96th Cong. (1979); *see also* PEIRCE & LONGLEY, *supra* note 8, at 205.

[43] *See, e.g.*, WILMERDING, *supra* note 8, at 97. ("The national plebiscite system has one great handicap that cannot be overcome. It could be established only by constitutional amendment, and no amendment establishing it stands any chance whatever of passing the Senate or being adopted by the states").

[44] *See* U.S. CONST. art. V.

[45] *Id.*

and adhering to the preexisting Constitutional framework of the Electoral College.

Compared to a constitutional amendment, the NPV legislation could implement direct popular election of the President with relative ease. The NPV legislation takes effect "when states cumulatively possessing a majority of the electoral votes have enacted [the NPV legislation]."[46] With the present distribution of electoral votes, the NPV legislation could take effect after passage in as few as eleven states.[47] In fact, evidence from past efforts to reform the Electoral College suggests that state legislatures may be more receptive to passing such legislation than Congress.[48]

A. How the NPV Legislation Works

The heart of the NPV legislation is a "cheeky idea" [49]: upon implementation of the NPV legislation, states that have passed the NPV legislation will pledge their Presidential electors to the winner of the national popular vote, rather than the state popular vote, thus assuring that the popular vote winner receives a majority in the Electoral College.[50] Linking the electoral vote to the national popular vote appears to be unprecedented in the history of proposed reforms to the Electoral College.[51] It allows the

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[46] S.R. 06-223, 65th Gen. Assem., Reg. Sess. art. 3 (Colo. 2006).

[47] The eleven most populous states together have 271 electoral votes, which is one more than the 270 needed to constitute a majority of the Electoral College. *See* WHITAKER & NEALE, *supra* note 25, at 2–3; Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW, Dec. 28, 2001, http://writ.news.findlaw.com/amar/20011228.html. *See also* Fed. Election Comm'n, Distribution of Electoral Votes, http://www.fec.gov/pages/elecvote.htm (last visited Nov. 8, 2006) (listing the present distribution of electoral votes).

[48] Polls of state legislators in 1966 revealed that at least 50% of legislators in forty-four states favored direct popular election of the President. *See* PEIRCE & LONGLEY, *supra* note 8, at 170–71. Over 59% of legislators overall supported a direct popular vote. *See* COMM'N ON ELECTORAL COLL. REFORM, AMER. BAR ASSOC., ELECTING THE PRESIDENT 7 (1967). Furthermore, Gallup polls since 1944 have consistently shown that a majority of the American public supports direct election. FairVote, Gallup Direct Election Polls Since 1944, http://www.fairvote.org/?page=1823 (last visited Nov. 18, 2006). The most recent survey, taken before the 2004 Presidential election, found 61% approval, 35% disapproval, and 4% undecided. *Id.*

[49] Editorial, *How to Drop Out of the Electoral College*, MINNEAPOLIS STAR TRIB., Mar. 27, 2006, at A8.

[50] *See, e.g.*, H.R. 2948, 2006 Assem., Reg. Sess. art. 3 (Cal. 2006); S.R. 06-223, 65th Gen. Assem., Reg. Sess. art. 3 (Colo. 2006). *See also* National Popular Vote!, The Plan, http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=page&page_id=4 (last visited Nov. 18, 2006) (describing NPV legislation in general terms).

[51] This innovation originated in a paper by Professor Robert W. Bennett of Northwestern Law School. *See* Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241 (2001). Professors Akhil Reed Amar of Yale Law School and Vikram David Amar of Hastings College of Law later promoted the paper in December 2001. *See* Amar & Amar, *supra* note 22. The idea received renewed attention with the formation of National Popular Vote ("NPV"), the organization now dedicated to passing the legislation, in early 2006. *See* Rick Lyman, *Innovator Devises Way Around Electoral College*, N.Y. TIMES, Sept. 22, 2006, at A22 (describing formation of NPV).

Electoral College to remain intact, but only as a "tourist attraction," replicating the national popular vote result, subject only to the possibility of faithless electors.[52] The NPV legislation overcomes the incentives against abandoning the winner-take-all rule by employing an interstate compact that does not bind states until the participating states cumulatively constitute a majority of the Electoral College, assuring that the national popular vote winner has a majority in the Electoral College.[53]

The first two articles of the NPV legislation extend the right to join the interstate compact to any state and to the District of Columbia[54] and mandate that each participating state conduct a popular election for the President and Vice President.[55] Article three contains the central operative language, which assigns the state's Presidential electors to the winner of the national popular vote: "The Presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner."[56]

The NPV legislation makes no provision for a recount. Each state's chief election officer must treat as final "an official statement containing the number of popular votes in a state for each Presidential slate" made by the day established by Congress for making the states' electoral vote determinations conclusive.[57] In the extremely unlikely event of a tie in the national popular vote, the NPV legislation provides for the states to revert to the present winner-take-all rule for assigning electors.[58]

States that have passed the NPV legislation will only utilize its procedures for a given election year if the NPV legislation is in effect by July 20 of that election year. To come into effect, the legislation must be adopted by a number of states such that the majority of the Electoral College votes would be apportioned under the NPV legislation.[59] Member states may withdraw from the agreement at any time, but any withdrawal occurring

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[52] *See* Hertzberg, *supra* note 3, at 27.

[53] *See, e.g.*, H.R. 2948, 2006 Assem., Reg. Sess. art. 4 (Cal. 2006), *available at* http://www.leginfo.ca.gov/pub/bill/asm/ab_2901-2950/ab_2948_bill_20060907_enrolled.pdf. ("This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state"). Accordingly, to assure success of the interstate compact, states must pass the NPV legislation "in substantially the same form" as other states. *See id. See also* S.R. 06-223, 65th Gen. Assem., Reg. Sess. art. 4 (Colo. 2006) (requiring that other states have enacted the compact in "substantially the same form" before the NPV legislation can take effect); KOZA ET AL., *supra* note 4, at 248–49 (showing original version proposed by the NPV).

[54] *See* H.R. 2948 art. 1 & 2.

[55] *See id.* art. 2. The bill also mandates the so-called short ballot, listing only the names of the candidates for President and Vice President, not the names of electors. *See id.* art. 5.

[56] *See id.* art. 3.

[57] *See id.*

[58] *See id.*

[59] *See* H.R. 2948, 2006 Assem., Reg. Sess. art. 3 (Cal. 2006).

within six months of the end of a President's term cannot take effect until the next President or Vice President is "qualified to serve the next term."[60]

i. *Interstate Compact*

The interstate compact, essentially a contract between states, overcomes the primary barrier to states' abandonment of the winner-take-all rule. In a mixed system where some states assign electors using the winner-take-all rule and others use a different rule, states using the winner-take-all rule wield greater influence over the outcome of the election.[61] In the case of the NPV legislation, the interstate compact ensures that no individual state must "unilaterally disarm" and reduce its Electoral College influence without an assurance that enough other states will do likewise.[62]

The constitutionality of the NPV interstate compact has not been definitively established.[63] The Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[64] Although the text of the Constitution plainly requires congressional approval of interstate compacts,[65] supporters of the NPV legislation ("NPV supporters") argue that congressional approval is unnecessary,[66] because they believe that the Supreme Court will classify the NPV legislation as one of the types of interstate compacts that do not

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[60] *See id.* art. 4. This provision prevents potential disruptions to ongoing Presidential campaigns. *See* KOZA ET AL., *supra* note 4, at 266.

[61] *See* BEST, *supra* note 30, at 23.

[62] *See* Bennett, *supra* note 51 and accompanying text.

[63] Assuming the interstate compact is constitutionally permissible, the compact would be legally binding on its signatory states.

> [C]ompacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and they take precedence over conflicting state laws, regardless of when those laws are enacted.

COUNCIL OF STATE GOVS., INTERSTATE COMPACTS AND AGENCIES 2003, at 6 (2003). *Cf.* Virginia v. Maryland, 540 U.S. 56, 66 (2004) (noting that congressionally approved interstate compacts have the force of a federal statute). Upon taking effect, the NPV legislation's interstate compact would require states to honor their commitment; they could not then renege by reverting to a state-based method of assigning their electoral votes.

[64] U.S. CONST. art. I, § 10, cl. 3. Congress may grant its approval in the form of a simple joint resolution. Congress's consent may also be implied. *See* Virginia v. Tennessee, 148 U.S. 503, 521 (1893) ("[Congress's] consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them"); KOZA ET AL., *supra* note 4, at 209.

[65] *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .").

[66] *See* KOZA ET AL., *supra* note 4, at 219 ("The Supreme Court has interpreted this clause to allow states to enter into compacts without Congressional consent"). *See also* Virginia v. Tennessee, 148 U.S. 503, 521–22 (1893) (suggesting that consent of Congress to an interstate compact may be implied by subsequent action).

require Congressional approval.[67] According to the Court, "the test is whether the Compact enhances state power *quoad* the National Government,"[68] which can be assessed by examining whether the agreement grants powers that the state did not already have individually, whether it is entirely voluntary as to its adoption or rejection by the states, and whether it burdens interstate commerce.[69] Compacts that do not increase "the political power or influence" of the party states or "encroach upon the full and free exercise of federal authority"[70] do not require congressional approval. NPV supporters argue that the Court's test has been interpreted to favor interstate compacts even in the absence of Congressional approval. For example, the Supreme Court has recognized the authority of the states to enact a compact mandating uniform durational residency requirements without Congressional approval.[71] Indeed, one supporter has proclaimed that he has been "unable to locate a single case where a court invalidated a compact for lack of consent on the grounds that it impermissibly encroached on federal supremacy."[72] Lower courts, such as the Third Circuit, have held that encroachment does not occur when the subject of the compact concerns "areas of jurisdiction historically retained by the states."[73]

C. Legislative Record

NPV supporters have outlined a three-part strategy for enactment of the NPV legislation: (1) the citizen-initiative process; (2) state legislative action; and (3) action by Congress after passage of the NPV by several states.[74] Although the public has consistently supported reform of the Electoral College,[75] the feasibility of using the citizen-initiative process is limited. Only twenty-five states allow some form of citizen-initiative (these

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[67] *See, e.g.*, U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459 (1978); New Hampshire v. Maine, 426 U.S. 363, 369–70 (1976).

[68] *See U.S. Steel Corp.*, 434 U.S. at 473.

[69] *See id.*

[70] *Virginia*, 148 U.S. at 520. *See also* KOZA ET AL., *supra* note 4, at 226–27. The Court applied the same test in *U.S. Steel Corp. v. Multistate Tax Comm'n*, when it upheld a compact lacking express Congressional approval after finding that the compact did not "authorize the member states to exercise any powers they could not exercise in its absence." 434 U.S. at 473.

[71] *See* Oregon v. Mitchell, 400 U.S. 112, 286–87 (1970).

[72] KOZA ET AL., *supra* note 4, at 229.

[73] McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991). *See also* Star Sci., Inc. v. Beales, 278 F.3d 339, 360 (4th Cir. 2002) (finding that the Master Settlement Agreement did not violate the Compact Clause because it did not authorize the exercise of any powers that the states did not already possess); Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 740 F.2d 203, 208 (2d Cir. 1984) (finding the Bank Holding Companies Act reserved power to the states to form the equivalent of an interstate compact).

[74] *See* KOZA ET AL., *supra* note 4, at 276 (describing the NPV supporters' strategy for enacting the NPV legislation).

[75] Gallup polls taken in 1944, 1966, 1967, 1968, 1977, 1980, 2000, and 2004 all revealed majority support for direct election of the President. *See* FairVote, *Gallup Direct Election Polls Since 1944*, http://www.fairvote.org/?page=1823 (last visited Oct. 2, 2006).

states in aggregate comprise less than a majority of the Electoral College), and in some of these states, such initiatives are not binding.[76] Thus, in practice, the vast majority of the electoral votes that would be assigned through the NPV legislation must come from action by state legislatures.[77] Unlike state legislative action, Congressional action may take several forms, including approval of the compact on behalf of the District of Columbia, streamlining of state election certification laws, or express consent to the compact.[78]

Thus far, NPV supporters have targeted state legislatures, because apart from the requirement of congressional approval of the compact, interstate compacts are enacted like ordinary state laws, through passage by the state legislatures and with the approval of governors.[79] The NPV legislation has not yet become law in any state, but it has made some progress, particularly in large states. Sponsors have introduced versions of the NPV legislation in at least six states—California, Illinois, New York, Missouri, Colorado, and Louisiana—since formation of the NPV on February 23, 2006.[80] It has been passed in three state legislature chambers: the California Assembly, the California Senate, and the Colorado Senate.[81] NPV supporters plan to introduce the NPV legislation in all fifty states by 2007 and have already found sponsors for the next legislative session in twenty-nine states.[82]

NPV supporters appeared poised for their biggest victory so far when the NPV legislation passed both chambers of the California legislature in August 2006.[83] On September 30, however, Governor Arnold Schwar-

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[76] For example, Illinois's statutory initiatives are advisory only. In other states, election administrators and the courts commonly disqualify ballot measures. *See* KOZA ET AL., *supra* note 4, at 277–79 (describing disadvantages of initiative processes for different states).

[77] *See id.* at 279 ("In practice, the authors of this book believe that the vast majority of the 270 electoral votes would, as a practical matter, come from state legislatures").

[78] *See id.* at 276.

[79] *See id.* at 203 ("Enactment of an interstate compact is generally accomplished in the same way that ordinary state laws are enacted"). For the District of Columbia, enactment requires Congress to consent to the compact on its behalf. *See id.* at 210.

[80] *See* Press Release, National Popular Vote, Five New York Republicans Introduce Bill for Nationwide Election of President—Vermont and Arizona Sponsors Announced for 2007 (May 25, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=71 (last visited Nov. 18, 2006).

[81] *See* Press Release, National Popular Vote, Colorado Senate Passes National Popular Vote Bill on Second Reading (Apr. 14, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=59 (last visited Nov. 18, 2006); Press Release, National Popular Vote, California Legislature Gives Final Approval to Bill for Nationwide Popular Election of the President (Aug. 30, 2006), http://www.nationalpopularvote.com/npv/index.php?optimon=npvcontent&task=viewContent&content_id=8 8 (last visited Nov. 18, 2006).

[82] *See* Press Release, National Popular Vote, 29 States Now Have Sponsors for Bill for Nationwide Popular Election of the President for Upcoming 2007 Legislative Sessions (Oct. 3, 2006), http://www.nationalpopularvote.com/npv/index.php?option=npvcontent&task=viewContent&content_id=105 (last visited Nov. 18, 2006).

[83] *See* Nancy Vogel, *A Vote to Quit the Electoral College*, L.A. TIMES, Aug. 31, 2006, at B1.

zenegger (R-Cal.) vetoed the bill,[84] which some commentators suggested might be fatal to the movement's momentum.[85] Although passed by the state Senate, Colorado's version of the NPV legislation stalled after a House Committee postponed consideration of it indefinitely on May 2, 2006.[86]

If the NPV legislation is not enacted by 2008, NPV supporters believe that the debate on national popular election of the President will figure prominently during the 2008 campaign, and that such a debate "will inevitably lead to a nationwide decision to embrace national popular election of the President in time for the 2012 Presidential election."[87]

III. EFFECTS OF THE NPV LEGISLATION ON THE SELECTION OF THE PRESIDENT

A. *Misfire*

One of the enduring concerns about the Electoral College is that the candidate who wins the popular vote may not win a majority in the Electoral College, a situation often referred to as "misfire."[88] Publicity surrounding the 2000 and 2004 elections has made this possibly the best known aspect of the Electoral College system, despite its relatively infrequent occurrence.[89] In fifty-five Presidential elections, there have been just four misfires, amounting to one every fifty years.[90] Economists have estimated that there is a 50% chance of misfire with a margin of 100,000 votes (approximately the Kennedy-Nixon margin in 1960); a 33% chance with

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[84] Governor Schwarzenegger (R-Cal.) said the bill ran "counter to the tradition of our great nation." *See Veto in California on Electoral College*, N.Y. TIMES, Oct. 3, 2006, at A17.

[85] *Id.*

[86] *See* Summarized History for Bill Number SB06-223, http://www.leg.state.co.us/clics2006a/csl.nsf/billsummary/b8fdcf0acad0de3687257131007f0795 (last visited Nov. 18, 2006).

[87] KOZA ET AL., *supra* note 4, at 281 (discussing how the NPV legislation will be an issue during the 2008 election).

[88] *See id.* at 16; WHITAKER & NEALE, *supra* note 25, at 6.

[89] *See, e.g.*, Jack N. Rakove, *The E-College in the E-Age*, *in* THE UNFINISHED ELECTION OF 2000, at 201–02 (Jack N. Rakove ed., 2001) ("In the days immediately preceding the Presidential election of 2000, the recognition dawned that Americans might well deliver a split verdict, granting a plurality in the popular vote to one candidate and a majority in the Electoral College to the other"); TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 8–9 (2004) (discussing rampant speculation before the 2000 election that Democratic Presidential candidate Al Gore might win the electoral vote without a popular majority).

[90] *See* KOZA ET AL., *supra* note 4, at 16; WHITAKER & NEALE, *supra* note 25, at 6. It is possible that some misfires were in part the result of strategic decisions: some candidates may have campaigned not to win the most popular votes possible nationwide, but to win the most electoral votes. A direct popular vote would probably have caused candidates to campaign differently, which may have affected the outcome of some elections. *See* BENNETT, *supra* note 24, at 49.

500,000 votes; a 25% chance with 1–1.5 million votes; and a 12.5% chance with 2 million votes.[91]

Supporters of the Electoral College defend the possibility of misfire on two grounds. Some argue that the possibility of misfire is not inconsistent with the principles underlying the Constitution, but instead coherent with the rejection of majoritarianism that characterizes the selection procedures for the Supreme Court and Senate, as well as the guarantee of minimum representation in the House of Representatives.[92] Other supporters of the Electoral College emphasize the relative infrequency of misfires as evidence that the Electoral College accurately reflects the popular majority.

Yet the argument that majoritarianism does not, should not and never has mattered in Presidential elections is belied by the rarity of conflict between the outcome of the Electoral College and popular vote.[93] At a minimum, actual practice has fostered the expectation that the Electoral College will and *should* reflect the outcome of the national popular vote. Indeed, many Electoral College supporters deny that the framers intended electors to act independently of the popular result.[94]

Yet viewing the Electoral College as either a repudiation or a reflection of majoritarian interests is largely unsatisfactory. If electors were meant to operate independently, the resultant election process would be unlikely to retain much popular support today. If electors simply exist to implement the results of the popular vote, they are at best superfluous and at worst inimical to democracy if they vote in unexpected ways and produce misfires.

The NPV legislation provides a satisfactory alternative to either traditional characterization of the Electoral College. Under the NPV legislation, electors will have the clear role of implementing the national popular vote, which will probably further popular support for the Presidential election process. To the extent that the Electoral College was or should be intended to reflect the popular will, the NPV legislation solidifies that purpose by preventing misfires, which are inherently anti-democratic.

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[91] *See* LONGLEY & BRAUN, *supra* note 5, at 3.

[92] ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 15–16 (1971) (expanded & rev. ed. of "The New Age of Political Reform" 1968) ("[N]ear-perfect apportionment is frustrated as well by state lines, which no district may cross, so that a state will gain or lose representation if after it carves a number of equal districts out of its population, it has a fraction left over").

[93] Arguably, the Electoral College's tendency to reflect popular vote result "may be far more reliable than the critics admit." BEST, *supra* note 30, at 58–59. She further predicts that the risk of misfire will continue to decline, making the "runner-up President [rare] indeed." *Id.* at 67.

[94] The Electoral College has been called simply "a vehicle for the expression of the people," where "the strongest evidence [demonstrates] that the framers did not intend electors to exercise independent judgment." HARDAWAY, *supra* note 35, at 86.

B. Battlegrounds and Spectators

A central issue in the debate over the NPV legislation is the phenomenon of the ever-shrinking battleground during Presidential elections. The force of the argument is augmented by the continuing decline in the number of so-called battleground states[95]—those states where no candidate has overwhelming support, meaning that both major party candidates have a reasonable chance of winning the state's electoral college votes—and the corresponding increase in the number of safe states—the "red states" and "blue states," which are insurmountably Republican and Democrat, respectively.

Arguably, the Electoral College's most dramatic impact on Presidential elections in recent years was not the misfire in 2000, but the de facto exclusion of most of the United States from Presidential election campaigns.[96] In practice, one effect of the Electoral College is to narrow the Presidential election from a nationwide, fifty-state race to one focused on a few battleground states. The gulf in campaign advertising and personal candidate appearances between the battleground and safe states was dramatic in the 2004 election: of the $237 million spent on advertising during the last month of the Presidential campaign, 72% was spent in five states (Florida, Ohio, Iowa, Wisconsin, and Pennsylvania).[97] The candidates spent nothing at all in twenty-three states.[98] Furthermore, sixteen states received 92% of the Presidential and Vice Presidential appearances; the five states with the highest advertising expenditures received 65% of these appearances.[99]

Supporters of the NPV legislation therefore criticize the Electoral College for its effect on the majority of the country: "the remaining two thirds of the states are, for all practical purposes, excluded from the campaign. They are mere spectators in the election process."[100]

Supporters of the Electoral College acknowledge that modern campaigns focus on only a few battleground states, but they argue that the battlegrounds change often and therefore that the Electoral College is not

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[95] In 1960, Richard Nixon visited every state during his Presidential campaign. During the final three weeks of that campaign, Kennedy and Nixon spent 88% of their time in twenty-four battleground states. *See* KOZA ET AL., *supra* note 4, at 12. In 1976, eleven states did not receive a single visit from the Democratic candidates for President and Vice President. Twelve other states received only one visit. *See* Mayer et al., *The Electoral College and Campaign Strategy*, *in* CHOOSING A PRESIDENT, *supra* note 1, at 103.

[96] Hertzberg, *supra* note 3, at 27–28 (stating that the Electoral College should be blamed for the "death of participatory politics in two-thirds of the country.").

[97] *See* KOZA ET AL., *supra* note 4, at 9–10. *See also* U.S. Presidential Campaign Spending Triples, CBC NEWS, Nov. 1, 2004, http://www.cbc.ca/world/story/2004/11/01/us_campaigncost041101.html (last visited Nov. 18, 2006).

[98] *See* KOZA ET AL., *supra* note 4, at 10. These ignored states included California, Illinois, Massachusetts, Georgia, and New Jersey. *Id.*

[99] *Id.* at 11.

[100] *Id.* at 10.

systematically detrimental to the voters of certain states.[101] For example, although Michigan and Florida are now considered to be battlegrounds, Michigan was not a battleground during the Clinton years, and Florida was considered a sure Republican state in 1996 and even as late as the summer of 2000.[102]

The fact that battlegrounds change frequently is not clearly a substitute for giving equal weight to every voter in every state. Sixteen states should not represent all fifty, especially as it is unlikely that the battleground states will reflect the interests of all fifty. By dividing the country into safe and battleground states, the Electoral College severely distorts the presidential campaign. If implemented, the NPV legislation would mean that no states are necessarily excluded from the campaign, because the focus of the candidates would be on garnering the majority of the national popular vote, rather than the popular votes of a select number of battleground states. By diminishing the strategic value of locally focused stump speeches, candidates may be motivated to address national issues more comprehensively.

C. Federalism and Sectionalism

Supporters of the Electoral College argue that the Electoral College's central importance to federalism outweighs any anti-democratic consequences.[103] In this view, eliminating the Electoral College would not only harm federalism,[104] but also exacerbate sectionalism. These supporters of the Electoral College maintain that the current system causes Presidential candidates "to hear and address the unique interests of the various states," rather than factions based on region, state, or ideology.[105] They distinguish states from interest groups organized around specific issues like gun control or racial preferences; comparatively, in this view, states are "safe"

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[101] *See* Bonnie J. Johnson, *Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?*, 35 PUBLIUS 337, 339 (2005) ("If states that are competitive change over time, it would indicate that the Electoral College bias is not systematic and, thus, not detrimental to state representation or democracy").

[102] *See* Allan Cigler et al., *Changing the Electoral College: The Impact on Parties and Organized Interests*, in CHOOSING A PRESIDENT, *supra* note 1, at 99.

[103] *See* ROSS, *supra* note 89, at 54. Federalism, in Madison's classic characterization, rests on the duality of the federal and state governments:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 5, at 291 (James Madison) (Clinton Rossiter ed., 1999).

[104] *See* ROSS, *supra* note 89, at 54.

[105] ROSS, *supra* note 89, at 76.

factions that can better check and balance one another, preventing tyranny.[106] It therefore follows that the Electoral College helps prevent "local needs from being ignored, controls dangerous factions, and requires a balancing of interests."[107] Some supporters of the Electoral College also argue that a direct popular vote, instead of making every vote equally valuable to all candidates, would refocus the candidates' attention on large states at the expense of small states.[108]

According to its supporters, the Electoral College minimizes sectionalism, or reliance by candidates on an electorate limited to one geographic section of the country. Some of these supporters argue that the Electoral College forces candidates to broaden their appeal geographically and prevents candidates with solely regional or sectional bases from ascending to the presidency.[109]

In contrast, supporters of the NPV legislation argue that the current system leads Presidential candidates to focus disproportionately on appealing to small factions of voters in battleground states, possibly to the detriment of national interests. For example, Presidential candidates have consistently supported the Cuban embargo to woo Cuban American votes in Florida, "the swing bloc within the swing state."[110]

Supporters of the NPV legislation note that other scholars have suggested that the present system can actually exacerbate sectionalist tendencies by awarding electors to candidates with strong regional followings, such as Strom Thurmond in 1948 and George Wallace in 1968, but not to broadly based, nationally focused candidates like Ross Perot in 1992.[111] The current system may foster candidates aiming to play the role of "spoiler." A spoiler could deny either major party candidate a majority and then bargain for concessions in exchange for their electoral votes.[112]

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[106] *Id.* at 57–58.

[107] *Id.* at 58.

[108] *See* Phyllis Schlafly, *Subversive Plan*, N.Y. SUN, May 9, 2006, at 9 ("The elimination of the Electoral College would overnight make irrelevant the votes of Americans in about 25 states because candidates would zero in on piling up votes in large-population states"); Ross, *supra* note 89, at 182 ("Getting rid of the Electoral College would allow Presidential candidates to win with positions that are not at all in the interest of less populous states").

[109] *See* Schlafly, *supra* note 109 at 9. ("The Electoral College ensures that no single faction or issue can elect a President because he must win many diverse states to be elected"). Yet the election of 1860 indicates that the Electoral College did not provide complete protection against sectionalism. Abraham Lincoln, a highly sectional candidate, won a majority of the Electoral College in that election even though he did not receive a single vote south of Virginia (he was not even on the ballot in ten states) and won less than 40% of the overall popular vote. *See* Amar & Amar, *supra* note 22, at 62.

[110] Keith Epstein & Chris Echegaray, *Hispanic Dynamics*, TAMPA TRIB., Sept. 18, 2005, Nation/World, at 1.

[111] *See* LONGLEY & BRAUN, *supra* note 5, at 9.

[112] That strategy worked in 1824 when Henry Clay apparently promised his support to John Quincy Adams in exchange for Adams's promise to make Clay his Secretary of State. Clay's support gave Adams victory over Andrew Jackson who had won a plurality of the national popular vote. *See id.* at 36.

An examination of contemporary Presidential elections largely refutes concerns about sectionalist candidates. For past elections, changing to a direct national popular vote would not have increased the chance that candidates appealing exclusively to one narrow sectional group, like Thurmond in 1948[113] and Wallace in 1968,[114] would have won the Presidency outright. Both the current system and the NPV legislation pose high hurdles to such candidates. Furthermore, today, Presidential elections generally do not offer a choice between one sectional candidate and one national candidate, but between two sectional candidates. A national candidate enjoys support from voters of all characteristics and all regions of the country. Yet a stark urban-rural divide has characterized the two most recent Presidential elections: just as Al Gore had limited appeal in rural areas in 2000, George W. Bush polled poorly among urban voters.[115] Recent elections also reflect regional differences: while Northeast and West Coast states strongly supported Gore, Bush's victories came in the South and Midwest.[116]

Recent elections suggest that the Electoral College has not substantially counteracted the regional and sectional divisions within the electorate. Instead, the evidence suggests that sectionalism can and does arise under the Electoral College, which in turn undercuts its alleged importance to preserving federalism. Instead of ensuring that candidates pay attention to each state's concerns, the Electoral College in practice focuses attention on the interests of a small and shrinking group of battleground states while ignoring the concerns of the majority of states[117]—a list that includes California, New York and Illinois—because such states are considered "safely" on one party's side, these states' citizens are essentially disenfranchised. Compared to the NPV legislation, the current system may actually exacerbate sectionalism by artificially increasing the influence of the small states, which gives an advantage to candidates that have broader appeal in small states.

The NPV legislation does not substantially undercut federalism while arguably minimizing sectionalism. Even without the current Electoral Col-

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[113] Thurmond won 2.4% of the popular vote and 39 electoral votes, but not enough to prevent Harry Truman from winning the majority of the electoral votes. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 72 (115 ed. 1995).

[114] George C. Wallace won 13.5% of the popular vote and forty-six electoral votes, again not enough to prevent Richard Nixon's electoral majority of 301 votes. *Id.*

[115] Many more (59%) rural voters supported Bush than supported Gore (37%). *See Breaking Down the Electorate*, TIME, Nov. 20, 2000, at 74. An overwhelming 71% of voters in cities with over 500,000 people cast ballots for Gore, while Bush earned only 26% of their votes. *Id. But see* ROSS, *supra* note 89, at 182 (noting that Bush carried at least one state in every region of the country and carried the election for over 2 million square miles of the country, while Gore carried only 580,000 square miles). The statistics cited by Ross demonstrate the extent of the rural-urban divide.

[116] *See* ROSS, *supra* note 89, at 182.

[117] *See supra* Part III.B (discussing the diminishing number of battleground states).

lege system, states would continue to have a central role in the Senate.[118] Since the NPV legislation removes the incentive to focus on battleground states, it should prevent disenfranchisement of states that would otherwise be considered safely on one party's side. By requiring candidates to win the national popular vote, the NPV legislation reinforces the role of the President as a representative not of the states, but of the whole population of the United States.

D. Voter Turnout

The United States ranks close to the bottom among world democracies in voter turnout.[119] Some scholars argue that a direct popular election, like that proposed by the NPV legislation, would motivate more Americans to vote by ensuring that every vote would count.[120] Some supporters of the Electoral College, however, suggest that the psychological benefit of knowing that every vote counts will have no appreciable effect on turnout.[121]

A comparison of turnout in battleground states and in safe states for the 2004 election suggests that battleground states have higher voter turnout than safe states. Among nine battleground states, aggregate turnout was 66.3% of eligible voters, compared with 58.9% in the other forty-two jurisdictions.[122] The disparity has increased over time. The turnout for the twelve most competitive states increased from 54% to 63% between 2000 and 2004, while turnout for the twelve least competitive states increased from 51% to only 53%.[123]

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[118] The equality of state representation in the Senate is immune from the Article V amendment process of the Constitution. *See* U.S. CONST. art. V ("[N]o state, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[119] *See* Robert L. Lineberry et al., *The Electoral College and Social Cleavages: Ethnicity, Class, and Geography*, *in* CHOOSING A PRESIDENT, *supra* note 1, at 161, 163. While established democracies averaged 73% turnout, turnout in the 2000 American presidential election was 49.3%. *See* Int'l Inst. for Democracy & Electoral Assistance, Voter Turnout: Main Findings, http://www.idea.int/vt/findings.cfm (last visited Nov. 18, 2006).

[120] *See, e.g.*, Burdett A. Loomis et al., *Electoral Reform, the Presidency, and Congress*, *in* CHOOSING A PRESIDENT, *supra* note 1, at 74, 78 (arguing that minority party voters would vote in increased numbers for President in a direct election system).

[121] *See, e.g.*, Robert M. Stein et al., *Citizen Participation and Electoral College Reform*, *in* CHOOSING A PRESIDENT, *supra* note 1, at 125–26 (arguing that electoral reform will have only a slight effect on voter turnout).

[122] *See* Scott L. Althaus, *How Exceptional Was Turnout in 2004?*, 15 POL. COMM'N REP. 1 (2005), *available at* http://www.ou.edu/policom/1501_2005_winter/commentary.htm (finding that the nine battleground states of Florida, Iowa, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, and Wisconsin experienced an 8.4% increase in turnout over 2000, while the other forty-two jurisdictions saw only a 4.7% increase).

[123] *See* FAIRVOTE, THE SHRINKING BATTLEGROUND: THE 2008 PRESIDENTIAL ELECTIONS AND BEYOND 13 (2005), *available at* http://www.fairvote.org/media/perp/Shrinking_Battleground_Final.pdf (reporting on the decrease in number of competitive battleground states in presidential elections and the likely civil and partisan consequences).

Under the NPV legislation, candidates who currently ignore states in which they have comfortable majorities would have a new incentive to maximize their supporters' turnout. Every candidate would also have an incentive to pursue every possible vote, even in states that are heavily tilted toward another party. Candidates would probably advertise on national television networks instead of on local stations,[124] so campaigns would reach even voters in sparsely populated areas, most likely increasing the total national turnout.

E. The House Contingency Procedure

Practically since its inception, the House contingency procedure has been much maligned.[125] As early as 1823, Thomas Jefferson wrote:

"I have even considered the Constitutional mode of election ultimately by the legislature voting by states as the most dangerous blot on our Constitution, and one which some unlucky chance will some day hit."[126] The NPV legislation would eliminate use of this much-criticized procedure by guaranteeing a majority of the Electoral College to the winner of the national popular vote.

F. The Two-Party System

Current Presidential elections feature two major candidates; only occasionally does a third party candidate credibly campaign. Supporters of the Electoral College claim that a direct popular vote for President would encourage "single-issue zealots, freelance media adventurers, and eccentric billionaires to jump into Presidential contests."[127] Former Senator Daniel Patrick Moynihan (D-N.Y.) has argued that abolishing the Electoral College would be the "the most radical transformation in our political system that has ever been considered"[128] because it would severely weaken the two-party system.[129]

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[124] *See* Michael M. Uhlmann, *Creating Constitutional Majorities: The Electoral College After 2000*, *in* SECURING DEMOCRACY, *supra* note 24, at 103, 106–07 ("Mass-market television advertising is expensive, but per capita it is the cheapest route to electoral success when what counts is the sheer number of votes rather than their state of residence").

[125] *See* William T. Gossett, *Direct Popular Election of the President*, *in* ABA SPECIAL COMMITTEE ON ELECTION REFORM, ELECTING THE PRESIDENT 58 (rev. ed. 1977) ("This feature of our system is clearly a political monstrosity, fully distorting the most elementary principles of self-government").

[126] LONGLEY & BRAUN, *supra* note 5, at 37.

[127] Arthur Schlesinger, Jr., *Fixing the Electoral College*, WASH. POST, Dec. 19, 2000, at A39.

[128] Daniel Patrick Moynihan, *The Electoral College and the Uniqueness of America*, *in* SECURING DEMOCRACY, *supra* note 24, at 87–88.

[129] *See id.* at 100 (arguing that the political parties would be replaced by an enormously powerful media).

Supporters of the NPV legislation argue, however, that a variety of other factors, including single-member congressional districts, the open nature of the parties, direct primaries, the Presidential nomination system, public funding requirements, and state ballot laws, would minimize the amount of change any Electoral College reform would have on the two-party system.[130]

Admittedly, a direct popular vote for President, as provided for under the NPV legislation, would provide incentives for third party candidates to run. Since the NPV legislation implements a plurality system, the entry of each new candidate would lower the threshold needed to win the election, so that the more candidates in the race, the greater the incentive for additional candidates to run.[131] Candidates might also enter the race to extract concessions from the major party in exchange for leaving the race.[132] Indeed, the general election could become a national primary in which highly ideological candidates from minor parties could bargain to lend their support to major candidates in the likely runoff.[133] Alternately, minor party candidates could capture the support of a major party's constituency, potentially preventing one of the major party candidates from even reaching the runoff.[134] The viability of minor party candidates requires such campaigns to overcome the common perception that a vote is "wasted" if cast for minor parties.[135]

One possible solution to any weakness introduced by a simply plurality requirement such as the NPV legislation, is the "instant runoff," in which voters would rank their choices. Under such a system, voters could then pick moderate, major party candidates as their second choice, preventing the highly ideological candidates from qualifying for any runoff.[136] While the current NPV legislation does not contain an instant runoff provision, it could be included in a future version, thereby assuring that elected candidates meet a specified popular vote threshold.

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[130] *See, e.g.*, Cigler et al., *supra* note 102, at 90–91.

[131] *See* Stein et al., *supra* note 121, at 134.

[132] *See id.*

[133] *See* HARDAWAY, *supra* note 35, at 18–19. At least one Electoral College supporter points out that the Nazis in Germany took advantage of direct popular election to establish a minority power base, and ultra-nationalist Vladimir Zhirinovsky's 23% could have swung the 1993 Russian Presidential election. *See id.*

[134] *See* BEST, *supra* note 30, at 117–18.

[135] *See* PEIRCE & LONGLEY, *supra* note 8, at 85 ("The vast preponderance of Americans apparently still consider it a wasted vote to support a maverick candidacy"); Michael Barone, *The Electoral College and the Future of American Political Parties*, *in* SECURING DEMOCRACY, *supra* note 24, at 79, 83 (arguing that "[d]on't waste your vote" is a powerful argument against third party candidates).

[136] *See* Amar & Amar, *supra* note 22, at 63.

G. *Chaos and Fraud in Close Elections*

Supporters of the Electoral College argue that under the Electoral College, recounts and controversy associated with close elections can be limited to one state or a handful of states, but that with a direct popular vote, recounts would have to be national, and thus costlier and more chaotic.[137] Of course, the cut-off for any such recount would in itself be a source of controversy. Indeed, some argue that the 1960 election, which Kennedy won with a 0.2% national popular vote margin, should have been recounted.[138] Others argue that because voting machines have an error rate of 1% or more, elections with margins of up to 1% are inherently problematic.[139]

Yet, the low probability of very close elections on the national level makes this aspect of the NPV legislation of only minimal concern. Since 1900, every election has had a national popular vote margin exceeding 100,000—a very high absolute number of ballots.[140] Simple arithmetic confirms this result: a 0.1% margin translates into a much larger absolute margin in a national vote than in a state vote. Moreover, the American people may not find very close elections, even on a national level, troubling, having become accustomed to very close elections due to their experience with state races.[141]

In the extremely unlikely event of a margin much smaller than 100,000 votes, however, the NPV legislation provides little guidance as to when

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[137] *See* Schlafly, *supra* note 108, at 9. ("If the popular vote were controlling, chaos would be the predictable result in any close election. An allegation of voter fraud in one state would begin a fatal chain reaction of challenges and recounts as campaign managers try to scrape up additional hundreds of votes in many states at once"); *see also* HARDAWAY, *supra* note 35, at 158–60 (discussing delays in tabulating and reporting results during recounts).

[138] *See* Lutz et al., *supra* note 1, at 44. Many states have automatic recount provisions if margins are within a certain percentage. For example, New Mexico requires a recount if the margin is within 0.3%—which would have included the Kennedy-Nixon 1960 results. *See id.*

[139] *See id.* at 43. Other evidence suggests that the error rate may be even higher. In one study, lever machines had an error rate of 2.2%, optical scan machines had an error rate of 2.7%, and electronic machines had an error rate of 3.1%. *See* Martha E. Kropf & Stephen Knack, *Balancing Competing Interests: Voting Equipment in Presidential Elections*, *in* COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA 121, 124 (Robert P. Watson ed., 2004) [hereinafter COUNTING VOTES]. In 2000, the rate of uncounted ballots was as high as 7.9% in districts in Chicago and Miami. *See* Teresa C. Green et al., *Voting Technology and Voting Access in Twenty-first-century America*, *in* COUNTING VOTES, *supra* note 139, at 105–06. One comprehensive study found that 6% of ballots cast nationwide went uncounted due to faulty voting machines, poorly designed ballots, or absentee ballot mistakes. *See* Neal Peirce, *Reforming Politics: A 'One-Stop' Guide*, STATELIINE.ORG, July 17, 2006, http://www.stateline.org/live/details/story? contentId=127312 (last visited Nov. 18, 2006). None of these problems, of course, is unique to the presidential elections; they are equally true for state and local elections.

[140] *See* KOZA ET AL., *supra* note 4, at 362.

[141] *See id.* at 229.

or how such recounts would be conducted. Ostensibly, such recounts would rely on existing state-by-state recount machinery.[142]

The NPV legislation would not necessarily exacerbate the problem of fraud in close elections. Specifically, NPV supporters argue that with a margin of more than 500,000 popular votes on the national level, even a close election like the one in 2000 would be unlikely to be the product of fraud.[143]

Under the current Electoral College system,[144] the incentives to cheat are substantial, because a few votes could change the result in a state, and thus, in the election:

> The large differences in the value of a vote in various states in Presidential elections has the additional negative side effect of increasing the likelihood of contested Presidential elections and recounts. Because the statewide winner-take-all system divides the nation's 122,000,000 popular votes into 51 separate pools, it regularly manufactures artificial crises even when the nation-wide popular vote is not particularly close.[145]

In contrast, under the NPV legislation, "[t]here are fewer opportunities for razor-thin outcomes when there is one single large pool of votes than when there are 51 separate smaller pools."[146] Under the NPV legislation, the diminished likelihood of changing the election result should provide fewer incentives for parties to engage in fraud or disenfranchisement.[147]

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[142] *See id.* at 364 (arguing that the states are always prepared to conduct recounts because recounts occur on a state level "in virtually every election cycle").

[143] *See* KOZA ET AL., *supra* note 4, at 18–19.

[144] In just one example, the U.S. Commission on Civil Rights investigated allegations of voter fraud and disenfranchisement during the 2000 election in Florida and concluded that "[d]espite the closeness of the election, it was the widespread voter disenfranchisement, not the dead-heat contest, that was the extraordinary feature in the Florida election. The disenfranchisement was not isolated or episodic. And state officials failed to fulfill their duties in a manner that would prevent this disenfranchisement." U.S. COMM. ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION 99 (2001), *available at* http://www.usccr.gov/pubs/vot2000/report/main.htm.

[145] KOZA ET AL., *supra* note 4, at 18. For example, the 1876 Tilden-Hayes contest, though not particularly close on a national level, included five states with margins under 3000 votes and was therefore a controversial election. *See id.* at 19. One effect of the tendency to artificially manufacture crises in close state outcomes is the potential for litigation. The two major candidates in 2004, George W. Bush and John Kerry, collectively stockpiled more than $20 million in their general election legal and accounting compliance funds in anticipation of legal battles akin to those of 2000. Bush had $15.6 million in his GELAC fund, and Kerry had $7.2 million in his GELAC fund. *See* Chris Cillizza, *Bush, Kerry Have Leftover Cash*, ROLL CALL, Jan. 27, 2005.

[146] KOZA ET AL., *supra* note 4, at 18.

[147] *See* LONGLEY & BRAUN, *supra* note 5, at 85.

H. Cost of Presidential Campaigns

The skyrocketing cost of Presidential campaigns is already controversial, but a transition to a nationwide popular vote in which every vote counts may increase costs even more rapidly. For the 2004 election, the major candidates for President raised a total of approximately $919 million.[148] Both major party nominees also opted out of the federal matching fund program during the primaries, which would have set an overall spending cap and limits in individual states. In the future, more candidates are expected to follow this opt-out practice, which will probably contribute to further escalations in fundraising and spending.[149]

The increased cost of a national Presidential campaign has gone largely unnoticed in the debate on a direct popular vote for President.[150] The practical difficulties of conducting a comprehensive nationwide campaign should be of substantial concern to NPV supporters. It seems quite likely that a fifty-state campaign would be much costlier than the present sixteen-state campaign. Instead of buying advertisements on local television stations, the candidates would probably need to buy time on the national networks, which although vastly more expensive than the local stations would still be the most cost-effective way to reach large numbers of voters.[151] The cost of candidates' direct mailings, automated calling, phone banking, public rallies, polling, radio advertising, canvassing, and other operations—all expensive already—would further increase, if expanded nationwide. The suddenly magnified need for fundraising and the accompanying increase in the stature of major contributors could exacerbate the perception that elites and large corporations hold disproportionate influence over the presidency.

The influence of money on politics, already criticized, would almost certainly come under greater scrutiny as campaign expenditures ballooned. A serious study of the effects of nationwide direct election on campaign

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[148] *See* PoliticalMoneyLine, 2004 Presidential Electronic Filing Summary, http://www.fecinfo.com/cgi-win/pml1_sql_PRESIDENTIAL.exe?DoFn=2004 (last visited Nov. 18, 2006) (showing funding itemization by candidate). The candidates spent a total of $891 million. *See id.*

[149] *See* Robert Schlesinger, *Plotting the Cash Path: Potential 2008 Presidential Candidates Are Already Stockpiling Campaign Money*, CAMPAIGNS & ELECTIONS, Sept. 2005, at 19 (discussing the political pressures on candidates to opt out of federal fund matching programs).

[150] NPV supporters have acknowledged the increased cost of campaigning in larger states than smaller ones, but they have never explicitly addressed the issue of increased costs in a direct-vote presidential election. *See* KOZA ET AL., *supra* note 4, at 172 ("Changing the statewide percentage of the popular vote in a large state is more costly (in terms of campaigning time, advertising, and organizational efforts) than generating the same percentage change in a small state").

[151] *See* Uhlman, *supra* note 124, at 106 ("Mass-market television advertising is expensive, but per capita it is the cheapest route to electoral success when what counts is the sheer number of votes rather than their state of residence").

expenditures is essential in evaluating the ultimate desirability of the NPV legislation.

1. Structural Precariousness

If adopted, the status of the NPV legislation, as an interstate compact, is at least theoretically precarious because any member state could withdraw from it at any time.[152] The NPV legislation attempts to foster at least election-year stability by prohibiting withdrawals from taking effect after July 20 of the election year.[153] Theoretically, this provides enough time for candidates to transition their campaigns to a battleground-centered race; however, it seems likely that such an event would still throw campaigns into disarray and undermine the purpose of NPV legislation.

The possibility of state withdrawal may be mitigated by several circumstances. First, more states than necessary may join the interstate compact, making the withdrawal of a few states irrelevant to the guaranteed majority. Second, since the early 1800s, state legislatures have been reluctant to manipulate the presidential voting system. Third, the popularity and self-propagating legitimacy of a true nationwide popular vote may make any switch back to a state-based system politically unfeasible.

Fourth, a switch would be advantageous and feasible only under the rare convergence of several circumstances. Specifically, the candidate would have to be trailing in nationwide polls, but have a reasonable likelihood of capturing a majority of the electoral votes under the state-based, winner-take-all system. Further, states that could affect the outcome of the election would have to be members of the NPV interstate compact. The composition of these states would have to be controlled by the trailing candidate's party and willing to manipulate the system for assigning electors. Practically, then, the danger of strategic withdrawals seems low. In sum, while state withdrawal remains a possibility, it is probably unlikely.

IV. CONCLUSION

The product of constitutional compromise, the Electoral College has largely deviated from the expectations of the Framers. By the mid-nineteenth century, electors were no longer selected through diverse appointment procedures, but almost only through the winner-take-all rule. Despite many proposed constitutional amendments to the process, only one has succeeded. The NPV legislation has the potential to address many of

[152] *See* H.R. 2948, 2006 Assem., Reg. Sess. art. 4 (Cal. 2006). For example, if one political party saw an advantage in reverting to the winner-take-all Electoral College system, it might be able to persuade enough states to withdraw from the agreement, resulting in a reversion to the current winner-take-all system.

[153] *See id.* art. 3.

the criticisms[154] of the Electoral College without succumbing to political hurdles that have traditionally stymied Electoral College reform efforts.[155] Specifically, the NPV legislation would ameliorate many of the problematic effects associated with the Electoral College with respect to misfire,[156] the shrinking number of battleground states,[157] federalism and sectionalism,[158] voter turnout,[159] the House contingency procedure,[160] the two-party system,[161] and chaos and fraud during close elections.[162] The NPV legislation could, however, create problems of its own, by damaging the two-party system,[163] increasing the cost of campaigns,[164] and infusing the election system with the potential for instability.[165]

The NPV legislation stands for a simple principle: every vote is equal.[166] It is a laudable proposal, whose benefits outweigh its costs, as well as an innovative way to update the Constitution's structure to reflect the preference in modern politics for majoritarian rule. For these reasons, it should be enacted.

*—Stanley Chang**

[154] *See supra* Part III.
[155] *See supra* Part I.
[156] *See supra* Part III.A.
[157] *See supra* Part III.B.
[158] *See supra* Part III.C.
[159] *See supra* Part III.D.
[160] *See supra* Part III.E.
[161] *See supra* Part III.F.
[162] *See supra* Part III.G.
[163] *See supra* Part III.F.
[164] *See supra* Part III.H.
[165] *See supra* Part III.I.
[166] While the choice between the present Electoral College system and the NPV legislation could perhaps be reduced to a "choice of rules" question, this simplification diminishes the role of these rules in promoting particular democratic values. To the extent that a certain rule reaffirms this central, desirable tenet of a political system, it should be favored over other alternatives. *Cf.* Akhil Reed Amar & Vikram David Amar, *Why Old and New Arguments for the Electoral College Are Not Compelling*, *in* AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE 61 (John C. Fortier, ed., 2004) (distinguishing the presidential election method from merely a choice of rules in a sports game).

* J.D. Candidate, Harvard Law School, Class of 2008.

REVISITING THE McDADE AMENDMENT: FINDING THE APPROPRIATE SOLUTION FOR THE FEDERAL GOVERNMENT LAWYER

The United States Congress enacted the McDade Amendment in 1998 following a history of ethics controversies arising from Department of Justice ("DOJ") policies regulating attorney conduct.[1] Representative Joseph McDade (R-Pa.), the subject of a DOJ investigation that ultimately resulted in an acquittal, introduced the measure with the intent of reining in what he viewed as "the overzealousness and excessiveness of federal prosecutors."[2] Since it became law, the McDade Amendment has made federal attorneys subject to the laws and rules of professional conduct in the states in which they practice.[3]

Yet, since the inception of the McDade Amendment, DOJ officials, academics, and legislators have criticized the measure for creating confusion over the applicable ethical standards and for its overly restrictive treatment of the federal government lawyer.[4] Some concerned legislators have repeatedly introduced proposals in Congress to amend the McDade Amendment, although all attempts have thus far been unsuccessful, garnering little attention after their introduction.[5] Nevertheless, criticism of the McDade Amendment has taken a sharper and more urgent tone following Septem-

[1] Citizens Protection Act ("McDade Amendment"), Pub. L. No. 105-277, div. A, Sec. 101(b), § 801(a), 112 Stat. 2681 (1998) (codified in relevant part at 28 U.S.C. § 530B (2000)).

[2] Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 214 & n.39 (2000) (citing *Ethical Standards for Federal Prosecutors Act of 1996: Hearings Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 7 (1996) (statement of Rep. Joseph McDade)).

[3] *See* 28 U.S.C. § 530B.

[4] *See, e.g.*, *Reauthorization of the U.S. Department of Justice: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 107th Cong. 35 (2001) (statement of Mark Calloway, Acting Director, Exec. Office for U.S. Attorneys, U.S. Dep't of Justice); Zacharias & Green, *supra* note 2, at 210; 147 CONG. REC. 27, 944 (daily ed. Dec. 20, 2001) (statement of Sen. Patrick Leahy (D-Vt.)). However, the McDade Amendment is not without its defenders. *See, e.g.*, Sapna K. Khatiwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 GEO. J. LEGAL ETHICS 111, 127 (1999) ("The McDade Amendment is an effective solution to the decade-long question over whether federal prosecutors should be subject to state ethics rules.").

[5] There have been ten legislative attempts to amend the McDade Amendment: S. 250, 106th Cong. (1st Sess. 1999); S. 855, 106th Cong. (1st Sess. 1999); S. 2783, 106th Cong. (2d Sess. 2000); H.R. 2506, 107th Cong. (1st Sess. 2001); H.R. 3309, 107th Cong. (1st Sess. 2001); S. 1435, 107th Cong. (1st Sess. 2001); S. 1437, 107th Cong. (1st Sess. 2001); S. 1510, 107th Cong. (1st Sess. 2001); H.R. 2215, 107th Cong. (1st Sess. 2001); S. 22, 108th Cong. (1st Sess. 2003).

ber 11,[6] as the investigation and prevention of terrorism has become the top priority of the DOJ.[7]

Thus, the issue of conflicting ethical standards in different jurisdictions within the federal system remains vital.[8] Although this issue affects all attorneys who practice in the federal court system, it has had the greatest impact on federal government lawyers, including those attorneys working at the DOJ, the United States Attorney's Offices around the country, the Chief Counsel's Office of the Drug Enforcement Administration, and the General Counsel's Office of the Federal Bureau of Investigation.[9]

This Recent Development seeks to evaluate a potential revision of the McDade Amendment to ensure that any proposed solution accommodates the requirements of the federal government lawyer's job. Part I briefly reviews the background of the ethics dispute underlying the passage of the McDade Amendment, and then examines both the problems posed by McDade and the previous proposals to revise the statute. Part II considers what federal government lawyers require from an ethical code governing their actions, both in the courtroom and as investigators working alongside law enforcement officials, and why any revision of the McDade Amendment must account for their particular needs.[10]

In Part III, this Recent Development proposes the creation of a Federal Rules of Ethical Procedure that would be similar to the previous federal rules projects in the areas of civil procedure, criminal procedure, and evidence. Such a code, which would be applicable to all lawyers practicing in federal courts, has drawn support in the academic literature,[11] and

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[6] *See, e.g.*, Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 656 (2004) (discussing the possible impact of the McDade Amendment on investigations into terrorist cells).

[7] As former Attorney General Ashcroft expressed following September 11, "[c]ounterterrorism had already been a serious focus of the Department. However, the events of September 11 caused us to further re-prioritize our activities: the fight against terrorism is now the first and overriding priority of the Department of Justice." John Ashcroft, Att'y Gen., Message from the Attorney General, *Department of Justice Fiscal Year 2001 Accountability Report* (2002), *available at* http://www.usdoj.gov/ag/annualreports/ar2001/ag_message.htm. Upon taking office, Attorney General Alberto Gonzalez pledged to maintain terrorism as a top priority. *See* Alberto Gonzalez, Att'y Gen., Remarks at Installation as the Eightieth Attorney General of the United States (Feb. 14, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/02142005_aggonzales.htm.

[8] *See, e.g.*, Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707, 710–18 (2001) (describing the McDade Amendment's application in cases from California, Missouri, and Oregon).

[9] All of these organizations are subject to the McDade Amendment, *see* 28 U.S.C. §530B (2000), and its regulatory provision, 28 C.F.R. § 77.2 (2006).

[10] For the purposes of this Recent Development, the term "government lawyer" is used principally to refer to federal prosecutors and federal attorneys who participate in investigations, as those are the parties specifically included under 28 U.S.C. § 530B and 28 C.F.R. § 77.2. However, a uniform federal ethics code would inevitably have an impact on all federal government lawyers as well as private attorneys practicing in the federal court system.

[11] *See, e.g.*, Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM

the federal judiciary briefly considered an analogous proposal.[12] Finally, Part IV engages three critiques of a uniform federal rules approach and concludes that a Federal Rules of Ethical Procedure is the most appropriate and practicable solution to the ongoing ethics dispute that was aggravated by the passage of the McDade Amendment.

I. BACKGROUND OF THE MCDADE AMENDMENT

Over the past two decades, public concern and congressional interest has erupted periodically over the ethical issues posed by federal government lawyers operating in district court jurisdictions across the country.[13] A memorandum issued in 1989 by then-Attorney General Richard Thornburgh sought to uphold the DOJ's capability to investigate organized crime under circumstances, for example, in which all individuals relevant to an investigation were represented by the same attorney.[14] Thornburgh thus exempted DOJ attorneys from complying with the general provisions of state bar rules requiring that a lawyer not communicate with a person represented by counsel on the subject of the representation, unless the lawyer has the consent of counsel or is "authorized by law" to do so.[15] Despite the criticism it engendered, the "Thornburgh Memorandum" remained the policy of the DOJ and the succeeding Attorney General, Janet Reno, adopted it through a regulation now known as the "Reno Rule."[16] It was in the shadow of this resolute stance by the DOJ that Representative McDade introduced his eponymous amendment.

L. REV. 125, 127 (1991); Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 974 (1992).

[12] In 1995, the Judicial Conference considered possible reforms to attorney conduct, including creating a national code of attorney conduct for all courts. However, this model was "proposed as a theoretical option" and "quickly stalled as overkill." Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 17 (2005).

[13] Earlier articles have already detailed the history of the ethics conflict between the DOJ, Congress, and the circumstances of Congress's passage of the McDade Amendment. This Recent Development will not attempt to repeat this task. *See, e.g.*, Zacharias & Green, *supra* note 2, at 211–15; Thomas H. Moore, *Current Developments 2003-2004: Can Prosecutors Lie?*, 17 GEO. J. LEGAL ETHICS 961, 966–69 (2004). Rather, this Recent Development seeks only to provide sufficient context to allow for consideration of the proposal discussed herein.

[14] *See* Memorandum from Att'y Gen. Richard Thornburgh to all Justice Dep't Litigators (June 8, 1989) [hereinafter Thornburgh], *reprinted in In re Doe*, 801 F. Supp. 478, 489–93 (D.N.M. 1992).

[15] *See* Thornburgh, *supra* note 14. The sources of the state rules from which Thornburgh exempted DOJ attorneys were Disciplinary Rule 7-104(A)(1) of the American Bar Association's ("ABA") Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct.

[16] Moore, *supra* note 13, at 967. The "Reno Rule" maintained that DOJ lawyers retained the right to contact unrepresented parties prior to their indictment, even though state professional conduct standards prohibited such conduct. *Id.*

Following his acquittal in a DOJ-initiated bribery prosecution, Representative McDade sought to restrict the DOJ's ability to exempt itself from state ethics rules in response to what he viewed as the DOJ's overzealous prosecution of him.[17] After McDade had introduced several versions of the amendment in earlier bills, a modified version was included as a rider within a 920-page appropriations bill.[18] Despite heavy floor debate,[19] the McDade Amendment was included in the final approved House bill and became law on October 21, 1998,[20] although additional opposition in conference committee delayed its implementation until April 19, 1999.[21] As codified, the McDade Amendment requires that federal government attorneys abide by state laws and rules governing attorney conduct in addition to following the applicable local federal rules.[22] An accompanying regulation essentially limits the McDade Amendment's scope to attorneys within the DOJ.[23]

Widely believed to be "an act of revenge on the part of Congressman McDade,"[24] the McDade Amendment has received much criticism, with

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[17] *See* Zacharias & Green, *supra* note 2, at 211–14.

[18] *See* H.R. 4328, 105th Cong. (1998). *See also* Zacharias & Green, *supra* note 2, at 211–14.

[19] *See* 144 CONG. REC. 18928-50 (1998). For instance, Rep. Asa Hutchinson (R-Ark.) offered an amendment to strike the McDade language, *id.* at 18928, while Rep. John Conyers (D-Mich.) offered a "perfecting" amendment to expand the McDade Amendment to include independent counsel. *See id.*

[20] *See* 28 U.S.C. § 530B.

[21] *See* H.R. REP. No. 105-825 (1998) (Conf. Rep.); *see also* Zacharias & Green, *supra* note 2, at 209 & n.9, 215 (noting that McDade was adopted "[o]ver the vociferous objection of Senator [Orrin] Hatch (of Utah)]").

[22] The text of the McDade Amendment (also known as the Ethical Standards for Attorneys for the Government Act) is as follows:

> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
> (c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

28 U.S.C. § 530B (2000).

[23] *See* 28 C.F.R. § 77.2 (2006). The McDade Amendment principally applies to DOJ lawyers but is also applicable to attorneys from other federal government departments and agencies working with the DOJ. Thus, this Recent Development's discussion has more general application to all federal government lawyers. *See Memorandum for Command Counsels*, OFFICE OF COMMAND COUNSEL NEWSLETTER (U.S. Army Material Command, Office of the Command Counsel, Ft. Belvoir, Va.), Dec. 1999, at 52–53 (on file with author).

[24] Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395, 402 (2002).

detractors dismissing it as "ill-considered,"[25] and "casual and flawed legislation."[26] Numerous academic articles have expressed concern with the McDade Amendment, often echoing the initial critiques of the congressional opponents of the statute.[27]

To begin, the critics of the McDade Amendment have condemned the provision for failing to recognize the unique role of the federal government lawyer. An "essential assumption of the [McDade Amendment] is that federal prosecutors should, for purposes of legal ethics, be treated more like private lawyers and state prosecutors."[28] Yet this assumption repudiates a conventional understanding of the ethical distinction between federal prosecutors and private attorneys; in practice, many state ethical standards may be either too permissive or too restrictive for federal prosecutors,[29] and federal prosecutors may differ not only from private attorneys but also from state prosecutors.[30]

Critics also argue that the McDade Amendment makes it difficult for a federal government lawyer to discern which rules to follow and what actions he may take.[31] Such confusion may stem from the text of the statute itself,[32] the ambiguous relationship between state and federal rule-makers,[33]

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[25] Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 156 (2000).

[26] Zacharias & Green, *supra* note 2, at 259.

[27] *See* Khatiwala, *supra* note 4, at 123 ("[Congressional] [o]pponents of the McDade Amendment note[d] several problems with its specific terms, including that it: (1) imposes conflicting state ethics rules on federal prosecutors when a federal investigation crosses state boundaries which, in turn, hamstrings the performance of federal prosecutors; (2) cedes a large portion of control of the enforcement of ethics rules on federal prosecutors to the states; and, (3) infringes on a system of oversight of federal prosecutors that existed under the Reno Rules.").

[28] Zacharias & Green, *supra* note 2, at 224.

[29] *See id.* at 224–35 (discussing how strict application of state rules may be overly permissive for prosecutors regarding client confidentiality and overly restrictive with respect to criminal investigations or conflicts of interest).

[30] *See id.* at 224–25 (discussing how federal prosecutors differ from state prosecutors both in the broader scope of federal law enforcement and the types of criminal laws they enforce).

[31] *See, e.g.*, Zacharias & Green, *supra* note 2, at 210. *But see* Khatiwala, *supra* note 4, at 124 (The "image of a hodgepodge of inconsistent state ethics standards . . . is simply not accurate.").

[32] *See* Zacharias & Green, *supra* note 2, at 210 ("The legislation's simple language . . . masks the complexity of the issues."); *see also* McMorrow, *supra* note 12, at 16 ("The McDade Amendment has many technical problems—ambiguity being the primary issue—and is a burr in the side of the DOJ.").

[33] *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 401, 418 (2002) ("The McDade Amendment specifically contemplates that federal prosecutors will be governed by both state ethics rules and local federal court rules. However, state and federal regulators may not see eye to eye."); *see also* Kaufman, *supra* note 25, at 155 (the McDade Amendment "subjects government attorneys to both state laws and rules and federal court rules without explaining how to reconcile these provisions when they conflict").

choice of law practice,[34] and the conflicting standards of the state bar associations.[35]

Third, numerous scholars have examined the restrictive effects of the McDade Amendment on the federal government lawyer's role in investigations. These scholars have concluded that it "leaves the federal government unable to respond to the needs of law enforcement and to national emergencies."[36] For instance, after the McDade Amendment's passage, ethics rules limiting contacts between lawyers and parties represented by counsel have established "a significant regulatory gap . . . between prosecutors and their agents, as agents, not bound by ethics rules, remain free to contact represented targets overtly and covertly, so long as they do not involve prosecutors in such endeavors."[37] These limits have created concern that "each day federal prosecutors and agents make decisions not to conduct interviews in many small and large cases because of the potential consequences of the McDade Amendment."[38]

Fourth, opponents also allege that the McDade Amendment prevents uniformity in the ethics rules. One scholar has noted that since its passage, American courts have suffered from a lack of uniformity both across the federal system ("horizontal uniformity") and sometimes between federal and state systems in the same jurisdiction ("vertical uniformity").[39] Under the McDade Amendment, lawyers practicing in each federal court are subject to the ethics rules of the state jurisdiction in which the court is situated, resulting in disparities between federal jurisdictions.[40] In ad-

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[34] Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2092–93 (2000) (noting that confusion over choice of law practice may stem from McDade's mandate that attorneys conform with "a multitude of state standards").

[35] *See* Radack, *supra* note 8, at 709 ("The McDade Amendment has ceded control of how federal prosecutions are to be conducted to the vagaries of fifty-four bar associations."); *see also* Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1286 (2001) ("[The McDade Amendment] prevents national uniformity in the regulation of prosecutorial ethics.").

[36] Zacharias & Green, *supra* note 2, at 210 ("[The McDade Amendment's] sponsors may have created serious obstacles to the effective administration of federal law enforcement."); *see also* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 34, at 2081 ("[T]he Amendment will unduly hinder federal law enforcement."); McMorrow, *supra* note 12, at 16 (noting that federal government attorneys perceive a "chilling effect" from the amendment); Mick, *supra* note 35, at 1275 (describing the McDade Amendment as "overrestrictive on proper, and otherwise lawful, prosecutorial investigative functions").

[37] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 821–22 (2003); *see also* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 34, at 2091 ("One of the greatest dangers of the McDade Amendment . . . is that federal prosecutors may feel compelled to dissociate themselves from undercover investigations, thereby increasing the likelihood that these unsupervised investigations will proceed without attention to the protection of constitutional rights.").

[38] Radack, *supra* note 8, at 723.

[39] *See* Kaufman, *supra* note 25, at 150.

[40] *See* 28 U.S.C. § 530B (2000).

dition, "interpretive differences" in how federal and state courts employ the state rules create further inconsistencies.[41] These differences occur because the state courts that create the rules do not enforce them in the federal courts; rather, the federal courts do.[42]

Finally, the McDade Amendment may violate federalism principles by permitting states to exercise regulatory control over the federal government lawyer.[43] These concerns are rooted in the fear of an erosion of the supremacy of federal law over local rules.[44] The McDade Amendment changes the "long-standing principle" that "federal rules . . . apply in federal court and state rules . . . apply in state court,"[45] and suggests that states have "blanket authority to impose further constraints."[46]

In the face of the problems of the McDade Amendment, academics and members of Congress have advanced numerous proposals. Indeed, efforts to repeal or amend McDade began in Congress even before the statute took effect in April 1999.[47] The legislative proposals have included attempts to simply repeal it,[48] create an exception for the investigation and supervision of covert activities,[49] and a more substantial proposal that would have provided the Attorney General with a role in establishing federal rules and policies and clearly enumerated what activities constitute improper conduct on the part of federal prosecutors.[50] Yet another proposal would have emphasized the supremacy of federal laws and rules over state rules and simultaneously established a procedure by which the judiciary may identify actual and potential conflicts and recommend federal rules to address those conflicts.[51] While these latter congressional proposals do begin to address the problems of the McDade Amendment, they do not resolve the issues posed by the dependence on state rules discussed below

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[41] *See* McMorrow, *supra* note 12, at 9.

[42] *See id.; see also* Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2000) (providing federal courts with the authority to promulgate "rules for the conduct of their business," subject to congressional oversight).

[43] Others have noted further problems with the McDade Amendment not discussed here. *See, e.g.*, Radack, *supra* note 8, at 718 (suggesting that McDade poses a potential conflict between federal statutes); Zacharias & Green, *supra* note 2, at 247 (noting that the McDade Amendment may cause a federal separation of powers conflict, may exceed Congress's powers, and may be an unconstitutional delegation of authority by Congress).

[44] *See* Casey, *supra* note 24, at 403–13.

[45] Zacharias & Green, *supra* note 2, at 219.

[46] *Id.* at 222–23.

[47] *See* S. 250, 106th Cong. (1st Sess. 1999) (sponsored by Senator Hatch); *see also* Zacharias & Green, *supra* note 2, at 209 & nn.8, 10 (noting that Senator Orrin Hatch attempted to amend the McDade Amendment before its effective date).

[48] *See* S. 2783, 106th Cong. (2d Sess. 2000).

[49] *See* H.R. 2506, 107th Cong. (1st Sess. 2001).

[50] *See* S. 250, 106th Cong. (1st Sess. 1999); *see* Mick, *supra* note 35, at 1292–94, 1305 (calling the bill "a step in the right direction" as it "begins to create a comprehensive ethics code to help prosecutors face the complicated legal and ethical questions that face them and them alone").

[51] *See* S. 22, 108th Cong. § 4503 (1st Sess. 2003).

and fail to adequately account for the unique position of the federal government lawyer.

The majority of prior academic studies of the McDade Amendment either seek to uphold state codes[52] or advocate amending them with provisions that address specific concerns.[53]

However, state ethics rules should not be the point of departure in the creation of a federal ethics regime. In addition to the problems of clarity and consistency and the limits on legitimate investigative activities detailed above, state rules may not adequately regulate federal government lawyers.[54] State ethics rules, some have argued, neither textually nor in their application, sufficiently regulate federal prosecutors.[55] Rather, state ethics codes may restrict federal prosecutorial conduct even less strictly than they regulate the conduct of other lawyers.[56]

One promising approach would have federal courts adopt individual federal ethics rules to supplement areas where the state rules are inadequate.[57] Such an incremental approach would provide an immediate response to the distinctive situations posed by federal prosecutors or federal litigation and to instances where significant interplay exists between ethics regulation and substantive law.[58] Federal courts might be more objective than state courts and regulators in these situations as they would be less likely to harbor improper motives to curtail federal prosecutors.[59] Federal courts would also provide a more national perspective on regulatory questions, implementing additional rules and informal regulation of federal prosecutors.[60] Nevertheless, this approach would still employ state ethics rules as the baseline, thus adding an additional layer of complexity to the existing difficulties posed by the varying rules of each state.

Any approach that builds upon the existing state rules will serve only to create additional confusion between the new provisions and the current state rules and will ignore the problem of conflicting rule interpretations by state and federal courts. Only a new federal code of ethics, applicable to the federal court system alone and interpreted only by federal

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[52] *See, e.g.*, Khatiwala, *supra* note 4, at 112.

[53] *See, e.g.*, Moore, *supra* note 13, at 975.

[54] *See, e.g.*, Mick, *supra* note 35, at 1284–86 (discussing how state ethics rules fail to regulate some of the most severe types of prosecutorial misconduct, including certain types of intentional misconduct and failure to reopen the cases of convicted defendants when evidence of innocence is uncovered).

[55] *See id.* at 396–99.

[56] *See id.*

[57] *See id.* at 425–26; *see also* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 34, at 2093–95 (finding that "the best solution to the McDade Amendment's problems involves both 'dynamic conformity' between federal and state courts' rules and [Senator Patrick Leahy's plan for] explicit federal exceptions to those ethics rules that pose the greatest threat to federal law enforcement interests").

[58] *See* Green & Zacharias, *supra* note 33, at 426–31 (discussing instances where federal ethics rules may be appropriate to supplement state codes).

[59] *See id.* at 431–35.

[60] *See id.*

courts, would remedy the problems inherent in an approach dependent on state rules. Yet to regulate the federal court system properly, this new code of ethics must account for the role of the federal government lawyer.

II. RECOGNIZING THE ROLE OF THE FEDERAL GOVERNMENT LAWYER

A solution to the problems of the McDade Amendment must adequately account for involvement of the federal government lawyer. First, the federal government lawyer plays a far-reaching role in the federal court system. The DOJ alone employs over 9400 attorneys,[61] with over 5500 of these attorneys located in the U.S. Attorney's Offices.[62] Moreover, the United States is the dominant party in the federal courts, filing over 69,000 criminal cases in federal district courts in 2005. The United States was also a party to over 20% of civil case filings that same year (52,386 out of 253,273 total civil cases).[63] The federal government lawyer is a repeated and influential player in the federal courts and consequently a federal code of ethics should accord him particular consideration.

Second, the federal government lawyer deserves particular attention because he is distinct from attorneys working in the private sphere and may not fit properly within existing ethics rules. For instance, federal prosecutors practice almost exclusively in the federal courts and often work in many jurisdictions at the same time.[64] Furthermore, these prosecutors, like all federal government lawyers, represent the people of the United States rather than individual private clients and play "an increasingly important role in coordinating (and limiting) ongoing criminal investigations."[65] In addition, the exercise of the federal prosecutor's job is uniquely limited by the DOJ Manual, geographic office-specific policies and guidelines, the DOJ's Professional Responsibility Advisory Office ("PRAO"), and special civil and criminal liability for certain ethics violations.[66] These limitations operate in addition to the federal constitutional provisions, ethics rules, bar and judicial sanctions, peer standards, and personal ethics standards applicable to all attorneys.[67]

More broadly, the federal government lawyer most closely satisfies the four principal rationales for federalizing legal ethics identified by

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[61] *See* National Association for Law Placement, The Department of Justice, http://www.nalpdirectory.com/dledir_search_results.asp?fscid=G005301&yr=2006&orgtypeid=G (last visited Nov. 16, 2006).

[62] *See* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2005, at 3 (2006).

[63] *See* ADMIN. OFFICE OF THE UNITED STATES COURTS, CASELOAD HIGHLIGHTS 20–21 (2006), *available at* http://www.uscourts.gov/judbus2005/front/JudicialBusiness.pdf.

[64] *See* Mick, *supra* note 35, at 1269–70.

[65] *Id.* at 1270–71.

[66] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006); DEP'T OF JUSTICE MANUAL (2000 & Supp. IV 2006); 28 C.F.R. § 45 (2006). *See also* Mick, *supra* note 35, at 1271–74 (providing examples of these unique limitations).

[67] *See* Mick, *supra* note 35, at 1273–74.

Professor Fred C. Zacharias in his consideration of the need for a uniform code of ethics.[68] First, the evolving practice of the federal government lawyer exemplifies the nationalization of the practice of law that has occurred in recent decades.[69] Since the 1960s, organized crime, drugs, and street violence, have come into the domain of federal law, and therefore the domain of the federal government lawyer.[70] Second, the federal government lawyer's growing involvement in multi-state litigation presents another reason for a harmonizing approach.[71] For instance, the DOJ may initiate class-action lawsuits, or prosecutors in multiple U.S. Attorneys' Offices may cooperate in pursuing a drug ring.[72] Third, the federal government lawyer, like all lawyers, would benefit from any improvements in the public's perception of the bar, perhaps disproportionately so given that every American citizen is his "client."[73] Zacharias argues that a unified federal code of ethics would indirectly improve the perception of lawyers by generating publicity and educating the media.[74] Such an improvement in public opinion would benefit all lawyers, including those representing the federal government. Finally, federal government intervention in the field of professional regulation would safeguard the federal government lawyer's unique position.[75] Federalizing the ethics code would free government lawyers from the confusion and conflicts present in a system plagued by local district and state bar ethics rules.

Therefore, any effective replacement for the McDade Amendment must consider what specific aspects of a code are essential to the federal government lawyer.[76] Most importantly, an ethics code must provide clar-

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[68] Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345–72 (1994).

[69] *See id.* at 345–54.

[70] *See* AM. BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998); *see also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1144–45 (1995).

[71] *See* Zacharias, *supra* note 68, at 354–57.

[72] *See id.; see also* Chitra Ragavan, *Federally Speaking, a Fine Kettle of Fish*, U.S. NEWS & WORLD REP., Oct. 16, 2000, at 32 (discussing chilling effect of the McDade Amendment on federal investigations).

[73] *See* Zacharias, *supra* note 68, at 357–65.

[74] *See id.* at 365.

[75] *See id.* at 365–70.

[76] In addition to such essential features, the federal government lawyer would likely seek substantial, if not sole, influence over the scope and content of a federal code of ethics. For instance, the DOJ has repeatedly expressed its desire for the power to determine the rules governing its attorneys, in the same manner that it possessed such authority before passage of the McDade Amendment. *See, e.g., Concerning the Impact of 28 U.S.C. § 530B on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Judiciary Comm.*, 106th Cong. (1999) (statement of Eric H. Holder, Jr., Dep. Att'y Gen.) *available at* http://permanent.access.gpo.gov/websites/usdojgov/www.usdoj.gov/archive/dag/testimony/dagcrim032499.htm [hereinafter Impact Hearing]. The DOJ has created an internal Professional Responsibility Advisory Office ("PRAO") since the passage of the McDade Amendment, largely to provide guidance and ensure compliance. *See* U.S. Dep't of Justice Prof'l Responsibility Advisory Office, Missions and Functions, http://www.usdoj.gov/prao/mission.htm (last visited on Oct. 19, 2006). However, assigning sole

ity—the federal government lawyer practicing in multiple jurisdictions must be able to determine which practices the ethics rules permit and which they prohibit. Similar to the regime created by the "Thornburgh Memorandum," which resolved conflicting state ethics rules concerning contact with represented parties, there must be only one set of rules, with one set of courts interpreting this text, in order for a code of ethics to be practicable for the government lawyer.[77] In its present state, the McDade Amendment provides only a "vague directive to comply with the rules in each state" where an attorney works.[78] The McDade Amendment necessarily places federal government lawyers in one of two equally undesirable worlds—they must either proceed, at their own peril, uncertain of the ethics rules applicable to their conduct, or act cautiously, and perhaps prudently, by remaining on the periphery while an investigation continues without prosecutorial oversight.[79]

In addition, the federal government lawyer needs consistency in the rules in order to carry out his job in the same manner across the country. The federal government lawyer's "client" is necessarily present throughout the United States. The lawyer needs to have the ability to represent that client anywhere in the federal court system without undue regard for the different rules imposed by the geographically included, but legally distinct, state jurisdictions. As has been observed, "[p]ractitioners who practice in federal courts in multiple jurisdictions prefer horizontal uniformity. They wish to avoid different treatment on the same issue, depending on where the litigation is pending."[80] The federal government needs to be concerned with maintaining consistency in the court system that it oversees; potential differences between the separate federal and state judicial systems need to be of less concern than intrasystem disparities. Additionally, federal ethics rules should prioritize consistency across the federal system over consistency between state and federal courts located in the same state; it is more likely that a federal government lawyer will practice in multiple federal jurisdictions than in a state court.[81]

Furthermore, the federal government lawyer must have the flexibility to carry out his many responsibilities—including his duties as a litigator, investigator, and negotiator—in an appropriate and constitutional manner. For instance, a federal ethics code could seek to build upon the efforts of texts like the American Bar Association's ("ABA") Model Rules of Professional Conduct in recognizing that ethical situations and their proper

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control over the content of the ethics code to those governed by those very rules is unwise. Such a scheme may create a perception of impropriety, as the PRAO remains within the DOJ and thus is not an autonomous organization that may independently police compliance with ethics rules.

[77] *See* Impact Hearing, *supra* note 76.

[78] *Id.*

[79] *See id.*

[80] McMorrow, *supra* note 12, at 13.

[81] *See* Mick, *supra* note 35, at 1269–70.

responses are context-specific and based on the lawyer's role, be it advisor, mediator, or otherwise.[82] The McDade Amendment lacks clarity, consistency, and flexibility: the federal government lawyer thereby faces ambiguous and inconsistent ethics rules that do not address his needs or provide practical guidance for the unique dilemmas he encounters.

III. Proposal for a Federal Rules of Ethical Procedure Project

The creation of a Federal Rules of Ethical Procedure would resolve the many problems caused by the McDade Amendment and ensure that the federal government lawyer receives an ethics code that is fair both to him and to his adversaries in the private sector. This project requires not only the guidance and oversight of Congress, but also Congress's active participation alongside the federal judiciary in shaping the content of the ethics rules.

Such a uniform federal rules proposal is one of five models previously proposed in the academic literature.[83] However, the Judicial Conference rejected this model in 1995,[84] as it sought "to impose some order on the wildly inconsistent local rules of the federal district courts, especially those pertaining to lawyers."[85] Rather than instituting a complete set of federal rules of professional conduct, the Judicial Conference elected to follow an approach that supplemented the state rules with a limited number of federal rules.[86]

Despite this prior rejection by the Judicial Conference, Congress and the courts should still pursue a Federal Rules of Ethical Procedure. If Congress created a commission to draft the new rules, interested parties could be induced to collaborate in the process. The rules commission could create an initial draft of the rules based on the general guidance and specific

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[82] *See* Zacharias, *supra* note 68, at 385; *see also* Model Rules of Prof'l Conduct (2006) (structured to reflect the lawyer's roles as counselor, advocate, and intermediary).

[83] *See* Kaufman, *supra* note 25, at 153. The other four models considered were: maintaining the current system, adopting "dynamic conformity" (having federal courts adopt not only state rules but any subsequent state amendments to those rules by inference), adopting "dynamic conformity" along with some federal rules addressing the most common professional responsibility issues, and adopting "dynamic conformity" but with federal courts retaining control over their procedure and the ability to adopt specialized rules. *See id.*

[84] *See* McMorrow, *supra* note 12, at 17. The Judicial Conference is a body of federal judges that is responsible for the administration of the federal court system under 28 U.S.C. § 331 (2000). Its statutory responsibilities include "carry[ing] on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court," with the goal of recommending measures that "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay" to the Supreme Court. 28 U.S.C. § 331 (2000).

[85] Kaufman, *supra* note 25, at 153.

[86] *See id.* at 153–54. However, this attempt to supplement the state rules with selected federal rules eventually stalled due to the potential for confusion among lawyers facing both state and federal rules of conduct. *See id.*

requests provided by Congress. It would then present its initial draft to members of Congress, the federal judiciary, the federal government lawyer, and private attorneys who practice in federal courts for broad discussion and formal comment. The rules commission would then consider this commentary and make revisions before submitting a modified draft for congressional approval. Congress would exercise final approval, with the option of using a system—similar to that used for military base closures—restricting it to an up-or-down vote on the submitted ethics code draft.[87] Such a procedure should discourage the private bar or DOJ from bypassing the formal comment process in favor of directly lobbying Congress on specific provisions. Congress would reassume the ability to make amendments at a specified date after passage and the Judicial Conference or a periodic rules commission could provide additional suggestions and commentary. Proactive federal court involvement in interpreting the ethics rules might also help galvanize congressional action to address future problems in the rules as they become evident.

This approach would possess a great advantage over the current system by excluding the state judiciaries and state bar associations—parties with entrenched interests in the existing state ethical codes. Rather than allowing states to apply their standards to federal practitioners, this method would create a distinct federal code that would take account of the unique circumstances of the federal system even while maintaining independent control over the federal government lawyer. Such a procedure is feasible because it roughly parallels the process that created and has maintained the federal rules enacted in the fields of civil procedure, criminal procedure, and evidence.[88] These previous projects have instituted uniformity across the federal system, and a set of federal rules concerning ethics would accomplish this same end.[89]

In determining the specific substantive content of the federal ethics code, the rules commission, Congress, and the other relevant parties would have the models of earlier codification attempts—such as the ABA's Model Code of Professional Responsibility,[90] the ABA's Model Rules of Professional Conduct,[91] and the Federal Bar Association's Model Rules of Professional Conduct for Federal Lawyers[92]—as well as the opportunity

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[87] *See* Press Release, Defense Base Closure and Realignment Commission, BRAC Commission Delivers Final Recommendations to President (Sept. 8, 2005) (on file with author), *available at* http://www.brac.gov/docs/PressRelease_8Sep2005.pdf; *see also* Defense Base Closure and Realignment Commission, Defense Base Closure and Realignment Timeline (Jan. 13, 2005) (on file with author), *available at* http://www.dod.mil/brac/docs/time05.pdf.

[88] *See generally* 28 U.S.C. §§ 2071-77 (2000) (establishing the process for the promulgation of the Federal Rules of Procedure and the Federal Rules of Evidence).

[89] *See* 28 U.S.C. § 2072 (granting the Supreme Court the sole power to prescribe rules of practice and procedure and rules of evidence for the federal court system and repealing all previous laws in conflict with the rules promulgated by the Supreme Court).

[90] MODEL CODE OF PROF'L RESPONSIBILITY (1980).

[91] MODEL RULES OF PROF'L CONDUCT (2006).

[92] MODEL RULES OF PROF'L CONDUCT FOR FED. LAWYERS (1990).

to learn from the experiences of the state and federal courts that have employed versions of such ethics codes for the past four decades.[93] The drafters of the federal ethics code could reconsider these earlier codes in light of the unique circumstances of the federal court system, a system sure to yield a better fit when compared to the wholesale application of fifty-plus individual state ethics codes to federal government lawyers.

A Federal Rules of Ethical Procedure should address each of the major problems of the McDade Amendment. First, less confusion would result from a code that produces a single set of rules applicable to all federal courts. In addition, the rules would provide the federal courts with exclusive authority to interpret the rules and would eliminate choice of law problems by clearly outlining the ethical standards applicable in all federal courts. Furthermore, a uniform set of rules should minimize the differences between federal jurisdictions. Uniformity would not be complete—the district and circuit courts should possess the power to reach divergent interpretations of ambiguous provisions or gaps in the rules, as they do with the current procedural and evidentiary rules. However, the power of the Supreme Court and the rule-making process to resolve circuit conflicts would serve to limit such differences.

In addition, a federal code would recognize the unique role of the federal government lawyer, reducing confusion and supplying greater uniformity, as well as providing the opportunity to account for the various roles of the federal government lawyer—advisor, litigator, investigator, negotiator, and more—through the rule-making process. Further, though the precise content of the rules must still be determined, the federal government lawyer and his supporters in Congress and academia would be able to seek less restrictive rules on investigation, although such a result would not be guaranteed. For instance, federal government lawyers would likely seek changes to the current limitations on federal prosecutors' contacts with represented parties. Finally, federal government authority over the rules for the federal courts would alleviate the federalism concerns noted above.[94]

Despite these advantages, there exist three principal critiques of this approach.

IV. THREE CRITIQUES OF A FEDERAL RULES APPROACH

A. *Kaufman's "Leave Ethics to the Judiciary" Critique*

One critic of a uniform federal rules approach, Professor Andrew L. Kaufman, dismisses the method as a threat to the diffusion of power in

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[93] Some observed problems with the Model Code of Professional Responsibility include gaps in its provisions and overly broad language that makes it unwieldy to use in practice. *See* McMorrow, *supra* note 12, at 29.

[94] *See* Mick, *supra* note 35, at 1262 ("Congress's general authority to preempt state ethics rules is almost universally unquestioned.").

the federal system and argues that attorney conduct is not fit for a national solution imposed by Congress.[95] Kaufman concludes that the judiciary is more experienced in regulating attorney conduct and that the legislature should leave this field to the province of the judiciary, as it has historically done.[96] He roots his argument in the assumption that more lawyers practice in both the federal and state systems than practice in multiple jurisdictions within the federal system.[97] Kaufman thus finds that the lack of horizontal uniformity for federal practitioners will create fewer problems than a lack of vertical uniformity and dynamic conformity for dual practitioners, with the latter system creating the potential for conflicts for lawyers who encounter state and federal elements within the same case.[98]

Even if empirically true, such an assumption is misguided in at least two respects. First, it does not recognize the unique role of the federal government lawyer already discussed. There are significant reasons to compose a new code bearing the federal government lawyer in mind rather than continuing to use state ethics rules that state courts did not design to supervise and regulate lawyers such as federal prosecutors.[99] Second, such an emphasis on vertical uniformity at the expense of horizontal uniformity fails to recognize that horizontal uniformity is the norm in both the federal and state courts when it comes to procedure. Requiring a private attorney who practices in both the state and federal courts to abide by the respective ethics codes of each court system places no greater burden on the attorney than asking him to follow the differing civil or criminal procedure codes or evidentiary rules of each court system.[100]

B. Green and Zacharias's "Congress as the Inappropriate Regulator" Critique

Another criticism of the Federal Rules of Ethical Procedure approach is that Congress lacks sufficient interest or is ill-equipped to play a leading role in creating and overseeing a federal ethics code. For instance, Professors Bruce A. Green and Fred C. Zacharias conclude that "[s]ince Congress has shown little interest in making individualized determinations on

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[95] *See* Kaufman, *supra* note 25, at 155–56.

[96] *See id.* at 156.

[97] *See id.* at 160 (concluding based on "instinct . . . that there are many more private lawyers who practice in both the federal and state systems in their states than who practice in the federal system in many different states").

[98] *See id.*

[99] *See supra* Part II.

[100] Under a horizontally uniform system of ethics rules, a private attorney would need to bear in mind the differences between the federal professional conduct rules and the professional conduct rules of the state where he practices and adjust his behavior accordingly. This necessary adjustment parallels the current requirement that he abide by the different filing requirements and discovery rules contained in the federal procedural rules as opposed to the state procedural rules and that he seek to admit evidence in accordance with the federal evidentiary rules rather than those of the state.

particular ethics issues to date, the best alternative is for Congress to delegate authority to make these choices to federal courts."[101] Green and Zacharias find that Congress should express a nonbinding preference for uniform rules but then delegate to the federal courts the responsibility of evaluating state and other rules.[102] Groups like the ABA and DOJ would then provide feedback to the courts, and although "[u]ltimately, this [plan] leaves the burden of determining the substance of the rules to the federal courts . . . Congress can always preempt particular rules with which it disagrees."[103] Green and Zacharias do recognize the role of the federal government lawyer, finding that "[t]he courts must give weight to the very real benefits offered by prosecutorial independence and self-regulation."[104] Yet, Green and Zacharias argue that Congress should focus on fostering a non-litigious setting for rulemaking that they believe will allow for cooperative discussion.[105]

Green and Zacharias offer a reasonable, but flawed, proposal. First, like other approaches previously discussed, Green and Zacharias take the state rules as their starting point, even though such a point of departure is inappropriate when the state courts did not design their rules for the federal government lawyer or for national implementation. There are national concerns, such as preserving the federal government's ability to pursue large-scale criminal operations, that one must take into account in a federal code.[106]

Second, Congress will likely remain involved in this field because, after the McDade Amendment, Congress is now the dominant party regulating attorney conduct in the federal courts. Although the McDade Amendment makes federal lawyers subject to ethics rules promulgated by the state courts, it is unlikely that Congress, having established itself as the regulator of ethics for the federal government lawyer, will now choose to cede this authority. Rather, it is more realistic to believe that Congress will expand its role in regulating legal ethics, as it has continued to expand its power in other law-related areas, such as the increasing federalization of criminal law since 1970.[107] Indeed, there have been no fewer than

[101] Green & Zacharias, *supra* note 33, at 436. Kaufman supports this critique, finding that "Congress simply does not have time to deal thoughtfully with all the nuances that need to be considered in adjusting the interests of clients, lawyers, and the system of justice and to keep adjusting them as problems appear." Kaufman, *supra* note 25, at 161. Kaufman further notes that "the danger with a congressional solution is that these delicate issues will be left to committee staffs and the lobbyists for the best financed or best organized interests." *Id.*

[102] *See* Green & Zacharias, *supra* note 33, at 453.

[103] *Id.*

[104] *Id.*

[105] *See id.* at 474.

[106] *See* Lerner, *supra* note 6, at 656.

[107] *See* AM. BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 & n.9 (1998) (noting that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970,"

ten legislative attempts to amend McDade since its passage,[108] with several of these proposals seeking to assert congressional control over the substance of the ethical rules.[109] Thus, it is pragmatic to provide for a more active congressional role in proposed ethics solutions than that envisioned by Green and Zacharias.[110]

In addition, the current proposal achieves each of the advantages of Green and Zacharias' system—respect for the historical role of the courts, cooperative discussion among the relevant parties, and congressional oversight. A uniform code would provide the non-litigious setting for rule-making that Green and Zacharias believe permits cooperative discussion.[111] This system also respects the role of the federal courts, which will maintain critical regulatory authority through enforcement of the ethics code. Yet, this system makes substantial gains by directly incorporating Congress, the ultimate decision-maker, into the rule-making process.

C. Zacharias's "Congress Is Unable To Regulate" Critique

Although observing that "strong justifications militate in favor of federalizing standards," and that "some form of standardized national regulation seems inevitable,"[112] Zacharias finds that political and internal constraints and the competence of the federal government to institute professional regulation make Congress incapable of enacting such a code.[113]

First, Zacharias finds that the lack of an initial working draft would force Congress to draft a code from scratch even while it encounters opposition from the ABA and other lawyers who would oppose any new regulation that does not lessen attorneys' obligations.[114] Zacharias also foresees opposition from the judiciary, including individual judges opposing any limitations on their discretion and the judiciary as an institution seeking to prevent Congress from encroaching on its traditional power to regulate the conduct of lawyers.[115] Although Zacharias finds that some groups—consumer-oriented organizations, federal agencies, and some academics—may be amenable to such an effort, he predicts that these actors will only support such a code if it weakens current constraints on attor-

particularly since 1980).

[108] *See supra* note 5.

[109] *See, e.g.*, S. 250, 106th Cong. (1st Sess. 1999) (listing specific acts qualifying as "prohibited conduct for Department of Justice employees").

[110] *Cf.* Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 251 (2004) (noting that the McDade Amendment demonstrates clear congressional intent to regulate federal prosecutors).

[111] *See* Green & Zacharias, *supra* note 33, at 474.

[112] Zacharias, *supra* note 68, at 379–80.

[113] *See id.* at 387–96. *See also* Green & Zacharias, *supra* note 33, at 390 n.11 (citing Zacharias, *supra* note 68, generally).

[114] *See* Zacharias, *supra* note 69, at 387–88.

[115] *See id.* at 388–89.

neys and that the probable supporters just mentioned will be unlikely to form cohesive lobbying groups.[116]

Second, relying on public choice theory, Zacharias concludes that Congress may lack incentive to act on the issue of professional ethics.[117] Although finding that in the abstract Congress will prefer to regulate attorney ethics rather than delegate such power to the states, Zacharias determines that in practice Congress will choose to regulate only if doing so enhances its members' electability by satisfying their supporters and minimizing political opposition.[118] Zacharias notes that the principal groups that might provide political support for such a measure are lawyers, those who use legal services, and advocates of states' rights, and that the response of these groups will likely depend upon the content of any changes enacted.[119]

Third, Zacharias finds that Congress may not be competent to institute a Federal Rules of Ethical Procedure.[120] Believing that "[t]he legislative process works best when an issue is focused and the root questions to be addressed are clearly defined,"[121] Zacharias questions the ability of Congress to predict future enforcement needs, address flaws in a federal code after its institution, or avoid the high costs of retooling the ethics system.[122]

In response to Zacharias's first argument, this Recent Development's proposal calls for Congress to work hand-in-hand with the judiciary in shaping a uniform code of ethics for the nation's federal court system. This approach would afford ample consideration to the concerns of the judiciary and would not impinge on judicial authority unless Congress chose to assert the inherent power that it has refrained from using thus far.[123] Furthermore, outside groups would have the opportunity to express opinions during the comment process as the rules commission worked to provide Congress with a draft for consideration.

Moreover, Congress has sufficient incentive and political support to enact a Federal Rules of Ethical Procedure. First, members of Congress have already expressed displeasure with the McDade Amendment and introduced

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[116] *See id.* at 389.

[117] *See id.* at 389–91 (citing Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 267–68 (1990)).

[118] *See* Zacharias, *supra* note 68, at 389–90.

[119] *Id.* at 390–91.

[120] *See id.*, *supra* note 68, at 391–96.

[121] *Id.* at 391.

[122] *See id.* at 393–96. However, Zacharias does note Congress's ability to harmonize the states' splintered professional regulation, to address regulation subjects that are national in nature, and to address the question of lawyer-client communications. *See id.* at 392–93.

[123] Article III, Section 1 of the Constitution entrusts Congress with the establishment of the federal court system and Congress has always played a role in the rule-making of the federal courts through enabling acts. U.S. CONST. art. III, § 1; *see* Zacharias, *supra* note 68, at 389–90.

numerous bills to amend it. Second, given that a Federal Rules of Ethical Procedure would offer advantages to the federal government lawyer and other multi-state attorneys, Congress will have an entrenched and vocal base of support, even if such supporters are relatively few in number. Allowing all interested parties who practice in the federal courts to contribute to the rule-making process would minimize political opposition. Third, the role of the rules commission and the judiciary's shared responsibility for the final ethical code would limit the political consequences for individual members of Congress. Fourth, a Federal Rules of Ethical Procedure is a concept that Congress—as an organization and through its individual members—can sell to the public. Interested members of Congress would have the opportunity to present themselves as reforming the judicial system and reining in potentially corrupt lawyers while also taking steps to improve the efficiency and effectiveness of the federal government lawyer. Both concepts—reform and efficiency—will likely resonate with the American electorate, a key consideration for members of Congress, as Zacharias recognizes.[124]

Finally, addressing Zacharias's third concern, Congress is competent to administer such a process. As one writer has observed,

> Congress's institutional qualities make it the ideal regulatory body. As a national entity, its regulations would preclude the possibility of disuniformity and lack of guidance. Moreover, in addition to being a diverse and inherently deliberative body, Congress also has at its disposal the input of the powerful lobbies on both sides of the debate. Congress also has the authority and incentive to establish neutral commissions to study and advise it on the matter. Moreover, Congress can seek the advice and counsel of the Judicial Conference and the Supreme Court—pursuant to the Rules Enabling Act—when formulating regulations.[125]

Thus, Congress is the appropriate body to initiate a Federal Rules of Ethical Procedure and such a code is feasible, both as a logistical matter and in terms of securing the involvement of Congress.

V. CONCLUSION

This Recent Development has presented a proposal for replacing the McDade Amendment's reliance on state ethics rules with a Federal Rules of Ethical Procedure applicable to all lawyers who practice in the federal courts. Such an ambitious project has not yet been attempted in profes-

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[124] *See* Zacharias, *supra* note 68, at 389–90; *see generally* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (finding that members of Congress are powerfully motivated by the desire for reelection).

[125] Mick, *supra* note 35, at 1291.

sional conduct regulation, but this approach looks for guidance to the previous federal rules movements as well as the earlier private sector efforts to compile model ethical codes and rules. Supporters would need to resolve several issues before proceeding. They would need to enlist an initial number of congressional sponsors to devise a strategy to ensure the proposal's successful passage by an already fully engaged Congress. These supporters or, more likely, the rules commission must determine the best structure for a uniform code and generate a clearer conception of the relative roles of Congress, the federal judiciary, and outside groups.

These inevitable battles over the specific substance of the uniform code must take place. Yet, if the federal rules approach can surmount these obstacles, all federal practitioners, and the federal government lawyer in particular, may one day be able to rely on a Federal Rules of Ethical Procedure when confronted with an ethical dilemma.

—*Gregory B. LeDonne*[*]

* B.A., Yale College, 2004; J.D. Candidate, Harvard Law School, Class of 2007.

EVALUATING THE APPLICATION OF THE NATIONAL STOLEN PROPERTY ACT TO ART TRAFFICKING CASES

In 1934 Congress legislated the National Stolen Property Act ("NSPA")[1] to coordinate federal and state prosecution of the illegal interstate movement of fraudulent securities, counterfeit money, and stolen goods.[2] In recent years, however, federal attorneys have used the NSPA to prosecute the illegal importation of cultural property[3] into the United States. After summarizing the problems presented by the illicit art trade in Part I, and outlining the goals of a legitimate art trade in Part II, in Parts III and IV this Recent Development analyzes the effectiveness of applying the NSPA to cases involving cultural property. The analysis proceeds in Part V by considering whether the use of the NSPA to prosecute art trafficking conflicts with the Convention on Cultural Property Implementation Act ("CPIA"),[4] which implemented U.S. treaty obligations under the 1970 United Nations Educational, Scientific and Cultural Organization Convention ("UNESCO 1970").[5] This Recent Development concludes that such an application of the NSPA potentially violates Congress's more recent statement of U.S. policy regarding cultural property in the CPIA. Following this assessment are recommendations for how to enhance the effec-

[1] The National Stolen Property Act extended the National Motor Vehicle Theft Act to other property. *See* Pub. L. No. 73-246, 48 Stat. 794 (codified at 18 U.S.C. §§ 2314–2315 (2006)).

[2] 18 U.S.C. § 2314; *see also* United States v. Sheridan, 329 U.S. 379, 384 (1946); United States v. McClain, 545 F.2d 988, 994 (5th Cir. 1977) ("The apparent purpose of Congress in enacting stolen property statutes was to discourage both the receiving of stolen goods and the initial taking . . . .") (citing United States v. Gardner, 516 F.2d 334, 349 (7th Cir. 1975)); United States v. Bolin, 423 F.2d 834, 838 (9th Cir. 1970); United States v. Patten, 345 F. Supp. 967, 968 (D.P.R. 1972)); George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYR. J. INT'L L. & COM. 77, 88–91 (1978) (describing Congress's intent in legislating the NSPA and the disjuncture between this legislative intent and its subsequent application to cultural property cases).

[3] A community's designation of an object as "cultural property" links that piece to a collective identity. "'Cultural property' refers to those objects that are the product of a particular group or community and embody some expression of that group's identity, regardless of whether the object has achieved some universal recognition of its value beyond that group." Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569–70 (1995).

[4] 19 U.S.C. § 2601 (1983).

[5] *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970]. After World War II, UNESCO emerged as the preeminent international organization charged with protecting cultural property. The post-war cooperation among nations led to the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict. Years later, as international focus shifted towards regulating the peacetime art trade, UNESCO's efforts led to the creation of the 1970 Convention. *See* Teresa McGuire, *African Antiquities Removed During Colonialism; Restoring a Stolen Cultural Legacy*, 1990 DET. C.L. REV. 31, 39, 46 (1990) (describing the role of UNESCO after World War II); *see also* John Merryman, *Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1, 3–4 (1998) (describing the UNESCO's role in forging the "modern period" of cultural property protection).

tiveness of the NSPA in prosecuting art trafficking cases by bringing the NSPA's application into greater accord with the CPIA and with cultural internationalist interests. Such a shift in the use of the NSPA would also have the effect of promoting a limited, licit art trade.

I. THE PROBLEM OF ILLICIT TRAFFICKING IN CULTURAL PROPERTY

The adverse consequences of the illicit art trade underscore the need for greater regulation. In a landmark 1969 article,[6] archaeologist Clemency Coggins demonstrated that a principal danger posed by the illicit art trade was the loss of vital historical and archaeological data that occurs when a cultural artifact is hastily removed from its original location.[7]

Art trafficking and the loss of cultural property can also threaten modern national identity because "the art of a society is both a manifestation and a mirror of its culture" and consequently, the loss of cultural property may disrupt the processes through which citizens shape their national identities.[8] Other scholars have gone beyond this nationalist understanding of cultural property to emphasize the loss to all people that follows from the destruction of any culture's objects.[9]

Economic consequences also follow from the illicit art trade: UNESCO estimates the annual value of the illegal art trade at $6 billion, second in value only to the illegal narcotics trade.[10] An unquantifiable consequence of the illicit art trade is the tension trafficking establishes between source and market nations.[11] The trade operates as a global exchange between financially poor, artifact-rich source nations and wealthy but artifact-poor market nations. The stress between source and market nations is exaggerated by the historical and colonial experiences of the two groups of countries.[12] The transnational effects of the illicit art trade present a unique set

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[6] *See* Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969) (providing a case study of the decontextualization of Pre-Columbian artifacts).

[7] *Id.*

[8] Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 304 (1981).

[9] *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831–32 (1986).

[10] *See Trafficking in Art Objects Next Only to Narcotics Trade: UNESCO*, NAVHIND TIMES, Sept. 7, 2005, *available at* http://cpprot.te.verweg.com/2005-September/001638.html (last visited Oct. 31, 2006). *But see* Kate Fitz Gibbon, *The Illicit Trade—Fact or Fiction?*, *in* WHO OWNS THE PAST? 179, 179–180 (Kate Fitz Gibbon ed., 2005) (disputing the current valuation of the illicit art market and further criticizing comparisons of the art market to the illicit narcotics and armaments trades).

[11] Merryman defines "source nations" as those that are rich in cultural artifacts, such as Egypt or Mexico. By contrast, demand exceeds supply in market nations like Japan or the United States. Thus, "[d]emand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property." Merryman, *supra* note 9, at 832.

[12] *See* Kwame Anthony Appiah, *Whose Culture Is It?*, N.Y. REV. OF BOOKS 2, 38–41 (Feb. 9, 2006); *see also* McGuire, *supra* note 5, at 32–34.

of challenges to any attempt to regulate the art trade. The application of the NSPA to cases involving art trafficking, evaluated in Part IV of this Recent Development, must be assessed in light of these pressures.

II. THE GOALS OF A LEGITIMATE ART TRADE

Any measure of the effectiveness of the NSPA in combating the problems described above must also consider the goals of a legitimate art trade. Paul Bator has described a limited set of principles that should inform any legal regime regulating the art trade.[13] These core values include: (1) the preservation of site-specific monuments and other endangered works;[14] (2) the national retention of a limited selection of cultural property; and (3) trade that does not threaten any nation's cultural heritage.[15] The principles summarized by Bator reflect both nationalist and internationalist interests in cultural property.[16] Cultural nationalists stress a close link between an object and the culture that created it, usually embodied in a nation-state.[17] Nationalist scholars therefore favor a strong regime of national retention of cultural patrimony.[18] By contrast, cultural internationalists emphasize a looser, more universal relationship between

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[13] Bator, *supra* note 8. Bator's description of the goals of a legitimate art trade provides an apt framework for evaluating legal regulation of the international art market because it attempts to balance both cultural national and internationalist arguments. His work has also been cited in the precedent cases. *See McClain*, 545 F.2d at 996 n.13; *see also* United States v. Schultz, 178 F. Supp. 2d 445, 449 (S.D.N.Y. 2002).

[14] On this point Coggins has advocated that "[t]he ideal scenario is to leave antiquities underground (unless threatened by construction or public works), where they have rested safely for centuries, having established a stable physical equilibrium that will be destroyed on exposure to the modern environment. Such hands-off stewardship of the past is a conservation initiative. Cultural heritage is a non-renewable resource that must be depleted very cautiously, very conservatively, and above all, very *consciously*." Clemency Coggins, *Cultural Property and Ownership: Antiquities*, 16 CONN. J. INT'L L. 183, 186 (2001).

[15] Bator, *supra* note 8, at 309–10. To distinguish between works for retention and works for the market, the scholarship of James Cuno is useful. Cuno distinguishes between "cultural patrimony," which should be nationalized, and other "cultural property," which should be free to travel. "For example, all old bells are cultural *property* but the Liberty Bell is cultural *patrimony*. Cultural *patrimony*, in other words, suggests a level of importance greater than that of cultural *property*. It is not something owned by a people, but something *of* them, a part of their defining identity." James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L. J. 83, 84–85 (2001) (emphasis in the original). *See also* David Rudenstine, *The Rightness and Utility of Voluntary Repatriation*, 19 CARDOZO ARTS & ENT. L.J. 69, 76 (2001). (distinguishing cultural patrimony from cultural property, noting that "[i]t must be emphasized that cultural patrimony is a much smaller and narrower group of antiquities than the broad term cultural property").

[16] *See* Bator, *supra* note 8, at 294–95, 308–09 (suggesting preferable goals for those "who are willing to set aside the narrowest nationalistic perspectives").

[17] *See* Merryman, *supra* note 9, at 832 ("Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the 'repatriation' of cultural property.").

[18] *See* Merryman, *supra* note 9, at 831–32.

an art object and the "common human culture."[19] Consequently, internationalists stress the need for cultural property to move relatively freely.[20] The competing values advocated by cultural nationalists and internationalists are reflected in the judicial opinions examined in Part III that apply the NSPA to art trafficking. Having described the unique challenges posed in regulating the art trade in Part I, as well as outlining some key goals of a lawful trade, this Recent Development next considers the effectiveness of applying the NSPA in prosecuting art trafficking cases and promoting the goals of a limited, licit, international art trade.

III. The Application of the National Stolen Property Act to Art Trafficking Cases

The NSPA criminalizes the importation or interstate transport of goods worth $5,000 or more when the defendant acts "knowing the same to have been stolen, converted or taken by fraud."[21] In the three leading cases, *United States v. McClain*,[22] *Peru v. Johnson*,[23] and *United States v. Schultz*,[24] U.S. courts have considered whether to recognize foreign nationalizing legislation, also known as omnibus statutes,[25] as sufficient to fulfill the definition of "stolen" goods under the NSPA.

In *McClain*, decided in 1977, the Fifth Circuit considered the application of the NSPA to the export of cultural property from Mexico.[26] While there was clear evidence that Mexico's nationalizing statute applied to the Pre-Columbian artifacts in the case, there was no evidence proving when the pieces had entered the United States.[27] Since prosecutors could not establish the timing of the importation with greater precision, a conviction under the NSPA appeared difficult.[28] U.S. prosecutors overcame this legal obstacle by showing that the artifacts were "stolen" because Mexico had

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[19] Merryman, *supra* note 9, at 831 ("One way of thinking about cultural property . . . is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.").

[20] *See* Merryman, *supra* note 9, at 831–32.

[21] 18 U.S.C. § 2314 (2000).

[22] 545 F.2d 988 (5th Cir. 1977).

[23] 720 F. Supp. 810 (C.D. Cal. 1989).

[24] 178 F. Supp. 2d 445 (S.D.N.Y. 2002).

[25] Nationalizing statutes can range from less-intrusive screening mechanisms to total embargoes of the export of cultural property. In the cases discussed here, the nationalizing statutes aimed to prevent the export of any cultural property from the foreign state and also established constructive ownership of the artifacts. This state ownership applied to both discovered and undiscovered works. *See* Bator, *supra* note 8, at 314 (describing the history and content of different omnibus statutes).

[26] *See McClain*, 545 F.2d at 991–92.

[27] *See id.* at 992 ("The government presented no evidence as to how and when the artifacts were acquired in Mexico, nor as to when the pieces were exported.").

[28] Bator, *supra* note 8, at 347–48 (describing the challenge to prosecutors in demonstrating that the defendant fulfilled the general knowledge requirement of NSPA liability).

nationalized all Pre-Columbian artifacts in 1972.[29] Since the government of Mexico had owned the artifacts, the defendants must necessarily have stolen the property by illegally removing it from Mexican territory.[30] This finding depended on the court's acceptance of the Mexican nationalizing statute and the propriety of applying Mexican law in U.S. courts. *McClain* was significant for its deference to a foreign statute in defining "stolen" property under the NSPA. However, this deference was qualified with "the proviso that a clear national ownership law has to have been enacted before an object was taken for the object to be considered stolen."[31]

The *McClain* decision raised considerable concern in the U.S. art community about the legitimacy of all Mexican objects imported into the country since 1972.[32] In 1989, however, one court retreated from *McClain's* broad deference to foreign omnibus statutes. In *Peru v. Johnson*, the Government of Peru brought a civil action to recover native objects from an American collection.[33] The Government of Peru alleged that the objects at issue were stolen under the NSPA because in 1822 Peru had nationalized its entire cultural patrimony, both discovered and unexcavated.[34] Peru's argument was consistent with the reasoning of the *McClain* court. However, in contrast to the holding in *McClain*, the *Johnson* court found that Peru had not actively enforced its own omnibus statutes.[35] Consequently, the court reasoned, Peru had enacted only export controls and had not gone so far as to establish ownership over the disputed cultural property.[36] Since the goods were never the property of Peru, the artifacts were not stolen for NSPA purposes.[37] The *Johnson* court held that U.S.

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[29] The lower court accepted the prosecutors' suggestion that Mexico nationalized its artifacts in 1897; however, the Fifth Circuit found that nationalization occurred in 1972. *See McClain*, 545 F.2d at 1000. Since Mexico established constructive ownership of the artifacts when it implemented nationalizing legislation in 1972, the removal of the works from Mexican territory after this time constituted theft for NSPA purposes. *See* Bator, *supra* note 8, at 348.

[30] *See McClain*, 545 F.2d at 1000–01 ("We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the [NSPA]. Such a declaration combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.").

[31] Alexi Shannon Baker, *Selling the Past:* United States v. Frederick Schultz, ARCHAEOLOGY, Apr. 22, 2002, *available at* http://www.archaeology.org/online/features/schultz/criminal.html. This qualification precluded foreign nations from passing nationalizing statutes and then seeking restitution from American collections in U.S. courts under the NSPA. *See id.*

[32] *See McClain*, 545 F.2d at 991 ("Museum directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock when they read the news if they did of the conviction of the five defendants in this case.").

[33] *See Johnson*, 720 F. Supp. 811 (C.D. Cal. 1989).

[34] *See id.* at 811–13.

[35] *See id.* at 814.

[36] *See id.* ("There is no indication in the record that Peru has ever sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions . . . .").

[37] *See Johnson*, 720 F. Supp. at 815.

courts would recognize foreign omnibus statutes only when the foreign nation had actively enforced its own nationalizing laws.[38] The holding in *Johnson* may also be attributable, in part, to the fact that the objects in question were duplicates—works for which many similar examples exist.[39] There is a stronger cultural internationalist argument in favor of allowing duplicate forms of cultural property to travel. This allows for a more universal disbursement of the works, and also better provides for their preservation, which source nations often cannot afford.[40]

United States v. Schultz[41] built upon *McClain* and *Johnson* and confirmed the *McClain* doctrine that a foreign omnibus statute could be used as the basis for domestic NSPA prosecution.[42] At trial the government proved Frederick Schultz's heavy involvement in the illegal excavation of numerous Egyptian cultural objects, including a relief which was mutilated for export.[43] After demonstrating the defendant's involvement, the key issue for the government in *Schultz* was establishing that the goods were "stolen" under the NSPA. To make this argument, the government relied on the precedent in *McClain* to show that Egypt had nationalized the objects in 1983.[44] The dispositive issue in *Schultz* was whether the Egyptian statute was more like the vague Peruvian export controls in *Johnson* or the more precise nationalizing statute of Mexico recognized in *McClain*. After considering expert testimony from Egyptian officials, the District Court for the Southern District of New York ruled that the Egyptian statute, while not precise, had established Egypt's rightful ownership of the artifacts.[45] As in *McClain*, the *Schultz* court held that a foreign nationalizing statute was an appropriate source for defining whether goods were stolen under the NSPA.[46]

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[38] *See id.* at 814–15.

[39] *See id.* at 812 ("The fact that the subject items are identifiable with excavation sites in modern Peru does not exclude the possibility that they are equally similar to artifacts found in archeological monuments in Bolivia and Ecuador.").

[40] *See* Gordon Gaskill, *The Smuggle History*, ILLUSTRATED LONDON NEWS, June 14, 1969, at 28. Paul Bator also notes that in the view of the art community, "the practice of exporting antiquities has materially aided the preservation of the artistic patrimony of mankind. . .[e]xport may thus put a work of art into hands far more eager and able to conserve it than any available at home." Bator, *supra* note 8, at 297.

[41] 178 F. Supp. 2d 445 (S.D.N.Y. 2002).

[42] *See id.* at 448–49.

[43] Alexi Shannon Baker, *Selling the Past:* United States v. Frederick Schultz, ARCHAEOLOGY, Apr. 22, 2002, *available at* http://www.archaeology.org/online/features/schultz/trial.html.

[44] *See Schultz*, 178 F. Supp. 2d at 446.

[45] *See id.* at 448–49.

[46] *See id.*

IV. Evaluating the Effectiveness of the National Stolen Property Act

McClain, *Johnson*, and *Schultz* remain the most prominent art trafficking cases. The use of the NSPA in these cases raises questions about how well it advances the ideals of a legitimate international art market described in Part II of this Recent Development. The NSPA, although not originally enacted to ensure the preservation of cultural property, successfully provides for preservation interests in multiple ways. By supporting nations' efforts to retain archaeological works, the NSPA promotes the preservation of artifacts, especially monumental and site-specific works such as the looted relief in *Schultz*. The national restitution of monumental works, as witnessed in *Schultz*, aligns well with Coggins's argument about the need to avoid the decontextualization of this form of cultural property. The *Johnson* court's hint in dicta that duplicates should travel also encourages the preservation of these artifacts, which source countries often lack the resources to care for adequately.[47] That U.S. courts will only enforce omnibus statutes where the foreign government has taken active steps to enforce its laws, according to the *Johnson* court, also encourages these states to preserve their own cultural property. The reservation of U.S. courts as a forum to settle cultural property disputes for cases in which the foreign government has actively protected its cultural property provides an incentive for foreign states to actively preserve their heritage.

Despite its potential benefits, the NSPA also fails to account for other goals of a legitimate art trade by granting broad judicial deference towards the incorporation of foreign omnibus statutes. The NSPA will enforce foreign statutes even when they are over-inclusive, as in *McClain*,[48] so long as these statutes are sufficiently specific about government ownership, as was the Egyptian statute in *Schultz*.[49] This aspect of the NSPA defers too heavily to cultural nationalism. By wholly incorporating foreign nationalizing legislation, the current application of the NSPA potentially encourages arbitrage and the development of a black market by driving the art trade underground.[50] In spite of the use of nationalizing stat-

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[47] *See Johnson*, 720 F. Supp. at 812. *See also* Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55, 70–71 (1987) (citing Turkey as a case study of strong nationalizing laws coupled with weak enforcement and heavy looting).

[48] *See* 545 F.2d at 997–1000 (examining legislation vesting constructive ownership of all Pre-Columbian artifacts in its territory, both discovered and undiscovered, with the Mexican government).

[49] *See* 178 F. Supp. 2d at 445–48 (holding that Egyptian Law 117 was sufficiently specific to establish Egyptian ownership of the artifacts thereby creating a cause of action under the NSPA).

[50] *See* Bator, *supra* note 8, at 310–11 (describing the challenges of preventing art theft through standard criminal law techniques in light of market forces which encourage looting). *But see* Adam Goldberg, *Comment: Reaffirming* McClain*: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L.REV. 1031, 1039–

utes that aim to stem the supply of cultural property by criminalizing its export from source nations, international demand for the endangered cultural property often remains high in market nations.[51] This international demand creates internal pressure within the source country for illegal excavation for sale abroad.[52]

Cultural internationalists argue that because nationalizing legislation ignores international demand for cultural property by attempting to statutorily limit the supply of works, these statutes spur black markets in cultural property.[53] Alternatively, cultural internationalists propose that each nation should reserve a limited number of especially important works for national retention while allowing less significant works to travel to satisfy international demand.[54] For example, Bator and other cultural internationalists have praised the British selective export system for its legislative restraint in retaining a limited number of works of vital cultural significance to Britain while allowing the export of the vast majority of less important works.[55]

By aligning the new application of the NSPA in cultural property cases with cultural internationalist interests in a limited, legitimate art market, the NSPA could better provide for the preservation of cultural property while also deterring a black market. However, in addition to the overreliance of the NSPA upon the foreign omnibus statutes favored by cultural nationalists, the current use of the NSPA to prosecute art trafficking also conflicts with the more current and comprehensive statement of U.S. policy regarding cultural property in the CPIA. This Recent Development now explores this inter-branch conflict between Congress's legislation of U.S. policy regarding cultural property in the CPIA and the judiciary's innovative use of the NSPA to address art trafficking.

V. The Convention of Cultural Property Implementation Act

The United States implemented UNESCO 1970[56] through the CPIA in 1983.[57] Articles 7 and 9 of UNESCO 1970 are the convention's two substantive provisions.[58] CPIA § 308 implements article 7 of UNESCO 1970

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46 (2006) (challenging criticisms of the *McClain* doctrine and presenting policy arguments in favor of a broad application of *McClain* and the nationalizing statutes at issue in the case).

[51] *See* Bator, *supra* note 8, at 310–311.

[52] *See id.*

[53] *See id.* at 317–19 (arguing that flawed export control systems and misaligned economic incentives encourage illegal trade).

[54] *See* Bator, *supra* note 8, at 317–19.

[55] *See id.* at 319–25 (providing a general discussion of the benefits and potential limits of the British and Japanese selective export systems).

[56] *See* UNESCO 1970, *supra* note 5.

[57] Pub. L. No. 97-446, Title III, §§ 302–324, 96 Stat. 2329, (1983) (codified at 19 U.S.C. §§ 2601–2613 (2006)); *see also* UNESCO 1970, *supra* note 5.

[58] *See Convention on Cultural Property Implementation Act: Hearing on H.R. 5643 and S. 2261 Before the Subcomm. on Int'l. Trade of the Senate Comm. on Fin.*, 95th Cong. 18, 2d. Sess. (1978) [hereinafter *Hearings*] (statement of Mark B. Feldman, Deputy Legal

by criminalizing the importation into the United States "of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party (signatory to the convention)."[59] Section 308 manifests the nationalist interest of article 7 in preventing the movement of nationalized or otherwise reserved works.

In contrast to the cultural nationalist goals promoted by section 308 of the CPIA, section 303, which implements article 9 of UNESCO 1970, balances nationalist and internationalist concerns. Article 9 requires signatory nations to erect import and export barriers to prevent the movement of cultural property upon the request of any signatory nation whose cultural patrimony is endangered.[60] Under section 303, Congress requires the executive branch to determine the following to institute import restrictions on foreign cultural property:

> (A) that the cultural patrimony of the State Party [to the Convention] is in jeopardy from pillage of archaeological or ethnological materials of the State Party;
> (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;
> (C) that (i) the application of the import restrictions . . . would be of substantial benefit in deterring a serious situation of pillage, and (ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and
> (D) that the application of the import restrictions . . . in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.[61]

Advisor for the Department of State) ("[The CPIA] contains two principal obligations that require implementing legislation. The first is the obligation under article 7(b) of the convention . . . . The other obligation, Mr. Chairman, implemented by this legislation is that set forth in article 9 of the convention . . . .").

[59] CPIA § 308, 19 U.S.C. § 2607.

[60] *See* UNESCO 1970, *supra* note 5, at Art. 9.

[61] CPIA § 308, 19 U.S.C. § 2602. In a 1975 House hearing regarding this section of the CPIA, the State Department explained the purpose of the factor analysis: "The requirement that the President make these findings prior to entering into an agreement is meant to ensure that a factual situation does indeed exist where such measures as import controls are appropriate, that less dramatic measures are not available, and that import controls by the United States would have the intended effect in remedying the situation." H.R. REP. No. 94-14171, at 15 (1976) (Conf. Rep.). The State Department's testimony underscores the conservative approach of the United States in implementing the UNESCO 1970 convention. However, there was some concern at the time of implementation that section 303 of the CPIA conferred too much power on the executive to make a discretionary finding and impose import restrictions. Given the restrained application of the section 303 analysis since 1983—there are currently only twelve import restrictions in place—these concerns have not been borne out. *See* H.R REP. No. 94-14171, at 21 (1976) (Conf. Rep.). *See also Hear-*

While article 9 of UNESCO 1970 called for an automatic system of matching import and export barriers between source and market nations, the U.S. has more narrowly interpreted its treaty obligations in the CPIA to mandate only a system of discretionary import barriers.[62] The section 303 factor analysis is consistent with the policy goals for a legitimate art trade described by Bator and other cultural internationalists in contrast to the more nationalist leanings of articles 7 and 9 of UNESCO 1970.[63] Building on the prohibition of trafficking in stolen works in section 308, section 303 stresses the preservation of endangered works. Congress noted both nationalist and internationalist interests in cultural property when it passed the CPIA and attempted to balance these concerns through the CPIA's four factor approach. In legislating the CPIA to implement UNESCO 1970, the House of Representatives acknowledged that "[i]ts purpose is to combat the illegal international trade of national art treasures,"[64] and the Senate similarly affirmed that the purpose of the bill was to "[preserve] the cultural treasures that not only are of importance to the nations whence they originate, but also to a greater international understanding of our common heritage."[65]

Under section 303(B) of the CPIA, the United States will only honor export controls that the petitioning foreign government has already attempted to enforce. However, under the current application of the NSPA as seen in *McClain*[66] and *Schultz*,[67] U.S. courts will enforce broader foreign omnibus statutes than those authorized by Congress in the CPIA. The divergence of criminal liability under the NSPA from the statement of U.S. policy in the CPIA is problematic because both pieces of legislation affect the form the art trade will take and seem to work at cross-purposes. Different definitions of what constitutes "stolen" property in each act highlights this problem.[68] One scholar has noted that whereas only a documented object may be considered stolen under the CPIA, "cultural property is deemed stolen if it is subject to a national declaration of ownership re-

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ings before the Subcomm. on Trade of the H. Comm. on Ways and Means: *Hearing on H.R. 5643*, 95th Cong. 35 (1977). *But see* James F. Fitzpatrick, *Stealth Unidroit: Is USIA the Villain?*, 31 INT'L L. & POL. 47, 53 (1998) (criticizing the executive's enforcement of the CPIA).

[62] One possible explanation for this narrow interpretation of UNESCO 1970 is that "U.S. history has always favored the free trade approach toward movement of cultural properties into and out of the United States." Fitzpatrick, *supra* note 61, at 47, 48.

[63] *See* Part III, *supra* (describing the goals of a limited, licit art trade and briefly summarizing the debate between cultural nationalism and cultural internationalism).

[64] H.R. REP. No. 94-14171 at 1 (1976) (Conf. Rep.).

[65] *See* S. REP. No. 97-564 at 21 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 4098, 4100.

[66] *See* 545 F.2d at 999–1001.

[67] *See* 178 F. Supp. 2d at 448–49.

[68] *See* CPIA § 308, 19 U.S.C. § 2607 (defining the scope of the CPIA as applying only to "cultural property documented as appertaining to the inventory of a museum or religious or secular monument. . ."). The NSPA only uses the term "stolen," allowing the judiciary to define what constitutes stolen property under the Act. *See* 18 U.S.C. § 2314 (2006).

gardless of whether the plaintiff can document that any owner actually lost possession" under the current application of the NSPA.[69] These varying definitions of "stolen" property create diverging incentives for foreign states when designing their legal regimes governing cultural property. While the application of the CPIA favors the specification by each nation of what pieces constitute its national patrimony,[70] the application of the NSPA instead favors all-encompassing omnibus statutes that nationalize all works.[71]

The current application of the NSPA in art trafficking cases muddles Congress's express statement of U.S. policy regarding cultural property in the CPIA. Although Congress was warned of such a potential conflict when it legislated the CPIA, it failed to address the issue by revising the CPIA to take account of the *McClain* decision. Douglas Dillon, president of the Metropolitan Museum of Art, testified before a subcommittee of the House Ways and Means Committee that the *McClain* decision had the potential to create a broader incorporation of foreign omnibus statutes than allowable under the prospective legislation of the CPIA.[72] Dillon was concerned about divergence of the *McClain* holding from the proposed CPIA, and testified that the *McClain* decision "could significantly undermine the intention and scope of the UNESCO convention."[73]

Through Dillon, the Metropolitan Museum proposed revisions to the draft version of the CPIA to "prevent the application of the National Stolen Property Act where the alleged act of stealing or conversion is based solely on a broad national patrimony statute."[74] However, the proposed amendments were never adopted.[75] Similarly, Douglas Ewing, president of the American Association of Dealers in Ancient, Oriental and Primitive Art, testified before the subcommittee that the draft version of the CPIA failed to "deal with the recent decision by the Court of Appeals for the Fifth Circuit in *United States v. McClain*"[76] and that "[t]his decision

[69] William G. Pearlstein, *Cultural Property, Congress, The Courts, and Customs: The Decline and Fall of the Antiquities Market?*, *in* WHO OWNS THE PAST? 9, 16 (Kate Fitz Gibbon ed., 2006). However, in dicta, the court in *Schultz* distinguished between the customs focus of the CPIA and the criminal law content of the NSPA. Recognizing the potential for overlapping or alternative liability for defendants under the CPIA and NSPA, the *Schultz* court indicated that one can distinguish between a customs violation under the CPIA and criminal liability under the NSPA. *See Schultz*, 178 F. Supp. 2d at 448–49.

[70] *See* 19 U.S.C. §§ 2604-06 (2006).

[71] *See McClain*, 545 F.2d at 1000–01 (holding that a declaration of national ownership combined with export restrictions can implicate the NSPA).

[72] *See Hearings*, *supra* note 58, at 2 (statement of Douglas Dillon) (noting that the broad definitions of national patrimony could potentially subject people to criminal prosecution and civil actions. In contrast, the CPIA "is prospective in operation and limits the material or property which may be claimed to that which is subject to a particular embargo under section 3").

[73] *Id.* at 2.

[74] *Id.* at 3.

[75] *See id.* at 15–17.

[76] *See Hearings*, *supra* note 58, at 31. Ewing also raised some questions about the over-

announced an interpretation of the [NSPA] which would vitiate the regulatory system to control art imports provided by H.R. 5643 [CPIA]."[77] To reconcile the judicial and legislative actions, Ewing also proposed an amendment to the CPIA to specifically address *McClain.*[78] Congress's failure to consider adequately the policy implications of *McClain* created the conditions for the present-day conflict between the judiciary's interpretation of the NSPA and Congress's legislation of U.S. policy regarding cultural property in the CPIA.

The judiciary's broad deference to foreign omnibus statutes under the NSPA creates a judicial forum to address cultural property cases that Congress foreclosed by delegating this authority to the executive in the CPIA. Sections 303(a)(2) and 306 of the CPIA shifted the administration of questions involving cultural property to the President and the Executive Branch's Cultural Property Advisory Committee and provided a four factor analysis in section 303 for use in resolving issues involving cultural property.[79] Although the current use of the NSPA mostly promotes a legitimate international art market, the NSPA would be improved by recognizing only more specific foreign omnibus statutes that protect a narrowly tailored definition of the cultural patrimony in accordance with the CPIA. This shift in the application of the NSPA would resolve the conflicting policies presently promoted by the NSPA and the CPIA.

The conflict between the NSPA and the CPIA will be tested in future art trafficking cases where liability is based on the NSPA. One such group of cases involves art looted by the Nazis. In *United States v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso,*[80] federal prosecutors for the first time premised NSPA liability on the interstate transportation of Nazi-looted art.[81] In the case, the U.S. Attorney's Office intervened in an ongoing dispute between two claimants to the rightful title to Picasso's "Femme en Blanc" and charged Marilynn Alsdorf under the NSPA. The government's prosecution was premised on Alsdorf's knowledge that the painting was stolen from its former owners by the Nazis and her transport of the work between states.[82] Alsdorf's motion to dis-

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lapping functions of the NSPA and CPIA, musing that "[i]f a foreign nation can by its own actions render it illegal to bring art into the United States, why enact H.R. 5643 [CPIA] at all?" *Id.* at 35.

[77] *See Hearings, supra* note 58, at 31 (citation omitted).

[78] *Id.* at 35.

[79] *See* CPIA §§ 303(a)(2), 306, 19 U.S.C. §§ 2602, 2604 (2002). *See also* President Reagan's delegation of CPIA duties within the executive branch in Exec. Order No. 12,555, 51 Fed. Reg. 3475–76 (Mar. 10, 1986) (delegating authority primarily to the Department of State, but also to the United States Information Agency, Department of the Treasury, and Secretary of the Interior).

[80] 362 F. Supp. 2d 1175 (C.D. Cal. 2005).

[81] *See* Sue Choi, *The Legal Landscape of the International Art Market after* Republic of Austria v. Altmann, 26 Nw. J. INT'L L. & BUS. 167, 187 (2005) (exploring the limits and potential of applying the NSPA to Nazi-looted art cases).

[82] *See Femme en Blanc*, 362 F. Supp. 2d at 1179–80.

miss was denied by the District Court.[83] Soon thereafter, in August 2005 the parties settled and the government consented to drop the NSPA charges, satisfied that the matter had been resolved.[84] Although there is potential for a great number of Nazi-looted art cases involving works in the United States, the number of such cases that will involve NSPA liability is much lower. The application of the NSPA in these cases will likely be limited by the knowledge and intent requirements of the NSPA to cases in which the defendant acquired the cultural property knowing it to have been stolen by the Nazis.[85]

Another group of cases in which the tension between the NSPA and the CPIA will be further tested involves foreign claims against works in U.S. collections. In Rome, J. Paul Getty Museum antiquities curator Marion True currently stands trial for conspiring to traffic in looted antiquities and receiving stolen property for display at the Getty.[86] Although Italian prosecutors desired to try True in an Italian forum, it was a major challenge for the prosecutors to bring True to trial given the defendant's U.S. residency.[87] However, because the charges in True's case align well with the elements of the NSPA liability, the current application of the NSPA potentially creates a parallel U.S. forum for criminal liability in such cases.

In the future, cases similar to True's might be more easily tried in the United States. The abundance of current foreign claims against imported cultural property in U.S. collections indicates the potential for numerous future domestic trials involving NSPA liability. An increased volume of NSPA cases may result in greater expertise by domestic courts in dealing with cultural property issues and increased consistency in these decisions. In these cases, courts will have to consider the conflict between broad NSPA liability and the more limited scope of U.S. policy concerning cultural property in the CPIA. One way courts could resolve this conflict is by lessening their deference to cultural nationalism and overly broad definitions of cultural patrimony in foreign omnibus statutes. By bringing the application of the NSPA into line with cultural internationalist interests and Congress's statement of policy in the CPIA, the courts could best provide for the preservation of works while fostering a legitimate trade in cultural property.

—Graham Green[*]

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[83] *See id.* at 1178.

[84] *See* Press Release, Burris & Schoenberg, LLP, Litigation Over Picasso Painting Settled Out of Court (Aug. 9, 2005), *available at* http://www.bslaw.net/news/050809.html (last visited on Nov. 10, 2006) (announcing the $6.5 million settlement).

[85] *See* Jennifer Anglim Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1222 (2005).

[86] Andrew L. Slayman, *The Trial in Rome*, ARCHAEOLOGY, (Feb. 6, 2006), http://www.archaeology.org/online/features/italytrial (last visited on Oct. 18, 2006).

[87] *See id.*

[*] B.A., Cornell University, 2002; J.D. Candidate, Harvard Law School, Class of 2007.
The author would like to thank Professor Terry Martin for his assistance during the research and writing of this Recent Development.