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ARTICLES

HOW TO INTEGRATE ADMINISTRATIVE LAW AND TORT LAW: THE REGULATION OF STEM CELL PRODUCTS

STEPHEN R. MUNZER*

TABLE OF CONTENTS

* Distinguished Professor of Law, UCLA School of Law. Debts of gratitude are a privilege to bear. For help with this project I am grateful to Preston Ascherin, Alan Butler, Neil Cooper, Heather Danesh, Russell Korobkin, Robert Lawner, Jon D. Michaels, Keith Monach, Sydney Truong, and Mark Woodhead. Above all I am grateful to Karen Y. Lam, Jenifer Morrissey, Jamie L. Summers, and Douglas Wolfe for extraordinary long-term research assistance. I appreciate financial support from the Academic Senate and the Dean's Fund at UCLA.

INTRODUCTION

Current administrative law is ill-prepared to deal with the surge of stem cell products poised to enter the market in coming years. The risks and rewards of such products differ markedly from those associated with drugs, medical devices, other biological products, and combination products. The differences necessitate a revamping of administrative law and the creation of a specialized regime of product liability. This Article proposes changes in administrative regulations to account for the special characteristics of stem cell products. These changes will promote the safety and effectiveness of stem cell products and reduce barriers to entry for stem cell makers. Simultaneously, this Article takes into account the justifications for altering the product-liability regime, which I discuss in a companion article on stem cell product liability.[1]

Stem cell products have the potential for enormous good and enormous harm. Yet, because of a radical lack of information, it is now nearly impossible to separate beneficial products from harmful ones. The unpredictability of risk and reward with stem cell products calls for an

1. *See generally* Stephen R. Munzer, *Risk and Reward in Stem Cell Products: A New Model for Stem Cell Product Liability*, 18 B.U. J. SCI. & TECH. L. 102 (2012) (challenging the typical economic assumptions underlying product liability law in constructing a product liability regime for stem cell products).

aggressive role by the Food and Drug Administration (FDA). The FDA ought to decide, in a manner that does not hinder innovation, which products should be allowed on the market and with what instructions, warnings, and restrictions on use. I contend that the Center for Biologics Evaluation and Research (CBER) is the best FDA center to assess the safety and effectiveness of stem cell products.

Some might object that this Article is premature because few stem cell products are now on the market. However, given the pace of technological advance in the biological sciences, an eventual flood of stem cell products seems inevitable. It would be foolish to wait until we have a decade of experience and large numbers of stem cell products before making any administrative adjustments. It is far more sensible to discern in advance, insofar as it is possible, the probable nature of the risks associated with stem cell products and to design a regulatory system for responding appropriately to these risks.[2] This is a job for today, not for a decade hence when legal and policy analysts can do little more than play catch-up. Thus, I concentrate here on upstream rather than downstream regulatory precautions.[3] However, my regulatory proposal is dynamic in that it allows for adjustment over time in light of new information.[4] This dynamism prevents my proposal from snuffing out innovative new stem cell products.

The regulatory scheme I propose suggests, first, that to acquire more and

2. The Food and Drug Administration (FDA) approved a stem cell product known as Hemacord on November 10, 2011. *November 10, 2011 Approval Letter—Hemacord*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/BiologicsBloodVaccines/CellularGeneTherapyProducts/ApprovedProducts/ucm279613.htm (last updated Nov. 10, 2011). Anyone who clicks on the Package Insert on the website will see that the warnings are substantial. Less than a year later, the FDA approved another stem cell product. *See May 24, 2012 Approval Letter—HPC, Cord Blood*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/BiologicsBloodVaccines/CellularGeneTherapyProducts/ApprovedProducts/ucm305620.htm (last updated May 25, 2012) (approving HPC, cord blood). Canada has approved Prochymal, a mesenchymal stem cell product used to treat children with graft-versus-host disease (GVHD) and perhaps other ailments. Andrew Pollack, *A Stem-Cell-Based Drug Gets Approval in Canada*, N.Y. TIMES, May 17, 2012, http://www.nytimes.com/2012/05/18/health/a-stem-cell-based-drug-gets-approval-in-canada.html.

3. The language of upstream versus downstream precautions comes from Carl F. Cranor, *Protecting Early Warners and Late Victims in a Precautionary World*, *in* EUROPEAN ENVIRONMENTAL AGENCY, LATE LESSONS FROM EARLY WARNINGS 2 (Copenhagen, European Environmental Agency) (in press) (page proofs obtained June 17, 2012) (forthcoming 2012). I use these terms a bit differently than Cranor.

4. *See infra* text accompanying note 116 (contending that such a dynamic approach would encourage advances in stem cell products). The plain fact that these issues involve uncertainty and the future poses special difficulties. *See generally* Louis Kaplow & David Weisbach, *Discount Rates, Social Judgments, Individuals' Risk Preferences, and Uncertainty*, 42 J. RISK & UNCERTAINTY 125 (2011) (identifying analytical problems in other economic models typically used for evaluating policies whose benefits and costs extend into the future).

better information, the FDA should strengthen preapproval requirements and preclinical administrative review. Second, the FDA ought to monitor both the short-term and long-term performance of stem cell products. For this to work, the FDA must improve its record of monitoring post-market drug safety. Third, the FDA ought to devise a risk-management and risk-reduction system that relies far more on the gathering of information than previous regulatory systems. Finally, the most ambitious feature of my regulatory proposal integrates the regulatory scheme effectively with the best liability system for defective stem cell products. To be most efficacious, the interlocking regulatory and product liability elements must satisfy three criteria: complementarity, well-suitedness, and mutual reinforcement. These criteria, which are semi-technical in ways to be explained in Part VI.A, are fundamental to extending the regulatory regime, advocated here for stem cell products, to other areas where administrative law and tort law intersect, such as nanotechnology and toxic substances.

The Article takes the following course. After Part I explains stem cell products, Part II sketches the FDA process and shows why its classificatory system matters. Part III argues that sui generis regulation is unwise and ferrets out some useful points from the academic literature. Part IV maps out and defends the proposed regulatory scheme. Part V distills the main lines of the product liability regime that I advance elsewhere.[5] Part VI then shows that the regulatory proposal and the liability regime are complementary, well-suited, and mutually reinforcing, and demarcates the extent to which this integration of tort and administrative law can be generalized to nanotechnology and toxic substances.

I. SOME FUNDAMENTALS OF STEM CELLS AND STEM CELL PRODUCTS

All the cells of an individual human being derive from a zygote—the product of the fertilization of an egg by a sperm cell.[6] As the cells of the organism divide, the zygote develops into a blastocyst, then an embryo, and eventually into a fetus.[7] A common functional definition of a stem cell is that it is any cell that has the capacity to self-renew and to differentiate into

5. *See* Munzer, *supra* note 1, at 135–49 (detailing the possible implementation of the proposed product liability regime in different types of suits and under schemes that determine the scope of liability among multiple manufacturers).

6. Although nonhuman animals have stem cells, this Article is entirely concerned with human stem cells and products made from them.

7. The term "embryo" is sometimes used to encompass all stages of development before the fetus. *See* CHRISTOPHER THOMAS SCOTT, STEM CELL NOW: FROM THE EXPERIMENT THAT SHOOK THE WORLD TO THE NEW POLITICS OF LIFE 27 (2006) (presenting the zygote, morula, and blastocyst as specific examples of pre-fetal developmental forms that are classified as embryos).

a more committed cell.[8] Human embryonic stem cells (hESCs) begin either wholly undifferentiated or nearly so. As the embryo develops, its cells self-renew into other hESCs, become more differentiated cells, or divide into one hESC and one more differentiated cell.[9] As these changes occur, most cells become increasingly restricted in function and eventually develop into fully specialized cells, such as brain cells and red blood cells.[10] Fully specialized cells cannot replicate themselves indefinitely. Ultimately, they age and in time can no longer divide.[11]

The chief purpose of practically oriented stem cell research is to develop stem cell lines that are therapeutically useful. The stem cells used for research and medical purposes often originate from embryos. But somewhat more differentiated stem cells also exist in fetal and adult tissues.[12] The most common sort of fetal and adult stem cells used in medical practice are hematopoietic stem cells—stem cells that can differentiate into lymphoid cells and different sorts of blood cells.[13] Whether fetal and adult stem cells can be given the same, or roughly the same, therapeutic potential as embryonic stem cells (ESCs) is a matter of scientific debate.[14] Ethical issues also influence the availability and use of each type of stem cell tissue.[15] Despite fierce disagreements on ethical

8. Douglas A. Melton & Chad Cowen, *"Stemness": Definitions, Criteria, and Standards*, *in* ESSENTIALS OF STEM CELL BIOLOGY xxiii, xxiii (Robert Lanza et al. eds., 2d ed. 2009).

9. *See* T. Ahsan et al., *Stem Cell Research*, *in* PRINCIPLES OF REGENERATIVE MEDICINE 28, 29 (Anthony Atala et al. eds., 2008) (noting that stem cells can become precursor cells whose division yields fully differentiated cells at an exponential rate and thereby enhances the capability of cell-based treatments).

10. *See id.* (underscoring that adult stem cells differentiate into fewer cell types than other stem cells).

11. ALICE PARK, THE STEM CELL HOPE: HOW STEM CELL MEDICINE CAN CHANGE OUR LIVES x (2011).

12. Examples include multipotent adult progenitor cells, bone marrow stem cells, neural stem cells, mesenchymal stem cells, hepatic stem cells, skeletal muscle stem cells, and pancreatic stem cells. PRINCIPLES OF REGENERATIVE MEDICINE, *supra* note 9, at 258–83, 300–417.

13. *See* Stephen R. Munzer, *The Special Case of Property Rights in Umbilical Cord Blood for Transplantation*, 51 RUTGERS L. REV. 493, 500 (1999).

14. *See* Ahsan et al., *supra* note 9, at 34. Although adult stem cells appear to be limited in function, it is disputed whether these cells may be more flexible than previously thought. *See id.* (emphasizing that scientific exploration of the plasticity of stem cells and the qualities of stem cells in adult animals may indicate that adult human stem cells have a greater capacity to become more specialized than has been shown to date). Additionally, adult stem cells are often harder to isolate and transplant. *See id.* at 32–33 (observing that even bone marrow and blood provide few usable stem cells, though such cells are among the easiest stem cells to isolate).

15. Scholarship abounds on the ethical issues surrounding stem cell use. *See, e.g.*, MICHAEL BELLOMO, THE STEM CELL DIVIDE: THE FACTS, THE FICTION, AND THE FEAR

issues, interest in inducing fully differentiated somatic cells to become pluripotent stem cells (iPSCs) has increased sharply within the last six or seven years.[16]

Once stem cells are isolated from a particular source, the cells may be guided to self-renew in large numbers and thereby produce what is known as a stem cell line.[17] A stem cell line is indispensable to the creation of therapies and products. Stem cell products, which can help to create tissues and organs, hold hope for treating a wide range of conditions—from cancer to osteoarthritis to heart disease, among many others.[18] In addition to stem cells and stem cell lines, some medical treatments rely on combinations of stem cells and devices. The devices are typically used to place the stem cells into the body at the treatment site.[19]

II. CURRENT ADMINISTRATIVE LAW AND STEM CELL PRODUCTS

A central purpose of administrative regulation in this field is to make sure that stem cell products are competently evaluated, for both safety and effectiveness, by the best-suited center within the FDA bureaucracy. The FDA must accomplish this goal without extinguishing innovation in the regulated field. Since existing FDA practices do not always achieve this balance, improvement is needed.

Under current law, a manufacturer must follow a strict protocol to get its

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DRIVING THE GREATEST SCIENTIFIC, POLITICAL, AND RELIGIOUS DEBATE OF OUR TIME (2006) (tracing the historical development and the possible future trajectories of stem cell research); FUNDAMENTALS OF THE STEM CELL DEBATE: THE SCIENTIFIC, RELIGIOUS, ETHICAL, AND POLITICAL ISSUES 62–78, 146–96 (Kristen Renwick Monroe et al. eds., 2008) (containing articles by Philip J. Nickel and Ronald B. Miller that discuss the possible legal, ethical, and societal foundations for conducting research on human embryos); LEO FURCHT & WILLIAM HOFFMAN, THE STEM CELL DILEMMA: BEACONS OF HOPE OR HARBINGERS OF DOOM? (2008) (assessing the potential of stem cell research to provide treatments for several diseases); ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE (2008) (addressing four objections to the proposition that human embryos deserve moral respect to the extent given to fully developed human beings).

16. *See, e.g.*, Shinya Yamanaka, *A New Path: Induced Pluripotent Stem Cells*, *in* ESSENTIALS OF STEM CELL BIOLOGY, *supra* note 8, at xxi–xxii (recognizing that scientists have been able to induce pluripotent stem cells (iPSCs) in both mice and humans through the use of the same transcription factors).

17. *See* BELLOMO, *supra* note 15, at 58–59 (describing an actual experiment that involved growing cells for easy testing for and preservation of pluripotency and produced five lines of stem cells).

18. *See* Mikkel L. Sorensen, *Preface* to STEM CELL APPLICATIONS IN DISEASES vii, vii (Mikkel L. Sorensen ed., 2008) (analogizing stem cells to microchips that one can tailor to complete specific functions).

19. See PRINCIPLES OF REGENERATIVE MEDICINE, *supra* note 9, at 579–1332, for a wide-ranging discussion of the biomaterials needed for cell and tissue therapeutic products.

product to market. First, the maker must fill out the appropriate application.[20] Next, it sends the application to a center within the FDA.[21] Then, the manufacturer seeks approval to market the stem cell product. Approval depends on satisfying the FDA on two key points: safety and effectiveness.[22] Evidence on both points usually comes first from animal studies and later from human trials. Only after the maker demonstrates the safety and effectiveness of a particular product in animals may it begin clinical trials for its safety and effectiveness in humans. Eventual approval hinges on three ever-widening phases of clinical trials in humans. The maker must also show that it can supply the item in consistent batches,

20. In this context, it will be either an investigational new drug application (INDA) or a new drug application (NDA). If an INDA is approved and preliminary testing goes well, the maker should progress to an NDA. *See* 21 C.F.R. pts. 312, 314, 610 (2011) (specifying the process by which the FDA approves an application and the reasons that may justify rejection); CTR. FOR DRUG EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., MANUAL OF POLICIES AND PROCEDURES 4000.1–7800.1, *available at* http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ManualofPoliciesProcedures/default.htm (last updated Nov. 21, 2012); *Investigational New Drug (IND) Application*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/InvestigationalNewDrugINDApplication/default.htm (last updated June 6, 2011) (noting the FDA requirement that there must be sufficient evidence from animal experimentation that the drug will not produce unreasonable safety risks to humans and can be developed into a marketable drug).

21. Getting the application to the right place is trickier than one might think. If most stem cell products are biologics or combination products in which the biological component dominates, applications for approval must, unless assigned elsewhere, go to the Center for Biologics Evaluation and Research (CBER). Any stem cell products classifiable as drugs are vetted by the Center for Drug Evaluation and Research (CDER). The picture is complicated by the fact that on October 1, 2003, the FDA shifted certain product oversight responsibility from CBER to CDER. Some biologics remain within CDER's purview. *See Therapeutic Biologic Applications (BLA)*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/TherapeuticBiologicApplications/default.htm (last updated Feb. 13, 2012) [hereinafter *CDER Products*] (listing cytokines, growth factors, enzymes, immunomodulators, thrombolytics, non vaccine immunotherapies, and certain proteins as under the CDER's review). The others, along with any stem cell drug products, go to the CBER. *See Transfer of Therapeutic Biological Products to the Center for Drug Evaluation and Research*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/CombinationProducts/JurisdictionalInformation/ucm136265.htm (last updated May 12, 2010) [hereinafter *CDER Transfer*] (listing examples of products under each Center's supervision as a means of contrasting similar products that nonetheless are supervised by different Centers). Legislative authority for FDA jurisdiction resides in the Federal Food, Drug, and Cosmetic Act of 1938 (FFDCA), Pub. L. No. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–99). Regulatory details dwell in the Code of Federal Regulations. See 21 C.F.R. pts. 312, 314 for drugs. See 21 C.F.R. pts. 600, 610 for biological products.

22. Edison Pharm. Co. v. FDA, 600 F.2d 831, 836–37 (D.C. Cir. 1979).

which may not be easy for some stem cell products.[23]

A major complicating factor in this process for manufacturers of stem cell products is that manufacturers must slot their products into one of four existing legal pigeonholes: drug, device, biological product, or combination product.[24] The FDA is unlikely to put *all* stem cell products into any *one* of the four categories.

For example, few stem cell products are likely to be classified as a "drug" or a "device."[25] Physicians may use a device to *deliver* stem cell products to

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23. During the entire process, the maker must be forthright. The FDA has authority to impose strict recordkeeping requirements. *See* United States v. Garfinkel, 29 F.3d 451, 453, 455–57 (8th Cir. 1994) (deferring to the FDA's expansion of the recordkeeping requirement to cover clinical investigators as well as manufacturers). A maker can be indicted for withholding adverse information and results and for violating recordkeeping regulations. *See id.* at 453–54, 457–59 (responding to the claim that the FDA's authority to indict was unconstitutionally delegated by Congress). By law, the FDA must disclose safety and effectiveness data upon request, even in the case of abandoned applications. Controversially, in *Public Citizen Health Research Group v. FDA*, the D.C. Circuit held that this duty to disclose applied only to NDAs, not to INDAs. 185 F.3d 898, 902–07 (D.C. Cir. 1999) (interpreting 21 U.S.C. § 355(l)). The FDA may withdraw its approval if the stem cell product turns out, in light of new or suppressed evidence, to not be safe or effective. *See* 21 U.S.C. § 355(e) (2006) (giving these and other justifications for withdrawal); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973) (holding that, despite § 355(e), an NDA remains effective unless it is suspended).

24. *See* 21 U.S.C. § 360bbb-2(a) (noting that the manufacturer can also determine the appropriate FDA authority under which to slot the product).

25. 21 U.S.C. § 321 states:

> The term "drug" means (A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).

Id. § 321(g)(1). Clauses (A), (B), (C), and (D) are broad enough that one or more of them might capture some stem cell products. In litigation, though, the FDA has at least once taken the position that stem cell products are both drugs and biological products. *See infra* text accompanying note 56 (remarking that the FDA found a manufacturer had improperly implanted cells without a license because a license was required for products classified as either drugs or biological products); *cf. infra* text accompanying note 61 (quoting a court decision to the effect that a particular stem cell product was both a "drug" and a "biological product" under federal legislation). However, due to the biological activity of such products, they are more likely to be seen as biologics. *See infra* note 27 (listing examples of products that fall under the category of biological products and noting that the FFDCA applies to such products). As to devices, § 321 provides:

> The term "device" (except when used in paragraph (n) of this section and in sections 331(i), 343(f), 352(c), and 362(c) of this title) means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or

the right place in a patient's body, but the products themselves are not devices. Likewise, some cells derived from hESCs can generate drug-like proteins in large quantities—think of the immune interferon and other proteins produced by the cells from John Moore's body.[26] These proteins might be classified as drugs, but this category is generally not used for living cells or tissues that have continuing biological action, which includes most stem cell products.

Therefore, most stem cell products will likely be classified as "biological products," or "biologic" for short.[27] Stem cell products bear some comparison to both cellular and non-cellular biologics. Stem cell products are plainly analogous to cellular biologic products like whole blood and blood components because hematopoietic stem cells from umbilical cord blood qualify as blood components. Stem cell products are less analogous to non-cellular biologic products, such as vaccines and antitoxins, because stem cells can potentially be used to reconstitute or strengthen a patient's immune system or regenerate tissues and organs whereas most non-cellular biologics cannot.

Although stem cell products are broadly biologic in character, and some may fall exclusively into that category, many other stem cell products will probably fall into the category "combination product"—specifically, a combination of a biologic and a device. An FDA regulation defines a

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related article, including any component, part, or accessory, which is—

(1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them,

(2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or

(3) intended to affect the structure or any function of the body of man or other animals, and

which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.

Id. § 321(h).

26. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 481 n.2 (Cal. 1990) (mentioning that scientists may be able to produce substantial numbers of proteins that have the potential for new treatments by isolating the gene responsible for generating such proteins).

27. 42 U.S.C. § 262(i) states that:

[T]he term "biological product" means a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product, or arsphenamine or derivative of arsphenamine (or any other trivalent organic arsenic compound), applicable to the prevention, treatment, or cure of a disease or condition of human beings.

Id. With a minor exception, the FFDCA applies to biological products regulated here. *See id.* § 262(j) (stating the exception).

"combination product" as, in part, a "product comprised of two or more regulated components, i.e., drug/device, biologic/device, drug/biologic, or drug/device/biologic, that are physically, chemically, or otherwise combined or mixed and produced as a single entity."[28] Typical examples of combination products are glucose monitor/insulin pump systems, transdermal patches that allow drugs to enter the body slowly through the skin, and cardiac stents that disseminate an antibiotic into the surrounding site and the blood to reduce the risk of infection.[29]

Using stem cells and their derivatives therapeutically often requires delivery to an appropriate area of the body. Such delivery usually necessitates the use of a device. As a result, many stem cell products will likely be joined to a device to yield a combination product. For instance, some treatments for heart conditions might administer hematopoietic stem cells through catheters into the coronary arteries or into the myocardium, or inject cells through a needle during a coronary artery bypass graft. Another possible treatment might use a scaffold seeded with autologous stem cells for organ transplantation. This product would have the shape of the target organ and the autologous cells would allow the product to function, for example, like a natural human bladder. Such a product can in principle function without the usual problems of rejection.[30] Some combination products are already in development. Pfizer, Inc., for example, is developing an artificial membrane onto which ESC-derived eye cells are placed to treat macular degeneration.[31] These illustrations provide but a small window into possible combination products involving stem cell products.

The classification of a stem cell product by the FDA is important for two reasons. First, both application fees and pre-market review costs differ markedly depending on the classification. To illustrate, for the 2012 fiscal year the fee for a drug or biologic application requiring clinical data was

28. 21 C.F.R. § 3.2(e)(1) (2012). Other items falling under the heading of combination products include separate products that are packaged together or intended to be used together. *See id.* § 3.2(e)(2)–(4).

29. For these and other illustrations, see *Examples of Combination Product Approvals*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/CombinationProducts/AboutCombinationProducts/ucm101598.htm (last updated July 15, 2010).

30. *See* Definition of Primary Mode of Action of a Combination Product, 70 Fed. Reg. 49,848, 49,858 (Aug. 25, 2005) (to be codified at 21 C.F.R. pt. 3).

31. *See Stem Cells Demonstrated to Reverse Macular Degeneration Blindness*, BREAKTHROUGH DIGEST MED. NEWS (Apr. 19, 2009), http://www.breakthroughdigest.com/eye-ailments/stem-cells-demonstrated-to-reverse-macular-degeneration-blindness/ (reporting that ESC-derived eye cells placed on an artificial membrane and inserted in the back of the retina were successful in rats with a disease similar to age-related macular degeneration in humans).

approximately $1,841,500, whereas the standard pre-market application fee for a medical device was $220,050.[32] Predictably, manufacturers jockey to get their products classified to increase the chances of approval and hold down review costs.[33] Ultimately, higher total costs fall upon consumers, manufacturers, or both. These fees, imposed under the Prescription Drug User Fee Act (PDUFA),[34] may have enabled quicker review of new drugs, biologics, and devices.[35] Not only has the regulatory review time decreased,[36] but the number of approved new drugs, biologics, and devices has increased.[37]

It is possible to accelerate review further by using regulatory vouchers under the FDA Amendments Act of 2007.[38] These vouchers are transferable. So even though the voucher program was intended for drugs used to treat neglected diseases, a voucher holder could sell the voucher to

32. *See* Prescription Drug User Fee Rates for Fiscal Year 2012, 76 Fed. Reg. 45,831 (Aug. 1, 2011); Medical Device User Fee Rates for Fiscal Year 2012, 76 Fed. Reg. 45,826–27 (Aug. 1, 2011); *cf.* Mark Lavender, *Regulating Innovative Medicine: Fitting Square Pegs in Round Holes*, 2005 DUKE L. & TECH. REV. 0001, ¶ 8 (giving older figures).

33. For example, ultrasound contrast agents, which are combination products, are usually assigned to the CDER, but one manufacturer persuaded the Office of Combination Products (OCP) to assign its ultrasound contrast agent to the Center for Devices and Radiological Health (CDRH). *See* Bracco Diagnostics, Inc. v. Shalala, 963 F. Supp. 20, 29 (D.D.C. 1997) (holding that though the FDA has some discretion, it may not treat similar products differently without adequate justification). CDER and CBER standards for approval are generally more stringent than CDRH standards. Again, the difference in the full cost of pre-market review can be substantial. Two manufacturers whose products were reviewed in 1997 by the CDER had $1.5 million and $3.7 million more in expenses than would have been incurred under CDRH review. *Id.* at 29 n.9; Lavender, *supra* note 32, at ¶ 9.

34. 21 U.S.C. § 379(g)–379(h)(a) (Supp. II 2006).

35. The fact that user fees are contingent on the FDA's strict adherence to review timetables is probably at least partly responsible for this correlation (i.e. tying user fees to a specific, performance-based purpose or goal is directly related to improved application review times). *See* Susan Okie, *What Ails the FDA?*, 352 NEW ENG. J. MED. 1063, 1064 (2005); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-958, FOOD AND DRUG ADMINISTRATION: EFFECT OF USER FEES ON DRUG APPROVAL TIMES, WITHDRAWALS, AND OTHER AGENCY ACTIVITIES 1, 3 (2002) [hereinafter GAO REPORT].

36. Okie, *supra* note 35, at 1064.

37. However, after the Prescription Drug User Fee Act's (PDUFA's) implementation, the following adverse consequences have been observed: shifting of FDA funds away from post-marketing safety surveillance; increased reviewer workloads; high reviewer turnover; reduced training for review teams; and inappropriate pressure to approve or recommend drug approval. *Id.* Moreover, a Government Accountability Office (GAO) report found that the rate of safety-related drug withdrawals significantly increased post-PDUFA. GAO REPORT, *supra* note 35, at 25–26.

38. 21 U.S.C. § 360n (Supp. II 2006).

a developer of stem cell products that target other diseases.[39] To some extent, manufacturers' quicker review times and patients' speedier access to new medicines and devices offset the higher review costs under the PDUFA. Whether the higher total costs are worth it to society depends on aggregative rather than product-specific judgments. For example, the aggregative judgment might be that the extra costs are regrettable because the products that get to market are more expensive than they otherwise would be. Alternatively, the aggregative judgment might be that the extra costs are worth bearing because they facilitate justifiably stringent regulation and monitoring.

Second, classification of a stem cell product as a biologic or combination product—or, perhaps, as a drug or device—has consequences within the internal bureaucracy of the FDA. The FDA has various centers that oversee the pre-market review and post-market regulation of these products.[40] Each center has its own staff, criteria, and culture, and each is largely self-governing.[41] Many innovative products possess features of two or even three classifications, and it is here that both detached legal observers and interested parties (such as manufacturers and FDA officials) must wrestle over which center should have primary jurisdiction.[42] Stem cell product manufacturers have a strong incentive to privilege monetary concerns over consumer safety in attempting to get a more favorable center for their products.[43]

Within the FDA, a product is classified as a combination product by the

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39. *Id* § 360n(b)(2). On the practical implications and the normative defensibility of the voucher program, see, for example, Aaron S. Kesselheim, *Drug Development for Neglected Diseases—The Trouble with FDA Review Vouchers*, 359 NEW ENG. J. MED. 1981 (2008), and Christopher-Paul Milne & Joyce Tait, *Evolution Along the Government-Governance Continuum: FDA's Orphan Products and Fast Track Programs as Exemplars of "What Works" for Innovation and Regulation,* 64 FOOD & DRUG L.J. 733 (2009). An unpublished work by my colleague Jon D. Michaels drew my attention to the voucher program.

40. For the jurisdiction of CDER and CBER, see *supra* note 21. The CDRH has jurisdiction over devices. FDA Product Jurisdiction, 21 C.F.R. §§ 3.2(b), 3.3–3.4 (2012). *See generally* Mary K. Olson, *Regulatory Agency Discretion Among Competing Industries: Inside the FDA*, 11 J.L. ECON. & ORG. 379 (1995). Criticism of CDRH for having a lower threshold for approval than CBER and CDER is severe. *See, e.g.*, INST. OF MED. OF THE NAT'L ACADS., MEDICAL DEVICES AND THE PUBLIC'S HEALTH: THE FDA 510(K) CLEARANCE PROCESS AT 35 YEARS (2011), *available at* http://www.nap.edu/catalog.php?record_id=13150.

41. For an excellent peer-reviewed study of the criteria and processes across FDA centers, see Burgunda V. Sweet, Ann K. Schwemm, & Dawn M. Parsons, *Review of the Processes for FDA Oversight of Drugs, Medical Devices, and Combination Products*, 17 J. MANAGED CARE PHARMACY 40 (2011), *available at* http://www.amcp.org/data/jmcp/40-50.pdf.

42. Lavender, *supra* note 32, at ¶¶ 1–4.

43. *Id*. at ¶¶ 10–11.

Office of Combination Products (OCP).[44] The assignment of a combination product turns on a judgment by the OCP as to the "primary mode of action," (PMOA) of the product.[45] Determining a product's primary mode of action can be quite complicated.[46]

Since stem cell products can be classified as biologics, combination products, or—less plausibly—drugs[47] or devices, the FDA's classification scheme, as applied to stem cell products, is especially susceptible to manipulation and classification problems. Manufacturers lobbying the FDA for a less costly classification of their product is, as detailed above, one manifestation of this problem.[48]

Other problems arise when the FDA must force a stem cell product into one of its pre-existing legal pigeonholes. For example, although most stem cell products can be plausibly classified as biologics, stem cell products encounter challenges that most noncellular biologics, such as toxins and antitoxins, do not. Most noncellular biologics are sterilizable and used within thirty days. In contrast, many stem cell products are likely to be cryopreserved for longer, which raises concerns about their stability and

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44. The OCP was created by the Medical Device User Fee And Modernization Act of 2002, Pub. L. No. 107-250, § 204, 116 Stat. 1588, 1611 (2002) (codified at 21 U.S.C. § 353(g) (2006)).

45. 21 U.S.C. § 353(g)(1) (2006). The term "primary mode of action" (PMOA) comes from the Safe Medical Devices Act of 1990, Pub. L. No. 101-629, § 16(a), 104 Stat. 4511, 4526 (1990) (codified at 21 U.S.C. § 353(g)(1) (2006)).

46. Effective November 23, 2005, the FDA amended the final rule in 21 C.F.R. Part 3 to create a new definition and method for determining a combined product's PMOA. Definition of Primary Mode of Action of a Combination Product, 70 Fed. Reg. 49,848 (Aug. 25, 2005) [hereinafter PMOA Definition]. The PMOA is now defined as "the single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action expected to make the greatest contribution to the overall intended therapeutic effects of the combination product." 21 C.F.R. § 3.2(m) (2011). Because the PMOA is often difficult to determine, the final rule has a two-tiered algorithm for determining the center to which the OCP should assign the combined product. The first tier explains that OCP should assign the combined product to the center that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole. PMOA Definition, *supra*, at 49,850. If there is no similar combination product, then the combination product should be assigned to the center that has the most expertise related to the most significant safety and effectiveness questions presented by the proposed combined product. *Id.*

47. *But see infra* text accompanying note 56 (discussing the FDA's classification of certain mesenchymal stem cell mixes as both drugs and biologics).

48. One lawyer commented, "There's an incentive for sponsors of new products to be very strategic in how they portray their products to ensure primary review by one center or another." Hannah Waters, *Combination Products Neglected by FDA Device Evaluation,* 17 NATURE MED. 1024 (2011) (quoting Jason Sapsin, a former FDA attorney).

requires safeguards for the pre-freeze and post-thaw preservation of the products.[49] Additionally, many stem cell products—unlike most noncellular biologics—are unsterilizable, can support the growth of pathogens, and might be placed in sensitive sites such as the central nervous system.[50] There are also well-known technical difficulties with the sources of stem cells used in stem cell products. The FDA seems likely to pay special attention to these difficulties if the stem cell products come from iPSCs or stem cell nuclear transplants (SCNT).[51] Moreover, the FDA office that deals with cellular, tissue, and gene therapies should be alert to parallels between gene therapy and the therapeutic use of stem cell products: unsterilizability, uncertain purity, possible source of pathogens, and risks created by the ongoing biological activity of the new genetic material or cells.[52] In sum, the FDA classification system and its

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49. *See, e.g.*, CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S FOOD & DRUG ADMIN., GUIDANCE FOR REVIEWERS: INSTRUCTIONS AND TEMPLATE FOR CHEMISTRY, MANUFACTURING, AND CONTROL (CMC) REVIEWERS OF HUMAN SOMATIC CELL THERAPY INVESTIGATIONAL NEW DRUG APPLICATIONS INDS, 19–20 (Draft, Aug. 2003) [hereinafter SCT Draft Guidance], *available at* http://www.fda.gov/OHRMS/DOCKETS/98fr/03d0349gdl.pdf.

50. *See, e.g.*, Marcia Barinaga, *Fetal Neuron Grafts Pave the Way for Stem Cell Therapies*, 287 SCIENCE 1421 (2000); BIOLOGICAL RESPONSE MODIFIERS ADVISORY COMM., BRMAC MEETING # 27: HUMAN STEM CELLS AS CELLULAR REPLACEMENT THERAPIES FOR NEUROLOGICAL DISORDERS 1 (Briefing Document for meeting on July 13–14, 2000, in Gaithersburg, Md.) (Draft, July 9, 2000) *available at* http://www.fda.gov/ohrms/dockets/ac/00/backgrd/3629b1a.pdf.

51. As to iPSCs and iPS cells generally, "[C]loser scrutiny of their genetic integrity and differentiation behaviour has revealed subtle yet potentially significant differences from ES cells." George Q. Daley, *Imperfect Yet Striking,* 478 NATURE 40, 40 (2011). Daley continues:

> As well as provoking rogue genetic changes, reprogramming can leave vestiges of the original differentiated (somatic) cell's identity—known as epigenetic memory—through faulty remodelling of chemical modifications on DNA and its associated proteins.

Id. In regard to stem cell nuclear transplants (SCNTs), the usual process has been to remove the genome (the haploid nucleus) from a human oocyte and replace it with the diploid nucleus of a fully differentiated adult cell such as a skin fibroblast. But it has proved hard to develop ESC lines from this maneuver, for growth arrest tends to occur at the six- to ten-cell stage. A recent study describes the insertion of the fibroblast in an oocyte that still has its haploid nucleus. This technique allows a blastocyst containing some 70 to 100 cells to develop. However, these are triploid cells and hence genetically anomalous. *Id.*; Scott Noggle et al., *Human Oocytes Reprogram Somatic Cells to a Pluripotent State,* 478 NATURE 70, 74–75 (2011).

52. *See, e.g.*, SCT Draft Guidance, *supra* note 49, at 1, 13–18; CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: GENE THERAPY CLINICAL TRIALS—OBSERVING SUBJECTS FOR DELAYED ADVERSE EVENTS (Recommendations, Nov. 2006), *available at* http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Cellular

accompanying bureaucratic centers will play a key role in scrutinizing stem cell products and evaluating the risks associated with them.[53]

Although the FDA has asserted jurisdiction over stem cell products, and what some authors call stem cell treatments, for two decades,[54] the matter is in litigation pending an appeal. Regenerative Sciences, LLC (Regenerative Sciences), is a Colorado firm that isolates mesenchymal stem cells (MSCs) from bone marrow. It then cultures the cells, adds some materials, and uses the mix for injection into patients. Its main treatment is called "Regenexx-C"; the "C" stands for "Cultured."[55] In 2008, the FDA sent a warning "letter to Regenerative Sciences stating that, based on the way the use of MSCs was being promoted on the Regenexx website, it considered those cells to be drugs and biological products" over which the FDA had authority.[56] The company's position was that its MSCs were not drugs or

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andGeneTherapy/ucm078719.pdf. FDA action is particularly evident in the case of somatic cell therapy for cardiac diseases, and this therapy would include stem cells. *See* U.S. FOOD & DRUG ADMIN. GUIDANCE FOR INDUSTRY: SOMATIC CELL THERAPY FOR CARDIAC DISEASE (2010), *available at* http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/CellularandGeneTherapy/UCM164345.pdf; *see also* Draft Guidance for Industry: Somatic Cell Therapy for Cardiac Disease; Availability, 74 Fed. Reg. 14,992 (Apr. 2, 2009).

53. It is doubtful that the Biologics Price Competition and Innovation Act of 2009 (Biosimilars Act), Pub. L. No. 111-148, §§ 7001–7003, 124 Stat. 119, 804–21 (2010) (to be codified at 42 U.S.C. § 201), will have any short-term impact on stem cell products. There are few such products on the market, and the test for biosimilarity will be hard to satisfy for these products. CTR. FOR DRUG EVALUATION & RESEARCH & CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: SCIENTIFIC CONSIDERATIONS IN DEMONSTRATING BIOSIMILARITY TO A REFERENCE PRODUCT (Draft Guidance, Feb. 2012), *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/ Guidances/UCM291128.pdf.

54. Application of Current Statutory Authorities to Human Somatic Cell Therapy Products and Gene Therapy Products, 58 Fed. Reg. 53,248–51 (Oct. 14, 1993).; *see also* United States v. Loran Med. Sys., Inc., 25 F. Supp. 2d 1082, 1084 (C.D. Cal. 1997) (issuing a permanent injunction on the importation of neonatal cells); CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: GUIDANCE FOR HUMAN SOMATIC CELL THERAPY AND GENE THERAPY 3 (1998), *available at* http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/CellularandGeneTherapy/ucm081670.pdf; Donald W. Fink, *FDA Regulation of Stem Cell-Based Products*, 324 SCIENCE 1662 (2009). For use of the term "stem cell treatments," see RUSSELL KOROBKIN, STEM CELL CENTURY: LAW AND POLICY FOR A BREAKTHROUGH TECHNOLOGY 232–57 (2007). Korobkin believes that the FDA has "the authority to require premarket approval of stem cell treatments," but adds that "[w]hether and when the FDA should exercise this statutory authority . . . is a different question." *Id.* at 243.

55. *Regenexx Procedures Family—Stem Cell and Platelet Procedures*, REGENEXX, http://www.regenexx.com/regenexx-procedures-family/ (last visited Nov. 9, 2012).

56. Barbara von Tigerstrom, *The Food and Drug Administration, Regenerative Sciences, and the*

biologics and that the FDA was interfering with the practice of medicine. Eventually, the company sued the FDA for injunctive and declaratory relief. A federal district court granted the FDA's motion to dismiss on ripeness grounds because the FDA had not yet attempted to regulate Regenerative Sciences.[57] In June 2010, Regenerative Sciences "applied for an order 'to prompt FDA to take "final agency action" or leave its medical practice alone.'"[58] Later, the FDA sought an injunction and ultimately, in January 2011, moved for summary judgment and dismissal of the defendants' counterclaims.[59]

In the newly captioned *United States v. Regenerative Sciences, LLC*,[60] the court ruled in favor of the United States and granted its request for a permanent injunction against the defendants. The court said that "the cell product used in the Regennex Procedure meets the statutory definition for both a 'drug' under the FFDCA and a 'biological product' under the PHSA."[61] The court then concluded that Regenerative Sciences' cultured mesenchymal stem cell products amount to a "drug" under federal law.[62] One might cavil whether Regenerative Sciences' MSCs are better classified as a biological product or as both a drug and a biological product. In any event, the thrust of the decision is sound because of the amount of manipulation the MSCs received and because of the need to control inadequately vetted stem cell products.

This case is interesting partly because of its political valence. The protests of Regenerative Sciences prior to the injunction had become a rallying cry against FDA regulation. Two articles addressed this litigation while it was in progress. One acknowledged that Regenerative Sciences was likely to lose but contended that "the FDA should recognize that it makes little sense to impose a regulatory framework developed for mass manufacturers on small physician practices."[63] The majority shareholders

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Regulation of Autologous Stem Cell Therapies, 66 FOOD & DRUG L.J. 479, 482 (2011).

57. Regenerative Sciences, Inc. v. FDA, No. 09-CV-00411-WYD-BNB, 2010 WL 1258010, at *7 (D. Colo. Mar. 26, 2010). The company sometimes drops "LLC" and calls itself Regenerative Sciences, Inc.

58. von Tigerstrom, *supra* note 56, at 483.

59. *Id.*

60. United States v. Regenerative Sciences, LLC, No. 10-1327, 2012 WL 2989988 (D.D.C. July 23, 2012).

61. *Id.* at *8.

62. Jocelyn Kaiser, *U.S. Federal Court Says Stem Cell Treatments Are Drugs,* SCIENCE INSIDER, (July 26, 2012, 2:46 PM), http://news.sciencemag.org/scienceinsider/2012/07/us-federal-court-says-stem-cell-.html?ref=hp.

63. Mary Ann Chirba & Stephanie M. Garfield, *FDA Oversight of Autologous Stem Cell Therapies: Legitimate Regulation of Drugs and Devices or Groundless Interference with the Practice of Medicine?,* 7 J. HEALTH & BIOMEDICAL L. 233, 272 (2011). There is a good deal of space

of Regenerative Sciences are two physicians who operate a clinic in Broomfield, Colorado, where, prior to the injunction, they injected Regenexx-C into patients.[64] But the crucial point is not the size of the laboratory or manufacturer. What is crucial is the nature and degree of the manipulation of the components of Regenexx-C. To create this product, MSCs are harvested from the patient's hip. The patient's blood is then drawn to isolate growth factors. Finally, using the MSCs, growth factors, reagents, and culture media, Regenerative Sciences increases the number of MSCs that go into Regenexx-C.[65] The manipulation of these ingredients is sufficiently intensive to warrant FDA oversight. This is not a case of regulation run wild.

Barbara von Tigerstrom, a well-known writer on stem cell technology and tissue engineering, was the author of the other article on this litigation while it was in progress. She makes a strong case that the FDA's regulation in this situation is "eminently reasonable."[66] It would be even more reasonable in cases involving allogeneic, rather than autologous, stem cell products and treatments, and in cases using autologous human induced pluripotent stem cells (hiPSCs).[67] Regulation is also needed to thwart stem cell tourism, whether within or outside the United States, because insufficiently vetted stem cell products pose health risks no matter where the products are administered.[68]

III. STEM CELL PRODUCTS AND THE REVISION OF ADMINISTRATIVE LAW

As we move to the prospect of revising current administrative law, it is important to have a more general understanding of when regulation, and of what sort, is justifiable. I immediately put one possible view to the side: that there ought not to be any administrative regulation of, or indeed any other form of governmental control over, stem cell products. Such a

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between the dichotomous terms in the title of their article.

64. The physicians have ceased doing so until the lawsuit is finally decided. However, von Tigerstrom, *supra* note 56, at 481–82, reports that the company "has licensed its technology to clinics offering it in China and Argentina, and is opening a stem cell culture lab in the Cayman Islands." Stem cell tourism, anyone?

65. *See* von Tigerstrom, *supra* note 56, at 480.

66. *Id.* at 506. For a brief commentary on the case, see Tamra Lysaght & Alastair V. Campbell, *Regulating Autologous Adult Stem Cells: The FDA Steps Up*, 9 CELL STEM CELL 393 (2011).

67. Paul S. Knoepfler, *Key Anticipated Regulatory Issues for Clinical Use of Human Induced Pluripotent Stem Cells*, 7 REGENERATIVE MED. 713 (2012).

68. Alex Philippidis, *Stem Cell Tourism Hardly a Vacation*, GENETIC ENGINEERING & BIOTECHNOLOGY NEWS, Aug. 16, 2012, http://www.genengnews.com/insight-and-intelligenceand153/stem-cell-tourism-hardly-a-vacation/77899669.

position would just rely on the market to sort out ways of responding to these products. I reject this view because there is, especially in such a new and unpredictable area as stem cell products, little justification for leaving all governance in this area to willing buyers and willing sellers. It is far too difficult for everyone to obtain and process all of the relevant information. Further, at this time, stem cell products do not satisfy the ideal market dynamic of perfect competition, for there are few producers or sellers that are willing and able to supply stem cell products and there are high barriers to entry.

Thus, to me, it is a nonstarter to argue that there ought to be no regulation at all in the area of prescription drugs, medical devices, and stem cell products. Given that, the question then becomes what shape regulation ought to take.[69]

Compared to an utter lack of regulation or obviously irrational regulation, the current administrative scheme for FDA regulation of stem cell products might seem broadly sensible. But can it be better? I discuss this question under two headings: sui generis regulation and a proposal offered by Dina Gould Halme and David A. Kessler.[70] I then offer, in Part IV, a new regulatory proposal that differs from, and is superior to, both of these.

A. Sui Generis Regulation

Some scholars believe that the FDA ought to regulate less than, and differently from, the way that it currently does.[71] Because stem cell

69. Unlike administrative agencies in some European countries, the FDA does not regulate prices. However, Congress has made generic drugs more readily available once the patent on a branded drug has expired, which tends to make the same compound available at a lower price. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (known as the Hatch–Waxman Act), (codified as amended at 15 U.S.C. §§ 68b–68c; 21 U.S.C. §§ 301, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 171, 282 (2006)); Mary K. Olson, *Pharmaceutical Regulation, in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 40, 41, 44–45 (Peter Newman ed., 1998).

70. The FDA has already issued a "draft guidance" for Risk Evaluation and Mitigation Strategies (REMS). CTR. FOR DRUG EVALUATION & RESEARCH & CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: FORMAT AND CONTENT OF PROPOSED RISK EVALUATION & MITIGATION STRATEGIES (REMS), REMS ASSESSMENTS, AND PROPOSED REMS MODIFICATIONS (2009), *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM184128.pdf.

71. If MARCIA ANGELL, THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT (2004), is overly critical of the pharmaceutical industry, RICHARD A. EPSTEIN, OVERDOSE: HOW EXCESSIVE GOVERNMENT REGULATION STIFLES PHARMACEUTICAL INNOVATION (2006), is too uncritical of it and unduly chastises

products will be new, it could be argued that they should have their own center in the FDA and that special regulations should apply to them. John Miller constructs an analogous argument for nanomedicine—various drugs, diagnostics, devices, and delivery systems that make use of extraordinarily small molecular structures.[72]

But stem cell products and regenerative medicine are not wholly analogous to nanomedicine. Although the eventual products of nanomedicine are unknown, they fall into all of the FDA's existing categories. In contrast, stem cell products will be mainly biologics, even if many of the products will require a delivery device. Moreover, while no FDA center has substantial expertise in the full range of nanomedical inventions, the FDA center that deals with biologics already has expertise in inventions related to stem cell products, such as vaccines, blood products, and gene therapies. It would be foolish to waste this expertise by creating a new FDA center having exclusive jurisdiction over stem cell products.

But in one critical respect stem cell products and nanomedicine are at least partly analogous. Both deal with innovative products that have the potential for enormous benefits and grave harms. That is why I am able, in Part VI.B.1, to project features of my integrated regulatory–product liability proposal onto nanotechnology generally (not just nanomedicine). The implications of my integrated proposal for nanomedicine differ in three ways from Miller's view. First, a special FDA center for nanomedicine is unnecessary. Second, nanomedical products should be regulated more stringently than he suggests. Third, his nanomedical proposal lacks the generalizability that my integrated proposal for stem cell products possesses.

In any event, promulgating sui generis regulations for stem cell products would needlessly make the law more complicated. No final judgment should be made on special regulations for these products without examining a detailed regulatory proposal. The issues and risks posed by many foreseeable stem cell products are akin to those posed by cellular and

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the FDA. For any article on stem cell products, the chief limitation of Epstein's book is its concentration on drugs at the expense of biologics and medical devices. Evenhanded reviews of his book are scarce. Despite the book's clarity and forcefulness, in my judgment it undervalues the usefulness of clinical trials, indulges in neoclassical economic argument over empirical data, mis-assimilates drugs to the general run of commercial products, and fails to explore adequately the merits of some government intervention such as the use of public oversight and (very rarely) march-in rights. *Cf.* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 212–42 (2008) (analyzing the pharmaceutical industry); Arnold S. Relman, *To Lose Trust, Every Day*, THE NEW REPUBLIC, July 23, 2007, at 36 (providing useful, if not always balanced, criticisms of Epstein's book).

72. John Miller, Note, *Beyond Biotechnology: FDA Regulation of Nanomedicine*, 4 COLUM. SCI. & TECH. L. REV. 2, 5 (2003).

gene therapies, as well as vaccines.[73] An evenhanded account is needed of the similarities and differences between existing biologics and predicted stem cell biologics.

A tension would exist if (1) sui generis regulation of stem cell products were rejected and (2) exactly the same differences and similarities existed between stem cell products and other, more familiar biological products. However, there are similarities between stem cell products and traditional biologics in some respects and differences in other respects. Thus proposition (2) is false, which rules out any objectionable tension. If my account of the close connections between predicted stem cell products and existing biologics is sound, then skepticism about sui generis regulation is warranted.

Some have suggested that because stem cell products return human-derived items to the body they should be regulated *less* stringently than would apparently be the case under current FDA regulations. In my opinion, if the products consist of stem cells that are from the patient's own body, they could be regulated less stringently, unless they have been significantly manipulated.

But if the products involve stem cells from someone other than the patient, then I doubt the soundness of less stringent regulation for two reasons. First, most stem cell products will probably be classified as biologics or as combination products in which the biologic component is primary. Given the risks associated with biologics, FDA regulation ought not to be eased.[74]

Second, most stem cell derived therapies will probably be cellular rather than noncellular biologics. Unlike noncellular biologics, such as viruses, vaccines, toxins, and antitoxins, cellular biologics are unsterilizable. Further, stem cell derived cellular biologics can come, so far as is currently

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73. For example, just as one of the potential adverse events associated with gene therapy includes treatment-induced cancers, there are questions about the transformation of hESCs, iPS cells, and their derivatives into cancerous tumor cells. *E.g.*, Salima Hacein-Bey-Abina et al., *Insertional Oncogenesis in 4 Patients After Retrovirus-Mediated Gene Therapy of SCID-X1*, 118 J. CLINICAL INVESTIGATION 3132 (2008); Chu-Chih Shih et al., *Issues in Development: Human Embryonic Stem Cells Are Prone to Generate Primitive, Undifferentiated Tumors in Engrafted Human Fetal Tissues in Severe Combined Immunodeficient Mice*, 16 STEM CELLS & DEV. 893 (2007).

74. There should be an exception in the case of stem cell therapies in human clinical trials that qualify for Orphan Drug and Fast Track status. *See, e.g.*, *FDA Fast-Track Clearance Expedites Stem Cell Therapy*, OSIRIS THERAPEUTICS, INC., http://www.osiristx.com/clinical.php (last visited Nov. 30, 2012) (discussing Prochymal, a formulation of mesenchymal stem cells intended for intravenous administration to treat acute and steroid-refractory GVHD and Crohn's disease, which was then in Phase III clinical trials). Osiris's Prochymal has been approved by Canadian regulators but not yet by the FDA. *See supra* note 2.

known, from only two sources. One source is individuals other than the patient. Since the biologics in question will have the DNA of someone other than the patient, the match might be imperfect. Even in the special case where the cell donor is the patient's identical twin, the DNA of monozygotic twins tends to differ a bit over the years because of transcriptional errors and random mutations. The donor's cells may also harbor viruses or antibodies that could prove harmful to the patient. A different source of stem cell derived cellular biologics is via SCNT. The *nucleus* of the cells would have the patient's DNA. But the *mitochondria*—organelles within the cell but outside the nucleus—would come from the egg donor and have different DNA from the mitochondrial DNA of other somatic cells in the patient's body. The risks associated with different mitochondrial DNA are not well understood at present but cannot be assumed to be zero.[75]

Stem cell products are likely to be similar enough to existing biologics to permit an effective regulatory scheme to build on already applicable sensible protocols. Still, because of the special nature of most stem cell products, they offer risks that merit maintaining the same degree of vigilance with which the FDA has dealt with existing biologics. Thus, sui generis regulation as a first step is unnecessary and ill-advised.[76]

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75. I leave to one side the rare case in which the egg donor and the patient are the same person. The FDA has asserted jurisdiction over and sought INDAs for work on ooplasm transfer, which is involved in almost all techniques of SCNT. Lawrence B. Ebert, *Lessons to Be Learned from the Hwang Matter: Analyzing Innovation the Right Way*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 239, 254 (2006); Margaret Foster Riley & Richard A. Merrill, *Regulating Reproductive Genetics: A Review of American Bioethics Commissions and Comparison to the British Human Fertilisation and Embryology Authority*, 6 COLUM. SCI. & TECH. L. REV. 1, 5 nn.16–18 (2005); *see also* Jonathan R. Friedman et al., *ER Tubules Mark Sites of Mitochondrial Division,* 334 SCIENCE 358, 358–62 (2011) (illuminating the way in which mitochondria divide in cell mitosis); Justin C. St. John et al., *The Potential Risks of Abnormal Transmission of mtDNA through Assisted Reproductive Technologies*, 8 REPROD. BIOMEDICINE ONLINE 34 (2003) (explaining some risks involving mitochondrial DNA); *supra* note 74.

76. FDA's current treatment of stem cell products reinforces this conclusion. CBER and CDRH consider these products to be a subclass of HCT/Ps, or human cells, tissues and cellular and tissue-based products. Some HCT/Ps have nothing to do with stem cells. An example is Gintuit, "a cell-based treatment for gum recession developed by . . . [o]rganogenesis." Charles Schmidt, *Gintuit Cell Therapy Approval Signals Shift at U.S. Regulator,* 30 NATURE BIOTECHNOLOGY 479 (2012). The only stem cell products approved by the FDA at this time are Hemacord and HPC, cord blood. *See supra* note 2. *See generally* E-mail from Paul Richards, Public Affairs Specialist for CBER, to Douglas Wolfe, research assistant to the author (June 11, 2012, 2:11 PM) (on file with the author) (explaining FDA classification of stem cell products).

B. The Halme and Kessler Proposal

In 2007, Halme and Kessler floated an admirably terse proposal for FDA regulation of therapies based on stem cells,[77] which also addresses "stem cell products" as understood here. Halme and Kessler approach this matter from the perspective of medical researchers. They suggest a framework for categorizing four risks associated with stem cell therapies and products.[78] The risks are: possible transmission of genetic or infectious diseases; possible contamination or damage caused by cell processing; possible adverse effects of different cell mixes and different levels of purity, potency, or both; and possible adverse events *in vivo*.[79] Later, Halme and Kessler reorganize the risks into a chart that segregates cell type, purity, and potency. They evidently contemplate that their proposal should have some impact on FDA regulation.

Halme and Kessler's treatment of this matter has many advantages. It is thoughtful and methodical. Their article, appearing as it does in a major medical journal, identifies risks that matter greatly to its readership, especially medical researchers and specialist physicians. It also differentiates among risks in a way that is likely to aid policy analysts in the FDA. It recognizes that the current regulatory model for biologics is likely to be appropriate for stem cells.[80] Up to this point, I would happily incorporate these advantages into my more ambitious proposal.[81]

Nevertheless, Halme and Kessler's treatment also has some disadvantages. It is not very probing in regard to how the different identified risks might overlap, or even interact, with each other. Some risks identified in their discussion could affect more than one category in their chart. For example, disease contamination could adversely affect both purity and potency. Furthermore, their treatment only indirectly aids firms that are trying to decide whether to pursue lines of stem cell research and development, when to submit a stem cell product to the FDA for approval, or how to slot their application into the existing centers of the FDA. Such firms will need to work backwards from the terms of Halme and Kessler's proposal and what they already know about the FDA and its procedures to make decisions. Finally, non-specialist physicians and the educated general population might not find Halme and Kessler's categories very easy to use in making decisions. They might not be able to figure out whether tissue

77. Dina Gould Halme & David A. Kessler, *FDA Regulation of Stem-Cell-Based Therapies*, 355 NEW ENG. J. MED. 1730 (2006).

78. *Id.* at 1731–34.

79. *Id.*

80. *Id.* at 1735. They do not address combination products. *See generally id.*

81. *See supra* notes 77–80; *infra* notes 86, 117.

contaminated during processing is more dangerous to a particular patient than an unpredictable mix of pluripotent and multipotent cells, or than the possible migration of these cells from the implantation site.[82]

IV. A NEW REGULATORY PROPOSAL

This Article, I submit, has two primary virtues. One is a sensitive, on-the-ground touch for the inner workings of the FDA and the decisions manufacturers must make in the research and development of stem cell products. Such a concern for the realities of stem cell production is necessary to craft a regulatory scheme that ensures consumer safety without retarding innovation of new products.[83] The other primary virtue of this Article is that it shows how my regulatory proposal, detailed below, and my product liability proposal, which I have put forward elsewhere,[84] interlock and shed light on the integration of administrative law and product liability law more generally.

The following proposal offers recommendations for pre-market approval of stem cell products, post-market regulation of these products, and a risk-management and risk-reduction system. Together, these suggestions favor giving the FDA a more robust role than it currently has. As indicated earlier, I incorporate the advantages of the Halme and Kessler proposal.[85] Chief among these advantages is the presentation of the risks of stem cell products in terms of cell type, purity, and potency.[86]

Four factors circumscribe my proposal. First, if the level and degree of regulation of a particular stem cell product should be proportionate to the risk it poses, it is crucial to acknowledge that there is currently little reliable information about risks associated with stem cell products. The lack of information presents a challenge both to administrative regulation and to the operation of the market in this area. Further, a "meta" regulatory issue arises. Since the FDA would have a role in determining the degree of risk, it would also have a role in determining the degree of its regulatory power. The meta-issue is whether it is wise for the FDA to have this power.

Second, because my proposal suggests that the FDA should play a more aggressive role, at some point my proposal must be lodged within a general project of assessing the FDA and, if necessary, reforming it. For instance,

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82. It would be churlish to fault Halme and Kessler for not solving problems that were absent from their agenda or for not reaching audiences that the *New England Journal of Medicine* regards as outside its scope.

83. The best recent study of the FDA is DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010).

84. Munzer, *supra* note 1.

85. *See supra* text accompanying note 81.

86. Halme & Kessler, *supra* note 77, at 1732–33.

discussions about raising application fees to support hiring more FDA personnel to process stem cell product applications inevitably feed into larger questions about tying application fees to strict timelines for decisions on applications. Again, conversations about a greater FDA role in post-market surveillance of stem cell products ineluctably involve larger questions about the FDA's authority to monitor all drugs, devices, and biologics once they have entered the market. These issues, though critically important in their own right, fall outside the scope of this Article.

Third, my proposal attempts to account for the various ways in which more regulation can backfire. Obviously, regulation comes with various costs, such as increases in the price of stem cell products and time to market. To be effective, regulation must produce benefits that outweigh its extra costs. Less obviously, making regulation transparent can sometimes introduce perverse incentives. Daniel Cahoy refers to this phenomenon as the "transparency paradox."[87] In fact, it is not a paradox but a predictable result of rejiggering the rules of tort and administrative law. Yet the phenomenon is important, and my proposal takes pains to avoid it.[88]

Fourth, the regulatory reform proposed here depends in part on the product liability analysis to be summarized in Part VI. As mentioned at the very beginning of this Article, any revamping of administrative law should take into account the justifications for altering the product liability regime. The regulatory reforms suggested here interlock with the proposal for reforming product liability law.[89] Thus, the achieved integration helps to make my proposal generalizable to other areas at the intersection of tort and administrative law.

A. The Core of the Proposal

Because so much uncertainty surrounds the risks associated with stem cell products, the FDA should play a more aggressive role than usual in deciding which of these products should be allowed on the market and what instructions, warnings, and restrictions on use should be applied. To illustrate the unknown risks of stem cells, consider the case of a patient with lupus nephritis, a disease in which the immune system attacks the kidneys. Her physicians injected her own hematopoietic stem cells directly into her

87. Daniel R. Cahoy, *Medical Product Information Incentives and the Transparency Paradox,* 82 IND. L.J. 623 (2007). With respect, I prefer to reserve the word "paradox" for logical, semantic, and epistemic paradoxes, of which Russell's paradox, Grelling's paradox, and the examination paradox are respective examples. For a lucid exposition of these paradoxes, see R.M. SAINSBURY, PARADOXES 107–14, 123–27, 142–45, 162 (3d ed. 2009).

88. *See infra* text accompanying notes 107–16; Munzer, *supra* note 1.

89. *See infra* Part VI.A.

kidneys. Six months later she developed cellular masses in her kidneys, adrenal glands, and liver, which researchers believed to be stem cell derived or induced.[90] Although causation has not been established, this case is a warning flag for unknown risks and the uncertainty of side effects.[91]

The FDA must concentrate above all on safety risks and risks of ineffectiveness. So far as safety risks are concerned, the FDA should refuse to allow the marketing of any stem cell products whose risks are deemed unacceptable for virtually all patients. It might, though, permit the nonmarket employment of such products under its compassionate-use program.[92] Even if the risks of a given product are acceptable, the FDA, in its discretion, may ask for additional safety information so that patients and physicians can make informed decisions. Once a product has been approved for sale and has gone on the market, the FDA should require manufacturers and physicians to keep it abreast of changes in risks to safety. The risks might rise, decline, or differ from what they were at the time of approval. The FDA should disseminate this information promptly in the clearest form possible.

As to the effectiveness of stem cell products, plainly the FDA should not allow utterly ineffective products to go on the market at all. Marginally effective products ought to be allowed only if no other treatments are available and the products pose little in the way of safety risks. As with safety, the FDA should monitor the effectiveness of products on the market. It should ask manufacturers and physicians to keep track of departures, up or down, from the effectiveness profile at the time of approval for marketing. It should update all concerned parties of changes in the effectiveness of these products as promptly and as clearly as possible.

In connection with both safety and effectiveness, the FDA should implement a systematic program for risk management and risk reduction. If it deems a risk unacceptable, it should explain its reasoning so that patients and physicians understand the reasons for the product's unavailability. The best way to achieve this goal is to give patients and physicians access to risk-evaluation information through a transparent process. Doing so will also give designers and manufacturers of stem cell products an opportunity to improve the safety and effectiveness profiles of their products.

The FDA should have similar provisions for products with acceptable

90. Duangpen Thirabanjasak et al., *Angiomyeloproliferative Lesions Following Autologous Stem Cell Therapy*, 21 J. AM. SOC'Y NEPHROLOGY 1218 (2010).

91. David Cyranoski, *Strange Lesions After Stem-Cell Therapy*, 465 NATURE 997 (2010); Andras Nagy & Susan E. Quaggin, *Stem Cell Therapy for the Kidney: A Cautionary Tale*, 21 J. AM. SOC'Y NEPHROLOGY 1070 (2010).

92. 21 C.F.R. § 312.300, 312.305 (2012).

levels of risk. Here, though, the FDA must recognize that many decisions have to be made by patients and physicians on an individual basis. For example, a grave risk may be justified in the case of a patient with an apparently terminal illness, because the benefit of a cure or even a marginally effective treatment may be enormous. Although it is certainly worth the FDA's time to catalog minor risks, it should focus mainly on serious and unpredictable risks. Moreover, the FDA should institute a program for risk reduction. Granted, most efforts to lower risk ought to come from the designers and manufacturers of stem cell products. Yet, the FDA's familiarity with different classes of such products should enable it to tell designers, manufacturers, and physicians how to reduce these risks.

Institutionally, CBER is the best place for the FDA to deal with risk. The arguments for a separate center for stem cell products are wanting, at least given current information.[93] CBER has more relevant expertise than any other FDA Center. For combination products using stem cells, cooperation between the OCP and CBER is essential. Within CBER, those departments that deal with noncellular biologics, such as toxins and antitoxins, are less likely to have relevant expertise than those that deal with infracellular biologics such as viruses and gene therapy and cellular biologics such as vaccines and blood products.

Nevertheless, since there are still difficulties with trying to assimilate vaccines to stem cell products, the FDA should establish a new department within CBER to assess the safety and effectiveness of stem cell products, which it can do by reassigning existing personnel as desired and hiring new scientists as necessary.[94] Here, the FDA can look to tort litigation regarding biologic–device combination products, gene therapies, and blood products to get some idea of the expertise required. Moreover, within the last two decades universities have trained many new scientists with experience in stem cell biology. Some of these individuals can bring much needed knowledge to the FDA enterprise of evaluating stem cell products submitted for approval by manufacturers.

As to combination products, it appears that currently the OCP would assign stem cell combination products based on the product's PMOA. However, such products could instead be assigned to the new stem cell department in CBER with a recommendation that the OCP seek aid from other FDA centers based on their relevant expertise. The chief advantages of this alternative include (1) reducing the time, effort, and money spent by manufacturers in jockeying to get review by what they consider a more favorable center and (2) promoting consistency within the FDA's internal

93. *See supra* Part III.A.
94. *See supra* Part III.A.

bureaucracy about the approval and monitoring of stem cell combination products.

The Critical Path Initiative (CPI) sheds further light on the FDA's role in evaluating and promoting stem cell products.[95] Even now CBER receives funding to "[f]acilitate development of treatments using neural stem cells to replace degenerative brain cells."[96] It also gets funds to "[d]etermine whether it is possible to track neural stem cells after transplantation using magnetic resonance imaging (MRI)."[97] This second project aims to ensure the safety and effectiveness of using such stem cells before they are allowed on the market. To this end, it will try to evaluate a possible biomarker for tracking neural stem cells once scientists transplant them into the brains of mice. If the project pays off, it will shed light on the engraftment, differentiation, and fate of these stem cells. The CPI does not have enough money to make CBER an independent player in the market for stem cell products, but it does support programs that add to CBER's expertise and its capacity to assess safety and effectiveness.

B. Strengthening Pre-Approval Requirements and Pre-Clinical Administrative Review

The best antidotes for inadequate information are more and better information. In light of concerns about the lack of understanding of the basic biology of stem cells,[98] the FDA and the federal government would do well to revisit their experience in addressing heart disease, stroke, and HIV infection. In these cases, "[D]iscoveries in basic science were made through government-funded research, but effective drugs were developed in the private sector."[99] Discoveries made by bench scientists will provide both more information and, because of the peer review process, arguably better information. Research and development in the private sector are likely to yield both more and better information. This information might be more practically oriented than that produced by academic bench scientists.

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95. U.S FOOD & DRUG ADMIN., THE CRITICAL PATH INITIATIVE: PROJECTS RECEIVING CRITICAL PATH SUPPORT FISCAL YEAR 2008 13–14 (April 2009), *available at* http://www.fda.gov/downloads/ScienceResearch/SpecialTopics/CriticalPathInitiative/UCM186110.pdf.

96. *Id.* at 11. This source does not explicitly state that CBER receives any of its funding from the Critical Path Initiative (CPI).

97. *Id.* at 12. Both projects involve murine stem cells and collaboration between the FDA and the National Institutes of Health (NIH) Mouse Imaging Facility. *Id.* at 11–14.

98. Yan Leychkis, Stephen R. Munzer & Jessica L. Richardson, *What Is Stemness?*, 40 STUD. HIST. & PHIL. BIOLOGY & BIOMEDICAL SCI. 312 (2009); James M. Wilson, *A History Lesson for Stem Cells*, 324 SCIENCE 727 (2009).

99. Alastair J. J. Wood, *A Proposal for Radical Changes in the Drug-Approval Process*, 355 NEW ENG. J. MED. 618, 618 (2006).

Based on better information and understanding, the FDA should consider strengthening its pre-approval requirements and pre-clinical regulatory review.[100] As a general matter, and at least while stem cell products are in early stages of development, the FDA should be cautious in allowing accelerated or fast-track review of applications for these products. Instead, the FDA should ask manufacturers to improve their pre-approval clinical trials to ensure the safety of stem cell products. For example, the FDA can demand longer-term clinical trials, reduced reliance on surrogate outcomes, and higher numbers of trial participants who are more representative of the target population for the product.[101] It must, though, take into account the costs to manufacturers and consumers in making these changes to ensure that increased safety justifies the expenditures.

The FDA would do well to develop relevant standards for testing and approving stem cell products. These standards generally reside in "guidance" and "best practices" documents. Documents of this sort would not only aid reviewers in a thorough and objective review of applications, they would also help manufacturers and researchers to develop their products with a keen eye on safety and effectiveness, thereby helping them to submit successful applications. To illustrate, the FDA could issue guidelines for the processing, storage, and distribution of stem cell products, and for the most sensible pre-clinical and clinical trial protocols. In issuing such guidelines, the FDA might build on the principles enunciated by the International Society for Stem Cell Research.[102] As a different illustration, the FDA could take a page from its own experience with human gene therapy, where it published a guide to assist reviewers in evaluating INDAs.[103] The content of such a guide for stem cell products would have

100. *Cf.* Wilson, *supra* note 98, at 727–28 (expressing concern about the safety and usefulness of introducing hESCs and iPS cells in patients in regard to engraftment, rejection, toxicity, and tumorgenicity).

101. Warrant for these changes lies in relevantly similar experience with drug approvals. Clinical trial results submitted with an NDA or INDA rarely "provide comprehensive information on possible adverse events." U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-00-21, ADVERSE DRUG EVENTS: THE MAGNITUDE OF HEALTH RISK IS UNCERTAIN BECAUSE OF LIMITED INCIDENCE DATA 9 (2000) (pointing out that the number of patients in pre-approval clinical trials is usually too small to detect less-frequent adverse results, and that patients in such trials are imperfectly indicative of the full range of consumers who will use the drug (because trial participants are usually not elderly, seriously ill, and taking many other medications)).

102. INT'L SOC'Y FOR STEM CELL RES., GUIDELINES FOR THE CLINICAL TRANSLATION OF STEM CELLS (2008), *available at* http://www.isscr.org/clinical_trans/pdfs/ISSCRGLClinicalTrans.pdf.

103. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., GUIDANCE FOR FDA REVIEWERS AND SPONSORS: CONTENT AND REVIEW OF CHEMISTRY, MANUFACTURING, AND CONTROL (CMC) INFORMATION FOR HUMAN GENE THERAPY

to be rather different, for gene therapies are infracellular, but once again CBER would be the most appropriate FDA center to take the lead in developing the suggested guidance.

These suggestions reveal more potent advantages than disadvantages. True, there is some chance of increased costs and time delay. All the same, these suggestions have the advantage of improving the safety and effectiveness of stem cell products. Another advantage is reducing the incidence of massive product recalls. This reduction should limit the amount and severity of fallout from episodes such as the recall associated with the Vioxx scandal.[104] The product liability proposal sketched in Part V indicates how to sort out issues of this kind under imperfect information, bounded rationality, and other impediments, but one cannot transpose that sketch into a regulatory key without qualifications and adjustments.

C. Post-Market Regulation

Few lapses are as well-documented as problems with the FDA's post-market drug-safety program and connected regulatory actions.[105] There are many ways in which both the FDA and manufacturers can perform better in the new area of stem cell products than they have in the case of drugs. Once the FDA has approved the marketing of a stem cell product, it should review the performance of that product both in the short term (e.g.,

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INVESTIGATIONAL NEW DRUG APPLICATIONS (2008), *available at* http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Xenotransplantation/ucm092705.pdf.

104. On September 30, 2004, Merck & Co. announced a voluntary withdrawal of Vioxx based on data from a prospective, randomized, placebo-controlled clinical trial which showed an increased risk of cardiovascular events, including heart attack and stroke. Press Release, Merck & Co., Merck Announces Voluntary Worldwide Withdrawal of VIOXX® (Sept. 30, 2004) (on file with author); Robert Pear, *Senate Approves Tighter Policing of Drug Makers*, N.Y. TIMES, May 10, 2007, at A1. Additionally, the FDA recommended revised labeling of COX-2 selective and non-selective non-steroidal anti-inflammatory drugs to highlight the potential increased risks of cardiovascular events and gastrointestinal bleeding. U.S. FOOD & DRUG ADMIN., *COX-2 Selective (includes Bextra, Celebrex, and Vioxx) and Non-Selective Non-Steroidal Anti-Inflammatory Drugs (NSAIDs)* (April 7, 2005), http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm103420.htm.

105. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-402, DRUG SAFETY: IMPROVEMENT NEEDED IN FDA'S POSTMARKET DECISION-MAKING AND OVERSIGHT PROCESS (2006); Amanda Gardner, *FDA to Monitor Post-Market Drug Safety*, WASH. POST, Jan. 31, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/30/AR2007013001388.html. Critics often single out the FDA's delayed response to adverse events and the failure of manufacturers to meet many of their post-market obligations (such as the obligation to conduct safety studies). Curt D. Furberg et al., *The FDA and Drug Safety: A Proposal for Sweeping Changes*, 166 ARCHIVES INTERNAL MED. 1938, 1940 (2006).

in two or three years) and in the long term (e.g., after ten years). It should also require physicians to report adverse events both to the FDA and to manufacturers, and require manufacturers to report adverse events to both the FDA and physicians. Transparency is every bit as important here as it is at the pre-market stage. Furthermore, the FDA should develop clear, effective, and objective criteria and processes for deciding which actions to take when adverse events become known. The FDA might also consider whether, given the many patients who might harbor unrealistic hopes for stem cell products and therapies, to curtail direct-to-consumer advertising for stem cell products insofar as it has the constitutional and statutory authority to do so. As with the pre-market suggestions made earlier, the FDA should tally the anticipated costs to see whether these post-market suggestions are worthwhile.

Once more, CBER is likely to be the FDA center best suited to carry out these actions. There is, however, a wrinkle to this recommendation. As with drugs, there would likely be potential conflicts of interest when the same FDA center that reviews and approves a stem cell product is solely responsible for taking post-market action against the very product it previously approved.[106] Thus, it seems unwise to have the same group in the proposed stem cell department within CBER perform both actions in the case of these products. It would make more sense to structure this department so that two independent groups make pre-market and post-market decisions yet require these groups to collaborate to prevent loss or duplication of expertise.

A pair of problems with post-market regulation merit special attention. One is whether the FDA currently has the expertise and legal power to compel the divulgence of post-market information. In a valuable discussion, Cahoy points out that the FDA has little experience with post-market clinical trials.[107] The FDA's authority to compel such trials is currently limited.[108] Still, the FDA could, under current law, require designers and manufacturers of stem cell products to report adverse events. Although the FDA can recall medical devices, it cannot recall—only seize—drugs and biologics.[109] Stem cell products are highly likely to have a device component. It is therefore an interesting question whether the FDA has the legal power to recall the entire combination product even if it is apparent that adverse events are due solely to the stem cell biologic

106. Furberg et al., *supra* note 105, at 1940.

107. Cahoy, *supra* note 87, at 667; *see* DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., FDA'S MONITORING OF POSTMARKETING STUDY COMMITMENTS 17–18 (2006) (observing that oversight of post-market commitments is not an FDA priority).

108. Cahoy, *supra* note 87, at 667.

109. *Id.* at 668–69.

component rather than the device component.

The other problem with post-market regulation stems from possible perverse incentives. If the FDA requires designers and manufacturers to divulge the results of post-market testing that they have undertaken voluntarily, then in the future they will be less likely to engage in such testing because it increases their liability exposure. And if they do less voluntary testing, the net result might be that less information is available under the FDA requirement than would have been available without it.

Cahoy's "market based" solution to this problem would immunize timely disclosure by limiting the use of regulation-induced information as evidence in product liability cases for failure to warn.[110] He recognizes that this "solution" could grant immunity in some meritorious cases, and that companies might manipulate research outcomes to gain a tort advantage.[111] Cahoy's "second-best" solution would make changes in administrative law. He would heighten the FDA's authority to demand information and allow manufacturers to invoke FDA approval as preempting state tort law.[112] He acknowledges shortcomings with this solution, too. One shortcoming is the FDA's reputation for "organizational dysfunction"[113] in regard to safety. Another lies in the "political issues" related to conducting further trials on a product that the FDA has already cleared for market, as the trials could suggest that the product is not safe.[114]

The upshot is that a sound administrative proposal must reflect an awareness of the ways in which it could backfire. Once these ways have been identified, it becomes a matter of reducing the likelihood and severity of problems associated with demands for more information. One possibility is to see that Cahoy's market-based and second-best solutions need hardly be mutually exclusive. Another possibility is to take into account not only the ancillary risks of regulation but also its ancillary benefits.[115] A third possibility is to be realistic: just because we can anticipate problems does not mean that they will materialize. Similarly, just because we have some effective solutions does not mean that they will work indefinitely. To account for this realistic view, the administrative proposal advanced here is a dynamic approach that calls for adjustment over time. This approach will promote useful innovations in stem cell

110. *Id.* at 657–60.

111. *Id.* at 660.

112. *Id.* at 660–70.

113. *Id.* at 665 (citing INST. OF MED. OF THE NAT'L ACADS., THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC 79–90 (2007)).

114. *Id.* at 670.

115. Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763 (2002).

technology.[116]

D. A Risk-Management and Risk-Reduction System

To guide assessments of risk, the observations of Halme and Kessler are highly useful.[117] They classify risks into four separate categories: (1) potential transmission of disease; (2) possible damage or contamination caused by cell processing; (3) potential adverse effects of various cell mixes and different levels of purity and potency; and (4) possible adverse events *in vivo*.[118] In the third category, Halme and Kessler's presentation of risks in terms of cell type, purity, and potency is especially useful.[119]

Once CBER is established as the proper center within the FDA for evaluating stem cell products, the next step in devising a system for managing and reducing the risk of such products is to assemble information about them in a database. Relevant information includes data on clinical trials, pre-market approvals, and post-market developments regarding the risks of various stem cell products. The information should be in the clearest form possible and accessible by at least five different groups: treating physicians; patients; research scientists; designers and manufacturers of stem cell products; and health insurers that are deciding whether stem cell products are covered—either generally in a formulary or on an individual-patient basis.

These groups have different informational needs. Patients who are considering stem cell therapies and products need information that they can understand—say, perhaps, at the level of the Merck Manual or the Mayo Clinic website.[120] In setting up the database, the FDA should consider how best to create a technical database that will be of interest mainly to members of the other four groups and whether to provide a non-technical, patient-friendly database. There would, of course, be no bar to patients accessing the technical database if they wish to do so. From this point, one could leave it to treating physicians to explain the risks and potential benefits to their patients. Differently, one could ask the FDA itself

116. *See supra* text accompanying note 4.

117. Halme & Kessler, *supra* note 77.

118. *See supra* text accompanying note 79.

119. *See supra* text accompanying notes 79, 86.

120. This level will be too high for quite a few patients. *See, e.g.*, Melinda Beeuwkes Buntin et al., *Consumer-Directed Health Care: Early Evidence About Effects on Cost and Quality*, 25 HEALTH AFFAIRS w516, w528 (2006) ("About half of all Americans now have difficulty understanding health information, which could affect their ability to obtain high-quality care."); James C. Robinson, *Health Savings Accounts—The Ownership Society in Health Care*, 353 NEW ENG. J. MED. 1199, 1201 (2005) ("But although some persons can and will function effectively as consumers of health services . . . others will fare less well.").

to set up a second, non-technical database. Among the difficulties the FDA would confront are how to simplify and modify the technical database so that it effectively aids patient decisionmaking, and whether the costs of re-crafting the technical database for patients outweigh the benefits of doing so.

A possible supplement to the information found in an FDA database would be information provided by voluntary organizations. Their information could be funneled into an FDA database as a complement to the more technical information already available. Voluntary organizations in this area tend to be disease-focused nonprofit entities, such as the National Kidney Foundation. As Richard Epstein observes, such organizations frequently fill in information gaps in the medical industry.[121] However, Epstein focuses chiefly on drugs used to treat cancer, and it may be that voluntary organizations will work differently in the case of stem cell products.[122] Surely, though, there is enough public interest in stem cell research, as well as prominent foundations that support this research, to make it plausible that voluntary organizations could be useful sources of information.

The foregoing risk-management and risk-reduction system has both disadvantages and advantages, but with help from voluntary organizations, the advantages win the day. The principal advantages lie in fostering, in different ways, the safety and effectiveness of stem cell products and the decisions to use or avoid them. Manufacturers and scientists can build on the recorded experience with previous research and products. Physicians and patients can work together to select therapies and products with a realistic understanding of the upside and the downside of the choices available. Health insurers can make informed decisions on which therapies and products merit coverage.

The disadvantages of the system are readily apparent; even if the FDA refrains from setting up a non-technical database suited to the average patient, there will still be substantial costs with the technical database aimed at manufacturers, scientists, insurers, and physicians.[123] In light of these costs, the FDA should consider building on the infrastructure of an existing

121. Richard A. Epstein, *Against Permititis: Why Voluntary Organizations Should Regulate the Use of Cancer Drugs*, 94 MINN. L. REV. 1, 25–29 (2009).

122. *Id.* at 4.

123. It will be expensive to create and maintain the technical database for all concerned. Serious enforcement and monitoring efforts will likely be necessary for post-market compliance. Failure to make these efforts could lead to underreporting of adverse events and inaccurate risk assessments. *See* Furberg et al., *supra* note 105, at 1939–40 (elaborating on these factors).

U.S. system[124] or at least learn from the experience of other similar international registries, such as the International Stem Cell Initiative Registry or the European Union Human Embryonic Stem Cell Registry. Furthermore, scientists and manufacturers will have legitimate concerns about their patents, trade secrets, patent applications in progress, and other proprietary information. If the type of information and degree of detail required impose substantial burdens on scientists and manufacturers, these burdens might dissuade them from pursuing stem cell products over other biotechnological and biomedical research and products.

E. Relation to Product Liability

If all of the elements of the foregoing proposal are set in place, they should have some impact on manufacturers' liability for stem cell products. But what should be the nature of that impact? An appealing answer is that because stem cell products will have to jump through more hoops to earn approval, manufacturers ought to receive more shelter from product liability than they would have otherwise. This answer, though appealing, is not wholly sound. If the level and degree of regulation of a stem cell product are fairly and accurately adjusted to match its safety risks and its risks of ineffectiveness, then one might argue that those products that are more stringently regulated should receive less protection from product liability suits because of the very fact that they carry elevated risks. Furthermore, manufacturers should not be able to receive increased protection if they have failed to meet all reporting requirements for post-market evidence of ineffectiveness or higher safety risks.

V. A PROPOSED TORT LIABILITY REGIME FOR STEM CELL PRODUCTS

The tort structure I have proposed elsewhere mandates strict liability for products with inadequate warnings or defects, yet adopts measures to safeguard product development and thus encourage innovation.[125] Thus, my product liability proposal contains significant qualifications. These secure a balance among innovation, safety, effectiveness, and patient preferences. This balance is informed by the ethics of imposing risks on others as well as by economic theory. My proposal is mindful of the

124. Examples of relevant systems include the National Library of Medicine clinical trials registry, the FDA's MedWatch Safety Information and Adverse Event Reporting Program, RiskMAPs, the FDA's Adverse Event Reporting System, and the FDA's Postmarket Requirements and Commitments for Human Drugs and Post-Approval Studies for Medical Devices databases.

125. Part V restates the content of Munzer, *supra* note 1, at 145–49, in different but basically equivalent language.

difficulty in determining the causes of harm in the design, development, manufacture, and use of stem cell products. The tort structure advocated here is a seed leaf for making my integrated stem cell proposal generalizable to other problems in which tort law and administrative law intersect.

A. Why Strict Liability Needs to Be Qualified

To begin, a strict liability scheme should include a socialized insurance function to hold down the financial burden on pioneers in the field. Money for a socialized insurance fund would come from patients, designers, and manufacturers. The government would act as an insurer of last resort. One could arrange contributions to the fund in various ways. Perhaps the most straightforward arrangement would have patients pay into the fund for each treatment and firms pay into the fund for each stem cell product. In this scheme, for every stem cell product a firm manufactures, it would pay a fixed amount into the insurance fund. These payments from various sources would defray the costs of caring for those patients who have adverse reactions to stem cell products.

There is every reason to be skeptical of a market-share approach on the producers' side. Under this approach, firms would contribute to the fund based on their market share of all stem cell products or of the stem cell products in a particular category. Nevertheless, a market-share approach may cause inequities in defraying the costs of liability, for some firms may violate standards of safety and effectiveness at the expense of other firms. If these violations occurred, other firms would have an incentive to shave down their compliance with relevant standards, especially if the cost of liability remained relatively low in comparison to the cost of ensuring optimal safety and effectiveness. To avoid these undesirable effects, regulators would have to police compliance with standards and undertake curative measures in cases of noncompliance. It would make little sense to bear the regulatory costs of this work if one can avoid it by the more straightforward approach identified earlier.

The point of my socialized insurance scheme is to spread the cost of liability, but my product liability proposal has additional rules to suppress some of the undesirable effects of an unqualified strict liability regime. These include an unavoidably unsafe rule, a learned intermediary rule, FDA approval as a rebuttable presumption in defective design suits, a state-of-the-art defense, a collateral-source rule, and assorted limitations on damages, especially on punitive damages.

My tort proposal also includes an exception for compassionate use of stem cell products to encourage a balance between patient safety and patient preferences. Patients who are diagnosed with serious or terminal

conditions that lack suitable non-stem cell treatments might want to be treated with cutting edge stem cell products. In such cases, firms should not be held liable for the harms these products cause, even though the stem cell products at issue may be insufficiently tested to warrant putting them on the market generally. Because informed consent is vital to the ethics of imposing risk on patients, I would allow the compassionate use of insufficiently tested stem cell products only when patients were informed of the risks of such use and discouraged from taking inordinate risks.[126] Even then, I would permit use of these products only in serious cases.

The FDA, the patient, and the treating physician should have the main voices in deciding whether a condition is serious enough to warrant a compassionate-use exception. They should also have the main voices in deciding whether safer treatments are insufficiently effective to merit the use of a less well-tested stem cell product. Still, one must be wary of a slippery slope in such decisions. Suppose that an existing treatment is safe and effective—but also very expensive. I doubt that an insufficiently tested but cheaper stem cell alternative treatment should be allowed on grounds of compassionate use. We should avoid the risk of a secondary market developing for stem cell products in which manufacturers both avoid product liability and market these products to patients who are less well-off and less well-informed than most patients.

B. Apportioning Liability in the Supply Chain Under a Strict Liability Scheme

If a stem cell product causes harm, pinpointing the exact cause of that harm can be a serious challenge. First, a stem cell product may become defective at various points in its development. The design may be faulty, the stem cell line may be corrupted, or the manufacture may be shoddy. Next, the product might cause harm when administered to the patient. For instance, medical personnel may improperly dispense or store the product and thereby create or even compound the harm. Further, these scenarios, and many more besides, could combine to produce the harm that results. Unearthing the likely cause of any particular harm may be especially difficult with stem cell products because the use, design, manufacture, and development of these products will be novel. Interplay among these possibilities might aggravate the task of identifying the causes of the harm a patient suffers.

126. *See, e.g.*, Zubin Master & David B. Resnik, *Opinion: Reforming Stem Cell Tourism*, THE SCIENTIST, Sept. 14, 2011, http://the-scientist.com/2011/09/14/opinion-reforming-stem-cell-tourism (offering suggestions for thwarting the use of unproven and possibly harmful stem cell therapies); *cf.* the discussion of Regenexx-C *supra* at text accompanying notes 55–66.

For this reason, my qualified strict liability scheme explores collective and proportional liability theories.[127] Under these theories, plaintiffs would be allowed to recover damages against multiple members of the supply chain in situations where fault could not be satisfactorily shown as to any one party. Proportional liability would parcel out the cost of liability based on the degree of harm each of the defendants caused. Members of the supply chain would be free to allocate the costs of liability among themselves, such as through indemnification arrangements. They could also minimize their collective risk through self-regulation.

In some cases, the party responsible for the harm may be uniquely identifiable. For instance, if a design is faulty, the plaintiff may bring suit against the design firm. Likewise, depending on the harm, a lawsuit may be brought for a manufacturing defect against the manufacturer or for an inadequate warning against either the manufacturer or designer. Each type of lawsuit presents distinct challenges.[128] As to the first option, a defect in design may create liability if there were safer design alternatives available at the time the product was conceived. If no such design existed, designers ought to be able to avoid liability with the state-of-the-art defense. The second option—suing the manufacturer—would be potentially more lucrative for plaintiffs, since manufacturers would rarely have a state-of-the-art defense. As to the third option, a lawsuit for inadequate warnings should fail in most cases if the warnings were transparent, but such warnings could increase the potential liability for designers and manufacturers, and thus reduce their incentive to unearth adverse information.[129] To avoid this result, courts could create protections for early warnings, but afford no such protections for delayed warnings.

VI. INTEGRATING ADMINISTRATIVE AND PRODUCT LIABILITY LAW

Accepting my administrative proposal does not require acceptance of my product liability proposal, nor does accepting my product liability proposal require acceptance of my administrative proposal. However, the two proposals are consistent with each other. Moreover, they are complementary, well-suited to each other, and mutually reinforcing. As to integration, the nub of the matter is to clearly specify *how* they interact on these criteria. That is the first item on the agenda of this Part. The second is to show how the results can be extended to other areas of tort and

127. *E.g.*, Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151 (2004).

128. Tomas J. Philipson & Eric Sun, *Is the Food and Drug Administration Safe and Effective?*, 22 J. ECON. PERSPECTIVES 85, 90–91 (2008).

129. *See supra* text accompanying notes 87–88, 108–15.

administrative law.

A. How the Two Proposals Mesh with Each Other

Stem cell products have risks that are largely unknown and potential rewards that are highly touted. The tort and administrative proposals detailed in this Article share some aims and means for reducing the risks of stem cell products while permitting their relatively unencumbered development. To explain how the commonalities between these proposals enable them to mesh well together, it is necessary to clarify three key terms, which I use in a semi-technical way.

Two proposals are *complementary* if they work together to promote common aims. The proposals advanced here share the following aims: mitigating disincentives to enter the stem cell market; increasing the safety of stem cell products and thereby lowering the risks they pose to consumers; and promoting the effectiveness of stem cell products and thereby increasing their usefulness to consumers.

Two proposals are *well-suited* if they use the same or similar means to achieve their shared aims with as little waste as possible of resources expended on extraneous means and aims.

Finally, two proposals are *mutually reinforcing* if each encourages compliance with the other. Take note that writing of means, aims, incentives, and avoiding waste does not make either proposal, or both of them together, a wholly consequentialist affair. The best analyses of risk reduction, risk management, and risk imposition have an important non-consequentialist cog in that they take seriously the ethics of imposing risks on other people.[130]

1. Complementarity and Common Ends

a. Entry

The product liability proposal mitigates disincentives to enter the stem cell market. It thereby advances safety in two ways. First, it immunizes firms that disclose post-market test results from liability in inadequate warning lawsuits. The disclosure must be timely, but such prompt notice enables designers and manufacturers to limit liability, which offers the prospect of increased profits. Secondly, the proposal limits punitive damages for firms that have fully complied with all FDA requirements. This limitation reduces the monetary risks of designing and making stem cell products. Lowering the exposure to one category of damages should

130. *See generally* Munzer, *supra* note 1.

draw more firms into the market. It should also increase the quality and variety of stem cell products, which might help control prices for consumers. Thus, limiting liability, and in turn reducing barriers to entry, increases the incentive to disclose post-market test results and to comply fully with all FDA requirements that advance safety.

The administrative proposal also mitigates disincentives to enter the stem cell market in various ways and thereby promotes safety. To begin, it eliminates the lobbying that would otherwise be needed to slot a proposed stem cell product into a particular FDA center. Under current law, firms often hire lawyers or professional lobbyists to persuade the FDA to place their products into a center that tests, or at least is believed to test, less rigorously and less expensively than another center. The proposal eliminates this lobbying expense by having a single department within CBER evaluate all proposed stem cell products.

Some might contend that the mandatory insurance provision in the product liability proposal will greatly increase barriers to entry and thereby raise prices to consumers. However, this assertion is easily rebutted. All insurance costs something. If it did not, there would be no reason for the insurer to provide any coverage. For designers and manufacturers of stem cell products, buying insurance is a way to hedge against risk. Hence, a required insurance premium, while possibly representing a minor barrier to entry, provides an even greater demonstrable benefit that reinforces the complementary nature of the product liability and administrative proposals. The mandatory insurance provision thus serves to mitigate disincentives to enter the stem cell market.

Further, the mandatory insurance premium is based partly on market share. Thus, a firm hoping to break into the field will face relatively small insurance costs. In return for a modest premium, the firm cabins the risk of debilitating judgments and settlements. Thereafter, efforts to improve safety and effectiveness, the eventual success of those efforts, compliance with post-market regulations, and the securing of FDA approval will all play a role in decreasing firms' payments into the mandatory insurance fund. As with all insurance, the premium paid hedges against risk, and that hedge should appeal to almost all firms, large and small. Consequently, the mandatory insurance provision in no way shows that the two proposals fail to mitigate disincentives to enter this market. As a result, any effect on costs to consumers stemming from the mandatory insurance provision is likely to be modest.

b. Safety

The two proposals are also complementary because they work together

to increase the safety of stem cell products and thereby decrease the risks to consumers. The product liability proposal advances this end by incentivizing firms to follow FDA procedures that will likely make their products safer by limiting liability and punitive damages in exchange for compliance. Further, FDA approval of products results in a rebuttable presumption of safety so far as design flaws are concerned. The availability of this presumption should encourage firms to comply with FDA regulations. As a corollary, compliance with FDA regulations might lead to a reduction in the insurance premiums paid by firms.

The administrative proposal seeks to increase the safety of stem cell products through its risk-reduction and risk-management system. This system provides for the rapid dissemination of information among firms, doctors, patients, consumers, and the FDA. The heightened level and quality of information should enable all concerned to make better choices about the design, manufacture, and use of stem cell products. In this situation, better choices include safer choices.

Two primary objections exist to the argument for complementarity. The first is that various parts of the product liability proposal actually increase risk to consumers. Limits on punitive damages might lead to carelessness on the part of designers and manufacturers. Immunizing defendants in failure-to-warn suits because of timely disclosure of post-market test results lowers the deterrent value of product liability suits. This lower value in turn decreases consumers' prospects of financial recovery. The objection, if sound, might suggest that the product liability proposal is not complementary to the administrative proposal, as the former undermines the aim of increasing safety and decreasing risk to consumers.

However, analysis of this objection reveals that it is less incisive than it initially appears. For a start, the objection relies on a suppressed premise—namely that many, if not most, parts of the product liability proposal increase consumer risk. Without this premise as a base, to be convincing the objection requires extrapolation from the few parts mentioned in the preceding paragraph to all or most parts of this proposal. Such an extrapolation is patently unwarranted, for it is evident that the proposal contains many provisions that increase consumer safety. Among them are tort liability for defective products and inadequate warnings and the fact that the regime suggested is a modified strict liability regime for stem cell products. Precisely because the extrapolation is unwarranted and the suppressed premise is false, many, if not most, parts of the proposal advance consumer safety.

A further point has to do with the "part-to-whole" relationship contemplated by the first objection. One way of putting the objection is that some elements of the product liability proposal undermine safety, or at

least seem to do so. This is the "part." From this point, the objector reasons that the proposal overall undermines safety. This is the "whole." This reasoning is fallacious. What is true of a part, or even of several parts, need not be true of the whole. It could well be that the proposal overall advances safety. So it is not simply that the suppressed premise is false and the extrapolation is unwarranted that the proposal advances safety; it is *because* the suppressed premise is false and the extrapolation is fallacious that the overall proposal could advance safety.

Moreover, both proposals seek to take competing considerations into account. On the one hand, were safety standards raised to an unattainable level, fewer firms would place even a toe in the icy waters of the market. On the other hand, were regulations decreased or loosened and tort actions curtailed, the prospect would arise of a free-for-all market in which firms cut costs and put out substandard products. Although some balancing is in order, it is too blunt to turn the entire conversation into "weighing" things on "scales." A virtue of much sophisticated work in moral and political theory is the move away from sole reliance on crude balancing metaphors to a wider awareness of the ways in which reasons and normative considerations on one side can variously exclude, undercut, override, neutralize, or otherwise affect reasons and normative considerations on the other.[131]

At the intersection of the two proposals, then, we must be wary certainly of tipping the scale too far in either direction. But we must be equally wary of allowing one proposal to exclude, or otherwise undercut, the other to an indefensible extent. Once these points are taken to heart, we see that the liability proposal must not be pushed so far as to throw the administrative proposal out of balance or to derail it. The parts of the liability proposal that the objection invokes fall well short of an exhaustive list of its parts. Other parts provide a good many incentives to safety. Consequently, once a judicious merger of Parts IV and V is reached, the fact that some aspects of the product liability proposal might result in less than an extremely high level of consumer safety does not defeat the complementarity of the proposals as regards safety.

The second objection is that the various incentives to follow FDA procedures, in the hope of avoiding product liability or at least punitive damages, might not increase consumer safety. The claim that it increases

131. *See generally* 1 DEREK PARFIT, ON WHAT MATTERS 31–174 (2011); JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 6–8, 143–47, 186–87, 205–08, 214–19, 367–69 (2009); JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–48 (3d ed. 1999); Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L. FORUM 1 (1968).

safety, it might be said, depends on the idea that the FDA has special knowledge about stem cell products. Only with this special knowledge can the FDA assess accurately the safety of products submitted for its approval. Yet, the objection concludes, right now the FDA has no such expertise or special knowledge.

This objection raises a problem that the administrative proposal is designed to overcome or at least to limit. It will take some time for the new department within CBER to gain knowledge of stem cell products. But it will likely not take long, for in the past two decades graduate schools in the life sciences have been minting new scientists with doctorates in stem cell biology. Hence, there should be a good labor supply of qualified scientists.

Moreover, the proposal deals with the timing issue by instituting various requirements that must be met before the limit on punitive damages takes effect. One such requirement is that the FDA have a more accurate picture of the risks of stem cell products. So before the limits on product liability damages come into effect, stem cell technology must be well-enough studied for the FDA, designers, manufacturers, physicians, and consumers to have a decent grasp of the risks. In consequence, the objective of consumer safety has priority over mitigating the disincentives to enter the market.

Hence, when the incentives to follow FDA procedures do take effect, the specialized knowledge of the FDA will enable compliance with the FDA procedures to increase consumer safety. Granted, this point does not entail that safety will increase immediately. Still, the modest limits on liability, preclusion of punitive damages, and significant barriers to entry are likely to have two effects. One is to encourage independent safety protocols by manufacturers and regulators. The other is to give the FDA time to come up with well-vetted procedures for increasing safety.

Although one can imagine why a legal scholar might make one or the other of the two objections above, it would be downright odd to make them together. The first objection targets the product liability proposal by claiming that it decreases consumer safety. The second targets the administrative proposal by claiming that it decreases consumer safety. If both objections were sound, that would hardly show that the proposals are not complementary. In fact, both proposals would be superlatively complementary because they would work together to lower consumer safety—perverse though such an aim would be. Perhaps some might hurl as many objections as possible in hopes that at least one will stick. In any case, the foregoing replies establish that neither objection is well-taken and that the two proposals are complementary as to safety.

c. Effectiveness

Here the product liability proposal plays a minor role, for consumers can hardly sue in tort just because a particular stem cell product failed to help them. Still, consumers might be able to sue manufacturers for false or misleading advertising. Also, the regime of modified strict liability encourages designers and manufacturers to avoid unnecessary risks and to produce products that work well. In these ways, the tort proposal thus furthers effectiveness to some extent.

The administrative proposal carries the laboring oar for effectiveness. Under it, the FDA will approve only products that clinical trials have shown to be effective for a given injury, disease, or condition. Additionally, if post-market testing indicates that certain products are ineffective, or are less effective than alternatives that have better-known risk profiles, then ineffective products will be withdrawn from the market, and less effective products with decent alternatives will decline in market share. Thus, the two proposals are complementary not only with respect to safety and mitigating disincentives to enter the stem cell market but also with respect to effectiveness.

2. Well-Suitedness and Common Means

Complementarity has to do with ends; well-suitedness concerns means. Recall that two proposals are well-suited if they use the same or similar means to achieve their shared ends with as little waste as possible of resources expended on extraneous means and ends. Two features of my proposals illustrate how well-suited they are to each other. The risk-management system created for the FDA is used in product liability cases. And the early disclosure of post-market test results both brings stem cell products into compliance with suggested FDA regulations and shields against some sorts of product liability lawsuits.

a. Risk-Management System

The system advocated in the administrative proposal includes a database of stem cell products that contains, among other things, information on their safety and effectiveness.[132] The contents of the database include information secured by post-market testing. By having this information readily accessible, the database makes it easier to determine the insurance premiums to be paid for various stem cell products in light of their claims histories. From the database, the entity overseeing the product liability

132. *See supra* text accompanying note 120.

insurance fund has an easier road to determine the market share of various firms. Thus, both proposals employ the same or similar means to further the aims of safety and effectiveness. These means might also advance the aim of mitigating disincentives to enter the stem cell market by calibrating mitigation. The two proposals are well-suited to each other, for the database included in the risk-management system aids both the administrative and product liability schemes in achieving their similar objectives.

b. Disclosing Post-Market Test Results

The product liability proposal uses incentives for firms to disclose post-market test results even when, and especially when, they are unfavorable to the firms' products. The administrative proposal compels such disclosure. Here, similar means advance the ends of having safe and effective stem cell products.

Precisely how the two proposals interlock here is slightly complicated. Insofar as the FDA has the legal authority to compel the disclosure of post-market test results, the so-called transparency paradox forcefully emerges.[133] To combat the possibility of backfire—having less information rather than more as a result of regulation—the qualified strict liability regime limits the information that plaintiffs can use in inadequate-warning suits.[134] The product liability proposal would also limit punitive damages.[135] Hence, this proposal has ways to encourage speedy disclosure by firms of post-market test results. The two proposals are well-suited in that both use similar means to advance the ends of safety and effectiveness.

Let no one contend that a combination of carrot, via the product liability proposal, and stick, via the administrative proposal, is unnecessary. The idea behind such a contention seems to be that incentivizing something while also compelling it is exactly what makes the two proposals ill-suited, or, at least, redundant. I reply that here we need both carrot and stick.

With only the stick, firms might well cease, or curtail, post-market testing for fear of product liability. With only the carrot, some firms might choose not to comply with the FDA. Noncompliance might be the result of calculating either that the costs of disclosure outweigh the benefits or that the unfavorable information is unlikely to be discovered by anyone else. Either way, the consumer is left at a higher risk of using an unsafe or ineffective product. What may seem superfluous is in fact necessary. The two proposals should use the common means of disclosure to pursue ends of

133. *See supra* text accompanying notes 87–88, 107–14.
134. *See supra* text accompanying notes 125–27.
135. *Id.*

safety and effectiveness.

3. *Mutual Reinforcement*

Two proposals are mutually reinforcing if each encourages compliance with the other. We have already seen one instance of mutual reinforcement: disclosure of post-market testing as mandated by the FDA reinforces—and is reinforced by—the corresponding immunity given in product liability litigation. Here are three more examples.

a. *Rebuttable Presumption of Safety*

Under the administrative proposal, FDA approval gives designers a rebuttable presumption of safety in product liability suits. The product liability proposal, by giving designers some protection against strict liability, spurs them to comply with FDA regulations for approving a stem cell product. Further, the rebuttable presumption of safety is bolstered by, and partly justified on the basis of, stricter FDA approval standards that increase consumer safety. Thus the added difficulty in securing FDA approval should erase doubts that the presumption might compromise consumer safety.

b. *Limits on Punitive Damages*

The punitive damages limit and compliance with the suggested FDA regulatory scheme mutually reinforce each other. The product liability regime, by limiting firm exposure to punitive damages, offers an incentive for firms to adhere to FDA regulations. In turn, strict FDA regulations are warranted partly because compliance with them limits the damages that injured plaintiffs can recover.

c. *Risk Management and Socialized Insurance*

The administrative proposal includes a risk-management system. This system, with its database, facilitates the exchange of information among the FDA, designers, manufacturers, physicians, and patients.[136] The transparency of the system gives firms an incentive to participate honestly. The product liability proposal includes a socialized insurance scheme. Firms' premiums are partly a function of information about the safety and effectiveness of their products. Honest participation in the risk-management system is likely to hold down the amount of their insurance premiums. Consequently, the socialized insurance scheme provides

136. *See supra* text accompanying notes 119–20.

incentives to participate honestly in the risk-management system and to comply with FDA regulations pertaining to safety and effectiveness.

Only Pollyanna, some might say, would have such an optimistic view of the honesty of designers and manufacturers.[137] They are likely, some would say, to provide *false* information. To a significant extent, I disagree. By no means am I blessed with the constant sincerity and sunny disposition of the title character in Porter's novel. Yet I think that the penalties for false statements by designers and manufacturers, aided by the transparency of the system in which they work, is apt to induce honest participation and significant, if grudging, compliance with FDA regulations.

The whole of the mutual reinforcement argument can be seen by looking at the above examples in the aggregate. The prospect of having to pay large judgments or settlements in a stem cell product liability suit may lead even the most safety-conscious firms to think twice about entering the stem cell market. By encouraging compliance with strict FDA regulations, the two proposals work together to increase safety and lower the chance that firms will be hit by an enormous verdict despite meticulous research and development. The rebuttable presumption of safety that arises from FDA approval further lowers the chances that firms will be exposed to substantial liability. The limit on punitive damages resulting from compliance with FDA procedures protects firms against debilitating damage awards even if a verdict is returned against it. Conversely, the socialized insurance premiums reflect, in their amounts, regulatory compliance. Should all firms comply with FDA regulations, it becomes even more appropriate that socialized insurance ought to exist to prevent any one firm from financial ruin.

To sum up: these four examples, as components of proposals for two different areas of the law, show that the proposals mutually reinforce each other in encouraging increased safety and effectiveness pursuant to FDA regulations by way of limiting potential liability and mitigating disincentives to market entry.

B. Generalization and Its Limits

Think of the integration of administrative and product liability law in Part VI.A as a wrench. Just because one has a wrench does not mean that every problem is a bolt that needs tightening. It would be foolish to claim that the integration suggested here can be applied without change to every area in which administrative law and product liability intersect. Here I argue that my integrated proposal, with adjustments, can be helpful in at

137. *See generally* ELEANOR H. PORTER, POLLYANNA (1913).

least some other cases.

To show that I do not see all problems as bolts, I emphasize that the integrated proposal is unlikely to be particularly helpful or even necessary for most workplace risks and injuries. Workers compensation and the Occupational Safety and Health Administration (OSHA) handle the majority of such cases fairly well. Nor is the proposal apt for problems of climate change. There are so many causes of climate change, and the ramifications and remedies are so disputed and so in need of international cooperation, that this Article can throw little light on them.

Nevertheless, the integrated proposal illuminates the regulatory and liability issues involved in toxic substances and nanotechnology.

1. Toxic Substances

Regulatory agencies and the judicial system do not work together to form a cohesive scheme in the case of toxic substances. Despite *Chevron*,[138] a court can still discard agency actions that do not meet the court's scientific standards.[139] The *Chevron* standard is sufficiently amorphous in practice that a court can strike down agency regulations because it disagrees with the agency's science. Moreover, compliance with judicial decisions can interfere with an organization's ability to comply with regulations. Sometimes judicial orders are so cumbersome that they frustrate regulatory compliance.[140] In this area, the actions of courts and administrative agencies are not complementary, well-suited, and mutually reinforcing.

All the same, at least two features of the integrated stem cell proposals can be mapped onto the case of toxic substances, for both stem cells and toxic substances have problems with uncertainty and risk. First, a presumption of safety with agency approval after full disclosure by the regulated entity would help to fix the current problem of judicial rejection of agency risk assessments. The Environmental Protection Agency (EPA), OSHA, and the FDA have scientific competence and already have a hand in pre-market approval and regulation.[141]

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138. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (setting an "arbitrary [and] capricious" review standard when an agency is charged with regulating a particular problem).

139. *See* Gulf S. Insulation v. U.S. Consumer Prod. Safety Comm'n, 701 F.2d 1137, 1145–50 (5th Cir. 1983) (holding that the Commission's method of determining carcinogenicity was insufficiently precise and had too high a margin of error); CARL F. CRANOR, REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW 110–11 (1993).

140. CRANOR, *supra* note 139, at 111.

141. *Id.* at 105–07. The agencies have authority to regulate toxic substances under scattered sections of the Toxic Substances Control Act, 15 U.S.C. §§ 2601–92 (2006); the

Second, the risk-management system and risk-reduction system proposed in Part IV.D of this Article would, in principle, work well for toxic substances. Current administrative schemes concentrate heavily on consumer safety, and some post-market regulations already exist. Even if the statutes cited favor companies that have passed pre-market approval,[142] the favor does not extend to tort suits so that companies can hide post-market test results without fear of liability. As Part IV.C shows, mandatory post-market testing and the rapid dissemination of information serve the goal of consumer safety. Disclosing the results of post-market testing and the effects of consumer use would be a ground for limiting product liability, and thus would be an incentive for companies to disclose.

Nevertheless, I do not claim that the integrated proposals advanced here are wholly appropriate for toxic substances. For a start, the socialized insurance function in the case of stem cells is not readily transferrable. Perhaps it is plausible to believe that many stem cell products will have similar risks and unknowns, and that adverse events will be seen in patients fairly quickly. The risks and unknowns of toxic substances run the gamut from relatively benign (aspartame) to extremely dangerous (asbestos). Adverse consequences might not come to light for many years (asbestos). Furthermore, incentives are not likely to operate in the same way. Scientists and physicians are aware that the side effects of stem cell products are unknown, and for that reason have an incentive to withhold them from patients until they are reasonably confident of a promising outcome. In contrast, firms put new chemicals into use without enormous concern for consumer safety. Because most chemicals do not have dangerous effects, the firms have little incentive to delay their introduction.

2. Nanotechnology

The nanotechnology field is similar to the field of stem cell products in key respects. For starters, both have significant potential to improve health. Nanotechnological research has come up with new diagnostic tests,[143] therapeutic vehicles,[144] and antibiotics for drug-resistant pathogens,[145] to

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Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2006); and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–99 (2006).

142. *See supra* note 141; CRANOR, *supra* note 139, at 104–08.

143. Kevin Rollins, *Nanobiotechnology Regulation: A Proposal for Self-Regulation with Limited Oversight*, 6 NANOTECHNOLOGY L. & BUS. 221, 223 (2009).

144. *See generally* Robert Lam & Dean Ho, *The Coalescence of Nanotechnology with Systems Biology for Optimized Drug Delivery*, 5 NANOTECHNOLOGY L. & BUS. 125 (2008) (discussing developments in drug delivery systems and their relationship to nanotechnological research).

145. Kerriann Greenhalgh & Edward Turos, *In Vivo Studies of Polyacrylate Nanoparticle Emulsions for Topical and Systemic Applications*, 5 NANOMEDICINE: NANOTECHNOLOGY, BIOL. &

name only a few.[146] Next, the risks of using both nanoparticles and stem cell products are unknown and difficult to quantify.[147] Even silver and gold take on new and sometimes unpredictable properties when reduced to the nanoscale.[148] Finally, as with stem cells, neither regulatory agencies nor tort law doctrine consider nanoparticles to be worthy of separate and special consideration.[149]

Given these similarities, at least some features of my integrated proposal for stem cells would be useful in the nanotechnology context. The socialized insurance function is one such feature. Although consumers and manufacturers should bear some of the risks and costs, at some point government-backed insurance as a last resort will be appropriate for nanotechnology products with unknown and unpredictable risks. Here, proportional liability based on market share can also be helpful in calculating initial manufacturer liability. Of course, once unknown risks become known and predictable, this part of the integrated proposal should be reassessed—just as it should in the case of stem cells.

Keep in mind that nanotechnology, like stem cell products, merits incentives because large social benefits are in the offing. Limiting punitive damages and allowing some litigation protection in failure-to-warn cases when a risk has been disclosed early should help prompt manufacturers to enter the field. By protecting nanotechnology firms from huge judgments, one can spur post-market research and disclosure of newly discovered risks. These provisions of the integrated proposal are especially apt in the case of nanotechnology that has significant potential to benefit others. I would not press them into service for, say, nanotechnology-based cosmetics.

And, yet, it is hardly sound to map all features of the integrated proposal onto nanotechnology. For one thing, the regulatory picture is much more complicated. Stem cell products will be mainly, if not entirely, the province of the FDA. Nanotechnology is under the sway not only of the FDA but also the EPA, OSHA, the Department of Agriculture, and other agencies. This multi-agency approach makes sense because nanotechnology is already being used in energy, optics, electronics, and environmental

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MED. 46 (2009).

146. For a list of other uses, see Rollins, *supra* note 143, at 222–24.

147. *See* THE NANOTECHNOLOGY CHALLENGE: CREATING LEGAL INSTITUTIONS FOR UNCERTAIN RISKS (David A. Dana ed., 2012) (collecting assorted essays on nanotechnology); David W. Grainger, *Nanotoxicity Assessment: All Small Talk?*, 61 ADVANCED DRUG DELIVERY REVS. 419 (2009) (discussing technical details that contribute to the difficulty of predicting nanotoxicity).

148. Jessica K. Fender, Note, *The FDA and Nano: Big Problems with Tiny Technology*, 83 CHI.-KENT L. REV. 1063, 1068 (2008).

149. Rollins, *supra* note 143, at 237–39.

remediation.[150] Furthermore, even the picture within the FDA is more complicated. CBER and the Office of Combination Products are the right places for evaluating stem cell products. Yet the FDA currently studies and regulates nanotechnology through CDER, CDRH, the Center for Food Safety and Applied Nutrition, the Center for Veterinary Medicine, and the National Center for Toxicology Research.[151] The FDA has formed a Nanotechnology Task Force to "identify and recommend ways to address any knowledge or policy gaps that exist so as to better enable the agency to evaluate health effects from FDA-regulated products that use nanotechnology materials."[152] Nanotechnology requires a much more thorough revamping of the FDA than do stem cell products.[153] It also requires a multi-agency approach that is inapposite to the case of stem cells.

CONCLUSION

The possibilities of stem cell products in treating disease and in regenerative medicine are vast. These possibilities, though, come with significant risks. It would be regrettable to delay the needed reformation of administrative law until hundreds, if not thousands, of stem cell products are on the market. The administrative regulation of eventual stem cell products by the FDA will require exacting attention to safety and effectiveness without imposing an undue burden on manufacturers. The same is true for product liability claims regarding stem cell products. Alas, no existing category—whether vaccines or blood products or combination products—offers a perfect legal model for stem cell products. However, one can tease out pertinent features of these categories to show what might work well for stem cell products. These features can then be considered and molded into more definitive recommendations as these products appear on the market and their risks and rewards become better understood over the coming decades.

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150. Gregory Mandel, *Nanotechnology Governance*, 59 ALA. L. REV. 1323, 1331–40 (2008).

151. Rollins, *supra* note 143, at 227.

152. U.S. FOOD & DRUG ADMIN., *Nanotechnology Task Force: About the Task Force*, http://www.fda.gov/ScienceResearch/SpecialTopics/Nanotechnology/ucm2006658.htm (last visited Nov. 30, 2012).

153. For further commentary, see Mark N. Duvall, Alexandra M. Wyatt & Felix S. Yeung, *Navigating FDA's Approach to Approval of Nanoparticle-Based Drugs and Devices*, 8 NANOTECHNOLOGY L. & BUS. 226 (2012); Jordan Paradise, *Reassessing Safety for Nanotechnology Combination Products: What Do Biosimilars Add to Regulatory Challenges for the FDA?*, 56 ST. LOUIS U. L.J. 465 (2012).

CHEVRON AND THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

RAJIV MOHAN*

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* J.D., Harvard Law School, 2012; B.A., The Ohio State University, 2009.

INTRODUCTION

So often, the question in cases of statutory interpretation is what "Congress meant,"[1] what "Congress intended,"[2] or what "Congress thought."[3] After all, the basic assumption of statutory interpretation is *legislative* supremacy.[4]

But these questions are incomplete, for they leave implicit an essential part of the legislative process: the President. Article I, Section 7 of the Constitution requires the President to sign a bill before it becomes a law unless two-thirds of each house override his veto.[5] And the Constitution gives the President the power to recommend legislation to Congress.[6] Typically, the President is as essential to the passage of legislation as Congress.

Yet the President's role in the legislative process is often overlooked and subordinated for linguistic convenience. This Article considers how the President's role in the legislative process affects whether courts should defer to agency interpretations of statutes. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that courts should defer to an agency's reasonable interpretation of an ambiguous statute.[7]

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1. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473 (1977).

2. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (discussing the presumption that Congress does not intend to preempt state law causes of action).

3. *See, e.g.*, Taylor v. United States, 495 U.S. 575, 597 (1990).

4. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (explaining the common idea that courts are subordinate to legislatures except when they exercise the power of judicial review).

5. U.S. CONST. art. I, § 7.

6. U.S. CONST. art. II, § 3 (stating, "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient").

7. 467 U.S. 837, 843–44 (1984).

Ambiguity, the Court explained, represented an implicit delegation of interpretive authority from Congress to the agency.[8] Moreover, agencies are more democratically accountable than courts, and they have greater technical expertise.[9]

The President's role in the legislative process offers another reason for deference. Legislative supremacy requires interpreters to construct legislative intent from statutory context. The President's involvement in the legislative process gives him unique knowledge of statutory context. And when agencies are subject to presidential control, their interpretations likely reflect this knowledge. The Executive Branch might then be a better expositor of statutory meaning than the courts. Unlike the traditional view of agency expertise, this view links agencies to the President and focuses on a specific sort of expertise in statutory meaning, one based on actual participation in the legislative process.[10]

But once revealed, this additional reason for deference is ultimately *Chevron*'s undoing. Embedded in the constitutional structure is the principle that lawmaking should be separate from law-exposition.[11] *Chevron* combines presidential lawmaking with binding interpretive authority contrary to this principle. This combination incentivizes the President to use his legislative influence to insist on vague language upfront that he can then interpret authoritatively away from the constitutional requirements of bicameralism and presentment.

Concerns about *Chevron* from a separation-of-powers perspective are not new.[12] These more general concerns, however, have overlooked the President's role in the legislative process. Moreover, they can be countered with the general constitutional principle of democratic accountability to no necessary conclusion.

The more specific constitutional principle offered here proves more formidable. After all, *Chevron* bears a striking resemblance to institutional arrangements the Framers rejected as inconsistent with the design of the Constitution—specifically, the Council of Revision, which would have

8. *See id.* at 843–44 (explaining that if Congress leaves a term in a statute ambiguous the court asks "whether the agency's answer is based on a permissible construction of the statute").

9. *Id.* at 864–66.

10. *See infra* notes 22–25 and accompanying text.

11. *See infra* Part IV.A.

12. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 470 (1989) (noting that "*Chevron* offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress's deliberate delegation of meaning-elaboration power to the agency").

involved the Judiciary in the exercise of the veto power.[13] This institutional arrangement is strong evidence of *Chevron*'s inconsistency with the constitutional design. A better interpretive rule, more consistent with constitutional structure, is to reject deference for independent judicial review—after all, the Judiciary plays *no* role in the legislative process.

The Article proceeds as follows: Part I sketches the traditional justifications for *Chevron*. Part II sets out the President's role in the legislative process, looking to the Constitution, history, and modern practice. Part III offers a distinct reason for deference based on the President's role in the legislative process. Part IV argues that *Chevron* combines lawmaking and binding interpretive authority in a way contrary to constitutional structure. And Part V argues for independent judicial review as an alternative. The Article then concludes.

I. TRADITIONAL JUSTIFICATIONS FOR *CHEVRON* DEFERENCE

In *Chevron*, the Supreme Court set out a two-step framework to determine if a court should defer to an agency's interpretation of a statute. First, a court was to use the traditional tools of statutory construction to determine "whether Congress has directly spoken to the precise question at issue."[14] If so, "that is the end of the matter."[15] If not, the court should defer to an agency's reasonable interpretation of the statute.[16] Crucially, *Chevron* identified ambiguity as implicit legislative intent to delegate the power to resolve statutory ambiguity to agencies.

Chevron's presumption that, absent legislative intent to the contrary, agencies have the authority to interpret ambiguities in statutes has often been referred to as a fiction.[17] For that reason, *Chevron* has also been justified as a constitutionally inspired default rule. When agencies resolve questions of statutory ambiguity, they are really exercising policy discretion.

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13. *See infra* Part V.A.

14. *Chevron*, 467 U.S. at 842.

15. *Id.* (explaining that if the intent of Congress is clear, no further inquiry is necessary).

16. *Id.* at 843–44.

17. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction."); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517 ("[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What The Law Is*, 115 YALE L.J. 2580, 2589–90 (2006) (stating that *Chevron*'s conclusion that delegations of rulemaking power implicitly include the power to interpret ambiguities is a legal fiction); *cf.* Farina, *supra* note 12, at 470 (pointing out that *Chevron*'s conclusion that silence in a regulatory statute represents "Congress's deliberate delegation of meaning-elaboration power to the agency" is not supported by evidence).

And it is more consistent with our democratic system to vest policy discretion in the politically accountable branches.[18] Although relying on the presumption of congressional intent, the Court also stressed this point:

> [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[19]

Chevron's default rule "serve[s] as a constitutional doctrine of second best, indirectly preserving structural norms that the Court will not enforce directly."[20] *Chevron* thus "reconciles modern conceptions of delegation and interpretive lawmaking with a constitutional commitment to policymaking by more, rather than less, representative institutions."[21]

In addition to being more democratic, agencies are also thought to be more expert than courts. For example, the Court further noted in *Chevron* that "[j]udges are not experts in the field."[22] And Justice Breyer has described "the traditional view that agencies are more 'expert' on policy matters than courts, and courts should 'defer' to their policy expertise."[23] On this view, agencies "are more likely than the courts to reach the correct result."[24] Expertise feeds into *Chevron*'s fiction: "It is virtually always proper for a court to assume Congress wanted the statute to work and, at least, did not intend a set of interpretations that would preclude its effective administration."[25]

None of these traditional reasons for deference, however, say anything about the President's role in the legislative process.

II. THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

The Supreme Court has stated: "The Constitution limits [the President's] functions in the lawmaking process to the recommending of

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18. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626–27 (1996) [hereinafter Manning, *Constitutional Structure*]; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978 (1992); Scalia, *supra* note 17, at 515.

19. *Chevron*, 467 U.S. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

20. Manning, *Constitutional Structure*, *supra* note 18, at 633.

21. *Id.* at 634.

22. *Chevron*, 467 U.S. at 865.

23. Breyer, *supra* note 17, at 390.

24. Scalia, *supra* note 17, at 514.

25. Breyer, *supra* note 17, at 368.

laws he thinks wise and the vetoing of laws he thinks bad."[26] But it would be wrong to consider these functions so limited as the Court's tone suggests.

A. The Recommendation Clause

Article II of the Constitution states that the President "shall . . . recommend to [the Congress's] Consideration such Measures as he shall judge necessary and expedient."[27] This provision was relatively uncontroversial at the Founding.[28] Two aspects of the Recommendation Clause's drafting history hint at its original meaning. First, from James Madison's notes on the Constitutional Convention for August 24, 1787: "On motion of Mr. Gov'r Morris, 'he may' was struck out, & 'and' inserted before 'recommend' in clause 2d. sect 2d art: X. in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it."[29] The change of language from permissive to mandatory suggests that the President has a duty to recommend measures to Congress.[30] Creating a duty rather than a right prevented Congress from "argu[ing] that the President's participation in lawmaking was part of a scheme to usurp Congress' legislative power"—the sort of umbrage and cavil that seemed to concern Governor Morris.[31]

Second, where an early version of the Recommendation Clause spoke to "Matters," the final version speaks to "Measures."[32] This change "reinforces the inference that the Framers intended the President's recommendations to be more than precatory statements."[33] Rather, the President was to recommend specific legislative bills.[34]

Early practice, however, departs from this original meaning. George Washington's first inaugural address initially contained detailed, specific legislative proposals. But these were scrapped because Washington feared

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26. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

27. U.S. CONST. art. II, § 3.

28. THE FEDERALIST NO. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[N]o objection has been made to this class of authorities . . . .").

29. James Madison, *Debates in the Federal Convention of 1787 as Reported by James Madison*, *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109, 612 (Charles C. Tansill ed., 1927).

30. J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081–82 (1989) ("James Madison's notes on the Constitutional Convention for August 24, 1787, reveal that the Framers explicitly elevated the President's recommendation of measures from a political prerogative to a constitutional duty . . . .").

31. *Id.* at 2082.

32. *Id.* at 2084.

33. *Id.*

34. Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 48–49 (2002).

the perception that "concrete presidential proposals might unduly influence an autonomous branch of government."[35] "So too, President Thomas Jefferson avoided specificity in his recommendations . . . ."[36] Among early Presidents, Andrew Jackson was the exception; his first State of the Union Message "contained more than ten specific recommendations."[37]

Any concerns about recommending specific legislation disappeared by the twentieth century. "Presidents Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt seized the legislative initiative."[38] President Eisenhower put forth an "elaborate paraphernalia of a comprehensive and specific inventory, contents settled and defined as regards substance no less than finance, *presented in detailed fashion and packaged form at the opening of each session of Congress* . . . ."[39]

Public addresses, such as the State of the Union and the inaugural, have traditionally served as opportunities for the President to recommend legislation, and doing so is now normal. Take President Barack Obama's most recent State of the Union address. Among other things, he called on Congress to pass tax reform for American manufacturing, to pass new immigration laws, to change energy policy, to pass legislation changing fraud penalties, to pass the Buffett Rule for taxes, to pass a law banning insider trading in Congress, and to pass legislation giving him authority to reorganize the bureaucracy.[40] Illustrating presidential ownership of legislation, President George W. Bush "urge[d]" Congress "to pass both *my* Faith-Based Initiative and the 'Citizen Service Act'" in his 2003 State of the Union address.[41] And in his first State of the Union address, Bill Clinton called on Congress to pass "the Brady Bill," "a tough crime bill," "a real campaign finance reform bill," "the motor voter bill," and "the lobbying registration bill," among others.[42]

More importantly, the Executive sends draft legislation to Congress. Executive communications have "become a prolific source of legislative proposals" and consist of a "draft of a proposed bill" that is sent "to the Speaker of the House of Representatives and the President of the Senate."[43]

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35. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–91*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 189 (1995).

36. Kesavan & Sidak, *supra* note 34, at 52.

37. *Id.*

38. *Id.*

39. Richard E. Neustadt, *Presidency and Legislation: Planning the President's Program*, 49 AM. POL. SCI. REV. 980, 981 (1955).

40. Barack Obama, State of the Union address (Jan. 24, 2012).

41. George W. Bush, State of the Union address (Jan. 28, 2003) (emphasis added).

42. William J. Clinton, State of the Union address (Feb. 17, 1993).

43. *How Our Laws are Made*, THE LIBRARY OF CONGRESS: THOMAS,

Today, the White House has institutionalized the proposal of legislation. The Office of Management and Budget (OMB) reviews legislative proposals from agencies and ensures that agency views on legislative proposals are consistent with administration policy.[44] OMB helps the President develop a position on legislation, it publicizes the President's views, and it coordinates agency views.[45] Agencies are required to submit their proposed legislative programs to OMB; they are also directed to "take into account the President's known legislative, budgetary, and other relevant policies."[46] Moreover, agencies "shall not submit to Congress any proposal that OMB has advised is in conflict with the program of the President."[47]

Executive drafting is common. In an example that perhaps belies the view that Congress should dominate legislative drafting, President Obama "acknowledged . . . that his hands-off approach to health care legislation had likely been a mistake and that he had 'probably left too much ambiguity out there' by allowing Congress to take the lead in drafting a bill."[48] Illustrating the specificity of draft legislation, Treasury Secretary Timothy Geithner wrote in *The Wall Street Journal* that, in formulating financial regulation reform, the President "asked [the Department] to write draft legislation rather than propose broad principles."[49] The Congressional Record tracks executive communications and the Executive Branch often submits new draft legislation through that channel.[50] The Executive Branch also suggests amendments to existing laws.[51]

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http://thomas.loc.gov/home/lawsmade.bysec/sourcesofleg.html (last visited Nov. 30, 2012).

44. *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 30, 2012).

45. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, LEGISLATIVE COORDINATION AND CLEARANCE (1979), http://www.whitehouse.gov/omb/circulars_a019.

46. *Id.*

47. *Id.*

48. Sheryl Gay Stolberg, *Hands-Off Approach May Have Been a Mistake, Obama Says*, N.Y. TIMES PRESCRIPTIONS BLOG (Sept. 9, 2009), http://prescriptions.blogs.nytimes.com/2009/09/09/hands-off-approach-may-have-been-a-mistake-obama-says/.

49. Timothy Geithner, Op-Ed., *A Dodd-Frank Retreat Deserves a Veto*, WALL ST. J., July 20, 2011, at A19.

50. *See, e.g.*, 158 CONG. REC. H1844 (daily ed. Apr. 16, 2012) (describing executive communication from the Chairman of the Nuclear Regulatory Commission containing draft legislation); 157 CONG. REC. H5659 (daily ed. July 27, 2011) (describing draft legislation submitted by the EPA, the Department of Veterans Affairs, and the Broadcasting Board of Governors).

51. *See, e.g.*, 158 CONG. REC. H1366 (daily ed. Mar. 16, 2012) (referencing a letter from

The power to recommend legislation is now commonplace. As political scientist Richard Neustadt explains:

> Traditionally, there has been a tendency to distinguish "strong" Presidents from "weak" depending on the exercise of the initiative in legislation. . . . If these were once relevant criteria of domination, they are not so today. As things stand now they have become part of the regular routines of office, an accepted elaboration of the constitutional right to recommend . . . .[52]

But the President provides Congress with more than a "drafting service."[53] He also "choose[s] most *legislative* issues on which serious attention is to center at a session; the President becomes agenda-setter for the Congress, the chief continuing initiator of subject-matter to reach actionable stages in [the] committee and on the floor . . . ."[54]

B. The Veto Power

Article I, Section 7 of the Constitution requires the President to sign a bill passed by the House of Representatives and the Senate before it becomes a law. If the President vetoes the bill, it is sent back to the house it originated in.[55] Congress can override the President's veto with a two-thirds majority in each house.[56]

Prior to the Revolution, colonial governors—appointed by the King—enjoyed an absolute veto over any legislative act.[57] And even if the colonial governor gave his assent, the King enjoyed a further absolute veto.[58] No surprise then that among the grievances in the Declaration of Independence was that the King "refused his Assent to Laws, the most wholesome and necessary for the public good."[59] Against this backdrop, the Framers rejected an absolute veto.[60]

But why have a veto power at all? As Alexander Hamilton explained in *Federalist No. 73*, the veto gave the President a means for defending himself

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the Secretary of the Department of Energy suggesting amendments to the Atomic Energy Defense Act).

52. Neustadt, *supra* note 39, at 1014.

53. *Id.* at 1015.

54. *Id.*

55. U.S. CONST. art. I, § 7.

56. *Id.*

57. Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 793–94 (1986).

58. *Id.* at 794.

59. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

60. THE FEDERALIST NO. 69, at 416–17 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

against congressional encroachment on his power.[61] But even further, the veto "furnishe[d] an additional security against the enaction of improper laws."[62] It provided this security by "establish[ing] a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."[63]

Put another way, the veto encouraged independent executive judgment about the substance of laws. This judgment could take different forms: the President could exercise independent constitutional judgment, or he could exercise independent policy judgment.

Early Presidents largely exercised constitutional judgment. Washington vetoed a bill passed by the First Congress on the grounds that it apportioned representatives in violation of the Constitution.[64] And while Adams and Jefferson used the power sparingly, Madison used it more frequently, objecting to laws because they violated the Establishment Clause, or because they were in excess of Congress's enumerated powers.[65]

In a famous exercise of the power, Andrew Jackson vetoed the bill renewing the Second Bank of the United States, insisting that it was unconstitutional[66]—no matter that the Supreme Court upheld the First Bank of the United States in *McCulloch v. Maryland*.[67] According to Jackson, each branch of government has the authority to judge the constitutionality of laws.[68] Congress was not thrilled. It viewed Jackson's veto as an affront to the Supreme Court's power to interpret the Constitution.[69] In the end, however, Congress could not override the veto and Jackson prevailed.[70]

Tension between the President and Congress, however, persisted. John Tyler's veto of a tariff bill led to a movement to impeach him.[71] The tension peaked in 1867, when, over President Andrew Johnson's veto, Congress passed the Tenure of Office Act, which prevented the President from removing certain officers without Senate consent.[72] The Act was

61. THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
62. *Id.* at 443.
63. *Id.*
64. *See* McGowan, *supra* note 57, at 798–99.
65. *Id.* at 799–800.
66. *Id.* at 800.
67. 17 U.S. (4 Wheat.) 316, 316–17 (1819).
68. McGowan, *supra* note 57, at 800 (discussing Jackson's veto of the Second Bank of the United States). Jackson was not alone in this view; others, such as Martin Van Buren and Thomas Jefferson, took a similar position. *Id*. at 800–01.
69. *Id.* at 801.
70. *Id.*
71. *Id.* at 802.
72. *Id.*

meant to antagonize Johnson, who stood in the way of the Reconstruction efforts of the Radical Republican Congress.[73] Johnson insisted that the law was unconstitutional. And he ultimately removed Secretary of War Edwin Stanton even though the Senate withheld its consent.[74] For this, Johnson was impeached.[75] In his trial, the prosecution argued that the President lacked the authority to judge the constitutionality of laws. Johnson, however, insisted that the law was unconstitutional and was ultimately acquitted.[76]

Following the Civil War, statutes proliferated and the veto power became less about constitutional judgment and more about policy judgment.[77] Moreover, the use of the veto increased.[78] Until Andrew Johnson, no President had vetoed more than twelve bills. Johnson vetoed twenty-nine bills while Ulysses S. Grant vetoed ninety-three bills.[79] Grover Cleveland vetoed 414 bills in his first term alone.[80] Franklin Delano Roosevelt vetoed 635 bills—a number made possible in part by his exceptional time in office. Use of the veto has declined since Roosevelt: Ronald Reagan vetoed seventy-eight bills, George H. W. Bush vetoed forty-four bills, Bill Clinton vetoed thirty-seven bills, and George W. Bush vetoed twelve bills. Barack Obama, to date, has vetoed only two bills. [81]

Constitutional objections persist. For instance, President Obama threatened to veto the National Defense Authorization Act because it interfered with the President's constitutional authority.[82]

But today, most vetoes and veto threats are policy-oriented. One of President Obama's two vetoes thus far was based on the "possible unintended impact" of the bill.[83] The other bill was vetoed because other

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73. *Id.* (Congress favored strict measures to ensure there would be no further uprisings in the South, while Johnson favored leniency).

74. *Id.* at 802–03.

75. *Id.* at 803.

76. *Id.*

77. *Id.*

78. *Presidential Vetoes: Washington–Obama*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/vetoes.php (last updated Nov. 7, 2012) (showing that the number of total vetoes per presidency increased after Abraham Lincoln's presidency).

79. *Id.*

80. *Id.*

81. *Id.*

82. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, S. 1867–NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, 1, 2–3 (2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

83. Barack Obama, *Presidential Memorandum—H.R. 3808* (Oct. 8, 2010), http://www.whitehouse.gov/the-press-office/2010/10/08/presidential-memorandum-hr-3808.

legislation rendered the bill unnecessary.[84] Likewise, President George W. Bush vetoed the Stem Cell Research Enhancement Act of 2005 based solely on policy objections.[85] Other examples are common.[86]

As Charles Black has observed, the veto power "could make the President, in the absence of energetic, principled and tactically imaginative resistance in Congress, the most important part of Congress."[87] Consequently,

> [M]ajorities, even quite large, in "Congress," as that word is commonly understood—that is to say, the House and the Senate—are powerless to fix American policy on anything, foreign or domestic, so long as Congress sticks to the forthright expression of policy judgment in a single bill, and attempts neither circumvention of the veto by "rider," nor reprisal.[88]

The rise of the policy-oriented veto coupled with the decline of the actual use of the veto may mean that modern presidents have had success in the legislative process. Because Congress knows of the veto power, "the actual veto can be rather rare"—often, the mere threat of the veto will suffice.[89] Sometimes, the President will publically make veto threats.[90] But even in the absence of an express veto threat, the President is likely to make his views known, and Congress is likely to craft a bill with these views in mind.

For instance, use of the Recommendation Clause—either by broad proposals or by draft legislation—provides Congress with important information about the President's views. And again, OMB plays an

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84. BARACK OBAMA, VETO MESSAGE ON H.J. RES. 64, H.R. DOC. NO. 111-84, at 1 (2d Sess. Jan. 13, 2010), *available at* http://www.gpo.gov/fdsys/pkg/CDOC-111hdoc84/pdf/CDOC-111hdoc84.pdf.

85. GEORGE W. BUSH, VETO MESSAGE ON H.R. 810, H.R. DOC. NO. 109-127, at 1 (2d Sess. July 20, 2006), *available at* http://www.gpo.gov/fdsys/pkg/CDOC-109hdoc127/pdf/CDOC-109hdoc127.pdf.

86. *See Summary of Bills Vetoed 1789–present*, U.S. SENATE, http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm (last visited Nov. 30, 2012) (listing all bills vetoed along with the respective President's reasons for doing so).

87. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 87, 89.

88. *Id.* at 94.

89. *Id.* at 95; *see also* Steven A. Matthews, *Veto Threats: Rhetoric in a Bargaining Game*, 104 Q.J. ECON. 347, 363–64 (1989) (characterizing the presidential veto as not only an indicator of the President's preferences but also the means to influence Congress).

90. *See, e.g.*, Charlie Savage, *Obama Drops Veto Threat over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 14, 2011, http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html (noting that due to the Obama Administration's threats of vetoing the National Defense Authorization Act of 2012 Congress amended the Act's provisions).

important role throughout the legislative process.[91] It approves agency testimony and letters and prepares statements of administration policy on pending legislation.[92] Some of these statements of administration policy contain express veto threats. For example, after expressing concern that a proposed bill would "unravel decades of work to forge consensus, solutions, and settlements" with respect to California water policy, one such statement concludes: "[W]ere the Congress to pass H.R. 1837, the President's senior advisors would recommend that he veto the bill."[93] Other OMB statements point out specific differences between Congress's version and the President's proposals.[94] Others statements express support for pending legislation.[95] At bottom, the Executive Branch—backed by the veto power—is in a constant dialogue with Congress throughout the legislative process.

Just how much influence the veto exerts on the legislative process depends on both the nature of the President and the nature of the Congress. It seems likely that in many scenarios the veto power does move legislative outcomes closer to the President's preferences.[96] Unless the veto is overridden, a bill to some extent "will almost always reflect the [P]resident's preference" because "Congress must craft the bill in such a way as to avoid the veto."[97] Of course, the background threat of the veto cannot put into law all the President's wishes. At times, he will compromise

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91. *See supra* notes 44–47 and accompanying text.

92. *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 30, 2012).

93. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1837—SACRAMENTO–SAN JOAQUIN VALLEY WATER RELIABILITY ACT, 1 (2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1837_20120228.pdf.

94. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1734—CIVILIAN PROPERTY REALIGNMENT ACT, 1 (2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1734h_20120206.pdf ("Unlike the President's proposal, H.R. 1734 provides broad categorical exemptions . . . .").

95. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 3521—THE EXPEDITED LEGISLATIVE LINE-ITEM VETO AND RESCISSIONS ACT, 1 (2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr3521r_20120206.pdf ("The Administration strongly supports House passage of H.R. 3521.").

96. *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 529–32 (1992) (discussing the legislative interplay between Congress and the President in terms of game theory).

97. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 350 (2006).

with Congress, conceding some points to enact others. But at the very least, the President's signature connotes that on some level, the legislation comports with his preferences.

C. The President as Legislator-in-Chief

The modern president has been commonly described as the "Legislator-in-Chief."[98] But the President's role in the legislative process should not be overstated. The President does not initiate every bill that becomes a law. He does not always participate so vigorously throughout the process. Nor is his veto so threatening in every case.

In many cases, Congress drives the legislative process. Individual members are often responsible for initiating bills—so much so that their names are forever attached to them. Think McCain-Feingold,[99] Norris-LaGuardia[100] or McCarran-Ferguson.[101] Moreover, each House has its own legislative counsel that provides drafting services.[102]

Still, the President makes considerable use of the recommendation power. With the help of OMB, he is involved in every stage of the legislative process.[103] And ultimately, every bill passed by the House and Senate must be presented to him. To a large extent, the President's political legacy is tied to his legislative success.[104]

Beyond his formal powers, the President exerts intangible force on the legislative process: "[W]hen the chips are down, there is no substituting for the President's own footwork, his personal negotiation, his direct appeal, his

98. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818–19 (1996) ("Wilson's proactive approach, if not always a success, has since become the norm, so much so that the President has aptly been termed the 'legislator-in-chief.'"); Kesavan & Sidak, *supra* note 34, at 48–49; Matt Vasilogambros, *Obama Campaign Releases New Long-Form Web Ad*, NAT'L J., Apr. 30, 2012, http://www.nationaljournal.com/2012-presidential-campaign/obama-campaign-releases-new-long-form-web-ad-20120430 ("[T]he campaign's new 7-minute ad . . . paints the president as a strong commander in chief—and legislator-in-chief . . . .").

99. 2 U.S.C. §§ 431, 434, 437(g), 441(b) (2006) (regulating the funding of political campaigns).

100. 29 U.S.C. § 107 (2006).

101. 15 U.S.C. §§ 1011–15 (2006).

102. *Office of the Legislative Counsel*, U.S. SENATE, http://slc.senate.gov (last visited Nov. 30, 2012); *Office of the Legislative Counsel*, U.S. HOUSE OF REPRESENTATIVES, http://www.house.gov/legcoun (last visited Nov. 30, 2012).

103. *See supra* notes 44–47 and accompanying text.

104. *Cf.* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 168 (1990) (describing how the legislative successes or failures of one presidency define the policy choices of later presidencies).

voice and no other's on the telephone."[105] The mere office of the President lends itself to persuasion. But the President's constitutional powers become all the more potent when placed in the hands of someone who knows how to use them. Bill Clinton has described Lyndon Johnson as the President "with more ability to move legislation through the House and Senate than just about any other president in history."[106] What made Johnson different? "He knew just how to get to you, and he was relentless in doing it."[107]

However limited the Framers might have thought the President's role in the legislative process, it appears, as Charles Black has said, that the President's modern role truly "illustrates the power of text over expectation."[108]

III. AN ADDITIONAL REASON FOR DEFERENCE

The President's role in the legislative process offers an additional reason for deference. Because the President is so involved in the legislative process that produced the statute, he likely has special knowledge of its statutory context. This knowledge is attributable to agencies accountable to him. This combined executive knowledge of statutory context may give the Executive Branch an advantage over courts when it comes to constructing a statute's meaning from its context. If that is so, courts do more for legislative supremacy by deferring to interpretations by the Executive Branch.

*A. Pre-*Chevron *Doctrine*

A few commentators have entertained in passing the possibility that agency interpretations might better represent statutory meaning.[109] And cases prior to *Chevron* hint at such an account.

As early as 1877 the Court explained that "[t]he construction given to a statute by those charged with the duty of executing it is always entitled to

105. Neustadt, *supra* note 39, at 1016.

106. Bill Clinton, *Seat of Power*, N.Y. TIMES, May 6, 2012, at 12 (reviewing ROBERT CARO, THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON (2012)).

107. *Id.*

108. Black, *supra* note 87, at 89.

109. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 209–10 (2006) ("As far as information is concerned, specialized agencies are closer to the statute, its legislative history, and its original purposes and compromises than are generalist judges."); Breyer, *supra* note 17, at 368 ("In the context of administrative law, this jurisprudential answer may rest upon a particularly important, highly relevant legal fact, namely, the likely intent of the Congress that enacted the statute. The agency that enforces the statute may have had a hand in drafting its provisions.").

the most respectful consideration" in part because "[n]ot unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."[110]

This noted relevance of agency participation in the legislative process persisted as a factor under the regime that preceded *Chevron*. Under that regime—exemplified by *Skidmore v. Swift & Co.*—deference was a case-by-case inquiry into the agency's interpretation, focusing on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[111]

In *United States v. American Trucking Ass'ns*, the Court stated, "[T]he Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."[112] In *Zuber v. Allen*, the Court said the agency's interpretation "carries the most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings."[113] And as late as 1979 the Court said, "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision."[114]

Even when there was no evidence of actual participation in the legislative process, the contemporaneousness of an agency's interpretation was a relevant factor under *Skidmore*. As the Court noted in *Norwegian Nitrogen Products Co. v. United States*, an agency interpretation "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion."[115]

All these cases focus on the agency's participation in the legislative process, but they do not discuss the President's participation in the legislative process. Nor do they establish any link between agencies and the President. Perhaps they should have.

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110. United States v. Moore, 95 U.S. 760, 763 (1877).

111. 323 U.S. 134, 140 (1944).

112. 310 U.S. 534, 549 (1940).

113. 396 U.S. 168, 192 (1969).

114. Miller v. Youakim, 440 U.S. 125, 144 (1979).

115. 288 U.S. 294, 315 (1933); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) ("The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title."); Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931) ("They constitute contemporaneous construction by those charged with administration of the act . . . .").

B. Agency Accountability to the President

Why should we link agencies to the President? "Because the power to remove is the power to control . . . ."[116] As the Supreme Court most recently explained in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*:

> Article II confers on the President "the general administrative control of those executing the laws." It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he cannot continue to be responsible."[117]

Ultimately, the President is responsible for the actions of executive agencies. The removal power ensures that agency officials act in accordance with the President's views.

Moreover, presidential control over administrative agencies has been institutionalized. OMB ensures that agency proposals and testimony are consistent with administration policy.[118] And President Reagan instituted "a centralized mechanism for review of agency rulemakings unprecedented in its scale and ambition—and soon shown to be unprecedented in its efficacy as well."[119] This mechanism set out substantive criteria for rulemaking and required executive agencies to submit proposed rules to the Office of Information and Regulatory Affairs (OIRA) for cost–benefit analysis.[120] Despite some differences, this basic structure of presidential control over agencies persists today.[121]

To be sure, some agencies are independent of the President. Independent agencies are marked by limits on the President's removal power—that is, the President may only remove an officer for good cause.[122] Moreover, independent agencies are not fully subject to OIRA oversight.[123]

Presidents, of course, are not completely powerless to control independent agencies. Supreme Court Justice Elena Kagan, for instance,

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116. *In re* Aiken County, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

117. 130 S. Ct. 3138, 3152 (2010) (citation omitted).

118. *See The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/organization_mission/ (last visited Nov. 30, 2012).

119. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277 (2001).

120. *Id.* at 2277–78.

121. *See generally id.*

122. *See* Humprey's Ex'r v. United States, 295 U.S. 602, 625 (1935) (explaining that independent agencies are created by Congress to be free from political control).

123. *See* Kagan, *supra* note 119, at 2277–88.

has argued that the President has some default authority to direct independent agencies in the exercise of their discretion.[124] And Presidents will often—though not always—appoint the officers who sit on independent agencies.[125]

Still, Presidents have less control over independent agencies. Consider the facts of *Humphrey's Executor v. United States*, the case upholding the constitutionality of independent agencies. When Roosevelt wrote to Federal Trade Commissioner William Humphrey: "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission . . . ."[126] This policy disagreement did not suffice as cause under the statute, and the Court found that Roosevelt could not remove Humphrey.[127]

When an agency official can disagree with the President's policy views without fear of reprisal, not much guarantees that the agency interpretation will accord with the President's own view. Thus, the agency's interpretation may not always reflect the President's knowledge of statutory context based on his participation in the legislative process, though it may reflect the agency's own knowledge of statutory context based on its participation in the legislative process.

But when agency officials are threatened with removal if they disagree with the President's policy, their interpretations will likely be consistent with the President's views. And if the President's view represents any special knowledge of statutory context, then the agency's view will too.

C. Constructing Statutory Meaning from Context

Statutory interpretation rests on the principle of legislative supremacy.[128] At bottom, legislative supremacy means that courts are the faithful agents of the legislative process and must follow its commands as best as possible.[129] Any notion of legislative supremacy requires some notion of legislative intent as statutory meaning. As Joseph Raz has argued, "It makes no sense to give any person or body law-making power unless it is assumed that the

124. *Id.* at 2250–51.

125. *See* U.S. CONST. art. II, § 2.

126. *Humphrey's Ex'r*, 295 U.S. at 619.

127. *Id.* at 629.

128. *See* Farber, *supra* note 4, at 283.

129. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63; (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) ("[S]trong purposivism and textualism both seek to provide a superior way for federal judges to fulfill their presumed duty as Congress's faithful agents.").

law they make is the law they intended to make."[130] Two theories of statutory interpretation dominate today: textualism and purposivism.

Neither theory purports to rely on *subjective* legislative intent—what the legislature and President actually thought. This view is typically associated with classical intentionalism, and has been forcefully attacked by Judge Easterbrook, among others.[131] As he has explained, "Intent is elusive for a natural person, fictive for a collective body."[132] Even if such a collective intent existed, the complexity of the legislative process likely makes it impossible for courts to discern any actual yet unexpressed intent on a given issue.[133]

Both purposivism and textualism avoid these difficulties by relying on *objective* legislative intent. Both theories look to a reasonable person, but they ask different questions of the reasonable person.

The classical statement of purposivism asks how "reasonable persons pursuing reasonable purposes reasonably" would have resolved a question of statutory interpretation.[134] Purposivism best furthers legislative supremacy because legislators vote for policies, not semantic details.[135] Of course, text still matters—in most cases, the text will be an accurate expression of the purposes of the statute. But at some point, courts should give precedence to policy context—"evidence that suggests the way a reasonable person would address the mischief being remedied"[136]—rather than semantic context, because doing so more accurately describes legislative behavior.

Textualists, on the other hand, ask how "a reasonable user of language would understand a statutory phrase in the circumstances in which it is used."[137] Focusing on semantic context best furthers legislative supremacy given the nature of the legislative process. As Professor Manning has explained: "[T]he legislative process prescribed by Article I, Section 7 of the Constitution and the rules of procedure prescribed by each House place an obvious emphasis on giving political minorities the power to block

130. Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258 (Robert P. George ed., 1996).

131. *See* Easterbrook, *supra* note 129, at 68.

132. *Id.*

133. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930).

134. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge & Philip P. Frickey eds., 1994).

135. *See* Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 400–08 (1942).

136. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) [hereinafter Manning, *Divides*].

137. *Id.* at 81.

legislation or, of direct relevance here, to insist upon compromise as the price of assent."[138] Semantic context refers to "evidence that goes to the way a reasonable person would use language under the circumstances."[139] Only by giving precedence to this do courts allow the legislative actors to "set the level of generality at which they wish to express their policies" and "strike compromises that go so far and no farther."[140]

The two theories are not always so different in practice. As noted above, purposivists will often view the text and accompanying semantic context as an accurate expression of purpose. And because textualists focus on the use of language in context—a key element of which is that "speakers use language purposively"[141]—they will often find it appropriate to resolve ambiguity in light of a statute's purpose and accompanying policy context. Although textualists reject legislative history as evidence of purpose, they are "willing to make rough estimates of purpose from sources such as the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment."[142]

The difference, then, between purposivists and textualists is more about the precise point at which an interpreter resorts to policy context over semantic context than the relevance of either. Purposivists are more likely to resort to policy context before exhausting semantic context. Textualists are more likely to exhaust semantic context before resorting to policy context. But under either theory, both semantic context and policy context are relevant to statutory meaning.

The Supreme Court's modern approach to statutory interpretation illustrates the relevance of both semantic and policy context. The Court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous."[143] But at some point the Court—even its most textualist members—resorts to policy context. For instance, Justice Scalia has referred to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination."[144] And as Judge Easterbrook has explained, "Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity."[145]

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138. *Id.* at 99.
139. *Id.* at 76.
140. *Id.* at 99.
141. *Id.* at 84.
142. *Id.* at 84–85.
143. BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004) (plurality opinion).
144. United States v. Fausto, 484 U.S. 439, 453 (1988).
145. Nat'l Tax Credit Partners v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (citations omitted).

D. The Executive Branch's Knowledge of Statutory Context

The nature of the Executive Branch's participation in the legislative process gives it unique knowledge of the factors relevant to statutory meaning under any theory of interpretation: semantic context, policy context, and the lines of compromise embedded in a statute.

1. Semantic Context

The Executive likely has some knowledge of a statute's semantic context. After all, the President often submits draft bills to Congress, which often serve as templates for future legislation. To the extent that a statute contains competing semantic canons of construction,[146] for instance, the Executive may have insight into which canon should prevail based on his potential involvement in the drafting of the bill. Similarly, the Executive might know about whether a word should be given its technical or ordinary meaning.[147]

Executive knowledge of semantic context is perhaps weaker than policy context. Executive drafts, after all, are just that—drafts. Even if they provide a template for Congress, there are numerous opportunities for revision and amendment of bills throughout the legislative process.[148] And the House and Senate tend to take drafting seriously—both have Offices of Legislative Counsel that provide drafting services to their members.[149]

That is not to say that executive knowledge in this area is nonexistent. Even if Congress revises executive drafts, individual agencies and OMB participate throughout the process and may be aware of significant revisions. Statements of administration policy sometimes refer to quite specific revisions.[150] Similarly, in the event that Congress takes the lead in drafting, the Executive Branch is likely to be aware of major language and its evolution throughout the process. To be sure, textual nuances may

146. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401–06 (1949).

147. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

148. *See* JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. Doc. No. 110-49, at 6 (2007), THE LIBRARY OF CONGRESS: THOMAS, *available at* http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf.

149. *Office of the Legislative Counsel*, U.S. SENATE, http://slc.senate.gov/ (last visited Nov. 30, 2012); *Office of the Legislative Counsel*, U.S. HOUSE OF REPRESENTATIVES, http://www.house.gov/legcoun/ (last visited Nov. 30, 2012).

150. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1249—AMERICA INVENTS ACT, 1 (2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1249r_20110621.pdf ("[T]he Administration is concerned that Section 22 of the Manager's Amendment to H.R. 1249 does not by itself ensure such access.").

sometimes escape the Executive Branch's oversight, but its familiarity with the general text and structure of the statute is of value.

2. Policy Context

The Executive's use of the recommendation power and the veto power gives it considerable knowledge of a statute's policy context, the most important aspect of which is purpose. Courts often look to purpose to shed light on ambiguity.[151] And evidence of purpose can be found in "the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment."[152]

Executive insight into purpose stems first from the Recommendation Clause. The President often initiates the legislative process. He proposes legislation during the State of the Union address, he submits drafts to Congress, agencies accountable to him submit legislative proposals, and he uses his influence with Congress to set the legislative agenda.[153] Because Congress's time is limited, and the President's agenda-setting power strong,[154] executive proposals may stand a greater chance of becoming law. In that case, the Executive assuredly knows the law's purpose. After all, when the President initiates the legislative process, he does so with some substantive purpose in mind.

Even for laws not initiated by the Executive, the veto power ensures some executive knowledge of purpose. The Executive Branch converses with Congress throughout the legislative process and the threat of the veto allows the President to influence the process. The President's ultimate approval of a bill signifies that he and Congress agree on purpose at some level of generality. And, therefore, he knows the law's purpose, at some level of generality.

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151. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) ("We hold that the term 'employees,' as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees. It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage.").

152. Manning, *Divides*, *supra* note 136, at 85; *see also* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue."); *Robinson*, 519 U.S. at 346 ("Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.").

153. *See supra* Part II.A.

154. *See* Neustadt, *supra* note 39, at 1014–15.

3. Legislative Compromise

The legislative process often begs for compromise. As Professor Manning has explained:

> [B]y dividing the constitutional structure into three distinct institutions answering to different constituencies, the bicameralism and presentment requirements of Article I, Section 7 effectively create a supermajority requirement. The legislative process thus affords political minorities extraordinary power to stop the enactment of legislation and, therefore, to insist upon compromise as the price of assent.[155]

Although "semantic meaning is the currency of legislative compromise,"[156] when semantic meaning is indeterminate, the lines of compromise embodied in a statute are hazier.

Through the Recommendation Clause, the Executive Branch often sets the initial lines of compromise by making proposals of his own. And its engagement in the legislative process means that it is likely aware of any drawing or redrawing of the lines of compromise as the legislative process unfolds—regardless of which branch initiated the legislation. Statements of the administration's policy, express veto threats, and informal negotiations all illustrate this awareness of line redrawing.

Not only is the Executive aware of the lines of compromise, he shapes those lines. After all, presidential involvement at any stage of the legislative process is backed by the veto power. The recommendation of legislation signals what will survive the veto.[157] Communications with Congress provide information about what legislation risks the veto. The President's ultimate approval means that the resultant compromise is at least minimally acceptable to the President.[158]

E. The Executive Branch as a Superior Expositor of Statutory Meaning

All this knowledge gives the Executive an advantage over the courts in interpreting ambiguous statutes. The unique knowledge of statutory context makes for a better construction of legislative intent. For that reason, courts generally fulfill their roles as faithful agents better when they defer to agency interpretations of ambiguous statutes.

Chevron instructs courts to use the "traditional tools of statutory construction" to determine if Congress "spoke[ ] to the precise question at

155. Manning, *Divides*, *supra* note 136, at 103 (footnote omitted).
156. *Id.* at 99.
157. *See* Neustadt, *supra* note 39, at 1014–15.
158. *See* Bradley & Posner, *supra* note 97, at 350.

issue."[159] If the statute speaks to the question, the case is resolved.[160] If not, courts should defer to an agency's reasonable interpretation.[161] It is not entirely clear what constitutes the "traditional tools of statutory construction." It seems that some level of textual analysis is appropriate at step one. Yet the Court has gone beyond textual analysis in some cases, looking at general administrative structure[162] and legislative history at step one.[163]

Whatever the precise contours of step one, it requires some minimal level of statutory ambiguity. And the more ambiguous the statute, the more difficult it is to construct statutory meaning from context. Indeed, some have even argued that a statute may be so ambiguous that any construction is unwarranted.[164] Judge Easterbrook has described the task this way:

> The construction of an ambiguous document is a work of judicial creation or re-creation. Using the available hints and tools—the words and structure of the statute, the subject matter and general policy of the enactment, the legislative history, the lobbying positions of interest groups, and the temper of the times—judges try to determine how the Congress that enacted the statute either actually resolved or would have resolved a particular issue if it had faced and settled it explicitly at the time. Judges have substantial leeway in construction. Inferences almost always conflict, and the enacting Congress is unlikely to come back to life and "prove" the court's construction wrong. The older the statute the more the inferences will be in conflict, and the greater the judges' freedom.[165]

This outlook on judicial competence to interpret ambiguous statutes is pretty grim. Take the presence of conflicting inferences: is the judicial choice of one over the other much more than an arbitrary exercise of discretion?

Not so with the Executive's choice: embedded in that choice is the Executive's superior knowledge of statutory context, which means that this branch is far more likely to embody the inference that is more faithful to legislative intent.

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159. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 843 n.9 (1984).

160. *See id.* at 842.

161. *See id.* at 866.

162. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (quoting ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988)).

163. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704–05 (1995).

164. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

165. *Id.* at 533–34 (footnote omitted).

F. Doctrinal Implications

This additional reason for deference is in some sense more limited than the traditional reasons. It would extend only to contemporaneous interpretations by agencies accountable to the President. And, of course, it would not apply to statutes passed over the President's veto.

But in another sense it would support broader deference. The President's participation in the legislative process, after all, is not limited to agency-administered statutes. Thus, a contemporaneous interpretation attributable to the President will be helpful in resolving statutory ambiguity outside the agency context. On this view, courts should pay attention to presidential signing statements.[166]

A clear rule of contemporaneousness could be based on whether the interpretation occurred under the President who approved the law. And a clear rule of accountability could be based on whether the agency officials are subject to removal at-will by the President. In these respects, the contours of the doctrine are relatively clear.

In *United States v. Mead Corp.*,[167] the Court limited *Chevron* to cases where Congress expected the agency to speak with the force of law.[168] It noted that a "very good indicator" of such an expectation is congressional authorization to engage in rulemaking or adjudication.[169] Because the justification for deference offered here has nothing to do with congressional delegation, the Court's foray into *Chevron* step zero is irrelevant. What matters is not congressional expectation about interpretive authority, but whether an interpretation can be attributed to the President.

This justification for deference diverges from current doctrine in another respect. The Court has said, "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."[170] If deference is based on executive knowledge of statutory context, inconsistency—particularly an inconsistent interpretation well after enactment—is problematic. In most cases, the prior interpretation will be a better representation of statutory meaning given its contemporaneousness.

G. The Threat of Strategic Interpretation

Crucially, however, agency interpretations of statutes are post-

166. *See* Bradley & Posner, *supra* note 97, at 350–55.

167. 533 U.S. 218 (2001).

168. *Id.* at 229–30.

169. *Id.*

170. Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

enactment. With respect to presidential signing statements, some have argued that "the potential for unchecked opportunistic behavior by the President is great."[171] The same issue arises here. Statutes, after all, are compromises, and the President may be willing to concede some points to win others. If courts defer to subsequent administrative interpretations, there may be an incentive for the President to shape those interpretations in a way that undermines rather than furthers the legislative compromise—an incentive to achieve what the President forfeited in the name of compromise during the legislative process.

But the opportunity to interpret strategically only arises to the extent that the President loses in the legislative process. If the President is influential, the legislative compromise is likely to reflect his policy preferences and there is no need to act strategically to undermine it. Moreover, the Executive is bound by *Chevron*.[172] At *Chevron* step one, courts, after all, will not defer when a statute speaks clearly to an issue.[173] At the very least, the text—and perhaps more—constrains the Executive's ability to act strategically.

And more so than other actors in the legislative process, the President pays for strategic interpretations with his credibility: "[T]he president is a more significant and visible figure, and he is more of a repeat player; thus, he has more to lose if he loses credibility."[174] A loss of credibility for the President makes it more costly to deal with Congress in the future: an Executive whose interpretation "violates legislative bargains will have more trouble obtaining Congress's cooperation later on."[175]

The President's pre-enactment involvement in the legislative process reinforces this point. Throughout the process, the President has an incentive to provide accurate information about his preferences to shape the legislative compromise to his benefit.[176] These prior statements will constrain the President's future interpretations, or else he will look disingenuous.

Although the threat of strategic interpretation is real, executive interpretations are likely more persuasive evidence of statutory meaning,

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171. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 727 (1992).

172. *See* Bradley & Posner, *supra* note 97, at 355 (explaining that "[c]ourts can decide to give more or less weight to the president's views relative to Congress's when deciding how to interpret a statute").

173. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

174. Bradley & Posner, *supra* note 97, at 352.

175. *Id.*

176. *See supra* notes 87–88 and accompanying text.

than, say, a single legislator's views post-enactment.[177] And executive interpretations are likely more faithful to legislative intent than a court's seemingly arbitrary choice among competing inferences.[178]

But there is a deeper problem with deference rooted less in the probative value of executive interpretations and more in principle.

IV. CONSTITUTIONAL STRUCTURE AND THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

One principle rooted in the Constitution's structure is an aversion to combining legislative power with binding interpretive authority. Consistent with this principle is the conventional and simplified view that Congress makes the law, the President executes the law, and the Judiciary interprets the law. But in reality, this view is not so simple.

A. The Principle Separating Lawmaking and Interpretive Authority

Although the Constitution divides power among the Executive, the Legislature, and the Judiciary, this does not mean that the departments are "totally separate and distinct from each other."[179] Rather, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[180] In this regard, the greatest threat to the separation of powers came from the legislature—in Hamilton's words: "The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments . . . ."[181]

To this end, Professor Manning has argued: "[A] core objective of the constitutional structure [is] to ensure meaningful separation of lawmaking from the exposition of a law's meaning in particular fact situations."[182] This principle, he argues, manifests itself in constitutional provisions that take "special pains to limit Congress's direct control over the instrumentalities that implement its laws."[183] The Constitution limits

177. *See* Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed.").

178. *See supra* Part III.D.2.

179. THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961).

180. *Id.* at 302–03.

181. THE FEDERALIST NO. 73, at 442 (Alexander Hamiltion) (Clinton Rossiter ed., 1961).

182. Manning, *Constitutional Structure*, *supra* note 18, at 644 (discussing the concern that the body that is capable and sometimes willing to pass "bad law" may exercise the same poor judgment when interpreting it).

183. *Id.* at 641.

congressional control over the President by giving the states the power to choose presidential electors.[184] The Constitution also prevents Congress from changing the President's compensation while in office.[185] Similarly, the Constitution limits congressional control over the Judiciary by providing judges with life tenure during good behavior,[186] and preventing Congress from not diminishing the salaries of judges while in office.[187]

Moreover, the Framers rejected certain structures that would combine lawmaking and law-exposition.[188] They rejected the Council of Revision, which would have provided for the Judiciary and the President to exercise the veto together.[189] And they rejected using the upper house of the legislature as a court of last resort[190]—as was true of the House of Lords in Britain.[191] In Hamilton's words:

> From a body which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them . . . .[192]

The principle finds further roots in the intellectual precursors to the Constitution: the writings of Locke, Montesquieu, and Blackstone all warned of the danger of combining lawmaking and law-exposition.[193]

The danger was arbitrary government and its threat to liberty. The separation between lawmaking and interpretation controls arbitrary government and protects liberty in two ways. First, it makes it "more difficult for lawmakers to write bad laws and then spare themselves from the effects of those laws through their control over the laws' application."[194] Second, it gives legislators "an incentive to enact rules that impose clear and definite limits upon governmental authority, rather than adopting vague and discretionary grants of power."[195]

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184. U.S. CONST. art. II, § 1, cls. 2–3.

185. U.S. CONST. art. II, § 1, cl. 7.

186. U.S. CONST. art. III, § 1.

187. *Id.*

188. Manning, *Constitutional Structure*, *supra* note 18, at 643–44 (listing several significant proposals that were consistently rejected by the Constitution's drafters).

189. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 336–47 (W. W. Norton & Co., 1987).

190. *Cf.* Manning, *Constitutional Structure*, *supra* note 18, at 643.

191. THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

192. *Id.* at 483.

193. Manning, *Constitutional Structure*, *supra* note 18, at 646.

194. *Id.*

195. *Id.* at 647.

1. Statutory Delegation to Agents of Congress

Perhaps with this principle in mind, the Supreme Court has rigidly prohibited statutory delegation of power to implement laws to agents or subsets of Congress.

First, in *INS v. Chadha*,[196] the Court struck down the one-house legislative veto, which allowed a single house of Congress to invalidate a decision by the Executive Branch to allow a deportable alien to stay in the United States.[197] The invalidation of the Executive Branch's decision was an exercise of legislative power that violated the requirements of bicameralism and presentment.[198]

Then in *Bowsher v. Synar*,[199] the Court held that an agent subject to the control of Congress could not participate in the execution of laws: "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."[200] In *Bowsher*, Congress retained removal power over the Comptroller General, who had the authority to exercise executive power by specifying budget cuts.[201]

Finally, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc*,[202] members of Congress served on a review board that could veto decisions made by the Metropolitan Washington Airports Authority's (MWAA's) Board of Directors.[203] Writing for the Court, Justice Stevens found labels irrelevant for separation of powers purposes: "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of [Article I, Section 7]."[204]

Common to all three cases is the purpose of protecting bicameralism and presentment. Allowing Congress to delegate power to agents under its control creates an attractive alternative to the rigors of Article I, Section 7. As the Court explained in *MWAA*, it did not matter that the institutional arrangement at issue was a "practical accommodation" that furthered a "workable government," because it "provide[d] a blueprint for extensive

196. 462 U.S. 919 (1983).
197. *Id.* at 956.
198. *Id.* at 956–57.
199. 478 U.S. 714 (1986).
200. *Id.* at 726.
201. *Id.* at 732–34.
202. 501 U.S. 252 (1991).
203. *Id.* at 255.
204. *Id.* at 276.

expansion of the legislative power beyond its constitutionally confined role."[205] Congressional involvement in the execution of the laws "raises the very danger the Framers sought to avoid—the exercise of unchecked power."[206]

2. Statutory Delegation to the Executive Branch and the Judicial Branch

By contrast, the Court has sustained broad delegations of authority to the Executive Branch,[207] which has the authority to create binding policy outside of bicameralism and presentment.[208] So long as a law "lay[s] down . . . an intelligible principle to which the [executive official] . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."[209]

In practice, there is no meaningful limit on delegation to the Executive Branch. Despite the nominal ban on delegation of legislative authority, the Court has only twice struck down statutes on nondelegation grounds.[210] And the Court has found an intelligible principle in statutes that direct the Executive Branch not to "unfairly and inequitably distribute[ ] voting power among security holders,"[211] and to regulate in the "public interest."[212]

The Court has declined to enforce a meaningful nondelegation doctrine because it lacks a judicially manageable standard for doing so:

> [W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.[213]

So too, the Court has sustained broad delegations of power to the Judiciary. In *Mistretta v. United States*, the Court sustained the delegation of power to promulgate binding sentencing guidelines to the United States

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205. *Id.* at 276–77.
206. INS v. Chadha, 462 U.S. 919, 966 (1983).
207. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001).
208. Manning, *Constitutional Structure*, *supra* note 18, at 653.
209. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
210. Pan. Refining Co. v. Ryan, 293 U.S. 388, 433 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).
211. Am. Power & Light Co. v. SEC, 329 U.S. 90, 96, 104–06 (1946).
212. NBC v. United States, 319 U.S. 190, 225–26 (1943).
213. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

Sentencing Commission, a body placed in the Judicial Branch.[214]

More commonly, delegation takes the form of broad statutory language that requires judicial policymaking: "The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law."[215] For such statutes, courts must craft rules of decision that cannot be grounded in the text.

Why has the Court adopted such a different approach when legislation delegates power to the Executive Branch or the Judiciary? Because these delegations are:

> [A] less substantial threat to bicameralism and presentment. . . .
>
> . . . Specifically, when Congress uses imprecision or vagueness to avoid the costs of investigating and agreeing on the precise policies it wishes to adopt, it does so only at the expense of ceding control over the particulars of its program to another branch of government.[216]

On this view, Congress makes the law. If Congress makes the law, it has an incentive to evade bicameralism and presentment by delegating to itself. It does not have a similar incentive to delegate to institutions beyond its control.

3. Implications of the Principle So Conceived

From the principle of separation expressed thus far, Professor Manning has argued for two propositions. First, he argues against giving authoritative weight to legislative history: "[I]t is the very fact of *congressional* involvement in the creation of legislative history that justifies textualists' rejection of such materials. . . . This practice effectively assigns legislative agents the law elaboration function . . . ."[217]

Second, Professor Manning has argued against binding deference to agency interpretations of their own regulations: "Given the reality that agencies engage in 'lawmaking' when they exercise rulemaking authority, *Seminole Rock* contradicts the constitutional premise that lawmaking and law-exposition must be distinct."[218]

Both of these interpretive rules, he points out, are more consistent with our "original structural commitments"[219] in the Constitution—here, the

214. *Id.* at 371–79, 385 (majority opinion).

215. Easterbrook, *supra* note 164, at 544.

216. Manning, *Constitutional Structure*, *supra* note 18, at 653 (footnote omitted).

217. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706 (1997).

218. Manning, *Constitutional Structure*, *supra* note 18, at 654 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).

219. Manning, *Constitutional Structure*, *supra* note 18, at 633.

structural commitment to separating lawmaking and interpretation.

But the principle so conceived is incomplete. In *Bowsher v. Synar*, for instance, the Court stated, "*Congress* cannot grant to an officer under its control what it does not possess."[220] And the canonical statement of the nondelegation doctrine states that, "*Congress* shall lay down by legislative act an intelligible principle."[221] These statements ignore—or at the very least, leave implicit—the President's role in the legislative process.

B. The Effect of the President's Participation in the Legislative Process

What effect does the President's role in the legislative process have on the principle separating lawmaking from interpretation? From one vantage point, perhaps we should be *less* concerned with legislative self-delegation corroding bicameralism and presentment. If Congress wants to avoid bicameralism and presentment by delegating interpretive authority to those under its control, the President can check that desire with the veto power. After all, Hamilton's first justification for the veto was self-defense against legislative encroachment.[222]

But from another vantage point, perhaps we should be *more* concerned about executive delegations. The more influential the President is in the legislative process, the more he is able to initiate legislation and shape legislative compromises that delegate broad interpretive power to agents under his control—again, outside of Article I, Section 7.

As a purely functional matter, the unconstitutional combination of legislative and binding interpretive power in Congress is not all that different than the constitutional combination of legislative and interpretive authority in the Executive. Each house of Congress has the exclusive power to formally initiate and draft legislation and has an absolute veto power. The President has the power to recommend legislation to Congress and a qualified veto power.

The biggest difference between Congress and the President is Congress's formal power to initiate and draft legislation. But in modern practice, these differences are smaller than they might seem. Although the President cannot force Congress to consider his recommendations, he is very influential in setting the legislative agenda.[223] His drafts serve as templates and the threat of the veto gives him some influence on congressional

220. 478 U.S. 714, 726 (1986) (emphasis added).

221. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 352 (1928) (emphasis added).

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

223. *See supra* Part II.A.

drafting.[224]

Further, the President's qualified veto is not all that qualified—it is very difficult to muster two-thirds of each house to override it. It may still be that executive delegations are a less substantial threat to bicameralism and presentment—though the prevailing sentiment of the President as Legislator-in-Chief suggests otherwise—but functionally, executive delegations are still a significant threat.

But whatever the functional similarities, there is a massive difference in principle: the Constitution *requires* some combination of lawmaking and law-elaborating power in the President. The Constitution both vests the executive power in the President and gives him a role in the legislative process. As Paul Bator has explained: "Every time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of the judicial power."[225] The very nature of executive power requires the Executive to "determin[e] the meaning and applicability of provisions of law."[226]

C. The Effect of Binding Deference

But just because some interpretation is incident to the executive power does not mean that courts should give authoritative weight to executive interpretations. Binding deference to executive interpretations of ambiguous statutes makes ambiguity more enticing for the Executive. And if the President has influence in the legislative process—as he surely does—he has a greater incentive to use that influence to insist on legislation with vague language. In essence, *Chevron* subsidizes ambiguity and delegation.

In a world without *Chevron*, ambiguity would not be as valuable to the Executive Branch. After all, the Executive Branch would face greater uncertainty that its interpretation of ambiguous language will be accepted by a court. By contrast, in a world with *Chevron*, the Executive Branch can be relatively certain that so long as its interpretation of ambiguous language is not completely beyond the pale, a court will accept it.[227]

The President might then propose legislation containing ambiguous language. Or he might use his influence throughout the legislative process

224. *See supra* Part II.B.

225. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264 (1990).

226. *Id.*

227. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

to push Congress to make statutory language even more ambiguous to get past step one of *Chevron*. The President might, for example, be artificially stubborn in insisting on a higher level of generality as the price for his assent. Delegation may be necessary—Congress and the President surely cannot specify every detail and contingency in the statutory text—but should the Court encourage ambiguity beyond what is necessary?

Of course, the President faces a tradeoff: statutes are more permanent than agency interpretations. After all, agencies are not penalized for inconsistent interpretations in the future.[228] It is therefore possible that an agency's interpretation of ambiguous language might be undone by a future administration with different aims. This fact does counteract the incentive to insist on vagueness to the extent that presidents care about the permanence of their policy choices. But it is just as likely that presidents only care about putting their policies in place while in office to enjoy the political benefits derived from those policies.

In any event, statutory ambiguity proliferates today. For example, the U.S. Code is filled with statutes directing administrative agencies to regulate in the "public interest"[229] or to regulate "for any other reason to promote equity and fairness,"[230] or to prevent "unfair discrimination."[231] Some statutes direct agencies to regulate with respect to certain "rights."[232] But as the D.C. Circuit has pointed out, "The word 'right,' instead of answering a question, unhelpfully asks another one: To what is a person legally entitled?"[233] Other statutes use the word "reasonable,"[234] giving a reviewing court the meaningless task of determining whether an agency's interpretation of the word "reasonable" is reasonable. As Richard Epstein has argued, vague language in the recent Affordable Care Act and Wall Street Reform and Consumer Protection Act "delegates much blanket authority to government officials who will, effectively, make the rules up as they go along."[235] Perhaps not surprisingly, presidential influence was significant in both of these pieces of legislation.[236]

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228. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (stating an initial interpretation is not an agency's final interpretation and that inconsistency is not a basis for declining *Chevron* deference).

229. *See, e.g.*, 47 U.S.C. § 157 (2006).

230. *Id.* § 312(g).

231. 15 U.S.C. § 78f(b)(5) (2006).

232. *See, e.g.*, 30 U.S.C. § 1272(e) (2006).

233. Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 708 (D.C. Cir. 2008).

234. *See, e.g.*, 42 U.S.C. § 1395y(a) (2006).

235. Richard A. Epstein, *Government by Waiver*, NAT'L AFFAIRS, Spring 2011, at 40.

236. *See supra* notes 40, 48, and accompanying text (stating the President influenced Congress through the State of the Union address by calling on Congress to pass legislation, but left Congress to take the lead in drafting the bill).

Ultimately, creating a further incentive for statutory vagueness disserves the virtues of bicameralism and presentment. Less policy is made under Article I, Section 7 and more is made solely under the Executive Branch. Bicameralism and presentment protect liberty by making it more difficult for factions to capture government.[237] And bicameralism and presentment promote wise laws by providing multiple rounds of deliberation by different institutions.[238] The bottom line is that *Chevron* acts as a pro-delegation canon,[239] but in a different—and more troubling—way than has traditionally been thought. Professor Farina has argued:

> [T]he nondelegation doctrine came to incorporate a vision of the constitutional relationships between the legislature, agencies, and the judiciary fundamentally at odds with *Chevron*'s assumption that Congress may empower agencies to decide what regulatory statutes mean whenever they appear ambiguous.[240]

The permissibility of delegation "hinged" on "judicial policing of the terms of the statute."[241] When agencies have the power to interpret the scope of their own authority, that judicial policing is gone and agency power is no longer "adequately checked."[242]

But *Chevron*'s problem is not just that agencies have the power to interpret, and thereby expand, the scope of their own authority. *Chevron*'s further problem is that it incentivizes the Executive to use his influence in the legislative process to insist on broad and discretionary grants of power up front, so that he can then construe it authoritatively.

From a separation of powers perspective, then, *Chevron*'s problem is not just that it provides an inadequate check on agency power. Rather, it discards a specific type of check embedded into the constitutional structure—the separation of lawmaking and binding interpretive authority.

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237. *See* THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) ("It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them.").

238. *See id.* ("The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from the want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.").

239. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) ("This is an emphatically prodelegation canon, indeed it is the quintessential prodelegation canon . . . .").

240. Farina, *supra* note 12, at 478.

241. *Id.* at 487.

242. *Id.* at 488.

V. INDEPENDENT JUDICIAL REVIEW

Even if courts are unable to enforce the nondelegation doctrine for lack of a judicially manageable standard, they need not adopt an interpretive rule that exacerbates the separation-of-powers problem by combining legislative influence and binding interpretive authority. While the Constitution necessarily tolerates some combination of lawmaking power and interpretation, it does not tolerate the combination of lawmaking power and *binding* interpretive authority. After all, the nondelegation doctrine still exists in principle, if not in practice.

For this reason, courts should reject *Chevron* deference in favor of independent judicial review. Without deference, statutory ambiguity is worth less to the President and he is less likely to use his influence in the legislative process to get it. The upshot is greater statutory clarity upfront and more policy made under Article I, Section 7. Independent judicial review, then, operates "as a constitutional doctrine of second best, indirectly preserving structural norms that the Court will not enforce directly by invalidating acts of Congress."[243]

A. The Judiciary, the President, and the Council of Revision

When it comes to binding interpretive authority, the complete absence of the Judiciary from the legislative process is critical. Recall Hamilton's warning about having the upper house act as a court of last resort: "From a body which had had *even a partial agency* in passing bad laws we could rarely expect a disposition to temper and moderate them in the application."[244] This structure was thought to be problematic for combining even partial agency in lawmaking with binding interpretive authority.

More to the point, consider how close *Chevron* comes to the Council of Revision. Proposed as part of the Virginia Plan, the Council of Revision was to consist of "the Executive and a convenient number of the National Judiciary."[245] It would have had the authority to "examine every act of the National Legislature before it shall operate . . . and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch."[246]

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243. Manning, *Constitutional Structure*, *supra* note 18, at 633.

244. THE FEDERALIST NO. 81, at 483 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

245. Edmund Randolph, *Variant Texts of the Virginia Plan Presented by Edmund Randolph to the Federal Convention, May 29, 1787, Text A*, *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 953, 954 (Charles C. Tansill ed., 1927).

246. *Id.*

Madison supported the measure. He thought it would give the Judiciary an additional means to defend itself from the legislature.[247] He also thought it would "preserv[e] a consistency, conciseness, perspicuity & technical propriety in the laws."[248] Finally, he thought it would serve "as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities."[249]

Madison stressed that the Council secured, rather than undermined, the separation of powers:

> Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate.[250]

In support, he pointed to the British Constitution, which "admit[ted] the Judges to a seat in the legislature, and in the Executive Councils."[251] According to Madison, if the Council of Revision "was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether."[252]

But the Convention ultimately rejected the Council of Revision.[253] Expressing his opposition, Elbridge Gerry stated: "It was making the Expositors of the Laws, the Legislators which ought never to be done."[254] So too, Governor Morris "objected that Expositors of laws ought to have *no hand* in making them."[255] Nathaniel Ghorum stressed that judges "ought to carry into the exposition of laws no prepossessions with regard to them."[256] According to Caleb Strong, "No maxim was better established" than "the power of making ought to be kept distinct from that of expounding, the laws."[257] And finally, Rufus King observed "that Judges ought to be able to expound the law as it should come before them, free from the bias of

247. *See* James Madison, *Debates in the Federal Convention of 1787 as Reported by James Madison*, *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 109, 423 (Charles C. Tansill ed., 1927).

248. *Id.*

249. *Id.*

250. *Id.* at 426–27.

251. *Id.* at 427.

252. *Id.*

253. *Id.* at 429.

254. *Id.* at 424.

255. *Id.* at 425 (emphasis added).

256. *Id.* at 428.

257. *Id.* at 424.

having participated in its formation."[258] While other members of the Convention offered different reasons for rejection of the Council of Revision, one persistent objection was the union of the veto power with binding interpretive authority.[259]

Yet *Chevron* creates a nearly identical structure: the Executive has both the veto power and the power to authoritatively construe ambiguous statutes—just as the Judiciary was to have both the veto power and the power to authoritatively construe statutes more generally. If anything, *Chevron* is more troubling because the President does not share the veto (as the Judiciary would have in the Council of Revision), and he has the additional legislative power of recommendation (which the Judiciary would have lacked under the Council of Revision).

The statements of Gerry, Morris, Ghorum, Strong, and King all suggest that *Chevron*'s institutional arrangements run counter to a constitutional principle separating lawmaking from law-exposition. But what then of Madison's assertion that this principle would be equally violated by *any* executive role in the legislative process?

That the Convention ultimately gave the President such a role suggests that Madison was wrong. But the Convention did so on the assumption that the Judicial Branch would independently interpret the law. While the Executive Branch would necessarily engage in some interpretation incident to the executive power, it would not have binding interpretive authority. Naturally then, binding interpretive authority should rest in the Judicial Branch, which has not even partial agency in the making of laws.

B. The Modern Presidency and Original Structural Commitments

Whatever might have been true in 1787, the need for an independent judicial check is more pressing than ever. Where early presidents shied away from the legislative process, modern presidents embrace it.[260] Both the veto and recommendation powers have evolved considerably since 1787. Presidential involvement in the legislative process today is extensive, and presidential influence in the legislative process through the veto power great—"the power of text over expectation."[261]

This influence heightens the President's ability to exploit *Chevron*'s structural combination of lawmaking and binding interpretive authority for his own good. An independent judicial check "make[s] sense of original structural commitments" in light of the great legislative power the modern

258. *Id.* at 147.
259. *See id.* at 422–28.
260. *See supra* Part II.A.
261. Black, *supra* note 87, at 89.

President exercises.[262] Here, that structural commitment is to bicameralism and presentment.

The Court has chosen default interpretive rules to further constitutional principles it is unwilling to enforce directly in light of modern reality. As the Court stated in *Mistretta*, "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[263] Similarly, the Court has adopted clear-statement rules[264] to protect federalism values that it is not willing to enforce directly.[265]

The Court should do the same here by setting a default rule of independent judicial interpretation of all statutes. The nondelegation doctrine must exist in principle, if not in practice, because rejecting the nondelegation doctrine in principle amounts to little more than a rejection of bicameralism and presentment. And if the nondelegation doctrine exists in principle, the Court should adopt an interpretive rule that furthers, rather than frustrates it.

C. Chevron*'s Constitutional Counter*

Of course, *Chevron* might strike back with its own constitutionally-rooted rationale. When the traditional tools of statutory construction fail, "the resolution of that ambiguity necessarily involves policy judgment"—and under the Constitution, "policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive."[266] After all, the Court in *Chevron* stressed that agencies are more democratically accountable.[267]

But as Justice Scalia has argued, the constitutional principle may be illusory: "[T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences."[268] Courts have long made policy judgments to resolve ambiguities, and never has their "constitutional

262. Manning, *Constitutional Structure*, *supra* note 18, at 633.
263. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).
264. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991).
265. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985).
266. Scalia, *supra* note 17, at 515.
267. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).
268. Scalia, *supra* note 17, at 515.

competence" to do so been doubted.[269]

And if the Constitution places such a premium on democratic accountability for policymaking, why stop at the Executive Branch? Why not insist on congressional involvement in policymaking by insisting on bicameralism and presentment? That the nondelegation doctrine in its current form is not up to the task does not mean that the whole enterprise should be abandoned. If a default interpretive rule of independent judicial review channels more policy through Article I, Section 7 by making statutory vagueness less attractive to the Executive, then such a rule might ultimately be more faithful to democratic accountability than *Chevron*.

D. The Proper Role of Executive Interpretations

None of this is to say that courts should close their eyes to executive interpretations of statutes. They may well be persuasive evidence of statutory meaning, and when that is the case, courts should follow them.

But if *Chevron* has any force at all, it must be that courts defer in some cases where they would otherwise disagree with the agency's interpretation. These cases are problematic and illustrate what the Executive has to gain from insisting on statutory ambiguity.

Accordingly, courts should give the same weight to executive interpretations as they would to any piece of persuasive evidence of statutory meaning. As Justice Jackson put it in *Skidmore v. Swift & Co.*:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[270]

Justice Scalia has characterized "*Skidmore* deference" as an "empty truism and a trifling statement of the obvious."[271] But that is precisely the point: courts should interpret agency-administered statutes as they would any other statute. If an agency interpretation is persuasive evidence of statutory meaning, then courts should consider it—as they would any other persuasive evidence of statutory meaning.

Conversely, if a court disagrees with an agency's interpretation—even when that interpretation would pass *Chevron* step one—it should reject it. *Skidmore* deference reduces the ex ante incentive for the Executive to exact statutory vagueness as the price for his assent. After all, without *Chevron*, it is more uncertain that a court will accept an executive interpretation.

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269. *Id.*
270. 323 U.S. 134, 140 (1944).
271. United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

CONCLUSION

Rejecting *Chevron* would appear to be a drastic change, supplanting a clear and workable rule concerning deference to administrative agencies. But it may not be so. Professor Beermann has argued that *Chevron* "has proven to be a complete and total failure."[272] Among other things, *Chevron*: "has no adequate theoretical foundation"; has "spawned three competing versions of Step One"; is "highly unpredictable"; has "not had the desired effect of significantly increasing deference to agencies"; has "created uncertainty about when it applies"; and is not even cited by the Supreme Court "in a high proportion of the cases in which it arguably applies."[273] At bottom, *Chevron*'s seductive image of simplicity is more illusory than real.

At the same time, the uncertainty of independent judicial review has been overstated.[274] Justice Scalia, for instance, has described the "ineffable rule" that preceded *Chevron*.[275] True enough that without *Chevron*, the persuasiveness of an administrative interpretation will vary based on the specifics of a case. But even under *Chevron*, courts must inquire into the specifics of the case—at least the statutory text, and perhaps more. Statutory interpretation necessarily proceeds case by case. Once that fact is admitted, scrutinizing, rather than rubber stamping, administrative interpretations does not seem all that much more burdensome.

And regardless, "The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."[276] As the rejection of the Council of Revision makes clear, the Convention made a choice to reject institutional arrangements combining legislative agency and binding interpretive authority. However clumsy, inefficient, or unworkable rejecting *Chevron* may be, it is ultimately more consistent with our original constitutional commitments.

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272. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should be Overruled*, 42 CONN. L. REV. 779, 782 (2010).

273. *Id.* at 783–84.

274. *See* Scalia, *supra* note 17, at 517.

275. *Id.*

276. INS v. Chadha, 462 U.S. 919, 959 (1983).

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GOVERNMENT ELECTION ADVOCACY: IMPLICATIONS OF RECENT SUPREME COURT ANALYSIS

STEVEN J. ANDRÉ*

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* Adjunct Professor, Lincoln Law School; Attorney, Carmel, California; J.D. University of California, Hastings College of Law, 1987; B.A. Political Science, B.A. Legal Studies, University of California, Berkeley, 1983.

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.
>
> —*Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

> "Compelled support of government"—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position.
>
> —*Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005).

INTRODUCTION

The purpose of this Article is to identify a constitutionally consistent approach to the problem of government election partisanship in light of the Supreme Court's First Amendment and election jurisprudence bearing upon the question of government efforts to influence the outcome of the electoral process. In this regard, the Court's recent decisions in *Pleasant Grove City v. Summum*,[1] *Citizens United v. FEC*,[2] and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*[3] are especially illuminating.

Consider a county transportation agency seeking passage of a ballot measure to fund road improvements. Opponents object to the measure on the basis that better management of existing funds is needed and that funding should instead be directed to alternatives to automotive transportation. Thirty days before the election, the county agency sends a mailer to every voting household in the county and posts the same material on its official website reminding people to vote and advising them of certain "facts" about the ballot measure. The agency states its conclusion that, due

1. 555 U.S. 460 (2009).
2. 130 S. Ct. 876 (2010).
3. 131 S. Ct. 2806 (2011).

to inadequate existing funds, without passage of the measure it will be necessary to forego certain highway work. As a result, roadways will be unsafe, accidents will occur, and people will be injured and die. The materials are illustrated with graphic photographs of gaping potholes and roads in terrible condition, a list specifying road repair projects throughout the county that will not be performed if the measure fails, and numerous depictions of visceral highway carnage. They contain no mention of the opposing perspective.

Most of us would agree that, in spite of any façade of informational objectivity and lip service to a duty to inform the voting public, the materials in question amount to an effort by the agency to influence the electorate in favor of the ballot measure in question. But is the agency's expenditure on the mailer and the posting on its website unconstitutional?

Most lower courts considering the question have treated government election partisanship as constitutionally unsupportable. They have grappled with pinpointing the precise constitutional infirmity and with determining when government has crossed the line—most accepting an objective reasonableness standard—while some have sought comfort in a per se rule. Other courts, relying upon a less-than-rigorous conception of the government speech doctrine, have perceived no constitutional difficulty with such government election advocacy. The United States Supreme Court, in spite of the split in lower court authority, has never directly addressed the problem—neither in the form of campaign regulations nor as a question of a constitutional limitation preventing government from lending support to one contending faction on a matter under consideration by voters. The United States Constitution contains no definite reference to the problem. Nevertheless, distinct outlines of the Court's treatment of the role of government in the election context lead inescapably to the conclusion that the government's role as speaker will be treated no differently than its role as regulator.

In the nation's lower courts, there are two basic judicial approaches with respect to government efforts to influence the electorate. The vast contrast in reasoning is aptly illustrated by the legal views taken by two courts considering government speech in the election context. The first court, representing the minority view, considers government as a valuable contributor, entitled, like any invested private speaker, to participate in the pre-election process:

> Clearly, the City has the responsibility to determine when improvements are necessary or desirable and to express its determination of those needs to the public. In order to implement such proposed benefits, a municipality must attempt to secure the funds from its citizenry. The ads at issue in the instant action merely amount to a solicitation of the necessary funds. Those

> taxpayers who disapprove of the proposed benefits have two opportunities to dissent: (1) They may dissent at the polls on the issues involved and (2) they may dissent at the polls when City officials seek re-election.
>
> One could reasonably suggest that to forbid defendants the right to support by advertising their position, initiated by their own resolution or ordinance, would be violative of their own First Amendment rights.[4]

That court continued:

> It would be a strange system indeed which would allow the City to determine its needs, allow it to adopt ordinances calling for elections to fulfill those needs, allow it to bear the expense of those elections, and then require it to stand silently by before the issues are voted on. Obviously, the City is not neutral under such circumstances and should not be required to appear so.[5]

Without regard for the context of the speech, this perspective accepts that government, like any private actor in pre-election debate, may participate in that process.[6] Government is viewed as having a right—and

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4. Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 820 (N.D. Ala. 1988); *see also* Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 318, 335 (1st Cir. 2009) (rejecting a citizen group's challenge to pre-election publication by the school board and town of a one-sided newsletter, mailings, and a website supporting passage of certain warrant articles); Kidwell v. City of Union, 462 F.3d 620, 626 (6th Cir. 2006) (characterizing a government agency as serving the citizenry by promoting ballot measures in which the agency is interested: "Governments must serve their citizens in myriad ways, including by provision of emergency services, and these activities require funding through taxation. Union's speech related to emergency service and tax initiatives thus fits squarely within its competence as governor and was made in the context of 'advocat[ing] and defend[ing] its own policies.' The issues on which the city advocated were thus germane to the mechanics of its function . . . ." (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000))); Schulz v. New York, 654 N.E.2d 1226, 1232 (N.Y. 1995) (Ciparick, J., dissenting) (opining that a school board's newsletter seeking to dispel what the board regarded as "myths" in the pre-election debate was proper government speech); City Affairs Comm. v. Bd. of Comm'rs, 41 A.2d 798, 800 (N.J. 1945) ("We think municipalities may . . . present their views for or against proposed legislation or referendum to the people of questions which in their judgment would adversely affect the interests of their residents. To accomplish this purpose we think they may incur expenditures . . . and that to do so is a proper governmental function.").

5. *Ala. Libertarian Party*, 694 F. Supp. at 821.

6. A proponent of this view is Laurence Tribe, who argued that when government spends public funds to propagate a political message, "[T]he fact that some people object to this expenditure of their tax money . . . is likely to be deemed irrelevant." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 590 (1978). In this view, those disagreeing with a public agency's viewpoint may not silence government's voice, "nor may they insist that government give equal circulation to their viewpoint" so long as the government speech does not threaten to drown theirs out. *Id.* How a court would gauge when other speech has been drowned out is a conundrum. Under the majority view, the difficulty in determining when drowning is imminent is avoided by a flat prohibition against government partisanship. *See* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 595–602 (1980).

even the duty[7]—to inform, educate, and persuade on matters of public controversy, including during an election. Its role involves guiding a public unfamiliar with what is in its best interest to recognize this.

The second judicial perspective, adopted by the majority of courts, evinces suspicion of government's participation in the election process, considers government favoritism in the process unlawful, and circumscribes government's role[8] to impartially informing the electorate:

> The theme which predominates in these cases, and one which is reinforced by logic and common notions of fair play, is simply stated. While the county not only may but should allocate tax dollars to educate the electorate on the purpose and essential ramifications of referendum items, it must do so fairly and impartially. Expenditures for that purpose may properly be found to be in the public interest. It is never in the public interest, however, to pick up the gauntlet and enter the fray. The funds collected from taxpayers theoretically belong to proponents and opponents of county action alike. To favor one side of any such issue by expending funds obtained from those who do not favor that issue turns government on its head and is the antithesis of the democratic process.
>
> . . . [G]overnment must permit the people to be heard and, in fact, to make the ultimate decision at the ballot box. If government, with its relatively vast financial resources, access to the media and technical know-how, undertakes a campaign to favor or oppose a measure placed on the ballot, then by so doing government undercuts the very fabric which the [C]onstitution weaves to prevent government from stifling the voice of the people. An election which takes place in the shadow of omniscient government is a mockery—an exercise in futility—and therefor a sham. The appropriate function of government in connection with an issue placed before the electorate is to

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7. *Ala. Libertarian Party*, 694 F. Supp. at 817.

8. The Founding Fathers regarded government as the chief threat to the governing power of the people. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 102, 103, 108 (1960). Meiklejohn was ironically a proponent of the minority view. *See* LUCAS A. POWE JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 247 (1991). Meiklejohn identified the key concerns driving the majority perspective: For the Founders, government's function was conceived as a delegation of certain governing powers to legislative, executive, and judicial agencies that remained under the active control of the voting politic. MEIKLEJOHN, *supra*, at 99. He elaborates:

> The intent of the Constitution is that, politically, we shall be governed by no one but ourselves. . . . We are the sovereign and the legislature is our agent. And as we play our sovereign role in what Hamilton calls "the structure and administration of the government," that agent has no authority whatever to interfere with the freedom of our governing.

Id. at 106.

enlighten, NOT to proselytize.[9]

The leading case articulating this latter view is the California Supreme Court decision *Stanson v. Mott*.[10] The perspective evinces a profound distrust of the machinations of government agents, their potential for defeating the will of the People, and an emphasis upon protecting the process of governance by the People.[11]

The Supreme Court's treatment of the limits upon government's role in the regulation of speech in the election process evinced in *Summum*, *Citizens United*, and *Arizona Free Enterprise* provides a strong indication as to its relative receptivity to the minority and majority approaches to governmental support of one faction in an election contest.

In *Summum*, the Court gave considerable sway to a government agency's ability to express a viewpoint and exclude others' views under the "government speech" doctrine.[12] The *Summum* Court was careful, however, to emphasize that there are limits upon what government can say, while remaining very unclear about what some of those limits might be.[13] The question, then, is whether the Court's analysis in *Summum* underscores an approach giving government license to put in its "two bits" during election battles or if such intervention in election contests will be treated equally as off-limits for government speech as it is for non-neutral regulation of private speech. Revealingly, the Justices displayed considerable unease with

9. Palm Beach Cnty. v. Hudspeth, 540 So. 2d 147, 154 (Fla. Dist. Ct. App. 1989) (involving alleged county expenditures to promote passage of a measure creating a health care district).

10. 551 P.2d 1 (Cal. 1976).

11. This apprehension is well-grounded in historical evidence, scientific studies, and common sense. The Gulf of Tonkin and the Watergate cover-up are more egregious examples of government efforts to manufacture the consent of the governed. As one court recognized, "Events of the past few decades have demonstrated that government is quite capable of misleading the public and defaming its citizens." Nadel v. Regents of Univ. of Cal., 34 Cal. Rptr. 2d 188, 198 (Ct. App. 1994). But it is not merely that government conceals and misleads; it also makes mistakes. Most government agents may not purposefully distort, manipulate, or suppress information valuable to the voter making a decision at the ballot box. Perfectly well-meaning government officials are a more likely problem. Their investment in a particular ballot measure inevitably predisposes them to be biased, to discount other perspectives, and to slant their approach in discussing it with the voting public. In addition, because they are insulated, they may be mistaken, misinformed, or unwittingly primed by institutional forces to mislead the voting public. And, even while motivated by the purest of motives, the result is to improperly influence the views of voters on particular issues, to interfere with the free and unadulterated choice of the voters, and, ultimately, to undermine the principle of popular sovereignty. *See infra* notes 170–174 and accompanying text.

12. Pleasant Grove City v. Summum, 555 U.S. 460, 467–69 (2009).

13. *Id.* at 469–70.

treating monuments as per se vehicles of government speech, denoting by way of concurrences that a more contextual, ad hoc approach would be favored in evaluating whether speech should be regarded as private or governmental in most situations.

Citizens United, which struck down regulatory restrictions on corporate and union election spending, might be construed as portending either of two contradictory approaches by the Court. On the one hand, the Court's rationale that more speech is better, applied to corporations and other fictitious entities, conceivably could be extrapolated and applied to municipal corporations and other public entities and agents. On the other hand, the Court's assessment of the proper role of government in relation to the election process and the marketplace of ideas suggests that it regards government actors very differently than private actors seeking to influence the outcome of a political battle.

In *Arizona Free Enterprise*, a 5–4 decision like *Citizens United*, the Court addressed a state campaign finance scheme designed to prevent corruption engendered by big money campaign contributions and the unlevel playing field between wealthy and poor candidates.[14] The Court struck down legislation that established public matching funding for candidates whose opponents' spending (including spending by others on their behalf) exceeded a certain cap.[15] The Court concluded that Arizona's campaign finance plan was unconstitutional on a First Amendment basis, holding that the law substantially burdened the free speech rights of the candidate spending private funds without any compelling State interest for doing so.[16] But the Court's free speech analysis is lacking and augurs that it may have been searching for a sounder constitutional basis for its holding. The underlying concern leading to its decision is entirely more consistent with a different basis—one in which government support of private factions in an election contest violates fundamental constitutional principles.

This Article will evaluate the two judicial approaches to the problem and their theoretical roots. It will scrutinize the proposed constitutional bases for precluding government efforts to manipulate the consent of the governed in elections with special attention to the validity of a compelled speech analysis. The distinction between an elected government promoting its policies and a government program or candidate that is the subject of an election will be considered in terms of a requirement of governmental neutrality inherent in the rule of law and implicit in the Constitution.

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14. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813–14, 2825 (2011).

15. *Id.* at 2813.

16. *Id.*

The Article will also examine the means for enforcing a requirement of government neutrality, illustrated by lower court approaches to the problem. Finally, the Supreme Court's treatment of First Amendment and election issues will be dissected to illuminate how the Court might treat the problem after *Citizens United*, *Arizona Free Enterprise*, and *Summum*. The Article will conclude that the Court's recognition of the inevitable infirmities entailed in governmental regulatory efforts to level the playing field in elections will similarly lead the Court to regard affirmative governmental efforts to adjust electoral response as failing to pass constitutional muster.

I. THE MINORITY PERSPECTIVE ON GOVERNMENT EFFORTS TO INFLUENCE ELECTION RESULTS

A. Political Theory Underlying the Approach

The minority view that government's role vis-à-vis the citizenry should not be confined to that of a neutral regulator of the political process and a mere functionary of the electorate has venerable origins. It proceeds from several key presumptions: (1) government expertise is capable of divining the political truth on a particular issue; (2) left to themselves, voters are not capable of voting correctly; (3) government has a proper role of educating voters concerning what decisions are in their best interests, and; (4) voters should trust and look to government to find out how they should think about an issue.

The presumptions underlying the minority view have roots that developed in Western tradition alongside the very different view accepted by Madison and Jefferson, which formed the basis for American constitutional democracy. Its origins can be traced to such philosophers as Hegel, who stated that the individual finds his liberty in obeying the State and the fullest realization of his liberty in dying for the State,[17] and Rousseau, whose conception of freedom entailed the individual's submission to a general will.[18]

Under the minority view, the concept of popular sovereignty presupposes that there is a common point at which men's wills necessarily coincide.[19] But even the People may not realize the general will; it is necessary to guide them.[20] The approach is based upon "the assumption of

17. *See generally* GEORG HEGEL, PHILOSOPHY OF RIGHT (1952).

18. *See* J.L. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY 38 (1960).

19. *Id.* at 250–51.

20. The blind multitude does not know what it wants, and what is its real interest. Left to themselves, the People always desire the good, but, left to themselves, they do

a sole and exclusive truth in politics."[21] This perspective is organic: It conceives of the individual as an indivisible part of a whole and the State as the infallible corpus embodying the general will.[22]

Following the turn of the century, a movement rose to prominence in the United States that challenged the conceptions of the Founders. The Progressive Movement, disillusioned with the ability of constitutional government to address the needs of the citizenry and enamored of scientific methods,[23] directly rejected what it perceived as a failed constitutional vision in favor of an organic vision with instrumentalist prerogatives:

> The Progressives took up the theme that the Constitution is process without purpose—whatever purpose there is in the world is assigned by evolutionary or progressive history, not framers of constitutions. The explicit goal of Progressivism was to free the Constitution from its moorings in the founding, most particularly from what were termed the "static" doctrines of the Declaration and its reliance on natural right.[24]

Progressives placed their faith in the ability of government agencies, rather than the reason of the voters, to assess what the best interests of the People may entail.[25]

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not always know where that good lies. The general will is always right, but the judgment guiding it is not always well informed. It must be made to see things as they are, sometimes as they ought to appear to them.

Id. at 47–48. Ideally, the State actualizes the general will in its decisions by recognizing what is best for the citizenry collectively. KENNETH N. WALTZ, MAN, THE STATE, AND WAR 173–75 (1959); BENITO MUSSOLINI, THE DOCTRINE OF FASCISM 13–18 (1935).

21. TALMON, *supra* note 18, at 1.

22. WALTZ, *supra* note 20, at 175 (elaborating Rousseau's analysis of the significance of inculcating patriotism or public spirit to social unity and in creating devotion by the citizenry to the welfare of the whole as embodied by the State); *see also* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 38–39 (Willmoore Kendall trans., 1954).

23. *See generally* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME (John Marini & Ken Masugi eds., 2005). The Progressives emphasized Darwin as revealing a dynamic process of social change throughout history. The emerging field of sociology captured the Progressive imagination as well, and the emphasis upon society as a biological entity in which individuals were interdependent organs supplanted the Founders' emphasis upon the individual. The notion that the individual was paramount was rejected as antiquated in favor of Rousseau's conception that freedom, far from being inherent, is something that exists by virtue of society and flows from the State. From this perspective, an individual rights perspective stood in the path of instrumental social reform and, therefore, of greater freedom.

24. Edward J. Erler, Marbury v. Madison *and the Progressive Transformation of Judicial Power*, *in* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME, *supra* note 23, at 163, 201; *see also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 3, 211–47 (1997).

25. *See* Erler, *supra* note 24, at 201; RABBAN, *supra* note 24, at 211–47. *See generally* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

The effect of the Progressive Movement upon American law was profound and, in particular, produced a deep and unresolved contradiction in constitutional thought with respect to the role of government in leveling the playing field in electoral battles.[26] This Progressive vision of the respective roles of government and the People is ultimately what underlies the minority lower court approach.

B. Constitutional Bases for Government Efforts to Influence the Electorate: First Amendment Protection for Government Speech

As a preliminary matter, we should dispense with the minority view notion that government enjoys a right to speak out on election issues. Aside from the plain lack of textual support for a government right to free speech from a First Amendment that speaks in terms of forbidding the State from abridging speech rights, the notion runs against the grain of basic constitutional principles. The Constitution speaks in terms of powers and rights. Conceptually, people have rights and relinquish them to grant powers to government. This is not to say that government has no constitutionally protected ability to speak. The recently developed government speech doctrine recognizes that government agents, consistent with principles of popular sovereignty, are able to promote policies of those voted into power by the People—including social, economic, political, and other agendas—until they face being voted out of office. But this does not entail a First Amendment right.[27] It derives from the same places any government ability to promote its policies does.[28] For the states, this is the police power. For the federal government—at least since 1937—this comes from the Commerce Clause[29] as amplified by the Necessary and Proper

26. *See* Steven J. André, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of* Citizens United v. FEC, 44 J. MARSHALL L. REV. 69, 81–107 (2010). *See generally* Tiffany R. Jones, *Campaign Finance Reform: The Progressive Reconstruction of Free Speech*, *in* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME, *supra* note 23, at 321.

27. Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 379 (5th Cir. 1989) ("While the [F]irst [A]mendment does not protect government speech, it 'does not prohibit the government, itself, from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression.'" (quoting Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982))).

28. Just as government "as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," it follows that, "[w]ithin this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its policies." Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

29. U.S. CONST. art. I, § 8, cl. 3.

Clause.[30]

Rights—which run in favor of persons, citizens, and states—should be contrasted with powers that are vested in government and are structurally controlled by *inter alia* dispersing the enumerated or implied power among the Legislative, Executive, and Judicial Branches to check and balance (i.e. limit) the exercise of power. The correct conceptualization of the constitutional source of government speech is that it is a power, not a right.[31] Because the constitutional basis for allowing government speech is not the First Amendment, the underlying principles are not the same.[32]

With the waning of the *Lochner* era, the power of government to act upon social, moral, and economic issues—even where such action conflicts with private economic interest—has come to be more accepted. Government action in the form of speech that seeks to promote public policy objectives comports with common sense, and the Supreme Court has upheld this conduct.[33] The essential importance of government's ability to speak has been framed as obvious: "Indeed, it is not easy to imagine how government could function if it lacked this freedom."[34] Undoubtedly for this reason, there is no prohibition in the Constitution directed against government taking a position on matters of public policy. Likewise, there is nothing specifically prohibiting government from acting through speech or other means to influence the formulation of public policy at its most seminal point: elections.

II. THE MAJORITY VIEW: GOVERNMENT NEUTRALITY AND THE COMPELLED SPEECH ANALYSIS

A. The Political Theory Underpinning the Majority Approach

The majority view of government's role in the constitutional scheme and, in particular, in the election process, is the antithesis of the minority conception of the relationship between the People and government. The Founders' conception regarded the individual as an independent sovereign unit rather than as a component of a whole body. The perspective is steeped in Montesquieuean treatment of conflictual social and political

30. U.S. CONST. art I, § 8, cl.18; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

31. *See infra* note 194.

32. Compared to the speech of private speakers, a government agency's own speech is "controlled by [very] different principles." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

33. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

34. Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

relations and Lockean natural law notions of social contract, individual autonomy, and liberty.[35] The conception proceeds from the premise that man is able to govern himself by virtue of the capacity of reason. The purpose of the State is to protect the individual and his property.[36] Rather than the collective body or State having absolute power over the People, the People have the absolute right to rid themselves of an unsatisfactory government.[37] This approach rejects the ideas of State infallibility and a single political truth and regards popular government as fallible and governance as an experimental, trial-and-error type of process.[38] Law is perceived positivistically as man-made determinations resulting from this process. Under this individualistic approach, while the citizen may distrust the ability of government officials—within the limited scope allowed them—to act in the best interests of the People,[39] he or she has the opportunity to oversee policy and correct official deviations, failures, and excesses at the ballot box.

Accordingly, from the perspective of the majority-view holders as well as the Founders, the following presuppositions prevail: (1) that the People alone are responsible for discovering the political truth on a particular issue, (2) that government's proper role is to remain impartial on issues before the People and to neutrally provide access to facts in its possession to inform the electorate, (3) that government should not be trusted to be involved in the process of deciding election issues that concern its future, and (4) that its involvement in that process would prevent and create corrosive distrust in the validity of the process of self-governance.

B. Isolating a Constitutional Basis for Restricting Government Involvement in the Process of Governance by the People

The state and lower federal courts that adopt the majority view have

35. HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 4–6 (1950).

36. *See* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 8 (Prometheus Books 1986) (1690).

37. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

38. *See* WILLIAM EBENSTEIN, TODAY'S ISMS 162, 163 (6th ed. 1970).

39. Jefferson epitomized this distrust, writing:

> [T]hat it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is every where the parent of despotism; free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go . . . .

Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799, in* THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99 17–18 (1834).

suggested various constitutional moorings for restricting government speech in the election process. Although the First Amendment is frequently mentioned as providing the controlling principle of law in these cases, the textual nexus is not elaborated.[40]

The ostensible reason courts fail to venture into "how" and "why" the First Amendment precludes government election activity is the absence of any obvious nail on which a court may hang this hat. The Free Speech Clause prevents government from interfering with speech, but does nothing to directly prevent government from speaking.[41] In effect, government intrusion into the marketplace of ideas—counteracting some views and supplementing or amplifying others—can be said to interfere with the speech of private factions every bit as much as government acts to hush

40. Nor do the cases limit reliance upon the First Amendment to a free speech rationale premised upon unfairness to the slighted campaign. The Petition Clause has been cited as well. *See* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 358 (D. Colo. 1978).

41. Nor does "speech" per se serve as the operative judicial concern. In fact, the cases acknowledge that there is no impropriety involved when government agents acting in their official capacity express views supportive of one faction in an election contest. Although the effective power and prestige of government unquestionably impacts public opinion, the practical difficulty in assessing the damage and delineating when the civil servant is speaking as a citizen enjoying First Amendment protection versus speaking in an official capacity has caused courts to give a wide berth to such activity. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 573–75 (1968); Colo. Taxpayers Union, Inc. v. Romer, 750 F. Supp. 1041 (D. Colo. 1990) (discussing the governor's advocacy against a proposed constitutional amendment); Choice-in-Educ. League v. L.A. Unified Sch. Dist., 21 Cal. Rptr. 2d 303, 313 (Ct. App. 1993) (holding a public agency's expenditure to broadcast a meeting in which it endorsed a position on a ballot measure "served purposes unrelated to its advocacy of a partisan position on the Initiative"); League of Women Voters v. Countywide Crim. Justice Coordination Comm., 250 Cal. Rptr. 161, 182 (Ct. App. 1988) (finding that a board adoption of a position on a ballot measure did not involve an expenditure of public funds and "[w]hile it may be construed as the advocacy of but a single viewpoint, there is no genuine effort to persuade the electorate such as that evinced in the activities of disseminating literature, purchasing advertisements or utilizing public employees for campaigning during normal working hours"); Harrison v. Rainey, 179 S.E.2d 923, 924–25 (Ga. 1971) (noting that a county's adoption of a resolution and a proposed constitutional amendment and legislation changing the form of county government posed no constitutional problem, but expenditures for promotion did); King Cnty. Council v. Pub. Disclosure Comm'n, 611 P.2d 1227 (Wash. 1980) (discussing a county council decision to endorse an anti-pornography initiative). Public officials and governing bodies can speak their minds on election issues, so long as they do not put public money where their mouths are. A more tangible measure than the providing of moral support is utilized by the courts—the commitment of public resources. But even then, the courts disregard commitment of public resources where these are associated with an elected official's office and are incidentally implicated. *See League of Women Voters*, 250 Cal. Rptr. at 178–79; Coffman v. Colo. Common Cause, 102 P.3d 999, 1007 (Colo. 2004).

certain speakers by regulatory measures.[42] Or it can be regarded as augmenting the debate—providing the electorate with the benefit of valuable additional matters to consider.[43]

Recognizing the logical leap required to apply First Amendment principles, some courts look elsewhere with similarly ambivalent results. Some states have statutory or constitutional provisions that address the use of public funds in elections.[44] Other courts look to the Guarantee Clause.[45] The court in *Burt v. Blumenauer*[46] addressed a county "fluoridation public information project" set up to extol the virtues of fluoridation.[47] The plaintiff challenged the agency's activities at a point when an anti-fluoridation measure was on the ballot.[48] The court found that an issue was presented for the trier of fact as to the agency's election advocacy.[49] Pointing to Article IV, Section 4 of the U.S. Constitution, the court stated,

> It hardly seems necessary to rely on the First Amendment . . . . The principles of representative government enshrined in our constitutions would limit government intervention on behalf of its own candidates or against their opponents even if the First Amendment and its state equivalents had never been adopted.[50]

Likewise, in *Mountain States Legal Foundation v. Denver School District No. 1*,[51] a case dealing with a school board committing school facilities and supplies

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42. *See infra* note 90.

43. A recent article analyzing the problem in terms of First Amendment values argues that government transparency in issue (ballot measure) elections serves instrumental free speech concerns. Helen Norton, *Campaign Speech Law with a Twist: When the Government is the Speaker, Not the Regulator*, 61 EMORY L.J. 209 (2011).

44. Minority view cases sweepingly dispense with arguments proposing a constitutional basis for restriction by asserting that the only courts finding such a limitation have grounded their holdings upon state laws. *See, e.g.*, Cook v. Baca, 95 F. Supp. 2d 1215, 1227–28 (D.N.M. 2000). Closer examination reveals that this disingenuously characterizes cases that look to a statutory provision allowing the expenditure. As shown by the *Cook* court's footnote, these cases actually hold that absent explicit statutory authority, the expenditure presents a constitutional issue. *Id.* at 1227 n.16. Additionally, the majority view cases actually leave open the "serious constitutional question" posed by a clear and express statutory provision allowing such an expenditure. Stanson v. Mott, 551 P.2d 1, 10 (Cal. 1976); *see also* David P. Haberman, Note, *Governmental Speech in the Democratic Process*, 65 WASH. U. L.Q. 209, 209–11, 220–21 (1987) (arguing that the constitutional mandate of democratic elections requires a per se rule that government election advocacy is unconstitutional notwithstanding statutory authority).

45. U.S. CONST. art. IV, § 4, cl. 1.

46. 699 P.2d 168 (Or. 1985).

47. *Id.* at 169 (internal quotation marks omitted).

48. *Id.* at 170.

49. *Id.* at 181.

50. *Id.* at 175.

51. 459 F. Supp. 357 (D. Colo. 1978).

to defeat a state ballot measure affecting funding, the court recognized that an expenditure of public funds to oppose a proposed constitutional amendment violates "a basic precept of this nation's democratic process," and averred, "Indeed, it would seem so contrary to the root philosophy of a republican form of government as might cause this Court to resort to the guaranty clause in Article IV, Section 4 of the United States Constitution."[52] Mention is also made of ensuring the legitimacy of government by protecting the fairness of elections and the appearance that election results are fairly achieved.[53]

The reference to "basic precepts" is fairly common. It expresses the idea that the concepts of popular sovereignty and limited government are the fundamental bedrock that the Constitution is built upon. Thus, since our entire republican form of government derives from these basic premises, their stature exceeds that of mere constitutional rights. Government conduct in derogation of such basic precepts is an affront not merely to basic liberties but to the Constitution itself.

1. Common Lower Court Acknowledgement of a Fundamental Mandate of Government Neutrality in the Election Setting

Whatever the constitutional basis for their decisions, the lesson taught by majority view courts is that government must remain neutral when the sovereign People are in the process of governing. With respect to a public agency's newsletter, the New York State Court of Appeals held that "the paper undisputably convey[ed] . . . partisanship, partiality . . . [and] disapproval by a State agency of [an] issue."[54] In so holding, the court

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52. *Id.* at 361.

53. Anderson v. City of Boston, 380 N.E.2d 628, 638 (Mass. 1978). The court in *Stanson* emphasized the "importance of government impartiality in electoral matters." Stanson v. Mott, 551 P.2d 1, 10 (Cal. 1976). The Court relied upon its decision in *Gould v. Grubb*, where the Court held invalid a city's policy that afforded an incumbent top position on the ballot, stating:

> A fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates. To that end, our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice; the state must eschew arbitrary preferment of one candidate over another by reason of incumbency or because of alphabetical priority of the first letter of his surname. In our governmental system, the voters' selection must remain untainted by extraneous artificial advantages imposed by weighted procedures of the election process.

Gould v. Grubb, 536 P.2d 1337, 1348 (Cal. 1975).

54. Schulz v. New York, 654 N.E.2d 1226, 1231 (N.Y. 1995) (alterations in original) (quoting Phillips v. Maurer, 490 N.E.2d 542, 543 (N.Y. 1986)) (internal quotation marks omitted).

applied the state's constitutional standard for permissible governmental election activities: "[t]o educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of an issue, worthy as it may be."[55] A New Mexico court considering a city's distribution of materials that were factual and accurate, but one-sided, recognized: "Although it may be a fine line between education, on the one hand, and advocating a partisan position, on the other, courts have enjoined officials from crossing it."[56] The court in *Smith v. Dorsey*,[57] another case addressing a school board's expenditure for the purported "education" of voters, stated: "In a nutshell, the school board can inform, but not persuade."[58]

These courts identify from a policy standpoint the danger involved in government electioneering. A federal court considering the same situation addressed in *Dorsey* enjoined a school district's use of supplies, equipment, and facilities to campaign against a Colorado constitutional amendment to limit governmental power to spend public funds. The court stated:

> It is the duty of this Court to protect the political freedom of the people of Colorado. . . . A use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgment of those fundamental freedoms. Specifically, . . . opposition to the proposal which is financed by publicly collected funds has the effect of shifting the ultimate source of power away from the people.[59]

Similarly, the *Burt* court noted, "In a democracy, . . . the legitimacy of the chosen policy rests on the consent, if not consensus, of the governed; excessive or questionable efforts by government to manufacture the consent of the governed calls the legitimacy of its action into question."[60]

Scholars considering the issue have also warned of the hazard presented by partisan government conduct: "[P]ermitting the government to depart from a neutral position would threaten both the reliability of the election result as an expression of the popular will and the appearance of integrity crucial to maintaining public confidence in the electoral process."[61]

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55. *Id.* (alteration in original) (quoting Stern v. Kramarsky, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975)) (internal quotation marks omitted).

56. Carter v. City of Las Cruces, 915 P.2d 336, 339 (N.M. Ct. App. 1996).

57. 599 So. 2d 529 (Miss. 1992).

58. *Id.* at 541.

59. Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 360–61 (D. Colo. 1978).

60. Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985).

61. Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93

Likewise,

> The government's use of public resources to manufacture citizen support for a partisan viewpoint on political issues raises serious questions concerning the integrity of the democratic process. It is a truism that, if a governing structure based upon widespread genuine citizen opinions is to survive as a viable democracy, it must place legal restraints on the government's ability to manipulate the formulation and expression of that opinion.[62]

And,

> The structure of American constitutional government and underlying historical assumptions about the relationship between the governed and the governors justify an interpretation of the [F]irst [A]mendment that encompasses limits on government expression. This view is consistent with older notions that the Constitution embodies norms against government secrecy, and that the [F]irst [A]mendment restrains, rather than enhances, government powers.[63]

Also,

> Governmental intrusion into the system of political expression impinges

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HARV. L. REV. 535, 554, 554 n.112 (1980) (observing that "[t]he [United States Supreme] Court has explicitly recognized that the validity of elections as bona fide expressions of the popular will depends as much upon citizens' faith that the electoral process is free from government tampering as on the actual fairness of that process").

62. Edward H. Ziegler Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 580 (1980). The problem with government agents acting impartially in expressing views on issues facing the electorate is manifold:

> More threatening to the integrity of the democratic process than official partisanship by elected officials is the use of public resources by non-political officials and agencies to create voter support for a particular viewpoint. Since public agencies speak with official authority and operate with substantial resources, any partisan view espoused by an agency may gain undeserved public acceptance. Worse, official partisanship by public agencies insulates public policy from democratic choice. Toleration of this type of official partisanship preserves the governing structure's democratic form without its democratic function. Since a fundamental goal of a democracy is to promote free and genuine citizen opinion, the notion that the non-political aspects of government can take sides in election contests or bestow an advantage on one of several competing factions must be emphatically rejected.

Id. at 584.

63. Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 898 (1979). Professor Yudof also stated that, with respect to the hazard of overstating the significance of government's informational function,

> [I]mplications of a public right to know do not justify a constitutional right for governments to engage in extensive communications activities. The right to know formulation simply obfuscates the analysis of how and why governments should have rights against the community under a [F]irst [A]mendment adopted to limit government power.

Id. at 869.

> upon first amendment purposes and principles in two respects. First, speech by government inhibits the process of the political mechanism itself. . . .
>
> . . . .
>
> A second difficulty arising from government speech is that it elevates the position and the prestige of government to a potentially dangerous level.[64]

The concern with maintaining government neutrality that may be distilled from the foregoing compendium of cases and commentators is the avoidance of a danger associated with partisan government election activity—that of diverting electoral control away from the People into the hands of those elected officials momentarily entrusted with power.[65] Thus, while the majority view cases have been far from uniform or analytically coherent in articulating a constitutional basis for the rule that government may not use public resources to meddle with the decisional process of the electorate, they are consistent in concluding that there is something anathema with governmental tampering affecting the ability of the People to govern themselves.

2. Navigating and Discovering Coherence and Consistency in the Court's Forum Analysis, Government Speech Doctrine, and Compelled Speech Cases

Locating a solid constitutional basis for government election neutrality is not possible without navigating the stormy waters surrounding the rocky shoals of several significant Supreme Court doctrines. From successfully doing so, we extract certain key guiding principles. We need to commence with the Court's forum analysis.

It may appear *Miami Herald Publishing Co. v. Tornillo*[66] is dispositive of the government agency's right to publish whatever it wants to say about a

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64. Jay S. Bloom, Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815, 833–34 (1978); s*ee also* Leigh Contreras, *Contemplating the Dilemma of Government as Speaker: Judicially Identified Limits on Government Speech in the Context of* Carter v. City of Las Cruces, 27 N.M. L. REV. 517, 540–41 (1997); Alyssa Graham, Note, *The Government Speech Doctrine and Its Effect on the Democratic Process*, 44 SUFFOLK UNIV. L. REV. 703, 719–25 (2011) (expressing current concern over the distortive effect of government speech upon the electoral process).

65. This danger was described by the court in *Stanson*:

> [S]uch expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976) (citations omitted).

66. 418 U.S. 241 (1974).

ballot candidate or measure without affording equal time to countervailing views. That case, dealing with a "right of reply" requirement that a newspaper publisher provide equal space to a candidate where criticism of the candidate is published, vindicated the publisher's right to refuse to print the opposing point of view.[67] Upon further consideration, two significant differences are apparent. The newspaper was published by a private speaker[68] and the basis for the holding was the First Amendment. By contrast, a government publication critical of a candidate or financial support of a ballot initiative is not protected by any constitutional right.[69]

What the Court would later label a "private forum" is the constitutionally protected domain of the individual who owns it. In the context of publicly controlled forums, different considerations have been held applicable to content regulation[70] in publicly controlled nonpublic forums,[71] public forums,[72] and quasi-public forums.[73]

The evolution of the Court's varied forum analysis is informative with respect to the significance of government neutrality in two important aspects: Government regulation and government speech. In terms of government regulation, the Court has steadfastly adhered to the idea that government may not favor one viewpoint over another. And, in terms of overlapping considerations relating to government speech, the Court has emphatically recognized that there are certain things about which a public agency simply cannot speak without offending constitutional principles. However, it has not been very clear about what those things are.

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67. *Id.* at 258.

68. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 20–21 (1986) (holding that a public utility's monthly billing mailer amounted to a private forum such that it was not required to include the views expressed by others).

69. *See supra* notes 27–32 and accompanying text; *infra* note 267 and accompanying text.

70. Even in the public forum, regulation of non-content aspects of speech is allowed. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (holding that reasonable "time, place and manner" restrictions pose no First Amendment problem).

71. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (discussing content regulation at a military base). A government informational publication generally falls under this rubric. A private interest group, for example, would have no right to demand equal time to extol the virtues of organic farming in a USDA publication for farmers describing department experts' views on safe pesticides and methods of application. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998).

72. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

73. *See, e.g.*, Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742 (Cal. 2007).

a. Forum Analysis and Government Neutrality

In *Marsh v. Alabama*,[74] the Court held that a company town that exhibited all the features of a city and had assumed civic responsibilities—including law enforcement—normally assumed by a public municipality was concomitantly bound by the constitutional obligations of local government—including the prohibition on the suppression of the exercise of freedom of speech. Subsequently, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[75] the Court declared a shopping center to be the "functional equivalent" of a "business block"—open to the public and similarly subject to constitutional duties.[76] It upheld the right of labor picketers to picket a business in the private shopping center.[77]

The Court seemed to backpedal in *Lloyd Corp. v. Tanner*,[78] holding that antiwar protesters were not entitled to First Amendment protection when handing out leaflets in a privately owned shopping center.[79] The Court limited *Logan Valley* to speech related to the shopping center's operations.[80] Shortly thereafter, a novel and significant development occurred in *Police Department of Chicago v. Mosley*.[81] In *Mosley*, a Chicago ordinance prohibited demonstrations near schools, but excepted "peaceful picketing of any school involved in a labor dispute."[82] Absent a rational basis for distinguishing between labor and other demonstrations, the protestors were denied the equal protection of the law.[83] Justice Marshall, writing for the Court in rejecting the school's prohibition on any picketing other than labor-related picketing, advanced a broad vision of the political role of government as neutral in regulating speech, the marketplace of ideas, and the electoral process, stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[84]

Hudgens v. NLRB[85] followed *Mosley*. *Hudgens* overruled *Logan Valley*, rejecting a First Amendment right of access, including access for picketing

74. 326 U.S. 501 (1946).
75. 391 U.S. 308 (1968).
76. *Id.* at 325.
77. *Id.* at 309.
78. 407 U.S. 551 (1972).
79. *Id.* at 570.
80. *Id.* at 564–66.
81. 408 U.S. 92 (1972).
82. *Id.* at 93.
83. *Id.* at 100.
84. *Id.* at 95–96.
85. 424 U.S. 507 (1976).

related to the shopping center operations.[86] Under *Mosley*, no rational difference in treatment could be asserted under the First Amendment based upon the content of the speech.[87] So, if the protesters in *Lloyd* "did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike . . . ."[88]

b. Emergence of the Government Speech Doctrine

The content-neutrality doctrine would be undermined by the development of the government-speech doctrine. Embracing the idea that government is free to express its own viewpoint, courts shrank from the perspective that where government opens a venue to one view, it must make it equally available to all perspectives.[89]

The critical distinction that emerges here—and which is often missed in judicial consideration of the election context—is whether government is regulating private speech or is speaking on its own behalf.[90] The requirement of viewpoint neutrality has been abandoned in situations involving government carrying out public policies—pursuing goals that have already been democratically resolved.[91] A public agency is free to use private speakers to convey its message, and it may disfavor certain

86. *Id.* at 520–21.

87. *Mosley*, 408 U.S. at 95–96.

88. *Hudgens*, 424 U.S. at 520–21.

89. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum, however, the State . . . may [not] discriminate against speech on the basis of its viewpoint." (citations omitted)).

90. The idea is that government speech does not restrict private speech, while regulations do: "[O]ur cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator." Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007). The reality—that government speech is, in effect, no different in terms of suppressing private speech than content-based regulations—is increasingly being recognized. *See* Developments in the Law, *State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1293 (2010); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 698 (2011) ("Government speech not only distorts the marketplace of ideas, in many cases it directly *regulates* individual private speakers—either forbidding them to express viewpoints they support or compelling them to express viewpoints they do not support.").

91. *Compare* Bonner-Lyons v. Sch. Comm. of Boston, 480 F.2d 442 (1st Cir. 1973), *and* Stanson v. Mott, 551 P.2d 1, 10 (Cal. 1976), *with* Vargas v. City of Salinas, 205 P.3d 207, 230 n.18 (Cal. 2009) (illuminating a dramatic change in treatment of the nonpublic forum analysis by courts from an emphasis upon the viewpoints aired to a focus upon the speaker (government) controlling its own forum).

viewpoints in doing so. Thus a government agency campaign to promote the consumption of red meat may exclude the views of vegetarians regarding the moral, environmental, and personal health problems associated with increased red meat in the American diet. In such situations, courts regard a government-created soapbox no differently than any privately created forum.[92]

The *Mosley* neutrality doctrine preceded this development and found fertile soil in the Court's treatment of nonpublic and public forums. A distinction was drawn between traditional public forums such as parks, street corners, public marketplaces[93]—where content-based limitations upon speech must serve a compelling state interest and be narrowly drawn[94]—and other places where government could impose greater restrictions. Limited forums are places the public entity has opened for certain expressive activity.[95] While the public entity may limit the topics and impose time restrictions and other guidelines, it must remain neutral as to viewpoint.[96] Additionally, facially neutral limitations may not be imposed where they are actually motivated by the "ideology, opinion, or perspective" of the speaker.[97]

With respect to nonpublic forums, restrictions on content need only be reasonable and not be an effort to restrict a particular view.[98] The reasonableness of a restriction upon access to a nonpublic forum is evaluated "in the light of the purpose of the forum and all the surrounding circumstances."[99] The Court has found reasonable the exclusion of a union

92. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding a restriction upon doctors receiving funding under the Public Health Service Act from counseling their patients regarding abortion). *But see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (holding that attorneys are not government speakers but instead speak on behalf of the private client, hence the range of their advocacy may not be restricted in legal services cases).

93. Frisby v. Schultz, 487 U.S. 474, 480 (1988); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

94. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

95. *Perry*, 460 U.S. at 45–46. An example would be a governing board meeting.

96. *Id.* at 46 n.7. Examples of impermissible viewpoint discrimination have arisen in the context of government efforts to avoid an Establishment Clause violation by precluding religious organizations from access to facilities. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (striking down a state university rule limiting funding for student publications to only secular publications); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 396–97 (1993) (striking down a restriction on after-hours use of school space to secular groups).

97. *Rosenberger*, 515 U.S. at 820.

98. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812 (1985).

99. *Id.* at 809.

from internal school staff mailboxes,[100] the limitation upon publicly owned billboards to nonpartisan advertisements,[101] and a ban upon fund-raising in federal offices by legal defense and political organizations.[102] In each case, the reason for the restriction was regarded to be within the government agency's discretion.[103]

So how does this help in evaluating whether government may use public funds to support a partisan position on an election issue? The Court's analysis has developed to the point that it is actually quite informative relative to this question. A number of aspects of the Supreme Court's forum analysis compel the conclusion that a public agency is not able to support one faction in an election contest in the same way the private newspaper publisher did in *Tornillo*. Even use of a government agency's newsletter—a nonpublic forum—to support one candidate or one ballot measure over another does not escape the neutrality requirement.

c. Application of the Neutrality Doctrine to Government Speech that Conflicts with Rights: The Establishment Clause Cases

It is helpful to start with the case of *City Council of Los Angeles v. Taxpayers for Vincent*,[104] where a political candidate sued because a city ordinance prevented him from putting up his campaign signs on public property—specifically utility pole crosswires.[105] The ordinance applied to all signs regardless of viewpoint and was premised upon aesthetic and safety concerns.[106] The Court recognized the property in question was a nonpublic forum and, since the regulation was neutral as to content, it looked to the framework set forth in *United States v. O'Brien*[107] to determine

100. *Perry*, 460 U.S. at 46.

101. Lehman v. City of Shaker Heights, 418 U.S. 298, 301–04 (1974).

102. *Cornelius*, 473 U.S. at 813.

103. In *Perry*, the school sought to avoid controversy. *Perry*, 460 U.S. at 52. In *Lehman*, the government agency sought to avoid confusion of government with partisan causes. *Lehman*, 418 U.S. at 300–01. In *Cornelius*, the federal government sought to avoid the appearance of federal support for partisan causes. *Cornelius*, 473 U.S. at 813.

104. 466 U.S. 789 (1984).

105. *Id.* at 792–93.

106. *See id.* at 804.

107. 391 U.S. 367 (1968). In upholding conviction of a defendant for burning his draft card, the Court stated the test for government regulation of its nonpublic property:

> [The] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

whether there was a rational basis for the restriction on speech. The Court had little difficulty in finding that a public agency's interest in dealing with visual blight was sufficient.[108] It contrasted situations where regulations were motivated by a desire to "suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas."[109]

But let's tweak the facts a tad. What about a situation where government uses its nonpublic forum to convey a viewpoint about the election—a newsletter or website, a mailer, the publicly owned signs in *Lehman v. City of Shaker Heights*,[110] or the utility poles in *Vincent*?[111] Overlapping considerations of the government speech doctrine come into play at this point. The fact that government does the talking is not material. Government may let a private speaker do its talking for it—favoring one private group with use of public property to express its views while excluding the opposing group.[112] Implicit in the analysis of *Lehman* and *Vincent*, however, is the recognition that there is something intuitively wrong with government departing from a neutral role in the election context by allowing one candidate to purchase space on its billboards, but not another, or even donating space to one faction. In such situations, the government's illegitimate interest in expressing its viewpoint, whether directly or indirectly by surrogate, invalidates its partisan conduct.[113]

The Court's jurisprudence involving Establishment Clause considerations is apt and particularly illuminating here. The Court's treatment of government support of religion is analogous to the situation of government support of one faction in an election contest for a number of reasons. Not only do both situations implicate a fundamental ban upon conduct by government, but both situations concern discriminatory government action. And they both implicate value judgments by public servants regarding what is "true" in life.[114] In addition, the methodology adopted by the Court for ascertaining when government has endorsed a

108. *Vincent*, 466 U.S. at 807.

109. *Id.* at 804 ("The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

110. 418 U.S. 298, 301–03 (1974).

111. *Vincent*, 466 U.S. at 792–93.

112. *Cf.* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547–50 (1983) (reasoning that government can choose to restrict the speech of charitable organizations by selectively placing conditions on its grant of public funds to those organizations).

113. *Id.*

114. In *Cantwell v. Connecticut*, the Court declared: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor." 310 U.S. 296, 310 (1940).

religion is entirely suitable for making the same assessment for when government has supported a candidate or ballot proposition. The decisions elucidating this methodology illustrate the salient distinction the Court has drawn between government support of a viewpoint in the forum analysis versus its government speech analysis. They also delineate the threshold for government speech that exceeds constitutional limitations.

Rosenberger v. Rector & Visitors of the University of Virginia[115] is the counterpoint to *Vincent*. Rather than restricting a nonpublic forum from all viewpoints, a college allocated funding to student publications with the exception of those containing a religious message. Ostensibly this was done to avoid an Establishment Clause violation. But as the Court has made clear, a viewpoint is a viewpoint for free speech purposes, and government may not discriminate because religious overtones may emanate from one.[116] The Court found the public agency's argument that the agency should be able to control messages it subsidizes (a government speech analysis) inappropriate.[117] The context was regarded instead as involving a forum for private speech opened by the school.[118] Under the forum analysis, government was required to remain neutral toward all viewpoints.[119] Where such neutrality is maintained, there is no Establishment Clause or other First Amendment problem.[120] But where the nonpublic forum is utilized by the government agency for viewpoint-based discrimination, the First Amendment is offended.[121]

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115. 515 U.S. 819 (1995).

116. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (striking down an exclusion of the Ku Klux Klan's cross from a public forum that allowed private displays of both secular and religious natures); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397 (1993) (striking down a school district's policy of opening facilities for after-school use by community organizations but not religious groups); Bd. of Educ. of Westside Comm. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 253 (1990) (overturning a school district's denial of a student group's application for permission to form a Christian club); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (rejecting a college's policy of excluding religious activities from facilities made available for other activities).

117. *Rosenberger*, 515 U.S. at 841–42.

118. *Id.* at 842–43.

119. *Id.* at 834 ("It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.").

120. *Id.* at 838–46.

121. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811 (1985).

Rosenberger ought not to be taken for the proposition that government may never exclude religious speakers from a limited forum, although how this would work is problematic.[122] The Court has emphasized that a government agency may limit the subject matter of the forum.[123] Just as a school can exclude union literature from internal mailboxes to prevent controversy,[124] a city may exclude political advertisements in its buses to avoid the appearance of government partisanship[125] and the federal government may exclude solicitations to employees by legal and political causes.[126] A public agency may likewise exclude religious subjects[127] from a forum for neutral and reasonable reasons to, *inter alia*, avoid an Establishment Clause problem.[128] But eschewing the appearance of partisanship to avoid a constitutional problem such as the one intimated in *Lehman* is 180 degrees from the situation involving government partisan support.[129] The Court's handling of the question of government support of

122. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 725 (2004) (holding that the exclusion of a state-funded scholarship for use to pursue a degree in devotional theology did not violate the Free Exercise Clause based upon the state's substantial interest in avoiding an establishment of religion).

123. *Rosenberger*, 515 U.S. at 829; *see also* Cogswell v. City of Seattle, 347 F.3d 809, 815 (9th Cir. 2003) (stating, "In order to preserve the limits of a limited public forum, however, the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum" and upholding limitation upon ballot statements to candidate self-discussion).

124. *Perry*, 460 U.S. at 47.

125. *See infra* note 129.

126. *Cornelius*, 473 U.S. at 813.

127. The Court's effort to distinguish between subject and content breaks down in practice. Consider a public forum limited to discussion of ballot measures or a school board meeting limiting discussion to agenda items. There really seems to be no considered basis for preventing a speaker from injecting religious views—even sermonizing—into the discourse. Where religious views color the speaker's perspective on a subject, any limitation on those views becomes content discrimination. Drawing the line necessarily entails one normative position evaluating another. The distinction between content and subject matter blurs when we are contemplating speech proceeding from any ideological perspective.

128. Pleasant Grove City v. Summum, 555 U.S. 460, 485–87 (2009) (Souter, J., concurring); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761–62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 275–76 (1990) (Stevens, J., dissenting).

129. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upholding a ban on political advertisements on paid spaces offered on government owned public transportation, observing the desirability of avoiding "lurking doubts about favoritism, and sticky administrative problems . . . in parceling out limited space to eager politicians"); *see also* Ysursa v. Pocatello Ed. Ass'n, 555 U.S. 353, 358–59 (2009) (upholding Idaho's ban on payroll deductions for political purposes, adopted to avoid the appearance of partisanship,

religious activity is where we need to focus.

The Court's treatment of government support of sectarian religious views in both the government speech and the forum contexts is illustrated by a number of cases. The determinative consideration in assessing government speech is whether it amounts to approval of religion. *County of Allegheny v. ACLU*[130] involved a county's preferential display of a crèche on its courthouse's "Grand Staircase."[131] The favoring of sectarian religious expression was held to be an Establishment Clause violation.[132] By contrast, the crèche in *Lynch v. Donnelly*,[133] which was part of the town's traditional holiday display and did not involve a governmental endorsement of religion,[134] entailed no Establishment Clause violation.[135]

In the forum context, meanwhile, government neutrality is the key consideration. The display of a cross in a public park with a neutral policy allowing private use to express views was held not to constitute an Establishment Clause violation in *Capitol Square Review and Advisory Board v. Pinette*.[136] Unlike the *exclusive* access to the staircase in *City of Allegheny v. ACLU*, a neutral access policy posed no constitutional problem.[137]

3. The Compelled Speech Doctrine as the Constitutional Basis for a Mandate of Government Neutrality

In order to reconcile the majority view that government's proper role in

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observing, "Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor").

130. 492 U.S. 573 (1989).

131. *Id.* at 578.

132. *Id.* at 578–79.

133. 465 U.S. 668, 671 (1984).

134. *Id.* at 685–87.

135. *Id.* at 671–72.

136. 515 U.S. 753, 770 (1995). The issue of viewpoint discrimination in the government denial of the application was not before the Court.

137. *Id.* The panacea of neutrality has not been accepted by all members of the Court dealing with the forum analysis. In *Board of Education of Westside Community Schools (Dist. 66) v. Mergens*, concern over allowing high school students to form a religious club having the same access to meeting facilities as other "noncurricular" groups organized by students without posing an Establishment Clause problem prompted two Justices to concur in the judgment in order "to emphasize the steps [the school] must take to avoid appearing to endorse the [religious] club's goals." 496 U.S. 226, 263 (1990) (Marshall, J., concurring). The concern was with a facially neutral policy that in effect worked to favor a religion: "If public schools are perceived as conferring the *imprimatur* of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause." *Id.* at 264.

the constitutional scheme precludes it from manipulating public opinion bearing on the exercise of the franchise with the government speech doctrine's support of the validity of government's ability to promote policies to the citizenry, we need to consider one more aspect of the Supreme Court's free speech jurisprudence—the prohibition against compelled speech.

This Article does not presume to wrestle with reconciling the role of government as a speaker in non-election contexts with the individual's right to freedom of conscience.[138] However, one accepted distinction drawn in the compelled speech cases is pertinent and illuminating. Government efforts to sway public opinion and to use tax dollars to support causes abhorrent to some has been well accepted: "With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process."[139]

But such promotion of government policies as a general rule is distinguishable from the compelled speech involved in collection of a mandatory fee to finance private, political, or ideological causes.[140] Something more than the mere fact that government is seeking to influence the populace needs to be at stake for such efforts to intervene in the election battle to be considered unconstitutional.[141] Let us consider what that might be.

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138. *See generally* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L., POL'Y & ETHICS J. 367 (2010); Recent Case, *Uncovering Coherence in Compelled Subsidy of Speech Doctrine:* Johanns v. Livestock Marketing Ass'n, *125 S. Ct. 2055 (2005)*, 29 HARV. J.L. & PUB. POL'Y 1107 (2006).

139. Keller v. State Bar of Cal., 496 U.S. 1, 12 (1990).

140. This was recognized in *Abood v. Detroit Board of Education*, 431 U.S. 209, 259 n.13 (1977) and *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 550–51 (2005); *see also* Smith v. Regents of Univ. of Cal., 844 P.2d 500, 506 (Cal. 1993) (explaining the difference between government policies and compelled speech).

141. Professor Shiffrin explains:

> Indeed, compelled contributions to ideological causes with which some taxpayers violently disagree are the norm, not the exception. Even when opposition to such causes is sincerely founded on religious grounds, it is without free speech force. The Christian Scientists, for example, have serious and sincere objections to the use of their tax funds to support government hospitals and government funding of medical care; the Quakers oppose military funding; Catholics oppose public funding of abortions; fundamentalists oppose the teaching of evolution. No case law supports their "right" to enjoin such programs or a right to refund to a pro rata portion of their tax dollars. The fact that contributions are compelled cannot be considered sufficient to justify restrictions on government activities or government speech. Thus something beyond the fact of financial compulsion would be necessary . . . .

Shiffrin, *supra* note 6, at 593.

The majority view, in keeping with its distrust of government motif, recognizes that one such point for limiting government speech is when the People seek to govern—during elections.[142] But what rationale can be identified for treating government efforts to affect public policy during elections differently than at most other times?

Sound constitutional principles can be identified requiring that at some level government speech be limited.[143] The Court in *West Virginia State Board of Education v. Barnette*[144] observed the constitutional bounds of government efforts to create consensus: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."[145] This high valuation of individual autonomy and healthy suspicion of government being placed on a political par with the sovereign electorate is the source of the constitutional limitation placed by the majority view upon partisan government involvement in the election process. Therein lies the link with the compelled speech analysis, as will be seen.

Citizens to Protect Public Funds v. Board of Education,[146] a case heavily relied upon by the Court in *Stanson*, premised its reasoning that government speech in the election context was fundamentally unlawful upon a compelled speech[147] analysis.[148] But some dots still need to be connected to

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142. *See* Keller v. State Bar of Cal., 767 P.2d 1020, 1031 (Cal. 1989) (recognizing that a special rule applies to the election setting); *see also* Yudof, *supra* note 63, at 915 ("Government attempts to influence election results, a critical point in the demo[c]ratic process, are particularly suspect." (footnote omitted)).

143. "The structure of American constitutional government and underlying historical assumptions about the relationship between the governed and the governors justify an interpretation of the first amendment that encompasses limits on government expression." Yudof, *supra* note 63, at 898.

144. 319 U.S. 624 (1943).

145. *Id.* at 641.

146. 98 A.2d 673 (N.J. 1953).

147. The Court in *Abood v. Detroit Board of Education* considered the use of dues by mandatory membership organizations to advance political causes opposed by some members. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). In finding a violation of the members' First Amendment right of association, the Court looked to its holding in *Buckley v. Valeo* that the right to contribute to an organization for the purpose of spreading a political message is protected by the First Amendment. *Id.*; Buckley v. Valeo, 424 U.S. 1 (1976). The Court stated:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First

comprehend why a compelled speech approach is a sound basis for treating election speech differently from the government speech ordinarily acknowledged by the Court as appropriate for promoting government policies.

The salient difference expressed in the majority view cases relating to government attempts to foist policy views upon the citizenry during elections is tied to fundamentals of constitutional governance. Government efforts to influence the citizenry regarding political or ideological causes during elections *are not* the support of adopted government policies or programs. In elections, government efforts to persuade occur in an as-of-yet unresolved battle fought between private factions over matters upon which the electorate is seeking to govern.[149] Consequently, such efforts amount to compelled support of private speech—subsidization of non-governmental political causes with which many voters may disagree. The fact that the public agency may believe its efforts to influence the People are warranted by the common good makes no difference. The question of what is in the best interest of the commonweal is still a subject of public debate among private factions. And, because the issue is before the popular electorate for decision, it is beyond the purview of public officials to intervene in an act of the sovereign.

Amendment's protections:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Abood, 431 U.S. at 234–35 (citations omitted) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

The analogy between *Abood*, the later case of *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (discussing the use of union members' dues to finance candidates' campaigns), and the use of citizens' tax dollars to fund campaign activity is unavoidable. The proper use of public funds to promote *government* policies is distinguishable from the compelled speech involved in the collection of a mandatory fee to finance *private* political or ideological causes. *Abood*, 431 U.S. at 259 n.13; Smith v. Regents of Univ. of Cal., 844 P.2d 500, 506 (Cal. 1993). Government support of one faction during an election campaign falls under the latter category.

148. "'The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint.'" Stanson v. Mott, 551 P.2d 1, 8 (Cal. 1976) (quoting Citizens to Protect Pub. Funds v. Bd. of Educ. of Parsippany, 98 A.2d 673, 677 (N.J. 1953)).

149. This presumes a differentiation between the making of laws (by the sovereign People or elected representatives) and government's role in implementing them once they are made.

4. Constitutional Considerations Relating to the Role of Government in Elections

The preservation of the dividing line between government's promotion of policies and its influencing of the sovereign electorate is imbued with paramount constitutional importance. This legal–political dichotomy, which is a necessary corollary of the rule of law, contemplates that arbitrary, political considerations should not intrude into legal processes; judges should not inject personal feelings into applying the law. Conversely, it contemplates that government officials should not extend special legal dispensations to family and friends. Maintaining this dichotomy requires that courts in the constitutional system of governance be charged with keeping the political process neutral and that government agents be constrained from affecting the normative evaluation underway. It is this latter aspect of the rule of law that is of concern when it comes to assessing government speech in the pre-election setting.

Partisan government speech is not censorship per se as it does not prevent citizens from speaking.[150] But it has the same purpose and effect as the regulation of speech designed to achieve an ideal of fairness that was addressed in *Citizens United*. On the face of it, the delegation of the role of arbiter of public discourse to a government bureaucrat may not seem particularly ominous. Certainly the minority view accepts the role of government in shepherding public opinion to appreciate the common good as proper. After all, public administrators' *raison d'être* is their expertise in carrying out the details fulfilling broad goals of public policy as determined by the sovereign voters. Should we not trust their training, experience, and ability for making such sensitive evaluations?

The answer lies in comprehending the civil servant's role in the grand scheme of constitutional self-governance. The subject being delegated for the administrator's discretion here is *not* merely the details. It is instead related to the broad, substantive policy determinations that are the province of the electorate, not the bureaucrats. Questions of what is important to consider in this primary context are not matters of mere implementation.

Theoretically, the problem with government agents seeking to influence the outcome of an election in the same manner as private actors boils down to essential precepts of liberal thought inherent in the constitutional design of the Founders and resonating in the analysis of the *Citizens United* majority. To reiterate, this philosophical outlook essentially conceives of the individual as autonomous and free and capable of self-governance by

150. As one commentator observed, it does not really raise a First Amendment issue. Fredrick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 384–85 (1983).

virtue of the capacity of reason. Government is a creature existing solely by virtue of an agreement (social contract) entered by individuals and is afforded only limited power to intrude upon the natural freedoms of individuals. Administrative implementation of broad policy determinations made by the electorate is essential. It is equally essential that government functionaries not derogate or impose upon the sovereign's free exercise of reason in the process of arriving at those broad determinations.

5. International Recognition of the Imperative of Government Election Neutrality

United States courts are not alone among nations adhering to the rule of law in recognizing the imperative of segregating government agents from the electorate's decisionmaking process. Elsewhere it is regarded as a prerequisite to the exercise of popular sovereignty that government's role in that process be circumscribed and remain neutral. Adherence to a standard of government neutrality is found in England, the European Union nations, and elsewhere.[151] Reflecting sensitivity to the timing of such government activity, government agencies in the United Kingdom may not publish partisan material within four weeks of an election.[152] The Supreme Court of Ireland recognized that "use by the Government of public funds to fund a campaign designed to influence the voters . . . is an interference with the democratic process."[153] Since 1908, Canada's civil service has maintained a non-partisan character.[154] Nigeria similarly restricts the civil servant from taking a political position.[155] Recognition of the importance of government election neutrality is found in the election observation handbook published by the Organization for Security and Cooperation in

151. The author acknowledges the research done by counsel for the Pacific Legal Foundation in *Vargas v. City of Salinas*. Brief for Pacific Legal Foundation as Amicus Curiae Supporting Appellants, Vargas v. City of Salinas, 205 P.3d 207 (Cal. 2009) (No. S140911). For an analysis of differences in the way European nations of varied political traditions treat civil servant neutrality, see Jolanta Palidauskaite, *Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective* (2005) (paper presented at the European Group for Public Administration Annual Conference, Oeiras), *available at* http://www.oecd.org/mena/governance/35521438.pdf. With the gradual economic, social, and even political unification of Europe in recent decades, a call has been made for a common standard of impartiality to avoid the politicization of government employees. *See* Eur. Parl. Ass., *Civil Service Reform in Europe*, Doc. No. 9711 (2003), *available at* http://assembly.coe.int/Documents/Workingdocs/doc03/EDOC9711.htm.

152. Political Parties, Elections and Referendums Act, 2000, c. 41, § 125 (Eng.).

153. McKenna v. An Taoiseach, [1995] 2 I.R. 10, 42 (Ir.).

154. Osborne v. Pub. Serv. Comm'n, [1991] 2 S.C.R. 69 (Can.); *see also* MEGAN FURI, PUBLIC SERVICE IMPARTIALITY: TAKING STOCK 9, 9–19 (2008) (tracing the history of Canadian legal treatment of public official partisanship).

155. *See* Indep. Nat'l Electoral Comm'n v. Musa, [2003] 3 NWLR 72 (Nigeria).

Europe (OSCE). The OSCE deems equal conditions for election participants to be a key to fair elections, stating:

> [T]he state media should meet its special responsibility for providing sufficient, balanced information to enable the electorate to make a well-informed choice. Regulations on campaign financing should not favour or discriminate against any party or candidate. There should be a clear separation between the state and political parties, and *public resources should not be used unfairly for the benefit of one candidate or group of candidates*. The election administration at all levels should act in a professional and neutral manner . . . .[156]

Similarly, the European Union handbook for election observation specifies as considerations in assessing whether an election is fair whether voter education is handled in an impartial manner, whether campaign regulations are implemented and enforced "in a consistent and impartial manner," and whether public funds and other resources are "being used to the advantage of one or more political contestants."[157]

The theme that resounds throughout these laws, standards, cases, and comments is that government neutrality in elections is essential. The alternative threatens the reliability of election results as the true expression of the sovereign peoples' will and undermines the integrity of the electoral process. The concerns are very real and are raised by any governmental conduct seeking to influence the outcome of the electoral process.

6. The Practical Infeasibility of Neutral Government Involvement in Election Contests

Part III of this Article discusses the Supreme Court's rejection of regulatory efforts to level the pre-election playing field. The problems inherent in such regulatory intervention in the electoral process are informative with regard to partisan government efforts to affect election results. The problems encountered with government involvement in the pre-election repartee are not purely theoretical or exclusively those of constitutional legal principles. Government partisanship—whether by affirmative speech or by negative suppression of speech—is not necessarily manifested as outright government corruption in seeking to preserve

156. ORG. FOR SEC. AND COOPERATION IN EUR., ELECTION OBSERVATION HANDBOOK 18 (5th ed. 2007) (emphasis added).

157. EUR. COMM'N, HANDBOOK FOR EUR. UNION ELECTION OBSERVATION 51–53 (2d ed. 2008) ("The fairness of a campaign will be undermined where state resources are unreasonably used to favour the campaign of one candidate or political party. State resources—such as the use of public buildings for campaign events—should be available on an equitable basis to all contestants.").

favored factions in power.[158] Even with the Hatch Act,[159] its state equivalents, and the curtailment of patronage systems,[160] the influence of the political process upon the function of the civil servant remains unavoidable.[161]

An election is a process of weighing normative values. It represents society's assessment of what issues are to be given a political dialogue and what form that should take. The determination of what values are to be prioritized in that process is itself a normative weighing process.[162] In this regard, the government agent given the task of moderating the public debate is subject to all the same vicissitudes affecting members of the voting public and more. Apart from the fundamental problem of innate bias that clouds the judgment of anyone placed in such a position, the government agent is also subject to institutional forces rendering him or her unsuited for the task of determining what views merit greater or lesser attention. Some of these may be identified.

Members of government agencies are impacted by pluralistic considerations that press upon the agency and the powerful tendencies toward capture of the regulator by the regulated[163] and concern with self-preservation[164] that skew governmental outlook. The shared insider outlook, or groupthink,[165] prevailing in any bureaucratic setting is itself a substantial impairment of the administrator's judgment applied in such a

158. The problems associated with partisanship on the part of civil servants are tied to an inability to separate politics from administration. Kenneth Kernaghan, *Political Rights and Political Neutrality: Finding the Balance Point*, *in* FEAR AND FERMENT: PUBLIC SECTOR MANAGEMENT TODAY 131, 142 (John D. Langford ed., 1987).

159. 5 U.S.C. §§ 7321–26 (2006).

160. Elrod v. Burns, 427 U.S. 347, 373 (1976).

161. Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 803–21 (2000).

162. The Court recognized the multi-faceted, normative evaluations (that inevitably must go beyond merely calculating a candidate's net worth) involved in assessing where "fair" lies when it struck down the Millionaire's Amendment of the Bipartisan Campaign Reform Act. Pub. L. No. 107-155, 116 Stat. 81 (2002). That law supplemented the campaign war chest of an opponent of a candidate spending more than $350,000 in personal funds with more than the normally allowed amount in contributions. *See* Davis v. FEC, 554 U.S. 724, 742 (2008).

163. *See* Marver H. Bernstein, *Independent Regulatory Agencies: A Perspective on Their Reform*, *in* THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 14 (Richard D. Lambert et al. eds., 1972).

164. ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 24, 98, 104, 121 (Eden Paul & Cedar Paul trans., 1999) (1915).

165. IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 8 (1972); ANTHONY DOWNS, INSIDE BUREAUCRACY 102, 103–07 (1967).

sensitive context as evaluating the merit of others' opinions. That the channels of government may be manipulated and influenced by private wealth and other powerful private forces is no revelation to anyone.[166] Institutional prerogatives, especially where the agency in question is invested in an issue, make the regulatory agency's task in remaining impartial an unrealizable proposition as well.

Studies of voting behavior identify group voting participation as increased: (1) where interests are strongly affected by government policies; (2) where there is access to information about the relevance of political decisions to its interests; (3) by exposure to social pressures to vote; and (4) by the amount of opposing pressure brought to bear on voters.[167]

Analysis of the first two factors discloses the inevitability of government officials' personal bias infusing any handling of the procedures relating to the electorate's consideration of information concerning a candidate or an election measure. The personal stake of the proponent agency is evident in how it affects its members' voting behavior. Lipset addressed the first factor affecting voting behavior and pointed out the special situation of the government worker:

> Although it may be argued that everyone is affected by government policies, some groups are more affected than others, and these groups might be expected to show a higher turnout at the polls than the public at large. The purest case of involvement in government policies is naturally that of government employees whose whole economic position and working life is affected. Data from national and local elections in both the United States and many European countries show that government employees have the highest turnout of any occupational group.[168]

The member of the public agency immediately grasps the relationship between failure of a revenue increase and their job. It means change—whether through belt-tightening, finding more efficient means of accomplishing work, or cutting lower priority programs. It also means overcoming natural bureaucratic intransigence to accomplish change. This restructuring of the personal microcosm of the public servant is doubtless an unpleasant prospect. Thus, the proposition that the public administrator is equipped to divorce him or herself from personal concerns, fairly evaluate the broader impacts of a ballot measure or a candidate's success, and ascertain what information is germane, requires emphasis, or should be de-emphasized for the voters is more than dubious. Even if the

166. Addressing this evil was the entire point of the Federal Election Campaign Act (FECA). *See generally* 2 U.S.C. §§ 431–442 (2006).

167. SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 186–219 (1960).

168. *Id.* at 186.

regulator could remain neutral, the inevitable appearance of bias would taint public confidence in the fairness of the process.

Lipset's analysis of the studies of voting behavior yields the conclusion that groups that are better informed are more likely to vote.[169] In explaining the second factor, he compared government workers with other groups:

> Two groups may have an equal stake in government policies, but one group may have easier access to information about this stake than the other. The impact of government policies on government employees, for example, is not only objectively great, but transparently obvious . . . . On the other hand, the impact of a whole collection of government policies (tariffs, controls, anti-trust policies, taxation, subsidies, etc.) on a worker or white-collar employee may be very large, but it is hidden and indirect.[170]

In other words, while the government employee may be better positioned than others to access data relevant to the electorate's decision, the relationship between the impacts associated with how a candidate fares or the passage or failure of the ballot measure are usually far more attenuated for John Q. Citizen as contrasted with those felt by the government employee. This is true in the case of a bond measure spearheaded by the agency to accomplish a coveted project or a tax measure designed to bring revenue into the public agency's coffers to accomplish goals esteemed by the agency. For example, passage of the measure may be felt by the proponent civil servant directly in terms of greater job security, improved working conditions, increased benefits, higher wages, etc. Other citizens may indirectly and eventually observe some increase in services from which they may personally benefit.[171]

In a nutshell, a civil servant evaluating what information should be placed before the voters is akin to a mother judging her daughter's beauty pageant. The bureaucrat is more directly and personally impacted by the success or failure of a ballot measure or a candidate.[172] This personal stake

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169. *Id.* at 191.

170. *Id.*

171. Conversely, the failure of the measure or a candidate tied to a certain agenda is directly felt by the public employee who may have to work harder or experience less favorable conditions, reduced income or benefits, or even the loss of a job. Personal investment in envisioning, planning, and believing in a proposal or platform is also at stake. Other citizens may eventually observe a lighter tax burden and may or may not observe some difference in the public agency's performance. They probably share no personal investment in the outcome of the election.

172. This is why government agents are at risk of succumbing to their natural biases and self-interests. This is the area where government employees are going to find personal normative inclinations and political ambitions interfere with their ability to provide complete, fair, and impartial information to the citizenry. Because government agents are

colors the perspective of the regulatory agency rendering it unable to impartially evaluate broader social, economic, and other impacts associated with an election measure.[173] Far from experience making the government body a reliable source of balanced voter information,[174] its inevitable and inherent bias prevents it from dispensing impartial information and from treating the election process fairly.

As an ideal, the concept of leveling the playing field by compensating for advantages of power and economics has definite appeal. The inevitable flaw in its implementation is illustrated by *Smith v. Dorsey*,[175] a case where the Supreme Court of Mississippi addressed a school board's expenditure related to a bond referendum.[176] The campaign was justified as necessary to compensate for voters' lack of "correct" information.[177] The decision notes, "According to Dr. Smith, the campaign workers and other

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inevitably going to be inclined in the pre-election context to promote personal beliefs concerning the commonweal, to err, to omit, and to distort their evaluation of the effects of a particular election outcome, this is the one area where it is critical to severely restrict their involvement with that process. Limiting their role prevents public servants from using public funds to mold public opinion to their own on election issues. And it prevents the erosion of confidence in the electoral process and the undermining of the legitimacy of the process that is the natural product of the appearance of such impartiality.

173. The bureaucrat's decision on what the public good requires is necessarily a political one. Recognition of this fact caused one jurist to rebuke the position that government may promote the public good during elections: "I do not endorse a distinction between electioneering expenditures for the common needs of citizens versus expenditures for political purposes. To determine that something is in the common needs of citizens is itself a *political* decision." Kidwell v. City of Union, 462 F.3d 620, 632 (6th Cir. 2006) (Martin, J., dissenting).

174. A large amount of literature demonstrates the importance of reliable information for voters to make wise decisions on ballot propositions. *See generally* SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY (1998) (analyzing how citizens logically decide what voting measures they may support); ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998) (exploring how citizens make decisions based on combining insights from political science, economics, and the cognitive sciences); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463 (2004).

175. 599 So. 2d 529 (Miss. 1992). The school board spent funds for a "documentary" concerning the bond issue, to pay poll workers to go door-to-door, answer phones, put up posters, and pass out pamphlets for four months preceding the election, and for a fish fry for the poll workers. *Id.* at 539–40. Incredibly, with respect to the $9,427.50 documentary, the record was devoid of the actual film or any details concerning its contents except the superintendent's self-serving statement "that the documentary was non-partisan." *Id.* at 549. The court necessarily found it was permissible: "Finding nothing in the record to contradict this assertion, we accept it at face value." *Id.*

176. *Id.* at 539–40.

177. *Id.* at 540.

promotional efforts were in response to distortions in the community generated by Mississippi Power and Light concerning the impact of a bond referendum on the local tax base."[178]

The court did not accept the rationale that it was up to the public agency to equalize "distortions" it perceived in the flow of information in the marketplace of ideas.[179] It rejected the claim "that an unbiased, nonpartisan presentation of the facts was the Board's aim."[180] After reviewing cases from other jurisdictions considering government's role in election contests, the Mississippi high court accepted the requirement that a government agency's informational role is not one of actively seeking to achieve a fair playing field but requires it to remain neutral:

> We find compelling wisdom and sound logic in this line of cases which recognizes a balanced, informational role in educating the local community about referendum proposals. A fair and balanced presentation of the facts would also include relevant information addressing the tax impact as well as proposed community benefits. A line does exist between a fair presentation of the facts in an innocent informational role and a concerted campaign designed to achieve the objectives of the proponents.[181]

7. Judicial Enforcement of the Requirement that Government Remain Neutral in Elections

The majority-view courts have generally accepted the idea that to cross the line, the form of governmental support must involve some tangible commitment of public resources beyond mere public pronouncements.[182] These courts have undertaken the task of providing guidance for a trier of fact to determine when government has crossed the line. In doing so, some courts have sought to avoid a case-by-case approach by looking to the form

178. *Id.*

179. *Id.* at 549.

180. *Id.* at 540, 549.

181. *Id.* at 542–43.

182. *See supra* note 41. This is in part a vestige of the historical origins of taxpayer suits concerning government expenditures on election campaigns. Citizen suits for disgorgement of such improperly spent funds were not tied to First Amendment issues or concerns with preserving the sanctity of the electoral process. Dillon's rule, the early view of municipal authority dating to 1865, severely limited government speech on the basis that a municipal corporation possesses no inherent powers. JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448–51 (5th ed. 1911); *see also* Elsenau v. City of Chi., 165 N.E. 129 (Ill. 1929). Such expenditures were *ultra vires* as exceeding the basic authority of the public entity. Although this approach to the problem of government election speech has not been completely abandoned, see *Ameritel Inns, Inc. v. Greater Boise Auditorium District*, 119 P.3d 624, 625 (Idaho 2005), it has fallen by the wayside with the rise of the welfare state and the recognition that government has implied powers to meet its vastly expanded duties.

of the government conduct at issue. This can involve rigid formulations to precisely evaluate when unlawful expenditures have occurred.

a. Assessing the Contextual and Per Se Approaches

The better rule involves a contextual analysis considering the alleged government support in light of the content and the surrounding circumstances. This rule, stated initially by the court in *Stanson*, assesses the substance of what a government actor has done by objectively evaluating the "style, tenor and timing" of the government activity.[183] The court in *Stanson* applied this approach to find that an alleged $5,200 expenditure by the Director of the State Department of Parks to promote passage of a bond measure providing funds for acquisition of park lands could be unlawful.[184] The promotional activity involved the Department mailing its own materials favoring the bond act, as well as materials created by a private organization formed to promote the act's passage, paying for travel expenses for speaking engagements to promote the act, and using agency staff time to promote its passage.

The futility of seeking to categorically anticipate and define all forms of unlawful government partisanship stems from the unlimited number of ways in which government agents may support an election cause. The methods for providing support to one faction in an election contest are not susceptible to compilation in a list.[185] Like the Hydra, every time one of myriad techniques is eliminated, more emerge to replace it. From fish fries[186] to election eve mailers[187] to strategically timed agency policy statements[188] to lopsided presentation of facts[189] and so on, the methods of providing support are legion.[190] Presumptions that official publications are

183. Stanson v. Mott, 551 P.2d 1, 12 (Cal. 1976) ("[T]he determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case.").

184. *Id.* at 12–13.

185. This has made the task of codifying such a standard impossible.

186. *See Dorsey*, 599 So. 2d at 539.

187. *See* Sweetman v. State Elections Enforcement Comm'n, 732 A.2d 144, 150–51 (Conn. 1999) (regarding yet another school board pamphlet seeking to convince voters of the negative consequences that would ensue if a measure was voted down).

188. *See* Burt v. Blumenauer, 699 P.2d 168, 179 (Or. 1985).

189. *See* Angela C. Poliquin, Note, Kromko v. City of Tuscon*: Use of Public Funds to Influence the Outcomes of Elections*, 46 ARIZ. L. REV. 423, 424 (2004).

190. The methods may be subtle as well. Rather than bluntly stating, "Vote for Candidate X," a government agency may spend funds to call attention to a concern of public interest that is a bone of contention in the election battle, such as potholes. Naturally, the publicity will emphasize in dramatic fashion the horrors of potholes—their danger to public safety and devastation to property—without directly mentioning a road repair bond

suspect or are neutral are insupportable.[191] Arbitrary time limitations provide no real measure of the effect government support may have upon a particular election contest.[192] Even looking to whether the government action involved only statements of objective facts does not prevent the unfair and one-sided presentation of such facts.

b. Relevant Considerations in Applying the Prohibition Contextually

The difficulty in drawing an indelible line between the situation where government action involves providing "neutral information" and the promotion of partisan views on election issues has been recognized elsewhere as well.[193] The determination is going to vary from case to case because the circumstances in each case differ. While it is not feasible to

measure on the upcoming ballot or a particular candidate's position on the need for repairs. Alternatively, an expenditure may objectively direct voter attention to the respective candidates' road maintenance voting records. The favored candidate can easily coordinate a campaign platform to coincide with a government "informational" campaign to strategic advantage. For examples of such crafty attempts to influence voter outlook by manipulating public opinion on issues dovetailing those before the voters, see *Tenwolde v. County of San Diego*, 17 Cal. Rptr. 2d 789, 790–91 (Ct. App. 1993) (concerning the sheriff's department distribution of postcards that cited judicial failings and urged the chief justice of the state supreme court to resign before a retention election); *California Common Cause v. Duffy*, 246 Cal. Rptr. 285 (Ct. App. 1987); *Dollar v. Town of Cary*, 569 S.E.2d 731 (N.C. Ct. App. 2002); and *Burt*, 699 P.2d at 168.

191. Numerous courts and commentators have parsed the serious constitutional danger posed by partisan government intrusion into the election debate. Significantly, none of these careful students of the problem identifies any less of a danger posed by partisan activity in the form of obvious campaign techniques than in the manner of ordinary governmental communications. On the contrary, greater danger is associated with authoritative, official modes of communication than with transparent political partisanship. *See* Brian C. Castello, Note, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654, 676–78; Bloom, *supra* note 64, at 833–34.

192. Advance efforts may be employed to soften the voters, mold their outlook, and make them more receptive to a particular ballot position. *See Tenwolde*, 17 Cal. Rptr. 2d at 790–91; Miller v. Cal. Comm'n on the Status of Women, 198 Cal. Rptr. 877, 878–79 (Ct. App. 1984).

193. *See* Putter v. Montpelier Pub. Sch. Sys., 697 A.2d 354, 359 (Vt. 1997) (observing the "nebulous line separating information from propaganda" in a case involving another election affecting school funding in which the school sent a newsletter warning voters of dire consequences if the ballot measures failed); Shiffrin, *supra* note 6, at 655 (concluding that the subject of government speech is far too complex to be amenable to reductionist analysis); Yudof, *supra* note 63, at 899 (describing the line between neutral and partisan information as "exceedingly difficult to make"); Ziegler, *supra* note 62, at 615 (discussing the "apparent dilemma of distinguishing proper from improper government conduct"); John A. Lambenth, Comment, *Using Public Money to Influence the Electorate: Is There Corruption Which Needs Correction?*, 22 PAC. L.J. 249, 257 (1991) (observing, "The court [in *Stanson*] never explicitly defined 'promotional' and 'informational,' and stated that the line between the two is not clear").

anticipate all the possible ways such impartial support may occur under all possible circumstances, the prohibition is clear enough. The ways in which it may be violated are simply not susceptible to itemization.[194] Thus, ad hoc review is unavoidable.

Courts seem to have no difficulty with "empirical data" or "purely factual" material presented in an impartial manner which "suggest[s] no position for or against."[195] The contextual standard contemplates that even purely factual details can be incomplete or otherwise presented in such a manner as to depart from neutrality and amount to an attempt to influence voter conduct.[196]

The need for an objective contextual approach to account for such manipulations of form is aptly illustrated by the facts of a North Carolina case. The court in *Dollar v. Town of Cary*[197] dealt with a town's campaign on the eve of a council election "'to better inform citizens about growth management issues.'"[198] To accomplish this supposed educational campaign, the town council appropriated $200,000 for "among other things[,] 'direct mail, media buys, and contracted services.'"[199] Growth management was an election hot button issue. The court looked beyond the façade of the nonpartisan rhetoric and applied a contextual analysis:

> The determination of whether advertising is informational or promotional is a factual question, and factors such as the style, tenor, and timing of the publication should be considered. . . . It is not necessary for the advertisement to urge voters to vote "yes" or "no" or "for" or "against" a particular issue or candidate in order for the advertising to be promotional.[200]

Applying the contextual approach, the court affirmed the trial court's

194. Granting relief where such a violation is found is another matter. The courts are disinclined to invalidate election outcomes. *See, e.g.*, Quinn v. City of Tulsa, 777 P.2d 1331 (Okla. 1989). In terms of disgorgement of funds by the responsible public official(s), identifying partisan government conduct does not predetermine liability. A strict liability standard has been declined in favor of a reasonable man negligence standard: should the public official under the circumstances, exercising due care, have known that the use of public resources would tend to unfairly support one side in the election contest? *See* Keller v. State Bar of Cal., 767 P.2d 1020, 1032–33 (Cal. 1989), *rev'd on other grounds*, 496 U.S. 1 (1990); Stanson v. Mott, 551 P.2d 1, 15–16 (Cal. 1976).

195. *See, e.g.*, Godwin v. E. Baton Rouge Parish Sch. Bd., 372 So. 2d 1060, 1064 (La. Ct. App. 1979) (discussing still another school board using facilities and issuing brochures to influence voters on a ballot measure impacting school revenues); *Stanson*, 551 P.2d at 11 n.6.

196. *See* Sweetman v. State Elections Enforcement Comm'n, 732 A.2d 144, 165 (Conn. 1999).

197. 569 S.E.2d 731 (N.C. Ct. App. 2002).

198. *Id.* at 732 (citations omitted).

199. *Id.* (alteration in original).

200. *Id.* at 733.

granting of a preliminary injunction.[201] Had the court adhered to a content-only approach, the town council's ruse to mask election advocacy as an educational program and thereby use public funds to perpetuate in power those sharing its perspective would have succeeded. Similarly, in *Burt v. Blumenauer*, the court recognized that while generally educating the public about health matters is a proper part of a government agency's duties, the agency's promotion of a policy germane to such a purpose would be improper where it supported one side of an issue before the voters.[202]

A contextual approach has similarly been applied to enjoin the misuse of the franking privilege for campaign purposes. The court in *Hoellen v. Annunzio*,[203] addressing the argument that its inquiry should be restricted to whether the content of a mailer expressly advanced the congressman's candidacy, held that "logic dictates that we should not close our eyes in the face of extrinsic evidence which reveals that an appearance of official business is nothing more than a mask."[204]

In formulating its contextual "style, tenor and timing" approach, the California Supreme Court in *Stanson* relied upon a decision by Justice Brennan, written when he sat on the New Jersey Supreme Court. That case, *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills TP*,[205] illustrates the variegated considerations involved in assessing whether a public agency's action is neutral or, all things considered, serves to unfairly advantage one faction in the election contest. *Citizens to Protect Public Funds* involved a school board's actions in the face of a school bond election.[206] The board disseminated a booklet.[207] Some pages directly

201. The court cut through the town council's strategy of elevating form over substance, holding:

> The advertisements were to run . . . coinciding with the Council elections where the smart/managed growth concept was a contested issue between candidates. We agree with the trial court that this evidence reveals "it is more likely than not that a . . . jury would find that a primary purpose of this [Campaign] is to influence [the Town's] voters in favor of 'slow growth' or 'managed growth' candidates in the [2001 Council] election." . . . The advertisements, in the context of the Council elections, appear to be more than informational in nature and instead implicitly promote the candidacy of those Council candidates in sympathy with the Council's position on the Town's growth. It is not material that the advertisements did not directly support one candidate over another; they promoted only one point of view on an important campaign issue.

Id. at 733–34.

202. 699 P.2d 168, 179–80 (Or. 1985).

203. 468 F.2d 522 (7th Cir. 1972).

204. *Id.* at 526.

205. 98 A.2d 673 (N.J. 1953).

206. *Id.* at 674–75.

exhorted "vote yes."[208] The California Supreme Court, recognizing the ease with which a public agency can avoid employing such blunt language, turned its attention to the other aspects of the New Jersey school board's publication.[209]

The bulk of the booklet consisted of information about the cost of the proposed building project and assertions regarding the need for new facilities.[210] The materials warned of the dire consequences that would ensue in the advent of the bond's failure.[211] This was too much for Brennan, who held such advocacy crossed the line, observing that the materials did not involve "presentation of facts merely but also arguments to persuade the voters that only one side has merit."[212] In view of the less obvious advocacy contained in the materials in *Citizens to Protect Public Funds*, the *Stanson* court recognized that the subtlety of persuasive techniques a government agency could employ necessitated a nuanced evaluation as to whether the agency had provided a balanced presentation of the facts, including "'all consequences, good and bad, of the proposal,'"[213] or whether the agency was seeking to persuade.[214] A "careful consideration" of the relevant facts is needed to make this determination.[215]

Applying the *Stanson* approach, a jury would not focus upon putative motive, form, or who did the actual speaking, but upon what a reasonable person would objectively conclude the effect of the government action would be. It might consider whether the school board acted in strategic proximity to the election date. Timing is likely much more a consideration of persuasion than informing, and an "informational" mailer timed to arrive just before absentee ballots issue would be a red flag. The tenor of the governmental action can be gauged in terms of what this author calls the "Chicken Little" factor—in other words, whether the presentation is calm, matter of fact, and unemotional, or whether it conveys the impression

207. *Id.* at 674.
208. *Id.*
209. Stanson v. Mott, 551 P.2d 1, 8 (Cal. 1976).
210. *Id.*
211. *Id.*
212. *Citizens to Protect Public Funds*, 98 A.2d at 677.
213. *Stanson*, 551 P.2d at 11 (quoting *Citizens to Protect Public Funds*, 98 A.2d at 676–77).
214. *Id.* at 12 n.8.
215. *Id.* at 12. Such an evaluation of contextual considerations would not generally seem amenable to determination as a matter of law. *But see* Peninsula Guardians v. Peninsula Health Care Dist., 134 Cal. Rptr. 3d 837, 837 (Ct. App. 2011) (finding materials conveying one-sided views on the need for a hospital project were informational as a matter of law—a conclusion made all the more questionable in view of the trial court's determination that disputed issues of fact existed permitting a trier of fact to find otherwise on this point).

that the sky is about to fall. Sensationalism and dire warnings of catastrophe designed to reach voters at an emotional level are red flags. In terms of style, the trier of fact can consider whether the government action is designed to inform or persuade. In other words, does it resemble tested campaign methods? If literature, is it presented in a slick, glossy, and sensational form? Are disputed views in the election presented as facts and without offering the countervailing point of view? Or is it unadorned, objective information designed to allow the voter to make up her own mind? These are the guidelines accepted by the better view approach in American lower courts to ascertain whether a governmental expenditure is designed to persuade or is proper, neutral (informational) conduct.

c. The Inadequacies of an Approach that Emphasizes the Form of the Government Action over Its Substance

The deficiencies of an approach focusing on the form of the message are pointed out by the New York high court in applying a constitutional prohibition against use of public funds for campaigning to a state agency newsletter disseminated on the eve of an election.[216] Rather than focusing on content or what the listener might think, the court looked to objective considerations concerning context:

> [W]e conclude that the document transgresses the constitutional boundary. It was disseminated on the eve of the Presidential campaign of 1992. Its subject matter covered one of the issues already then of primary interest in that campaign—welfare reform. Although the newsletter contained a

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216. Schulz v. New York, 654 N.E.2d 1226 (N.Y. 1995). The court considered a newsletter containing the following material cited by the court:

> "Led by the Bush Administration, Republicans in New York and across the nation are seeking to slash assistance to the needy. [ ]The Republicans appear to have devised a strategy of using distortions and half-truths about Medicaid and welfare to divide the people in a key election year."
>
> The newsletter also reported the Governor's criticism of "President Bush and the Republicans for using welfare as the 'Willie Horton issue of the 1992 campaign.'"
>
> While [the newsletter] did properly urge the public to vote and to "[s]tudy the candidates," it also sought to enlist the public's support in opposition to the alleged Republican position on the welfare and Medicaid reform issues. Thus, the newsletter urged: "[y]ou can also write at any time to your local representatives. Tell them that welfare and Medicaid is a lifeline during troubled times, and that they shouldn't pull in the lifeline while so many people are in need." Moreover, it proceeded to ask the public to "vote for the men and women who put people before politics," a thinly veiled entreaty to vote against the previously disparaged Republican stance on the issues addressed.
>
> Finally, [the] newsletter contained a tear-sheet message to be sent to the Governor for the individual recipient among the public to sign and fill in . . . .

Id. at 1231 (citations omitted).

> substantial amount of factual information which would have been of assistance to the electorate in making an educated decision on whose position to support on that issue, the paper undisputably convey[ed] . . . partisanship, partiality . . . [and] disapproval by a State agency of [an] issue.[217]

The court looked outside the four corners of the newsletter and emphasized the overriding need for government to be neutral in performing an informational function.[218] The court cited with approval *Stern v. Kramarsky*'s[219] admonition against partisanship: "To educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be."[220]

Another problem with focusing exclusively or primarily upon textual considerations is more basic. Such an approach does not address public resources diverted to provide support of a non-textual nature. Obviously support of one side in an election contest does not need to involve speech. It can take such forms as allocating funds and allowing use of public property or employees to support one campaign against another. These forms of support are often no more readily susceptible to clear delineation in advance than those involving words of advocacy.[221]

d. Confusion with Campaign Finance Legal Standards

One problem of form that has caused judicial consternation has been a curious tendency to bootstrap legal requirements applicable to campaign finance regulations—specifically, the "express advocacy" requirement identified by the Supreme Court in *Buckley v. Valeo*[222] as essential to salvage the Federal Election Campaign Act from constitutional infirmity. In *Kromko v. City of Tucson*,[223] the Arizona Court of Appeals considered information

217. *Id.* (alterations in original) (citations omitted) (internal quotation marks omitted).

218. *Id.* at 1230–31.

219. 375 N.Y.S.2d 235 (1975) (holding a state agency's promotion of passage of an equal rights amendment to the New York state constitution by pamphlets and radio and television advertisements was unlawful).

220. *Schulz*, 654 N.E.2d at 1231 (quoting *Stern*, 375 N.Y.S.2d at 239) (internal quotation marks omitted).

221. "The mechanics of official partisanship are limited only by government's imagination and the tools at hand." Ziegler, *supra* note 62, at 581.

222. 424 U.S. 1 (1976). What makes this proclivity to confuse the requirement of government neutrality with campaign regulatory standards curious is that the purpose of the *Buckley* "express advocacy" requirement was to prevent government from chilling protected citizen speech. It simply has no application to a requirement with an objective of preventing unlawful and constitutionally unprotected government speech. *Id.* at 48–49.

223. 47 P.3d 1137 (Ariz. Ct. App. 2002).

disseminated by the city of Tucson and its city manager concerning two related ballot propositions—an increase to a business tax by one-half percent and a transportation plan.[224] The message was spread via pamphlets, television announcements, and websites.[225] The information was presented in a one-sided manner.[226]

The *Kromko* court, although finding that the applicable statute there derived from "language in *Buckley* itself as well as cases decided later," rejected an "express advocacy" standard for gauging whether the city had crossed the line: "such a narrow construction of the statute leaves room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words, albeit that the message and purpose of the communication may be unequivocal."[227] Instead, the court looked beyond a "magic words" standard to an approach that incorporated contextual factors.[228] The court determined that "the message must be examined within the textual context of the medium used to communicate it."[229] What exactly this cryptic test might involve is not explained in the decision, but the court rejected the challenge to the communications there on the basis that "'reasonable minds could differ'" as to whether the communications encouraged a vote for the propositions.[230] The California

224. *Id.* at 1138–39.

225. *Id.* at 1139.

226. Poliquin, *supra* note 189, at 424.

227. *Kromko*, 47 P.3d at 1140.

228. The case was decided in the period before such decisions as *Governor Gray Davis Comm. v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 551 (Ct. App. 2002) and *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003) rejected an approach to express advocacy which was not limited to magic words. The court looked to the decisions in *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Ct. App. 2002) and *FEC v. Furgatch*, 807 F.2d 857, 863–64 (9th Cir. 1987) that accepted contextual considerations. The Supreme Court would later accept an objective, contextual "functional equivalent" of express advocacy approach in *McConnell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

229. *Kromko*, 47 P.3d at 1141.

230. *Id.* The decision's reasoning has drawn criticism. *See* Poliquin, *supra* note 189, at 429–33. The court's deference to content apart from context fails to recognize the mischief that may ensue from one-sided presentation of facts. Objectively verifiable information that is presented in a one-sided, splashy manner can have as much or greater deleterious effect on the fairness of the ballot process than express exhortations. For example, emphasis—headlining with bold, color text—of a purely factual statement may amount to a partisan presentation. The non-neutral nature of the presentation may only be recognized by looking outside the text of the materials. This might include considering omitted or de-emphasized relevant facts that counter the highlighted fact. A contextual analysis allows the trier of fact to objectively assess what factual information was overemphasized, omitted, or downplayed.

Courts do not adequately explain why express advocacy coerces the electorate any

Supreme Court has also rejected a city's effort to supplant its *Stanson* contextual standard with an "express advocacy" (whether "magic words" or "functional equivalent") approach.[231]

e. The Argument that a Contextual Standard "Chills" Government Speech

The argument that the contextual standard is vague or ambiguous and chills valuable government speech has been made, but has been met with no acceptance.[232] The argument borders on the bizarre in any event. Aside from the glaring absence of any right being infringed upon or of any state action, there is no chilling of speech per se, only a dampening of the inclination to use the public treasury to purchase a soapbox. It is difficult to even ascertain what is really horrible about chilling expenditures on government pronouncements relating to elections.[233] On the contrary, there is much that may be positive in having government maintain a cautious approach to tapping public funds.

The reality is that the hypothetical public official eager to publicize a particular point, but who has doubts about whether a proposed expenditure crosses the line from being informational to being partisan, will not suppress the information. She can consult with agency counsel.[234] Assuming doubts remain and she decides not to spend public funds, the public is not going to be deprived of the information. Open government requirements make it available to the citizenry for the asking. As a practical matter, even if no one asks, the information is going to come to

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> more than other forms of speech by the government. . . . While express advocacy, such as "vote yes," may "tend[ ] to supplant the critical capacity of its hearers," a presentation that is less strident, but uses facts favoring only its position, may be equally or more persuasive.

Contreras, *supra* note 64, at 544.

231. Vargas v. City of Salinas, 205 P.3d 207, 225–27 (Cal. 2009).

232. Sweetman v. State Elections Enforcement Comm'n, 732 A.2d 144, 157 (Conn. 1999); *Vargas*, 205 P.3d at 227–28.

233. It should be observed that the standard of liability for a public employee's misuse of public funds for election advocacy may involve minimal deterrent effect. Courts have moved away from strict liability toward application of a simple negligence standard. *Compare* Mines v. Del Valle, 257 P. 530, 537–38 (Cal. 1927) (advocating that there is no excuse for a municipal officer to illegally expend the public's money), *with* Stanson v. Mott, 551 P.2d 1, 15 (Cal. 1976) (overruling the *Mines*' strict liability standard for holding public officials accountable for illegal expenditures of the public money). Consequently, the reasonably mistaken public employee would not be liable for the unlawful use of public resources.

234. *See* Porter v. Tiffany, 502 P.2d 1385, 1389 (Or. 1972) (declining to decide if this, unlike the "good faith" of the public employee, would provide a defense, but observing that "[i]n order to rely on advice of counsel as a defense such advice obviously must be followed").

light. The civil servant is still going to make it available to the public—through board meetings, in press releases and conferences, and so on. Realistically, she is going to make sure it finds its way to whatever faction is going to be most interested in using it and is most willing to spend private funds to bolster their arguments in the election debate. In addition, if the public servant really wants to, she can open her own purse and spend personal funds on her personal time to get the information she feels is pertinent out to the voters.

III. TREATMENT OF THE ISSUE BY THE UNITED STATES SUPREME COURT

A. Amenability to Judicial Review of the Problem

That the constitutional conflict presented by government election factionalism is not enumerated in the Constitution should not present a difficulty for even the most hardened interpretivists on the Court. From *Yick Wo v. Hopkins*[235] to *Baker v. Carr*[236] to *Bush v. Gore*,[237] the Court has been willing to reach beyond the parameters of a clause-bound constitutionalism to protect participatory precepts of constitutional governance.[238]

It is understandable why judicial intransigence is overcome for the sake of preserving the integrity of the electoral process. This integrity is fundamentally important in terms of legitimacy and adherence to the rule of law and the basic ideals of constitutional governance. An electoral process that preserves the ability of the sovereign People to determine the nature of their government free from interference is easily "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental" because it is part of the "matrix, the indispensable condition, of nearly every other form of freedom."[239] The Court has frequently recognized a significant legislative

235. 118 U.S. 356 (1886).

236. 369 U.S. 186 (1962).

237. 531 U.S. 98 (2000).

238. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980) (observing that judicial interventionism in the voter qualification and malapportionment areas was not prompted by desire to inflict personal judicial predilections about substantive values upon society, but by the motivation "to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis").

239. This is the approach to identifying non-enumerated rights articulated by Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325, 327 (1937) and further developed by the Court in subsequent cases. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (delimiting government's power to intrude into the personal sanctity of one's home); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding that is it unconstitutional for a state to

prerogative in seeking to achieve this objective. It is also a rather straightforward jump to make from existing constitutional concepts. It is akin to finding a "right to read" which, while not specifically enumerated in the Bill of Rights, flows naturally and obviously from First Amendment principles. We cannot have government by the People without preserving from interference the ability of the People to govern.

B. Citizens United*'s Treatment of Free Speech and the Role of Government Agents with Regard to Elections*

In light of the various foregoing judicial efforts tenuously anchoring the limitation upon government election speech in constitutional soil, does the Supreme Court's analysis in *Citizens United v. FEC*[240] provide some indication that the nation's high court has embraced any of these approaches?[241] Or does *Citizen United*'s acceptance that artificial entities are not subject to spending limitations in the marketplace of ideas signal the Court's willingness to extend similar treatment to government actors—freedom from regulation and judicial restriction—in the pre-election melee?

The Supreme Court's peripheral treatment of the issue in *Anderson v. City of Boston*[242] was some indication that it was not receptive to such an extrapolation of the First Amendment rights of private corporations to government entities.[243] The case involved the City of Boston establishing an agency utilizing public facilities, funds, and employees to oppose passage of an amendment to Massachusetts's state constitution by changing the classification of property.[244] In the appeal from the judgment of the Massachusetts Supreme Court enjoining the expenditure of city funds in support of a ballot proposal, the U.S. Supreme Court issued a stay order.[245]

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restrict contraceptive distribution to minors); Griswold v. Connecticut, 381 U.S. 479 (1965) (declaring a right to marital privacy).

240. 130 S. Ct. 876 (2010). The Court reaffirmed its decision that election expenditures may not be limited for certain associations (corporations) but not others, in *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

241. The Court in *Citizens United* perceived government regulation of speech as the problem, not the cure. Addressing regulatory valuations regarding what speech should and should not be allowed into the public discourse, the Court flatly stated, "Those choices and assessments, however, are not for the Government to make." *Citizens United*, 130 S. Ct. at 917.

242. 380 N.E.2d 628 (Mass. 1978).

243. *See* Shiffrin, *supra* note 6, at 571 n.24 ("[S]ome justices initially thought Boston was right, but on reflection concluded that Boston was not only wrong, but was so clearly wrong that no substantial federal question was involved."); Note, *supra* note 61, at 548 n.76.

244. *Anderson*, 380 N.E.2d at 630.

245. City of Boston v. Anderson, 439 U.S. 1389, 1389–91 (1978).

When the appellant's jurisdictional statement stressed the similarities between the municipal advocacy there and the corporate advocacy involved in *First National Bank of Boston v. Bellotti*,[246] the appeal was unceremoniously dismissed for want of a substantial federal question.[247] The conclusion to be drawn is that the Court, having had an opportunity to consider the matter in greater depth, did not think much of the assertion that a municipality enjoyed a right to use public funds for election advocacy.[248]

Austin v. Michigan State Chamber of Commerce[249] and *McConnell v. FEC*[250] demonstrated the Court's amenability to restrictions especially impacting corporate speech where the objective was preserving the integrity of the electoral system. But as the Court made clear in *Citizens United*, it is no longer willing to treat such limitations as reasonable time, place, and manner restrictions validated by a compelling state interest.[251]

The Court's rejection of regulations on corporate campaigning might seem to pull the rug out from under any *Anderson* rationale for declining to extend similar protection to government. But the recognition that government speech is not constitutionally protected[252] and is

246. 435 U.S. 765 (1978) (striking down a Massachusetts law criminalizing the expense of corporate funds for campaign purposes). *Bellotti* was preceded by a substantial shift in the court's treatment of commercial advertising from *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

247. *See* Yudof, *supra* note 63, at 866 n.10.

248. It should be observed, however, that the state supreme court's holding relied upon a state statute regulating election financing, which was held to preempt the municipality's ability to appropriate the funds to finance the campaign. *City of Boston*, 439 U.S. at 1389–90.

249. 494 U.S. 652, 658–60 (1990).

250. 540 U.S. 93, 207 (2003).

251. Citizens United v. FEC, 130 S. Ct. 876, 903, 907–08 (2010). Strict scrutiny applies to expenditures. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007). A looser formulation applies to regulation of contributions. Such restrictions must be "'closely drawn'" to serve "a 'sufficiently important interest.'" Randall v. Sorrell, 548 U.S. 230, 247 (2006) (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)); *see also* Davis v. FEC, 554 U.S. 724, 740 n.7 (2008) (citing McConnell v. FEC, 540 U.S. 93, 136 (2003)).

252. Many authorities, having given the question careful consideration, have rejected such a notion. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 n.7 (1973) (Stewart, J. concurring)) ("Government is not restrained by the First Amendment from controlling its own expression."); Warner Cable Commc'ns, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) ("When the . . . speaker is the government, that speaker is not itself protected by the first amendment . . . ."); *see also* NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990) ("[G]overnment speech itself is not protected by the First Amendment."); Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass., 868 F.2d 473, 481 (1st Cir. 1989) (concluding that the legal services organization run by a state university, as "a state entity, itself has no First Amendment rights"); *id.* at 482 n.10 ("We do not imply

constitutionally limited in the election context to preserve the integrity of that process is supported by an analytic distinction highly evident in the Court's decisions. This understanding is essential to evaluating what happens when the government's power to promote its agenda runs up against the right of citizens to govern themselves. That situation implicates fundamental rule of law precepts relating to government neutrality in the election process and illustrates why, in evaluating the respective interests, it is critical to understand government speech as a power rather than a right.

The distinction is one the Court continues to iterate between governmental regulatory evaluations on the propriety of the public debate versus private assessments on what speech is appropriate in a discourse driven by a free market.

The Court in *Citizens United* invoked distrust of government as a premise for the right to freedom of speech.[253] The Court juxtaposed this with its acceptance of a marketplace of ideas metaphor that is tied to the function of self-governance.[254]

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that government speech is protected by the First Amendment."); Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 944, 945–46 (W.D. Va. 2001) (citing *Columbia Broad. Sys.*, 412 U.S. at 139 n.7 (Stewart, J., concurring)) ("It is, of course, a well-settled point of law that the First Amendment protects only citizens' speech rights from government regulation, and does not apply to government speech itself."); David Morgan, *The Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 37 VAND. L. REV. 433, 467 (1984) ("Extending [F]irst [A]mendment rights to government, therefore, would conflict with the first amendment's fundamental purpose of preserving individual rights.").

Even where lower courts have overlooked the lack of state action and have toyed with the notion that government actions may merit protection in terms of rights in addition to the abundant protections government agents already enjoy merely by virtue of their empowerment as the government, analysis has been framed in terms of citizen rights—the rights of listeners, impairment to the marketplace of ideas, or the notion that government is effectively acting on behalf of certain voiceless or underpowered citizens. *See* Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 644–45 (9th Cir. 2009) (quoting Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1093 (9th Cir. 2000)) (noting that government entities are conduits for its citizens and may "act on behalf" of them); Creek v. Vill. of Westhaven, 80 F.3d 186, 193 (7th Cir. 1996) (suggesting that a "curtailment" in a municipality's right to speak for its citizens is an intrusion of their First Amendment rights). The difficulty in pushing the logic that government is acting on behalf of citizens is that it is too easy to argue that government is always acting on behalf of its citizens. This argument ignores the fact that the controlling forces of government are not entirely representative and merely reflect the political victory of the prevailing contingent in the last election. Another obstacle to Supreme Court acceptance of the notion that government may vicariously enjoy First Amendment protection is that the Court generally treats rights as personal and non-assignable. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 133–34 (1978) (holding that one person may not invoke another's Fourth Amendment right to be free from unreasonable search).

253. *Citizens United*, 130 S. Ct. at 899.

254. The rationale is that government speech in the election context must be limited because it "threatens the primary object that the freedom-of-speech clause was designed to

The marketplace of ideas paradigm has ancient roots, but has been recently articulated in the Court's jurisprudence. The attribution of value to discourse as a device for finding truth is classical and was accepted by Plato. Acknowledgment of its import for effective governance developed with the ascendance of the corporate form in an age when novel economic relations gave impetus to new concepts of individual rights and participation in the processes of government.[255] The idea reached its zenith with the publication of Mills's *On Liberty* in the middle of the nineteenth century. It found legal expression in the United States with the famous dissent by Justices Holmes and Brandeis in *Abrams v. United States*,[256] after which the marketplace of ideas metaphor enmeshed itself inextricably with the Court's First Amendment analysis.[257] Ironically, the metaphor was the product of the effort of Progressive legal theorists to obtain protection for proponents of social change who were fair game for persecution under the "'bad tendency'" test.[258] Because it presents a fundamentally unregulated conception of the power of truth to triumph over lesser competing ideas, latent in the metaphor was an unresolved conflict with the cornerstone of Progressive thought that government regulation is essential to curb the unfairness resulting from economic advantage.[259]

The acceptance of the idea that the exercise of popular sovereignty requires a free marketplace of ideas does not entail acceptance of the idea that the People are required to be informed.[260] Nor does it contemplate a role for government agents to step in and compensate for perceived informational inadequacies and excesses.[261] The "free market" the Court

protect; a free marketplace of ideas necessary to true self-government." Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1106 (1979).

255. *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence trans., 1989) (1962); Phil Withington, *Public Discourse, Corporate Citizenship, and State Formation in Early Modern England*, 112 AM. HIST. REV. 1016 (2007).

256. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

257. The marketplace paradigm has become so dominant—and competing models so dormant—in free speech jurisprudence that "it is difficult even to identify . . . competing views." CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 4 (1995).

258. André, *supra* note 26, at 82.

259. *Id.* at 82–83.

260. Like the freedom not to vote, the unspoken right to remain ignorant or at least to shut out viewpoints one does not want to hear is a guilty American tradition. As Justice Marshall observed, unlike other nations that require the exercise of "rights" (such as the franchise), in our system "we permit our citizens to choose whether or not they wish to exercise their constitutional rights." Schneckloth v. Bustamonte, 412 U.S. 218, 283 (1973) (Marshall, J., dissenting).

261. *See generally* Robert Meister, *Journalistic Silence and Governmental Speech: Can Institutions*

postulates is unambiguously one that is free from substantive government involvement. The term "free" is emphatically not utilized by the Court in the sense of equalizing private forces.[262] On the contrary, the "free" market of ideas is, with the holding in *Citizens United*, contrasted with situations where the marketplace is interfered with or entered by government actors.[263] From this premise that government meddling is what makes the marketplace of ideas "un-free," it is apparent that the Court has characterized the voice of government not as another source of information in the marketplace of ideas to be considered by the electorate, but as an aberration in that context.

Proceeding from the Court's "us versus them" distrust of government orientation, there is no sound basis to entrust government with anything more than a role of neutrality in the election context. Critical to understanding the *Citizens United* majority analysis is comprehending its conception that government's role in a system of popular sovereignty is not the same as a benevolent dictator or even the same as a fellow citizen. The ability of government agents to speak on an issue is circumscribed by their role.[264] Government's function is distrusted for its potential to usurp the power of the sovereign.[265] There is no room in this perspective to provide government agents[266] the role of evaluating what information the public

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Have Rights?, 16 HARV. C.R.-C.L. L. REV. 319 (1981).

262. The majority's marketplace of ideas approach adheres to the conception that individuals are capable of evaluating the merits of issues themselves and that government efforts to weight this evaluative process are an intrusion upon political liberty. The Court minority adheres to an egalitarian conception that economic disparities affect the ability of meritorious ideas to receive appropriate reception in the market. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); André, *supra* note 26, at 122.

263. The Court observed:

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

Citizens United v. FEC, 130 S. Ct. 876, 908 (2010).

264. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2350 (2011) (holding that the legislator's vote is not protected by the First Amendment's Free Speech clause because "[t]he legislative power . . . is not personal to the legislator but belongs to the people").

265. This is the danger presented by unrestricted government activity in the election setting: "Freedom to choose and to decide among competing directions and policies which the government should adopt would have little practical significance if those in power were allowed to influence and to coerce the will of the citizens." Bloom, *supra* note 64, at 833–34.

266. The courts that have considered the question have recognized the difference between a government employee acting as a private citizen or passively answering direct requests for information and the proactive government expenditure of funds to promote a perspective favoring one side in an election contest. *See* Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976); Stern v. Kramarsky, 375 N.Y.S.2d 235, 239–40 (Sup. Ct. 1975).

should be considering on a candidate or ballot measure.

Moreover, in light of the requisite level of distrust to be accorded government, public agencies cannot be qualified as "associations of individuals" contributing views in the free marketplace, which was the Court's lynchpin for extrapolating individual free speech rights to unions and corporations. The Court continues to adhere to the view that "[i]n the free society ordained by our Constitution it is not the government, but the people—individually as citizens . . . and collectively as associations . . . —who must retain control over the quantity and range of debate on public issues in a political campaign."[267]

C. Enlightenment from Citizens United*'s Perspective on the Role of Government Agents in Modulating Election Speech*

The Court in *Citizens United* does not deeply explore the basis for its distrust of putting government agents in the role of deciding what is or is not good for the public's consideration. But the Court's adherence to the liberal view of the Founders that there exists an essential separation between a political realm—where laws are made based upon the judgment of the sovereign electorate weighing the normative considerations pertaining to particular issues and candidates—and a province where laws are neutrally applied and interpreted is plain.

More contemporary liberal thinking—recognizing the inequities arising from the economic disparity that is the progeny of the traditional liberal model—has accepted a Progressive perspective.[268] This latter view regards government regulation as warranted to ensure a more level playing field and to benefit the common good. It considers government agents' role as one of assessing what is in the public interest and guiding the electorate to that informed and scientifically predetermined conclusion. Taken to its logical conclusion, such a philosophical approach challenges the wisdom of popular sovereignty and limited government, and undermines the rule of law conception that the legal and political realms are to be separate. It is this latter philosophical approach that the *Citizens United* majority rejected with its acceptance of an individualistic, rational, contractualized, marketplace of ideas, trial-and-error approach to free speech, the election process, and governance.[269]

The notion that government should involve itself in divining social truth,

267. Buckley v. Valeo, 424 U.S. 1, 57 (1976); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

268. *See supra* notes 27–30 and accompanying text.

269. André, *supra* note 26, at 81–87, 103–07; Sullivan, *supra* note 262, at 146–55.

and enlightening and molding the opinion of the voting public to such assessments of the social good was declined.[270] Instead, the Court left this process to the private marketplace to be guided by the power of voters' reason and, undoubtedly, the power of immense agglomerations of wealth to drive that process.

The Court in *Citizens United* recognized that in the election context we are not merely dealing with Tribe's characterization of government[271] adding just another voice to the discourse.[272] By eschewing an "anti-distortion" rationale for government regulation of speech, the Court rejected the "right to know"[273] model as a justification for government injecting itself into election debates as a referee to decide what information has been overstated and what information the social good mandates be emphasized. Its dismissal of this approach is in keeping with the Court's prior jurisprudence.[274] The Court has rejected the government's ability to prevent speech from certain speakers.[275] By direct implication, it has necessarily rejected the role of the government bureaucrat in assisting the election-related speech of other speakers.[276]

The Court flatly recognized that government regulation of speech, at

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270. Explicit in its analysis is the Court's acceptance of the perspective that "[e]lections are basic means by which the people of a democracy bend government to their wishes" rather than the opposite formulation. V.O. KEY JR., PUBLIC OPINION & AMERICAN DEMOCRACY 458 (1961).

271. TRIBE, *supra* note 6, at 590; *see also* Shiffrin, *supra* note 6, at 595–601.

272. Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

273. *See* POWE, *supra* note 8, at 247; MEIKLEJOHN, *supra* note 8, at 19–26. *See generally* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329 (1987).

274. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48–49 (1976); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The converse conclusion is logically unavoidable: government may not enhance the relative voice of some in order to counter the relative voice of others.

275. Lower courts have applied the Supreme Court's reasoning that government should not take on the mantle of official quantifier of speech to the argument that government has an obligation to compensate for under-expressed speech in elections. One court responded:

> The First Amendment does not have an egalitarian function. It may not be used to equalize an imbalance of resources or to increase or diminish the persuasive power of the competitors for public support. The protection it grants is freedom *to* speak; not freedom *from* conflicting speech. The objective is to preserve a free market for ideas.

Colo. Taxpayers Union, Inc. v. Romer, 750 F. Supp. 1041, 1045 (D. Colo. 1990).

276. It might be suggested that government's lending support to one position on an election issue is not per se assisting the speakers espousing that view but is in actuality government speaking itself. This would misconstrue government's role in a constitutional scheme as that of a citizen rather than as the servant of the People.

least in the election context,[277] is censorship[278] and is subject to strict scrutiny. Government's role as arbiter of the public dialogue is circumscribed to one of strict neutrality by virtue of its constitutional function as the servant of the sovereign People in applying and interpreting the laws enacted by the sovereign. The Court effectively rejected the suggestion that the public's right to know should place government in the role of ensuring that the public is properly informed on issues. The *Citizens United* decision makes it plain that bureaucratic determinations concerning what information the public should contemplate are beyond the pale. This function should be activated by the People; if the public wants certain information, it should ask for it. It is not the civic duty of the public administrator to decide when or how to supplement or regulate the content and flow of information on the public's dime.

D. The Arizona Free Enterprise *Case: The Supreme Court Rejects "Neutral" Government Support of Election Factions*

One governmental effort to reduce the disparity between big money-financed electioneering and the campaign efforts of less well-heeled factions was the focus of the Court's attention in *Arizona Free Enterprise*. The Court's consideration of the problem presented by Arizona's legislative scheme for providing public funds to private candidates contained no mention of public forum analysis or the government speech doctrine.[279] This is remarkable in light of the Court's recognition that under the government speech doctrine government may freely use public funds to promote public policies and even do so by advancing positions on issues contrary to those held by some taxpayers.[280] This was precisely what was at issue in *Arizona Free Enterprise*. Public funds were being provided exclusively to one

277. The Court emphasized the core nature of election-related speech: "The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United*, 130 S. Ct. at 898 (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (internal quotation marks omitted)).

278. *Id.* at 908. Deciding what information ought to be included in the pre-election debate requires the public official to make value-based judgments concerning speech content and speakers. Whether it involves keeping certain speakers from having input (reducing some speech) or government funding of certain views (supplementing some speech) makes no difference in the final analysis.

279. The government speech and public forum analyses are illuminated in more detail and dissected in terms of their implications for government support of one side in an election context, *supra*, Part II.B.2–4.

280. The taxpayer has no First Amendment right not to fund government speech and enjoys no heckler's veto over governmental expenditures on views of which she may disapprove. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562, 574 (2005).

candidate to allow that candidate to promote his or her position.[281] The Court's constitutional basis for invalidating the subsidization of campaigning was a free speech analysis.[282] But examination of this analysis and the Court's stated concerns reveals that what truly compelled the Court's holding was the offending of a related, but unarticulated, constitutional value.

1. A Government Speech Analysis Provides No Basis for Invalidating a Campaign Finance Reform Scheme Providing Public Funds to Candidates

Ordinarily, a government speech analysis would have no qualms with the government expressing a view on a matter of public concern. More precisely, it would see no difficulty with government employing private sources to speak out on an issue.[283] The mere fact that another private speaker's speech is rendered less effective or is offset by the countervailing governmentally funded speech would be of no concern.[284] After all, the First Amendment does not guarantee that one's speech is going to be effective, only that the government may not prevent one from publicly expressing that point of view. So what makes the situation in *Arizona Free Enterprise* deserving of different treatment? It is evident from the Court's reasoning that this has something to do with the election context.[285]

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281. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011).

282. *Id.*

283. Government's use of private sources to express a view on abortion was not a problem in *Rust.* Rust v. Sullivan, 500 U.S. 173, 203 (1991) (holding that the Department of Health and Human Services' regulations requiring recipients of Title X funding to not engage in abortion counseling was constitutional). One court has observed, "Government can express public policy views by enlisting private volunteers to disseminate its message, and there is no principle under which the First Amendment can be read to prohibit government from doing so because the views are particularly controversial or politically divisive." ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2006) (addressing a state's issuance of personalized license plates containing a pro-life message, but not a pro-choice message).

284. This was the unavailing complaint in *Johanns*, where beef producers objected that the government's speech promoting beef generally rendered ineffective their efforts to promote the superiority of their particular type of beef. *Johanns*, 544 U.S. at 556.

285. Indeed, Chief Justice Roberts's majority opinion encapsulates the Court's aversion to the Arizona plan in terms that do not ring of protecting individual rights at all. Taking issue with the dissent's position that the subsidy does not restrict speech, but increases it, the decision retorts, "Not so. Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates." *Ariz. Free Enter.*, 131 S. Ct. at 2820, 2822. Plainly, the Court is looking askance at government financing of an election faction. Reliance upon considerations of individual free speech rights, however, seems a slender reed to lean upon in finding constitutional infirmity with such government support

One salient distinction drawn by the Court in the government speech cases comes to the fore. This concerns the difference between government speech and the subsidization of private speech pointed to in *Legal Services Corp. v. Velazquez*.[286] The Court contrasted the situation in *Velazquez* with that in *Rust v. Sullivan*. *Rust* upheld funding restrictions that limited physicians' ability to give patients abortion counseling. *Velazquez* struck down funding restrictions that limited the scope of advocacy by legal services attorneys. The subsidy in *Arizona Free Enterprise* would amount to the funding of private speech, like that in *Velazquez*. Any message conveyed by the publicly funded candidate would not be the government's and would not be subject to government control. This would seem to take the public funding of a candidate's private speech out of the government speech analysis altogether.

2. A Public Forum Analysis Yields No Constitutional Flaw in Providing Public Subsidies to Poor Candidates

The question then arises whether governmental support of private inveighing upon an issue of public concern opens a public forum requiring it to provide equal access to those holding alternative views. The analysis of this inquiry is controlled by *Arkansas Educational Television Commission v. Forbes*.[287] That case upheld the exclusion of a marginal candidate from a television debate sponsored by a state-owned public broadcaster. The Court rejected the view that the public broadcast was a public forum.[288]

The Court in *Arkansas Educational Television* recognized that where there is no public forum created requiring equal access, the standard for unlawful differential treatment of candidates is much reduced. The inquiry for a non-forum or non-public forum is whether the exclusion is "based on the speaker's viewpoint"[289] and whether the exclusion is "reasonable in light of the purpose."[290] Under such an approach, the Arizona campaign regulation would seem to readily pass muster as both viewpoint neutral and reasonable in purpose.

3. The Court's Free Speech Basis for Invalidating Arizona's Campaign Reform Plan

Now we turn to the actual reasoning behind the Court's determination

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of one side in an election.

286. 531 U.S. 533, 542 (2001).

287. 523 U.S. 666 (1998).

288. *Id.* at 675, 676–78.

289. *Id.* at 682.

290. *Id.*

in *Arizona Free Enterprise* that Arizona's effort to address corruption[291] in election campaigning was unconstitutional. The Court analyzed the campaign finance law in terms of whether it imposed a burden upon the free speech rights of the privately bankrolled candidate. Because the campaign regulatory scheme in no way prevented any First Amendment activity, the argument that a privately funded candidate's free speech rights were impacted is dubious.[292] As the dissent observed, "Arizona's matching funds provision does not restrict, but instead subsidizes, speech."[293]

The Court identified three unconstitutional burdens imposed upon free speech by the Arizona campaign reform scheme. First, unlike the situation in *Davis*, privately funded speech was the catalyst for "the direct and automatic release of public money"—something the Court regarded as "a far heavier burden than in *Davis*."[294] Here again, no actual restriction upon candidate speech is identified and the Court's actual concern is the unfairness involved in one candidate receiving public funds while the other has to dip into her own pocket.

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291. The corruption basis for the Arizona legislation was framed two different ways by the Court: as a means of maintaining a level playing field and as a device for preventing situations where campaign capital can purchase political fealty. Election corruption manifests itself in two ways that concern those supporting regulations to ensure fair elections against the impact of financial might. First, the process itself is subject to distortion from the ability of money to effectively buy votes. The fear is that a well-funded faction pushing a less than meritorious or duplicitous argument can drown out a very valid message conveyed by the underfunded speech of an opposing faction. Second is preventing the corrosive impact of money after an election—keeping a successful candidate from betraying the common good to reward the campaign assistance of a private backer. The necessity of filthy lucre for obtaining votes leaves office seekers (and, to some extent, initiative backers as well) beholden to large contributors instrumental to their success at the polls. The dissent in *Arizona Free Enterprise* observed that even where actual quid pro quo does not result from large private contributions, the public's confidence in the process is undermined by the perception that corrupt bargains are the product of such monetary assistance to a faction in the election contest. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2830 (2011) (Kagan, J., dissenting).

292. This evident lack of infringement upon freedom of speech was observed in a concurring opinion in the lower court that stated,

> The only speech related concern I can see to the Arizona scheme is that a privately funded candidate has to raise a lot more money to swamp a publicly funded candidate. . . . [H]is or her speech is not limited by this increased burden of fundraising. . . . [T]he First Amendment does not protect the candidate's interest in winning, just his interest in being heard. There is no First Amendment right to make one's opponent speak less, nor is there a First Amendment right to prohibit the government from subsidizing one's opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.

McComish v. Bennett, 611 F.3d 510, 528–29 (9th Cir. 2010).

293. *Ariz. Free Enter.*, 131 S. Ct. at 2833 (Kagan, J., dissenting).

294. *Id.* at 2818–19 (majority opinion); *see* Davis v. FEC, 554 U.S. 724 (2008).

Second, the Court observed the situation where a private candidate faces multiple publicly funded candidates. Where the privately bankrolled candidate exceeds the expenditure limit, this will produce matching funds for each opponent he faces. The Court characterized this as pitting the wealthy candidate against "a political hydra of sorts"[295] because each dollar he spends over the limit generates multiple adversarial dollars to counter his campaign efforts. Here again, the electoral unfairness the Court identifies as befalling a wealthy candidate in such a scenario does not involve any direct restriction on the candidate's ability to speak. Obviously the candidate's opponents are entitled to speak and may spend their own money or that of contributors without offending the First Amendment. What concerned the Court is where the money spent is not provided by private sources. The poor candidate spending public money to campaign is for some unspoken reason a problem for the Court.

Third, the Court observed that the privately funded candidate cannot control the amount of funds provided to the publicly funded opponent. Even if the candidate stopped spending personal funds at the threshold, the opponent may still receive public funds due to spending on the privately funded candidate's behalf by independent expenditure groups. While the publicly funded candidate can allocate use of those funds strategically, the privately funded candidate may have no say over how independent groups spend their money.[296] Once again, however, the unfairness of this situation involves no actual restriction upon the candidate's speech. It merely means that her opponents are better able to speak by virtue of the publicly provided financial wherewithal to disseminate their message.

Perhaps acknowledging the lack of any actual state action restricting candidates' free speech, the Court invoked the purpose underlying the First Amendment, observing, "'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs,' 'includ[ing] discussions of candidates.'"[297] This confirms that the Court's meaning when it speaks of keeping the election debate on public issues "uninhibited, robust, and wide-open"[298] is that this process should be left to private forces and resources—that for it to be a free process, government must be kept out of it.

295. *Ariz. Free Enter.*, 131 S. Ct. at 2819.
296. *Id.*
297. *Id.* at 2828 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)).
298. *Id.* at 2829.

4. The Real Reason for the Court's Aversion to Publicly Funding Economically Disadvantaged Candidates

As we have seen, the reason for the expenditure in *Arizona Free Enterprise*—to allow the receiving candidate to offset an opponent's unfair financial advantage—would appear to be beside the point from a free speech, a government speech, or a public forum approach. The real difficulty the Court had with Arizona allowing government to intrude into a contest between private factions by funding one side has little to do with restricting anyone's speech. Casting the problem with government subsidies as something that "penalizes speech"[299] or creates a "chilling effect"[300] because it allows the opponent to talk back is awkward at best.[301] The Court's reasoning demonstrates its real concern is that "[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival."[302] This concern relates to a constitutional unease with allowing government to participate in a process reserved to private parties: the process of self-governance by the People. In short, the Court identified the wrong reason for finding a very real constitutional problem with Arizona's campaign finance reform.

E. Illumination Provided by Summum*'s Treatment of Government Speech*

Summum involved a donation of a monument to a city for its park that contained eleven monuments, including a Decalogue monument.[303] The monument recited the Seven Aphorisms of Summum.[304] When the city declined the donation, the donors sued, charging that the refusal of their (religious) message while the city displayed the private message of the Ten Commandments was unconstitutional viewpoint discrimination.[305] The Tenth Circuit accepted the argument that the park was a public forum and

299. *Id.* at 2821.

300. *Id.* at 2824. The "chill" is the result of the fear that one's opponent might speak up. One would presume that the real source of such a "chill" would be the fear of the merits of the opponent's message, not the mere fact that they are saying something.

301. It is akin to saying that a teacher providing special attention to a student with a learning disability imposes a penalty upon all the other students. Of course it does not. The other students still have all the same opportunities and attention. They are not deprived. They are not made to sit in the corner. It is just that one student is getting a little needed, extra help. Likewise, the wealthy election candidate can still speak as long and loudly as she would like. Her opponent just gets some help in doing the same thing.

302. *Ariz. Free Enter.*, 131 S. Ct. at 2821.

303. Pleasant Grove City v. Summum, 555 U.S. 460, 465 (2009).

304. *Id.*

305. *Id.* at 466.

that having opened the forum to one viewpoint, the city was required to allow access to Summum's view as well.[306] It ordered the city to accept the monument.[307] The Supreme Court reversed.[308]

The case raised an Establishment Clause concern over the city accepting one religious monument but rejecting another that esouposed the credo of a different religious faith. But the Court took pains to emphasize that the issue had not been raised.[309] Consequently, the analysis was incongruously limited to the question of whether the monuments—and the messages contained therein—were private speech in a government-regulated forum or were government speech.[310] From a forum analysis, the non-neutral treatment of the two monuments' messages would have been a problem.

The Court held that public forum analysis had no application to the case because the speech at issue was properly understood to be government speech.[311] It recognized that the government was entitled to lend its imprimatur to a private message: "Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."[312] The Court held the government's acceptance of a monument effectively denudes it of all private speech characteristics and transmutes it into a purely governmental statement.[313]

The Court was quick to note that government's power to speak was not unlimited, citing Establishment Clause considerations and accountability to the electorate.[314] In other words, public officials should tread cautiously in espousing views that might be offensive to a large segment of the community. While the Court acknowledged the ability of the voters to

306. *Id.*
307. *Id.*
308. *Id.* at 467.
309. *Id.* at 467–69 (focusing solely on free speech implications).
310. *Id.* at 467.
311. *Id.* at 481.
312. *Id.* at 470–71.
313. *Id.* at 481. The Court did not command a strong majority on this point. Justices Souter and Stevens, who were joined by Justice Ginsburg, expressed reservations about the "recently minted" government speech doctrine. *Id.* (Stevens, J., concurring). Justice Souter specifically balked at a per se rule that all monuments are government speech. *Id.* at 487 (Souter, J., concurring). Justice Breyer counseled that the "'government speech'" doctrine should be considered a "rule of thumb" and that courts must look past such labels to ascertain whether speech is burdened without an offsetting legitimate government purpose. *Id.* at 484 (Breyer, J., concurring).
314. *Id.* at 468 (majority opinion).

effectively censor government speech by voting the elected officials who authorized the offensive speech out of office, it did not suggest that the elected officials could use government's power to express private views as a device to influence that vote.

1. Implications of Summum*'s Allowance for Government Endorsement of Private Viewpoints*

A number of questions relating to the government speech doctrine were resolved by the Court in *Summum*. It created uncertainty as well. While the Court's acceptance of an approach that treats government endorsement of private speech, at least in the form of monuments, as per se transforming it into government speech adds some aspect of clarity to the doctrine, it also opens a new can of First Amendment worms. While government cannot exclude one view from a forum, it *can* exclude *all* views (except one it favors) from government speech. The potential for oppression is considerable[315] and merits some consideration. Significantly, scant mention and zero basis is provided for the notion that *Summum*'s treatment of government speech should not be construed to allow government to discriminate against views expressed by monuments "on political grounds."[316]

The Court has really articulated no coherent limitations for government speech on the basis of political, social, economic content, or other grounds of discrimination except those required by the Constitution. An equal protection approach to viewpoint discrimination has not materialized.[317] While the argument that governmental political speech interferes with the ability of the People to exercise the right of popular sovereignty is certainly compelling in the election context, the emerging doctrine of government speech seems to accept without qualification the idea that government agents are free to promote policies of those voted into power by the People—including social, economic, political, and other agendas—until they face being voted out of office.

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315. *See, e.g.*, Meister, *supra* note 261, at 345–46.

316. *Summum*, 555 U.S. at 484 (Breyer, J., concurring). Justice Stevens' concurrence gives similar short shrift to this concern, undoubtedly reflecting a visceral rather than a reasoned response in the absence of any authoritative support for the assertion that "recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages." *Id.* at 482 (Stevens, J., concurring).

317. The Court has relied upon such an analysis in *Police Department of Chicago. v. Mosley*, 408 U.S. 92 (1972) and in *Carey v. Brown*, 447 U.S. 455 (1980). But with the advent of the forum and government speech doctrines, the roots for such an approach to develop have been cut. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech*, 74 S. CAL. L. REV. 49, 53–56 (2000).

In practical terms, consider a government placard. Make it big and heavy and enduring so there is no question but that it should be considered a "monument." The message is placed next to Uncle Sam or the Statue of Liberty or some other such patriotic icon and reads, "Communism is bad!" There is no salient difference as far as the government speech doctrine goes from "drugs can kill you," "cigarettes are unhealthy," "racism is nasty," or all sorts of wartime propaganda attacking the national enemy on an ideological level. It is simply a government policy perspective that a particular ideology is deleterious to the commonweal.

What if it is posted in a park, street, or other traditional public forum? And what if the government entity takes back the forum in which it is posted, excluding all contrary viewpoints? And why stop at placards? And why stop at Communists? There seems to be no reason to restrict government from expressing negativity via radio and television bulletins, newsletters, websites, and billboards, and concerning whatever political party is in the minority. The Court has not yet addressed such Orwellian scenarios directly, but the extant logic of its government speech doctrine seems to pose no barrier to government efforts to manipulate popular ideology.

Another unanswered question that received slightly more consideration by the Justices in *Summum* is how to tell when government is speaking its mind via proxy private speakers versus when it is opening a forum to select private viewpoints in a non-neutral fashion.[318] In other words, is government regulating the content of private speech or merely utilizing private speakers as its surrogate?[319] More than one Justice bristled at the

318. Justice Souter recognized that "there are circumstances in which government maintenance of monuments does not look like government speech at all." *Summum*, 555 U.S. at 487 (Souter, J., concurring). He eschewed a categorical rule in favor of an objective "reasonable observer" test to determine whether the expression in question is "government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land." *Id.* Justice Breyer echoed this concern, counseling the need to look beyond the labels of "'government speech,' 'public forums,' 'limited public forums,' and 'nonpublic forums' with an eye towards [the categories'] purposes." *Id.* at 484 (Breyer, J., concurring).

319. Because government is forbidden to endorse religion, such government support—direct or by proxy—cannot be countenanced under either a forum or a government speech approach. It is *both* viewpoint discrimination under a forum analysis and an Establishment Clause violation under the government speech approach. The same may be said of government largesse favoring one faction in an election. From a forum perspective, it is viewpoint discrimination. From a government speech perspective, it amounts to interference with the political process. The problem of gleaning whether the speech involves government conveying a message versus government discriminating on the basis of content is considered here because of its indirect implications for the adoption of a test to guide lower courts in determining when government speech in elections has gone beyond the pale.

idea that government's endorsing one viewpoint over others is adequately addressed in every instance by neatly labeling content that takes the form of a monument to be government speech.[320]

There is no cogent difference between a public subsidy[321] to fund a privately created monument and acceptance of a private donation of a work of art and sticking it on public property for purposes of this analysis.[322] The same problem exists as to whether the decision is to exclude some private speakers from an open public forum[323] or whether private speakers are used as instruments of government policy.[324] The same problem is raised as to whether the status of the donor or artist is that of a private speaker independently participating in the marketplace of ideas or that of a governmental envoy promoting public policies by proxy. The same problem is presented as to whether the government is regulating private speech (requiring that it remain neutral) or is itself weighing in as a participant on the question at hand.[325] And the same problem exists regarding whether speech that has such dual qualities should be relegated to just one category at all. Ad hoc review of the circumstances is necessary to assess whether the government's role is that of a surrogate for private speakers or vice versa.

For example, consider a public mural project—a plan to erect a work of art depicting a famous town historic figure in the city transit center. The plain message honors that person as representative of certain admirable

320. *See supra* note 313 and accompanying text.

321. *See, e.g.*, NEA v. Finley, 524 U.S. 569, 587–88 (1998) (acknowledging that the First Amendment applies in the subsidy context, but maintaining that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake").

322. The same can be said for a governmental decision to exclusively publish a particular point of view on the entity's bulletin board or in an official publication such as a newsletter or website.

323. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that the exclusion of religious views from university funding for student-run publications is just as offensive to the First Amendment as other viewpoint discrimination); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (finding that "the specific interests sought to be advanced by § 399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects").

324. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991) (concluding that regulations prohibiting funding to programs proposing abortion as a form of family-planning do not violate First Amendment rights); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 551 (1983) (determining that prohibitions on funding for lobbying do not infringe First Amendment rights).

325. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 (1996).

civic virtues. Private sector influences affecting the public entity's motivation for the project and its message may abound; it may be financed by a private donor. This should not be regarded as simply an unconditional endowment of funds; strings may be attached. A particular artist may be specified and that might happen to be someone who specializes in portraiture for the local Ku Klux Klan chapter. It may be required that great grandpa Fred be portrayed in a positive light and that means "no mention of that scandalous business with that slave girl." A specific location of prominence may be required. The proposal may provoke a reaction from those who object to the historical accuracy of the view expressed and who voice the position that Fred was a slave owner and exploiter of women and the poor and otherwise entirely unsavory in character. The artist's preliminary sketch may be objected to as containing a subtle theme of racial purity. City graffiti artists may ask for equal space for a mural to express their countervailing perspective about the historic figure's legacy and expressing an underlying theme of racial equality.[326]

The vehicle employed by government to convey the message seems to provide no categorical guidance to the analysis. Whether we are dealing with murals, monuments, governmental bulletins, or illuminated blimps, the determination necessarily depends not just upon form, but upon the context and particular circumstances in each case. And even then, it may not be possible to definitively say that the mixed speech in question falls on just one side of the artificial line the Court has created. The purported motive behind the public entity's adoption of the speech is likewise of unlikely value to this inquiry.[327]

Isolating the source or impetus of the speech is not helpful either. One student of the problem has posited that where the speech is not affirmatively initiated by government, the concern that it is discriminating among private viewpoints rather than making its own public policy statement is greater. In such cases, it is argued, the Court's rationale that the privately initiated speech should be regarded as government speech has "expanded government speech doctrine beyond its justifications."[328] The practical reality of political life and governmental function is that

326. Assuming the city allows the counter-monument, this raises the question of whether it has thereby opened a forum.

327. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 437 (1996).

328. Leading Cases, *Government Speech:* Pleasant Grove City v. Summum, 123 HARV. L. REV. 232, 233, 237 (2009) (criticizing the *Summum* Court's treatment of "hybrid speech"—speech mixing governmental and private messages—and arguing the per se categorization of such speech masks the danger that government is actually discriminating against private viewpoints rather than conveying its own message).

government is itself a hybrid.[329] It is private proponents of particular positions who stalk the corridors of power, finesse their objectives onto the public agenda, and manipulate government agents into adopting ideas to begin with. It is individuals in their capacity as government agents with their own predilections that conceive, advance, and implement such ideas. Inherent in the concept of popular sovereignty is the notion that governing is the process of evaluating and accepting or rejecting private ideas. Attempting to discern the source of speech as governmental or private may hopelessly blur into teleological infeasibility.[330] Undoubtedly, this is why we can see no difficulty with public employees saying whatever they want about election issues on their own time and on their own dime.[331] There may be no feasible way to discern what engendered an adopted policy idea, but it is possible to restrict the use of public resources from advancing private objectives.

The proposal and the decision to accept or deny a content-imbued monument is inevitably the product of private forces. Even where funding is public, unless art can be accomplished by committee, some individual has to conceive the artistic vision. Someone also has to spearhead the proposal—whether an individual inside government or an outsider cozying up to it and manipulating the mucky-mucks and powers-that-be. We just cannot easily pinpoint when government begins and ends because it is composed of people who are not government. Its ideas are the product of voters and elected officials and administrators affected by personal beliefs, concern for the public trust, the influence of lobbyists, and power brokers who impose their policy interpretations upon the voters' mandate. The realization for those who distrustfully tend to contrast government as a distinct entity apart from the individual citizenry is very much what dawned upon Walt Kelly's character in Pogo: "We have met the enemy, and he is us."[332]

Popular sovereignty comprehends that one group gets to foist its policy agenda upon a minority until it is voted out of office and that this agenda is

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329. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, BOOK 2 10 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989) (1748) ("In a democracy the people are, in certain respects, the monarch; in other respects, they are the subjects.").

330. In the final analysis, calling for treatment of all privately engendered speech as subject to the neutrality doctrine is no different than removing all government speech from the rubric of the government speech doctrine. It will always be traceable to a private source of origin.

331. This is in contrast to the rigors of neutrality imposed upon the career civil servant in European nations. *See supra* notes 156–57 and accompanying text.

332. WALT KELLY, POGO: WE HAVE MET THE ENEMY AND HE IS US (1972).

ultimately private in origin. Acceptance of a monument, like any other government decision, is a product of a political process that involves evaluating public and private concerns, compromise, and a momentary triumph of certain political forces over others. Focusing upon *who* initiated the idea is an inadequate guide for ascertaining whether the content involved should be designated private or governmental. Justice Souter took a more pragmatic approach in *Summum*.

2. An Objective Test for Differentiating Government from Private Speech

The *Summum* Court's simple answer to the problem of differentiating between state discrimination based upon content and governmental expression—that by deciding to accept the monument the government entity is adopting any speech content associated with it as its own and is divorcing that content from any private sources—accepts a dichotomy between the government and the public that exists more in fantasy than the practical reality of political life. But then, how can we tell the difference? At this point of indistinction, the government speech doctrinal idea that government can espouse a policy view limited only by the Constitution and the vicissitudes of the electoral process crashes up against the forum analysis requirement that government refrain from favoring one viewpoint over others.[333] Here the distinction between government as regulator and government's prerogative to "add its own voice"[334] as speaker appears contrived and seems to hopelessly break down.

In his *Summum* concurrence, Justice Souter glanced at the elephant in the drawing room and sparingly sketched a non-categorical approach. He recognized that the problem is not as simple as adopting a per se rule that monuments are government speech. There were other analytical complications besides the one posed by the Establishment Clause question that was conveniently not before the court.[335]

In spite of all the tip-toeing around, it was apparent from the Justices' opinions that the Establishment Clause issue was not overcome by the facile categorizing of the speech in question as governmental. The opinion of the Court flatly acknowledged that "government speech must comport with the Establishment Clause."[336] Justice Stevens, joined by Justice Ginsburg,

333. As one scholar of the problem has observed, determining whether the source of the speech is private or governmental is "complex, contextual, and obscure" without a "simple empirical or descriptive line of demarcation." *See* Post, *supra* note 325, at 163. Ultimately the determination is the product of "normative and ascriptive judgments." *Id.*

334. TRIBE, *supra* note 6, at 590.

335. Pleasant Grove City v. Summum, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

336. *Id.* at 468.

concurred, noting, "For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."[337]

Justice Souter was no exception, expressing his concerns over the undefined relationship of the government speech doctrine to Establishment Clause requirements. But Justice Souter's concern went beyond averting Establishment Clause ramifications of government speech. It encompassed First Amendment implications for non-neutral treatment of private speech. His methodology is the same for distinguishing private from government speech as for ascertaining a government endorsement of religion:

> To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.[338]

What is proposed here is a reasonable man approach to determining when government is really just providing a forum for private speech rather than conveying its own message.

Justice Souter's approach plainly contemplates that a trier of fact should, based upon consideration of all the facts relevant to such an inquiry, make the determination of whether the content in question is private or government speech.[339] The approach is indistinguishable from the contextual "style, timing and tenor" inquiry widely accepted by the lower courts to ascertain whether government conduct amounts to unlawful election campaign support. Thus, improper government endorsement of religion in violation of the Establishment Clause would be determined in the same manner as improper government support of an election candidate

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337. *Id.* at 482 (Stevens, J., concurring). Only Justices Scalia and Thomas expressed the view that the Establishment Clause issue should be regarded as a non-issue because of the secular and historic attributes of the Ten Commandments. *Id.* at 482–83 (Scalia, J., concurring).

338. *Id.* at 487 (Souter, J., concurring).

339. Interestingly, Justice Souter does not follow the course of this logic. Rather than deferring to the lower court's factual determination that the monument involved private speech or remanding for a determination on this issue, the concurrence simply concludes that the monument was "government expression." *See id.* at 487 (referring to the Tenth Circuit's finding); *see also* Aaron Harmon, Pleasant Grove City v. Summum*: Identifying Government Speech and Classifying Speech Forums*, 4 DUKE J. CONST. L. 57, 66 (2008) (analyzing the lower court treatment of forum analysis and anticipating the Court's treatment of private monument donation as adopted government speech).

or ballot measure.

The Establishment Clause and the prohibition upon government campaigning both place similar restrictions upon government agents. Unlike statements of individual rights to engage in certain activities, both recognize activities in which the State may not engage. The Establishment Clause was prompted by the fear of the State's adoption of a religion and the associated persecution of and discrimination against those who are not adherents of government-prescribed theology. The Founders' fear of government exceeding its proper role in the political process is the danger of cronyism and that those in power will act to feather their own nests and turn government to their own ends and away from the dictates of the People.[340]

The critical question for government campaign speech, as with government religious speech, is one of support by the government agency. An Establishment Clause problem arises through government support of religion. In the case of support for a faction in the election contest, a different but analogous constitutional problem arises. The "endorsement test,"[341] which the Court has applied in situations involving government expressive conduct, is a contextual standard[342] based upon the observations of a reasonable person as to whether the message or conduct in question appears to endorse or disapprove of a religion.

The style, timing, and tenor approach to ascertain government partisan support is really no different. The approaches look to context and are objective standards whereby a trier of fact considers all relevant facts to determine whether the conduct or message by the government advances (or

340. See *supra* note 65 and accompanying text.

341. The "endorsement test" was initially developed as an alternative or supplement to the *Lemon* test in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The *Lynch* Court recognized a contextual analysis was essential to this inquiry: "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* at 694.

342. *See* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring) ("To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins."). By way of illustrating Justice O'Connor's point and the need to treat the question as factual rather than legal, see *Van Orden v. Perry*, in which Justice Breyer eschewed a "single mechanical formula" and observed the test "must take account of context and consequences," but nevertheless reached a different result than Justice O'Connor. Van Orden v. Perry, 545 U.S. 677, 699–700 (2005) (Breyer, J., concurring); *see also* Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 11 (2005) ("Context is crucial in determining that there is a governmental symbolic endorsement of religion.").

hinders) one religion or one faction in the election contest.[343] When the Court comes to terms with this uncertain aspect of its government speech doctrine, adoption of such an approach to determine the outside limits of government speech and to differentiate private from government speech seems inevitable.

CONCLUSION

The Supreme Court majority's reaction to government subsidies for financially disadvantaged candidates in *Arizona Free Enterprise* and its response in *Citizens United* to the idea of government agents serving as arbiters of what election speech deserves more or less attention has definite implications for the Court's acceptance of the perspective that government must remain neutral in the pre-election debate. The driving concerns with maintaining a process reserved to private actors, distrust of governmental valuations of the merits of speech in that process and the omnipresent metaphor of the privately driven marketplace of ideas depart from the minority view lower court cases that conceive of government as properly entrusted with the role of divining the public interest and guiding the electorate toward one conception of the public good. These judgments are ones the Court has declared it is not prepared to allow government agents to make in the election context.

The Court treats government regulations designed to level the playing field by reducing advantages of wealth, strength, and government activity seeking to supplement disadvantaged voices in the pre-election marketplace of ideas no differently. Although acceptance of a uniform constitutional foundation for precluding such governmental intervention in the electoral process has not clearly emerged, a compelled speech analysis presents a solid basis. The lower court majority view decisions have articulated a sound dichotomy between partisan and neutral use of public resources and have developed a well-reasoned methodology for identifying when government has departed from strict neutrality by objectively considering the timing, style, and tenor of the government conduct in question. This approach is fully consistent with the Court's analysis of the interrelated concerns involving freedom of speech, the election process, and the constitutional role of government.

The Court's treatment of government speech in *Summum* indicates that the nascent doctrine entails limits upon the scope of a public entity's speech. While the precise limitations remain undefined, the Court will

343. To be sure, Justices Stevens, O'Connor, and Souter, who all specifically rejected a categorical approach, have left the Court. But the compelling objective, contextual test articulated in *Lynch* and *County of Allegheny* remains.

enforce constitutional parameters. Just as the Court's members recognize the Establishment Clause exists as a limitation upon government speech, so too should they be expected to restrict government efforts to influence elections in favor of one faction. At least one member of the Court has gone the next step and has outlined a methodology for ascertaining when government's actions cross this line. This contextual, objective standard is entirely consistent with the "style, timing and tenor" approach that lower courts have already developed to address when government conduct is neutral and proper or amounts to unlawful, partisan election support. The matter is to be determined by the trier of fact based upon consideration of all relevant facts.

Applying this foreshadowed methodology to the county's mailer described at the beginning of this Article would yield the conclusion that, while it is not a direct subsidy to one faction, the county has crossed the line, absent offsetting factors. The timing of the materials is designed to reach voters at the crucial point when they are considering how to cast ballots. The tenor appears attuned to persuade in a one-sided manner (if not to frighten), rather than to objectively inform in a neutral fashion. Finally, the style is sensational and is directed at an emotional level rather than simply presenting information objectively and in a balanced presentation. A jury considering this evidence and following Justice Souter's approach would likely find the government agency had exceeded the proper bounds of government speech.

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COMMENTS

BAITING THE HOOK: THE FAILURE OF THE PTO TRADEMARK LITIGATION TACTICS REPORT TO DISSUADE EITHER TRADEMARK BULLYING OR TRADEMARK BAITING

TIMOTHY J. CALLERY*

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* J.D. Candidate, 2013, American University Washington College of Law; B.S. Business Administration, 2006, Marist College. I would first like to thank Professor Paul Figley for his guidance and impartations of wisdom throughout my law school career. I would also like to thank Aaron Gleaton, Shannon Cain, Bryan Thurmond, Tess Dillon, and all other members of the *Administrative Law Review* who played a role in shaping this Comment for their invaluable feedback and assistance throughout the writing and editing process. Last, but certainly not least, I would be remiss if I did not thank my parents, Phyllis and Jack, and my brother Andrew, without whose constant love and support I assuredly would not be where or who I am today.

INTRODUCTION

Trademark law, like much of the common law of property, affords mark owners the ability to exclude any and all others from using their established marks in commerce.[1] This right is not absolute, however. To maintain the protections afforded their trademarks, owners must take reasonable measures to prevent other firms from adopting identical or confusingly similar marks.[2] This duty to police one's mark has always been inherent in the Lanham Act,[3] but as trademarks have become increasingly valuable and important to the growth of the owners' businesses, this duty has provided firms with an opportunity to exploit their rights for financial benefit.

While active and diligent policing has not only been accepted, but encouraged, by courts,[4] the importance of trademarks, along with the dire ramifications of losing exclusive use of those marks, has led some firms to overzealously police their marks.[5] Reasoning that this overly thorough

1. *See* The Trade-Mark Cases, 100 U.S. 82, 92 (1879) (affirming that trademark ownership conveys a property right on the owner and that this proposition is "so well understood as to require neither the citation of authorities nor an elaborate argument").

2. *See* Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 766 (C.C.P.A. 1982) (agreeing that while firms must assure the distinctiveness of their marks by engaging in active policing, "an owner is not required to act immediately against every possibly infringing use to avoid a holding of abandonment").

3. *Cf.* 15 U.S.C. § 1115(b)(2) (2006) (listing owner abandonment of the mark as a valid defense to a claim of infringement); *id.* § 1127 (explaining that a mark is "abandoned" when "any course of conduct of the owner, including acts of omission . . . causes the mark to . . . lose its significance as a mark").

4. *See Wallpaper Mfrs., Ltd.*, 680 F.2d at 766 ("Without question, distinctiveness can be lost by failing to take action against infringers.").

5. *See, e.g.*, Gene DellaSala, *Monster Cable Shifts Back Into Lawsuit Gear Against Monster Transmission*, AUDIOHOLICS (July 24, 2009), http://www.audioholics.com/news/industry-news/monster-cable (highlighting Monster Cable's reputation for filing infringement suits against numerous companies using the word "Monster" in either the name of their company or their products); *see also* Ranking of the Biggest Bullies of 2011, TRADEMARKIA,

policing is essentially an overstepping of the bounds set by the Lanham Act,[6] firms accused of infringement have begun claiming that they are actually being bullied—forced by larger, more powerful firms into relinquishing control of a non-infringing mark.[7] This issue is compounded by the inability of many firms to engage in litigation to protect their right to the mark due to the financial and temporal costs of doing so.[8]

This apparent uneven playing field has led numerous small business owners, practitioners, and academics to call for legislative and regulatory measures to aid bullied businesses in defense of their legitimate, unique marks.[9] Advocates have also promoted the use of non-traditional, non-judicial measures of resistance to provide a means of protection for small business owners unable to afford an adequate legal defense. One such technique—shaming—recommends that firms turn to the court of public opinion rather than a court of law or equity in order to defend their right to continued use of their marks.[10] By calling the public's attention to their situation using traditional and social media, firms that feel they are being bullied can make their case without incurring the expenses of litigating the issue in court.[11]

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http://www.trademarkia.com/opposition/opposition-brand.aspx (last visited Nov. 30, 2012) (indicating that, based on the number of registration oppositions filed, Kellogg, The Lance Armstrong Foundation, and Apple were the three largest trademark bullies in 2011).

6. *See* Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 WASH. & LEE L. REV. 585, 587–89 (2008) (arguing that while policing competing uses of protected marks is necessary, some firms today "are using this course of conduct to expand their trademark rights, not just to object to truly objectionable uses").

7. *See* Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 641–42 ("Trademark owners are incentivized by the developments in trademark law to obtain expanded trademark rights and to keep these rights through aggressive policing. However, some trademark owners cross the line from aggressive, but reasonable, trademark enforcement to abusive trademark enforcement.").

8. *See id.* at 654–57 (outlining the reasons many small companies are unable to engage in infringement litigation).

9. *See, e.g.*, Cynthia Bunting, *Is Your Small Business Being 'Trademark Bullied'?*, BUS. NEWS DAILY (Mar. 31, 2011, 8:59 AM), http://www.businessnewsdaily.com/813-trademark-enforcement-bullying.html (providing the opinion of patent attorney Raj Abhyanker that the PTO should do more to mitigate the threat posed by trademark bullies); *see also* Lara Pearson, *IP Heavyweights Weigh in on Brand Bullying*, BRANDGEEK (Feb. 15, 2011), http://brandgeek.net/2011/02/15/ip-heavyweights-weigh-in-on-brand-bullying/ (expressing disagreement with the opinions of two organizations of intellectual property attorneys that believe the current legislative and regulatory framework of trademark law provides sufficient protections against bullying).

10. *See generally* Grinvald, *supra* note 7, at 688 (promoting the use of shaming to defend against trademark bullying rather than engaging in litigation that could cripple or bankrupt many businesses).

11. *See id.* at 677–79 (asserting that shaming "provides an effective alternative to

However, while measures aimed to help small businesses protect themselves against potential trademark bullies can be beneficial in many cases,[12] the increased availability and acceptance of these measures may actually serve to encourage small firms to purposely adopt trademarks similar to those of large companies.[13] Calling these powerful firms to task in the court of public opinion often increases these small firms' publicity and exposure, and in turn increases their revenues, even when the larger firm has a legitimate infringement or dilution claim.[14] As such, ambitious startups are presented with an opportunity to bait large, established firms into sending cease-and-desist letters and threatening litigation, which the startup can then exploit by claiming it is being bullied.[15] Once this publicity is garnered, the small firm can quietly enter into a settlement with the competitor and relinquish control of its infringing mark. By then, however, the damage is done. The small firm has gained the exposure it sought, and the reputation of its blameless accuser has likely been damaged as well.

In response to constituents' complaints of falling victim to trademark bullying, Congress introduced, and President Obama signed into law, the Trademark Technical and Conforming Amendment Act of 2010.[16] Section 4 of this Act required the Department of Commerce (DOC), in conjunction with the Intellectual Property Enforcement Coordinator, to conduct a study on the prevalence of the use of "abusive trademark enforcement tactics"[17] against small businesses in the United States.[18] The

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litigation for small businesses and individuals to defend themselves . . . [and] has the potential to solicit potential providers of low-cost legal assistance").

12. *See, e.g.*, Jess Bidgood, *Chicken Chain Says Stop, But T-Shirt Maker Balks*, N.Y. TIMES, Dec. 5, 2011, at A12 (discussing a Vermont T-shirt artist's struggle against claims of infringement by Chick-fil-A); Mike Masnick, *Monster Cable Caves Again, with Oddly Worded Apology*, TECHDIRT (Jan. 7, 2009, 6:33 AM), http://www.techdirt.com/articles/20090106/1546523298.shtml (highlighting Monster Mini Golf's success in convincing Monster Cable to drop the infringement suit it filed).

13. *See, e.g.*, Steve Baird, *Putting the Shoe on the Other Tootsie*, DUETSBLOG (Nov. 21, 2011), http://www.duetsblog.com/2011/11/articles/dilution/putting-the-shoe-on-the-other-tootsie/ (applauding Tootsie Roll Industries' decision to file an infringement and dilution suit against the makers of Footzyrolls foldable shoes).

14. *See id.* (reasoning that the media attention focused on the issue has made the practice of baiting more practical, despite the fact that competent trademark attorneys normally caution against it).

15. *See, e.g.*, *id.*

16. Trademark Technical and Conforming Amendment Act of 2010, Pub. L. No. 111-146, 124 Stat. 66, 66–70 (2010).

17. DEP'T OF COMMERCE, REPORT TO CONGRESS, TRADEMARK LITIGATION TACTICS & FEDERAL GOVERNMENT SERVICES TO PROTECT TRADEMARKS & PREVENT COUNTERFEITING 1 (Apr. 2011) [hereinafter TACTICS REPORT].

DOC was further instructed to report back to Congress within one year with the results of that study and with any recommendations for remedies it thought necessary to rectify the problem.[19] Neither the Act nor the resulting report addresses the issue of trademark baiting.

The DOC delegated responsibility for this report to its agency, the United States Patent and Trademark Office (PTO).[20] The PTO, after months of reaching out to small business owners and inviting comments from business owners, practitioners, and other interested parties, submitted its report to Congress in April 2011.[21] In the report, the PTO summarized the various responses it received and the remedies the commenting parties proposed.[22] Ultimately, however, the report concluded that trademark bullying was not a serious enough problem to warrant increased regulation or oversight.[23]

The PTO nevertheless recommended three measures it believed would both prevent bullying and better prepare small business owners to respond to a bully should they encounter one. First, the PTO sought to better protect small business owners by recommending increased efforts to entice private sector attorneys to offer free or low-cost legal assistance to business owners facing potential infringement claims.[24] Second, the PTO recommended improved resources to encourage small business owners to become better acquainted with trademark rights and enforcement options.[25] Finally, the PTO sought to prevent larger firms from engaging in overly aggressive trademark protection by recommending that these firms' attorneys participate in continuing legal education (CLE) programs geared toward increasing their understanding of the requirements for maintaining established trademark rights and of proper policing and protection techniques.[26]

These proposals, however, do not appear to provide much comfort to those firms faced with trademark bullies. Due to the expense of prolonged litigation, and because there now seems to be less hope of a viable legislative or regulatory fix on the horizon, it seems possible that the use of

18. Trademark Technical and Conforming Amendment Act of 2010 § 4.

19. *Id.*

20. *See* TACTICS REPORT, *supra* note 17, at 1.

21. *Id.*

22. *Id.* at 18–22.

23. *Id.* at 1 ("Ultimately . . . such tactics may best be addressed by the existing safeguards in the litigation system in the U.S. and by private sector outreach, support, and education relating to these issues.").

24. *Id.*

25. *Id.*

26. *Id.* at 1–2.

non-judicial measures such as shaming could be poised to spread. Furthermore, as noted above, neither Congress nor the PTO seems to have even mentioned the issue of trademark baiting.

To that end, this Comment will argue that the recommendations set forth in the PTO's 2011 Trademark Litigation Tactics Report not only fail to adequately remedy the problem of trademark bullying, but, just as significantly, they do nothing to prevent trademark baiting by small firms against more powerful competitors and may even serve to intensify this issue. Part I outlines the options currently available to firms seeking to prevent trademark infringement and highlighting the loopholes, including both bullying and baiting, that these options leave open. Part II will address the PTO's 2011 Report on Trademark Litigation Tactics and its effect on bullying, highlight the problems that remain, and propose solutions for these lingering issues. Part III will more thoroughly discuss the issue of trademark baiting, the safeguards that are currently in place to prevent such baiting by smaller firms, the ineffectiveness and insufficiency of these current measures to discourage baiting, the potential baiting-related dangers created by the PTO's proposed anti-bullying measures, and proposals for remedies that the PTO can work to establish to stem the tide of trademark baiting.

I. THE CURRENT STATE OF TRADEMARK ENFORCEMENT

With hundreds of thousands of trademarks being registered with the PTO every year,[27] and countless more gaining common law protection through use in commerce,[28] it is virtually unavoidable that cases of mark infringement and dilution will arise. Because owners have a duty to police others' use of these protected marks,[29] when these cases do arise, owners must stop the infringing or dilutive use in order to avoid losing their exclusive right in the mark.[30] This Part will begin by outlining the options

27. U.S. PATENT & TRADEMARK OFFICE, 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 142 (2010) (demonstrating that, including both new registrations and renewals of existing registrations, the Patent and Trademark Office (PTO) has approved more than 100,000 registrations each year since 1997).

28. *See* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 416 (1916) (affirming that common law trademark protection "'extends to every market where the trader's goods have become known and identified by his use of the mark'" (quoting Hanover Star Milling Co. v. Allen & Wheeler Co., 208 F. 513, 519 (7th Cir. 1913))).

29. *See* Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 766 (C.C.P.A. 1982) (asserting that failure to police infringing uses of a firm's mark can cause it to lose its distinctiveness and status as a clear source identifier).

30. *But see id.* (cautioning that while a mark owner does have a duty to protect against others' use of the protected mark, "an owner is not required to act immediately against every possibly infringing use to avoid a holding of abandonment").

available to mark owners to assist them in this policing process and will then describe these options' shortcomings, as applied today.

A. Pre-Litigation Policing Options

Often the first step that firms take in policing marks they believe are being infringed or diluted is to send the offending firm a cease-and-desist letter. These letters, which can take a number of forms,[31] alert the accused infringer to its improper use of the protected mark and demand one or more measures the mark owner believes are necessary to end the infringement and remedy the damage caused by the improper use of the mark.[32] The mark owner then generally allows the firm a period in which to comply with its demands and threatens litigation should the firm refuse or fail to do so.[33]

Due to a number of factors, these letters are often all that is necessary to end and remedy the infringing or dilutive use of the protected mark. First, many parties—especially small business owners—are unaware that they are infringing another's mark.[34] In many of these cases, once a mistake is

31. While there is no standard form to which these letters must adhere, many law firms and organizations have offered examples and templates that drafters can follow. *See, e.g.*, LAW OFFICE OF BAMBI FAIVRE WALTERS, PC, *Example Trademark Cease & Desist Letter*, http://www.patent-trademark-law.com/trademarks/trademark-infringement-dilution/trademark-cease-desist-letter/ (last visited Nov. 30, 2012) (depicting a cease-and-desist letter sent from Tiffany & Co. to Digg, Inc.); Charles Runyan, *Sample Cease & Desist Letter to Send to a Domain Name Owner Whose Domain Name Is Infringing on a Trademark*, KEYTLAW, http://keytlaw.com/urls/c&d.htm (last visited Nov. 30, 2012) (providing a sample cease-and-desist letter for domain name infringement).

32. *See, e.g.*, Grinvald, *supra* note 7, at 628–29 (highlighting that firms may also demand compensation for attorney's fees in the text of cease-and-desist letters); Letter from Fox Rothschild, LLP on behalf of Spin Media, LLC, to Twitter user @spin (May 20, 2011), *available at* http://www.chillingeffects.org/trademark/notice.cgi?NoticeID=85729 (demanding cessation of the use of the Twitter handle @spin within eleven days of the drafting of the letter and threatening "to take whatever additional steps are necessary to protect [Spin Magazine's] trademark and URL rights" if the recipient should fail to comply).

33. As with the form of the letter, there is no standard amount of time that firms need offer the accused infringer to comply with the terms of the letter. *Compare* Letter from Fox Rothschild, *supra* note 32 (affording @spin eleven days to comply), *and* Letter from Shiseido Corp. to unnamed recipient (Aug. 3, 2010), *available at* http://www.chillingeffects.org/trademark/notice.cgi?NoticeID=154920 (requiring confirmation of compliance within nine days of the drafting of the letter), *with* Letter from P. Christopher Music to unnamed recipient (Dec. 21, 2011), *available at* http://www.chillingeffects.org/trademark/notice.cgi?NoticeID=195088 (permitting twenty-six days for the website owner to remove all references to the infringed trademark).

34. Most small business owners have little, if any legal training. In fact, the majority of self-employed individuals have undertaken no graduate education and only a small percentage have received a professional degree. *See* Chad Moutray, *Baccalaureate Education*

brought to an infringer's attention, the party is willing to relinquish the mark without contest.[35] Alternatively, firms may feel that they have no choice but to comply with the letter's demands, whether or not they are actually willing to admit that they are improperly using the mark.[36] As will be discussed in more detail below, business owners lacking formal legal training may be unable to discern legitimate claims from baseless threats and may be unaware of possible protections and options available to them should they refuse to concede.[37]

In cases where the infringing firm is unwilling to fully comply with the demands of the cease-and-desist letter but is nonetheless open to resolving the issue without litigation, firms may work to enter into a settlement agreement with the aggrieved firm.[38] While these agreements do often require legal assistance, the cost is generally far less than litigation and they resolve the matter much more quickly.[39] Further, settlement agreements generally provide the added benefit of being confidential.[40] This confidentiality can save the infringing firm the embarrassment of a prolonged lawsuit and allows it to control the public relations and marketing ramifications of switching to a new mark.[41]

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and the Employment Decision: Self-Employment and the Class of 1993 1, 30 (Office of Advocacy, U.S. Small Bus. Admin., Working Paper No. 333), *available at* http://archive.sba.gov/advo/research/rs333tot.pdf (indicating that 63.3% of self-employed respondents had no graduate enrollment while only 8.3% had received a professional degree and only 1.3% had received a doctoral degree).

35. *Cf.* Grinvald, *supra* note 7, at 654 (positing that if a company with unlimited monetary resources were faced with an infringement suit, it would likely accept litigation rather than simply comply with the accuser's demands, but that in reality most businesses—especially small businesses—are unable to risk the consequences of this tactic).

36. *See id.* at 628–29 (explaining that the recipients of these letters are often intimidated since the letters are generally sent from the accuser's attorney and often contain "legalese," numerous case citations purporting to back the claim, and demands ranging from immediate compliance to destruction of infringing property to payment of attorney's fees).

37. *See infra* Part II.A.

38. *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 874–75 (2007) (outlining the economic theory behind why many cases settle before reaching litigation).

39. *See id.* (explaining that the threat of additional costs a party would incur from litigation is often sufficient motivation to settle a claim before it reaches that point).

40. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994) (affirming that Federal Rule of Civil Procedure 41 "does not . . . empower a . . . court to attach conditions to the parties' stipulation of dismissal"). This includes the parties' agreement as to whether the terms of the settlement will be disclosed. *Id.*

41. *See* Moss, *supra* note 38, at 870 (highlighting the arguments against the continued use of confidential settlements stemming from cases "beginning with allegations of grievous social harm but ending with the legal equivalent of 'never mind,'" including that they permit the parties to avoid public dissemination of their wrongdoing).

B. Litigation Policing Options

There remain times, however, when firms are unable to resolve their differences through anything short of litigation. In cases where firms have registered, or are attempting to register, their marks, parties that believe that the mark in question infringes on their established marks can bring a claim to the PTO's Trademark Trial and Appeal Board (TTAB).[42] These proceedings lack some of the formality of civil litigation[43] and often provide a less expensive resolution.[44] The TTAB, however, holds only the power to control the status of a mark on the registry.[45] It is not able to rule on whether the challenged mark's owner may be subject to civil or criminal liability.[46]

Because of the limitations on the scope of the TTAB's jurisdiction and power, and because so many trademarks are never registered with the PTO, civil litigation is also available as a means of achieving legal and equitable relief against an infringer.[47] Courts finding infringement or dilution liability have the ability to impose a number of remedies, depending on the nature and severity of the violation.[48]

There are a number of reasons, however, why civil litigation is unattractive to both parties in the trademark context. Most prominently, civil litigation—from the filing of a complaint to disposition—is often a lengthy process.[49] This is especially true in trademark cases, due to the fact-

42. *See* U.S. PATENT & TRADEMARK OFFICE, TRADEMARK TRIAL & APPEAL BOARD MANUAL OF PROCEDURE § 102.02 (2011) [hereinafter TBMP] (outlining the four types of inter partes proceedings over which the Trademark Trial and Appeal Board (TTAB) has jurisdiction).

43. *See id.* § 102.03 (describing the various stages of Board proceedings and highlighting the differences, including the lack of in-person testimony, between TTAB proceedings and those taking place in federal district courts).

44. *See, e.g.*, Frito-Lay N. Am. Inc. v. Princeton Vanguard LLC, 100 U.S.P.Q.2d (BNA) 1904, 1907 (T.T.A.B. 2011) (limiting the use of electronic discovery in the majority of TTAB cases due to its cost generally outweighing its benefits in cases with such limited scope as those most often before the TTAB).

45. TBMP, *supra* note 42, § 102.01 ("The Board is empowered to determine only the right to register. The Board is not authorized to determine the right to use, nor may it decide broader questions of infringement or unfair competition." (footnote omitted)).

46. *Id.*

47. Lanham Act, 15 U.S.C. § 1121(a) (2006).

48. *Id.* § 1114.

49. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR, 175–77 (2010) [hereinafter JUDICIAL BUSINESS REPORT], *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (depicting the median length of a civil case in federal district court that proceeds through trial as being 22.9 months). This figure does not take into account the length of time to file and argue subsequent appeals.

specific nature of infringement and dilution claims.[50] This length of time can be damaging to firms not only in terms of the cost of legal fees and expenses[51] but also in terms of the uncertainty surrounding their use of the marks in question. Due to the substantial investment that can go into creating and establishing a mark,[52] firms want to be sure they will be permitted to continue using it before allocating any further funding toward creating and building consumer recognition and power of the mark.[53]

Due to these factors, although the number of infringement and dilution suits brought in the United States on an annual basis continues to rise,[54] the number of these cases that proceed to trial and actually reach disposition during or after that trial remains extremely small.[55]

C. Shortcomings of Current Policing Options

While the range of options available for firms seeking to police third parties' use of established marks is sufficient to resolve most disputes, these alternatives, coupled with the requirements imposed by the Lanham Act,[56] do have a number of shortcomings that result in problems for both the owners of protected marks and the owners of identical or similar marks. Despite Congress's realization of this fact and its attempt to investigate

50. *See, e.g.*, Polaroid Corp. v. Polarad Elecs. Corp., 287 F. Supp. 2d 492, 495 (2d Cir. 1961) (listing eight factors the Second Circuit will consider in deciding whether a competing firm's use of a protected mark constitutes infringement). Each circuit court of appeals has its own similarly lengthy list of factors it uses to analyze infringement claims. *See* JANE C. GINSBURG, JESSICA LITMAN & MARY L. KEVLIN, TRADEMARK AND UNFAIR COMPETITION LAW 334 (4th ed. 2007).

51. *See* Grinvald, *supra* note 7, at 647 (quoting a small business owner on the extreme cost of defending an infringement suit, and the damage it could do to his brand and the success of his business).

52. *See, e.g.*, Martin Zwilling, *10 Rules for Picking a Company Name*, CNN MONEY (Dec. 15, 2011, 9:28 AM), http://finance.fortune.cnn.com/2011/12/15/10-rules-for-picking-a-company-name/ (mentioning two firms that charge $1 million to work with new business owners to develop an ideal brand name).

53. *See* Parija Kavilanz, *Trademark Wars Heat Up. Be Ready.*, CNN MONEY (Dec. 1, 2011, 11:50 AM), http://money.cnn.com/2011/12/01/smallbusiness/trademark/index.htm (mentioning the importance of choosing a unique brand and policing and protecting the mark once established).

54. *See* Port, *supra* note 6, at 618 (depicting that the number of initial claims of infringement have risen from just 129 in 1947 to 3,636 in 2006).

55. *See id.* at 619 (showing that the percentage of trademark cases that proceed to trial fell from a high of 24% in 1947 to a low of 1.3% in 2006); *see also* JUDICIAL BUSINESS REPORT, *supra* note 49, at 170 (indicating that only 1.5% of trademark cases terminated between September 30, 2009, and September 30, 2010, proceeded to trial).

56. 15 U.S.C. §§ 1051–1127 (2006).

effective remedies,[57] the PTO's failure to recognize the prevalence of these shortcomings has effectively allowed them to persist.

Engaging in litigation, entering into settlement negotiations, drafting and following up on cease-and-desist letters, registering a mark, and even periodically searching for infringing marks can be expensive endeavors.[58] The assistance of counsel is recommended for most of these activities, further increasing the cost to the policing firm.[59] Because of this, many firms, especially those without a large amount of expendable capital, may be unable to sufficiently police their marks. This constraint could lead to a risk of the firm losing its exclusive rights to the mark.[60]

Conversely, the requirement that firms police their marks also leads some successful firms to over-enforce their trademark rights.[61] While many infringement and dilution claims have at least a degree of merit—especially given the subjective nature of these claims and the threats posed by failing to adequately curb improper uses of identical or similar marks—this duty to police can also lead firms to make accusations of infringment in cases where reasonable parties analyzing the case would find no valid claim.[62]

Over-enforcement can lead to a number of issues that threaten the legitimacy of trademark law in the United States.[63] This Comment, however, focuses on only two of these issues—trademark bullying and trademark baiting—and the PTO's response, or lack thereof, to them.

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57. *See* 156 CONG. REC. 349 (2010) (statement of Sen. Patrick Leahy) (asserting the necessity of a study to determine ways through which "the current system can better protect small businesses from abuses of the trademark system by larger corporations").

58. *See* Kavilanz, *supra* note 53 (advocating that companies pay for trademark searches, hire a lawyer, register a mark with the PTO, and actively police others' use of the mark, but recognizing that these actions come at an expense, especially to small business owners).

59. *See* TBMP, *supra* note 42, § 114.01 ("[I]t is strongly recommended that an attorney familiar with trademark law represent a party."); *see also* Letter from J. David Sams, Chief Admin. Trademark J., TTAB, to Leo Stoller (July 14, 2006), *available at* http://www.oblon.com/sites/default/files/news/320.pdf (requiring that Mr. Stoller be represented by counsel in future TTAB proceedings because it had already been strongly recommended in the TBMP, and Mr. Stoller had abused his privilege of self-representation).

60. *See* Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 766 (C.C.P.A. 1982) (confirming that a trademark's distinctiveness and significance as a mark can be lost if its owner fails to adequately police).

61. *See* Port, *supra* note 6, at 589 (arguing that many trademark owners are using the duty to police to attempt to effectively expand their rights as mark owners and prevent entry into the market by potential competitors).

62. *See id.* (positing that infringement cases "are almost never prosecuted to a conclusion on their merits. In fact, if prosecuted to a trial on their merits, the trademark holder/plaintiff would likely lose because they are not very meritorious claims").

63. *See generally* Port, *supra* note 6 (opining that the over-policing of trademarks is leading to an unsustainable expansion of trademark rights under the Lanham Act).

II. THE PTO'S RESPONSE TO OVERZEALOUS TRADEMARK ENFORCEMENT

Recognizing that fair and effective trademark enforcement is beneficial to both businesses and consumers,[64] the 111th Congress passed the Trademark Technical and Conforming Amendment Act of 2010.[65] Focused on the growing problem of over-enforcement of trademark rights, Congress sought information from the DOC on its recommendations to curb overzealous infringement policing while simultaneously "ensuring that legitimate trademark infringement actions are handled efficiently and expeditiously by the courts."[66] The DOC was given one year to report its findings to Congress.[67]

A. Trademark Litigation Tactics Report

In conducting its research, the PTO, which had been tasked with compiling this report by the DOC, recognized that much of the data it sought was unavailable in a readily accessible format.[68] As such, the scope of its research instead centered on the receipt of comments from practitioners, academics, business owners, and other interested parties.[69] These individuals and groups were encouraged to respond with both their thoughts and experiences on the subject and their recommendations for solutions to prevent the issue going forward.[70] The PTO, with the assistance of the U.S. Commercial Service, also held a roundtable on trademark litigation tactics shortly before the Tactics Report was released to gather further feedback.[71]

In addition to the comments received from participants at the

64. *See* 156 CONG. REC. 349 (2010) (statement of Sen. Patrick Leahy) ("Trademark protection is critical both for businesses that have invested in creating a reliable product, and for consumers who trust a 'brand name' product to be safe and of high quality.").

65. Pub. L. No. 111-146, 124 Stat. 66, 66–70 (2010).

66. 156 CONG. REC. 349 (2010) (statement of Sen. Patrick Leahy).

67. Pub. L. No. 111-146, 124 Stat. 66, 69–70.

68. *See* TACTICS REPORT, *supra* note 17, at 15 (recognizing that only 1.5% of trademark cases reach trial and that, for the cases that are resolved before that point, little information is ever made public).

69. *See id.* at 15–17 (outlining the PTO's outreach efforts and listing twelve specific questions it asked commenters to address); *see also Request for Comments: Trademark Litigation Tactics*, U.S. PATENT & TRADEMARK OFFICE (last modified Feb. 7, 2011, 2:41 PM) http://www.uspto.gov/trademarks/notices/litigation_tactics.jsp (announcing the request for comments publicly on the PTO website and listing the twelve question prompts).

70. *See* TACTICS REPORT, *supra* note 17, at 16–17.

71. *See id.* at 16 (mentioning that a second roundtable, to be held in conjunction with the U.S. Small Business Administration's Office of Advocacy, was scheduled but later cancelled "due to a lack of participant interest").

roundtable, the PTO received comments from seventy-nine interested parties.[72] These remarks ranged from those believing that some firms exploited trademark rights and that reforms were necessary[73] to those arguing that what had been perceived as bullying was actually just firms rightfully exercising their duty to police their marks.[74]

Given the wide array of responses, and the sparsity of concrete data to support them, the PTO ultimately concluded that the feedback "may be better viewed as anecdotal."[75] Thus, it reasoned, bullying must not be a serious enough problem to warrant increased regulation.[76] What the PTO attempted to gain from these comments, it seems, was not only these

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72. *See id.* at 18 (providing that thirty-three of the responses were from small business owners, thirteen from attorneys, four from professors, two from attorneys on behalf of small business owners, four from intellectual property organizations, and twenty-three from other interested parties).

73. *See, e.g.*, Erik M. Pelton, *Comments on "Small Business Study" by the U.S. Patent and Trademark Office*, IPELTON BLOG (Jan. 10, 2011), http://www.erikpelton.com/2011/01/10/bullies-comments/ (focusing specifically on problems in the TTAB system that work to the disadvantage of small business owners and proposing solutions to level the playing field).

74. *See, e.g.*, Letter from Douglas K. Norman, President, Intellectual Prop. Owners Ass'n, to Hon. David Kappos, Under Sec'y of Commerce for Intellectual Prop. & Dir. of the USPTO (Jan. 7, 2011), *available at* http://www.ipo.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=28192 (insisting that most infringement cases are just businesses validly seeking to protect their marks and thus bullying is not prevalent enough to necessitate PTO regulation); Letter from Alan C. Drewsen, Exec. Dir., Int'l Trademark Ass'n, to Hon. David Kappos, Under Sec'y of Commerce for Intellectual Prop. & Dir. of the USPTO (Jan. 4, 2011), *available at* http://www.inta.org/Advocacy/Documents/January42011TMLitigationTactics.pdf (urging that trademark owners must be able to zealously police their marks and that bullying is not currently a significant problem, but warning that new regulations could cause new problems if they restrict owners' ability to police their marks); *see also* Letter from Marylee Jenkins, Chair, Am. Bar Ass'n Section of Intellectual Prop. Law (ABA–IPL), to Hon. David Kappos, Under Sec'y of Commerce for Intellectual Prop. & Dir. of the USPTO (Feb. 4, 2011), *available at* http://meetings.abanet.org/webupload/commupload/PT020100/otherlinks_files/Ltr-Survey_Resp-TM-Bullying.pdf (positing that because companies of all sizes can face opponents attempting to exceed their rights as a mark owner and because bullying occurs in numerous areas of civil litigation, handling of the issue of trademark bullying should be left to the judiciary to decide on a case-by-case basis); *cf.* Letter from Q. Todd Dickinson, Exec. Dir., Am. Intellectual Prop. L. Ass'n, to Hon. David J. Kappos, Under Sec'y of Commerce for Intellectual Prop. & Dir. of the USPTO (Jan. 7, 2011), *available at* http://www.aipla.org/advocacy/executive/2011/Documents/AIPLA%20Comments%20to%20UPSTO%20on%20TrademarkLitigationTactics-01.7.11.pdf (reasoning that the primary basis of trademark law is consumer protection and that regulations aimed at preventing bullying may actually lead to an increase in consumer confusion).

75. TACTICS REPORT, *supra* note 17, at 18.

76. *See id.* (citing a lack of evidence indicating "whether and to what extent [bullying] is a significant problem").

parties' personal experiences, but also their actual evidence that bullying is, in fact, a widespread problem.[77] What this failed to recognize, however, is that commenters likely faced the same—if not greater—obstacles in gathering data as the PTO experienced when it attempted to do so.[78]

Despite the PTO's contention that bullying was not a significant issue, it nonetheless offered three recommendations that it believed would be sufficient to quell any further bullying complaints.[79] To prevent firms from enforcing their trademark rights to a greater degree than that afforded them under the Lanham Act, the PTO recommended offering continuing legal education programs for trademark attorneys to better inform them how to properly police their clients' marks.[80] The PTO further recommended similar education initiatives geared toward small business owners and individuals to better inform them of the requirements of trademark use, how they should go about responding to cease-and-desist letters and litigation threats, and resources available to assist them.[81]

Finally, the PTO acknowledged that most current safeguards against bullying take effect only at the litigation stage[82] and that the inability to afford an attorney is often cited as a reason for not proceeding to litigation to defend use of a mark.[83] In light of this, the PTO recommended reaching out to private sector trademark attorneys to encourage them to take on representation of more small businesses and individuals on a pro bono basis.[84] Since an accused's willingness to engage in litigation is often enough for trademark bullies to withdraw their complaints,[85] the PTO's thought was that providing bullied firms with free or low-cost attorneys would make fighting infringement claims a more realistic option.[86]

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77. *See id.*

78. The PTO, in its report to Congress, acknowledged the lack of available information relating to the vast majority of trademark cases. *See id.* at 15. If the federal government—with a year to gather data—was unable to track down concrete statistics, it does not seem unreasonable that private parties would have had the same or greater difficulty in doing so.

79. *See id.* at 26 (affirming its belief that current safeguards should be sufficient to prevent trademark bullying but nonetheless advocating increased education initiatives and outreach efforts to private sector attorneys).

80. *See id.* at 27–28 (conceding that some trademark attorneys may mistakenly believe that proper policing requires preventing and ending all potential infringement against the mark).

81. *Id.* at 28.

82. *Id.* at 26.

83. *Id.*

84. *Id.* at 26–27.

85. *See id.* (reasoning that often the only reason small businesses refrain from fighting clearly frivolous claims is their inability to afford competent representation and their inability to understand and argue the relevant points of trademark law themselves).

86. *Id.* at 27.

B. *Remaining Vulnerabilities in the Trademark Bullying Prevention System*

When Congress first called for this study on the prevalence of bullying in the trademark arena, some commentators had high expectations for the report that would result and its potential to effect substantive change.[87] Upon review of that report, however, while the PTO's willingness to establish increased safeguards to help ensure fair enforcement of Lanham Act rights is admirable, questions ultimately remain about the effectiveness and practicality of the Office's recommendations. Primarily, there is no evidence that the PTO's proposed outreach efforts will increase the number of trademark attorneys willing to take on a significant volume of pro bono cases.[88] Because without these attorneys willing to assist small business owners the sanctions and penalties imposed against bullies during litigation remain out of reach in most cases,[89] they can no longer be viewed as viable remedies.

Further, even if the PTO is successful in convincing attorneys to take on these cases, clients may still find themselves unable to fully defend themselves against larger firms' claims. The average attorney who engages in pro bono work takes on only about forty hours of such work per year.[90] Given the prolonged and fact-specific nature of most infringement cases, while these attorneys might be able to provide their clients with valuable advice on how to address the claims, they likely will not be willing or able to see their client through lengthy litigation. These attorneys may be able to more adequately respond to cease-and-desist letters, but they may encourage settlement rather than fully engaging the bully in court.[91]

The educational measures proposed by the PTO introduce their own

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87. *See, e.g.*, Sara Marie Andrzejewski, Note, *"Leave Little Guys Alone!": Protecting Small Businesses from Overly Litigious Corporations and Trademark Infringement Suits*, 19 J. INTELL. PROP. L. 117, 141 (2011) (expressing optimism that the report, "while a seemingly small step, may put into motion meaningful reform" to alleviate the issue of trademark bullying).

88. *See* ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 8, 10, 12–13 (2009) [hereinafter PRO BONO REPORT] (reporting that while 73% of attorneys engaged in some degree of pro bono work during the prior year, most believe that provision of these services should be limited to non-profit organizations and individuals, and attorneys are able to take on only a limited amount of such work).

89. *See* JUDICIAL BUSINESS REPORT, *supra* note 49, at 168–71 (indicating that only 1.5% of trademark cases proceed to trial).

90. *See* PRO BONO REPORT, *supra* note 88, at 12–13 (placing the average amount of pro bono work undertaken at forty-one hours annually).

91. *See, e.g.*, Pelton, *supra* note 73 (indicating that even paid attorneys recognize it is often more responsible for businesses to settle infringement cases because the prolonged nature of TTAB proceedings and litigation require higher expenditures of money than many firms are able to absorb).

issues as well. While better informing small business owners of their trademark rights is undoubtedly a beneficial initiative, if those owners are faced with the threat of unaffordable litigation upon receipt of a cease-and-desist letter,[92] this education is of little assistance. Efforts focused on providing trademark attorneys with more CLE opportunities may be equally ineffective. Evidence does not appear to indicate that these attorneys are acting in bad faith or failing to properly defend their clients' marks.[93] Instead, it simply appears that, because of the value of trademarks in today's economy,[94] they are erring on the side of caution when presented with a potentially competing use of their clients' mark.[95]

Finally, the current lack of accessible judicial remedies has led some commentators to recommend non-judicial responses to trademark bullying.[96] One of these ideas gaining increased use is the "shaming" of perceived bullies.[97] In this scenario, rather than defend against an infringement claim in court, a business or individual calls the public's attention to the mark owner's accusations using social media, traditional media, or some combination of the two.[98] While this tactic has the benefit of being much less expensive than litigation,[99] and has proven effective,[100] as will be discussed more below,[101] use of this technique should only be

92. *Id.*

93. *See, e.g.*, Letter from Marylee Jenkins, *supra* note 74 (providing results of an ABA–IPL study indicating that, in general, even firms that are accused of being bullies are acting only on a good faith belief that they are simply policing their marks).

94. *See, e.g.*, Suhejla Hoti, Michael McAleer & Daniel Slottje, *Intellectual Property Litigation Activity in the USA*, 20 J. ECON. SURV. 715, 715 (2006) (placing the value of the Coca-Cola brand at $72.5 billion and the value of the Microsoft brand at $70.5 billion).

95. *See* Letter from Alan C. Drewsen, *supra* note 74, at 2 ("[I]f a trademark owner fails to challenge use of a confusingly similar mark or a diluting mark, then it not only allows an encroachment on its trademark rights in that instance, but also opens the door for future third parties to do the same.").

96. *See, e.g.*, Grinvald, *supra* note 7, at 663–64 (endorsing the technique of "shaming trademark bullies"); Ronald Coleman, *Bully for Who?*, INTELL. PROP. MAG., Jan. 2011, at 10–11 (acknowledging the ability of small firms to retaliate in "extra-judicial and perhaps even unlawful" ways that could damage the large corporation without the expense of litigation).

97. *See generally* Grinvald, *supra* note 7.

98. *See id.* at 665–67 (outlining the process of shaming and the requirements for success).

99. *See id.* at 678 (reasoning that most shaming in today's society would take place through the Internet and social media, which provide inexpensive means of getting a message to the public).

100. *See id.* at 627 (providing the example of Rock Art Brewery, which was accused of infringement by Hansen Beverage Company and succeeded in negotiating an amicable settlement after an extensive shaming campaign).

101. *See infra* Part III.A.

embraced with reservation, as overly aggressive shaming can unfairly limit the legitimate rights of many mark owners.

C. Recommended Solutions to the Trademark Bullying Problem

While the recommendations set forth in the PTO's Tactics Report alone may be insufficient to fully eradicate the prevalence of trademark bullying, they may provide a suitable solution if supplemented by other prophylactic measures.[102] First, the PTO should work with lawmakers and practitioners to standardize the elements of cease-and-desist letters. Recipients of these letters frequently complain of the aggressive tone, prevalence of legalese, and litany of case citations used by many drafters.[103] When coupled with the short timeframes often afforded for compliance[104] and the recipients' lack of access to an attorney,[105] these letters frequently force recipients to acquiesce to even frivolous demands.[106] In light of this, the PTO should advocate for certain standards for these letters to level the playing field between the sides.[107] These standards should require firms to allow the recipients sufficient time to consult an attorney and discuss the best way to

102. Due to the limited jurisdiction and lack of rulemaking power afforded the PTO, the Office will likely need the assistance of Congress, the Judiciary, other influential parties, or any combination of the three to enact most of these measures. *See* 35 U.S.C. § 2(b)(2) (2006) (limiting the scope of the PTO's rulemaking power). Congress has already expressed its willingness to hear the PTO's thoughts on bullying, see 156 CONG. REC. 349 (2010) (statement of Sen. Patrick Leahy), so it seems feasible that it would remain open to the Office's recommendations regarding this and other related issues.

103. *See* Grinvald, *supra* note 7, at 648–49 (highlighting the aspects of many cease-and-desist letters that make them intimidating to recipients, especially when recipients are not familiar with trademark law).

104. *See id.* at 649 (arguing that the short timeframe for compliance extended by many firms provides insufficient time for the recipient to consult with an attorney before deciding how to proceed); *see also* sources cited *supra* note 33 (providing examples of letters offering as little as nine days to comply with a letter's demands).

105. *See* Grinvald, *supra* note 7, at 655–56 (explaining that most small business owners do not know or have access to a trademark attorney and that, even if they do, they likely will not be able to afford the attorney's services).

106. *See* William E. Ridgway, *Revitalizing the Doctrine of Trademark Misuse*, 21 BERKELEY TECH. L.J. 1547, 1569 (2006) (arguing that in the current trademark law landscape "trademark holders have every incentive to abuse this lawful tool [of sending cease-and-desist letters]: they can send cease-and-desist letters to anyone . . . and exaggerate or even lie about their rights or the potential repercussions").

107. The PTO has already recognized that cease-and-desist letters typically contain some or all of a standard set of elements. *See* TACTICS REPORT, *supra* note 17, at 10. It seems a logical next step to adopt these best practices as requirements. *See id.* at 27 (indicating that intellectual property bar associations may even already have best practices established). Doing so would have the additional advantage of making education of small business owners simpler.

proceed.[108] The PTO should further endorse a standard form for these letters[109] and work to ensure that recipients are able to share and potentially publicize these letters.[110] With free services available to assist unrepresented business owners with infringement claims,[111] if recipients of cease-and-desist letters are educated about their ability to publicize the letters they receive, accusers may think twice before sending letters based on questionable claims, and recipients may be able to gather advice from knowledgeable parties without incurring legal fees.[112] Once established, the PTO can include information on these new protections in their proposed education initiatives geared toward small businesses.

The PTO should further recommend both the development of current defenses to infringement and dilution claims and the establishment of new defenses to such claims.[113] First, established defenses, such as fair use and First Amendment protection, should receive greater recognition[114] and should be addressed by the courts before they delve into a full

108. This may be especially necessary if, as the PTO recommends, these parties are working with attorneys on a pro bono basis, since the attorney may not be able to address the concern as quickly.

109. *See* TACTICS REPORT, *supra* note 17, at 27 (considering the possibility of establishing best practices but not yet taking the idea as far as deciding on a standard form or template).

110. *See* Grinvald, *supra* note 7, at 681–82 (mentioning that some firms include warnings in cease-and-desist letters that the letters are protected by copyright, and therefore publicizing or sharing them with anyone else would constitute infringement); *see, e.g.*, Letter from Donald E. Morris to Justin E. Leonard (Sept. 21, 2007), *available at* http://www.citizen.org/documents/directbuycd.pdf. Courts have held that cease-and-desist letters—at least when already registered with the Copyright Office—are subject to copyright protection. *See, e.g.*, *In re* Subpoena Issued Pursuant to the Digital Millennium Copyright Act To: 43SB.com, LLC, 86 U.S.P.Q.2d (BNA) 1505, 1508 (D. Idaho 2007). However, whether publication of such letters by recipients may nonetheless be protected by a fair use defense remains unclear. Efforts to clarify this aspect of the law, including input from the PTO and the United States Copyright Office, would obviously be beneficial to recipients of such letters.

111. *See, e.g.*, CHILLING EFFECTS CLEARINGHOUSE, http://www.chillingeffects.org (last visited Nov. 30, 2012) (providing educational resources to firms that conduct business online relating to their First Amendment and intellectual property rights).

112. *See id.* (encouraging recipients to submit cease-and-desist letters for posting to the site's database and permitting practitioners and other aggrieved parties to post comments offering details of similar experiences and advice they would propose as a result).

113. As the PTO's Trademark Trial and Appeal Board's jurisdiction is limited to deciding the registrability of marks, see TBMP, *supra* note 42, § 102.01, the applicability of these proposals would be limited to court proceedings.

114. *See* Michael Grynberg, *Things Are Worse Than We Think: Trademark Defenses in a "Formalist" Age*, 24 BERKELEY TECH. L.J. 897, 914–15 (2009) (arguing that while current trademark standards of liability are "malleable[,] . . . traditional trademark defenses are comparatively rigid").

likelihood-of-confusion analysis.[115] If courts could quickly dispose of cases brought against firms using others' marks in legitimate, protected manners, the incentive for mark owners to bring such suits would be greatly diminished. Beyond that, the PTO should also investigate endorsing the revival of the oft-forgotten defense of trademark misuse. Misuse defenses are already employed in other intellectual property contexts.[116] The defense, which "originated in patent law[ ] as an analogue to the common-law doctrine of unclean hands,"[117] has also gained acceptance in copyright law.[118] In that context, it is generally employed in cases where a plaintiff asserts a claim of infringement "in a manner violative of the public policy embodied in the grant of a copyright."[119]

Similarly, a misuse defense in the trademark context could be introduced in cases where the defendant believes the plaintiff's claims are frivolous or abusive and could be another deterrent of over-aggressive policing behavior.[120] Given these remedies, coupled with existing safeguards and the recommendations set forth in the Tactics Report, the PTO should be able to fully remedy the problem of trademark bullying without forcing accused infringers to resort to self-help and non-judicial measures.

III. THE UNADDRESSED ISSUE OF TRADEMARK BAITING

Looking beyond the issue of trademark bullying, today's economy and the current landscape of trademark law have also permitted, and perhaps

115. *See* Grinvald, *supra* note 7, at 660 (criticizing the inefficiencies in current infringement defenses that prevent them from serving as the "screening mechanism[s]" they were designed to be (internal quotation marks omitted)).

116. *See id.* at 661–62 (describing the judicially recognized defense of misuse in the context of a copyright infringement claim); *see also* Ridgway, *supra* note 106, at 1550–53 (explaining that while the popularity of the misuse defense has waned in the patent context, it remains widely used in copyright law).

117. Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1301 (2008).

118. *Id.* at 1302 n.86 (highlighting the recent acceptance of the copyright misuse defense by Judge Richard Posner, a long-time critic of the idea).

119. Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990).

120. *See* Grinvald, *supra* note 7, at 661 ("Without robust defenses, small-business owners and individuals are easy prey for trademark bullies seeking to increase the strength and exclusivity of their trademarks."); Ridgway, *supra* note 106, at 1571 (critiquing the opinion in Northwestern Corp. v. Gabriel Mfg. Co., 48 U.S.P.Q.2d 1902, 1908–09 (N.D. Ill. 1998) that, while trademark misuse "may apply in situations in which the trademark owner 'somehow [does] violence to the public policy which establishes [the] trademark right' . . . this only occurs when trademark holders misrepresent their product" (alteration in original) (quoting *Nw. Corp.*, 48 U.S.P.Q.2d at 1908–09)). Ridgway argues that, "as a matter of logic, it is hard to see why misuse should stop at misrepresentation when other behaviors probably contravene trademark public policy as well." Ridgway, *supra* note 106, at 1571.

encouraged, another type of trademark rights abuse—trademark baiting. In a time when budget-trimming is in vogue and firms must closely monitor all expenditures,[121] fledgling businesses can save some of the marketing costs associated with building brand recognition by adopting names, logos, and slogans similar to those of well-known, established brands.[122] While this practice would normally be discouraged by anyone versed in the norms of trademark enforcement,[123] the increased public exposure to, and disgust toward, the issue of trademark bullying[124] has presented small businesses with the opportunity to accelerate the growth of their companies without concerning themselves with the infringement or dilution suit they will likely face as a result.

A. Definition of Trademark Baiting

Whereas trademark bullying occurs when established trademark-rights holders attempt to unfairly expand those rights through overly aggressive policing,[125] trademark baiting occurs when relatively unknown firms attempt to gain recognition and exposure by adopting, and subsequently exploiting, marks similar to those of larger, renowned companies.[126] The threat of this tactic has always been present in trademark law to some degree.[127] However, due to business owners' increased use of

121. *See, e.g.*, Lauren Tara LaCapra, *Morgan Stanley Beats Expectations with Cost Cuts*, REUTERS (Jan. 19, 2012, 5:06 PM), http://www.reuters.com/article/2012/01/19/us-morganstanley-idUSTRE80I0W920120119 (highlighting Morgan Stanley's budget-trimming measures but recognizing that the firm would like to cut some costs back even further).

122. *See, e.g.*, Emily Maltby, *Name Choices Spark Lawsuits*, WALL ST. J., June 24, 2010, at B13 (telling the story of Jimmy Winkelmann, creator of The South Butt clothing line, which was accused of infringement by the North Face).

123. *See, e.g.*, Baird, *supra* note 13 (stressing that business owners' counsel would generally discourage adopting a mark close to an already established, protected mark by asking them to "put the shoe on the other foot" and consider how they would feel if their mark were stolen (internal quotation marks omitted)).

124. *See, e.g.*, 156 CONG. REC. 349 (2010) (statement of Sen. Patrick Leahy) (decrying corporations "abusing the substantial rights Congress has granted them in their intellectual property to the detriment of small businesses").

125. *See* Grinvald, *supra* note 7, at 665–69 (explaining the concept of shaming in general and reasoning why it can be successful in the trademark context).

126. For the purposes of this Comment, "trademark baiters" include only those firms that act in bad faith in adopting another's established, protected mark. While those firms too naïve to realize what they are doing should not necessarily be exonerated, it can be assumed that they would be more likely to relinquish the mark without contest once the mistake is brought to their attention.

127. *See* Baird, *supra* note 13 (admitting that some business owners have always *considered* adopting infringing marks because of the potential perks of doing so).

nontraditional tactics to gain an edge over their competitors, and the changing landscape of trademark law, the ability of firms to achieve success in employing this tactic has reached an unprecedented level.[128]

In difficult economic times, small companies are more willing and more likely to look to new and creative means of improving exposure to, the reputation of, and demand for their products or services. At a time when more small businesses are closing their doors,[129] this resourcefulness may mean the difference between success and failure. In place of expensive traditional marketing channels, for instance, companies have instead begun relying more heavily on social and viral media to increase recognition of their brands and products.[130] This practice gives firms their desired exposure without incurring the significant cost of traditional advertising.[131]

The difficulties presented by today's economy have also increased the public's distrust of large corporations.[132] At a time when many Americans are struggling to make ends meet,[133] the news is riddled with stories of corporations experiencing record profits.[134] As such, the public is quick to

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128. *Id.*

129. *See* Dun & Bradstreet, THE STATE OF SMALL BUSINESS POST GREAT RECESSION: AN ANALYSIS OF SMALL BUSINESS BETWEEN 2007 AND 2011 (May 2011), http://www.dnbgov.com/pdf/DNB_SMB_Report_May2011.pdf (indicating that between 2007 and 2011 the rate of small businesses that failed in the United States increased by 40%).

130. *See* Michael A. Stelzner, *2011 Social Media Marketing Industry Report*, SOC. MEDIA EXAMINER, Apr. 2011, at 11 (reporting that 93% of interviewees acknowledged using social media to market their businesses), *available at* http://www.socialmediaexaminer.com/SocialMediaMarketingReport2011.pdf.

131. *See id.* at 16, 19 (highlighting that 88% of respondents indicated that social media marketing generated exposure for their businesses and that "a significant percentage of participants strongly agreed that overall marketing costs dropped when social media marketing was implemented").

132. *See, e.g.*, *Poll: Occupiers Fare Better Than Wall St.*, CBSNEWS (Nov. 7, 2011, 9:46 AM), http://www.cbsnews.com/8301-201_162-57319592/poll-occupiers-fare-better-than-wall-st/ (reporting on the results of a national poll that indicated that, while support for Occupy Wall Street protesters was declining, it still remained higher than the 16% of those surveyed that held a favorable opinion of large corporations).

133. *See, e.g.*, *Many Above Poverty Line Struggle to Make Ends Meet*, REUTERS (Nov. 22, 2011, 2:21 PM), http://www.reuters.com/article/2011/11/22/us-poverty-struggle-idUSTRE7AL25S20111122 ("Nearly half of all Americans lack economic security, meaning they live above the federal poverty threshold but still do not have enough money to cover housing, food, healthcare and other basic expenses, according to a survey of government and industry data.").

134. *See, e.g.*, Maureen Farrell, *Bank of America Shares Spike on Earnings*, CNN MONEY (Jan. 19, 2012, 1:11 PM), http://money.cnn.com/2012/01/19/markets/bofa_earnings/index.htm?hpt=hp_t3 (crediting the "gradually improving economy" for Bank of America exceeding investors' earnings expectations (internal quotation marks omitted)).

jump to the aid of a small business when it perceives that the firm faces a threat from a Goliath corporation.[135]

Coupled with these realities, changes in trademark law have simultaneously made trademark baiting a more attractive option for ambitious businesses. First, trademarks have become more valuable to companies than ever before.[136] Further, for famous marks, recent alleviations of the standard required to find trademark dilution have made it more enticing for mark owners to prevent even non-competing uses of identical or similar marks.[137] As such, to protect the value of these assets, mark owners are focused on policing and ensuring the exclusive use of their marks more than ever before.[138]

While this increase in policing may lead firms accused of infringement to claim that they are being bullied, it also heightens the likelihood of firms purposely adopting infringing or dilutive marks in order to bait the owner of the protected mark. Finally, with the inability of many small firms to gain access to competent legal assistance,[139] as discussed above, the use of shaming has become an increasingly popular remedy for small firms looking to maintain their marks in the face of an infringement claim by a larger firm.[140] All of these factors combined make the thought of baiting a large, powerful, well-known corporation into threatening trademark litigation an attractive proposition for firms looking to gain a new level of public exposure.

B. Current Preventative Measures and Remedies Regarding Baiting

To complicate matters further, there are currently very few safeguards in place to prevent this baiting behavior. The most obvious deterrent would

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135. *See* Grinvald, *supra* note 7, at 676 ("[E]ntrepreneurship, as opposed to 'corporate America,' may be viewed as the morally correct approach to business, since the entrepreneur is in many cases simply seeking to make a self-sustaining wage for herself and her family."). Grinvald further argues that in disputes between small businesses and large corporations, small businesses are often given the benefit of the doubt because "small businesses are generally assumed to be honest and morally righteous" and are often known on a more personal level within the community to which they cater. *Id.* at 675.

136. *See* Port, *supra* note 6, at 586 (mentioning the multi-billion dollar value of the Coca-Cola and Microsoft brand names).

137. *See generally* Sandra L. Rierson, *The Myth and Reality of Dilution*, 11 DUKE L. & TECH. REV. 212 (2012) (differentiating the original intent of the trademark dilution cause of action from the reality of how it is utilized today).

138. *See* Port, *supra* note 6, at 589 (describing firms' over-policing of protected marks).

139. *See* Ridgway, *supra* note 106, at 1548 (indicating that cease-and-desist letters "tend to compel compliance from non-infringing [firms] because ready access to a lawyer is a barrier the internet has failed to eliminate").

140. *See generally* Grinvald, *supra* note 7.

be the threat of litigation that companies would face for engaging in such behavior and the unsustainable expenses that would likely accompany fighting those charges.[141] Further, upon losing the case in court or entering into a settlement agreement, the company would need to develop a plan to maintain its clientele and reputation while likely starting over with a new name, logo, and insignia and carrying with it the stigma of being labeled an infringer. This too would come with sizeable expenses.[142]

While the threat of these complications and expenses should generally be sufficient to prevent baiting from being a serious consideration, the Lanham Act has an additional safeguard in place to further prevent both frivolous infringement claims and frivolous defenses of clear infractions. Section 35(a) of the Act permits a court to award attorney's fees to the prevailing party in "exceptional cases."[143] While the definition of what constitutes an exceptional case is a topic of debate,[144] the sheer amount of fees accrued in a typical trademark case[145] should be a sufficient deterrent for companies even considering instigating such litigation.[146]

C. Ineffectiveness of Current Measures

Despite the severe ramifications of the existing safeguards, they are ultimately insufficient to fully prevent baiting behavior in today's market. The main reason for this is that most of these remedies are available only when cases proceed to and through litigation. As discussed above, few trademark cases drag out this far.[147] Rather than be faced with the

141. *See* Hoti et al., *supra* note 94, at 715 (computing the cost of the average trademark litigation case at $600,000).

142. *See* Saleh Abdulaziz Alshebil, Consumer Perceptions of Rebranding: The Case of Logo Changes 2 (Aug. 2007) (unpublished Ph.D. dissertation, University of Texas at Arlington), *available at* http://dspace.uta.edu/bitstream/handle/10106/572/umi-uta-1769.pdf (discussing the various costs that a company must absorb when rebranding itself and providing the example of Esso, which spent more than $200 million when it changed its name to Exxon); *see also id.* at 35–37 (depicting the high degree of skepticism consumers often exhibit when faced with a company that has changed its branding).

143. 15 U.S.C. § 1117(a) (2006).

144. *See generally* Richard J. Leighton, *Awarding Attorneys' Fees in "Exceptional" Lanham Act Cases: A "Jumble" of "Murky" Law*, 102 TRADEMARK REP. 849 (2012) (highlighting the lack of legislative history surrounding the enactment of § 35(a) and the resulting incongruity of case law on the subject); Christopher P. Bussert, *Interpreting the "Exceptional Cases" Provision of Section 1117(a) of the Lanham Act: When an Award of Attorney's Fees Is Appropriate*, 92 TRADEMARK REP. 1118 (2002) (discussing the various interpretations of the "exceptional cases" standard).

145. *See supra* note 51 and accompanying text.

146. The TTAB also has the ability to impose sanctions on attorneys it believes are abusing its process. *See* 37 C.F.R. § 11.20 (2011).

147. *See supra* note 55 and accompanying text.

imposition of attorney's fees, for example, a firm can simply concede before trial and enter into a settlement agreement with its opponent.[148] Because they are only imposed at or after trial, and because firms are aware of this before deciding on a course of action, many of these remedies do not pose significant risks to those firms considering engaging in baiting behavior.

Along the same lines, the availability of pre-litigation settlements may make the idea of baiting even more enticing. Most settlement agreements in the trademark context are kept confidential.[149] This means that a baiter can adopt the infringing mark, gain the consumer exposure that comes with it, potentially attempt to shame the accusing firm (gaining even further exposure), and then, rather than face the consequences of infringing, simply settle with its accuser.[150] In this scenario, the baiting firm is not only never held fully accountable for its actions, but, due to the confidentiality of the agreement, is free to spin the switch to a new mark in whichever way is most beneficial to it.

Finally, because of the immediate, largely irreversible nature of shaming via social media, baiters can quickly[151] and severely damage the reputation of the baited firm before that firm even has an opportunity to defend itself. A simple post on Facebook, Twitter, YouTube, or even the company's own website can spread virally in a matter of minutes.[152] The viral effect of this technique can be further bolstered by the public's general trust in the morality of small companies and its skepticism toward the actions of large corporations.[153]

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148. *See* Grinvald, *supra* note 7, at 646–48 (depicting how easily small business owners can be coerced into settling due to the economic threat of prolonging the dispute).

149. *See supra* note 40 and accompanying text.

150. *See* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1458–59 (2006) (positing that in many cases "[t]he defendant has an incentive to settle secretly because it does not want information about the dispute to be publicized").

151. A recent study indicated that more than half of all American adults who use the Internet use Facebook every month. *See Facebook Reaches Majority of U.S. Web Users*, EMARKETER (Feb. 24, 2011), *available at* http://www.emarketer.com/(S(rt15q0euzflupcbj2u1lkpnp))/Article.aspx?R=1008247 (mentioning that 16.4 million American adults used Twitter on a monthly basis in 2010, as well). Usage of both social media sites was expected to expand in the proceeding years. *Id.*

152. *See, e.g.*, Adam Nason, *Timeline: Rock Art vs. Monster Energy*, BEERPULSE (Oct. 15, 2009, 3:17 PM), http://beerpulse.com/2009/10/timeline-rock-art-vs-monster-energy/ (describing the efforts of Rock Art Brewery to fend off a bullying attack from the makers of Monster energy drinks, including the success of a YouTube video posted by Rock Art's owner to state his case).

153. *See supra* notes 132, 135, and accompanying text.

D. The Potential for the PTO Bullying Recommendations to Exacerbate the Prevalence of Trademark Baiting

As mentioned above, the PTO, in researching the issue of trademark bullying, did not address trademark baiting or even request comments on the subject. However, the additional safeguards proposed by the PTO to curb trademark bullying not only do little to deter firms from baiting, but they also may unintentionally make the activity even more attractive. If the PTO, as it proposed, is able to recruit more attorneys to take on infringement cases on a pro bono basis, for example,[154] firms may feel better protected against the threat of expensive litigation. If the firm knows it has free or low-cost legal assistance waiting in the wings should it find itself faced with an infringement or dilution suit, it may find the idea of baiting more alluring than if it would have to foot the bill for such litigation on its own.

The increased efforts to inform small business owners about the trademark process and the rights of mark owners[155] could similarly spur more firms to develop the idea of engaging in trademark baiting. "Creative" small business owners may begin to more frequently view this as an easily employable tactic to build their businesses once they are educated in the trademark process in general and specifically in the prevalence and acceptance of shaming trademark bullies.[156]

E. Recommendations to Eliminate Trademark Baiting

While the current safeguards against unfair trademark tactics and the recommendations proposed by the PTO to curb trademark bullying are insufficient to fully deter firms from engaging in trademark baiting, the PTO can take additional steps that should be sufficient to make baiting an unattractive enough option so as to prevent firms from seriously considering it. These recommendations should provide victims of baiting with the security of knowing that they can maintain the reputation and goodwill of their marks without being faced with undue financial burdens or unwarranted public relations nightmares.[157]

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154. *See* TACTICS REPORT, *supra* note 17, at 26–27.

155. *See id.* at 28.

156. *Contra* Grinvald, *supra* note 7, at 680–81, 687–88 (acknowledging the possibility that some firms could engage in "overzealous . . . shaming efforts" but dismissing the significance of the issue, arguing that judicial reprimands for such behavior, coupled with self-regulation by firms, should be sufficient to prevent firms from engaging in these tactics).

157. *See Brand Rehab: How Companies Can Restore a Tarnished Image*, KNOWLEDGE@WHARTON (Sept. 21, 2005) http://knowledge.wharton.upenn.edu/article.cfm?articleid=1279 (outlining the difficulties companies face in restoring their

First, the PTO could encourage the courts to expand the scope of preliminary injunctions issued against the infringing firm, not only preventing that firm from continuing its use of the mark in question but also preventing it from engaging in any conduct that would threaten the reputation of the infringed firm or the value of its brand or trademarks. The application for these injunctions could be filed contemporaneously with sending a cease-and-desist letter to the infringer and could ensure that the infringement will be addressed before the infringing firm can engage in a shaming campaign. While the legal backing that an injunction would provide the corporation may enhance its ability to prevail in infringement disputes, the high burden required to permit the issuance of such an injunction[158] would prevent corporations from using this safeguard recklessly as a means of even more effective trademark bullying.

Second, the PTO could recommend legislation that would allow for the award of damages resulting from shaming conduct's detrimental effect on the infringed firm's brand and reputation. Like damages for a defamation claim,[159] this remedy could be employed to repair the loss of goodwill and brand value caused by an infringing firm's conduct. This remedy would be most useful if it could be employed even in cases where the dispute never reaches the trial stage. While the availability of confidential settlements generally lessens the ramifications of infringing conduct and shaming, the potential for an award of damages should force firms to seriously reconsider engaging in such conduct.

Finally, the PTO could recommend that courts mandate a public apology or admission of baiting from firms found to have engaged in such conduct.[160] This approach has been proposed and employed as an equitable remedy in other areas of the law.[161] In the context of a

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reputations after a scandal or other event that diminishes the public's opinion of the firm).

158. *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

159. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974) (outlining the requirement of actual injury for an award of compensatory damages and limiting the award of punitive damages in defamation cases).

160. For TTAB proceedings, this could potentially be considered a "[c]ondition[] imposed with discipline" under 37 C.F.R. § 11.20(b) (2012). Something more would be necessary for it to apply in court. Another alternative would be to refuse to allow the settlement to be kept confidential. *See* Drahozal & Hines, *supra* note 150, at 1458 (explaining that some courts already refuse to keep settlements under seal and that some states refuse to allow confidential settlements, concluding that such secret agreements are "against public policy and unenforceable").

161. *See, e.g.*, Kit Chellel, *Apple Must Publish Notice Samsung Didn't Copy iPad in U.K.*,

defamation suit, for example, the award of damages may be limited to only the amount of actual injury incurred by the defamed party in cases where the liable party issues a timely retraction and apology.[162] While this falls short of a court-imposed mandate, by removing the possibility of punitive and other damages, the courts incentivize defaming parties to issue a retraction in a way that few would be able to resist.

In the trademark-baiting context, since the main benefit of engaging in such behavior is the inexpensive brand exposure, forcing a baiter to issue a public admission of guilt and an apology when it has acted in bad faith would likely undo any advantage the firm gained at the infringed firm's expense. Because this remedy may result in insurmountable, irreversible damage to the firm's brand, it should only be employed in extreme cases of clear and egregious malfeasance. However, even if rarely imposed, the presence of this remedy as a looming threat alone should make the idea of engaging in trademark baiting a sufficiently unattractive option so as to prevent firms from even considering it.

CONCLUSION

The current landscape of trademark law is open to numerous types of abusive behavior. While large firms seeking to eliminate or prevent the entry of competition may engage in overly aggressive policing of their established, valuable, and potentially famous trademarks, small, fledgling firms may specifically target those same marks and use them to gain a level of instant consumer exposure that no new, unique mark would permit. The advocacy of simple, inexpensive, and effective self-help remedies, such as shaming, by leaders in the trademark field, as well as the burdensome costs of litigation, makes the terrain even more volatile. While ambitious small businesses should never be bullied into relinquishing legitimate trademarks, neither should they have the option of building their businesses at the expense of an established firm.

BLOOMBERG (July 19, 2012, 5:29 AM), http://www.bloomberg.com/news/2012-07-18/apple-must-publish-notice-samsung-didn-t-copy-ipad-judge-says.html (reporting on a British court ruling in a patent dispute in which the court required Apple to post a disclaimer on its U.K. website and in local newspapers affirming that Samsung did not infringe on Apple's design patents for its iPad tablet computer). *See generally* Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (describing the power of apology as an equitable remedy in civil suits and specifically advocating for the use of such court-imposed apologies by government actors found liable for civil rights violations).

162. *See* John C. Martin, Comment, *The Role of Retraction in Defamation Suits*, 1993 U. CHI. LEGAL F. 293, 296–97 (reciting the history of common law and statutory limits on damages in defamation suits where the liable party has issued a timely retraction).

To date, the PTO seems unwilling to burden itself with remedying, or even seriously addressing, these issues. The insufficient recommendations set forth by the Office in its Trademark Litigation Tactics Report seem to evince this attitude. Despite the lack of consistent response it received to its recent study, however, the PTO should continue analyzing the issues of trademark bullying and baiting and develop proposals for real solutions and safeguards to help protect the rights trademark owners are afforded. Compared to other areas of intellectual property, trademark law often goes unnoticed. The PTO should seize the opportunity Congress's attention to this issue has presented and use it to take decisive action to alleviate the threat of abusive trademark litigation tactics by companies both large and small.

DEMYSTIFYING RISK ASSESSMENT: GIVING PRISONERS A SECOND CHANCE AT INDIVIDUALIZED COMMUNITY CONFINEMENT UNDER THE SECOND CHANCE ACT

JOHN SPYROS ALBANES*

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* J.D. Candidate, May 2013, American University Washington College of Law. B.A. History, May 2009, Cornell University. I wish to thank my loving family, the staff at the *Administrative Law Review*, and Professor Lubbers for all their advice and support.

INTRODUCTION

Federal agencies use "backdoor rulemaking" to circumvent the requirements of the Administrative Procedure Act (APA) to the point of abuse[1]: they issue guidance documents, memoranda, bulletins, circulars, and other nonlegislative rules to avoid laborious[2] notice-and-comment procedures.[3] These rules sometimes take the form of "spurious" rules, which may appear to be general policy statements but which agencies misuse to bind agency staff and the public.[4] Scholars have called on the courts to rein in such backdoor rulemaking,[5] going so far as to advocate substantive review of guidance documents.[6] The Judiciary appears to have taken notice, as many courts are scrutinizing these rules to ensure adherence to separation of powers principles.[7] And while some

1. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1317 (1992) [hereinafter Anthony, *Interpretive Rules*) (noting agencies' tendency to avoid judicial and public scrutiny by issuing "nonlegislative" rules). This Comment occasionally will use Professor Anthony's term *spurious rule*—a rule that does not interpret law and was not subject to notice-and-comment procedures but which the agency nevertheless treats as binding upon affected parties. *See generally* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 10 (1994) [hereinafter Anthony, *Lifting the Smog*).

2. *See* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 529–30 (1977) (noting that imposing a requirement of notice-and-comment rulemaking for guidance documents is generally rejected by agency staff members because of the delays and costs associated with such a requirement).

3. *See* Anthony, *Lifting the Smog*, *supra* note 1, at 3 n.8 (noting the tendency to avoid formal procedures).

4. *See* Anthony, *Interpretive Rules supra* note 1, at 1328–31 (explaining how agencies misuse such rules).

5. *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011) (reviewing various proposals to curb improper rulemaking).

6. *See generally id.*

7. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Law is made, without notice and comment, without public participation, and without publication . . . .

Id. But see Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for*

commentators bemoan the "ossification,"[8] or stagnation, that supposedly results from heightened judicial skepticism of agency action,[9] others are willing to take the risk to rein in spurious rules and create better systems.[10] Some even question whether a "hard look" at agency action creates significant ossification at all.[11] Whichever side of this debate one takes, at bottom it is the courts that must ascertain agency compliance with the APA.

This Comment explores the trend toward backdoor rulemaking in the context of one agency within the Department of Justice (DOJ): the Federal Bureau of Prisons (BOP or the Bureau). The Bureau has promulgated a binding informal policy based on a regulation that did little more than "parrot" the language of its enabling statute.[12] While BOP enforcement actions premised on this rule should be invalidated as arbitrary and capricious,[13] the courts have upheld them.[14] Thus, Bureau staff continues to interpret the statute on an ad hoc basis, a result Congress never intended.[15]

The enabling statute in question, the Second Chance Act (SCA or the Act), funded a national prisoner re-entry initiative to be implemented by

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an Essential Element, 53 ADMIN. L. REV. 803, 807 (2001) (criticizing the D.C. Circuit for invalidating agency guidance).

8. *Ossification*, as used by some commentators, is "a tendency toward or state of being molded into a rigid, conventional, sterile, or unimaginative condition." *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 821 (10th ed. 2000).

9. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–88 (1992) (describing the relative difficulty of rulemaking).

10. *See* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 682 (1996) (advocating hard-look review, a more searching form of judicial oversight of agency action).

11. *See* William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. Rev. 393, 396 (2000) (explaining that in the D.C. Circuit, most remanded agency action was able to "recover"), *cited in* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 535 n.266 (4th ed. 2006).

12. The regulation's language copied the language of the authorizing statute and should be afforded little deference under Supreme Court precedent. *See* Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006) (remarking that interpretations of regulations that use "parroting" statutory language do not receive "*Auer* deference"); *cf.* Auer v. Robbins, 519 U.S. 452, 461 (1997) (showing that agency interpretations of its own regulations are normally entitled to substantial deference).

13. *See, e.g.*, Anthony & Codevilla, *supra* note 10, at 671 n.18 (citing U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994)); *see also infra* Part III.B (analyzing *U.S. Tel. Ass'n*).

14. *See infra* Part II.A (describing decisions that have upheld the Federal Bureau of Prisons (BOP or the Bureau) actions).

15. *See infra* Part I.C (explaining Congress's intent in passing the Second Chance Act (SCA or the Act)).

BOP and DOJ.[16] The Act ordered BOP's director to issue regulations that would maximize all inmates' chances of successful reintegration.[17] To help achieve this ambitious goal, the SCA increased the maximum time that BOP could place inmates in halfway houses from six months to one year.[18] Instead of interpreting the Act, however, the Bureau, without soliciting advance public comment, issued a regulation that simply copied the statutory language[19] and published binding guidance documents that substantially restrict inmates' access to community confinement.[20] The informal policy is primarily comprised of two Bureau memoranda, issued in April and November 2008.[21] Even though the memoranda are practically

16. The BOP is directed, at a minimum, to assess and track each prisoner's skill level, give priority to high-risk offenders, and track prisoner re-entry needs. *See* 42 U.S.C. § 17541(a)(1)(D) (Supp. II 2009); 18 U.S.C. § 4042(a) (Supp. IV 2011) (requiring the creation of a skills development plan); 18 U.S.C. § 3621(b)(1)–(5) (2006 & Supp. II 2009) (delineating factors the Bureau must consider in determining the length of a prisoner's Resident Reentry Center (RRC) placement).

17. Second Chance Act of 2007, Pub. L. No. 110-199, § 251, 122 Stat. 657, 692, 693 (2008) (to be codified at 42 U.S.C. § 17555(c)(6)(C) (2012)) ("[The Bureau Director shall issue regulations] which shall ensure that placement in a community correctional facility by the Bureau of Prisons is . . . of sufficient duration to provide the greatest likelihood of successful reintegration . . . .").

18. *Compare* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 2009 (1984) (codified as amended at 18 U.S.C. § 3624) (pre-2008 amendment) (enumerating that pre-release community confinement is not to exceed six months of the last 10% of the inmate's sentence), *with* 18 U.S.C. § 3624(c)(1) (Supp. II 2009) (highlighting that pre-release community confinement placements are "not to exceed 12 months").

19. 73 Fed. Reg. 62,440, 62,441 (Oct. 21, 2008), *invalidated by* Sacora v. Thomas, No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

20. *See* U.S. SENTENCING COMM'N, REGIONAL HEARING ON THE STATE OF FEDERAL SENTENCING 9–10 (2009) [hereinafter U.S.S.C. ALTERNATIVES TO INCARCERATION] (statement of Harley G. Lappin, Director, Federal Bureau of Prisons) (acknowledging that the Act gives BOP increased pre-release placement authority but declining to give most offenders more than three-to-four months' time). For a thorough discussion of the SCA's statutory language in the context of BOP's pre-release policy, see S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235, 320 (2011) (recommending twelve-month pre-release community confinement and an exception to the mootness doctrine so that courts can hear more prisoners' claims on the merits).

21. *See* Memorandum from Joyce K. Conley, Assistant Dir., Corr. Programs Div., Fed. Bureau of Prisons, and Kathleen M. Kenney, Assistant Dir./Gen. Counsel, Fed. Bureau of Prisons, to Chief Exec. Officers, Inmate Requests for Transfer to Residential Reentry Centers (Nov. 14, 2008) [hereinafter BOP November 2008 Mem.] (on file with author); Memorandum from Joyce K. Conley, Assistant Dir., Corr. Programs Div., Fed. Bureau of Prisons, and Kathleen M. Kenney, Assistant Dir./Gen. Counsel, Fed. Bureau of Prisons, to Chief Exec. Officers, Pre-Release Residential Re-Entry Center Placements Following The Second Chance Act of 2007 (Apr. 14, 2008) (on file with author) [hereinafter BOP April

binding on the public, neither has gone through notice-and-comment rulemaking.[22] This backdoor rule in effect has enabled the Bureau to block Congress's effort to reduce recidivism.[23] Indeed, by one account, only 2% of BOP inmates have been placed in community confinement for more than six months.[24] BOP has not taken the steps necessary to achieve Congress's goal, and yet few courts have stepped in to force the Bureau's adherence to legislative intent,[25] leading to congressional oversight and resignation of BOP's director.[26]

In a rare example of judicial intervention, on June 16, 2010, the U.S. District Court for the District of Oregon invalidated BOP's parroting regulation (but not its memoranda) because the Bureau did not establish good cause to forgo advance notice-and-comment.[27] While the court enjoined the regulation's enforcement until BOP re-issued it after having provided notice and an opportunity for public comment, it did not find the Bureau's informal policy to be contrary to the SCA or the APA.[28] The Ninth Circuit affirmed.[29] On September 20, 2011, the Bureau published a

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2008 Mem.].

22. Apparently realizing its misstep, the Bureau issued another memorandum that no longer required regional director approval and adopted an "approach" of targeting high-risk offenders, but lacked useful guidance for staff about how the "approach" would work in practice. *See* Memorandum from D. Scott Dodrill, Assistant Dir. Corr. Programs Div., Fed. Bureau of Prisons, to Chief Exec. Officers, Revised Guidance for Residential Reentry Center (RRC) Placements (June 24, 2010) [hereinafter BOP June 2010 Mem.]. Moreover, the newest memorandum does not rescind the requirement of "unusual or extraordinary" circumstances. *See id.*

23. Correctional researchers had the following to say about institutional impediments to reforms:

> The environment of corrections is primarily a command and control, punishment-oriented culture. In this environment, rehabilitation is often a periphery goal, if it is supported at all. . . . [R]esistance to implementation is an anticipated challenge due to the perceived misalignment of these practices. . . . Resistance to change, while sometimes limited to a few individuals, is most likely to arise from an organizational culture that prefers the traditional way of doing things.

Jennifer Lerch et al., *Organizational Readiness in Corrections*, FED. PROBATION, June 2011, at 6 (citations omitted).

24. *See* Mitchell, *supra* note 20, at 301 n.399.

25. *See infra* Part II.A (reviewing judicial responses to BOP's memoranda).

26. *See infra* Part IV (describing Congress's Government Accountability Office BOP audit and former Director Lappin's possibly "for cause" resignation).

27. Sacora v. Thomas, No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011); *see also* Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006).

28. *Sacora*, 628 F.3d at 1068–70.

29. *Id.* at 1070. BOP did not appeal the district court's order that it reissue the interim rule using notice-and-comment rulemaking. *Id.* at 1065 n.6.

notice of a "new" regulation that reads exactly the same as the first one.[30] The Bureau has not predicted the final rule's likely publication date.[31]

This Comment recommends that courts force BOP's 2008 memoranda through notice-and-comment rulemaking to give the public its rightful say on the pre-release rule.[32] Once the Bureau has provided the public with a meaningful opportunity to comment, the resulting regulation, enlightened by modern correctional research,[33] should incorporate an offender risk-assessment instrument to determine future Resident Reentry Center (RRC) placements. In the final analysis, requiring rulemaking will better align BOP's policy with congressional intent and empirical data on recidivism and re-entry—an improvement that should pay dividends for law-abiding taxpayers and ex-offenders alike.

Part I reviews the legal backdrop to the Act's passage and explains the SCA's intent and purpose. Part II analyzes judicial responses to BOP's "interpretation" of the Act and argues that the Bureau's implementation of the SCA violates the APA and the Act itself. Part II also asserts that, given their unique expertise in sentencing decisions, courts should not defer to BOP's pre-release rule. Part III examines two cases that repudiated actions of the Federal Communications Commission and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and urges courts to send BOP's memoranda back to the Bureau for notice-and-comment rulemaking. Lastly, Part IV discusses executive and legislative responses to the Bureau's broader failure to enforce the SCA and recommends that BOP incorporate a risk-assessment instrument into its new regulation.

I. BACKGROUND

A. The Federal Bureau of Prisons and the Second Chance Act

BOP, directly or through its contract facilities, manages over 218,000 prisoners, about 9,000 of whom are confined in halfway houses; 5,800

30. Pre-Release Community Confinement, 76 Fed. Reg. 58,197 (proposed Sept. 20, 2011) (to be codified at 28 C.F.R. pt. 570).

31. *See* e-mail from BOP to author, July 18, 2012 ("The final rule on pre-release confinement is still in development. We are unable to project a publication date at this time.") (on file with author).

32. *See* 5 U.S.C. § 706(2)(D) (2006) ("[T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of [required] procedure . . . .").

33. Public participation is a foundation stone of agency action, even when agencies promulgate interpretive rules and guidance. *See* Asimow, *supra* note 2, at 575 (stating that the need for the public to provide agencies with relevant information on proposed informal rules, including guidance, is just as great as when agencies are issuing legislative rules).

inmates enter the federal correctional system annually.[34] Approximately 40% of inmates are serving sentences of ten years or more; about half for drug offenses; and 93% are male.[35] Despite longstanding criticism of prison overcrowding,[36] federal prisons are now over 35% above capacity.[37] And imprisonment comes at a price: in 2010 alone it cost taxpayers $28,284[38] to keep one federal inmate behind bars, while it cost 8.6% less[39] to confine the same prisoner in one of the Bureau's 175 RRCs,[40] also known as halfway houses or community correctional centers (CCCs).

According to BOP, "[RRCs] make it possible for ex-offenders to establish positive ties to the community gradually, while correctional staff supervises their activities during this important readjustment phase."[41] Indeed, community confinement can play an important role in reducing recidivism (or re-offending), as a shocking 60% of inmates re-offend within two years of release.[42] Yet today, only around 4% of inmates are housed in RRCs (during a transition period called pre-release community confinement)[43] before re-entering society.

In the face of this cycle of criminality,[44] all three branches of the Federal Government have sought to reduce recidivism by promoting programs centered on drug treatment, vocational training, and community

34. *See Weekly Population Report*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp#contract (last updated Nov. 29, 2012).

35. *See Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/facts.jsp (last updated Oct. 27, 2012).

36. *See, e.g.*, Costello v. Wainwright, 397 F. Supp. 2d 20, 38 (M.D. Fla. 1975) (concluding that overcrowding "ultimately disserve[s] the rehabilitative goals of the correctional system").

37. U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20, at 1.

38. By comparison, social services workers earn a median salary of $28,740. *See* BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/current/oes211093.htm (last modified Mar. 27, 2012).

39. *See* Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (Sept. 15, 2011).

40. *See Directory of Active Contracts: March 2010*, FED. BUREAU OF PRISONS, *available at* http://www.bop.gov/locations/cc/RRcontracts_0310.pdf (listing current RRCs).

41. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009 31, *available at* http://www.bop.gov/news/PDFs/sob09.pdf.

42. *See* Laura Knollenberg & Valerie A. Martin, *Community Reentry Following Prison: A Process Evaluation of the Accelerated Community Entry Program*, FED. PROBATION, Sept. 2008, at 54, 55 (stating how critical the period immediately following release is to offender outcomes).

43. *See Weekly Population Report*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp (last updated Nov. 29, 2012).

44. One out of every 99 Americans, and an astonishing 1 in 9 African-American men between the ages of 20 and 34 (approximately 11%), is imprisoned. *See* Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.: Inmate Population is Highest in the World*, N.Y. TIMES, Feb. 29, 2008, at A14.

confinement.[45] Judicial opinions,[46] legislative enactments,[47] and executive policy statements[48] indicate broad support for programs that will help offenders successfully reintegrate. Moreover, in an effort to create a smarter administrative state, in recent years the Executive Branch has urged agencies to justify their rules with current empirical research and to solicit public input.[49]

By the early 2000s, prison overcrowding coupled with little change in recidivism rates spurred Congress to pass the SCA.[50] Given the burgeoning

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45. *See* ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 163–64 (2008) (noting that DOJ established the Federal Reentry Courts in an effort to track the nearly 650,000 prisoners released yearly from state and federal prisons in the 1990s).

46. *See* Tapia v. United States, 131 S. Ct. 2382, 2392–93 (2011) (approving lower courts' discussion of rehabilitative programs during sentencing and encouraging judges to recommend that the BOP place prisoners in treatment programs, but not permitting courts to impose longer sentences "to enable an offender to complete a treatment program"); *see also* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010) (indicating that 44% of respondents believed split sentencing between imprisonment and community confinement should be made more available for certain crimes).

47. Second Chance Act of 2007, Pub. L. 110-199, 122 Stat. 657 (2008) (to be codified as amended in 42 U.S.C. § 17501).

48. Keith B. Richburg, *States Seek Less Costly Substitutes for Prison: Treatment, Parole Are Gaining Favor*, WASH. POST, July 13, 2009, at A4 ("President Obama has asked Congress for more than $200 million for prisoner-reentry programs."). DOJ recently committed another $58 million to reentry programs following significant reductions in many states' recidivism rates. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Announces $58 Million to Improve Reentry Outcomes (Oct. 1, 2012), *available at* http://www.justice.gov/opa/pr/2012/October/12-ag-1185.html. And in an earlier example of executive action, in January 2011, Attorney General Eric Holder convened the first annual meeting of the Reentry Council, a cabinet-level group whose mission it is to reduce recidivism, save taxpayer dollars, and make communities safer. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Eric Holder Convenes Inaugural Cabinet-Level Reentry Council (Jan. 5, 2011) [hereinafter Press Release, Reentry Council], *available at* http://www.justice.gov/opa/pr/2011/January/11-ag-010.html.

49. *See* Cass Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Keynote Address at the Administrative Law Review Symposium: Interbranch Control of Regulation: Executive, Legislative, and Judicial Influence, and Agency Response (Feb. 17, 2012) (stating that OIRA's future goals are, among others, "interagency cooperation" and empirically informed agency decisions that will reduce costs and eliminate unjustified burdens).

50. *See* H.R. REP. NO. 110-140, at 2 (2007), *reprinted in* 2008 U.S.C.C.A.N. 24 ("The Federal prison population has increased more than seven-fold over the past 20 years. . . . According to the Bureau of Justice Statistics, expenditures on corrections alone increased from $9 billion in 1982 to more than $50 billion today."); *see also* Richburg, *supra* note 48, at A4 ("A powerful motivator for alternative sentencing is recidivism. For nearly 20 years, national recidivism rates have remained the same . . . ."); Liptak, *supra* note 44, at A14 (quoting Susan Urahn, Pew Center managing director, saying, "'We aren't really getting the

cost of the federal prison system and the United States' serious debt crisis,[51] it is no surprise that the House Report found a severe increase in federal imprisonment rates as one reason to support the Act's sweeping reforms[52] or that the bill passed with almost unanimous support.[53]

The House and Senate versions of the bill elected a recidivism-reduction approach to decrease the costs—economic and social—associated with America's federal correctional institutions.[54] The text of the bill emphasized its "focus[ ] on development and support of programs that provide alternatives to incarceration, expand the availability of substance abuse treatment, strengthen families, and expand comprehensive re-entry services."[55] Significantly, the SCA's pre-release provisions increased inmates' maximum allowable community confinement from six months of the last 10% of the sentence[56] to twelve months[57] and required that placements be made on an individual basis.[58] Accordingly, the Act read:

> ISSUANCE OF REGULATIONS.—The Director of the Bureau of Prisons shall issue regulations . . . which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—(A) conducted in a manner consistent with section 3621(b) of this title; (B) determined on an individual

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return in public safety from this level of incarceration. . . . Being tough on crime is an easy position to take, particularly if you have the money. And we did have [it] in the '80s and '90s.'").

51. *See* Liptak, *supra* note 44, at A14 (quoting a Pew Center official as stating that the "tough on crime" mentality has caused taxpayers to rethink whether lawmakers are spending public funds appropriately); *see also* Teresa Tritch, Editorial, *How the Deficit Got This Big*, N.Y. TIMES, July 24, 2011, at SR 11 (citing two wars and alterations in the tax code as causes of the debt crisis).

52. *See* H.R. REP. NO. 110-140, at 2.

53. *See* Erik Eckholm, *U.S. Shifting Prison Focus to Re-entry into Society*, N.Y. TIMES, Apr. 8, 2008, at A23 (noting the remarkably wide bipartisan support for the bill).

54. *See* H.R. REP. NO. 110-140, at 2 (noting that the staggering corrections expenditures do not include costs associated with prosecutions and arrests).

55. *See id.* at 5.

56. 18 U.S.C. § 3624(c) (2006).

57. 18 U.S.C. § 3624(c)(1) (Supp. IV 2011).

> The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

Id.

58. *Id.* § 3624(c)(6)(B); *see also* 18 U.S.C. § 3621(b) (2006 & Supp. IV 2011) (ordering the Bureau to designate placements considering "(1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence . . . and (5) any pertinent policy statement issued by the Sentencing Commission").

> basis; and (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.[59]

The Act also included grants for rehabilitative programs[60] and forced BOP to set clear recidivism-reduction goals.[61]

Although Congress directed the Bureau to implement these sweeping changes,[62] BOP still has not realized many of the reforms, in part because it has not promulgated a regulation that actually interprets the Act.[63] BOP's initial attempt[64] to implement the law was rejected in *Sacora v. Thomas*[65] because it declined advance notice-and-comment rulemaking. In BOP's words, "Requiring formal notice-and-comment procedures would be contrary to the public interest in this case, particularly because the revision of these regulations will provide a greater benefit for inmates, through the possibility of a greater community confinement time frame . . . ."[66] Despite statutory language requiring individualized halfway house placements, and despite the Bureau's express acknowledgement of the benefits of RRCs,[67] BOP issued two guidance documents that have substantially undermined the Act's rehabilitative goals.[68]

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59. 18 U.S.C. § 3624(c)(6) (Supp. IV 2011).

60. *See* 42 U.S.C. § 3797w (2006 & Supp. IV 2011) (permitting grants of up to $1,000,000 to states, territories, and Indian tribes for the establishment of reentry projects). In 2010, DOJ awarded over $100 million in state and local reentry grants to support reentry. *See* Press Release, Reentry Council, *supra* note 48.

61. *See* 42 U.S.C. § 17541(d)(3)(C)(i) (Supp. IV 2011) (requiring the Director to establish an attainable goal for reductions in recidivism).

62. *See infra* Part I.C (explaining Congress's purpose and intent in passing the SCA).

63. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-854R, FEDERAL BUREAU OF PRISONS: BOP HAS MECHANISMS IN PLACE TO ADDRESS MOST SECOND CHANCE ACT REQUIREMENTS AND IS WORKING TO IMPLEMENT AN INITIATIVE DESIGNED TO REDUCE RECIDIVISM 1–2 (2010) [hereinafter GAO REP. ON BOP PROGRESS].

64. *See* 73 Fed. Reg. 62,440, 62,442 (Oct. 21, 2008) (codified at 28 C.F.R. pt. 570). The regulation pithily repeated the statutory requirements, followed by: "Section 570.22 reflects the three factors listed above." *Id.*

65. No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

66. 73 Fed. Reg. at 62,442. Of course, since claiming the exception, BOP has effectively extinguished the "possibility" of a "greater community confinement timeframe" through its memoranda. *Id.*; *cf.* Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983) (narrowly construing the good cause exemption), *cited in* LUBBERS, *supra* note 11, at 108.

67. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009 31, *available at* http://www.bop.gov/news/PDFs/sob09.pdf (extolling the benefits of RRCs).

68. Indeed, studies show that individualized risk assessments are essential to successful community reintegration. *See* Knollenberg & Martin, *supra* note 42, at 54 (recommending the use of a risk assessment to identify individual offenders who would benefit from intensive programming).

The first, issued on April 14, 2008, referenced a fourteen-year-old program statement and stated that "Bureau experience reflects inmates' pre-release RRC needs can usually be accommodated by a placement of six months [just over 180 days] or less" and, "[s]hould staff determine an inmate's pre-release RRC placement may require greater than six months, the Warden must obtain the Regional Director's written concurrence . . . ."[69] The second, issued six months later, emphasized that departures from the six-month limit would be approved only under "unusual or extraordinary circumstances."[70] Issued just after passage of the SCA, these new pre-release requirements caught many inmates' case managers off guard.[71]

That the memoranda referenced a 1998 BOP program statement is quite significant. When the Bureau issued the 1998 guidance, the statute authorizing pre-release placements limited community confinement either to six months, or to the last 10% of the prisoner's sentence, whichever is less.[72] Accordingly, the 1998 policy stated: "(1) An inmate may be referred up to 180 days, [the maximum authorized,] with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval . . . ."[73] Plainly, the ten-year-old program statement permitted community confinement up to, and in excess of, the then-statutory limit,[74] making BOP's 2008 memoranda all the more inconsistent.

The 1998 program statement expressly encouraged RRC placements because such placements provided inmates with a smooth transition into their communities and enhanced public safety.[75] To this end, the policy, still in full effect by reference in the 2008 memoranda,[76] stated that:

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69. BOP April 2008 Mem., *supra* note 21, at 4.

70. BOP November 2008 Mem., *supra* note 21, at 3.

71. *See* Telephone Interview with U.S. Prob. Officer, Admin. Office of the U.S. Courts (Feb. 7, 2012) (anonymity requested) [hereinafter USPO Interview].

72. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 7310.04, COMMUNITY CORRECTIONS CENTER UTILIZATION AND TRANSFER PROCEDURE 6 (1998) [hereinafter PROGRAM STATEMENT], *available at* http://www.bop.gov/policy/progstat/7310_004.pdf.

73. *Id.* at 8.

74. *Id.* at 4 ("[BOP] may place an inmate in a CCC for more than the 'last ten per centum of the term,' or more than six months, if appropriate.").

75. *See id.* at 1 (stating that "whenever possible, eligible inmates are to be released to the community").

76. *See* BOP April 2008 Mem. *supra* note 21, at 2. The 1998 program statement remains in full force. *See* Arnett v. Washington-Adduci, No. CV 11-5898-JAK(E), 2012 WL 32386, at *3 n.4 (C.D. Cal. Jan. 3, 2012) ("The Statement remains in effect 'with minor adjustments' to comply with the [SCA].").

> [RRCs] provide an excellent transitional environment[,] . . . assure[] accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills[, and] . . . increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services may reduce the likelihood of an inmate with limited resources from recidivating, whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle. . . . [E]ligible inmates should generally be referred to CCCs to maximize the chances of successful reintegration into society.[77]

Thus, the 1998 program statement highlighted the benefits of RRC confinement while it simultaneously allowed case managers to choose the statutory maximum. Only a decade later, the Bureau issued its current pre-release rule, which comparatively limits staff discretion and, as demonstrated by BOP's public statements, downplays the benefits of community confinement.[78]

B. Modern Correctional Research and the Bureau's "Data"

Modern correctional research supports individualized and, in many cases, longer durations of community confinement, but the Bureau's six-month policy contradicts this empirical data, likely for institutional reasons.[79] Studies have shown that, in the context of drug treatment programs, "a *minimum* threshold of . . . 6–12 months [is required] to achieve lasting reductions in drug use and crime. Longer treatment duration appears to improve outcomes for individuals in . . . community corrections settings."[80] Other reports also point to the benefits of a more generous pre-

77. PROGRAM STATEMENT, *supra* note 72, at 1.

78. *See infra* Part I.B (discussing the Bureau's downplaying of the benefits of RRCs).

79. *See* CRIME & JUSTICE INST. & NAT'L INST. OF CORR., IMPLEMENTING EVIDENCE-BASED POLICY AND PRACTICE IN COMMUNITY CORRECTIONS ix (2d ed. 2009) (identifying agencies' inability to change their organization culture as a reason why, despite "a substantial body of literature" of practices "proven to reduce offender risk," necessary reforms are slow in coming); *see also Second Chance Act of 2007: Hearing on H.R. 1593 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 43 (2007) [hereinafter *SCA Hearing*] (prepared statement of Stefan LoBuglio, Chief, Pre-Release and Reentry Services, Montgomery County Department of Correction and Rehabilitation) (describing the fourth criterion for successful implementation of pre-release programs, "fidelity," or institutional support). LoBuglio states, "[C]orrectional institutions have few incentives to develop reentry programs given that the benefits of these programs accrue to society as a whole, while the institutions bear the full costs and liabilities of running them." *Id.*

80. *See SCA Hearing*, *supra* note 79, at 51 (prepared statement of Roger H. Peters, Chairman and Professor, Department of Mental Health Law and Policy, University of South Florida) (emphasis added).

release enforcement policy. For example, one study found that "[b]ehavior change is a long process that requires a minimum of 12 to 24 months. The period of incarceration and reintegration provides a sufficient period to bring about change."[81] Another study concluded that current RRC placements last on average only about five months and are ineffective, and it recommended that RRC placements be tailored to each offender's risk level, with higher-risk offenders receiving longer placements.[82] Additionally, a 2004 study conducted by the U.S. Sentencing Commission concluded that offenders who served a straight term of imprisonment recidivated at a rate of nearly 26%, while those who served a mixed sentence of prison and confinement alternatives recidivated at a much lower rate of 18%.[83]

Rather than support its pre-release rule with empirical findings, the Bureau has employed sweeping generalizations and, sometimes, inaccurate facts. For instance, after issuing the 2008 pre-release memoranda, BOP cited, at best, inconclusive research when at a 2008 U.S. Sentencing Commission symposium on alternatives to incarceration, former BOP Director Lappin asserted that halfway house placements actually cost more than imprisonment.[84] But published data on the costs of RRC versus prison incarceration are to the contrary: in its annual statistics and as recently as September 2011, the Bureau itself announced that RRC confinement costs 8.6% less than traditional imprisonment.[85]

During the symposium, Director Lappin said, "[O]ur research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better," and beyond six months, "tend to fail more often."[86] BOP has offered no reports to corroborate these statements.[87] Indeed, these claims contradict

81. *See* FAYE S. TAXMAN ET AL., FROM PRISON SAFETY TO PUBLIC SAFETY: INNOVATIONS IN OFFENDER REENTRY 15 (2002).

82. *See* FAYE S. TAXMAN ET AL., EXECUTIVE OVERVIEW: WHAT WORKS IN RESIDENTIAL REENTRY CENTERS 4 (2010).

83. *See* U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 13, 33 (2004).

84. *See* U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20, at 10.

85. *See* Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (Sept. 15, 2011). Inmates in halfway houses must also contribute one quarter of their income to defray the costs of their own confinement. *See Residential Reentry Management*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/locations/cc/index.jsp (last visited Nov. 30, 2012).

86. U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20, at 267.

87. *See* Brief for Appellant at 36, Sacora v. Thomas, 628 F.3d 1059 (9th Cir. 2010) (No. 10-35553), 2010 WL 5079251, at *36 ("[T]he BOP's own research department said, that there is not 'anything to confirm that the "6-months" was empirically based.'").

the Bureau's 1998 program statement, which touted the benefits of community confinement,[88] and should also raise concerns given the Bureau's criteria for inmates "doing worse" and "failing" at a halfway house.[89]

BOP's apparent decision to ignore a substantial body of research[90] and instead to propagate its own unsubstantiated findings raises grave doubts about its readiness to implement the Act.[91] The Bureau has shown its willingness to ignore highly relevant data that supports longer and individualized RRC placements.[92] Under these circumstances, notice-and-comment rulemaking of BOP's pre-release memoranda becomes a compelling alternative to induce necessary change.[93] Rulemaking would force BOP to publicly confront available research concerning community confinement and to offer a reasoned explanation for rejecting that research or accepting it and developing a better regulation.[94] While Congress retains ultimate authority over BOP's decisions,[95] the agency's decision not

88. *See* PROGRAM STATEMENT, *supra* note 72, at 1; *see also* Yana Dobkin, Note, *Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate over Community Confinement Centers*, 91 CORNELL L. REV. 171, 183 (2005) (describing BOP's promotion of RRCs as suitable alternatives to prison).

89. Community confinement rules can severely curtail an inmate's access to transportation, cell phones, and family visitation. *See* FED. BUREAU OF PRISONS, *Community Corrections FAQs*, http://www.bop.gov/locations/cc/ccc_faqs.jsp#3 (last visited Nov. 30, 2012). As violation of any of these rules could potentially constitute a violation of community confinement, sooner or later most inmates in RRCs will have "failed" the conditions of pre-release placement. *See* USPO Interview, *supra* note 71. But the consensus among correctional experts is that rules violations are not necessarily sound predictors of recidivism. *See, e.g.*, Carol M. Miyashiro, *Research 2 Results (R2R)—The Pretrial Services Experience*, FED. PROBATION, June 2008, at 80, 82 (warning that technical violations may not be probative of safety risks).

90. *See also infra* Part IV.A (describing modern correctional research in greater detail).

91. *Cf.* Brae Corp. v. United States, 740 F.2d 1023, 1047–51 (D.C. Cir. 1984) (discussing the Interstate Commerce Commission's failure to consider relevant data would not have resulted in judgment of abuse of discretion but for specific legislative intent in enacting authorizing statute); *id.* ("Congress anticipated that the ICC would engage in a far broader and more thorough inquiry into the need for continued joint rate regulation before granting a total and unconditioned exemption of joint rates from any oversight or regulation."), *cited in* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 519 n.189 (1997).

92. *See supra* notes 79–81; *infra* Part IV.A (detailing a modern risk-assessment tool).

93. A petition for rulemaking could be brought under the APA. *See* 5 U.S.C. § 553(e) (2006) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); *see also* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 434, 440–43 (2007) (encouraging use of petitions for rulemaking as vehicles for challenging guidance).

94. *See generally* Mendelson, *supra* note 93.

95. *See* Seidenfeld, *supra* note 91, at 519.

to faithfully interpret the Act necessitates judicial intervention.

C. Congressional Intent in the Second Chance Act

Congressional intent as expressed in the SCA's legislative history supports a more generous pre-release policy.[96] The first enumerated purpose of the Act is "to break the cycle of criminal recidivism";[97] it was in the context of that purpose that Congress increased the maximum allowable placement in RRCs. The Act's overall thrust is rehabilitative: several provisions require the Bureau to improve offender outcomes.[98] Perhaps most important among them is the enabling provision that requires the Bureau Director to implement the Act so as to ensure inmates' "greatest likelihood of successful reintegration."[99]

In the months before the bill's passage, several members of Congress, including then-Senator Obama,[100] publicly expressed their support for the legislation.[101] Senator Obama lamented the fact that "most communities where prisoners go upon release already struggle with highly concentrated poverty, unemployment, fragile families, and a dearth of jobs. . . . In many cases, they will fail to become fully rehabilitated and go on to commit more crimes. We must end this revolving door of failure."[102]

> [T]he legitimacy of the bureaucratic state as a source of regulatory standards depends on a presumption of legislative supremacy. Thus, even if the legislature leaves resolution of the details of regulation to an agency, if the agency's authorizing statute prescribes that it look to certain factors to guide its decision, the agency has no legitimate power to give those factors short shrift.

Id. (footnote omitted).

96. *See* H.R. 1593, 110th Cong. (2007) (ensuring that offenders have a sufficient amount of time, up to one year, to transition into their communities); *see also* U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20 (statement of Bobby Vassar, Chief Counsel, Subcomm. on Crime, Terrorism, and Homeland Sec.) ("What we were primarily trying to correct was the inability of the Bureau to be able to place a person in for a period of time that would be beneficial to the person and the program . . . .").

97. 42 U.S.C. § 17501(a) (Supp. IV 2011).

98. *See* 42 U.S.C. § 17533 (Supp. IV 2011) (requiring BOP's Director to ensure continued mentorship for offenders after their release from prison); *see also supra* notes 57–72, (describing the Act's other rehabilitative provisions and purposes).

99. 18 U.S.C. § 3624(c) (Supp. IV 2011).

100. 154 CONG. REC. 4614 (2008) (statement of Sen. Barack Obama).

101. *See* 153 CONG. REC. 31,028–31,030 (2007) ("[T]he number of Federal inmates has grown from just over 24,000 in 1980 to 173,739 in 2004. . . . [E]arly release is a commonsense option to raise capital.").

102. 154 CONG. REC. 4614 (2008).

II. JUDICIAL RESPONSES TO BOP'S "INTERPRETATION" OF THE SECOND CHANCE ACT

A. Cases Deferring to BOP's Discretion

While the SCA increased the Bureau's authority to release inmates to RRCs—for up to twelve months—BOP has refused to take the hint, limiting community confinement to six months or less[103] and potentially precluding individualized decisions.[104] Yet cases challenging BOP's six-month cap have, for the most part, proven unsuccessful.[105] Courts have concluded that the Bureau has wide discretion in incarceration, including RRC placements.[106] In particular, courts frequently refer to one provision that gives the Bureau Director broad placement authority.[107] They tend to assert that, by including the "no limitations" provision in the Act, Congress expressed its intent not to diminish the Director's authority.[108] In doing so, however, courts gloss over the context of the no-limitations provision, which was likely added in response to an order[109] from the DOJ's Office of Legal Counsel (OLC) that denied BOP the authority to confine inmates exclusively in RRCs instead of prisons.[110] Indeed, according to the American Bar Association, the no limitations provision simply "reaffirms BOP's independent authority . . . to make individualized front-end or direct placements to halfway houses," a possibility DOJ's order had foreclosed.[111]

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103. At least one organization has found that BOP places inmates in community confinement for an average of just over three months. *See FedCure Frequently Asked Questions*, FEDERAL CURE, http://www.fedcure.org/FAQ.shtml (last visited Nov. 30, 2012).

104. 18 U.S.C. § 3624(c).

105. *See, e.g.*, Steck v. Chester, 393 Fed. App'x 558, 560 (10th Cir. 2010) (prisoner did not exhaust administrative remedies); Sessel v. Outlaw, No. 2:08cv00212 JMM., 2009 WL 1850331, at *6 (E.D. Ark. June 25, 2009) (BOP did not abuse discretion).

106. *See, e.g.*, Guzman v. Daniels, No. 11-cv-00849-WYD, 2011 WL 3861582, at *2 (D. Colo. Aug. 31, 2011) ("In promulgating the SCA, Congress expressly made clear that it was not intending 'to limit or restrict the authority' of the BOP.").

107. *See* 18 U.S.C. § 3624(c)(4) ("Nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under [Section] 3621.").

108. *See Guzman*, 2011 WL 3861582, at *2 (emphasizing that the provision reposed considerable discretion in the Bureau).

109. *See* Bureau of Prisons Practice of Placing in Cmty. Confinement Certain Offenders Who Have Received Sentences of Imprisonment, 2002 WL 31940146, at *1 (O.L.C. Dec. 13, 2002) (concluding that BOP lacked the authority to place inmates directly into RRCs).

110. *See* Mitchell, *supra* note 20, at 247 n.51 and accompanying text (explaining that the Office of Legal Counsel's (OLC's) memorandum responded to the Bureau's then-policy to release some offenders directly into RRCs rather than prison, which the OLC found to be contrary to statute); *see also infra* note 159 (further explaining the OLC's memorandum and the ensuing response from federal courts).

111. *See* Letter from Thomas M. Susman, Director of the Am. Bar Ass'n Governmental

Yet this important history is overlooked in the courts.[112]

B. Sacora v. Thomas*: The Ninth Circuit Validates BOP's Pre-Release Rule*

The Ninth Circuit's opinion in *Sacora v. Thomas*[113] is instructive as one of the few reported United States Courts of Appeals cases to have fully considered BOP's pre-release memoranda under the APA.[114] In *Sacora*, the district court had required BOP to re-issue its interim rule as a notice-and-comment rule.[115] The Ninth Circuit affirmed, holding that BOP's policy was only entitled to *Skidmore* deference[116] but that the memoranda were nonetheless valid interpretations of the SCA. [117] The court recognized that

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Affairs Office, to the Bureau of Prisons, BOP Docket No. 1151-I Interim Rule Change (revised submission) (on file with author); *see also* Dobkin, *supra* note 88, at 213 (concluding that OLC's memorandum "severely" limited BOP's discretion).

112. One student author even argues that OLC's memorandum itself violates the APA, consisting of a binding substantive rule promulgated without notice-and-comment rulemaking. *See* Dobkin, *supra* note 88, at 197.

113. 628 F.3d 1059 (2010), *cert. denied*, 132 S.Ct. 152 (2011).

114. Other circuits to have considered BOP's policy include the Third, see Vasquez v. Strada, 684 F.3d 431, 434 (3d Cir. 2012), which concluded that the prisoner did not exhaust administrative remedies and BOP did not abuse discretion in recommending three-to-four month placement; the Sixth, see Demis v. Sniezek, 558 F.3d 508, 510 (6th Cir. 2009), which rejected the inmate's appeal as moot; the Eighth, see Miller v. Whitehead, 527 F.3d 752, 757–58 (8th Cir. 2008), which found that the BOP did not abuse discretion and memoranda were not contrary to the SCA; and the Tenth, see Garza v. Davis, 596 F.3d 1198, 1205 (10th Cir. 2010), which held that the prisoner did not exhaust administrative remedies.

115. Sacora v. Thomas, No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

116. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that challenged agency policies are "entitled to respect" depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

117. *Sacora*, 628 F.3d at 1070. Before *Sacora*, two district courts had held such memoranda to be invalid interpretations. *See* Krueger v. Martinez, 665 F. Supp. 2d 477, 483–84, 486 (M.D. Pa. 2009) (declining to defer to BOP's memoranda because placement pursuant to them was not "individualized" as required by the SCA); Strong v. Schultz, 599 F. Supp. 2d 556, 563 (D.N.J. 2009) (same). The courts also found the "discretion" reserved to staff to be hollow given the onerous requirements for recommending inmates for more than six months pre-release. *See Strong*, 599 F. Supp. 2d at 563; *Krueger*, 665 F. Supp. 2d at 483 ("[The April 2008 Memorandum] effectively chills staff discretion because staff are aware of the institutional preference for a RRC placement of six months or less, a preference that is contrary to the apparent purpose of the Second Chance Act."). In this sense, neither court believed the staff's freedom to exercise its discretion to be "genuine." *Cf.* Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980) (a policy statement "genuinely leaves the agency and its decision-makers free to exercise discretion"), *quoted in* LUBBERS, *supra* note 11, at 94.

the Bureau's memoranda were not legally binding on the court but stopped short of requiring the Bureau to promulgate the rule using notice-and-comment procedures because "the challenged policies [were] not substantive rules."[118]

1. Statutory Intent

In deriving congressional intent, the court emphasized the factor in § 3621(b)[119] that requires the Bureau to consider "the resources of the facility contemplated" when making placement decisions.[120] From this provision, the court divined an intention to balance inmates' placements with the ability of RRCs to house them, opining that "it is not unreasonable for the agency to conserve the resources of RRCs by applying an extra check on the *longest* placements in RRCs."[121] Of course, the Bureau's pre-release rule does not simply place an "extra check on the *longest* placements,"[122] but on all placements beyond the midline—even placements of six months and one day. A more persuasive reading of the SCA, then, in light of the Act's purpose and BOP's own program statements, would lead to the conclusion that the "resources of the facility contemplated" refers to the treatment options available to inmates—and not the facility's maximum occupancy.[123] This reading of the statute is underscored by the fact that BOP policy directs case managers to review the adequacy of proposed halfway houses prior to inmate placements.[124]

Support for this reading can also be found in the Bureau's November 2008 memorandum in which BOP instructs staff to "consider the resources of available RRCs . . . to assure accountability, provide program opportunities in employment counseling and placement, substance abuse, and aid inmates in acquiring daily life skills so as to successfully reintegrate into the community at large."[125] Nowhere does the November 2008 memorandum refer to the RRCs' bed space. Given that BOP's

118. *Sacora*, 628 F.3d at 1070.

119. 18 U.S.C. § 3621(b) (2006).

120. 628 F.3d at 1067.

121. *Id.* (emphasis added).

122. *Id.* (emphasis added).

123. The appellants in *Sacora* argued along similar lines. *See* Brief for Appellant, *supra* note 87, at *52.

124. Indeed, the entire RRC transfer procedure supports this contention. *See* PROGRAM STATEMENT, *supra* note 72 ("Staff shall make recommendations for CCC placements based on assessments of *inmate needs for services*, public safety, and the necessity of the Bureau to manage its inmate population responsibly." (emphasis added)).

125. BOP November 2008 Mem., *supra* note 21.

interpretation was not entitled to *Chevron* deference,[126] the court was more than able to adopt this interpretation.

A necessary assumption of the court's deference is that the Bureau used its special expertise to choose its particular interpretation of the statute.[127] Indeed, in determining whether BOP considered available facts, the court in *Sacora* acquiesced in the Bureau's assertion of generalized "experience."[128] However, the presumption of agency expertise makes little sense here since, as the court stated, the Bureau had not quantified the results of its "experience," and was thus unable to offer the court any basis on which to decide the issue.[129] As the Bureau conceded,[130] its only RRC placement experience was with pre-release confinements of six months or less—before the Act even became law.[131] And the agency offered no data concerning inmates' success rate from the earlier period, either.[132]

And yet the respondents in *Sacora* were rebuffed on this front as well: the court found that, while empirical research "may have been preferable," it was nonetheless "reasonable for the BOP to rely on its experience, even without having quantified it in the form of a study."[133] In accepting that BOP's mere *claim* of experience was a "product of agency expertise"[134] without inquiring into its basis,[135] the court did what the Supreme Court

126. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The marked departures between BOP's 1998 and 2008 guidance weaken the Bureau's position. *See supra* notes 76–82 and accompanying text.

127. *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (holding that "deference to an agency administering its own statute *has been understood to vary with circumstances*, and courts have looked to the . . . [agency's] *relative* expertness" in granting or denying it (emphases added)).

128. Sacora v. Thomas, 628 F.3d 1059, 1067 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

129. *Id.*

130. *Id.* at 1069 ("Although the BOP's experience with RRC placements of six months or less may not exactly parallel the issue here, its experience does provide some basis for understanding of how placements of varying lengths would affect most inmates.").

131. *Cf.* Sams v. Thomas, No. 11-333-AC, 2011 WL 2457407, at *4 (D. Or. May 12, 2011) (finding BOP's reliance on the 1998 program statement to deny an inmate's halfway house eligibility to be contrary to the statute).

132. *See Sacora*, 638 F.3d at 1069 n.9 (noting the absence of data collected by the BOP in the record); Brief for Appellant, *supra* note 87.

133. 628 F.3d at 1069.

134. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

135. In the same breath, the court wondered aloud about the Bureau's purported research and then overlooked its obvious absence. *See Sacora*, 628 F.3d at 1069 n.9 (noting the existence of BOP's reporting requirement under the Act, but conceding that "no such

explicitly has instructed courts not to do: "supply a reasoned basis for the agency's action that the agency itself has not given."[136]

2. Non-Binding Policy

The *Sacora* court also held that the requirement of "unusual or extraordinary" circumstances for placements beyond six months did not constitute a binding rule requiring notice-and-comment rulemaking, despite the fact that all of the class members had been denied placements exceeding six months.[137] In so deciding, however, the court did not address an important implication of its holding: that an agency's interpretation can be nonbinding and not subject to rulemaking as long as the agency does not apply it strictly in *all* cases.[138] Indeed, the court found that the memoranda were nonbinding in large part because a few dozen inmates outside the certified class were granted RRC placements in excess of six months.[139] Courts have decided otherwise under analogous circumstances,[140] and in so doing recognize that public participation in rulemaking is warranted when an agency's policy is effectively binding on most affected individuals.[141] Instead, the court in *Sacora* validated a practically binding rule that ignored scientific findings and public opinion. Thus, the Bureau's approach may

reports are part of the record"); *cf. infra* note 192 and accompanying text (detailing the results of a Government Accountability Office audit that found BOP had failed to implement its reporting and other requirements under the SCA); *supra* Part III (examining a case much less forgiving of a similar omission).

136. *State Farm*, 463 U.S. at 43.

137. The court also found that requiring regional director approval for placements exceeding six months was not a new legal duty subject to notice and comment. 628 F.3d at 1069–70. Because BOP retracted the requirement in its June 2010 Memorandum, this Comment does not address that part of the court's opinion. *See supra* note 22. Nonetheless, it is worth noting that courts have held differently. *See, e.g.*, Natural Res. Def. Council v. EPA, 643 F.3d 311, 320–21 (D.C. Cir. 2011) (holding that an EPA guidance document binding regional directors required notice-and-comment rulemaking).

138. *See Sacora*, 628 F.3d at 1070 ("These regional differences [showing virtually no pre-release placements over six months in some regions, but not others] demonstrate that the BOP's rule allows staff to make individualized determinations and does not create a new binding rule of substantive law."). It could just as easily have been decided that these scant intraregional differences demonstrated not individualized placements but rather substantially similar ones within regions.

139. *Id.*; *see also* Brief for Appellant, *supra* note 87, at 18 (revealing that only one region had granted RRC placements in excess of six months and that the majority of granted requests came from Federal Prison Camp Duluth, a minimum-security facility).

140. *See, e.g.*, U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994); *infra* Part III.B.

141. *See U.S. Tel. Ass'n*, 28 F.3d at 1235–36; *see also supra* Part III.B; *cf.* Seidenfeld, *supra* note 5, at 514 (extolling hard look review as a way to force considered agency decisionmaking and to inhibit rash, interest-group-driven policy choices).

have invaded the province of the judiciary.[142]

III. HOW TO SUBJECT BOP'S PRE-RELEASE RULE TO RULEMAKING

A. The Importance of Rulemaking and the Absence of "Ossification"

The disparate outcomes between *Krueger* and *Strong*,[143] and *Sacora* and similar cases, may rest in the difficulty of distinguishing legislative rules from nonlegislative rules.[144] Under these circumstances, however, courts should hold that BOP's six-month limit is a legislative rule.[145] Otherwise, they risk improvidently allowing the Bureau to make "law" without the benefit of public input.[146] The advantages of requiring notice-and-comment rulemaking are well established.[147] Sifting BOP's "guidance" memoranda through rulemaking would force BOP to reconcile its current pre-release rule with a body of research that compels a contrary approach.[148] Judicial review would thus perform an important function: oversight of agency action to ensure against costly externalities.[149]

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142. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 57–58 (1990) ("[A] practice of routine acceptance for interpretations expressed in these formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force." (footnote omitted)).

143. *See supra* note 117 and accompanying text (explaining *Krueger* and *Strong*).

144. *See* LUBBERS, *supra* note 11, at 75 (noting that distinctions between legislative rules and non-legislative rules "tend to break down and become confused in practice").

145. *See* Joseph Scott Miller, *Substance, Procedure, and the Divided Patent Power*, 63 ADMIN. L. REV. 31, 66–68 (2011) ("The purpose of the substance–procedure distinction in the APA is to protect the general public's right to participate in an agency's formulation of the rules that regulate the public's primary conduct, and courts are thus a vital check on agencies." (footnote omitted)).

146. *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 707 (2007) ("If the agency does not explain the basis for the interpretive rule or policy statement, but simply treats it as a binding rule, the agency has not articulated any explanation for its decision, and the decision (not the rule) should be invalidated as arbitrary and capricious.").

147. *See id.* at 734–35 (explaining that public participation in rulemaking enhances public perception of the resulting law as a fair and democratic one); *see also* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 550 (2000) (reviewing the principal advantages of official rulemaking, including enhancing rules' overall quality, fairness, and legitimacy); Asimow, *supra* note 2, at 574 (noting that the primary function of public participation is as a channel through which agencies receive much-needed information).

148. *See* Batterton v. Marshall, 648 F.2d 694, 703, 707–08 (D.C. Cir. 1980) (asserting that the "essential purpose" of notice-and-comment rulemaking is fairness and public participation in the decisions of unelected agency officials).

149. *See* Anthony & Codevilla, *supra* note 10, at 667 ("The courts' reviewing power is the citizen's bulwark against improper and abusive agency actions. . . . Citizens are bound by

"Ossification" should not be a concern. First, one of the usual complaints lodged against judges who scrutinize agency action is meritless; namely, that by adding to an agency's administrative calculus their own laundry list of a rule's possible unintended consequences, judges give the agency a Hobson's choice: either expend substantially more resources beforehand to account for every conceivable consequence and win, or conserve resources but risk failing to provide sufficient ad hoc justifications and losing on arbitrary or capricious grounds.[150] This criticism presumes consideration of at least *some* alternatives to the proposed action. BOP, however, should have already considered data that is germane to its pre-release rule, but it apparently has chosen not to acknowledge it.[151] The marked difference between what studies suggest should be done in pre-release confinement, and what the Bureau has actually done, reinforces this point.[152] Under these circumstances, accusations of judicial wrench-throwing are simply without merit.[153]

Second, while challenges to BOP's rule are, *a fortiori*, brought on behalf of prisoners, the alternatives to the current rule are both reliable and highly salient and deserve careful judicial consideration.[154] Publicly available research findings on risk assessments and offender re-entry needs exist only as a result of correctional experts' considerable efforts. It takes but a small step to presume that the same research before the court, even when presented by soon-to-be ex-offenders, merits serious consideration. Judges should welcome such evidence if it is offered in support of prisoners' assertions that the Bureau's rule is arbitrary.[155]

Nonetheless, most judges have not taken the reins on issues ostensibly committed to BOP's discretion, as revealed by *Sacora* and similar cases.

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such documents to the extent that courts will accept and apply them." (footnote omitted)); Cass Sunstein, *Smarter Regulation: Remarks from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs*, 63 ADMIN. L. REV. (SPECIAL ISSUE) 7, 7–8 (2011) (emphasizing the importance of public input in agency decisions).

150. *See* Seidenfeld, *supra* note 91, at 515 (describing sua sponte judicial inquiry into unintended consequences of a proposed rule when the agency had not been notified of such an inquiry in advance, by either the court or the public).

151. *See supra* Part I.B (describing modern correctional research and BOP's response); *see also infra* Part IV.A (describing the advantages of the federal Post Conviction Risk Assessment (PCRA) over BOP's reliance on professional judgment and highlighting research showing that high-risk inmates require longer placements than they receive).

152. *Supra* Parts I.B, IV.A.

153. *See* Seidenfeld, *supra* note 91, at 515.

154. *Id.* at 515–16 (exploring issues that arise in challenges to agency action, such as the challengers' motives).

155. *Id.* (imploring courts, in carefully determining groups' motives in opposing agency action, to pick up on certain "signals," including investment of group resources into research supporting their arguments).

This Comment suggests that so-called generalist judges can—and should—intrude into agency discretion when it promulgates spurious rules,[156] especially when the judges are not generalists in the agency's field but quasi-experts.[157] Indeed, district courts have historically played the predominate role in sentencing,[158] and until recently[159] could recommend

156. *See* Anthony, *Lifting the Smog*, *supra* note 1, at 14 ("[I]f the agency treats the new propositions as binding, its attempt to go beyond existing legislation without observing legislative processes is invalid. In such a case, the agency has produced only spurious rules.").

157. *Cf.* Morrison v. Olson, 487 U.S. 654, 676 (1988) (holding that judicial officers could appoint independent counsel to investigate Executive Branch violations); *id.* at 676 n.13 ("Indeed, in light of judicial experience with prosecutors in criminal cases, . . . courts are especially well qualified to appoint prosecutors."); *see also* Joshua D. Wright & Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission 19–20 (Jan. 23, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=1990034 (finding, contrary to the oft-cited maxim that agencies possess greater expertise than "generalist" judges, that federal judges actually outperformed the Federal Trade Commission in adjudicating antitrust proceedings).

158. *See* Mistretta v. United States, 488 U.S. 361, 364–65 (1989) (emphasizing the considerable discretion Congress traditionally afforded judges in sentencing).

159. After the Department of Justice issued its legal memorandum directing the Bureau to no longer respect judicial sentencing recommendations, courts were further deprived of their ability to fashion sentences according to each offender's needs. This caused considerable consternation among some judges who despaired at the prospect of seeing non-violent offenders lose their positive community ties as a result of transfers from RRCs into prisons. *See, e.g.*, Culter v. United States, 241 F. Supp. 2d 19, 28–29 (D.D.C. 2003) (rejecting the government's request, after issuance of the DOJ's memorandum, to transfer defendant from a halfway house to a federal prison).

> [A]ll indications were that petitioner had begun the process of turning her life around. Recognizing and seeking to encourage these positive trends, the Court sought to fashion a sentence that would punish petitioner for her offense without interrupting the admirable strides she had made to rehabilitate herself. The Court believed that it was vital for petitioner to continue her participation in church activities, her therapy, and her paid employment. It was hoped that doing so would assist her reintegration into law-abiding society, her mental health recovery, and her ability to meet her restitution obligations. The Court decided that the best way to achieve these ends was for her to be committed to BOP for 12 months with the understanding that she would serve this sentence in a local halfway house. . . .
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> . . . .
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> . . . Given these unique circumstances, the Court concludes that BOP is estopped from relying on its new policy directive to remove petitioner from the halfway house. For the government to imprison petitioner merely because BOP was misguided about the scope of its authority and this misinterpretation was fostered and shared by both the Executive and Judicial branches for more than fifteen years is simply arbitrary and unfair.

Id. at 21, 28–29; *see also* Jennifer Borges, *The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion and to Get Tough on White-Collar Crime*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 142 (2005) (recounting the judicial

that the Bureau place prisoners directly into RRCs instead of prisons.[160]

To their credit, more and more federal judges are informing their sentencing decisions with empirical data on offender outcomes.[161] Given judges' sentencing expertise and their increasing willingness to incorporate science into their decisions,[162] courts should heed modern correctional research when considering future challenges to the Bureau's pre-release rule.

B. Agencies' "General Policies" that in Application Result in Legally Binding Rules Are Subject to Notice-and-Comment Rulemaking

In *United States Telephone Ass'n v. FCC*,[163] the District of Columbia Circuit Court of Appeals considered a challenge to a Federal Communications Commission (FCC) "schedule" used to assess fines.[164] The challengers argued that the schedule was a legislative rule subject to notice-and-comment rulemaking; the FCC claimed that the schedule was a general statement of policy exempt under APA § 553(b)(3)(A).[165] The FCC labeled the policy "discretionary" and maintained that it retained the right to, and did, depart from it under certain circumstances, as indicated by the outcomes of several prior adjudications.[166]

The court scrutinized those prior adjudications and found otherwise: out of 300 proceedings, arguably only eight did not apply the prescribed schedule fine.[167] The court concluded that the FCC considered the policy to be a binding rule, even though the Commission deviated from the schedule on occasion—a fact that, "while probative, [did] not vitiate its adherence to the schedule of base amounts."[168] The court also found the form of the policy suspicious, since it was "rather hard to imagine an

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backlash in response to DOJ's sentencing directive).

160. *See* 18 U.S.C. § 3621(b) (Supp. IV 2011) (judicial recommendations of RRC placements are to be considered but are not binding in determining place of confinement).

161. *See, e.g.*, Michael A. Wolff, Brennan Lecture, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1402, 1416 (2008) (advocating evidence-based sentencing decisions using available empirical research).

162. *Id.*

163. 28 F.3d 1232 (D.C. Cir. 1994).

164. The statute at issue, the Communications Act, is similar to the SCA in several respects. *See* 47 U.S.C. § 503(b)(2)(D) (2006). Both statutes list mandatory factors the agency must consider and were amended to increase the relevant statutory maximum. *See* Brief for Petitioner at 8–9, U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (Nos. 92-1321, 93-1526), 1994 WL 16777179 at *8–9.

165. *U.S. Tel. Ass'n*, 28 F.3d at 1234.

166. *Id.*

167. *Id.*

168. *Id.* at 1235.

agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion."[169] It ordered the FCC to issue the policy as a legislative rule with notice and an opportunity for comment.[170]

There are at least two insights to be gleaned from *U.S. Telephone Ass'n* that have immediate implications for BOP's pre-release rule. One is that an agency's boilerplate disclaimer of strict adherence to its policy will not prevent a reviewing court from scrutinizing the rule's previous applications. Another related implication is that a policy the court finds in application to have been strictly adhered to by the agency—even if the agency occasionally (but rarely) departed from it—can be invalidated as a legislative rule and shipped back for notice-and-comment rulemaking. Finally, and although less obvious on the face of the court's opinion, courts will view policies that prescribe numerical values with heightened skepticism.[171]

These factors support subjecting the Bureau's 2008 memoranda to notice-and-comment rulemaking. BOP, like the FCC, has repeatedly asserted that it reserves the right to depart from its policy in appropriate cases ("unusual or extraordinary" ones).[172] And both agencies have applied their policies nearly uniformly across enforcement proceedings.[173] Furthermore, both agencies' rules raise the question *why* the limitations would be promulgated at all if the agencies did not intend to apply them so as to "cabin" their discretion. Finally, both policies use numeric values as the basis for the rule's application. And yet, contrary to the D.C. Circuit's conclusion, in *Sacora* the court found the Bureau's reference to "extraordinary" circumstances, the Bureau's "discretion" to depart from its rule, as evidence that it was *adhering* to the statute. The court also found the fractional number of departures from the rule as evidence that BOP did *not* consider it to be binding.[174]

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169. *Id.* at 1234.

170. *Id.* at 1236.

171. This insight originated in LUBBERS, *supra* note 11.

172. *Compare* BOP April 2008 Mem., *supra* note 21 (referring to the new requirement of individualized assessment of inmates no less than five times), *and* BOP November 2008 Mem., *supra* note 21 (referring to the new requirement at least five times), *with U.S. Tel. Ass'n*, 28 F.3d at 1234 (stating that the FCC's schedule referred to the Agency's discretion to depart from the policy no less than twelve times).

173. *See* Sacora v. Thomas, 628 F.3d 1059, 1070 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011) (showing that almost none of the inmate-class members had been granted an RRC placement exceeding six months); Mitchell, *supra* note 20, at 308 (estimating that only 2% of federal inmates have been granted pre-release in excess of six months); *U.S. Tel. Ass'n*, 28 F.3d at 1234 (showing that the FCC applied its schedule in all but 2.7% of proceedings).

174. *Cf. Sacora*, 628 F.3d at 1070.

More likely than not, the differences came down to the numbers: the court in *Sacora* apparently took notice that a number of inmates at one prison had been granted pre-release placements exceeding six months.[175] The D.C. Circuit, by contrast, only considered proceedings against the challenger's members and closely scrutinized each so-called deviation from the FCC's schedule. Thus, the outcome of future challenges to the Bureau's 2008 memoranda may depend on whether courts consider only the placement decision of the prison holding the inmates or a much broader sampling in determining how BOP applied its pre-release rule. Courts reviewing such challenges should conclude that, because the rule results in so few inmates receiving halfway house placements of six months or more, the memoranda are binding and must go through notice-and-comment rulemaking.

C. Rejecting Agencies' Categorical Assertions of Expertise Without More: Tripoli Rocketry Ass'n v. ATFE

Not all courts reviewing agency action have accepted vague assertions of general agency expertise like the court did in *Sacora*. Indeed, had *Sacora* been before the panel that decided *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms and Explosives*,[176] the result might have been different. There the court held that the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATFE) had not relied on sufficient data to support its classification of toy rocket propellant as "explosive" and remanded to ATFE for reconsideration.[177] The court rebuffed ATFE's appeals to judicial deference to its expertise because it failed to offer empirical proof supporting the product classification.[178]

In both *Sacora* and *Tripoli Rocketry* the agencies appealed to the judiciary's typical deference in matters of agency expertise. And while the posture of the cases differed in a significant respect—the *Tripoli Rocketry* court was merely deciding the commercial rights of a rocket manufacturer and not someone's post-conviction interests—this distinction would seem to counsel a more favorable outcome in *Sacora*. So would the fact that, while *Tripoli Rocketry* involved a highly technical area outside of the judges' expertise,[179]

175. *See id.* (finding that some prisoners were granted placements exceeding six months).

176. 437 F.3d 75, 81 (D.C. Cir. 2006) ("To survive review under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks omitted)); *see also* Motor Vehicles Mfr. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983).

177. *Tripoli Rocketry*, 437 F.3d at 84.

178. *Id.* at 82.

179. *See* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103

Sacora involved the comparatively less technical (and more familiar) field of imprisonment.[180]

Yet the cases reached nearly opposite results: unlike *Tripoli Rocketry*, *Sacora* upheld the agency action. These results appear irreconcilable, all the more so because the Bureau in *Sacora* made no attempt to provide empirical proof to corroborate its position that "most" inmates' needs are met with an RRC placement of six months or less.[181] The *Tripoli Rocketry* court gave short shrift to this level of generalization by ATFE.[182]

The disparate outcomes in *Sacora* and *Tripoli Rocketry* reveal that agencies can be perversely incentivized into not really interpreting their authorizing statutes and then not offering evidence during contested proceedings.[183] ATFE did the opposite and the court found against it; BOP, since it never interpreted the SCA beyond "parroting" the statute, successfully hid behind assertions of expertise. As the only authority that can require agency rules to be lawfully promulgated and enforced, the courts should be wary of such backdoor rulemaking.[184]

IV. NEXT STEPS: IMPLEMENTING THE SECOND CHANCE ACT

In December 2011, after public interest groups called for BOP

(1983); *see also* Indus. Union Dep't v. Hodgson, 499 F.2d 467, 474–75 (D.C. Cir. 1974) (suggesting deference for determinations at "frontiers of scientific knowledge").

180. *See supra* notes 173–177.

181. *See* Brief for Appellant, *supra* note 87 (showing that, not only did BOP not proffer such data, but the appellants sought and received admissions from Bureau researchers that the pre-release rule had no known foundation in empirical proof). Thus, BOP did worse than ATFE: whereas the latter at least made an effort to offer relevant data supporting its decision, BOP readily admitted it had none to offer.

182. *Tripoli Rocketry*, 437 F.3d at 81 (holding that "the fatal shortcoming" of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATFE's) position was that the agency "provided virtually nothing to allow the court to determine whether its judgment reflects reasoned decisionmaking").

183. It should be noted that, when contested pre-release decisions come before district courts, BOP will occasionally offer "proof" that it applied the statutory factors reasonably—or, more specifically, that the inmate's *case manager* applied them reasonably. As the Bureau has never really interpreted the SCA, courts that accept BOP's litigation strategy may in effect be handing over their interpretive functions to lower-level BOP staff. *See, e.g.*, Sessel v. T.C. Outlaw, No. 2:08cv00212 JMM, 2009 WL 1850331, at *5 (E.D. Ark. June 25, 2009) (holding that BOP did not abuse its discretion because there was no requirement of a detailed analysis of the specific statutory factors at each level of the administrative review process).

184. *See* Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 632–34 (1997) (praising aspects of active judicial review of agency decisionmaking).

leadership changes,[185] Attorney General Eric Holder announced the appointment of a new BOP Director, Charles E. Samuels Jr.[186] Director Samuels's appointment may hint at a new direction for Bureau policies;[187] executive staff changes have already begun.[188] According to the DOJ, Director Samuels "shares the attorney general's commitment to reduce recidivism by preparing incarcerated people to return to their communities and become productive members of society."[189] BOP's leadership changes make sense given the Bureau's lackluster track record, of which Congress appears to have taken notice. In the 2009 *State of the Bureau* introduction, then-Director Lappin acknowledged the external pressure for improved post-release results.[190] In the aftermath of unsuccessful litigation challenging the prerelease rule,[191] Congress exercised its oversight function and commissioned a 2012 report concerning the Bureau's re-entry initiative that confirmed BOP had not implemented several provisions of the SCA, including its reporting and individualized assessment requirements.[192] The Government Accountability Office's study found that BOP lacked a risk-

185. *See* James Ridgeway & Jean Casella, *Groups Urge Holder to Clean House at the Bureau of Prisons*, SOLITARY WATCH (May 19, 2011) (quoting the groups' letter to Eric Holder as saying, "Unfortunately, the agency has not adapted its management strategy to take full advantage of the diverse population reduction authorities and cost-savings measures given to it by Congress, such as: expanded half-way house placement . . . .").

186. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Holder Announces New Federal Bureau of Prisons Director (Dec. 21, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-ag-1693.html.

187. Harley Lappin resigned from BOP soon after he was arrested and charged with driving under the influence of alcohol in Annapolis, Maryland. *See* Matt Zapotosky, *Bureau of Prisons Director Faces DUI, Related Charges*, WASH. POST, Mar. 30, 2011, http://www.washingtonpost.com/local/bureau-of-prisons-director-faces-dui-related-charges/2011/03/30/AF0dTg5B_story.html. BOP's director is a member of the Senior Executive Service (SES) and is thus removable only "for cause." *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3179–80 (2010) (Breyer, J., dissenting) (listing SES agency heads who are removable only "for cause"). Mr. Lappin now represents private correctional industry interests. *See* Kevin Johnson, Proposal to Buy Prisons Raises Ethical Concerns, USA TODAY, Mar. 7, 2012, http://www.usatoday.com/news/nation/story/2012-03-07/prisons-ethical-concerns-executive/53405290/1.

188. *See* News & Information, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, www.bop.gov/news/ (last updated June 4, 2012).

189. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *supra* note 186.

190. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009, at iii, *available at* http://www.bop.gov/news/PDFs/sob09.pdf (anticipating that success will require enlarging BOP's responsibilities) (2009).

191. *See supra* Part II (examining challenges to BOP's community confinement policy).

192. *See* GAO REP. ON BOP PROGRESS, *supra* note 63, at 15 (indicating that BOP has "mechanism[s] in place" to "[e]stablish a strategy that assesses inmates' skills, develops skills development plans, determines program assignments, [and] gives priority to high-risk inmate populations").

assessment program necessary for individualized, need-based placement decisions; instead, the Bureau relies primarily on its staff's professional judgment (i.e., experience).[193] By comparison, a report that reviewed the Administrative Office of the U.S. Courts' risk-assessment instrument, the Federal Post Conviction Risk Assessment (PCRA) found that "actuarial devices [such as PCRA] in combination with professional judgment are generally more accurate and consistent than professional judgment alone, which is based solely on . . . experience and individualized assessments . . . ."[194] In fact, subjective professional decisions are the most basic measurements of offender needs.[195] Yet BOP instructs its staff to use professional judgment combined with two Bureau instruments: the Inmate Skills Development (ISD) Plan, and the Custody Classification Form (BP-338).[196]

A. The Federal Post Conviction Risk Assessment

To give prisoners individualized placement decisions and "the greatest likelihood of successful reintegration into the community,"[197] BOP must incorporate a validated risk-assessment instrument into its pre-release rule.[198] By using such a tool, Bureau staff will be able to better prepare inmates for life outside prison, and BOP will be able to better defend placement decisions against future attacks.[199] The Bureau's "sister agency," the United States Probation Office (USPO), already uses PCRA.[200]

193. BOP June 2010 Mem., *supra* note 22.

194. *See* OFFICE OF PROB. & PRETRIAL SERVS., ADMIN. OFFICE OF THE U.S. COURTS, AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT 3 (2011).

195. *See id.* at 7 n.28 (calling professional judgment risk assessments' "first generation").

196. *See* BOP June 2010 Mem., *supra* note 22, at 4 (calling the Inmate Skills Development (ISD) Plan and the Custody Classification Form (BP-338) "helpful in establishing broad-based groupings"); *see also* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT P5100.8: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION (2006), *available at* http:///www.bop.gov/policy/progstat/5100_008.pdf (describing the custody classification system).

197. 18 U.S.C. § 3624(c)(6) (2006 & Supp. IV 2011).

198. *See* TAXMAN ET AL., *supra* note 82, at 5 (recommending BOP use a validated risk-assessment tool). Several states already use risk assessments or their principles, including Michigan, Mississippi, Ohio, Oregon, and Vermont. *See States Report Reductions in Recidivism*, JUSTICE CENTER, NATIONAL REENTRY RESOURCE CENTER, *available at* http://nationalreentryresourcecenter.org/documents/0000/1569/9.24.12_Recidivism_Reductions_9-24_lo_res.pdf.

199. *See, e.g.*, Sams v. Thomas, No. 11-333-AC, 2011 WL 2457407, at *4 (D. Or. May 12, 2011).

200. *See* FEDERAL POST CONVICTION RISK ASSESSMENT, *supra* note 194, at 1 (noting PCRA's efficiency goals, and that it has yet to be considered for use in other contexts, such as RRCs).

PCRA's measurement of offender needs will enable re-entry plans that can anticipate and mitigate inmates' situational triggers, thus reducing recidivism.[201] Indeed, PCRA can predict when an offender is more or less likely to reoffend—and correctional staff can detect these changes and calibrate the inmate's re-entry plan accordingly.[202]

By using the same assessment as the USPO, the Bureau could save time and money; since probation often runs concurrently with RRC confinement, the agencies could share offender data to coordinate re-entry plans.[203] But to pursue this goal, the Bureau must be willing to cooperate with its sister agency, and the USPO must be willing to share its new tool.[204] Achieving such interagency cooperation would fulfill a prime directive of the Obama Administration's OIRA future goals.[205] The Bureau is well aware of modern correctional methodology;[206] it simply has to use it. A pre-release rule that incorporates PCRA analysis to determine individual risks and needs would fulfill the letter and spirit of the SCA.

CONCLUSION

As long as BOP continues to ignore available empirical research and public opinion, it not only circumvents the requirements of the APA, but it does so at the expense of all Americans, offenders and their victims alike. Outdated rules and institutional customs should not be allowed to justify agency reticence to reform. Requiring notice-and-comment rulemaking for BOP's prerelease rule will give the Bureau another chance to adopt a validated risk-assessment tool, which in turn will give federal offenders a second chance at law-abiding lives.

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201. *See* TAXMAN ET AL., *supra* note 82, at 8 (concluding that correctional best practices should encourage redesigned offender re-entry plans).

202. *See* James L. Johnson et al., *The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)*, FED. PROBATION, Sept. 2011, at 16 (2011).

203. Expert correctional researchers have recommended the same. *See* TAXMAN ET AL., *supra* note 82, at 5 (recommending that BOP use the same risk assessment tool as the United States Probation Office).

204. The Administrative Office of the United States Courts limits PCRA use to trained and certified probation officers. *See* FEDERAL POST CONVICTION RISK ASSESSMENT, *supra* note 194, at 14 ("The use of the PCRA without successfully completing the formal training . . . is strictly prohibited.").

205. *See* Exec. Order 13,563, 76 Fed. Reg. 3821 (2011); *see also* Sunstein, *supra* note 49.

206. *See* TAXMAN ET AL., *supra* note 82, at 1 (noting that the study was funded by a cooperative grant from DOJ, BOP, and the National Institute of Corrections).

RECENT DEVELOPMENTS

ADJUDICATING ADDICTS: SOCIAL SECURITY DISABILITY, THE FAILURE TO ADEQUATELY ADDRESS SUBSTANCE ABUSE, AND PROPOSALS FOR CHANGE

WARNECKE MILLER & REBECCA GRIFFIN*

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* The views expressed in this paper do not represent the views of the Social Security Administration (SSA) or the United States Government. They are solely the views of the authors, Warnecke Miller and Rebecca Griffin, in their personal capacity. The authors are not acting as agents or representatives of the SSA or the United States Government in this activity. There is no expressed or implied endorsement of views by either the SSA or the United States Government. Warnecke Miller graduated from the University of Kentucky College of Law in 1999 and has worked as a law clerk for Judge Joseph M. Hood on the Eastern District of Kentucky; as an Honors Attorney for the Department of the Treasury; as a litigation attorney for several offices in the Department of Defense; as an Administrative Law Judge (ALJ) for SSA; and currently as an attorney-advisor for the National Aeronautics and Space Administration at Johnson Space Center. Rebecca Griffin holds a Master of Arts from the University of Kentucky, Patterson School of Diplomacy and International Commerce, and a *Juris Doctor* from the University of Kentucky College of Law (2012), where she served as Note Editor for the *Kentucky Journal of Equine, Agriculture, and Natural Resource Law*.

OVERVIEW

Drug and alcohol abuse are major public health problems in this country, causing over forty million injuries and illnesses each year.[1] Alcohol misuse alone results in seventy-five thousand deaths annually and is associated with serious medical conditions such as "liver disease, cancer, cardiovascular disease, and neurological damage," as well as "depression, anxiety, and antisocial personality disorder."[2] Drug and alcohol abuse's connection to severe medical conditions makes it an important issue for the Social Security Administration (SSA) to consider because persons afflicted with these conditions often apply for disability benefits.

Currently, the federal benefits system does not properly address the drug and alcohol abuse plaguing U.S. society. The current system does not provide addicts or alcoholics with any disability benefits, thus allowing persons with a substance abuse problem to potentially develop even more serious, sometimes irreversible, health problems. While the disability adjudication process identifies individuals who have "material" drug or alcohol abuse problems, after affixing this label, it fails to address their problems' underlying cause. This lack of substance abuse treatment increases the likelihood that addicts become claimants who file multiple subsequent applications. In turn, these chronic filers drive up program administration costs. Further, failing to treat addicts requesting disability benefits often prevents them from being rehabilitated and returning to productive work.[3] This approach to drug and alcohol abuse only further deteriorates the mental and physical conditions of addicts and ultimately costs taxpayers more in benefit payouts and program administration costs.

Second, the current benefit system is not clear and predictable, which is why "errors in the adjudication of drug addiction and alcoholism continued to be noted by peer review study, appeals counsel, and the federal courts."[4] The 1996 Welfare Reform Act eliminated an applicant's ability to use a

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1. *Drug Abuse*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/drugabuse.html (last updated Nov. 30, 2012).

2. *Alcohol*, CAPITAL AREA SUBSTANCE ABUSE COUNCIL, http://casac.org/alcohol/ (last visited Nov. 30, 2012).

3. *Principles of Drug Abuse Treatment for Criminal Justice Populations—A Research-Based Guide*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations/why-should-drug-abuse-treatment-be-provided-to-offe (last updated Jan. 2012) [hereinafter *Principles*] (indicating that drug abuse treatment "may improve prospects for employment").

4. DVD: OHA Hour: Drug Addiction & Alcoholism (SSA 2004) (on file with the Social Security Administration (SSA)) [hereinafter DVD: OHA Hour]. The training videos produced by the SSA, and referred to in this paper, were obtained though SSA FOIA Request AH5574, dated December 3, 2011, at 10:35:53 AM. SSA provided full, un-redacted versions of both referenced videos.

substance abuse disorder as an independent basis for receiving benefits; however, the preexisting § 404.1536 of the Code of Federal Regulations (C.F.R.) mandates that applicants suffering from a substance abuse disorder avail themselves of treatment.[5] Since § 404.1536 has not been repealed, there is substantial confusion in the adjudication of cases involving drug and alcohol addiction.

As the federal government has an administrative system that officially recognizes when a person has a drug or alcohol addiction or both, this system should be required to address the problem and direct the person to resources for recovery, even if disability benefits are not paid. The current system identifies when a claimant is a substance abuser, and yet adjudicators are removed from the responsibility of addressing the issue once that determination has been made. The most efficient and responsible time to address that issue is when the Administrative Law Judge (ALJ), as required by the Social Security disability adjudication process, legally establishes that a person struggles with substance abuse. Political leaders are recognizing the need to take action and address the deteriorating situation caused by the current system. For example, Newt Gingrich and Senator Ron Paul have suggested developing "a more logical long term policy."[6] Gingrich expressed a desire for a system able "to sanction [addicts] . . . give them medical help and . . . get them to detox."[7] Restructuring federal aid programs is one way of achieving that end.

To rectify the current situation, the federal government must amend the current benefits system so that it is capable of promptly and effectively addressing drug and alcohol abuse. First, this Article discusses the government interest in discouraging drug and alcohol abuse. Then, it delves into the SSA's different approaches to drug abuse and alcoholism in regulations and benefit adjudications. The third Part presents an overview of the current SSA' disability adjudication process in cases involving substance abuse. The fourth Part details how to adjust the disability benefits system to more appropriately address drug abuse and alcoholism. Refining and adopting a § 404.1536-style regulation would address the substance abuse plaguing the nation and promote a healthy workforce. Doing so would also allow the SSA to avoid burdening taxpayers with

5. Employees' Benefits, 20 C.F.R. § 404.1536 (2012) *see also* 20 C.F.R. §§ 404.1536–.1541, §§ 416.936–.941. These provisions of the Code are no longer in effect, but linger on the books as echoes of the haphazard solutions given to this pervasive problem.

6. Chris Moody, *Newt Gingrich on Drug Laws, Entitlements and Campaigning: The Yahoo News Interview*, YAHOO! NEWS: DESTINATION 2012: TICKET BLOG (Nov. 28, 2011), http://news.yahoo.com/blogs/ticket/newt-gingrich-drug-laws-entitlements-campaigning-yahoo-news-152936251.html.

7. *Id.*

paying lifetime benefits to claimants for the irreversible physical results of chronic drug and alcohol abuse.

I. GOVERNMENT'S INTEREST IN DISCOURAGING DRUG AND ALCOHOL ABUSE

The U.S. government has a legitimate state interest in discouraging substance abuse.[8] The Social Security disability adjudication process is an administrative system that officially recognizes when a person has a drug or alcohol abuse problem and requires a legal finding that the substance abuse impacts the individual's functionality. However, there is no mechanism in place to effectively address this legally recognized problem.

There is a significant economic interest in treating substance abuse. Estimates suggest that "substance abuse costs our nation more than $484 billion per year."[9] The magnitude of the problem becomes more obvious in light of the fact that the costs of substance abuse are as high as, or exceed, the costs of other long-term, debilitating diseases; as a comparison, diabetes and cancer amass annual costs of approximately $131.7 billion and $171.6 billion, respectively.[10] A substantial part of the cost of substance abuse to the nation includes the loss of productivity and the incapacitation of potential members of the labor force. Some estimates calculate the loss in productivity alone to be over $120 billion annually.[11]

In addition to its national economic impact, substance abuse has a tremendous impact on the health care system and the health of the American people. In 2009, approximately two million visits to the emergency room in the United States were the result of drug abuse or misuse, which led to $161 million in health care costs.[12] In addition to these health problems, substance abuse has been scientifically proven to lead to other serious illnesses. For example, "Researchers have found a connection between the abuse of tobacco, cocaine, MDMA (ecstasy), amphetamines, and steroids and the development of cardiovascular diseases."[13] "Approximately one-third of AIDS cases reported in 2000 (11,635) and most cases of hepatitis C (approximately 25,000 in 2001) in the United States are associated with injection drug use."[14]

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8. Mitchell v. Comm'r of the SSA, 182 F.3d 272, 275 (4th Cir. 1999).

9. *Magnitude*, NAT'L INST. ON DRUG ABUSE, http://archives.drugabuse.gov/about/welcome/aboutdrugabuse/magnitude/ (last visited Nov. 30, 2012).

10. *Id.*

11. U.S. DEP'T OF JUSTICE, NAT'L DRUG INTEL. CTR., No. 2011-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 2011 1, 4 (2011).

12. *Id.* at 5.

13. *Magnitude*, *supra* note 9.

14. *Id.*

Moreover, the failure to address drug and alcohol abuse leads to other social problems. Substance abuse increases crime, incites violence, "undermines family cohesion, [and] reduces workplace productivity."[15] Additionally, "The National Highway Traffic Safety Administration estimates that drugs are used by approximately 10 to 22 percent of drivers involved in crashes, often in combination with alcohol."[16] Substance abuse also plays a catalytic role in more serious, violent crimes. The Institute for Health Policy indicates: "At least half of the individuals arrested for major crimes including homicide, theft, and assault were under the influence of illicit drugs around the time of their arrest."[17] A study by the Arrestee Drug Abuse Monitoring Program found that "60 percent or more of arrestees tested positive" for some illicit drug at the time of their arrest, which "shows a strong correlation between drug abuse and criminal activity."[18]

Substance abuse not only plays an important role in individual criminal acts but also in organized crime and terrorist organizations.[19] Often, revenue generated from drug trafficking and consumption funnels directly back to illegal and terrorist organizations. "Drug trafficking [has been] the most widespread and lucrative organized crime operation in the United States, accounting for nearly 40 percent of this country's organized crime activity and generating an annual income estimated to be as high as $110 billion."[20] Without question, "terrorism is a significant threat to American lives and property, at home and abroad."

> As evidenced by the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, the 1993 World Trade Center bombing in New York City, the 1995 Riyadh and the 1996 Khobar Towers bombings in Saudi Arabia, and the 1995 assassination of two U.S. nationals in Karachi, Pakistan, . . . [a]nd the most devastating terrorist attack . . . in 2001 in New York and Washington, DC.[21]

Drug consumption and trafficking often finance such attacks.[22]

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15. Jim Kouri, *The Global Underworld: Terrorists, Drug Traffickers, and Organized Crime*, COMPUTER CRIME RESEARCH CTR. (Nov. 1, 2004), http://www.crime-research.org/analytics/759/.

16. *Magnitude*, *supra* note 9.

17. *Id.*

18. NATIONAL DRUG THREAT ASSESSMENT, *supra* note 11, at 4.

19. *Id.* at 40.

20. PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, & ORGANIZED CRIME (1986), *available at* http://www.druglibrary.org/schaffer/govpubs/amhab/amhabc3.htm; *see also* Ryan Byrnes, *Mexican Drug Trafficking Now "Greatest Organized Crime Threat" to U.S.*, CNSNEWS.COM, Jan. 21, 2009, http://cnsnews.com/news/article/mexican-drug-traffickers-now-greatest-organized-crime-threat-us.

21. Kouri, *supra* note 15.

22. *Id.*

For these reasons, administrative action must be taken to modify the current benefits system. Treating individuals for substance addiction will undoubtedly reduce the possibility that benefit recipients develop more serious, debilitating illnesses in the future; it will also decrease the number of future disability claimants and suppress demand for illegal drugs.

Congress and the courts believe that the current system discourages alcohol and substance abuse "in that it withholds social security benefits from those who likely would use the funds to purchase alcohol or drugs."[23] However, there is no evidence to support the assertion that withholding benefits from substance abusers actually addresses the problem. In fact, "The abuse of several major illicit drugs, including heroin, marijuana, and methamphetamine, appears to be increasing, especially among the young."[24]

The current approach of denying benefits to addicts is a prudent one, but does not fully address the consequences that drug abuse inflicts on the American population. Under the current system, disabled persons[25] with addictions are not mandated to receive treatment and their demand for drugs is left unchecked. Without being obligated to address their substance abuse or having access to a treatment program for their addiction, addicts use illegal methods of generating income to fund their substance abuse problem. To properly quell demand for harmful or illegal substances, addicts must be treated. While not every addict can be reformed to the point of returning to productive employment, studies show that access to treatment increases the likelihood of improvement.[26]

No one disputes that the government has an interest in addressing the multi-faceted substance abuse problem plaguing the nation.[27] Yet, the current system does not provide an adequate solution to those with an identified substance abuse issue. Current regulations deny benefits while acknowledging addicts' inability to engage in gainful employment. As mentioned previously, politicians—and the general public—recognize the impact that drug and alcohol abuse has on our society. Surveys demonstrate that people rank substance abuse among the top ten most

23. Mitchell v. Comm'r of the SSA, 182 F.3d 272, 275 (4th Cir. 1999).

24. NATIONAL DRUG THREAT ASSESSMENT, *supra* note 11, at 1.

25. The term "disabled" refers to a determination thorough the Social Security adjudication process that the individual is unable to work. Under the current system, those who are found disabled, but experience drug or alcohol abuse that is material, are denied all benefits. Those who are found disabled, and are not identified as having material drug or alcohol abuse, receive financial benefits.

26. *Principles*, *supra* note 3 (indicating that drug abuse treatment "may improve prospects for employment").

27. *Mitchell*, 182 F.3d at 275.

serious health problems plaguing our society, with 82% of those polled classifying substance abuse as a "very serious problem."[28]

It is time to reexamine how Social Security disability benefits programs operate. Reform is necessary to effectively address the very serious issue of substance abuse disorders. The system must be modified to identify and treat persons disabled by addiction. As this Part demonstrated, treating current addicts is essential to decreasing substance abuse and the grave problems associated with it. Treating drug and alcohol addicts is also a more effective way to address America's current substance-related problems, considering that other government prevention methods are being thwarted: "Traffickers are responding to government counterdrug efforts by modifying their interrelationships, altering drug production levels, and adjusting their trafficking routes and methods."[29] To uncover the most effective way to use the SSA's benefits system to treat addicts, one must examine the evolution of this system and its fluctuating position on drug and alcohol abuse.

II. HISTORY OF THE SSA APPROACH TO DRUG AND ALCOHOL ABUSE

In the 1950s, the federal government began to offer disability benefits to persons unable to maintain gainful employment.[30] However, several years passed before the SSA began to consider drug and alcohol abuse within the disability system.[31] Originally, the SSA refused to recognize drug addiction and alcoholism as causes of disability, instead seeing "chronic alcoholism, sexual deviation and drug addiction to be medically determinable impairments . . . [but] not disabling."[32] Later, the general perception about

28. *Magnitude*, *supra* note 9.

29. NATIONAL DRUG THREAT ASSESSMENT, *supra* note 11, at 1.

30. *See generally* SOC. SEC. ADMIN., HISTORY: CHRONOLOGY 1950S, http://www.ssa.gov/history/1950.html (last visited Nov. 30, 2012); *see also* SOC. SEC. ADMIN., A HISTORY OF THE SOCIAL SECURITY DISABILITY PROGRAMS, http://www.ssa.gov/history/1986dibhistory.html (Jan. 1986) (noting that, as defined by the 1954 Amendments, disability meant, "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.").

31. *See* George Farris, *An Evaluation of Alcoholism as a Disabling Impairment*, OHA L.J., Summer 1992, at 38, 38–39; *see also* Andrea Callow, Social Security Disability for the Chronically Homeless 18 (2012) (unpublished submission to the 2012 University of Connecticut School of Law Student Legal Writing Competition), *available at* http://www.law.uconn.edu/files/UCONN%20Law%20Student%20legal%20Writing%20Competition_2012%20Third%20Place%20Paper_Andrea%20Callow.pdf.

32. David J. Agastein, *Social Security Disability Benefits and the Control Theory of Alcoholism: Is It Time to Rethink an Old Problem?*, 50 SOC. SEC. REPORTING SERV. (West) 893, 893 (1996) (internal quotation marks omitted).

substance abuse shifted away from the "formerly prevailing social and legal view that an alcoholic is simply an individual who lacks the will or moral fiber to curb his self-indulgence."[33] Consequently, during this period, an applicant suffering from multiple impairments, including addiction, was still entitled to receive benefits.[34] The SSA considered the change in social views, and in 1968 adopted a "Listing of Impairments" that allowed applicants to receive benefits if they suffered from an "addictive dependence on alcohol or drugs, with evidence of irreversible organ damage."[35]

Despite this change in position, neither substance abuse nor addiction was considered an independent basis for disability benefits until a decade later.[36] In 1975, the SSA stopped requiring applicants to prove end organ damage.[37] Under the revised rules and regulations, an addiction *could* be an independent basis for awarding disability benefits,[38] meaning a substance addiction disorder, in and of itself, was considered a disabling medical impairment if it met the requirements defined by the SSA. "*No additional physical or mental impairment* . . . [would be] *required* for a finding of disability."[39]

Administrative case law attempted to clarify when an addict could take advantage of disability benefits during this time. An Eighth Circuit case, *Adams v. Weinberger*, explained that the key fact in determining whether or not an addict was eligible for benefits was whether "the claimant [had] the power to control his alcoholism."[40] Under *Adams*, an applicant who has lost control over the consumption of alcohol or drugs would be entitled to disability benefits.[41] Other circuits adopted similar positions on the subject and handed down decisions requiring applicants to demonstrate a loss of control over their drug or alcohol usage.[42] The SSA later incorporated this

33. Farris, *supra* note 31, at 39 (quoting *In re* Sullivan, 904 F.2d 826, 835 (3d Cir. 1990)).

34. Weaver v. Finch, 306 F. Supp. 1185, 1194 (W.D. Mo. 1969) ("The existence of alcoholism with other medically determinable impairments does not vitiate recovery on account of disability where the plaintiff is otherwise disabled.").

35. Agastein, *supra* note 32, at 893 (internal quotation marks omitted).

36. *See* Dru Stevenson, *Should Addicts Get Welfare? Addiction & SSI/SSDI*, 68 BROOK. L. REV. 185, 188 (2002) (discussing the SSA's historical treatment of applicants with substance abuse conditions).

37. *See id.*; *see also* Adams v. Weinberger, 548 F.2d 239, 242–43 (8th Cir. 1977).

38. *See* Cannon v. Harris, 651 F.2d 513, 518 (7th Cir. 1981) ("By itself, the mere finding that an individual suffers from alcoholism is insufficient to support a finding of disability.").

39. Farris, *supra* note 31, at 40 (internal quotation marks omitted).

40. *Adams*, 548 F.2d at 245.

41. *Id.*

42. *See* Farris, *supra* note 31, at 39 (citing Purter v. Heckler, 771 F.2d 682, 689 (3d Cir.

case law into 20 C.F.R. §§ 404.1525(e) and 416.925(e).[43] Under this regime, "[I]ndividuals whose sole severe disabling condition [was] drug addiction or alcoholism [were] eligible to receive monthly cash . . . if they [were] unable to work because of their addictions."[44] The system also required participation in a rehabilitation program,[45] and the assumption can be made that the recipient, at the completion of the program, would no longer be disabled and that benefits would cease.

This addiction impact analysis required consideration of whether the addict's usage was voluntary or involuntary.[46] However, when reviewing the many dimensions of addiction, the voluntariness classification is irrelevant, as the impact on society and the addict remains the same. It is important to address any addictive behavior that prevents an individual from fully participating in the activities of daily life,[47] contributes to the individual's mental and physical ailments, or renders the individual incapable of participating in the workforce. This is true regardless of the individual's ability to control her consumption. Whether by choice or by compulsion,[48] the destructive behavior that accompanies an addiction indicates that an individual is not engaging in rational behavior and therefore needs treatment for addiction issues. When establishing government policy on the award of benefits, the voluntary or involuntary nature of an addiction should be irrelevant. The arguments supporting such a distinction are red herrings that lack tangible impact on the

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1985); Gerst v. Sec'y of HHS, 709 F.2d 1075, 1078 (6th Cir. 1983); Rutherford v. Schweiker, 685 F.2d 60, 62 (2d Cir. 1982); *Cannon*, 651 F.2d at 519; Ferguson v. Schweiker, 641 F.2d 243, 248–49 (5th Cir. 1981); Swaim v. Califano, 599 F.2d 1309, 1312 (4th Cir. 1979)).

43. 20 C.F.R. §§ 404.1525(e), 416.925(e) (2010).

44. H.R. REP. NO. 104-379, at 17 (1995). While the commentary may be somewhat harsh, it nonetheless reflects the status of the law at that time.

45. *See* 20 C.F.R. §§ 404.1536, 416.936.

46. *Cf.* Farris, *supra* note 31, at 43. The author notes that a review of case law indicates that some courts hold that there is "no disability from alcohol-related impairments when there is no absence of control." *Id.*

47. *See* 20 C.F.R. § 404.1520a(c)(3) (rating the degree of an applicant's functional limitation by requiring that "four broad functional areas" be considered: "[a]ctivities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation").

48. The existence of this distinction is difficult to empirically prove as,

> [E]conomists contradict the disease model by showing that consumption patterns, even among addicts, often respond to market forces such as price increases, criminalization and taxes on the products. Addicts who are given money vouchers in exchange for "clean" urine tests each week respond well, and more so as the monetary amounts increase.

Stevenson, *supra* note 36, at 204–05. (footnote omitted).

practicalities of substance abuse's impact on society and the individual.

The relationship between federal disability benefits and drug and alcohol addiction transitioned again in the mid-1990s with the government taking a more punitive approach towards addicts.[49] Congress passed the Social Security Independence and Programs Improvements Act in 1994, which "altered and restricted the receipt of SSI [Social Security Income] and SSDI [Social Security Disability Insurance] benefits by persons who are disabled wholly or partially as a result of drug or alcohol addiction."[50] For "the first time in the history of these programs . . . benefits [were] time-restricted";[51] benefit applicants with a drug or alcohol problem had to contend with a thirty-six month limitation on Title II and Title XVI benefits.[52] The 1994 modifications put greater emphasis on treatment and rehabilitation.[53] During this period, the system mandated that "drug addicts or alcoholics . . . receive payments through a representative payee and participate in a treatment program."[54] There were also consequences for non-compliance with the requirements, such as a suspension of benefits and retroactive payment for benefits in lieu of a lump-sum check.[55] These restrictions on applicants with drug or alcohol addiction in the mid-1990s paved the way for even more stringent reforms years later.

Until 1996, the regulations of the SSA reflected the belief that substance abuse could constitute a disability, but the regulations became increasingly punitive toward the recipients. The 1996 Congress, despite the earlier reforms, still did not believe that the current system adequately deterred substance abuse. At that time, Congress believed that the pre-1996 system provided "a perverse incentive that affront[ed] working taxpayers and fail[ed] to serve the interests of addicts and alcoholics, many of whom use[d] their disability checks to purchase drugs and alcohol, thereby

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49. *See* Dean Spade, *Undeserving Addicts: SSI/SSD and the Penalties of Poverty*, 5 HOW. SCROLL: SOC. JUST. L. REV. 89, 94 (2002).

50. *Id.*

51. *Id.* at 95.

52. *See id.*

53. *See* 42 U.S.C. § 423(d)(1)(A) (1994); *see also* GEOFFREY KOLLMANN, CONG. RESEARCH SERV., RL 30565, SOCIAL SECURITY: SUMMARY OF MAJOR CHANGES IN THE CASH BENEFIT PROGRAM 19 (2000), *available at* http://www.ssa.gov/history/reports/crsleghist2.html (stating that the 1994 bill "restricted DI and SSI benefits payable to drug addicts and alcoholics by creating sanctions for failing to get treatment, limiting their enrollment to 3 years, and requiring that those receiving DI benefits have a representative payee (formerly required only of SSI recipients)").

54. Paul Davies et al., *The Effect of Welfare Reform on SSA's Disability Programs: Design of Policy Evaluation and Early Evidence*, 63 SOC. SECURITY BULL., 2000, at 3, 4.

55. DVD: OHA Hour, *supra* note 4.

maintaining their addictions."[56] One commentator summarized Congress's belief: "[It is] counterintuitive to give a financial award to individuals for their self-destructive behavior, much less illegal activities such as the habitual consumption of contraband."[57] So, the 1996 Congress and President Clinton passed legislation that ended disability payments for drug and alcohol addiction, indicating that "[t]he proposal would convert part of the savings to taxpayers into additional Federal funding to States for drug and alcohol treatment, providing an incentive for States to provide treatment to former recipients."[58] This legislation only provided additional funding for treatment programs for fiscal years 1997 and 1998 and did not purport to permanently establish or fund such treatment goals.[59] The purpose of this legislation was:

> [T]o eliminate payment of cash Social Security and SSI disability benefits to drug addicts and alcoholics, to ensure that beneficiaries with other severe disabilities who are also addicts or alcoholics are paid benefits through a representative payee and referred for treatment, and to provide additional funding to States to enable recipients to continue to be referred to treatment sources.[60]

Inherent in this legislation was a desire "to discourage alcohol and drug abuse, or at least not encourage abuse through the provision of a permanent government subsidy."[61]

To accomplish these goals, the 1996 Congress "passed the Contract with America Advancement Act (Contract with America), which excluded from the category of disabled individuals under SSI and SSDI persons whose alcoholism or drug addiction would . . . be a contributing factor material to the determination that they are disabled."[62] Effectively, the reform prevented an applicant from using a drug or alcohol dependency to qualify for disability benefits.[63] This change in the system prevented applicants disabled by substance addiction from receiving benefits, regardless of how much those impairments interfered with their ability to function.

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56. H.R. REP. NO. 104-379, at 17 (1995).

57. Stevenson, *supra* note 36, at 202 (summarizing the rationale that paying benefits to addicts creates a moral hazard while ultimately criticizing such a rationale).

58. H.R. Rep. No. 104-379, at 17.

59. *Id.*

60. *Id.* (purporting to allow substance abusers to be "referred for treatment," but failing to codify the method for an ALJ to execute such a referral and not providing an affirmative responsibility to make such a referral).

61. CAROLYN A. KUBITSCHEK & JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND PROCEDURE IN FEDERAL COURT § 5:52 (2011).

62. Spade, *supra* note 49, at 96 (alteration in original) (footnote omitted) (internal quotation marks omitted).

63. Davies et al, *supra* note 54, at 4.

> In 1996, more than 200,000 individuals received [SSI] or [SSDI] payments based on diagnoses of "drug and alcohol addiction." This classification was abolished and individuals for whom drug or alcohol addiction was the primary reason for their disability had their benefits terminated. Many individuals with terminated benefits could re-qualify for disability assistance based upon other conditions. However, existing studies indicate that many terminated beneficiaries did not return to the roll.[64]

The 1996 reform and its "wholesale exclusion of persons disabled by drug and alcohol addiction from SSI eligibility [was] the first time in the history of the program that Congress [had] eliminated entire categories of disease or diagnosis as a basis for eligibility."[65] The reforms had a substantial impact on the benefits system, but did not necessarily achieve their goals. After the implementation of the 1996 legislation, one study found that the "proportion [of Drug Addiction & Alcoholism (DAA) recipients] who were payment eligible [prior to the 1996 legislation] dropped dramatically from 77.3 percent to 24.9 percent—by 52.4 percentage points."[66] That same study also determined that "almost half . . . of all targeted beneficiaries . . . lost their eligibility (and did not have it reinstated) as a result of the policy change."[67] That being said, the impact on the overall number of beneficiaries on the welfare rolls did not dramatically change. The legal reform "had only a very small effect on the size of the SSA's disability programs as a whole, reflecting the fact that the targeted recipients accounted for only 2.6 percent of beneficiaries receiving [SS]DI and disabled adults receiving SSI at the time."[68]

To summarize, the current benefit system under the 1996 reforms has not succeeded in its endeavor to substantially decrease the number of claimants on welfare rolls.[69] In fact, the more punitive approach toward drug and alcohol addicts "undermine[s] the rehabilitative thrust of the SSI and SSDI programs"[70] and will cause even greater administrative costs

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64. Rukmalie Jayakody et al., *Substance Abuse and Welfare Reform*, NAT'L POVERTY CENTER POL'Y BRIEF, Apr. 2004, at 1, 1–2, *available at* http://www.npc.umich.edu/publications/policy_briefs/brief02/.

65. Spade, *supra* note 49, at 97–98.

66. Davies, *supra* note 54, at 5.

67. *Id.* at 6.

68. *Id.*

69. *See id.* at 6.

70. *See* Spade, *supra* note 49, at 98 (internal citation omitted) (describing the view of critics of the reforms). From its inception, the Social Security benefits system was intended to promote rehabilitation. In fact, "When Congress enacted the disability program in 1956, it intended that an effort would be made to rehabilitate as many disabled beneficiaries as possible so that they could return to work." *See* John R. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 SOC. SEC. BULL.,

when addicts develop serious medical conditions and become chronic filers in the future. Moreover, the failure to revoke or adapt existing regulations has generated confusion and "errors in the adjudication of drug addiction and alcoholism."[71] To rectify these problems, steps must be taken to make our nation's benefits systems both effective and understandable.

III. CURRENT SSA APPROACH TO DRUG AND ALCOHOL ABUSE

Under the current system, the federal government provides Social Security benefits "to people who cannot work because they have a medical condition that is expected to last at least one year or result in death."[72] Citizens who wish to receive benefits submit their applications to their local SSA office, which then forwards the application to the Disability Determination Services office in the applicant's state.[73] To decipher who will receive benefits among the applicants, the state agency's staff reviews the application and applies a five-step process to determine whether the applicant is disabled, pursuant to 20 C.F.R. § 416.920.[74] If any of the steps in this sequential evaluation process result in a determination that benefits may or may not be paid, then the analysis does not proceed any further.[75]

The sequential evaluation begins when the agency determines whether the applicant is working and the amount the applicant earns from her employment.[76] If the applicant's income exceeds a certain published figure, the agency will no longer consider the application.[77] If the applicant's income falls below the published threshold, the agency moves to the second step and considers the severity of the applicant's medical condition.[78] Not only must an applicant prove that he has an existing medical condition as determined by "acceptable medical sources,"[79] but the "medical condition must significantly limit [the applicant's] ability to do basic work activities—such as walking, sitting[, or] remembering—for at least one year."[80] An

2005/2006 at 1, 20, *available at* http://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.html.

71. DVD: OHA Hour, *supra* note 4.

72. SOC. SEC. ADMIN., SSA PUB. NO. 05-10029, SOCIAL SECURITY: DISABILITY BENEFITS 4 (2012), *available at* www.socialsecurity.gov/pubs/10029.pdf.

73. *Id.* at 8.

74. *See* 20 C.F.R. § 416.920(a)(4) (2012) (addressing the steps for a Title XVI claim). The mirror section addressing Title II claims can be found at 20 C.F.R. § 404.1520(a)(4) (2012); SOC. SEC. ADMIN., *supra* note 72, at 9–10. *But see* 20 C.F.R. § 416.935 (providing for a different process when there is evidence of a drug addiction or alcoholism).

75. *See* SOC. SEC. ADMIN., *supra* note 72, at 9–10.

76. *See id.*

77. *Id.*

78. *Id.*

79. *See* 20 C.F.R. § 404.1513(a) (2012).

80. SOC. SEC. ADMIN., *supra* note 72, at 9.

applicant whose medical condition does not limit "basic work activities" is not disabled.[81] The third step of the process considers whether the applicant's medical condition appears on the "List of Impairments," which details medical conditions that are "so severe that they automatically mean that [an applicant is] disabled as defined by law."[82]

The last two steps in the five-step process involve the agency basically evaluating the applicant's ability to work.[83] This adjudicative process establishes the applicant's residual functional capacity—a description of what the individual is still able to do—despite medically-proven impairments and limitations.[84] The state agency will examine whether or not the asserted medical conditions prevent the applicant from doing work he previously had done.[85] Then, taking into consideration factors like "age, education, and work experience," as well as medical conditions, the agency determines whether an applicant can work in any capacity.[86] If the claimant could do any other work that exists in significant numbers in the national economy, the state agency will determine that the individual is not disabled and not eligible to receive benefits.[87]

Even if an applicant satisfies all five steps, she may still be denied disability benefits if she is a drug abuser or alcoholic. A substance abuse disorder, drug addiction, or alcoholism, as defined by the SSA, is "when a maladapted person's pattern of substance abuse leads to clinically significant impairment or distress."[88] When a person suffering from this type of condition applies for benefits, the SSA first determines whether or not the applicant is disabled, given the totality of the circumstances.[89] After the agency determines the applicant to be disabled, it may deny disability benefits to an applicant whose "drug addiction or alcoholism is a contributing factor material to the determination of disability."[90]

Whether the presiding ALJ grants benefits will depend on whether the applicant's substance abuse disorder is "material."[91] Once the applicant is already determined to be disabled, the ALJ "will evaluate which of [the applicant's] current physical and mental limitations, upon which [the ALJ]

81. *Id.*
82. *Id.* at 10.
83. *See* 20 C.F.R. § 404.1520a(c)(4) (2012).
84. *See* 20 C.F.R. § 404.1545(a)(4) (2012).
85. *Id.* § 404.1545(a)(5)(ii).
86. *See id.* § 404.1520(a)(4)(v).
87. *See* 20 C.F.R. §§ 404.1520(g), 404.1566(a), 416.920(g), 416.966(a).
88. DVD: OHA Hour, *supra* note 4.
89. *Id.*
90. *See* 20 C.F.R. §§ 416.935(a), 404.1535(a).
91. *See id.*

based [the] disability determination, would remain if [the applicant] stopped using drugs or alcohol and then determine whether any or all of [the] remaining limitations would be disabling."[92] Specifically, the agency examines whether it would still find an applicant disabled if he stopped using drugs or alcohol.[93] If the agency decides an applicant would not be disabled after drug or alcohol usage ceased, then the agency will find that the drug use or alcoholism is a "material contributing factor."[94] When substance abuse is a material contributing factor, then the agency will deny benefits to an applicant despite the fact that he may not be able to properly function and maintain gainful employment. The only way that an addict or alcoholic may keep her benefits is "if the claimant would remain disabled if she stopped using alcohol or drugs."[95]

This process must be followed even if the claimant fails to mention, or outright denies, his substance abuse problem. A presiding ALJ must investigate and determine whether there is an existing abuse condition.[96] Using available evidence such as medical records, physician notes, and evidence like repeated visits to the emergency room for intoxication, if an ALJ finds any indication that a substance abuse disorder exists, the ALJ must analyze and process the benefits adjudication under the contributing factor analysis.[97] Under the current system, an applicant is legally deemed to have a substance abuse problem but is not offered any means to treat the problem, depriving the applicant, who may be seriously disabled by his condition, of the opportunity to return to the workforce.

To better illustrate, consider the following: an applicant who suffers from seizures and substance addiction "must first be found disabled considering all impairments, including DAA."[98] Once an ALJ determines that the applicant is in fact disabled, the ALJ must then apply the contributing factor analysis to the case.[99] If an applicant experienced seizures while using drugs, a judge could deem the applicant disabled. If those seizures would stop if the claimant stopped using drugs, the drugs would be found material to the seizures and the applicant would be found ineligible for

92. *Id.* § 404.1535(b)(2).

93. *See id.* §§ 416.935(b)(1), 404.1535(b)(1)–(2).

94. KUBITSCHEK & DUBIN, *supra* note 61, § 5:52.

95. *Id.* at 565.

96. DVD: Office of Disability Adjudication and Review Training Video: Drug Addiction and Alcoholism [DAA] (SSA 2009) [hereinafter DVD: ODAR]. The training videos produced by the SSA, and referred to in this paper, were obtained though SSA FOIA Request AH5574, dated December 3, 2011, at 10:35:53 AM. SSA provided full, unredacted versions of both referenced videos.

97. *Id.*

98. DVD: OHA Hour, *supra* note 4.

99. *See* Stevenson, *supra* 36 at 192.

benefits. If, however, the applicant's seizures continued regardless of whether or not he was using drugs, his seizures would be an independent basis for conferring social security benefits.

To conclude our discussion of the present system, the 1996 reforms currently in place prevent applicants with DAA from receiving treatment. Failing to meaningfully address drug and alcohol addiction will only further exacerbate mental and physical problems for the applicant. Additionally, this failure will encourage chronic filings with the SSA in the future and burden taxpayers with the cost of providing long-term benefits to the applicant who develops a more serious, perhaps irreversible, condition.[100] Moreover, continued DAA will prevent any medical improvement that might enable the claimant to return to productive work.

In addition, current adjudication of cases involving drug and alcohol abuse is complicated by the fact that inconsistent, pre-1996 regulations still exist.[101] Provisions within the current code were not removed to reflect the change in policy. The legal reforms state: "An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled."[102] Provisions enacted before the newer reforms, namely § 404.1536, still remain in title twenty of the C.F.R. and suggest that substance abusers may receive benefits in the form of treatment.[103] These conflicting provisions not only confuse those participating in the adjudication of these claims, but also confuse the general public, which relies on the C.F.R. to make regulations "accessible, consistent, written in plain language, and easy to understand."[104]

The C.F.R. was written for the general public to understand the benefits process, and the inclusion of inaccurate or outdated information misleads the public. In fact, it appears that even the SSA is confused about the applicability of 20 C.F.R. § 404.1563. In a training video produced to educate Social Security employees about the proper way to process applications containing substance abuse issues, viewers are told that "if a

100. Medicaid benefits may also be implicated. Before age sixty-five, an individual is eligible for free Medicare hospital insurance if he has been entitled to Social Security disability benefits for twenty-four months. SOC. SEC. ADMIN, SSA PUB NO. 05-10043, SOCIAL SECURITY: MEDICARE, at 6 (2012) *available at* http://www.ssa.gov/pubs/10043.pdf.

101. *E.g.*, 20 C.F.R. § 404.1536–.1541; § 416.936–.941 (2012).

102. 42 U.S.C. § 423(d)(2)(C) (2006); *see* DVD, OHA Hour, *supra* note 4.

103. 20 C.F.R. § 404.1536.

104. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (explaining the general goals of regulations); *see also Plain Language: It's the Law*, PLAINLANGUAGE.GOV, http://www.plainlanguage.gov/plLaw/index.cfm (last visited Nov. 30, 2012).

claimant is determined to be disabled and also found to have a [DAA] condition they must have a representative payee and the claimant must also receive appropriate [DAA] treatment."[105]

In summary, the SSA awards benefits to individuals with administratively determined substance abuse and addiction issues, but there is no requirement to address and rectify those issues for continuation of benefits. At the same time, other applicants who are administratively labeled as substance abusers and addicts are dismissed from the system without being provided access to services that could be used to restore their productivity as employees. While the reforms proposed in the following section could allow some claimants to use their benefits awards to subsidize DAA behavior,[106] they are preferable to the current system that conveniently ignores the substance abuse problems plaguing the nation. In the current system, if an addict suffers from an additional impairment that prevents employment, benefits are awarded without requiring the claimant to mitigate further mental and physical damage through a substance abuse program. If a claimant is an addict without other significant ailments, the individual is labeled as such, and is promptly turned out to fend for himself until the chronic addiction produces irreversible mental and physical damage that will qualify for the receipt of disability benefits. The economic efficiency, if not the sanity, of this approach must be questioned.

IV. SUGGESTIONS FOR REFORM

As is evident, the current disability system does not address the needs of a certain population of disabled persons. The system simply fails to respond to the treatment needs of individuals who are administratively labeled as addicts and substance abusers and, by doing so, generates economic inefficiency. Without assistance, these potential workers will probably not reintegrate into the labor force.[107] Moreover, ignoring this disability now will deplete government revenues in the future because addicts will develop more serious health issues that require more benefits

105. DVD: ODAR, *supra* note 96.

106. The approach recommended in this paper will not fully prevent disability payments from being utilized to purchase drugs or alcohol. The system reforms in the 1990s were subject to extensive legislative debate. *See* Stevenson, *supra* note 36, at 212 ("The legislative history is replete with anecdotes of purported system abuses, including 'junkies' who designate their suppliers as their 'representative payees,' and alcoholics who designate their local watering hole as the mailing address for their benefits checks.").

107. *See* Dieter Henkel, *Unemployment and Substance Use: A Review of the Literature* (1990–2010), 4 CURRENT DRUG ABUSE REVS. 4, 4 (2011), *available at* http://www.ncbi.nlm.nih.gov/pubmed/21466502 ("Problematic substance use increases the likelihood of unemployment and decreases the chance of finding and holding down a job.").

and medical care. To rehabilitate these persons and avoid this economic drain, the current Social Security disability benefits system must be altered.

The issue now becomes how the current system may be modified so as to better serve those labeled as substance abusers and addicts. Two possible approaches[108] address the current situation. Restituting 20 C.F.R. § 404.1536 is one possible method. If this former regulation was revived and accompanied by the appropriate procedures, the disability system could more effectively address drug addiction and abuse. In such a system, agency procedures would instruct SSA ALJs to cease to distribute benefits when the recipient fails to comply with a designated rehabilitation or treatment program. These procedures would not only promote rehabilitation but would also avoid squandering government funds on a non-compliant recipient. However, as addressed below, this approach has significant shortcomings.

Alternatively, SSA could adopt a § 404.1536-type system that does not award benefits but provides the claimant with resources for drug and alcohol rehabilitation and job training. To be eligible for this federally

108. Obviously, the potential list of solutions is expansive. However, this paper will focus on reforms related to the implementation or modification of 20 C.F.R. § 404.1536. While other solutions have been suggested, many are impractical. For example, the suggestion that the SSA add DAA as part of the grid analysis at 20 C.F.R. § 404.1569 and provide addicts with financial benefits is ineffective. *See* Stevenson, *supra* note 36, at 235. Using the grid analysis results in an automatic determination of benefit availability based on the categorization of an individual's standing. For instance, if a person is over a certain age, has limited education, and is found unable to engage in work that would require lifting more than ten pounds, the person automatically qualifies for benefits. If DAA is added as a factor that would automatically allow an individual to qualify for benefits, there will be several undesirable results. First, the grid prevents the adjudicator from looking at the person as an individual, but instead removes discretion from the adjudicator and forces her to classify that person under a pre-determined standard. This is incompatible with the complex nature of a DAA analysis where classification is not objectively quantified or precisely measured. Successful classification and treatment of DAA requires an individualized approach that considers the person holistically. Second, this system would encourage addictive behaviors and would prevent individuals from seeking treatment for rehabilitation and recovery. Often, individuals wait over a year from their state agency denial of benefits until their in-person hearing before an ALJ. The motivation to obtain financial Social Security disability benefits is influential. During this time, applicants are often wary of seeking employment opportunities or engaging in behaviors that would jeopardize their appeal. Adding DAA to the grid would cause those who are aware of their need for substance abuse treatment to avoid engaging in treatment until after their scheduled hearing. While it may be possible to develop another grid for the determination that a person is "DAA Relevant Despite Being Otherwise Disabled" and thus qualifies for addiction treatment, this approach would still oversimplify the subtlety of the determination that an individual is a substance abuser. Therefore, the holistic evidentiary approach proffered in this paper is superior to the development of such a grid analysis.

established program, the claimant would go through the established application process for disability benefits and be classified as "DAA Material." Such an individual would not be considered disabled *but for* their addiction. This addiction would prevent the individual from being employed, and the claimant would therefore be considered a "DAA Material" claimant. The § 404.1536-type reform would also address individuals who were awarded benefits based on other ailments, despite evidence of substance abuse. These individuals would be required to participate in a substance abuse treatment program to continue receipt of financial disability benefits.

It is essential to understand how the system worked under 20 C.F.R. § 404.1536 before addressing the respective benefits and drawbacks of each of the aforementioned options. Section 404.1536, originally promulgated in 1995, provided that if the SSA determined that an applicant's addiction was "material to the determination of disability," the applicant was required to "avail [herself] of appropriate treatment . . . at an institution or facility approved by" the agency.[109] Revocation of benefits occurred when an applicant "did not comply with the terms, conditions and requirements of the treatment which has been made available," or when the applicant failed to avail himself of treatment after he had been notified that such treatment was available.[110]

The wholesale reimplementation of 20 C.F.R. § 404.1536 is not a sensible approach to today's problem. It is difficult to persuade the political electorate that providing a stream of income to an acknowledged substance abuse addict is sound public policy. Taxpayers will find the premise distasteful and support for such a policy is likely to serve as fodder for negative political ad campaigns. In addition, suggesting a return to past precedent is "unlikely to be popular politically, as this will intuitively strike voters as regressive. From a purely pragmatic standpoint, advocates will be more effective originating something 'new' to achieve the same purpose."[111]

The administrative cost of monitoring rehabilitation compliance and terminating benefits would be burdensome and expensive. This termination procedure may become so cumbersome to execute that the SSA may essentially just overlook and underutilize it. In the best case scenario, it would still take a significant amount of time to determine if a claimant has not complied with treatment and to process the appropriate paperwork to discontinue benefits. This would allow individuals classified as substance abusers to continue to receive benefits without engaging in

109. *See* 20 C.F.R. § 404.1536(a) (2012).
110. *See id.* § 404.1536(a)(1)–(2).
111. Stevenson, *supra* note 36, at 232–33.

substance abuse treatment.

Furthermore, providing financial disability benefits to claimants while requiring participation in substance abuse treatment would likely flood rehabilitation programs with individuals who are not fully committed to successfully treating their addictions. These individuals would attend only as necessary to continue receiving disability payments. As successful program completion would result in elimination of benefits, the individual is motivated to attend and participate only enough to avoid benefits termination. A claimant would be financially incentivized to extend the treatment as long as possible by intentionally relapsing into substance use or by showcasing an inability to maintain sobriety in the absence of continued treatment. For these reasons, it is unwise and unwarranted to return wholesale to the historic use of 20 C.F.R. § 404.1536.

However, a modified version of this system could potentially stem the rising number of substance abusers and efficiently preserve limited government resources. Therefore, 20 C.F.R. § 404.1536 should be reexamined and adopted, but with the accompanying provisions.

First, the modified regulation must provide an ALJ with the authority to both provide a claimant identified as "DAA Material" with access to a federally funded drug and alcohol treatment program and prevent the award of accompanying financial benefits. This access to treatment would provide an opportunity for the claimant to obtain services but would not mandate that the claimant participate in a substance abuse program. By eliminating the financial payment incentive for those classified as DAA Material, only the individuals committed to recovery will choose to utilize the rehabilitation benefits they have been awarded. This will direct federal funding only to individuals who are motivated to cease substance abuse.

The program would primarily address the medical and psychological needs of an individual seeking to cease the use of drugs, alcohol, or both. The program's goal will be to provide the individual with the skills necessary to maintain a lifestyle of complete abstinence from these substances. Once the initial phase of the program is complete and abstinence is obtained, it would also be appropriate to introduce job or vocational training as part of this rehabilitation process during the second phase of the treatment, in which the abstinent lifestyle is stabilized and the individual receives appropriate counseling and training. The specific requirements or attributes of this rehabilitation program are beyond the scope of this paper, but it is sufficient to state that the rehabilitation goals for this program include abstinence from substance abuse and stabilization of the newly sober lifestyle, including appropriate vocational training.

Next, ALJs should be provided with a new regulatory category: "DAA Relevant Despite Being Otherwise Disabled." Based on the individual

situation, an ALJ should be vested with the authority to require addiction treatment services for individuals receiving disability benefits when evidence establishes an active addiction. New regulations should require rehabilitation as a prerequisite to continuation of disability benefits. Requiring rehabilitation would decrease the costs associated with additional medical issues related to ongoing abuse. Additionally, it could potentially enable a benefit recipient to return to the workforce if other medical issues improve as a result of treatment. Lastly, this system would further provide some accountability for payment of disability benefits.

The requirement of rehabilitation would differ in philosophy from the offer of substance abuse treatment provided to individuals classified as DAA Material. While the DAA Material claimant is denied financial disability benefits, he is offered the opportunity to access substance abuse rehabilitation services on a voluntary basis. As articulated earlier, this will funnel services to individuals who are motivated to cease substance abuse and will not waste resources on individuals disinterested in this type of lifestyle change. This approach preserves government resources and also coincides with an individual's desire to choose if and when to pursue substance abuse treatment.

However, when a claimant receives the requested financial benefits from a disability determination, the government has a vested interest in ensuring that the benefits will be well-managed, that the individual is not engaging in illegal behavior, and that the individual now designated as a substance abuser is responsibly addressing the issue. It may be argued that mandated treatment will not be as effective as voluntary treatment. However, by analogy, the criminal justice system has shown that mandated treatment can be beneficial:

> Often, the criminal justice system can apply legal pressure to encourage offenders to participate in drug abuse treatment; or treatment can be mandated through a drug court or as a condition of pretrial release, probation, or parole. A large percentage of those admitted to drug abuse treatment cite legal pressure as an important reason for seeking treatment. Most studies suggest that outcomes for those who are legally pressured to enter treatment are as good as or better than outcomes for those who entered treatment without legal pressure. Individuals under legal pressure also tend to have higher attendance rates and remain in treatment for longer periods, which can also have a positive impact on treatment outcomes.[112]

There will be a discrepancy in treating addicts: DAA Material addicts will be offered substance abuse treatment, and DAA Relevant Despite Being Otherwise Disabled claimants will be mandated to participate in

112. *Principles*, *supra* note 3.

such treatment. However, the distinction is rationally based on the government's interests in a claimant's sobriety as benefits are paid from public funds.[113] Discussed above, these interests support the need for mandated treatment, even if success rates are higher among the voluntary DAA Material participants.

If the SSA adopted such a system, there would need to be some guidance concerning requirements for finding a claimant DAA Relevant Despite Being Otherwise Disabled. A myriad of issues could be considered when establishing a standard for determining that a claimant falls into this category. However, the threshold determination must be clear and easy to establish.

A number of relevant factors were considered in the early 1990s to establish if alcoholism or addiction was voluntary or involuntary. While a similar approach would not be appropriate in this case, as the voluntary or involuntary nature of a person's consumption should be irrelevant in the determination of public policy, the types of evidence under review would be similar. The standards proffered in the voluntary/involuntary analysis provide a starting point for determining if a person should be classified as DAA Relevant Despite Being Otherwise Disabled. The adjudicator should be able to consider job-attendance issues, alcohol-related arrests, patterns of attempted treatment, continued drinking while on disulfiram[114], parole violations, frequency of intoxication, withdrawal symptoms, increased tolerance for the abused substance, and evidence of end organ damage, such as alcoholic neuropathy, alcohol withdrawal seizures, and other related conditions.[115] This is not an exhaustive list of factors establishing that a person has a relevant substance abuse problem despite being otherwise disabled, but such factors are appropriate for consideration.

Other evidence that could be used to administratively determine the existence of a substance abuse problem includes statements from the claimant or other witnesses at a hearing. While such statements need to be "treated cautiously" because individuals tend to deny substance abuse

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113. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203 (2003) (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.")).

114. Disulfiram, also known as Antabuse, is used to treat chronic alcoholism. The drug:

> [C]auses unpleasant effects when even small amounts of alcohol are consumed. These effects include flushing of the face, headache, nausea, vomiting, chest pain, weakness, blurred vision, mental confusion, sweating, choking, breathing difficulty, and anxiety. These effects begin about ten minutes after alcohol enters the body and last for one hour or more. Disulfiram is not a cure for alcoholism, but discourages drinking.

See Disulfiram, U.S. NAT'L LIBRARY OF MED., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000726/ (last updated Feb. 11, 2012).

115. *See* Farris, *supra* note 31, at 43–44.

problems,[116] an admission would support a finding of DAA Relevant Despite Being Otherwise Disabled. This would be akin to a "statement against interest"[117] in that the claimant would not willingly admit use of illegal substances or excessive use of alcohol unless such a statement was true. Such an admission mandates a DAA analysis that could possibly result in a DAA Material finding and a denial of financial disability benefits. Therefore, if the claimant makes such a statement at a hearing, it is likely to be true as it is an admission against interest. Likewise, as the witnesses testifying at a disability hearing are chosen by the claimant and his representative, the statement against interest theory is equally applicable.

It would also be prudent to consider medical records when determining if a person is DAA Relevant Despite Being Otherwise Disabled. When evaluating a claimant, a statement from a medical care professional that a claimant is unable to prudently manage funds because of a substance abuse issue would be relevant. Such an evaluation would demonstrate an impact on daily functioning that directly correlates to the substance abuse, indicating a need for treatment. It is also prudent to consider statements from a medical professional notifying the claimant that the claimant will suffer physical or psychological complications if substance use continues, followed by evidence of continued use. Statements from a medical professional showing that the claimant has continued substance abuse, regardless of its negative impact on his health, would support the need for substance abuse treatment. Likewise, the medical record may plainly contain a diagnosis of "alcoholism," "drug abuse," or "drug addiction." Medical records should be used as conclusive evidence that substance abuse treatment is warranted for a claimant receiving disability benefits.

The adjudicator should be vested with the authority to use any record evidence available to logically support her conclusion classifying an individual as DAA Relevant Despite Being Otherwise Disabled and mandated to treatment. The adjudicator should be required to support this finding with a citation to the relevant evidence. However, the required legal analysis should be simple and the evidentiary threshold should be low.

The supported analysis should require only a citation to a claimant's admission of addiction or abuse, a medically acceptable source's diagnosis of abuse or addiction, *or* a brief explanation of the evidentiary rationale that led the adjudicator to the conclusion that the claimant is DAA Relevant Despite Being Otherwise Disabled.

A more detailed requirement would be counterproductive for two

116. *See id.* at 44.

117. *See* FED. R. EVID. 804(b)(3).

reasons: First, clarity and simplicity prevent confusion and avoid grounds for appeal. A simple and clear analysis will decrease administrative costs and support the finality and reliability of issued decisions. Second, a complicated analysis would create a burden of proof on the adjudicator that would be so high that the analysis would likely be avoided whenever possible. The production requirements within the disability adjudication system are already high, and a complicated evidentiary analysis represents additional work that would be sidestepped. An overly complicated analysis would potentially result in finding that substance abuse does not impact a claimant, even if the evidence suggests otherwise. Overall, a high standard of proof is not necessary, as mandated substance abuse treatment should be considered a provision of needed services, rather than a punishment.

If an individual classified as DAA Relevant Despite Being Otherwise Disabled fails to appropriately participate in substance abuse treatment, it would be necessary to terminate benefits. As discussed above, termination procedures are fraught with administrative challenges, and there is no persuasive public policy that merits this type of cost and effort for individuals who would not otherwise receive financial disability benefits because they are classified as DAA Material. However, in cases where a substance abuser is determined to be disabled based on another unrelated ailment, implementing this monitoring and termination procedure would motivate recipients to continue participation in their required substance abuse treatment program. Even if benefit termination procedures were not swiftly administered, the potential for loss of benefits would still exist and could prompt compliance with substance abuse program requirements.

In determining if a DAA Relevant Despite Being Otherwise Disabled claimant is appropriately participating in substance abuse treatment, the adjudicator must consider the availability of the treatment program and the claimant's participation effort. A treatment program would be considered "available" if the government has notified the claimant of the program's location and schedule and has allocated appropriate resources to allow the claimant to be seated in such a program. Once such notice has been provided, the claimant could refute a finding of "program availability" only by obtaining a substantiated statement from a treating medically acceptable source[118] that the claimant's other medically determinable ailments prevent participation in the particular program offered by the government.

The claimant's appropriate participation in a substance abuse program would also be considered during a benefits termination decision. Evidence of participation would be garnered from the records kept by the treating facility. Also, the adjudicator would give substantial weight to any

118. 20 C.F.R. § 404.1527(c)(2) (2012).

determination that the claimant is being dismissed from the program due to noncompliance with treatment. In addition, medical opinions from acceptable sources[119] will be considered, and records showing anything other than complete abstinence from the substance of abuse will be given weight in the termination decision. This evidence may be in the form of blood or urine test results, observations relating to continued use garnered from examination of the claimant, or admissions from the claimant during treatment. Other evidence may also be considered as appropriate, such as arrest records for public intoxication, driving under the influence, or possession of illegal drugs or drug paraphernalia.

The modification and implementation of 20 C.F.R. § 404.1536 may be an effective tool in America's "War on Drugs." As outlined above, a program that affords treatment options may allow substance abusers an opportunity to attain sobriety. This could potentially return individuals to the workforce and prevent costs associated with awarding these individuals lifetime disability benefits when their addiction issues culminate in irreversible physical or psychological damage. At the very least, Congress and the SSA should seek to remove the C.F.R. provisions that are no longer in effect because inaccuracies contradict the purpose of plain language conventions and confuse the public.[120] This clarification would not address the needs of claimants with substance abuse issues, but it might help decrease the "errors in the adjudication of drug addiction, and alcoholism [that] continue to be noted by peer review study, appeals counsel, and the federal courts."[121]

CONCLUSION

The federal government needs "a comprehensive proposal on drugs . . . designed to say that we want to minimize drug use in America and we're very serious about it."[122] Without an investment in the treatment of substance abuse among Social Security disability applicants and benefit recipients, the long-term social and financial costs will continue to rise. The first step toward a comprehensive drug policy can be found in the revision and implementation of 20 C.F.R. § 404.1536.

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119. *Id.* §§ 404.1527(a)(2), .1513(a).

120. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). Under the current system, 20 CFR § 404.1536 through § 404.1541 and § 416.936 through § 416.941 remain in the Code of Federal Regulations as a vestige of the programs that were eliminated in 1996. Their enduring presence in the Code confuses individuals trying to understand how disability benefits are administered and reflects the unfinished nature of Social Security's stumbling attempt to address this serious problem.

121. DVD: OHA Hour, *supra* note 4.

122. Moody, *supra* note 6.

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THE CASE FOR JUDICIAL REVIEW OF PRESIDENT OBAMA'S JANUARY 4 RECESS APPOINTMENTS

SHANNON CAIN*

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INTRODUCTION

On January 4, 2012, President Barack Obama appointed four individuals to positions in administrative agencies under the auspice of the Recess Appointments Clause in the U.S. Constitution. He appointed Richard Cordray as the head of the Consumer Financial Protection Bureau (CFPB) and Sharon Block, Terence Flynn, and Richard Griffin as Commissioners on the National Labor Relations Board (NLRB).[1] Richard

* J.D., American University Washington College of Law; B.A., Elon University. I would like to thank Professors Jamin Raskin and Jeff Blattner for inspiring me to write this Article during their Legislative Process and Political Rhetoric class and the *Administrative Law Review* staff for their hard work and dedication.

1. *See* Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J., Jan. 4, 2012, http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html.

Cordray was previously denied confirmation to the CFPB in a Republican filibuster.[2]

Though President Obama sent the three NLRB nominations to Congress after the recess appointments, there are numerous court and political challenges to his ability to make these appointments.[3] The discussion of the appointments has been sharply characterized by political rhetoric with headlines ranging from *Obama Deserves Praise for Keeping GOP in Check*[4] to *Obama's Cordray Appointment Mocks the Constitution*.[5] Despite the politicized rhetoric surrounding the recent appointments, they are in fact quite commonly used by presidents. As of January 4, 2012, President Obama had made thirty-two recess appointments;[6] President George W. Bush made 171 recess appointments, President Clinton made 139, and President Reagan made 240.[7]

Article II provides that the President "shall nominate, and by and with

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2. *See* Jonathan Turley, *Column: Obama's Recess Appointments an Abuse of Power*, USA TODAY, Feb. 14, 2012, http://www.usatoday.com/news/opinion/forum/story/2012-02-14/recess-appointments-cordray-nomination/53094876/1 (conceding that while Cordray was a well-qualified nominee, sometimes the selection process is just as important as the selection itself).

3. *See* Tom Schoenberg, *Obama Recess Appointments Can't Be Challenged in Labor Rule Suit*, BLOOMBERG (Mar. 3, 2012, 3:08 AM), http://www.bloomberg.com/news/2012-03-02/judge-rejects-challenge-to-obama-labor-relations-board-recess-appointments.html (listing four lawsuits where the appointments have been raised to avoid enforcement of actions); *see also* Press Release, H. Educ. & Workforce Comm., Committee Announces Hearing to Examine Unprecedented NLRB Recess Appointments (Jan. 25, 2012), *available at* http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=276580 (quoting Rep. Phil Roe as saying the recess appointments were "an abuse of power").

4. Ian Millhiser, *Obama Deserves Praise for Keeping GOP in Check*, USNEWS (Jan. 6, 2012), http://www.usnews.com/debate-club/is-the-cordray-appointment-constitutional/obama-deserves-praise-for-keeping-gop-in-check (arguing that these agencies were created by Congress to support the American people and that by refusing to appoint President Obama's candidates or to take a recess, it is an "attempt to shut these agencies down [which] is a direct assault on the rule of law").

5. Phil Kerpen, *Obama's Cordray Appointment Mocks the Constitution*, FOXNEWS.COM (Jan. 4, 2012), http://www.foxnews.com/opinion/2012/01/04/obamas-cordray-appointment-mocks-constitution (pointing to President Obama's statement as a candidate that he "taught the Constitution for 10 years" and, if elected, he would "obey the Constitution of the United States" as evidence that President Obama has failed to live up to the promise that he would not "make laws as he is going along").

6. President Obama has not made additional appointments since the January 4, 2012 appointments as of November 1, 2012.

7. HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2012); *see* Ed O'Keefe, *Obama's Recess Appointments Will Create Uncertainty, GOP Critics Say*, WASH. POST, Feb. 1, 2012, http://www.washingtonpost.com/blogs/federal-eye/post/obamas-recess-appointments-will-create-uncertainty-gop-critics-say/2012/01/31/gIQAHbdbhQ_blog.html.

the Advice and Consent of the Senate" appoint federal nominees to office.[8] The very next clause is known as the Recess Appointments Clause (the Clause) which states, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[9] Neither house of Congress can recess for more than three days without the consent of the other house.[10] During the recent appointments, the U.S. House of Representatives denied the U.S. Senate's request for a recess, instead holding sessions every three days in an attempt to prevent such appointments as those made by President Obama. President Obama, with the support of the Department of Justice (DOJ), argued that the U.S. Senate sessions were pro forma and thus, the Senate was in recess—regardless of whether the House was in session or had granted the Senate's request for a recess.[11]

This Article argues that while the Clause may not have originally been intended to cover the recesses that exist today, the current precedent did allow President Obama to legally make the recess appointments. However, this Article acknowledges the likelihood that the legality of the appointments will be settled in the courts and could reach the Supreme Court; thus, the ensuing years will likely bring a new interpretation of the Clause and greater clarification from the courts that will assist both the Executive and Legislative Branches. Part I summarizes the history of the Clause including past use of the Clause and the effect of pro forma sessions on that use. Part II focuses on President Obama's January 4, 2012 appointments—providing background on the reasons for making the appointments, the individuals that were appointed, and where those appointments currently stand. Section A discusses current court challenges to the appointments, including the inability to find a proper jurisdictional place. However, it is more likely that the courts will ultimately make the decision; thus, Section B discusses the constitutionality of the appointments and potential conclusions a reviewing court could reach. Section B suggests that Congress should not be able to use its internal procedures to thwart the President's constitutional responsibility to carry out the laws enacted by Congress, which he cannot do without effective administrative agencies.

8. U.S. CONST. art. II, § 2, cl. 2.

9. U.S. CONST. art. II, § 2, cl. 3.

10. U.S. CONST. art. I, § 5, cl. 4.

11. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *1–2 (O.L.C. Jan. 6, 2012) (discussing the Office of Legal Counsel's consistent stance that a "recess" within the meaning of the Recess Appointments Clause permits the President to exercise his constitutional power to fill vacancies in offices, so long as the recess is a sufficient length).

Finally, Section C briefly describes the issues that would arise should the challenge ultimately reach the Supreme Court.

I. HISTORY OF THE RECESS APPOINTMENTS CLAUSE

The constitutional provision for recess appointments essentially excludes the Senate from the appointment process, providing that the President can approve temporary commissions that occur during a "Recess of the Senate."[12] The Clause is "broad and indefinite in scope."[13] The Constitutional Congress adopted the Clause without debate and without dissent.[14] In *Federalist No. 67*, Alexander Hamilton described the purpose of the Clause:

> The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the [Recess and Appointments] clause is evidently intended to authorize the President, singly, to make temporary appointments.[15]

Hamilton further described the Clause as providing a "supplement" to the President's appointment power and establishing "an auxiliary method of appointment, in cases to which the general method was inadequate."[16]

Intrasession recesses[17] have become quite common since 1943, but started with President Johnson in 1867.[18] The appointments were often related to the length of the recess, "because none of the intrasession recesses

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12. *Cf.* Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 751–52 (2009) (citing U.S. CONST. art. II, § 2, cl. 3) (describing that on the face of the Recess Appointments Clause the "power and discretion [is] solely in the hands of the president").

13. *Id.* at 752, 777 (concluding that the Recess Appointments Clause "should essentially be read out of the Constitution when examining Article III vacancies").

14. Louis Fisher, *Recess Appointments of Federal Judges*, *in* The SUPREME COURT AND THE FEDERAL JUDICIARY 126 (Steven C. Caldwell ed., 2002).

15. THE FEDERALIST NO. 67, at 409–10 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphases omitted). Hamilton also explains that the word "officers" refers to those positions described in the Advice and Consent Clause. *Id.*

16. *Id.* at 409.

17. Because President Obama's appointments occurred after the Second Session of the 112th Congress convened, they are characterized as having occurred during an intrasession recess. Thus, this Article will focus on intrasession recesses.

18. *See* Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 666 (2004) (discussing the history and frequency of intrasession recess appointments).

taken by the Senate until that time had lasted more than 15 days."[19] Presidents Harding and Coolidge each made intrasession recess appointments in the 1920s during recesses of twenty-seven and thirteen days.[20] Then, "Beginning in 1943, presidents started to routinely make recess appointments during long intrasession recesses."[21] However, it is very difficult to determine how many recess appointments presidents have made because, prior to 1965, "recess appointments were recorded in haphazard fashion."[22] "The last five Presidents have all made appointments during intrasession recess of fourteen days or fewer."[23]

The Executive Branch's analysis of the Clause has focused on the availability of the Senate to be consulted on nominations.[24] The DOJ has "long interpreted the term 'recess' to include intrasession recesses if they are of substantial length."[25] In a 1921 opinion, then-Attorney General Daugherty, serving under President Harding, determined that "[r]egardless of whether the Senate has adjourned or recessed, the real question . . . is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained."[26]

The Senate Judiciary Committee has also characterized the term "recess" as "something real, not something imaginary; something actual, not something fictitious"[27] and has defined the term to mean:

> [T]he period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress . . . when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.[28]

Traditionally, the Clause has been read to apply when a vacancy exists and does not require that the vacancy actually arise during the recess.[29]

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19. *Id.*
20. *Id.*
21. *Id.* at 666.
22. Memorandum from Rogelio Garcia, Analyst in Am. Nat'l Gov't, to the Senate Comm. on Banking, Hous. and Urban Affairs, Cong. Research Serv., Library of Congress, *Number of Recess Appointments, by Administration, from 1933 to 1984* at 1 (Mar. 13, 1985).
23. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *5 (O.L.C. Jan. 6, 2012).
24. *Id.* at *8 (citing Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 633 (1823)).
25. Intrasession Recess Appointments, 13 Op. O.L.C. 271, 272 (1989).
26. Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 21–22 (1921).
27. S. REP. NO. 58-4389, at 2 (1905).
28. *Id.* (emphasis omitted).
29. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52

There is little case law developing the confines of the Clause. "[T]he constitutional test for whether a recess appointment is permissible is whether the adjournment of the Senate is of such duration that the Senate could not receive communications from the President or participate as a body in making appointments."[30] The U.S. Court of Appeals for the Eleventh Circuit concluded in *Evans v. Stephens*[31] that "Recess of the Senate" includes intrasession recesses and declined to set a lower bound on the required length of time the Senate must be in recess for the President to make such appointments.[32] Litigants had challenged the President's intrasession appointment of Judge William H. Pryor Jr. to the court during an eleven-day Presidents' Day break.[33] The majority opinion relied on the text of the Constitution, the intent of the Framers, historical practice, and precedent to uphold the President's constitutional authority to make the appointment.[34]

The Supreme Court has never decided the issue; however, Justice Stevens filed a statement respecting the denial of certiorari in *Evans* and agreeing that there were "legitimate prudential reasons for denying certiorari,"[35] but stating that the "case . . . raise[d] significant constitutional questions regarding the President's intrasession appointment" and "it would be a mistake to assume that . . . disposition of th[e] petition constitute[d] a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies . . . with appointments made absent consent of the Senate during short intrasession 'recesses.'"[36]

UCLA L. REV. 1487, 1487 (2005).

30. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *4 (O.L.C. Jan. 6, 2012) (internal quotation marks omitted) (citing Intrasession Recess Appointments, 13 Op. O.L.C. at 272).

31. 387 F.3d 1220 (11th Cir. 2004) (en banc).

32. *Id.* at 1222, 1225; *see also* Nippon Steel Corp. v. U.S. Int'l Trade Comm'n, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int'l Trade 2002) ("The long history of the practice (since at least 1867) without serious objection by the Senate . . . demonstrates the legitimacy of these appointments."). *But see Evans*, 387 F.3d at 1228–29 n.2 (Barkett, J., dissenting) ("Although I would not reach this question, the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only inter-session recesses.").

33. *Evans*, 387 F.3d at 1221–22.

34. However, a dissenting judge argued that the Clause "directly, expressly, and unambiguously" required that the vacancy occur during the recess. *Evans*, 387 F.3d at 1229 (Barkett, J., dissenting).

35. *Evans v. Stephens*, 544 U.S. 942, 942–43 (2005) (Stevens, J., opinion respecting the denial of certiorari).

36. *Id.*

A recess appointment expires in one of a few ways: either at the end of the Senate's next session or when the appointee or another individual is nominated, confirmed, and permanently appointed.[37] In practice, an appointment could last for almost two years, although the length of the appointee's term will differ based on when the appointment is made.[38]

A. Pro Forma Sessions

A "pro forma session" is defined by the Senate as "a brief meeting of the Senate (sometimes only a few minutes in duration)."[39] It is held usually to satisfy the constitutional obligation that neither chamber can adjourn for more than three days without the consent of the other.[40] During the last three Congresses, pro forma sessions have lasted only a few seconds.[41] Frequently, messages from the President received during the recess are not entered into the *Congressional Record* until the Senate returns from a substantive session even if pro forma sessions are held.[42]

The Senate has frequently conducted pro forma sessions during recesses since late 2007. Pro forma sessions have been used to explicitly prevent recess appointments. For example, during the presidency of George W. Bush, the Senate Majority Leader, Harry Reid, announced that the Senate would "be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."[43] Additionally, pro forma sessions have been used to meet Congress's obligation to convene on January 3 each year, to permit a cloture vote to ripen, or to hear an address.[44]

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37. HOGUE, *supra* note 7, at 4.

38. *See id.* at 4–5 (discussing the difference in potential lengths of appointment between Charles W. Pickering and William H. Pryor to judgeships on courts of appeals based on when appointed by President George W. Bush).

39. U.S. SENATE, http://www.senate.gov/reference/glossary_term/pro_forma_session.htm (last visited Nov. 30, 2012); *see also* U.S. CONST. art. I, § 5, cl. 4.

40. U.S. CONST. art. I, § 5, cl. 4.

41. *See, e.g.*, 157 CONG. REC. 8793 (daily ed. Dec. 30, 2011) (pro forma session lasted thirty-two seconds); *id.* at S5301 (daily ed. Aug. 12, 2011) (pro forma session lasted twenty-four seconds); 156 CONG. REC. S7857 (daily ed. Oct. 26, 2010) (pro forma session lasted twenty-seven seconds); 154 CONG. REC. S10,525 (daily ed. Oct. 30, 2008) (pro forma session lasted eight seconds).

42. *See, e.g.*, 157 CONG. REC. S7905 (daily ed. Nov. 28, 2011) (message from the President was sent on November 21, recorded on November 28); *id.* at S6916 (daily ed. Oct. 31, 2011) (message from the President received on October 25, recorded on October 31).

43. 153 CONG. REC. 31,874 (2007) (statement of Sen. Reid).

44. *See* U.S. CONST. amend. XX, § 2; *see e.g.*, 133 CONG. REC. 15,445 (1987) (ordering a pro forma to qualify the cloture motion to be voted on the next day); 139 CONG. REC. 3039 (1993) (stating that any pro forma session would be for the purpose of hearing the Presidents' Day address).

II. THE JANUARY 4 APPOINTMENTS

During the first few months of the 112th Congress, the House and Senate passed concurrent resolutions of adjournment prior to periods of absence of more than three days. On December 17, 2011, the Senate agreed by unanimous consent to "adjourn and convene for pro forma sessions only" with "no business conducted" every Tuesday and Friday.[45] The Senate convened a pro forma session on January 3, 2012.[46] The session lasted less than one minute.[47]

On January 4, 2012, President Obama announced recess appointments to "Key Administration Posts."[48] President Obama appointed Richard Cordray as Director of the CFPB, where Cordray previously served as the Chief of Enforcement.[49] President Obama nominated Cordray to head the CFPB for the five-year term on July 18, 2011; however, on December 8, 2011, a Republican filibuster blocked Cordray's appointment despite the support of a majority of the Senate.[50] The filibuster met opposition and was hailed as the first time a "minority party in the Senate has ever before decided to render an agency inoperative by refusing to allow up or down votes on any nominee to run it."[51] Additionally, President Obama appointed Sharon Block, Terence F. Flynn,[52] and Richard Griffin to the NLRB.[53] Block previously worked at the Department of Labor, Flynn was the Chief Counsel to NLRB Board Member Brian Hayes, and Griffin was

45. 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011).

46. 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

47. *Id.*

48. Press Release, The White House, Office of the Press Sec'y, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

49. *Id.*

50. *Cf.* Jonathan Turley, *Is the Cordray Recess Appointment Constitutional?*, JONATHAN TURLEY BLOG (Jan. 6, 2012, 11:21 AM), http://jonathanturley.org/2012/01/06/is-the-cordray-recess-appointment-constitutional ("The Cordray controversy, however, combines the controversial use of filibustering with the controversial practice of recess appointments—a perfect storm of dysfunctional actions by both parties.").

51. Jonathan Bernstein, *In Blocking Cordray, Senate GOP Proves How Radical It's Become*, WASH. POST, Dec. 8, 2011, http://www.washingtonpost.com/blogs/plum-line/post/in-blocking-cordray-senate-gop-proves-how-radical-its-become/2011/12/08/gIQA4x0bfO_blog.html.

52. Terence Flynn resigned from the NLRB in July 2012 amid accusations of ethics violations. *See, e.g.*, Sam Hananel, *Terence Flynn Resigns from National Labor Relations Board Amid Ethics Violation Allegations*, HUFFINGTON POST, May 27, 2012, http://www.huffingtonpost.com/2012/05/28/terence-flynn-resigns-nlrb_n_1549708.html.

53. Press Release, *supra* note 48.

the General Counsel for the International Union of Operating Engineers.[54] On February 13, 2012, President Obama sent the nominations of Block, Flynn, and Griffin to the Senate.[55]

According to the DOJ Office of Legal Counsel's (OLC's) letter to Attorney General Holder supporting the President's appointments, the "sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to receive communications from the President or participate as a body in making appointments."[56] The OLC letter frames the discussion as whether the President had the authority to make recess appointments during an intrasession recess of twenty days, despite the pro forma sessions, finding that the pro forma sessions had no effect on the number of days of the intrasession recess.[57] While the Senate could potentially remove the President's ability to make recess appointments by remaining continuously in session, the OLC concluded that pro forma sessions where no business is conducted do not limit the President's recess appointment power.[58] The OLC asserted that there was "little doubt that a twenty-day recess may give rise to presidential authority to make recess appointments."[59] Furthermore, it rejected any assertion that the failure of the House to consent to the Senate's adjournment had an effect on the Senate's actual availability and thus, did not affect the determination of whether the Senate was in fact in "Recess."[60]

Opponents of the appointments frame the question as whether the President can make intrasession recess appointments when the recess is only three days rather than twenty, finding that the January 4 appointments occurred during a three-day recess between two pro forma sessions of the

54. *Id.*

55. Press Release, The White House, Office of the Press Sec'y, Presidential Nominations Sent to the Senate (Feb. 13, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/13/presidential-nominations-sent-senate.

56. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *1 (O.L.C. Jan. 6, 2012) (internal quotation marks omitted).

57. *Id.* at *7 n.13 ("Because we conclude that pro forma sessions do not [have the legal effect of interrupting the recess of the Senate], we need not decide whether the President could make a recess appointment during a three-day intrasession recess."); *see id.* at *13 (reiterating that the Department of Justice does mention that the period of time could be characterized as a thirty-seven-day recess because the Senate adjourned pursuant to an order that there would also be no business conducted during the final seventeen days of the first session).

58. *See id.* (concluding that such an interpretation is consistent with the purpose of the Clause and with historical practice).

59. *Id.* at *5.

60. *Id.* at *15.

Senate. The Senate Majority Leader has stated that pro forma sessions break a long recess into shorter adjournments, each of which might ordinarily be deemed too short to be considered a recess within the meaning of the Clause and thus, the sessions prevent the President from exercising power to make recess appointments.[61]

A. Getting to the Courthouse

The Constitution does not specifically define the scope of a partial Senate recess or the effect of pro forma sessions on the Clause—courts will ultimately have to decide. Whether Congress can prevent the President from making recess appointments by conducting pro forma sessions is a "novel" question "and the substantial arguments on each side create some litigation risk for such appointments."[62] Even the OLC recognized in its letter, "Due to this limited judicial authority, we cannot predict with certainty how courts will react to challenges of appointments made during intrasession recesses, particularly short ones."[63] It further acknowledged, "If an official appointed during the current recess takes action that gives rise to a justiciable claim, litigants might challenge the appointment on the ground that the Constitution's reference to 'the Recess of the Senate' contemplates only the recess at the end of a session."[64] Thus, the constitutionality of these appointments is likely to be determined by the federal courts; however, a litigant must first get a court to reach the merits of its claim. The three greatest obstacles challengers face are: standing, ripeness, and the political question doctrine.

1. Standing

An element of the case or controversy requirement is that the plaintiff must establish standing to sue—there must be an injury fairly traceable to the alleged misconduct likely to be redressed by the requested relief.[65] In *Evans*, a case decided by the Eleventh Circuit, the plaintiffs reached standing by moving for the judge appointed through the Clause to recuse himself.[66] Since the appointments are not Article III judges, a similar

61. 154 CONG. REC. 16,625 (2008) (statement of Sen. Reid); 153 CONG. REC. 31,874 (2007) (statement of Sen. Reid).

62. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *4 (O.L.C. Jan. 6, 2012).

63. *See id.* at *7.

64. *Id.*

65. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

66. *See generally* Evans v. Stephens, 387 F.3d 1220, 1227 (11th Cir. 2004) (en banc)

challenge has proved more difficult.

Challenges to the Cordray appointment are just beginning as the CFPB has begun to promulgate and enforce its first regulations. One such case is *State National Bank of Big Spring v. Geithner*,[67] where the plaintiffs—a small national bank and two nonprofit organizations—filed suit against multiple parties including the Treasury Secretary, Comptroller of the Currency, Cordray, the CFPB, and the chairs of various agencies, including the Securities and Exchange Commission, challenging the constitutionality of the CFPB on a number of bases. The challenge to the appointment of Cordray is just one of the constitutional violations alleged in the thirty-one-page complaint.[68] However, the Complaint fails to allege any final agency action or enforcement by the CFPB to create standing for the challenge to Cordray and is ripe for a motion to dismiss for lack of standing by the DOJ. The CFPB issued its first enforcement action on July 18, 2012, creating the first true opportunity for a litigant with standing to challenge the appointment.[69] As the CFPB continues to enforce regulations more challenges are likely to arise, although many litigants may wait to challenge the constitutionality of his appointment pending the resolution of the challenges to the NLRB appointments.

Individuals affected by decisions of the NLRB made with the new appointees have already taken to the courts to seek redress and to avoid the claimed "years of legal uncertainty for actions taken by those agencies and chaos for companies affected by the decisions."[70] The challengers often claim that NLRB decisions cannot be applied because the requisite quorum was not met to make those decisions since President Obama's appointees are not constitutional appointees.[71] There are currently cases pending in

(stating that the recess appointment of Judge Pryor was within the President's constitutional authority and that the court lacks the legal standards to determine "how much Presidential deference is due to the Senate").

67. Complaint at 3–4, State Nat'l Bank of Big Spring v. Geithner, No. 12-01032 (D.D.C. filed June 21, 2012), 2012 WL 2365284.

68. *Id.*

69. Press Release, Consumer Fin. Prot. Bureau, CFPB Probe into Capital One Credit Card Marketing Results in $140 Million Consumer Refund (July 18, 2012), *available at* http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe.

70. O'Keefe, *supra* note 7.

71. *See, e.g.*, Petition for Review, Stewart v. NLRB, No. 12-1338 (D.C. Cir. Aug. 1, 2012); Representation of Parties' Consent to Participation As Amici Curiae, Noel Canning v. NLRB, Case Nos. 12-1115, 12-1153 (D.C. Cir. Apr. 25, 2012); Petition for Review, Richards v. NLRB, No. 12-1973 (7th Cir. Apr. 23, 2012); Complaint, Nat'l Ass'n of Mfrs. v. NLRB, No. 11-01629 (D.D.C. Sept. 8, 2011); Amended Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act, Paulsen v. Renaissance Equity Holdings, LLC, No. 12-cv-350 (E.D.N.Y. Mar. 1, 2012).

both the Court of Appeals for the District of Columbia and the Seventh Circuit.[72] The Senate GOP joined the plethora of NLRB challengers, retaining Miguel Estrada to represent them and filing an amicus brief in the case of *Noel Canning v. NLRB*,[73] a case before the U.S Court of Appeals for the D.C. Circuit challenging a cease and desist order relating to a refusal to bargain.[74] The D.C. Circuit Court of Appeals extended the briefing schedule for the *Noel Canning* case; it is scheduled to be fully briefed on December 11, 2012.[75] As a result of the Supreme Court's decision in *Raines v. Byrd*,[76] it is increasingly difficult for members of Congress to bring a lawsuit alleging diminution of their constitutional role, which likely explains why the Senate GOP's current plan is to file an amicus brief rather than attempt a lawsuit on its own.[77]

However, the cases decided thus far by district court judges have not reached favorable results for those challenging the appointments. In *National Ass'n of Manufacturers v. NLRB*,[78] Judge Amy Jackson of the District Court for the District of Columbia held that NLRB appointments could not be challenged as part of a lawsuit over requirements for businesses to inform employees of their rights, stating that "[t]he court declines this invitation to take up a political dispute that is not before it."[79] Similarly, on March 1, 2012, Paul Clement asked a federal district court judge to throw

72. Petition for Review, *Stewart*, *supra* note 71; Petition for Review, *Richards*, *supra* note 71; Petition for Review of Decision and Order of the National Labor Relations Board, *Canning*, *supra* note 71; Complaint, *Nat'l Ass'n of Mfrs*., *supra* note 71.

73. Representation of Parties' Consent to Participation as Amici Curiae, *supra* note 71.

74. *See* Ed O'Keefe, *Senate GOP Joining Legal Action Against Obama Recess Appointments*, WASH. POST, Apr. 17, 2012, http://www.washingtonpost.com/blogs/2chambers/post/senate-gop-joining-legal-action-against-obama-recess-appointments/2012/04/17/gIQAuEJbOT_blog.html (specifying that the challenge "will demonstrate to the Court how the President's unconstitutional actions fundamentally endanger the Congress's role in providing a check on the excesses of the executive branch"). After *Raines v. Byrd*, 521 U.S. 811, 821 (1997), the Senate GOP cannot bring suit on its own to claim "diminution of legislative power," rather, any lawsuit on those grounds would need to be brought by the Senate or Congress in its entirety.

75. Order Granting Motion to Consolidate Briefing at 2, Noel Canning v. NLRB, No. 12-1115 (D.C. Cir. Aug. 15, 2012), *available at* http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Order%20Granting%20Motion%20to%20Consolidate%20Briefing.pdf.

76. 521 U.S. 811.

77. *Cf.* Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999) (recognizing that the *Raines* decision made "untenable" the Circuit's legislative standing cases, Kennedy v. Sampson, 511 F.2d 430 (1974) and Moore v. U.S. House of Representatives, 733 F.2d 946 (1984)).

78. No. 11-CV-01629 (D.D.C. Mar. 2, 2012).

79. Order Denying Motion for Leave to Supplement Complaint, Nat'l Ass'n of Mfrs. v. NLRB, No. 11-CV-01629 (D.D.C. March 2, 2012), ECF No. 60.

out a court petition seeking to halt a lockout of seventy workers under the lack of quorum theory.[80] The court ruled that the NLRB could proceed in pursuing a halt to the lockout and refused to reach the constitutional issue of the recess appointments, instead ruling that the action by the NLRB was proper.[81] Thus far, the challengers are finding it difficult to persuade a court to address the constitutional challenge against the recess appointments, as opposed to deciding the case on administrative principles.

2. Ripeness

Recess appointments expire at the Senate's next session or if the recess appointee or another is confirmed. Thus, a case has to overcome any mootness issues. These mootness issues could arise from either the recess appointee or the President no longer holding their positions. Challenges to recess appointments have suffered ripeness issues before. The appointments could be challenged since President Obama will remain in office. In *Mackie v. Clinton*,[82] challengers sought invalidation of President Bush's appointment of a member to the Board of Governors of the United States Postal Service.[83] The district court judge determined there was no "vacancy" to be filled, and thus the purported appointment was null and void; however, the court found that "[i]n view of the fact that President Bush is no longer in office . . . [the] Complaint is moot."[84] The recent recess appointees will create agency decisions that have a lasting effect, which likely means that the harm will continue to occur and a challenge to the constitutionality or validity of a rule would be reviewed.

3. Political Question

Even if a court finds a case otherwise justiciable, it could avoid the constitutional questions by determining that a challenge presented only a political question. The Supreme Court outlined the political question doctrine in *Baker v. Carr*,[85] explaining that it would not resolve questions

80. Paulsen v. Renaissance Equity Holdings, LLC, 849 F. Supp. 2d 335, 338, 342 (E.D.N.Y. 2012).

81. *See* Jessica Dye, *Judge Upholds NLRB Petition in Brooklyn Dispute*, REUTERS, Mar. 27, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/03_-_March/Judge_upholds_NLRB_petition_in_Brooklyn_dispute (explaining that U.S. District Judge Brian Cogan declined to reach the constitutional issue and instead ruled that the action had been properly brought by the NLRB).

82. 827 F. Supp. 56 (D.D.C. 1993).

83. *Id.* at 57.

84. *Id.* at 58–59.

85. 369 U.S. 186 (1962).

with either "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "a lack of judicially discoverable and manageable standards for resolving it . . . ."[86] In *Powell v. McCormack*,[87] the Court further determined the scope of a "textual commitment" by the Constitution to a coordinate branch and created a narrow exception—where the Constitution expressly prescribes all the requirements without leaving any authority to Congress to change those requirements, a claim is justiciable.[88]

In *Evans v. Stephens*,[89] the Eleventh Circuit determined that with regards to the appointment of a judge, it was within the Court's "authority and duty to construe and to apply the Constitution as it is written" and thus concluded that the Constitution gave the President the authority to "appoint a judge to fill a vacancy on an Article III court during a ten- or eleven-day, intrasession recess of the Senate."[90] The court differentiated that review from review of the argument that "this specific recess appointment circumvented and showed an improper lack of deference to the Senate's advice-and-consent role" finding that the latter argument constituted a political question moving beyond just interpretation of the text of the Constitution and into discretionary power or "good policy."[91]

Similar to the court's avoidance of the policy arguments in *Evans*, a court could avoid the constitutional question of the January 4 recess appointments by finding any challenge to the recess appointments to be a political question. There has been a "textually demonstrable constitutional commitment"[92] that the houses of Congress "may determine the Rules of its Proceedings."[93] Thus, a court could find that the Constitution commits any determination of whether the Senate is in recess to the Senate and its rules. Additionally, a reviewing court could find it difficult to create "manageable standards for resolving" the conflict—is a court going to mandate how many members must be present to create a legislative session or how many minutes the Senate must meet to avoid a pro forma session? However, the decision reached in *Evans* provides a niche for a reviewing court to focus on

86. *Id.* at 217 (listing other political questions that the court would similarly not find justiciable).

87. 395 U.S. 486 (1969).

88. *Id.* at 548.

89. 387 F.3d 1220 (11th Cir. 2004) (en banc).

90. *Id.* at 1227.

91. *Id.* ("These matters are criteria of political wisdom and are highly subjective. They might be the proper cause for political challenges to the President, but not for judicial decision making. . . .").

92. Baker v. Carr, 369 U.S. 186, 217 (1962).

93. U.S. CONST. art. I, § 5, cl. 2.

interpreting the text of the Constitution and to avoid questions determining how much deference is due to the Senate.

Although a court could duck behind these jurisdictional concerns as a means of constitutional avoidance, it is more likely that a court will determine at least part of the recess appointment challenges to be justiciable. Judges will recognize the importance of creating clarity and providing guidance for the Executive and Legislative Branches on the constitutional handling of appointments.

B. Potential Outcomes

There is no doubt the Clause served a crucial function early in American history when the Senate took long recesses and presidential action was necessary, but it is unclear whether the same need is still present today.[94] The outcome of any court decision finding justiciable the constitutional questions will depend greatly on the framing of the analysis or, at an appellate level, the question certified.

The DOJ supports an application of the traditional understanding that the Clause must be given a practical construction focusing on the Senate's ability to provide advice and consent to nominations. The DOJ emphasizes the functionality of the Clause, yet it seems to be a circular argument. In support of the President's appointments, the OLC relies heavily on historical writings that it believes indicate that the recess appointment power "is required to address situations in which the Senate is *unable* to provide advice and consent on appointments"[95]—but fails to make the distinction that with the recent appointments it seems more appropriate to characterize the Senate as *unwilling* to provide advice and consent on appointments rather than actually unavailable to do so.[96] The twenty senators that urged House Speaker John Boehner "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term"[97] intended to block President

94. *Cf.* Denton, *supra* note 12, at 769 (explaining why the Recess Appointments Clause fulfilled a crucial function in early American history).

95. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *8 (O.L.C. Jan. 6, 2012) (emphasis added).

96. *See* HOGUE, *supra* note 7, at 7 ("From the 110th Congress onward, new scheduling practices have arisen that appear intended to prevent the President from making recess appointments.").

97. Press Release, Sen. David Vitter, Vitter, DeMint Urge House to Block Controversial Recess Appointments (May 25, 2011), *available at* http://www.vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=290b81a7-802a-23ad-4359-6d2436e2eb77; *see also* Letter from Rep. Jeff

Obama from using the recess appointment power. The White House characterized the sessions as "an overt attempt to prevent the President from exercising his authority during this period . . . using a gimmick called 'pro forma' sessions."[98] The OLC does not find this distinction relevant and argues that any analysis should focus on whether the Senate could actually give advice and consent. It is arguable whether the Senate could have provided that advice and consent, but through proper legislative means it chose not to and thus, would not have been unable to consent as OLC suggests.

The DOJ argues that if the Senate can use pro forma sessions to avoid a "Recess of the Senate" then, practically, the Senate could preclude the President from making recess appointments even if the Senate were unavailable for a significant period of time.[99] However, as the DOJ acknowledges, the Senate passed legislation during pro forma sessions in 2011 and has agreed to a conference with the House during a session, even putting the messages received from the House on the record[100]—exemplifying that the Senate could theoretically provide advice and consent on pending nominations during a pro forma session in the same manner.

Because the Supreme Court has not interpreted the Clause, it is unlikely a court would have any on-point controlling precedent to apply.[101] A decision could be reached on a number of points: whether the vacancy has to arise during the recess or can arise prior to the recess; whether it is a twenty-day or three-day recess and thus, the effect of pro forma sessions on the President's power; and whether the Clause as intended by the Founders is even relevant in today's society where the Senate is more frequently in session.

The DOJ should differentiate federal judiciary appointments, which

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Landry & Rep. Austin Scott, to John Boehner, Speaker of the House, et. al. (June 15, 2011), *available at* http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf (conveying a request from seventy-eight Representatives that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress").

98. Dan Pfeiffer, *America's Consumer Watchdog*, THE WHITE HOUSE BLOG (Jan. 4, 2012, 10:45 AM), http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog.

99. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *12 (O.L.C. Jan. 6, 2012).

100. *Id.* at *16.

101. *See supra* notes 31–36 and accompanying text (discussing *Evans* where both the majority and Justice Stevens comment on the denial of certiorari regarding Article III recess appointments).

have internal mechanisms for coping with judicial vacancies, from administrative agency appointments. The CFPB and the NLRB were created by acts of Congress and need a director and adequate members to hold a quorum, respectively, to effectuate the goals of their creation. Carrying out the laws enacted by Congress through the administrative state is required of the President, and Congress should not be able to use its internal procedures to thwart those constitutional responsibilities of the President. Specifically with regards to the Cordray appointment, those in opposition did not oppose the nominee but rather took the position that they would not approve anyone to lead the CFPB.[102] Thus, any position should emphasize the difficult situation of the President as he tries to carry out his mandatory duties under the Constitution to execute the laws as the Legislative Branch refuses to approve a necessary appointee. This differentiation can also help distance the case from *Evans* where Justice Stevens seemed eager to address Article III recess appointments.

As a secondary argument in defense of the appointments, if the case challenged Cordray's appointment, the DOJ could use the suit as an opportunity to challenge the filibuster used to block Cordray. The DOJ could argue that Cordray was in fact approved by the Senate because Cordray gained majority support, but not the higher requisite needed to overcome the Republican filibuster. Similar to *Powell*, the DOJ could reason that the Constitution lays out all that is required for a presidential appointee to be confirmed—"the Advice and Consent of the Senate."[103] When the Framers desired a two-thirds approval requirement, as with treaties discussed in the same paragraph, they specified such a requirement. No two-thirds approval requirement is mentioned for presidential nominees. However, this argument would also face the counterargument that since the Constitution is not specific—i.e., does not explicitly require only a majority vote—the constitutionality should be determined by custom or practice, and thus it should be left up to the Senate since the Constitution allows it to make its own rules.[104] The DOJ would have to argue that Congress's custom of making its own rules is inconsistent with the Constitutional provision on presidential appointees and return to the argument that this should not allow the Legislature to keep the Executive Branch from executing the laws as the Constitution requires.

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102. *See, e.g.*, Jim Puzzanghera, *GOP Stalls Confirmation of Consumer Agency Nominee*, L.A. TIMES, Sept. 7, 2011, http://articles.latimes.com/2011/sep/07/business/la-fi-consumer-bureau-cordray-20110907 (noting that in Richard Cordray's confirmation hearings the Senate Republicans cautioned him he could not overcome the unanimous opposition to a job "they believed was far too powerful").

103. U.S. CONST. art. II, § 2, cl. 2.

104. *See* U.S. CONST. art. I, § 5, cl. 2.

C. The Ultimate Showdown: Reaching the Supreme Court

With cases pending in both the Court of Appeals for the D.C. Circuit and the Seventh Circuit, a filing of a petition for a writ of certiorari in the Supreme Court is almost certain. The Supreme Court might use any challenge to the recent recess appointments as an opportunity to clarify the Clause,[105] as Justice Stevens indicated in the denial of certiorari in *Evans*.[106] Similar to the Supreme Court's analysis of the Commerce Clause through health care, any review of the Clause could yield unpredictable results.[107]

If the Court made it past the jurisdictional elements and the political question doctrine, the only certainty is that Justice Antonin Scalia would cite the 1773 dictionary to define "recess" as in *District of Columbia v. Heller*[108] when he used it to define the word "Arms" at the time when the Constitution was written.[109] While this author did not have access to Justice Scalia's preferred dictionaries—the 1773 edition of Samuel Johnson's Dictionary of the English Language or Timothy Cunningham's 1771 Legal Dictionary[110]—slightly more recent dictionaries do not provide much guidance. The 1783 edition of the Cunningham Dictionary does not contain a definition for recess and the 1785 Johnson Dictionary's relevant definition of recess is "remission or suspension of any procedure."[111] Johnson uses these examples: "On both sides they made rather a kind of recess, than a breach of treaty, and concluded upon a truce" and "I conceived this parliament would find work, with convenient recesses, for the first three years."[112] The dictionary definition will not provide originalists with much guidance in determining the Founders' intent as to

105. *Cf.* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all (citing legal specialists stating that "it was likely that the Supreme Court would eventually have an opportunity to review whether it was lawful for Mr. Obama to grant the recess appointments").

106. *See supra* notes 33–36 and accompanying text.

107. *Cf.* Alex M. Parker, *Richard Cordray Recess Appointment Sparks More Bickering*, U.S. NEWS & WORLD REPORT (Jan. 4, 2012), http://www.usnews.com/news/articles/2012/01/04/richard-cordray-recess-appointment-sparks-more-bickering (suggesting that banks could challenge regulations issued under Cordray's leadership, but, "[a]s with court challenges to the Affordable Care Act's constitutionality, the current Supreme Court makeup can be a wildcard").

108. 554 U.S. 570 (2008).

109. *Id.* at 581.

110. *Id.*

111. SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE cdlxi (6th ed. 1785).

112. *Id.*

how long that recess needs to be to allow presidential recess appointments.

Additionally, controversial recusal issues would likely arise. Now-Supreme Court Justice Elena Kagan argued as Solicitor General that the recess appointment of a member of the NLRB does not render moot the controversy about legal consequences of a Board quorum.[113] She wrote that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period."[114] The DOJ differentiates that position from its current support of President Obama's recent recess appointments suggesting that now-Justice Kagan's letter addressed "the question whether an intrasession recess of three days or fewer constitutes a recess under the Recess Appointments Clause" rather than the current question of whether "pro forma sessions at which no business is conducted interrupt a recess that is more than three days long in a manner that would preclude the President from exercising his appointment power under the Clause."[115] However, this seems to be a rather forced distinction and, depending on the question certified by the Supreme Court, could be irrelevant.

CONCLUSION

President Obama's controversial January 4 recess appointments are being challenged in multiple lawsuits, and the addition of the Senate GOP as an amicus further raises the stakes. However, without the January 4 recess appointments, federal agencies would lack the necessary leadership to function, and in turn, the President would not be fulfilling his constitutional duty to execute the laws. Although a court could duck behind jurisdictional concerns as a means of constitutional avoidance, it is more likely, given the importance of the issues, that a court will determine part of the recess appointment challenges to be justiciable. The current political process has reached an extreme: either the President can determine when the Senate is in recess—ignoring the required consent of the House—or the Senate can deny the President the opportunity to make recess appointments even when they may be unavailable to fulfill their constitutional advice-and-consent role. Clarification from the courts regarding the Clause should be welcomed as an opportunity to both create clarity and provide guidance for the Executive and Legislative Branches.

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113. Letter from Elena Kagan, Solicitor Gen., Office of the Solicitor Gen., to William K. Suter, Clerk, Supreme Court of the United States, at 3 (Apr. 26, 2010).

114. *Id.*

115. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *18 (O.L.C. Jan. 6, 2012).

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RESPONSE

BENTHAM AT THE OMB: A RESPONSE TO PROFESSOR ROWELL

MELISSA J. LUTTRELL*

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* Visiting Assistant Professor of Law, Florida International University College of Law. Thank you to David Driesen, Lisa Heinzerling, M. Alexander Pearl, Ed Richards, Arden Rowell, Sidney Shapiro, and Howard Wasserman for helpful comments and suggestions. Thanks also to the editors and staff of the *Administrative Law Review*.

INTRODUCTION

In her September 2012 article, *Partial Valuation in Cost–Benefit Analysis* (*Partial Valuation*),[1] and in a related May 2012 essay for RegBlog,[2] Arden Rowell argues that regulators should stop "refusing"[3] to place dollar figures on some goods, like "emotional goods,"[4] that are incommensurable with money; if people are willing to pay *anything* for such goods, then before agencies propose major new regulations, a dollar figure should be generated to express these goods' monetary values for use in regulatory cost–benefit analyses (CBAs).[5] She argues that, in its analysis of a pending regulation that would make rearview cameras standard auto safety equipment, the National Highway Traffic Safety Administration (NHTSA) should have monetized the value of the unique trauma experienced by parents who back over and kill their own children.[6] This emotional harm may be technically incommensurable with money, but if people are willing to pay something to avoid it then it is not totally non-monetizable, and so, she argues, it must be possible to express some portion of its total holistic

1. Arden Rowell, *Partial Valuation in Cost–Benefit Analysis*, 64 ADMIN. L. REV. 723 (2012).

2. Arden Rowell, *Valuing the Rear-view Camera Rule*, REGBLOG (May 30, 2012), http://www.law.upenn.edu/blogs/regblog/2012/05/30-rowell-camera.html.

3. Rowell, *supra* note 1, at 724; *see also* Rowell, *supra* note 2.

4. Rowell, *supra* note 1, at 724.

5. *Id.*

6. *Id.* at 737, 742; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585). A 2008 law directed the National Highway Traffic Safety Administration (NHTSA) to establish improved rearview standards to protect bicyclists and pedestrians from being struck by reversing vehicles. *See* Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110–189, 122 Stat. 639–642 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)). As of October 6, 2012, a proposed final rule that would require automakers to phase in rearview cameras for all passenger vehicles is currently under review at the Office of Management and Budget (OMB), where it has been "under review" since November 16, 2011. *See* OFFICE OF INFO. & REGULATORY AFFAIRS, Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors, REGINFO, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2127-AK43 (last visited on Nov. 30, 2012); *infra* Part V. The agency has stated that it plans to finalize a rule by the end of 2012. Peter Valdes-Dapena, *Rearview Car Camera Rules Delayed by U.S.*, CNNMONEY, Feb. 29, 2012, http://money.cnn.com/2012/02/29/autos/rearview_cameras_postponed/index.htm.

value in dollar terms.[7] She argues that the regulation should be blocked by the Office of Management and Budget (OMB) until "the agency completes an adequate analysis."[8]

But NHTSA cannot pull a defensible monetary value for this highly specific trauma out of thin air. The proposed expanded monetization process would require agencies to acquire ad hoc valuation estimates for any regulatory goods that are incommensurable with money, but for which there exists some "willingness to pay," goods that often could not be even partially monetized without significant new research. This "partial valuation" process would attempt to disaggregate the incommensurable good's holistic value by separating out the estimated monetizable portion of the good from its non-monetized "remainder,"[9] which risks being forgotten in the analysis once a monetary value is assigned.

Partial valuation is already contained in the regulatory economist's toolbox: few would contend that the dollar values commonly assigned to human lives for the purpose of regulatory analyses represent complete accountings of those lives' holistic values, yet human lives are already regularly included in CBAs. At issue is the extent to which this incomplete monetization of incommensurables should be understood to be mandatory.

Any expanded partial valuation requirement would inevitably delay many vital lifesaving and environmental regulations and would commandeer scarce agency resources that might be better used in other ways by regulatory agencies. And it seems unlikely that policymakers will make better choices if incommensurable benefits are always broken apart into the proposed components instead of being described narratively and holistically in at least some analyses.

Thus, it is critical to examine the reasons Professor Rowell offers for arguing that agency CBAs should monetize all regulatory goods for which any willingness to pay exists, including goods that are currently expressed in nonmonetized, narrative form in agency regulatory analyses.

Professor Rowell contends in *Partial Valuation* that the executive orders governing regulatory review might not permit any consideration of non-monetized benefits when agencies are deciding whether the benefits of proposed regulations justify their costs—a threshold determination agencies are directed to make before regulating (unless exempted by law).[10] If this

7. Rowell, *supra* note 1, at 737, 742.

8. Rowell, *supra* note 2.

9. Rowell, *supra* note 1, at 734, 739.

10. *See id.* at 725 ("If an agency is considering a rule for which the monetized costs exceed the monetized benefits, can the consideration of non-quantifiable benefits tip the balance?"); *id.* at 731 (describing "the question of whether non-monetizable benefits should affect the result of a cost–benefit analysis" as a "dilemma"); *see also infra* Part IV.

were the case, then regulators seeking to protect health, safety, or the environment would have a strong incentive to find dollar values for any non-monetized but partially monetizable benefits, perhaps even when this process would delay the effective date of a regulation in a way that will cost lives, as with NHTSA's backover regulation.

However, no executive order prohibits agencies from considering and narratively describing non-monetized benefits in CBA, and the OMB's guidelines on completing regulatory CBA actually encourage this practice.[11] Professor Rowell's assertion that it is an open question whether regulators determining if a rule's benefits justify its costs can even look at non-monetized benefits is alarming, because—if accepted—it could ratchet down the optimal level of stringency for many regulations with valuable benefits that are incommensurable with money.

The rationale for adopting partial monetization that Professor Rowell provides in her related RegBlog essay is even more alarming for its potential to ratchet down the stringency of regulations.[12] There, she attempts to establish, via a sort of logical proof, that when choosing which regulations to block and which to release, policymakers at the OMB's Office of Information and Regulatory Affairs (OIRA) should adhere to the principle that a regulation should never cost more, in money, than "people are willing to pay," in money.[13] Thus, even if some regulatory goods are wholly or partially incommensurable with money, and even if it is impossible to express all the benefits of a regulation in dollars, as a matter of public policy OIRA should block any regulations whose monetary costs are projected to exceed the estimated amount of money that "people are willing to pay."[14]

The policy implications of this analysis are dramatic, as it would defend the way regulators and OIRA actually treat non-monetizable goods in real-world regulatory decisionmaking,[15] a practice that, until now, had enjoyed

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11. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003), 10, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf [hereinafter OMB, CIRCULAR A-4]; *see also infra* Part IV.

12. *See* Rowell, *supra* note 2. The contentions made in Professor Rowell's RegBlog essay have enormous policy implications for the stringency of future public health and environmental safeguards, and are thus well worth addressing on their individual merits, as well as in conjunction with the related arguments made in *Partial Valuation*.

13. *Id.*

14. *Id.* The troubling position that the OMB's Office of Information and Regulatory Affairs (OIRA), acting under the authority of executive orders, can and should have the amount of influence Professor Rowell advocates over executive agency regulators is addressed at *infra* note 89 and the accompanying text.

15. *See* Melissa J. Luttrell, *The Case for Differential Discounting: How a Small Rate Change Could Help Agencies Save More Lives and Make More Sense*, 3 WM. & MARY POL'Y REV. 80, 108–

almost no support in the literature.[16] This rationale for a wholly monetary CBA-based decision criterion is particularly interesting, as it purports to depend on neither utilitarianism nor welfarism[17] for its validity.[18]

If Professor Rowell's analysis here were correct, it would arguably provide a compelling policy reason for regulators to attempt to monetize benefits in the manner she proposes. However, to reach her conclusion, Professor Rowell implicitly depends on a false assumption that there is an identity of interests between regulatory winners and losers; without this identity of interests, it is simply utilitarianism recast.[19] Professor Rowell also incorrectly assumes that economic valuations based on estimated willingness to pay, as this figure is assessed in CBA, will fully reflect larger, societal preferences.[20] Without these assumptions, which are necessary to support her logical argument, Professor Rowell's claim resolves to a highly controversial normative assertion, one that requires a normative defense she does not provide.

In short, the very thorough monetization of benefits envisioned by Professor Rowell will often be impracticable, or, in the case of some risks and harms, impossible. While some of the benefits agencies deem non-monetizable could, theoretically, be monetized, commissioning the requisite studies will often be unacceptably time consuming and expensive.[21] This is not to say that agencies should not strive to more completely monetize regulatory benefits, which agencies often grossly underestimate in CBAs. However, a directive to monetize every benefit for which there exists any willingness to pay would too often paralyze regulators. It is preferable for regulators to continue to have the option of providing a narrative list of those benefits that they cannot practicably monetize, and for decisionmakers to retain the ability to take these unmonetized benefits into

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10, 110 n.93 (2011).

16. *See* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST–BENEFIT ANALYSIS 4 (2006) [hereinafter, ADLER & POSNER, NEW FOUNDATIONS]; *see also* Matthew D. Adler & Eric A. Posner, *Rethinking Cost–Benefit Analysis*, 109 YALE L.J. 165, 167 (1999). Thank you to David Driesen for raising this point in his very helpful comments.

17. For the best known and most complete welfarist justification for the current role of cost–benefit analysis (CBA) in the regulatory state, see generally ADLER & POSNER, NEW FOUNDATIONS, *supra* note 16.

18. *See* Rowell, *supra* note 1, at 741 n.70.

19. *See* discussion *infra* Part II.

20. *See* discussion *infra* Part II.

21. In at least one rulemaking, OIRA demanded the Environmental Protection Agency (EPA) do a better job of monetizing regulatory benefits, even though EPA was unable to secure funding from the OMB for original valuation studies needed to estimate the value of these benefits. *See* Amy Sinden, Douglas A. Kysar, & David M. Driesen, *Cost–Benefit Analysis: New Foundations on Shifting Sand*, 3 REG. & GOVERNANCE 48, 54 (2009).

account when evaluating regulations.

This response further argues that, despite methodological imperfections in NHTSA's CBA of its rearview camera rule, a CBA that likely underestimates benefits and overestimates costs, OIRA should not attempt to block the regulation while it waits for a CBA that presents monetized benefits in excess of the rule's monetized costs. NHTSA has already established that its proposed rearview camera rule is the most cost-effective alternative that can actually accomplish the objectives of the relevant statute.[22] Given this now overdue statutory mandate,[23] OIRA simply lacks the authority to stop the rearview camera rule from moving forward. OIRA's regulatory review authority here derives from executive orders; neither OIRA nor any other executive actor can, by fiat, overrule the mandates of an act of Congress.

I. REQUIRING AGENCIES TO OBTAIN AD HOC ESTIMATES FOR "PARTIALLY MONETIZABLE" GOODS WOULD UNACCEPTABLY SLOW DOWN REGULATION FOR THE SAKE OF OBTAINING VALUATION ESTIMATES OF LIMITED UTILITY

Professor Rowell is right that many goods classified as non-monetizable in CBAs are goods for which there does exist some willingness to pay.[24] She is similarly right that parents must be willing to pay some amount of money to avoid the devastation of killing their own children in backover accidents.[25] However, the value of acquiring ad hoc valuation estimates for all such partially monetizable goods that cannot be monetized without significant new research would not justify the delay and expense this extreme monetization process would require.

There are a number of benefits that agency economists deem non-monetizable, but for which there surely exists some willingness to pay (WTP), and with more research and study, *some* of these WTP figures could be added to the benefits side of agencies' CBAs, improving the accuracy of these analyses. However, there are some goods that agencies classify as non-monetizable for very good reasons. In the case of a known or

22. Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76,189 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585) ("Less expensive countermeasures . . . would not satisfy Congress's mandate for improving safety.").

23. Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, § 2(b), 122 Stat. 639, 640 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)) ("The Secretary shall prescribe final standards pursuant to this subsection [Rearward Visibility] not later than 36 months after the date of enactment of this Act.").

24. *See* Rowell, *supra* note 1, at 724.

25. *Id.* at 742.

suspected toxin, one reason might be that the risk of harm at the relevant exposure level is simply unknown. Another might be that the number of people who would be exposed to toxic levels of the substance in the absence of regulation is unknown. The tactic of making estimates based on what *is* known does not necessarily help:

> [E]stimates of exposure risks produced by cancer risk assessment models can vary by five to ten orders of magnitude, depending on the models selected and the exposure assumptions that are plugged into those models. Translated into economic terms, differences of this magnitude are analogous to the difference between the price of a cup of coffee and the size of the national debt at its peak.[26]

Our level of certainty of the scope and magnitude of ecological benefits may be even lower.[27] Because "many human and environmental risks are not very well understood," economists "lack empirical estimates of them."[28] These gaps in understanding are not a result of lack of effort; such risks have been the subject of extensive research in universities around the world for decades. We cannot press pause on agencies' implementation of statutes while we wait for defensible estimates of all regulatory benefits for which *some* willingness to pay exists, but where analysts confront unknowns that thwart monetization.

In the Environmental Protection Agency's (EPA's) CBA for a proposed regulation of emissions from sewage sludge incinerators, it identified the following environmental benefits not monetized and not accounted for in the "net benefits" figures:

- 26,000 tons of carbon monoxide
- 96 tons of HCl
- 5,500 pounds of mercury
- 1.6 tons of cadmium
- 3 tons of lead
- 90 grams of dioxins/furans
- Health effects from reduced NO2 and SO2 exposure[29]

How might EPA have monetized the value of the three tons of annual lead pollution the regulation will prevent? First, it would need to investigate

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26. SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 94 (2003) (footnote omitted).

27. *Id.* (stating that very "little is understood about the relationship between human activity and environmental outcomes").

28. *Id.* at 103.

29. RTI INT'L, REGULATORY IMPACT ANALYSIS: STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES AND EMISSION GUIDELINES FOR EXISTING SOURCES: SEWAGE SLUDGE INCINERATION UNITS 1–3 (2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0559-0042.

dispersal patterns of lead for each incinerator. Does particulate lead fall on crops or farmland? To what extent does lead fall onto playgrounds, backyards, or other areas where children—who are particularly sensitive to lead in small amounts[30]—may be exposed? Is the lead deposited in, for example, public park sandboxes where children would be especially likely to get lead on their hands—hands that may enter their mouths or may touch the food they eat? The EPA must determine not just where the lead will be dispersed in the absence of regulation, but how much will actually end up in people's bodies. And, for the entire exposed population, the EPA will want to know the amount of lead exposure from other sources, since the health effects of lowering lead exposure vary depending on the quantity of lead exposure from other sources.[31]

When the EPA has a handle on how many people at what ages and at which baseline levels of lead exposure will be affected by the rule, it can start to monetize the health and other benefits of avoided lead exposures. One problem with lead pollution is that exposure to even minute quantities can lower the IQs of children.[32] So, the EPA will need to select a strategy for monetizing lost IQ points. In the past, it has extrapolated the value of IQ points from expected reductions in lifetime earnings; however, this is an incomplete valuation, as it fails to account for potentially diminished quality of life and for impacts on affected children's parents.[33]

Once the EPA has completed this monetization exercise, it still must identify and monetize other benefits that will result from diminished lead exposure, such as other health benefits (besides retained IQ points), and the reduced crime that may occur if exposure to this powerful neurotoxin is reduced.[34] Then, the EPA must complete the challenging exercise of monetizing ecological harms avoided by the reduction in lead pollution.

And then the EPA would have to complete a similar exercise for all the other unmonetized benefits on its list, a project that would likely require it to commission expensive and time-consuming new research. While the results of such an undertaking may have some value—even though the risk-

30. Richard L. Canfield et al., *Intellectual Impairment in Children with Blood Lead Concentrations Below 10 μg per Deciliter*, 348 NEW ENG. J. MED. 1517, 1518, 1525 (2003).

31. *See id.* at 1522–23 (noting that previous research has shown that effects of lead on IQ are proportionally greater at a lower lead concentration).

32. *See id.* at 1525 (stating that "there may be no threshold for the adverse consequences of lead exposure" that are both persistent and irreversible).

33. FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 103–04 (2004).

34. *See* Steven D. Levitt, *Lead and Crime*, FREAKONOMICS (July 9, 2007, 10:04 AM), http://www.freakonomics.com/2007/07/09/lead-and-crime/ (stating that evidence shows that "high exposure to lead is harmful to both IQ and the ability to delay gratification, two traits that could enhance the attractiveness of crime").

analysis-and-monetization exercise will undoubtedly produce indeterminate values for many benefits—if the agency thinks it is important to regulate expeditiously to prevent additional harms from accruing, then it may not be feasible for the EPA to monetize every regulatory benefit for which any significant partially monetizable value may exist.

II. PROFESSOR ROWELL'S LOGICAL ARGUMENT FOR A MONETARY COST–BENEFIT ANALYSIS DECISION CRITERION RELIES ON TWO INVALID ASSUMPTIONS

According to Professor Rowell:

> When monetized costs exceed monetized benefits, the costs of a regulation exceed what people are willing to pay for the effects of that regulation. Such a regulation should be barred by Executive Order 13,563, which requires that the benefits of a regulation "justify" its costs.
>
> The agency cannot sidestep this conclusion by reference to nonmonetizable benefits. Nonmonetizable benefits have a monetary value of $0—not because they are necessarily worthless in some larger sense, but because, by definition, any value they may have cannot be expressed in monetary terms. In other words, people are willing to pay $0 to secure a nonmonetizable benefit—otherwise the benefit would be monetizable.[35]

Here, Professor Rowell claims to present a justification for a utilitarian

35. Rowell, *supra* note 2. To my knowledge, Professor Rowell has not disavowed the contentions made in this RegBlog essay, and so—given what is at stake—these arguments are well worth addressing. Early versions of *Partial Valuation* expanded and elaborated on these arguments, which played a large role in prompting this Response, although the final version of *Partial Valuation* boiled it down to only the following brief language, where Professor Rowell continues to suggest that the CBA valuation process implies that regulators should not regulate when monetized costs exceed monetized benefits:

> As we have seen, the nonmonetary effects of regulations are monetized on the basis of people's willingness to pay for those effects. If we take this practice seriously, it points to a reason not to regulate when costs exceed benefits: because in those cases, the costs of the regulation exceed what people are willing to pay for it. Regulating where costs exceed willingness to pay may implicate autonomy concerns about respecting people's preferences, and it may also implicate democratic concerns about the appropriate role of agencies as agents for the public. These concerns may be separable from the typical welfarist arguments offered in favor of cost–benefit analysis as a decision tool. If they are, this would be a reason to refuse to regulate when costs exceed willingness to pay, even if willingness to pay operates as a poor proxy for welfare, as many analysts have argued it does.

Rowell, *supra* note 1, at 741 n.70. Given that agencies implement statutes enacted via a democratic process, and given that economic values of lives and other intangible regulatory goods are developed, not by popular votes, but by extrapolation from emerging, imperfect academic studies and surveys, it is difficult to see how giving greater weight to CBAs would make rulemaking either more respectful of people's known preferences or more democratic.

decision criterion that works whether or not one subscribes to utilitarianism. Instead of providing any explicitly philosophical grounding for her proposal, she establishes its validity via a sort of logical proof. Even assuming, *arguendo*, that economists are able to monetize every significant regulatory benefit for which there exists any willingness to pay (a heroic assumption taken up in Part I), the logical argument would still fail. This is because the argument depends on an implicit assumption that a budgeting principle that is self-evident in the context of individuals and individual households applies equally to diverse societies where individuals may have very conflicting interests and vastly different resource constraints. The argument also, fatally, conflates two distinct meanings of the phrase "willingness to pay."

A. Professor Rowell Implicitly Assumes an Identity of Interests Between Winners and Losers

According to Professor Rowell:

> At first blush, NHTSA's argument that nonquantifiable benefits can justify monetized costs may seem plausible. But if we take seriously the claim that these benefits cannot be monetized, the agency's argument cannot stand.
>
> To see this, consider how regulators monetize benefits. The benefits in a regulatory cost–benefit analysis are calculated by reference to people's willingness to pay money to secure those benefits. When monetized costs exceed monetized benefits, the costs of a regulation exceed what people are willing to pay for the effects of that regulation. Such a regulation should be barred by Executive Order 13,563, which requires that the benefits of a regulation "justify" its costs.[36]

Professor Rowell's argument would be on sounder footing if there were a single, unitary purchaser and beneficiary of regulatory goods. This hypothetical purchaser and beneficiary would wisely avoid irrational regulatory expenditures. But this reasoning only works when there is a complete identity of interests between regulatory winners and losers. Assuming nothing constrains an individual from spending her money however she likes, it is perfectly logical to say it makes no sense for her to spend more on something than she is willing to pay for it. However, the same logic that holds for individuals does not hold at the societal level. This becomes clearer when moving from a generic proposition like "society should not spend more than it is willing to pay for mine safety" to a concrete application like "federal regulators should not require Massey

36. Rowell, *supra* note 2; *see also* Rowell, *supra* note 1, at 741 n.70.

Energy to spend more to prevent deadly coal mine accidents than whatever amount coal miners, and other beneficiaries, are willing to pay for that safety." Our "society" is composed of individuals. Under almost any regulation, some will win and some will lose.

"Sadie should not voluntarily pay more for any good than the amount she is willing to pay" is true as a matter of logic. However, "society should not voluntarily pay more for regulatory benefits than the amount society is willing to pay, where the amount society is willing to pay is defined to mean the monetized value of the regulatory benefit to the regulatory beneficiaries, as derived via willingness-to-pay studies" is a normative statement, and one that requires defense. To the extent the normative justification for Professor Rowell's neo-Benthamite decision criterion lies in utilitarianism—or some other variety of consequentialism such as welfarism—this should be made explicit.

For example, consider the family in *Partial Valuation*'s "science fair" example.[37] There, parents are not willing to pay more than $25 to enter their child into a science fair, and so it makes no sense for that family to pay more money for the science fair than the $25 it is willing to pay.[38] Does it similarly never make sense for federal regulators to establish national public health, safety, or environmental standards with monetized costs that exceed the monetized value of the benefits?

A family is different, not just quantitatively, but also qualitatively, from the aggregate population of the United States. Even if this hypothetical family should not pay more than $25 for the science fair, it simply does not follow that a similar logic applies to society at large. For example, assume that the average family entering a child in that science fair is willing to pay a maximum of $25 in admission fees, and that this $25 happens to be the actual fee for admission. Assume that the state provides a partial subsidy of the fair, at a cost of $5 per child, to cover the extra cost of keeping the facility open and staffing the event, so that the total social cost of each child's participation is $30: the $25 entry fee plus the $5 subsidy. If the only monetizable benefits are represented by the families' willingness to pay entry fees, would it be irrational for the state to subsidize this science fair, given that the monetized costs exceed the monetized benefits by $5 per child?[39]

In truth, we do not yet have enough information to determine whether

37. *See* Rowell, *supra* note 1, at 739–41.

38. *Id.* at 739–40.

39. While it may appear that the state offering the subsidy had a sort of "willingness to pay" (WTP) that should be counted, CBA only counts monetized benefits to regulatory beneficiaries as benefits. *See infra* Part II.B.

this subsidy would be a good or bad investment of government funds. We need to know more about the students, their families' resource constraints, the science fair itself, and how it compares to other projects that are *actually* competing with the science fair for the relevant funds. Someone needs to make a decision that considers qualitative factors, and not just the monetized values of costs and benefits. Perhaps the students live in an economically depressed area and their parents have a below-average ability to pay for such educational "extras." If we imagine that families with average incomes in that state would have been willing to pay entry fees of $50, on average, for the exact same experience, then it may not be unreasonable for a decisionmaker to conclude that the state's subsidy of the facially cost-ineffective science fair is a good thing.

B. Professor Rowell Assumes that Economic Estimates of Beneficiaries' Willingness to Pay Accurately Represent Larger Societal Preferences

The phrase "willingness to pay" can mean two things. It can be used in a general sense to refer to the willingness of a person, entity, or society to expend resources on some thing. And so, when legislation directing NHTSA to improve vehicle rearview visibility to reduce backover accidents sailed through both houses of Congress and was signed into law by President Bush in 2008,[40] this offered strong evidence of a societal willingness to pay the costs of such a rule.

In the field of welfare economics, "willingness to pay" ("WTP," in the jargon of CBA) is also a term of art that refers specifically to the highest price a recipient is willing to pay for a good.[41] One way regulators monetize the value of the lives saved by regulations is through the use of survey data; people are asked how much they would be willing to pay to eliminate small risks of premature death and, from their responses, economists attempt to monetize the "value of a statistical life" (VSL).[42]

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40. Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)).

41. *See generally* W. Michael Hanemann, *Willingness to Pay and Willingness to Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635 (1991).

42. In addition, these "value of a statistical life" (VSL) figures are often derived from the "compensating wage premiums" workers receive in exchange for taking on risky work; this process has been criticized on numerous grounds as producing indefensibly low VSL figures. *See infra* note 51. *See generally* Anna Alberini, *What Is a Life Worth? Robustness of VSL Values from Contingent Valuation Surveys*, 25 RISK ANALYSIS 783 (2005). In theory, VSLs can also be derived via assessment of consumer expenditures made for the sake of safety. *See generally* W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5 (2003). Limitations of this approach include limitations on consumers' knowledge of risks and limitations on their

But another way to arrive at a VSL figure is by evaluating the results of surveys that ask, "How much would you have to be paid to voluntarily accept being subjected to an additional risk of premature death?" A thorny problem for CBA economists is that VSL figures derived from "willingness to accept" (WTA) survey data are higher than VSLs derived via WTP.[43] This is hardly surprising, since people have a demonstrated tendency to want to hang on to whatever health and environmental entitlements they "own,"[44] and since WTP figures are much more tightly constrained by the resources actually available to the research subjects. A person with no disposable income cannot realistically buy more safety, but can nevertheless refuse to sell off—or can set a very high price on—whatever protection he or she already owns.[45]

Professor Rowell conflates two different meanings of willingness to pay when she argues from the premise that we, as a society, should not pay more for regulatory goods than the amount we are "willing to pay," to the conclusion that determinations of which proposed regulations are sufficiently cost-justified to survive OIRA review should be made via economic analyses wherein any benefits incommensurable with money are monetized, to the extent possible, using WTP.[46] WTP, in the CBA context, is only one of several possible mechanisms economists may use when monetizing extra-market goods, and, despite its name, it is not intended to provide a complete measure of societal willingness to pay for those goods. WTP is only meant to reflect the amount the beneficiary would pay for the good if it were available for purchase on the market;[47] it does not completely account for human preferences from a broad, societal perspective.

Professor Rowell is incorrect when she states in *Partial Valuation* that "NHTSA determined that people's willingness to pay for protection against

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disposable income.

43. Richard O. Zerbe, Jr., *Is Cost–Benefit Analysis Legal? Three Rules*, 17 J. POL'Y ANALYSIS & MGMT. 419, 420–21, 449 (1998).

44. *See id.* at 434; *see also* Hanemann, *supra* note 41, at 646. *But see* Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay–Willingness to Accept Gap, the "Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 531–32 (2005) (arguing that WTP and "willingness to accept" (WTA) may converge when experimental subjects are better educated by testers; however, the goods at issue in this study were tangible goods with market values, and in that sense are different from extra-market health and environmental goods).

45. *See* Thomas O. McGarity, *A Cost–Benefit State*, 50 ADMIN. L. REV. 7, 67–68 (1998).

46. Rowell, *supra* note 2.

47. OMB, CIRCULAR A-4, *supra* note 11, at 18–31; *see, e.g.*, CAROLINE DINWIDDY & FRANCIS TEAL, PRINCIPLES OF COST–BENEFIT ANALYSIS FOR DEVELOPING COUNTRIES 264 (1996).

mortality risks justifies an expenditure of $6.1 million per life saved"[48] and that "NHTSA has told us that it believes society is willing to pay $6.1 million per life saved by the rearview camera rule."[49] When NHTSA used a VSL of $6.1 million in its CBA of this rule, the agency did not thereby conclude that $6.1 million represents the quantum of costs "justified" for this benefit; as is explained in Part IV, *infra*, the issue of what costs are justified is, at least in part, a normative question not conclusively answered by the monetized values of the benefits. And, again, the VSLs used in CBAs (such as NHTSA's $6.1 million figure) are not claimed by any agency actor to be comprehensive measures of what *society* is willing to pay to save a life. Such VSL estimates are based on the estimated value of a saved life *to a beneficiary*, and these figures may not even be WTP values; to the extent these values are based on premiums workers must be paid to accept riskier work, they are probably better described as incomplete WTA measures.[50]

It is also noteworthy that WTP should not be the default CBA valuation methodology for extra-market goods, such as averted deaths. As a matter of both logic and fairness, the choice of whether to use WTP values or WTA values for such goods should be determined by who has the stronger rights interest in the goods in question—the intended beneficiaries or the entity being regulated.[51] As Thomas McGarity explains:

> A fundamental assumption underlying most health and environmental legislation is that each individual is entitled to some minimal level of security from risks posed by others, and that commonly held resources are likewise protected. Potentially affected individuals or their governmental representatives must be persuaded to accept additional risks; they cannot be imposed with impunity up to the point at which the potentially affected individuals are willing to pay to prevent the risk-producing conduct.[52]

Returning to the proposed rearview camera rule, Congress created an

48. Rowell, *supra* note 1, at 728–29.

49. *Id.* at 740.

50. *See supra* note 42; *infra* note 51.

51. Richard O. Zerbe, Jr., *The Legal Foundation of Cost–Benefit Analysis*, 2 CHARLESTON L. REV. 93, 120–21 (2007). In addition to survey data, the "compensating wage premiums" workers must be paid to undertake additional increments of occupational risk are also used to establish VSL values; these VSL values arguably reflect WTA values, assuming workers are not constrained in their ability to decline the riskier work. But these VSL measures arguably reflect decisions made by people who are less risk averse than average, uninformed about the risks of their work, unable to freely choose safer work, or all three, and so the VSL figures derived using this method likely understate the average monetized value of a human life in the United States. *See* ACKERMAN & HEINZERLING, *supra* note 33, at 77–81.

52. McGarity, *supra* note 45, at 68 (footnote omitted); *see* Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost–Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 456 (2008).

entitlement in the intended beneficiaries when it directed NHTSA to promulgate regulations designed to protect pedestrians and cyclists from backover accidents by requiring the installation of cameras, or other equipment that would reduce backover accidents, in new passenger vehicles.[53] From this perspective, VSLs for the rule will be too low if they are based on WTP, as opposed to WTA.[54]

III. SOME NORMATIVE OBJECTIONS TO A MONETIZED COST–BENEFIT DECISION CRITERION

Because the argument analyzed in Part II fails as a matter of logic, it is best understood as a normative assertion—one that requires a normative defense that Professor Rowell does not provide.

Because the proposal so closely resembles real-world regulatory review, which rarely takes unmonetized regulatory benefits seriously,[55] many objections to the proposal apply equally to most real-world regulatory review. CBA's defenders in the legal literature have provided thoughtful responses to such objections, but a key concession in these responses has been that incommensurable, non-monetizable policy goals and moral values—such as justice, equity, and the promotion of environmental values—should, in some cases, trump competing utilitarian concerns.[56]

Since the decision criterion defended in Professor Rowell's RegBlog essay would completely omit non-monetizable concerns when determining whether a regulation is sufficiently cost-justified to proceed, it is missing key concessions of the existing normative defenses of CBA, which would allow for some consideration of important non-monetizable concerns when evaluating whether regulations are worth their monetized costs.

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53. *See* Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)). For the statistical lives that would be saved under the weakest possible regulation that the NHTSA has the discretion to implement, it is especially difficult to justify the use of WTP-derived VSLs.

54. *See supra* note 43 and accompanying text.

55. *See* Luttrell, *supra* note 15, at 109–10, 110 n.93.

56. John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 418–19 (2008); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 65–66 (1995); *see* ADLER & POSNER, NEW FOUNDATIONS, *supra* note 16, at 53; *see also* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost–Benefit State*, 48 STAN. L. REV. 247, 293–94 (1996) ("The various consequences of regulation ought not to be thought commensurable along a single metric. Any cost–benefit analysis should be accompanied by a disaggregated, qualitative description of the consequences of government action, so that Congress and the public can obtain a fuller picture than the crude and misleadingly precise 'bottom line' of the cost–benefit analysis." (footnote omitted)).

A. A Monetary CBA Decision Criterion Would Fail to Account for the Rights of Regulatory Beneficiaries

Many regulatory beneficiaries have a *right*, often a statutory right, to regulatory benefits that could appear to be bad investments under CBA. When we throw these rights and entitlements out the window—except to the extent there exists a willingness to pay for them, i.e., except for this partial, entirely instrumental value—and when we make decisions based solely on the Kaldor–Hicks criterion,[57] we have adopted a policy of strict utilitarianism. This policy is then vulnerable to all the objections that plague utilitarianism. For example, philosophies of ethics and justice that stand in opposition to utilitarianism can be found in the writings of Rawls and Kant, among numerous other philosophers.[58] Simply put, utilitarianism is controversial:

> Like any comprehensive moral or religious doctrine, utilitarianism will inevitably be controversial. Many persons will reasonably reject it. . . . Basing state policy on utilitarianism or entrenching utilitarianism into the constitution of a democratic society as the foundational value would be akin to establishment of religion. No more than Buddhism, Roman Catholicism, or any other comprehensive doctrine should utilitarianism be advanced for the role of [public philosophy].[59]

This is not to say that utilitarian, consequentialist concerns have no place at all in setting regulatory policy. But an adoption of a strict monetary CBA decision criterion would amount to a complete rejection of all other rights and values—except to the extent they have an instrumental value that can be monetized—for most rulemakings. Such an "efficiency über alles" policy would stand in tension with the policy goals of many, if not most, of the statutes that regulators are charged with implementing through their regulations, as numerous commentators have persuasively argued.[60]

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57. Under the Kaldor–Hicks criterion, a policy is socially beneficial if it has the effect of making one set of people better off and another set worse off, so long as what the winners gain has a higher value than what the losers lose. *See* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491 (1980).

58. CARL L. BANKSTON III, *Nozick, Robert*, *in* 2 ETHICS 1053, 1054 (John K. Roth ed., rev. ed. 2005); s*ee, e.g.*, RICHARD A. SPINELLO, *Deontological Ethics*, *in* 1 ETHICS 367, 368 (John K. Roth ed., rev. ed. 2005).

59. Richard J. Arneson, *Rawls Versus Utilitarianism in the Light of Political Liberalism*, *in* THE IDEA OF A POLITICAL LIBERALISM: ESSAYS ON RAWLS 231, 246–47 (Victoria Davion & Clark Wolf eds., 2000).

60. Shapiro & Schroeder, *supra* note 52, at 473 ("[T]o the extent that CBA is defended on normative grounds, it determines the value of proposed policy and regulatory options using just one factor—economic efficiency. This makes CBA unhelpful in implementing the other policy values that underlie most regulatory statutes. Moreover, because it is focused

B. Many Societal "Goods" Have More Than an Instrumental Value

A recent outraged blog post from Lisa Heinzerling highlights the clear, inherent tension between a completely monetary CBA decision criterion and the protection of rights in a civil society. [61] When the Department of Justice (DOJ) issued regulations—mandated by statute—intended to control rampant rape and other sexual abuse of prisoners, DOJ was required to submit a CBA of the proposal to OIRA. And so, in a chilling report, DOJ dutifully attempted to provide the monetized value of rape and sexual abuse.[62] A forcible rape of an adult prisoner was assigned a monetary value of -$310,000 or -$480,000, while "contacts with a staff member that only involved touching of the inmate's buttocks, thigh, penis, breasts, or vagina in a sexual way" were assigned a value of -$600 per incident.[63] Although this CBA apparently did not influence DOJ's final rules,[64] in theory, we *could* use monetization to determine whether prevention of sexual assault is worth the expense; this appears to be how we would make such decisions under a strictly monetary CBA decision criterion.[65]

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on only one value, CBA does not generate any discussion of how to resolve conflicts between efficiency and other regulatory and policy goals to the extent that this conflict is relevant under a regulatory statute."); *see* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost–Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 92–93 (2005); *see also* Sinden, Kysar, & Driesen, *supra* note 21, at 56–57 (summarizing philosophical objections to CBA in the regulatory context). *See generally* Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1408–10 (2005).

61. Lisa Heinzerling, *Cost–Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape*, GEO. L. FAC. BLOG (June 13, 2012), http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html.

62. DEP'T OF JUSTICE, REGULATORY IMPACT ASSESSMENT: NOTICE OF FINAL RULE FOR PRISON RAPE ELIMINATION ACT (PREA) STANDARDS (May 17, 2012), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.

63. *Id.* at 24, 64.

64. Heinzerling, *supra* note 61.

65. In a blog post responding to Professor Heinzerling, Rick Hills argues that the Department of Justice's (DOJ's) regulations might have prevented more assaults if DOJ had given more weight to the results of its CBA. Rick Hills, *In Defense of Cost–Benefit Analysis: Lessons from Recent Rules for Preventing Prison Rape*, PRAWFSBLAWG (June 16, 2012, 11:51 AM), http://prawfsblawg.blogs.com/prawfsblawg/2012/06/in-defense-of-cost-benefit-analysis-lessons-from-recent-rules-for-preventing-prison-rape.html. Even if this is true, it is a consequentialist argument; CBA will point toward less protection of human rights in other cases. Professor Heinzerling argues that CBA is not the appropriate decision criterion for determinations of how much sexual assault of prisoners to prohibit, but she does not claim CBA will always result in less protection for prisoners.

IV. EXECUTIVE ORDER 12,866 AND EXECUTIVE ORDER 13,563 ARE UNAMBIGUOUS IN THAT NEITHER REQUIRES REGULATIONS TO PASS A "MONETARY CBA"

Professor Rowell writes that President Obama's Executive Order on regulatory review, Executive Order 13,563,[66] is ambiguous in that it is not clear whether agencies can rely on non-monetized benefits in determining that benefits justify costs for a rule whose monetized benefits exceed its monetized costs.[67]

But there is no ambiguity there. The language in Executive Order 13,563 to the effect that benefits must justify costs is taken directly from Executive Order 12,866,[68] a Clinton-era order on regulatory review that Executive Order 13,563 explicitly reaffirms and does not amend.[69] Executive Order 12,866 provides that, to the extent permitted by law, "[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[70] Nothing at all in either Executive Order requires *monetization* of any costs or benefits, and certainly neither requires that monetized costs must exceed monetized benefits.

In 1981, Ronald Reagan issued Executive Order 12,291,[71] which was replaced in 1993 by Executive Order 12,866. Executive Order 12,291 provided that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation *outweigh* the potential costs to society."[72]

"Justify" means "to prove or show to be just, right, or reasonable."[73] "Outweigh" means "to exceed in weight, value, or importance."[74] By changing this word, and by explicitly recognizing concerns like equity and distributional fairness,[75] Clinton softened the CBA requirements that had earlier existed under Executive Order 12,291.

The OMB's 2003 guidelines to agencies conducting CBA under

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66. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).
67. Rowell, *supra* note 1, at 725, 730–31.
68. Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (reprinted as amended in 5 U.S.C. § 601 (1994)).
69. Exec. Order No. 13,563, 3 C.F.R. at 215.
70. Exec. Order No. 12,866, 3 C.F.R. at 639.
71. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).
72. *Id.* at 128 (emphasis added).
73. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 680 (11th ed. 2003).
74. *Id.* at 882.
75. Exec. Order No. 12,866, 3 C.F.R. at 639.

Executive Order 12,866, which were issued under George W. Bush's Administration and which remain active, support this construction. The guidelines provide: "When important benefits and costs cannot be expressed in monetary units, [CBA] is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."[76] Moreover, the guidelines explicitly recognize that nonmonetized benefits can influence policy outcomes: "For cases in which the unquantified benefits or costs affect a policy choice, you should provide a clear explanation of the rationale behind the choice."[77]

In sum, nothing in the plain language of the executive orders requires that all regulations subject to regulatory review be evaluated under a formal, completely quantitative, and fully monetized analysis. There is nothing in the text of the currently operative executive orders on regulatory review that would prohibit an analysis that monetizes some goods, describes others qualitatively, and then assesses whether the regulatory benefits of a rule are reasonable, given its costs. Professor Rowell's conclusion that there is no place for consideration of non-monetized goods in a "monetary cost–benefit analysis"[78] is irrelevant to actual regulatory policy because there is simply no requirement that the CBA completed by agencies during the regulatory review process be fully monetary.

V. DESPITE METHODOLOGICAL IMPERFECTIONS IN NHTSA'S CBA, OIRA SHOULD NOT BLOCK THE PENDING BACKOVER RULE

For the reasons explained above, to the extent the monetized values of the deaths and injuries to be prevented by the NHTSA regulation were calculated using WTP estimates—as opposed to WTA estimates—they are likely to be too low. And there are a host of other reasons the prospective monetized benefits of the rule were arguably understated by NHTSA; Professor Rowell identifies many of these. For example, in theory, regulators could find creative ways to partially monetize difficult-to-value goods like avoiding the horrific experience of having run over one's own child, especially if the agency's failure to monetize this good may be what causes OIRA to kick the regulation back to the agency.[79]

In this way, *Partial Valuation* builds on Professor Rowell's earlier work describing the systematic understatement of regulatory benefits in agency CBAs. For example, she has argued convincingly that agencies relying on

76. OMB, CIRCULAR A-4, *supra* note 11, at 10.
77. *Id.* at 27.
78. Rowell, *supra* note 1, at 741.
79. *See id.* at 737.

existing WTP survey data to calculate the value of averted deaths are likely engaging in a form of "double discounting," thereby improperly reducing the monetized value of lives to be saved by regulation.[80] Professor Rowell has also advocated use of VSL multipliers for lives to be saved in the future[81]—another step that would increase projected regulatory benefits. Although, if regulators *must* evaluate health and environmental standards using CBA, I would go further than the VSL multiplier approach, and would reduce discount rates for all regulatory health and environmental benefits.[82] Another problem with NHTSA's CBA of its backover rule is that the 7% discount rate is indefensibly high.[83] Also, if history is any guide, the rule's costs have most likely been overstated.[84]

By proposing ways CBAs could be modified to provide more complete accountings of costs and benefits, Professor Rowell follows in the steps of Jeremy Bentham, who was not as cold-hearted in his utilitarianism as many commentators assume.[85] For example, while modern-day agency CBA would favor an act that reduces the value of a poor person's home by $1,000, if that act would create at least $1,001 in immediate new wealth for a very rich person, Bentham believed that utilitarian decisionmaking should reflect the greater utility that goods, like money, have for people who lack them ("diminishing marginal utility," in the language of economics).[86]

Professor Rowell is right that many CBA methodologies are in need of reform, and she is right that the benefits side of the ledger is systematically diminished when certain goods that could have been at least partially monetized are omitted from the net benefits analysis altogether. However,

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80. Arden Rowell, *The Cost of Time: Haphazard Discounting and the Undervaluation of Regulatory Benefits*, 85 NOTRE DAME L. REV. 1505, 1525–34 (2010).

81. Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 183–84 (2007).

82. *See* Luttrell, *supra* note 15, at 122 (arguing for the discount rate for health and environmental goods to be lower than the rate for compliance costs).

83. Graham, *supra* note 56, at 504 ("[W]e now realize [a 7% discount rate is] too high."); *see also* Sunstein & Rowell, *supra* note 81, at 206 n.126 (7% rate "seems badly outmoded").

84. *See generally* David M. Driesen, *Is Cost–Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997 (2002).

85. *See* Uwe E. Reinhardt, How Economists Bastardized Benthamite Utilitarianism, (unpublished manuscript) http://www.princeton.edu/~reinhard/pdfs/100-NEXT_HOW_ECONOMISTS_BASTARDIZED_BENTHAMITE_UTILITARIANISM.pdf (last visited Nov. 30, 2012) [hereinafter Reinhardt, *Utilitarianism*], *cited with approval in* Uwe E. Reinhardt, *When Value Judgments Masquerade as Science*, N.Y. TIMES ECONOMIX (Aug. 27, 2010 6:00 AM), http://economix.blogs.nytimes.com/2010/08/27/when-value-judgments-masquerade-as-science/.

86. Reinhardt, *Utilitarianism*, *supra* note 85.

many of the much-needed CBA methodological reforms, including Professor Rowell's recommendations regarding the problem of "double discounting,"[87] are unlikely to be operationalized by agency analysts until after time-consuming new studies have been commissioned and completed. In the meantime, OIRA should not block NHTSA's backover rule.[88] The executive orders that empower OIRA regulatory review are only effective "to the extent permitted by law."[89] When a statute directs an agency to act, the administration cannot overrule the statute by fiat. NHTSA's final rule is mandated by statute, and is now overdue.[90] While—to meet the Act's requirement that NHTSA enable drivers to detect children behind the vehicle—NHTSA was permitted to consider technology, including sensors, cameras, and mirror systems,[91] in field tests, only the video cameras were effective.[92] NHTSA found that "[l]ess expensive countermeasures, i.e., mirrors and sensors, have thus far shown very limited effectiveness and thus would not satisfy Congress's mandate for improving safety."[93]

While stalling the rule may have saved automakers some compliance costs in the short run, it is highly unlikely that automakers would actually prefer a switch from safety equipment consumers like, such as back-up cameras, which are already standard equipment in 45% of 2012 model cars,[94] to something less effective that will likely be unpopular with consumers, such as unsightly "cross-view" side mirrors that extend much

87. *See generally* Rowell, *supra* note 80.

88. *See* Rowell, *supra* note 2 ("OIRA should refuse to let the regulation through until the agency completes an adequate analysis.").

89. Exec. Order No. 13,563, 3 C.F.R. 215, 217 (2012) ("Nothing in this order shall be construed to impair or otherwise affect . . . authority granted by law to a department or agency, or the head thereof . . . . "); Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994) (reprinted as amended in 5 U.S.C. § 601 (1994) ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.").

90. *See* Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110–189, §2(b), 122 Stat. 639, 639–42 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)).

91. *Id.*

92. Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76,189 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585); *see also* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., VEHICLE BACKOVER AVOIDANCE TECHNOLOGY STUDY 3–5 (Nov. 2006) (while sensors and mirrors were also statutory options, they were highly unsuccessful at preventing backover accidents in NHTSA field tests) [hereinafter VBATS].

93. 75 Fed. Reg. at 76,189.

94. Nick Bunkley, *U.S. Rule Set for Cameras at Cars' Rear*, N.Y. TIMES, Feb. 27, 2012, at A3. Smaller, convex "look-down" mirrors—which can only be mounted on a subset of passenger vehicles—were also studied by NHTSA, and—like cross-view mirrors—were effective at preventing backover accidents in 0% of trials. VBATS, *supra* note 92, at 3.

further out to the sides of vehicles, as on a school bus.[95]

Mandatory back-up camera systems may cost some consumers an extra $58 to $203 per vehicle,[96] a significant extra cost. But there are currently no regulations governing rearview visibility[97] and, in vehicles without back-up cameras, the rearview blind spot—the area that cannot be seen even when one uses side and rearview mirrors and also looks over one's shoulder—can extend up to 101 feet behind the vehicle.[98] To demonstrate the need for rearview cameras, one advocacy group managed to fit sixty-two children in the blind spot behind a single large SUV; the driver, despite using all mirrors and looking over her shoulder, could see none of these children.[99]

When CBA proponents argue against intuitively appealing, but allegedly "cost-ineffective," regulations, they often note that every dollar spent as a result of such regulations is a dollar that cannot be spent on goods like "housing, education, transportation, [and] national security."[100] While this is true, because there is no mechanism that will cause the averted regulatory costs to be diverted into such projects, it is equally true that this is money that cannot be spent on chrome rims, plasma televisions, spa treatments, or top-shelf vodka. Forgone national security, for example, is only an opportunity cost of the NHTSA regulation to the extent the NHTSA regulation actually diverts resources away from national security.

Even if, by preventing NHTSA from issuing this regulation, OIRA could somehow cause the averted regulatory costs to be used in a more cost–beneficial way (from a broad, societal perspective), OIRA is simply not empowered to override any allegedly poor social welfare choices embodied in acts of Congress. NHTSA was supposed to finalize its backover rule last year, but missed its deadline. According to NHTSA's estimates, for every year of regulatory delay, there will be approximately 7,000–8,000 additional injuries due to backover accidents, and about 100 extra deaths.[101]

And that is a shame.

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95. *See* Brian Naylor, *Government Backs Up On Rearview Car Cameras*, NAT'L PUB. RADIO (Mar. 02, 2012), http://m.npr.org/news/Politics/147742760?singlePage=true.

96. 75 Fed. Reg. at 76,236.

97. Bunkley, *supra* note 94, at A1, A3.

98. *Id.* at A3; *see also The Danger of Blind Zones: the Area Behind Your Vehicle Can Be a Killing Zone*, CONSUMER REP., http://www.consumerreports.org/cro/2012/03/the-danger-of-blind-zones/index.htm (last updated March 2012) (reporting that rear blind spots were as far as fifty-one feet for pickup trucks).

99. Bunkley, *supra* note 94, at A3; *see* KidsandCarsUSA, *KidsandCars 62 Children*, YOUTUBE, (Feb. 22, 2011) http://www.youtube.com/watch?v=fn0RocUSLmk.

100. Graham, *supra* note 56, at 412.

101. 75 Fed. Reg. at 76,189.

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