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DOES CONGRESS HAVE THE CONSTITUTIONAL POWER TO PROHIBIT PARTIAL-BIRTH ABORTION?

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The Partial-Birth Abortion Ban Act makes it a federal crime for doctors to perform certain late-term abortions. Congress justified this law as an exercise of its power "to regulate Commerce . . . among the several States." It is unclear whether the Act will be upheld under the Supreme Court's current Commerce Clause standards, which are malleable and therefore tend to be applied in light of each judge's politics and ideology. To remedy this problem, the author urges the Court to articulate and consistently apply precise rules of law rooted in the Commerce Clause's language, history, and early precedent. Under this approach, the Court would sustain the Act because the performance of partial-birth abortions is "commerce"—the sale of a service in the market—that has demonstrable effects "among the states." The proposed analysis is politically neutral, however, because it would also support the constitutionality of the federal statute protecting abortion clinics, as interstate market-based enterprises, from criminal interference. Such an apolitical legal approach seems especially useful when addressing an explosive issue like abortion.

In November 2003, Congress passed the Partial-Birth Abortion Ban Act (PBABA), which imposes criminal penalties on "[a]ny physician who, in or affecting interstate . . . commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus."[1] The acrimonious legislative debate over the PBABA focused on whether it infringed the constitutional right to abortion, in light of the Supreme Court ruling a few years before striking down a similar state law.[2] But members of the House and Senate largely ignored another vital constitutional question: Does Congress have the power to proscribe partial-birth abortion?

As the "in or affecting . . . commerce" language indicates, Congress deemed the PBABA to be an exercise of its authority "to regulate Commerce . . . among the several States."[3] The Court would have readily ac-

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[1] 18 U.S.C.A. § 1531(a) (West 2003 & Supp. 2004).

[2] *See* Stenberg v. Carhart, 530 U.S. 914 (2000). This case, and the congressional dispute over its relevance to the PBABA, are discussed *infra* Part I.A.

[3] U.S. CONST. art. I, § 8, cl. 3; *see also Partial-Birth Abortion Ban Act of 2003*, H.R.

cepted that assertion from 1937 to 1994, when it upheld every statute enacted under the Commerce Clause, including a broad spectrum of social and moral legislation that appeared to have little or nothing to do with interstate commerce.[4]

Over the past decade, however, Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy have revoked Congress's Commerce Clause license. In *United States v. Lopez*, this majority invalidated the Gun-Free School Zones Act on the ground that Congress could not regulate conduct—firearm possession near schools—that was not inherently "commercial," did not "substantially affect" interstate commerce, and invaded areas of "traditional state concern" (criminal and education law).[5] Applying the same logic in *United States v. Morrison*, the Court struck down a provision of the Violence Against Women Act[6] granting a civil cause of action to victims of gender-motivated violence that occurred entirely within a state.[7] In both cases, Justices Stevens, Souter, Ginsburg, and Breyer dissented and urged judicial deference to Congress's determinations under the Commerce Clause.[8]

Though most scholars have sided with the dissenters, the majority in *Lopez* and *Morrison* properly recognized the general idea that in a Constitution of limited and enumerated powers, the Commerce Clause cannot be interpreted as granting Congress untrammeled authority.[9] Nonetheless, the specific analytical framework established in those two cases is defective because it requires wholly subjective judgments about three vague standards.

First, although the Court correctly ruled that Congress can regulate only "commerce," it expressly declined to define this crucial word.[10] Thus, the Justices seemed to rely on their mere intuition that gun possession in a school zone and gender-based violence are not "commercial." But the Court failed to explain persuasively how such activities can be distinguished from gun possession by felons, drug possession, and gender discrimination, all of which Congress has been allowed to prohibit.[11]

REP. No. 108-58, at 23–26 (2003) (identifying the Commerce Clause as the source of power for the PBABA).

[4] *See infra* notes 56–70 and accompanying text (citing cases on laws dealing with local crime, public health, and discrimination).

[5] 514 U.S. 549, 556–68 (1995).

[6] 42 U.S.C. § 13981 (2000).

[7] 529 U.S. 598, 600–19 (2000).

[8] *See Lopez*, 514 U.S. at 602–03 (Stevens, J., dissenting); *id.* at 603–15 (Souter, J., dissenting); *id.* at 615–44 (Breyer, J., dissenting); *Morrison*, 529 U.S. at 628–55 (Souter, J., dissenting); *id.* at 655–64 (Breyer, J., dissenting). Justice Ginsburg joined these dissents but did not write separately.

[9] *See* Robert J. Pushaw, Jr., & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 695–99 (2002).

[10] *See Lopez*, 514 U.S. at 565–66; *id.* at 569, 574 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 610–11.

[11] *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control*

Second, *Lopez* and *Morrison* retained the requirement that the regulated conduct must "substantially affect" interstate commerce.[12] Again, however, the Court provided no concrete guidelines (e.g., dollar thresholds) for ascertaining what effect should be considered "substantial."

Third, both the majority and concurring opinions emphasized the need to preserve from federal interference subjects of "traditional state concern," such as crime and education.[13] Yet the Court neglected to reconcile this federalism rationale with its long-established precedent permitting Congress to regulate significant segments of this formerly state domain.

In short, current Commerce Clause jurisprudence depends largely on federal judges' instinctive assessments about whether a particular activity is "commercial," affects interstate commerce "substantially," or trenches upon a matter of historical state control. This approach, when applied to the PBABA, could plausibly yield diametrically opposite outcomes.[14] On the one hand, this statute might be characterized as a valid regulation of economic activity—the performance of partial-birth abortions for money—that exerts a substantial effect on interstate commerce (the abortion business) in an area not traditionally committed to the states (because this procedure has been developed only recently).[15] On the other hand, a court might strike down the PBABA as legislation targeting morality rather than commerce, addressing a procedure so rare that its effects on the interstate economy are hardly "substantial," and interfering with three subjects long entrusted to the states: crime, health care procedures, and family law.[16]

The indefiniteness of *Lopez* and *Morrison* invites impressionistic decisionmaking influenced, whether consciously or not, by political and ideological factors. For example, the same Justices who have spearheaded the restraints on the Commerce Clause—Rehnquist, Scalia, and Thomas—are also the most adamantly opposed to abortion.[17] Will they adhere to their federalism rationale and invalidate the PBABA, or suddenly rediscover deference to Congress's judgment about what constitutes interstate commerce? Conversely, the four Justices who have eschewed any limits on the Commerce power—Stevens, Souter, Ginsburg, and Breyer—are also the most

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over Social Issues, 85 IOWA L. REV. 1, 84–88, 136–41 (1999) (citing precedent).

[12] *Lopez*, 514 U.S. at 555–67; *Morrison*, 529 U.S. at 609–16.

[13] *Id.* at 564–68; *id.* at 568–83 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 611–19.

[14] *See infra* Part I.C (elaborating upon these two possible results).

[15] *See infra* notes 98–106, 114–118 and accompanying text.

[16] *See infra* notes 107–113 and accompanying text. For a cogent summary and defense of these arguments casting doubt upon Congress's power to enact the PBABA, see Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMM. 441 (2004). Two other scholars reached a similar conclusion after considering a congressional bill that served as a blueprint for the PBABA. *See* David P. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 59–64, 104–16 (1997).

[17] *See infra* notes 119–120 and accompanying text.

committed to protecting abortion rights.[18] Will they continue to acknowledge Congress's plenary authority, or carve an exception for partial-birth abortion?

Precisely to avoid such potential political manipulation of malleable standards, I have always maintained that the Court should announce and consistently apply clear rules of law derived from a "Neo-Federalist" methodology.[19] This approach initially identifies principles drawn from the Constitution's text read in light of its underlying Federalist political theory and structure, its drafting and ratification history, and early congressional and judicial precedent.[20] Those originalist principles are then refined to account for subsequent developments.[21] As employed in the Commerce Clause context, Neo-Federalism yields a two-part legal test.[22]

First, Congress can regulate only "commerce"—defined as "the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests."[23] "Commerce" includes buying and selling merchandise; producing goods for the marketplace through manufacturing, mining, and farming; providing services for compensation (e.g., labor and professional employment, insurance, and banking); and transporting goods or people for consideration.[24] By contrast, "commerce" does not encompass actions undertaken solely for personal or home use and does not reach matters of exclusively moral, social, or cultural concern (such as local crimes not involving market transactions).[25]

Second, this "commerce" must be "among the several States"—i.e., either cross a state line or occur within one state but affect others.[26] This prong is usually easy to satisfy, because in America's integrated national economy almost any commercial activity, when considered in the aggregate, has such an interstate impact.

Under the proffered legal analysis, the PBABA would pass muster. Performing partial-birth abortions is a type of "commerce"—the sale of a

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[18] *See infra* note 121 and accompanying text.

[19] *See, e.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) [hereinafter Pushaw, *Case/Controversy*]; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1998) (book review) [hereinafter Pushaw, *Advisory Opinions*].

[20] For a fuller description of this mode of analysis, see, for example, Pushaw, *Justiciability*, *supra* note 19, at 397–99, 454, 467–72, 511–12.

[21] *See id.*

[22] For a book-length study of the Commerce Clause using this methodology, see Nelson & Pushaw, *supra* note 11. For a defense of this thesis against its critics, see Pushaw & Nelson, *supra* note 9.

[23] Nelson & Pushaw, *supra* note 11, at 9.

[24] *See id.* at 9–10, 107–10.

[25] *See id.* at 11–12, 109–10, 113–19.

[26] *See id.* at 10–11, 110–13.

service by professionals engaged in a market-oriented enterprise.[27] Furthermore, Congress could reasonably conclude that all such abortions have an effect on interstate commerce significant enough to warrant regulation, even though others might plausibly differ with this judgment.

Although such a result will disappoint supporters of abortion rights, the proposed Commerce Clause test is politically neutral on this issue. For instance, I have previously contended that the Court should sustain the Freedom of Access to Clinic Entrances Act (FACE) because Congress can protect specifically defined commercial establishments, such as abortion facilities, from criminal interference.[28] Such an apolitical legal approach is preferable to a nakedly partisan one—for example, the conservative view that Congress can enact the PBABA but not FACE, or the liberal position that would hold exactly the opposite.[29]

The foregoing themes will be developed in two parts. Part I will describe the PBABA, summarize Commerce Clause jurisprudence, and demonstrate the arbitrariness of the Court's current standards by applying them to the PBABA. Part II will set forth, employ, and defend the proposed two-part Commerce Clause test in the context of the PBABA.

I. THE PARTIAL-BIRTH ABORTION BAN ACT AND THE COMMERCE CLAUSE

A. The Fate of Partial-Birth Abortion in the Court and Congress

In *Planned Parenthood v. Casey*, Justices Kennedy, O'Connor, and Souter unexpectedly joined two pro-choice Justices in reaffirming the core holding of *Roe v. Wade*[30] that women have a constitutional right to abort a fetus before viability.[31] Thereafter, pro-life activists concentrated on out-

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[27] In general, Congress can regulate partial-birth abortion as "commercial" activity. However, the PBABA might exceed constitutional bounds if it were applied to the relatively rare situation where a doctor performed this procedure for free. To avoid this possible problem, Congress inserted the "in or affecting commerce" jurisdictional requirement with the intent of limiting the PBABA's scope to the usual case of a compensated partial-birth abortion. *See infra* notes 214–220 and accompanying text.

[28] *See* Nelson & Pushaw, *supra* note 11, at 150 (citing and analyzing FACE, 18 U.S.C. § 248 (1994)). Congress can safeguard the interstate commerce it regulates by prohibiting crimes that disrupt or threaten particularly described persons or entities engaged in such commerce—for example, abortion clinics and their doctors and patients. By contrast, Congress cannot enact a broad criminal law (e.g., banning murder) on the ground that the victims will be unable to engage in interstate commerce generally, for such a theory would effectively federalize all state crimes. *See id.* at 107–13, 119–27, 136–52.

[29] This Article rejects the common assertion by scholars that a non-partisan legal approach to constitutional interpretation is impossible. *See infra* Part II.A.

[30] 410 U.S. 113 (1973).

[31] 505 U.S. 833, 844–901 (1992). Four Justices argued that the Court should reverse *Roe* and leave the issue of abortion to the states. *See id.* at 979–1002 (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Thomas, J.).

lawing "partial-birth abortions"—procedures in which a doctor delivers any part of a living fetus into the vagina before the abortion is completed.[32]

From 1995 until 2000, Congress repeatedly passed bills criminalizing these abortions, which President Bill Clinton always vetoed.[33] Many states, however, successfully enacted such laws.[34] The Supreme Court halted this legislation in *Stenberg v. Carhart*, which struck down Nebraska's partial-birth abortion ban on two constitutional grounds.[35] First, although the statute aimed to prohibit abortions on viable fetuses, its vague language could have been interpreted as also reaching certain pre-viability abortions, thereby running afoul of *Roe* and *Casey*.[36] Second, the state did not make the constitutionally required exception to protect the mother's health.[37]

Stenberg did not end the debate, but rather shifted it back to the federal level. Once again, the majority of Congress approved a ban on partial-birth abortion, and this time the President (now George W. Bush) signed it.[38] Many Senators and Representatives argued that the PBABA was indistinguishable from the statute invalidated in *Stenberg* and hence violated the constitutional right to reproductive choice.[39] But they never questioned Congress's power to enact this law in the first place.

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[32] *See* Stenberg v. Carhart, 530 U.S. 914, 922 (2000) (citing Nebraska's statute prohibiting partial-birth abortions); *id.* at 995–96 n.13 (Thomas, J., dissenting) (setting forth many similar state laws). *See also* H.R. REP NO. 108-58, at 4–5 (2003) (discussing the swift political success of the procedure's opponents).

[33] *See* H.R. REP. NO. 108-58, at 12–14 (2003) (describing this legislative history). Although debates over these bills focused on the right to abortion, a few legislators and constitutional law professors questioned Congress's power to pass this statute under the Commerce Clause. *See, e.g., Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 16 (1995) (statement of Sen. Arlen Specter (R-Pa.)); *id.* at 188–89 (prepared statement of Prof. Louis Michael Seidman, Georgetown University Law Center) [hereinafter Seidman Statement].

Some Republicans expressed their dilemma of supporting this bill on policy grounds, but generally opposing the use of the Commerce Clause to centralize federal power. *See, e.g., id.*, at 206 (statement of Sen. Fred Thompson (R-Tenn.)); *Partial-Birth Abortion Ban Act: House Floor Debate*, 146 CONG. REC. H1772 (daily ed. Apr. 5, 2000) (statement of Rep. Ron Paul (R-Tex.)). Senator Hatch recognized this potential problem, but argued that the provision of medical services (including abortion) was commerce and had interstate market effects—as Congress had previously recognized in protecting access to abortion clinics. *See Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 1 (1995) (statement of Sen. Orrin Hatch (R-Utah)); 141 CONG. REC. 35,182 (1995) (statement of Sen. Hatch); *see also* H.R. REP. NO. 105-24, at 26 (1997) ("[T]he Committee finds the authority for this legislation in Article I, section 8, clause 3 of the Constitution.").

[34] *See, e.g.*, Stenberg, 530 U.S. at 995–96 n.13 and accompanying text (2000) (Thomas, J., dissenting) (citing statutes from many of the twenty-eight states that had passed such bans).

[35] 530 U.S. 914 (2000).

[36] *See id.* at 922–46.

[37] *See id.* at 929–38. As in *Casey*, four Justices vehemently disagreed with the majority. *See id.* at 952 (Rehnquist, C.J., dissenting); *id.* at 953–56 (Scalia, J., dissenting); *id.* at 956–79 (Kennedy, J., dissenting); *id.* at 980–1020 (Thomas, J., dissenting).

[38] 18 U.S.C.A. § 1531 (West 2003 & Supp. 2004).

[39] These congressional critics focused on two similarities. First, like the Nebraska law, the PBABA forbids all partial-birth abortions, not merely those performed on viable fetuses. *See id.* § 1531(b)(1). Second, the PBABA makes no exception to protect the mother's

Nor did the PBABA's proponents pay much attention to this issue.[40] The Act mandates criminal penalties for "[a]ny physician who, in or affecting interstate . . . commerce, knowingly performs a partial-birth abortion."[41] Although this language reveals Congress's understanding that its authority derived from the Commerce Clause, the official findings supporting the PBABA do not mention—much less explain—the connection between partial-birth abortion and interstate commerce. Rather, these findings are exclusively devoted to establishing that (1) partial-birth abortion is never medically necessary, can endanger the health of the mother, and is an inhumane procedure, and (2) federal courts must defer to these con-

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health. *See id.* § 1531(a) (allowing partial-birth abortions only where "necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury"—and, by implication, not for non-life-threatening health reasons). Indeed, Congress found that no health exception was required because "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . [is] never medically necessary." *See Partial-Birth Abortion Ban Act of 2003,* Pub. L. No. 108-105, § 2(1), 117 Stat. 1201 (2003); *see also id.* § 2(5), (13), and (14)(C)–(E), (O) (elaborating upon this finding); *id.* § 2(2), (5), (13), and (14)(A), (F), (O) (concluding that partial-birth abortion "in fact poses serious risks to the long-term health of women").

Senator Barbara Boxer (D-Cal.) gave the most comprehensive critique of the PBABA's overbreadth and its lack of a health exception. *See* 149 CONG. REC. S3385–87, S3392–99 (daily ed. Mar. 10, 2003); 149 CONG. REC. S3459–61, S3474 (daily ed. Mar. 11, 2003); 149 CONG. REC. S3560–62, S3568–70, S3578–80, S3592, S3597 (daily ed. Mar. 12, 2003). Many other Senators echoed her concerns. *See, e.g.*, 149 CONG. REC. S3423–25, S3478–81, S3483–84 (daily ed. Mar. 11, 2003) (statements of Sens. Patty Murray (D-Wash.), Richard Durbin (D-Ill.), and Susan Collins (R-Me.)); 149 CONG. REC. S3570–71, S3575–77, S3583–90, S3598–3602, S3605–06, S3608–13 (daily ed. Mar. 12, 2003) (statements of Sens. Patrick Leahy (D-Vt.), Mary Landrieu (D-La.), Barbara Mikulski (D-Md.), Olympia Snowe (R-Me.), Edward Kennedy (D-Mass.), Hilary Clinton (D-N.Y.), Maria Cantwell (D-Wash.), Dianne Feinstein (D-Cal.), Frank Lautenberg (D-N.J.), Debbie Stabenow (D-Mich.), James Jeffords (I-Vt.), and Russell Feingold (D-Wis.)). In the House, dozens of Representatives reiterated these arguments. *See, e.g.*, 149 CONG. REC. H4911–16, 4924–49, 4953 (daily ed. June 4, 2003).

Federal courts that have reviewed the PBABA have agreed with these members of Congress and struck down the Act as inconsistent with *Stenberg*. *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 482–93 (S.D.N.Y. 2004); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 959–60, 966, 968–75, 1032–35 (N.D. Cal. 2004); Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1003–37 (D. Neb. 2004). These courts did not consider Congress's power to pass this law, except for one mention in a footnote that "[p]laintiffs do not allege that Congress exceeded its authority under the Commerce Clause." *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 439 n.1.

[40] For example, during debates over the PBABA in the 108th Congress, the Senate entirely overlooked the question of Commerce Clause power, and in the House only one Representative mentioned it in passing. *See* 149 CONG. REC. H4934–35 (daily ed. June 4, 2003) (statement of Rep. Ron Paul (R-Tex.)) (agreeing with the law's policy, but objecting that Congress had further stretched the definition of interstate commerce and thus contributed to the ballooning of the federal government).

A few law professors contended that the Commerce Clause did not authorize this legislation. *See, e.g.*, Jonathan H. Adler, *One Bad Turn Doesn't Merit Another*, NAT'L REV. ONLINE (July 2, 2002), *at* http://www.nationalreview.com/script/printpage.asp?ref=/adler/adler070202.asp; Alan B. Morrison, *Can This Be Legal? Another Bill on Partial-Birth Abortions, Another Bout of Constitutional Questions*, LEGAL TIMES, Aug. 25, 2003, at 52.

[41] 18 U.S.C.A. § 1531(a) (West 2003 & Supp. 2004).

clusions.[42] The House Conference Report (issued jointly with the Senate) accompanying the PBABA had the identical focus.[43] An earlier Report from the House Judiciary Committee featured a similar emphasis,[44] but also contained a brief description of Congress's power to enact the law under the Commerce Clause.[45] The Committee asserted that partial-birth abortion "is an economic transaction in which a service is performed for a fee" and has two interstate dimensions.[46] First, because so few physicians performed this procedure, women seeking partial-birth abortions were especially likely to cross state lines,[47] and doctors induced such travel by advertising this service outside of their home states.[48] Second, partial-birth abortions were usually performed in a hospital or clinic that purchased medicine, supplies, and instruments produced in other states.[49]

Unfortunately, neither the Committee Report nor any other legislative history set forth details about the amount of money that flowed nationwide from the provision of partial-birth abortions and related travel and advertising.[50] After *Lopez* and *Morrison*, will the Court defer to Congress's lightly supported claim that the PBABA is legislation about interstate commerce?

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[42] *See* Pub. L. No. 108-105, § 2, 117 Stat. 1201 (2003).

[43] *See* H.R. REP. No. 108-288, at 9–18 (2003), *reprinted in* 2003 U.S.C.C.A.N. 1273, 1273–82.

[44] *See* H.R. REP. No. 108-58, at 2–23 (2003).

[45] *See id.* at 23–26.

[46] *Id.* at 24.

[47] *See id.* For this proposition the Committee relied upon *Partial-Birth Abortion: Hearing on H.R. 1833 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 101–02 (1995) (testimony of David M. Smolin, Professor of Law, Cumberland Law School, Samford University) [hereinafter Smolin Testimony]. It also provided evidence from Kansas of the extremely high percentage of out-of-state patients who had obtained this procedure. *See* H.R. REP. No. 108-58, at 25 (2003).

[48] *See* H.R. REP. No. 108-58, at 25 (2003). This conclusion rested primarily upon an advertisement in Indiana placed by an Ohio doctor. *See id.*

[49] *See id.* at 25 (citing *The Freedom of Access to Clinic Entrances Act of 1993: Hearing on S. 636 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 16 (1993) (prepared statement of Attorney General Janet Reno) [hereinafter Reno Statement]). Although Reno referred to abortions in general, the partial-birth abortion procedure is performed in the same facilities that provide earlier abortions. *See id.* at 2–5, 17, 24–25.

The Committee Report distinguished *Lopez* on two grounds. First, partial-birth abortions involved interstate commercial activity, whereas the mere possession of a gun near a school did not. *See id.* at 25–26. Second, the PBABA had a jurisdictional requirement ("in or affecting . . . commerce") which would ensure that the abortion at issue in a particular case had a sufficient connection to interstate commerce. *Id.* at 26.

[50] *See* Ides, *supra* note 16, at 454–56 (arguing that the Committee's findings merely outline the potential interstate commercial effect of partial-birth abortions, instead of furnishing relevant facts regarding the actual extent of purchases of this service and related travel and advertising).

B. The Commerce Clause

1. The Evolution of Constitutional Standards

During the twentieth century, the Court showed ever-increasing solicitude toward Congress's power to "regulate Commerce . . . among the several States"[51] in three distinct categories. The first involved the "channels" of interstate commerce, such as highways. Initially, the Court upheld federal statutes that addressed commercial activities using such channels, typically by prohibiting the interstate transportation of products deemed dangerous[52] or immoral[53] and people providing illicit compensated services (e.g., prostitutes).[54] This precedent was soon extended, however, to endorse congressional regulation of noncommercial interstate transportation. For instance, the Court sustained the application of the Mann Act—which criminalized taking a woman across state lines for "immoral purposes"—to men who had brought their mistresses from California to Nevada as part of consensual, noncommercial relationships.[55] Moreover, after the New Deal the Court allowed Congress to regulate the purely local sale—or even the mere possession—of any item (or its components) that had ever passed through interstate channels, no matter how distantly in the past.[56] In short, Congress possessed plenary power over anyone or anything that would cross, or had crossed, a state line.

The second category followed from the first. The Court granted Congress carte blanche to protect "instrumentalities" of interstate commerce, such as railroads.[57]

Third, and most important for present purposes, the New Deal Court held that Congress could regulate anything that "substantially affected" interstate commerce.[58] These rulings reversed decades of precedent striking

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[51] U.S. CONST. art. I, § 8, cl. 3.

[52] *See* Reid v. Colorado, 187 U.S. 137, 142–53 (1902) (sustaining an Act of Congress designed to prevent the shipment of diseased cattle).

[53] *See* Champion v. Ames (The Lottery Case), 188 U.S. 321, 352–64 (1903) (upholding a federal law prohibiting the interstate carriage of gambling tickets).

[54] *See* Hoke v. United States, 227 U.S. 308, 320–23 (1913).

[55] *See* Caminetti v. United States, 242 U.S. 470, 484–96 (1917) (citing statute).

[56] *See* United States v. Sullivan, 332 U.S. 689, 690–98 (1948) (upholding the conviction of a small retail pharmacist who, after buying a large bottle of pills containing an FDA-required warning label from an in-state wholesaler, transferred a few pills to an unlabeled box and sold them over the counter); *see also* Scarborough v. United States, 431 U.S. 563, 569–77 (1977) (enforcing an Act of Congress that prohibited a convicted felon from simply possessing a firearm if it had ever traveled through interstate commerce).

[57] The "instrumentalities" theory traces to *Southern Ry. v. United States*, 222 U.S. 20, 23–27 (1911) (approving the constitutionality of the federal Safety Appliance Act, ch. 196, 27 Stat. 531 (1893)).

[58] *See* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37–43 (1937) (sustaining the National Labor Relations Act because, even though the employees involved were engaged in "manufacturing" rather than "commerce," and even though they performed labor within one state, Congress could regulate their activities as "essential and appropriate" to govern the interstate commerce that had been "substantially affected" in a

down federal statutes addressing activities like labor and manufacturing that occurred entirely within a state and that did not meet a narrow definition of "commerce" (selling and shipping goods).[59] Furthermore, the "substantial effect" on interstate commerce would be measured by considering not the conduct at issue in any particular case, but rather the total of all such activity nationwide. In the seminal case of *Wickard v. Filburn*, the Court sustained penalties imposed under the Agricultural Adjustment Act on a small-scale Ohio farmer who had exceeded his quota of wheat by a few acres and had devoted part of this surplus to home use rather than sale.[60] The Court concluded that, although the farmer had produced only a trivial quantity of this commodity for local and noncommercial purposes, the cumulative amount of all such wheat throughout America would have a substantial impact on supply and therefore prices.[61]

As the Justices who decided *Wickard* understood, virtually any activity, when considered in the aggregate, substantially affected interstate commerce.[62] Accordingly, Congress successfully began to invoke the Commerce Clause to exercise a general police power to do whatever it felt was in the national interest, as illustrated by antidiscrimination[63] and environmental

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direct and intimate way by labor disputes). The Court later applied similar reasoning to the Fair Labor Standards Act in *United States v. Darby*, 312 U.S. 100, 118–19 (1941).

Judges and scholars often overlook that these New Deal cases and their progeny relied heavily on the Necessary and Proper Clause. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807–08 (1996) (lamenting this oversight). The Court reasoned that a federal statute could reach even conduct that was noncommercial or intrastate (or both) if Congress deemed such coverage "necessary and proper" to regulate interstate commerce. The Necessary and Proper Clause, however, only allows Congress to "carry into effect" an enumerated power. U.S. CONST. art. I, § 8, cl. 18. Hence, if Article I, Section 8, Clause 3 limits Congress to regulating "commerce" (i.e., market-oriented activity) that occurs "among the several States," Congress would not be effectuating those restrictions by invoking the Necessary and Proper Clause to evade them. *See* Nelson & Pushaw, *supra* note 11, at 82–83, 98–100; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 833–43 (2001) (discussing the historical meaning of the Necessary and Proper Clause).

[59] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 299–310 (1936) (holding that the Commerce Clause did not authorize legislation governing the "local" productive activity of coal mining); Hammer v. Dagenhart, 247 U.S. 251, 269–77 (1918) (invalidating the Child Labor Act as an attempt to regulate local production and labor); United States v. E.C. Knight Co., 156 U.S. 1, 12–16 (1895) (ruling that the Sherman Antitrust Act could not constitutionally be construed as extending to multi-state sugar refineries because they engaged in "manufacturing" rather than "commerce" and affected interstate commerce only "indirectly"). The Court, however, sometimes sustained congressional regulation of labor and production when it concluded that such activities directly affected interstate commerce, typically where the rights of management (not workers) were implicated. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 305–09 (1908).

[60] *See* 317 U.S. 111, 113–199 (1942).

[61] *See id.* at 120–28.

[62] Professor Cushman has established this point through his extensive study of the private papers of the Justices who joined the opinion in *Wickard*. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 217–21 (1998).

[63] *See* Katzenbach v. McClung, 379 U.S. 294, 298–305 (1964) (upholding the Civil Rights Act of 1964 by concluding that Congress had a rational basis for determining that

legislation.[64] For instance, in *Hodel v. Indiana*,[65] the Court upheld strict federal standards for strip mining techniques that might harm prime farmland and hence decrease future agricultural productivity, even though (1) only 21,800 acres of farmland were affected annually, and (2) land use regulation had always been the province of state governments.[66]

Of special relevance to the PBABA is the massive expansion of federal criminal law, which began in the 1970s. Before then, Congress typically included a "jurisdictional element" requiring prosecutors to establish that the accused's conduct was related to interstate commerce.[67] In *Perez v. United States*, however, the Court sustained a statute that criminalized all loan sharking because of its aggregate effect on interstate commerce, even as applied to a local loan shark who had no connection to any interstate commercial or criminal network.[68] Since then, Congress has prohibited many crimes formerly left to the states, including politically popular laws banning the mere possession of drugs[69] and guns under certain circumstances.[70]

One such statute, which made it a crime to possess a firearm within a thousand feet of a school, prompted the Court in *United States v. Lopez* to end over half a century of blind deference to Congress's judgments under the Commerce Clause. The majority opinion by Chief Justice Rehnquist initially noted that the Gun-Free School Zones Act (GFSZA) did not fall into the "channels" or "instrumentalities" categories.[71] The Court then ruled that merely possessing a gun was not "commerce," that the statutory ban was not "an essential part of a larger regulation of economic activity" that

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racial discrimination by all restaurants, including local ones owned by a single family, had a substantial effect on interstate commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241, 255–58 (1964) (applying a similar approach to the statutory provision barring discrimination by hotels).

[64] *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268–83 (1981) (sustaining an Act of Congress setting forth exacting standards for strip mining and for the restoration of "steep slopes" to a commercially useful condition). For a summary and analysis of the leading cases dealing with federal environmental laws, see Nelson & Pushaw, *supra* note 11, at 86–87, 122–23, 141–47.

[65] 452 U.S. 314 (1981).

[66] *Id.* at 321–29. The Court cited *Hodel v. Indiana* with approval in *Lopez*, 514 U.S. at 557, 559.

[67] Even this requirement, however, was not terribly onerous. For example, the Gun Control Act of 1968 (currently codified at 18 U.S.C. § 922(g) (2000)) prohibits felons from "possess[ing], in or affecting commerce, any firearm." The Court found this jurisdictional element had been satisfied by proof that a gun previously had traveled at some time through interstate commerce. *See* Scarborough v. United States, 431 U.S. 563, 569–77 (1977). Based on such reasoning, virtually every firearm in America has such an interstate nexus. Thus, this requirement is a matter of form rather than substance.

[68] *See* 402 U.S. 146, 147–58 (1971).

[69] *See* Nelson & Pushaw, *supra* note 11, at 136–39 (reviewing the pertinent statutes and cases and arguing that under the Commerce Clause Congress should not be allowed to forbid the simple possession of drugs, as opposed to drugs being held with an intent to sell).

[70] *See, e.g., id.* at 139–41 (describing the federal regulation of guns, and contending that their mere possession is not "commerce" and hence cannot be reached by Congress).

[71] *See* 514 U.S. 549, 558–59 (1995).

would be undercut unless the noncommercial, intrastate conduct were covered, and that incidents of such possession could not be aggregated to create a "substantial effect" on interstate commerce.[72] Moreover, the GFSZA lacked a jurisdictional requirement that would limit prosecution to cases involving firearms that had a nexus to interstate commerce.[73] Finally, Chief Justice Rehnquist emphasized that the GFSZA invaded two areas of traditional state concern, crime and education.[74]

The Court reaffirmed *Lopez* in *United States v. Morrison*, which invalidated a provision of the Violence Against Women Act granting a civil cause of action to victims of gender-based violence—a noncommercial activity that took place within a state and that had long been subject to state criminal sanctions.[75] In both *Lopez* and *Morrison*, Justice Thomas concurred and argued that the "substantial effects" test should be abandoned because it had no foundation in the Commerce Clause as originally understood, which (on his reading of history) restricted Congress to regulating the sale and transportation of goods that moved between two states.[76]

In sum, for many decades the Court essentially abdicated its duty to review federal statutes passed under the Commerce Clause. The *Lopez* and *Morrison* cases, however, imposed restraints on Congress's ability to regulate certain noneconomic, local matters.

2. *Problems with the Court's Approach*

Despite the objections of the *Lopez/Morrison* dissenters[77] and most legal scholars,[78] it is hardly unreasonable for the Court to construe a pro-

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[72] *Id.* at 559–66. Although the Court would not require Congress to make findings, their absence in the GFSZA precluded informed judicial consideration of the counterintuitive legislative assertion that the regulated activity (gun possession near schools) substantially affected interstate commerce. *See id.* at 562–63.

[73] *See id.* at 561–62.

[74] *See id.* at 564–68; *see also id.* at 568–83 (Kennedy, J., concurring) (stressing this federalism rationale).

[75] *See* 529 U.S. 598, 601–19 (2000).

[76] *See Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584–602 (Thomas, J., concurring).

[77] *See Morrison*, 529 U.S. at 628–55 (Souter, J., dissenting); *id.* at 655–64 (Breyer, J., dissenting); *Lopez*, 514 U.S. at 602–03 (Stevens, J., dissenting); *id.* at 603–15 (Souter, J., dissenting); *id.* at 615–44 (Breyer, J., dissenting).

[78] Commentators have argued that the Court drew two distinctions that cannot meaningfully be applied to concrete cases. The first is between "commercial" and "noncommercial" activities. *See* Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 768–69 (1996); Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 SUP. CT. REV. 125, 184, 203–06; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 742–50 (1995); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 555, 564–65 (1995). The second untenable distinction is between "national" and "local" activities. *See, e.g.*, Graglia, *supra*, at 768; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182–83, 2215–16, 2225–31 (1998); Lessig, *supra*, at 135–54, 168–85; Regan, *supra*, at 566.

vision authorizing the regulation of "Commerce . . . among the several States" to mean that Congress can regulate only "commerce" that concerns "several states." Moreover, the majority correctly stressed that the contrary interpretation, which grants Congress absolute discretion, cannot be reconciled with a Constitution that confers only limited and enumerated powers.[79] Unfortunately, the specific approach set forth in *Lopez* and *Morrison* is so imprecise that it virtually guarantees arbitrary results. Three vague standards are especially troubling.

First, the Court held that Congress can regulate only "commerce," but refused to define this word—indeed, suggested that attempting to do so would be futile.[80] It is Kafkaesque to strike down federal statutes because they do not regulate "commerce," but not tell Congress what that term means. To compound this confusion, the majority used "commerce" and "economics" as synonyms.[81] They are not. "Commerce" refers to activities and enterprises geared to the market, whereas "economics" is a far broader term that encompasses anything related to the production or distribution of goods and services.[82] Most pertinently, economists such as Nobel Prize winner Gary Becker have documented the economic impact of crime.[83] They would be surprised to read the Court's confident assertion that sexual assault and gun possession are not "economic." That such crimes have "economic" consequences, however, does not make them "commercial" (i.e., driven by the market).

Second, all of the Justices except Thomas agreed that the regulated activity, considered in the aggregate, must have a "substantial effect" on interstate commerce. Again, however, the Court did not specify the meaning of "substantial" (e.g., by establishing a minimum dollar threshold), although it indicated that some past cases had been too lenient in finding that this standard had been met.[84]

Third, *Lopez* and *Morrison* applied heightened scrutiny to congressional attempts to interfere with areas of "traditional state concern" such as crime, education, and family law.[85] Alas, the Court let these horses out

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[79] *See Lopez*, 514 U.S. at 552–53, 564–68. The idea of a federal government restricted to exercising its enumerated powers would be eviscerated if Congress could simply invoke the Necessary and Proper Clause to obliterate the limitations contained in the Commerce Clause. *See supra* note 58 and accompanying text.

[80] *See Lopez*, 514 U.S. at 565 (noting that "depending on the level of generality, any activity can be looked upon as commercial"); *id.* at 569, 574 (Kennedy, J., concurring) (contending that it was pointless to try to "defin[e] by semantic or formalistic categories those activities that were commerce").

[81] *See Morrison*, 529 U.S. at 610–13, 615; *Lopez*, 514 U.S. at 556–57, 559–61, 564–65, 567.

[82] *See* Nelson & Pushaw, *supra* note 11, at 109–10.

[83] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[84] *See Lopez*, 514 U.S. at 559 (disavowing language in previous opinions suggesting that any effect on interstate commerce would suffice under the Commerce Clause).

[85] *Morrison*, 529 U.S. at 611–19; *Lopez*, 514 U.S at 564–68; *id.* at 568–83 (Kennedy, J., concurring).

of the barn in 1937, and they have been galloping across the countryside ever since. To illustrate, the federal government boasts approximately three thousand criminal laws,[86] a Department of Education,[87] and significant legislation on families.[88] Therefore, the invocation of abstract ideals of federalism in *Lopez* and *Morrison*, such as the "distinction between what is truly national and what is truly local,"[89] provides little help in discerning which subjects of historical state control Congress may or may not regulate.[90]

The Court further muddied the waters by purporting to leave its prior Commerce Clause jurisprudence intact,[91] even though many of these cases had upheld federal legislation of noncommercial activities that happened entirely within a state and that had always been committed to state regulation.[92] To take an example directly on point, the *Lopez* opinion did not convincingly reconcile its holding that Congress lacks power to prohibit in-state gun possession near schools with a prior decision sustaining a federal law that banned in-state firearm possession by felons.[93] Likewise, the Court in *Morrison* failed to adequately explain why Congress cannot deal with gender-based violence, but can address many other local crimes that have always been prohibited by the states, such as robbery and extortion.[94]

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[86] *See* TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION, A.B.A., THE FEDERALIZATION OF CRIMINAL LAW 2, 5–14 (1998).

[87] *See generally* 20 U.S.C. §§ 1–9413 (2000) (setting forth 1356 pages of statutes on education).

[88] *See, e.g.*, Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298–1301, 1370–86 (1998) (detailing such federal regulation).

[89] *Morrison*, 529 U.S. at 617–18 (citing *Lopez*, 514 U.S. at 568).

[90] *See* Kopel & Reynolds, *supra* note 16, at 72 (making this point, and faulting the Court for failing to explain how its stated desire to preserve pockets of state autonomy like education and crime could be reconciled with the federal government's massive involvement in those areas).

[91] *See Lopez*, 514 U.S. at 553–64 (summarizing the major Commerce Clause cases with approval); *id.* at 573–74 (Kennedy, J., concurring) (emphasizing that the Court had not questioned this precedent).

[92] *See id.* at 554–61, 566 (citing with approval Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942)). In these three landmark cases, however, the Court unequivocally declared that Congress could regulate even local, noncommercial activities as long as they "substantially affected" interstate commerce. *See supra* notes 58–62 and accompanying text.

[93] *See* Scarborough v. United States, 431 U.S. 563, 569–77 (1977). One possible distinction is that the statute in *Scarborough* required evidence that the gun had been "in commerce or affecting commerce," whereas the GFSZA did not include such a jurisdictional element. *See Lopez*, 514 U.S. at 561–62. Indeed, after *Lopez*, Congress amended the GFSZA to substitute for the word "firearm" the phrase "firearm that has moved in or that otherwise affects interstate or foreign commerce." *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208 (1996) (amending the GFSZA, 18 U.S.C. §§ 922(q)(2)(A) and (3)(A)). But just about every gun (or its components) has traveled "in" or "affects" interstate commerce. Hence, if the addition of such boilerplate language is sufficient to overcome the *Lopez* barrier, then that case will have little practical impact.

[94] *See* United States v. Green, 350 U.S. 415, 420 (1956) (upholding the Hobbs Act, which criminalizes robbery or extortion that "in any way or degree obstructs, delays, or affects commerce," even as applied to a single incident occurring within a state).

Overall, the validity of a federal statute enacted under the Commerce Clause now turns on whether five Justices feel that a particular activity is "commercial," has a "substantial" effect on interstate commerce, and is a matter of "national" rather than "local" concern. Perhaps because of this vagueness, Congress has not repealed a single law passed under its Commerce power—even the GFSZA, which was simply amended.[95] Statutes on other hot-button moral and social issues abound, ranging from child support enforcement[96] to drug control.[97] Thus, Congress does not appear to be paying much heed to *Lopez* and *Morrison*.

C. Applying Current Commerce Clause Analysis to the PBABA

The deficiencies of the Court's standards become apparent when one tries to apply them to the PBABA. *Lopez* and *Morrison* require three key judgments about partial-birth abortion, all of which are subjective.

The first two concern whether such abortions are "commercial" or "economic" and, if they are, whether they "substantially affect" interstate commerce. Viewed from one perspective, doctors are engaged in the multibillion-dollar business of providing health care services, which the Court long ago recognized as "commerce."[98] Medical services include abortions of all types.[99] Abortion facilities participate heavily in the interstate commercial market for both goods (e.g., equipment and supplies) and services (e.g., employees, insurance, and banking).[100] Moreover, patients seeking

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[95] *See supra* note 93 (discussing the GFSZA amendment).

[96] *See* Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2000).

[97] *See* Nelson & Pushaw, *supra* note 11, at 136–39 (setting forth the panoply of federal regulations on controlled substances).

[98] *See* Am. Med. Assoc. v. United States, 317 U.S. 519, 528–29 (1943) (concluding that a health cooperative's rendering of medical services was "commerce" within the meaning of the Sherman Act, which had been passed under the Commerce Clause); *see also* Kopel & Reynolds, *supra* note 16, at 72 (describing the federal government's extensive regulation of health care through Medicare, Medicaid, subsidies for medical education, and national quality control standards).

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> The provision of abortion services is commerce, . . . at least where payment is received from some source. . . . Abortion services would generally be classed with the broader category of medical and health care services for purposes of Commerce Clause analysis. Health care constitutes . . . a large and significant portion of the national economy, and it would seem absurd to hold that an industry comprising one-seventh of the national economy could not be regulated under the Commerce Clause.

Smolin Testimony, *supra* note 47, at 102 (cited in H.R. REP. No. 108-58, at 24 (2003)); *see also* Kopel & Reynolds, *supra* note 16, at 65, 88, 104 (acknowledging the plausibility of characterizing abortion clinics as "commercial" enterprises, and partial-birth abortions as "commerce," because they involve the exchange of services for money).

[100] *See supra* notes 49, 99 and accompanying text; Kopel & Reynolds, *supra* note 16, at 104.

abortions are especially likely to travel across state lines.[101] Indeed, the Clinton administration made precisely these arguments in defending the power of Congress to protect abortion clinic patients, doctors, and staff from obstruction and violence:

> The provision of abortion[ ] services is commerce. The entities that provide these services, including clinics, physician's offices, and hospitals, purchase or lease facilities, purchase and sell equipment, goods, and services, employ people, and generate income. . . . It should be easy to document that they purchase medicine, medical supplies, surgical instruments, and other supplies produced in other States. Moreover, it is well-established that many serve significant number[s] of patients from other States. . . . Thus, there can be little doubt that abortion providers are engaged in interstate commerce.[102]

In short, partial-birth abortions constitute "commerce" and can be aggregated to meet the "substantial effects" test. True, the annual number of such abortions is fairly small (approximately 5000 per year),[103] which translates into about twelve million dollars in fees.[104] Nonetheless, the Court has previously deferred to Congress's judgment that similarly modest

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[101] *See* Kopel & Reynolds, *supra* note 16, at 95–98, 104; *see also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274–78 (1993) (noting a lower court's finding that abortion patients often travel interstate). Women wishing to obtain partial-birth abortions go out of state even more frequently, because only a few doctors in America perform this procedure. *See supra* note 47 and accompanying text; *see also* Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, in 35 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 16, 18 (2003) (finding that only two percent of all abortion providers offer their services at 26 weeks).

[102] Reno Statement, *supra* note 49, at 16 (quoted in H.R. REP. NO. 108-58, at 23–24 (2003)).

[103] *See* Stenberg v. Carhart, 530 U.S. 914, 929 (2000); *but see id.* at 984 n.2 (Thomas, J., dissenting) (noting that 67,000 abortions are performed annually from the middle of the second trimester through the third trimester, but not specifying how many of these occur after viability).

[104] This number represents a very rough estimate, because accurate financial statistics on partial-birth abortions are scarce. Indeed, a limited search has revealed no published information about the price of a third-trimester abortion. A "dilation and evacuation" abortion performed in the late second trimester (between 22.5 and 24 weeks) ranges in cost from $1,450 to $3,675. *See* Abortion Fee Chart, *Family Planning Associates Medical Group*, *at* http://www.fpamg.net/fees.html (last visited May 10, 2005). Assuming an average individual price of $2,500 for 5000 partial-birth abortions, the total annual cost would be a little over $12,000,000.

If the focus is widened to include all types of abortions, the dollar amounts rise dramatically. About 1.3 million abortions are performed annually. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–05, at 70 tbl.90, *available at* http://www.census.gov/prod/2004pubs/04statab/vitstat.pdf (last visited May 10, 2005). The cost of a first-trimester abortion is about $468. See Henshaw & Finer, *supra* note 101, at 18. An enterprise that generates hundreds of millions of dollars in direct fees (and many times that amount in overall economic activity) clearly exerts a "substantial effect" on interstate commerce.

economic impacts were "substantial."[105] Moreover, partial-birth abortions are performed in medical facilities that engage in large-scale interstate commerce.[106]

On the other hand, it would be reasonable to apply *Lopez* and *Morrison* to reach the opposite conclusion—that the PBABA does not regulate "commerce" that has "substantial" interstate economic effects. After all, Congress prohibited partial-birth abortions on the ground that they are morally objectionable (like all crimes), not because they are commercial activity requiring uniform national regulation.[107] That ethical rationale explains why the PBABA does not unambiguously exempt such abortions when they are performed without any pecuniary exchange.[108] Indeed, Congress did not zero in on the commercial aspects of partial-birth abortions at all (or the abortion business in general), such as advertising, quality control standards for equipment and personnel, employment conditions, and prices.[109] Rather, it simply banned one method of abortion, even if a doctor's professional judgment would otherwise dictate choosing that procedure.[110] From this vantage point, partial-birth abortions are akin to gun possession near schools and gender-motivated violence, which the Court has found to be "noncommercial" and hence ineligible for aggregation.[111] Furthermore, even if such

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[105] *See* Hodel v. Indiana, 452 U.S. 314, 321–29 (1981) (upholding a federal law that involved 21,800 acres of farmland—a minuscule amount of overall national acreage), discussed *supra* notes 65–66 and accompanying text.

[106] *See supra* notes 46–49, 99–102 and accompanying text.

[107] Every member of the House and Senate who publicly expressed support for the PBABA did so for moral and ethical reasons, not economic ones. The bill's Senate sponsor, Rick Santorum (R-Pa.), summarized these arguments on the first day of the debate. *See* 149 CONG. REC. S3383–85, S3387–89 (daily ed. Mar. 10, 2003); *see also* Ides, *supra* note 16, at 448 ("[T]he partial-birth abortion prohibition is a stand-alone measure designed to address what its proponents see as an immoral act, independent of any larger economic or commercial considerations."); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 424 (2002) (contending that conservatives cannot sincerely claim that Congress has power to pass the PBABA, because they openly endorsed the law as preventing murder, not as a means of regulating interstate commerce).

Under modern Commerce Clause analysis, however, Congress can regulate any interstate economic activity, even if it is motivated by noncommercial concerns such as morality. *See supra* notes 53–55, 63, 68 and accompanying text (illustrating this point with cases upholding federal laws that prohibited prostitution, loan sharking, and racial discrimination in public accommodations).

[108] *See, e.g.*, Morrison, *supra* note 40, at 52 (emphasizing that the PBABA did not require payment for the abortion or any other specific interstate commercial connection); Ides, *supra* note 16, at 446, 461–62.

[109] *See supra* note 50 and accompanying text (noting the absence of congressional findings about the monetary impact of partial-birth abortions).

[110] *See* Kopel & Reynolds, *supra* note 16, at 68–70, 99, 105; Law, *supra* note 107, at 410–11; *see also* Kopel & Reynolds, *supra* note 16 at 88, 104–06 (observing that courts might portray the issue at a level of generality that is high (the entire abortion industry) or low (how to perform a particular medical operation)); David G. Savage, *Endangered Statutes: U.S. Laws Protecting Crime Victims, Environment Could Fall*, 86 A.B.A. J. 32, 33 (July 2000) ("[I]t is not clear that an office medical procedure is an aspect of interstate commerce.").

[111] *See* Ides, *supra* note 16, at 445–51. As Professor Seidman testified before the Sen-

abortions did constitute "commerce," they do not have a "substantial" effect on interstate commerce; a few million dollars is a drop in the ocean of our national economy.[112]

Similar problems of malleability arise in applying the third *Lopez/Morrison* factor: whether the PBABA interferes with a subject of traditional state concern. Characterized at a high level of generality, this federal law meddles with three areas that historically have been committed to the states: local crime, regulation of medical procedures, and family law.[113] In the specific context of abortion, however, this position has been rejected. In *Roe v. Wade* and its progeny, the dissenting Justices argued that abortion had always been—and should remain—a matter for state legislation.[114] The majority, however, made abortion into a federal constitutional right[115] and then extended it in *Stenberg* by forbidding states from banning partial-birth abortions.[116] Having nationalized abortion, the Court cannot now proclaim that this subject is of purely local concern.[117] More-

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ate:

> Having an abortion is no more a commercial activity than possessing a gun. True, most (although by no means all) abortions are purchased, and [A]rticle I probably does reach legislation that would prohibit the interstate payment of money for certain types of abortions (at least in cases where an effect on commerce can be shown). But most guns are also purchased. Just as Congress can regulate the interstate purchase of guns, but not the intrastate possession, so, it would seem, it can regulate the interstate purchase of abortions, but not the intrastate procedure itself.

Seidman Statement, *supra* note 33, at 52. Furthermore, partial-birth abortions do not fall within the *Lopez* exception as "an essential part of a larger regulation of commercial activity." 514 U.S. at 561. Congress did not purport to prohibit this procedure as part of a broader regulation of abortion in earlier stages of pregnancy, which would have patently violated *Roe* and *Casey*. *See supra* notes 30–31 and accompanying text (summarizing these cases).

[112] *See, e.g.*, Seidman Statement, *supra* note 33, at 52; Ides, *supra* note 16, at 459–62; Law, *supra* note 107, at 411–12.

> The relatively small number of partial-birth abortions performed in the United States every year do not have a substantial effect on interstate commerce, even in the aggregate (and aggregation would only be allowed if the decision about which type of abortion to perform were commercial). The women who travel interstate each year to obtain a partial-birth abortion do not have a substantial effect on interstate commerce, and Congress could not rationally conclude that they do.

Kopel & Reynolds, *supra* note 16, at 105.

[113] *See* Seidman Statement, *supra* note 33, at 52; Ides, *supra* note 16, at 453–54, 462; Kopel & Reynolds, *supra* note 16, at 72, 105; Law, *supra* note 107, at 412.

[114] *See* Roe v. Wade, 410 U.S. 113, 171–78 (1973) (Rehnquist, J., dissenting); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 979–1002 (Scalia, J., dissenting) (maintaining that the Court was continuing its mistake of failing to leave abortion to the states); *id.* at 945–53, 966–79 (Rehnquist, C.J., dissenting) (similarly urging the overruling of *Roe* and deference to state regulations on abortion).

[115] *See Roe*, 410 U.S. at 152–54.

[116] *See* Stenberg v. Carhart, 530 U.S. 914, 922–46 (2000).

[117] A possible response to this argument is that the states remain free to regulate abor-

over, because partial-birth abortion is a relatively new procedure, it does not qualify as an issue of "traditional" state regulation.[118]

As the foregoing analysis reveals, *Lopez* and *Morrison* provide no objective criteria for ascertaining whether or not the PBABA regulates "commerce," "substantially affects" interstate commerce, or invades an area of "historical state concern." Consequently, these judgments are especially prone to distortions caused by politics and ideology. For example, a Justice like Antonin Scalia, who believes partial-birth abortion is barbaric infanticide,[119] might deem this medical procedure interstate "commerce" fit for federal regulation, even though he has supported the movement to restrict Congress's power under the Commerce Clause.[120] At the other end of the political spectrum, a Justice such as Ruth Bader Ginsburg, an outspoken champion of women's rights, might treat partial-birth abortion as a noneconomic matter outside of Congress's purview, despite her opposition to the conservative majority's attempts to limit the Commerce Clause.[121]

The possibility of such result-oriented manipulation is an inevitable byproduct of the majority's adoption of such elastic standards in *Lopez* and

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tion, so long as (1) they do not unduly burden a woman's fundamental right to choose to abort a fetus before viability, and (2) bans on post-viability abortions contain an exception for the mother's life and health. *See* Kopel & Reynolds, *supra* note 16, at 110. If "health" includes not just physical but also psychological and emotional well-being, however, a state's power to prohibit any abortion procedure would be almost nonexistent, for such nonmedical problems can be easily asserted and are nearly impossible to disprove. *See* Michael F. Moses, Casey *and Its Impact on Abortion Regulation*, 31 FORDHAM URB. L.J. 805, 810–13 (2004). In any event, the Court's constitutional rules on this subject are so sweeping and detailed that the states' formerly absolute authority in this area has been reduced to a few minor statutory provisions of little public interest.

[118] This method of abortion became widely known only in 1992, and therefore state legislation outlawing this procedure appeared in the mid-to-late 1990s. *See* H.R. REP. NO. 108-58, at 2–5 (2003).

[119] *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting) ("The method of killing a human child . . . proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion.").

[120] Justice Scalia joined Chief Justice Rehnquist's opinions in *Lopez* and *Morrison*, and he has been a consistent advocate of a "states' rights" view of federalism. *See, e.g.*, Printz v. United States, 521 U.S. 898, 916–17 (1997) (Scalia, J.) (writing the majority opinion striking down a provision of the Brady Act as unconstitutionally "commandeering" state executive officials to enforce federal law).

[121] Justice Ginsburg joined the dissents in *Lopez* and *Morrison*. *See supra* note 8 and accompanying text. As a practical matter, however, neither Justice Ginsburg nor her fellow dissenters need to forsake their position that Congress has plenary authority under the Commerce Clause. Rather, they will likely conclude that even if the PBABA regulates interstate commerce, its specific provisions violate the constitutional right to abortion outlined in *Stenberg*.

Professor Law has persuasively argued that liberal lawyers and judges should hesitate to invoke *Lopez*, *Morrison*, and other Rehnquist Court federalism decisions to justify invalidating the PBABA because such a rejection of broad congressional power would also call into question progressive federal statutes prohibiting discrimination, requiring strict enforcement of child support obligations, and (most pertinently) protecting women and doctors at abortion clinics. *See* Law, *supra* note 107, at 422–24. She contends that, conversely, conservatives should be reluctant to abandon their basic commitment to limiting federal authority simply because doing so might salvage a particular law they support: the PBABA. *See id.* at 408, 424.

Morrison. Hence, the Court should abandon this approach and replace it with one based on clear legal principles.

II. APPLYING PRECISE COMMERCE CLAUSE RULES TO THE PBABA

This Article's specific proposal regarding the Commerce Clause reflects a more general philosophy that constitutional decisions can, and should, rest on legal rules rather than malleable standards. Therefore, this section begins by defending that traditional view and explaining why a Neo-Federalist approach produces optimal legal principles. This approach will then be applied to the Commerce Clause in the context of the PBABA.

A. "Rules" Versus "Standards"

1. The Decline of "Law"

The classical Anglo-American definition of "judicial power" is the impartial application of rules of law to the facts in particular cases.[122] This conception of adjudication must be supported rather than merely posited, however, because it has been under constant siege by the legal elite over the past century.

The assault began with the Legal Realists, who sought to understand the nonlegal factors that influenced the way judges actually decided cases, and who used the tools of social science to recommend more rational law-making by both courts and legislatures.[123] The Realist project has been advanced by sophisticated scholars in different fields. Most notably, political scientists have demonstrated statistically that a judge's party affiliation is the strongest predictor of his or her votes in cases, and they have argued that judges rationally seek to maximize their policy preferences.[124] More recently, psychological work has cast further doubt on the model of the logical, disinterested jurist.[125] Finally, the Critical Legal Studies (CLS) movement has characterized law as a political instrument used by the powerful to subordinate the oppressed.[126]

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[122] *See* Pushaw, *Justiciability*, *supra* note 19, at 411 n.91, 417–25 (citing sources).

[123] *See, e.g.*, Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 500–02 (1996).

[124] *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1273–75 (2002); *but see* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1515 (2003) (concluding upon empirical study that "judicial duty" is a more powerful determinant of a judge's decisions than the admittedly significant factor of "judicial preferences").

[125] *See, e.g.*, Chris Guthrie, et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

[126] For instance, leading CLS scholar Mark Tushnet has long advocated "an explicitly political approach to constitutional law" and has urged judges to make "a political judg-

This scholarship sees judges as little more than politicians in robes. Not surprisingly, it has never been cited as authority by the Supreme Court, which has an overriding institutional interest in continuing to pay lip service to the notion that it is simply following the dictates of the Constitution.[127] Nonetheless, the declining faith among intellectuals in the idea of "law" as a set of fixed principles has had a subtle effect on the Justices: encouraging them to use flexible constitutional "standards" that are applied on a case-by-case basis to reach results perceived as sensible and just.[128] This style of jurisprudence, usually associated with Justices like O'Connor, Breyer, Souter, and Kennedy,[129] has sometimes been adopted even by professedly rules-oriented Justices like Scalia[130] and Rehnquist.[131] A prime

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ment: which result is . . . likely to advance the cause of socialism?" Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 416, 424 (1981).

[127] For example, the Court has virtually ignored CLS. A WESTLAW search on April 19, 2005, revealed no mention of Derrick Bell or Richard Delgado, two prominent figures in this field. A few Justices have occasionally cited works by Mark Tushnet and other "Crits," but never for a proposition central to the CLS intellectual program. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 782 n.10 (1984) (Brennan, J., dissenting) (citing an article by Professor Tushnet on standing doctrine). Similarly, the Court has not highlighted political and social science literature depicting judges as political actors and as influenced by various psychological factors that distort decisionmaking of all kinds.

Admittedly, however, Legal Realism has had a deep-rooted and profound impact on Americans' understanding of all law, including the Constitution. Perhaps the best early illustration is President Roosevelt's repeated appointment of Justices who were political allies, and who could thus be trusted to uphold the constitutionality of his policies, particularly the New Deal. *See* William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 525 (2005). Indeed, one of these appointees, William Douglas, had been a leader of the Realist movement. *See* AMERICAN LEGAL REALISM 233–34, 236, 272 (William W. Fisher et al. eds., 1993). Nonetheless, most citizens, scholars, and politicians clung to an objective view of constitutional law until it became untenable in the face of decisions like *Roe v. Wade*, 410 U.S. 113 (1973), and *Bush v. Gore*, 531 U.S. 98 (2000). *See* Marshall, *supra*, at 526–31. Even in such controversial cases, however, the Court itself did not confess that constitutional law is subjective and a mere outgrowth of the Justices' political or philosophical beliefs. Rather, the opinions feature conventional legal analysis.

[128] Of course, if the People choose to place a malleable "standard" into the Constitution, courts have no business converting it into a fixed "rule." Nonetheless, the Commerce Clause sets forth certain rules that constrain Congress, for reasons that have been detailed elsewhere. *See* Nelson & Pushaw, *supra* note 11, at 1–63, 107–19.

[129] Professor Sunstein has praised such moderate Justices for rendering constitutional opinions that narrowly decide the particular case at hand, instead of making broad legal pronouncements that might cut off further democratic deliberation about the issues left open. *See* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[130] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending adjudication based on adherence to fixed legal rules). *But see* Employment Div. v. Smith, 494 U.S. 872, 876–90 (1990) (declining to honor established principles requiring the government to show a compelling interest for burdening the free exercise of religion, and instead announcing that states could enact any neutral laws of general applicability (such as Oregon's statute criminalizing peyote) even if they happened to interfere with religious practices (such as the sacramental use of peyote by Native Americans)).

[131] For instance, Chief Justice Rehnquist wrote the majority opinion declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), even though he had previously declared that the warnings mandated by that case were not required by the Constitution, largely on the pragmatic ground that such warnings had become routine police practice. *See* Dickerson v.

illustration is the nebulous majority opinion in *Lopez*, joined in full only by those two Justices.[132]

2. *The Problem With Pragmatism:* Bush v. Gore *Revisited*

Admittedly, pragmatic constitutional adjudication based on "standards" has the advantage of enabling courts to respond to the peculiar facts of each case as well as to larger legal and social changes. But this approach also has a dark side. What happens if judges exercise their discretion in applying loose and evolving constitutional standards to reach dubious results seemingly driven by politics rather than law?

Bush v. Gore[133] starkly exposed this danger. Since the early 1960s, the Court has drawn on the Equal Protection Clause,[134] which concerns *civil* rights, as a bottomless well to bring forth new *political* rights.[135] Most importantly, *Baker v. Carr*[136] and its progeny created a requirement that all state legislatures be apportioned based solely on population,[137] despite the dissenters' arguments that (1) the Constitution itself contradicted this representation principle by establishing the Senate and Electoral College,[138] and (2) the Court had always treated such questions as political, chiefly because of federalism concerns.[139] From these apportionment cases grew a general standard that voters must receive equal treatment, which has been applied to eliminate wealth-based voting classifications,[140] to invalidate state rules that decreased the influence of voters from larger counties in presidential nominating processes,[141] and to strike down gerrymandering designed to increase the representation of African Americans.[142] In *Bush v. Gore*, the Court described the Equal Protection standard as prohibiting the

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United States, 530 U.S. 428, 434–35, 442–44 (2000).

[132] *See* United States v. Lopez, 514 U.S. 549, 556–68 (1995). Justice Kennedy wrote a concurring opinion, which Justice O'Connor joined. *Id.* at 568–83 (Kennedy, J., concurring). Justice Thomas also concurred. *See id.* at 584–602.

[133] 531 U.S. 98 (2000) (per curiam).

[134] U.S. CONST. amend. XIV, § 1.

[135] *See* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N. C. L. REV. 1165, 1171–79, 1199–1201 (2002) (summarizing and critiquing this jurisprudence).

[136] 369 U.S. 186 (1962).

[137] *See id.* at 192–95, 207–08, 226, 237; Reynolds v. Sims, 377 U.S. 533, 561–81 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–15 (1964); Gray v. Sanders, 372 U.S. 368, 379–81 (1963).

[138] *See Gray*, 372 U.S. at 384–85 (Harlan, J., dissenting); *Baker*, 369 U.S. at 333–34 (Harlan, J., dissenting).

[139] *See Baker*, 369 U.S. at 266–70, 277–301 (Frankfurter, J., dissenting) (setting forth dozens of relevant cases protecting state autonomy in legislative districting); *id.* at 332–40 (Harlan, J., dissenting) (stressing that no constitutional provision, including the Equal Protection Clause, authorized the Court to intervene in a state's internal political conflicts over apportionment).

[140] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[141] *See* Moore v. Ogilvie, 394 U.S. 814 (1969).

[142] *See* Shaw v. Hunt, 517 U.S. 899 (1996).

government from "arbitrary and disparate treatment [that] value[s] one person's vote over that of another."[143] The majority therefore reversed a state court order allowing election officials to use divergent criteria in recounting contested presidential ballots[144]—even though America's federalist system had always left such electoral matters to the states.[145]

Outraged liberal professors charged that "instead of deciding the case in accordance with preexisting legal principles, . . . five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these [J]ustices' preference for the Republican Party."[146] As CLS scholar Mark Tushnet has rightly pointed out, however, such criticism would have had considerably more force if these academics had not devoted their careers to justifying—and urging the extension of—Supreme Court decisions implementing liberal policy goals through creative interpretations of the Fourteenth Amendment (including the foray into election law begun in *Baker*).[147] Of equal and opposite concern, conservative Republicans who have long railed against such liberal judicial activism endorsed *Bush v. Gore*, typically on the pragmatic ground that the Court had to intervene to avoid a constitutional crisis.[148]

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[143] 531 U.S. 98, 104–05 (2000) (per curiam).

[144] *See id.* at 103–11.

[145] *See id.* at 124–27 (Stevens, J., dissenting) (emphasizing this point); *id.* at 143 (Ginsburg, J., dissenting).

[146] Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore?, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 114 (Bruce Ackerman ed., 2002) [hereinafter LEGITIMACY]; *see also id.* at 210, 214–15, 222 (reprinting an essay by Jack Balkin accusing the Court of "illegally stopp[ing] the presidential election and hand[ing] the presidency to George W. Bush," discarding the law "to achieve a particular result," and "betray[ing] their oaths of office"). Other essayists in this book were similarly vituperative. *See id.* at 20, 21, 26 (Jed Rubenfeld); *id.* at 57 (Laurence Tribe); *id.* at 198–99 (Bruce Ackerman).

[147] *See* Mark Tushnet, *The Conservatism in* Bush v. Gore, *in* LEGITIMACY, *supra* note 146, at 163–76 (noting that liberal constitutional theorists have long endorsed principles of constitutional "law" that coincide with their political and social values, and thus not viewing the role of politics (albeit conservative) in *Bush v. Gore* as particularly surprising).

The argument made in the text is fleshed out in Robert J. Pushaw, Jr., Bush v. Gore: *Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMM. 359, 360, 379–82, 386–90, 398–402 (2001); and Robert J. Pushaw, Jr., *Politics, Ideology, and the Academic Assault on* Bush v. Gore, 2 ELEC. L.J. 97 (2003).

[148] *See, e.g.*, Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 NEW CRITERION 4, 5–11 (2001) (condemning Warren Court-style liberal constitutionalism, recognizing the strained reasoning in the Court's equal protection holding, yet praising the decision as necessary to prevent Democrats from "stealing" the election); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Dispute and the Ensuing Litigation*, 2000 SUP. CT. REV. 1 (similarly questioning the majority's legal analysis, but defending its action as preventing a national constitutional emergency). For an excellent rejoinder, see Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, *in* LEGITIMACY, *supra* note 146, at 145–62.

3. A Defense of Neutral Principles of Law

The debate over *Bush v. Gore* reflects the more general inability of judges and scholars to rise above their political and ideological preferences when analyzing constitutional law. Herbert Wechsler long ago recognized, and lamented, this phenomenon.[149] He argued that (1) Supreme Court decisions must rest upon neutral and general rules rooted in the Constitution's text, structural postulates, history, and precedent, and (2) absent such constitutional principles that transcend the result in any particular case, the Justices must defer to democratic value choices rather than impose their own personal beliefs.[150] Consequently, Professor Wechsler condemned many Warren Court cases as legally unprincipled, even though he agreed politically with their outcomes.[151] Likewise, he decried the pre-New Deal Court's Commerce Clause and Substantive Due Process jurisprudence as merely implementing the conservative Justices' policy preferences.[152]

Professor Wechsler's theory has faded out of fashion among academics, but perhaps *Bush v. Gore* will spark a revival. Indeed, the case has caused liberal law professors like Alan Dershowitz to concede that they had placed too much confidence in the Court's constitutional interpretation, and too little in the democratic process, to achieve their policy aims.[153] On the other side of the political fence, a few prominent conservatives like Steven Calabresi have criticized the Court for intervening in *Bush v. Gore*.[154]

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[149] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[150] *See id.* at 6, 10–20.

[151] *See id.* at 8–9, 22–23, 26–34. Most importantly, Professor Wechsler endorsed the result, but not the legal reasoning, of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). He contended that, assuming the state provided equal facilities, racial segregation involved not discrimination but freedom of association. *See id.* at 33–34. Wechsler then asserted that the Constitution contained no neutral principle for holding that blacks' claimed right to associate with whites should prevail over whites' desire to avoid mingling with those of other races. *See id.* at 34. As Charles Black immediately responded, however, *Brown* correctly implemented the fundamental principle of the Equal Protection Clause: that states cannot enact laws that intentionally and significantly disadvantage blacks as a group (despite any previous freedom whites may have had not to associate with blacks in public life). *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

Notably, Professor Black accepted the premise that the Court must apply legal rules truly grounded in the Constitution, and instead criticized Wechsler's failure to grasp the anti-caste principle embedded in the Fourteenth Amendment. *See id.* at 421–22, 429–30. I take the same position. Unfortunately, Wechsler's utterly discredited analysis of *Brown* has led most scholars to abandon his broader theory of neutral constitutional principles. *See, e.g.*, Cass R. Sunstein, *Black on* Brown, 90 VA. L. REV. 1649, 1656 (2004) ("The . . . virtue of Black's essay is that it offers a vivid, concrete, and realistic understanding of segregation—a historicized understanding that cuts through the almost comically uninformative and abstract accounts offered by Wechsler and others."); *id.* at 1664 (praising Black's article as "a great triumph for legal realism in American constitutional law," but warning that Wechsler's "errors . . . find analogues today").

[152] *See* Wechsler, *supra* note 149, at 23–25.

[153] *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE 190–97 (2001).

[154] *See* Steven G. Calabresi, *A Political Question*, *in* LEGITIMACY, *supra* note 146, at

Other Republicans, like Judge John Noonan, have attacked the Court for interpreting the Constitution—particularly the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment—to promote conservative political goals.[155]

All these critiques presuppose that constitutional "law" is something other than politics by another name. But is that assumption hopelessly naive, given Legal Realism, CLS, and social science studies of judicial decision-making? Not necessarily. True, it can no longer be pretended that judges mechanically apply preexisting legal rules to the facts of each case to reach a preordained conclusion. But the inevitability of judicial discretion should lead us to demand that courts adopt legal principles of greater, not lesser, specificity. More particularized rules narrow the scope of discretion and make it more obvious when judges are simply imposing their political or ideological views.

To take the most germane example, Justice Thomas wrote separate concurrences in *Lopez* and *Morrison* arguing that the "substantial effects" test conflicted with the original meaning of the Commerce Clause, which in his opinion limited Congress to regulating the sale and transportation of goods between two states.[156] Whatever one thinks of this narrow conception of the Commerce power,[157] Justice Thomas should be commended for articulating a plain rule that sharply curtails his discretion in future cases. In fact, he has pre-committed himself to striking down the PBABA because it does not concern trading or shipping goods; the opposite vote would reveal him as transparently motivated by his personal opposition to abortion.

This example undercuts the common scholarly claim that it is impossible to craft and follow clear legal rules that can be fairly applied without regard to politics or ideology. Indeed, the rule of law demands such pre-

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129–44.

[155] *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

[156] *See* United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

[157] Justice Thomas endorsed the theory that the Court had embraced from 1889 to 1936. *See* Carter v. Carter Coal Co., 298 U.S. 238, 297–310 (1936) (citing precedent). Professor Epstein resurrected this idea a half century later. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). After *Lopez*, two other scholars defended Justice Thomas's position. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996).

As I have recognized, the core definition of "commerce," both in 1787 and today, is the sale and transportation of merchandise. *See* Pushaw & Nelson, *supra* note 9, at 696. Nonetheless, "commerce" has always had a broader meaning—all activities intended for the marketplace, including the production of goods and the compensated provision of services. *See* Nelson & Pushaw, *supra* note 11, at 9–10, 37–42. Justice Thomas and his scholarly acolytes have mistakenly treated one definition of "commerce" as exclusive. *See* Pushaw & Nelson, *supra* note 9, at 696–711.

cision, consistency, and neutrality. A Neo-Federalist methodology is especially useful in formulating such principles.[158]

B. Apolitical Neo-Federalism

This approach proceeds in two steps. The first is to recover, in light of the Constitution's structure and underlying Federalist political theory, a constitutional provision's original "meaning" (the ordinary definition of its words circa 1787), "intent" (the purposes and objectives of its framers), and "understanding" (the sense of its ratifiers and early implementers in all three branches).[159] Second, these original Federalist principles must be evaluated in light of two centuries of legislative practice and judicial precedent.[160]

Neo-Federalist methodology can, and should, be applied in an apolitical manner.[161] Indeed, one of its pioneering practitioners, the liberal Democrat Akhil Amar, has examined the Constitution's language, structure, history, and precedent to conclude that some orthodox liberal doctrines are supportable, but that others are not—particularly in the areas of criminal procedure and abortion (including *Stenberg*).[162]

Admittedly, however, Neo-Federalism can be used to promote a political or ideological agenda. To take a prominent example, Bruce Ackerman has argued that a Neo-Federalist conception of constitutional democracy justifies progressive New Deal and Great Society legislation and the Warren Court's creative reading of the Fourteenth Amendment, but not Ronald Reagan's conservative Republican counterrevolution.[163] Such claims flow

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[158] This approach has been explained in depth elsewhere. *See, e.g.*, Pushaw, *Justiciability*, *supra* note 19, at 397–99, 454, 467–72, 511–12; Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 847–51. These articles rely upon the seminal work of 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 19–20, 34–57, 165–67 (1991) [hereinafter ACKERMAN, FOUNDATIONS]; and Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206–09, 211–59 (1985).

[159] *See* Pushaw, *Advisory Opinions*, *supra* note 19, at 478 n.35.

[160] *See* Amar, *supra* note 158, at 206–09.

[161] This thesis is developed in Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1206–11 (2003).

[162] *See, e.g.*, Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 90–114 (2000).

[163] In brief, Professor Ackerman contends that America has a "dualistic" democracy that produces ordinary laws during periods of normal politics, but higher laws during extraordinary "constitutional moments"—most notably the Founding, Reconstruction, and the New Deal. *See* ACKERMAN, FOUNDATIONS, *supra* note 158, at 3–33, 40. He then details the formal defects of constitutional amendments during those eras: The Constitution did not meet the Articles of Confederation's requirement that it could be amended only with unanimous state approval; the Reconstruction Amendments failed to comply with Article V; and the New Deal resulted in no formal amendments. *See id.* at 34, 42–58, 69–70, 92–94, 103–04, 108–13, 167–99. Nonetheless, during these three eras "We the People" accepted basic transformations of the constitutional order through a dramatic, super-majoritarian, multistage political process that effectively ratified these "amendments." *See* 2 BRUCE ACKER-

naturally from Professor Ackerman's unabashed commitment to modern liberalism,[164] but do not seem to be connected in any meaningful way to the Constitution as drafted and understood by the Founders.

This problem reflects Ackerman's tendency to make abstract generalizations about the Constitution's "values."[165] By contrast, Amar pays fastidious attention to the language of particular constitutional provisions.[166] Only when Neo-Federalism is grounded in such a careful textual reading can it yield true principles of law that can be applied in a politically neutral way.[167]

C. A Neo-Federalist Approach to the Commerce Clause

Grant Nelson and I have offered such an "apolitical Neo-Federalist" interpretation of the Commerce Clause.[168] Evidence from the Constitution's structure, history, and early precedent all reinforce the two-part legal test that inheres in the Clause's language: Congress can regulate "[1] Commerce . . . [2] among the several States."[169]

The first inquiry is whether the activity at issue is "commerce." A precise definition of that word, rooted in 1787 usage but still workable today, is the voluntary sale of property or services and all accompanying activities intended for the marketplace.[170] Therefore, "commerce" includes not only buying and selling goods (which has always been its core meaning), but also producing them through manufacturing, mining, and farming, as well as providing services for compensation (e.g., labor and professional employment, insurance, and banking) and transporting goods and

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MAN, WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]. By contrast, in the 1980s Ronald Reagan's conservative movement sought a similarly bold transformation—overturning the New Deal and the Warren Court's jurisprudence—but lacked the sustained super-majoritarian support to do so, as evidenced by the unsuccessful nomination of Robert Bork. *See id.* at 26–27, 255–420; ACKERMAN, FOUNDATIONS, *supra* note 158, at 51–56.

[164] *See, e.g.*, ACKERMAN, TRANSFORMATIONS, *supra* note 163, at 419 (describing himself as "a liberal committed to social justice").

[165] *See, e.g.*, ACKERMAN, FOUNDATIONS, *supra* note 158, at 19–20, 34–57.

[166] *See, e.g.*, Amar, *supra* note 158, at 238–42 (parsing the words of Article III).

[167] Some scholars would argue that judges can construe any legal materials (including text) to reach their preferred result. Nonetheless, most people would agree that some interpretations are more plausible than others, especially when put forth by Justices who have previously published opinions on a particular constitutional provision. For instance, Justice Thomas, having construed the Commerce Clause as limited to the sale of goods between states, could not now assert with a straight face that it covers the in-state provision of services like partial-birth abortion. *See supra* notes 76, 156–157 and accompanying text.

[168] *See* Nelson & Pushaw, *supra* note 11. *See also* Pushaw & Nelson, *supra* note 9 (defending our approach). Interested readers can consult these articles for voluminous authority supporting the points made in the following pages.

[169] U.S. CONST. art. I, § 8, cl. 3.

[170] *See* Nelson & Pushaw, *supra* note 11, at 9–12, 107–10. For evidence of this eighteenth-century meaning of "commerce," see *id.* at 14–21. *See also id.* at 107–72 (demonstrating how this definition can sensibly be applied in evaluating the validity of modern Commerce Clause legislation).

people for a fee.[171] On the other hand, activities undertaken solely for personal satisfaction or home use are not "commerce."[172] Nor are purely moral, social, or cultural issues—including local crimes not involving market transactions.[173]

Second, the commerce regulated must be "among the several States."[174] This phrase includes commerce that is transacted between two (or more) states or that occurs within one state but affects other states.[175] Because modern America has an interdependent national economy, most commercial activity has such an interstate character.[176] Thus, Congress has tremendous latitude in determining whether these multistate impacts are significant enough to warrant national regulation. A court has no principled legal basis for second-guessing this legislative judgment call.

This two-prong legal approach finds support in the Constitution's structure and Federalist political theory.[177] Most crucially, one bedrock tenet of federalism is that uniform national regulations are desirable for interstate commercial subjects, whereas state-by-state diversity is preferable for local noncommercial activities that involve exclusively moral and social matters.[178]

The Convention and Ratification debates and *The Federalist Papers* buttress this conclusion. Although several parts of the historical record may fairly be debated, one thing is clear: The Framers and Ratifiers sought to rectify the problems of the Articles of Confederation by empowering Congress to promote interstate commerce and to prevent the states from adopting protectionist economic policies.[179] Furthermore, several delegates expressed a broad understanding of Congress's authority under the Commerce

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[171] *See id.* at 9–10, 107–10.

[172] *See id.* at 109–10.

[173] *See id.* at 11–12, 113–19.

[174] U.S. CONST. art. I, § 8, cl. 3.

[175] *See* Nelson & Pushaw, *supra* note 11, at 10–12, 42–49, 110–13.

[176] *See id.* at 11, 110–11.

[177] Federalist political science hinged on the idea that sovereignty rested with "the People" collectively, who could delegate their authority to their government representatives. Through the Constitution, "We the People" granted certain powers to the federal government, divided it into three independent yet coordinate branches, and allowed the states to retain all their pre-existing jurisdiction that had not been given to the national government. These structural principles—limited federal authority, separation of powers, and federalism—would ensure that American governments could operate effectively yet not become oppressive. For a detailed explanation of how the Constitution's underlying political theory and structure informs our two-part Commerce Clause test, see Nelson & Pushaw, *supra* note 11, at 25–50, 113–19.

[178] *See id.* at 11–12, 26–30, 113–19; Pushaw & Nelson, *supra* note 9, at 697, 718–19; *see also* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 774–84, 787, 803–05, 815–17, 829 (1995) (lauding federalism for allowing national uniformity in areas like interstate infrastructure, but leaving to each state control over divisive social, cultural, moral, educational, and community issues).

[179] *See, e.g.*, THE FEDERALIST No. 11 (Alexander Hamilton); THE FEDERALIST No. 40 (James Madison). For exhaustive citations to these and other primary sources, see Nelson & Pushaw, *supra* note 11, at 21–50.

Clause and related Article I provisions (e.g., those dealing with taxation, borrowing, currency, bankruptcy, intellectual property, immigration, foreign affairs, and weights and measures).[180]

The Marshall Court adopted a two-step Commerce Clause test in *Gibbons v. Ogden*.[181] In deciding whether Congress had the power to regulate navigation, Chief Justice Marshall first determined that navigation was "commerce," which he broadly defined as encompassing "commercial intercourse . . . in all its branches" (not merely buying and selling goods).[182] Secondly, the Court concluded that "among the several States" included "that commerce which concerns more States than one."[183]

Finally, Neo-Federalism allows for originalist principles to evolve in light of intervening changes, but not to devolve into malleable "standards" shorn of historical roots.[184] Most importantly, the legal meaning of the Commerce Clause has remained constant since 1787: authorizing Congress to regulate market-based activities that involve two or more states. However, critical facts have changed which have exponentially increased the volume of both "commercial" and "interstate" activities.[185] Put simply, America has moved from predominantly self-sufficient households in farming communities to an integrated national and international economy based on commercial agriculture, manufacturing, and service.[186] Congress and the Court have the power to respond to such real-world changes, so long as they do not go beyond the core legal meaning of the Commerce Clause.

The suggested two-step test achieves that balance and leaves intact most Commerce Clause legislation and precedent, albeit under different reasoning than that employed by the modern Court. For example, federal laws regulating all aspects of commercial production (agricultural, industrial, mining, and forestry) should be upheld simply because these activities fall within the proposed definition of "commerce" and affect more than one state—not because they are "noncommercial" activities having a "substantial effect" on interstate commerce, as the Court maintains.[187] Likewise, Acts of Congress addressing labor, employment, banking, insurance, and public accommodations are regulations of "commerce"—the compensated provision of services in the market.[188] Finally, the proffered test would give the Court a legally principled basis for distinguishing federal

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[180] *See* THE FEDERALIST NOS. 42, 44 (James Madison); *see also* Pushaw & Nelson, *supra* note 9, at 704; Nelson & Pushaw, *supra* note 11, at 25, 31–35.

[181] 22 U.S. (9 Wheat.) 1 (1824).

[182] *Id.* at 189–90.

[183] *Id.* at 194.

[184] For further explanation, see Pushaw, *Justiciability*, *supra* note 19, at 397. *See also* Amar, *supra* note 158, at 207–08 n.7, 208–09 n.9, 230–31 n.86.

[185] *See* Nelson & Pushaw, *supra* note 11, at 8–9 n.34.

[186] *Id.*

[187] *See* Pushaw & Nelson, *supra* note 9, at 696–97, 715; Nelson & Pushaw, *supra* note 11, at 9, 120–23, 159.

[188] *See* Pushaw & Nelson, *supra* note 9, at 697–98, 716; Nelson & Pushaw, *supra* note 11, at 9–10, 120, 124–25, 150, 159–60.

criminal statutes that legitimately control the voluntary sale of harmful products (like drugs) and services (like prostitution and gambling) from laws that impermissibly reach wholly noncommercial activities, such as gender-motivated violence, child support, and the mere possession of drugs or guns with no intent to sell them.[189]

Professor Nelson and I applied our Neo-Federalist test apolitically. To offer one example that has become very controversial today, we argued that the Commerce Clause does not authorize Congress to regulate same-sex marriage—whether to allow, prohibit, or limit it—because marriage is not "commerce" (although it obviously has significant "economic" implications).[190] Far from being the sale of goods or services in the market, marriage is an intimate personal relationship whose legal contours reflect cultural and moral norms.[191] We acknowledged that our neutrality made us

> vulnerable to attack by both the right (for expanding Congress's ability to pass counterproductive economic legislation, denying it authority to enact laws that enforce traditional morality, and failing to protect states' rights) and the left (for suggesting that Congress should not interfere with states whose citizens have benighted social and moral values).[192]

In fact, we have been criticized by both conservatives and liberals.[193] But we consider our ideological agnosticism to be a virtue rather than a vice, because genuine rules of law under the Commerce Clause must have this impartial quality. Such detachment is especially beneficial when dealing with highly charged issues like partial-birth abortion.

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[189] *See* Pushaw & Nelson, *supra* note 9, at 697–98, 716–19; Nelson & Pushaw, *supra* note 11, at 9–13, 109–10, 125–41, 159–61. We would, however, allow Congress to establish reasonable presumptions that the possession of a specified significant quantity of illegal goods (e.g., drugs) indicates an intent to sell. *See* Nelson & Pushaw, *supra* note 11, at 137.

Nonetheless, Congress should not be permitted to assert that it must prohibit all possession of drugs or guns as necessary and proper to inhibit demand for, and hence the sale of, such items. Although this argument has a certain logic, accepting it would enable Congress to regulate the possession of virtually anything it pleases. *See id.* at 130, 138.

[190] *See* Nelson & Pushaw, *supra* note 11, at 170–72.

[191] *See id.* at 172.

[192] *Id.* at 12 n.46.

[193] Conservatives have faulted us for extending Congress's power beyond the circumscribed orbit of regulating trade in goods that actually move between two states. Liberals have objected primarily to our conclusion that the Commerce Clause does not authorize specific laws like the Violence Against Women Act, 42 U.S.C. § 13981 (2000), and the Child Support Enforcement Act, 42 U.S.C. § 659 (2000), even though we would uphold other statutes they support, such as FACE, 18 U.S.C. § 248 (2000). *See* Pushaw & Nelson, *supra* note 9 (summarizing and responding to such arguments).

D. Applying the Proposed Commerce Clause Test to the PBABA

The Neo-Federalist approach yields concrete rules that streamline analysis. Application of the proposed two-step test would result in upholding Congress's power to enact the PBABA.

First, partial-birth abortion falls squarely within the suggested definition of "commerce"—the voluntary selling of a service by a professional engaged in a market-based enterprise that invariably invests thousands of dollars annually on facilities, equipment, supplies, insurance, and staff.[194] Or, looking at the issue like a photographic negative, "commerce" excludes activities done solely for personal or household use,[195] and partial-birth abortion surely does not fall within that exception (as physicians do not perform this procedure on themselves or family members in their homes).[196] In short, like medical services generally, abortions of all kinds are commercial exchanges.

Second, partial-birth abortions qualify as commerce "among the several States" because they "concern more states than one" (to use John Marshall's phrase).[197] Most significantly, patients seeking this procedure frequently travel interstate, as do their doctors.[198] As long as Congress is addressing activity that is "commercial," its policy determination that the conduct has a sufficient interstate impact to justify regulation is entitled to judicial deference.[199]

Critics might respond that this analysis is simplistic. Specifically, they may raise three objections, which have been alluded to earlier.[200]

First, they might contend that, realistically, Congress is not regulating partial-birth abortions because they are a significant component of the

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[194] *See supra* notes 23–24, 27, 170–171 and accompanying text.

[195] *See supra* notes 25, 172–173 and accompanying text.

[196] Put differently, a key element of "commerce" is the voluntary provision of goods or services to others in the marketplace. Hence, doctors who offer partial-birth abortions to women in businesses open to the public can be distinguished from those who supply goods or services to themselves or their families in the home, such as farmers who dedicate a portion of their crop to feeding household members.

[197] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824).

[198] *See supra* notes 47, 101 and accompanying text (noting that interstate trips are often required for partial-birth abortions, which are available in relatively few states).

[199] Moreover, in making this decision, Congress can consider future trends. For example, the number of partial-birth abortions tripled from 1996–2000. *See* 149 CONG. REC. S3398 (daily ed. Mar. 10, 2003) (statement of Sen. George Voinovich (R-Ohio)). This increase occurred even though twenty-eight states had barred this procedure. *See* Stenberg v. Carhart, 530 U.S. 914, 995–96 n.13 and accompanying text (2000) (Thomas, J., dissenting). After the Court struck down these bans in *Stenberg*, the number of such abortions presumably rose. *See supra* text accompanying notes 34–37 (discussing *Stenberg* and these state laws).

Once the fact of interstate impact has been established, however, judgments about the need for federal regulation are questions of degree. Thus, Congress could reasonably have concluded that partial-birth abortions (even accounting for future increases) were too negligible to warrant legislation, if it so desired.

[200] *See supra* notes 16, 27, 39–50, 107–113 and accompanying text.

national economy that demands uniform treatment.[201] Rather, the PBABA is a criminal law intended to ban conduct that the legislative majority believes is immoral and socially harmful.[202] As the Court properly recognized in *Gibbons v. Ogden*, however, judicial review under the Commerce Clause is confined to determining whether Congress has regulated activity that is (1) commerce, which (2) affects more than one state.[203] If so, the Court must uphold the law, even if legislators may have had other reasons (including moral or ethical ones) for passing it. Indeed, most statutes reflect a variety of purposes and interests,[204] and emerge only after a messy process.[205] The Court has wisely limited its inquiry to questions of constitutional power, not legislative motive.

Similarly, under the proposed Neo-Federalist approach to the Commerce Clause, Congress can regulate (including by criminal prohibition) any genuinely commercial activity, even when moral or societal concerns also may have influenced its policymaking. Prostitution and loan sharking are familiar examples,[206] and partial-birth abortion is not materially different. If Americans do not like a federal law that bars particular interstate commercial conduct (such as the PBABA), their remedy is political rather than judicial. Courts should intervene only when Congress attempts to govern matters that have no commercial component, but rather involve purely social, moral, or cultural issues.

A second criticism might be that, even conceding that Congress generally can reach commercial interstate crimes, the PBABA sweeps in noncommercial partial-birth abortions because it contains no exception for those done gratis.[207] Assuming for the moment that this statutory interpretation is correct, the PBABA would still be valid under established Supreme Court precedent sustaining Congress's power to regulate an entire area of commercial activity even if isolated transactions within the field might not involve contractual consideration.[208] Thus, the fact that physicians and other professionals occasionally provide their services for free does not negate the essentially commercial nature of their businesses. Moreover, the proposed definition of "commerce" includes both the sale of services

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[201] *See supra* notes 16, 107–112 and accompanying text.

[202] *See supra* notes 16, 39, 42–44, 107 and accompanying text.

[203] 22 U.S. (9 Wheat.) 1, 189–95 (1824).

[204] *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

[205] *See* Otto von Bismarck, *quoted in* THE TIMES BOOK OF QUOTATIONS 410 (The Times 2000) (wryly observing that "[l]aws are like sausages. It's better not to see them being made.").

[206] *See supra* notes 54–55, 68 and accompanying text.

[207] *See supra* notes 27, 108, 111 and accompanying text.

[208] *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (citing cases allowing Congress to reach noncommercial activities if necessary to vindicate a larger economic regulatory scheme). For instance, federal antidiscrimination legislation covers all restaurants that engage in interstate commerce, even though they sometimes give food away to community or charitable organizations. *See supra* note 63 and accompanying text (discussing such statutes).

"and all accompanying market-based enterprises."[209] A hospital or clinic where partial-birth abortions are performed obviously qualifies as a "market-based enterprise,"[210] even if doctors who work there sometimes waive their fees.

Admittedly, however, the PBABA is directed only at "physicians" (not health-care facilities),[211] and it might well exceed constitutional bounds under the Nelson/Pushaw approach if interpreted as applicable to the unusual case of a doctor who provided a partial-birth abortion without receiving any payment.[212] After all, the primary meaning of "commerce" is selling goods or services.[213] Nevertheless, the PBABA can fairly be read as not extending to uncompensated partial-birth abortions. As a textual matter, the statute is limited to performances of this procedure by physicians "in or affecting interstate . . . commerce."[214] This awkward boilerplate phrase, inserted into much federal legislation, technically refers to all activities that are either physically "in" interstate commerce (i.e., using its channels or instrumentalities) or that have an impact on such commerce.[215] Presumably, regulated doctors would be "in" interstate commerce if they traveled across state lines to perform partial-birth abortions or if they served out-of-state patients,[216] and would "affect" such commerce if the total number of such abortions exerted a substantial economic impact.[217] Furthermore, the PBABA's legislative history indicates that the "in or affecting commerce" language was intended to restrict the statute's scope to commercial partial-birth abortions (i.e., those provided for money).[218] Al-

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[209] *See supra* notes 23, 27, 170 and accompanying text.

[210] *See supra* notes 49–50, 102, 106, 194 and accompanying text.

[211] 18 U.S.C.A. § 1531(a) (West 2003 & Supp. 2004).

[212] *See supra* note 23–24, 170–171 and accompanying text.

[213] *See* Nelson & Pushaw, *supra* note 11, at 108 (noting that one aspect of "commerce" is "the compensated provision of services").

[214] 18 U.S.C.A. § 1531(a) (West 2003 & Supp. 2004).

[215] *See supra* notes 52–70, 93–94 and accompanying text.

[216] *See supra* notes 47, 101, 198 (describing such interstate travel).

[217] *See supra* notes 15, 49, 58, 60–70, 84, 100–106 and accompanying text. Accordingly, it is hyperbole to assert that "[u]nless a physician is operating a mobile abortion clinic on the Metroliner, it is not really possible to perform an abortion 'in or affecting interstate or foreign commerce.'" *See* Kopel & Reynolds, *supra* note 16, at 111. The constitutional meaning of such statutory language has been established since the landmark case of *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In *Jones & Laughlin*, the Court upheld the National Labor Relations Act's prohibition on unfair labor practices "affecting commerce" (defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce"). *Id.* at 23–24, 31 (citing the statute). Chief Justice Hughes stressed that this statutory provision should be interpreted as contemplating the congressional exercise of control within constitutional bounds, and hence as reaching not every potential unfair labor practice in all businesses but rather only those that substantially affected interstate commerce. *Id.* at 29–32.

[218] Two statements in the House Judiciary Committee's Report on the PBABA reveal this intent. First, the Committee declared that a partial-birth abortion "is an economic transaction in which a service is performed for a fee." *See* H.R. REP. No. 108-58, at 24 (2003). Second, the Report noted that the purpose of the "in or affecting commerce" jurisdictional requirement was to assure a case-by-case determination that the partial-birth abortion in

though the PBABA could have been drafted more clearly,[219] it should be interpreted to avoid the constitutional questions that would arise if it were deemed to include non-compensated partial-birth abortions.[220]

A third objection might be that our "neutral" legal test is actually a subterfuge animated by hostility toward abortion. The short answer is that Professor Nelson and I previously have applied our analysis to conclude that Congress has the constitutional power to protect abortion clinics, as particularly defined commercial enterprises, from criminal and tortious

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question had a sufficient interstate commercial connection. *See id.* at 26; *see also* Smolin Testimony, *supra* note 47, at 5–6 (arguing that this jurisdictional element satisfies the *Lopez* standard).

[219] Allan Ides recognizes that the phrase "in or affecting commerce" can be construed as limiting the PBABA to abortions for hire. *See* Ides, *supra* note 16, at 448. Nonetheless, he contends that this language pertains to the consequences of the activity regulated, whereas *Lopez* and *Morrison* require that the nature of the activity itself be commercial. *Id.* at 448–49. He further asserts that partial-birth abortions are not inherently commercial because they may be performed without compensation, and thus flunk the *Lopez/Morrison* test. *Id.* at 446–51.

Professor Ides is correct that Congress cannot, by pronouncing the magic words "in or affecting commerce," transform noncommercial into commercial activity. *See id.* at 456–57. For instance, the mere possession of a firearm without intent to sell is not "commerce," and Congress cannot escape this fact by purporting to restrict prosecutions to possession of guns "in or affecting commerce," because virtually all firearms meet that test. *See supra* notes 67, 70, 93, 189 and accompanying text (rejecting the Court's pre-*Lopez* endorsement of such reasoning).

But the PBABA does not feature such sleight-of-hand, because ordinarily partial-birth abortions are "commerce" (service in exchange for money), and they are always performed in market-based businesses. *See supra* note 27 and accompanying text. In this crucial sense, a partial-birth abortion is nothing like gender-motivated violence, which never involves a voluntary "commercial" exchange or enterprise. Similarly, the GFSZA criminalized the simple possession of a gun, without any reference to the market transaction of buying or selling this item. *See* 18 U.S.C. § 922(q)(2)(A) (2000).

[220] If the Court continues to adhere to the reasoning of *Wickard*, it could find that free partial-birth abortions reduce the overall demand for paid ones, thereby "affecting commerce" in this service. Nonetheless, the Court in *Lopez* and *Morrison*, while purporting to keep *Wickard* intact, cast a skeptical eye on the argument that Congress can regulate noncommercial activity that, considered in the aggregate, substantially affects interstate commerce. The Court will likely seek to avoid resolving this issue unless it has no other alternative.

In fact, the Court has chosen this path of least resistance after *Morrison*. Most pertinently, in *Jones v. United States*, 529 U.S. 848, 852–59 (2000), the Justices unanimously interpreted a federal statute prohibiting arson of "any building . . . used in interstate commerce" as inapplicable to a private residence, thereby sidestepping the question of whether Congress could constitutionally have extended the law that far. *See also* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 166–74 (2001) (obviating the need to decide a claim about the limits of Congress's Commerce Clause power by holding that the Corps had exceeded its authority under § 404(a) of the Clean Water Act, which regulates "navigable waters . . . of the United States," by asserting jurisdiction over ponds within a state). The Court also invoked this venerable canon of statutory construction in several Commerce Clause cases before *Lopez*. *See, e.g.*, Jones & Laughlin, 301 U.S. at 29–32; United States v. Bass, 404 U.S. 336, 339–49 (1971) (interpreting a federal statute prohibiting any felon from possessing a firearm "in or affecting commerce" as requiring the government to prove that the gun possession being prosecuted had a nexus to interstate commerce, and therefore avoiding the question of whether Congress could regulate mere possession).

interference.[221] Our proposal, published long before the enactment of the PBABA, treats abortion as a commercial activity for all purposes, without regard for whether the specific legislation at issue is perceived as "liberal" (like FACE) or "conservative" (like the PBABA).[222]

Overall, application of Neo-Federalist legal principles derived from the Commerce Clause would sustain Congress's power to prohibit partial-birth abortions because they (1) involve a classical commercial exchange (the provision of a paid service in the marketplace), and (2) are performed in more than one state and have demonstrable interstate effects. Hence, the PBABA does not exceed any limits contained in the Commerce Clause itself. Whether this statute violates an external restraint on Congress's power, such as the Due Process Clause, is grist for another mill.

CONCLUSION

The Court's current Commerce Clause standards lack genuine legal substance. They contemplate arbitrary case-by-case judgments about whether a regulated activity is "commercial" or not, has a "substantial" or "insubstantial" effect on interstate commerce, and concerns "national" or "local" matters. As the PBABA illustrates, a Justice could apply these amorphous standards to justify virtually any outcome. Such a discretionary regime invites political and ideological manipulation, and therefore breeds cynicism.

Accordingly, the Court should abandon this approach and instead adopt clear rules of law rooted in the Commerce Clause's text, structure, history, and longstanding precedent. Attorneys, members of Congress, and judges deserve more clarity about the extent and the outer boundaries of the Commerce power. The cost of such fixed legal rules will be the invalidation of certain federal statutes that one likes, and the approval of some laws that one dislikes (perhaps including the PBABA). That price is worth paying in order to maintain the Constitution as true law.

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[221] *See* Nelson & Pushaw, *supra* note 11, at 150.

[222] As the distinguished feminist scholar Sylvia Law recognizes, both liberal and conservative lawyers who wish only to achieve their preferred policy goals on abortion will have to take inconsistent positions on whether abortion constitutes interstate commerce. *See* Law, *supra* note 107, at 422–25.

ARTICLE

SEX, SHAME, AND THE LAW: AN ECONOMIC PERSPECTIVE ON MEGAN'S LAWS

DORON TEICHMAN*

There is a long history of legal regimes using shaming to punish criminal offenders, a practice that is currently employed throughout the United States to sanction sex offenders. This Article focuses on how policymakers can minimize the cost of criminal punitive measures by utilizing both legal and non-legal sanctions. After discussing the general economic case for the use of non-legal sanctions, the Article presents a model of shaming that, unlike existing models, incorporates the endogenous effects of legal and non-legal sanctions. More precisely, the model demonstrates that changes in the level of legal sanctions can affect the level of non-legal sanctions and vice-versa. The Article then examines current practices in various U.S jurisdictions of publicizing the names of convicted sex offenders. The author concludes that while such policies arguably have limited preventative value, they may still be justified as an efficient way to sanction sex offenders, subjecting them to non-legal sanctions at costs lower than those associated with legal sanctions.

The legal system does not function in a vacuum. Some acts that are governed by legal rules are also governed by social norms. In many cases, these social norms are enforced by a set of non-legal sanctions, which include internal sanctions such as guilt and external sanctions such as the refusal to interact with an offender. This Article focuses on the general question of how policymakers aiming to minimize the cost of sanctioning should utilize legal and non-legal sanctions when designing a system of criminal sanctions. Specifically, this Article examines the use of Megan's Laws, measures enacted by various states which require the publication of the names of convicted sex offenders.

Law and economics scholars have studied social norms and non-legal sanctions for many years. This inquiry initially focused on the characteristics of non-legal systems within close-knit societies[1] and then broad-

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[1] *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Indus-*

ened to include issues related to public law.[2] Recently, researchers have turned to developing more general theories as to the origin of social norms[3] and the relationship between social norms and the law.[4] The importance of this field of study to law and economics scholars is indicated by the wealth of research in the area.[5]

One of the current debates regarding non-legal sanctions concerns the extent to which legally induced non-legal sanctions such as shaming should be used to punish criminals. At one end of this debate stand scholars such as Toni Massaro and James Whitman, who argue that non-legal sanctions are either ineffective or morally repugnant and therefore should not be used.[6] At the other end stand scholars such as Dan Kahan and Eric Posner, who argue that non-legal sanctions may be an efficient and politically viable sanctioning tool.[7] This Article sides with the latter group and contributes further economic insights to the debate. It demonstrates that policymakers cannot substitute legal sanctions with non-legal ones and still hold the level of non-legal sanctions constant, since the level of one type of sanction affects the level of the other. For example, a reduced legal sanction might cause the public to perceive a certain crime as less severe, which in turn might reduce the non-legal sanctions it imposes as a result. Thus,

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try, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Diamond Industry*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Cotton Industry*]; Steven N. S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AMER. ECON. REV. 525 (1993); Mark D. West, *Private Ordering at the World's First Futures Exchange*, 98 MICH. L. REV. 2574 (2000).

[2] *See generally* Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155 (1998); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

[3] *See generally* ERIC POSNER, LAW AND SOCIAL NORMS (2000) [hereinafter POSNER, SOCIAL NORMS]; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

[4] *See generally* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); McAdams, *supra* note 3, at 391–432; Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1725–36 (1996) [hereinafter Posner, *Inefficient Norms*]; Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021 (1996).

[5] An overview of the economic analysis of social norms can be found in Eric Posner's study of the issue. *See* POSNER, SOCIAL NORMS, *supra* note 3.

[6] *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1883–84 (1991); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L. J. 1055, 1087–92 (1998).

[7] *See* Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630–31 (1996); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 366–68 (1999).

tailoring an efficient system that combines legal and non-legal sanctions might be more difficult than previously perceived.

This Article analyzes the interplay between legal and non-legal sanctions by looking at the treatment of sex offenders in the United States. Since the 1990s, every state in the country has enacted some form of a Sex Offender Registration and Notification Law ("SORNL").[8] These laws create a system that disseminates information to the public about convicted sex offenders such as their names and home addresses. Originally, these laws were enacted to assist the public in protecting itself from the threat of repeat sex offenders. However, a large number of scholars have argued that the true effect of these laws is punitive,[9] referencing the harsh non-legal sanctions triggered by these laws such as physical attacks on offenders and their property, denial of housing, and termination of employment.[10] This Article develops a theory that allows policymakers to distinguish between different types of non-legal sanctions. Building on this theory, the Article argues that SORNLs are actually a form of punishment, even though their stated purpose is the protection of the public. Despite this misconception, using SORNLs to punish sex offenders may in fact be an efficient way to sanction sex offenders. However, adopting this punitive approach toward SORNLs requires a change in attitude toward these laws.

This Article is organized as follows: Part I makes the general case for the use of non-legal sanctions as a punitive tool. It points out the potential efficiencies and inefficiencies of using legal and non-legal sanctions and also explores the potential interactions between the two. Part II presents a case study on sanctioning sex offenders and analyzes the social phenomena triggered by SORNLs from an economic perspective. Part III builds on these findings regarding the actual effects of SORNLs in order to make several policy recommendations. Finally, the Article offers concluding remarks and makes suggestions for future research.

I. NON-LEGAL SANCTIONS AS AN ALTERNATIVE SANCTIONING TECHNOLOGY

This Part sets out the case for the use of non-legal sanctions as an alternative to legal sanctions. It begins by defining these non-legal sanctions and by exploring some of the forces that explain their existence. It then presents the economic case for using laws to induce the public to impose

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[8] *See* Appendix to this Article (citing the SORNLs of the fifty states and the District of Columbia).

[9] *See, e.g.*, Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 91 (1996); Jane A. Small, *Who are the People in your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1492–93 (1999).

[10] *See, e.g.*, Lewis, *supra* note 9, at 106–07; Small, *supra* note 9, at 1467–69.

non-legal sanctions and contends that the arguments made against their use, while important, do not justify their abandonment as a sanctioning tool. Next, a model for combining legal and non-legal sanctions is developed. This model differs from existing models in that it incorporates the potential effects of changes in the level of legal sanctions on the level of non-legal sanctions. Finally, this Part demonstrates how non-legal sanctions can affect the level of legal sanctions through the sentencing and plea-bargaining processes.

A clarifying comment as to the scope of the argument presented below should be made. This Part deals exclusively with the question of how, not why, sanctions should be inflicted. Economic analysis can point out the most efficient way to implement a policymaker's decision as to the appropriate level of sanction without reference to the ultimate purpose of punishment. Therefore, the analysis presented here is relevant whether the underlying theory of punishment is retribution or deterrence.

A. A Theory of Non-legal Sanctions

In recent years, courts and legislatures have turned to using laws to induce the public to impose non-legal sanctions as an alternative to imprisonment. In certain jurisdictions, the names of prostitute patrons are published in newspapers,[11] while individuals convicted of driving under the influence of alcohol are required to use special license plates or bumper stickers.[12] Offenders must at times wear t-shirts announcing their crimes,[13] while others are required to appear in public, describe their crimes, and apologize for them.[14] These measures sanction wrongdoers by disseminating information about their past criminal activity which is expected to cause two distinct adverse effects. First, these measures may cause wrongdoers to experience negative feelings ranging from mild embarrassment to severe shame.[15] This is the internal aspect of non-legal sanctions. Second, these measures may induce sanctions, inflicted on wrongdoers by other members of the community, such as the severing of relationships, termination of employment, and even violent retaliation. This is the external aspect of non-legal sanctions.

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[11] *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 735 n.12 (1998); Courtney Guyton Persons, *Sex In the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525 (1996).

[12] Case Comment, *The Bumper Sticker: The Innovation that Failed*, 22 NEW ENG. L. REV. 643, 644 (1988).

[13] *See* Kahan, *supra* note 7, at 632.

[14] *See, e.g., id.* at 634; Massaro, *supra* note 6, at 1888–89.

[15] For an analytical discussion of the distinction between these feelings, see, for example, Price Tangney et al., *Are Shame, Guilt and Embarrassment Distinct Emotions?*, 70 J. PERSONALITY & SOC. PSYCH. 1256 (1996).

The mechanism behind the first effect is straightforward—people feel discomfort when their past wrongful acts are revealed to the public. The second effect operates more complexly, as the desire of the public to sanction wrongdoers is more difficult to understand. While the cost of inflicting such sanctions is high,[16] the benefits resulting from the sanctions, such as deterrence, are distributed to the general public and not to the cost-bearing individuals.[17] The cost of inflicting non-legal sanctions depends on the kind of sanction. For passive sanctions such as cutting off a relationship, the cost is the forgone opportunity to interact with the wrongdoer.[18] For more active sanctions such as shaming, the costs include the time and mental resources invested in sanctioning as well as the risk that the sanctioned party will choose to retaliate. More extreme sanctions, such as the use of violence, generate an additional cost in the form of potential legal liability.

The costs born by individuals who inflict non-legal sanctions are balanced by certain benefits of which there are three distinct types. The first is the fulfillment of a preference for sanctioning,[19] or more specifically, a preference for reciprocity.[20] This preference has been demonstrated in a long line of ultimatum game experiments, in which participants willingly endured monetary losses in order to sanction individuals who treated them in a way they perceived to be unfair.[21] This preference for reciprocity can be explained by evolutionary models showing a higher reproductive success for those adopting such a preference[22] as well as by game theory models suggesting that players can maximize their payoffs in repeated games by implementing a strategy based on reciprocity.[23] Moreover, the prefer-

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[16] *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 211 (1981) (pointing out that in the absence of compensation, an individual must derive utility from a vengeful act in order to be motivated to commit it). Some scholars who deal with the creation of non-legal sanctions have argued that the withholding of esteem forms a costless basis on which non-legal sanctions can be built. *See, e.g.*, McAdams, *supra* note 3, at 355. However, since even withholding esteem requires some action, these sanctions arguably require the individuals who inflict them to bear at least some costs.

[17] *See* McAdams, *supra* note 3, at 352–53.

[18] The termination of long-term relationships might cause the parties to incur significant monetary costs. The most obvious example of this is divorce.

[19] *See* Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137 (2002) (advancing the hypothesis that emotions are an important factor behind the act of punishing others).

[20] For a review of the economics of reciprocity, see generally Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EUR. ECON. REV. 687, 689–704 (2002).

[21] The first experiments evaluating behavior in ultimatum games were reported in Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982). For an updated review of ultimatum game studies, see generally RICHARD H. THALER, THE WINNER'S CURSE 21–35 (1992); Werner Güth, *On Ultimatum Bargaining Experiments—A Personal Review*, 27 J. ECON. BEHAV. & ORG. 329 (1995).

[22] *See* Werner Güth & Menahem E. Yaari, *Explaining Reciprocal Behavior in Simple Strategic Games: An Evolutionary Approach*, *in* EXPLAINING PROCESS AND CHANGE—APPROACHES TO EVOLUTIONARY ECONOMICS 23, 23–24 (Ulrich Witt ed., 1992); Steffen Huck & Jörg Oechssler, *The Indirect Evolutionary Approach to Explaining Fair Allocations*, 28 GAMES & ECON. BEHAV. 13, 13–24 (1999).

[23] *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 27–54 (1984) (showing

ence for reciprocity is not limited to the direct victim of the wrongful act. Rather, concrete examples of non-legal sanctions and stylized experiments demonstrate that individuals also hold a preference for sanctioning those individuals who have treated other members of society unfairly.[24]

A second benefit of non-legal sanctions is that participating in acts of sanctioning can induce positive reactions from others, and conversely, refraining from such participation may trigger negative reactions. In other words, social norms enforced by a completely separate set of non-legal sanctions encourage the sanctioning of wrongdoers in certain circumstances. For instance, individuals who refuse to participate in a consumer boycott may be sanctioned for their refusal.[25] This social phenomenon can be explained by the signaling model of social norms.[26] In this model, individu-

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how a reciprocal strategy can lead to higher payoffs for a player in a repeated prisoner's dilemma).

[24] Consumer boycotts can serve the purpose of expressing disapproval of wrongful acts toward others. *See* MONROE FRIEDMAN, CONSUMER BOYCOTTS 12–13 (1999). A historical example of such an expressive non-legal sanction is the Jewish boycott of German goods during World War II. In part, the goal of the boycott was to allow American Jews to signal their disapproval of the Germans' conduct. *See* William Orbach, *Shattering the Shackles of Powerlessness: The Debate Surrounding the Anti-Nazi Boycott of 1933–41*, 2 MODERN JUDAISM 149, 161–66 (1982). Similarly, experiments also show a predilection for punishing those who have wronged others. *See* Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. OF BUS., S285, S290–S292 (1986). In the first stage of an experiment, participants played a variation of the ultimatum game in which the allocator had to divide $20 between herself and a recipient. The allocator was able to divide the $20 either equally or by allocating $18 to herself and allocating $2 to the recipient. In the second stage of the game, participants were asked to choose between receiving a payoff of $12 to be shared equally with a player who chose to allocate $18 to herself in the first round and receiving a payoff of $10 to be shared equally with a player who chose to allocate $10 to herself in the first round. Thus, the players in the second round could give up one dollar in order to sanction a player who acted unfairly in the first round. The results of the experiment were clear: 74% of the players in the second round chose to sacrifice the dollar to sanction individuals who had treated other players unfairly. *Id.; see also* Ernst Fehr et al., *Strong Reciprocity, Human Cooperation and the Enforcement of Social Norms*, 13 HUM. NATURE—INTERDISC. BIOSOCIAL PERSP. 1, 16–17 (2002).

[25] *See, e.g.*, FRIEDMAN, *supra* note 24, at 136 (describing how the Jewish boycott of German goods during World War II was rigorously enforced by non-legal sanctions); W. Muraskin, *The Harlem Boycott of 1934: Black Nationalism and the Rise of Labor-Union Consciousness*, 13 LABOR HISTORY 361, 364 (1972) (presenting a case where the photographs of boycott violators were published in a local newspaper); Sankar Sen et al., *Withholding Consumption: A Social Dilemma Perspective on Consumer Boycotts*, 28 J. CONSUMER RES. 399, 401 (2001) (pointing out the connection between consumer boycotts and group membership).

[26] The relation between signaling and social norms has been extensively examined and therefore merits only a brief explanation here. For further analysis, see Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998) [hereinafter Posner, *Symbols*]; POSNER, SOCIAL NORMS, *supra* note 3, at 11–35. The signaling model of social norms is not the only explanation for the existence of a sanctioning norm. Recently, Paul Mahoney and Chris Sanchirico presented a game theory analysis of strategies in a repeated prisoner's dilemma which offered an alternative explanation for the existence of a sanctioning norm. *See* Chris William Sanchirico & Paul G. Mahoney, *Norms, Repeated Games, and the Role of Law*, 91 CAL. L. REV. 1281 (2003). In their paper, Mahoney and Sanchirico introduced a game strategy "def-for-dev" (defect-for-deviate), which has the practical effect of requiring parties to sanction defectors and view those who

als are either "cooperators" who care about future payoffs or "cheaters" who care about present payoffs. Both types of players take part in a repeated game in which cooperators attempt to maximize their payoffs by working together. In order to achieve their goal, cooperators can use costly signals that are only affordable to individuals who expect high cooperative payoffs.[27] Within this framework, the cost incurred by the sanctioning party makes these sanctions a credible signal. Individuals who do not take on this cost of sanctioning are perceived as non-cooperators and consequently find it difficult to interact with members of the sanctioning group. Furthermore, since non-legal sanctions express disapproval of a wrongful act, they might have a cost structure in which signaling is more costly for cheaters. (Cheaters might not disapprove of the sanctioned act and therefore receive no benefit from the discouragement of such an act.) Such a cost structure will render superior signals since it will reduce the amount of resources spent on signaling.[28]

The last benefit that may encourage people to sanction a wrongdoer is the discovery that the wrongdoer tends repeatedly to commit wrongful acts. In some cases, past wrongful acts can serve as a predictor of future wrongful acts, allowing a community to take preventative measures. Once members of society learn the specific risks in dealing with a wrongdoer, they use the information to decide how to interact with him in the future. For example, once it is discovered that a businessperson has a higher probability of breach than was previously believed, the value of the contracts offered by him or her will diminish.

Having identified the three benefits driving the creation of non-legal sanctions (preferences, sanctioning norms, and prevention), an analytical

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do not as deviators who should be sanctioned. Thus, according to this model, if individuals do not have exceptionally high discount rates, they will participate in the act of sanctioning in accordance with the social norm. *Id.* at 1297–1301.

[27] For an illustration, see the numerical example presented in Posner, *Symbols*, *supra* note 26, at 769–70. In his example, the world is divided into "senders" and "receivers" who can interact with each other. Both senders and receivers are composed of "cooperators" and "cheaters." In this game, a cooperating receiver needs to decide whether to deal with a sender. The players face the following payoffs: if the receiver does not cooperate with the sender, the payoff for the sender and the receiver is $0. If the receiver cooperates and the sender is a cheater, the sender will cheat and gain $2 while the receiver will lose $2. However, if the receiver cooperates and the sender is a cooperator, they will both gain a payoff of $6. Furthermore, there is some random act such as saluting the flag, which costs both parties $3 and which receivers believe indicates cooperation. Under these assumptions, a separating equilibrium may emerge in which receivers will cooperate with players who engage in the random act that becomes the focal point of a social norm and refuse to deal with players who do not. Under such a strategy, cheaters will not be able to deal with cooperators, since their payoff of $2 is insufficient to cover the cost of the signal. Cheaters will prefer not to deal and gain $0 rather than signal and lose $1. On the other hand, cooperators will earn $6 when dealing with other coooperators thus making the choice to send the $3 signal an economical one.

[28] In terms of the numerical example presented in the previous footnote, assume that the cost of the signal is still $3 for cheaters but only $1 for cooperators. Such a signal is superior since it allows the creation of a separating equilibrium at a lower cost.

distinction between the different types of non-legal sanctions can be introduced. From an economic perspective that focuses on incentivizing individuals to refrain from doing wrong, the term "non-legal sanction" encompasses any worsening of an individual's welfare resulting from someone's discovery that he committed a wrongful act. In contrast, the term "punishment" is narrower and refers to the worsening of the welfare of the wrongdoer as a means to achieve a normative goal such as retribution or deterrence. With this distinction in mind, the first two categories of non-legal sanctions (those driven by preferences and sanctioning norms) should be viewed as a form of punishment, since they inflict suffering to wrongdoers on account of their past behavior and therefore fulfill a societal need for retribution and deterrence. However, preventative non-legal sanctions should not be viewed as a form of punishment. From a retributive perspective, such sanctions do not balance past accounts but rather look forward to the offender's prospective actions. From a deterrence perspective, preventative sanctions reflect future harms that the wrongdoer may cause and thus should not be viewed as part of his punishment.[29]

B. Non-legal Sanctions as a Substitute for Legal Sanctions

From an economic perspective, the basic argument underlying the shift to non-legal sanctions is the proposition that policymakers should use the most cost-effective form of punishment.[30] For instance, economists have long argued that policymakers should use cheap punishments such as fines rather than costly non-monetary sanctions such as imprisonment.[31] Similarly, if one can inflict the same amount of pain to the wrongdoer through imprisonment or through a non-legal sanction, one should choose to use the sanctioning technology that is cheaper to administer.[32] In fact, budget

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[29] For example, after a wrongdoer causes an accident by driving recklessly, his insurance premiums may rise. This rise is similar to preventative non-legal sanctions in that the insurance company reassesses its contractual relationship with the wrongdoer after receiving new information about his actions. However, in a competitive insurance market, the rise in premiums reflects precisely the rise in expected losses attributable to the wrongdoer. Thus, while painful from the perspective of the wrongdoer, this additional sanction does not serve a punitive function.

[30] *See* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236 (1985) (defining the social welfare problem). For an alternative view of shaming sanctions, see generally Garvey, *supra* note 11 (presenting an educating model of shaming).

[31] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193–98 (1968) (arguing that fines should be used whenever feasible); Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) (arguing that white collar criminals should be sanctioned by fines rather than imprisonment); Shavell, *supra* note 30, at 1236–41 (arguing that non-monetary sanctions should be used only if the offender lacks the financial resources to pay the appropriate fine).

[32] *See, e.g.*, Garvey, *supra* note 11, at 738 (noting that "at a time when the costs of imprisonment consume ever larger shares of state budgets, shame may serve as a politically viable and cost effective way of achieving deterrence, specific and general, as well as of satisfying the legitimate demands of retribution"); Kahan & Posner, *supra* note 7, at 367–

crises around the nation have led states and counties to realize that they simply cannot afford to continue using imprisonment at the levels to which they have grown accustomed.[33]

In order to analyze the optimal use of legal and non-legal sanctions, one must understand their costs. This Article assumes that the cost of producing both legal and non-legal sanctions marginally increases, meaning that under a particular sanctioning technology, each additional unit of disutility inflicted on offenders is more costly than the previous unit. This assumption is quite standard in economic analysis and is synonymous with social rationality.

The application of legal sanctions is consistent with the assumption of marginally increasing costs. Minor criminal activity is often sanctioned by the imposition of fines, which is a socially cheap if not costless sanction. More severe crimes are often sanctioned by the imposition of parole and community service, which are more costly forms of punishment. It is only after these cheaper sanctioning modes fail that governments generally turn to costlier methods of sanctioning such as imprisonment.

Similarly, inflicting and inducing non-legal sanctions reflect a picture of marginally increasing costs. With respect to the infliction of non-legal sanctions, Robert Ellickson's description of the scale of non-legal sanctions used in Shasta County serves as a useful illustration.[34] These non-legal sanctions ranged from negative gossip to threats of violence and the use of actual violence.[35] Arguably, the costs of sanctions on this scale are marginally increasing. Inducement of non-legal sanctions involves its own costs, distinct from the costs of infliction. In the context of SORNLs, for example, these costs include setting up notification websites, updating these websites, tracking down offenders, and actively notifying communities.[36] In

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68 (arguing that "shaming could prove to be an efficient alternative to prison for white-collar offenders"). Even scholars who raise fierce opposition to the use of shaming as punishment concede that sanctions of this nature are cheaper than imprisonment. *See* Toni M. Massaro, *Meanings of Shame: Implications for Legal Reform*, PSYCHOL. PUB. POL'Y & L. 645, 649 (1997).

[33] *See, e.g.*, Mark R. Chellgren, *Kentucky to Release Felons Early Move to Help Corrections Department Balance Budget*, EVANSVILLE COURIER & PRESS, Dec. 18, 2002, at B12 (reporting on Kentucky Governor Paul Patton's decision to release over 550 prison inmates due to the state's budget crisis); V. Dion Haynes & Vincent J. Schodolski, *Strapped States Turn to Prisons; Early Releases Among Saving Options*, CHI. TRIB., May 5, 2003, at 8 (reporting that inmates in Los Angeles County were released from jail in order to save $17 million); Scott Kraus, *100 Inmates Granted Early Release; Northampton County Says Crowding, Budget Cuts Led to Move*, ALLENTOWN MORNING CALL, Apr. 12, 2003, at B1. The highly publicized Kentucky program was eventually abandoned after two released inmates were arrested and charged with bank robbery and rape. *See* Mark R. Chellgren, *Patton Says He Won't Release More Inmates*, ASSOCIATED PRESS NEWSWIRES, Jan. 31, 2003.

[34] *See* ELLICKSON, *supra* note 1, at 56–59 (describing the network of social norms and non-legal sanctions governing the relationships between neighbors in Shasta County in situations such as trespass disputes and fence-building cost allocation).

[35] *See id.*

[36] *See, e.g.*, Alex B. Eyssen, *Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on*

fact, several states are currently reducing the resources dedicated to such programs as a result of budget constraints.[37] Costs for inducing non-legal sanctions range from low-cost shaming such as bumper stickers and flyers to more costly measures such as personal notification conducted by officers to every household in a certain area.[38] Because the more costly acts represent more severe punishments, an assumption of marginally increasing costs is reasonable.

Having discussed the cost of sanctioning, it is now possible to determine the conditions for using legal and non-legal sanctions efficiently. Generally, the cost of sanctioning is minimized when the marginal cost of inflicting legal and non-legal sanctions are equal. To understand why, consider the decision of a policymaker who is trying to achieve a given total sanction. Suppose that she initially uses only legal sanctions. If the "last" or marginal unit of the legal sanctions is very costly, she can reduce the total cost of sanctioning by replacing this unit with one equivalent unit of non-legal sanctions that is less expensive. She can continue to reduce the total cost of sanctioning by substituting more units of legal sanctions with units of cheaper non-legal sanctions. As she continues substituting in this manner, the savings gradually diminish as the marginal cost of legal sanctions gradually decreases while that of non-legal sanctions gradually increases. Once she reaches the point at which the marginal costs of legal and

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Vigilantism Resulting from "Megan's Law," 33 ST. MARY'S L.J. 101, 117 (reporting that in Dallas, Texas, more than 100 officers spent four days verifying sex offenders' addresses); Carol L. Kunz, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 480–81 (1997) (assessing the costs of SORNLs); Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 732–33 (1994) (pointing out cost-related problems in implementing SORNLs).

[37] *See, e.g.*, Denisue M. Bonilla & Joy L. Woodson, *Continuing Debate Over Megan's Law; Some Question Whether Sex Offender List Curbs Crime; The State Statute is Set to Expire Next Year*, L.A. TIMES, Feb. 14, 2003, at B2 (noting that verifying registration would cost the state $15 million to $20 million, which the California Attorney General called a "hefty request" given the California budget deficit); Kevin Dayton, *Budget Scenarios Criticized*, HONOLULU ADVERTISER, Feb. 26, 2002, at A1 (noting that the Hawaii Attorney General was considering the elimination of the state's sex offender registration program due to budget cuts); Scott Milfred, *5 Jobs that Deal With Sex Offenders Cut; The State Department of Corrections Has Eliminated the Positions to Save Money*, CAPITAL TIMES & WIS. ST. J., July 13, 2003, at A1 (describing job cuts in the Wisconsin program due to budget constraints).

[38] Non-legal sanctions are unique because through their use, the government can externalize some of the costs of sanctioning to the public. The amount of sanctions inflicted can therefore be raised without tapping into a limited government budget. Not only is this true of the cost of non-legal sanctions, which are quite obviously born by the sanctioning public, but is also true with respect to the costs of inducing non-legal sanctions. For example, in the context of SORNLs, some states have attempted to externalize the cost of notification to sex offenders. *See* IDAHO CODE § 18-8324(7) (Michie 2004) (requiring offender to pay for newspaper advertisements); IOWA CODE § 692A.6.1 (2003) (requiring offender to pay registration fee); LA. REV. STAT. ANN. § 15:542(D) (West 2004) (requiring offender to pay registration fee). Louisiana has also imposed the responsibility (and costs) of notification on the offenders themselves. *See id.* § 15:542(B)(1). From an economic perspective, all of these costs are part of the social costs of sanctioning and should be accounted for when developing a theory of efficient sanctioning.

non-legal sanctions are equal, any additional substitutions will cause the marginal cost of non-legal sanctions to exceed that of legal sanctions and will therefore raise the total cost of sanctioning. Hence, this point reflects the point at which the cost of sanctioning is minimized.[39]

A simple numerical example might clarify the argument. Assume that the required sanction of a certain type of criminal is 1000.[40] Table 1 presents a possible cost structure of inflicting legal and non-legal sanctions to such criminals. Column One represents units of legal sanctions, while Column Two (C(LS)) represents their corresponding cost. Column Three represents the units of non-legal sanctions required to make a total of 1000 sanction units, while Column Four (C(NLS)) represents their corresponding cost.[41] Finally, Column Five (C(TS)) represents the total cost of sanctioning.

TABLE 1: THE BENCHMARK CASE

Legal Sanction	C(LS)	Non-legal Sanction	C(NLS)	C(TS)
500	100	500	81	181
600	110	400	68	178
700	124	300	58	182

According to Table 1, the combination that minimizes the cost of sanctioning is the one in which there are 600 units of legal sanctions and 400 units of non-legal sanctions. If a policymaker chooses to deviate from that combination by substituting 100 units of legal sanctions with 100 units of non-legal sanctions, she will save the marginal cost of inflicting legal sanctions (10) but will have to spend an additional 13 on non-legal sanctions for a net loss of 3. If, on the other hand, she chooses to deviate by substituting 100 units of non-legal sanctions with 100 units of legal sanctions, she will save the marginal cost of inflicting non-legal sanctions

[39] The problem of minimizing the cost of sanctioning can sometimes lead to corner solutions in which the optimal result is to use only one of the two sanctioning technologies. This occurs when introducing a new sanctioning technology is more costly than increasing the magnitude of the existing sanctioning technology. This Article will only deal with situations in which a positive amount of both types of sanctions should be used.

[40] All of the figures in this example as well as subsequent examples reflect measured "disutility units." While measuring disutility may be a difficult task, courts and legislatures deal on a daily basis with issues that involve great measurement problems. The challenge of measuring non-legal sanctions can be similarly tackled.

[41] Note that the costs of both types of sanctions in the example are true to the marginally increasing assumption, meaning that each additional 100 units of either type of sanction are more costly than the previous 100 units.

(10), but will have to spend an additional 14 on legal sanctions for a net loss of 4. Thus, the cost-minimizing combination is the one in which the marginal costs of legal and non-legal sanctions are equal.

Despite the economic justification for the combined use of legal and non-legal sanctions, there are critics who oppose such a practice. In an influential article, Toni Massaro argued that shaming sanctions simply do not work as a means to deter crime in modern urbanized societies.[42] According to this argument, shaming sanctions might have been useful historically in close-knit communities, but they lose their utility in modern urban societies in which people do not know each other and do not care about the way others perceive them.[43] Admittedly, modern communities are not as close-knit as they used to be; they are larger, members know less about each other, and the probability of repeated dealings with the same members of the community is somewhat low. However, people today continue to live in sub-communities that exhibit the characteristics of close-knit communities. Families, neighbors, and work associates are examples of such sub-communities.[44] Thus, although a person might be indifferent as to whether a stranger knows that he used the services of a prostitute, he would probably not want his family members and co-workers to find out about such behavior.[45]

Furthermore, while shaming sanctions are very effective in cohesive groups, some argue that they will not be effective in contemporary America where there is no social consensus as to what constitutes a shameful

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[42] *See* Massaro, *supra* note 6, at 1921 (arguing that "[t]he cultural conditions of effective shaming seem weakly present, at best, in many contemporary American cities"); *see also* NORVAL MORRIS & MICHAEL TORNY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENT IN A RATIONAL SENTENCING SYSTEM 5 (1990) (arguing that sanctions based only on stigma "seem more romantic than real in the urban agglomerations where crime flourishes").

[43] *See* Massaro, *supra* note 6, at 1921–28.

[44] Extensive literature has been devoted to the importance of non-legal sanctions in the context of commercial transactions in modern America. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55–67 (1963) (presenting the initial contribution to this area of research). For more contemporary studies that deal with this issue, see, for example, Bernstein, *Diamond Industry*, *supra* note 1, at 138–48; Bernstein, *Cotton Industry*, *supra* note 1; David Charny, *Non-legal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990).

[45] Admittedly, non-legal sanctions that individuals face in a modern urban setting are not as severe as those in past, close-knit societies. In fact, some evidence does in fact indicate that sex offenders are moving to urban areas in order to minimize their harassment. For example, a disproportionately high number of offenders in Minnesota moved to Minneapolis, which led representatives of the city to reshape the local SORNL in a way that would force sex offenders out of the city. *See* Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1309–11 (2003). Similar concerns were raised in New York City. *See* Daniel M. Filler, *Making the Case for Megan's Law: A Case Study in Legislative Rhetoric*, 76 IND. L. REV. 315, 345 (2001). Despite this phenomenon, wrongdoers in modern urban settings will still face some level of non-legal sanctions to the degree that they are members of a sub-community.

act.[46] In a society as diverse as modern America's, different groups have varying attitudes toward what type of act is shameful.[47] For example, while some may find drug use shameful, others may disagree. Given these differences, there might also be inconsistencies as to what causes people shame.[48] For instance, while members of one group may find cleaning streets in a unique outfit degrading, others may not. However, even in a culture as diverse as America's there continues to exist some consensus as to what acts are shameful. As this Article will describe in more detail, this consensus exists especially in the case of sex offenses.[49]

In arguing against the use of shaming sanctions, critics further claim that criminals by their very nature are less susceptible to shame, therefore making it counterproductive to attempt to shame them.[50] However, such critics do not provide a clear empirical basis for their claim. Furthermore, this argument focuses only on the internal aspects of shaming and ignores its external aspects, as even the shameless would want to avoid losing central elements of their lives such as family, close friends, employment, and housing.

James Whitman, an opponent of shaming sanctions, points out the adverse effects of these sanctions on the sanctioning public.[51] More specifically, Whitman is concerned that delegating the act of punishing to the public could stir up emotions and create an atmosphere of lynch mob justice.[52] However, policymakers have the power to take measures to prevent this from happening.[53] Prosecution of vigilantes, policing demonstrations against offenders, and harm caused to innocent bystanders are all costs associated with shaming sanctions that must be incorporated into the cost-benefit analysis of these sanctions.

The inducement of non-legal sanctions also poses a problem in that it requires reliance on local communities and their own sanctioning norms to punish criminals rather than on a central government. While local norms may serve the narrow interests of a specific community, they may be inefficient from the perspective of the broader community.[54] For example, a

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[46] *See, e.g.*, Massaro, *supra* note 6, at 1922–23.

[47] *See id.* at 1922–24.

[48] *Id.*

[49] *See infra* notes 164–167 and accompanying text.

[50] *See* Massaro, *supra* note 6, at 1918 (arguing that "the people most likely to respond to public shaming sanctions are nonoffender members of the audience, not potential offenders").

[51] *See* Whitman, *supra* note 6, at 1087–92.

[52] *See id.*

[53] Historically, systems using shaming sanctions have been aware of this problem and devoted resources to controlling the behavior of the sanctioning public. For example, when the pillory was used in England, constables made sure that the event would not deteriorate to wild violence. *See* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660–1800, at 614–16 (1986).

[54] *See* Posner, *Inefficient Norms*, *supra* note 4, at 1720–21 (analyzing the potential inefficiencies of norms that generate negative externalities).

local community may choose to punish criminals by banishing them.[55] Such sanctions are potentially inefficient since they result in a negative outcome outside of the local community, namely the relocation of an offender to a neighboring area.[56] As with banishment, housing discrimination may be inefficient since it simply forces criminals to find housing elsewhere. A system based on non-legal sanctions must therefore expend resources on regulating these sanctions, and outlawing certain inefficient sanctions may be necessary.[57]

Critics of non-legal sanctions further contend that stigmatizing criminals may drive them to commit additional crimes.[58] Criminologists theorize that labeling individuals as deviants may cause them to further withdraw from society into either a life within criminal subcultures or one of solitary deviance.[59] Social psychologists also point to the self-fulfilling aspects of stereotypes and stigmas.[60] According to these studies, stereotypes may create a psychological burden that adversely affects performance in situations

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[55] This seems to be the case currently with respect to sex offenders. *See, e.g.*, Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 908 (1995) (noting that "[s]ometimes the community outrage and rejection forces the offender out of town"). For a review of the non-legal sanctions suffered by offenders, see Part II of this Article.

[56] *See* Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. (forthcoming June 2005).

[57] *See, e.g.*, N.J. STAT. ANN. § 2C:7-11(c)(7) (West 1997) (prohibiting housing discrimination on the basis of registration as a sex offender).

[58] *See, e.g.*, Persons, *supra* note 11, at 1544–45 (pointing out the specific deterrence problems associated with publishing the names of patrons of prostitutes).

[59] *See, e.g.*, HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963); FRANK TANNENBAUM, CRIME AND THE COMMUNITY 8–22 (1938); Kai T. Erikson, *Notes on the Sociology of Deviance*, 9 SOC. PROBLEMS 307, 308–13 (1962); W. B. Miller, *Lower-Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5, 5–19 (1958).

[60] *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797 (1995) (demonstrating that exposing African Americans to a disparaging stereotype about their group's intellectual abilities caused them to perform significantly worse than Caucasians on a standardized test). These results have been duplicated in numerous studies in different contexts. *See, e.g.*, J. C. Croizet & T. Claire, *Extending the Concept of Stereotype Threat to Social Class: The Intellectual Underperformance of Students from Low Socioeconomic Backgrounds*, 24 PERSONALITY & SOC. PSYCH. BULL. 588 (1998) (showing that students of low socioeconomic status underperform on a verbal test if it is framed as a test of intelligence); Jacques-Philippe Leyens et al., *Stereotype Threat: Are Lower Status and History of Stigmatization Preconditions of Stereotype Threat?*, 26 PERSONALITY & SOC. PSYCH. BULL. 1189 (2000) (reporting the effects of male stereotypes with respect to their processing of emotional information); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613 (1997) (reporting the effects of female stereotypes on standardized math test performance); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCH. 1213 (1999) (showing the effects of stereotypes on Caucasians with respect to athletic abilities). For a review of the literature, see S. Christian Wheeler & Richard E. Petty, *The Effects of Stereotype Activation on Behavior: A Review of Possible Mechanisms*, 127 PSYCH. BULL. 797 (2001).

subject to the stereotype[61] or may decrease one's self-expectations and in turn cause lower performance.[62]

In economic terms, the concept of marginal deterrence offers an additional explanation for the high crime rates among stigmatized individuals. The theory of marginal deterrence asserts that the law should refrain from inflicting too harsh a penalty for a crime since such sanctions will inhibit the deterrence of additional crimes.[63] Individuals penalized by a harsh sanction will face no effective sanction for additional crimes since they already face the extremely high sanction associated with their first crime. For example, if the punishment for robbery is death, then a robber may as well kill the victim, since she incurs no further punishment for doing so and lowers her probability of getting caught by eliminating a witness.[64]

The threat of non-legal sanctions is important in any deterrence regime.[65] However, individuals with less to lose in a social context (in other words, who have less social capital) are affected less by non-legal sanctions and are therefore more difficult to deter.[66] Indeed, an abundance of studies point out that such individuals tend to have higher crime rates. Crimes are committed in disproportionately high numbers by unmarried people,[67] individuals with lower social statuses (that is, low socio-economic status or membership in an oppressed minority group),[68] and people with high residential mobility.[69] In addition, historical studies demonstrate that extreme

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[61] *See* Steele, *supra* note 60, at 616–17. This explanation has recently been confirmed by studies that quantified both the psychological anxiety and physiological changes that stereotypes cause. *See* Jim Blascovich et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 PSYCH. SCI. 225, 228 (2001) (finding that African Americans exhibited higher blood pressure than European Americans when under stereotype threat even though the two groups exhibited similar blood pressure levels in the absence of such a threat); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCH. 4, 14–21 (1999) (reporting a relationship between stereotype-induced anxiety and poor test performance).

[62] *See* Mara Cadinu et al., *Stereotype Threat: The Effect of Expectancy on Performance*, 33 EURO. J. SOC. PSYCH. 267, 269–70 (2003); Charles Stagnor et al., *Activating Stereotypes Undermines Task Performance Expectations*, 75 J. PERS. & SOC. PSYCH. 1191 (1998). *But see* Leyens et al., *supra* note 60, at 1197 (arguing that it is very unlikely that participants performed less well because they felt helpless and unmotivated).

[63] *See, e.g.*, George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

[64] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 222 (6th ed. 2003).

[65] *See* Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 325–35 (1980) (presenting an empirical measurement of the deterrence power of non-legal sanctions).

[66] For an analysis of the effects of social capital on the design of criminal sanctions for repeat offenders, see David A. Dana, *Rethinking the Puzzle of Escalating Sanctions for Repeat Offenders*, 110 YALE L.J. 733, 774–75 (2001).

[67] *See, e.g.*, Nancy T. Wolfe et al., *Describing the Female Offender: A Note on the Demographics of Arrests*, 12 J. CRIM. JUST. 483, 483–92 (1984).

[68] *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 48–49 (1989).

[69] Studies of the connection between population mobility and crime rates date to the 1930s. *See* Elsa Schneider Longmoor & Erle Fiske Young, *Ecological Interrelationships of Juvenile Delinquency, Dependency, and Population Mobility: A Cartographic Analysis of*

non-legal sanctions lead subjected individuals to a life of criminal activity. For instance, cheek branding, a sanction used in eighteenth-century England, made an un-concealable mark on the cheeks of criminals, depriving them of any opportunity to reintegrate into society and driving them into a life of habitual crime.[70]

Thus, non-legal sanctions that are extremely harsh may make it difficult to rely on non-legal sanctions to deter future crimes. However, policymakers can create a re-integrative shaming regime characterized by the reacceptance of criminals into the community after they have been shamed.[71] Such a regime would rebuild the social capital of criminals so that they would be threatened by future non-legal sanctions.

Finally, critics have argued that state-sponsored shaming is morally wrong.[72] It would seem, however, that given the degrading nature of imprisonment, any such argument is unconvincing once framed within a discussion of substituting imprisonment with non-legal sanctions.[73] Furthermore, if the sanctioning regime allows criminals to choose between legal and non-legal sanctioning,[74] they will suffer from what they perceive to be the lighter sanction.[75] Therefore, a moral argument against non-legal sanctions is hard to defend.

The use of non-legal sanctions may, on the other hand, raise a different moral concern. Arguably, non-legal sanctions have a higher variance than legal sanctions. One offender may be subjected to extraordinarily harsh non-legal sanctions, while another offender who committed an identical crime may suffer a milder non-legal sanction. From an economic standpoint that focuses on the ex ante perspective of sanctioning, this is of no major consequence as long as similar offenders face similar sanctions ex ante. However, if the purpose of criminal sanctions is ex post retribution, the use of non-legal sanctions does raise a serious problem, since criminals who are

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Data from Long Beach, California, 41 AMER. J. SOC. 598, 598–610 (1936). For a more recent study, see Robert D. Crutchfield et al., *Crime Rate and Social Integration: The Impact of Metropolitan Mobility*, 20 CRIMINOLOGY 467 (1982).

[70] *See* POSNER, SOCIAL NORMS, *supra* note 3, at 105–06.

[71] *See* BRAITHWAITE, *supra* note 68, at 55. Despite Braithwaite's call for reintegration, he asserts that shame has an important role in deterring crime and sustaining a free society. *Id.* at 55.

[72] *See, e.g.*, Massaro, *supra* note 6, at 1942–43; Whitman *supra* note 6, at 1090–91.

[73] *See, e.g.*, Garvey, *supra* note 11, at 760 (noting that "evaluating which is more 'undignified'—prison or public shaming—will depend on the details"); Kahan, *supra* note 7, at 646 (arguing that "[h]owever cruel shaming is, imprisonment is much worse. It expresses at least as much condemnation, and adds a grotesque variety of indignities that shaming cannot hope to rival").

[74] This practice is not unprecedented. *See, e.g.*, Jay Mathews, *Freedom Means Having to Say You're Sorry; Criminal Justice System Tries an "Apology Ad" Program as an Alternative to Prison*, WASH. POST, Nov. 9, 1986, at A3 (reporting a case in which the defendant was allowed to choose to publish an apology in a local newspaper in lieu of jail time).

[75] *See* Kahan, *supra* note 7, at 647 (stating that "it is more than paradoxical—it is either confused or disingenuous—to say that one of the reasons to disregard offenders' preferences is to spare them from cruelty").

equally blameworthy from a moral perspective may suffer different sanctions. Thus, if non-legal sanctions do in fact have a higher variance than legal sanctions, the argument in favor of using them is more closely aligned with the goal of deterrence rather than retribution.

As shown above, there is a strong economic case for the use of non-legal sanctions. While there are some valid concerns about the use of such sanctions, these concerns do not represent a reason to forgo their use. This Article now turns to present a model of shaming that incorporates the effects of the law on the shaming behavior of individuals.

C. An Endogenous Model of Shaming

The analysis thus far has assumed that a policymaker can simply reduce legal sanctions without affecting the amount of non-legal sanctions imposed. This type of analysis is consistent with current economic studies of non-legal sanctions.[76] This Section of the Article will relax this assumption and offer an endogenous model for the combined use of legal and non-legal sanctions. The model indicates that reducing legal sanctions may lower or raise the level of non-legal sanctions depending on the social context. Since there is currently limited empirical data evaluating this issue, both possibilities will be tentatively analyzed.[77]

1. The Signaling Case

One can plausibly assume that the desire to impose non-legal sanctions decreases as the level of legal sanctions decreases. The infliction of legal sanctions may serve as a signal that a wrongdoer deserves to be subject to non-legal sanctions as well.[78] Thus, when courts lower the legal sanctions applied to a certain type of offender, society may want similarly to lower its infliction of non-legal sanctions. This in turn will cause the cost of inducing the original level of non-legal sanctions to increase. This effect will be

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[76] *See, e.g.*, Robert Cooter & Ariel Porat, *Should Courts Deduct Non-legal Sanctions from Damages?*, 30 J. LEGAL STUD. 401 (2001) (overlooking the fact that deducting non-legal sanctions from damages might affect the level of non-legal sanctions imposed); Kahan & Posner, *supra* note 7 (overlooking the effects of substituting legal sanctions with non-legal sanctions).

[77] Given the current limited data on non-legal sanctions, it is not uncommon for scholars to reach tentative conclusions in this field. *See, e.g.*, Kahan, *supra* note 7, at 607 (maintaining that "the existing gap in empirical knowledge should not discourage informed speculation about how deep-seated public sensibilities shape the opportunities for reform"); Massaro, *supra* note 6, at 1918 (noting that "[t]hese conclusions are subject to an important caveat. No empirical work currently is available with which to test the practical impact of shaming sanctions. What follow, therefore, are provisional hypotheses.").

[78] *See* BRAITHWAITE, *supra* note 68, at 181 (stating that "the levels of punishment the state provides for a particular crime themselves give a message about how shameful that offense is"); Kahan, *supra* note 7, at 603 (presenting an endogenous analysis of the law's impact on moral perceptions).

referred to as "the signaling effect." John Lott's study of non-legal sanctions in the context of larceny and theft lends some empirical support for the signaling effect, as he found that longer prison sentences are related to lower post-conviction income (that is, a higher non-legal sanction).[79]

Two claims can be made as to the efficient use of legal and non-legal sanctions in the signaling case. First, the cost of sanctioning continues to be minimized at the point at which the marginal cost of inflicting either sanction is equal. The reasoning is similar to the benchmark case discussed in Part I.B. As long as a policymaker is not at the point of equal marginal costs, she can always lower the cost of sanctioning by shifting to the sanctioning technology with the lower marginal cost. Second, the efficient combination of legal and non-legal sanctions will have a higher level of legal sanctions when compared to the benchmark case of Part I.B. To understand why, consider again a policymaker who is trying to achieve a given total sanction only using legal sanctions. She begins to gradually substitute legal with non-legal sanctions. However, each substitution has two effects. First, as in the benchmark case, each substitution forces the policymaker to use non-legal sanctions with increasing marginal costs. Second, each substitution lowers the level of legal sanctions, which raises the marginal cost of non-legal sanctions. In other words, in the signaling case, each substitution will cause a greater increase in the marginal cost of non-legal sanctions. Thus, the policymaker will reach the point at which the marginal costs of both sanctions are equal after substituting a lower amount of legal sanctions, resulting in a cost-minimizing combination that includes a higher level of legal sanctioning.

A simple numerical example may be useful. The signaling effect can be captured as a rise in the cost of inducing non-legal sanctions when the legal sanctions are reduced. Table 2 presents a possible cost structure for such a case.

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[79] *See* John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583, 597 (1992). Part of the decline in the income of individuals serving prison sentences can be explained by the fact that they lose some of their human capital during their prison stay. Nevertheless, the data presented by Lott demonstrates that the decline in the income of convicted individuals exceeds any potential loss due to the loss of human capital. *But see* Nigel Walker & Catherine Marsh, *Do Sentences Affect Public Disapproval?*, 24 BRIT. J. CRIMINOLOGY 27, 40–41 (1984) (presenting data suggesting that sentencing generally has a limited effect on the level of disapproval of a wrongful act).

TABLE 2: THE SIGNALING CASE

Legal Sanction	C(LS)	Non-legal Sanction	C(NLS)	C(TS)
500	100	500	98	198
600	110	400	77	187
700	124	300	60	184

As is evident from Table 2, the cost-minimizing combination of sanctions is 700 units of legal sanctions and 300 units of non-legal sanctions, the point at which the marginal costs of both are equal. Furthermore, Table 2 demonstrates that the rise in the cost of non-legal sanctions created by the signaling effect shifts the cost-minimizing combination to one in which a higher amount of legal sanctions is utilized.

2. The Substitution Case

One can also plausibly assume that the desire to inflict non-legal sanctions increases as the level of legal sanctions decreases in an effort to compensate for the decreased legal sanctions. The public has a desire to see offenders suffer an "appropriate" punishment, which can be exacted through legal or non-legal means.[80] Since legal sanctions and non-legal sanctions produce the same outcome (harm to wrongdoers), they may serve as substitutes for each other. In other words, offenders have a debt to repay to society, and this debt can be discharged through legal or non-legal means.[81] This effect will be referred to as "the substitution effect."[82]

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[80] This effect can bring about not only non-legal sanctions but also non-legal "remedies" to those subjected to what their community perceives as excessive legal sanctions. For example, Braithwaite reports that, while 90% of doctors found liable in medical malpractice suits suffered less business, 8% actually reported an increase in business after the suit. This occurred because fellow doctors sympathizing with the sanctioned doctors took measures to assist them. *See* BRAITHWAITE, *supra* note 68, at 128.

[81] In the context of non-legal sanctioning of sex offenders, some argue that offenders have "paid their debt to society" through incarceration and should not be subjected to further social sanctions. *See, e.g.*, Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 175 (2003) (quoting comments made by Rep. Melvin Watt (D-N.C.)); Logan, *supra* note 45, at 1292–93 (referring to comments made by state senator Thomas Neuville (R-Minn.)); Amy L. Van Duyn, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 659 (1999) (arguing that "once offenders are released, they have paid their debt to society and have the constitutional right to re-integrate into society.").

[82] There is much literature to support the argument that the law has evolved as a substi-

Empirical support for the substitution effect can be found in the "crowding out" literature. Much research has indicated that organized regulatory and market institutions may crowd out public motivation to create alternative social mechanisms that might achieve the same result.[83] Recently, these studies have expanded to the field of sanctioning and demonstrated that the use of legal sanctions may similarly crowd out non-legal sanctions.[84] For example, a study conducted in daycare centers in Israel found that the introduction of a fine levied on parents who were late in picking up their children actually caused an increase in the number of tardy parents.[85] This finding seems to indicate that when legal sanctions such as a fine are introduced, non-legal sanctions such as guilt and shame are crowded out.[86]

Two claims can be made as to the efficient use of legal and non-legal sanctions in the substitution case. First, as before, the cost of sanctioning is minimized when the marginal costs of inflicting legal and non-legal sanctions are equal. Second, the efficient combination of sanctions will have a lower level of legal sanctions in the substitution case than in the benchmark

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tute for non-legal sanctions, specifically for revenge-based ones. Perhaps the most famous such claim can be found in OLIVER W. HOLMES, JR., THE COMMON LAW 1–38 (1881). In his first lecture on the law, Holmes argues that various forms of legal liability developed from the concept of revenge. For a more contemporary analysis of this argument, see RICHARD A. POSNER, LAW AND LITERATURE 49–60 (2d ed. 1998) in which he analyzes the evolution from revenge to the law. For a model of the development from a revenge-based society to a legalistic one, see, for example, Geoffrey MacCormack, *Revenge and Compensation in Early Law*, 21 AM. J. COMP. L. 69, 74 (1973).

[83] *See, e.g.*, RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971) (arguing that monetary payments to blood donors can diminish the amount of blood given voluntarily); Axel Ostmann, *External Control May Destroy the Commons*, 10 RATIONALITY & SOC'Y 103 (1998) (suggesting that external regulation of pooled resources can diminish the moral obligations of individuals and undermine internal regulation). Additional support for this effect can be found in John Lott's study of non-legal sanctions applied to individuals convicted of drug-related crimes. *See* John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEGAL STUD. 159, 176 (1992). In this study, Lott found that individuals with longer prison sentences had higher post-conviction income (in other words, a lower non-legal sanction). However, these results were not statistically significant. *See also* Walker & Marsh, *supra* note 79, at 40 (stating that "in certain circumstances a severe sentence might even *lower* disapproval").

[84] *See* Juan Camilo Cardenas & John Stranlund, *Local Environmental Control and Institutional Crowding-Out*, 28 WORLD DEV. 1719 (2000) (pointing out that the introduction of a regulatory environmental scheme backed by legal sanctions can diminish the tendency of individuals to act according to group interests); Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

[85] *See* Gneezy & Rustichini, *supra* note 84, at 5–8.

[86] Although Gneezy and Rustichini do not make their argument in the terms used above, they in effect derive a similar explanation. They contend that the situational norm is to pay for daycare center services. They hypothesize that the introduction of a fine changes the nature of the transaction because once a price is set for these services in the form of a fine, being late no longer violates the norm. *See id.* at 13–14. Gneezy and Rustichini offer another explanation that relies on a model in which parents have imperfect information as to the daycare center manager as a person (i.e., what kind of sanctions she will inflict if they are late to pick up their child). In this model, after the fine has been fixed, the deterrent on parents' lateness (formerly in the form of an uncertain fine) is diminished and more parents choose to be late. *See id.* at 10–13.

case of Part I.B. To understand why, consider once again our policymaker. In the substitution case, each reduction in legal sanctions has two effects. First, as in the benchmark case, each substitution shifts the policymaker to a non-legal sanction with a higher marginal cost. Second, each reduction in legal sanctions lowers the cost of non-legal sanctions by raising the motivation of individuals to inflict non-legal sanctions. Thus, each move to non-legal sanctions causes a smaller increase in marginal cost than the benchmark case. The policymaker thereby reaches the point at which the marginal costs of both sanctions are equal after substituting a greater amount of legal sanctions, resulting in a cost-minimizing combination that has a lower level of legal sanctions.

Following the numerical example presented above, the substitution effect can be captured as a decrease in the cost of inflicting non-legal sanctions when legal sanctions are reduced. Table 3 presents a possible cost structure for such a case.

TABLE 3: THE SUBSTITUTION CASE

Legal Sanction	C(LS)	Non-legal Sanction	C(NLS)	C(TS)
500	100	500	71	171
600	110	400	63	173
700	124	300	56	180

In Table 3, the cost-minimizing combination of sanctions in this case is 500 units of each type, the point at which the marginal costs of both are equal. Furthermore, Table 3 illustrates how the decrease in the cost of non-legal sanctions created by the substitution effect can shift the cost-minimizing combination to one in which a lower amount of legal sanctions is used.

D. Endogenous Legal Sanctions

This Section of the Article evaluates the way non-legal sanctions might affect legal sanctions. More precisely, judges, jurors, and prosecutors may adjust legal sanctions in order to take into account the non-legal sanctions that offenders face. Furthermore, high mandatory non-legal sanctions may lead to the counterintuitive result of lowering the aggregate sanctions that offenders face.

Certain players in the criminal justice system hold substantial discretion over the sanctioning process. For instance, if legislatures enact non-

legal sanctions at a level that judges or prosecutors perceive as unfair, they might circumvent these non-legal sanctions by choosing not to use them or by using their discretion to adjust the legal sanctions. In such cases, the total sanction wrongdoers face will remain relatively stable, yet the internal distribution of legal and non-legal sanctions may change. However, if the application of these non-legal sanctions is mandatory and if judges and prosecutors perceive them to be excessive, their only option is to not convict the offender of a crime that triggers the non-legal sanctions.[87] Judges can achieve this goal by acquitting defendants, while prosecutors can achieve this goal by pleading defendants to alternative offenses that do not trigger the non-legal sanctions.[88] This latter practice has been documented in the contexts of the Federal Sentencing Guidelines and federal supplemental sanctions, such as the ban on owning firearms attached to convictions for domestic abuse.[89] In such cases, the total sanction wrongdoers face may decrease as a result of circumvention.

Adding high mandatory non-legal sanctions to legal sanctions may also affect the plea bargaining process by raising the incentives of defendants to go to trial.[90] If the non-legal sanctions associated with a plea are mandatory, the only benefit of a plea agreement for defendants is the savings in trial costs, which in many cases may not justify forgoing the opportunity of acquittal. In turn, prosecutors, who operate within budgetary constraints and want to encourage plea agreements, may attempt to circumvent the mandatory sanctions by reducing the charges to ones that do not trigger them.

The following numerical example may clarify the argument.[91] Assume that a prosecutor can charge a defendant with either assault or sexual assault. The maximum legal sanction for assault is 500, and the maximum legal sanction for sexual assault is 1000. Both parties have equal probabilities to win at trial with respect to both charges. If the prosecutor wishes to maximize the sanction imposed on the defendant, she will charge him with sexual assault. At this point, the defendant will agree to plea to sexual assault as long as the prosecutor offers him a sanction that is lower than his expected sanction (0.5 * 1000 = 500). Now assume that a mandatory non-legal sanction of 1100 is applied to those convicted of sexual as-

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[87] *See* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2451 (1997).

[88] *See id.* Additionally, jurors could express their disapproval of a particular non-legal sanction by refusing to convict a defendant. *See id.*

[89] *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284 (1997) (discussing the circumvention of the Federal Sentencing Guidelines); Robert A. Mikos, *State Crimes Carrying Federal Penalties: The Law and Economics of Federal Supplemental Sanctions* (unpublished manuscript, on file with author) (discussing the circumvention of federal supplemental sanctions).

[90] *See* Mikos, *supra* note 89 (analyzing this point in the context of federal supplemental sanctions). All mandatory sanctions present this risk. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

[91] *See* Mikos, *supra* note 89 (presenting a similar example).

sault but not to those convicted of assault. The introduction of this sanction eliminates the incentive of the defendant to agree to a plea, since the lowest sanction the prosecutor can offer him (the mandatory 1100), is greater than the expected sanction at trial (0.5 * (1000 + 1100) = 1050). Thus, the only possible plea will be to an assault charge, which will allow the prosecutor to offer the defendant a sanction that is below his expected sanction at trial (0.5 * 500 = 250). The different payoffs for defendants are compiled in Table 4.

TABLE 4: SANCTIONS WITH AND WITHOUT MANDATORY SUPPLEMENTAL NON-LEGAL SANCTIONS

	Non-legal Sanctions Not Added		Non-legal Sanctions Added	
	Expected Sanction	Plea Range	Expected Sanction	Plea Range
Charge: Sexual Assault	500	<500	1050	1100<
Charge: Assault	250	<250	250	<250

Furthermore, encouraging defendants to litigate rather than accept plea agreements may in fact lower the total sanction that is imposed on offenders.[92] Once defendants can credibly threaten to go to trial, prosecutors will have to either agree to plea bargain to lesser charges that do not trigger the non-legal sanctions and have lower legal sanctions or prosecute a smaller number of offenders for larger sanctions. Returning to the numerical example above, assume that the prosecutor has a fixed budget of $20, trials cost prosecutors $10, plea agreements cost prosecutors $1, thirty potential defendants can possibly be prosecuted for sexual assault, and prosecutors and defendants have equal bargaining power in plea negotiations (they agree on a sanction that is half of the expected sanction). In the absence of mandatory non-legal sanctions, the prosecutor will be able to reach plea agreements with twenty defendants on sexual assault charges for a total sanction of 5000. However, in a world with mandatory non-legal sanctions, prosecutors can no longer plead defendants to sexual assault and are forced to choose between three other options: plea twenty defendants to assault for a total sanction of 2500; plea ten defendants to assault and take one to trial on a sexual assault charge for a total expected sanction of 2300; or take two defendants to trial on a sexual assault charge for a total expected sanc-

[92] *See id.*

tion of 2100. All of these options represent a reduction in the aggregate sanction these thirty offenders face.

Thus, the actual legal sanction offenders face might change once non-legal sanctions are introduced. At times, legislatures may simply add non-legal sanctions to existing legal sanctions on the assumption that the process is simply additive.[93] This mistaken belief is exacerbated by the fact that legislatures may only account for the cost of inducing non-legal sanctions while ignoring their social costs.[94]

Thus far, this Article has argued that using non-legal sanctions as a substitute for legal sanctions can lower the aggregate cost of sanctioning. Designing a regime that will utilize non-legal sanctions in an optimal fashion requires taking into account the potential effects of legal sanctions on non-legal sanctions and vice versa. Building upon these insights, the Article now turns to analyze the way in which sex offenders are sanctioned.

II. SANCTIONING SEX OFFENDERS EFFICIENTLY

This Part of the Article will evaluate a concrete example of using legally induced non-legal sanctions as punishment, namely the current practice of publicizing the names of sex offenders. It will begin by reviewing the current content of SORNLs and then demonstrating their weakness as crime prevention tools. Next, this Article will argue that SORNLs should be viewed as a sanction-generating tool. Finally, it will evaluate the potential effects of SORNLs on the legal sanctions and future criminal behavior of sex offenders.

A. Legal Background: Sex Offender Registration and Notification Laws

SORNLs, commonly known as Megan's Laws, reflect a significant change in the landscape of American criminal law.[95] In general, these laws require convicted sex offenders who are released into the community to register as offenders and provide for some level of public notification as to the presence of a sex offender in a community. Currently, all fifty states and the District of Columbia have enacted their own SORNLs.[96]

Undoubtedly, the event that triggered the wave of registration and notification legislation was the brutal murder of seven-year-old Megan

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[93] *See* Kahan, *supra* note 7, at 605 (noting that the use of alternative sanctions has caused sanctions to become more severe since they have simply been added to preexisting sanctions).

[94] *See supra* note 38 (highlighting some of the social costs of non-legal sanctions).

[95] In fact, these laws are not limited to the United States. *See* Meghann J. Dugan, *Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 LOY. L.A. INT'L & COMP. L. REV. 617 (2001) (comparing American SORNLs to their English equivalent).

[96] *See* Appendix to this Article (citing the SORNLs of the fifty states and the District of Columbia).

Kanka on July 29, 1994.[97] Megan was raped and murdered by a Kanka family neighbor, a previously convicted sex offender.[98] Following the murder, Megan's parents began a public campaign for the adoption of sex offender registration and notification laws. Just two weeks after the murder, bills providing for sex offender registration and notification were introduced to the New Jersey General Assembly,[99] and New Jersey enacted its SORNL by October of that year.[100] Following in New Jersey's footsteps, other states enacted their own SORNLs.[101]

Politicians in Congress, aware of the growing national concern over sex offenders, moved to introduce federal legislation addressing the issue. The 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program required all states to enact sex offender registration laws.[102] It gave states a strong incentive to comply with its requirements by conditioning federal law enforcement grants on this enactment.[103] In 1996, Federal lawmakers decided to go a step farther and require the addition of notification provisions in states' SORNLs.[104] Following this amendment, the guidelines issued by the Attorney General explicitly stated that information regarding sex offenders must be disseminated to the general public when needed.[105]

A full comparative analysis of SORNLs is beyond the scope of this Article. Nevertheless, some characterization of these laws is useful. The Jacob Wetterling Act sets out minimal registration requirements that states must meet. Every state is required to have a sex offender registry, which must include the names, addresses, fingerprints, and photographs of all sex

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[97] *See* E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997) (describing how SORNLs spread to forty-nine states following the murder). Although the murder triggered nationwide adoption of SORNLs, some states already had such laws, including California, which enacted its SORNL in the 1940s. *See* CAL. PENAL CODE § 290 (West 1947). The first state to introduce the concept of public notification was Washington, which enacted its Community Protection Act in 1990. *See* WASH. REV. CODE ANN. §§ 4.24.550, 9A.44.130 (West 1995 & Supp. 1997). As of 1983, five states had enacted some form of a sex offender registration law. *See In re* Reed, 33 Cal. 3d 914, 925 (1983). Nevertheless, until the case of Megan Kanka, there was no sign that other states were about to adopt similar laws.

[98] *See E.B.*, 119 F.3d at 1081.

[99] *See id.*

[100] *See* N.J. Stat. Ann. §§ 2C:7-1–7-11 (West 2004).

[101] According to one account, in 1994, prior to the enactment of any federal legislation, twenty-five states had some form of SORNL and sixteen other states were considering similar pieces of legislation. *See* Houston, *supra* note 36, at 731.

[102] 42 U.S.C. § 14071 (2000) (codifying the Jacob Wetterling Act).

[103] *Id.* § 14071(g).

[104] *Id.* § 14071(e)(2) (stating that "the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section"). Until 1996, federal law did not require states to engage in notification and simply indicated that states "may release" information in order to protect the public safety. *Id.* § 14071(d).

[105] *See* Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 FED. REG. 572, 581 (1999) [hereinafter The Final Guidelines] (instructing that "[i]nformation must be released to members of the public as necessary to protect the public from registered offenders").

offenders.[106] Registration is necessary after a conviction of one of the enumerated offenses in the statute.[107] These offenses include all sex crimes, regardless of the identity of the victim, as well as several specific crimes (such as kidnapping) that require registration only if the victim is a minor.[108] Despite the fact that SORNLs are perceived and marketed as laws aimed at preventing sex crimes that target children,[109] some of these laws have an extremely large scope, covering all sex offenders.[110]

Initial registration is conducted upon the conviction of the offender, his release from incarceration, or his moving into a new state.[111] Offenders are required to update any change in their personal information and verify this information on an annual or quarterly basis.[112] The minimum period of registration required by the Jacob Wetterling Act is ten years from the date of release from prison.[113] However, any offender that has been convicted more than once of an enumerated offense, has been convicted of an aggravated offense, or has been found to be a sexually violent predator, must register for life.[114]

Although the Jacob Wetterling Act requires public notification, it leaves flexibility on how this notification is carried out. In fact, states diverge dramatically on this matter.[115] The predominant method of notification is through the Internet. Currently, approximately forty states and the District of Columbia operate websites allowing visitors to obtain information

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[106] 42 U.S.C. § 14071(b) (2000). In addition, the Jacob Wetterling Act requires states to collect information about individuals deemed to be sexually violent predators, such as identifying factors, anticipated future residence, offense history, and documentation of any treatment for mental abnormalities or personality disorders. *Id.* § 14071(b)(1)(B).

[107] *Id.* § 14071(a)(1)(A) (basing registration requirements on past convictions). *But see infra* Part III.E (discussing registration based on charges rather than on convictions).

[108] *Id.* §§ 14071(a)(1)(A), (a)(3)(A) (requiring registration of persons convicted of a sexually violent offense or of a criminal offense against a minor, including certain sex-related crimes, kidnapping, and false imprisonment).

[109] *See* Filler, *supra* note 45, at 355–58 (noting that in most legislative debates, members often represent the laws as targeting sex offenders who victimize children). In his remarks at the signing ceremony of Megan's Law on May 17, 1996, President William Jefferson Clinton made the following remarks:

> From now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love. Today America warns: If you dare prey on our children, the law will follow you wherever you go. State to state, town to town.
>
> Today, America circles the wagon around our children.

Remarks on Signing Megan's Law and an Exchange With Reporters, 1 PUB. PAPERS OF THE PRESIDENTS: WILLIAM J. CLINTON 763–64 (1996).

[110] *See, e.g.*, N.J. STAT. ANN. § 2C:7-2b (West 2004).

[111] 42 U.S.C. §§ 14071(a)(1)(a), (b) (2000).

[112] *Id.* §§ 14071(b)(1)(A)(ii), (b)(3).

[113] *Id.* § 14071(b)(6)(A).

[114] *Id.* § 14071(b)(6)(B).

[115] *See* Carol L. Kunz, *Towards Dispassionate, Effective Control of Sex Offenders*, 47 AM. U. L. REV. 453, 458–60 (1997) (reviewing the great variety of notification schemes).

about registered sex offenders.[116] All of these websites include general details such as the offender's name, date of birth, physical characteristics, and the offense committed.[117] Other websites include additional information such as the offender's photograph and a description of his mode of operation.[118] This information is searchable by the offender's name or geographical area.[119]

Aside from the Internet, states employ an array of other notification tools. In California, until recently, notification occurred primarily by calling a 900 number or using CD-ROMs available at local police stations.[120] Other states require police officers to conduct notification.[121] Louisiana has perhaps the most intrusive notification provisions. Under the Louisiana SORNL, an offender is required to give notice of his name, address, and crime to at least one person in every residence or business within a one-mile radius in a rural region or a three-square-block area in an urban region.[122] In addition, the offender is required to publish, at his expense, an advertisement in the newspaper or an official journal that includes the details of his crime, his name, his address, and his photograph.[123] Louisiana courts can order additional methods of notification, such as signs, handbills, bumper stickers, or labeled clothing.[124]

Finally, states differ as to whether sex offenders should be assessed for their risk of re-offending prior to notification. Some states, such as Massachusetts, New York, and New Jersey, choose to conduct such assessments.[125] In Massachusetts, this assessment involves a special board that

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[116] As of 2002, thirty-four states and the District of Columbia had such websites. *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 1(a)-24(a), Smith v. Doe, 538 U.S. 84 (2003) (No. 01-729). Since then, at least six additional states have begun to operate such websites. *See* http://www.meganslaw.ca.gov/ (California's notification website); http://www.iowasexoffenders.com/ (Iowa's notification website); http://www.informe.org/sor/ (Maine's notification website); http://www.oit.nh.gov/nsor/search.asp (New Hampshire's notification website); http://www.drc.state.oh.us/search2.htm (Ohio's notification website); http://docapp8.doc.state.ok.us/servlet/page?_pageid=190&_dad=portal130&_schema=PORTAL30 (Oklahoma's notification website) (all last visited Mar. 15, 2005).

[117] *See, e.g.*, http://www.mipsor.state.mi.us/ (Michigan's notification website) (last visited Mar. 15, 2005).

[118] The New Jersey website offers such information. *See* http://www.njsp.org/info/reg_sexoffend.html (last visited Mar. 15, 2005).

[119] *See, e.g.*, the Michigan website, *supra* note 117; the New Jersey website, *supra* note 118. In addition, the New Jersey website offers users more advanced search options based on an offender's physical characteristics and vehicle. *Id.*

[120] *See* CAL. PENAL CODE §§ 290.4(a)(3)–(4) (West 2005).

[121] For example, the Alabama SORNL requires the police chief or sheriff to disclose the residence of a sex offender to all persons living within 1000 feet of the offender in cities, 1500 feet in towns, or 2000 feet in rural areas. *See* ALA. CODE § 15-20-25(a) (1999).

[122] *See* LA. REV. STAT. ANN. § 542B(1)(a) (West 2004). Additionally, subsection (b) requires the offender to notify the superintendent of the school district in which he resides, and subsection (c) requires him to notify the lessor, landlord, or owner of the property on which he resides. *See id.* § 542B(1)(b)–(c).

[123] *See id.* § 542B(2)(a).

[124] *See id.* § 542B(3).

[125] *See* MASS. GEN. LAWS ch. 6, § 178K (2001) (establishing a board responsible for

evaluates the offender and categorizes him into one of three risk groups, which determines what level of notification is required.[126] Other states, such as Alaska, Connecticut, and Oklahoma, do not conduct individualized risk-assessments and use past convictions as the sole criterion for notification.[127]

B. The Preventative Approach Toward SORNLs

The enactment of SORNLs was driven by the legislative desire to prevent released sex offenders from committing sex crimes in the future.[128] Legislatures reasoned that sex offenders have exceptionally high recidivism rates and that once members of a community become aware of the presence of a sex offender, they will be able to protect themselves. This analysis is problematic for two reasons. First, the assumption of high recidivism rates among all sex offenders is questionable. Second, even if this assumption is valid, SORNLs supply a poor tool for communities to protect themselves.

Legislatures enacting SORNLs often refer to "exceptionally high" recidivism rates of sex offenders as a reason for their adoption.[129] This assumption has also been adopted by scholars writing about SORNLs[130] as well as the general public.[131] However, a close examination of studies on

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risk-assessment); N.Y. CORRECT. LAW § 168-l (2003) (same); N.J. STAT. ANN. § 2C:7-8 (West 2004) (instructing the state's Attorney General to issue guidelines that will enable individual risk-assessment).

[126] *See* MASS. GEN. LAWS ch. 6, § 178K(2) (2001). More specifically, in the case of level one (low risk) offenders, the law requires notification of law enforcement agencies but prohibits public notification. *See id.* § 178K(2)(a). For level two (moderate risk) offenders, the law requires that the information be disseminated to law enforcement agencies and available to the public. *See id.* § 178K(2)(b). Finally, for level three (high-risk) offenders, the law requires the police to actively disseminate to the public the information regarding offenders. *See id.* § 178K(2)(c).

[127] *See* ALASKA STAT. §§ 12.63.010–.63.100 (Michie 2004); CONN. GEN. STAT. §§ 54-250 to -261 (2004); OKLA. STAT. tit. 57, §§ 581–589 (2004).

[128] *See, e.g.*, Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1101–09 (1997); Filler, *supra* note 45, at 329–46.

[129] *See, e.g.*, ALA. CODE § 15-20-20.1 (2004) ("The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government"); ARK. CODE ANN. § 12-12-902 (Michie 2004) ("The General Assembly finds that sex offenders pose a high risk of re-offending after release from custody"); IDAHO CODE § 18-8302 (Michie 2004) ("The legislature finds that sexual offenders present a significant risk of reoffense"); NEB. REV. STAT. § 29-4002 (2004) ("The Legislature finds that sex offenders present a high risk to commit repeat offenses"); *see also* Filler, *supra* note 45, at 335–38 (reviewing statistical claims made by legislatures at the time of the enactment of SORNLs).

[130] *See, e.g.*, David S. DeMatto, *Welcome to Anytown U.S.A.—Home of Beautiful Scenery (and Convicted Sex Offender): Sex Offender Registration and Notification Laws in* E.B. v. Verniero, 43 VILL. L. REV. 581, 581 (1998) (stating that "[o]ne of the most vexing aspects of sexual predation is the high recidivism rate, especially among sex offenders who target and victimize children"); Houston, *supra* note 36, at 731 (noting that "sex offenders have the highest rates of recidivism of any group of criminals").

[131] *See, e.g.*, Bedarf, *supra* note 55, at 898 (citing a Canadian study indicating public

the recidivism rates of sex offenders reveals a more complicated picture. Several reviews of the empirical literature have pointed out that interpreting the recidivism data is a complicated task and that, according to some studies, sex offenders actually have lower recidivism rates than other groups of offenders.[132] Recently, a Bureau of Justice Statistics study showed that while sex offenders generally have a lower rate of re-arrest than other violent offenders, they have a substantially higher rate of re-arrest for a new violent sex offense.[133] These studies raise the question, why should comprehensive registration and notification regimes be created for sex offenders but not for murderers, thieves, and drug dealers?[134]

Furthermore, it is debatable whether such regimes should be adopted with respect to sex offenders in the first place. Even if sex offenders represent a more significant risk of re-offense than other offenders, SORNLs are a problematic crime prevention tool. In the few studies conducted that evaluate the effectiveness of SORNLs, researchers could find no statistically significant difference in recidivism rates between offenders who were subjected to notification and those who were not.[135] A study evaluating the prevention potential of the Massachusetts SORNL found that, out of 136 cases involving a convicted sex offender, in only six cases could notification have potentially warned the victim (or the victim's guardian) before the

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perceptions of high recidivism rates among sex offenders as a group); Leonore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & L. 275, 300 (2000) (noting that "[t]he public shares the sentiment of the legislature and fears the repeat sex offender who is incapable of rehabilitation"). Similar sentiments are echoed by advocacy groups promoting SORNLs. According to the website of Klasskids, a foundation dedicated to stopping crimes against children, "[s]ex offenders pose a high risk of re-offending after release from custody." *See* http://www.klaaskids.org/pg-legmeg.htm (last visited Mar. 15, 2005).

[132] *See, e.g.*, Bedarf, *supra* note 55, at 893–98 (reviewing data regarding recidivism rates and concluding that recidivism "is not as significant of a problem as [some] claim"); Simon, *supra* note 131, at 301 (noting that "[w]hat is clear is that there is no empirical evidence that predictions of future sex offenses based on convictions for past ones are accurate"); Small, *supra* note 9, at 1456–58 (reviewing and analyzing sex offenders' recidivism rates); *see also* Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan's Law to Juveniles*, 57 AM. PSYCHOLOGIST 690, 698–700 (2002) (reviewing the literature regarding sex offender recidivism rates and emphasizing that juvenile sex offenders have significantly lower recidivism rates than adult offenders).

[133] *See* Lawrence A. Greenfeld, *Sixty Percent of Convicted Sex Offenders Are on Parole or Probation*, Bureau of Justice Statistics News Release 2, *available at* http://www.westlaw.com *as* 1997 WL 53093 (Feb. 2, 1997).

[134] Registration statutes that applied to more general categories of criminals date back to the 1930s. *See* Note, *Criminal Registration Law*, 27 J. CRIM. L. & CRIMINOLOGY 295 (1936–1937); Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PA. L. REV. 60, 61–64 (1954).

[135] *See* Logan, *supra* note 45, at 1337 (citing two unpublished studies). *See also* Simon, *supra* note 131, at 300 (noting "there is no empirical evidence that sexual offender registration laws achieve their intended aims"); Trivits & Reppucci, *supra* note 132, at 695 (noting "there is currently no evidence that the registration and notification statutes have protected children in the community").

re-offense.[136] Thus, this study suggests the limited preventative value of SORNLs.[137]

The use of SORNLs has significant weaknesses. First, SORNLs depend on sex offenders for information. Given the limited resources devoted to verifying registration and the lack of a central identification system in the United States, it is not difficult for offenders simply not to register. A recent survey conducted by Parents for Megan's Law, a non-profit advocacy organization, found that on average, states are unable to account for twenty-four percent of the sex offenders that are supposed to be registered.[138] In the state of California alone, 33,000 offenders are unaccounted for.[139] Furthermore, sex offenders who re-offend should be disproportionately represented within this group since they have a greater incentive to avoid registration. Thus, states are possibly using their resources to compile information on sex offenders who pose a lower risk.

Second, public notification might exacerbate the problem of registration avoidance, since the non-legal sanctions triggered by registration give offenders a strong incentive not to register.[140] In other words, offenders who would willingly register if their information were used only for investigative purposes refuse to register once they realize that the information will be widely disseminated. Thus, public notification may reduce the amount of information law enforcement agencies have about sex offenders.

Finally, SORNLs do nothing to prevent offenders from traveling to a nearby neighborhood to commit their crimes.[141] Legislatures acknowledged this problem during their enactment of these laws. For example, in the debate in the New York Assembly over that state's SORNL, one of the as-

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[136] *See* Anthony J. Petrosino & Carolyn Petrosino, *The Public Safety Potential of Megan's Law in Massachusetts: An Assessment From a Sample of Criminal Sexual Psychopaths*, 45 CRIME & DELINQUENCY 140, 150 (1999). Petrosino and Petrosino chose for their study only sex offenders who were actually incarcerated. *See id.* at 145–47. In addition, they assumed perfect compliance with the law, perfect notification by the police, and error-free risk-assessment of offenders. *Id.* Finally, their study focused on sexual psychopaths, who are more likely to be subject to notification requirements, rather than felony sex offenders. *Id.*

[137] *See id.* at 154 (concluding that the Massachusetts SORNL has a limited ability to prevent stranger-predatory sex crimes).

[138] *See* Kim Curtis, *Sex-Offender Registries Flawed Across Nation; Non-Profit Group Estimates that Up-To-Date Address Lacking for 1 in 4 People Who Should Appear on List*, AKRON BEACON J. (OHIO), Feb. 7, 2003, at A7; *see also* Houston, *supra* note 36, at 733 (citing claims that only fifty percent of sex offenders have registered).

[139] *See* Curtis, *supra* note 138, at A7.

[140] *See* Bedarf, *supra* note 55, at 909 (noting that "harassment is likely to drive a sex offender to . . . fail to comply with his community notification duties"); Dugan, *supra* note 95, at 635 (noting that "sex offenders hear about the harassment and decide they would rather not register, despite the risk of getting caught, rather than be harassed by the public").

[141] *See* Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 317 (1997) (noting that "[t]here is nothing to stop the sexual abuser who wants to molest children or rape women from going into neighboring communities, where he or she is not known, to select a victim").

semblymen noted that "[a]ll any pervert has to do who lives on my street is hop on the subway and in five minutes he is in another community where there are children who are going to the store for milk or going to school."[142]

In sum, despite the fact that SORNLs and their public notification provisions aim to prevent future crimes, their ability to do so is questionable. In fact, voices calling to shift resources from these programs to other social services are beginning to emerge, an unsurprising fact given the questionable effectiveness of such programs.[143] The next part of this Article will turn to develop an alternative approach toward SORNLs.

C. The Punitive Approach Toward SORNLs

It is unclear whether prevention is an adequate justification for SORNLs. But these laws can fulfill an additional purpose, namely the punishment of sex offenders through non-legal sanctions. In order to demonstrate the punitive nature of SORNLs, one must look to the actual effects of these laws. For example, if the non-legal sanctions triggered by SORNLs are mostly the adverse effects of preventative measures, then these sanctions should not be seen as a form of punishment according to the framework adopted earlier.[144] If, in contrast, the non-legal sanctions induced by SORNLs reflect a preference for reciprocity and a norm of sanctioning, then one should view these sanctions as a form of punishment.

According to the preventative view of SORNLs, the non-legal sanctions induced by these laws can mainly be seen as preventative measures taken by members of society who wish to minimize the risk associated with living in proximity with sex offenders. Undoubtedly, SORNLs do cause sex offenders to suffer from such non-legal sanctions. For instance, SORNLs have caused offenders to lose income opportunities that involve close work with potential victims.[145] Nevertheless, a closer look at the sanctions incurred by sex offenders demonstrates that they are not merely preventative.

First, one can see that sanctions are applied to sex offenders by individuals who do so not because they are at risk, but because they wish to avoid non-legal sanctions that are applied to those who refuse to sanction offenders. For example, employers have terminated sex offenders' employment because they were concerned with the reactions of their customers

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[142] Filler, *supra* note 45, at 345 (quoting New York Assemblyman Edward Sullivan).

[143] *See, e.g.*, Editorial, *Megan's Law: Good Intentions, Impossible Task*, J. & COURIER, Feb. 12, 2003, at 7 (arguing that funds spent on the implementation of SORNLs "could be spent on improved day care for the children of poor working parents. It's money that could be spent in the nation's classrooms. It's money that could go toward after-school programs for latchkey kids").

[144] *See supra* Part I.A.

[145] *See, e.g.*, Feldman, *supra* note 128, at 1106 (noting that California's SORNL has been used to locate sex offenders working in positions that might put them into contact with potential victims).

if they continued to employ offenders.[146] This kind of behavior illustrates a type of non-legal sanction that is propelled by a sanctioning norm enforced by a secondary set of non-legal sanctions. Prevention does not play a role in this equation.

The significant amount of cases where sanctions are directed against the family members of an offender similarly demonstrates the punitive nature of non-legal sanctions generated by SORNLs.[147] In research conducted in Wisconsin, for example, two-thirds of offenders reported negative effects on the lives of their family members.[148] It is difficult to categorize ridiculing an offender's son and causing him to leave his school's football team as a preventative measure.[149] Rather, these cases indicate that the sanctioning of sex offenders has become a focal point for a sanctioning norm in some communities.[150] Since norm-driven non-legal sanctions are based simply on the willingness to engage in costly acts, the identity of the target of non-legal sanctions is immaterial. Thus, publicly sanctioning the children of sex offenders can be as effective a signal as sanctioning the offenders themselves.

Additionally, non-legal sanctions that are applied to sex offenders are often applied inconsistently, singling out specific individuals arbitrarily.[151]

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[146] *See* Doe v. Pataki, 940 F. Supp. 603, 610 (S.D.N.Y. 1996) (describing an incident in which a gas station that employed a sex offender was boycotted); Brief of Amici Curae Office of the Public Defender of the State of New Jersey et al. at 8, Smith v. Doe, 538 U.S. 84 (2003) (No. 01-729) [hereinafter New Jersey Public Defender Brief] (reporting that an offender was refused a job because of the hiring company's fear of negative publicity); *id.* at 15–16 (describing a case in which an employer terminated an offender due to public pressure despite the employer's acknowledgement of the offender's "outstanding performance"); Brian D. Gallagher, *Now that We Know Where They Are, What Do We Do with Them?: The Placement of Sex Offenders in the Age of Megan's Law*, 7 WIDENER J. PUB. L. 39, 53 (1997) (reporting a case in which a business rescinded a job offer to a released sex offender due to negative public reaction). Not surprisingly, community members who oppose notification are sometimes fearful of voicing their opinions in public. In Texas, a resident who spoke out against the local notification policies refused to identify himself to the media out of fear of retaliation. *See* Tracey-Lynn Clough, *Neighbors Warned About Sex Offender*, DALLAS MORNING NEWS, May 24, 1996, at 1A.

[147] *See, e.g.*, *Pataki*, 940 F. Supp. at 609 (noting a case in which members of a sex offender's family were harassed); Small, *supra* note 9, at 1466 (reporting a case in which the offender's sister-in-law and her children were shot at and harrassed).

[148] *See* Richard Z. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & L. 375, 383 (2000). This fraction overstates the number of non-legal sanctions that are aimed toward family members since it includes cases in which family members were hurt solely by the publication of the offender's name. *See also* THE NATIONAL CRIMINAL JUSTICE ASSOCIATION, SEX OFFENDER REGISTRATION AND NOTIFICATION: PROBLEM AVOIDANCE & BARRIERS TO IMPLEMENTATION & SEX OFFENDER REGISTRATION & NOTIFICATION COSTS SURVEY RESULTS 32 (1999) [hereinafter NAT'L CRIM. JUST. ASS'N STUDY] (discussing the harassment of children of offenders).

[149] *See* Zevitz & Farkas *supra* note 148, at 383.

[150] *See* POSNER, SOCIAL NORMS, *supra* note 3, at 93 (pointing out that norm-based non-legal sanctions might target relatives of wrongdoers).

[151] *See* Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin, National Institute of Justice—Research in Brief* 9 (2000), *available at* http://www.ncjrs.org/pdffiles1/nij/179992.pdf (last visited Mar. 15,

This is consistent with non-legal sanctions that are driven by a sanctioning norm rather than a desire to prevent further misconduct. As we have seen, sanctioning norms tend to emerge around focal points of a signaling equilibrium, and these focal points might be determined arbitrarily.[152] If the non-legal sanctions applied to offenders were truly preventative, one would expect a logical application of sanctions with an offender's individual risk taken into account.

Sanctions that target offenders are frequently conducted by groups rather than individuals, reflecting a "lynch mob attitude."[153] Group-based non-legal sanctions are another indicator that signaling behavior is at work. Such participation in sanctioning offenders is driven by a need to conform to the norms of the group rather than by an individual decision to protect oneself from future harms.[154]

Finally, it should be noted that the acts of violent vigilantism suffered by sex offenders are consistent with punitive rather than preventative non-legal sanctions. Since the adoption of SORNLs, sex offenders have been subjected to threats,[155] vandalism of their property,[156] physical assaults,[157] and gunshots.[158] Despite the fact that these acts are relatively

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2005); *see also* Scott Matson & Roxanna Lieb, *Community Notification in Washington State: 1996 Survey of Law Enforcement* 16 (1996), *available at* http://www.wsipp.wa.gov/rptfiles/sle.pdf (last visited Mar. 15, 2005) (pointing out that "communities can be unpredictable in their reactions towards sex offenders").

[152] *See supra* notes 26–28 and accompanying text. The phrase "social focal point" can be attributed to Thomas Schelling's classic study of strategic human interactions. *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT, 54–58 (1960) (demonstrating how seemingly arbitrary focal points can become the basis for cooperation among individuals).

[153] *See* Dugan, *supra* note 95, at 618; Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions In Sex Offender Statues*, 47 DRAKE L. REV. 635, 650 (1999).

[154] *See* POSNER, SOCIAL NORMS, *supra* note 3, at 93 (noting that "[t]he reason that people join mobs is that it is better to be a member of a mob than its target").

[155] *See, e.g.*, New Jersey Public Defender Brief, *supra* note 146, at 7 (reporting that an offender received a letter with a message made of newspaper clippings saying, "[w]e'll be watching you asshole"); *id.* at 9 (reporting that a man told an offender, "[s]top fucking little girls. I'm going to kill you," and that the offender was attacked by another man armed with a gun wearing a ski mask who told him, "[i]f you don't get out of this neighborhood I'm going to kill you"); Small, *supra* note 9, at 1466 (reporting death threats made against the sister-in-law of an offender).

[156] *See, e.g.*, New Jersey Public Defender Brief, *supra* note 146, at 11 (describing a series of incidents including placing human feces on the steps of an offender's home, slashing the tires of an offender's car, and destroying offenders' mailboxes); Small, *supra* note 9, at 1466 (describing a case in which the car of the offender was vandalized); Zevitz & Farkas, *supra* note 148, at 383 (same); Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J. L. & POL'Y 569, 579 (1995) (noting the case of Joseph Gallardo, a Washington sex offender whose house was burned down).

[157] *See, e.g.*, Doe v. Pataki, 940 F. Supp. 603, 610 (S.D.N.Y. 1996) (describing an incident in which an offender was punched in the face); New Jersey Public Defender Brief, *supra* note 146, at 8–9 (describing an incident in which two men broke into an offender's residence and attacked a man they mistook for the offender and an incident in which an offender was struck with a crowbar).

[158] *See, e.g.*, Robert Hanley, *Neighbor Admits Firing Gun Into Home of Paroled Rapist*,

rare,[159] they are still a significant sanction from the perspective of potential offenders since they have such serious consequences.

In sum, the various characteristics of non-legal sanctions generated by SORNLs suggest a social mechanism concerned not merely with precautionary measures. This conclusion is also supported by the only available systematic study of the non-legal sanctions incurred by sex offenders as a result of SORNLs. This study reported that eighty-three percent of offenders were excluded from their place of residence and that over fifty percent were terminated from their place of employment.[160] These large numbers reflect a general sanctioning norm to which sex offenders are subject.

Having suggested that SORNLs effectively function as a punitive tool, the question remains as to the desirability and effectiveness of such a use. Though one cannot answer definitively, one can point out several characteristics of SORNLs that might make them an effective sanction-generating tool. SORNLs single out sex offenders as a distinct class of criminals and subject them to special legal treatment. This is of importance, since in order for a norm of inflicting non-legal sanctions to emerge, there needs to exist a focal point around which this norm will be formed.[161] The law can create such a focal point since it enjoys moral power and tends to focus public attention.[162] By singling out sex offenders, SORNLs have created a focal point for a signaling equilibrium in which a norm of sanctioning sex offenders can emerge.

Policymakers should consider shaming sanctions only with respect to a limited group of criminals since the cost of inducing these sanctions is expected to rise as their use becomes common. This assumption is grounded in the forces that drive the creation of non-legal sanctions. With respect to preference-driven non-legal sanctions, the conventional assumption of marginally decreasing utility suggests that over time people will derive less pleasure from sanctioning and will therefore engage in less of it. As to norm-based non-legal sanctions, since these sanctions are based on signaling, individuals might stop sanctioning once they manage to send a credible signal as to their type.

Finally, singling out sex crimes in particular is desirable for several reasons. First, from the perspective of offenders, sex is an ideal context to inflict suffering through shame. Psychologically, we are inclined to be

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N.Y. TIMES, Nov. 10, 1998, at B8 (reporting the case of a shooting at the house of a sex offender in Linden, New Jersey).

[159] *See* Matson & Lieb, *supra* note 151, at 15 (reporting that 3.5% of offenders report cases of harassment); Zevitz & Farkas, *supra* note 148, at 381 (reporting that in only three percent of cases did sex offenders report acts of vigilantism).

[160] *See* Zevitz & Farkas, *supra* note 148, at 381.

[161] *See supra* note 27.

[162] For an analysis of the ability of the law to create focal points, see generally Richard McAdams and Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL L. STUD. 87 (2005).

ashamed of issues that relate to our sexual activity, especially when this activity is considered deviant.[163] This characteristic suggests that sex offenders might suffer from a substantial internal non-legal sanction when their acts are publicly exposed. Second, from the perspective of the sanctioning public, there exists a cross-cultural consensus about the shamefulness of sex crimes.[164] Despite some disagreements as to what constitutes a sex crime,[165] this consensus is held in modern American society with respect to most sex crimes.[166] Even among criminals, sex offenders are considered to be worthy of sanctioning and shaming.[167] This characteristic of sex crimes assures us that the public will unite in their opposition to sex offenders and inflict external non-legal sanctions on them. Thus, although some commentators have argued the opposite,[168] sanctioning sex offenders through non-legal sanctions has significant advantages.

D. SORNLs, Stigmas, and Marginal Deterrence

Despite the potential advantages highlighted above, the use of SORNLs as punishment is not without potential drawbacks. As previously discussed, sanctioning regimes based on non-legal sanctions run the risk of

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[163] *See* Whitman, *supra* note 6, at 1064–65 (describing the connection between shame and sex).

[164] *See* JAMES T. TEDESCHI & RICHARD B. FELSON, VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS 334 (1994) (pointing out that rape was one of the three most heavily punished crimes in a survey of 110 societies).

[165] A clear exception is the attitude of Americans toward sodomy laws and homosexual acts. As was evident from public reaction to the recent Supreme Court ruling in *Lawrence v. Texas* holding sodomy laws unconstitutional, *see* 539 U.S. 558, 578 (2003), some groups believe that homosexual acts should be criminalized and that those who commit them should be shamed, while others believe that such acts should be legal and that there is no shame in committing them. *See, e.g.*, Nicole R. Hart, Note, *The Progress and Pitfalls of* Lawrence v. Texas, 52 BUFF L. REV. 1417, 1417–18 (2004) (reviewing some of the reactions to *Lawrence*).

[166] *See, e.g.*, Kunz, *supra* note 36, at 454 ("Few crimes spark as strong or distinctive an aversion as sexual offenses against children"); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. & CRIMINOLOGY 1167, 1167 (1999) ("Sex offenders are the scourge of modern America"); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 506 (1998) ("perhaps more than any other group, sex offenders are the pariahs of our society."); Alison Virag Greissman, Note, *The Fate of "Megan's Law" in New York*, 18 CARDOZO L. REV. 181, 181 (1996) ("Sexual crimes disgust, anger, and frighten Americans in a way that no other human act does").

[167] *See, e.g.*, Gallagher, *supra* note 146, at 63 (quoting a prison inmate describing the harsh treatment of child molesters in prison); *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 327, 339 (2003) ("Within the hierarchy of prisons, moreover, sex offenders in general—and child molesters in particular—are considered the lowest of the low"); Rob Tripp, *The Bernardo Trial: Fellow Inmates Despise Homolka*, OTTAWA CITIZEN, July 11, 1995, at A3 ("[T]here is an unwritten code that regards sex offenders and child abusers lowest on the prison pecking order.").

[168] *See, e.g.*, Bedarf, *supra* note 55, at 912 (arguing that "in the context of sex offenses, where the community's reaction is highly emotional, and sometimes violent, shaming is inappropriate"); Whitman, *supra* note 6, at 1092 (opposing the use of shame sanctions in the context of sex crimes).

raising the crime rate of the criminals that are subjected to them, because of both the psychological impact of stereotypes and stigmas as well as the economic aspects of marginal deterrence.[169] This Subsection illustrates how SORNLs may in fact create such problems. There are two reasons to suspect that SORNLs may trigger the psychological reaction associated with stereotypes and stigmas.[170] First, SORNLs constantly remind offenders of their social status and expected behavior. As one offender described:

> [I]t's hard to, in a manner of speaking, to move on and try to put things behind you when you're constantly reminded by the rules that you are a sex offender and the rules more or less make you feel like it just happened yesterday . . . . The rules don't let you have a normal life and the rules are a constant reminder that you're not a normal person.[171]

This state of mind may exacerbate the self-fulfilling aspects of stigmas.[172] Second, SORNLs may trigger self-fulfilling behavior by lowering sex offenders' expectations of their own performance.[173] As another offender noted, "[w]ell, there is no [greater] pressure than being exploited by media, the people you work with, the people you live with, relatives, and so the pressure is constantly there. And because [sex offenders are] miserable, then that would put them in that cycle to recommit the offense."[174]

From an economic perspective, SORNLs seem to create a problem of marginal deterrence, since in many cases they deprive offenders of the opportunity to regain new social capital. Although SORNLs do not attach a physical mark to sex offenders as did branding punishments in eighteenth-century England or scarlet letter punishments in colonial times, they are relatives of such schemes. SORNLs attach specific information to sex offenders in such a way that this information becomes a part of their identity. This information causes detrimental consequences, including loss of

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[169] *See supra* notes 58–71 and accompanying text.

[170] As of yet, studies have not evaluated whether the stereotypes associated with sex offenders trigger this effect. This is not surprising given the methodological problems of conducting experiments aimed at testing such a hypothesis and the newness of this field of inquiry. The studies that have been conducted suggest that this mechanism can function within any group. *See, e.g.*, Steele, *supra* note 60, at 617 (stating that stereotype threat "affects the members of any group about whom there exists some generally known negative stereotype"); Wheeler & Petty, *supra* note 60, at 804 (noting that "a member of any group targeted by negative stereotypes can show stereotype threat effects in the domains relevant to the stereotype").

[171] *See* Zevitz & Faraks, *supra* note 148, at 385.

[172] *See* Steele & Aronson, *supra* note 60, at 806–11.

[173] *See, e.g.*, Bedarf, *supra* note 55, at 911 n.151 (quoting an offender: "I got the feeling no one cares about me, so why should I care about myself and what I do?"); Winick, *supra* note 166, at 557 (noting that SORNLs produce "the feeling that improvement or change is hopeless").

[174] Zevitz & Faraks, *supra* note 148, at 388.

housing, disruption of personal relationships, and loss of employment.[175] Thus, sex offenders subject to SORNLs find themselves with little social capital and do not feel very threatened by the possibility of future non-legal sanctions. In fact, it has been reported that some offenders have chosen to return to prison since that is their only housing option.[176] In extreme cases, SORNLs have made sex offenders feel that they literally have nothing to lose, and they end up committing suicide as a direct result of notification.[177] These cases reflect a potentially fatal weakness in a deterrence system, since there is most likely no threat that the law can use in order to deter individuals who are willing to commit suicide.[178]

Nevertheless, apart from the notification provisions, the registration aspects of SORNLs may be advantageous from a specific deterrence perspective. A unified database that is at the disposal of law enforcement agencies may increase the probability of detection in cases involving past offenders. This would be true especially in jurisdictions requiring sex offenders to submit DNA samples as part of their registration.[179] Thus, SORNLs may raise the expected sanction offenders face and therefore deter them from committing future crimes.

E. Plea Bargaining in the Shadow of SORNLs

The theoretical framework for plea agreements developed above indicates two possible effects: (1) mandatory registration will cause defendants to reject plea offers and opt for trials and (2) this effect will cause defendants and prosecutors to circumvent SORNLs by pleading defendants to offenses that do not trigger registration.[180] Regrettably, since the

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[175] *See supra* Part II.C.

[176] *See* Zevitz & Faraks, *supra* note 148, at 382.

[177] *See, e.g.*, New Jersey Public Defender Brief, *supra* note 146, at 19–21 (describing numerous incidents of offenders committing suicide as a result of notification); Associated Press, *Suicide Is Recalled as Maine Revisits Megan's Law; Released Sex Offender Shot Himself After Neighborhood Notification*, WASH. POST, Feb. 17, 1998, at A2 (reporting on an offender committing suicide just two days after notification); Todd S. Purdum, *Death of Sex Offender Is Tied to Megan's Law*, N.Y. TIMES, July 9, 1998, at A16 (reporting two separate incidents of offenders committing suicide after notification).

The link between shaming sanctions and suicide is not unique to SORNLs or to American culture. *See, e.g.*, JOHN BEATTIE, OTHER CULTURES; AIMS, METHODS, AND ACHIEVEMENTS IN SOCIAL ANTHROPOLOGY 176 (1964) (reporting that shame caused suicide among Tobriand Islanders); BRAITHWAITE, *supra* note 68, at 138 (noting that cases of suicide due to corporate malpractice are common in Japan); Persons, *supra* note 11, at 1527 (reporting the case of a patron of a prostitute who committed suicide after his name was published in a newspaper as part of a shaming scheme).

[178] *See* ALAN M. DERSHOWTIZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 29 (2002) (pointing out that in the context of suicide bombers "the usual deterrent strategy of threatening death to the perpetrator will not work").

[179] As of 2003, twenty-nine states collected DNA samples from sex offenders. *See* KAREN J. TERRY & JOHN S. FURLONG, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A MEGAN'S LAW SOURCEBOOK III3–III4 (2003).

[180] *See supra* Part I.D.

enactment of modern day SORNLs, no empirical studies have been conducted evaluating the effect of SORNLs on plea bargain negotiations.[181] Nevertheless, the evidence that is available makes a persuasive case for the validity of the model.

The evidence suggests that defendants have withdrawn from plea agreements after learning of the registration requirement triggered by a plea.[182] The significant amount of litigation that has addressed the question of whether defendants may withdraw a plea for this reason supports this contention,[183] as do news reports of several sex crime cases. For example, in Maricopa County, Arizona, a defendant objected to a deal mandating registration and withdrew from a plea agreement that capped his prison sentence at three and a half years, opting instead for a trial that could have resulted in a prison sentence of over twenty-eight years.[184] In another case, a defendant accused of having sex with a teenage girl initially agreed to plead guilty to lewd and lascivious acts with a child younger than sixteen,[185] but after learning of the registration requirement, he chose to rescind his plea and go to trial.[186] Additionally, policymakers have voiced concerns regarding the tendency of sex offenders to reject plea agreements as a result of the registration requirement.[187]

As for the second predicted effect, namely that prosecutors and defendants will attempt to contract around SORNLs, a good place to begin the examination is California, which enacted the first sex offender registra-

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[181] Studies of SORNLs have generally overlooked their potential effect on plea bargaining behavior. *But see* Kunz, *supra* note 36, at 476–77 (speculating that SORNLs may result in fewer plea bargains and consequently in fewer sex offenders being punished).

[182] The fact that some defendants are not aware of the registration requirements may lead to skepticism over the deterrence power of SORNLs. Nevertheless, one can expect that over time the registration requirements of SORNLs will become common knowledge. Furthermore, to the extent that one holds a retributionist view of punishment, the fact that defendants do not foresee a type of punishment ex-ante is of little consequence.

[183] Generally, courts have been reluctant to allow such withdrawals. *See, e.g.*, State *ex rel.* Chauvin v. State, 814 So. 2d 1, 3 (La. Ct. App. 2000) (denying petition to withdraw a guilty plea); Kaiser v. State, 641 N.W.2d 900, 907 (Minn. 2002) (same); State v. Anderson, No. C8-01-665, 2001 WL 1608560, at *4 (Minn. Ct. App. Dec. 18, 2001) (same); State v. Koenig, No. C3-01-38, 2001 WL 950044, at *4 (Minn. Ct. App. Aug. 21, 2001) (same); People v. Clark, 704 N.Y.S.2d 149, 151 (App. Div. 2000) (same); Ducker v. State, 45 S.W.3d 791, 797 (Tex. App. 2001) (same). *But see* State v. Wiita, 744 So. 2d 1232, 1235 (Fla. Dist. Ct. App. 1999) (allowing defendant to withdraw his guilty plea due to the potential effects from the state's new SORNL). Such withdrawals do not necessarily reflect cases that went to trial. In some instances, if a withdrawal were allowed, the parties would then be able to agree on a lower legal sanction and avoid trial.

[184] *See* Susan Carroll, *Teen Out of Plea Deal in Sex Case; Ex-Football Player Will Face Jury Trial in Assault on Girl*, ARIZ. REPUBLIC, Feb. 15, 2003, at B5.

[185] *See* Brett Barrouquere, *Man May Withdraw Plea of No Contest in Sex Case*, SARASOTA HEARLD-TRIB., Aug. 24, 1999, at 1B.

[186] *See* Brett Barrouquere, *Menard Rescinds Plea in Sex Case*, SARASOTA HEARLD-TRIB., Sept. 9, 1999, at 3B.

[187] As one member of Maine's Commission to Improve Community Safety and Sex Offender Accountability noted, "requiring sex offenders to register for life may make them refuse a plea agreement." *See* David Hench, *Recommendation Due on Sex Offender Rules*, PORTLAND PRESS HERALD, Dec. 1, 2003, at 1A.

tion law in the 1940s.[188] Evidence from California dating back to the 1960s indicates that prosecutors and defendants contracted around these registration requirements by using section 650.5 of the California Penal Code, which criminalized "openly outrageous public indecency" and did not trigger registration.[189] When a California court invalidated section 650.5 due to vagueness, it acknowledged that the statute's main use at the time was to allow persons accused of sex crimes to plead guilty to section 650.5 violations in order to avoid the stigma associated with registration.[190] Additional evidence of this practice was pointed out by an empirical study conducted in Los Angeles County regarding the enforcement and administration of the sections of the California Penal Code that regulated adult homosexual behavior.[191] As noted by the study, section 650.5 was commonly used to address judicial concerns over the harshness of non-legal sanctions potentially resulting from registration, such as the loss of employment.[192]

Media reports further support the "contracting-around" hypothesis. The highly publicized case of Gary Wayne Jackson, a repeat sex offender from Oklahoma who succeeded in avoiding registration by pleading to nonsexual charges, brought this practice to the attention of the Oklahoma public.[193] However, Jackson's case is not unique. According to one newspaper report, there were forty-seven cases in Tulsa County in 2001 alone in which allegations of a sexual nature were pleaded down to a nonsexual charge.[194] A similar picture emerges from a report of a Georgia case in which the defendant and the prosecutor apparently cooperated in order to rescind a registration condition required under Georgia's SORNL.[195]

These two predicted effects of the theoretical bargaining model may have several undesirable effects. First, "contracting around" may lead law enforcement agencies to have less information about sex offenders, since this practice results in sex offenders pleading to a nonsexual offense and

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[188] CAL. PENAL CODE § 290 (West 1947); *see* Logan, *supra* note 166, at 1172 n.25 (noting that California enacted the first sex offender registration laws).

[189] CAL. PENAL CODE § 650.5 (West 1957) (repealed 1991).

[190] *See In re Davis*, 242 Cal. App. 2d 645, 666 n.21 (Cal. Dist. Ct. App. 1966).

[191] *See The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 647, 771–75 (1966).

[192] *See id.*

[193] *See* Bill Braun, *Prison Not Part of Plea Proposal*, TULSA WORLD, Jan. 18, 2002, at 1. The case of Cory B. West seems also to have affected public opinion on the matter. West was originally charged with one count of first-degree rape and two counts of sexual battery. He eventually reached a plea agreement with prosecutors granting him a deferred sentence and allowing the case to be dismissed with no conviction if he completed a four-year probation. *See* Bill Braun, *Plea Deal Nets Man No Time in Sex Case*, TULSA WORLD, Feb. 1, 2002, at 13.

[194] *See* Bill Braun, *State Firm in Registration of Sex Offenders*, TULSA WORLD, Sept. 22, 2002, at A15; Simon, *supra* note 131, at 301 (describing the case of Richard Allen Davis, a repeat sex offender from California who managed to avoid registration by pleading to nonsexual offenses).

[195] *See* Sandy Hodson, *Convict Must Join Registry for Sex Crime*, AUGUSTA CHRON., Feb. 5, 2003, at A1.

therefore not being on the record as a sexual offender. Arguably, prosecutors could develop bargaining policies requiring the indication of the original offense. For instance, California prosecutors in the 1960s were aware that section 650.5 of the California Penal Code was used to plead sex offenders out of registration requirements.[196] Nevertheless, this type of policy indicates the existence of a problem rather than a satisfactory solution. Such policies are by their very nature local. For instance, in the 1960s, prosecutors outside of California were probably not privy to the special meaning of a conviction under section 650.5.

Second, this behavior may have a detrimental effect on the rehabilitation of sex offenders. Rehabilitation generally requires offenders to acknowledge the acts they have committed and to atone for them as part of an educational process.[197] This process is of particular importance in the treatment of sex offenders,[198] who tend to live in denial as to the wrongfulness of their acts.[199] Pleading sex offenders to nonsexual crimes may encourage self-denial in sex offenders, and this in turn may lower the severity of the act in their own eyes.[200] Hence, quite ironically, SORNLs may stand in the way of rehabilitating sex offenders and by doing so raise their chance of recidivism.[201]

III. POLICY IMPLICATIONS

This Part evaluates the policy implications of the punitive approach toward SORNLs with respect to five topics: (1) the retroactive application of SORNLs; (2) the legal limitations on the use of SORNLs as punishment;

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[196] *See* E. A. Riddle, *Compulsory Registration: A Vehicle of Mercy Discarded*, 3 CAL. W. L. REV. 195, 198 n.18 (1967) (quoting an interview with members of the San Diego City Attorney's staff).

[197] *See, e.g.*, R. A. DUFF, TRIALS AND PUNISHMENT 254–62 (1986) (presenting a theory as to the role of penance and reconciliation within a punitive system); Stephanos Bibas, *Harmonizing Substantive Criminal Law and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1390 (2003) (noting the Kantian argument that "punishment reforms and deters in part by educating the offender and society"); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1804–29 (1999) (presenting a theory of punishment based on atonement).

[198] *See, e.g.*, Judith V. Becker & William D. Murphy, *The Science of Sex Offenders: Risk-assessment, Treatment, and Prevention*, 4 PSYCHOL. PUB. POL'Y & L. 116, 128 (1998) (observing that within the cognitive therapy approach to treating sex offenders, the most accepted method at the time, treatment focuses on eliminating an offender's denial); Bibas, *supra* note 197, at 1395–96 (asserting the importance of admitting wrongdoing in the treatment of sex offenders); Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. KAN. L. REV. 487, 497–98 (2001) (noting that acceptance of responsibility is a key part of the treatment of sex offenders).

[199] *See* Bibas, *supra* note 197, at 1393–94.

[200] *See* NATIONAL CRIMINAL JUSTICE ASSOCIATION STUDY, *supra* note 148, at 8. *But see* Zevitz & Farkas, *supra* note 148, at 389 (pointing out that notification forces offenders to be honest and accept responsiblilty for their crimes.)

[201] *See* Bibas, *supra* note 197, at 1396–97 (pointing out that self-denial might result in higher recidivism rates for sex offenders).

(3) the rights of sex offenders to a risk-assessment hearing prior to public notification; (4) the reintegration of sex offenders; and (5) the plea bargaining behavior created by SORNLs. Generally, the discussion in this Part focuses on the notification rather than the registration aspects of SORNLs, since this Article is mainly concerned with the non-legal sanctions triggered by notification.

A. The Retroactive Application of SORNLs

The constitutionality of SORNLs under the ex post facto clause has spawned a substantial amount of litigation.[202] The ex post facto clause outlaws four distinct types of laws:[203] (1) laws that criminalize an act that was not previously criminal; (2) laws that make the crime greater than it originally was at the time it was committed; (3) laws that raise the punishment attached to the crime; and (4) laws that change the rules of evidence allowing for less or different testimony than that which was required at the time the offense was committed. Sex offenders argue that SORNLs fall under the third category, essentially asserting that these laws create an additional punishment that is inflicted retroactively on sex offenders.

The ex post facto doctrine serves three main goals. First, it assures individuals that they will receive fair warning of the boundaries of legal conduct, allowing them to reasonably rely on the legal situation at the time at which they act.[204] Second, it serves as a check on the power of government.[205] More specifically, it acts to prevent legislatures from imposing vindictive or arbitrary legislation on unpopular groups or individuals.[206] By doing so, it protects the separation of powers between the legislative and judicial branches of government.[207] Finally, the prohibition recognizes an interest in fairness by holding the government to the rules it created itself.[208] This line of reasoning supports the treatment of the ex-post facto clause as an exogenous moral constraint on a sanctioning regime, one that does not necessarily serve any economic purpose.

Several state supreme courts have reached conflicting conclusions as to the constitutionality of the retroactive provisions of their states' SORNLs,[209]

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[202] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto law").

[203] The original categorization was set out in Calder v. Bull, 3 U.S. 386, 390 (1798). This categorization is still used by courts. *See, e.g.*, Carmell v. Texas, 529 U.S. 513, 521–22 (2000). It is also used by commentators. *See, e.g.*, Danielle Kitson, *It's an Ex-Post Fact: Supreme Court Misapplies the Ex-Post Facto Clause to Criminal Procedure Statutes*, 91 J. CRIM. L. & CRIMINOLOGY 429, 434 (2001).

[204] *See, e.g.*, Miller v. Florida, 482 U.S. 423, 429–30 (1987); Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

[205] *See, e.g.*, *Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 28–29.

[206] *See Weaver*, 450 U.S. at 28–29; *Calder* 3 U.S. at 390.

[207] *See Weaver*, 450 U.S. at 29 n.10; *Calder*, 3 U.S. at 389.

[208] *See* Carmell v. Texas, 529 U.S. 513, 533 (2000).

[209] *See, e.g.*, Kansas v. Myers, 923 P.2d 1024, 1043–44 (Kan. 1996) (striking down the Kansas notification provision); Louisiana *ex rel.* Olivieri v. Louisiana, 779 So. 2d 735, 749–50

with federal circuit courts similarly divided.[210] This difference of opinion set the stage for Supreme Court review.[211]

In *Smith v. Doe*,[212] the Supreme Court evaluated the constitutionality of the Alaska Sex Offender Registration Act ("Alaska SORNL"),[213] which is applied to sex offenders retroactively.[214] The Alaska SORNL is not significantly different from SORNLs of other states. It includes a detailed registration scheme[215] and creates a structure for Internet-based notification.[216] In its opinion, the Court followed its ruling in *Kansas v. Hendricks*, which held that the constitutionality of laws challenged under the ex post facto clause hinges on whether the provisions are better characterized as civil regulations, which do not implicate the clause, or as punishments, which do implicate the clause.[217] To distinguish between the two, the Court uses a two-stage test.[218] If the legislature intended the legislation to be punitive, further analysis is unnecessary—the law is punitive and unconstitutional. In contrast, if the legislature did not have a punitive intent, the Court must consider whether the actual effects of the law are so punitive that they negate any civil intent of the legislature, in which case the law is invalid.[219]

Under the first part of the *Hendricks* test, the Supreme Court in *Smith* found two indications of a non-punitive intent underlying the Alaska SORNL. First, the Alaska legislature specifically cited a civil objective in enacting the law.[220] Second, the Alaska SORNL does not offer any proce-

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(La. 2001) (upholding the Louisiana notification provision); Ohio v. Cook, 700 N.E.2d 570, 585 (Ohio 1998) (upholding the Ohio notification provision).

[210] *See, e.g.*, E.B. v. Verniero, 119 F.3d 1077, 1105 (3d Cir. 1997) (upholding the New Jersey notification provision); Doe I v. Otte, 259 F.3d 979, 993 (9th Cir. 2001), *cert. granted*, 534 U.S. 1126 (Feb. 19, 2002) (No. 01-729) (striking down the Alaska SORNL).

[211] *See* Otte v. Doe I, 534 U.S. 1126 (2002) (granting certiorari).

[212] *See* 538 U.S. 84 (2003).

[213] ALASKA STAT. §§ 12.63, 18.65.087 (Michie 2002 & Supp. 2003) (constitutes the Alaska SORNL).

[214] *Id.* § 12.63.100(5) (giving definition of a sex offender).

[215] The Alaska SORNL requires all sex offenders present in Alaska to register with the Department of Corrections if they are incarcerated or at an Alaska state trooper post or municipal police department if they are not. *Id.* §§ 12.63.010(a)–(b). Sex offenders must provide the state with details such as name, aliases, address, anticipated addresses, place of employment, date of birth, driver's license number, information regarding cars the sex offender might have access to, and identifying features. *Id.* § 12.63.010(b)(1). Furthermore, the Alaska SORNL requires offenders to allow authorities to photograph and fingerprint them. *Id.* § 12.63.010(b)(2).

[216] The Alaska SORNL requires the Alaska Department of Public Safety to create a central registry of sex offenders. *Id.* § 18.65.087(a). The registry makes information such as the offender's name, aliases, address, photograph, description, vehicle information, and conviction information available to the public. *Id.* § 18.65.087(b). Alaska uses the Internet to disseminate this information to the public. *See* Alaska Department of Public Safety: Sex Offender Registration, Central Registry, *at* http://www.dps.state.ak.us/nSorcr/asp/ (last visited Mar. 15, 2005).

[217] *See* 521 U.S. 346, 360–71 (1997).

[218] *See Smith*, 538 U.S. at 92.

[219] *See id.*

[220] *See id.* at 93.

dural safeguards that are normally associated with the criminal process.[221] Given these findings, the Court reached the conclusion that "the intent of the Alaska Legislature was to create a civil, nonpunitive [sic] regime."[222] The Court next turned to consider whether the actual effects of the Alaska SORNL negated the legislature's intent. In its analysis, the Court employed the framework it previously developed in *Mendoza-Martinez* in order to evaluate whether an act is punitive.[223] This framework, developed in the context of double jeopardy jurisprudence, has since migrated into ex post facto case law.[224] The Court first distinguished the Alaska SORNL from historical shaming sanctions by observing that the SORNL regime did not display offenders in public for ridicule and shaming.[225] The Court then dismissed the arguments concerning the punitive employment and housing effects of the Alaska SORNL as mere "conjecture."[226] Finally, the Court found that the Alaska SORNL was not excessive, given the high recidivism rates among sex offenders and the importance of the goal of promoting public safety.[227] Thus, the Court concluded that the Alaska SORNL was non-punitive and could be applied retroactively.[228]

Since its publication, the Supreme Court's ruling in *Smith* has drawn criticism from legal scholars. This criticism has mainly focused on a general

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[221] *See id.* at 96.

[222] *Id.* In addition, the Court dealt with two possible objections to its conclusion. First, the court considered the fact that the registration portion of the act was codified within the Alaska Criminal Procedure Code. Under *Hendricks*, the placement of an act within the state code might indicate the legislative intent underlying the act. *See Hendricks*, 521 U.S. at 361. Nevertheless, the Court pointed out that the Alaska Criminal Procedure Code contained several provisions that did not involve criminial punishment, and thus the inclusion of the Alaska SORNL in the Code did not indicate that the legislative intent was necessarily punitive. *See Smith*, 538 U.S. at 94–95. In addition, the Court downplayed the importance of the fact that, following the passage of the Alaska SORNL, Alaska amended its Rules of Criminal Procedure to require courts to inform the defendant in writing as to potential registration requirements, *see* ALASKA R. CRIM. P. § 11(c)(4), and to incorporate the registration requirements into the written judgments of offenders, *see* ALASKA STAT § 12.55.148(a) (Michie 2002 & Supp. 2003). The court found that these facts were not indicative of legislative intent since informing individuals of the adverse effects of conviction is consistent with both civil and criminal policies. *See Smith*, 538 U.S. at 957–96.

[223] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

[224] *See Smith*, 538 U.S. at 97. The factors that the Court found to be most relevant to its analysis were whether the regulatory scheme "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive [sic] purpose; or is excessive with respect to this purpose." *Id.*

[225] *See id.* at 98–99. Even within its analysis of the effects of the Alaska SORNL, the Court continued to stress the importance of legislative intent. Thus, when the court distinguished between colonial shaming sanctions and the Alaska SORNL, it found that "[i]n contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id.* at 99. The Court then noted that "the purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.*

[226] *See id.* at 100.

[227] *See id.* at 102–03.

[228] *See id.* at 105–06.

displeasure with the outcome of the case, but has failed to provide a comprehensive theoretical argument explaining its flaws.[229] The theoretical framework regarding non-legal sanctions presented above provides a schema with which to critique *Smith*.[230]

SORNLs represent an intersection between legal and non-legal sanctions in which the law causes a specific group of people to be subjected to a series of non-legal sanctions. Thus, when courts analyze the legal status of these laws, they should be armed with a theory of the nature of non-legal sanctions. Without such a theory, courts run the risk of developing a body of law that ignores the real-world effects of SORNLs. The underlying assumption throughout the Supreme Court's analysis in *Smith* is that the adverse effects incurred by offenders are preventative. The Court found that "[t]he State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant."[231] Other courts that have upheld SORNLs against ex post facto challenges have adopted this line of reasoning as well.[232]

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[229] *See, e.g.*, *The Supreme Court, 2002 Term—Leading Cases*, *supra* note 167, at 334–39 (critically evaluating the Court's opinion in *Smith*). *But see* Kimberly B. Willkins, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1277–78 (2003) (viewing SORNLs as aimed at protecting the public rather than punishing offenders).

[230] *See supra* Part I.A. This Article focuses its critique of *Smith* on its treatment of non-legal sanctions as a social phenomenon. Nevertheless, it should be noted that the opinion of the Court in *Smith* raises other difficulties. The Court's overwhelming reliance on legislative intent as the standard in constitutional scrutiny is undesirable for several reasons. First, the use of legislative intent in a federal context such as that of SORNLs can create inconsistencies among different jurisdictions. In effect, the *Smith* opinion deals exclusively with the question of the constitutionality of the Alaska SORNL. Under *Smith*, an identical law adopted by another state that does in fact have a punitive intent should be deemed unconstitutional. Constitutional doctrine does not necessarily have to strive for consistency, but the goal of fairness in the criminal justice system seems to call for uniformity in outcomes. In addition, the ex post facto doctrine aims to limit the power of legislatures. However, if a court evaluates legislative intent through mechanical instruments such as the stated legislative intent and the place in which the statute was codified, it may be giving a road map for legislatures to immunize their laws from ex post facto review. *See* Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1720, 1725–28 (1996) (noting the manipulable nature of legislative intent and providing an argument for focusing on the effects of SORNLs rather than the intent behind their enactment).

An additional problem with the *Smith* ruling stems from the fact that the Supreme Court partially based its conclusion of non-punitive intent on a lack of procedural safeguards in the Alaska SORNL. *See Smith*, 538 U.S. at 86. Holding a law constitutional because it does not offer rights and protections to defendants only incentivizes legislatures not to grant defendants such rights in the future. It seems nonsensical that courts would want to incentivize legislatures in this way.

[231] *Smith*, 538 U.S. at 101.

[232] *See* Femedeer v. Haun, 227 F.3d 1244, 1251 (10th Cir. 2000) (stating that dissemination of information about criminal activity "has never been regarded as punishment when done in furtherance of a legitimate governmental interest"); Cutshall v. Sundquist, 193 F.3d 466, 475 (6th Cir. 1999) (arguing that the dissemination of information should not be viewed as punishment); E.B. v. Verniero, 119 F.3d 1077, 1099–1100 (3d Cir. 1997) (noting

However, this one-dimensional analysis ignores the fact that non-legal sanctions are driven by three different forces—preferences, norms, and prevention.[233] To assume that SORNLs cause only, or even mostly, preventative non-legal sanctions simplifies their effects. The evidence presented above demonstrates that SORNLs cause sex offenders to suffer from non-legal sanctions that have little to do with prevention and have much more to do with reciprocity and a norm of sanctioning.[234] In *Smith*, Justice Souter, while not using the signaling terminology employed here, demonstrated his understanding of the social process that might be triggered by creating a focal point surrounding sex offenders:

> While the Court accepts the State's explanation that the Act simply makes public information available in a new way, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.[235]

Regrettably, the Court did not incorporate this insight into its holding in *Smith* and instead based its ruling on the misconception that the non-legal sanctions created by SORNLs are predominately preventative.[236]

Finally, the ruling of the Supreme Court in *Smith* is not consistent with the view of courts that have examined public notification in a different context. When assessing the legality of probation conditions, courts have often concluded that public dissemination of information about an offender's past criminal activities constitutes punishment. Generally, states allow

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that the dissemination of accurate information when done in furtherance of a legitimate governmental interest cannot be considered a punishment).

[233] *See supra* Part I.A.

[234] *See supra* Part II.C.

[235] *Smith*, 538 U.S. at 109 (Souter, J., concurring) (internal citation omitted). For a similar view, see Noble v. Board of Parole and Post-Prison Supervision, 964 P.2d 990, 995 (Or. 1998) (noting that a sex offender has a liberty interest "in knowing when the government is moving against you and why it has singled you out for special attention").

[236] Interestingly, a few weeks after releasing its decision in *Smith*, the Supreme Court released its decision in *Lawrence* striking down sodomy laws. *See* Lawrence v. Texas, 539 U.S. 558 (2003). One of the points made by the Court in *Lawrence* was that adults engaged in consensual acts of sodomy might be subjected to the adverse affects of SORNLs in at least four states. *See id.* at 575. If SORNLs solely caused members of the public to take precautions in order to prevent violent sex crimes, the Court's concern in *Lawrence* is arguably unfounded. Individuals engaging in consensual homosexual acts do not represent such a risk to their community. Thus, according to the Court's reasoning in *Smith*, homosexuals should not suffer any adverse effects as a result of their registration. Nevertheless, as the *Lawrence* court intuitively realized, inclusion in a sex offender registry can lead to extreme adverse effects independent of any risk factor associated with the individual offender.

judges to set probation conditions that promote the rehabilitation of offenders and the safety of the community but forbid judges from imposing additional punitive measures.[237] In some jurisdictions, proactive judges have tried to use this authority to impose conditions that disseminated information to the public about the crimes committed by offenders. However, offenders subjected to such conditions have argued successfully that these conditions are punitive and therefore beyond the scope of the court's authority.

For example, in *Montana v. Mohammad*, the offender was required by the District Court judge to post on every entrance of his residence a sign stating "CHILDREN UNDER THE AGE OF 18 ARE NOT ALLOWED BY COURT ORDER."[238] Recognizing the potentially devastating effect such a sign might have on the life of the offender, the Montana Supreme Court found that the condition was punitive and therefore outside of the authority of the district court.[239] This line of reasoning was also followed by the Tennessee Supreme Court in *State v. Burdin*.[240] In *Burdin*, the Court evaluated a probation condition imposed on a defendant convicted of sexual battery of a sixteen-year-old victim. The condition required the defendant to place in the frontyard of his residence a four-foot-by-eight-foot sign reading, "Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware."[241] The *Burdin* Court held that under Tennessee law the primary goal of probation conditions is rehabilitation and that courts cannot impose punishments that do not further that goal.[242] Because the Court concluded that the sign's purpose was punitive, it held that the trial court was unauthorized to set such a condition.[243]

The *Muhammad* and *Burdin* rulings reflect the majority view on this issue.[244] Even states that have found such measures lawful did so while

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[237] For instance, in Montana, the authority of judges to impose conditions at sentencing is limited to those conditions "necessary to obtain the objectives of rehabilitation and the protection of the victim and society." MONT. CODE ANN. § 46-18-202(1) (2003).

[238] *See* 309 Mont. 1, 4–5 (2002). This sign is not equivalent to the regime created by SORNLs since it does not explicitly identify the released offender as a sex offender and it informs people of a court order rather than a past offense. Furthermore, while SORNLs mostly employ Internet notification, this case involves physical signs. Nevertheless, one can assume that the actual effects of the sign are similar to that of SORNLs since the result in both cases is to inform the offender's neighbors about his past sex crimes.

[239] *See id.* at 12 (noting that the condition is "unduly severe and punitive to the point of being unrelated to rehabilitation . . . the effect of such a scarlet letter condition tends to overshadow any possible rehabilitative potential that it may generate").

[240] *See* 924 S.W.2d 82, 85–87 (Tenn. 1996).

[241] *Id.* at 84.

[242] *See id.* at 87.

[243] *See id.*

[244] *See Muhammad*, 309 Mont. at 12 (noting that the opinion of the court reflects the opinion of most jurisdictions). For additional examples of such rulings, see People v. Meyer, 176 Ill. 2d 372, 373 (1997) (holding that a probation condition requiring a violent felon to post a four-foot-by-eight-foot sign with eight-inch letters reading "VIOLENT FELON" at each entrance of his property is an unreasonable form of shaming); People v. Letterlough, 86 N.Y.2d 259, 261 (1995) (holding that a probation condition requiring de-

acknowledging their punitive nature. For instance, in *Lindsay v. State*, the Florida District Court of Appeals upheld the legality of a probation condition requiring a defendant to place an advertisement regarding his DUI conviction in a local newspaper.[245] The *Lindsay* court noted that, while the condition was punitive, Florida law allows judges to impose such punitive probation conditions.[246]

While one might argue that these cases deal with sanctions that are harsher than those created by SORNLs, a main effect of these probation conditions, as with SORNLs, is the dissemination of truthful information regarding past criminal activity. Although the Supreme Court in *Smith* declined to acknowledge the humiliating nature of public notification and its resemblance to historical forms of punishment, the state court rulings reviewed above do so.[247]

In sum, taking a punitive view of SORNLs leads to the conclusion that these laws should not be applied retroactively. However, this conclusion is of limited consequence in the long run since it applies to a gradually decreasing set of offenders who have already commited their crime. Nonetheless, adopting this stance will help sustain the fairness of the criminal justice system.

B. Substantive Limitations on the Use of SORNLs as a Sanctioning Tool

A second line of arguments brought forward by sex offenders challenges the general validity of SORNLs, not merely their application to a specific group of offenders. The challengers' two main arguments are that SORNLs represent an unconstitutional deprivation of privacy and that they are a form of cruel and unusual punishment.

Generally, sex offenders have been unsuccessful in bringing claims based on a privacy right. The Third, Sixth, and Ninth Circuits have considered privacy arguments to some extent in the context of SORNLs and have all found them unpersuasive.[248] Of these decisions, the Third Circuit's

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fendant to affix two signs to his cars stating in large fluorescent block letters "CONVICTED DWI" is an unauthorized form of punishment). *But see* Ballenger v. State, 210 Ga. App. 627, 629 (Ga. Ct. App. 1993) (upholding a probation condition requiring the defendant to wear a pink fluorescent bracelet imprinted with the words "D.U.I. CONVICT").

[245] *See* 606 So. 2d 652, 654 (Fla. Dist. Ct. App. 1991).

[246] *See id.* at 656 (noting that "the idea that this condition of probation is improper simply because it is punitive is belied by both the statute and the cases").

[247] *See Meyer*, 176 Ill. 2d at 382 ("The sign contains a strong element of public humiliation or ridicule because it serves as a formal, public announcement of the defendant's crime."); *Muhammad*, 309 Mont. at 12 (viewing a notification condition as a "scarlet letter condition"); *Letterlough*, 86 N.Y.2d at 266 ("public disclosure of a person's crime, and the attendant humiliation and public disgrace, has historically been regarded strictly as a form of punishment").

[248] *See* A.A. v. New Jersey, 341 F.3d 206, 209–14 (3d Cir. 2003) (upholding the New Jersey SORNL against privacy challenges); Paul v. Farmer, 227 F.3d 98, 99 (3d Cir. 2000) (same) [hereinafter *Paul II*]; Paul v. Verniero, 170 F.3d 396, 406 (3d Cir. 1999) (same) [hereinafter *Paul I*]; Cutshall v. Sundquist, 193 F.3d 466, 480–82 (6th Cir. 1999) (rejecting

opinions on the subject offer the most extensive evaluation of offenders' privacy claims and are ripest for extended analysis. The petitioners in Paul v. Verniero ("*Paul I*") were classified as tier 2 and tier 3 sex offenders under New Jersey law and were therefore subject to the public notification requirement.[249] Addressing the privacy argument made by the plaintiffs, the Court first found that privacy rights do not restrict public notification of offenders' criminal records.[250] However, the Court did find that offenders have a nontrivial privacy interest in preventing the publication of their home addresses.[251] Having found this privacy interest, the Court nonetheless rejected the offenders' privacy claim, citing the compelling governmental interest in preventing future sex crimes.[252] The Court did, however, remand the case to the District Court to determine whether the law in question was applied in such a way as to assure that the information was disclosed only to parties who had a particular need for it.[253] This issue was revisited in Paul v. Farmer ("*Paul II*"), in which the Court held that New Jersey's SORNL guidelines limited notification to those individuals who had a need for the information and therefore did not violate the offenders' privacy rights.[254]

Thwarted by the Third Circuit's decisions in *Paul I* and *Paul II* upholding New Jersey's notification scheme based on its limited reach, offenders leveled a new privacy challenge against the state's SORNL after the state began employing Internet-based notification. In *A.A. ex rel. M.M. v. New Jersey*, this challenge met an unsympathetic court.[255] In its decision, the Third Circuit emphasized the importance of widely disseminating information about offenders in order to prevent future crimes and ruled that the state's interest in expanding notification outweighed any privacy interest of the offenders.[256]

Several commentators have criticized these rulings.[257] They argue that sex offenders, like any other type of offender, have a reasonable interest

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privacy arguments made against the Tennessee SORNL); Russell v. Gregoire, 124 F.3d 1079, 1093–94 (9th Cir. 1997) (rejecting privacy claims with respect to Washington's SORNL). *But see* Doe v. Otte, 248 F.3d 832, 850–51 n.18 (9th Cir. 2001) (limiting the scope of *Russell*).

[249] *See Paul I*, 170 F.3d at 399.

[250] *See id.* at 403.

[251] *See id.* at 404.

[252] *See id.*

[253] *See id.* at 406.

[254] *See Paul II*, 227 F.3d at 107.

[255] *See* 341 F.3d 206, 212 (N.J. 2003).

[256] *See id.* at 212–13. Interestingly, in supporting this proposition, the *A.A.* Court relied on the Supreme Court's ruling in *Smith*, which did not consider whether SORNLs violate a constitutional right to privacy. *See id.* This may indicate that *Smith* has farther-reaching implications than its limited content might suggest, serving as a general authority in rejecting claims made by sex offenders.

[257] *See, e.g.*, Houston, *supra* note 36, at 762–64 (arguing that public notification with respect to sex offenders who do not pose a serious risk may be unconstitutional); Lewis, *supra* note 9, at 96–102 (arguing that SORNLs may be unconstitutional on privacy

in keeping their criminal past private so that they can embark on a new life after incarceration.[258] Furthermore, these commentators point out that SORNLs have not proven to be successful in preventing future crimes.[259] Therefore, in balancing sex offenders' privacy rights and the states' interest in preventing future crimes, they argue that the former should prevail.[260]

The punitive approach to SORNLs developed above[261] suggests that the debate surrounding offenders' privacy rights should take a different direction. Rather than focusing on the appropriate balance between offenders' privacy rights and the states' interest in crime prevention, the debate should focus instead on the extent to which states may infringe on offenders' privacy rights in order to punish them. Once the debate is framed in such a manner, the rulings upholding SORNLs against privacy challenges seem to be justifiable. The public has a strong interest in punishing sex offenders, including a societal need for retribution and deterrence. Thus, while there may be a limitation on the ability of states to strip individuals of their privacy in order to punish them, it seems reasonable to conclude that the interests served by SORNLs in punishing offenders outweigh their privacy interests.

Although accepting the punitive approach to SORNLs would not change the outcome of these cases, it is an important shift for two reasons. First, in order to uphold SORNLs, some courts are compelled to interpret privacy rights narrowly in order to find that SORNLs do not violate sex offenders' privacy rights.[262] Such reasoning is troublesome because the dramatic lowering of search costs for the public coupled with the availability of information that includes a sex offender's home address indeed invade an offender's most private space. Moreover, courts willing to recognize sex offenders' privacy rights have for the most part uncritically accepted the states' justification for curtailing those rights due to the public interest in preventing future sex crimes.[263] Yet in light of the dramatic effects of SORNLs on the privacy of offenders and their questionable preventative value,[264] one would expect a far more rigorous evaluation of the public interest invoked to justify them.

Sex offenders challenge the validity of SORNLs on other constitutional grounds as well, arguing that they are unconstitutional inflictions of cruel

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grounds); Tara L. Wayt, *Megan's Law: A Violation of the Right to Privacy*, 6 TEMP. POL. & CIV. RTS L. REV. 139, 149–53 (1997) (arguing that the New Jersey Supreme Court misapplied the right to privacy in Doe v. Poritz, 662 A.2d 367 (N.J. 1995)).

[258] *See* Lewis, *supra* note 9, at 96–97.

[259] *See id.* at 100–02.

[260] *See id.*

[261] *See supra* Part II.C.

[262] *See, e.g.*, Cutshall v. Sundquist, 193 F.3d 466, 480 (6th Cir. 1999); Russell v. Gregoire, 124 F.3d 1079, 1093–94 (9th Cir. 1997).

[263] *See, e.g.*, A.A. v. New Jersey, 341 F.3d 206, 211–13 (3d Cir. 2003) (recognizing "the State's interest in expanding the reach of its notification to protect additional members of the public").

[264] *See supra* Part II.B.

and unusual punishment.[265] Similar arguments have been made by legal scholars, who tend to focus their attention on the vigilante attacks facilitated by SORNLs.[266] Thus far, since the majority of courts have found that SORNLs do not constitute punishment, they have necessarily rejected claims that SORNLs constitute cruel and unusual punishment.[267] Under the punitive approach to SORNLs, these laws generally should not be considered cruel and unusual punishment. Despite their harsh effects on offenders, there seems to be no reason to view SORNLs' sanctions as exceptionally cruel, especially when compared to the alternative sanction of imprisonment.[268]

Nonetheless, there may be specific types of public shaming that could be viewed as cruel and unusual punishment in that they contradict the common morals of society.[269] Such values are based on a variety of theories, such as human dignity or the disutility caused to the general public by the humiliation of a fellow community member. For instance, one may argue that the provisions of the Louisiana SORNL authorizing courts to order offenders to wear T-shirts and post signs outside their homes indicating their status as sex offenders represent an unacceptable form of humiliation. Evaluating which types of notification are unacceptable should be done on a case-by-case basis and is beyond the scope of this Article.

In sum, the punitive approach toward SORNLs does not offer much hope to offenders seeking to overturn them since this approach sees noth-

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[265] *See, e.g.*, Cutshall v. Sundquist, 193 F.3d 466, 472–83 (6th Cir. 1999). The Eighth Amendment provides that "[e]xcessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. Amend. VIII.

[266] *See, e.g.*, Bedarf, *supra* note 55, at 936–39 (arguing that SORNLs constitute cruel and unusual punishment because they are degrading); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Depravation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 820–26 (1996) (arguing that SORNLs constitute cruel and unusual punishment because vigilante acts are a foreseeable result of such laws); Andrea L. Fischer, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protection for Sex Offenders*, 45 CLEV. ST. L. REV. 505, 523–30 (1997); G. Scott Rafshoon, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L. J. 1633, 1668–71 (1995). *But see* Houston, *supra* note 36, at 747–56 (arguing that SORNLs are a legitimate way to promote public safety and do not constitute cruel and unusual punishment).

[267] *See, e.g.*, *Cutshall*, 193 F.3d at 477. *But see In re* Reed, 663 P.2d 216, 222 (Cal. 1983) (finding that requiring a defendant convicted of soliciting lewd or dissolute conduct to register as a sex offender constitutes cruel and unusual punishment under the California Constitution). Recently, the California Supreme Court overruled *Reed* in *In re* Leon Casey Alva, 92 P.3d 311, 312 (Cal. 2004). However, one should note that the discussion in *Alva* was limited to the question of whether registration constitutes cruel and unusual punishment. *See id.* at 313. Thus, it is still unclear whether the enactment of a widespread notification program is constitutional under California law.

[268] *See supra* notes 72–75 and accompanying text.

[269] Courts have generally held that the Eighth Amendment creates a moral limitation on the types of punishments that can be used. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 (1958) (stating that the basic principle underlying the Eighth Amendment is human dignity); Weems v. United States, 217 U.S. 349, 378 (1910) (explaining that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice").

ing inherently wrong with publicly shaming people in order to punish them. Nevertheless, adopting the punitive approach should be encouraged by those who wish to protect individual rights since it does recognize the harsh effects of these laws.

C. Procedural Due Process: The Right of Sex Offenders to Risk-Assessment Hearings Prior to Public Notification

A common argument raised by sex offenders is that automatic registration and notification without a prior individual evaluation of the risk of recidivism violates their due process rights under the Fourteenth Amendment.[270] According to this argument, the harsh reputational effects of notification, coupled with the burden of registration, constitute a liberty interest requiring legislatures to give offenders a chance to demonstrate that they represent a low risk of re-offending. As a matter of existing law, the Jacob Wetterling Act does not require individual risk-assessments, and states differ on the issue.[271]

Courts have been divided in their treatment of sex offenders' due process claims. While the majority of courts at both the state and federal level have rejected these claims,[272] several influential decisions have found that SORNLs, especially their notification provisions, infringe on offenders' liberty interests and require a risk-assessment hearing.[273] At the same time, a lively academic debate has evolved on this question.[274] Given the divergence of opinions on the matter, including a difference between the Second and Sixth Circuit Courts of Appeal,[275] the Supreme Court unsurprisingly agreed to consider the issue.[276]

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[270] The Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

[271] *See supra* notes 125–127 and accompanying text.

[272] *See, e.g.*, *Cutshall*, 193 F.3d at 478–80; Milks v. State, 848 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 2003); State v. Wilkinson, 9 P.3d 1, 5–8 (Kan. 2000); Boutin v. LaFleur, 591 N.W.2d 711, 718–19 (Minn. 1999).

[273] *See, e.g.*, Doe v. Dep't of Pub. Safety *ex rel.* Lee, 271 F.3d 38 (2d Cir. 2001); Espindola v. Florida, 855 So. 2d 1281 (Fla. 2003); Hawaii v. Bani, 36 P.3d 1255 (Haw. 2001). The New Jersey Supreme Court similarly found that the state's SORNL violated offenders' due process rights. *See* Doe v. Poritz, 662 A.2d 367, 417–22 (N.J. 1995). The court read into the law a judicial hearing requirement and then upheld it. *See id.* at 381–85.

[274] *See, e.g.*, Jennifer G. Daugherty, *Sex Offender Registration Laws and Procedural Due Process: Why* Doe v. Department of Public Safety ex rel. Lee *Should be Overturned*, 26 HAMLINE L. REV. 713, 748–49 (2003) (arguing that SORNLs should not be struck down on due process grounds); Logan, *supra* note 166, at 1167 (arguing that sex offenders' due process rights should be protected); Rafshoon, *supra* note 266, at 1671–73 (arguing that offenders subjected to notification should be provided a hearing); Small, *supra* note 9, at 1451 (concluding that an individual, fact-specific risk evaluation should be conducted with respect to each offender).

[275] *Compare* Conn. Dep't of Pub. Safety v. Doe, 271 F.3d 38 (2nd Cir. 2001) *with Cutshall*, 193 F.3d 466.

[276] *See Conn. Dep't of Pub. Safety*, 271 F.3d 38, *cert. granted*, 535 U.S. 1077 (2002) (No. 01-1231).

On the same day that the Supreme Court issued its ruling on *Smith*, it also handed down its ruling in *Connecticut Department of Public Safety v. Doe*, a case which evaluated the constitutionality of the Connecticut SORNL against a procedural due process challenge.[277] The Connecticut SORNL applies to all individuals convicted of various sex crimes and crimes against minors,[278] while generally making no distinctions among different offenders according to their potential risk of recidivism.[279] The respondent in this case argued that, since he did not pose a high risk of re-offending, the Connecticut SORNL deprived him of a liberty interest—i.e., his reputation—by including his name in a sex offender registry without granting him a meaningful opportunity to be heard.[280]

In a brief ruling with no dissenting voices, the Supreme Court upheld Connecticut's SORNL. The Court began its analysis by pointing out that "sex offenders are a serious threat" and are "much more likely than any other type of offender to be re-arrested for a new rape or sex assault."[281] The Court then held that the Connecticut SORNL does not deprive registrants of their due process rights since registration indicates nothing more than prior conviction and the law does not categorize all sex offenders as dangerous.[282] Furthermore, as noted by the Court, the notification website explicitly states that the Connecticut Department of Public Safety "has made no determination that any individual included in the registry is currently dangerous."[283] Thus, since the issue of an individual's dangerousness is not a relevant factor to the Connecticut SORNL, the Court deemed there to be no reason to conduct a risk-assessment hearing prior to registration.[284]

As with *Smith*, the unwillingness of the Supreme Court to face the practical effects of SORNLs led to a flawed decision in *Connecticut Department of Public Safety*. In its analysis, the Court remained committed to the preventative approach to SORNLs and implicitly assumed that SORNLs cause communities to focus rationally on preventing future sex crimes.[285] The Court ignored the fact that mere inclusion in a sex offender registry

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[277] *See* 538 U.S. 1 (2003).

[278] CONN. GEN. STAT. §§ 54-251–52 (2003). While the Connecticut SORNL applies to felonies committed "for a sexual purpose," Connecticut courts have full discretion regarding the application of the SORNL to offenders convicted of such felonies. *Id.* § 54-254.

[279] The Connecticut SORNL does make some distinctions among offenders. Most offenders need only comply with the registration and notification provisions for ten years, but those convicted of sexually violent offenses must register for life. *Id.* §§ 54-251–52. In addition, a court may exempt certain offenders from the SORNL's requirements. For example, an offender convicted of sexual intercourse with a minor aged between thirteen and sixteen when the offender was no more than two years older than the minor may be exempt from the requirements of the law "if the court finds that registration is not required for public safety." *Id.* § 54-251(b).

[280] *See Conn. Dep't of Pub. Safety*, 538 U.S. at 5–6.

[281] *Id.* at 4 (quoting McKune v. Lile, 536 U.S. 24, 32 (2002)).

[282] *See id.* at 7.

[283] *See id.* at 7–8.

[284] *See id.*

[285] *See supra* Part II.B.

detrimentally affects an offender's reputation since communities act out of a desire for reciprocity and according to a norm of sanctioning sex offenders.[286] As has been demonstrated herein, much of the non-legal sanctions sex offenders are subjected to stem from their past crimes, not their potential future ones.[287] Thus, disclaimers on states' notification websites regarding the dangerousness of listed offenders are of little consequence to the public in inflicting these non-legal sanctions.

The punitive approach toward SORNLs offers a far more consistent and persuasive view on the issue of an offender's right to a risk-assessment hearing. This approach recognizes the stigmatizing effect of including individuals in a sex offender registry. Nevertheless, since the focal point of this approach is punishing offenders for their past acts, there is no need to evaluate the future dangerousness of specific offenders. From a punitive perspective, the only relevant hearing is the offender's sentencing hearing following conviction. At least one court has explicitly followed this line of reasoning.[288]

Again, as with offenders' substantive due process arguments, the punitive approach to SORNLs does not provide much ammunition for their procedural arguments either. However, adopting this approach is important since, unlike the Supreme Court's reasoning in *Connecticut Department of Public Safety*, the Court does acknowledge the actual effects of SORNLs and therefore allows the creation of a more meaningful jurisprudence of procedural safeguards.[289]

D. Reintegrating Sex Offenders

As shown above, shame sanctions in general and SORNLs in particular may have the perverse effect of increasing the crime rate of the shamed group.[290] Legislatures that accept this possibility must weigh the advantages of creating an efficient regime of general deterrence against

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[286] *See supra* Part II.C.

[287] *See id.*

[288] *See* State v. Wilkinson, 9 P.3d 1, 8 (Kan. 2000) (noting that "the only procedural due process to which Wilkinson was entitled was the process required to convict him of the underlying offenses which triggered this noncruel, nonarbitrary aspect of his 'punishment'").

[289] While the punitive approach toward SORNLs does not require a risk-assessment for offenders, this does not indicate whether such an evaluation is desirable. On the one hand, the public perception of the high risks associated with registered offenders is clearly a central part of the effectiveness of SORNLs as a sanctioning device. From that perspective, one may conjecture that risk-assessment hearings are a useful tool in imposing higher non-legal sanctions on offenders. On the other hand, conducting such hearings is costly and will lower the number of people subject to SORNLs since offenders who are found to present little risk will presumably not be required to register. Thus, the use of non-legal sanctions would be reduced. Fully evaluating this tradeoff depends on empirical data not yet available. In any event, this balancing of considerations is a legislative matter that should not raise significant constitutional questions.

[290] *See supra* Part II.D; *supra* notes 58–71 and accompanying text.

the disadvantages of increased criminality amongst a specific group of offenders. One may conjecture that the benefits of general deterrence are greater since it applies to the population as a whole, but this remains an open empirical question. Legislatures, however, should not accept this problem as a given. Rather, they should design a regime that will inflict sanctions while minimizing the problems associated with shaming. This goal can be achieved by allowing for the reintegration of offenders into society. This Subsection presents policy recommendations that will assist in the construction of such a regime.

One point of contention regarding SORNLs involves the duration of registration and notification. The Jacob Wetterling Act requires offenders who are either convicted of aggravated offenses or have multiple convictions to register for life without exception.[291] Furthermore, since the Jacob Wetterling Act only establishes minimum requirements, some states have created harsher rules and require all offenders to register for life with no possibility of relief.[292] This type of sanctioning is undesirable from the perspective of marginal deterrence since it threatens offenders with a life of stigmatization and a diminished possibility of reacquiring social capital. As one offender stated before committing suicide, "I have no hope .... What is left for me? I will be subject to Megan's Law for the rest of my life."[293] A policy sensitive to marginal deterrence considerations would allow for the removal of offenders from the registry after a specific period of time that reflects a socially desired level of sanctioning. Purging one's name from the registry could be contingent on meeting certain requirements, such as clean police records, that would motivate offenders to refrain from criminal activity.[294] Creating a finite registration and notification period would give offenders something to lose by re-offending and would enable policymakers to utilize non-legal sanctions to deter future crimes.[295]

The case for a finite registration and notification period may be phrased in constitutional terms. The Supreme Court has yet to make a clear connection between the concept of marginal deterrence and the Eighth Amend-

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[291] 42 U.S.C. § 14071(b)(6)(B) (2000). The Final Guidelines make clear that "[a] state is not in compliance with subsection (b)(6)(B) (i) or (ii) if it has a procedure or authorization for terminating the registration of convicted offenders within the scope of these provisions at any point in their lifetimes." The Final Guidelines, *supra* note 105, at 582.

[292] *See* MO. REV. STAT. § 589.400.3 (2000 & Supp. 2004) (setting out lifetime registration for all offenders); S.C. CODE ANN. § 23-3-460 (Law. Co-op. Supp. 2004) (same).

[293] *See* New Jersey Public Defender Brief, *supra* note 146, at 22.

[294] Some states have opted for such a regime. For example, the Florida SORNL provides for judicial review of the registration requirement twenty years after the initial registration. FLA. STAT. ch. 943.0435(11)(a) (2004). However, since this provision is subject to the constraints of the Jacob Wetterling Act, offenders in Florida cannot currently ask for such relief.

[295] The mere fact that registration ends will not necessarily end non-legal sanctions since the community will continue to hold the information that was disseminated by the SORNL. Nevertheless, the moment that registration is no longer required, the offender has the opportunity to move to a different community and start a new life without non-legal sanctions.

ment. Nevertheless, in several cases in which the Court was willing to strike down punishments, its decisions appear to have been at least partially driven by marginal deterrence intuitions. This can be seen in the way the Court has read a proportionality requirement into the Eighth Amendment's prohibition on cruel and unusual punishment.[296] For example, in *Coker v. Georgia*, the Supreme Court struck down on proportionality grounds a Georgia law allowing the imposition of the death penalty on rapists.[297] Although the court did not ground its ruling in a marginal deterrence theory, the decision is consistent with such a theory of punishment. Imposing the death penalty on rapists would give rapists an incentive to kill their victims, since by doing so they could reduce the possibility of detection with no risk of a harsher sentence.[298]

Similarly, some of the concerns of courts regarding three-strike laws can be framed in terms of marginal deterrence. Under these laws, offenders convicted for the third time of certain crimes are subject to harsh mandatory sanctions.[299] For instance, in *Solem v. Helm*, the Supreme Court evaluated a sentence of life without the possibility of parole imposed on a repeat offender convicted of issuing a no-account check for $100.[300] The Court struck down the punishment, finding it was disproportionate to the crime.[301] Again, despite the fact that the Court did not base its decision on marginal deterrence grounds, one can point to a connection between the theory and the Court's holding. A sanctioning regime that imposes harsh mandatory sanctions for crimes of widely varying degrees erodes marginal deterrence. A two-strike offender who faces the same sanction for shoplifting a videotape as for armed robbery may opt for the latter if his expected payoff from the latter crime is higher.

Regrettably, the Supreme Court in recent years has limited the scope of *Solem* to a point where one can question the viability of Eighth Amendment challenges to any incarceration sanction. For instance, in *Harmelin v. Michigan*, the Court upheld a sentence of life without the possibility of

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[296] *See* Weems v. United States, 217 U.S. 349, 367 (1910) ("[P]unishment for crime should be graduated and proportioned to offense.").

[297] *See* 433 U.S. 584, 592 (1977) (concluding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment"). It should be noted that *Coker* does not represent a complete ban on imposing the death penalty on sexual crimes that do not involve murder. *See* Louisiana v. Bethley, 685 So. 2d 1063 (La. 1996) (upholding a Louisiana statute allowing the death penalty when the victim of a rape was less than twelve years of age); *cert. denied*, Bethley v. Louisiana, 520 U.S. 1259 (1997).

[298] This conclusion presupposes that law enforcement agencies devote equal resources to the investigation of rapes in which the victims are murdered as to those in which they are not. If law enforcement agencies in fact increase their efforts in murder cases, the rapist may still have an incentive to avoid murdering his victim.

[299] For a comparative description of these laws, see JOHN CLARK ET AL., U.S. DEP'T OF JUSTICE, THREE STRIKES AND YOU'RE OUT: A REVIEW OF STATE LEGISLATION 6–12 (1997).

[300] *See* 463 U.S. 277, 281–83 (1983).

[301] *See id.* at 290.

parole for a first-time offender who was convicted of possessing more than 650 grams of cocaine.[302] Given that a state could likely impose a life sentence without the possibiity of parole on sex offenders under such a ruling, it could also arguably require lifelong registration of these individuals. This trend in Eighth Amendment jurisprudence is not necessarily desirable. Punishments that are too harsh are not in the best interest of society, and some type of external regulation of overly zealous legislatures may be desirable.[303]

In addition to allowing for removal from a sex offender registry, society should try to reintegrate sex offenders by establishing social ceremonies that allow for sex offenders to regain some social capital while sustaining the shame-inflicting aspects of SORNLs.[304] Many cultures that rely on shame-based sanctions utilize such ceremonies,[305] and sophisticated modern commercial parties that rely on extra-legal sanctions often create similar mechanisms.[306] In the context of sex offenses, some states are turning to community meetings in which law enforcement officers guide communities through the process of notification.[307] Such meetings, which arguably do not diminish the shaming of offenders, may assist the offenders' reintegration process by directing the public to a more constructive attitude toward offenders that emphasizes supervision.[308]

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[302] *See* 501 U.S. 957, 996 (1991); *see also* Ewing v. California 538 U.S. 11, 30–31 (2003) (upholding a 25-years-to-life sentence for the stealing of merchandise valued at approximately $1,200); Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (upholding a sentence of two consecutive sentences of twenty-five years to life in prison for two cases of petty theft).

[303] There are numerous explanations for the tendency of American legislatures to systematically harshen criminal sanctions. *See generally* Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 Crime & Delinquency 419 (1999) (reviewing some of the explanations); Teichman, *supra* note 56 (arguing that the decentralized structure of U.S. government causes local jurisdictions to harshen their sanctions.).

[304] *See supra* note 71 and accompanying text. For a general theory of shame and reintegration, see BRAITHWAITE, *supra* note 68, at 54–68.

[305] *See* BRAITHWAITE, *supra* note 68, at 74 (noting that cultures that use shaming "follow shaming ceremionies with ceremonies of repentance and reacceptance"); Massaro, *supra* note 6, at 1924 (pointing out the importance of reintegration).

[306] *See* Bernstein, *Diamond Industry*, *supra* note 1, at 129. For example, Bernstein points out that one of the possible sanctions that the board of arbitraries of the Diamond Dealers Club face is expulsion from the club. Yet as Bernstein notes, the imposition of such a sanction may create an end-game problem in which expelled members harm other dealers since they do not expect future transactions with them. *See id.* To avoid this problem, the laws governing the diamond trade allow for the readmission of expelled members after a period of two years. This provision is quite literally a reintegration provision. It gives expelled members a carrot in the form of potential future membership while giving the Diamond Dealers Club a stick in the form of the threat to withhold future readmission.

[307] For a description of these meetings, see Matson & Lieb, *supra* note 151, at 10–14 (describing community meetings in Washington state); Richard Z. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Examining the Importance of Neighborhood Meetings*, 18 BEHAV. SCI. & L. 375, 393 (2000) (reviewing community meetings in Wisconsin).

[308] *See* Zevitz & Farkas, *supra* note 308, at 405 (asserting that community members can assist in the reintegration of offenders and can help prevent crime).

Finally, legislatures should create legal protections that will help offenders establish new social capital. Laws prohibiting discrimination against sex offenders in areas such as employment (aside from cases in which such discrimination reflects a rational preventative measure related to the specific type of work) and housing may help achieve this goal. Some legislatures have in fact adopted such measures recently.[309]

E. Plea Agreements

As previously discussed, SORNLs may cause prosecutors and defendants to circumvent registration through the plea bargaining process.[310] Recently, some legislatures have taken steps to prevent this behavior. Upon its enactment in 1991, the Minnesota SORNL only required that persons convicted of certain enumerated felony offenses register as sex offenders.[311] However, in 1993, the Minnesota legislature amended the statute to require that a person register if charged with a registerable offense and convicted of that offense or "another offense arising out of the same set of circumstances."[312] Despite no clear indication as to the legislative intent behind this amendment, it seems designed to prevent offenders from pleading out of the registration requirements.[313] The adoption of this amendment is a strong indication that, at least in Minnesota, contracting around SORNLs is an issue of concern.[314]

Since the amendment does not alter the desire of both defendants and prosecutors to contract around SORNLs, it is unsurprising that parties are attempting to circumvent the new constraint created by the amendment. One plausible means is by shifting the negotiations to a time before charges are brought and before the registration requirement is triggered. Alternatively, the parties may seek procedural loopholes that allow them to continue their contracting practices. In *Gunderson*, the defendant was initially charged with a sex offense, yet after the sexual aspects of the allegations proved inconsistent with the findings of the police investigation, the prose-

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[309] *See supra* note 57.

[310] *See supra* Part II.E.

[311] *See* Act of Jun. 1, 1991, ch. 285, §§ 3, 13(a), 1991 Minn. Laws 1325, 1329.

[312] MINN. STAT. § 243.166(a)(1) (2002).

[313] *See* Gunderson v. Hvass, 339 F.3d 639, 643–44 (8th Cir. 2003) (observing that the Minnesota legislature, in extending the registration requirements to defendants who are charged with a "predatory" offense but who plead guilty to a "non-predatory" charge arising from the same circumstances, was attempting "to insure the inclusion in the registration rolls of all predatory offenders, including those who take advantage of favorable plea agreements" (internal quotations omitted)); Boutin v. LaFleur, No. C1-97-1490, 1998 WL 8486 at *2 (Minn. App. Jan. 13, 1998) (noting that the Minnesota legislature "appears to have intended that offenders such as Boutin not be able to avoid registration as a predatory offender by plea bargaining for a lesser or different offense").

[314] Other states are also considering amending their SORNLs to deal with this issue. According to one report, Maine is considering allowing judges to add an asterisk to defendants' records that would indicate the existence of an accusation of a sex crime despite the lack of a conviction. *See* Hench, *supra* note 187, at A1.

cutor agreed to plea the case to a non-sexual offense.[315] In what would seem to be an attempt by both sides to bypass the Minnesota amendment, the prosecutor agreed to dismiss the initial complaint in its entirety while the defendant agreed to plead guilty to a new complaint charging him with third-degree assault.[316] This plan worked initially, but less than a year after sentencing, Gunderson violated his probation and was then informed that he would have to register as a sex offender under the Minnesota amendment.[317] Gunderson challenged his registration in federal court, but the court found that, under the amendment, the non-registered offense does not have to be charged in the same complaint as the registerable offense as long as the conviction arises from the same set of circumstances.[318]

Undoubtedly, schemes such as the Minnesota amendment can make it more difficult for prosecutors and defendants to reach plea agreements that circumvent SORNLs. Nevertheless, such schemes are undesirable for several reasons. First, as the bargaining model presented above demonstrates, prohibiting such agreements may actually lower the aggregate sanction sex offenders face.[319] Thus, these schemes may have the perverse effect of actually lowering deterrence and creating additional crime. Second, limiting plea bargaining does not affect the underlying incentives to contract around SORNLs. Hence, prosecutors and defense attorneys will continue to attempt to develop loopholes, such as the shifting of negotiations to the pre-charge stage. Third, in some cases such schemes may cause judges and jurors to avoid convicting guilty defendants since they would rather acquit a guilty defendant than impose what they perceive to be an excessive sanction. Jurors facing a choice between triggering the SORNL through conviction for a minor crime and acquitting the defendant may see the latter as a lesser evil.[320] Thus, such schemes may reduce the number of defendants found guilty, lower aggregate sanctions, and limit the information we hold about the past criminal acts of sex offenders. Finally, in some cases, the shift to a lesser offense may not be due to negotiation tactics but rather to the fact that the case is too difficult to prove. In *Boutin*, for instance, the prosecutors agreed to drop the sexual charges after the victim recanted the portion of her story in which she alleged the defendant forced her to have sex.[321] From an optimal deterrence perspective, this

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[315] *See Gunderson*, 339 F.3d at 641.

[316] *See id.*

[317] *See id.* at 642.

[318] *See id.* at 642–43.

[319] *See supra* Part I.D.

[320] In other cases, judges themselves may try to circumvent the penalties. In Minnesota, for instance, several judges have adopted "creative interpretations" of the law in order to avoid what they perceive to be excessive sanctions. *See, e.g.*, *In re* Welfare of J.L.M., No. C9-95-2480, 1996 WL 380664, 1 (Minn. Ct. App. July 9, 1996) (finding that requiring registration in two cases in which defendants plead guilty to non-sexual offenses after being charged with sex offenses is "unreasonable and unnecessary," thus exempting defendants from registration).

[321] *See* 591 N.W.2d at 713–14. *See also Gunderson*, 339 F.3d at 641 (reaching a plea

may not be an undesirable outcome since imposing sanctions only when defendants' guilt is proven beyond a reasonable doubt may create a problem of under-deterrence.[322] Nevertheless, those who cherish the presumption of innocence should be concerned about this development.[323]

Legislatures who wish to avoid the circumvention of SORNLs must realize that, regardless of their intent in enacting these laws, defendants view these laws as sanctions, and large mandatory sanctions create circumvention problems. Thus, a more prudent policy would be to grant courts discretion as to the application of the notification aspects of SORNLs and allow judges to opt out of the notification periods prescribed by the law.[324] Such a policy would create transparency in the sanctioning process, allow prosecutors to maximize the deterrence value of their budgets, and help deal with problematic individual cases. Furthermore, there is little reason to think that judges would forego notification requirements easily since their decisions will be constrained by the fear that an offender for whom they waive the notification requirement will re-offend, which could have a devastating effect on their careers.

CONCLUSION

As this Article demonstrates, policymakers who aim to minimize the cost of sanctioning should use non-legal sanctions as a form of punishment, but they must be careful when designing such a sanctioning regime. The note of caution is important for two reasons. First, designing a regime that is based on legal and non-legal sanctions requires significant amounts of information with respect to the way in which each type of sanction affects the other. Without such information, policymakers cannot confidently predict the effects of their policies. Second, like extreme legal sanctions, extreme non-legal sanctions are a problematic tool. Given the

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agreement after sexual allegation were found to be inconsistent with forensic evidence).

[322] *See* KEITH N. HYLTON & V. S. KHANNA, TOWARD AN ECONOMIC THEORY OF CRIMINAL PROCEDURE 20–23 (John M. Olin Center for Law, Economics and Business, Harvard Law School, Discussion Paper No. 318, 2001, revised 2004), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/318.pdf (last visited Mar. 15, 2005).

[323] Judge Randall of the Minnesota Court of Appeals has expressed concerns with such a statutory scheme:

> This is a rare occasion in the history of the United States of America! The presumption of innocence embedded in both the U.S. Constitution and the Minnesota Constitution is swept aside in favor of a "rule" that says you are "guilty" and must register as a predatory sex offender simply because you were "charged" with an offense requiring registration, even though that charge did not stick.

In re Welfare of J.S.K., No. C5-02-388, 2002 WL 31892086, at *3 (Minn. App. Dec. 31, 2002) (Randall, J., concurring).

[324] This recommendation follows recommendations made by commentators with respect to mandatory sanctions. *See* Schulhofer & Nagel, *supra* note 89, at 1315–16 (suggesting a reform in federal minimum sentences).

lower budgetary constraint non-legal sanctions create for policymakers, they may be tempted to create harsh non-legal sanctions.

More specifically, while public notification laws targeting sex offenders may have some preventative value, their main effects are punitive, despite contrary findings by several courts. The rulings of the Supreme Court reviewed above and the rulings of other courts that stated explicitly that they would not take into account the full scope of non-legal sanctions created by SORNLs[325] raise the concern that courts are willing to turn a blind eye toward the actual effects of such legislation.

The conclusions of this Article are tentative in nature for the simple reason that there is limited empirical data on the issues discussed. Thus, this Article should not be viewed as an attempt to close the debate over the design of optimal sanctions but rather as a call to discussion. Additional studies that would aid such a dialogue include research offering empirical measurements of the way laws affect non-legal sanctions, studies of plea bargaining behavior surrounding the use of non-legal sanctions, and studies of the specific application of non-legal sanctions to particular crimes—such as sex offenses—that will offer us a better understanding of how to design a sanctioning regime that utilizes non-legal sanctions optimally.

[325] *See* Russell v. Gregoire, 124 F.3d 1079, 1092 (9th Cir. 1997) (noting that "our inquiry into the law's effects cannot consider the possible 'vigilante' or illegal responses of citizens to notification"); *see also* W.P. v. Poritz, 931 F.Supp. 1199, 1211–12 (D.N.J. 1996) (noting that the scope of the analysis of the effects of the law is limited to legal reactions of the public).

APPENDIX

All fifty states and the District of Columbia have enacted their own versions of "Megan's Law," New Jersey's sex offender registration and notification provision. *See* ALA. CODE §§ 13A-11-200 to -203 (1994); ALASKA STAT. §§ 12.63.010–.100 (Michie 2004); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3827 (West 2001); ARK. CODE ANN. §§ 12-12-901 to -920 (Michie 2003); CAL. PENAL CODE §§ 290–290.9 (West 1999); COLO. REV. STAT. § 18-3-412.5 (2004); CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2001); DEL. CODE ANN. tit. 11, § 4120 (2001); FLA. STAT. ANN. § 775.21 (West 2005); GA. CODE ANN. § 42-1-12 (1997 & Supp. 2004); HAW. REV. STAT. ANN. § 846-E (Michie Supp. 1997); IDAHO CODE §§ 18-8301 to -8311 (Michie 1997); 730 ILL. COMP. STAT. ANN. 5/3-3-11.5 (West 1997); IND. CODE ANN. § 5-2-12 (West Supp. 1997); IOWA CODE ANN. § 692.A (West Supp. 1998); KAN. STAT. ANN. §§ 22-4901 to -4910 (1995); KY. REV. STAT. ANN. §§ 17.500–.540 (Michie 1996); LA. REV. STAT. ANN. §§ 540–549 (West Supp. 1998); ME. REV. STAT. ANN. tit. 34-A, §§ 11001–11144 (West Supp. 1997); MD. ANN. CODE art. 27, § 792 (1996 & Supp. 1997); MASS. GEN. LAWS ch. 6, §§ 178D–Q (1996); MICH. COMP. LAWS ANN. §§ 28.721–.732 (West Supp. 1997); MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1998); MISS. CODE ANN. §§ 45-33-21 to -57 (2001); MO. ANN. STAT. §§ 589.400–.425 (West Supp. 1998); MONT. CODE ANN. §§ 46-23-501 to -520 (1997); NEB. REV. STAT. §§ 29-4001 to -4013 (Supp. 1996); NEV. REV. STAT. §§ 207.151–.157 (1997); N.H. REV. STAT. ANN. §§ 651-B:1 to :10 (Supp. 1997); N.J. STAT. ANN. §§ 2C:7-1 to -9 (West 2004); N.M. STAT. ANN. §§ 29-11A-1 to -8 (Michie 1997); N.Y. CORRECT. LAW §§ 168-a to -v (Consol. Supp. 1998); N.C. GEN. STAT. §§ 14-208.5 to .32 (Supp. 1997); N.D. CENT. CODE § 12.1-32-15 (Supp. 1997); OHIO REV. CODE ANN. § 2950 (Anderson 1996 & Supp. 1997); OKLA. STAT. ANN. tit. 57, §§ 581–588 (West 1991 & Supp. 1999); OR. REV. STAT. §§ 181.594–.608 (2003); 42 PA. CONS. STAT. ANN. §§ 9791–9799.7 (West Supp. 2004); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (1996); S.C. CODE ANN. §§ 23-3-400 to -530 (Law Co-op. Supp. 1999); S.D. CODIFIED LAWS §§ 22-22-31 to -41 (Michie Supp. 1997); TENN. CODE ANN. §§ 40-39-201 to -211 (Supp. 2004); TEX. REV. CIV. STAT. ANN. art. 4413(51) (Vernon Supp. 1998); UTAH CODE ANN. § 77-27-21.5 (1995 & Supp. 1997); VT. STAT. ANN. tit. 13 §§ 5401–5414 (Supp. 2002); VA. CODE ANN. §§ 9.1-901 to -920 (Michie 1995 & Supp. 1997); WASH. REV. CODE ANN. §§ 9A.44.130–.145 (West 2000); W. VA. CODE §§ 15-12-1 to -10 (1999); WIS. STAT. ANN. §§ 301.45–.46 (West 2005); WYO. STAT. ANN. §§ 7-19-301 to -307 (Michie 2003); D.C. CODE ANN. §§ 22-4001 to 4017 (2001).

ARTICLE

FIELDS OF HOPE, FIELDS OF DESPAIR: LEGISPRUDENTIAL AND HISTORIC PERSPECTIVES ON THE AGJOBS BILL OF 2003

LAUREN GILBERT*

In this Article, Professor Lauren Gilbert examines the unique story of the Agricultural Job Opportunity, Benefits and Security Act of 2003 (AgJobs), first in its historical context and then as a case study for applying various legisprudential theories. Professor Gilbert first provides an historic overview of guest-worker programs in America, a detailed analysis of the history of the AgJobs negotiations, and a study of Congressional developments following the bill's introduction in two different Congresses. She follows this with a review of legisprudence literature and a discussion on how the various theories, including pluralism, public choice theory, institutionalist theory, and critical legal theory, while helpful in understanding why AgJobs failed, are each inadequate in explaining the whole story. She then proposes a framework of analysis entitled "biennial factionalism" to explain how a bill based on an historic alliance between traditional adversaries that enjoyed broad support among legislators in the Senate was still unable to achieve enactment. Professor Gilbert concludes that biennial factionalism, which depends on the dynamic interplay among political and non-governmental actors and the cyclical nature of the legislative process, should give AgJobs advocates reason to be optimistic for eventual success.

The crops are all in and the peaches are rott'ning,
The oranges piled in their creosote dumps,
They're flying 'em back to the Mexican border
To pay all their money to wade back again.

CHORUS:
Goodbye to my Juan, goodbye Rosalita;
Adios, mis amigos, Jesus y Maria;
You won't have your names when you ride the big airplane,

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* Associate Professor of Law, St. Thomas University School of Law; J.D., University of Michigan School of Law, 1988; B.A., Harvard University, 1983. I would like to thank Rob Williams, director of the Migrant Farmworker Justice Project in Tallahassee and lead negotiator for the United Farmworkers of America, for his insights into the political process and for his comments on an earlier draft. I would also like to thank Esther Olavarria, legal counsel to Sen. Edward Kennedy on the Senate Immigration Subcommittee, for her invaluable assistance. For their comments on an earlier version, I am also grateful to Alex Aleinikoff, Jennifer Gordon, Beth Lyon, and Philip Martin. I am especially grateful to my research assistant, Linda Berman, for her outstanding work, and to Ned Swanner, our faculty services librarian. Finally, I thank my daughter, Megan Gilbert, for her assistance.

All they will call you will be "deportees."[1]

Rob Williams, director of the Migrant Farmworker Justice Project in Tallahassee and Lead Negotiator for the United Farmworkers of America ("UFW" or "United Farmworkers"), thought that the Agricultural Job Opportunity, Benefits and Security Act of 2003 (AgJobs)[2] just might pass the Senate.[3] On Independence Day 2004, he sent an e-mail to supporters indicating that Senator Larry Craig (R-Idaho), chief sponsor of the AgJobs bill,[4] planned to offer the bill as an amendment to the Class Action Bill currently before the Senate.[5] The AgJobs bill, which had been introduced in both houses of Congress the previous September and currently enjoyed the bipartisan support of sixty-two co-sponsors in the Senate alone,[6] would have allowed anywhere from 508,000 to as many as one million migrant farmworkers[7] to earn lawful permanent residency in the United States over

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[1] Woody Guthrie, *Deportee*, on PLANE WRECK AT LOS GATOS (Vanguard Records 1972). Lyrics as reprinted in THE NEARLY COMPLETE COLLECTION OF WOODY GUTHRIE FOLK SONGS 24–25 (Pete Seeger ed., 1973); *see also* http://www.geocities.com/Nashville/3448/deportee.html (last visited Mar. 7, 2005) (providing lyrics, history, and commentary on the song). Special thanks to Professor Daniel Kanstroom, director of the International Human Rights Program, Boston College Law School Human Rights Program, and clinical professor of law, who shared the song with participants at the Immigration Law Teachers Workshop of 2004, and whose forthcoming book GOOD-BYE ROSALITA: A HISTORY OF DEPORTATION (forthcoming 2005) opens with its refrain. The song might allude to the agreement of 1947 between Mexico and the United States, which allowed for the legalization of undocumented farmworkers already in the United States. *See* e-mail from Daniel Kanstroom, Professor, Boston College Law School, to Lauren Gilbert, Associate Professor, St. Thomas University School of Law (Mar. 29, 2005) (on file with author) (indicating his belief that the poem and crash "were related to the 1947–48 Bracero so-called 'drying out the wetbacks' regime."); The Woody Guthrie Foundation and Archives, *Woody Guthrie*, *at* http://www.woodyguthrie.org/biography.htm (last visited Apr. 9, 2005) (providing biographical information about Woody Guthrie); Migratory Workers, Mar. 10, 1947, U.S.-Mex., 1947 U.S.T. 425.

[2] Agricultural Job Opportunity, Benefits and Security Act of 2003, S. 1645, 108th Cong. (2003) [hereinafter AgJobs].

[3] *See* E-mail from Rob Williams, Director of Migrant Farmworker Justice Project (July 4, 2004) (on file with author) (indicating Sen. Larry Craig (R-Idaho) would offer AgJobs bill as amendment to the Class Action Bill, and that "this might be it—stay tuned").

[4] AgJobs, S. 1645, 108th Cong. (2003).

[5] *See* The Class Action Fairness Act of 2004, S. 2062, 108th Cong. §§ 4–5 (2004).

[6] S. 1645, Bill Summary Status for 108th Congress, Thomas Legislative Information on the Internet, *available at* http://thomas.loc.gov [hereinafter S. 1645 Bill Summary and Status].

[7] The number of migrant workers who would benefit from the legalization provisions of AgJobs is subject to some debate. *See* Dr. James S. Holt, *The Adjustment of Status Provision of the "Agricultural Job Opportunities, Benefits and Securities Act of 2003" (S. 1645/HR 3142, "AgJobs"), and the Impact of Adjustment Program on the H-2A Program* (2003) (on file with author); *see also* Philip Martin, *Guest Workers: New Solution, New Problem?*, Pew Hispanic Center (Mar. 21, 2002), *available at* http://pewhispanic.org/reports/archive/ (last visited Apr. 9, 2005). Holt's study estimates the number of persons who will qualify for adjustment of status to lawful permanent residency under AgJobs and is based on the U.S. Department of Labor's National Agricultural Worker Survey (NAWS). *See* U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997–1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED

the course of the next six years and would have provided this exploited group with greater workplace protections.[8] The bill also would have made it easier for growers to hire temporary foreign agricultural workers under the H-2A visa program.[9]

The legislation was the result of nearly five years of negotiations and a historic compromise between the United Farmworkers of America and major growers' associations,[10] including the American Farm Bureau Federation, the National Council of Agricultural Employers and the American Nursery and Landscape Association.[11] Over 400 growers associations, labor unions and immigrant advocates had endorsed the bill.[12] Despite broad-based national support and bipartisan backing in the Senate, Senate Bill 1645 was not referred to the Republican-controlled Immigration Subcommittee out of concern by its sponsors that the subcommittee's anti-immigrant Chairperson, Saxby Chambliss (R-Ga.), would kill the bill in Committee.[13]

In the face of these obstacles, the only chance the bill had for passage was as an amendment to unrelated legislation being considered by the Senate.[14] On the day, however, that Senator Craig planned to introduce his

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STATES FARMWORKERS 22 (2000) (on file with author) [hereinafter NAWS STUDY]. The NAWS STUDY, conducted from 1998 to 1999, which reported that 52% of farmworkers do not possess valid documentation to work in the United States. According to the Holt study, of the 1.6 million non-casual workers, approximately 1.02 million were estimated to work 100 days or more doing agricultural work during the year, as required under the AgJobs bill. *See* Holt, *supra*. Based on that figure, Holt estimated that 508,000 would be eligible for adjustment under AgJobs, but that the number who would choose to adjust would be less because of mistrust of the system or because the applicant would be unable to prove the eligibility requirements. *Id.* Professor Martin's study indicates that the percentage of unauthorized workers is most likely 1.2 million, but recognizes that the number who qualify for legalization will be significantly lower, depending on the statutory definition of the work day, and the number of days (60, 90, or 120) or previous agricultural work over a particular time period (twelve or eighteen months) required to qualify. *See* Martin, *supra*. It has been suggested that the percentage of undocumented farmworkers may be much higher than 52%, because the NAWS figure is based on self-reporting from farmworkers randomly surveyed nationwide. *See, e.g.*, STUART ANDERSON, NAT'L FOUND. FOR AM. POL'Y, MAKING THE TRANSITION FROM ILLEGAL TO LEGAL MIGRATION, 3 (2003). If this is the case, the number of persons eligible for adjustment of status under AgJobs may also be significantly higher.

[8] *See* AgJobs § 101(c); *see also id.* § 201(a).

[9] *Id.* § 201 (Title II—Reform of H-2A Work Program) (streamlining the application process for applying for H-2A workers, including replacing labor certification with attestation process, gradually eliminating adverse effect wages rate (AEWR), and easing other procedural obstacles to admission).

[10] *See* 150 CONG. REC. S7705 (daily ed. July 7, 2004) (statement of Sen. Edward M. Kennedy (D-Mass.)); *see also* Christine Stapleton, *Bush Bypassed Bill by Growers Farmworkers*, PALM BEACH POST, Jan. 13, 2004, at 1A.

[11] *See* Letter from AgJobs Supporters to Members of Congress (Feb. 12, 2004) (on file with author).

[12] *See id.*

[13] *See* Telephone Interview with Esther Olavarria, Legal Counsel to Sen. Edward Kennedy, Immigration Subcommittee (Dec. 3, 2004) [hereinafter First Telephone Interview with Olavarria].

[14] Senate procedure allows for non-germane amendments to be attached to pending

amendment, Senate Majority Leader Frist (R-Tenn.) announced that the Senate would only allow germane amendments to be attached to Senate Bill 2062, the Class Action Bill,[15] complaining that Senate Bill 2062 had become "fly paper" for a slew of unrelated legislation.[16] He requested "unanimous consent" that only relevant amendments be offered by each leader or his designee (with the exception of an amendment related to the minimum wage)[17] to which the Senate minority leader objected.[18] Yet despite efforts to reach a compromise solution which would have allowed unrelated amendments to be included on the Amendment Tree,[19] discussion on the bill quickly bogged down in a debate over the institutional legitimacy of the actions of the majority leader, who, with the apparent urging of the Bush Administration, single-handedly prevented AgJobs from coming to the floor.[20]

The story of the AgJobs bill provides a valuable case study for examining various legisprudential theories and their applicability to immigration reform, and for developing a new theoretical framework for analyzing legislative change in the immigration context. The AgJobs bill seemed to have everything working in its favor. An apparent example of pluralism in action, it was the result of years of arduous negotiations and a historic compromise between agricultural producers and the United Farmworkers.[21] Furthermore, it was introduced at a time when the Bush Administration was publicly advocating for a temporary worker program which would "match willing foreign workers with willing American employers when no Americans can be found" and which would "offer legal

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legislation as a means to overcome the tyranny of committee and subcommittee chairs. *See Nongermane Amendment*, Senate Glossary, *at* http://www.senate.gov/reference/glossary_term/nongermane_amendment.htm (defining a nongermane amendment as one that "would add new and different subject matter to, or may be irrelevant to, the bill or other measure it seeks to amend" and providing that "Senate rules permit nongermane amendments in all but a few specific circumstances"); 50 CONG. REC. S7705 (daily ed. July 7, 2004) (statement of Sen. Kennedy); *id.* at S7707 (statement of Sen. Dodd (D-Conn.)). *Cf.* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at Rule XVI (2000) (allowing only germane amendments to appropriations bills).

[15] 150 CONG. REC. S7697 (daily ed. July 7, 2004) (statement of Sen. Frist).

[16] *Id.* at S7697.

[17] *Id.* at S7697. Unanimous consent is the only means to alter Senate Rules with regard to a particular measure or piece of legislation. The objection of a single Senator defeats the request. *See* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at Rule V (2000).

[18] *Id.* at S7698 (statement of Sen. Daschle (D-S.D.)).

[19] *Id.* at S7698. The "Amendment Tree" is a device for controlling the number and content of amendments that can be offered to any piece of legislation. *See, e.g.*, Walter J. Oleszek, *Senate Amendment Process: General Conditions and Principles*, CRS Report for Congress 98-707 GOV, Feb. 20, 2001, at CRS 1; *What is the "Amendment Tree" in the Senate and Why Does Senator Trent Lott Keep Filling It?* (May 3, 2000), *available at* C-Span.Org Public Affairs on the Web, http://www.c-span.org/questions/weekly78.asp (last checked 12/29/2004) [hereinafter *What is the Amendment Tree?*].

[20] *Id.* at S7704 (statement of Sen. Reid (D-Nev.)); S7706–07; 7711; 7736–37 (statement of Sen. Dodd); S7717–7718 (statement of Sen. Schumer (D-N.Y.)); *see also* David Rogers, *Farm-Worker Bill Becomes a Hot Button*, WALL ST. J., July 14, 2004, at A4.

[21] *See supra* notes 10–11 and accompanying text.

status, as temporary workers, to the millions of undocumented men and women now employed in the United States . . . ."[22] Yet in the waning days of the 108th Congress and during the final hours before the bill was to be introduced as an amendment to the Class Action Bill, the Bush Administration put pressure on Senator Craig and asked him not to introduce it.[23] According to sources, the White House also asked Senator Frist to prevent AgJobs from coming to the Senate floor[24] because the President was concerned that he had badly miscalculated the conservatives' vehement opposition earlier that year to his proposal to create a guestworker program. In an election year, the Administration did not want to have to choose between angering its base of supporters and providing greater protections for undocumented workers.[25] Although Senator Craig refused to yield to the Administration's demands, Majority Leader Frist acceded, doing everything in his power (including defying Senate procedures and tradition) to prevent the bill from coming to the floor.[26]

This Article will examine the AgJobs bill in a historical context and under the lens of different legisprudential theories. In examining Congress's failure to pass the bill in the 106th and 108th sessions, it will offer a theoretical framework applicable to this bill and to other immigration legislation. Part I of the Article will provide the historical overview of AgJobs as it traveled through the political process, a detailed analysis of the history of negotiations leading up to its introduction, and an analysis of developments in both Houses of Congress following the bill's introduction in both the 106th and 108th Congresses.

Part II will review the legisprudence literature, discussing its utility in understanding the AgJobs story. It will show how traditional theories of pluralism, while essential in explaining how the historic agreement was reached, became a Congressional bill, and earned the support of sixty-three co-sponsors, are insufficient in explaining the bill's repeated failures in both the 106th and 108th Congresses. It will then turn to process, public choice, and institutionalist theories, which, while helpful in examining the procedural and political obstacles faced by the AgJobs bill in Congress,

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[22] *See* Press Release, Office of the Press Secretary, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004) *at* http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html (last visited Apr. 20, 2005) [hereinafter Bush Worker Program Proposal]; *see also* Elizabeth Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, N.Y. TIMES, Jan. 7, 2004, at A1; Elizabeth Bumiller, *Politics at the Border: Bush Woos Hispanics and Moderates Alike By Offering a Proposal on Illegal Immigrants*, N.Y. TIMES, Jan. 8, 2004, at A1; Richard Stevenson & Steven Greenhouse, *Plan for Illegal Immigrant Workers Draws Fire from Two Sides*, N.Y. TIMES, Jan. 8, 2004, at A28.

[23] *See* Rogers, *supra* note 20, at A4.

[24] *See id.*; *see also* Telephone Interview with Esther Olavarria, Legal Counsel to Sen. Edward M. Kennedy, Senate Subcommittee on Immigration (Dec. 21, 2004) [hereinafter Second Telephone Interview with Olavarria].

[25] *See* Rogers, *supra* note 20, at A4; *see also* Second Telephone Interview with Olavarria, *supra* note 24.

[26] *See* Rogers, *supra* note 20, at A4.

are inadequate in understanding how the accord between growers and farmworkers was reached or in assessing the likelihood of future reform.

This Article will then propose a framework of analysis, herein termed "biennial factionalism," to understand Congress's failure, thus far, to enact reforms in this area, and to help in predicting the possibility of future reform. The model of biennial factionalism is grounded in the dynamic interplay among political and non-governmental actors, and depends on the cyclical nature of the legislative process, which allows these actors, from one Congress to another, to address weaknesses in prior legislative proposals and overcome procedural obstacles, and to restructure the political alliances necessary to ultimately achieve passage.

I. THE HISTORY OF NEGOTIATIONS

A. Background

1. The Plight of Agricultural Workers in the U.S. Economy

Over the last century, migrant workers have been perhaps the most exploited class of workers in America.[27] From the first Mexican guest-worker program launched in 1917,[28] to the *bracero* programs of the 1940s,[29] to the indentured servitude cases of the modern age,[30] migrant workers in

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[27] *See generally* MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY 70–72 (1979); KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. 5–6 (1992); CAMILLE GUERIN-GONZALES, MEXICAN WORKERS AND AMERICAN DREAMS: IMMIGRATION, REPATRIATION, AND CALIFORNIA FARM LABOR, 1900–1939, at 111–14 (1994); CINDY HAHAMOVITCH, ATLANTIC COAST FARMWORKERS AND THE FRUITS OF THEIR LABOR: MAKING OF MIGRANT POVERTY, 1870–1945, at 96, 151, 200–04 (1997).

[28] *See* HAHAMOVITCH, *supra* note 27, at 96; Philip Martin, *Guestworkers: Past and Present*, in MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY 878 (last updated Apr. 28, 1998) *at* http://www.utexas.edu/lbj/uscir/binpap-v.html.

[29] From 1942 to 1952, a total of 818,545 *braceros* were imported from Mexico. *See* CALAVITA, *supra* note 27, at 31–32. The term "bracero" comes from the Spanish word "brazo," or "arm," and can roughly be translated as "farmhand" or "one who works with his arms." *Id.* at 1; *see also* PETER N. KIRSTEIN, ANGLO OVER BRACERO: A HISTORY OF THE MEXICAN WORKER IN THE UNITED STATES FROM ROOSEVELT TO NIXON (1977). Similarly, the U.S. government admitted 15,241 Bahamians and 50,598 Jamaicans between 1943 and 1947. PRESIDENT'S COMM'N ON MIGRATORY LAB. IN AM. AGRIC: REP. OF THE PRESIDENT'S COMM'N ON MIGRATORY LAB. 38 (1951) [hereinafter TRUMAN REPORT]. Labor scholars contend that each time growers turned to foreign labor, including during the *bracero* program, it was not because of an actual shortage, but because existing agricultural workers had begun to organize and demand an improvement in their working conditions. *See, e.g.*, CALAVITA, *supra* note 27, at 3. In response, growers pressured the U.S. government to open the borders to foreign agricultural workers to provide a cheap supply of malleable labor. *Id.* at 29–30. For example, in Florida, growers pitted African Americans against West Indians to drive down prices. HAHAMOVITCH, *supra* note 27, at 128.

[30] *See, e.g.*, *Used and Abused: Five Recent Cases with Slavery Convictions: A Palm Beach Post Special Report*, PALM BEACH POST, Dec. 7, 2003, special section at 2 (describing five cases of modern day slavery uncovered and prosecuted in Florida in the last five years).

this country have been paid substandard wages to work in substandard conditions with little access to the kinds of workplace protections enjoyed by workers in other sectors of the economy. Migrant workers were first excluded from labor protection policies during the New Deal,[31] and their situation in the U.S. economy has failed to improve during the last 100 years. They remain perhaps the most marginalized group of workers in the U.S. economy today.

In 1960, Edward R. Murrow hosted the CBS documentary *Harvest of Shame*, which aired on Thanksgiving Day and shocked the nation with its depiction of the plight of migrant workers, including many in south Florida.[32] More recently, series in the *Miami Herald*[33] and the *Sacramento Bee*[34] have demonstrated that the last forty years have done little to improve their situation. These news accounts are confirmed by the federal government's own reports.[35]

Today, anywhere from 52% to 85% of farmworkers are undocumented,[36] with the overwhelming majority coming from Mexico.[37] In light of the physically intense nature of the occupation, it is not surprising that approximately 79% of all farmworkers are between the ages of 18 and 44. Six percent are between the ages of 14 and 17, while only 15% are 45 or

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[31] Agricultural workers specifically had been excluded from the labor protections of the Wagner Act of 1935. *See* National Labor Relations (Wagner) Act, ch. 372, § 2(3), 49 Stat. 450 (1935) (codified as amended at 29 U.S.C. § 152(2) (2000)) (excluding "agricultural laborer" from the statute's definition of "employee"). They were also denied Social Security, unemployment benefits, and the protections of the Fair Labor Standards Act. *See, e.g.*, Celeste Corlett, *Impact of the 2000 Child Labor Treaty on United States Child Laborers*, 19 ARIZ. J. INT'L COMP. L. 713, 718 (2002) (discussing exclusion of agricultural workers from New Deal protections).

[32] *Harvest of Shame* (CBS television broadcast, Nov. 25, 1960).

[33] *See* Ronnie Greene, *A Crop of Abuse: Brutal Farm Labor Bosses Punished But Not Growers Who Hire Them*, MIAMI HERALD, Sept. 1, 2003, at 1A; Ronnie Greene, *Herald Series on Worker Abuse Honored*, MIAMI HERALD, May 18, 2004, at 5A (noting series cited as finalist in prestigious Sidney Hillman Foundation Journalism Awards); Ronnie Greene, *The Face of Florida's Farmworkers: Florida Farmhands Reap a Harvest of Poverty, Pain and Exploitation*, MIAMI HERALD, Aug. 31, 2003, at 1L; Ronnie Greene, *The Ties That Bind: Politician's Farming Interests Lead to Drought of Laws for Workers*, MIAMI HERALD, Sept. 2, 2003, at 1A.

[34] *See* Editorial, *"Honored" By Neglect: Will State Again Ignore Farmworkers' Plight?*, SACRAMENTO BEE, May 22, 2001, at B6; Andy Furillo, *Big Deal Pays Off For All But Workers: A Court Settlement Reveals Flaws in the State's Farm Labor Contracting System*, SACRAMENTO BEE, May 21, 2001, at A1; Andy Furillo, *Farm Labor Reforms Far from Certain*, SACRAMENTO BEE, May 22, 2001, at A1; Andy Furillo, *Special Report: Toiling Under Abuse: Farmworkers' Struggle Goes On*, SACRAMENTO BEE, May 20, 2001 at A1; Andy Furillo, *With Union in Decline, Farmworkers Turning Elsewhere*, SACRAMENTO BEE, May 22, 2001, at A8.

[35] *See, e.g.*, NAWS STUDY, *supra* note 7, at 39–42. This study is based on 4199 personal interviews with workers conducted in eighty-five counties nationwide between October 1, 1996, and September 30, 1998. *Id.* at 3.

[36] *Id.* at 22.

[37] *Id.* at 5 (indicating that 81% of all farmworkers are foreign-born, with approximately 95% of the foreign-born coming from Mexico).

older.[38] The median level of schooling is the sixth grade, as 20% have completed fewer than three years of school and only 15% have completed 12 years or more.[39] According to the study, 58% are either totally or functionally illiterate, and another 27% are only marginally literate.[40] Three out of four farmworkers are paid by the hour, averaging an hourly wage of $5.94.[41] Only 5% reported being covered by employer-provided health insurance for non-work-related injuries or illness.[42] Fifty-six percent reported that they were not covered by workers' compensation.[43] Nearly three-quarters of all U.S. farmworkers earned less than $10,000 per year, with half of individual farmworkers earning less than $7,500 per year.[44] Sixty-one percent of all farmworkers had below poverty-level incomes.[45] Few farmworkers received needs-based social services.[46]

The media has publicized the fact that farmworkers perform arduous, backbreaking work that most Americans will not do for such low wages; that farmworkers are exploited by employers and the independent contractors who hire them largely as a means to insulate growers from liability for hiring undocumented workers; and that they often live in abysmal, slave-like conditions.[47] Notwithstanding such evidence, the fact remains that American consumers rely on a largely undocumented workforce to harvest most of the fruit and vegetables they place on their tables. Without migrant workers, it has been argued, food would rot on the vine, prices would skyrocket, or, in this new era of globalization and outsourcing, the nation would become dependent on food imports.[48] Thus, despite strong

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[38] *Id.* at 9.
[39] *Id.* at 13.
[40] *Id.* at 16.
[41] *Id.* at 29.
[42] *Id.*
[43] *Id.* at 36.
[44] *Id.* at 39.
[45] *Id.*
[46] *See id.* at 40. According to the NAWS STUDY, between October 1, 1996, and September 30, 1998, only 1% utilized disability insurance or social security, while approximately 20% reported receiving benefits from unemployment insurance. *Id.* Approximately 17% used needs-based services, with 13% of all farmworkers and their families using Medicaid in 1997 and 1998. *Id.* at 41. About 10% of farmworker families utilized the supplemental nutrition program Women Infants and Children (WIC) and Food Stamps. *Id.* Only 1 in 100 families used Aid for Families With Dependant Children (AFDC), Public Housing, General Assistance or other services. *Id.* Only 2% of farmworker households used more than one such service. *Id.*
[47] *See, e.g.*, John Bowe, *Nobodies: Does Slavery Exist in America?*, NEW YORKER, Apr. 21, 2003, at 106; Ronnie Greene, *The Face of Florida's Farmworkers: Florida Farmhands Reap Harvest of Poverty, Pain and Exploitation*, MIAMI HERALD, Aug. 31, 2004, at 1L; Ron Gurwitt, *Power to the Pickers*, MOTHER JONES, July/Aug. 2004, at 24; John Lantigua & Christine Stapleton, *Labor Contractors Control Migrants' Lives and Sometimes Commit Crimes Against Them*, PALM BEACH POST, Dec. 7, 2003, special section at 5 ("The reason that growers use contractors is to distance themselves," says Raul Barrera of the Migrant Farmworker Justice Project in Florida. "The growers use it as a way to hire undocumented workers and avoid liability.")
[48] *See* 151 CONG. REC. S1288–89 (daily ed. Feb. 10, 2005) (statement of Sen. Craig). For

anti-immigrant sentiment in society and vocal opposition to any type of reform that would "reward lawbreakers" by providing a path to lawful residency for undocumented workers, the United States has tended to overlook both the presence and exploitation of undocumented agricultural workers because of the benefits they yield both to growers and consumers.[49]

2. *A Brief History of U.S. Guestworker Programs*

One cannot fully appreciate the current debate over agricultural labor and the AgJobs legislation without revisiting how foreign workers became central to the agricultural economy during the twentieth century. The legislation, while a novel compromise between growers and the United Farmworkers, also has deep historical roots in evolving migrant labor policies of the twentieth century.

From their origins, guestworker programs have demonstrated a persistent tension between legally admitting temporary workers and permitting undocumented workers to fill the enormous gap between supply and demand. In the late nineteenth century, California growers shifted from a dependence on the Chinese farmworkers from the late 1870s to the 1890s to greater reliance on Japanese farmworkers beginning in the 1890s and going into the 1910s, as Chinese workers began to organize to demand better working conditions.[50] By the end of the twentieth century, however, and into the 1900s, Japanese farmworkers, who had initially earned even lower wages than the Chinese, began to organize into mutual aid societies to protect their interests and to acquire land, thus posing a threat to growers.[51]

Meanwhile, on the east coast, growers relied more heavily on domestic workers, including former slaves and sharecroppers, to harvest the crops. As domestic migrant workers began to organize to demand better wages and working conditions, growers began their search for alternative

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a satirical look at the consequences of eliminating undocumented workers from the U.S. economy, see the mockumentary, A DAY WITHOUT A MEXICAN (Televisa Cine USA 2004). *See also* Albor Ruiz, *Serious Point to This Comedy*, N.Y. DAILY NEWS, MAY 16, 2004, at 54. Some labor economists would argue, however, that without undocumented workers, growers would be forced to mechanize farm production and pay higher wages to their workforce. *See, e.g.*, Rafael Alarcon & Rick Mines, *Options for U.S. Labor Intensive Agriculture: Perpetuation of the Status Quo or Transition to a New Labor Market?*, *in* FORUM FOR TRANSNATIONAL EMPLOYMENT 1, 12–13 (Cal. Inst. for Rural Studies 1990) *at* http://www.cirsinc.org/fte.html. It has also been suggested that growers would be forced to absorb these costs and that the impact on prices for consumers would be negligible. *See* Second Telephone Interview with Rob Williams, Director of the Migrant Farmworker Justice Project, Tallahassee (Jan. 21, 2005) [hereinafter Second Telephone Interview with Williams].

[49] See 151 CONG. REC. S1288–89 (daily ed. Feb. 10, 2005) (statement of Sen. Craig).

[50] *See* GUERIN-GONZALES, *supra* note 27, at 18.

[51] *See id.* at 19. A 1911 Report of the Senate Committee on Immigration found 30,000 Japanese farmworkers in California and concluded that Japanese were the most important group of farmworkers engaged in agricultural work. S. REP., at 20–33 (S. Comm. on Immigration) (1911) *cited in* GUERIN-GONZALES, *supra* note 27, at 19; *see also* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 203 (1989).

sources of labor. By the turn of the century, growers in the mid-Atlantic region had begun to turn to Italian immigrants to harvest their crops.[52]

In 1913, in response to growing xenophobia, California passed the Alien Land Law prohibiting immigrants ineligible for citizenship from owning land or from leasing land for longer than a three-year period.[53] Congress followed with the Immigration Act of 1917,[54] which barred the immigration of non-whites, including Chinese, Japanese, Armenians, and Asian Indians,[55] creating a temporary labor crisis for west coast growers in the context of the United States' entry into World War I.[56] The Act also incorporated a provision of the Anti-Alien Contract Labor Law of 1885, which had prohibited the importation of contract labor.[57] Nonetheless, the ninth proviso to section 3 of the Immigration Act of 1917 gave the U.S. Attorney General broad authority to "issue rules and prescribe conditions . . . to control and regulate the admission and return of otherwise inadmissible aliens . . . ."[58] This escape clause enabled the U.S. government to provide for the importation of Mexican guestworkers.

In light of this self-declared labor crisis,[59] west coast growers, with the assistance of the U.S. Department of Labor, turned to Mexican workers in 1917, believing that these workers could be recruited for temporary work and then deported to Mexico when their services were no longer needed.[60] Under the 1917 law, the Attorney General, at the behest of growers, issued specific exemptions for temporary Mexican agricultural workers and classified Mexicans as "white" under the 1917 law.[61] The importation of Mexican workers was also enabled by a provision of the law exempting Mexican agricultural workers remaining in agricultural work from the law's ban on the admission of illiterates.[62] These workers comprised what growers had come to see as a malleable and cheap workforce, in contrast to the Chinese and Japanese, who were perceived as more troublesome.[63]

Between 1917 and 1921, more than 72,000 Mexican workers entered the United States as guestworkers—the majority performing agricultural work.[64] While most did return to Mexico at one point or another, between

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[52] *See* HAHAMOVITCH, *supra* note 27, at 29.

[53] *See* GUERIN-GONZALES, *supra* note 27, at 20; *see also* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 203 (1989).

[54] Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1952).

[55] *See id.* § 3.

[56] *See, e.g.*, HAHAMOVITCH, *supra* note 27, at 92–96 (describing U.S. efforts to confront labor shortages during World War I).

[57] *See* Immigration Act of 1917 § 3.

[58] *Id.* § 3, proviso 9.

[59] *See* HAHAMOVITCH, *supra* note 27, at 92.

[60] *See* CALAVITA, *supra* note 27, at 7; GUERIN-GONZALES, *supra* note 27, at 44–45.

[61] *See* HAHAMOVITCH, *supra* note 27, at 92.

[62] *See* CALAVITA, *supra* note 27, at 7; *see also* HAHAMOVITCH, *supra* note 27, at 96.

[63] By the end of nineteenth century, both Chinese and Japanese farmworkers began to organize as a means of protecting their interests and acquiring land. *See generally* GUERIN-GONZALEZ, *supra* note 27, at 18–20.

[64] *See* GUERIN-GONZALEZ, *supra* note 27, at 44.

40% and 60% settled in the United States.[65] By 1931, in the midst of the Great Depression, the United States determined that it was time for the Mexicans to depart.[66] That year, U.S. Secretary of Labor William N. Doak ordered the Bureau of Immigration, which was then under the authority of the Department of Labor, to locate and remove all non-citizens illegally in the United States, targeting particular immigrants involved in labor disputes.[67] This resulted in raids and the mass expulsion of thousands of persons of Mexican descent,[68] many of whom were actually U.S. citizens.[69] The raids and repatriations continued until 1942, when the United States embarked on the *bracero* program, the foundation for the AgJobs legislation.

The Farm Security Administration (FSA) had been established during the Great Depression to address the needs of the nation's rural poor, and the *bracero* program was, at least in part, a response to threats to the FSA's very survival.[70] By the early 1940s, with World War II underway, growers began to complain of labor shortages in different parts of the country.[71] The FSA expanded the Migratory Camp Program to mobilize workers, directing them to areas of the country where labor shortages existed.[72] Despite the success of the program in different parts of the country, growers in areas from which workers were recruited bitterly complained of the so-called labor shortages the program created in their areas.[73]

Under attack by growers, the FSA needed to find another source of labor. In April 1942, the United States and Mexico negotiated a new ac-

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[65] *See id.* at 45.

[66] For excellent accounts of the forced expulsion of persons of Mexican descent from the United States, see FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995); GUERIN-GONZALES, *supra* note 27, at 77.

[67] *See* GUERIN-GONZALES, *supra* note 27, at 79.

[68] *See id.* at 77–80.

[69] *See* Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 659–70 (2004).

[70] *See* HAHAMOVITCH, *supra* note 27, at 167–68. The Farm Security Administration was established to serve the needs of the rural poor in light of the exclusion of agricultural workers from the labor protections of the New Deal. *See id.* at 156. Its role would be to serve as a guardian and protector of migrant farmworkers, but, because of the workers' exclusion from the Wagner Act, the FSA lacked the power to legally empower them. *See id.* at 151.

[71] *See id.* at 163.

[72] *See id.* at 156. During its tenure, the FSA established and ran the Migratory Camp Program, which created a series of migratory labor camps throughout the country, many of which were mobile camps that moved with the harvest, but included others, such as camps in Florida, that were permanent camps in areas of year-round agricultural activity. *Id.* at 156. These camps functioned as self-contained villages and included health clinics, schools, laundry facilities, and even day care centers. On January 23, 1942, the FSA and the U.S. Employment Service (USES) signed a statement of policy to coordinate farm labor actions: The USES would identify areas of labor shortage and surplus and recruit farmworkers willing to relocate, while the FSA would provide them with transportation, food and shelter. *See id.*

[73] *See id.* at 164–67. Hahamovitch describes the fact that, while growers complained that World War II had created a farm labor emergency, federal officials continued to report that the nation's labor supply was adequate to meet the demand for increased production. *Id.* at 163. In actuality, farmers only needed to pay labor a fair wage to assure themselves of an adequate supply. *Id.* at 163–64.

cord that would allow for the temporary admission of Mexican agricultural workers into the United States over the next several years.[74] However, the agreement with Mexico involved certain restrictions that were designed to protect Mexican workers by guaranteeing them minimum wages, maximum hours, and basic labor protections.[75] The FSA saw the treaty as an opportunity to extend the labor protections negotiated for Mexican workers to domestic rural workers, who had little bargaining power.[76]

Growers' associations complained bitterly, and many growers chafed at the restrictions of the program negotiated with Mexico.[77] In 1943, largely in response to this pressure, the authority of the FSA over migratory farm labor was transferred to the War Food Administration, which transformed the Migratory Camp Program from a program focused on the labor conditions of farmworkers into one considered friendlier to growers.[78] That same year, the *bracero* program, which would provide a steady supply of Mexican agricultural workers to U.S. growers,[79] was passed into law by Congress.[80]

The evolution of the *bracero* program and other guestworker programs and their administration by various agencies of the U.S. government underscore the tensions that have long existed in agricultural labor policy between relaxing the requirements for foreign guestworkers and legalizing the status of undocumented farmworkers[81] already in the field. Even the original *bracero* program, established to "import" temporary workers from Mexico, included by 1947 a legalization component to provide legal status to undocumented workers already in the United States to meet the needs of growers who claimed they were not being adequately served by the temporary worker program.[82]

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[74] Agreement Between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, U.S.-Mex., 1942 U.S.T. 209.

[75] *See* HAHAMOVITCH, *supra* note 27, at 168; *see also* TRUMAN REPORT, *supra* note 29, at 42.

[76] *See* HAHAMOVITCH, *supra* note 27, at 168.

[77] *See* CALAVITA, *supra* note 27, at 22.

[78] *See id.* Growers had complained both about the FSA's "socialist" tendencies and that the FSA had "stalled around" in providing foreign guestworkers. *Id.*

[79] *See* GUERIN-GONZALES, *supra* note 27, at 135.

[80] *See* Supply and Distribution of Farm Labor, ch. 82, 57 Stat. 70 (1943) (repealed 1947).

[81] The term "undocumented worker" refers to foreign workers who are in the United States without legal status and distinguishes them from H-2A workers and workers under the *bracero* program who entered the United States with legal status. Modern accounts, including official U.S. sources, tend to refer to this group as illegal aliens. The historic literature, including official sources, consistently referred to undocumented workers using the pejorative "wetback." *See, e.g.*, TRUMAN REPORT, *supra* note 29, at 69–88 (describing the situation of undocumented workers in the agricultural sector, which it refers to as "The Wetback Invasion"); KIRSTEIN, *supra* note 29, passim; Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. 334, 334 (1956). As Beth Lyon points out in a recent article, the term undocumented worker "highlights the technical, legally constructed nature of this status and de-emphasizes the concept of willful lawbreaking." Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws That Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 577 (2004).

[82] *See* CALAVITA, *supra* note 27, at 24–25. Another essential component of U.S. labor

The wartime *bracero* program lasted from 1942 to 1947, and provided for the "importation" of 219,500 farm employees to twenty-four states.[83] Yet stringent requirements for grower participation in the *bracero* program resulted in, at best, lax enforcement by the Immigration Service against undocumented workers. For example, the Mexican government insisted that Texas be excluded from the *bracero* program because of the history of exploitation of Mexican workers by many Texas growers.[84] As a result, Texas growers had to find alternative sources of labor. However, in order to accommodate the needs of growers, throughout this period, the Immigration Service systematically failed to enforce the immigration laws against undocumented agricultural workers in the Southwest, including in Texas.[85]

By 1947, as the official *bracero* program drew to a close, as a result of an accord between Mexico and the United States, the Immigration Service began to provide for the legalization of undocumented farmworkers already in the United States.[86] The agreement contained a novel provision that provided that undocumented Mexicans who were deported could return to the United States as temporary contract workers. First, the INS would be allowed to "deport" the worker by having him brought to the border.[87] The worker would then be given an identification slip and allowed to step across the border into Mexico.[88] Finally, he would re-enter as a documented worker.[89] This became euphemistically known as "drying out the wetbacks."[90]

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policy which has been examined by numerous scholars is the impact of guestworkers and undocumented workers on the U.S. labor force, including both U.S. citizens and residents. *See, e.g., Evaluating a Temporary Guestworker Proposal: Hearing before the Subcommittee on Immigration and Border Security of the Senate Committee on the Judiciary*, 108th Cong. (2004) (statement of Dr. Vernon Briggs, Prof. of Industrial Relations, Cornell University); Philip Martin, *Guestworkers: Past and Present*, *supra* note 28, at 877–80. Although growers continued to complain of "labor shortages," many critics emphasize that there never was a labor shortage. *Id.* What growers were actually concerned about was maintaining a cheap and malleable workforce. As wages rose and farmworkers' bargaining power increased, growers pressured U.S. officials to import foreign workers to maintain a cheap and steady supply of labor. Despite the noble goals of the FSA, the guestworker program did little, if anything, to improve the situation of domestic farmworkers, and may, in fact, have done just the opposite, by providing growers with this alternative labor source.

[83] *See* CALAVITA, *supra* note 27.

[84] *See* CALAVITA, *supra* note 27, at 20–24; *see also* Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion* 18, 28 N.Y.U. REV. L. & SOC. CHANGE 547, 554–59 (2004) (underscoring the history of conflict between the United States and Mexico, the legacy of racism and discrimination, and the role played by the Mexican government in advocating for the rights of Mexicans working in the United States).

[85] *See* CALAVITA, *supra* note 27, at 32–33.

[86] *See* Migratory Workers, Mar. 10, 1947, U.S.-Mex., 1947 U.S.T. 425.

[87] *See id.*

[88] *See id.*

[89] *See id.*; TRUMAN REPORT, *supra* note 29, at 53.

[90] *See* Philip Martin, *Does the U.S. Need a New Bracero Program?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 127, 130 (2003).

The *bracero* program was officially terminated by Congress in 1948[91] but continued, however, without new congressional authorization, from 1948 to 1951, through a series of bilateral accords between the United States and Mexico.[92] These agreements provided for the recruitment, processing, and contracting of Mexican workers through recruitment centers in the interior of Mexico, and by the early 1950s came to closely resemble the current H-2A program.[93]

On February 21, 1948, after the *bracero* program had officially been terminated, Mexico and the United States reached a new agreement for the importation of Mexican workers.[94] The main area of disagreement between the two countries was with regard to the ban on contracting Mexican workers to Texas growers, due to reports of widespread discrimination by Texas employers.[95] Mexico also insisted on a system of interior recruitment of contract workers, rather than the border recruitment favored by U.S. growers.[96] During a nearly two-month hiatus in negotiations, U.S. agencies and growers lobbied hard for an agreement. Finally, at the El Paso conference, the parties reached an accord that became final on February 21, 1948.[97]

Although the new program functioned efficiently for several months, by the fall of 1948, the program was disintegrating due to continuing disagreement over the placement of recruiting centers and the ban on contracting Mexican workers to Texas growers.[98] Following a flurry of unsuccessful negotiations and nearly eight months after the *bracero* program had officially ended, during what became known as the El Paso Incident, the INS literally opened the El Paso border to undocumented Mexican workers for the weekend, paroling the workers to growers through the Texas Employment Service.[99]

Nonetheless, complaints by domestic farmworker organizations about the impact of foreign farm labor on domestic farmworkers' wages and work-

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[91] Farm Labor Supply Program Continuance and Liquidation, ch. 43, 61 Stat. 55 (1947) (providing that the *bracero* program "may be continued up to and including December 31, 1947, and thereafter shall be liquidated within thirty days").

[92] *See, e.g.*, Migration of Mexican Agricultural Workers, Feb. 20, 1948, U.S.-Mex., 62 Stat. 3887–94; Mexican Agricultural Workers, Aug. 1, 1949, U.S.-Mex., 2 U.S.T. 1048; Mexican Agricultural Workers, Mar. 9, 1951, U.S.-Mex., 2 U.S.T. 1917 [hereinafter March 1951 Agreement]; Migrant Labor Agreement of 1951, Aug. 11, 1951, U.S.-Mex. 2 U.S.T. 1940 (extended and amended by Mexican Agricultural Workers, May 19, 1952, U.S.-Mex., 3 U.S.T. 4341) [hereinafter August 1951 Agreement].

[93] *See* August 1951 Agreement, *supra* note 92, art. 4, 11, 18. The statutory basis for continuing the guestworker program between 1948 and 1951 was the famous escape clause of the Immigration Act of 1917—the ninth proviso to Section 3. *See* TRUMAN REPORT, *supra* note 29, at 41; *supra* note 58 and accompanying text.

[94] *See* Migratory Workers, Feb. 21, 1948, U.S.-Mex., 1948 U.S.T. 417.

[95] *See* KIRSTEIN, *supra* note 29, at 134–35.

[96] *See id.* at 136.

[97] *See id.*

[98] *See id.* at 135–36.

[99] *See* CALAVITA, *supra* note 27, at 30.

ing conditions persisted. On June 30, 1950, in response to such complaints, President Truman appointed a Commission on Migratory Labor.[100] The Commission's Final Report was the culmination of an exhaustive investigation into the problems incident to migratory labor, including the use of foreign labor, both guestworkers and the undocumented. The Commission issued a series of recommendations, including recommendations that labor importation only be undertaken pursuant to the terms of intergovernmental agreements and that administration of the agreements be the responsibility of the INS rather that the U.S. Employment Service (USES), which was perceived to be largely responsive to growers.[101]

By the early 1950s, bilateral accords between the United States and Mexico had come to closely resemble the current H-2A program. The August 1949 agreement between the United States and Mexico was intended as a one-time legalization of migrant workers already in the United States. The August 1951 Agreement, which in many ways resembled the modern scheme for the employment of temporary agricultural workers,[102] set forth new rules for the recruitment, processing and transporting of agricultural workers based on joint recommendations of the two countries, and provided for a new labor contract for the Mexican workers.[103] Additionally, the August 1951 Agreement emphasized that preference in employment would be given to U.S. workers and that Mexican workers could not be employed if their employment would adversely affect the wages and working conditions of domestic workers.[104] The Agreement also provided for the issuance of labor certifications by the Secretary of Labor, which would establish whether there were sufficient American workers available to perform the labor for which foreign workers were being sought, and for work permits by the Department of Justice.[105] Furthermore, the Agreement underscored that growers who knowingly hired or had in their employ undocumented workers would be deemed ineligible for participation in the program.[106]

In 1952, the H-2A temporary agricultural worker program was codified as part of the Immigration and Nationality Act of 1952.[107] The 1952

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[100] *See* TRUMAN REPORT, *supra* note 29, at 187–88; *see also* Kirstein, *supra* note 29, at 185–87 (providing an excellent study of the work of this Commission).

[101] *See* KIRSTEIN, *supra* note 29, at 197–98.

[102] *See* Immigration and Nationality Act, 8 U.S.C. § 1188 (2000) [hereinafter INA].

[103] *See* August 1951 Agreement, *supra* note 92, art. 11.

[104] *See id.* art. 9 ("Mexican workers shall not be employed in the United States in any jobs for which domestic workers can be reasonably obtained or where the employment of Mexican workers would adversely affect the wages and working conditions of domestic agricultural workers in the United States."); *see also id.* art. 15 (setting forth minimum wage requirements).

[105] *See id.* art. 10.

[106] *See id.* art. 7.

[107] *See* INA, Pub. L. No. 414, 66 Stat. 163 (1952). The 1952 Act "was passed by Congress over President Truman's veto." ALICIA J. CAMPI, AM. IMMIGRATION L. FOUND., IMMIGRATION POLICY BRIEF, THE MCCARRAN-WALTER ACT: A CONTRADICTORY LEGACY ON

Act, which consolidated various immigration provisions into the Immigration and Nationality Act (INA), for the first time created a temporary worker H-visa category under INA section 101(a) of the Act.[108] The modern H-2A visa program, which provides for the admission of temporary H-2A agricultural workers where "there are not sufficient [American] workers who are able, willing and qualified and who will be available at the time and place needed," had begun.[109] Meanwhile, Mexico and the United States extended the August 1951 Agreement in May 1952 and yet again in 1959, to provide for the importation of Mexican workers outside the regular program.[110]

In 1986, Congress enacted major reforms to the laws governing migrant workers when it passed the Immigration Reform and Control Act (IRCA).[111] IRCA provided for the legalization of undocumented persons who had been physically present in the United States since before January 1, 1982.[112] The law also provided for the legalization of seasonal agricultural workers (SAWS) who had worked at least ninety days in certain agricultural occupations over a 180-day period.[113] It split the temporary worker category into H-2A and H-2B workers, distinguishing agricultural H-2A workers from other temporary workers.[114] Finally, IRCA enacted strict employer sanctions against anyone who from that point onward employed undocumented workers.[115]

IRCA was intended both to provide a solution to the plight of growers and workers in the United States and to close the border to further undocumented migration. As Donald Kerwin and Charles Wheeler point out in a recent article, while growers desired a cheap and dependent source of farm labor, farmworkers sought greater protection from exploitation.[116] Although the law resulted in the legalization of nearly 1.1 million individuals,[117] most critics agree that it did not accomplish either of its prin-

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RACE, QUOTAS, IDEOLOGY (June 2004) *at* http://www.aif.org/ipc/policy_reports_2004_mccarranwalter.asp (last visited Apr. 22, 2005); *see also* Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J. L. & POL'Y 79, 85 (2004). President Truman had vetoed the bill because of Congress's refusal to abolish national origin quotas for the legal admission of immigrants. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 167 (Westgroup 4th ed. 1998) (1985).

[108] *See* INA § 101(a) (codified at 8 U.S.C. § 1101(15)(H) (2000)).

[109] *See id.* § 218(a)(1)(A) (codified at 8 U.S.C. 1188(a)(1)(A) (2000)).

[110] *See* Agreement Extending and Amending the Agreement of August 11, 1951, May 19, 1952, U.S.-Mex., 3 U.S.T. 4341; Mexican Agricultural Workers, Oct. 23, 1959, U.S.-Mex., 10 U.S.T. 2036.

[111] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[112] *See id.* § 201.

[113] *See id.* § 301.

[114] *See id.* § 301(a).

[115] *See id.* § 274A(f).

[116] *See, e.g.*, Donald Kerwin & Charles Wheeler, *The Case for Legalization, Lessons from 1986, Recommendation for the Future, Issues in Immigration*, Center for Migration Studies, Occasional Paper Series, at 13 (2004) (on file with author).

[117] NAWS STUDY, *supra* note 7, at 23 n.8.

cipal objectives.[118] Workers in the agricultural sector who obtained their residency under IRCA soon transferred to better-paying jobs, while the flow of undocumented workers into the United States continued at a breathtaking pace. By 2002, the undocumented population in the United States had soared from between 1.5 million and 3 million in 1988 to 9.3 million individuals in 2002.[119] Nonetheless, the story of IRCA, like that of AgJobs, provides a valuable lesson in how legislation is often the result of competing groups arriving at compromise solutions. Kerwin and Wheeler discuss how IRCA was "at least ten years in the making and the result of many competing forces finally reaching a compromise."[120] Growers initially opposed a program that would provide workers with permanent residency and job portability, fearing workers would leave the agricultural sector for higher-paying jobs. They sought a solution that would require temporary workers to work for a particular employer.[121] Advocates opposed such a plan, favoring an amnesty that would allow for lawful permanent residency while giving growers a mechanism to replenish their workforce.[122] Eventually, out of these competing proposals, IRCA emerged and was finally enacted after several attempts in 1986.[123]

B. Conceiving AgJobs

1. The H-2A Program

Of the approximately 2.5 million foreign farmworkers in America,[124] only about 40,000 are here pursuant to the H-2A visa program,[125] which allows for the temporary hiring of foreign workers to perform agricultural work where there are not sufficient U.S. workers able, willing, and qualified.[126] Today, it is estimated that anywhere from 52% to 85% of

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[118] *See* Kerwin & Wheeler, *supra* note 116, at 5.

[119] *See id.*

[120] *See id.*

[121] *See id.* at 14.

[122] *See id.*

[123] *See id*; *see also* Bernard D. Reams, Jr. & Mary Ann Nelson, *Immigration Reform and the Simpson-Rodino Act: A Legislative History of the Immigration Reform and Control Act of 1986 (P.L. 99–603) with Related Documents and Secondary Sources*, 22 INT'L J. LEGAL INFO. 12, 16–17 (1994).

[124] *See* Holt, *supra* note 7, at 1–2. The study estimates that there are about 2.5 million persons in the "hired farm work force" (HFWF). *Id.* at 1. About one-third of the HFWF are very casual workers who perform less than twenty-five days of hired farm work, while about 1.6 million are non-casual HFWF. *Id.* About 1.02 million work 100 or more days of hired farm work per year. *Id.* The 2000 NAWS STUDY estimates that from 1992 to 1996, 52% did not possess valid documents. NAWS STUDY, *supra* note 7, at 22.

[125] *See* Holt, *supra* note 7, at 2.

[126] *See* IRCA § 101(a)(15)(H)(ii)(a) (defining a temporary agricultural worker as "an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature . . . ."); *see also* INA § 218, 8 U.S.C. § 1188 (2000); *see also* 8 C.F.R. § 214.2(h) (2004) (containing the rules for petitioning for temporary

agricultural workers are undocumented.[127] The number of H-2A workers admitted each year has steadily declined over the last four years from a high of 33,292 workers in 2000 to a low of 14,094 workers in 2003.[128] Ironically, although both California and Florida account for the majority of agricultural workers in the United States, in 2002, only 911 new H-2A workers were officially destined for Florida and 213 for California.[129] The reasons for this are multi-faceted, many having to do with the costs and cumbersome process for hiring H-2A workers, while others relate to the greater labor protections available to such workers, making them less economical from the standpoint of many growers.[130] In any event, the evidence clearly demonstrates that the two states with the largest numbers of agricultural workers have tended to rely on the undocumented for their labor needs.

Furthermore, experts indicate that the use of H-2As also depends to a certain extent on the predictability of the crop being harvested. Those industries with much more predictable harvesting seasons tend to be the most H-2A friendly while those industries whose harvest is less predictable are more likely to rely on undocumented workers. For example, in the state of Florida, the tomato industry tends to be less H-2A friendly because the harvest is much more unpredictable, and there is no guarantee that H-2A workers can be deployed into the fields upon their arrival

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agricultural workers); 20 C.F.R. §§ 655.90–.113 (2004) (detailing the labor certification process for temporary agricultural workers).

[127] *See* NAWS STUDY, *supra* note 7 at 22; Holt, *supra* note 7, at 1 (citing NAWS STUDY for proposition that 52% of U.S. migrant workers do not have valid documentation to work in the United States); ANDERSON, *supra* note 7, at 3 (suggesting that NAWS figure is based on self-reporting and that figure may in fact be much higher).

[128] *See* U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, NONIMMIGRANTS ADMITTED AS TEMPORARY WORKERS, EXCHANGE VISITORS AND INTRACOMPANY TRANSFEREES BY REGION AND COUNTRY OF CITIZENSHIP, FISCAL YEAR 2000, at 154 tbl.38 (2001). In 1998, the United States admitted 27,308 H-2A workers. *See* U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, NONIMMIGRANTS ADMITTED AS TEMPORARY WORKERS, EXCHANGE VISITORS AND INTRACOMPANY TRANSFEREES BY REGION AND COUNTRY OF CITIZENSHIP, FISCAL YEAR 1998, at 142 tbl.40 (1999). The following year, in 1999, it admitted 32,372 H-2A workers. *See* U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, NONIMMIGRANTS ADMITTED AS TEMPORARY WORKERS, EXCHANGE VISITORS AND INTRACOMPANY TRANSFEREES BY REGION AND COUNTRY OF CITIZENSHIP, FISCAL YEAR 1999, at 142 tbl.38 (2002); U.S. DEP'T OF HOMELAND SECURITY, STATISTICAL YEARBOOK OF IMMIGRATION AND NATURALIZATION SERVICE STATISTICS, NONIMMIGRANTS ADMITTED AS TEMPORARY WORKERS, EXCHANGE VISITORS AND INTRACOMPANY TRANSFEREES BY REGION AND COUNTRY OF CITIZENSHIP, FISCAL YEAR 2003, at 104 tbl.25 (2004).

[129] *See* U.S. DEP'T OF HOMELAND SECURITY, STATISTICAL YEARBOOK OF IMMIGRATION AND NATURALIZATION SERVICE STATISTICS 2002, NONIMMIGRANTS ADMITTED BY STATE OF DESTINATION AND CATEGORY OF ADMISSION, FISCAL YEAR 2002, at tbl.611 (2003).

[130] *See Reform of the H-2A Agricultural Guestworker and Earned Adjustment of Status of Experienced Farm Workers Are Urgent National Priorities for American Agriculture*, National Council of Agricultural Employers Issue Paper (Jan. 2003) *at* http://www.ncaeonline.org/papers/2003/H-2A_Reform-Jan2003.pdf (last visited Mar. 28, 2005) [hereinafter NCAE Issue Paper].

in the United States.[131] The citrus industry, in contrast, tends to be more H-2A oriented because the harvest is more regular.[132] The Department of Labor underscores that its regulations are specifically "designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized nonimmigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market . . . ."[133] H-2A workers, in short, are most suitable for growers with regular planned harvests where fixed costs can be spread as much as possible over the work that has to be done. And even though growers also can combine into associations, so that when a particular employer does not need a particular H-2A worker, he can send his workers somewhere else,[134] growers still argue that, because of the cumbersome requirements of the H-2A labor certification process, fewer of them have been able to rely on H-2A workers for their labor needs in recent years.[135]

Under the current statute, before Immigration Services can approve a petition for H-2A status, the Secretary of Labor must certify that there are not sufficient U.S. workers "able, willing and qualified, and who will be available at the time and place needed."[136] The Secretary must also certify that the employment of foreign agricultural workers will not "adversely affect" the wages and working conditions of similarly employed U.S. workers.[137] The term "adversely affect" is not defined in the statute, which has been problematic for growers. Over the years, the Department of Labor (DOL) has adopted regulations which the courts have upheld[138]

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[131] Telephone Interview with Rob Williams, Director of Migrant Farmworker Justice Project, Tallahassee, and Counsel to United Farmworkers (Oct. 5, 2004) (on file with author) [hereinafter First Telephone Interview with Williams]. As Mr. Williams explained, tomatoes cannot be harvested until they are ready to be picked, and workers often must go back into the same fields to pick. Thus, H-2A visas are not particularly helpful for tomato growers, who tend to rely on hiring workers at the bus stop and taking them out to the fields as the need arises. *See id.*

[132] *See id.* Growers will send workers into the fields to pick all the juice oranges off the trees and load them into a truck. The next day, they will go to a different orchard. Furthermore, the citrus industry is less market driven. *See id.*

[133] 20 C.F.R. § 655.93 (2004).

[134] *See* INA § 218(d), 8 U.S.C. § 1188 (2000).

[135] *See* JAMES S. HOLT, NAT'L COUNCIL OF AGRIC. EMPLOYERS, A TECHNICAL ANALYSIS OF THE H-2A PROVISIONS OF THE AGRICULTURAL JOB OPPORTUNITIES, BENEFITS AND SECURITY ACT OF 2003 AND A COMPARISON WITH THE EXISTING H-2A PROGRAM 4 (2003) *at* http://www.ncaeonline.org/AgJOBS.html.

[136] *See* INA § 218(a)(1).

[137] *See id.*

[138] *See* Williams v. Usery, 531 F.2d 305, 308 (5th Cir. 1976) (explaining that regulations and procedures used by the Secretary of Labor in determining the adverse effect wage rate for sugar cane cutters in Florida were reasonably suited to achieve statutory purpose of guarding against a general wage deflation from the employment of foreign workers).

that, from the standpoint of the growers, have made these labor certifications difficult to obtain in a timely fashion.[139]

Each year, the Department of Labor (DOL) sets the Adverse Effect Wage Rate (AEWR) by region.[140] The AEWR is the rate which the DOL determines must be paid to both foreign and domestic workers so as not to depress the wages of U.S. workers.[141] At least once each calendar year, the DOL publishes AEWRs for each state or region.[142] Typically, in determining whether to grant an application for labor certification of H-2A workers, the DOL compares the rate offered by the grower or growers' association in the job offer included in the labor certification request with the AEWR, the prevailing wage rate, or the minimum wage, whichever is highest. If the rate offered is equal to or greater than this rate, before the labor certification will be granted, the DOL must take the additional step of testing the labor market to determine if U.S. workers are available.[143]

As noted above, one of the biggest complaints by growers relates to the nature of the agricultural industry, where the time frame for harvesting crops is relatively narrow and often unpredictable. Thus, the immediate need for an agricultural workforce is often hard to predict, and any delay in the labor certification process or approval of a petition filed with the Department of Homeland Security can have disastrous consequences for growers and their harvest. Although the two-track process of applying for H-2A temporary agricultural workers is relatively streamlined compared to the process for applying for other categories of nonimmigrant workers,[144] the potential for delay has led most agricultural growers to rely on the services of undocumented workers.[145]

Under current law, there are a number of requirements involved in applications for labor certification of H-2A agricultural workers. These requirements include making positive efforts to recruit U.S. workers and

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[139] *See* HOLT, *supra* note 135, at 4; *see also* Fla. Sugar Cane League v. Usery, 531 F.2d 299, 302 (5th Cir. 1976) (discussing Secretary of Labor's determination of an adverse effect wage rate for sugar cane workers in Florida for the 1975–76 harvest year, based on the 1974 legal wage rate, which was established by the Secretary of Agriculture under the Sugar Act and affected approximately 8500 foreign workers annually); *see generally* INA § 218.

[140] *See* 20 C.F.R. § 655.207 (2004).

[141] *Id.* It is the "prevailing wage rate in the area of intended employment" and equals the "annual weighted average hourly wage rate for field and livestock workers for the region." *Id.*

[142] *Id.*

[143] Under the Department of Labor's own regulations, before it can make any factual determination that there are no U.S. workers available to perform temporary employment, it must first determine that the employment of foreign workers for such temporary work will not "adversely affect the wages or working conditions of similarly employed U.S. workers." 20 C.F.R. § 655.0 (2004); *see also* 20 C.F.R. § 655.90 (2004).

[144] *See* 20 C.F.R. § 655.200 (2004) (detailing the labor certification process for logging employment); 20 C.F.R. § 655.310 (2004) (containing the attestation process for hiring foreign nurses); 20 C.F.R. § 655.730 (2004) (containing the process for filing H-1B labor condition application).

[145] *See* NCAE Issue Paper, *supra* note 130, at 1.

demonstrating that the applicant has not been provided with referrals of qualified U.S. workers.[146] Once labor certification is approved, the employer must petition the Department of Homeland Security by filing a form I-129.[147] Upon approval, the worker can apply for a visa and admission.[148] However, one of the major restrictions of the current program is that non-immigrants who have engaged in unauthorized employment or who have violated H-2A status in the past are not eligible for the program.[149] Thus, technically, the overwhelming majority of current agricultural workers are ineligible for H-2A status.[150]

Furthermore, H-2A status is limited to agricultural workers. Job opportunities must be "agricultural" and "temporary" or "seasonal," with the maximum duration of jobs set at 365 days.[151] Employers must pay the highest of either the Adverse Effect Wage Rate (AEWR) as established by DOL, the prevailing wage, which is the average wage paid to agricultural workers in the same occupation,[152] or the federal or state minimum wage.[153] They must also guarantee employment for 75% of the work hours anticipated at the time of employment.[154] Employers cannot hire an H-2A worker if the specific opportunity is vacant because the former occupant is on strike.[155] Further, they must offer housing to all non-local workers[156] and reimburse workers for certain transportation costs.[157] The Secretary of Labor

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[146] 20 C.F.R. § 655.100 (2004); *see also* INA § 218(c)(1), 8 U.S.C. § 1188 (2000); *id.* § 218(c)(2)(A); *id.* § 218(b)(4); *id.* § 218(c)(3)(A)(ii); 20 C.F.R. § 655.101 (2004).

[147] *See* INA § 214(c)(1) (providing that the "question of importing any alien as a nonimmigrant under section 101(a)(15)(H) . . . shall be determined by the Attorney General . . . upon petition of the importing employer . . . . The provisions of section 218 shall apply to the question of importing any alien as a nonimmigrant under section 101(a)(15)(H)(ii)(a))"); *see also* 8 C.F.R. § 214.2(h)(2)(i) (2005) (detailing the process for applying for H-2A visas).

[148] *See* 8 C.F.R. § 214.2(h)(2)(i).

[149] *See* 8 C.F.R. § 214.2(h)(5)(viii)(A) ("An alien may not be accorded H-2A status who the Service finds to have violated the conditions of H-2A status within the prior five years. H-2A status is violated by remaining beyond the specific period of authorized stay or by engaging in unauthorized employment.").

[150] *See supra* note 128 and accompanying text (describing how number of H-2A workers admitted each year has steadily declined since 2000). Rob Williams points out that, while this is technically the law, the reality is often quite different. In an unwritten policy of "don't check; don't tell" reminiscent of the 1947 policy of "drying out the wetbacks," many undocumented workers have returned to Mexico to apply for and receive H-2A status. Second Telephone Interview with Williams, *supra* note 48.

[151] *See* 8 C.F.R. § 214.2(h)(1)(ii)(C), (h)(5)(iv)(A) (offering exemption from this requirement only "in extraordinary circumstances").

[152] *See* JAMES S. HOLT, NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, AN ANALYSIS OF THE WAGE PROVISIONS OF THE AGRICULTURAL JOB OPPORTUNITIES, BENEFITS AND SECURITY ACT OF 2003, at 1–2 (2004) (on file with author).

[153] *See* 20 C.F.R. § 655.102(b)(9)(i) (2004).

[154] *See id.* § 655.102(b)(6).

[155] *See* INA § 218(b)(1), 8 U.S.C. § 1188 (2000).

[156] *See* INA § 218(c)(4).

[157] *See* 20 C.F.R. § 655.102(b)(5) (2004).

has the authority to investigate compliance with H-2A requirements and to seek civil penalties and backpay for violations of program requirements.[158]

Under the program, a worker may remain in the United States for up to two weeks after the period of employment ends to seek additional employment.[159] The worker cannot, however, work for an employer who files an extension until the extension has been approved.[160] The worker can remain in the United States for up to three years with successive certified employers.[161]

2. The Need for a New Strategy

By the mid-1990s, growers associations concluded that something had to be done to streamline the cumbersome process for hiring H-2A workers. Farmers were ready to admit that the majority of their workforce was undocumented, and that it was in their interest to create a legal workforce.[162] In 1996, the growers succeeded in getting an amendment to the Immigration and Nationality Act introduced in Congress that would have streamlined the process for hiring foreign agricultural workers from abroad. The amendment was introduced by Representative Richard Pombo (R-Cal.) and would have allowed the admission of up to 250,000 foreign agricultural workers a year outside the H-2A program.[163] The amendment was defeated in the House on March 21, 1996, by a vote of 180 to 242.[164] On July 22, 1998, the industry offered an amendment, the Agricultural Job Opportunity Benefits and Security Act of 1998, to the Senate Appropriations Bill.[165] That amendment provided for the creation of DOL-run registries in each state, from which growers would request authorized workers.[166] If such workers were not available, growers could then petition for foreign workers.[167] The bill also included an "earned legalization" provision, which provided that workers performing at least six months of agricultural work in four consecutive years could become lawful permanent residents, with no limit on the number of persons who could adjust status.[168]

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[158] *See* 8 C.F.R. § 214.2(h)(5)(vi) (2005).

[159] *See id.* § 214.2(h)(5)(x).

[160] *See id.* § 214.2(h)(2)(i)(D).

[161] *See id.* § 214.2(h)(5)(viii)(C).

[162] *See* Stapleton, *Bush Bypassed Bill by Growers*, *supra* note 10, at 1A.

[163] *See* Immigration in the National Interest Act, H.R. 2202, 104th Cong. (1995); 142 CONG. REC. H2605–09 (amendment by Rep. Pombo); *see also New Guest Workers?*, 8 RURAL MIGRATION NEWS (Apr. 2002), *available at* http://migration.ucdavis.edu/rmn/more.php?id=581_0_4_0 (last visited Feb. 11, 2005).

[164] *See* 142 CONG. REC. H2621 (providing roll call vote on House Bill 2202); *see also New Guest Workers?*, *supra* note 163.

[165] *See* S. Amdt. 3258, 105th Cong. (1998); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, S. 2260, 105th Cong. (1998); 144 CONG. REC. S8793 (1998); *see also New Guest Workers?*, *supra* note 163.

[166] *See* S. Amdt. 3258; 144 CONG. REC. S8793 (1998).

[167] *See* S. Amdt. 3258; 144 CONG. REC. S8797 (1998).

[168] *See* S. Amdt. 3258; 144 CONG. REC. S8799 (1998).

Although that bill was approved in the Senate on July 23, 1998, by a 68-31 vote,[169] it failed in the House after farmworker advocates who opposed the bill won support in the Congress and from President Clinton.[170]

From the standpoint of farmworkers already in the United States, reforms to the H-2A system would only make it easier to hire foreign guest-workers, thus displacing existing workers in the fields.[171] Thus, while growers sought reforms to the H-2A visa program for foreign agricultural workers to streamline the program and to make it more grower-friendly, farmworker advocates sought a legal mechanism that would allow undocumented workers to legalize their status. But thus far, these bills had also been unsuccessful.

3. The Origins of the Current AgJobs Legislation

Finally, in 1999, despite ongoing efforts by industry to enact reforms to the current H-2A system,[172] industry negotiators, including the National Council of Agricultural Employers, reached the conclusion that the only way to achieve genuine reform was by joining forces with the farmworkers to negotiate a bill that would benefit each side.[173] That year, a group of growers hired Rick Swartz, a long-time advocate of migrant workers, to develop a blueprint for negotiations with the farmworkers.[174] While indus-

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[169] *See* 144 CONG. REC. S8879–S80 (1998).

[170] *See New Guest Workers?*, *supra* note 163; *see also* Stapleton, *supra* note 10, at 1A.

[171] *See, e.g.*, *A Vision for the Future of Public Policy in Migrant Workers*, Position Paper, National Council of La Raza and Farmworker Justice Fund, Inc. (May 1999) (on file with author).

[172] *See, e.g.*, Agricultural Opportunities Act, H.R. 4548, 106th Cong. (2000).

[173] *See* Stapleton, *supra* note 10, at 1A. The National Council of Agricultural Employers (NCAE) has been one of the organizations at the forefront of efforts to achieve legislative reform on both immigration and labor issues. Although a unified interest group that is national in scope, it is dominated by growers from California and Florida, including the citrus industry, the sugar cane industry, tomato growers, and other vegetable producers. *See* First Telephone Interview with Williams, *supra* note 131. The American Nursery and Landscaping Association (ANLA) is also increasingly active in this coalition. *See Issues and Legislation*, ANLA Legislative Center, *available at* http://capwiz.com/anla/issues/ (last visited Apr. 2, 2005) [hereinafter ANLA Legislative Center]. The nursery and landscape industry consists of thousands of small family businesses that grow, sell, install, and care for plants and landscapes. *Meet the Nursery and Landscape Industry*, ANLA website, *at* http://www.anla.org/industry/index.htm (last visited Apr. 2, 2005). The nursery and landscape industry is one of the fastest growing segments of U.S. agriculture, according to the U.S. Department of Agriculture's Economic Research Service. *See Floriculture Crops*, Economic Research Service, U.S. Department of Agriculture, *available at* http://www.ers.usda.gov/Briefing/floriculture/ (last visited Apr. 20, 2005) (indicating that floriculture and nursery crops are one of fastest growing sectors of U.S. agriculture). Although ANLA has not traditionally been a part of the NCAE, it has been a major actor in growers' legislation efforts and has become a partner with NCAE in this endeavor. *See* First Telephone Interview with Williams, *supra* note 131; ANLA Legislative Center, *supra*. Grower politics have been complicated, however, by a mini-revolt from the Southeastern states, particularly in Georgia and North Carolina. These smaller growers tend to prefer using the H-2A program as opposed to legalization. *See* First Telephone Interview with Williams, *supra* note 131.

[174] Stapleton, *supra* note 10, at 1A.

try members were satisfied with Swartz's plan, farmworker advocates balked, accusing Swartz of being too accommodating to the growers.[175] The proposal, some felt, would convert undocumented workers into indentured servants of the agricultural industry: in order to obtain lawful residency, farmworkers would be required to work in the agricultural sector over a multi-year period before they could convert their temporary status into permanent status.[176]

Although the United Farmworkers initially rejected the proposed road-map for negotiations, in the early winter of 1999, Congressman Howard Berman (D-Cal.), a noted champion of migrant workers, called together a group of advocates and convinced them to come to the negotiating table.[177] The UFW then retained Rob Williams, a long-time advocate for migrant workers, to act as their lead negotiator in talks with the growers.[178]

From March through October 2000, representatives from growers' associations and of farmworkers met to develop a proposal for agricultural reform, which would become known as the "Berman Compromise."[179] Although at first the negotiations were arduous and heated, over time, the sides began to develop trust.[180] Both sides recognized that any reform of the laws applicable to migrant workers had to be constructed on two pillars: (1) reform of the H-2A visa program for foreign agricultural workers, and (2) earned legalization for undocumented workers currently in the United States.[181]

Negotiations culminated on October 31, 2000, with a 150-page proposal that was to be introduced in Congress in the waning days of the Clinton Administration.[182] The Berman Compromise would have allowed undocumented workers who performed at least 100 days of farmwork in the previous 18 months to become temporary legal residents, and to acquire lawful permanent residency by doing at least 360 days of farmwork over the next 6 years, with at least 275 days of farm work during the first 3 years.[183]

When George W. Bush was announced the victor in the 2000 elections, farmworker advocates felt the bill had become a lost cause.[184] To the UFW's surprise, however, the growers announced that they wanted to go forward with the bill during Congress's lame duck session.[185] This was

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[175] *See id.*
[176] *See id.*
[177] *See id.*
[178] *See id.*
[179] *New Guest Workers?*, *supra* note 163.
[180] Rapporteur's Report, *Discussion of Legislative Proposals for Immigration Reform*, St. Thomas University (Apr. 13, 2004) [hereinafter *Roundtable Discussion of Legislative Proposals for Immigration Reform*].
[181] *See* Stapleton, *supra* note 10, at 1A.
[182] *See id.*
[183] *New Guest Workers?*, *supra* note 163.
[184] *See* Stapleton, *supra* note 10, at 1A.
[185] *See id.*

a critical moment for farmworker advocates, who saw this as evidence that the growers were committed to improving the situation of undocumented workers.[186] In the last days of the 106th Congress, it appeared that this new AgJobs bill would become law as an amendment to the Omnibus bill.[187] In December 2000, Senator Bob Graham (D-Fla.) agreed to the compromise bill brokered by Congressman Berman,[188] Senate Majority Leader Trent Lott (R-Miss.) agreed to sign off on it, and the Clinton Administration agreed to support the bill.[189] The AgJobs proposal had one fatal flaw, however: It was susceptible to a filibuster because it did not enjoy enough support in the Senate to sustain a cloture vote. Immediately before the Christmas holidays, Senator Phil Gramm (R-Tex.) threatened a filibuster, which would have effectively closed down the government on Christmas Eve.[190] Senator Lott withdrew his support and the AgJobs bill of 2000 died.[191]

Both sides were devastated and felt betrayed by the legislative process. Several growers walked away from negotiations altogether, and after the lame duck session, stopped talking to the UFW.[192] It was not until the late summer of 2001, after Senator Jeffers left the Republican party and the Democrats temporarily regained control of the Senate, that both parties prepared to resume negotiations.[193] President George W. Bush's conversations with Mexican President Vicente Fox indicated that Fox was open to immigration reform and to easing the restrictions on Mexican workers in the United States.[194] Indeed, on the morning of September 11, 2001, both sides were prepared to resume negotiations, but impetus for immigration reform stalled after the planes struck the World Trade Center and the Pentagon.[195] Nonetheless, despite this tremendous setback, enough goodwill had been built over the previous two years that both sides quietly resumed negotiations in 2002.[196]

4. The AgJobs Bill of 2003

In February 2003, a bipartisan group of lawmakers met with Karl Rove, senior advisor to the President, who told them that while the Administra-

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[186] *See id.*

[187] *See* Second Telephone Interview with Olavarria, *supra* note 24.

[188] *See* Terrorism, Guest Workers, 7 Rural Migration News (Oct. 2001) *available at* http://migration.ucdavis.edu/rmn/more.php?id+545_0_4_0.

[189] Stapleton, *supra* note 10, at 1A; Second Telephone Interview with Olavarria, *supra* note 24.

[190] *See* Stapleton, *supra* note 10, at 1A.

[191] *See id.*

[192] *See* Second Telephone Interview with Williams, *supra* note 48.

[193] *See id.*

[194] "Fox, Bush Promote Closer U.S.-Mexican Partnership," InsidePolitics (Sept. 7, 2001), *available at* http://archives.cnn.com/2001/ALLPOLITICS/09/06/us.mexico/ (last visited Apr. 20, 2005).

[195] *See* Stapleton, *supra* note 10, at 1A.

[196] *See id.*

tion would not support the AgJobs legislation if it were reintroduced, President Bush would probably sign it if it came across his desk.[197] With nonopposition from the Administration apparently secured, on September 23, 2003, a bipartisan group of lawmakers introduced Senate Bill 1645, the Agricultural Job Opportunity, Benefits, and Security Act of 2003, to a fanfare of support.[198] Similar to the Berman Compromise of 2000, the bill, known as AgJobs, would allow for adjustment of status of certain foreign agricultural workers, amend the H-2A worker program, and provide basic labor protections to foreign and U.S. workers.[199]

Specifically, the bill would confer "Temporary Resident Status" on certain agricultural workers who could show that they had performed at least 575 hours or 100 work days of agricultural employment in the United States during any 12 consecutive months between February 28, 2002 and August 31, 2003.[200] Eligible workers would have eighteen months to apply for such status, beginning six months from the date of enactment.[201] Applicants would have to establish that they were otherwise admissible to the United States.[202] Persons granted temporary residency under this legislation would have the same rights as persons admitted for permanent residence.[203] Temporary resident status under the program could be terminated only upon a determination that the noncitizen was deportable.[204]

The legislation would provide critical labor protections for such individuals, including the right not to be terminated except for just cause.[205] It would also establish extensive mechanisms, including the right to arbitration, for filing complaints against employers violating any provisions of the Act, including the right to arbitration.[206]

Furthermore, the legislation also would provide for adjustment of status to lawful permanent residency for those workers granted temporary residency who could satisfy certain minimum labor requirements over the course of the application period. Applicants would need to show (1) that they had worked at least 2060 hours or 360 work days of agricultural employment between September 1, 2003, and August 31, 2009; (2) that they

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[197] *See id.*

[198] *See* S. 1645, 108th Cong. (2003); 149 CONG. REC. S11,834–11,858 (daily ed. Sept. 23, 2003).

[199] *See* S. 1645, at § 101(b) ("Rights of Aliens Granted Temporary Resident Status"); *id.* § 201 ("Reform of H-2A Worker Program").

[200] *See id.* § 101(a)(1)(A).

[201] *See id.* § 101(a)(1)(B).

[202] *See id.* § 101(a)(1)(C). INA section 212(a) sets forth the various grounds of inadmissibility, including public health grounds, labor grounds, public charge grounds, and grounds related to previous immigration violations, under which an applicant for admission to the United Stats or lawful residency can be denied. *See* INA § 212(a), 8 U.S.C. 1182 (2000).

[203] *See* S. 1645 § 101(b)(1).

[204] *See id.* § 101(a)(4).

[205] *See id.* § 101(b)(2)(B).

[206] *See id.* § 101(b)(1)(B)(ii).

had performed at least 430 hours or 75 work days of agricultural employment in each of at least three nonoverlapping periods during the same time period; and (3) that they had performed at least 1380 hours or 240 work days between September 1, 2003, and August 31, 2006.[207] Persons seeking adjustment to lawful permanent residency under the Act would have until August 31, 2010, to apply.[208] These complicated provisions, demanded by growers, were designed to ensure that temporary residents would remain within the agricultural sector as long as possible and not use their new legal status as a stepping stone to other employment.[209]

The legislation also provided that the Department of Homeland Security would deny adjustment to any applicant who obtained temporary resident status through fraud; to any applicant convicted of one felony or three misdemeanors; or to anyone otherwise inadmissible under INA Section 212.[210] Certain grounds of inadmissibility relating to immigration violations would not apply, and the Department of Homeland Security could waive other provisions for humanitarian purposes, to ensure family unity, or when otherwise in the public interest.[211] Certain criminal and national security grounds of inadmissibility, as well as the public charge grounds, would not be waivable, although an applicant could satisfy the public charge ground, despite falling below Health and Human Services poverty guidelines, if he or she could demonstrate a history of employment evidencing self-support without reliance on public cash assistance.[212] The legislation also would provide for temporary stays of removal for persons placed in removal proceedings who could demonstrate their eligibility for temporary residency.[213] It also included a mechanism for judicial review, in the context of review of an order of removal.[214]

The Act also contained certain family unity provisions. It provided for residency for the spouse and minor children of the principal applicant, and a derivative child would qualify for such status as long as he or she was a minor on the date the principal applicant was granted temporary residency.[215]

The legislation would permit the filing of such applications both within and outside the United States, and would provide a mechanism by which such applications would have to be filed through Qualified Designated Enti-

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[207] *See id.* § 101(c)(1)(A)(i)–(iii).
[208] *See id.* § 101(c)(1)(A)(iv).
[209] *See* Holt, *supra* note 7, at 2–3.
[210] *See* INA § 212(a), 8 U.S.C. § 1182(a) (2000).
[211] *See* S. 1645 § 101(e)(2)(B).
[212] *See id.* § 101(e)(2)(c).
[213] *See id.* § 101(f)(1).
[214] *See id.* §101(g)(2).
[215] *See id.* § 101(c)(2).

ties (QDEs) or private attorneys.[216] It would also provide for the confidentiality of applicant information.[217]

Title II of the Act laid out a series of reforms to the H-2A Worker Program, in order to streamline the process for applying for H-2A workers. First, the bill would eliminate the contentious labor certification process, replacing it with an attestation process modeled after the current H-1B program.[218] Under the attestation process, an employer wishing to hire foreign H-2A workers would have to file an application with the DOL including the number of workers needed, a description of the nature and location of the work to be performed, the anticipated beginning and end dates of employment, and a commitment to comply with the H-2A program requirements.[219] DOL would be required to approve the application within seven days if it was complete and contained no obvious inaccuracies.[220] Second, the bill would gradually eliminate the Adverse Effect Wage Rate (AEWR), by freezing the AEWR at its 2002 level through the 2006 growing season, and thereafter indexing it by the annual percentage change in the consumer price index for urban areas (CPI-U).[221]

Third, the bill would ease other procedural obstacles to the admission of H-2A workers. It included a requirement that the Secretary of Homeland Security establish a process for expedited adjudication of H-2A petitions within seven days and also required the Secretary to expedite delivery of approved petitions to the consulate or port of entry where the H-2A worker would be applying for admission.[222] Under current law, there is no statutory or regulatory requirement for adjudication of H-2A petitions nor any requirement to assure expedited delivery of approved petitions to the consulate or port of entry.[223] Growers had criticized such delays as causing them hardship and economic loss as well as uncertainty and unnecessary expense for H-2A beneficiaries awaiting their visas.[224]

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[216] *See id.* § 101(d)(1)(A)(i)(II).

[217] *See id.* § 101(d)(5)–(6).

[218] *See id.* § 201(a).

[219] *See id.*

[220] *See id.* § 201(a).

[221] *See id.* § 201(a). Under the current H-2A program, growers must pay H-2A workers the higher of (1) the AEWR; (2) the prevailing wage in the industry; or (3) the applicable state, local or federal minimum wage. 20 C.F.R. § 655.107 (2004). According to James Holt, a Senior Economist for the National Council of Agricultural Workers (NCAE), the AEWR has burdened growers because it is generally higher than the prevailing wage for at least half of agricultural workers, because it is based on the average wage for the field and livestock workers in the region. *See* JAMES S. HOLT, *supra* note 152, at 1–2. Holt believes that indexing the AEWR to the CPI-U under AgJobs will gradually result in elimination of the AEWR, because wages of field and livestock workers, on which the AEWR is based, have increased, on average, a full percentage point more per year than the CPI-U. *Id.* at 2–3.

[222] *See id.* § 201(a).

[223] *See generally* INA § 218, 8 U.S.C. § 1188 (2000).

[224] *See* HOLT, *supra* note 135, at 2.

Fourth, the bill would relax other requirements imposed on growers. AgJobs provided that for H-2A workers seeking an extension of their status, a worker would be authorized to begin new employment on the day on which the employer filed the petition for extension of stay, rather than having to wait for approval as required under current law.[225] It would also allow an employer to immediately replace an H-2A worker who abandoned employment with a new worker.[226] Furthermore, under this provision, if an H-2A worker abandoned employment, his status would be terminated and he would have to leave the United States.[227] Growers argued that in the past, the INS was unlikely to take action to remove a worker who had abandoned his or her employment, and that this language was necessary to maintain the integrity of the H-2A program by dissuading H-2A workers from abandoning their employment with the threat of removal.[228]

Furthermore, AgJobs would allow H-2A employers to offer a monetary housing allowance under certain conditions, including if the governor of the state certified that there was adequate housing in the area of intended employment, rather than requiring them to offer free housing.[229] Although AgJobs would require H-2A employers to provide or reimburse workers for transportation, it would not apply where the distance traveled was 100 miles or less, or where the worker did not reside in employer-provided housing.[230] Although AgJobs would require H-2A employers to comply with applicable federal, state, and local laws, it contained a provision providing that a violation of another labor law would not be treated as a violation of the H-2A law for purposes of penalties and continuing participation in the AgJobs program.[231] Nevertheless, it created a private right of action for H-2A workers that would allow them to bring claims in federal court to enforce its protections.[232]

Furthermore, the bill would eliminate on a one-time basis the statutory bar preventing undocumented workers not currently in the program from acquiring H-2A status.[233] Under current law, agricultural employers are unable to bring their existing workforce into compliance with immigration laws because persons who have worked without authorization or have remained unlawfully in the United States for more than 180 days are barred from participating as H-2A workers.[234] The waiver would continue as long as the worker did not trigger the bar by again remaining illegally in the

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[225] *See* S. 1645 § 201(a).
[226] *See id.*
[227] *See id.*
[228] *See* HOLT, *supra* note 135, at 7.
[229] *See* S. 1645 § 201(a).
[230] *See id.*
[231] *See id.*
[232] *See id.*
[233] *See id.* § 201, § 201(a) (Amendment to the Immigration and Nationality Act); *see also* HOLT, *supra* note 135, at 7–8.
[234] *See* 8 C.F.R. § 214.2(h)(5)(viii) (2004).

United States.[235] This would allow undocumented persons currently in the United States to participate in the H-2A program and would allow current and former H-2A workers who may have overstayed their visas in the past to participate in the program as well.[236]

On the day it was introduced, the bill had twenty-one co-sponsors in the Senate, while the House version, House Bill 3142, had two co-sponsors in the House.[237] By early December 2003, the bill had earned forty-nine co-sponsors in the Senate and eighty-one in the House. On December 9, 2003, Secretary of Homeland Security Tom Ridge appeared to send up a trial balloon during a visit to south Florida. He stated that "I think there's a growing consensus that, sooner rather than later, we need to deal with the reality that these men, women and families are here, many contributing—most contributing—to their community, paying taxes, paying into Social Security. We have to legalize their status."[238]

The growers' associations and farmworker advocates were cautiously optimistic, viewing this statement as a clear message that the Bush Administration was prepared to stand behind the AgJobs bill.[239] Representative Howard Berman (D-Cal.) and Senator Bob Graham (D-Fla.) called Secretary Ridge's comments "quite a positive contribution to the momentum that's building for the bill" and further indicated that "We're building up a real head of steam for passage in the Senate," as early as January 2004.[240]

5. The Bush Plan

On January 7, 2004, as primary season got under way, President George W. Bush announced the broad contours of a major new immigration initiative ("the Bush Plan") that would give temporary legal status to millions of undocumented workers in the United States and make it possible for other workers to enter the United States legally for temporary employment.[241] The plan's stated aim was to match willing foreign workers with American employers when no American could be found for the job.[242] Although it would give temporary legal status and labor protection to will-

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[235] *See* S. 1645 § 201(a).

[236] Rob Williams has stated that the current bar on unlawful workers obtaining H-2A status is not a very large obstacle because the federal government generally does not verify whether an applicant for an H-2A visa has been working unlawfully in the United States. *See* Second Telephone Interview with Williams, *supra* note 48.

[237] S. 1645, 108th Cong. (2003); H.R. 3142, 108th Cong. (2003); 131 CONG. REC. S11,8833 (daily ed. Sept. 23, 2003).

[238] Jane Daugherty et al., *Support Grows for Immigrant Amnesty*, PALM BEACH POST, Dec. 14, 2003, at A1.

[239] *Id.*

[240] *Id.*

[241] *See* Bumiller, *Bush Would Give Illegal workers Broad New Rights*, *supra* note 22, at A1.

[242] *See id.*

ing workers for a three-year period (with the possibility of renewal for another three-year period),[243] this plan would not provide a path to lawful permanent residency.

The proposal, which was not limited to the agricultural sector, appeared to reflect an attempt to balance national security concerns with the need to provide a ready source of unskilled labor to the national economy. The proposal made no mention of the AgJobs bill and instead appeared to be at odds with a core tenet of AgJobs: earned legalization for agricultural workers. President Bush emphasized that under his plan, any resulting law would not reward lawbreakers and it would not grant an opportunity for obtaining legal permanent residency;[244] it would only provide for temporary status for the undocumented in all sectors of the economy.[245]

AgJobs negotiators were troubled by the Bush Plan, angry that the President had ignored the AgJobs bill, and unsure of whether it would reinforce or undermine their efforts to achieve passage of AgJobs.[246] It soon became clear that the Bush Plan had polarized the debate over immigration reform. Although many commended President Bush for acknowledging that the current system was broken,[247] anti-immigrant groups attacked the proposal, claiming that it rewarded lawbreakers and depressed wages for American workers.[248] Immigrant advocates, on the other hand, argued that the proposal did not go far enough in providing a permanent solution for the 8 to 10 million undocumented workers who contribute vital labor to the U.S. economy.[249]

Across the political spectrum, critics condemned the proposal as a crass example of election year politics to woo Hispanic voters.[250] As Senator Patrick Leahy (D-Vt.) testified before the Senate Judiciary Committee, "I fear that the President's proposal is more about election-year politics than about creating a more rational and fair immigration policy."[251] He chal-

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[243] *See id.*; Bush Worker Program Proposal, *supra* note 22.

[244] Bush Worker Program Proposal, *supra* note 22.

[245] *Id.; see also* Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, *supra* note 22, at A1; Stevenson & Greenhouse, *supra* note 22, at A28.

[246] *See* Stapleton, *supra* note 10, at A1; *Roundtable Discussion of Legislative Proposals for Immigration Reform*, *supra* note 180 (discussing impact of Bush Proposal on other pending legislative reforms).

[247] *See, e.g., Evaluating a Temporary Guestworker Proposal: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the Sen. Comm. on the Judiciary*, 108th Cong. 40 (2004) (testimony of Demetrios Papademetriou, President, Migration Policy Institute) (praising President Bush on his political courage and willingness to "think outside of the box").

[248] Stevenson & Greenhouse, *supra* note 22, at A28.

[249] *Id.*

[250] *Id.*; *see also* Bumiller, *Politics at the Border*, *supra* note 22; Mike Schneider, *Unions Criticize Government's Hispanic Worker Summit*, A.P. (July 22, 2004) ("[L]abor unions denounced a federal government-sponsored Hispanic Safety and Health Summit on Thursday, claiming it was nothing more than political posturing by the Bush administration to attract Hispanic voters during a presidential election year.").

[251] *Evaluating a Temporary Guestworker Proposal: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the Sen. Comm. on the Judiciary*, 108th

lenged the White House to "demonstrate its seriousness about the proposal by submitting a bill."[252]

In the ensuing months, Congress held hearings on the Bush Plan[253] and the President continued in his public statements to call for immigration reform.[254] However, the Bush Administration declined calls to submit a legislative proposal, arguing that to do so was the role of the Congress.[255] More significantly for AgJobs, the Administration was quietly growing concerned that its conservative base would be infuriated if it were to sign off on major immigration reform.[256]

6. Senate Super-Majority Fails To Yield Results

Despite these setbacks, the AgJobs bill continued to win support in Congress, and by April 26, 2004, it had achieved the support of sixty senators necessary to sustain a cloture vote on a likely filibuster in the Senate.[257] The success of AgJobs now seemed to hinge on selecting another bill that AgJobs could be attached to as an amendment. AgJobs had not been referred to subcommittee out of concern that Senator Chambliss, Chairman of the Subcommittee on Immigration, Border Security and Citizenship of the Senate Committee on the Judiciary, would kill it.[258] In light of this potential opposition to the bill in committee, the only chance the bill stood for passage was to be attached as an amendment to unrelated legislation being considered by the Senate.[259] The pro-business Class Action Bill was seen as the last possible vehicle in the 108th Congress to which AgJobs could be attached.[260]

Cong. 159 (2004) (testimony of Sen. Patrick Leahy (D-Vt.)).

[252] *Id.*

[253] *See, e.g., Evaluating a Temporary Guestworker Proposal: Hearing Before the Subcomm. on Immigration and Border Security of the Sen. Comm. on the Judiciary*, 108th Cong. (2004).

[254] *See, e.g.*, President George W. Bush, 2004 State of the Union Address to Joint Session of Cong. (Jan. 20, 2004) ("I propose a new temporary worker program to match willing foreign workers with willing employers when no Americans can be found to fill the job."), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html, at ¶ 45; President George W. Bush, Third Bush Kerry Debate, Tempe, Ariz. (Oct. 13, 2004) ("There ought to be a temporary worker card that allows a willing worker and a willing employer to mate up, so long as there's not an American willing to do that job.") *Bush-Kerry Debate transcript No.3*, at Question No. 11.

[255] *Roundtable Discussion of Legislative Proposals for Immigration Reform*, *supra* note 180 (comments by Donald Kerwin, Chief Operating Officer of the Catholic Legal Immigration Network) (stating that when asked during a meeting with nonprofit organizations whether the Administration planned to submit a specific legislative proposal, an Administration official replied that this was the role of Congress).

[256] Rogers, *supra* note 20, at A4.

[257] *See* 131 CONG. REC. S11,833 (daily ed. Sept. 23, 2003).

[258] *See* First Telephone Interview with Olavarria, *supra* note 13.

[259] *See supra* notes 13–14 and accompanying text.

[260] *See* Second Telephone Interview with Olavarria, *supra* note 24. Rob Williams comments that, although the Class Action Bill was generally seen as a pro-business piece of legislation, there were business interests not sorry to see it fail. The controversy over Ag-

What AgJobs' supporters did not expect was that anti-immigrant forces would wield such influence in the White House. The supporters also may not have anticipated that Republican strategists wanted President Bush to get credit for initiating any major immigration reform.[261] Passing AgJobs not only could take some of the pressure off the building momentum for a comprehensive guestworker program and reduce the chances of the President's proposal being enacted; AgJobs' earned adjustment provisions could raise expectations for what the President's guestworker program should include.[262]

Despite pressure from the Bush Administration not to introduce the AgJobs bill,[263] on July 7, 2004, Senator Craig submitted AgJobs as an amendment to the Class Action Bill, but it was ordered "to lie on the table" pending further action.[264] Furthermore, Senator Frist had the power as majority leader to be recognized on the floor over other senators, and thus was able to fill the Amendment Tree before Senator Craig could introduce AgJobs as an amendment.[265] At the end of that same day, Senator Frist introduced a petition for cloture,[266] signed by seventeen senators, to cut off debate on the Class Action Bill and bring it to a vote.[267] The following evening, on July 8, the cloture vote failed by a vote of forty-four to forty-three.[268]

The Class Action Bill had become hostage to Senate governance.[269] Besides Democrats and Republicans who saw the Class Action Bill as a

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Jobs provided a way to kill class action for those interests, which included several Democrats. *See* Second Telephone Interview with Williams, *supra* note 48.

[261] *See* Second Telephone Interview with Williams, *supra* note 48; *see also* Stephen Dinan, *Senate Opens Door to Alien Amnesty*, WASH. TIMES, Apr. 1, 2005, at A1 (responding to reports that Senator Craig planned to introduce the AgJobs legislation as an amendment to the pending emergency spending bill in the 109th Congress, "both congressional aides and lobbying sources said the Bush Administration would prefer to see a comprehensive bill pass rather than Mr. Craig's bill").

[262] Second Telephone Interview with Williams, *supra* note 48.

[263] *See* Rogers, *supra* note 20, at A4.

[264] 150 CONG. REC. S7760 (daily ed. July 7, 2004) (submission of Amendment). To "table" a measure (or more formally, to lie the question on the table) can be done through a simple majority vote and effectively disposes of the matter permanently and adversely. *See* Richard S. Beth & Stanley Bach, *Filibusters and Cloture in the Senate*, CRS Report for Congress, RL30360, Updated Mar. 28, 2003, at CRS-4.

[265] Second Telephone Interview with Olavarria, *supra* note 24; *see also What is the Amendment Tree?*, *supra* note 19 ("although it is a very controversial move Majority Leaders have from time to time used that preferential recognition to offer one amendment after another until all the branches of the amendment tree are f[illed].").

[266] For more information on filibustering, see U.S. Senate website *at* http://www.senate.gov/reference/reference_index_subjects/Filibuster_vrd.htm (last visited Apr. 21, 2005). Under Rule XXII of the Standing Rules of the Senate, a petition for cloture can be brought by at least sixteen senators to end a filibuster or bring debate on any measure, motion or other matter pending before the Senate to a close. *See* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at Rule XXII (2000). Having at least three-fifths of the senators present and voting is required to sustain the cloture petition and end debate. *See id.*

[267] 150 CONG. REC. S7743 (daily ed. July 7, 2004) (cloture motion).

[268] 150 CONG. REC. S7818–19 (daily ed. July 8, 2004) (cloture vote).

[269] *Id.* at S7816 (statement of Sen. Leahy) ("The Republican leader's actions have frus-

vehicle for bringing AgJobs to the floor, it appeared that other members of Congress who opposed class action reform saw this procedural obstacle as a way of keeping the Class Action Bill from ever coming to a vote.[270] Moreover, conservative Republicans who opposed immigration reform were prepared to sacrifice the pro-business Class Action Bill to prevent the AgJobs bill from coming to the floor,[271] where it likely would have passed.[272] Following the failure of the cloture vote on the Class Action Bill, debate on class action was suspended indefinitely.[273]

Over the next several weeks, advocates attempted to hold the Administration's feet to the fire, arguing that failure to enact AgJobs would cost the President the Latino vote.[274] However, it soon became clear that this battle for AgJobs had probably come to an end.[275] For the second time in four years, an attempt to bring AgJobs to a vote before the full Senate, where it appeared to enjoy wide support, seemed to have failed more because of procedure than because of substance. Advocates' only hope was that the President's failure to support AgJobs would be a factor that would cost him the election, and that presidential candidate John Kerry, one of the bill's original co-sponsors, would continue to support the bill if elected.[276]

7. Epilogue

President Bush was reelected in 2004, winning a sizeable percentage (an estimated 44%) of the Latino vote.[277] In mid-November, less than two weeks after the President's victory, Secretary of State Colin Powell indicated during a trip to Mexico City that the President would give "high priority" to creating a guestworker program for hundreds of thousands of

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trated Members on both sides of the aisle who sincerely want to have a productive legislative session. The citizens of this country did not elect us to engage in a staring contest."); *see also id.* at S7818 (statement of Sen. Hatch (R-Utah)) ("We have a bipartisan deal on class action reform that now stands on the verge of collapse—a broken deal that will forever stain the honor of this hallowed institution the minute the supporters of this bill cast a no vote on cloture.").

[270] *See* Second Telephone Interview with Williams, *supra* note 48.

[271] *See* Rogers, *supra* note 20, at A4.

[272] *Id.*

[273] 150 CONG. REC. at S7867 (statement of Sen. Frist) ("The orderly process led today, because of the insistence on these non-germane, non-relevant amendments, to a point that we are not going to be able to consider class action reform now.").

[274] Schneider, *supra* note 250 ("labor unions denounced a federal government-sponsored Hispanic Safety and Health Summit on Thursday, claiming it was nothing more than political posturing by the Bush administration to attract Hispanic voters during a presidential election year . . . . Tirso Moreno, general coordinator for the Farmworker Association of Florida, said the most important thing the administration could do to help Hispanic workers is make sure the federal AgJobs bill passes.").

[275] *See, e.g.*, Editorial, *First He Raised Hopes for Reform, Then He Dashed Them*, SAN JOSE MERCURY NEWS, July 21, 2004, at 6B.

[276] *See* S. 1645, 108th Cong. (2003); First Telephone Interview with Williams, *supra* note 131.

[277] *See* Richard Nadler, *Bush's "Real" Hispanic Numbers*, NAT'L REV., Dec. 8, 2004.

Mexicans working and living in the United States without documentation.[278] Ten days later, in Santiago, Chile, during a press conference at the Asia-Pacific Economic Cooperation Conference, President Bush committed to move forward on his proposal to allow undocumented immigrants to remain in the United States as guestworkers.[279] In response to questions regarding opposition from anti-immigrant lawmakers, the President stated that they objected to the program because they believed it to be an amnesty.[280] The President emphasized that it was not an amnesty program, but rather a guestworker program.[281]

Nonetheless, some descriptions of the program, which had not yet been written into a bill, would have allowed guestworkers to apply for permanent legal status if their employers could demonstrate that they were filling jobs that could not be filled by U.S. citizens.[282] Other descriptions indicated that the Administration would seek an increase in the number of green cards granting lawful permanent residency.[283] Meanwhile, Mexican President Vicente Fox emphasized that he had made U.S. immigration reform his top foreign policy priority and that he hoped to travel to Washington, D.C., to "finish off some of these issues we've been discussing, perhaps putting them in the shape of some form of agreement."[284]

What many critics argued had been nothing more than a glorified press conference had now become the Administration's official immigration policy.[285] President Fox appeared to have lowered his expectations for a broad-based legalization program, indicating that he no longer expected a broad amnesty.[286] At the time of this writing, it was not clear whether the resurrected Bush Plan would provide any path to lawful permanent residency for temporary workers, or whether the Administration would be willing to support a program of earned legalization, such as that envisioned in the AgJobs bill.[287]

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[278] *See* Howard LaFranchi, *Guest-worker Program Back on Table for U.S. and Mexico*, CHRISTIAN SCI. MONITOR, Nov. 12, 2004, at 11, 13.

[279] *See* Peter Wallsten & Richard Boudreaux, *Bush Renews Migrant Pledge; President Tells Mexican Leader Vicente Fox that He Plans to Push Ahead With a Measure to Give Illegal Immigrants Guest-worker Status*, L.A. TIMES, Nov. 22, 2004, at A1.

[280] *Id.*

[281] *Id.*

[282] *See id.*; Second Telephone Interview with Olavarria, *supra* note 24.

[283] *See* Michelle Mittelstadt, *Guest Visas to Test Bush Bill Uproar May Hurt Immigration Proposal*, DALLAS MORNING NEWS, Dec. 13, 2004, at A1.

[284] Wallsten & Boudreaux, *supra* note 279, at A1.

[285] *Roundtable Discussion of Legislative Proposals for Immigration Reform*, *supra* note 180, at 1 (comments by Don Kerwin, Chief Operating Officer of the Catholic Legal Immigration Network).

[286] Wallsten & Boudreaux, *supra* note 279, at A1.

[287] At the time of this publication, an aide to Senator Cornyn (R-Tex.), Chair of the Immigration Subcommittee of the Senate Judiciary Committee, indicated that the Senator would be holding hearings to produce a comprehensive immigration bill. Dinan, *supra* note 261, at A1. *Cf. Strengthening Interior Enforcement: Deportation and Other Issues: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the Sen. Comm. on the Judiciary*, 109th Cong. (Apr. 14, 2005).

Furthermore, the mini-revolt by House conservatives after immigration provisions were removed from the intelligence overhaul bill[288] suggested that the President would have to expend a great deal of political capital for his immigration proposal to become law and that newly energized anti-immigrant forces in the House would be likely to put up a major fight.[289]

II. LEGISPRUDENCE AND THE AGJOBS BILL

A. A Brief Review of Theories of Legislation in the Context of Immigration Reform

In a law review article in 1987, law professors William Eskridge, Jr., and Philip Frickey called on legal scholars to explore legisprudential theories in their scholarship and teaching.[290] The following year, the two published a groundbreaking textbook that has transformed the way law professors teach and think about legislation and legislative theory.[291] No longer the domain of political scientists, legisprudence has evolved over the last fifteen years into a rich body of scholarship that not only focuses on the process of lawmaking but on the impact of lawmaking on statutory interpretation.

In their 1987 article, Eskridge and Frickey acknowledged that legisprudence owes a huge debt to the early process theories developed during the 1950s by professors Hart and Sacks of Harvard Law School.[292] Under the Weberian process theory of Hart and Sacks, all branches of government are presumed to act pursuant to a rational purpose, which can be discovered from the context of government action.[293] Since every law has a purpose or objective, any ambiguities can be resolved by identifying the purpose of the law and the policy it embodies and arriving at the result

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[288] *See* Intelligence Authorization Act for Fiscal Year 2005, H.R. 4548, 108th Cong. (2004); 151 CONG. REC. H11,030–39 (daily ed. Dec. 7, 2004) (enacted); CNN News, *Senate OKs Intelligence Overhaul Bill; Bill Heads to President Bush for Signing* (Dec. 10, 2004), *at* http://www.cnn.com/2004/ALLPOLITICS/12/08/intelligence.bill/; Charles Babington & Walter Pincus, *Intelligence Overhaul Bill Blocked*, WASH. POST, Nov. 21, 2004, at A1.

[289] *See generally* Mittelstadt, *supra* note 283, at A1; *see also* Second Telephone Interview with Olavarria, *supra* note 24.

[290] *See* William N. Eskridge, Jr. & Philip Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693 (1987) [hereinafter Eskridge & Frickey, *Legislation Scholarship*].

[291] *See* WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (West 1988) [hereinafter ESKRIDGE & FRICKEY].

[292] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 694–95.

[293] *See* HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958) [hereinafter HART & SACKS, 1958 ed.], discussed in Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 693–98; *see also* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 147–48 (eds. W. Eskridge & P. Frickey) (1994).

most consistent with that purpose or policy.[294] According to this theory, laws ought to be passed pursuant to an informed, deliberative, and efficient process in which key decisions are made only after all relevant information has been collected; legislators have fully discussed the information and policy implications; and lawmakers have given priority to the most important issues.[295]

Eskridge and Frickey underscored, however, that by the 1960s, the process theories of Hart and Sacks had proven inadequate to explain the failure of progressive social reforms to become law.[296] Hart and Sacks posited that the legislative process was "informed," "deliberative," and "efficient," and would give priority to the most important issues.[297] The reality, however, was that, in practice, a legal process approach tended to support the status quo.[298] This was especially true in the context of civil rights legislation, where majoritarian forces often opposed the will of discreet and insular minorities, or where vocal and powerful minorities prevented socially progressive legislation supported by the majority from becoming law.[299] In light of the limits of a legal process approach, Eskridge and Frickey called on scholars to reconceptualize legislative theory, and, over the next fifteen years, a new body of literature on legisprudence, nourished by sociology, economics, political science, and literary theory, blossomed.[300]

James Madison's theories articulated in the Federalist Papers provide an invaluable source for many of the legisprudence theories developed over the last fifty years, ranging from the process theory of Hart and Sacks to the pluralism theory of Robert Dahl to the public choice and capture theories of modern-day law and economics scholars.[301] Madison alerted

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[294] *See* HART & SACKS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994), at 166–67.

[295] *See* HART & SACKS, 1958 ed., at 715–16, discussed in Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 696.

[296] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 699–702.

[297] HART & SACKS, 1958 ed., *supra* note 293, at 715–16.

[298] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 697.

[299] *See, e.g.*, ESKRIDGE & FRICKEY, *supra* note 291, at 66.

[300] *See, e.g.*, Dorothy Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L. Q. 179 (1996); Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139 (2002); Richard Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2122 (1990); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

[301] *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 19–20 (1993); Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 572–74 (1997); Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism and its Effects on Liberty, Equality and Choice*, 76 S. CAL. L. REV. 1105, 1161–68 (2003); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1167, 1171–74 (1993); *see generally* Jack N. Rackove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988).

the framers to the danger of majority factions in Federalist Number 10.[302] Madison expressed concern with the laws being determined solely by the "superior force of an interested and overbearing majority"[303] and recognized that "enlightened statesmen will not always be at the helm."[304] He therefore argued that the problem of factions is best addressed through a constitutional design of representative democracy, where government functions are delegated to a small number of the citizens by the rest and where a large number of citizens are spread across a more extensive territory, thus reducing the possibility of majority factions oppressing the minority.[305] In Federalist Number 51, Madison argued that another "auxiliary precaution" against majoritarian impulses was to design the government under a system of separation of powers.[306]

Over two hundred years later, Madison's writings continue to influence proceduralist, pluralist and institutionalist thinking. In explaining the legislative process, pluralist theory tends to rely heavily on the role of private actors while institutionalist theory tends to emphasize the role of different government actors in enacting and executing legislative reforms. Modern public choice theory gives greater emphasis to the role of both private and public actors, but emphasizes economic models that suggest that political actors, including legislators and other government officials, are "egoistic, rational utility maximizers" whose principle goal is to be reelected.[307] It suggests that most public policy problems are not resolved by the legislature, but that when they are, legislators have an incentive to reach a compromise or come up with a symbolic solution in order to satisfy as many interest groups as possible. These theories, and their importance in understanding the trajectory of the AgJobs legislation, are discussed in the following sections.

1. Pluralism Theories

The starting point for many pluralist theories of legislation is Madison's view regarding the dangerous and disruptive role of factions in political society.[308] Although some mid-twentieth-century pluralist theories

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[302] THE FEDERALIST No. 10, at 71 (James Madison) (Clinton Rossiter ed., 2003) (defining a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community.").

[303] *Id.* at 71.

[304] *Id.* at 75.

[305] *See id.* at 76–77.

[306] THE FEDERALIST No. 51, at 319–20 (James Madison) (Clinton Rossiter ed., 2003).

[307] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 703.

[308] Madison was most concerned about the dangers of majority factions, although he recognized that minority factions could play a disruptive role as well. In Federalist No. 10, he wrote:

tended to cast the role of factions in the democratic process in a more positive manner[309] than had Madison in the Federalist Papers,[310] by the 1980s, with the emergence of public choice theory, modern pluralist theories had taken on a more descriptive, and less normative, approach to interest group politics.[311] This Section will begin by describing traditional models of pluralism, and then move on to a discussion of public choice theory. Finally, the section will examine the utility of these models as an explanatory framework for how AgJobs was negotiated and achieved a supermajority in the Senate, but ultimately failed to survive Senate procedural politics.

a. Traditional Pluralism

During the 1950s and 1960s, pluralism became broadly accepted by political scientists as a normative tool to explain the political process.[312] While Madison had warned that factions were a threat to democratic governance and had to be controlled through constitutional mechanisms, Robert Dahl argued centuries later in a series of books and articles that under a republican form of representative democracy, factions, or interest groups, are essential to the legislative process.[313] His ideas echo the work of Alexis de Tocqueville, who observed in *Democracy in America* that freedom of association had become an essential guarantee against the tyranny of the majority.[314] In an extensive republic spread across a large national territory,

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> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society, but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.

THE FEDERALIST No. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003).

[309] *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (arguing that under a representative system of government, factions, or interest groups, are essential to the political process).

[310] THE FEDERALIST No. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003).

[311] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 706.

[312] *See generally* V. O. KEY, POLITICS, PARTIES AND PRESSURE GROUPS (1958); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); DAVID TRUMAN, THE GOVERNMENTAL PROCESS (1951).

[313] *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, WHO GOVERNS? (1961); ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL (1982); ROBERT A. DAHL, POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES (1966); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971); Robert A. Dahl, *Procedural Democracy*, *in* PHILOSOPHY, POLITICS AND SOCIETY 97–113 (Peter Laslett & James S. Fishkin eds., 1979); Robert A. Dahl, *Governing the Giant Corporation*, *in* CORPORATE POWER IN AMERICA, 10–24 (Ralph Nader ed., 1973); Robert A. Dahl, *On Removing Certain Impediments to Democracy in the United States*, POLITICAL SCIENCE QUARTERLY 92 (1977).

[314] *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 194 (Henry Reeve trans.,

de Tocqueville wrote, citizens must be able to organize into associations in order to prevent the despotism of a faction or the arbitrary power of the ruler.[315] Similarly, in a modern incarnation of this view of pluralism, Dahl viewed interest group politics as a means of both spreading political power across many political actors and restraining self-serving factions, as the interests of one group check those of another.[316]

Dahl wrote that pluralism would tend to promote moderation in political change and serve as an effective restraint on radicalism.[317] Traditional pluralism thus sees factions, or interest groups, as key actors in the political process. Under this model, in a representative democracy, it is necessary for individuals to come together in interest groups to make their wills known before government actors. The model thus wants minority factions to have a voice in government because change will only come about through a process of compromise among various factions. Legislation is likely to reflect such a process of compromise.

Dahl recognized that although independent organizations are necessary to the functioning of the democratic process, organizations sometimes use their power in the political process to appropriate public functions and to perpetuate injustice.[318] Therefore the fundamental challenge of pluralist democracy is to determine the degree of autonomy that such organizations should enjoy and the degree of control that the government should exercise over them.[319] This is especially important, Dahl argued, in the case of economic organizations, including businesses and trade unions, where autonomy is both a "value as well as a potential source of harm."[320] He recognized that organizational pluralism is consistent with immense inequality in control over the government of the state.[321]

Dahl proposed, however, that there is a tendency for organizations involved in important conflicts to frequently accommodate each other through a process of cross-cutting cleavages, where one's allies today may be-

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Vintage Classics 1990) (1835), *cited in* DAHL, DILEMMAS OF PLURALIST DEMOCRACY, *supra* note 313, at 27 (arguing that associations were necessary to a people that wanted to enjoy not only democracy, but also liberty and civilization).

[315] *Id.* at 195. De Tocqueville also argued that associations were necessary to a people that wanted to enjoy not only democracy, but also civilization, and that without the habit of forming associations, civilization itself would be in jeopardy. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 107 (Henry Reeve trans., Vintage Classics 1990) (1840).

[316] DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES, *supra* note 313, at 24.

[317] DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES, *supra* note 313, at 24 ("[B]ecause constant negotiations among different centers of power are necessary in order to make decisions, citizens and leaders will perfect the precious art of dealing peacefully with their conflicts, and not merely to the benefit of one partisan but to the mutual benefit of all the parties to a conflict.").

[318] *See* DAHL, DILEMMAS OF PLURALIST DEMOCRACY, *supra* note 313, at 47.

[319] *See id.* at 1–2.

[320] *Id.* at 28.

[321] *See id.* at 40.

come one's opponents in the near future.[322] Structural reforms that would significantly redistribute wealth, income, control, or other resources become impossible to achieve. Organized pluralism thus becomes a "stabilizing force that is highly conservative in the face of demands for major structural change."[323] Cross-cutting cleavages in a pluralist system tend to produce moderation in political conflicts.[324]

Similarly, David Truman demonstrated that any legislative decision usually involves the compromise of interests. Even in a situation involving near unanimity, the reconciliation of conflicting interests must already have taken place, often outside of the formal institutions of government.[325] Truman pointed out that the variety of meanings that can be read into legislative formulas may be the very heart of successful political compromise.[326]

Traditional pluralist theories are essential for understanding how the AgJobs bill was introduced in Congress and won such broad-based support. In 1999, the United Farmworkers of America (UFW) and many growers' associations reached the conclusion that the only way to achieve genuine reform was through collaboration rather than class struggle.[327] While growers were seeking reforms to streamline the H-2A visa program for foreign agricultural workers and to make it more grower-friendly, farmworkers sought a legal mechanism that would allow undocumented workers to legalize their status. The growers and the farmworkers did not agree on what reforms to the H-2A system were desirable.[328]

By 2000, however, both sides began to see that a legislative solution could only be found through compromise. As previously discussed, Congressman Berman from California, a long-time advocate for farmworker rights, was able to convince both sides to negotiate.[329] What came out of those negotiations was not only the historic AgJobs bill of 2000, but a proc-

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[322] *See id.* at 57.

[323] *Id.* at 43. A number of legal scholars continue to rely on Dahl's work in developing their own theories. *See, e.g.*, Guido Calabresi, *An Introduction to Legal Thought: For Approaches to Law and the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2146 (2003); Stephen P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 3–7 (1998); Stephen M. Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 494–98 (1989); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 688 (1986); David A. Martin, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 VA. J. INT'L. L. 301, 304–05 (1994).

[324] *See* DAHL, DILEMMAS OF PLURALIST DEMOCRACY, *supra* note 313, at 60. It is only where cleavages are reinforcing that political conflict tends to be more intense. *See id.* at 60.

[325] DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS; POLITICAL INTERESTS AND PUBLIC OPINION 392 (1951).

[326] *Id.* at 373.

[327] *See supra* notes 173–186 and accompanying text.

[328] *See, e.g.*, Agricultural Job Opportunity Benefits and Security Act of 1999, S. 1814, 106th Cong. (1999); Agricultural Job Opportunity Benefits and Security Act of 1998, S. 2337, 105th Cong. (1998); H. Amdt. 979 to H.R. 2202, 104th Cong. (1996).

[329] *See supra* text accompanying notes 177–183.

ess of trust-building that was able to sustain them through the next four years.[330] The AgJobs bills of 2000 and 2004 appear to be classic examples of pluralism in action: interest groups traditionally and historically at odds with each other were able to come together to create a politically acceptable piece of legislation that eventually earned the support of a supermajority of Senators.

The history of this legislation also calls for some consideration of the darker side of pluralism, warned about by James Madison and identified by Robert Dahl in some of his later works. Madison had warned about the dangers of majority factions who are able to impose their will upon a powerless minority.[331] He argued that the solution to this problem was the constitutional design of representative democracy, whereby the "influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other States."[332] Madison's writings have been criticized, however, for underestimating the power of minority factions that are able to gain control over the machinery of government through their power and influence.[333] Dahl addressed the missing piece of Madison's argument by pointing to the influence of economic organizations, underscoring that in a capitalist economy, organizational pluralism may be consistent with great inequality in control over government.[334]

Similarly, David Truman, in discussing the dynamics of access to the political process, described how structurally, some groups have greater access to the political process than others.[335] For example, he described how agricultural groups, which had been predominant in certain thinly populated states, enjoyed greater access in the Senate than urban groups, who were concentrated in a smaller number of populous states.[336]

Critics of the AgJobs bill, particularly anti-immigrant organizations, would argue that the legislation should be viewed as the result of two powerful economic organizations, agriculture and labor, coming together to impose their will on Congress. Critical legal scholars, on the other hand, would accuse the farmworker advocates of a Marxian false consciousness in striking this pact with an elite association of growers that had historically oppressed them. Indeed, early critiques of "earned adjustment," including those by farmworker advocates themselves, had concluded that this solu-

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[330] *See supra* text accompanying notes 189–223.

[331] THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003).

[332] *Id.* at 52.

[333] *See, e.g.*, Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 201 (2002); James S. Liebman & Brandon L. Garrett, *Madisionian Equal Protection*, 104 COLUM. L. REV. 837, 995 (2004); Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1089 (1995).

[334] *See* DAHL, DILEMMAS OF PLURALIST DEMOCRACY, *supra* note 313 at 108.

[335] DAVID B. TRUMAN, *supra* note 325, at 322.

[336] *Id.*

tion was unacceptable because it bound farmworkers to growers in a kind of indentured servitude.[337]

Over forty-five years after the first pluralist scholarship emerged, Peter Schuck criticized both modern public choice theorists and critical legal scholars,[338] who, he said, shared the Madisonian view that "special interests tend to destroy individual liberty, social welfare, and political health."[339] Rather, he argued that "special interest groups are essential to a vibrant, participatory, technically sophisticated, flexible, and democratically accountable polity."[340] He also contended that providing constitutional protection to a strongly reviled system reflects a political and constitutional commitment to take certain risks in return for the larger societal benefits of interest group politics.[341] He commented that much of the criticism by public choice theorists that public interest groups would be unable to mobilize and sustain themselves in the face of powerful special interests proved to be unfounded, and that during the 1960s and 70s such groups "proliferated and prospered."[342]

In analyzing the AgJobs compromise, traditional pluralists would argue that pluralism allowed the United Farmworkers, a minority faction, to have a voice in government. They would also argue that the compromise solution reached by growers and workers was consistent with the idea that one's enemy today may be one's ally tomorrow,[343] and that pluralism is less likely to result in major structural reforms that significantly redistribute wealth or power, but will instead produce moderation in political outcomes. They might also underscore that one of the reasons the UFW was able to negotiate the accord that they did was because they had the support of immigrant advocacy organizations behind them, including La Raza and the Catholic Church.[344] Traditional pluralists also suggest that the reason AgJobs failed in the 108th Congress was that there was a third set of interests that had to be factored in—immigration foes—but there was no one willing to negotiate on behalf of that group. As Rob Williams indicated, if Mark Krikorian, executive director of the conservative Center for Immigration Studies, had come to the UFW and indicated an interest in discussing the legislation and what he would be willing to support, the UFW would have talked to him. Restrictionists like Krikorian and the

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[337] *See, e.g.*, Rural Coalition, *U.S. Policy and Mexican Guestworkers: The History of U.S. Policies Toward the Mexican Agricultural Worker and the Impact of New Legislation*, *at* http://www.ruralco.org/html2/action/policycenter/guestworker2.html#newly (last visited Apr. 11, 2005) (describing the opposition to Senate Bill 1814 because it creates a form of "indentured servitude").

[338] For greater detail on the approach public choice and critical legal studies scholars might take to the AgJobs legislation, see discussion *infra* Parts II.A.1.b, II.A.4.

[339] Schuck, *supra* note 301, at 555.

[340] *Id.* at 574.

[341] *Id.* at 554.

[342] *Id.* at 566.

[343] *See* DAHL, DILEMMAS OF PLURALIST DEMOCRACY, *supra* note 313, at 57.

[344] Second Telephone Interview with Williams, *supra* note 48.

Federation for American Immigration Reform (FAIR) did not come to the bargaining table because they usually represent an undefined part of the American public that tends to be anti-immigrant, but does not have the same stake in the outcome or the same organized interests as growers and farmworkers.[345]

Traditional pluralist theories which focus on the role of private actors in influencing legislation only take us so far. While critical for understanding how growers and farmworkers came together to negotiate the AgJobs bill, they do not aid in understanding the complexities of the legislative process and the role of institutional actors once the bill was introduced. Thus, they do not provide insight into why the bill failed in successive congresses, despite overwhelming support in the Senate. For this, modern public choice theory, as well as institutionalist and process theories, need to be considered.

b. Public Choice Theories

Public choice theory is a version of pluralism which utilizes an economic model to explain the behavior of interest groups and legislators. As with traditional pluralism, under the public choice model, legislation is the product of political compromises. Public choice theorists, however, take a far less favorable view than traditional pluralists of the role of competing interest groups in the political process[346] and of the rationality of the political process itself.[347] Public choice theory assumes that political actors, including Members of Congress, are "egoistic, rational utility maximizers" who behave in their rational self-interest.[348] The legislative process is a transaction between those demanding statutes (interest groups) and those supplying them (legislators).[349] Under this model, legislators are primarily motivated by their desire to be reelected.[350] A legislator thus has every incentive to reach a compromise that satisfies as many interest groups as possible, as opposed to the best solution to a particular social problem.[351]

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[345] *Id.*

[346] *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 141–48 (1965).

[347] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2–3 (2d ed. 1963).

[348] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 703.

[349] *See* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION 54 (3d ed. 2001).

[350] *See, e.g.*, MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989). Although most public policy problems are not resolved by the legislature, those that are tend to represent compromise or merely symbolic solutions because the process of accommodating different groups involves reaching equilibrium in the political process at any particular moment. *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 703.

[351] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 705–06.

Economist Kenneth Arrow's Impossibility Theorem ("Arrow's Theorem") has served as the theoretical basis for most modern public choice literature.[352] Arrow's Theorem posits that efforts to resolve political choices through the aggregation of individual preferences will often result in outcomes that do not reflect the public interest because of instability in the voting process and collective choice mechanisms.[353] Under Arrow's Voter Paradox, with three choices and three sincere voters whose individual preferences are ranked numerically, there is no voting mechanism that will not result in the cycling of voting.[354] Control over the agenda thus becomes essential in determining results on individual votes.[355]

Public choice theory also has been heavily influenced by Mancur Olson's work, *The Logic of Collective Action*.[356] Olson was skeptical that interest groups could bring about change in the public interest. He theorized that individuals were unlikely to contribute to group activities or organize such groups in the public interest because even non-contributing individuals would reap the benefits from such organizing.[357] Under Olson's reasoning, smaller groups with intensely held preferences, not necessarily in the public (majority) interest, were much more likely to organize and to recoup the gains of such organizing.[358]

Public choice theory thus presents a rather pessimistic view of the political process and was met with dismay by many constitutional scholars and judges, who were troubled by its implications for democracy.[359] In recent years, however, public choice theory has been subjected to vigorous theoretical challenges and empirical testing.[360] Empirical research test-

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[352] *See* Pildes & Anderson, *Slinging Arrows at Democracy*, *supra* note 300, at 2124–25 (discussing how legal scholars across the political spectrum have reassessed democracy theory in light of Arrow's Theorem).

[353] *Id.* at 2138.

[354] ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES, *supra* note 347, at 2–3. In other words, any choice that beats another choice in pairwise voting will in turn be beaten when paired against the third choice.

[355] *See* Tom Ginsburg, *Ways of Criticizing Public Choice: The Use of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1143–44 (2002) (describing modern interpretations of Arrow's Impossibility Theorem).

[356] OLSON, *supra* note 346.

[357] *See id.* at 1–2. Olson posited that contributions to group organization were public goods and subject to the free-rider problem. *Id.* The free-rider problem occurs when no incentive for individuals to contribute to a public good exists because the good is available to both contributors and non-contributors (free-riders). *Id.* at 2.

[358] *Id.* at 43–52.

[359] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 1–8, 12 n.6 (2d ed. 1988); Brown, *supra* note 300, at 180 (arguing that because public choice theory underestimates ability of majority to influence the political process, it is of limited use as a predictive tool); Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 79 (1989); Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 590–91 (1977); Pildes & Anderson, *supra* note 300, at 2124–25.

[360] *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 13, 182 (1990), *noted in* Ginsburg, *supra* note 300, at 1148 n.46.

ing Olson's propositions about collective action[361] and legal and social science scholarship challenging his underlying assumptions revealed some flaws in his theory.[362] For example, public choice theory fails to explain why individuals vote at all and why they do not always vote in accord with their economic interests.[363] It also fails to explain why legislators are often motivated by ideological concerns or why consumer, environmental, and other public interest groups have had such an impact on the political process during the last thirty years.[364]

These criticisms, though valid, should not discount the value of public choice theory as one model for explaining why traditional adversaries were able to put aside their differences to reach the historic AgJobs agreement. It suggests that growers and workers were rational utility maximizers who finally resolved that it was in their respective self-interests to join together to propose legislation that was favorable to both sides. It also provides a better explanation than traditional pluralism for the reaction to the bill once it was introduced. Public choice theory, unlike traditional pluralism, takes into account the role of different government actors in the political process as potential suppliers of legislation, including: the role of Republican senators and representatives from agricultural states in supporting the bill;[365] the role of conservative members of the House of Representatives in opposing the bill; the critical role of Majority Leader Frist in controlling the agenda and preventing the bill from coming to a vote; and the role of the Bush Administration in attempting to thwart the bill's passage because of its potential impact on the President's reelection. Public choice theory also tends to explain the motivations of political actors largely in terms of their desire to be reelected. It thus suggests that the government is more likely to enact legislation, even if purely symbolic, that satisfies as many different actors as possible.

The model provides one rationale for why representatives are more likely than senators to demonstrate extremism in their views: difference in constituent base. While senators represent the entire state, representatives represent a smaller geographic area, making homogeneous political views of

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[361] *See* Ginsburg, *supra* note 300, at 1147–48.

[362] *See, e.g.*, Brown, *supra* note 300; Rubin, *supra* note 300, at 745–46.

[363] Rubin, *supra* note 300, at 745.

[364] *See id.* at 746.

[365] One area for future research that the Author intends to pursue more systematically would involve looking at contributions from growers' associations to the senators and representatives who both supported and opposed the bill. It is interesting to note that both Senator Craig and Representative Cannon, both Republicans and co-sponsors of the AgJobs bill, received sizeable contributions from growers' associations from 2000 to 2003. Interestingly, several key opponents of the legislation, including Senator Chambliss and Representative Tom Tancredo, also received contributions that were more limited in scope, but probably enough to achieve political access. For a list of political contributions and expenditures of different Political Action Committees, see FEDERAL ELECTIONS COMMISSION website at http://www.fec.gov./finance/disclosure/disclosure_data_search.shtml (last visited Apr. 20, 2005).

constituents more likely. If their districts are conservative with regard to immigrants' rights, representatives are more likely to reflect these concerns, a phenomenon which is further exacerbated by the fact that the entire House of Representatives is subject to reelection every two years.

Public choice theory, as noted above, has been criticized for not considering the sincere ideological concerns that motivate many lawmakers and for undervaluing the role of public interest groups in bringing about collective action. Furthermore, also noted above, Arrow's Theorem, which has been embraced by public choice scholars, suggests that the aggregation of individual preferences will often result in outcomes that do not necessarily reflect the public interest.

The AgJobs legislation provides a valuable opportunity for testing Arrow's Theorem. Under Arrow's Theorem, one can divide voters in the Senate into three main groups: (1) those senators who favored farmworker interests; (2) those senators who favored large grower interests; and (3) those senators who supported restrictionist groups opposing progressive immigration reform. Similarly, one might classify the following options regarding immigration reform as (A) adopt the AgJobs bill providing for earned adjustment for agricultural workers; (B) adopt a temporary guest-worker program benefiting workers both inside and outside the United States; and (C) maintain the status quo.[366] One can then rank the various groups preferences as follows:

GROUP PREFERENCE RANKINGS

	First	Second	Third
Senate Group #1	A	B	C
Senate Group #2	B	A	C
Senate Group #3	C	B	A

This preference ranking, which reflects the real world, is slightly different from Arrow's Theorem;[367] under this ranking, senators favoring growers' interests would support a more broadbased reform of the laws governing farmworkers over maintenance of the status quo, but would prefer a more limited solution which would allow growers to indefinitely maintain control of their workforce over the earned adjustment approach preferred by farmworkers. This finding is based on the failed legislative proposals of both farmworkers and growers that preceded the 2000 proposal

[366] For the sake of simplicity, this model does not include a fourth alternative urged by farmworkers: legalization for long-time farmworkers without the requirement that they remain in the agricultural sector to earn their residency.

[367] Under Arrow's Theorem, A, B, and C would be the three alternatives and 1, 2, and 3 the three individuals. He would suppose that individual 1 prefers A to B and B to C, and therefore A to C; that individual 2 would prefer B to C and C to A and therefore B to A; and that individual 3 would prefer C to A and A to B, and therefore C to B. *See* ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES, *supra* note 347, at 3.

negotiated by both sides, where farmworkers sought a more comprehensive amnesty while growers sought to ease the rules for importation of temporary workers from abroad.[368]

Under this ranking scheme, sponsors of AgJobs sought to present the bill as an alternative to the status quo. Thus, A, the bill, was presented as an alternative to C, maintaining the status quo. If voted on in this context, it would have prevailed because both Group 1, the farmworkers, and Group 2, the growers, favored A over C. Under Arrow's Theorem, if A had been presented as an alternative to B, a more modest guestworker program, AgJobs should have failed because both growers and restrictionists favored B over A. Arrow's Theorem, however, fails to fully reflect the process of coalition-building that took place over a period of over four years, and thus cannot explain why the growers and farmworkers were able to arrive at this compromise legislation.

Olson's theory of interest group politics may be more helpful in explaining why these two traditional adversaries were able to reach an accord that served both their interests and also raises the question of whether the solution the adversaries reached was actually in the public interest. Under Olson's theory, smaller groups with intensely held preferences, such as the growers associations and the United Farmworkers, would be more likely to organize to bring about collective action than groups acting in the broader public interest. He suggests that the collective action of these smaller groups is not necessarily in the public interest.[369] Nonetheless, the support of over 400 organizations, including advocacy and religious organizations such as Catholic Charities, National Council of La Raza, the Farmworker Justice Fund, the Evangelical Lutheran Church in America and immigrant and farmworker rights networks throughout the country suggests that the legislation enjoyed a broad base of support nationwide.[370] It was this wide base of public support that helped AgJobs achieve a supermajority in the Senate during the 108th Congress.

Thus, while public choice theories present a more comprehensive model for explaining the legislative process, they tend to over-emphasize the role of government officials and private actors as "egoistic, rational utility maximizers" who always behave in their self-interest. They also tend to under-emphasize the different motivations for collective action to bring about progressive political change.

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[368] *See supra* notes 163–171 and accompanying text.
[369] OLSON, *supra* note 346, at 43–52.
[370] *See* Letter of AgJobs Supporters, *supra* note 11.

2. Process Theories

Proceduralists have invoked Madison's *Federalist Papers* Numbers 10 and 51 to describe how the legislative process imposes a series of procedural obstacles, both Constitutional and rule-based, to ensure deliberative decision-making and to prevent the control of government by factions.[371] In addition to the basic constitutional design of bicameralism, presentment, and judicial review that creates a series of "vetogates"[372] through which legislation must pass before it becomes accepted law, there are a series of rule-based obstacles that each house of Congress has created to assure deliberative decision-making.[373] Process theorists like Hart and Sacks posit that these various obstacles are essential mechanisms to ensure that a bill that is passed into law is in the public interest. Hart and Sacks argued that the best measure of sound legislation is "whether it is the product of a sound process of enactment" that is informed, deliberative, and efficient.[374] Similarly, modern process theorists contend that while process does not guarantee that deliberation will occur, it at least creates an opportunity for such deliberation and greater potential for a context conducive to open debate.[375]

The constitutional structure of bicameralism and presentment and these rules-based obstacles, however, also provide a tremendous advantage to those groups attempting to thwart legislative reform. As David Truman discusses in *The Governmental Process*, these procedures operate to delay or obstruct action rather than facilitate it.[376] Along the path of the legislative process, there are many points at which to "kill" a bill, even one like AgJobs that appears to enjoy majority support. Many bills never make it out of committee,[377] but even if they do they face many other obstacles, such as passing the Rules Committee of the House[378] and getting to the floor of

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[371] HART & SACKS, 1958 ed., *supra* note 293, at 154.

[372] *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 18–19 (1994).

[373] *See generally* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15 (2000); RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H. DOC. NO. 107-284 (2003).

[374] HART & SACKS, 1958 ed., *supra* note 293, at 695.

[375] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 212–16 (Columbia Univ. Press 1993); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995), *discussed in* ESKRIDGE, JR., ET AL., *supra* note 349, at 70.

[376] TRUMAN, *supra* note 325, at 354 (describing legislative advantage enjoyed by defensive groups because of American structure and procedure).

[377] In either chamber, a bill can be killed in committee if the chairperson never refers it to the subcommittee, if the subcommittee chairperson never holds hearings on the bill, or if the subcommittee votes the bill down. *See, e.g.*, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at Rule XXVI (2000); RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H. DOC. NO. 107-284, at Rule XI (2003).

[378] In the House, a bill voted out of committee must also make its way out of the Rules Committee before it comes to the floor. The Rules Committee determines how debate on the bill will proceed and the nature of the amendments that can be attached to it. *See* RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H. DOC. NO. 107-284, at Rule X (2003).

the House and Senate for a vote. Those bills that come to the floor can be killed in a number of ways even if they enjoy majority support, such as by means of filibuster[379] or attaching amendments that make the bill unacceptable to the voting members of Congress.[380]

Even if a bill survives both houses of Congress, it generally must go to Conference Committee where both houses attempt to work out any differences in the bills, or where conference leaders use this device to undermine the legislation altogether.[381] Finally, if all of these hurdles can be overcome, a bill faces one remaining obstacle: presentment. Unless the bill enjoys enough support in both houses of Congress to override a presidential veto, the bill can still fail at this final stage. Additionally, a bill presented to the President within the last ten days of a Congressional term can die if the President fails to take action on it.[382]

Hamilton argued in *Federalist Paper Number 73* that the President's veto power

> not only serves as a shield to the Executive, but it furnishes an additional security against the enaction [sic] of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or any impulse unfriendly to the public good which may happen to influence a majority of that body.[383]

Hamilton further argued, however, that the status quo was generally to be preferred to new legislation and that the harm done by killing a few good bills was more than compensated by the value of defeating the bad ones.[384]

The stories of AgJobs and other important legislative reforms, including the 1964 Civil Rights Act, support the critique that process theories tend to value the status quo above all else. These accounts also raise important questions of whether proceduralism imposes excessive obstacles to the enactment of progressive legal reforms.[385] The failure of Ag-

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[379] In the Senate, a significant minority prepared to challenge the bill by filibuster can kill the legislation through continued indefinite debate, unless the bill has enough support to sustain a cloture vote (at least three-fifths of voting members of the Senate for most legislation). *See* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15 at Rule XXII, § 2 (2003).

[380] *See* ESKRIDGE, JR., ET AL., *supra* note 349, at 34.

[381] *See* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15 at Rule XXVIII (2003); *see also* ESKRIDGE, JR., ET AL., *supra* note 349, at 35.

[382] *See* U.S. CONST. art. I, § 7.

[383] THE FEDERALIST NO. 73, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[384] *See id.* at 412.

[385] In their casebook, Eskridge, Frickey, and Garrett use the history of the Civil Rights Act of 1964 as an example of how procedural obstacles prevented important civil rights bills from being passed in the 1950s. *See* ESKRIDGE, JR., ET AL., *supra* note 349, at 68. Eventually, however, the bill did pass both houses and was signed into law by the President. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.). Madison argued in Federalist Paper No. 63 that proceduralism would improve rather than permanently block important social legisla-

Jobs to pass the Senate first in 2000 and again in 2004 appears to be an example of proceduralism undermining important social legislation that enjoyed majority support.

Although there have been several so-called "AgJobs" bills introduced over the years at the behest of growers' associations,[386] the AgJobs bill negotiated in December 2000 closely resembled the 2004 bill. The 2000 bill was the result of months of difficult negotiations and hundreds of pages of drafts between growers and farmworkers. It enjoyed majority support in the Senate. Yet when it finally came to the Senate floor in 2000, it could not overcome a filibuster from anti-immigrant forces.[387] In 2004, learning from this devastating experience, Senate leaders did not work to move the bill onto the Senate floor until it enjoyed a super-majority in the Senate. It was only when the bill had reached sixty co-sponsors, enough to sustain a cloture vote, that its principal sponsors began maneuvers to attach it to pending legislation.[388]

This time, the 2004 bill enjoyed the super-majority that it had lacked during the 106th Congress, and likely would have passed the Senate if only it had been introduced successfully. However, Senate Majority Leader Frist defied traditional Senate rules and practices to prevent the bill from being offered as an amendment. He argued that his reasons for doing so were to ensure that the Class Action Bill to which it would have been attached enjoyed full consideration, free from the discussion of unrelated amendments that could have prolonged the debate.[389] Nonetheless, evidence to the contrary suggests that Senator Frist was willing to sacrifice the Class Action Bill, which was supported by the business community, as a way to prevent the AgJobs legislation from coming across the President's desk for signature.[390] Proponents of both the Class Action Bill and AgJobs, such as Senator Chris Dodd, expressed concern that Senator Frist was ignoring traditional Senate rules that would have allowed for full

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tion. THE FEDERALIST NO. 63, at 352 (James Madison) (Clinton Rossiter ed., 1999). Early in the 109th Congress, Senator Craig reintroduced AgJobs as Senate Bill 359. *See* Agricultural Job Opportunities, Benefits and Security Act, S. 359, 109th Cong. (2005). At the time of this writing, it remains to be seen whether Congress, which has twice defeated the AgJobs bill, will enact a new and improved version of the legislation in a subsequent session.

[386] *See, e.g.*, Agricultural Job Opportunity Benefits and Security Act of 1999, S. 1814, 106th Cong. (1999); Agricultural Job Opportunity Benefits and Security Act of 1998, S. 2337, 105th Cong. (1998) ("a bill to establish a system of registries of temporary agricultural workers to provide for a sufficient supply of such workers and to amend the Immigration and Nationality Act to streamline procedures for the admission and extension of stay of nonimmigrant agricultural workers, and for other purposes"); H. Amdt. 979 to H.R. 2202, 104th Cong. (1996) (amending the current H-2A temporary agriculture worker program by replacing the labor certification requirement with a labor attestation requirement).

[387] *See supra* notes 187–191 and accompanying text; Stapleton, *supra* note 10, at 1A.

[388] *See* Rogers, *supra* note 20, at A4.

[389] *See* 150 CONG. REC. S7689, S7697 (daily ed. July 7, 2004) (statement of Sen. Frist).

[390] *See* Rogers, *supra* note 20, at A4; Second Telephone Interview with Olavarria, *supra* note 24.

deliberation of both the Class Action Bill and AgJobs.[391] Rather than fully discussing the policy implications of class action and AgJobs, the Senate leadership avoided any deliberation on the amendment altogether in response to a plea from the White House.[392] It would appear that overriding political objectives trumped any full and fair consideration of the legislation.

While process theorists argue that the Constitutional structure of government and House and Senate rules tend to ensure a legislative process that is informed, deliberative, and efficient, the story of AgJobs demonstrates the contrary. Procedural mechanisms here were used by the Senate leadership to kill a bill that enjoyed support from a super-majority of Senators. If the bill had succeeded in being introduced as an amendment to the Class Action Bill, it would have been subject to debate, a possible filibuster, and would have required a cloture vote to overcome any filibuster. Whether the super-majority that had co-sponsored AgJobs would have survived a possible filibuster remains unknown. Senate Majority Leader Frist first attempted to achieve unanimous consent to limit amendments to the Class Action Bill and later, his own cloture motion to end debate on that bill. When both of these procedural maneuvers failed, the majority leader ended debate on the Class Action Bill, effectively preventing AgJobs from coming to a vote.[393]

Although descriptively process theory helps us to understand the failure of AgJobs to survive the 2000 and 2004 Congresses, the story of the legislation raises serious questions regarding the normative value of traditional process theories. It could be argued that the AgJobs story is an exception to the rule and that the legislation was defeated because the process was corrupted by the majority leader. The AgJobs story, however, only underscores the extent to which rules can be manipulated and used to reinforce the status quo, standing in the way of progressive reform.

Nonetheless, one of the bill's key advocates argues that in spite of the bill's failure to survive the Senate gauntlet, the process is not such a bad one. "At the end of the day," Rob Williams philosophizes, "if you have to have major change, lots of people have to say yes."[394] He suggests that one of the reasons the bill did not pass was because it did not represent a complete compromise of the issues. A third set of interests, that of the immigration restrictionists, needed to be factored in, but the restrictionists were not coming to the negotiating table.[395] To better understand the role of these various constituencies, pluralist theories of legislation must

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[391] 150 CONG. REC. at S7706, S7707 (daily ed. July 7, 2004) (statement of Sen. Dodd).

[392] *See* Rogers, *supra* note 20, at A4; Second Telephone Interview with Olavarria, *supra* note 24.

[393] *See* Rogers, *supra* note 20; Second Telephone Interview with Olavarria, *supra* note 24; *see also* 150 CONG. REC. S7689, S7697 (daily ed. July 7, 2004) (statement of Sen. Frist).

[394] Second Telephone Interview with Williams, *supra* note 48.

[395] *Id.*

also be considered. Furthermore, to better understand the role of different governmental actors in the legislative process, it is necessary to turn to institutionalist theories.

3. Institutionalist Theories

Institutionalist theories of legislation also draw on the work of James Madison, but tend to focus on the interactions between different branches of government and the central importance of separation of powers.[396] Legislative change is dependent on the actions of various branches of government that may act consecutively or simultaneously. The legislative process and administrative rulemaking reflect the dynamic equilibria of interacting government institutions, such as Congress, executive agencies, and the Courts.[397] Rather than focusing on the process in any one branch of government, such as the central role of the Senate in the AgJobs example, institutionalists take into account the positions of, or actions undertaken by, other branches of government.

Under this theory, the role of different institutions constrains and shapes the behavior of each branch of government. Each branch is aware of its interdependence on other branches of government and acts accordingly to achieve equilibrium. Therefore, a key feature of institutionalism is the "anticipated response" of different government actors.[398] Moreover, under an institutionalist theory, political actors also take into account both the role of special interest groups and the reaction of constituents at election time.[399]

In *The Article I, Section 7 Game*, William Eskridge and John Ferejohn modeled the procedural requirements of bicameralism and presentment as a sequential game ("the Article I game") where all actors desire to enact legislation reflecting their preferences, but where they are aware that their own positions may need to be compromised because of the position of other governmental actors.[400] They proposed the following notations to describe the different points in the model:

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[396] *See* ESKRIDGE, JR., ET AL., *supra* note 349, at 74; *see also* Daniel A. Farber & Philip P. Frickey, *Forward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 466, 470–71 (1992); Daniel A. Farber, *Positive Political Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1579–80, 1520–84 (1995); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1398, 1400–02 (1996); Lisa L. Tharpe, *Analysis of the Political Dynamics Surrounding the Enactment of the Family Medical Leave Act*, 47 EMORY L.J. 379, 380 (1998).

[397] *See* ESKRIDGE, JR., ET AL., *supra* note 349, at 75; *see generally* THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM (Bernard Grofman & Donald Wittman eds., 1989).

[398] ESKRIDGE, JR., ET AL., *supra* note 349, at 74.

[399] *See generally* ELISABETH GERBER, THE POPULIST PARADOX (1999).

[400] William N. Eskridge, Jr., & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO.

SQ	=	status quo
H & S	=	preferences of median legislator in each house of Congress
P	=	preference of the President
h & s	=	pivotal voter in veto override in bicameral legislature
x	=	statutory policy resulting from model

In the case of AgJobs during the 108th Congress, one might represent the preferences on a continuum as follows:

S P SQ H

In this case, a super-majority of senators favored the AgJobs bill over the status quo while it appeared that a majority of House members were opposed to the legislation. The President, on the other hand, favored a temporary guestworker program that would have provided temporary legal status to workers throughout the economy but would not have provided a path to lawful permanent residency for beneficiaries under the plan.

Institutionalists might argue that AgJobs ultimately failed to pass the Senate not necessarily because of procedural obstacles in the Senate, but because the bill was not supported by the Bush Administration and faced strong opposition in the House of Representatives where a significant number of House members had formed an anti-immigrant caucus. Under the Article I game, the requirement of bicameral approval should have caused the Senate to abandon its efforts to pass the legislation once it became apparent that a majority of House members did not support the bill. Under this approach, Majority Leader Frist's actions were rational, as he prevented the AgJobs amendment from coming to the floor of the Senate because the President was opposed to it and because it faced stiff opposition in the House of Representatives.

Institutionalist theories clarify why overwhelming support for the bill in the Senate was not sufficient to achieve its passage in light of strong opposition to the bill by an increasingly vocal minority in the House and the decision by the Bush Administration to back away from immigration reform in the context of an election year and a conservative anti-immigrant base of supporters. However, institutionalism still fails to capture the full complexity of the legislative process.[401] It tends to assume that players have full knowledge of other players' preferences while simplifying players' preferences as stable and unchanging.[402] It views the political process as a snapshot in time in order to observe the interaction among different governmen-

L.J. 523, 527 (1992).

[401] *See* ESKRIDGE, JR., ET AL., *supra* note 349, at 75.

[402] *Id.*

tal actors, without taking into account how players' preferences may change over time.[403]

In the AgJobs example, the various players had imperfect knowledge of each others' preferences during the process. Advocates had assumed that if they could achieve passage in the Senate, this would hopefully create the necessary momentum to move the bill through the House.[404] Also, Karl Rove had promised lawmakers back in 2003 that President Bush would sign the AgJobs bill if it came across his desk.[405] Advocates relied on this in moving forward on the legislation, but knew that if the President backed away from his commitment the bill would fail.[406]

Furthermore, institutionalist theory, by examining political preferences as a snapshot in time, tends to disregard the way in which preferences can change in successive Congresses. Presidential politics in an election year proved to be fatal for the 2003 AgJobs bill, but may have laid the groundwork for the bill's consideration in the 109th Congress. A model of biennial factionalism, which emphasizes the cyclical nature of the legislative process, may be more effective in explaining both why the AgJobs bill failed in 2004 and what prospects it has for passage in the 109th Congress.

Before turning to biennial factionalism, the Article briefly examines the utility of critical legal theory in understanding the AgJobs story, and how elements of the theory can be integrated into a model of biennial factionalism.

4. Critical Legal Theory

Critical legal studies scholars question the underlying legitimacy of law and the lawmaking process. While process theorists would argue that laws are enacted pursuant to an informed, deliberative, and efficient process, critical legal studies scholars would contend that the lawmaking process is subjective, arational, and political.[407] In stark juxtaposition to the process theorists, critical legal theorists argue that all laws cannot be neutral because neutral laws cannot resolve the conflicts among different societal interests. Furthermore, once one acknowledges that the law is not neutral, then one must accept that each law subordinates the interests of one group in society to those of another. Critical legal scholars suggest that the "rule of law" obscures the domination of society by elite interests.[408] It also obscures the central tension within our constitutional system, which is founded

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[403] *Id.*
[404] Second Telephone Interview with Olavarria, *supra* note 24.
[405] *See supra* note 197 and accompanying text; Stapleton, *supra* note 10, at 1A.
[406] *See* Second Telephone Interview with Williams, *supra* note 48.
[407] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 710.
[408] *See id.* at 711.

on the conflicting premises of respecting majority rule and protecting minority rights.[409]

Critical legal theory thus offers a valuable critical perspective on other legisprudential theories, particularly process theories and traditional pluralism. Nonetheless, it fails to offer an adequate explanation for why progressive social reforms are enacted. If law truly is dominated by the societal elite, then how is the enactment of progressive social reforms over the last fifty years explained? As noted above, Dorothy Brown made this same point in her critique of public choice theory, arguing that Olson's theory of the free-rider effect failed to explain why public interest organizations have had such an impact on the political process over the last forty years.[410]

Edward Rubin proposes a new model, the "microanalysis of institutions," which attempts to integrate institutionalist theories of lawmaking with outsider scholarship to "develop a unified scholarly discourse" on institutional behavior.[411] He defines "outsider scholarship" as a post-critical legal studies approach that uses critical race theory, feminist theory and queer theory to achieve social justice for marginalized and disempowered groups.[412] He argues that "racial minorities, women, and gay men and lesbians cannot afford the luxury of critical legal studies' fatalism; the legal system is too well entrenched to be dismissed."[413] Rather, he suggests that a deeper understanding of these structures, based on the microanalysis of institutions, can provide the basis for legal reform.

Rubin suggests that a critical legal studies approach shares much in common with public choice theory. Both theories "depict institutions as either purposefully or instinctively supporting existing power structures."[414] While public choice theory would regard public institutions as rational in carrying out their strategic goals, outsider scholarship "seeks mechanisms for sensitizing these institutions to the demands of social justice."[415] Rubin's article calls for a synthesis of the various schools of legal scholarship, including the legal process school, public choice theory and critical legal studies. His proposed methodology is based on the microanalysis of institutions and a substantive focus on the interplay between efficiency and social justice considerations in the law making process.[416]

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[409] *See id.*

[410] Brown, *The Invisibility Factor*, *supra* note 300, at 180–81. *See also* Tharpe, *Analysis of the Political Dynamics Surrounding the Enactment of the Family Medical Leave Act*, *supra* note 396, at 391 (arguing that the prescriptive power of positive political theory may prove dangerous to democracy if the public loses faith in its ability to influence the political process).

[411] Rubin, *supra* note 300, at 1393–94.

[412] *Id.* at 1407–08.

[413] *Id.* at 1407.

[414] *Id.* at 1427.

[415] *Id.*

[416] *Id.* at 1437–38, *discussed in* Tharpe, *Analysis of the Political Dynamics Surrounding the Enactment of the Family Medical Leave Act*, *supra* note 396, at 380–81 (arguing

Focusing on social justice considerations for immigrants, which is particularly relevant for this Article, Kevin Johnson addresses their relative political powerlessness and the obstacles immigrant groups face in advocating for immigration reform.[417] In particular, he notes that even when non-citizens enjoy support from a majority of the electorate, they often still lose in the political and legal process because of inherent dysfunctions in lawmaking and adjudication.[418] Nonetheless, Johnson, like Brown and Rubin, recognizes that immigrant groups often enjoy the support of the advocacy community even though they are unable to participate in the electoral process.[419]

Such support from the advocacy community proved to be critical in the negotiations for the AgJobs legislation, both in 2000 and 2004. The United Farmworkers, a relatively weak political actor, was able to negotiate on a reasonably even playing field with politically influential and powerful growers because they enjoyed the support of immigrant advocacy organizations from across the United States.[420] Moreover, although growers traditionally wielded significant influence in Congress, they had been unable in recent years to pass legislation that would primarily serve their interests, largely because of opposition from both immigration restrictionists on the one hand and pro-immigrant groups on the other.

Kevin Johnson identifies one of the biggest obstacles immigrants face as the presence of nativist groups. Nativist groups, although a minority, are extremely vocal and brandish an inordinate amount of political influence in Congress and with certain executives.[421] This "vocal minority," as Johnson refers to them, has played a fundamental role in killing major reforms in the area of immigration.[422] Indeed, in 2004 when President Bush announced his proposal for a guestworker program, he was unprepared for the vehemence of reactions from the radical right and ultimately backed away from his modest plan.[423] It was mainly in meetings with Latino groups that Bush would renew his call for immigration reform.[424]

By supporting such a program in the first place, however, President Bush managed to touch on a controversial issue. In an article titled *The Hispanic Challenge*, noted Harvard political scientist Samuel Huntington

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that the microanalysis of institutions approach offered by Rubin offers a better explanation for why the Family Medical Leave Act passed than interest group analysis, which failed to explain why the FMLA was enacted despite organized opposition from business and industry and diffuse support from the American family).

[417] *See* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993).

[418] *See id.* at 1147.

[419] *Id.* at 1155.

[420] *See* Letter from AgJobs Supporters to Members of Congress (Feb. 12, 2004) (on file with author); *see also* Second Telephone Interview with Williams, *supra* note 48.

[421] Johnson, *supra* note 417, at 1158–59.

[422] *Id.* at 1161.

[423] *See* Wallsten & Boudreaux, *supra* note 279, at A1.

[424] *Id.*

warned that the "persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples, two cultures and two languages."[425] He emphasized that "the single most immediate and most serious challenge to America's traditional identity comes from the immense and continuing migration from Latin America, especially from Mexico . . . ."[426] Huntington posed the question: "Will the United States remain a country with a single national language and a core Anglo-Protestant culture?," warning that failure to answer this question would result in our transformation into a nation with two cultures and two languages.[427] He warned that Mexican Americans could only share in the American Dream if they dreamed in English.[428] Although such statements would not have been surprising if they had come from anti-immigrant groups like FAIR, authors like Peter Brimelow who wrote *Alien Nation*,[429] or white supremacist groups, such public displays of xenophobia were unexpected from a respected U.S. academic in a mainstream publication. This raised the question of whether the debate over a guestworker program during an election year had revealed the deep fissures that had come to exist in American society.[430]

The discourse of critical legal studies scholars, with regard to the structural tension of respecting majority rule while protecting minority rights, usually involves discussions regarding the appropriate role of judicial review and the countermajoritarian difficulty.[431] However, it also has relevance in analyzing issues of access to the political process. Critical legal studies, Critical Race, Latcrit, and feminist scholars help to debunk the myth that formal access to the political process is meaningful access. They underscore that certain political actors wield much greater influence over the political process, usually in proportion to their financial status, than others.[432] They emphasize that legal norms are often constructed on the foundation of oppressive and violent power structures.[433] Indeed, they critique the

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[425] Samuel Huntington, *The Hispanic Challenge*, FOREIGN POL'Y, Mar./Apr. 2004, at 30.

[426] *Id.* at 32

[427] *Id.*

[428] *See id.* at 45 ("There is no Americano dream. There is only the American dream created by an Anglo-Protestant society. Mexican Americans will share in that dream and in that society only if they dream in English.").

[429] PETER BRIMELOW, ALIEN NATION (HarperPerennial 1995) (1996).

[430] *See, e.g.*, Michael Crowley, *Border War*, NEW REPUBLIC ONLINE, Mar. 28, 2005 *at* http://www.tnr.com/docprint/mhtml?I=20050328&s=crowley032805 (last visited Apr. 22, 2005).

[431] *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part 5*, 112 YALE L.J. 153, 155 (2002).

[432] *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 290, at 712.

[433] *See, e.g.*, Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 32 CAL. L. REV. 741, 760 (1994); Sharon K. Homm & Eric K. Yamamoto, *Collective Memory, History and Social Justice*, 47 U.C.L.A. L. REV. 1747, 1801 (2002); John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1404 (2002).

view that associates, on the one hand, an orderly political process with peace and, on the other, disorder with violence.[434]

Nonetheless, critical legal studies, while offering a valuable critique of process and pluralism theories, including a deeper understanding of issues of unequal access to the political process, may have discounted the role that progressive social movements can play in bringing about change through legislative advocacy. In 1831, de Tocqueville commented on the power of associations:

> Citizens who are individually powerless do not very clearly anticipate the strength that they may acquire by uniting together; it must be shown to them in order to be understood . . . a thousand citizens do not see what interest they have in combining together; ten thousand will be perfectly aware of it.[435]

He recognized that unrestrained liberty of association could threaten to throw the country into a state of anarchy,[436] but ultimately concluded that "extreme democracy," including freedom of association, would obviate the dangers of democracy, especially the tyranny of the majority.[437]

The reality is that political decisions frequently do not reflect the will of the majority. Often they are the result of the influence of a powerful elite on the political process, but they can also be the result of well-organized lobbies by public interest groups. This realization, rather than disempowering minority groups like the farmworkers, can often be the inspiration needed to bring about progressive change.

B. A Framework for Analysis

Each of the legisprudential theories discussed above is helpful in understanding aspects of the AgJobs story. No single theory, however, is sufficient for fully capturing the complexities of the legislative process in the context of immigration reform. Pluralism theories, both traditional pluralism and public choice, are essential for understanding how grower associations and the United Farmworkers were able to come together to negotiate compromise legislation and how AgJobs was able to achieve supermajority co-sponsorship in the Senate. Process theories are useful for understanding the failure of the AgJobs bill to make its way through the Senate. The series of vetogates placed in the path of AgJobs in the House and Senate in 2000 and 2003–2004, including the committee hearing process, the

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[434] *See* Gary Peller, *The Metaphysical American Law*, 73 CAL. L. REV. 1152, 1184–87 (1985).

[435] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 116 (Harry Reeve trans., Vintage Books, 2d ed. 1991) (1945).

[436] 1 DE TOCQUEVILLE, *supra* note 314, at 195.

[437] *Id.* at 198.

amendment process, and the role of the Senate filibuster, ensured that the bill could only make its way through the legislative process if it achieved major support on both sides of the aisle. Institutional theories become essential in understanding why overwhelming support in the Senate did not ensure passage, shedding light on the institutional interdependence of the various branches of government and how this influences the actions of political actors. Finally, critical legal theory offers a discerning perspective on other legisprudential theories, helping to demonstrate the powerful role played by elite growers and raising questions about the dark side of pluralism and process theories. It debunks the notion that formal access to the political process is necessarily meaningful access, while at the same time challenging scholars to consider alternative models for bringing about progressive change.

This Article proposes a new pluralist model for analyzing immigration reform that draws on each of these different theories, but emphasizes the role of the various actors in the political process, including state and non-governmental actors, as well as international actors, including foreign governments and intergovernmental institutions. This new model is called "biennial factionalism," because of the tendency of the political process to renew or reinvent itself every two years, in a somewhat cyclical repetition of new attempts at legislative reform. Under the model of biennial factionalism, the only constant in the political process would be the constitutional structure of U.S. government. Each actor in this process could be seen as a political variable, with different actors wielding different degrees of power.

Operating against the backdrop of stability provided by the constitutional framework of government, defined largely in terms of bicameralism and presentment, legislative outcome is substantially determined by process and by the deliberative nature of government under a separation of powers regime. The model takes into account the essential roles played by the House of Representatives and the Senate, and the substantial influence of each, for if either chamber rejects the legislation it cannot move forward. Other actors, including the Executive and the Judiciary are critical, and in the case of the Executive often decisive, but not necessarily essential.[438] Rather than being thought of as determinants of legislative outcome, they are better viewed as influences on the House and Senate.

Private actors, including corporate interests, labor unions, and citizen groups, tend to have a direct impact on members of Congress, although structurally they have less influence than the Executive or the Judiciary. Such private actors, particularly economic organizations, may often play a

[438] For example, major immigration reform, such as the Immigration and Nationality Act of 1952, was enacted when Congress overrode President Truman's veto. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952). Other federal laws have been enacted despite their being clearly unconstitutional under Supreme Court doctrine, such as the recently passed partial birth abortion law. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003).

fundamental role in the drafting process and in lobbying individual members of Congress. However, their influence can be offset by that of other private actors. As Dahl recognized in his later writings, organizational pluralism is consistent with immense inequality in control over the political process, and defects in the political process tend to exist more in capitalist economies like the United States than in more centralized economies.[439] Dahl also recognized the tendency for economic organizations involved in important conflicts to reach accommodation with each other.[440] Structural changes that would significantly redistribute wealth, income or control become nearly impossible to achieve. Cross-cutting cleavages tend to produce moderation in political conflicts, rather than broadscale structural change.[441]

A legisprudential theory of biennial factionalism reflects both the importance of process to legislative outcome as well as the critical role of both institutional and private actors in lawmaking. It also reflects the idea that lawmaking is a biennial process, and that the failure of legislation to pass in one Congress often becomes a learning opportunity for achieving reform in future Congresses. The biennial element of this model is perhaps the feature that has been most neglected in legisprudential literature, yet it is the aspect that best explains why certain progressive legal reforms eventually became law despite repeated failures in Congress. Scholarship tends to underemphasize the relationship between the two-year Congressional cycle and how public interest laws introduced into successive Congresses ultimately were enacted. Biennialism explains why advocates both in and out of Congress are willing to engage in a virtual Groundhog Day[442] of attempts at legislative reform, despite recurring failures.

The Civil Rights Act of 1964[443] is a classic example of this,[444] as is the Immigration Reform and Control Act of 1986.[445] The Civil Rights legislation failed to be passed repeatedly in Congress. First introduced by President Eisenhower in 1957, it was not passed into law until after President Kennedy's assassination in 1963.[446] Having encountered numerous procedural obstacles in Congress and having enjoyed relatively lukewarm support from President Kennedy in his early years in office, it was President Johnson's address to a joint session of Congress calling for "earliest pos-

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[439] DAHL, DILEMMAS OF PLURALIST DEMOCRACY, *supra* note 313, at 108–16.

[440] *Id.* at 57.

[441] *Id.* at 60.

[442] This term references a phenomenon that was the focus of the 1993 movie "Groundhog Day." GROUNDHOG DAY (Columbia Pictures 1993) (featuring the story of a cynical weatherman who must continue to relive one particular Groundhog Day, until he becomes a better person.) .

[443] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[444] *Discussed in* ESKRIDGE, JR., ET AL., *supra* note 349, at 2–23.

[445] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[446] 42 U.S.C. § 2000(a) (2000); ESKRIDGE, JR., ET AL., *supra* note 349, at 11.

sible passage of the civil rights bill for which [President Kennedy] fought for so long" that eventually helped ensure its passage.[447] Similarly, the Immigration Reform and Control Act of 1986, which provided amnesty for undocumented agricultural workers and for persons in the United States since 1982, was first introduced in Congress in 1982[448] but was not passed until two Congresses later, after repeated failed attempts, and only then after the Hispanic Caucus changed their position to support the bill.[449]

The biennial nature of the legislative process proves particularly critical in understanding the AgJobs case. First introduced in its present form in 2000, the bill was nearly enacted at the end of the 106th Congress. It enjoyed the support of the outgoing President and the support of a Congressional majority, but ultimately failed because it did not enjoy the necessary super-majority to override a filibuster. Two Congresses later, it was reintroduced, but this time, having learned from the previous experience in the Senate, its advocates waited until it enjoyed the necessary votes to override a filibuster. It had become increasingly apparent to advocates, however, that without the President's support, it was unlikely to achieve passage even if it passed the Senate. Nonetheless, advocates had hoped that if AgJobs came across the President's desk in an election year, he might be shamed into supporting it in lieu of alienating Latino voters.[450]

C. Recent Developments Under a Legisprudential Lens

The theory of biennial factionalism is borne out by recent developments in the current 109th Congress. On February 10, 2005, Senators Larry Craig and Edward M. Kennedy reintroduced the AgJobs bill in the Senate as Senate Bill 359, the Agricultural Job Opportunities, Benefits and Security Act of 2005 after which it was referred to the Senate Judiciary Committee.[451] Representatives Chris Cannon (R-Utah) and Howard Berman (D-Cal.), with fourteen other co-sponsors, introduced companion legislation (House Bill 884) in the House of Representatives a week later.[452] Interestingly, the same day the AgJobs bill was reintroduced into the Senate, the REAL ID Act of 2005 (House Bill 418) passed the House of Representatives by a vote of 261 to 161.[453] REAL ID included many of the

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[447] ESKRIDGE, JR., ET AL., *supra* note 349, at 11.

[448] H.R. 5872, 97th Cong. (1982); S. 2222, 97th Cong. (1982).

[449] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Reams & Nelson, *supra* note 123, at 12, 16–17. In light of growing antagonism toward illegal immigration, the Hispanic Caucus recognized that this could be their last opportunity to achieve comprehensive legalization. *Id.* at 17.

[450] *See, e.g.*, Schneider *supra* note 250 (quoting Tirso Moreno, General Coordinator for the Farmworker Association of Florida, "The most important thing the administration could do to help Hispanic workers is make sure the federal AgJobs bill passes.").

[451] Agricultural Job Opportunities, Benefits and Security Act of 2005, S. 359, 109th Cong. (2005); 151 CONG. REC. S1260 (daily ed. Feb. 10, 2005).

[452] H.R. 884, 109th Cong. (2005); 151 CONG. REC. H791 (daily ed. Feb. 17, 2005).

[453] REAL ID Act of 2005, H.R. 418, 109th Cong. (2005); 151 CONG. REC. H566 (daily

anti-immigrant provisions that had failed to pass as part of the intelligence overhaul bill in the previous Congress,[454] including expanded grounds of inadmissibility and a provision that would effectively prevent states from issuing drivers' licenses to persons not having lawful immigration status.[455]

At the time of this writing, the Senate was preparing for a major battle over the AgJobs legislation. According to a news report, the Senate parliamentarian had ruled that the bill could be offered as an amendment to House Bill 1268, an emergency supplemental spending bill which had passed the House of Representatives and been referred to the Senate, because provisions in the REAL ID Act, which had earlier passed the House of Representatives and had been incorporated into House Bill 1268,[456] had effectively opened the door for Senator Craig to offer AgJobs as an amendment to the Senate bill.[457] During the week of April 4, 2005, the emergency supplemental spending bill came before and was voted out of the Senate Appropriations Committee,[458] potentially providing the opportunity for AgJobs to be offered as an amendment during floor debate. Senator Craig's spokesperson Sidney Smith indicated that it was "looking more and more likely we'll offer AgJobs as an amendment."[459]

A spokesperson for Senator Cornyn, head of the Immigration Subcommittee of the Senate Judiciary Committee, criticized the AgJobs bill and said that it would not pass because it was "an amnesty bill, and the President's not going to sign it."[460] Furthermore, Cornyn's aide criticized the bill for not being a "comprehensive [immigration] bill, and it would slow momentum for getting a comprehensive bill."[461] Senator Cornyn was planning a series of hearings to produce a comprehensive bill.[462] Furthermore, critics of the AgJobs legislation underscored that the bill, which had

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ed. Feb. 10, 2005).

[454] *See* CNN News, *supra* note 288.

[455] REAL ID Act of 2005, H.R. 418, 109th Cong. § 202(a) (2005).

[456] *See* 151 CONG. REC. H1526 (daily ed. Mar. 16, 2005) (appending text of House Bill 418 to engrossment of House Bill 1268, pursuant to House Resolution 151).

[457] *See* Dinan, *supra* note 261, at A1.

[458] *See* Press Release, U.S. Senate Committee on Appropriations, Chairman Cochran Announces Committee Approval of FY05 Emergency Supplemental (Apr. 6, 2005), *at* http://appropriations.senate.gov/releases/record.cfm?id=236115 (last visited Apr. 20, 2005). The Senate Appropriations Committee did not include the REAL ID Act of 2005, which had been included in the House version of the bill. *See id.*

[459] Dinan, *supra* note 261, at A1. On April 8, 2005, Rob Williams indicated to supporters that "[i]t now appears probable that Larry Craig and Ted Kennedy will offer AgJOBS next week to the supplemental appropriation." E-mail from Rob Williams to AgJobs Supporters (Apr. 8, 2005) (on file with author). In a subsequent e-mail to the Author, Williams indicated that the Democratic objective was to kill the REAL ID Act, and that AgJobs was "the most potent poison pill." E-mail from Rob Williams to Lauren Gilbert (Apr. 8, 2005) (on file with author).

[460] Dinan, *supra* note 261, at A1.

[461] *Id.*

[462] *See supra* note 287 and accompanying text.

achieved sixty-two co-sponsors in the 108th Congress, currently enjoyed only forty-three sponsors.[463]

The 109th Congress presented a fresh opportunity for achieving passage of AgJobs. Institutionalist theory, taking into account the interdependence and "anticipated response" of different branches of government, would indicate that its prospects for passage in the Senate were dim at the time. This assessment is in light of the President's desire to achieve passage of his guestworker proposal and claim credit for comprehensive immigration reform,[464] as well as the anti-immigrant posture in the House of Representatives, as reflected in passage by the House of the REAL ID Act. Process theory would suggest that, while advocates had overcome one obstacle by obtaining a favorable ruling from the Senate parliamentarian, they faced a similar obstacle to that encountered in the 106th Congress: the bill, which had less than fifty co-sponsors, did not appear to enjoy a super-majority, and thus was susceptible to a filibuster.

While traditional pluralist theory is critical in understanding how this coalition of growers, farmworkers, and advocates came together yet again to propose the AgJobs bill, it is less helpful in assessing the bill's prospects for passage in the Senate. Nonetheless, to the extent that advocates for AgJobs could convince restrictionist groups to come to the negotiating table, this could improve the legislation's prospects for passage. The fact that restrictionists had succeeded in attaching the REAL ID Act to the emergency supplemental bill in the House while Democrats had made killing the REAL ID Act a major priority suggested that such a compromise at this point could undermine the critical support AgJobs had achieved from immigrant advocates.

Public choice theory, particularly Arrow's Voter's Paradox, suggests that political decision-making is not always a rational process, and that control over the Senate agenda could prove critical to whether AgJobs could be attached to emergency spending legislation. Thus, there might be a certain advantage in offering AgJobs as an amendment before President Bush's immigration proposal came before the Senate. The AgJobs bill is less comprehensive than President Bush's guestworker proposal in that it is limited to one sector of the economy, and therefore might be seen by restrictionist groups as a more acceptable solution. Furthermore, proponents of immigration reform could view its earned legalization provisions as a model for more comprehensive immigration reform.

Critical legal studies and other outsider scholarship provide a useful critique of the legislative process as dominated by elite interests and suggest that it has been because of the involvement of powerful growers that the AgJobs bill stands any chance of passage in this Congress. Nonetheless, it fails to explain why grower-friendly legislation has not been able to pass

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[463] Dinan, *supra* note 261, at A1.

[464] *See supra* note 261 and accompanying text.

without farmworker support. Post-critical legal studies approaches, however, underscore the important role played by a well organized social movement in both opposing legislation that would primarily favor grower interests and achieving a legislative package that serves both the interests of growers and workers.

CONCLUSION

Although AgJobs failed to survive the 108th Congress, some advocates argued that this only meant that its day had not yet arrived. Like the Civil Rights Act that had repeatedly failed to pass in Congresses before its enactment in 1964, and the Immigration Reform and Control Act of 1986, which traveled a similar path, the confluence of circumstances for AgJobs' passage was not yet ripe. Despite strong support in the Senate, it had met with resistance in the House from an increasingly vocal minority of restrictionist members. Furthermore, during the 108th Congress, AgJobs did not factor into strategist Karl Rove's political equation for surviving the Presidential elections of 2004.

In the 109th Congress, AgJobs comes up against the Administration's proposal for a guestworker program and comprehensive immigration reform. Despite the bill's failure to become law in the 108th Congress, AgJobs' proposal for earned adjustment of agricultural workers could conceivably become a feature of President Bush's guestworker plan. Furthermore, critics on both sides of the aisle expressed doubts that the Bush Plan would become law. The Bush Plan's application to workers in all sectors of the economy makes it vulnerable to attacks by restrictionist groups. If the Bush Plan were to falter, AgJobs could conceivably provide an alternative framework for immigration reform.[465]

As this Article went into final production in April 2005, the AgJobs bill stood at forty-six sponsors with the potential for more in the following days. Advocates were confident that they had the necessary fifty-one votes to attach it as an amendment to the supplemental emergency spending bill which had earlier that month passed in the House and been voted out of the Senate Appropriations Committee. However, advocates remained uncertain as to whether they had the sixty votes needed to override a filibuster. The main Democratic objective, however, was to eliminate the anti-immigrant REAL ID Act, included in the House emergency supplemental bill, but not in the Senate version. AgJobs was seen as a "potent poison pill" for killing the REAL ID Act and supporters indicated that advocates would still consider it a victory if the AgJobs amendment was included in the Senate bill but was stripped from the emergency supplemental in Con-

[465] *See* Second Telephone Interview with Williams, *supra* note 48 (commenting that there would only be, at best, one major piece of immigration reform in the 109th Congress, and that he did not think it would be the Bush Plan).

ference Committee.[466] Another possible outcome was that both houses of Congress would agree to a "clean" emergency supplemental bill without the immigration provisions, but with a date certain for votes on both AgJobs and the REAL ID Act.[467]

A theory of biennial factionalism illuminates AgJobs' prospects for passage in the current or future Congresses, as well as the history of the legislation. By emphasizing the biennial nature of the legislative process, this theory suggests that each failure (or partial success) at legislative reform can be viewed as a learning opportunity for advocates to regroup, rethink, and reintroduce reforms into subsequent Congresses.

Many proposals will die through this process, especially if attractive alternatives fracture the cross-cutting coalitions that have been built over time. Other reforms, however, particularly those that have achieved the support of a broad coalition of actors, may eventually succeed. In the AgJobs example, biennial factionalism encouraged a broad coalition of growers, farmworkers, and immigrant advocates, working with conservatives and liberals in the Senate and the House of Representatives, to engage in repeated attempts at legislative reform. It is biennialism that continues to hold out the promise of eventual success.

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[466] *See* E-mail from Rob Williams to Lauren Gilbert, *supra* note 459.
[467] *See id.*

ARTICLE

ENDANGERED GREEN REPORTS: "CUMULATIVE MATERIALITY" IN CORPORATE ENVIRONMENTAL DISCLOSURE AFTER SARBANES-OXLEY

MITCHELL F. CRUSTO*

Recent corporate financial scandals involving Enron, WorldCom, and other companies raise questions about the transparency of corporate disclosures. In this Article, Professor Mitchell Crusto advocates for the reform of corporate environmental disclosure in the wake of the Sarbanes-Oxley Act of 2002. He first explores the shortcomings of current environmental disclosure requirements and traces corporate, investor, and regulatory pressure to improve environmental compliance and reporting. Professor Crusto then analyzes a disclosure reform proposal developed by the American Society of Testing and Materials that would require companies to report environmental liabilities in the aggregate. He concludes that this cumulative materiality standard for environmental disclosures should be adopted to promote investor confidence and improve corporate environmental management.

Recent corporate financial scandals involving Enron, WorldCom, Arthur Andersen, and others have heightened awareness of the need to revisit corporate accountability. Congressional response in the form of the passage of the Sarbanes-Oxley Act of 2002 raises questions about the transparency of corporate environmental disclosure.

Over the years, corporations have selectively disclosed their environmental performance. In the past, corporate environmental disclosure was driven by three things: environmental compliance statutes, federal securities law, and public relations. Corporations sought to positively influence investor and public opinion of their environmental record through the use of the "green report"; typically a glossy, unaudited showcase of corporate environmental good deeds. However, the Enron scandal and Sarbanes-Oxley are likely to change what corporations disclose as to their environmental matters.

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This Article explores the impact that post-Enron corporate reform, and specifically the Sarbanes-Oxley Act, has had on corporate environmental financial disclosure, particularly green reports. Part I provides an overview of the current environmental disclosure landscape and pressure for reform after Sarbanes-Oxley. Part II details the shortcomings of corporate, investor, and regulatory efforts to encourage corporate compliance with environmental regulations, creating a need for more accurate environmental disclosure. Part III describes the current demand for a heightened standard of corporate environmental disclosure and the Securities and Exchange Commission's (SEC's) attempts at establishing a satisfactory disclosure standard. Part IV analyzes the central feature of a current corporate environmental disclosure proposal developed and presented by the American Society of Testing and Materials (ASTM), which would require a cumulative assessment of the financial impact of all environmental liabilities for "materiality." This "cumulative materiality standard," if adopted, would replace the present SEC standard of materiality for each proceeding or liability. The author concludes that, while Sarbanes-Oxley does not expressly address corporate environmental disclosure, large economic entities, including publicly traded corporations and the federal government, should adopt the ASTM "cumulative materiality standard" over voluntarily published green reports.

I. THE DEMISE OF VOLUNTARY CORPORATE ENVIRONMENTAL DISCLOSURE OR GREEN REPORTS AFTER ENRON REFORMS?

Recent corporate financial scandals involving Enron, WorldCom, Arthur Andersen and others have led to the passage of significant legislation affecting, inter alia, corporate financial disclosure.[1] These recent financial reporting scandals raise red flags concerning corporate accountability generally and particularly question the future of corporate environmental disclosure.[2] While Sarbanes-Oxley does not directly speak to corporate envi-

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[1] *See* Sarbanes-Oxley Act of 2002, 15 U.S.C.A §§ 7201–7266 (West Supp. 2004). The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) is also commonly known as the Public Company Accounting Reform and Investor Protection Act. Pub. L. No. 107-204, 116 Stat. 745 (2002); *see also* Philip E. Karmel, *SEC Disclosure Requirements for Environmental Liabilities and the Impact of the Sarbanes-Oxley Act*, in Practising Law Institute, Real Estate Law and Practice Course Handbook Series, New Solutions to Environmental Problems in Business & Real Estate Deals 2003, 293, at 297–98 (PLI Order Number N0-00C0, November 2003) ("Sarbanes-Oxley . . . was prompted largely by the Enron meltdown, which resulted from its failure to disclose facts that were important for an understanding of the substance of its transactions with off-balance sheet entities."); *see generally In Re* Enron Corp. Sec., Derivative & Erisa Lit., 235 F.Supp.2d 549 (S.D. Tex. 2002) (providing details into the scandal that lead to the passage of Sarbanes-Oxley); American Institute of Certified Public Accountants, *Summary of Sarbanes-Oxley Act of 2002*, *at* http://www.aicpa.org/info/sarbanes_oxley_summary.htm (last visited Mar. 12, 2005) (presenting a summary of Sarbanes-Oxley).

[2] A number of excellent articles have recently been published (usually written by practicing attorneys) on the importance of viewing corporate environmental disclosure in light

ronmental disclosure, it is important to those disclosures for several reasons. By directing chief executive officers to certify their company's financial statements, Sarbanes-Oxley heightens the standard for all corporate disclosures.[3] In addition, Sarbanes-Oxley creates a new oversight board that will promote more exacting, independent accounting principles to guide corporate disclosures.[4] More importantly, Sarbanes-Oxley represents a milestone in corporate disclosures from "fuzzy" corporate disclosure standards to those promoting transparency.[5] Because of all this, now is an appropriate time, especially for the environmental lawyer,[6] to reconsider corporate environmental disclosure in light of recent changes in corporate accountability.[7]

A. Seminal Study of Corporate Environmental Disclosure

There is a dearth of academic work relating to corporate environmental disclosure after Sarbanes-Oxley. The few published articles appear in professional journals written by knowledgeable lawyers and accountants.[8] Most of these articles have a similarity to them; they review the history of recent developments in corporate environmental disclosure, noting how Sarbanes-Oxley will likely result in a higher standard of environmental disclosure.[9]

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of the Enron-era scandals. *See, e.g.*, Andrew N. Davis & Stephen J. Humes, *Environmental Disclosures After Sarbanes-Oxley*, PRAC. LAW., June 2004, at 19, 20 ("Although Sarbanes-Oxley has not yet mandated that the U.S. Securities and Exchange Commission . . . amend the environmental disclosure rules, the legal context within which they must now be read has changed significantly."); *see also* Karmel, *supra* note 1, at 297–98 ("[Sarbanes-Oxley's] scope is much broader . . . and requires the SEC to engage in a number of complex rulemakings that will affect all SEC disclosure documents and the bar.").

[3] *See* 15 U.S.C.A. § 7241.

[4] *See* 15 U.S.C.A §§ 7211, 7213.

[5] *See* discussion *infra* notes 107–112.

[6] *See* Karmel, *supra* note 1, at 298, 315, 319 (noting that the two provisions "most likely to affect environmental practitioners" are new rules requiring disclosure of off-balance sheet arrangements and reporting of material violations to a company's chief legal officer or chief executive officer); *see also* SEC, Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, 17 C.F.R. §§ 228, 229, 249 (2003); SEC, Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205 (2003); Pamela R. Esterman, *Ethical Issues in Environmental Law*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Environmental Law, 333, 335 (Feb. 11–13, 2004) ("Although the ethical problems faced by environmental lawyers are not unique, the issues posed are often exacerbated by the nature of the practice, with its technical and scientific aspects, its political overtones, and its significant implications for public health and safety.").

[7] For a companion article, see Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175 (2003).

[8] *See, e.g.*, Davis & Humes, *supra* note 2; Karmel, *supra* note 1.

[9] *See* Richard M. Schwartz & Donna Mussio, *Environmental Disclosure Requirements Under the Federal Securities Laws*, 1424 PLI/CORP. 372, 372–73 (2004) (arguing that the new SEC rules on certification and material violation reporting "should provide a strong incentive to ensure that there is a well-documented system to ensure the accuracy of environmental disclosures and appropriate consideration and accounting treatment of potential

Unfortunately, there is little, if any, critical analysis of increased corporate environmental disclosure in the academy. This Article hopes to begin a dialogue on the desirability of an increased standard in corporate environmental disclosure. In doing so, the author acknowledges the work of Professor Larry Ribstein in his recent critical analysis of the Sarbanes-Oxley Act.[10] This Article aspires to bring Professor Ribstein's critical eye to the issue of heightened corporate environmental disclosures.

B. Timely, Relevant Analysis of Corporate Environmental Disclosure

This Article seeks to evaluate the state of corporate[11] environmental disclosure. There are three reasons to evaluate corporate environmental[12] disclosure.[13] First, corporate environmental disclosure is "investor" focused. Such disclosures, if not fully and fairly accounted for, could constitute material errors or omissions in violation of federal securities regulations.[14] And even where such omissions do not technically violate federal security

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environmental liabilities"); *see also* Davis & Humes, *supra* note 2, at 23 (noting that risk disclosures filed with the SEC must include "identification of known and unknown environmental liabilities and risk, including liabilities associated with discontinued operations").

[10] Larry E. Ribstein, *Market Vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 36–47 (2002) (critiquing Sarbanes-Oxley's reliance on regulation as an inefficient approach to corporation fraud).

[11] "Corporate" is defined as any large business enterprise, including but not limited to large publicly traded corporations. *See* LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS 8 (3d ed. 1996). The term "corporate" for purposes of this Article includes all economic entities whose operations have a significant impact on the environment, regardless of their legal composition, and as such includes publicly traded corporations, federal and state governments, LLCs, and private, non-publicly traded entities. While it is recognized that large publicly traded corporations are under greater legal obligation to disclose financial information to the investing public, this Article is not limited to legally required disclosures for publicly traded corporations under the federal securities laws.

[12] "Environmental" is defined as environmental, health, and safety matters, including those regulated under international, federal, state, and local environmental, health, and safety laws and regulations, as well as any voluntary industry or entity self-imposed initiatives, such as the former Chemical Manufacturing Association's Responsible Care Program or Monsanto Corporation's "Monsanto Pledge." *See* RICHARD J. MAHONEY, A COMMITMENT TO GREATNESS 30–39 (1988) (setting goals to create and operate chemical plants that are environmentally safe for both its employees and its community). Throughout this Article, the word "environmental" expressly includes environmental protection, as well as human health and safety, unless expressly stated otherwise.

[13] "Disclosure" is defined as publicly published information relating to an economic entity's environmental, health, and safety impacts, including, but not limited to, legal and extra-legal liabilities; environmental, health, and safety expenditures; product life-cycle analysis impacts; and reports from other analytical tools to measure and assess impacts. *See* Davis & Humes, *supra* note 2, at 20–23. While most of the following discussion directly relates to publicly traded corporations under direct control of the SEC, all large business entities, including the federal government, should be required to comply with heightened environmental disclosure standards.

[14] *See* Schwartz & Mussio, *supra* note 9, at 333 (outlining a host of SEC requirements regarding the recordation and disclosure of environmental loss contingencies, as well as various accounting standards and guidance documents).

laws, or where the economic entity is not subject to federal security laws, proactive corporate environmental disclosure serves to benefit investors who have a right to know what investment risks they are taking.

Second, corporate environmental disclosure is "economic entity" focused. Corporate environmental disclosure, when properly performed, serves the business interests of the economic entity by improving the entity's ability to forecast its financial future.[15] If a business entity conducts a truly honest and thorough financial analysis of its environmental impacts, it will be in a better position to plan its financial future. In a worst-case scenario, a business entity may conclude that its environmental impacts might be greater than its assets or projected income.

This economic focus is at the core of a new scholarly discipline, environmental business, emerging in boardrooms and classrooms across the nation, which employs principles of strategic corporate environmental management.[16] Corporate environmental disclosure should be viewed broadly through a multi-disciplinary lens, taking into account legal compliance, governmental and community relations, and business management principles. Commentators note that this new discipline does just that by incorporating principles of risk reduction, auditing, public accountability, planning, business practices, community and employee involvement, and cost management.[17] The tools of this incorporation include life-cycle analysis (LCA),[18] environmental or full cost accounting,[19] international environmental standards such as the International Organization for Standardization's (ISO's) ISO 14000,[20] sustainable manufacturing,[21] pollution prevention strate-

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[15] *See* Noah Walley & Bradley Whitehead, *It's Not Easy Being Green*, *in* HARVARD BUSINESS REVIEW ON BUSINESS AND THE ENVIRONMENT 102–03 (2000).

[16] *See* FRANK B. FRIEDMAN, PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT 51 n.1 (8th ed. 2000) (referring to a report that "as of May 1995, up to 50 business schools and 100 other schools included 'environmental business' courses in their curricula." (citing Env't Today, May 1995, at 1)).

[17] *See, e.g.*, BRADEN R. ALLENBY, INDUSTRIAL ECOLOGY: POLICY FRAMEWORK AND IMPLEMENTATION (1999); BRUCE W. PIASECKI ET AL., ENVIRONMENTAL MANAGEMENT AND BUSINESS STRATEGY: LEADERSHIP SKILLS FOR THE 21ST CENTURY (1999); Susan J. Colby et al., *The Real Green Issue: Debunking the Myths of Environmental Management*, 2 MCKINSEY Q. 132 (1995).

[18] LCA or "product life-cycle analysis" is "a detailed balance sheet of the energy and material inputs and outputs of a carefully defined system, such as a product, activity, or set of processes . . . [and] encompasses everything from raw material production to end-of-life alternatives such as incineration . . . to better understand the full environmental cost of production . . . ." FRIEDMAN, *supra* note 16, at 82, nn.127–128.

[19] "Full cost accounting," "activity-based costing," and the "Eco-Audit" are attempts to take an accounting-based strategy to environmental management by first adding a cost to environmental expenses and activities and then making sound management decisions using a cost-based analysis. *See* Crusto, *supra* note 7, at 212; Bryan T. Downes, *Toward Sustainable Communities—Lessons from the Canadian Experience*, 31 WILLIAMETTE L. REV. 359, 383 n.180 (1995).

[20] *See generally* JOSEPH CASCIO, THE ISO 14000 HANDBOOK (1996) (describing the ISO's voluntary consensus environmental management standards).

[21] "Sustainable manufacturing 'applies the sustainable development concept to manufacturing . . .' and addresses materials selection, production, 'Market and After-Market,'

gies,[22] and total quality management.[23] A successful integration of these tools into a single business strategy is "strategic environmental management," or "the pursuit of competitive advantage through environmental management strategies."[24] In recent years, many corporations have recognized the need for implementing strategic environmental management, including the use of public disclosure.[25]

The third, and most significant, reason to improve corporate environmental disclosure is "human rights" focused. The primary and most compelling reason for environmental, health, and safety laws is the protection of human health and safety.[26] Promoting a better environment through heightened corporate environmental disclosure could have the desired effect of enhancing people's physical and emotional health and safety by cleaning pollution, reducing toxins, and producing safer products. Overall, the public, consumers, and investors are entitled to complete and accurate disclosure about corporate environmental behavior.[27] Without this information, they are unable to make informed decisions about which company's products to support, stock to buy, and permits to renew.

The three foregoing reasons provide incentive to evaluate corporate environmental disclosure, and it is timely to do so now. This analysis comes at a critical time in our nation's corporate, political, and environmental history.[28] Investor confidence is at an all-time low, as represented by Con-

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and full cost accounting." FRIEDMAN, *supra* note 16, at 84, 111–12.

[22] *See, e.g.*, New Jersey Pollution Prevention Act, N.J. ADMIN. CODE tit. 7, § 1K-4.3(b)(6) (2000) (seeking to encourage companies' substitution of pollution prevention for costly waste management strategies).

[23] *See* Global Environmental Management Initiative, Proceedings—Corporate Quality/Environmental Management: The First Conference (Washington, D.C., Jan. 9–10, 1991), *noted in* FRIEDMAN, *supra* note 16, at 76–79 & n.108.

[24] FRIEDMAN, *supra* note 16, at 73; *see, e.g.*, ALLENBY, *supra* note 17; PIASECKI ET AL., *supra* note 17; Colby et al., *supra* note 17.

[25] *See* BRUCE SMART, BEYOND COMPLIANCE—A NEW INDUSTRY VIEW OF THE ENVIRONMENT 188 (1992); GLOBAL ENVIRONMENTAL MANAGEMENT INST., ENVIRONMENT: VALUE TO BUSINESS 49 (1998), *available at* http://www.gemi.org/EVTB_001.pdf (last visited Mar. 12, 2005).

[26] *See generally* RACHEL CARSON, SILENT SPRING (1962); JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958).

[27] *See* ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 603–18 (2001) (providing an overview and excerpts of leading discussions of the corporate social responsibility debate); Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Law and Business in the 21st Century: Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 466, 470 (1997) (pointing out that seventy-six percent of Americans consider themselves environmentalists (Gallup poll), and that environmental concerns run throughout the corporation, not just management); Robert W. Hamilton, *Corporate Governance in America 1950–2000: Major Changes But Uncertain Benefits*, 25 J. CORP. L. 349, 354–57 (2000). *Cf.*, Michael D. Goldman & Eileen M. Filliben, *Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century*, 25 DEL. J. CORP. L. 683, 700–03 (2000) (noting a surge in shareholder activism since the 1990s).

[28] *See* Davis & Humes, *supra* note 2, at 20 (noting that the General Accountability Office (GAO) has been studying environmental disclosures upon the Senate's October 2002 request).

gress's recent passage of the Sarbanes-Oxley Act.[29] Also, American business is facing uncertainty coming out of the recent economic downturn, highlighting a greater need for accurate and effective financial forecasting and business planning.[30] In addition, some commentators believe that the present political regime, including the Bush Administration, a Republican-led Congress, and a conservative-controlled U.S. Supreme Court, has greatly exposed the public to environmental, health, and safety harms.[31]

An evaluation of corporate environmental disclosure is therefore both important and timely. This is especially true in light of both the current corporate practice of issuing quasi-voluntary[32] disclosure documents known as green reports,[33] and increased public interest and investor groups' demand that the critical regulatory SEC disclosure standard of "materiality" be heightened.[34]

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[29] *See Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002 Before the Senate Committee on Banking, Housing and Urban Affairs*, 108th Cong. 4–5 (2003) (statement of William H. Donaldson, Chairman, U.S. Securities and Exchange Commission), *available at* http://banking.senate.gov/_files/donaldsn.pdf (last visited Apr. 16, 2005); Lyman P. Q. Johnson & Mark A. Sides, *Corporate Governance and the Sarbanes-Oxley Act: The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1153 (2004); John Paul Lucci, *Enron—The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 248–49 (2003).

[30] *See* Lucci, *supra* note 29, at 222–31.

[31] *See, e.g.*, R. Randall Kelso, *Narcissism, Generation X, the Corporate Elite, and the Religious Right within the Modern Republican Party: A Set of "Friendly" Observations for President Bush*, 24 CARDOZO L. REV. 1971, 1991 (2003).

[32] "Quasi-voluntary" is the author's qualifier for green reports, because only some of the environmental information disclosed therein is legally required by federal statutes.

[33] "Green reports" are defined as mainly voluntary, annual reports that large, often publicly traded corporations issue to the public. They contain some legally mandated environmental, health, and safety information (such emissions of toxic chemicals), as well as self-promotional examples of proactive environmental projects (such as wildlife protection refuges). *See, e.g.*, The Coca Cola Environmental Management System, *available at* http://www2.coca-cola.com/citizenship/eKOsystem.pdf (last visited Apr. 12, 2005); Disney's Environmentality, *at* http://corporate.disney.go.com/environmentality/index.html (last visited Apr. 12, 2005). They usually highlight corporate environmental accomplishments, often while simultaneously drowning out corporate environmental failures. *See* David F. Sand & E. Ariane van Buren, *Environmental Disclosure and Performance: The Benefits of Standardization*, 12 CARDOZO L. REV. 1347, 1355 (1991); *Corporate Reporting*, BUS. ENV'T, Aug. 2002, at 6 (citing a recent KPMG survey showing that 45% of the Global Fortune 500 are preparing environmental, social, or sustainability reports in addition to their annual financial reports). Many are glossy public relation pamphlets; none are fully audited according to established standards. *See* David W. Case, *Legal Considerations in Voluntary Corporate Environmental Reporting*, 30 ENVTL. L. REP. 10375 (2000). The federal government published its own version of a green report with the Council on Environmental Quality's Annual Report, published in accordance with sections of the National Environmental Policy Act of 1969. *See* 42 U.S.C. § 4341 (2000); "Environmental Quality—The World Wide Web" (1997), *available at* http://ceq.eh.doe.gov/nepa/reports/1997/ (last visited Apr. 8, 2005).

[34] *See, e.g.*, Revised Petition from Jill Ratner, President, Rose Foundation for Communities and the Environment, to Jonathan G. Katz, Secretary, SEC, SEC File # 4-463, *at* http://www.sec.gov/rules/petitions/petn4-463.htm (last visited Mar. 12, 2005) (urging the SEC on behalf of the Rose Foundation, a coalition of charitable foundations and socially responsible investment funds, to clarify the concept of materiality with respect to environmental liabilities and compliance with existing disclosure requirements). "Materiality"

II. CURRENT CORPORATE, INVESTOR, AND REGULATORY EFFORTS FAIL TO PROMOTE CORPORATE ENVIRONMENTAL COMPLIANCE

A. Corporate Structure and Corporate Law Hinder Voluntary Environmental Protection

After the federal government, large corporations[35] are the greatest concentration of wealth, resources, and power in the United States.[36] Although some large corporations promote environmental protection by complying with the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or "Superfund" law,[37] corporate status provides limited liability, which frustrates environmental protection by shielding corporations from sanctions for statutory violations. As a result of the ease of maintaining corporate status, corporations have little or no pressure from incorporating host states to comply fully with challenging environmental laws.[38] While some unique "piercing the corporate veil" cases involve federal environmental violations,[39] a corporation will lose its corporate status for violating environmental laws only in extremely limited instances.[40] That is not to say that corporations do not face substantial compliance pressures under other federal and state environmental laws.[41]

Although corporate laws may place little pressure on corporations to conform to environmental regulations, corporations may try to comply with environmental laws to serve shareholder interests. Corporate behavior is driven by shareholder return on investment.[42] Therefore, because environ-

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involves the issue of what information publicly traded companies are legally required to disclose to the public, especially, as relevant here, concerning corporate environmental liabilities from threatened or actual legal proceedings and the financial costs of environmental compliance with present and emerging governmental laws and regulations. *See* Staff Accounting Bulletin No. 99, 17 C.F.R. § 211 (2004) (containing the most recent authoritative literature on materiality); Davis & Humes, *supra* note 2, at 20–21.

[35] Often referred to as publicly traded or publicly held corporations or public companies, these business entities are regulated by the SEC. *See generally* WILLIAM L. CARY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 324–74 (7th ed. 1995).

[36] For a detailed analysis of corporate structure undermining environmental protection, see Crusto, *supra* note 7, at 183–88.

[37] *See* Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2000)); *see also* Environmental Protection Agency, "Superfund," *available at* http://www.epa.gov/superfund/ (last visited Mar. 30, 2005); EPA'S SUPERFUND REPORT (Inside Washington Publishers), *available at* http://www.InsideEPA.com (last visited Mar. 12, 2005); *see generally* Thomas J. Schoenbaum et al., *Superfund and Hazardous Waste Liability*, in ENVIRONMENTAL POLICY LAW 583–706 (4th ed. 2002).

[38] *See* Mark J. Loewenstein, *Delaware As Demon: Twenty-Five Years after Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 503–07 (2000).

[39] *See* HAMILTON, *supra* note 27, at 337–47; *see also* United States v. Bestfoods, 524 U.S. 51, 62 (1998) (recognizing potential shareholder liability in CERCLA context when "the corporate form would otherwise be misused to accomplish certain wrongful purposes").

[40] *See* Crusto, *supra* note 7, at 188.

[41] *See id.* at 186–87, 221.

[42] For a detailed analysis of environmental protection benefiting shareholders financially,

mental protection might maximize shareholder profits by reducing the damage future pollution causes under a cost-benefit analysis, economic self-interest might favor healthier environmental policies. For example, one John Hopkins Medical Center Study showed that spending $27 billion to comply with the Clean Air Act would save American companies up to $110 billion in health care costs.[43]

While better environmental practices might increase shareholder profits under a cost-benefit analysis, internal corporate reforms might mandate environmental compliance as part of the corporate governance movement. In general, however, recent attempts at corporate reform appear to have had little effect on corporate behavior.[44] The emergence of "other constituency" or "alternative constituency" statutes[45] that allow corporate management to broaden its focus beyond maximizing shareholder profits to promoting employee and community welfare has not led to significant reform. The American Law Institute's (ALI's) Corporate Governance Project published a 1992 report proposing that legal compliance becomes a corporate obligation, not an option subject to cost-benefit analysis.[46] Additionally, the ALI Principles encouraged corporations to devote reasonable resources to public welfare and humanitarian, educational, and philanthropic purposes.[47] If followed, the ALI Principles could thus encourage environmental protection compliance and reporting even if the cost-benefit analysis does not favor compliance. While it was expected that the Principles would have a profound effect on corporate law, in fact, "its influence on the long-term development of corporation law is still unclear."[48]

Overall, there are systemic and structural reasons why publicly traded corporations are not proactive when it comes to environmental disclosures. They are concentrations of wealth and power, and their protections under the rules of corporate law make them impervious to change. Because corporate purpose is too narrowly focused on enhancing shareholder value, legal compliance is considered an option and not a mandate. Corporate law also shields shareholders from environmental liability by the limited liability doctrine. Although some recent developments support greater input into corporate decision-making, many features of U.S. corporate law

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see Crusto, *supra* note 7, at 175, 240.

[43] *See* Margaret Graham Tebo, *Fertile Waters*, A.B.A. J., Feb. 2001, at 40–41.

[44] For a detailed analysis of corporate governance reforms failing to increase environmental compliance, see Crusto, *supra* note 7, at 193–95.

[45] *See* HAMILTON, *supra* note 27, at 615.

[46] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 cmt.g (1992) [hereinafter PRINCIPLES]. For a critique of PRINCIPLES, see DOUGLAS M. BRANSON, CORPORATE GOVERNANCE (1993). *See generally* CHARLES HANSEN, A GUIDE TO THE AMERICAN LAW INSTITUTE CORPORATE GOVERNANCE PROJECT 1–7 (1995) (providing background on PRINCIPLES).

[47] *See* PRINCIPLES, *supra* note 46, § 2.01(b)(2) and (3).

[48] HAMILTON, *supra* note 27, at 237 (noting that as of the summer of 2000, the Principles had been cited only fifty times by state appellate courts and twenty-three times by federal appellate courts).

hinder environmental protection, and there is thus a great need to promote more accurate environmental disclosure.

B. Investment Community Fails To Change Corporate Environmental Behavior

Although corporate law fails to promote environmental protection, corporations are influenced by other factors, such as investor opinion.[49] Many investors have promoted socially responsible corporate principles, including environmental protection.[50] Since undisclosed liabilities can deflate stock trading value due to the expenses of environmental compliance, shareholders demand more disclosure on environmental policies.

For example, over sixty companies have endorsed the Coalition for Environmentally Responsible Economies (CERES) Principles,[51] a series of environmental protection pledges that were originally introduced as the Valdez Principles in 1989 by a partnership of environmental groups and institutional investors.[52] The annual CERES Report is distributed to mutual funds and investors with the intent of increasing investment in socially responsible companies.[53] Following this model of ethical investing, recent shareholder proposals have ranged from general calls for companies to adopt environmental values to specific demands for environmental compliance.[54] Despite continuing shareholder demand for corporate environmental change, such proposals generally fail to win full shareholder approval, and investors have had little success in reforming corporate environmental practices.[55] Investor pressure to nudge or force corporations to act in an environmentally friendly manner, however, may have influenced the present trend of self-regulation by corporations.[56]

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[49] *See* CARY & EISENBERG, *supra* note 35, at 249–50; *see also* Investor Responsibility Research Center, http://www.irrc.com (last visited Mar. 12, 2005). For a detailed analysis of shareholder proposals to increase environmental compliance, see Crusto, *supra* note 7, at 224–26.

[50] *See* HAMILTON, *supra* note 27, at 623–33.

[51] *See* CERES, COALITION & COMPANIES, *at* http://www.ceres.org/coalitionandcompanies/company_list.php (last visited Apr. 17, 2005) (listing over 60 endorsing companies, including several Fortune 500 corporations).

[52] *See* MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 313–27 (2000); CERES, ABOUT US, *at* http://www.ceres.org/ceres/about.php (last visited Apr. 17, 2005) (describing the history and function of CERES).

[53] *See* http://www.ceres.org/ceres/about.php (last visited Apr. 17, 2005) (describing CERES's role in promoting more disclosure and corporate accountability).

[54] *See* Geltman & Skroback, *supra* note 27, at 468.

[55] *See* HAMILTON, *supra* note 27, at 623–33.

[56] *See* discussion *infra* Part III.A.1.

C. The Environmental Protection Agency Has Failed To Systemically Change Corporate Environmental Behavior

In the last century, the federal government has regulated corporate environmental compliance through the Environmental Protection Agency (EPA), the federal agency primarily responsible for protecting human health and the environment.[57] EPA regulation is flawed, however, because it might deter qualified individuals from seeking to work for a company with the threat of liability and both civil fines and criminal sanctions have generally failed to induce environmental compliance. Since civil and criminal efforts are ineffective, the EPA has experimented with alternatives to regulation, such as the Environmental Leadership Program, a voluntary partnership between the agency and participating corporations designed "to encourage and publicly recognize environmental leadership and promote pollution prevention."[58]

Although these innovative non-regulatory programs may help encourage environmental compliance, the EPA's general regulatory functions may be ill-suited to change corporate practices. Since civil and criminal sanctions have not substantially altered corporate behavior, the EPA has largely failed to engender corporate environmental compliance.

III. The Demand for a Heightened Standard of Corporate Environmental Disclosure

A. Various Sources of Recent Demand for a Heightened Disclosure Standard

In the three years since the passage of Sarbanes-Oxley, many corporate constituents have argued the need for heightening the standard of corporate environmental disclosure, based upon a discrepancy between the cost of environmental compliance and the cost of corporate disclosure of environmental expenditures and liabilities.[59] These demands have come from public interest groups, institutional investors, the insurance industry, standard-setting organizations, industry itself, the EPA, and even Congress. .

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[57] *See* Crusto, *supra* note 7, at 222–24 (providing a detailed analysis of EPA efforts to push for corporate environmental compliance).

[58] Environmental Leadership Program, 58 Fed. Reg. 4802 (Jan. 15, 1993). The EPA has established other initiatives for changing corporate environmental behavior, including Project XL, Energy Star, and other "partnership" projects. *See* Industry Partnerships, *at* http://www.epa.gov/epahome/industry.htm (last visited Mar. 12, 2005) (detailing voluntary industry programs seeking to promote cost-effective environmental protection).

[59] *See* Richard M. Schwartz & Donna Mussio, *Environmental Due Diligence for Securities Offerings*, Practising Law Institute, Corporate Law and Practice Course Handbook series, PLI Order No. B0-01 NC 509, 512–17 (2003) (citing and describing a list of sources and actions that show increased scrutiny of environmental disclosure in recent years).

There is growing activism[60] among institutional investors[61] in publicly traded corporations demanding that corporations disclose more environmental information.[62] Many active investor groups are promoting greater environmental disclosure nationally and internationally, including the Council on Economic Priorities (CEP)[63] and the Investor Responsibility Research Center (IRRC).[64] On July 23, 2004, the IRRC released an investor guide outlining specific strategies for addressing the financial risks and investment opportunities posed by global warming.[65]

Many other institutional investors have engaged in similar activities promoting greater corporate environmental disclosure, such as the Carbon Disclosure Project (CDP), a "coordinating secretariat" for 143 institutional investors with assets of $20 trillion.[66] In May 2002, November 2003, and again in February 2005, the CDP wrote to the 500 largest companies in the world (by market capitalization), requesting disclosure of investment information concerning greenhouse gas emissions.[67]

On August 21, 2002, the Rose Foundation for Communities and the Environment, along with twenty environmental and community foundations (including the Rockefeller Family Fund) representing over two billion dollars in combined assets, submitted a rule-making petition to the SEC, requesting that the SEC adopt the ASTM heightened environmental disclosure standards.[68] Along with the petition, the Rose Foundation released a

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[60] *See* CARY & EISENBERG, *supra* note 35, 247–54 (7th ed. 1995) (discussing investor activism, particularly as to shareholders).

[61] "Institutional investors" are institutions such as public and private pension funds, investment companies (including mutual funds), insurance companies, bank and trust companies, and foundations that invest in publicly traded companies. Over the last several years, there has been an increased concentration of shareholdings in publicly traded corporations "due to the dramatic increase of shareholdings by institutional investors." CARY & EISENBERG, *supra* note 35, at 244–45.

[62] *See* INVESTOR RESPONSIBILITY RESEARCH CENTER, ENVIRONMENT: MANAGEMENT AND REPORTING 2004 3 (2004) (reporting that proponents of increased environmental management and disclosure submitted twenty-five corporate resolutions in 2003 and nineteen resolutions in 2004); Clifford Rechtshaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1248–49 (1998).

[63] The Council on Economic Priorities is a socially responsible corporate watchdog that has over the years issued detailed, but sometimes inaccurate, environmental reports on corporations. *See* Council on Economic Priorities, http://www.cepnyc.org/ccawin2000.htm (last visited Mar. 12, 2005); FRIEDMAN, *supra* note 16, at 156.

[64] The IRRC considers itself "the worldwide leader in investor and corporate responsibility research and services . . . [and] the oldest and the largest company . . . supporting good corporate governance." Message from Linda Crompton, President and CEO, *at* http://www.irrc.com/company/company_home.htm (last visited Mar. 12, 2005).

[65] *See* IRRC, INVESTOR GUIDE TO CLIMATE RISK (2004), *available at* http://www.irrc.com/resources/ClimateGuide.pdf (last visited Mar. 12, 2005) (noting its commission by CERES, "a coalition of investor, environmental, labor, and public interest groups working together to increase corporate environmental responsibility worldwide").

[66] *See* CARBON DISCLOSURE PROJECT, ABOUT CARBON DISCLOSURE PROJECT, *at* http://www.cdproject.net/about.asp (last visited Mar. 12, 2005) (providing an overview of CDP activities).

[67] *See id.*

[68] *See* Revised Petition from Jill Ratner, *supra* note 34; *see also* William Baue, *SEC*

report documenting how corporate environmental liabilities can impair shareholder value.[69] The Rose Foundation petition supported modifying the ASTM standards from precatory language to mandatory language. For example, the proposed rule would read: "Disclosure shall be made when an entity believes its environmental liability for an individual circumstance or its environmental liability in the aggregate is material" instead of recommending that disclosure "should" be made as provided by ASTM standards.[70]

The insurance industry also has a lot at stake and has not been silent on the issue. As noted above, insurance companies are major institutional investors in publicly traded corporations.[71] In addition to their role and interest as investors, insurance companies are interested in corporate environmental disclosure for another reason: their bottom line. As corporations seek to manage risk through the use of environmental insurance, insurance companies have become very interested in the quality of corporate environmental disclosure.[72] Also, as corporations are held liable for environmental matters, they have sought indemnification from their insurance carriers, and "no issue in all of business law has been more vigorously contested in the last quarter-century" than environmental liability claims.[73] As a result, some insurance companies abroad are demanding greater corporate environmental disclosure.[74]

Although non-governmental standard-setting organizations do not have a financial stake in disclosure reform like investors and the insurance industry do, several of these organizations have pushed to improve corporate environmental reporting. In 2002, the ASTM, one of the largest voluntary standards development organizations in the world, published two benchmark documents: the *Standard Guide for Disclosure of Environmental Liabilities* and the *Standard Guide for Estimating Monetary Costs*

Urged to Strengthen Rules Governing Corporate Disclosure of Environmental Risks, *at* http://www.socialfunds.com/news/article.cgi/article911.html (last visited Mar. 12, 2005).

[69] SUSANNAH BLAKE GOODMAN ET AL., THE ENVIRONMENTAL FIDUCIARY: THE CASE FOR INCORPORATING ENVIRONMENTAL FACTORS INTO INVESTMENT MANAGEMENT POLICIES 3–16 (The Rose Foundation for Communities and the Environment ed., 2002), *available at* http://www.rosefdn.org/images/EFreport.pdf (last visited Feb. 15, 2005).

[70] *See* Revised Petition from Jill Ratner, *supra* note 34; Schwartz & Mussio, *supra* note 9, at 383.

[71] *See* CARY & EISENBERG, *supra* note 35, at 244–45.

[72] *See* Eileen Pleva & Peter Gilbertson, *Reconciling Environmental Disclosure with Environmental Exposure in an Evolving Regulatory Climate*, AIG ENVIRONMENTAL WHITE PAPER, *at* http://erraonline.org/spring2003SEC.htm (last visited Apr. 8, 2005).

[73] ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 556 n.615 (2002) (citing KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW (1991); TOD I. ZUCKERMAN & MARK C. RASKOFF, ENVIRONMENTAL INSURANCE LITIGATION: LAW AND PRACTICE (1992)).

[74] *See Asset Managers Want Large UK Firms to Publish Reports*, BUS. ENV'T, May 2001, at 7 (reporting that in Great Britain, the Association of British Insurers adopted new guidelines requiring corporations to disclose environmental issues in their annual reports).

and Liabilities for Environmental Matters.[75] Their major proposal is to heighten the SEC's "materiality" test for corporate environmental disclosure, which would force corporations to disclose more information on potential liabilities in the aggregate.[76]

Another non-governmental organization, the International Organization for Standardization (ISO), sets voluntary standards by which companies conduct business in other countries, but compliance may become mandatory as emerging markets incorporate ISO standards into their environmental laws.[77] Its newest series of voluntary consensus environmental management standards, the ISO 14000, may eventually be adopted uniformly by international corporations, particularly after the United Nations endorsed the standard.[78] The ISO 14000 information may also be used both internally to improve environmental management and externally to improve vendor contracts and access to international markets.[79] The EPA has sponsored a demonstration project to examine implementation of ISO 14000 standards in the United States.[80]

Beyond assessing non-governmental organization standards, the EPA has been a constant watchdog over disclosure of both mandatory and voluntary corporate environmental matters.[81] Additionally, it has promoted enhanced corporate environmental disclosure as an essential tool in the development and implementation of environmental management systems.[82] For example, in 1992, the EPA created an Environmental Accounting Project to "encourage and motivate business to understand the full spectrum of their environmental costs, and integrate these into decision-making."[83]

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[75] *See* AMERICAN SOC'Y OF TESTING AND MATERIALS, STANDARD GUIDE FOR DISCLOSURE OF ENVIRONMENTAL LIABILITIES, E-2173-01 (2002), *available at* http://www.astm.org (last visited Mar. 12, 2005) [hereinafter Disclosure Guide]; AMERICAN SOC'Y OF TESTING AND MATERIALS, STANDARD GUIDE FOR ESTIMATING MONETARY COSTS AND LIABILITIES FOR ENVIRONMENTAL MATTERS, E-2137-01 (2002), *available at* http://www.astm.org (last visited Mar. 12, 2005) [hereinafter Cost Guide].

[76] *See* discussion *infra* Part IV.

[77] For a detailed analysis of ISO standards, see Crusto, *supra* note 7, at 214–15.

[78] *See* Donald A. Carr & William L. Thomas, *Devising a Compliance Strategy Under the ISO 14000 International Environmental Management Standards*, 15 PACE ENVTL. L. REV. 85, 150–65 (1997) (examining the adoption of corporate compliance programs and explaining the possibility that compliance will become mandatory); Craig D. Galli, *ISO 14000 and Environmental Management Systems in a Nutshell*, 9 UTAH B.J. 15, 15 (1996) (describing the origin of ISO 14000 and United Nations endorsement).

[79] *See* Richard N. L. Andrews et al., *ISO 14001: Greening Management Systems*, *in* GREENER MANUFACTURING AND OPERATIONS 178, 184–88 (J. Sarkis ed., 2001).

[80] *See* CRAIG P. DIAMOND, NSF INT'L, ENVIRONMENTAL MANAGEMENT SYSTEM DEMONSTRATION PROJECT: FINAL REPORT 7 (1996), *available at* http://www.p2pays.org/ref/01/00326.pdf (last visited Mar. 12, 2005).

[81] *See* discussion *supra* notes 57–58.

[82] *See* ENVIRONMENTAL LAW INSTITUTE ET AL., DRIVERS, DESIGNS AND CONSEQUENCES OF ENVIRONMENTAL MANAGEMENT SYSTEMS 3, *available at* http://ndems.cas.unc.edu/document/NDEMS2001Compendium.pdf (last visited Apr. 8, 2005) [hereinafter Drivers]; http://www.eli.org (last visited Mar. 12, 2005) (seeking to evaluate actual effects of implementation of enhanced disclosure as an integral part of an environmental management system).

[83] *See* EPA, Environmental Accounting Project, *at* http://www.epa.gov/opptintr/acctg

In an effort to promote more accurate corporate environmental disclosure, the EPA has devised means to disclose pertinent corporate environmental information to the public. One such means is a website, the Enforcement & Compliance History Online (ECHO).[84] This site discloses facility-level compliance and enforcement information on nearly 800,000 regulated facilities nationwide.[85] The EPA developed this site as a means of promoting transparency in corporate environmental compliance matters.[86]

Congress has also pushed the EPA and other agencies to study environmental disclosure reform. In July 2004, the U.S. Government Accountability Office (GAO) issued a report in response to a Senate Committee on Environment and Public Works request to review the implementation and effectiveness of the SEC's environmental reporting requirements, nonregulatory programs, and interpretative releases regarding environmental reporting by public corporations.[87] The GAO recommended that the SEC organize and track key information from its review of company filings to best facilitate analysis, consider creating a publicly accessible database of comment letters and company responses, and improve coordination between itself and the EPA on environmental disclosure.[88]

B. The Elusive "Materiality" Standard

A major controversy concerning corporate environmental disclosures, whether publicly trading corporations are sufficiently accounting for their environmental costs and liabilities, translates into one word: materiality.[89] In a recent letter to Senator Jon S. Corzine (D-N.J.) of the Senate Committee on Environment and Public Works, the GAO summarized the matter accordingly:

(last visited Mar. 12, 2005).

[84] EPA, Enforcement & Compliance History Online, *at* http://www.epa.gov/echo (last visited Mar. 12, 2005).

[85] *See* EPA, ECHO, About the Site, *at* http://www.epa.gov/echo/about_site.html (last visited Mar. 12, 2005).

[86] *See id.*; Press Release, EPA, EPA Seeks Comment on Pilot Online Tool to Access Facilities' Environmental Compliance (Nov. 18, 2002), *available at* http://www.epa.gov/echo/info/echopressrelease.pdf, 1–2 (last visited Apr. 16, 2005) (noting that ECHO's goal is to provide the public direct access to the environmental compliance record of more than 800,000 regulated facilities nationwide and assist corporations in achieving compliance with their environmental obligations).

[87] *See* GOV'T ACCOUNTABILITY OFFICE, Environmental Disclosure: SEC Should Explore Ways to Improve Tracking and Transparency of Information, Report to Congressional Requesters (GAO-04-808, July 14, 2004).

[88] *See id.* at 36 ("Without more compelling evidence that the disclosure of environmental information is inadequate . . . [the] SEC should ensure that it has the information it needs to allocate its oversight resources and determine where additional guidance might be warranted.").

[89] *See* Staff Accounting Bulletin No. 99, 17 C.F.R. § 211 (2004) (containing the most recent authoritative literature on materiality).

> A matter is material if there is a substantial likelihood that a reasonable person would consider it important. Environmental risks and liabilities are among the conditions that, if undisclosed, could impair the public's ability to make sound investment decisions. For example, the discovery of extensive hazardous waste contamination . . . [or] impending environmental regulations could affect a company's future financial position . . . .[90]

Materiality is a crucial element of the existing reporting requirements enforced by the SEC, a major force in corporate environmental behavior. The SEC oversees and regulates the U.S. federal securities laws, which consist of six separate statutes and corresponding regulations enacted between 1933 and 1940.[91] The SEC has become increasingly concerned about the methods and extent to which corporations are accounting for environmental matters; such concerns were certainly raised by the passage of the Sarbanes-Oxley Act.[92]

A review of the development of SEC corporate environmental disclosure regulation reveals its commitment to proper accounting and shifting interpretations of materiality.[93] The SEC's environmental disclosure rules have evolved over the last thirty years as federal environmental activity increased under CERCLA, which imposes retroactive liability on companies to remediate hazardous waste sites.[94]

In response to the National Environmental Policy Act (NEPA),[95] which required all governmental agencies to promote environmental protection, corporate environmental disclosure first expanded when the SEC issued Release No. 5170 mandating disclosure of all material effects of environmental regulation compliance.[96] Faced with increasing pressure to ex-

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[90] Letter from John B. Stephenson, Director, National Resources and the Environment, to Senator Jon S. Corzine (D-N.J.) (Aug. 4, 2004) (GAO-04-1019R); *see also* Karmel, *supra* note 1, at 303–14 (providing a comprehensive analysis of "materiality" relative to environmental disclosure).

[91] Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2000); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79–79z(6) (2000); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa–77bbb (2000); Investment Company Act of 1940, 15 U.S.C. §§ 80a(1)–80a(64) (2000); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b(1)–80b(21) (2000).

[92] *See* Schwartz & Mussio, *supra* note 9, at 372–73.

[93] For a detailed analysis of the development of corporate environmental disclosure rules in this section, see Crusto, *supra* note 7, at 226–34.

[94] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (1988)); *see, e.g.*, United States v. Olin Corp., 107 F.3d 1506, 1512–15 (11th Cir. 1997), *rev'g* 927 F. Supp. 1502 (S.D. Ala. 1996). CERCLA also imposes joint and several liability on "potentially responsible" parties. United States v. Monsanto Co., 858 F.2d 160, 165 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[95] 42 U.S.C. § 4332 (2000).

[96] *See* Disclosures Pertaining to the Environment and Civil Rights, Securities Act Release No. 5170, Fed. Sec. L. Rep (CCH) ¶ 78,150 (July 19, 1971).

pand environmental requirements later on, the SEC issued interpretive Release No. 16,223 clarifying its environmental disclosure requirements.[97] The release required companies to disclose all proceedings related to environmental compliance and all material costs associated with environmental compliance for the current year and in future years.[98] However, as environmental litigation rose, the SEC ruled in 1989 that companies designated as potentially responsible parties (PRP's) under CERCLA did not necessarily have to disclose its designation.[99]

Four years later, the SEC issued Staff Accounting Bulletin No. 92 (SAB 92)[100] in response to SEC Chairman Richard Y. Robert's concern with inadequate disclosure of environmental liabilities.[101] SAB 92 clarified accounting principles for estimating environmental losses in corporate disclosures by providing guidance on recognizing contingent losses,[102] measuring the time value of money,[103] and outlining the scope of environmental reporting both inside and outside financial statements.[104] SAB 92 thus imposed a duty to report about sites with environmental problems on a case-by-case basis in order to ensure full understanding of the accrued and reasonably likely losses relevant to the site.[105]

The SEC has continued to refine its environmental disclosure requirements,[106] and some specific provisions of Sarbanes-Oxley could arguably promote environmental disclosure. Sections 101 and 103 create a new Accounting Oversight Board responsible for setting audit quality control for

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[97] *See In re* United States Steel Corp., Exchange Act Release No. 16,223 [1979–1980 transfer binder] Fed. Sec. L. Rep. (CCH) ¶ 23,507B, at 17,203–04 (Sept. 27, 1979). The release was issued as part of a settlement agreement with United States Steel Corp. *See* Tracy Soehle, Comment, *SEC Disclosure Requirements for Environmental Liabilities*, 8 TUL. ENVT'L L.J. 527, 531 n.25 (1995) (discussing the release and its history).

[98] *See* Environmental Disclosure Requirements, Securities Exchange Act Release Nos. 33-6130 and 34-16224, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,507B, at 17,203–06 (Sept. 27, 1979).

[99] *See* Management's Discussions and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Staff Accounting Bulletin No. 92, 17 C.F.R. §§ 211, 231, 241, 271 (2004).

[100] Staff Accounting Bulletin No. 92, 17 C.F.R. § 211 (2004).

[101] *See Roberts Predicts Widespread Concern with Disclosing Environmental Liabilities*, 25 Sec. Reg. & L. Rep. 1620 (Dec. 3, 1993).

[102] *See* 17 C.F.R. § 211. The SEC staff believed this requirement was needed in order to prevent misrepresentation of the likelihood of insurance policy recoveries. *See* Elizabeth Glass Geltman, *The Pendulum Swings Back: Why the SEC Should Rethink its Policies on Disclosure of Environmental Liabilities*, 5 VILL. ENVTL. L.J. 323, 364 (1994).

[103] *See* Richard Y. Roberts & Kurt R. Hohl, *Environmental Liability Disclosure and Staff Accounting Bulletin No. 92*, SB18 ALI-ABA 505, 518 (Oct. 1996) (noting the importance of discounting future potential liability to the present value of money because the ultimate settlement of environmental liabilities may not occur for many years).

[104] *See* 17 C.F.R. § 211; Herbert S. Wander, *Developments in Securities Law Disclosure*, 1285 PLI/CORP 659, 878–79 (2002) (noting that financial statements must disclose all "material" liability, which includes both the total anticipated cost and "reasonably possible additional losses").

[105] *See* Wander, *supra* note 104, at 879.

[106] *See, e.g.*, 17 C.F.R. § 229.103(5)(A) (2004) (requiring public corporations to disclose "national" environmental liabilities).

public accountants, thus adding another powerful, government-sponsored source for developing environmental audit principles and practices.[107] Section 108 authorizes the SEC to recognize as "generally accepted" any accounting principles that are established by a standard-setting body that meets the Act's criteria, thereby opening the door to the SEC's adoption of standards proposed by organizations like the ASTM.[108] Perhaps most noteworthy is Section 302, which requires chief executive officers and chief financial officers to certify the accuracy and completeness of the financial statements and periodic reports.[109] This requirement, along with the criminal sanctions for reckless certification imposed in Section 906, heightens all corporate disclosures and potentially arms the public with a great hammer to redress material omissions and misstatements in environmental disclosures.[110]

Can the increase in personal accountability under Sarbanes-Oxley successfully deter corporate fraud relating to environmental disclosure? Its likely success might be viewed through an examination of previous legislative responses to corporate crimes.[111] The environmental legislation providing sanctions against individuals seems to have met the purpose of deterring environmental crimes and improving the environment, based on the number of companies taking steps to prevent pollution through environmental audits, the number of government prosecutions against offenders, and the overall improved environment.[112]

While Sarbanes-Oxley may hold promise in improving environmental disclosures, federal securities laws in general have done little to promote corporate environmental protection. The "materiality" standard limits the scope of mandatory disclosure of environmental liabilities, though some corporations recognize that it is in their best interest to disclose some aspects of their environmental performance in voluntary green reports.[113] Since corporate green reports are usually unaudited and frequently misleading,[114] the current accuracy of reporting environmental liability is suspect.

IV. American Society of Testing and Materials's "Cumulative Materiality Standard" of Corporate Environmental Disclosure

Because current environmental disclosure is limited to potential environmental liabilities that are material to a company's financial condition, a

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[107] *See* Sarbanes-Oxley Act of 2002, 15 U.S.C.A §§ 7211, 7213 (West Supp. 2004).

[108] *See* 15 U.S.C.A. § 7218(a) (amending 15 U.S.C.A § 77s (West Supp. 2004)).

[109] *See* 15 U.S.C.A. § 7241.

[110] *See* 18 U.S.C.A. § 1350 (West Supp. 2004).

[111] *See* Kristin Kenny, Comment, *The Sarbanes-Oxley Act: Balancing the Rights of Investors and the Rights of Corporate Officers*, 13 Temp. Pol. & Civ. Rts. L. Rev. 151, 164–71 (2003).

[112] *See id.* at 171.

[113] *See supra* notes 59–70 and accompanying text.

[114] *See* discussion *supra* note 33.

broader understanding of "materiality" is critical to foster more corporate environmental reporting. The ASTM has proposed a materiality standard requiring a fuller assessment of the financial impact of environmental liabilities than the existing SEC standard.[115] An analysis of this "cumulative materiality standard" reveals that the ASTM proposal could heighten corporate environmental disclosure beyond current reliance on voluntary green reports.

A. Digested Provisions of ASTM's Environmental Disclosure Proposal

In 2002, ASTM published a controversial benchmark for corporate environmental disclosure, E2173-01 (Disclosure Guide),[116] that sought to identify the conditions for disclosure and the content of appropriate environmental disclosure.[117] The following is a digest of the important provisions of the Disclosure Guide,[118] followed by a brief analysis of each provision.

1. Uses

The ASTM standard is designed for voluntary use by an entity providing environmental disclosures that vary in degree according to the scope of its financial statements.[119] This provision is problematic, however, in that it only applies to publicly traded corporations, which already comply on a mandatory basis with SEC reporting requirements. To suggest that such corporations enhance their disclosure beyond what is presently required raises many legal and practical issues. For example, mandating more disclosure beyond current SEC requirements risks driving corporations to "opt out" of the SEC reporting scheme by reorganizing into entities not regulated by the SEC.[120] Such a strategy would defeat the goals of the ASTM standard; instead of generating more environmental disclosure by a large number of corporations, what might result is an exodus of corporations reporting.[121]

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[115] *See* Disclosure Guide, *supra* note 75, at 1–3; ASTM, About ASTM International, *at* http://www.astm.com/cgi-bin/SoftCart.exe/ABOUT/aboutASTM.html?L+mystore+xdmz9700+1108428751 (last visited Mar. 12, 2005) (noting that ASTM has over 30,000 technical expert members from over one hundred countries who develop technical standards for industries).

[116] *See* Disclosure Guide, *supra* note 75; (reproduction authorized per License Agreement with Mitchell F. Crusto).

[117] *See id.* at 1 n.2; Karmel, *supra* note 1, at 329.

[118] This Article focuses on the Disclosure Guide because it is the source of the major reform of the existing SEC requirements. For a discussion and analysis of the Cost Guide, see Karmel, *supra* note 1, at 329–30.

[119] *See* Disclosure Guide, *supra* note 75, at 2.

[120] *See* CHRISTIAN LEUZ ET AL., WHY DO FIRMS GO DARK?: CAUSES AND ECONOMIC CONSEQUENCES OF VOLUNTARY SEC DEREGISTRATIONS 4–7 (Wharton School Working Paper, 2004) (describing the deregistration process to exit the SEC reporting system).

[121] *See id.* at 1–4 (concluding that the surge in deregistrations to nearly two hundred

2. Principles

The standard provides five underlying principles intended to be referred to in resolving ambiguities or disputes in interpretation of the guide: (1) a reporting entity's position with regard to the existence and extent of its environmental liabilities may be made even though there remains uncertainty with regard to the final resolution of factual, technological, regulatory, legislative, and judicial matters; (2) each environmental liability need not be disclosed with the same level of detail; (3) disclosures should be evaluated on the reasonableness of judgment and inquiry at the time they were made, and subsequent disclosures that convey different information should not be construed to indicate inappropriate information in the initial disclosure; (4) an appropriate disclosure does not mean an exhaustive disclosure of the reporting entity's environmental liabilities; the cost of obtaining information or time to gather should be considered; and (5) the reporting entity should evaluate the actual or potential risk to human health and the environment when facing an environmental liability or risk, and that should be a factor in the level of effort devoted to developing the costs and liability estimates associated with the environmental condition or the compliance issue.[122]

This list of underlying principles seems to undermine the primary goal of the proposed standard—adding greater certainty to information provided to the investing public about a reporting entity's environmental liabilities and risks. It appears that these principles undermine that goal by stating that (1) a disclosure need not be certain, (2) a disclosure need not be material, (3) a disclosure need not be consistent over time, (4) a disclosure need not reflect a complete picture, and (5) a disclosure should accentuate actual or potential risk to human health and the environment regardless of costs. These principles at a minimum seem inconsistent with the goals of transparency and accuracy underlying the cumulative materiality standard.

3. Warranted Disclosures

The ASTM standard lists four circumstances that are indicators of environmental liabilities and risks.[123] The list includes (1) the naming of a reporting entity as a potentially responsible party (PRP) or under the Resource Conservation and Recovery Act[124] on a contaminated site; (2) contractual assumptions of risk or transfer risk agreements (e.g., insurance contracts);

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companies in 2003 was likely motivated by a desire to avoid the demanding Sarbanes-Oxley reporting requirements).

[122] *See id.*

[123] *See id.*

[124] 42 U.S.C. § 6901–6992k (2000) (establishing a federal-state regulatory program for tracking hazardous waste).

(3) commencement of litigation or assertion of a claim against the reporting entity; and (4) the reporting entity's knowledge of an environmental liability.[125] In addition, the standard sets out ten specific sources of information that should be reviewed in determining whether disclosure is warranted, including (1) the PRP list; (2) the National Priorities List (NPL) site list; (3) the Comprehensive Environmental Response, Compensation and Liability Information System list; (4) the state PRP list; (5) environmental lawsuits; (6) leaking underground storage tank (LUSTs) lists; (7) title searches of fifty years of known owned sites; (8) known payments for environmental claims and costs; (9) environmental claims or demands other than lawsuits; and (10) results of site assessment or investigation reports, environmental audits, and monitoring results.[126] Most items on this list are already the source of present disclosure checklists. Others are likely to be minor and therefore immaterial. The list only suggests sources of disclosure information and thus does not require a complete audit of all sources listed.

4. Supplemental to Existing Disclosures

The content of the disclosures addressed in the standard "are provided by management and are not meant to replace the disclosure requirements as prescribed or regulated though [Generally Accepted Accounting Principles], SEC, or any other agency or regulatory body."[127] This standard is supplemental and is voluntary. It is curious that ASTM is so convinced of the necessity of this standard, and yet does not seek to make it mandatory and a part of SEC requirements.

B. The "Cumulative Materiality Standard"

The "Cumulative Materiality Standard" (CMS) is the hallmark of the ASTM environmental disclosure standard. ASTM primarily proposes that reporting entities voluntarily report their presently non-material environmental liabilities and aggregate them into a new cumulative disclosure standard.[128] The standard lists disclosures that a reporting entity should make, including (1) statements on the likelihood of liability from any or all sites, suits, cases, payment requests, notices, demands, and the potential materiality of same; (2) statements regarding PRP sites; (3) estimates of environmental liabilities, the method used to make the estimate, and the amount accrued for environmental liabilities; (4) estimates of anticipated recov-

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[125] *See* Disclosure Guide, *supra* note 75, at 2.

[126] *See id.* at 2–3.

[127] *Id.* at 3.

[128] *See id.* ("Disclosure should be made when an entity believes its environmental liability for an individual circumstance or its environmental liability in the aggregate is material. These amounts include . . . damages attributed to the entity's products or processes, cleanup of hazardous waste or substances, reclamation costs, fines, and litigation costs.").

eries and estimating method; and (5) discussion of key external and internal environmental factors regarding the timing and amount of the liabilities or recoveries.[129]

CMS differs from existing SEC environmental disclosure requirements in several ways. First, as already discussed, present SEC environmental disclosure requirements are mandatory, whereas CMS's are voluntary.[130] Second, present SEC environmental disclosure requirements are narrower than CMS's in that CMS seeks to aggregate or accumulate environmental liabilities,[131] contrary to the SEC's rules pertaining to the disclosure of lawsuits requiring that only suits with "the same legal and factual issues" be aggregated for determining whether they are material and therefore must be disclosed.[132] If environmental liabilities are aggregated, it is more likely that all these liabilities would approach the important threshold of "materiality" as a group, thereby triggering the mandatory disclosure requirement.

CMS also differs from how most companies have interpreted SEC S-K Item 303, which requires disclosure of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[133] Under this requirement, companies must record a potential liability when it can be reasonably estimated.[134] The problem is that the two major sources of environmental liability, hazardous waste remediation under Superfund and environmental compliance with present and future regulations, are often difficult to estimate due to the uncertainty of varying compliance standards. Because companies would aggregate environmental liabilities under CMS instead of viewing each liability separately, corporations would be more likely to identify "material" loss contingencies correctly and avoid misstating their financial picture.[135]

C. The Case for ASTM's "Cumulative Materiality Standard" of Corporate Environmental Disclosure

There are many reasons why ASTM's CMS would be beneficial as a replacement for often misleading green reports.[136] Some reasons are legally driven; adopting CMS would encourage uniform environmental man-

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[129] *See id.*

[130] *See supra* note 119 and accompanying text.

[131] *See* Disclosure Guide, *supra* note 75, at 3.

[132] *See* Legal Proceedings, 17 C.F.R. 229.103, Instruction 2 (2000); Karmel, *supra* note 1, at 329.

[133] *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, 17 C.F.R. 229.303(a)(3)(ii) (1994); Karmel, *supra* note 1, at 329–30.

[134] *See* DAVID N. RICCHIUTE, AUDITING 689–90 (4th ed. 1995) (analyzing loss contingency auditing).

[135] *See supra* notes 131–132 and accompanying text.

[136] For a detailed analysis of the general benefits of better corporate environmental practices, see Crusto, *supra* note 7, at 209–10.

agement practices essential to an effective environmental compliance program.[137] Additionally, CMS may lessen a criminal fine or penalty should an environmental violation occur.[138] On the business side, CMS serves investor interests by disclosing environmental vulnerabilities crucial to investment decisions and responding to investor demands that corporations protect the environment. Ultimately, CMS might provide a competitive business advantage,[139] and it is ethically the right thing to do.[140]

Despite the advantages of promoting more accurate environmental disclosure, some critics might question the wisdom or fairness of adopting CMS. First, critics might claim that adopting CMS is unnecessary because the Sarbanes-Oxley Act will promote more environmental disclosure. In a recent study, the GAO concluded that the current standard for environmental disclosure, one based upon "materiality," is sufficient to provide parties the requisite information about a business entity's environmental liabilities.[141] Therefore, critics might claim that what is needed is not a different or a higher standard, but a better monitoring and enforcement process, which already exists in the provisions of Sarbanes-Oxley that create an Accounting Oversight Board and impose criminal penalties for faulty certification of financial statements.[142]

This criticism fails to account for the many corporations that continue to issue voluntary green reports, however.[143] Many of these reports highlight a corporation's environmental "pet projects" and de-emphasize their environmental shortcomings.[144] As a result, some investors dismiss these reports as self-promotional, public relations pieces and are pushing for independent environmental auditing even after the passage of Sarbanes-Oxley.[145] If Sarbanes-Oxley were effective in improving environmental disclosure without changing standards, investors would have more accurate information than the existing green reports. Since the existing interpretation of "materiality" has not supplanted green reports with improved environmental reporting, adopting CMS would replace green reports with a

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[137] *See* FRIEDMAN, *supra* note 16, at 51–115.

[138] Federal sentencing guidelines for environmental crimes proposed a reduction in criminal penalty if a company has an environmental compliance program. *See* Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs*, 25 ENVTL. REP. NO. 7, at 325 (June 17, 1994).

[139] *See* JOSEPH FIKSEL, COMPETITIVE ADVANTAGE THROUGH ENVIRONMENTAL EXCELLENCE 4 (1996).

[140] *See* Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, *in* ENVIRONMENTAL LAW ANTHOLOGY, 40–44 (Robert L. Fischman et al. eds., 1996).

[141] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 87, at 18.

[142] *See id.*; *supra* notes 9–10, 107–112 and accompanying text.

[143] *See* discussion *supra* note 33.

[144] *See id.*

[145] *See* discussion *supra* Part III.A.

more consistent, reliable, and functional disclosure of corporate environmental liabilities beyond existing narrow SEC requirements.

Despite the need for replacing green reports, other critics might reject CMS as an unfair regulatory regime. As Alan Greenspan warned, "We have to be careful . . . not to look to a significant expansion of regulation as the solution to current problems . . . ."[146] Increased disclosure or truthfulness, unfortunately, comes with a possible price: deterring beneficial transactions, increasing the adversarial nature of corporate governance, reducing executives' incentives to increase firm value, and diverting talent to closely held firms.[147]

While critics might not find CMS unfair on its face, they might argue that it would have an unjust impact. There are many reasons why an economic entity has environmental liabilities, most of which are due to past history. Much of the current corporate environmental liabilities are the result of the government's desire to clean up past pollution.[148] These critics would claim that environmental laws are an invisible tax on industry by which the federal government wins twice—by both purporting to bring about environmental protection and by doing so without levying a direct tax on industry or on the general public.

There is also an inter-generational equity issue.[149] To force corporations to accelerate their environmental liabilities through CMS could reduce corporate profits today. This would have the greatest negative impact on younger Americans, through job loss and loss of other benefits, as they will pay for the pollution of older Americans. The present, younger generation would suffer most from holding current corporate profits liable for past environmental pollution.

Additional fairness problems might arise from the distinction between the treatment of public companies and closely held corporations. The first is that ASTM proposes that publicly traded corporations voluntarily adopt the enhanced disclosure standard.[150] If some did, it would create an uneven playing field. If, on the other hand, what the Rose Foundation has proposed to the SEC were made mandatory,[151] there would be another problem of fairness: closely held, non-publicly traded companies would have a unique advantage.

Furthermore, critics could attack the passage of environmental legislation without providing funding for implementation as both unfair and

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[146] *See* Ribstein, *supra* note 10, at 18–19 (citing Greg Ip, *Greenspan Warns Against Too Much Regulation*, WALL ST. J., Mar. 27, 2002, at A3).

[147] *See id.*

[148] *See* MILTON RUSSELL ET AL., HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD A-3.10 (1991) (finding that hazardous waste clean-up in America would cost between $500 billion and $1 trillion from 1990 to 2020).

[149] *See* Weiss, *supra* note 140, at 40–44.

[150] *See* Disclosure Guide, *supra* note 75, at 2.

[151] *See* Revised Petition from Jill Ratner, *supra* note 34.

dangerous.[152] It is reminiscent of the 1986 Tax Reform Act that brought about the savings and loan debacle and the ensuing massive government bailout of savings and loans.[153] Critics might argue that it is not right for the government to help create a pollution problem and then hold industry primarily responsible for the problem.[154] Since everyone benefited from industrial development that created pollution, everyone should share the burden of a national pollution solution, not just corporate America.

These complaints are not unique to CMS—the same charges of intergenerational inequity and disparate treatment of publicly traded corporations could also be lodged against the current regulatory scheme under Sarbanes-Oxley. While this criticism of environmental regulation might have some validity, adopting CMS is a fairer alternative to the existing regulatory regime because it could reduce the risk of future environmental liabilities and the resulting civil and criminal sanctions.

CMS might reduce the threat of loss of corporate status for environmental violations, thus exposing the shareholder to less "unfair" liability than the existing regime.[155] In the few instances where a corporation has lost corporate status, the "shareholder" loses limited liability protection and is subject to unlimited personal liability. By pushing for more accurate environmental reporting and management, CMS will help companies avoid the damaging effects of loss of corporate status for environmental violations.

Another meaningful enforcement reason for supporting CMS is the safe harbor provision of the Private Securities Litigation Reform Act of 1995 (PSLRA).[156] This provision shields corporations from securities fraud litigation in connection with statements on anticipated environmental liabilities, even if those statements are subsequently found to have significantly missed their estimate.[157] Under CMS, more comprehensive environmental disclosure could thus shield companies from civil fraud liability.

Even if violations do occur, CMS would reduce "unfair" government regulation and burdensome liability by improving corporate environmental self-management.[158] CMS may form an essential element of an effective

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[152] *See* FRIEDMAN, *supra* note 16, at 52–55.

[153] *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC EFFECTS OF THE SAVINGS AND LOAN CRISIS: A CBO STUDY 13 (1992).

[154] *See* FRIEDMAN, *supra* note 16, at 35–36; *see, e.g.*, MICHAEL S. GREVE & FRED L. SMITH, JR., ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (1992).

[155] For a detailed analysis of improved environmental policies reducing the risk of loss of corporate status, see Crusto, *supra* note 7, at 220.

[156] 15 U.S.C. § 77z-2 (2000).

[157] *See* 15 U.S.C. § 77z-2(c); *see also* Davis & Humes, *supra* note 2, at 24–25; Staavros v. Exelon Corp., 266 F. Supp. 2d 833, 850 (N.D. Ill. 2003) (holding that application of PSLRA safe harbor was appropriate when environmental disclosures regarding site contamination could affect corporate earnings); Collmer v. U.S. Liquids, Inc., 268 F. Supp. 2d 718, 755–56 (S.D. Tex. 2003) (noting that inadequately disclosed environmental liabilities were insufficient to establish securities fraud under PSLRA).

[158] For a detailed analysis of the corporate management benefits from adopting CMS,

compliance program by providing uniform rules for environmental management, greater corporate accountability, and a reduction of governmental monitoring because of self-regulation. The standard would also likely reduce criminal sanctions for environmental violations since the establishment of an environmental management program like CMS is a mitigating factor for federal environmental crimes under the federal sentencing guidelines.[159]

Furthermore, concerns with unfairness to some shareholders must be balanced with the shareholder interests that will be advanced by adopting CMS.[160] Many investor groups advocate more accurate and comprehensive environmental disclosure both to safeguard their investment from unpredicted liabilities and to encourage more environmental protection.[161] Because stronger environmental protection may be cost-effective for corporations, fuller disclosure under CMS could benefit corporations from a market-driven perspective.[162] More comprehensive environmental disclosure would reveal inefficient and harmful allocation of resources, so CMS would encourage companies to maximize existing resources. CMS would effectively internalize external influences demanding enhanced disclosure and channel them for positive societal purposes.[163]

The adoption of CMS would also serve shareholder interests by responding to growing international pressure for better environmental protection.[164] In 1991, the ISO established the Strategic Advisory Group for the Environment (SAGE), which concluded that an environmental management system, including enhanced disclosure, was a critical element in meeting future environmental needs worldwide.[165] With international pressure increasing for progressive environmental protection in exchange for free trade, CMS would play a critical role in avoiding potential trade barriers by promoting more accurate disclosure.[166]

Even if CMS resolves some of the equity concerns of the current regulatory regime, other critics may claim that CMS will be an inadequate response to corporate pollution. These critics would argue that enhanced

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see Crusto, *supra* note 7, at 210–11.

[159] *See* U.S. SENTENCING COMMISSION, Federal Sentencing Guidelines, Ch. 2, pt. Q, *reprinted in* 18 U.S.C. § 2Q1.1–2Q1.6 (2000).

[160] *See* Crusto, *supra* note 7, at 218–19 (providing a detailed analysis of improved environmental disclosure favoring shareholder interests).

[161] *See* discussion *supra* Part III.A.

[162] For a detailed analysis of free market perspectives favoring environmentally friendly policies, see Crusto, *supra* note 7, at 213.

[163] The predominant external influences and standards include: ISO 14000, BS 7750, ANSI/ASQC E4, and Community Eco-Management and Audit Scheme.

[164] For a detailed analysis of international pressure for environmental management, see Crusto, *supra* note 7, at 220.

[165] *See* Crusto, *supra* note 7, at 220.

[166] *See* Mitchell F. Crusto, *All That Glitters Is Not Gold: A Congressional-Driven Global Environmental*, 11 GEO. INT'L ENVTL. L. REV. 499, 519 (1999) (proposing a Global Environmental Protection Act).

corporate environmental disclosure alone will not make the environment cleaner or safer.[167] This analysis, however, diminishes the importance of more accurate and comprehensive environmental disclosure. Improved corporate disclosure is essential to the development of environmental management systems, which play a substantial role in improving corporate compliance with environmental regulations.[168] Standardized environmental disclosure will also increase corporate accountability for environmental liabilities beyond the existing self-promotional green reports.[169] Adopting CMS will not eliminate the pollution problem, but it may make an invaluable contribution in fostering better environmental management.

CONCLUSION: ASTM'S "CUMULATIVE MATERIALITY STANDARD" OVER VOLUNTARY GREEN REPORTS

While Sarbanes-Oxley does not expressly address corporate environmental disclosure, large economic entities, including publicly traded corporations and the federal government, should adopt the ASTM's "cumulative materiality standard" over voluntarily published green reports. If CMS is voluntarily adopted, it would be another important means of promoting investor confidence and facilitating a full evaluation of the true cost of environmental compliance and remediation. In addition to private enterprises, the "cumulative materiality standard" would also be a useful tool for the federal government to evaluate and manage its enormous environmental liabilities.

As a note of caution, the SEC should not rush to adopt the "cumulative materiality standard" as a mandatory requirement. To do so might have unexpected consequences, such as the possibility that some of the present reporting corporations will elect to reorganize into non-reporting entities, including moving their stock to the less regulated over-the-counter markets or privatizing.

Nevertheless, utilizing a cumulative assessment of the financial impact of all environmental liabilities for "materiality," instead of the present standard of materiality for each proceeding or liability, should promote greater environmental protection following the maxim: what gets counted gets managed. It would add to the spirit of transparency following the passage of Sarbanes-Oxley, and it would promote investor confidence in the financial markets. Whether it will result in a cleaner, safer, and healthier environment is left to be seen, but adopting CMS could be a key step toward better corporate environmental management.

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[167] *See* FRANCES CAIRNCROSS, COSTING THE EARTH 291–97 (1991) (disputing critics who question the effectiveness of reporting by claiming that enforced disclosure will have a large effect on corporate environmental policy).

[168] *See id.* at 297; Drivers, *supra* note 82, at 3–25.

[169] *See* discussion *supra* note 33.

RECENT DEVELOPMENTS

JURISDICTION-STRIPPING: THE PLEDGE PROTECTION ACT OF 2004

In 2002, the Ninth Circuit held that Congress's inclusion of "under God" in the Pledge Of Allegiance[1] was an unconstitutional establishment of religion.[2] Soon thereafter, public opinion turned strongly against the court's decision and a swift congressional response ensued.[3] By the end of 2002, Congress overwhelmingly passed a law reaffirming the presence of "under God" in the Pledge of Allegiance and criticizing the Ninth Circuit's interpretation of the Constitution in *Newdow*.[4] In addition, Representative Todd Akin (R-Mo.) introduced House Bill 5064, the Pledge Protection Act ("PPA"), which proposed to strip lower federal courts of subject matter jurisdiction over First Amendment challenges to the Pledge of Allegiance.[5] The House of Representatives took no action on H.R. 5064 before the end of the 107th Congress.

The Ninth Circuit also soon considered whether to grant an *en banc* rehearing in *Newdow*.[6] However, declining to avoid controversy, the full Ninth Circuit denied *en banc* rehearing, reaffirming the initial panel's decision.[7] In response, Representative Akin introduced the PPA in the 108th Congress,[8] which was identical to House Bill 5064 in the 107th Congress.[9] Representative Akin's stated purpose was to "rein in a renegade judiciary" by stripping the courts of the power to decide Pledge cases.[10]

Although the Supreme Court reversed the Ninth Circuit's decision in *Newdow* on justiciability grounds,[11] many "under God" supporters were

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[1] *See* 4 U.S.C. § 4 (2000).

[2] *See* 292 F.3d 597 (9th Cir. 2002), *amended by* Newdow v. United States Cong., 328 F.3d 466 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow, 123 S. Ct. 2301 (2004) (reversing the Ninth Circuit's decision on standing grounds).

[3] *See, e.g.*, Stephen Dinan, *DeLay Threatens to Curb Courts' Jurisdiction; Vents Ire over Pledge of Allegiance*, WASH. TIMES, Mar. 6, 2003, at A04; *Legion Prepared for Supreme Court Battle over California Court Pledge of Allegiance Ruling*, U.S. NEWSWIRE, Mar. 14, 2003, *available at* 2003 WL 3729003; Henry Weinstein, *Controversial Ruling on Pledge Reaffirmed*, L.A. TIMES, Mar. 1, 2003, at A1.

[4] *See* Pub. L. No. 107-293, 116 Stat. 2057 (2002). The law passed the House of Representatives by a vote of 401-5, and the Senate by a vote of 99-0.

[5] *See* H.R. 5064, 107th Cong. (2002).

[6] *See Newdow*, 328 F.3d 466.

[7] *See id.*

[8] *See* H.R. 2028, 108th Cong. (2003) (as introduced, *reprinted in* H.R. REP. No. 108-691, at 56–58 (2004)).

[9] *Cf. id.* The House also passed a resolution, by a vote of 400-7, criticizing the panel's ruling and recommending that the Supreme Court grant certiorari in the case. *See* H.R. Res. 132, 108th Cong. (2003).

[10] Press Release, Representative Todd Akin (R-Mo.), *Akin Introduces Pledge Protection Act* (July 8, 2002), *at* http://www.house.gov/akin/release/20020708.html.

[11] *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301, 2305 (2004) (dismiss-

frustrated with the Court's refusal to rule on the merits.[12] Public outrage once again flourished,[13] and support for H.R. 2028 revived.[14] The House Judiciary Committee reported to the full House an expanded bill, which excluded all questions "pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance" from the jurisdiction of both lower federal courts and the Supreme Court.[15] The expanded version of the PPA passed the House by a vote of 247 to 173,[16] and was received in the Senate the next day.[17]

Politically driven court-stripping was not a new phenomenon, especially in the 108th Congress. In fact, the PPA joined a panoply of court-stripping bills that had been proposed in that Congress.[18] Such proposed

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ing case due to plaintiff's lack of standing to assert daughter's claim).

[12] *See id.* at 2312 (Rehnquist, C.J., dissenting) (remarking that "[t]he Court today erects a novel prudential standing rule in order to avoid reaching the merits of the constitutional claim."); *see also* Paul Gullixson, *Pledge Wins, But It Deserved a Full Verdict*, SANTA ROSA (CAL.) PRESS DEMOCRAT, June 20, 2004, at G1 (describing the decision as "frustrating"); *The O'Reilly Factor: Interview with Sandra Banning* (Fox News television broadcast, June 15, 2004), 2004 WL 75788889 (commenting that the Supreme Court sidestepped the issue).

[13] *See, e.g.*, Henry Weinstein, *Ban on Reference to God Delayed; Stay Gives the High Court Time to Decide Whether to Review the Pledge of Allegiance Case*, L.A. TIMES, Mar. 5, 2003, at A1.

[14] *See, e.g.*, Press Release, Representative Todd Akin (R-Mo.), *Congressman Todd Akin Proposes Permanent Approach to Pledge of Allegiance Controversy* (June 14, 2004), *at* http://www.house.gov/akin/release/20040614.html; Alexander Bolton, *Courts May Be Stripped on Pledge*, HILL, Sept. 16, 2004, at 1.

[15] *See* H.R. REP. NO. 108-691, at 2 (2004). Earlier bills excluded such jurisdiction only from lower federal courts; presumably, they would have left open the Supreme Court's appellate jurisdiction over cases appealed from state courts of last resort.

[16] 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004) (recording roll-call passage of the bill). The bill that passed the House was amended on the floor by Representative James Sensenbrenner (R-Ohio) to create an exception from the exclusion of jurisdiction for the Superior Court of the District of Columbia and the District of Columbia Court of Appeals. *See id.* at H7471–72. Representative Sensenbrenner, the principal author of the amended bill, proposed this amendment so as not to leave District of Columbia residents without any forum in which to bring Pledge of Allegiance challenges. *See id.* Residents in other states could continue to bring Pledge claims in their state courts, but since the District of Columbia is not a state, it does not have state courts. This amendment was brought after Representative. Robert Scott (D-Va.) suggested in committee that total removal of a forum for District of Columbia residents might render the PPA unconstitutional. *See* H.R. REP. No. 108-691, at 100.

[17] 150 CONG REC. S9722 (daily ed. Sept. 27, 2004) (stating that the PPA had been received in the Senate). The bill was referred to the Senate Judiciary Committee, but no further action was taken in the 108th Congress. However, Representative Akin has announced his intention to reintroduce the bill. *See* Press Release, Representative Todd Akin, *California-Atheist Michael Newdow Renews Assault on Pledge of Allegiance* (Jan. 6, 2005), *at* http://www.house.gov/akin/release/20050106.html.

[18] *See* Constitution Restoration Act, H.R. 3799, 108th Cong. (2004) (removing all federal court jurisdiction over any case in which relief is sought against the government due to the government's acknowledgement of God); Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) (removing all federal court jurisdiction over questions interpreting the Defense of Marriage Act); *see also* We the People Act, H.R. 3893, 108th Cong. (2004) (removing all federal court jurisdiction over cases involving the Free Exercise Clause, Establishment Clause, the "right of privacy," and equal protection challenges to prohibitions on

bills include preclusions of jurisdiction over challenges to the Defense of Marriage Act[19] and challenges to government officials' acknowledgements of God.[20] This surge of court-stripping legislation is the strongest since the early 1980s, when court decisions upholding school busing programs provoked an equally strong congressional reaction.[21] In light of the manifestly hostile attitude many legislators recently have displayed toward controversial judicial decisions, court-stripping has become a salient issue. This Recent Development focuses on one such measure, the Pledge Protection Act, arguing that the Act is both unconstitutional and ill-advised.

It is well-established that Congress has far-reaching power to limit federal court jurisdiction.[22] Article III of the U.S. Constitution creates the Supreme Court and provides for, but does not mandate, the creation of lower federal courts by Congress.[23] Furthermore, the Constitution divides Supreme Court jurisdiction into original and appellate, allowing Congress to make "exceptions" to the latter.[24] Even in its original jurisdiction, the Supreme Court does not have exclusive jurisdiction over cases and controversies.[25]

While the judicial power extends to all cases "arising under" the Constitution or federal law,[26] Congress has never granted the federal courts the full extent of that power.[27] In fact, while the Judiciary Act of 1789[28] created the lower federal courts, those courts had only limited jurisdiction over state law, federal statutory, and constitutional claims.[29] Full federal-question

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same-sex marriage); Religious Liberties Restoration Act, S. 1558, 108th Cong. § 3(d) (2003) (removing lower federal court jurisdiction over the rest of the bill's subject matter, which was an affirmation that certain religion-related practices are within the "powers reserved to the States"); Protect the Pledge Act of 2003, S. 1297, 108th Cong. (2003) (removing lower federal court jurisdiction over any claim that the Pledge of Allegiance violates the First Amendment); Life-Protecting Judicial Limitation Act of 2004, H.R. 1546, 108th Cong. (2003) (removing lower federal court jurisdiction over any "abortion-related case").

[19] *See* Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004).

[20] *See* The Constitution Restoration Act, H.R. 3799, 108th Cong. (2004).

[21] *See, e.g.*, H.R. 761, 97th Cong. (1981) (proposing the elimination of federal court jurisdiction over forced school busing); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 n.1 (1981) (listing eighteen bills limiting federal jurisdiction that were before the 97th Congress); *see also, e.g.*, Linda Greenhouse, *How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES, Oct. 27, 1996, at E5.

[22] *See* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 319 (5th ed. 2003) [hereinafter HART & WECHSLER] ("Although Article III states that 'the judicial Power of the United States shall be vested,' Congress possesses significant powers to apportion jurisdiction among state and federal courts and, in doing so, to define and limit the jurisdiction of particular courts.").

[23] *See* U.S. CONST. art. III, § 2, cl. 1.

[24] U.S. CONST. art. III, § 2, cl. 2.

[25] *See* California v. Arizona, 440 U.S. 59, 65 (1979).

[26] *See* U.S. CONST. art. III, § 2, cl. 1.

[27] *See* HART & WECHSLER, *supra* note 22, at 320. (describing history of congressional grants of federal court jurisdiction).

[28] Act of Sept. 24, 1789, ch. 19, 1 Stat. 73.

[29] *See id.* § 11 at 78–79 (providing for federal court jurisdiction according to the nature of the parties, that is, diversity jurisdiction over a certain amount in controversy regardless

jurisdiction was not granted to lower federal courts until after the Civil War[30] and the Supreme Court only gained jurisdiction over all state court judgments arising under federal law in 1914.[31] Since then, much legislation limiting jurisdiction has been proposed for efficiency concerns, for example, the reduction of the federal judiciary's workload.[32] A different purpose, however, underlies more recent "court-stripping"[33] legislation. Here, Congress removes jurisdiction so as to have the final federal word on particular constitutional issues, such as the Pledge of Allegiance or homosexual marriage. In essence, Congress seeks to abrogate the core holding of *Marbury v. Madison*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[34]

Very few instances of this politically motivated removal of jurisdiction have been enacted into law, and "even fewer have been subjected to scrutiny by the courts."[35] For instance, in the early 1980s, court-stripping legislation was repeatedly proposed as a political tool to "overrule" judicial decisions on school prayer, school busing, and abortion. No such legislation passed both Houses of Congress.[36]

The 108th Congress, however, brought a resurgence of court-stripping proposals.[37] Widespread public and congressional concerns about an "activist" judiciary,[38] engendered by high-profile constitutional decisions affect-

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of whether a dispute involved a federal question).

[30] *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (granting federal court jurisdiction over "all suits of a civil nature, at common law or in equity, . . . arising under the Constitution or laws of the United States" if the amount in controversy exceeded $500).

[31] *See* HART & WECHSLER, *supra* note 22, at 467 (explaining that in the Judiciary Act of 1914, 38 Stat. 790, Congress, for the first time, introduced the discretionary writ of certiorari over state court judgments that upheld a claim of a federal right; previously, review, which was mandatory, extended only to judgments denying federal rights). Since 1914, the scope of the Supreme Court's jurisdiction has remained relatively static, although there has been a gradual change from mandatory review to discretionary review of state court judgments. *See id.* at 467–68.

[32] *See, e.g.*, 28 U.S.C. § 1332 (2000) (limiting the diversity jurisdiction of federal district courts over state civil law claims to those where the amount in controversy is greater than $75,000); 28 U.S.C. § 1441 (2000) (providing limits on the removal of cases from state courts to federal courts).

[33] The first use of the term "court-stripping" to mean the politically motivated removal of jurisdiction was likely by Tom Wicker of the *New York Times* as an analogue to the "court-packing" plans suggested by President Roosevelt. *See* Tom Wicker, *Court-Stripping*, N.Y. TIMES, Apr. 24, 1981, at A31.

[34] 5 U.S. (1 Cranch) 137, 177 (1803).

[35] KENNETH R. THOMAS, CONG. RESEARCH SERV., LIMITING COURT JURISDICTION OVER FEDERAL CONSTITUTIONAL ISSUES: "COURT-STRIPPING" 4 (2004) (on file with the Harvard Law School Library). However, in 1869, Congress passed a statute depriving the Supreme Court of appellate jurisdiction over habeas corpus petitions. Act of Mar. 27, 1868, ch. 24, § 2, 15 Stat. 44. This was upheld in *Ex parte McCardle*, 74 U.S. 506, 508–15 (1869).

[36] *See* Greenhouse, *supra* note 21 (describing 1980s court-stripping legislation); *see also* Tribe, *supra* note 21, at n.1.

[37] *See supra* notes 18–20 and accompanying text.

[38] *See, e.g.*, Chief Justice William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary* at 4 (2005), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf (last visited, Mar. 13, 2005) (highlighting the "new turn" taken in

ing social policy,[39] provided Congress with the impetus to "rein in a renegade judiciary."[40] In the 108th Congress, at least five court-stripping bills had been introduced in the House, two of which passed, and at least two court-stripping measures were introduced in the Senate.[41] Although none of these measures received a vote by both Houses of Congress, sponsors of some of the bills have stated their commitment to reintroduce them during the 109th Congress.[42] The political controversies that sparked the bills' introductions will continue, and therefore an analysis of the language and principles underlying the proposed court-stripping in the Pledge Protection Act remains informative.

The PPA's language is relatively simple. If passed, the bill would eliminate federal court jurisdiction over cases and controversies involving the Pledge of Allegiance.[43] It would apply to the Supreme Court and to all lower federal courts, and to any question that pertains to the interpretation or the constitutionality of the Pledge of Allegiance or its recitation.[44] The bill does not contain any specific findings or references to interpretive memoranda that describe the bill's purpose.[45]

Textually, Congress would derive its power to pass the PPA in the broad powers that the Constitution grants Congress to regulate the juris-

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"charges of [judicial] activism"); President George W. Bush, President's Remarks at the 2004 Republican National Convention (Sept. 2, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/09/20040902-2.html ("I support the protection of marriage against activist judges. And I will continue to appoint federal judges who know the difference between personal opinion and strict interpretation of the law.").

[39] *See, e.g.*, *Newdow*, 328 F.3d 466, 466 (9th Cir. 2003); Lawrence v. Texas, 123 S.Ct. 2472 (2003) (holding that the panoply of constitutional privacy rights includes the right to engage in homosexual sodomy); Goodridge v. Dep't of Pub. Health, 798 N.E.2d. 941 (Mass. 2003) (ruling that the Massachusetts Constitution prohibited denying homosexuals the right to marry).

[40] *See* Press Release, *supra* note 10 and accompanying text.

[41] *See* Constitution Restoration Act, H.R. 3799, 108th Cong. (2004); Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004); Life-Protecting Judicial Limitation Act of 2004, H.R. 1546, 108th Cong. (2004); Religious Liberties Restoration Act, S. 1558, 108th Cong. (2003); Safeguarding our Religious Liberties Act, H.R. 3190, 108th Cong. (2003); We the People Act, H.R. 3893, 108th Cong. (2004); Protect the Pledge Act of 2003, S. 1297, 108th Cong. (2003). Additionally, the House passed the Marriage Protection of 2004 by a margin of 233-194. *See* 150 CONG. REC. H6612 (daily ed. Jul. 22, 2004). The House also passed the Pledge Protection Act by a margin of 247-173. *See* 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004). The other bills did not reach a vote.

[42] *See, e.g.*, Represenative Todd Akin, Press Release, *supra* note 17 (describing Rep. Akin's (R-Mo.) intention to reintroduce the Pledge Protection Act); Press Release, Rep. Robert B. Aderholt (R-Ala.), *Congressman Aderholt Introduces Constitution Restoration Act* (Mar. 3, 2005), *at* http://aderholt.house.gov/HoR/AL04/Newsroom/News+Releases/2005/Aderholt+Introduces +Constitution+Restoration+Act.htm (describing Rep. Aderholt's (R-Ala.) intention to reintroduce the Constitution Restoration Act).

[43] *See* H.R. 2028, 108th Cong. § 2 (2004).

[44] *Id.* Specifically, the statute removes "any jurisdiction" from Congressionally created courts and only "appellate jurisdiction" from the Supreme Court, leaving open the question of whether the Supreme Court would be allowed to hear a Pledge case that fell under its limited original jurisdiction. *See id.* In addition, there is an exception for the courts of the District of Columbia. *Id. See also supra* note 16.

[45] *See* H.R. 2028.

diction of the federal courts.[46] Article III gives Congress the power to create courts inferior to the Supreme Court and to grant jurisdiction to those courts that is narrower than the full judicial power.[47] Nevertheless, Congress's broad power in this area is not plenary. It must, in fact, be subject to other limitations on congressional power set forth in the Constitution, including due process, equal protection, and the structural principles of separation of powers.[48] For example, while Congress possesses broad powers under the Commerce and Necessary and Proper Clauses, it may not exercise those powers in contravention of constitutional prohibitions.[49]

While the PPA's language is deceptively simple, its far-reaching implications render it constitutionally problematic. At first glance, it seems that there is no doubt that the PPA is constitutional. As mentioned above, Congress has broad power to regulate the jurisdiction of the federal courts.[50] The Constitution grants the power to create, but does not mandate the creation of, the lower federal courts.[51] The Supreme Court has interpreted this congressional power as one of regulation, saying that "Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."[52] In fact, the Court has repeatedly upheld actions by Congress to remove jurisdiction over federal statutory questions from lower federal courts. For example, in *Lauf v. E.G. Shinner, Inc.*, the Court upheld the Norris-LaGuardia Act of 1932, which eliminated federal jurisdiction over labor strike cases.[53] Moreover, in *Lockerty v. Phillips*, the Court sustained the removal of jurisdiction over the validity of price-control regulations in the Emergency Price Control Act of 1942.[54] Essentially, Congress's broad regulatory power over federal jurisdiction is well-established by Supreme Court precedent.[55]

The Exceptions Clause also provides Congress the power to make exceptions to the Supreme Court's appellate jurisdiction.[56] In *Ex parte*

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[46] *See supra* notes 22–24 and 26–27 and accompanying text.

[47] *See* U.S. CONST. art. III, § 2.

[48] *See infra* note 66 and accompanying text.

[49] *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (striking down FCC editorial restriction as violative of the First Amendment).

[50] *See supra* notes 22–24 and 26–27 and accompanying text.

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

[52] Sheldon v. Sill, 49 U.S. 441, 449 (1850); *see also* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (noting that "Congressional power . . . includes the power ' . . . of withholding jurisdiction from [courts] in the exact degrees and character which to Congress may seem proper for the public good.'") (quoting Cary v. Curtis, 44 U.S. 236, 245 (1845)); *but see* Lawrence Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25–27 (1981) (asserting that Congress's power to remove jurisdiction from lower federal courts is subject to other constitutional limitations).

[53] *See* 303 U.S. 323, 330 (1938).

[54] *See id.* at 187.

[55] *See supra* note 22 and accompanying text.

[56] *See* U.S. CONST. art. III, § 2, cl. 2.

McCardle,[57] the Court first addressed a challenge to its jurisdiction under that clause. McCardle had been detained by federal military authorities and had sought a writ of habeas corpus from a lower federal court. Upon denial of the writ, he then appealed to the Supreme Court. After the Court heard oral argument, Congress eliminated the jurisdiction of the Supreme Court to hear certain types of habeas corpus appeals.[58] The Court subsequently dismissed McCardle's appeal, stating that Congress's removal of jurisdiction was proper.[59]

Essentially, the Court forbade itself from inquiring into Congress's motives. Rather, because the "power to make exceptions to the appellate jurisdiction of this court is given [to Congress] by express words," the Court lacked the power to hear McCardle's appeal.[60] However, the Court in *McCardle* specifically noted that Congress had not precluded all types of appeal and that other avenues of Supreme Court review were left open to McCardle.[61] The Court therefore left open the question of whether Congress could completely preclude such jurisdiction.

Ninety years later, Justice Frankfurter, dissenting in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, re-expressed *McCardle*'s reasoning, stating that "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*."[62] Nevertheless, while the Exceptions Clause seems to grant Congress very broad power, the Supreme Court has not yet ruled on the constitutionality of a total preclusion of Supreme Court review.[63] The Pledge Protection Act, barring all federal review of cases about the constitutionality of the Pledge of Allegiance, is such a total preclusion.[64]

While the textual case is strong, the express powers granted to Congress under Article III do not insulate the PPA from further constitutional scrutiny. Indeed, one could argue from an institutional perspective that

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[57] 74 U.S. 506 (1869).

[58] *See id.* at 508.

[59] *See id.* at 514.

[60] *Id.*

[61] *See id.* at 515 ("[c]ounsel seem to have supposed . . . that the whole appellate power of [this] court . . . is denied. But this is an error. [The legislation] does not affect the jurisdiction which was previously exercised."). McCardle has appealed under an earlier congressional act dated February 5, 1867, and Congress's later statute only repealed jurisdiction for appeals made under the earlier act. *See id.* The Supreme Court still had jurisdiction under Congress's original grant of jurisdiction, the Judiciary Act of 1789. *See id.* at 513.

[62] 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (italics added).

[63] HART & WECHSLER, *supra* note 22, at 341–42 (commenting on "how the limits of congressional power over Supreme Court appellate jurisdiction have never been completely clarified"). The same commentators also argue that in *Felker v. Turpin*, 518 U.S. 651 (1996), "[t]he Court pointedly avoided constitutional questions about the scope of Congress' power to limit its appellate jurisdiction," when it held that a removal of certiorari jurisdiction over some habeas corpus cases did not affect its original jurisdiction to hear the same cases. *Id.* at 340.

[64] *See* H.R. 2028, 108th Cong. § 2 (2004).

the Court would likely find interpretive devices to preserve its own power in the face of court-stripping statutes.[65] Those devices would likely take the form of invalidating statutes under other constitutional limitations on Congress's power. Simply, congressional measures regulating jurisdiction must comport with the constitutional requirements of equal protection, due process, and separation of powers.[66] The PPA likely cannot withstand scrutiny under those three constitutional requirements.

The PPA likely violates the equal protection component of the Fifth Amendment's Due Process Clause.[67] Laws that burden a suspect classification or a fundamental right are subject to heightened scrutiny, that is, they must be narrowly tailored to further a compelling state interest.[68] First, one could credibly argue that the PPA specifically targets atheists—those who do not believe we live in "one nation" under any God. While the PPA does not explicitly single out a religious group, it obviously targets them by its plain terms, and works to prevent atheist constitutional challenges to the Pledge's religious language. Therefore, despite its ostensible neutrality, the PPA would be subject to a higher constitutional standard.[69] Second, there is no compelling government interest at stake here. Congressional concern about "activist judges" clearly cannot be a compelling justification.[70] For these reasons, the PPA could fail under heightened Equal Protection scrutiny.

It may be argued that since the PPA is facially neutral, it should not be subject to such scrutiny.[71] However, even under "rational basis" scrutiny, the PPA still might not pass constitutional muster. In *Romer v. Evans*, the Supreme Court held that a state constitutional amendment prohibiting the inclusion of homosexuals in antidiscrimination laws failed rational basis scrutiny in part because it was motivated by animus.[72] As Justice

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[65] *See generally* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004) (arguing that ensuring "judicial supremacy" has recently been a guiding principle of the courts).

[66] *See* Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 139–52 (1981) (applying external, i.e., non–Article III, constitutional restraints to court-stripping legislation).

[67] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (recognizing the reverse incorporation of the Equal Protection Clause of the Fourteenth Amendment into the Fifth Amendment's Due Process Clause).

[68] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[69] *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that a facially neutral ordinance violated the Equal Protection Clause because of unequal application).

[70] *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 516 (1974) (arguing that only neutral, efficiency-focused limitations on lower federal court jurisdiction are permissible). *But see* Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 74 (1975) (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973), as foundation for the proposition that "[m]otive, however, is generally unimportant when the protection of constitutional rights is at issue").

[71] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that a disproportionate impact is not sufficient to render unconstitutional a facially neutral law).

[72] 517 U.S. 620, 632 (1996); *see also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S.

Kennedy wrote in his opinion, the amendment in *Romer* did not fully foreclose the promotion of homosexual interests, but did impose a greater burden on homosexuals than others.[73] Because the denial of a "specific legal protection" did not rationally further any legitimate state interest, it was unconstitutional.[74]

There are striking parallels between the doomed *Romer* amendment and the PPA. Both target a discrete group of individuals and work to remove specific legal protections while leaving far less effective measures open. In *Romer*, recourse to the legislature was foreclosed, while leaving change open via state constitutional amendment procedures. Under the PPA, federal courthouses would be slammed shut, but the state courts would remain available and recourse could be made to Congress itself.[75] The similarities between the *Romer* amendment and the PPA are strong, and the latter might fail the animus-based rational basis test laid out by the *Romer* Court.

In addition to running afoul of the Equal Protection Clause, forcing claims relating to the Pledge of Allegiance into state courts might also violate the procedural protections guaranteed by the Due Process Clause. Procedural due process requires that the adjudication of constitutional rights must be "pursuant to constitutionally adequate procedures."[76] There is a presumption that state courts are adequate fora for the purposes of procedural due process, since state courts are under a duty to enforce federal con-

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432, 446 (1985) (striking down an ordinance targeting the mentally retarded under rational basis review due to invidiousness); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

[73] *See Romer*, 517 U.S. at 631 ("[T]he amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry . . . to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability.").

[74] *Id.* at 627, 631. It is worth noting that one of the justifications that Colorado proffered for the amendment in *Romer* was "its interest in conserving [governmental] resources." *Id.* at 635. This is similar to the interest in judicial efficiency often proffered by court-stripping advocates. *See, e.g., Federal Marriage Amendment: Hearing on S.J. Res. 26 Before the Subcomm. On Constitution, House Comm. On Judiciary*, 108th Cong. 1 (2004) (statement of Phyllis Schlafly, President, Eagle Forum) (arguing that the Marriage Protection Act would stem "the assault on the Defense of Marriage Act" by "dismissing pending [federal] lawsuits"). The *Romer* Court found the resource conservation justification "impossible to credit" due to the breadth of the measure at issue. 517 U.S. at 635.

[75] *See* H.R. REP. NO. 108-691 (2004). Removal of federal jurisdiction still allows state courts to hear constitutional questions. Also, if Congress can indeed strip the federal courts of jurisdiction in these cases, it can surely restore it in the future.

[76] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (explaining that the Due Process Clause requires that "constitutionally adequate procedures" must be used to adjudicate certain substantive rights).

stitutional rights.[77] Thus, the Court has usually recognized that state and federal courts are of equal competence to decide constitutional issues.[78]

If state courts can be proven to be unequal to the task of protecting federal constitutional rights, however, a jurisdiction-stripping provision could violate procedural due process, as it would leave prospective plaintiffs without a constitutionally acceptable forum.[79] Two such arguments may be leveled at the competence of state courts. First, state courts might not meet the standards of independence necessary to adjudicate constitutional rights. Second, state courts may lack the ability to issue the necessary remedies to enforce constitutional rights.

First, state court judges may lack the protections of independence that Article III judges have, such as life tenure and salary stabilization.[80] The lack of those protections lends state courts to analogies to other non–Article III courts, which have been found incompetent to try some issues because of their lack of Article III protections. For example, in *Glidden Co. v. Zdanok*,[81] Justice Harlan's plurality opinion suggested that due process would be violated if constitutional claims were decided by judges that lacked the independence of the protections of Article III.[82] Similarly, some commentators have suggested that non–Article III courts would not be allowed to have the final say on federal constitutional claims.[83] The argument could be made, however, that the independence necessary for the adjudication of constitutional claims is independence from Congress, and it is well-settled that Congress has limited power over state courts.[84] Nevertheless, a serious constitutional problem would present itself when fifty different sets of non–Article III judges were empowered to make final fed-

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[77] *See, e.g.*, Testa v. Katt, 330 U.S. 386, 389 (1947) (holding that the Supremacy Clause requires state courts to enforce federal rights).

[78] *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 484 (1983) (stating, "We have noted the competence of state courts to adjudicate federal constitutional claims.") (citing Sumner v. Mata, 449 U.S. 539, 549 (1981)); *see also* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 n.15 (1982) (asserting that "virtually all matters that might be heard in Article III courts could also be left by Congress to state courts."); Allen v. McCurry, 449 U.S. 90, 105 (1980); Swain v. Pressley, 430 U.S. 372, 383 (1977)). Notably, Justice Brennan's qualification of state-court competence to "*virtually* all matters" in *Northern Pipeline Construction* begs the question of which federal constitutional claims fall outside the scope of that competence. 458 U.S. at 64 n.15 (emphasis added).

[79] *See Loudermill*, 470 U.S. at 541.

[80] *See, e.g.*, TEX. CONST., art. V, § 2 (providing for the election and term limits of Texas Supreme Court justices); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127–28 (1977) (describing the majoritarian pressures felt by state court judges). *But see* Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 599 (1991) (arguing that the lack of independence of state court judges does not necessarily lead to poorer outcomes).

[81] 370 U.S. 530 (1962).

[82] *See id.* at 532–33.

[83] *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 743 (2004) (arguing that the Supreme Court has always sought to ensure that Article III courts have some review of constitutional judgments by non–Article III courts).

[84] *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971).

eral constitutional rulings within their respective jurisdictions. In light of that concern, the Supreme Court might hold that state courts lack some full measure of competence or that the sheer number of jurisdictions might lead to constititutional incoherence. Federal court review could be necessary to cure those defects.

Second, if the resolution of a constitutional claim requires a state court judge to issue orders to federal officials, plaintiffs may be left without remedies for violations of their constitutional rights. For example, if a plaintiff mounts a successful constitutional challenge to a federal program, a state court might be required to enjoin a federal officer to ensure compliance with the program. Suppose that, after the enactment of the PPA, Congress passes a statute requiring all federal employees to recite the Pledge of Allegiance at the beginning of each workday. A federal employee then sues in state court, seeking to enjoin the recitation requirement. The state court, following precedent, would rule that the recitation requirement is unconstitutional,[85] but the remedy would require an injunction against a federal officer.[86]

While it is unclear whether a state court may grant injunctive relief against federal officers,[87] the "weight of reasoned opinion emanating from the state and lower federal courts supports the general denial of such state court power."[88] Therefore, in certain controversies, federal court-stripping statutes might leave plaintiffs without remedies, which would be a fundamental denial of procedural due process.[89]

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[85] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding forced recitation of the Pledge of Allegiance unconstitutional).

[86] *Cf. id.* (affirming the lower court's order against the West Virginia State Board of Education that enjoined enforcement of the recitation requirement).

[87] *See* Redish & Woods, *supra* note 70, at 88 (illustrating that state courts are not allowed to issue writs of mandamus or habeas corpus to federal officials); *see also* McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 605 (1821) (denying state court power to issue a writ of mandamus to a federal officer); Tarble's Case, 80 U.S. (13 Wall.) 397, 411 (1871) (denying state court power to issue a writ of habeas corpus for a federal prisoner); *see generally* Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964). On the other hand, under state law, state courts may impose personal liability on federal officials for actions outside the scope of their official duties. *See* Colorado v. Symes, 286 U.S. 510, 519–20 (1932); *see also* Scranton v. Wheeler, 179 U.S. 141, 152–53 (1900) (holding that state courts may impose liability on federal officers in ejectment actions). The Supreme Court has not directly ruled on this question. *See* Arnold, *supra*, at 1394.

[88] Redish & Woods, *supra* note 70, at 89 (citing decisions that deny state court power to such injunctive relief); *see also, e.g.*, Keely v. Sanders, 99 U.S. 441, 443 (1879) (stating, in dicta, that state courts could not, "by injunction or otherwise, prevent federal officers from collecting federal taxes"); Alabama ex rel. Gallion v. Rogers, 187 F. Supp. 848, 852 (M.D. Ala. 1960), *aff'd per* curiam, 285 F.2d 430 (5th Cir. 1961), *cert. denied*, 366 U.S. 913 (1961) (espousing the "basic legal principle that the state courts are without jurisdiction to . . . enjoin the acts of federal officers"); *but see* Arnold, *supra* note 87, at 1386 (arguing that basic principles of federalism require state courts' injunctive power over federal officials).

[89] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); *supra* text accompanying notes 76–80. Whether a scenario yielding an unconstitutional outcome provides a

Lastly, separation of powers principles likely render the PPA unconstitutional. Court-stripping measures abrogate the federal judiciary's "essential role" as a check on the legislative process,[90] allowing Congress to make end-runs around constitutional provisions. Judicial interpretations of the Constitution can be overturned in only two ways: (1) a constitutional amendment, or (2) the court's decision being overruled by itself or a higher court. The Supreme Court has repeatedly held that Congress does not have the power to overrule courts' interpretations of the Constitution.[91]

Jurisdiction-stripping provisions attempt to give Congress precisely that power. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court held that a compelling governmental interest was not required for generally applicable criminal laws that burden the free exercise of religion.[92] In response, Congress passed the Religious Freedom Restoration Act (RFRA),[93] the stated purpose of which was to overrule *Smith*,[94] and to restore the compelling interest with respect to such statutes. The Supreme Court, in *City of Boerne v. Flores*, found RFRA's reinterpretation of a constitutional standard to be an unconstitutional encroachment on the power of the judiciary.[95] To uphold RFRA, the Court said, would mean that "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[96] The Court was simply unwilling to entertain the proposition that constitutional meaning fluctuates with the whims of Congress.

Suppose, however, that Congress had attached a jurisdiction-stripping provision, similar to the PPA, to the RFRA. In that case, rather than dictating to federal courts which rules to apply in certan cases, Congress would simply deprive federal courts of the ability to hear those cases in the first instance. In the absence of a binding federal court decision, a patchwork quilt of state court decisions regarding RFRA validity would develop. Some state courts would uphold RFRA; others would find it unconstitutional. In essence, attaching a jurisdiction-stripping provision allows

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successful basis for an "as applied" challenge to the PPA or whether that single scenario renders the PPA facially unconstitutional is beyond the scope of this Recent Development.

[90] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (proposing that court-stripping is unconstitutional where it destroys the "essential role of the Supreme Court in the constitutional plan"); *see also, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (remarking that it is the role of the judiciary to define the boundary of permissible legislative activity); Sager, *supra* note 52, at 42–60 (arguing that regulating state and federal conduct is an essential function of the federal judiciary).

[91] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); City of Boerne v. Flores, 521 U.S. 507, 536 (1997); Dickerson v. United States, 530 U.S. 428, 432 (2000).

[92] 494 U.S. 872, 885 (1990).

[93] Pub. L. No. 103-141, 107 Stat. 1488 (1993).

[94] *See id.* § 2.

[95] *Boerne*, 521 U.S at 536.

[96] *Id.* at 529.

Congress to exercise plenary power, limited only by each state's judiciary.[97] Granting Congress that power violates the principle of uniformity inherent in the "essential role" of the federal court system.[98] Both courts and commentators have stressed the importance of uniformity, especially concerning federal constitutional rights.[99]

In addition to violating substantive constitutional provisions, the PPA is an unwise incursion by Congress into the federal judicial role and a foolish devolution of power over the interpretation of the Union's core document to state courts. Even if the PPA were to be interpreted as constitutional, stripping the federal courts of jurisdiction over federal constitutional issues eviscerates the goal of national uniformity of constitutional rights, which has been consistently present, if not consistently applied, since the Founding.[100] In making the case for general federal question jurisdiction, Alexander Hamilton wrote: "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."[101]

The Pledge Protection Act and other jurisdiction-stripping proposals likely violate substantive provisions of the Constitution. They would also spawn the "hydra in government" that Hamilton so feared. As such, they are both constitutionally problematic and imprudent as a matter of policy.

—Alexander K. Hooper

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[97] On the federal level, court-stripping shifts power from the judiciary to the legislature. Peculiarly, on a state level, power moves in the opposite direction. If Congress passes an unconstitutional law with a jurisdiction-stripping provision attached, state judiciaries will retain the power to opt in or opt out. In the absence of a federal law, to serve the same ends the state legislature would have to enact a state statute. In the Violence Against Women Act example, post-*Morrison*, state legislatures have had to pass state anti-gender-motivated-violence statutes. If the Violence Against Women Act had contained a jurisdiction-stripping provision, the law would have been applicable in any state where the state judiciary had not struck it down as unconstitutional.

[98] *See* Heckler v. Edwards, 465 U.S. 870, 882 (1984) (describing the "need for certainty and uniformity in federal government when an Act may have been declared unconstitutional").

[99] Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19 (1975) ("As a general matter, it does not appear appropriate that federally guaranteed rights, particularly when their basis is constitutional, should have materially different dimensions in each of the states when both the source of the right and any ultimate interpretation is unitary."); *see also* Martin v. Hunter's Lessee, 14 U.S. 304, 347–48 (emphasizing "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution."); Sager, *supra* note 52, at 57 ("[T]he lack of uniform enforcement and the complete vulnerability of the federal government to the will of any state would have fatally undermined even a limited form of nationhood.").

[100] *See, e.g.*, McKesson Corp. v. Div. Of Alcoholic Beverages and Tobacco, 496 U.S. 18, 29 (1990) (noting the importance of "national uniformity of federal law"); *Hunter's Lessee*, 14 U.S. at 347–48; Gibbons v. Ogden, 22 U.S. 1, 11 (1824) (lauding the benefits of "uniform law" across the several States).

[101] THE FEDERALIST No. 80, at 406 (Alexander Hamilton) (Max Beloff ed., Basil Blackwell Ltd. 2d ed., 1987).

THE VICTIMS' RIGHTS AMENDMENT

Since its ratification, the Constitution of the United States has only been amended twenty-seven times. Despite the difficulty of passing a constitutional amendment, many are proposed every year in Congress, and some are taken seriously. One recently proposed amendment, given serious consideration by the Senate Judiciary Committee, is the so-called Victims' Rights Amendment.[1] This Recent Development discusses the origins of the Victims' Rights Amendment, traces its progress forward to its current state, analyzes its provisions and explains the comparative advantages of a statutory solution.

In every congressional session, dozens of amendments are proposed,[2] of which few pass beyond committee consideration and even fewer become actual amendments.[3] Many potential amendments are proposed repeatedly, such as the amendment to disallow the desecration of the American flag.[4] The Victims' Rights Amendment is one of the few amendments that has not only been considered many times, but has also passed the committee level to reach the floor of the Senate.[5]

The idea of a Victims' Rights constitutional amendment was born in 1982, when President Reagan convened the Task Force on Victims of Crime ("the Task Force") to study the role of the victim in the criminal justice system.[6] In its Final Report, the Task Force proposed a federal constitutional amendment to protect the rights of crime victims.[7] Arguing that the

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[1] S.J. Res. 1, 108th Cong. (2003). This is the most recent incarnation of a proposed amendment for victims' rights; various pieces of legislation under this name have been proposed over time.

[2] In Article V of the U.S. Constitution, the term "proposed" is used in relation to an amendment to mean that it received a two-thirds majority in both chambers of Congress. U.S. CONST. art. V. It is used here to mean simply "introduced," regardless of passage.

[3] According to C-SPAN, 103 constitutional amendments were proposed in the 105th Congress, 158 in the 104th, 156 in the 103d, 162 in the 102d, and 214 in the 101st. C-SPAN.org, C-SPAN's Capitol Questions (2000), *at* http://www.cspan.org/questions/weekly54.asp. Despite the large number of proposals, the Constitution was only amended twelve times in the twentieth century. *See id.* Indeed, although over 10,000 proposals have been made since the Constitution's inception, only 27 have led to actual constitutional amendments. *See* Michael J. Lynch, *The Other Amendments: Constitutional Amendments that Failed*, 93 LAW LIBRARY J. 303, 309 (2001). For a compilation of proposed amendments from 1985 to 1990, see DARYL B. HARRIS, PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION, 99TH–101ST CONGRESSES (1985–1990) (1992).

[4] The most recent incarnation of this proposed amendment is H.J. Res. 5, 109th Cong. (2005). *See also, e.g.*, S.J. Res. 4, 108th Cong. (2003); H.J. Res. 36, 107th Cong. (2001).

[5] *See, e.g.*, 150 CONG. REC. S4150 (daily ed. Apr. 20, 2004).

[6] *See* Exec. Order No. 12,360, 3 C.F.R. 181 (1982), 47 Fed. Reg. 17,975 (Apr. 23, 1982). The Task Force's mandate was to "conduct a review of national, state, and local policies and programs affecting victims of crime" and to advise regarding "actions which can be undertaken to improve our efforts to assist and protect victims of crime." *Id.* The Task Force traveled to six cities to hear accounts of problems with the criminal justice system. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT [hereinafter FINAL REPORT] 119 (1982). The Task Force concluded that the way crime victims are treated is a national disgrace, and that crime victims were ignored, mistreated and blamed by the system. *See id.* at vii.

[7] *See id.* at 114–15.

current system offers many protections to those accused of crime, but few protections to victims of crime, the Final Report suggested that the following sentence be added to the Sixth Amendment's list of rights for the criminal defendant: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."[8]

At the time, even some victims' advocacy groups felt the recommendation was unachievable, and decided to focus their initial efforts on the passage of similar state constitutional amendments.[9] However, in 1985, a national conference of activists considered the Task Force's proposal, and after a series of meetings, formed the National Victims' Constitutional Amendment Network (NVCAN) in 1986.[10] The purpose of NVCAN was ultimately to obtain a federal constitutional amendment[11] and initially to focus efforts on the passage of state constitutional amendments to test whether such provisions could actually reduce victims' alienation from the justice system without causing unintended harm.[12] To date, all fifty states, as well as the federal government, have various victims' rights statutes,[13] but only thirty-

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[8] *Id.* at 114. Interestingly, a May 1986 report by the Department of Justice analyzing the progress made four years later on the recommendations of the Task Force discusses point by point the recommendations made by the Task Force and the actions that have been taken, but does not mention the recommendation of a federal constitutional amendment. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1986).

[9] *See* LEIGH GLENN, VICTIMS' RIGHTS 17, 23–24 (1997).

[10] *See Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the Senate Comm. on the Judiciary*, 108th Cong., at 227 (Apr. 8, 2003) *available at* http://www.gpoaccess.gov/index.html [hereinafter *Hearing on S.J. Res. 1*] (testimony of Steven Twist, General Counsel, NVCAN).

[11] *See Hearing on S.J. Res. 1*, *supra* note 10, at 227 (testimony of Steven Twist); *see also* GLENN, *supra* note 9, at 24.

[12] *See Hearing on S.J. Res. 1*, *supra* note 10, at 227 (testimony of Steven Twist).

[13] *See* 18 U.S.C.A. § 3771 (2005); ALA. CODE §§ 15-23-1 to -83 (1995); ALASKA STAT. § 18.66.100 (Michie 2004); ARIZ. REV. STAT. ANN. §§ 13-4401 to -4439 (West 2001); ARK. CODE ANN. §§ 16-90-1101 to -1115 (Michie 2003); CAL. PENAL CODE § 679.02 (Deering 2005); COLO. REV. STAT. ANN. §§ 24-4.1-100.1 to -304 (West 2001); CONN. GEN. STAT. ANN. § 51-286d (West 2005); DEL. CODE. ANN. tit. 11, §§ 9401–9419 (2001); FLA. STAT. ANN. §§ 960.001–.298 (West 2005); GA. CODE ANN. § 17-10-1.1 (2004); HAW. REV. STAT. § 351 (1993); IDAHO CODE § 19-5306 (Michie 2004); 725 ILL. COMP. STAT. ANN. 120/1–9 (West 2004); IND. CODE ANN. §§ 35-40-5-1-1 to 35-40-13-5 (Michie 2004); IOWA CODE §§ 915.10–.100 (2003); KAN. STAT. ANN. §§ 74-7301 to -7321 (2002); KY. REV. STAT. ANN. §§ 421.500–.576 (Michie 1992); LA. REV. STAT. ANN. § 46:1841–45 (West 2004); ME. REV. STAT. ANN. tit. 15, § 6101 (West 2003); MD. CRIM. PROC. CODE ANN. § 11-102 (2001); MASS. GEN. LAWS ch. 258B (1998); MICH. COMP. LAWS ANN. §§ 780.751–780.911 (West 1998); MINN. STAT. § 611A (2004); MISS. CODE ANN. §§ 99-43-1 to -49 (2000); MO. REV. STAT. §§ 595.010–.218 (2000); MONT. CODE ANN. §§ 53-9-101 to -33 (2003); NEB. REV. STAT. § 81-1848 (1999); NEV. REV. STAT. 33.015 (1957); N.H. REV. STAT. ANN. § 21-M:8-k (2001); N.J. STAT. ANN. § 2A:12-14 (West 2004); N.M. STAT. ANN. §§ 31-26-4 to -10 (Michie 1978); N.Y. CRIM. PROC. LAW § 440.50 (McKinney 2005); N.C. GEN. STAT. §§ 15B-1 to -25 (2003); N.D. CENT. CODE § 12.1-34-02 (1998); OHIO REV. CODE ANN. § 109.42 (West 2002); OKLA. STAT. ANN. tit. 21, §§ 142A–B (West 2004); OR. REV. STAT. §§ 147.405–.421 (2003); 18 PA. CONS. STAT. § 11.201 (1976); R.I. GEN. LAWS §§ 12-28-1 to -13 (2002); S.C. CODE ANN. § 24-22-90 (Law. Co-op. 2004); S.D.

two states have victims' rights constitutional amendments.[14] Many of the state statutes and constitutional amendments go beyond the limited right "to be present and to be heard" proposed by the President's Task Force,[15] and also included the rights to be: informed of the outcome of the case,[16] told when a court proceeding has been postponed, rescheduled or cancelled,[17] protected from intimidation,[18] informed of the procedure for receiving witness fees,[19] allowed to wait in a separate waiting area from the defendant,[20] provided a timely disposition of the case,[21] returned personal possessions as soon as possible,[22] and provided an intermediary to an employer to minimize the pay and benefits lost while participating in court proceedings.[23]

In 1995, the leaders of NVCAN decided that the time had arrived to move forward with a federal constitutional amendment.[24] Members of NVCAN approached Senator Jon Kyl (R-Ariz.) in the fall of 1995 and asked him to consider introducing a constitutional amendment for crime victims' rights.[25] Senator Kyl then asked Senator Dianne Feinstein (D- Cal.) to work with him in a bipartisan fashion, and, after lengthy deliberations, they reached an initial agreement on the language for such ân amendment.[26]

CODIFIED LAWS §§ 23A-28C-1 to -6 (Michie 2003); TENN. CODE. ANN. § 40-38-103 (2003); TEX. CRIM. PROC. CODE ANN. §§ 56.01–.64 (Vernon 2004); UTAH CODE ANN. § 77-27-9.5 (2003); VT. STAT. ANN. tit. 13, §§ 5301–5321 (2002); VA. CODE ANN. § 19.2-11.01 (Michie 2004); WASH. REV. CODE § 7.69.030 (2004); W. VA. CODE § 62-12-23 (2000); WIS. STAT. ANN. §§ 950.01–.11 (West 2004); WYO. STAT. ANN. § 7-21-102 (Michie 2003). For a thorough, although somewhat outdated breakdown of various victims' rights state-by-state, see DEBRA J. WILSON, THE COMPLETE BOOK OF VICTIMS' RIGHTS (1995).

[14] *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. XXIX, § b; FLA. CONST. art. I, § 16; IDAHO. CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13b; KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. CONST. art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, §§ 42, 43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m. Though Montana does not have a Victims' Rights Amendment per se, it did expand the purpose of its criminal justice system to include restitution to victims. *See* MONT. CONST. art. II, § 28. *See also* Victims' Rights Educational Project (VREP) Sites and Victims' Rights State-by-State, *at* http://www.nvcan.org/canmap.html (last visited Apr. 4, 2005).

[15] FINAL REPORT, *supra* note 6, at 14.

[16] *See, e.g.*, KAN. STAT. ANN. § 74–7333(a)(4) (2002); WASH. REV. CODE § 7.69.030 (2004).

[17] *See, e.g.*, FLA. STAT. ANN. § 960.001(1)(b)(5)(d) (West 2001); R.I. GEN. LAWS § 12-28-3(a)(4) (2002).

[18] *See, e.g.*, ARIZ. CONST. art. II § 2.1(A)(1); WYO. STAT. ANN. § 1-40-205 (Michie 2003).

[19] *See, e.g.*, ALA. CODE § 15-23-5 (1995); R.I. GEN. LAWS § 12-28-3(a)(g) (2002).

[20] *See, e.g.*, TENN. CODE ANN. § 40-38-102(b)(1) (2003); WIS. STAT. § 967.10(2) (2005).

[21] *See* MICH. CONST. art. I, § 24(1).

[22] *See, e.g.*, TENN. CODE ANN. § 40-38-106(1) (2004); WIS. STAT. § 950.04(1v)(s) (1997).

[23] *See, e.g.*, R.I. GEN. LAWS § 12-28-3(a)(7) (2002); UTAH CODE ANN. § 77-37-3(1)(g) (2003); *see also* GLENN, *supra* note 9, at 19.

[24] *See Hearing on S.J. Res. 1*, *supra* note 10, at 228 (testimony of Steven Twist).

[25] *See* GLENN, *supra* note 9, at 24.

[26] *See Hearing on S.J. Res. 1*, *supra* note 10, at 229 (testimony of Steven Twist).

On April 22, 1996, before the 104th Congress, Senators Kyl and Feinstein introduced Senate Joint Resolution 52 as the first federal constitutional amendment to protect the rights of crime victims.[27] The idea proved popular and they were soon joined by twenty-seven other Senators who cosponsored the resolution.[28] The Senate version contained eight basic elements: the right to notice of the proceedings; the right to be present at all proceedings at which the accused has the right to be present; the right to be heard at any sentencing proceeding; the right to notice of release or escape; the right to restitution; the right to a speedy trial; the right to reasonable victim protection; and the right to be notified of these rights.[29] In the House of Representatives, Henry Hyde (R-Ill.) introduced a similar resolution in House Joint Resolution 174.[30]

That year, both the Senate and the House Judiciary Committees held hearings on the respective proposals.[31] After taking into account comments that had been made at the hearings, Senators Kyl and Feinstein introduced a modified version of the amendment in the form of Senate Joint Resolution 65,[32] which added to the original rights the right of every victim to independent standing to assert the other rights established.[33] However, neither the Senate nor the House acted on the proposals before the 104th Congress adjourned.[34]

With the proposed amendment dead due to inactivity, on January 21, 1997, the opening day of the 105th Congress, Senators Kyl and Feinstein introduced another draft of the proposal,[35] which had thirty-two cosponsors.[36] After a hearing was once again held on the bill,[37] concerns expressed

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[27] S.J. Res. 52, 104th Cong. (1996). *See* 142 CONG. REC. 8336 (1996) (introducing the bill).

[28] *See* 142 CONG. REC. S6854 (daily ed. June 25, 1996); 142 CONG. REC. S7190 (daily ed. June 27, 1996); 142 CONG. REC. S7416 (daily ed. July 8, 1996); 142 CONG. REC. S7906 (daily ed. July 16, 1996); 142 CONG. REC. S9074 (daily ed. July 29, 1996); 142 CONG. REC. S9161 (daily ed. July 30, 1996); 142 CONG. REC. S9968 (daily ed. Sept. 5, 1996); 142 CONG. REC. S10609 (daily ed. Sept. 16, 1996).

[29] S.J. Res. 52, 104th Cong. § 1 (1996).

[30] H.J. Res. 174, 104th Cong. (1996). *See* 142 CONG. REC. H3657 (daily ed. Apr. 22, 1996) (introducing the bill).

[31] *See Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (Apr. 23, 1996); *Proposals for a Constitutional Amendment to Provide for Victims of Crime: Hearing Before the House Judiciary Comm.*, 104th Cong. (July 11, 1996).

[32] S.J. Res. 65, 104th Cong. (1996). *See* 142 CONG. REC. S11972 (daily ed. Sept. 30, 1996) (introducing the bill).

[33] *Id.* § 2.

[34] *See* 142 CONG. REC. S11,999 (daily ed. Sept. 30, 1996); 142 CONG. REC. S3796 (daily ed. Apr. 22, 1996); 142 CONG. REC. H3657 (daily ed. Apr. 22, 1996).

[35] S.J. Res. 6, 105th Cong. (1997). *See* 143 CONG. REC. S163 (daily ed. Jan. 21, 1997) (introducing the bill).

[36] This number does not include Senators Kyl and Feinstein. *See* 143 CONG. REC. S163 (daily ed. Jan. 21, 1997).

[37] *See Proposed Constitutional Amendment to Provide for Crime Victims' Rights: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (Apr. 16, 1997).

at the hearing were incorporated,[38] and on April 1, 1998, Senators Kyl and Feinstein introduced a new bill,[39] this time with thirty-nine cosponsors.[40] On July 7, 1998, the Senate Judiciary Committee approved the resolution by a vote of eleven to six.[41] The measure never received a vote by the full Senate.[42]

Continuing their efforts, Senators Kyl and Feinstein again introduced their project on the opening day of the 106th Congress.[43] After another hearing,[44] the Senate Judiciary Committee approved the resolution on September 30, 1999.[45] However, on April 27, 2000, after three days of debate on the floor of the Senate, it became apparent that opponents of the bill could sustain a filibuster to block the bill and Senators Kyl and Feinstein asked that further consideration of the amendment be halted.[46]

After the difficulties the amendment faced on the floor of the Senate, its sponsors attempted to address those issues raised by the critics. Senator Feinstein asked Steven Twist, a representative of the National Victims' Constitutional Amendment Project, and Harvard Law Professor Laurence Tribe to redraft the amendment.[47] A new draft[48] was completed in the fall of 2000.[49]

Senator Kyl introduced the most recent Victims' Rights Amendment on January 7, 2003, as Senate Joint Resolution 1.[50] That same day, Congressman Edward Royce (R-Cal.) proposed a similar bill in the House of Representatives, House Joint Resolution 10.[51] Lacking sufficient cosponsors in the House, the amendment was proposed again on April 10, 2003, by Congressman Steve Chabot (R-Ohio), as House Joint Resolution 48; this

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[38] *See* S. REP. NO. 108-191, at 5 (2003).

[39] S.J. Res. 44, 105th Cong. (1998). *See* 144 CONG. REC. S2698 (daily ed. Apr. 1, 1998) (introducing the bill).

[40] *See* 144 CONG. REC. S2698 (daily ed. Apr. 1, 1998); *see also* S. REP. NO. 108-191, at 5.

[41] *See* 144 CONG. REC. S7574 (daily ed. July 7, 1998); *see also* S. REP. NO. 108-191, at 5 (2003).

[42] *See* S. REP. NO. 108-191, at 5 (2003).

[43] S.J. Res. 3, 106th Cong. (1999). *See* 145 CONG. REC. S345 (daily ed. Jan. 19, 1999) (introducing the bill).

[44] *See Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 3 Before the Senate Comm. on the Judiciary*, 106th Cong. (Mar. 24, 1999); *see also* 145 CONG. REC. 3291 (daily ed. Sept. 30, 1999).

[45] *Id.*; *see also* S. REP. NO. 108-191, at 6 (2003).

[46] *See* 146 CONG. REC. S3037 (daily ed. Apr. 27, 2000); *see also Hearing on S.J. Res. 1*, *supra* note 10, at 230 (testimony of Steven Twist).

[47] *See Hearing on S.J. Res. 1*, *supra* note 10, at 230 (testimony of Steven Twist).

[48] The revised draft was presented to the White House and the Department of Justice in order to reach an agreement on the language. *Id.* at 231.

[49] *See id.*

[50] S.J. Res. 1, 108th Cong. (2003). *See* 149 CONG. REC. S37 (daily ed. Jan. 7, 2003) (introducing the bill); 149 CONG. REC. S82 (daily ed. Jan. 7, 2003) (showing Senator Kyl's remarks).

[51] H.J. Res. 10, 108th Cong. (2003). *See* 149 CONG. REC. H60 (daily ed. Jan. 7, 2003) (introducing the bill with two cosponsors).

time, the bill had a long list of cosponsors.[52] Both houses of Congress referred their resolutions to their respective judiciary committees.[53]

The Senate version of the Victims' Rights Amendment received a full Senate Judiciary Committee hearing on April 8, 2003[54] and was approved by the Committee on September 4, 2003.[55] Approximately two months later, Senator Orrin Hatch (R-Utah), then chairman of the Judiciary Committee, filed a full written report on the proposal.[56] After a period of inactivity, on April 20, 2004, a motion to proceed to consideration of the measure was made in the Senate.[57] That same day a cloture motion to the measure was presented in the Senate, only to have the motion to proceed to consideration of measure withdrawn.[58] Since that day, no further consideration has been made on the bill.

The text of the proposed Victims' Rights Amendment[59] is significantly longer and confers more rights than the original single-sentence proposal of the Task Force.[60] Section 1 of the proposed amendment has three parts. The first, and most significant clause, states the general purpose of the amendment: to establish the rights of victims of violent crime.[61] The amendment's limited applicability to victims of only violent crime is narrower than that proposed by the Task Force, which sought to protect victims in every criminal prosecution.[62] As will be discussed below, some opponents of the measure complain that this term is not adequately defined, while others protest that the category is not broad enough.[63] Second, this section establishes the premise that the rights of victims are "capable of protection without denying the constitutional rights of those accused of victim-

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[52] H.J. Res. 48, 108th Cong. (2003). *See* 149 CONG. REC. H3303–04 (daily ed. Apr. 10, 2003) (introducing the bill with fifteen cosponsors).

[53] *See* 149 CONG. REC. S37 (daily ed. Jan. 7, 2003); 149 CONG. REC. H3304 (daily ed. Apr. 10, 2003).

[54] *See Hearing on S.J. Res. 1, supra* note 10.

[55] *See* 149 CONG. REC. S11117 (daily ed. Sept. 4, 2003).

[56] *See* S. REP. NO. 108-191 (2003) (laying out the purposes, background and legislative history, the need for constitutional protection, the specific rights envisioned, a section-by-section analysis, vote of the committee, cost estimate, regulation impact statement and additional minority views).

[57] *See* 150 CONG. REC. S4150 (daily ed. Apr. 20, 2004) (motion by Senator Crapo (R-Idaho)).

[58] *See id.*

[59] For this textual analysis, Senate Joint Resolution 1 will be used, since it is the most recent version of the amendment and it is similar to the text of the language of House Joint Resolution 48. *Compare* H.J. Res. 48 108th Cong. (2003) *with* S.J. Res. 1, 108th Cong. (2003).

[60] *Compare* S.J. Res. 1, 108th Cong. (2003) (303 words) *with* FINAL REPORT, *supra* note 6, at 114 (25 words).

[61] S.J. Res. 1, 108th Cong. § 1 (2003).

[62] *See* FINAL REPORT, *supra* note 6, at 114. For a thorough discussion of the definition of a "victim" in various federal and state constitutional and statutory provisions, see DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 41–44 (1999); PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 14–16 (2001).

[63] *See infra* text accompanying notes 145–151.

izing them"[64]—thus confronting an issue that the authors knew would be an area of concern, based on their experiences with the previous versions of the amendment.[65] Finally, the first section limits the restrictions on these rights to those that are provided in the remainder of the amendment.[66]

The second section sets out the actual substantive rights of the victim. These rights include reasonable and timely notice, which encompass notice of any public proceeding involving the crime, as well as notice of the release or escape of the accused.[67] The victim of violent crime also has the right not to be excluded from public proceedings.[68] Interestingly, this right is phrased in the negative as the right not to be excluded, rather than as a positive right to access. Yet the section does provide explicit affirmative rights, such as the right "reasonably to be heard" at specified intervals: public release, plea, sentencing, reprieve, and pardon proceedings.[69] The use here of the modifier "reasonably" provides room for judges to be flexible in considering circumstances that the framers of the proposed amendment may not have specifically envisioned, but which might make the victim's right to be heard unreasonable.[70] Section 2 also provides the victim of violent crime with the right to adjudicative decisions that consider the victim's safety,[71] though it does not specify whether such consideration should be given during sentencing or after a defendant has finished serving his sentence.

The adjudicative decisions must also consider the victim's interest in avoiding unreasonable delay.[72] However, it is not apparent how this provision will affect the right of a criminal defendant to a full and complete defense. Although criminal defendants have a constitutionally protected right to a speedy trial,[73] this right often comes into conflict with the also constitutionally protected right of every person not to be deprived of liberty without due process of law,[74] as due process can be extremely time

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[64] S.J. Res. 1, 108th Cong. § 1 (2003).

[65] *See* S. REP. NO. 105-409, at 64–68 (1998) (minority views of Sens. Leahy, Kennedy and Kohl) (arguing that the proposed amendment without such language would harm the constitutional rights of the accused). Earlier versions of the amendment did not have this language. *Compare* S.J. Res. 1, 108th Cong. § 1 (2003) *with* S.J. Res. 52, 104th Cong. (1996) *and* S.J. Res. 44, 105th Cong. (1998). During the mark-up to S.J. Res. 44, the language "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution" was used, but it was rejected by a ten to six vote. Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., at 109–11 (July 7, 1998).

[66] S.J. Res. 1, 108th Cong. § 1 (2003).

[67] *Id.* § 2.

[68] *Id.*

[69] *Id.*

[70] For example, the sheer number of victims of September 11, 2001, would render impractical the right of every victim to be heard. *See infra* text accompanying notes 142–144.

[71] S.J. Res. 1, 108th Cong. § 2 (2003).

[72] *Id.*

[73] U.S. CONST. amend. VI.

[74] U.S. CONST. amends. V, XIV.

consuming.[75] If these competing rights must also be balanced with a victim's interest in avoiding unreasonable delay, judges may have difficulty ruling when the criminal defendant claims that delay is necessary for due process, but the victim asserts that such delay is unreasonable. Similarly, the victim's right to avoid delay may also compete with a prosecutor's desire for postponement to generate extra time for trial preparation; the enforcement of the victim's right could force prosecutors to try cases before they are fully prepared.[76]

Aside from preventing unreasonable delay, the section provides the victim of violent crime with the right to seek a just and timely claim for restitution from the offender.[77] In its listing of these substantive rights, Section 2 goes significantly beyond the original intent of the Task Force's proposal to give victims the constitutional right to attend hearings and to be heard.[78]

However, the final part of Section 2 provides for some restriction of these substantive rights. The rights may be limited, but only to the degree necessitated by a substantial interest in public safety, the administration of criminal justice, or compelling necessity.[79] This restriction clause is fairly broad, allowing a judge or administrator seeking to reign in victims' rights to simply cite the administration of criminal justice or some generic "compelling necessity" as justification for doing so.

Section 3 specifies that the act should not be interpreted to provide grounds for a new trial or claims for damages by the defendant.[80] The trial provision is clearly present in order to prevent the criminal defendant from obtaining a new trial on the sole ground that the victim's rights were violated. The damages provision expands upon this idea by emphasizing that not only may the person accused of the crime not benefit by obtaining a new trial, but that he or she may not obtain any form of relief whatsoever.[81] Finally, the third section provides that only the victim or the victim's lawful representative may assert the rights established in the amend-ment.[82]

Section 4 discusses the relationship of this amendment, otherwise predominantly affecting the judicial branch, to the other branches of government. It provides that Congress has the power to enforce the provisions of

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[75] *See* S. REP. NO. 108-191, at 86 (2003) (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin).

[76] *See id.* at 78 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin).

[77] *Id.* For more information on the history of restitution in the United States, see Susan Hillenbrand, *Restitution and Victim Rights in the 1980's*, *in* 25 VICTIMS OF CRIME PROBLEMS, POLICIES, AND PROGRAMS, 188–204 (Arthur J. Lurigio, et al. eds., 1990).

[78] *See* FINAL REPORT, *supra* note 6, at 114–15.

[79] S.J. Res. 1, 108th Cong. § 2 (2003).

[80] *Id.* § 3.

[81] *Id.*

[82] *Id.*

the article through legislation.[83] Further, it clarifies that the proposed amendment does not affect the President's authority to grant pardons or reprieves.[84]

Most of the debate surrounding the Victims' Rights Amendment takes place at two levels. First, there exists a substantive debate regarding the particular provisions of the amendment, and whether victims should be given these specifically enumerated rights. Second, there is a debate regarding whether the rights, aside from their normative value, would be better achieved by means of a combination of state statutes, state constitutional amendments and federal statutes.

Throughout the debate over the relative merits and flaws of the substantive provisions, proponents of the amendment marshal the emotional elements in their favor, likely hoping that it will be very difficult for a senator or a representative to criticize the amendment in the face of heart-wrenching stories. At a 2003 Senate Judiciary Committee hearing on the topic, many audience members became emotional during the testimony of victims,[85] and were moved to tears.[86] The commingling of the emotional appeal with the rational provisions of the amendment presents a political challenge because it is difficult for politicians to justify opposition to a bill that promotes the rights of a sympathetic group.[87]

The persuasive power of the victims' personal stories lay in the unique pain and loss suffered first because of the crime, and subsequently because of poor treatment of the victim within the criminal justice system. One of the witnesses at the Senate hearing told the dramatic story of the gruesome death of her sixteen-year-old son, and the injustices she faced in the proceedings that followed, including not being told of the death of her son by the authorities, informed of her rights or the charges filed, given adequate notice of changes in court dates or an opportunity to attend the sentencing despite the extenuating circumstance that it was scheduled for the day after September 11, 2001, and the airports were closed.[88] Another witness explained how his wife was shot a few months before their fiftieth anniversary, and how his impact statement to the jury was limited by the Court,

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[83] *See id.* § 4.

[84] *Id.* The last section of the Amendment, Section 5, sets out ratification procedures, including a seven-year deadline for ratification after submission to the states. *Id.* § 5.

[85] *See Hearing on S.J. Res. 1*, *supra* note 10, at 21–22, 23–24, 29–31 (testimonies of Collene Campbell, Earlene Eason, and Duane Lynn).

[86] *See Hearing on S.J. Res. 1*, *supra* note 10. Author was present at the hearing.

[87] *See Rights and Wrongs for Victims*, WASH. POST., Apr. 23, 2003, at A34 (pointing out difficulty of speaking against victims); *see also No Need to Add to Bill of Rights*, ROCKY MT. NEWS, Apr. 25, 2003, at 52A (posing the question: What politician does not want to be able to show voters a commitment to helping crime victims?). Of course, even opponents of the proposed amendment are not necessarily against victims' rights; rather, they simply disagree as to whether this is the best way to guarantee those rights without jeopardizing other crucial public interests. S. REP. No. 108-191, at 52 (2003) (additional views of Sens. Leahy and Kennedy, agreeing that crime victims deserve enforceable rights, but questioning the means of assuring such rights).

[88] *See Hearing on S.J. Res. 1*, *supra* note 10, at 23–24 (testimony of Earlene Eason).

which barred him from expressing how he wanted the perpetrator to be sentenced.[89] A third witness related how she had experienced multiple tragedies due to crime, first losing her son to a gruesome death in which her son was strangled on an airplane and then thrown from it, and then kept from the trial of the men accused of murdering him.[90] When she lost her only brother twenty years later to a random shooting, she was similarly told she could not attend the trial of those accused.[91]

Despite the emotional impact of these accounts, this type of testimony fails to make a connection between problems and possible solutions. All of these stories build a poignant case that there are problems with the way crime victims are treated in the current system. However, they do not address how the proposed constitutional amendment will fix these problems. Since the proposed amendment would only give Earlene Eason, and those like her, the right not to be excluded from public proceedings, that she was not able to attend the hearing due to September 11 airport closures would not constitute a violation of her rights, since she would have no affirmative right to be present. Similarly, nothing in the proposed amendment would necessarily give Duane Lynn the right to express his preference for a life sentence. Though he would have the right to reasonably be heard at the sentencing, this right was not infringed on at the time: he was heard, but he was just limited in his scope, an outcome which might still occur under the "reasonably" modifier of the proposed amendment. On the other hand, the proposed amendment may be able to address the complaints of victims like Collene Campbell. Yet the fact that her particular exceptional tragedy would be resolved does not suggest the usefulness of this kind of testimony generally.

Proponents of the amendment do not rely on emotion alone because they must overcome specific arguments over provisions by doubters. The criticisms are many, but can be divided into roughly four categories: efficiency arguments, opposition to victim participation generally, concerns over possible infringements on rights of the accused, and definitional problems or language ambiguities.

The efficiency arguments center on the effects of the amendment at various stages in the criminal justice process. Proponents have no blanket response, and instead must minimize the extent of each efficiency attack. For example, some opponents have expressed concerns that the amendment would dampen the ability of prosecutors to obtain timely convictions.[92]

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[89] *See id.* at 29–31 (testimony of Duane Lynn) (though he preferred a life sentence, the jury gave the death penalty).

[90] *See id.* at 21–22 (testimony of Collene Campbell).

[91] *See* S. REP. NO. 108-191, at 9 (2003).

[92] *See, e.g.*, Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 236 (Robert C Davis et al. eds., 2d ed. 1997); Letter from Law Professors Regarding the Proposed Victims' Rights Constitutional Amendment (Apr. 15, 1997), *in* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 717 (1999).

However, Viet Dinh, at the time the assistant attorney general for the Department of Justice, stated in his congressional testimony that he believed that the proposed amendment would not hinder attempts by prosecutors to get such convictions.[93] Furthermore, research in jurisdictions which allow victim participation shows that including victims in the criminal justice process does not cause delays and that few court officials believe that increasing victims' rights will exacerbate problems or slow down proceedings.[94]

Opponents complement their efficiency argument concerning prosecutorial inability to obtain convictions by similarly arguing that victims' rights may hamper the plea bargaining process.[95] Since nearly ninety percent of federal criminal cases are currently resolved by plea agreement,[96] letting a victim block a plea agreement would require a trial, remove a prosecutor's best tool for inducing cooperation by lesser offenders to testify against more serious criminals, and tie the prosecutor's office "in knots" by forcing them to prosecute more cases than they may have the resources to adequately undertake.[97] However, National Victim Center Assistant Director for Legislative Services Susan Howley points out that the amendment neither permits victims to block plea bargains nor affords victims the right to confer with the prosecutor.[98] Rather, it allows them only to address the court regarding plea bargains.[99] Furthermore, Howley reports that states that have provided victims with similar rights to appear and reasonably be heard in plea proceedings have not registered any delays in the system.[100]

Other efficiency arguments focus on the notice requirements, which may require corrections authorities to identify, locate, and notify victims of decades-old crimes every time any proceeding involving an offender occurs.[101] Given the large number of people incarcerated, this undertaking could be extremely onerous and costly. However, Howley notes that expanded notification would only affect victims of violent crimes,[102] which is a smaller subset of the general victim population.[103] Furthermore, most

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[93] *See Hearing on S.J. Res. 1*, *supra* note 10, at 12 (testimony of Hon. Viet Dinh, Assistant Attorney General, U.S. Dep't of Justice, Office of Legal Policy).

[94] *See* Kelly & Erez, *supra* note 92, at 237 (citing research studies conducted both in 1979 and 1994 on the impact of victim participation).

[95] *See* S. REP. NO. 108-191, at 74 (2003). For a discussion of the role of victims in plea-bargaining in the States, see Deborah P. Kelly, *Victim Participation in the Criminal Justice System*, *in* 25 VICTIMS OF CRIME, PROBLEMS, POLICIES, AND PROGRAMS 172, 176–77 (Arthur J. Lurigio et al. eds., 1990). *See also* TOBOLOWSKY, *supra* note 62, at 67–80.

[96] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(c), at 6 (2002).

[97] Scott Wallace, *Mangling the Constitution: The Folly of the Victims' Rights Amendment*, WASH. POST, June 28, 1996, at A21.

[98] *See* TOBOLOWSKY, *supra* note 62, at 68.

[99] *See* GLENN, *supra* note 9, at 26.

[100] *See id.*

[101] *See* Wallace, *supra* note 97.

[102] *See* GLENN, *supra* note 9, at 27.

[103] The proposed amendment is unclear as to exactly what kind of victims would be in-

victims' rights laws already require victims to request notification of proceedings and to keep their address and phone numbers up to date; thus, measures are possible that would make locating victims less difficult.[104] The requirement of "reasonable notice" suggests that officials would be excused from the requirement for those victims who had not provided such information. Indeed, the committee report for the proposed amendment advises that it would be reasonable to require victims to keep this information up-to-date in order to receive notice,[105] though courts would not be bound by this interpretation.

Moreover, despite the language in Section 3 that "nothing in this article shall be construed to . . . authorize any claim for damages,"[106] uneasiness remains that victims whose rights were violated will be able to file claims for declaratory judgments or injunctions, or pursue fines for contempt against public officials who fail to notify them or otherwise violate their constitutional rights.[107] Indeed, the congressional report supporting the amendment suggests that this restriction may not be as absolute as it sounds, as the amendment does not preclude damages established by other legislation or limit remedies within the criminal process.[108] At the very least, the victims' lawyers could receive compensation under statutes allowing reasonable attorneys' fees in suits to protect constitutional rights.[109] This situation could lead both to increased litigation and to systemic inefficiency. Ultimately, the language in Section 3 is crucial for both sides. Insofar as it would permit remedies that undermine the criminal justice system, it harms the interest of the victims in seeing offenders convicted and punished.[110] Yet, to the extent that it creates rights with no remedy, it creates empty promises and undermines confidence in the U.S. Constitution.[111]

Another efficiency concern involving the potential costs of the Victims' Rights Amendment is that the amendment would be yet another unfunded mandate by the government.[112] As argued by Senator Patrick Leahy (D-Vt.), "Insofar as the amendment makes victims promises that we lack the ability, or the political will, to turn into practical realities, we should reject it.

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cluded under the definition of "victims of violent crime." S.J. Res. 1, 108th Cong. § 1 (2003). However, according to Bureau of Justice statistics, which do not include murder victims, in 2002 there were approximately 5.5 million victims of violent crime, compared to 23.6 million total victims (approximately 24.8%). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN NCJ 199994, CRIMINAL VICTIMIZATION, at 3 (2002).

[104] *See* GLENN, *supra* note 9, at 27.

[105] *See* S. REP. NO. 108-191, at 34 (2003).

[106] S.J. Res. 1, 108th Cong. § 3 (2003).

[107] *See* Wallace, *supra* note 97.

[108] *See* S. REP. NO. 108-191, at 42 (2003).

[109] *See* Wallace, *supra* note 97.

[110] *See* S. REP. NO. 108-191, at 104 (2003) (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin).

[111] *See id.*

[112] In 1995, Congress expressed its desire "to curb the practice of imposing unfunded Federal mandates on States and local governments." Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

Otherwise, we will just be tacking on to the Constitution what Shakespeare called 'words, full of sound and fury, signifying nothing.'"[113] Senator Leahy's concern is an important one, particularly because the Victims' Rights Amendment does not delineate the source of funding for its requirements. Proponents of the amendment dispute this assessment, arguing that the amendment would have a minimal impact on the federal budget since crimes of violence rarely are federally prosecuted.[114] However, this rejoinder does little to explain who will bear the costs for state compliance with the amendment, ultimately suggesting that this amendment may be an unfunded mandate on the states.

Aside from these efficiency arguments, proponents must also address those opponents who harbor concerns regarding victim participation in the criminal justice system.[115] Though it was only in 1983 that Alabama became the first state to allow victims to be present in any critical stage of the judicial process,[116] the resistance to victim participation has lessened.[117] Most of the lingering concerns focus on specific victim participation rights rather than victim participation generally.[118]

Opponents raise concerns with victim participation in all phases of the criminal justice process. They argue that victim participation exposes the court to public pressure and substitutes the victim's subjective approach for the objective approach of the court.[119] They argue further that victim participation undermines the fairness of the system because similar cases might be decided differently, depending on the victim's availability and persuasiveness.[120] Similarly, opponents argue that the victim's view of sentencing is irrelevant and likely to be highly prejudicial.[121] Patricia Perry, whose son was killed in the September 11 attacks, testified in opposition to the amendment, expressing the inherent difficulty in allowing victim participation in the criminal justice process: "Victims and family members are not dispassionate. We are angry, depressed, and mourning. As families, we have a torrent of emotions that are not useful in preparing a legal case."[122]

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[113] *Hearing on S.J. Res. 1*, *supra* note 10, at 7 (statement of Senator Patrick Leahy, Ranking Member, Senate Judiciary Comm.), *available at* http://leahy.senate.gov/press/200304/040803.html (last visited Mar. 23, 2005) (quoting WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5).

[114] *See* S. REP. NO. 108-191, at 47 (2003).

[115] *See* Kelly & Erez, *supra* note 92, at 233; *see also* Kelly, *supra* note 95, at 176–77.

[116] ALA. CODE §§ 15-14-50 to 15-14-57 (2005); *see also* Kelly & Erez, *supra* note 92, at 233.

[117] *See* Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289 (1999) (arguing that the law now acknowledges the importance of victim participation in the criminal process).

[118] *See, e.g.*, *supra* text accompanying notes 95–97 (discussing concerns with victim participation in plea bargaining).

[119] *See* Kelly & Erez, *supra* note 92, at 236–37.

[120] *See id.*

[121] *See id.*

[122] *Hearing on S.J. Res. 1*, *supra* note 10, at 181 (testimony of Patricia Perry).

Victim participation in sentencing may also be problematic if it erodes prosecutorial control over cases and the predictability of outcomes when prosecutorial sentencing recommendations are disregarded.[123] Since criminal law already accounts for the harm done to the victim through the statutory definitions of crimes and their associated punishments, unforeseen victim hardships should be excluded from the sentencing calculation.[124] Further, opponents dispute the benefit of victim participation for the victims themselves, as it can create false expectations that can be painful for the victims if their opinions are ignored by the court.[125]

To address such resistance, proponents rely on a broad class of arguments in favor of victim participation which recognize symbiotic benefits to both the victim and the system itself. Victim participation benefits victims by acknowledging the victim's wishes to be treated with dignity; promoting psychological healing; and reminding judges, juries, and prosecutors that behind the state's case is a real person with a real interest in the case's resolution.[126] But, proponents argue that the judicial system itself also benefits from the recognition of these rights. For example, they argue that sentencing is more accurate if victims can convey their feelings[127]—that such participation renders the criminal justice system not only more democratic, but also more accurately reflective of the community's reaction to specific crimes.[128] Finally, victim participation leads to increased victim satisfaction and thus promotes cooperation with the criminal justice system, which, in turn, enhances the system's efficiency by making it more likely that victims will come forward in the future.[129] Other arguments appeal to fairness, claiming that if the offender's family and friends can be heard, it follows that the people injured should be allowed to speak as well.[130] Additionally, proponents claim that victim participation may promote rehabilitation by forcing offenders to face their victims.[131]

The realities of victim participation prompt the next round of criticism, which generally poses the gravest problem for the proposed amendment: that it could violate defendants' rights to due process.[132] While victims

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[123] *See* Kelly & Erez, *supra* note 92, at 236–37.

[124] *See id.*

[125] *See id.*

[126] *See id.* at 236.

[127] *See* Beloof, *supra* note 117, at 321–22.

[128] *See* Howard C. Rubel, *Victim Participation in Sentencing Proceedings*, 28 CRIM. L. Q. 226, 231–32 (1986).

[129] *See* Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL., 501, 506 (1986).

[130] *See* Kelly & Erez, *supra* note 92, at 236.

[131] *See id.*

[132] *See, e.g.*, S. REP. No. 108-191, at 84–86 (2003); Christopher R. Goddu, *Victims' "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 255–66 (1993) (arguing that the numerous programs for victim protection and participation have eroded defendants' Sixth Amendment rights to a fair trial and an impartial jury); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1694 (1997).

testified before the Senate Judiciary Committee, as did the Department of Justice on behalf of prosecutors, no specific representative advocated for the rights of criminal defendants.[133] Although Assistant Attorney General Dinh maintained that the rights of defendants would be upheld,[134] federal prosecutors are not in the best position to ensure the rights of individual criminal defendants.

Yet, rights for criminal defendants must be maintained if victims are allowed to play a more active role in criminal trials. In their desire to exact revenge and obtain closure, victims of crimes may blindly believe in the guilt of the accused and may become unable to consider facts in a rational manner.[135] If unchecked, the injection of the victim into the legal process could undermine the rights of the accused.[136] This danger reflects why the jury, rather than a group of victims, has the power to determine guilt or innocence.[137] Though the Task Force, in its original proposal, noted that it did not want "to vitiate the safeguards that shelter anyone accused of crime"[138] and though this goal was echoed in Section 1 of the proposed amendment,[139] it remains unclear whether rights can be given to victims without undermining the constitutional rights of the accused.[140]

Finally, the amendment's ambiguities in definitions and language provoke implementation concerns. For example, proponents of the amendment have failed to address the issue of how to define "crime victim." The amendment discusses the rights of victims of violent crime, but nowhere does it define the people included in that class.[141] In the case of a robbery, for example, it is fairly clear that the victim is the person robbed. However, other crimes, such as murder, complicate the question.[142] Presumably, the victim's family is also a victim in a murder case; however, how far does the family connection go? Does anyone related to the victim have the right to appear in court? Only immediate family? What about close friends? What about step-families? In today's world of complex family and other intimate

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[133] *See Hearing on S.J. Res. 1*, *supra* note 10.

[134] *See id.* at 99 (testimony of Hon. Viet Dinh).

[135] *See id.* at 181–82 (testimony of Patricia Perry) ("[Victims] usually lack expertise and have a desire for vengeance that we claim is the need for justice. We are likely to quickly claim that an accused is guilty in our need to satisfy our loss and grief.").

[136] *See* James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 90 (1987) ("By constitutionally emphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel, the victims' rights amendment represents a dangerous return to the private blood feud mentality").

[137] Indeed, defense counsel often excludes past victims of similar crimes from juries. *See, e.g.*, People v. Macioce, 242 Cal. Rptr. 771, 781–82 (Ct. App. 1987) (accepting peremptory challenges of crime victims who may be biased).

[138] FINAL REPORT, *supra* note 6, at 114.

[139] *See* S.J. Res. 1, 108th Cong. § 1 (2003).

[140] *See infra* text accompanying notes 177–189 (examining this question further).

[141] *See* S.J. Res. 1, 108th Cong. (2003).

[142] *See* S. REP. NO. 108-191, at 95–97 (2003). (explaining many complex relationships that may or may not be covered as "victims" under the proposed amendment).

relationships, the boundaries are unclear as to who will benefit from victim classification.[143]

An even more precarious definition problem arises with regard to major criminal disasters such as September 11. How is the court to uphold the rights of the victims in those cases where there are thousands of victims? How is the court to decide who has the right to be present or heard? What if the victims do not agree?[144] While the proposed amendment does allow the judge to waive the right of all victims to be heard, it does not explain how in the event of a "compelling necessity" the judge may waive the rights of certain families while simultaneously granting the rights to similarly situated families without violating the Constitution.

On the other extreme of this definitional debate are those who argue that the definition of "victim" is not sufficiently inclusive. Even proponents of the amendment have expressed this concern, such as Senator Orrin Hatch (R-Utah),[145] who revealed his skepticism "as to whether we should create a constitutional distinction that grants greater rights to the victims of violent crime than the victims of non-violent crime, such as a financial fraud that wiped out a lifetime of savings."[146] Proponents had made this change as a compromise to address previous concerns: "In a perfect world[,] the amendment would extend to victims of all crimes. Nonetheless, we have acceded to the insistence of others that the amendment be limited in this fashion because we believe strongly that the rights proposed, once adopted, will benefit all crime victims."[147] In so doing, the supporters admit that the amendment is not optimally comprehensive because it merely benefits the victims of "violent" crime, yet proponents still believe that conferring any rights at all in this area will bring about an "era of cultural reform" that will help all victims.[148]

Judges interpreting this constitutional amendment may read this specific inclusion of victims of violent crime as an indication that other victims of crime were intentionally excluded and therefore not meant to possess comparable rights. Though proponents argue that judges will be able to interpret "violent crime" in a very broad sense to include many crimes that would not necessarily traditionally be considered "violent," such as burglary,[149] even this broad construction—assuming the exercise of broad judi-

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[143] *See id.*

[144] *See Hearing on S.J. Res. 1, supra* note 10, at 182 (testimony of Patricia Perry) ("In the case of the tragedy on September 11 there were thousands of deaths and tens of thousands of victims. And, as we have seen in the aftermath of this tragedy and others, victims do not always agree on the best way a case should be handled.").

[145] Senator Hatch was either the chair or minority ranking member of the Senate Judiciary Committee when all of the various Victim's Rights Amendments were proposed. *See* United States Committee on the Judiciary, The Chairman, *at* http://www.judiciary.senate.gov/chairman.cfm (last visited Mar. 30, 2005).

[146] *Hearing on S.J. Res. 1, supra* note 10, at 116 (statement of Sen. Orrin Hatch).

[147] *Id.* at 239 (testimony of Steven Twist).

[148] *Id.*

[149] *See* S. REP. NO. 108-191, at 31 (2003).

cial discretion—would still not include many types of crime, such as Senator Hatch's example of fraud. Additionally, some argue that the bill's language that extends rights only to victims of violent crimes, without reference to public official crime (POC), may run afoul of the United Nations Charter[150] by failing to provide claims, rights, or remedies to POC victims.[151] Definitional problems such as these occur generally throughout the proposed text.[152]

Proponents of the amendment try to circumvent the definitional failures of the amendment by interpreting these terms through the committee report. For example, the report suggests that to define the term "crime victim," states can enact their own definitions.[153] However, the report's comments are merely persuasive and are not binding on the courts. If proponents of the amendment wanted to clarify the amendment's definitions, they would need to do so in the amendment itself. Otherwise, the courts may look not to the committee report, but first to the text of the amendment, and then to common understandings when defining terms.[154] Their conclusions may or may not coincide with the intentions of the committee.[155]

Judicial interpretation of the amendment is further complicated by differences in language from previous versions of the bill. The concern is that a judge will interpret any change from specific to ambiguous language as a strategic change on the part of the drafters because "when legislation contains ambiguous language, most judges will resolve the ambiguity in part by looking at the legislative history and in part by applying certain assumptions about legislative intent."[156] Several language changes might

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[150] U.N. CHARTER art. 2, para. 4; G.A. Res. 34, U.N. GAOR, 40th Sess., 96th plen. mtg., Annex 1, Agenda Items 8, 11, U.N. Doc. A/RES/40/34 (1985).

[151] *See* Michael K. Browne, *International Victims' Rights Law: What can be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of a "Victim's Rights Amendment" to Its Constitution?*, 27 HAMLINE L. REV. 15, 42 (2004). If this is the case, definitional weaknesses could lead to inadvertent violation of international law, another negative outcome of language oversights.

[152] *See* S. REP. NO. 108-191, at 94–108 (2003) (pointing out the interpretive problems with terms such as "victim," "violent crime," "reasonable and timely notice," "public proceeding," "adjudicative decisions" and "restricted").

[153] *See id.* at 30.

[154] *See* S. REP. NO. 108-191, at 56–57 (2003) (arguing that the attempts of the majority to solve the problems with the amendment through explanations in the report will not work, as they will be ignored by the court in favor of alternative interpretive tools). *See, e.g.*, In re Sinclair, 870 F.2d 1340 (7th Cir. 1989) (establishing plain meaning rule); Elizabeth A. Liess, Comment, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568 (analyzing Justice Scalia's objections to using legislative history in statutory interpretation). *See generally* Peter C. Schanck, *The Only Game in Town: Contemporary Interpretive Theory, Statutory Construction, and Legislative Histories*, 82 LAW LIBR. J. 419 (1990) (explaining and critiquing four methods of statutory interpretation).

[155] *See* S. REP. NO. 108-191, at 56–57 (2003).

[156] *Hearing on S.J. Res. 1*, *supra* note 10, at 158–59 (testimony of James Orenstein, U.S. Magistrate Judge). *See also* Schanck, *supra* note 154.

be affected. For example, the most recent version of the amendment did not contain an explicit prohibition preventing a court from either reopening a proceeding or invalidating a ruling to remedy a violation of a victim's right to participate,[157] a provision that was contained in a previous version of the bill.[158] If a court interprets this change as a deliberate one, "any ambiguity on the issue must . . . be resolved in favor of allowing such remedies—remedies that could well harm the prosecution's efforts to convict an offender."[159]

Another specific language change renders seemingly innocuous language potentially harmful in the "restrictions" clause. The most recent proposal allows victims' rights to be restricted "to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."[160] The purpose of this section is to provide flexibility in specific cases for the judge to use his or her discretion.[161] However, Magistrate Judge James Orenstein suggests that the use of the word "restrictions," when contrasted with the use of the term "exceptions" in previous versions, will lead the courts to interpret the meaning of "restrictions" as "a limitation on the way the right is to be afforded in a particular situation rather than an outright denial."[162] The provision designed as a sensible loophole thus becomes less effective, in comparison with earlier versions of the text, than it initially appears standing alone.

Language changes also muddy the implementation of the right of victims to be heard. An earlier version of the bill gave a victim the right "to be heard, if present, and to submit a statement" at public proceedings,[163] whereas the more recent version provides a right "reasonably to be heard" at the proceedings.[164] Judge Orenstein argues, "[w]hile the drafters may have intended no substantive difference, I believe that the courts will interpret the change in language to signal the opposite intention."[165] Specifically, Judge Orenstein is concerned that courts will interpret the deletion of the phrase "submit a statement" as a signal of legislative intent to allow victims actually to be "heard" through an oral statement.[166] If a judge thinks that the victim's statement must be heard orally, then a burden might be placed on the court to ensure not only that notice of the proceedings is provided, but also that the victim can actually attend all such hearings. This may

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[157] *See* S.J. Res. 1, 108th Cong. (2003).

[158] *See* S.J. Res. 3, 106th Cong. § 2 (1999).

[159] *Hearing on S.J. Res. 1*, *supra* note 10, at 159 (testimony of James Orenstein). Alternatively, such an interpretation could violate the defendant's Sixth Amendment right to a speedy trial. *See* U.S. CONST. amend. VI.

[160] S.J. Res. 1, 108th Cong. § 2 (2003).

[161] *See* S. REP. NO. 108-191, at 41 (2003).

[162] *See Hearing on S.J. Res. 1*, *supra* note 10, at 160 (testimony of James Orenstein).

[163] S.J. Res. 3, 106th Cong. § 1 (1999).

[164] S.J. Res. 1, 108th Cong. § 2 (2003).

[165] *Hearing on S.J. Res. 1*, *supra* note 10, at 161 (testimony of James Orenstein).

[166] *Id.*

imply that the victim is guaranteed that "the government will take affirmative steps, if necessary, to provide such a reasonable opportunity."[167] Proponents have not sufficiently addressed the concerns that judges might interpret the amendment according to textual changes made from earlier versions.[168]

The second major category of arguments deals less with specific provisions of the amendment, instead debating the need for a constitutional amendment as the medium through which to best provide rights to victims of crime. Of course, in arguing that there is no need for a constitutional amendment, opponents of the amendment point to the textual concerns already discussed, which, in their views, have not been addressed sufficiently. Opponents supplement the textual argument by asserting that given the hallowed nature of the Constitution and the difficulties of amending it, there should be extreme skepticism that the benefits of the proposed amendment will outweigh the dangers of its faults.[169] They argue that it should be the duty of the amendment's proponents to demonstrate why there is an affirmative need to have the amendment, according to Senator Leahy's stated principle that "if it ain't broke, don't fix it."[170]

The Task Force attempted to justify such a need in its Final Report, stating that "[t]he fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action."[171] To bolster this justification, proponents offer four types of arguments in favor of amendment: symbolism, efficacy, uniformity, and permanence. As will be discussed, and as opponents argue, an amendment is not necessarily the best platform for achieving these goals.

Like they do amid the debate concerning the substantive issues of the amendment, proponents are quick to rally the emotional argument. They argue that, symbolically, victims need to know that their rights are as important as the rights of the accused,[172] and the only way to make this possible

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[167] *Id.*

[168] *See* S. REP. No. 108-191, at 30–43 (2003) (providing a textual analysis of the amendment, without addressing problems of language changes). For example, in discussing how courts will interpret the term "violent crime," the proponents suggest the court should look to the Federal Rules of Criminal Procedure, case law, and the report's own definition of the term, with no mention of how the change in the language from the earlier version might affect the court's understanding of the term. *Id.* at 31–32.

[169] *See id.* at 56 (2003) (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schuman, and Durbin) (recalling the history of Prohibition to point out the danger of adopting a constitutional amendment without adequate consideration); *see also* Mosteller, *supra* note 132, at 1694 (arguing that the Victims' Rights Amendment should not be adopted because a guarantee of participatory rights to victims does not require a constitutional amendment, and balancing criminal and victims' rights is misguided and unworthy of a constitutional amendment).

[170] *Hearing on S.J. Res. 1*, *supra* note 10, at 128 (statement of Sen. Patrick Leahy) (adding that "[w]e should not amend the Constitution unless and until we identify problems in the Constitution itself that need to be fixed.").

[171] FINAL REPORT, *supra* note 6, at 115.

[172] *See Hearing on S.J. Res. 1*, *supra* note 10, at 92–93 (statement of Collene Campbell)

is to make both parties' rights constitutional.[173] The Task Force report included, in the margin, the statement of one of the victims interviewed: "They explained the defendant's constitutional rights to the *n*th degree. They couldn't do this and they couldn't do that because of his constitutional rights. And I wondered what mine were. And they told me, I haven't got any."[174] Clearly, it would be symbolically powerful to have constitutional rights, as opposed to mere statutory rights, for crime victims. However, if the only motivation of the amendment is emotional, then "the Amendment may prove to be innocuous symbolism responsive to a politically popular issue of the day,"[175] ultimately insufficient to overcome the heavy burden necessary to justify a constitutional amendment. As with the victim testimony at the Senate hearing, such testimony explains neither why a legislative solution is insufficient nor why a constitutional amendment is necessary.

Beyond the emotional rhetoric, supporters make an efficacy argument that a constitutional amendment is necessary because lesser measures have not sufficed. From the contention that current protections have been inadequate, they conclude that non-constitutional measures will always be insufficient.[176] Specifically, they feel that any measures short of a constitutional amendment are insufficient to protect victims because they lack the gravity of the U.S. Constitution.

Proponents maintain that "these rights can only be fully protected by amending the Constitution of the United States."[177] Assistant Attorney General Dinh argues that if the rights of crime victims are only protected by statute, they will be "subjugated to the rights of criminal defendants" already protected by a constitutional amendment.[178] Similarly, in his testimony before the Senate Judiciary Committee, Steven Twist claimed that "true rights for crime victims can only be established through an Amendment to the U.S. Constitution [because] twenty years of experience with statutes and state constitutional amendments proves they don't work. Defendants trump them, and the prevailing legal culture does not respect them."[179]

While part of this claim addresses the notion, discussed below, that the legal culture does not respect statutory rights,[180] the suggestion that the

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(asking for the same constitutional rights for crime victims as those given to those accused of crime).

[173] *See* FINAL REPORT, *supra* note 6, at 114 ("[T]he criminal justice system has lost an essential balance . . . ."); *see also* S. REP. NO. 108-191, at 10 (2003).

[174] *See Hearing on S.J. Res. 1*, *supra* note 10, at 114 (statement of Collene Campbell).

[175] Mosteller, *supra* note 132, at 1694.

[176] *See* S. REP. NO. 108-191, at 10 (2003) ("Only an amendment to the U.S. Constitution can remedy great injustices once and for all."). Here too, emotional arguments are used, as the experiences of individual victims are provided as examples of the failures of the previous non-constitutional measures to adequately protect victims' rights.

[177] *Hearing on S.J. Res. 1*, *supra* note 10, at 98 (testimony of Hon. Viet Dinh).

[178] *Id.*

[179] *Id.* at 237 (testimony of Steven Twist).

[180] *See infra* text accompanying notes 208–218.

rights of defendants trump statutory rights reveals an inherent contradiction. If a constitutional amendment is necessary so that defendants cannot trump victims' rights, as would occur under a statutory regime, then the victims' rights contained in that amendment must necessarily conflict with defendants' rights—an outcome that is inconsistent with proponents' claims that enacting victims' rights will not affect the rights of the accused.[181] The very language of the proposed amendment promotes the notion that the two bundles of rights—those of the victims and those of the accused—can be kept separate.[182] However, if this were the case, proponents would not have to speak of one bundle of rights "trumping" the other. Therefore, in trying to explain the need for a constitutional amendment as opposed to a federal statute, proponents of the amendment give merit to the substantive arguments of their opponents, who contend that such legislation would undermine the rights of the accused. Despite the troubling implications of their argument, proponents maintain that a constitutional amendment will "level the playing field" between criminal defendants and crime victims[183] in a criminal justice system that is currently improperly tilted in favor of defendants, given that "while criminal defendants have almost two dozen separate constitutional rights . . . there is not a single word in the Constitution about the victims of crime."[184]

However, the idea that the Bill of Rights is somehow off-balance misconstrues the fundamental purpose of elevating rights to the constitutional level.[185] Senator Leahy argues that constitutional rights are created to protect politically weak minorities against governmental tyranny.[186] The protections for those accused of crime are not for the benefit of criminal defendants, but for each individual as a counterweight against the potential for governmental oppression.[187] The constitutional rights of the accused exist because it will often be unpopular to enforce these rights, whereas the public naturally supports victims' rights, both in law and in practice, such that there is no need to grant them special constitutional protections.[188] In reply, Harvard Law School Professor Laurence H. Tribe, a staunch supporter of the proposed amendment and one of its contributors, argues that protecting the rights of victims "does not entail constitutionalizing the rights of private citizens against other private citizens," but rather that a constitu-

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[181] *See supra* text accompanying notes 138–140.

[182] *See* S.J. Res. 1, 108th Cong. § 1 (2003) ("The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established . . . ").

[183] *Hearing on S.J. Res. 1*, *supra* note 10, at 4 (statement of Senator Feinstein).

[184] *Id.* at 3.

[185] *See* Statement of Senator Patrick Leahy, Markup of S.J. Res. 1, *at* http://leahy.senate.gov/press/200307/072403a.html (last visited Mar. 30, 2005).

[186] *See id.*

[187] *See id.*

[188] *See id.*

tional amendment would prohibit governmental authorities themselves from paying insufficient attention to the concerns of the victim.[189]

While fending off attacks regarding the conflicting rights of accused and victim, proponents seek to strengthen their position by arguing for uniformity. When opponents ask why a federal amendment is needed when states are increasingly altering their constitutions to acknowledge victims,[190] proponents point to the present "hodgepodge" of victims' rights protections, with some states providing extensive rights and others providing fewer.[191] Proponents argue the unique ability of a constitutional amendment to create a uniform national standard.[192]

Though the desire for uniformity is a legitimate one, it fails to recognize the common inconsistency of outcomes in the federal system, which affects criminal defendants in the same way proponents claim it affects victims. For example, though Susan Howley believes that "[i]t shouldn't depend on [which] side of a state line you were standing on when the crime occurred" as a trigger for victims' rights,[193] her sentiment reflects some degree of naïveté, because that same state division can also mean the difference between the death penalty and life imprisonment for the defendant. Such discrepancies are inherent in a federal system because many bodies of law vary from state to state.

Proponents further argue that uniformity can only be achieved through constitutional amendment because any federal legislation only applies to federal criminal cases and therefore cannot protect crime victims in state prosecutions, whereas a constitutional amendment would apply to victims of both state and federal crime.[194] In response to the "states' rights" concern that the proposed amendment would limit state discretion to protect their citizens in the manner they choose,[195] proponents point out that the proposed amendment "does not bar [states] from providing additional or broader rights to victims. Instead, it provides a floor rather than a ceiling . . . ."[196] Additionally, they indicate that the states will retain the right to define key terms of the proposed amendment.[197] However, if it is true that each state can define the terms as it wishes, the uniformity sought by

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[189] Laurence H. Tribe, Statement on Victims' Rights (Apr. 15, 1997), *in* BELOOF, *supra* note 62, at 721.

[190] *See* GLENN, *supra* note 9, at 25.

[191] *See id.* at 28; *see also* S. REP. NO. 108-191, at 6 (2003) (stating that the patchwork of state and federal protections has not ensured comprehensive victim protection).

[192] *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY, 10 (1993) ("A victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels.").

[193] GLENN, *supra* note 9, at 28.

[194] *See Hearing on S.J. Res. 1*, *supra* note 10, at 4 (statement of Senator Feinstein).

[195] *See* S. REP. NO. 108-191, at 88 (2003).

[196] *Hearing on S.J. Res. 1*, *supra* note 10, at 98 (testimony of Hon. Viet Dinh).

[197] *See* S. REP. NO. 108-191, at 30 (2003).

the federal amendment cannot truly exist, and the amendment will "simply replace one patchwork with another."[198]

Moreover, the argument that federal constitutional action is needed to rectify state gaps is undermined by widespread state activity in passing victims' rights legislation. Every state has enacted protections for victims of crime,[199] and thirty-two have done so through constitutional amendments.[200] Although proponents argue that not every state offers the full array of benefits that have been extended to victims of federal crimes,[201] this claim may be misleading. For example, forty-eight states and the District of Columbia provide for victim input at a parole hearing.[202] Furthermore, forty-two states and the District of Columbia require victims to be notified of canceled or rescheduled hearings.[203] Thus, only a small minority of states has failed to take action.

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[198] *Id.* at 89 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin); *see also* Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims Rights Amendment*, 78 N.C. L. REV. 371, 378 (2000).

[199] *See supra* note 13 (citing state statutes).

[200] *See supra* note 14.

[201] *See Hearing on S.J. Res. 1*, *supra* note 10, at 4 (statement of Senator Feinstein).

[202] *See* ALA. CODE § 15-22-36 (1995); ALASKA STAT. § 33.16.087 (Michie 2004); ARIZ. REV. STAT. ANN. § 31-411 (West 2001); ARK. CODE ANN. § 16-90-1113 (Michie 2003); CAL. PENAL CODE § 679.02 (Deering 2005); COLO. REV. STAT. ANN. § 17-2-214 (West 2001); CONN. GEN. STAT. ANN. § 54-126a (West 2005); DEL. CODE. ANN. tit. 11, § 4350 (2001); D.C. CODE ANN. § 23-103a (2005); FLA. STAT. ANN. § 947.06 (West 2005); GA. CODE ANN. § 17-10-1.1 (2004); HAW. REV. STAT. § 706-669 (1993); IDAHO CODE § 19-5306 (Michie 2004); 725 ILL. COMP. STAT. ANN. 120/4.5 (West 2004); IND. CODE ANN. § 35-40-5-5 (Michie 2004); IOWA CODE § 915.18 (2003); KAN. STAT. ANN. § 22-3717 (2002); KY. REV. STAT. ANN. § 421.530 (Michie 1992); LA. REV. STAT. ANN. § 15:574.2 (West 2004); MD. CODE ANN., CORR. SERVS. § 4-305 (2001); MASS. GEN. LAWS ch. 127, § 133A (1998); MICH. COMP. LAWS ANN. § 780.771 (West 1998); MINN. STAT. § 243.05 (2004); MISS. CODE ANN. § 99-43-43 (2000); MO. REV. STAT. § 217.690 (2000); MONT. CODE ANN. § 46-23-202 (2003); NEB. REV. STAT. § 81-1848 (1999); NEV. REV. STAT. 213.1099 (1957); N.H. REV. STAT. ANN. § 21-M:8-k (2001); N.J. STAT. ANN. § 30:4-123.54 (West 2004); N.M. STAT. ANN. § 31-26-4 (Michie 1978); N.Y. CRIM. PROC. LAW § 440.50 (McKinney 2005); N.C. GEN. STAT. § 15A-1371 (2003); N.D. CENT. CODE § 12.1-34-02 (1998); OHIO REV. CODE ANN. § 109.42 (West 2002); OKLA. STAT. ANN. tit. 57, § 332.2 (West 2004); OR. REV. STAT. § 144.120 (2003); 18 PA. CONS. STAT. § 11.501 (1976); R.I. GEN. LAWS § 11-37-8.7 (2002); S.C. CODE ANN. § 24-22-90 (Law. Co-op. 2004); S.D. CODIFIED LAWS § 23A-28C-1 (Michie 2003); TENN. CODE. ANN. § 40-38-103 (2003); TEX. CRIM. PROC. CODE ANN. § 56.02 (Vernon 2004); UTAH CODE ANN. § 77-27-9.5 (2003); VT. STAT. ANN. tit. 13, § 5305 (2002); VA. CODE ANN. § 19.2-11.01 (Michie 2004); W. VA. CODE § 62-12-23 (2000); WIS. STAT. ANN. § 302.114 (West 2004); WYO. STAT. ANN. § 7-13-402 (Michie 2003).

[203] *See* ALA. CODE § 15-23-63 (1995); ALASKA STAT. § 12.61.010 (Michie 2004); ARIZ. REV. STAT. ANN. § 13-4409 (West 2001); ARK. CODE ANN. § 16-21-106 (Michie 2003); CAL. PENAL CODE § 679.02 (Deering 2005); COLO. REV. STAT. ANN. § 24-4.1-302.5 (West 2001); DEL. CODE ANN. tit. 11, § 9411 (2001); D.C. CODE ANN. § 23-1902 (2005); FLA. STAT. ANN. ch. 960.001 (West 2005); GA. CODE ANN. § 17-17-8 (2004); HAW. REV. STAT. § 801D-4 (1993); 725 ILL. COMP. STAT. ANN. 120/4.5 (West 2004); IND. CODE ANN. § 35-40-6-4 (Michie 2004); IOWA CODE § 915.13 (2003); KY. REV. STAT. ANN. § 421.500 (Michie 1992); LA. REV. STAT. ANN. § 46:1844 (West 2004); MD. CODE ANN. CRIM. PROC. § 11-1002 (2001); MASS. GEN. LAWS ch. 258B, § 3 (1998); MICH. COMP. LAWS ANN. §§ 780.756, 780.816 (West 1998); MINN. STAT. § 611A.033 (2004); MISS. CODE ANN. § 99-36-5 (2000); MO. REV. STAT. § 595.209 (2000); MONT. CODE ANN. § 46-24-204 (2003);

Despite these statistics, proponents like Howley suggest that state enforcement is a problem. Even if a state has passed a victims' rights law, there is effectively no remedy if the state is not vigilant about enforcing the law.[204] Howley claims that if the rights were guaranteed by the Constitution, victims could seek court orders to enforce them.[205] However, a constitutional amendment is not the sole way to guarantee enforcement. As explained by Judge Orenstein, "[t]he same result . . . could likely be achieved through the use of the federal spending power to give States proper incentives to meet uniform national standards."[206] When Senator Leahy asked then-Assistant Attorney General Dinh about this option, Dinh acknowledged that "such legislation would do away with one of the main concerns with statutory remedies, the need for uniformity."[207]

Nonetheless, proponents of uniformity point to the trial of Timothy McVeigh to illustrate the necessity for a federal constitutional amendment as opposed to mere federal legislation.[208] During proceedings against McVeigh, the judge ruled that victims of the bombing or their families may either attend pretrial and trial proceedings or testify at sentencing, but not both,[209] despite the federal Victims' Bill of Rights statute passed in 1990, which prevented victims from being excluded from the trial unless their presence would alter their testimony at sentencing,[210] and a victims' allocution rule, which gives victims of violent federal offenses the right to speak at sentencing.[211] Congress responded by approving the Victim Rights Clarification Act of 1997, which allowed victims of the Oklahoma City bombing to attend trial if they planned to provide only impact testimony.[212]

NEB. REV. STAT. § 81-1848 (1999); NEV. REV. STAT. 178.5694 (1957); N.H. REV. STAT. ANN. § 21-M:8-K (2001); N.J. STAT. ANN. §§ 52:4B-36, 52:4B-44 (West 2004); N.C. GEN. STAT. § 15A-825 (2003); N.D. CENT. CODE § 12.1-34-02 (1998); OHIO REV. CODE ANN. § 2930.06 (Anderson 2005); OKLA. STAT. ANN. tit. 19, § 215.33 (West 2004); 18 PA. CONS. STAT. § 11.902 (1976); R.I. GEN. LAWS § 12-28-3 (2002); S.C. CODE ANN. § 16-3-1545 (Law. Co-op. 2004); S.D. CODIFIED LAWS § 22-1-11 (Michie 2003); TEX. CRIM. PROC. CODE. ANN. §§ 56.02, 56.08 (Vernon 2004); UTAH CODE ANN. § 77-37-3 (2003); VT. STAT. ANN. tit. 13, § 5304 (2002); VA. CODE ANN. §§ 19.2-11.01, 19.2-265.01 (Michie 2004); WASH. REV. CODE § 7.69.030 (2004); W. VA. CODE § 61-11A-6 (2000); WIS. STAT. ANN. § 950.04 (West 2004); WYO. STAT. ANN. § 1-40-204 (Michie 2003). *See also* The Nat'l Ctr. for Victims of Crime, *Crime and Victimization in America, Statistical Overview: 2004*, *available at* http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=33533 (last visited Mar. 30, 2005).

[204] *See* GLENN, *supra* note 9, at 28.

[205] *See id.*

[206] *Hearing on S.J. Res. 1*, *supra* note 10, at 155–56 (testimony of James Orenstein).

[207] S. REP. NO. 108-191, at 72 (2003); *see also* Leahy, *supra* note 185.

[208] *See* S. REP. NO. 108-191, at 20–21 (2003).

[209] *See* United States v. McVeigh, 958 F.Supp 512, 514.(D. Colo. 1997); *see also* S. REP. NO. 108-191, at 64 (2003) (explaining events).

[210] *See* 42 U.S.C. § 10606(b)(4) (1990), *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004).

[211] *See* FED. R. CRIM. P. 32(i)(4)(B); *see also* GLENN, *supra* note 9, at 25.

[212] *See* 18 U.S.C. § 3510 (2000).

Because the Victim Rights Clarification Act of 1997 applies only to federal cases, proponents seek a constitutional amendment that would extend this protection to the states.[213] In his testimony, Assistant Attorney General Dinh referred to the Oklahoma City bombing trials and implied that if the right to speak at sentencing had been protected by a constitutional amendment, victim access to court proceedings would not have been so limited.[214] However, an examination of the language of the proposed amendment reveals that it is not clear whether the proposed amendment would solve the problem presented in the Oklahoma City case. The right in the amendment to not "be excluded from [a] public proceeding" is limited "to the degree dictated by . . . the administration of criminal justice."[215] Therefore, it is possible that the judge in the Oklahoma City case could still have ruled the same way by explaining that the need for victims to testify at sentencing is sufficiently related to the administration of criminal justice to fall under the constitutionally permissible restriction.

The argument that statutory rights are ineffective demonstrates a general disregard for statutory law—which provides the vast majority of the rights and protections that Americans enjoy today—while placing undue faith in the power of constitutional rights that are, unfortunately, violated frequently.[216] In this way, the arguments regarding the superior effectiveness of a constitutional amendment over a statutory solution do not pan out, leaving mainly the emotional power of the amendment as a point in its favor. Senator Leahy responds that in light of the seriousness of a constitutional amendment, "[w]e should not amend the Constitution as a symbolic gesture—as a way of saying, 'listen up . . . we really mean it!' When we pass a statute, we also 'really mean it.'"[217] He suggests that the problem of seriousness should be solved through better funding and training for criminal justice personnel, not an amendment to the Constitution.[218] Un-

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[213] *See* GLENN, *supra* note 9, at 26.

[214] *See Hearing on S.J. Res. 1*, *supra* note 10, at 98–99 (testimony of Hon. Viet Dinh).

[215] S.J. Res. 1, 108th Cong. § 2 (2003).

[216] *See* Leahy, *supra* note 185. For example, in the criminal context, constitutional violations often occur during searches of a suspect's home. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (creating exclusionary rule for evidence obtained without a warrant); James v. Louisiana, 382 U.S. 36, 37 (1965) (applying *Mapp*). Though these cases are instances in which the constitutional violation was corrected by the Supreme Court, they are representative of the class of constitutional violations by police during investigations of suspects. Of course, constitutional violations can also occur when the Supreme Court first permits certain state behavior and later deems those actions to be unconstitutional, often due to an evolving understanding of personal rights. *Compare, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that due process clause of the Fourteenth Amendment did not confer a right to engage in sodomy) *with* Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers* and invalidating Texas sodomy statute); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding "separate but equal" standard for treatment of African Americans) *with* Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling *Plessy* and requiring integration of a Kansas school).

[217] Leahy, *supra* note 185.

[218] *See id.*

der this solution, the problem of the judge's decision in the Oklahoma City trial could be solved more efficiently—and with fewer risks—by training attorneys and judges about what is intended by the applicable statute (in the case of Oklahoma City, the Victims' Rights Clarification Act), passing regulations clarifying the statute, and providing adequate funding and enforcement mechanisms.

Aside from the uniformity arguments, many advocates favor a constitutional amendment for the same reason that some people oppose it: its permanence.[219] Though legislators can take away tomorrow what they give today, the fact that amendments are difficult to remove or change[220] is a positive characteristic for those advocates who believe that victims' rights fall into the category of fundamental human rights, which necessarily belong in the Constitution.[221]

Of course, the opposition recognizes that precisely because constitutional amendments are so difficult to pass and change, there is concern about passing an amendment that may prove to be problematic in the future. Judge Orenstein brought the Senate Judiciary Committee's attention to this obstacle: "Amending the Constitution . . . has both risks and benefits, and given the difficulty of curing any unintended adverse consequences, it should properly be considered only as a last resort."[222] While proponents counter that nearly seventy drafts of the amendment provide evidence that its language has been thoroughly considered,[223] opponents view the numerous drafts as grounds for concern.[224] As Senator Leahy notes:

> If Congress had passed an earlier version, like the version that the Senate debated three years ago, we could now be stuck with that version, with both the flaws that its sponsors now concede and the inevitable limitations that arise from the fact that it was drafted before September 11 . . . .[225]

Just as September 11 was not envisioned by the drafters of the earlier version of the amendment, there are other scenarios that the drafters cannot en-

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[219] *See* GLENN, *supra* note 9, at 29; *see also* S. REP. NO. 108-191, at 15 (2003) (explaining that victims' advocates want a constitutional amendment to give "permanence to victims rights").

[220] Only the Prohibition amendment has ever been repealed. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

[221] *See* GLENN, *supra* note 9, at 29.

[222] *Hearing on S.J. Res. 1*, *supra* note 10, at 154 (testimony of James Orenstein).

[223] *Hearing on S.J. Res. 1*, *supra* note 10, at 232 (testimony of Steven Twist) (explaining how the newest text is the product of seven years of reflection and debate and incorporates challenges to earlier versions of the text).

[224] *See* S. REP. NO. 108-191, at 94 (2003) (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin).

[225] Statement of Senator Patrick Leahy on a Proposed Constitutional Amendment to Protect Crime Victims, *at* http://leahy.senate.gov/press/200304/040803.html (last visited Mar. 30, 2005).

vision. This possibility may cause future generations to be punished for the drafters' lack of foresight if the amendment, with its binding permanence, succeeds.

Given the concerns and complications inherent in drafting and passing a constitutional amendment, many proponents sought a legislative solution as a superior method of protecting victims' rights. Senate Bill 805, entitled the Crime Victims Assistance Act of 2003,[226] included many of the same rights for victims as were contained in the proposed constitutional amendment and expanded many others. For example, the rights to a speedy trial and to be present at the trial are maintained, while the bill increased rights of participation at sentencing.[227] The right in the proposed amendment to be heard at a public release proceeding[228] is supplanted in the bill by the right to be consulted by the government both prior to and during the hearing.[229] Similarly, the right to be heard at the plea hearing[230] is rephrased in the bill as a victim's right to have the government consult and reasonably consider the victim's views regarding a plea agreement.[231] Finally, the bill adds to the amendment's rights to notice of public hearings, release or escape, the rights to notice of sentence adjustment, discharge from a psychiatric facility, or executive clemency.[232] Because the bill was not restricted by the necessarily vague language of a constitutional amendment, each of these rights is detailed, and can specifically address the concerns of victims in concrete terms. For instance, the proposed bill includes the right to consult concerning detention, which would provide a forum for individual preferences, such as the possibility that some victims may prefer the imposition of a life sentence instead of the death penalty.[233]

More importantly, the bill creates several mechanisms to ensure that the enforcement of victims' rights becomes reality. For example, the bill specifically directs the Attorney General to promulgate regulations to enforce victims' rights and to establish and carry out pilot programs regarding those rights.[234] Similarly, the legislation provides for increased resources to develop a state-of-the-art system for notifying crime victims of important dates and developments,[235] as well as numerous grants, including

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[226] Crime Victims Assistance Act of 2003, S. 805, 108th Cong. (2003).

[227] *Compare* S.J. Res. 1, 108th Cong. § 2 (2003), *with* S. 805, 108th Cong. §§ 102, 104–05 (2003). The latter allows victims to make statements at sentencing, requiring the courts to consider the victims' views before sentencing. *See id.* § 105.

[228] *See* S.J. Res. 1, 108th Cong. § 2 (2003).

[229] *See* S. 805, 108th Cong. § 101 (2003).

[230] *See* S.J. Res. 1, 108th Cong. § 2 (2003).

[231] *See* S. 805, 108th Cong. § 103 (2003).

[232] *Compare* S.J. Res. 1, 108th Cong. § 2 (2003), *with* S. 805, 108th Cong. § 106 (2003).

[233] *See generally* Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447 (2004). *See, e.g.*, Testimony of Duane Lynn, *supra* note 89.

[234] *See* S. 805, 108th Cong. §§ 107, 201 (2003).

[235] *See id.* § 202.

restorative justice grants, grants to develop interdisciplinary coordinated service programs for victims of crime, and grants for services to crime victims with special communication needs.[236] In other words, rather than simply making abstract promises about notifying crime victims of important dates and deadlines, this act would materially assist in the laborious notification process. Similarly, rather than simply promising the right to restitution, the act would authorize the funding necessary to fulfill that promise. In these ways, the proposed legislation takes into account the concerns regarding the unfunded mandates of the proposed amendment.

Although the Crime Victims Assistance Act did not pass before the end of the 108th Congress, Congress did pass other legislation to assist victims of crime. The Justice for All Act of 2004[237] encompasses four separate titles, the first of which amends the federal criminal code to create specified rights to crime victims.[238] The rights provided in the law[239] include several familiar provisions, such as timely notice of any public or parole proceeding involving the crime or any release or escape of the accused;[240] the rights not only not to be excluded from the proceedings, but to be reasonably heard;[241] rights to full and timely restitution[242] and proceedings free from unreasonable delay.[243]

Statutory provisions included in the act and not found in the proposed amendment include the rights to confer with the government attorney,[244] to be reasonably protected from the accused[245] and to be treated with fairness and respect for dignity and privacy.[246] The statute does not lack any of the central rights of the proposed amendment, but variations in language do reveal some omissions in the statute. For example, both the amendment and the statute provide for the right reasonably to be heard at numerous proceedings, but the amendment specifically mentions reprieve and pardon proceedings whereas the statute does not.[247] Similarly, the statute overlooks the amendment's provision for adjudicative decisions that "duly consider the victim's safety"[248] though such a right may be included in the aforementioned right to reasonable protection from the accused.

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[236] *See id.* §§ 203–205.

[237] Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004). *See* 150 CONG. REC. H7328 (daily ed. Sept. 21, 2004) (introducing the bill in the House); 150 CONG. REC. H8208 (daily ed. Sept. 30, 2004) (report by the House Committee on the Judiciary); 150 CONG. REC. H8208 (daily ed. Oct. 6, 2004) (passing the House); 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004) (passing the Senate by unanimous consent).

[238] Justice for All Act of 2004 tit. I.

[239] 18 U.S.C.A. § 3771 (2005).

[240] *Id.* § 3771(a)(2).

[241] *Id.* § 3771(a)(3)–(4).

[242] *Id.* § 3771(a)(6).

[243] *Id.* § 3771(a)(7).

[244] *Id.* § 3771(a)(5).

[245] *Id.* § 3771(a)(1).

[246] *Id.* § 3771(a)(8).

[247] *Compare* S.J. Res. 1, 108th Cong. § 2 *with* 18 U.S.C.A. § 3771(a)(4).

[248] *Compare* S.J. Res. 1, 108th Cong. § 2 *with* 18 U.S.C.A. § 3771(a)–(b).

By enacting a statute rather than a constitutional amendment, Congress was able to give direction to the judges regarding how the statute should be read. The statute instructs the court not only to ensure that the crime victim is afforded the rights described, but, more specifically, to consider reasonable alternatives before excluding the victim from a criminal proceeding and to make any decision denying relief on the record.[249]

In addition to instructing the courts, the statute also requires the officers and employees of the Department of Justice and other departments and agencies to make their best efforts to see that crime victims are notified of and accorded their rights.[250] Specifically, like the Crime Victims Assistance Act of 2003, the Justice for All Act of 2004 contains a section requiring the Attorney General to promulgate regulations to enforce the rights of crime victims and to ensure compliance with those obligations.[251] However, the statute fails to provide for the monetary mechanisms contained in its unsuccessful predecessor, the Crime Victims Assistance Act.[252] As such, it fails to have as many enforceability options.

The statute does, however, address many of the concerns with the proposed amendment. For example, it speaks to the September 11 scenario of mass victimhood by explicitly stating that if a court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights allocated in the statute, the court is given discretion to create a reasonable procedure to designate rights to victims in a way that does not "unduly complicate or prolong the proceedings."[253] Furthermore, while the proposed amendment left the definition of "crime victim" unclear, the statute explicitly defines the term to mean "a person directly and proximately harmed as a result of the commission of a Federal offense."[254] This definition is not without its own problems, as it remains unclear how many family members can be included as victims. It is also broader than the proposed amendment's definition because it is not limited to victims of violent crimes. The statute also provides more specificity regarding restriction of the rights: Whereas the amendment allowed for restriction of the enumerated rights generally in the face of a "compelling necessity,"[255] the statute specifies that only the right not to be excluded from a court proceeding may be limited, and only after the court's determination by clear and convincing evidence that "the testimony by the victim would be materially altered if the victim heard other testimony."[256]

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[249] *See* 18 U.S.C.A. § 3771(b).

[250] *See id.* § 3771(c)(1).

[251] *Compare* Crime Victims Assistance Act of 2003, S. 805, 108th Cong. § 107 (2003), *with* 18 U.S.C.A. § 3771(f).

[252] *See* 18 U.S.C.A. § 3771 (2004).

[253] *Id.* § 3771(d)(2).

[254] *Id.* § 3771(e).

[255] S.J. Res. 1, 108th Cong. § 2.

[256] 18 U.S.C.A. § 3771(a)(3).

The primary advantage of the legislative solution lies in the nature of statutes. That is, any provisions that were inadvertently omitted or that need revision can be supplemented relatively easily by a future Congress when the need arises. For instance, future provisions might authorize more funding. The flexibility of the statute is a major benefit, especially for a statute that addresses a legal issue that has been characterized by years of vigorous debate.

Of course, the statute may fall prey to congressional inaction. However, the criticism that "it is impractical and unrealistic to expect that Congress can and will intervene to pass legislation each time a victim is denied his or her right to participate in the criminal justice system"[257] misconstrues the problem. Perhaps Congress will not intervene every time a victim is denied the right to participate in the criminal justice system, but that intervention is the job of the courts rather than Congress. The crucial role of Congress is the ability to legislate if new needs are identified. Members of Congress are more likely, and more able, to address each new situation than the inanimate text of the Constitution.

Ultimately, a constitutional amendment to protect the rights of crime victims is well-intentioned and, as such, ought to be commended. Nonetheless, the most recent proposed constitutional amendment has failed to address many of the legitimate concerns of crime victims. Additionally, the complex process of altering a constitutional amendment poses a serious obstacle in the future, should questions of interpretation or scenarios not envisioned by the amendment arise. Given that the substantive benefits of the amendment can be achieved by a combination of federal legislation and monetary incentives for the states, proceeding down the unpredictable course towards a constitutional amendment seems inadvisable.

Instead, a statutory solution is superior to a constitutional amendment for two reasons. First, legislation need not be constrained by the abstract and often ambiguous language expected of constitutional amendments. There is no simple and precise way to describe the circumstances in which exceptions to victims' rights may be required, and the Constitution is not the place for lengthy descriptions, explanations, or experiments. As statutes, the Justice for All Act of 2004 and the proposed Crime Victims Assistance Act of 2003 can make the necessary distinctions and explanations.

Second, a statute is considerably easier to change than the Constitution itself. If Congress finds that the legislation intended to balance the rights of the victims, the rights of the defendants, and the needs of law enforcement fails to achieve its purpose, or if the courts interpret the legislation in a way that was not intended, Congress can simply amend the legislation to clarify the misunderstanding and realign the balance. However, if a constitutional amendment is found to have similar failings, it is prohibitively difficult to fix because any change requires not only approval

[257] *Hearing on S.J. Res. 1*, *supra* note 10, at 99 (testimony of Hon. Viet Dinh).

by Congress, but also the full and complex ratification process set forth in Article V of the Constitution.[258]

Despite these advantages, the fight for a Victims' Rights Amendment has not ended. Although the amendment has not yet been reintroduced in the 109th Congress,[259] its strong support suggests that it will resurface. In fact, the analogous state provisions show that, generally, the sequence of events has been to establish state statutes for victims' rights first and then to work to pass a state constitutional amendment.[260] Having passed federal legislation, Congress may not have yet abandoned the amendment option. However, there seems to be no articulated reason for Congress to pass such an amendment to the Constitution without first giving the newest federal legislative option every chance to achieve the same end.

—*Victoria Schwartz*

[258] U.S. CONST. art. V.

[259] The proposed amendment had not been reintroduced as of April 16, 2005.

[260] *See* FRANK J. WEED, CERTAINTY OF JUSTICE: REFORM IN THE CRIME VICTIM MOVEMENT 22 (1995).