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THE IDEA OF “TOO MUCH LAW”

Mila Sohoni*

If brevity is the soul of wit, what is verbosity the soul of? Of overweening, inefficient, even tyrannical government—at least according to the critics who, for years, have bewailed the fact that federal laws and regulations are growing by the minute, by the mile, and by the metric ton. These critics argue that America suffers from “hyperlexis,” or the existence of too much law, and their calls for remedies to that malady are now finding a receptive ear in the highest echelons of the federal government. The idea that there is too much federal law has been embraced by all three branches of government and by members of both major political parties.

In order to analyze these claims, this Article taxonomizes and evaluates the most common claims of hyperlexis in federal law, including the claims that federal laws and regulations are too numerous, too complex, too costly, and too invasive of state and local prerogatives. Once these arguments are untangled, their individual flaws become evident. Almost each account of federal hyperlexis faces serious conceptual obstacles in either its technique for measuring hyperlexis or in its method for remedying it.

This Article then notes one argument that has not been convincingly made: the argument that the proliferation of federal law results from a democratic failure. No public choice account plausibly explains the persistent and widespread overgrowth of law. But the absence of such an account cannot, of course, put a stake through the heart of the hyperlexis critique, which implicates deeply embedded philosophical beliefs concerning the nature of individual liberty and the proper role of government. The critique represents a challenge to the legitimacy of law that current theories of law’s legitimacy are not oriented to deflect. We are left, then, in the worst of both worlds. The hyperlexis critique does not map out a means to achieve the goal of reducing the amount of federal law, but the currency of the critique has corrosive effects upon the sociological legitimacy of federal law and institutions.

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INTRODUCTION

Thousands of pages of statutes and millions of pages of regulations are smothering America's economy and killing its spirit.¹ Permits and paperwork cost businesses billions or even trillions of dollars annually.² Regulations are excessively burdensome, too intrusive, and sometimes "just plain dumb."³ Some bodies of law are so complex that even federal judges claim not to understand them.⁴ Though the country is "drowning" in law already,⁵ it will soon be deluged by a "regulatory tsunami" of historic

1. See, e.g., Philip K. Howard, *Drowning in Law: A Flood of Statutes, Rules and Regulations Is Killing the American Spirit*, N.Y. DAILY NEWS, Oct. 10, 2010, at 36.

2. See NICOLE V. CRAIN & W. MARK CRAIN, SMALL BUS. ADMIN. OFFICE OF ADVOCACY, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS 2–3 (Sept. 2010), available at <http://www.sba.gov/advo/research/rs371tot.pdf> (discussing estimates of the "annual cost" of federal regulations ranging from \$51 billion to over \$1 trillion).

3. Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17.

4. See Richard Lazarus, *Complex Laws Can't Spell Judicial Respect*, ENVTL. F., Jan.–Feb. 2005, at 8, 8 (describing judicial antipathy to environmental law claims because of their technical and scientific nature, as well as their dense jargon).

5. See Howard, *supra* note 1.

scale.⁶ Some regulations are a “clear and present danger” to the national security of the United States and, if they came from a foreign power, “would rightly be considered an act of war.”⁷

It is impossible to open a newspaper without seeing some such version of the claim that America suffers from “hyperlexis,” or the existence of “too much law.”⁸ Especially since the 2008 financial crisis, one variant of the idea of hyperlexis has become a commonplace feature of public debate: the perception that the inexorable growth of federal statutory and regulatory law has reached an unacceptable level.⁹ In the wake of the global liquidity crunch, the collapse of Lehman Brothers, and the threat of bankruptcy at AIG,¹⁰ the country was riveted by several dramatic and perhaps unavoidable government interventions in the financial and economic markets. These interventions included the United States Treasury’s creation of the Troubled Asset Relief Program,¹¹ the Treasury’s purchase of preferred stock in “too big to fail” financial institutions,¹² the Federal

6. Thomas J. Donohue, President & CEO, U.S. Chamber of Commerce, *The Regulatory Tsunami—How a Tidal Wave of Regulations Is Drowning America* (Oct. 7, 2010), available at <http://www.uschamber.com/press/speeches/2010/regulatory-tsunami-how-tidal-wave-regulations-drowning-america>.

7. See Editorial, *An EPA Moratorium*, WALL ST. J., Aug. 29, 2011, at A16.

8. Bayless Manning coined the term “hyperlexis” in a law review article published in 1977. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977) (“Hyperlexis is America’s national disease—the pathological condition caused by an overactive law-making gland.”). Most subsequent discussion of hyperlexis has focused on the alleged excesses of lawsuits and lawyers, rather than on law per se. See, e.g., Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1341–42 (2009) (asserting that “hyperlexis” is another word for the “litigation explosion”); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6 (1983) (examining “one component of the hyperlexis syndrome—the alleged high rates of disputing and litigation—in the context of current research”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985 (2003) (similar).

9. See *infra* notes 19–22 and accompanying text. Ironically, the 2008 crisis was an economic cataclysm that many (including some prominent conservatives) argued was caused by too little law, not too much. See RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION*, at xii (2009) (arguing that “[t]he movement to deregulate the financial industry went too far,” the economic crisis “is a market failure” and that “a more active and intelligent government” is needed to prevent future problems). The repeal of the Glass-Steagall Act of 1933 has often been blamed for the crisis. See, e.g., Barbara Crutchfield George et al., *The Opaque and Under-Regulated Hedge Fund Industry: Victim or Culprit in the Subprime Mortgage Crisis?*, 5 N.Y.U. J. L. & BUS. 359, 385 (2009) (“[T]he present financial crisis begins with the repeal of the Glass-Steagall Act . . .”).

10. See POSNER, *supra* note 9, at viii–ix.

11. Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 101–136, 122 Stat. 3765, 3767–3800 (codified as amended at 12 U.S.C. §§ 5211–5241 (Supp. IV 2010)).

12. See Press Release, U.S. Dep’t of the Treasury, *Treasury Announces TARP Capital Purchase Program Description* (Oct. 14, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp1207.aspx> (announcing that the Treasury would buy up to \$250 billion in preferred shares from qualifying banks).

Reserve's purchase of over \$1 trillion in mortgage-backed securities,¹³ the bailout of troubled automakers Chrysler and General Motors,¹⁴ and the federal conservatorship of Fannie Mae and Freddie Mac.¹⁵

During roughly the same period, the Obama Administration pressed forward on plans to overhaul the nation's health insurance market and to regulate consumer finance transactions. In 2010, these efforts resulted in the passage of two enormous pieces of law—the Patient Protection and Affordable Care Act¹⁶ (PPACA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁷ (Dodd-Frank)—each of which obviously required extensive new regulations.¹⁸

The federal government's rescue efforts and the new laws contributed to an increased public perception of excessive government intervention in the markets and in the decisions of private actors. The emergence in early 2009 of a loosely organized movement known as the Tea Party either produced,¹⁹ or was a product of,²⁰ an increase in rhetoric about government intrusiveness. By late 2009, public opinion polls showed a resurgence in the percentage of Americans saying that the government is trying to do “too many things” and that the federal government has “too much power.”²¹

13. *FAQs: MBS Purchase Program*, FED. RESERVE BANK OF N.Y., http://www.newyorkfed.org/markets/mbs_faq.html (last visited Feb. 23, 2012).

14. *Programs*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/initiatives/financial-stability/programs/Pages/default.aspx> (last visited Feb. 23, 2012) (describing the Bush and Obama Administrations' automobile manufacturer bailout).

15. Press Release, Fed. Hous. Fin. Agency, Statement of FHFA Director James B. Lockhart 5–6 (Sept. 7, 2008), <http://www.fhfa.gov/webfiles/23/FHFAStatement9708final.pdf> (announcing conservatorship of Fannie Mae and Freddie Mac).

16. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered titles of U.S.C.), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered titles of U.S.C.).

17. Pub. L. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered titles of U.S.C.).

18. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41180, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA), at Summary (2010), available at http://geoffdavis.house.gov/UploadedFiles/Regulations_Pursuant_to_the_Patient_Protection.pdf (noting that the report identifies “more than 40 provisions in PPACA . . . that require, permit, or contemplate rulemaking by federal agencies to implement the legislation”); CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU 3 (2010) [hereinafter COPELAND, DODD-FRANK], available at <http://www.fas.org/sfp/crs/misc/R41380.pdf> (noting that one source says that Dodd-Frank requires “a total of 243 ‘rulemakings’” while another “placed the number of rules expected to be issued pursuant to the act even higher”).

19. See David Brooks, Op-Ed., *The Tea Party Teens*, N.Y. TIMES, Jan. 5, 2010, at A21 (noting that the Tea Party, which opposed “bloated government,” was “more popular than either major party” and that it might “become a major force in American politics”); E.J. Schultz, *Tea Party Patriots' Stage Rally: Sacramento Protest Targets Government*, FRESNO BEE, Aug. 29, 2009, at A5 (noting that a Tea Party rally in Sacramento drew thousands “to protest government over-regulation”).

20. Kate Zernike, *In Power Push, Movement Sees Base in G.O.P.*, N.Y. TIMES, Jan. 15, 2010, at A1 (“The Tea Party movement ignited a year ago, fueled by anti-establishment anger.”).

21. Frank Newport, *Americans More Likely to Say Government Doing Too Much*, GALLUP (Sept. 21, 2009), <http://www.gallup.com/poll/123101/americans-likely-say-government-doing-too-much.aspx> (“Gallup data show that 57% of Americans say the

Think tank reports and newspaper commentary condemning the proliferation of laws themselves proliferated.²²

The hue and cry against overregulation is familiar to anyone who has been even a casual observer of recent events. What is perhaps less obvious, however, is how all three branches of the federal government have begun echoing the proposition that there are too many burdensome regulations, too many wordy statutes, and, in short, too much law. And they are not just talking about the problem; they are making policy and legal decisions to attack it.

As Part I describes, the evidence of these policymaking and legal choices is apparent in legislative proposals, in executive orders, and even in U.S. Supreme Court opinions. In Congress, several hearings and pending bills have addressed initiatives for fairly radical regulatory reform.²³ In two separate executive orders issued in 2011, President Obama directed all federal agencies, including independent agencies, to cull all existing federal regulations to weed out “outmoded,” “excessively burdensome” rules.²⁴ The Supreme Court has even cast the problem in constitutional terms: in a major campaign finance decision in 2010, the Court held that “[p]roliferous laws” offend the First Amendment because a person of ordinary intelligence would be unable to readily determine how they would apply to the speech that fell within their ambit.²⁵

These instances, and many others like them, reveal that all three branches are taking steps calibrated in various ways to respond to the proliferation of federal statutes and regulations, civil as well as criminal. Indeed, in today’s fractious political environment, one may safely guess that the proposition that there ought to be less federal law—a sentiment that we may call “legislative minimalism”²⁶—is one of the only propositions that can command bipartisan, triple-branch support.

government is trying to do too many things that should be left to businesses and individuals, and 45% say there is too much government regulation of business. Both reflect the highest such readings in more than a decade.”). For a more qualitative assessment of the impact on regulation on popular sentiment, see, for example, Susan E. Dudley, *Administrative Law & Regulation: Prospects for Regulatory Reform in 2011*, ENGAGE, June 2011, at 7, 7 (“Over the course of our history, concerns about the cumulative impact of regulations have occasionally reached a level of public discourse that led to meaningful efforts at regulatory reform (and even outright deregulation). There is evidence that we may be witnessing such a period today.”).

22. See, e.g., Howard, *supra* note 1; James Gattuso et al., *Red Tape Rising: Obama’s Torrent of New Regulation*, HERITAGE FOUND. 5 (Oct. 26, 2010), http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf.

23. See *infra* notes 37–38 and accompanying text.

24. See Exec. Order No. 13,579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41,587 (July 11, 2011); Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).

25. *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010).

26. The core idea of legislative minimalism—the desirability of less law—has been both lauded and mocked for centuries. See, e.g., SIR THOMAS MORE, *UTOPIA 100* (Gilbert Burnet trans., London, R. Reilly 1737) (1516) (“They have but few Laws, and such is their Constitution, that they need not many. . . . [T]hey think it an unreasonable Thing to oblige Men to obey a Body of Laws, that are both of such a Bulk, and so dark, that they cannot be read or understood by every one of the Subjects. They have no Lawyers among them, for

At least in modern history, the degree of bipartisan consensus on this question is at a peak. During the last apogee of complaints about hyperlexis—which occurred during the Reagan Administration—the parties and branches were divided on this question.²⁷ Thus, the idea never really became dissociated from the particular political agenda of its proponents. Today, however, the call for legislative minimalism has become a stock proposal for both parties.²⁸

Given the difficulty of achieving even modest political consensus on any subject, it feels almost mean-spirited to point out the conceptual problems besetting the various accounts of federal hyperlexis. Nevertheless, the purpose of this Article is to present a systematic examination of the idea of hyperlexis in federal law,²⁹ as well to explore how the adoption of legislative minimalism as a normative ideal challenges current conceptions of federal law's legitimacy.³⁰

Part I of this Article maps the various approaches taken by each of the three branches concerning hyperlexis. This part takes a pointillist approach, juxtaposing and combining data points drawn from discrete and unconnected aspects of law and from each of the three branches. The picture that emerges shows that animosity to the growth of federal law is not (or, at least, is no longer) merely an element of a certain stripe of

they consider them as a Sort of People, whose Profession it is to disguise Matters, as well as to wrest Laws"); JONATHAN SWIFT, GULLIVER'S TRAVELS 125 (Claude Rawson ed., Oxford Univ. Press 2005) (1726) ("No Law of that Country must exceed in Words the Number of Letters in their Alphabet; which consists only of two and twenty. But indeed, few of them extend even to that Length. They are expressed in the most plain and simple Terms, wherein those People are not Mercurial enough to discover above one Interpretation. And, to write a Comment upon any Law, is a capital Crime.").

27. See Steven V. Roberts, *Democrats Press the 'Safety' Issue*, N.Y. TIMES, June 3, 1986, at B6 (discussing how Democrats were reframing their pro-regulation campaign as a matter of "safety" instead of "fairness").

28. See *infra* Part I.

29. This Article will generally use the term "hyperlexis" to refer to the idea of the existence of too much federal law, whether it is statutory or regulatory. Unless otherwise qualified, the term "law" will generally be used to encompass both statutes and regulations.

30. Though "[t]he sentiment, 'there's too much law,' surely rings true to both practitioners and regulated parties, . . . there is remarkably little scholarship delving into this glib cliché." J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 762 & n.13 (2003). Existing literature touches tangentially on the hyperlexis critique in the federal regulatory context. See, e.g., William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 37 (2003) (assessing "the overregulation hypothesis"); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1347 (2003) (noting that the "modern critique" of agencies is that "agencies—driven by ideology, bureaucratic ambition, or 'public interest' pressures—are regulating too strictly and too much"). But existing scholarship has not taken up Professor Manning's implicit challenge to break down systematically the "too much law" critique, see Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 12–13 (1982) (listing seven possible meanings of "over-regulation"), nor does it examine how the critique is being voiced by and influencing federal institutions. On the implications of law's increasing pervasiveness, see PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 419 (2000). For an identification of the phenomenon of regulatory accretion and how the administrative state should address the burdens of accretion, see Ruhl & Salzman, *supra*, at 763, 800–23.

partisan or ideological rhetoric. Rather, pursuit of the ideal of legislative minimalism is being endorsed as a normative goal and inscribed into black-letter law by all three branches of the federal government.

Next, Part II lays out the most common accounts of the problem of hyperlexis and then evaluates them to clarify the stakes of the debate. As the inventor of the term “hyperlexis” noted, the hyperlexis critique actually incorporates a hodgepodge of alternative claims.³¹ In order to assess the hyperlexis critique, therefore, it is necessary to break apart and probe separately the various senses of the claim that too much law exists. This process reveals that the prevailing descriptions of hyperlexis in federal law suffer from serious conceptual flaws in their techniques for measuring hyperlexis or in their proposals for remedying it. Either the diagnostic criteria for hyperlexis are faulty, or the prescribed cure has no logical relationship to the diagnosed ailment.

Where does that leave us? Part III begins by noting that for all the arguments put forth about hyperlexis, an argument that is *not* made is perhaps the most significant. Critics of hyperlexis have failed to supply a reason to think that the proliferation of laws thwarts democratic preference. Without a convincing account of a public-choice pathology responsible for the uncontrollable generation of hyperlexis, why should hyperlexis should be treated as anything other than an unobjectionable consequence of the ordinary processes of democracy?

As this part goes on to note, however, the mere fact of law’s democratic provenance cannot overcome the hyperlexis critique. The critique of federal hyperlexis draws upon commitments to liberty and to small government that have long animated American politics. At its core, the federal hyperlexis critique, and the call to legislative minimalism that flows from that critique, operate as an attack on the legitimacy and claim to authority of the modern state—and it is an attack that current theories of legal legitimacy are not oriented to deflect. Moreover, efforts to accommodate wariness of federal hyperlexis can backfire by producing legal regimes that appear partial, unaccountable, or selectively enforced. Thus, the hyperlexis critique’s corrosive toll on federal law’s legitimacy has the potential to compound itself.

I. CONSENSUS ABOUT HYPERLEXIS

Though they differ in their respective techniques, Congress, the President, and the Supreme Court all have recently taken steps expressly calibrated to curb or even reverse the growth of federal law. Some of these measures attempt to reduce burdens on regulated entities, others aim at cutting the raw number of regulations or reducing the number of pages of laws, and still others attempt to simplify the law. As this part illustrates, notwithstanding the ideological divisions between and within the three branches, all three branches and members of both parties are making myriad efforts to combat the growth of federal law.

31. See Manning, *supra* note 30, at 12–13.

A. Congress

One might reasonably wonder how Congress, whose sole purpose it is to enact law, could intelligibly indicate animosity to growth in law, since any congressional action will necessarily take the form of additional pages of law. The answer is that it does so under the mantle of reform—normally, regulatory reform, but also (though more rarely) through reform of the process through which statutes are enacted.

With respect to regulation, abundant evidence exists of current congressional concern about federal hyperlexis.³² For many years, the framework of statutes constraining the promulgation of federal regulations has remained relatively unchanged. This framework chiefly consists of the Administrative Procedure Act,³³ the Congressional Review Act,³⁴ the Unfunded Mandates Reform Act,³⁵ and the Regulatory Flexibility Act.³⁶ Today, however, regulatory reform is high on the legislative agenda. Congressional committees in both houses of Congress have cast a spotlight upon the growth of federal law through a series of hearings.³⁷ In concert

32. In describing this elevation of congressional concern, this Article makes the parsimonious assumption that Congress is structured in such a way that its activities are driven to some extent by information received by its members regarding the effect of their choices on relevant outcomes, and that its activities thus represent the results of a collective choice that is modestly driven by this calculus. To employ the convenient shorthand, Congress acts upon “its” priorities through its activities. See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 13 n.25 (2008) (“Characterizing the legislature, or the enacting coalition, as a unitary actor that ‘knows’ the effect of policies on outcomes and chooses the policy that would advance ‘its’ interest is a shorthand way of describing this more complex collective choice process.”).

33. 5 U.S.C. §§ 500–706 (2006).

34. *Id.* §§ 801–808. The Congressional Review Act gives Congress an opportunity to “veto” rules it does not approve. *Id.* § 801. Agencies must submit reports on certain rules to each house of Congress, which then has a certain period to assess such rules and prevent them from going into effect. *Id.* Congress has only exercised this veto once. Jonathan H. Adler, *Would the REINS Act Rein in Federal Regulation?*, REGULATION, Summer 2011, at 25.

35. 2 U.S.C. §§ 658–658g, 1501–1571 (2006). The Unfunded Mandates Reform Act requires an assessment of costs and benefits and an accounting, as well as other requirements, upon rules that require spending by state, local, and tribal governments or by the private sector when those required expenditures exceed \$100 million in any one year. *Id.*

36. 5 U.S.C. §§ 601–612. The Regulatory Flexibility Act (RFA) is designed principally to protect small businesses from excessive regulation by requiring agencies to consider the effects of their regulations on small businesses and explore alternatives to minimize the economic impact upon such businesses. See *id.*

37. See, e.g., *Unfunded Mandates, Regulatory Burdens, and the Role of the Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (May 25, 2011); *Unfunded Mandates and Regulatory Overreach: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (Mar. 30, 2011); *Unfunded Mandates and Regulatory Overreach: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (Feb. 15, 2011); *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *APA at 65*]; *Federal Regulation: A Review of Legislative*

with these hearings, bipartisan supporters in both houses have introduced major proposals for regulatory reform that would upend the decades-old structure of the administrative state.

The most notable item on the congressional agenda is the Regulations from the Executive in Need of Scrutiny Act of 2011³⁸ (REINS Act). The REINS Act is intended to invert the structure of the Congressional Review Act. Whereas the Congressional Review Act gives Congress an automatic opportunity to veto new rules, the REINS Act would require affirmative approval by Congress and the President of any “major” new regulations, which are defined to include rules that are likely to result in “a major increase in costs or prices for consumers [or] individual industries.”³⁹ For this subset of new rules—estimated to number between fifty and eighty annually—the REINS Act would functionally require the passage of a bespoke law to permit the regulation to go into effect,⁴⁰ a requirement that could very well kill many such regulations or deter their promulgation. In December 2011, the REINS Act passed the House.⁴¹

The REINS Act’s structure suggests its proponents believe that new rules should be introduced with wariness; that one should be especially wary of rules that increase costs to the private sector; and that additional congressional supervision is necessary to prevent agencies from exceeding the bounds of the power congressionally delegated to them. Other reforms conceive of the problem of hyperlexis in a similar fashion. A recent resolution adopted by the House of Representatives directs House standing committees to “inventory and review existing, pending, and proposed regulations, orders and other administrative actions . . . by agencies of the Federal Government.”⁴² Adopted with overwhelming bipartisan support,⁴³ the resolution directs each House standing committee to identify “regulations, executive and agency orders, and other administrative actions or procedures” that “impede private-sector job creation,” “harm the Nation’s global competitiveness,” or “create additional economic uncertainty.”⁴⁴ Like the REINS Act, this reform also seeks to address the effects of regulatory burdens upon the private sector, albeit with respect to existing rules as well as proposed rules.

Proposals, Part I, SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS (June 23, 2011), <http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-i>; *Federal Regulation: A Review of Legislative Proposals, Part II*, SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS (July 20, 2011), <http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-ii>.

38. H.R. 10, 112th Cong. (2011).

39. *Id.* § 804.

40. Adler, *supra* note 34, at 22–24.

41. See *Final Results for Roll Call 901*, HOUSE OF REP. (Dec. 7, 2011, 5:30 PM), <http://clerk.house.gov/evs/2011/roll901.xml>.

42. H.R. Res. 72, 112th Cong. (2011).

43. *Bill Summary & Status, 112th Congress (2011–2012)*, H. Res. 72, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HE00072:@@X> (last visited Feb. 23, 2012) (resolution passed by a vote of 391 to 28).

44. H.R. Res. 72.

Another regulatory reform proposal mooted by Senator Mark Warner, a Democrat from Virginia, would implement a so-called regulatory “pay-go” system.⁴⁵ As it was initially formulated, Senator Warner’s plan would have required all federal agencies “to identify and eliminate one existing regulation for each new regulation they want to add.”⁴⁶ His proposal would have, in other words, capped the raw number of federal regulations without regard to the relative costs, benefits, or harms of the added and eliminated rules. Senator Warner subsequently announced that he would draft legislation to require that “agencies would have to provide cost estimates for the economically significant rules they plan to impose—and then offset those rules by cost burden reductions on existing regulations.”⁴⁷ The revised Warner pay-go proposal would only require federal agencies to ensure parity in their costs, not in their net regulatory benefits, and it would not require the costs and the benefits offsets to come from the same population.⁴⁸ Other regulatory reform measures currently under consideration include proposals to augment the standard of judicial review of agency action and to codify requirements for cost-benefit analysis.⁴⁹

With respect to statutes, symptoms of congressional concern are subtler, but they are nonetheless apparent. Congress is considering measures aimed at “tax simplification,”⁵⁰ despite the fleeting effects of earlier attempts to reform the tax code.⁵¹ In addition, the House in 2011 effectively ended the longstanding practice of issuing commemorative resolutions, such as bills celebrating an anniversary of an important event or expressing appreciation for particular individuals, animals, or inanimate objects.⁵² This reform may sound trivial, just as the resolutions the reform targets may have been trivial, but it will have its intended effect: a dramatic reduction of the raw number of resolutions that pass the House.⁵³

45. See Mark R. Warner, Op-Ed., *Red-Tape Relief for a Sluggish Recovery*, WASH. POST, Dec. 13, 2010, at A19.

46. *Id.*

47. See *Federal Regulation: A Review of Legislative Proposals, Part I: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Affairs* (June 23, 2011) (testimony of Sen. Mark Warner) [hereinafter *Testimony of Mark Warner*], available at <http://www.hsgac.senate.gov/download/2011-06-23-warner-testimony>.

48. *Id.*

49. See, e.g., H.R. 527, 112th Cong. (2011); H.R. 3010, 112th Cong. (2011); SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. (2011) (bill requiring SEC to conduct a cost-benefit analysis prior to issuing new regulations).

50. See, e.g., Bipartisan Tax Fairness and Simplification Act of 2011, S. 727, 112th Cong. (2011).

51. See MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 134 (1997) (explaining why the 1986 tax reform act, instead of simplifying the tax code, actually introduced “staggering new complexities”).

52. David A. Fahrenthold, *‘Inspiring’ Votes No Longer Fly in the House*, WASH. POST, July 4, 2011, at A1 (“Something is off in the House of Representatives: It’s already July 4, and the House still has not yet registered its opinions on bald eagles, motherhood or the American flag.”); *112th Congress Legislative Protocols*, COMM. ON RULES (Feb. 23, 2011), <http://www.rules.house.gov/about/PolicyDetail.aspx?NewsID=186>.

53. See Fahrenthold, *supra* note 52.

B. The President

The President has a limited set of options for preventing growth in federal statutory law. Apart from political suasion, in fact, the President has only one concrete tool for doing so—the veto—which is, in any event, subject to congressional override.

With respect to federal regulation, however, the President has far more discretion. For more than thirty years, American presidents have tried various approaches to restrain the growth of federal regulation.⁵⁴ These efforts, which have focused primarily on restraining the costs and number of federal rules, have taken three main forms: requirements that agencies meet cost-benefit criteria for new regulations; requirements that agencies submit their regulations for review prior to adoption by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget; and requirements that agencies conduct retrospective reviews of existing rules to remove the ones that are unnecessary or not functioning well.⁵⁵

Recently, President Obama has made a renewed commitment to efforts to reduce the accumulated body of federal regulations. In an op-ed in the *Wall Street Journal* in January 2011,⁵⁶ he announced the issuance of a new executive order (Obama Order) that directs all executive agencies to eliminate unnecessary federal regulations.⁵⁷ The Obama Order instructs each executive agency to submit to OIRA a plan under which the executive agency will periodically review existing significant regulations to determine whether they should be modified, streamlined, expanded, or repealed.⁵⁸ The Obama Order requires agencies to plan to perform these look-back reviews as an ongoing, recurrent exercise.⁵⁹ The Obama Order also reiterates the importance of cost-benefit analysis and of OIRA review.⁶⁰

Alongside the Order, President Obama also released a “presidential memorandum” stating his administration’s commitment to “eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses.”⁶¹ Such presidential pronouncements are a critical technique “both of setting an

54. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 487–88 (2003) (summarizing the history of presidential efforts to reform regulation).

55. *Id.*

56. Obama, *supra* note 3.

57. See Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).

58. *Id.*

59. *Id.*

60. *Id.*

61. See Regulatory Flexibility, Small Business, and Job Creation, 76 Fed. Reg. 3827, 3827 (Jan. 18, 2011). Under the RFA, agencies may consider such flexibilities as extended compliance dates, simplified reporting and compliance requirements, and partial or total exemptions for small businesses. See 5 U.S.C. § 603 (2006). The Memorandum requires agencies to justify any failure to offer such flexibilities in proposed or final rules. See Regulatory Flexibility, Small Business, and Job Creation, 76 Fed. Reg. at 3828.

administrative agenda that reflect[s] and advance[s] [the President's] policy and political preferences and of ensuring the execution of [his] program."⁶² Shortly thereafter, President Obama issued a second presidential memorandum, aimed at ensuring that agencies accorded "administrative flexibility" to state, local, and tribal governments, and that they avoided the imposition of "onerous" requirements or "unnecessary regulatory and administrative burdens" upon such entities.⁶³

In July 2011, President Obama went a step further by asking even independent agencies, including the Consumer Product Safety Commission, the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission, to comply with his earlier executive order.⁶⁴ No previous executive order targeting regulation had ever encompassed the independent regulatory agencies.⁶⁵

The President's public presentation of the initiatives was just as interesting as the initiatives themselves. According to the President, the Obama Order would reform "regulations that have become a patchwork of overlapping rules, the result of tinkering by administrations and legislators of both parties and the influence of special interests in Washington over decades."⁶⁶ He explained that it was his administration's "mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb."⁶⁷ The look-back reviews mandated by the new executive order, he claimed, would result in the elimination of "absurd and unnecessary paperwork requirements that waste time and money," and the removal of "excessive, inconsistent and redundant regulation."⁶⁸ Like the first order, the Obama Administration heralded the July order aimed at independent agencies as necessary to promote the country's economic strength and competitiveness.⁶⁹

These directives proclaim that there exists a body of ineffective, unnecessary, and burdensome federal regulation, and further proclaim that the elimination of that surplusage is a task of pressing importance. This premise is not novel on its face; as noted above, previous executive orders and presidential memoranda have mandated similar look-back reviews. What is novel, though, is the extent of public commitment to this project

62. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290 (2001).

63. See Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments, 2011 DAILY COMP. PRES. DOC. 123 (Feb. 28, 2011).

64. See Exec. Order No. 13,579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41,587 (July 11, 2011).

65. Charles S. Clark, *Obama Widens Regulatory Review to Independent Agencies*, GOV'T EXEC. (July 11, 2011), <http://www.govexec.com/dailyfed/0711/071111cc2.htm?oref=relink> (noting that Cass Sunstein, the administrator of OIRA, remarked that the order was "historic" because "there is no other such free-standing requirement for independent agencies"). Because the agencies are independent, the order is precatory, not mandatory; but it is, nonetheless, couched in strong terms.

66. Obama, *supra* note 3.

67. *Id.*

68. *Id.*

69. See Mike Lillis, *White House Expands Its Efforts to Reduce Red Tape*, THE HILL, July 12, 2011, at 4.

from a White House, and a Democratic White House at that. It is also novel to encompass independent agencies within this project. The new directives reflect, in short, a pledge by the executive to install as a fixture of the modern regulatory state a dedicated mechanism for trimming the growth of all forms of that state.

C. *The Supreme Court*

On one view, the Supreme Court is entrusted with a powerful arsenal with which to curb or reverse the growth of federal law: the provisions of the Constitution. The Court continually addresses the constitutionality of federal regulations, statutes, or even entire agencies. By enforcing constitutional limits in these cases, the Court will, as a rule, curtail the ability of Congress and the executive to act to some extent. In that sense, almost any constitutional holding restricting a federal law—the Court's entire federalism revolution, for example—could arguably form evidence of the Court's animosity to hyperlexis in federal law.

But that threshold sets too low a bar. The Court is obviously motivated by multiple incentives to police the constitutional boundaries of federal power. To be confident that distaste for hyperlexis is playing any role at all in the Court's decision-making process, one ought to demand clear or particularized evidence of that concern. Put differently, for a Supreme Court opinion to qualify as evidence of judicial concern with federal hyperlexis, it ought to consider expressly and openly the burdens of that syndrome.

Until recently, such evidence was quite hard to adduce. The main reason for this likely has to do with the history of the Court's interaction with the regulatory state. The Court did not have much occasion to deal with regulatory law or to fret about its proliferation until the New Deal. Between 1930 and 1940, however, seventeen new federal agencies were created, doubling the number that had existed since the signing of the Constitution.⁷⁰ Subsequent decades saw increasing involvement by the federal government in regulating employment, the environment, and consumer transactions.⁷¹ In the era following this regulatory spring, federal courts' case dockets became crowded with cases involving federal statutes and regulations.⁷² In response, federal courts overcame their historic aversion to statutory law and developed doctrinal mechanisms to channel and guide the powers of the modern administrative state.⁷³ Although these doctrines are in many respects complex, their core instruction is quite simple: the federal courts must leave policymaking discretion to Congress and the agencies, and must consequently abstain from questioning the wisdom of statutory and regulatory choices. To select one conventional

70. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408–09 (1989).

71. *Id.* at 409.

72. *Id.* at 409 & n.10 (“[T]he sheer volume of federal statutes and regulations has dramatically changed the business of the federal courts.”).

73. *Id.* at 409.

formulation of this idea: “The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.”⁷⁴ Barring a constitutional violation, whether or how Congress chooses to resolve the matters of policy entrusted to it is not a matter of judicial concern.

One consequence of this doctrinal development has been that the Supreme Court has traditionally treated concerns about the proliferation or complexity per se of federal laws and regulations, and whatever that phenomenon might portend, as off-limits. There has never been any particular reason why the raw *quantity* of permits, fees, costs, laws, regulations, or agencies should have carried any significance to the Court. The Court has continued to apply the “deeply rooted” maxim that “ignorance of the law . . . is no defense,” except where Congress has authorized the courts in the relevant statute to “soften[.]” this presumption.⁷⁵ The Court has never suggested that it is hindered in its ability to “say what the law is” by the amount of law that there is.

In short, the Court has formally refrained from demanding simplicity, brevity, or economy from Congress and the agencies. Concerns about federal hyperlexis have, nonetheless, exerted an unmistakable pull upon doctrine, and even upon constitutional doctrine.

Consider the plurality opinion in *Rapanos v. United States*.⁷⁶ The Clean Water Act (CWA) authorizes the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits for the discharge of “dredged or fill material” into the navigable waters of the United States.⁷⁷ The question before the Court in *Rapanos* was whether the Corps had correctly interpreted the statutory phrase “the waters of the United States.”⁷⁸ The opinion begins, however, by sounding the alarm about regulatory overreach:

The burden of federal regulation on those who would deposit fill material in locations denominated “waters of the United States” is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people.” The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design

74. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

75. *See Cheek v. United States*, 498 U.S. 192, 199–200 (1991) (“The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. . . . This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.”).

76. 547 U.S. 715, 719 (2006) (plurality opinion).

77. *Id.* at 723.

78. *Id.* at 730.

changes. “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.”⁷⁹

The *Rapanos* plurality later concedes that the costs of complying with the CWA are utterly irrelevant to the question of statutory interpretation before the Court, which is a straight *Chevron* issue.⁸⁰ But by leading with the discussion of regulatory burdens, the plurality places the costs of the agency’s proposed interpretation of its statute first and foremost—and leaves the reader in little doubt that the entire process is “despot[ic].”⁸¹

*Free Enterprise Fund v. Public Co. Accounting Oversight Board*⁸² offers another example. In this case, the Court cited the enormous scope and reach of the federal government as an additional reason for affirming presidential power over that bureaucracy: “The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”⁸³ Accordingly, the Court ruled that the Constitution prohibited an agency head from being protected by dual for-cause provisions from Presidential removal.⁸⁴ This decision constituted the “most expansive vision of presidential power over the structure of administrative agencies in perhaps ninety years.”⁸⁵

If the Court had continued to confine its concerns about hyperlexis to dicta, such disquisitions would be a phenomenon of mild interest. In 2010, however, the Court incorporated a condemnation of hyperlexis into its holding—and into a constitutional holding at that—in *Citizens United v. FEC*.⁸⁶ In addressing the constitutionality of the federal laws addressing campaign finance, the Court noted the “unique and complex rules” imposed by this legal regime: “These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those

79. *Id.* at 721 (alteration in original) (internal citations omitted).

80. *See id.* at 753 (“We have begun our discussion by mentioning, to be sure, the high costs imposed by that interpretation—but they are in no way the basis for our decision, which rests, plainly and simply, upon the limited meaning that can be borne by the phrase ‘waters of the United States.’”).

81. *Id.* at 721, 753. The influence of concern about hyperlexis is similarly apparent in dicta in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 412 (1999) (“[T]his regulation, and the numerous other regulations and statutes littering this field, demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.”).

82. 130 S. Ct. 3138 (2010).

83. *Id.* at 3156.

84. *See id.* at 3164 (“[T]he Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way.”).

85. Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 1, 1 (2010).

86. 130 S. Ct. 876 (2010).

regulations, and 1,771 advisory opinions since 1975.”⁸⁷ The Court reasoned that given “the complexity of the regulations and the deference courts show to administrative determinations,” the body of federal campaign finance law was itself a de facto prior restraint on speech: “[A] speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak.”⁸⁸ In rejecting a limiting interpretation of the offensive provision, the Court concluded that the scheme offended the First Amendment:

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. *Prolix laws chill speech for the same reason that vague laws chill speech*: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.”⁸⁹

Witness the shift from *ignorantia juris non excusat* to *jus ignorantiae ipsius aptat*.⁹⁰ *Citizens United* appears to say that federal statutory schemes can be (to coin a phrase) “void for verbosity” when their complexity makes them not easily understandable and they impinge upon a fundamental right. It may be the first modern instance of the Supreme Court treating the volume and complexity per se of a federal regulatory scheme as an unacceptable burden on the exercise of a fundamental right, but surely it will not be the last.⁹¹

D. A Coda on Consequences

As the foregoing discussion reflects, wariness of federal hyperlexis and the related ideal of legislative minimalism are influencing the various branches of the national government in multifarious ways.⁹² One might reasonably wonder whether this influence merits much attention. After all, the relentless manufacturing of more and more federal law has not ceased; Congress continues to legislate, the executive branch keeps issuing regulations, and the Supreme Court continues to construe and apply federal law. All three cylinders of the lawmaking engine are firing.

87. *Id.* at 895.

88. *Id.*

89. *Id.* at 889 (alteration in original) (emphasis added) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

90. Roughly, “the law adapts to ignorance of itself.” Thanks to Varun M. Jain, NYU Law School Class of 2014, for supplying a translation of this concept.

91. *See, e.g.*, *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010) (Colorado’s registration and reporting requirements are unconstitutional because “[t]he average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado’s constitution, the Campaign Act, and the Secretary of State’s Rules Concerning Campaign and Political Finance. Even if those rules that apply to issue committees may be few, one would have to sift through them all to determine which apply.”).

92. This is not to say that the idea is deployed in every context where it could have been. A systematic account of when and why the hyperlexis critique is launched would be a fascinating project, but it is one that lies beyond the scope of this Article.

The fact that lawmaking is largely inevitable, however, does not render irrelevant the content of attitudes about lawmaking. If lawgivers perceive and describe growth in law as illegitimate, that view will affect the public’s perception of the legitimacy of the accumulated corpus of law. We will revisit this point in the final part of this Article. For the moment, it is important to recognize that an authentic distrust of hyperlexis can coexist with the creation of law. Indeed, this disjoint may itself play an important role in undercutting the law’s legitimacy.

II. ACCOUNTS OF HYPERLEXIS

The hyperlexis critique is a conceptual portmanteau that covers a multitude of overlapping, distinct, and mutually incompatible concerns. This part introduces the rubrics that are most commonly used to identify, measure, and critique the phenomenon of excessive federal law. The discussion then explores various conceptual flaws with each of these accounts of hyperlexis.

Arguments about hyperlexis can be usefully divided into three buckets: formal, institutional, and substantive. The formal arguments focus upon superficial aspects of laws—their numerosity or their complexity. The chief institutional objections complain that proliferating federal laws unduly intrude on state and local prerogatives or that proliferating federal regulations unduly subject individuals and entities to rule by agencies rather than Congress. The substantive bucket contains policy-based arguments about cost, such as the arguments that the proliferation of statutes and regulations impose excessive burdens and the argument that too many unnecessary and unduly burdensome regulations exist.

At the risk of appearing to miss the forest for the trees, this taxonomy omits one oft-heard and very important kind of claim: the argument that the burden imposed upon individual liberty by federal hyperlexis has reached an intolerable level. This omission is purposeful. The argument that hyperlexis encroaches upon liberty is chiefly an argument about the *consequences* of hyperlexis rather than its nature. Put differently, the liberty argument is a second-order argument that relies on one or another of the “first-order” accounts of hyperlexis that shall be described below. So, for example, one sees claims that the laws are multiplying in number or density to such an extent that individual liberty must have dwindled to the vanishing point,⁹³ that the federal government’s intrusion into state and local matters imperils individual liberty,⁹⁴ that the surfeit of complex

93. See, e.g., Thomas E. Baker, *Tyrannous Lex*, 82 IOWA L. REV. 689, 709 (1997) (“It seems that there is not an aspect of our everyday life, from cradle to grave, that is not ruled-over by what George Wallace used to call ‘pointy-headed, briefcase-totin’-burro-crats in Washin’ten Dee Cee.’”).

94. *Bond v. United States*, 131 S. Ct. 2355, 2364–66 (2011); *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla.) (holding that if Congress could use the Commerce Clause to require everyone to buy health insurance, then “Congress could require that people buy and consume broccoli at regular intervals”), *aff’d in part and rev’d in part*, 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011).

federal criminal laws infringes the rights of innocent citizens,⁹⁵ and so forth. Because the concept of liberty operates on this second-order level, it is more fruitfully addressed in Part III of this Article, which discusses the effects of the hyperlexis critique.

These categories are not watertight, nor are they mutually exclusive. Complaints about hyperlexis rarely remain confined to one category; on the contrary, such arguments frequently shift from one category to another. This elision makes it all the more important to develop a quick evaluative toolkit for recognizing and analyzing various hyperlexis critiques.

A. Formal Arguments

1. The Argument from Numerosity

Raw counts of the length, weight, or volume of federal laws are the beginning (and sometimes the end) of many arguments diagnosing hyperlexis. Though some commentators engage only in qualitative appraisals, others appear to relish the parlor-game challenge of totting up the words,⁹⁶ pages,⁹⁷ physical length,⁹⁸ tonnage,⁹⁹ or raw number of federal statutes or regulations.¹⁰⁰ Cute conceits like estimating the country's

95. See, e.g., Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23–24, 2011, at A1 (“As federal criminal statutes have ballooned, it has become increasingly easy for Americans to end up on the wrong side of the law.”). This Article only briefly touches upon the concept of “over-criminalization.” See *infra* text accompanying notes 114–23, 152–59. A fair examination of this topic would require a detailed examination of state law, a task that lies beyond the scope of this piece. For a recent effort to formulate standards by which to measure whether there is too much criminal law, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

96. See, e.g., Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 42 (2006) (“The Internal Revenue Code itself is approximately 1.5 million words long, and in excess of 9,500 pages of text, not counting five volumes of regulations.”).

97. See, e.g., *APA at 65*, *supra* note 37, at 12 fig.2 (statement of Susan Dudley, Director, George Washington University Regulatory Studies Center) (showing growth in the number of pages in the *Federal Register* between 1940 and 2010); CLYDE WAYNE CREWS JR., *COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE* 13–17, 37–38 (2011), available at <http://cei.org/sites/default/files/Wayne%20Crews%20-%202010,000%20Commandments%202011.pdf> (discussing growth in pages of the *Federal Register*).

98. See, e.g., Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105 (2000) (“In 1928, the unannotated version of the United States Code appeared in two tall volumes that totaled six inches in width. The 1988 version of the unannotated Code included twenty-nine volumes that spanned six feet, a twelve-fold increase.”).

99. See, e.g., Sean Gorman, *Rep. Forbes Says Federal Register Containing Regulations Has 34,000 Pages, Weighs 340 Pounds*, POLITIFACT (July 1, 2011, 11:27 AM), <http://www.politifact.com/virginia/statements/2011/jul/01/andy-forbes/rep-forbes-says-federal-registration-containing-re/> (responding to a congressman’s estimate that the *Federal Register* weighs 340 pounds by noting that the regulations are printed on both sides of each page and not just one, as Representative Forbes apparently assumed).

100. See, e.g., CREWS, *supra* note 97, at 5 tbl.1 (showing an annual increase in *Federal Register* final rules and total rules in various stages of implementation and higher increases

“Gross Legal Product” or its “Known Law Reserve” add rhetorical zest.¹⁰¹ The tax code, for obvious reasons, is a perennial favorite.¹⁰² Sometimes the most frightening number is no number at all, as when we are told that it is “impossible” to count the number of federal crimes,¹⁰³ or informed that a new statute authorizes an “unknowable” number of regulations.¹⁰⁴ The implication is that an effort to quantify the mass of law would somehow exhaust the universe’s supply of time, or possibly of integers.¹⁰⁵ The implication is also that the formerly robust sphere of unregulated conduct must have shrunk to the size of a mere mote.

It is worth noting at the outset that not all of the numerical indicators of the annual increase in federal law are uniformly rising. The number of statutes enacted by Congress has declined in recent years.¹⁰⁶ The most recent Congress was remarkable only because it set an eight-year record low for the number of laws passed. The number of regulations may also have been declining,¹⁰⁷ though some believe this is the calm before a

over one-, five-, and ten-year timeframes for “[e]conomically significant’ rules in the pipeline”).

101. The Gross Legal Product represents “how much law we produce annually” while the Known Law Reserve “guesstimate[s] how much law has accumulated over our Nation’s two hundred years.” Baker, *supra* note 93, at 690.

102. Politicians from both major parties campaign in parallel against the complexity of the tax code. See Remarks on the Federal Budget and Job Growth Legislation, 2011 DAILY COMP. PRES. DOC. 650 (Sept. 19, 2011) (announcing that, because of the “decades of accumulated loopholes, special interest carve-outs, and other tax expenditures . . . [President Obama is] eager[] to work with Democrats and Republicans to reform the Tax Code to make it simpler”); Ron Scherer, *Herman Cain’s ‘999 Plan’: Long Overdue Tax Reform or Job Killer?*, CHRISTIAN SCI. MONITOR (Sept. 30, 2011), <http://www.csmonitor.com/USA/Elections/President/2011/0930/Herman-Cain-s-999-plan-long-overdue-tax-reform-or-job-killer>. Even a division of the IRS bemoans the tax code’s complexity. See NATIONAL TAXPAYER ADVOCATE, TAXPAYER ADVOCATE SERV., 2010 ANNUAL REPORT TO CONGRESS 4–6 (2011), available at http://www.irs.gov/pub/irs-utl/execsummary_2010arc.pdf (highlighting the enormous compliance costs and size of the tax code).

103. See Fields & Emshwiller, *supra* note 95 (“Counting [criminal offenses found in regulations] is impossible. The Justice Department spent two years trying in the 1980s, but produced only an estimate: 3,000 federal criminal offenses.”).

104. See COPELAND, DODD-FRANK, *supra* note 18, at 3 (“[T]he actual number of rules that will be issued by the [Consumer Financial Protection] Bureau pursuant to the act’s authority is currently unknowable.”).

105. It seems likely that the actual reason is often both more mundane and more intractable—the difficulty of formulating what constitutes “a rule” or “a crime” and, additionally, the (quite reasonable) choice by Congress not to impose a hard constraint upon the number of rules an agency may use to effectuate a statute’s provisions.

106. The last Congress—the 111th—passed 383 public laws. *Browse Public Laws*, LIBRARY OF CONG., <http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws;c=111> (last visited Feb. 23, 2012). The preceding Congress passed 460. 122 Stat. iv (2009). The 109th Congress passed 482. 120 Stat. iii (2007). The 108th Congress passed 498. 118 Stat. iv (2005). The 107th Congress passed 377. 116 Stat. iv (2003). The 106th Congress passed 580. 114 Stat. iv (2001). The 105th Congress passed 394. 112 Stat. iv (1999). And the 104th passed 333. 110 Stat. iv (1997).

107. See CREWS, *supra* note 97, at 15–17 (noting that the average number of finalized rules in the 1990s was 4,596 while the average number for the years 2000–09 was 3,945). Interestingly, the annual *Ten Thousand Commandments* report, without apparent irony or self-reflection, grew from thirty pages in 1996 to fifty-eight pages in 2011, an increase of 86

“regulatory tsunami” that shall be triggered by the twin meteor impacts of PPACA and Dodd-Frank.¹⁰⁸ Nearly three years into his administration, President Obama had approved fewer regulations (though at higher cost to business) than President George W. Bush at the same point in his presidency, leading one pair of columnists to quip that the tsunami of new rules “looks more like a summer swell.”¹⁰⁹

A more obvious concern also bears mentioning: treating words and pages as meaningful measurements of the amount of law ignores important features of American government, including judicial review, the Supremacy Clause, and the ordinary processes of administrative rulemaking. If a court strikes down a federal statute as unconstitutional, is that “more” or “less” law? An immediate reduction in the pages of statutory law may be more than offset by the amount of constitutional, statutory, and regulatory law eventually generated by a new and important federal constitutional holding.¹¹⁰ What if a new federal statute and regulatory scheme adds copious pages of legalese to federal rulebooks, but also preempts a common law rule or replaces the overlapping and mutually inconsistent enactments of fifty separate states? Has the aggregate amount of American law gone up or down? Pages are not fungible: one page of the U.S. Code may expand federal law to a previously untouched realm, whereas large chunks of each day’s Federal Register may merely elaborate or specify long-existing requirements without expanding federal law’s scope at all.

Even if the tallies were all skyrocketing, however, it is not at all clear what that trend would really represent. What is the ideal goal, the desired endpoint, implicitly being invoked by these tallies? The most radical answer—some imaginable “zero point” where no law existed—suffers from a distinct lack of normative appeal. The locales where law most completely and affirmatively disappears are not places that anyone would willingly choose to inhabit.¹¹¹

A more modest normative vision might unfavorably compare the modern regulatory state to a world in which positive law (whether statutory or

percent. Compare *id.*, with CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: A POLICYMAKER’S SNAPSHOT OF THE FEDERAL REGULATORY STATE (1996), available at http://cei.org/cei_files/fm/active/0/10KC_1996.pdf.

108. Donohue, *supra* note 6 (“If you think we’ve seen dramatic increases [in regulation] in recent years, you ain’t seen nothin’ yet!”).

109. Mark Drajem & Catherine Dodge, *Obama Wrote 5% Fewer Rules than Bush While Costing Business*, BLOOMBERG (Oct. 25, 2011, 4:20 PM), <http://www.bloomberg.com/news/2011-10-25/obama-wrote-5-fewer-rules-than-bush-while-costing-business.html>.

110. Consider *City of Boerne v. Flores*, 521 U.S. 507 (1997), the subsequent legislation enacted by a nearly unanimous Congress in response to *Boerne* (the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2006)), and the regulations and litigation spurred by RLUIPA.

111. One such place may have been the “legal black hole” at the Guantánamo Bay detention facility before 2004, when it was yet to be determined whether even federal habeas jurisdiction extended over prisoners there. See Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 772–73 (2005) (collecting sources claiming that detention and interrogation of the terrorist suspects in Guantánamo Bay occurred in a lawless zone or legal black hole).

regulatory) has largely disappeared, leaving behind a common law regime of property and contract and a rudimentary set of legal systems adequate to protect against force and fraud.¹¹² This vision does not depict a world of *no* law, but rather a world of primarily judge-made law. In such a world, courts elaborating common law rules would replace legislators as the primary source of law. But where there are courts and judges, there will be words and pages. Common law jurisprudence is not known either for its brevity or for its accessibility. Unlike statutory and regulatory law, its aggregate volume can only increase over time. Is it fair to assume that the aggregated corpus of judge-made law could never be “too much law,” when that body of law might eventually exceed the page count of those two verbose villains, the U.S. Code and the Federal Register? Arguments about numerosity tend to glide over these puzzling implicit determinations about the sorts of numerosity in law that are and are not acceptable.

A narrow focus on metrics of numerosity has another important flaw: it misses the real question, which is not how many words or pages there are, but rather what these words and pages say.¹¹³ For example, consider the argument that federal criminal law has grown to an unacceptable extent. Using metrics of numerosity, growth of the federal criminal code is not

112. A cursory search indicates that few seem to want a wholesale return to the common law. Those who do are often far out of the mainstream, advocating religious law or anarchism. *E.g.*, David VanDrunen, *Common Law and the Free Society*, RELIGION & LIBERTY (Acton Inst., Mich.), July–Aug. 1999, at 8, available at http://www.acton.org/sites/v4.acton.org/files/pdf/rl_v09n4.pdf. However, many mainstream commentators favor the common law over statutory law in certain respects. Richard Posner prefers the common law for its economic efficiency. *See* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 502–07 (1980) (defending common law as efficiency-seeking). J.B. Ruhl has argued in favor of “a system that relies on common law, rights-based solutions as a predominant, if not preferred, approach,” in part, because of its flexibility. J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 860–61, 920 (1996). Richard Epstein has argued that “[t]he growth of statutory law has lead us away from questions of first principle, and from questions of political morality.” Richard A. Epstein, *Introduction: Baron Bramwell at the End of the Twentieth Century*, 38 AM. J. LEGAL HIST. 241, 245 (1994). Commentators have also argued for a return to common law principles in targeted areas. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) (arguing for a return to common law in the field of employment law); Larry E. Ribstein, *Private Ordering and the Securities Laws: The Case of General Partnerships*, 42 CASE W. RES. L. REV. 1 (1992) (arguing that securities law policy supports allowing parties to contract out of the rights and requirements created by positive securities law).

113. *See* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 6 (1992) (noting that he could not “prove increased regulatory burdens by counting pages in the *Federal Register* (although many have purported to do so)”). Two scholars have argued that even a system containing only “individually perfect” rules would face a downside of “system burdens” when there are too many laws in aggregate, but nonetheless agreed that “the solution is not . . . to reduce the number of rules.” Ruhl & Salzman, *supra* note 30, at 764, 768, 800–23. Indeed, the argument that system burdens matter only poses further, vexing empirical questions: do the benefits of the new laws outweigh their costs plus any alleged system burdens? There is no good way to know. *See id.* at 830 (noting that one of the difficulties is determining “the effects of accretion” on the “payoff of rules”).

difficult to show.¹¹⁴ The first federal criminal statute criminalized treason, counterfeiting, piracy, and murder, maiming and robbery in federal jurisdictions.¹¹⁵ By the start of the twentieth century, dozens of federal criminal offenses existed.¹¹⁶ Recent efforts to count the number of federal criminal laws have (ominously) failed. Conservative estimates indicate that over 3,000 and probably over 4,000 such offenses exist today.¹¹⁷ These laws prohibit everything from the worst *malum in se* crimes (treason, assassination) to the most comical *malum prohibitum* offenses.¹¹⁸ This apparent expansion has drawn vigorous criticism from many quarters. Indeed, “for the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion.”¹¹⁹

At least some of the fervor behind this unanimity must flow from the apparently asymptotic growth of the numbers of words, pages, and crimes that comprise the federal criminal code. But a look behind the numbers, however, suggests that the expansion of federal criminal law may not have been very significant, at least from the perspective of a person who was already regulated by a state sovereign (which is to say, any resident of any of the fifty states). Much federal criminal law merely parrots what is already illegal under state laws,¹²⁰ and the accretion of esoteric federal offenses in the codebooks may therefore not have much felt impact to ordinary individuals. Federal authorities have concurrent jurisdiction over an array of criminal activity also regulated by the states, but “the national government’s exercise of its concurrent authority has been so selective that its share of overall enforcement has actually declined for more than the last half century.”¹²¹ Federal criminal law enforcement accounts for only about 6 percent of the country’s total felony prosecutions each year.¹²² A blinkered focus on metrics of numerosity obscures these substantive details,

114. See, e.g., John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 548 (2005) (collecting data).

115. See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790); cf. Fields & Emshwiller, *supra* note 95.

116. *Id.*

117. *Id.*

118. The most “famously innocuous federal crimes” are the “Woodsy Owl” statute, which prohibits the unauthorized use of the character “Woodsy Owl,” the name “Woodsy Owl,” and the associated slogan, “Give a Hoot, Don’t Pollute,” and the federal prohibition against tearing the tag off a mattress (which applies to dealers, not consumers). See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 590 n.13 (2005); see also Stuart P. Green, *Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 & n.264 (1997).

119. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

120. Baker, *supra* note 114, at 575–76 (“As is well known, however, the expansion of federal criminal law has largely involved a duplication of state crimes.”).

121. Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 252 (1997).

122. See MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2005, at 6 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs05.pdf> (“Felony convictions in federal court increased from 4% of the nation’s felony convictions in 1996 to 6% in 2004.”).

which have obvious relevance to the question whether the quantum of federal criminal law has exceeded the optimal level.

In sum, one should be wary of arguments from numerosity both because numerosity is a slippery metric and because numerosity alone does not make out a prima facie case for illegitimacy. Perhaps in part because of the ambiguity and indeterminacy of numerosity arguments, critics of hyperlexis rarely use numerosity except as a launching pad for supplementary arguments, including complaints about excessive complexity or costs. These are discussed in turn below. For the moment, the important point is a very simple one—a critique of hyperlexis that relies solely on claims about numerosity skates on thin normative ice.

2. The Argument from Complexity

The argument from complexity contends that the system of federal law has become unacceptably complicated. This is a superficial or formal argument, in the sense that (like the argument from numerosity) it targets the format in which the law is elaborated and stated, rather than the source of the law or the law’s substantive content.¹²³

Unlike with numerosity, metrics for complexity are not readily accessible. Complexity is itself complex: the notion of complexity incorporates several independent characteristics or vectors including “density, technicality, differentiation, and indeterminacy or uncertainty.”¹²⁴ Professor Richard Epstein defines a complex rule as one that has high compliance costs but also as one that “has *pervasive application* across routine social activities, and is not directed solely to the dangerous activities of people who live at the margins of society.”¹²⁵ This suggests that complexity ought to be measured not just by a rule’s formal properties, but also by the likelihood that it affects “the day-to-day conduct of ordinary people.”¹²⁶

Assessing complexity is a delicate matter. Is a legal system more complex when it is made up of lengthy rules or terse standards?¹²⁷ It is hard to say; long and numerous laws may be fairer and easier to understand while a system of few and short laws may be opaque and difficult to apply. Thus, a world of only a handful of simple rules may be a much more

123. The words “superficial” and “formal” are not here intended to be pejorative or to connote a lack of gravity; some objections to form, such as an objection to how a criminal law is disseminated, can be very serious indeed. *See, e.g.*, *Lambert v. California*, 355 U.S. 225, 230 (1957) (noting that a due process violation would exist if a criminal law were “written in print too fine to read or in a language foreign to the community”).

124. Schuck, *supra* note 113, at 3.

125. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 29 (1995).

126. *Id.*

127. The ancient rules-versus-standards debate proceeds. For an example of recent pro-standards scholarship, see Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1223–25 (2010), which argues that standards necessitate moral deliberation and thereby promote democracy.

baffling world in which to operate, even though that confusion is precisely the fundamental objection to complexity.¹²⁸

Let us make the (unwarranted) assumption that shorter laws are inherently less complex and further make the (less unwarranted) assumption that the corpus of federal law is increasing in complexity. That still leaves a harder, normative question: how complex should the federal legal system be?¹²⁹ Although complexity “often is discussed as an evil to be minimized,” it does not automatically impose an undesirable cost.¹³⁰ For example, “[l]egal complexity sometimes produces fairer, more refined, more efficient, even more certain, forms of social control,” for instance, by tailoring the rule to each of the goals and constraints of the policy that drives the rule.¹³¹ In addition, complex rules may be perceived as more just because they more finely grade legal consequences to conduct or status.¹³²

Even, however, if the factors that affect complexity could somehow magically be pinpointed, and an optimal level of complexity identified, that level might not be possible to achieve because of the way that aspects of complexity mutually interact. “The legal system as a whole exhibits a marked tendency to become more complex, a feature that it appears to share with other systems, physical and social.”¹³³ Growing complexity “may reflect a more secular, perhaps even universal, dynamic affecting such systems.”¹³⁴

Complexity is easy to redistribute but hard to reduce.¹³⁵ Efforts to reduce one sort of complexity, such as density, technicality, or differentiation, often require trading off against another form of complexity, like indeterminacy or uncertainty. Such efforts may also result in trading off complexity “here and now” versus complexity “there and later.”¹³⁶

128. See EPSTEIN, *supra* note 125, at 28 (“It is also a dangerous mistake to think of a rule as simple just because it is short.”); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 161 (1995) (describing the elimination of complexity as “misguided” because of uselessness of “the simplest rules”). The main objection to complexity is the difficulty in compliance.

129. See Schuck, *supra* note 113, at 8 (“The question always is: All things considered, are the benefits of a given level of complexity worth its costs? There is no general answer to this question, of course [C]omplexity should not be seen as a symbol of what is wrong with American law more generally. Indeed complexity is both a weakness and a strength.”).

130. Kaplow, *supra* note 128, at 161; see also Schuck, *supra* note 113, at 8.

131. Schuck, *supra* note 113, at 8, 37.

132. See Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 589 (“[P]sychology brings to light a previously unrecognized virtue of legal complexity—to wit, its potential to calm citizens’ reactions in their engagement with rules, to the extent complexity is manifested as gradations of legal consequences.”).

133. Schuck, *supra* note 113, at 9.

134. *Id.* at 9 n.28.

135. R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can’t Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 718 (2000) (“[C]omplexity in the law cannot simply be reduced in any reasonably uncontroversial way. Simplifying the law in general, or even some particular area of the law, takes on the profitlessness of the proverbial wild goose chase.”).

136. See *id.* at 744 (“[E]ven if we can all agree that we have simplified the law in some respect, we may have only displaced the complexity of the law forward or backward in the overall lawmaking and implementation process”).

Well-intentioned efforts to reduce complexity may not just fail, but backfire by deferring or displacing complexity at a usurious interest rate.¹³⁷

A more concrete example—the outcome of *Citizens United*—illustrates these pitfalls. In *Citizens United*, the Supreme Court endorsed what this Article has called a “void for verbosity” doctrine, holding in part that certain laws regulating campaign-related speech were simply too complicated to be permissible under the First Amendment.¹³⁸ The Court treated the FEC’s “1,278 pages of explanations and justifications” and its “568 pages of regulations” as evidence that the regulation functioned as prior restraint because of its complexity,¹³⁹ arguing that a person “of common intelligence” could not work out how the law should apply to her conduct.¹⁴⁰ But the opposite result could have followed just as well. While dense, these regulations may have been determinate; the agency’s copious explanations and justifications may have shed light, rather than obscured a speaker’s path; and the volume of advisory opinions may have made the corpus of federal campaign finance law more, rather than less, digestible. In other words, people of average intelligence may have better understood long regulations rather than short statutes that used terms of art.¹⁴¹ The immigration laws, to take one example, are made vastly more accessible to people of average intelligence by the reams of guidance published by the responsible federal agency.¹⁴² The plethora of explanations, justifications, and opinions condemned by *Citizens United* could have mitigated the concerns of complexity that so struck the Court.

The *Citizens United* opinion also illustrates how intractable the problem of complexity is. The Court’s opinion (which was accompanied by two concurrences and two opinions concurring in part and dissenting in part) struck down one provision of the statute regulating campaign finance but left untouched the rest.¹⁴³ This pruning is unlikely to improve much of the complexity the Court condemned; in all likelihood, the opinion will spur further regulation, legislation,¹⁴⁴ litigation, and interpretation. Campaign finance law will continue to occupy “a ‘patch-work’ world” whose chief ingredients are “unchanged regulation, deregulation, . . . stalled regulation,

137. To take an extreme example, entirely repealing federal statutory and regulatory law because of its perceived complexity would leave behind a system of judge-made common law chiefly designed to protect property and common law rights. Whatever its other benefits may be, such a system may not actually result in a net decrease in complexity over the current system.

138. *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010).

139. *Id.* at 895.

140. *Id.* at 889; *supra* text accompanying note 89.

141. For an example of a short legal rule unreadable to a lay person, see *Skilling v. United States*, 130 S. Ct. 2896, 2927 (2010) (parsing “the intangible right of honest services”).

142. See U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 12, 2012), <http://www.uscis.gov/portal/site/uscis> (collecting handbooks, guidance, manuals, “how to” guides, and other resources).

143. *Citizens United*, 130 S. Ct. at 916 (striking corporate independent expenditures provisions but preserving disclosure and disclaimer requirements).

144. For discussion of how states have reacted to *Citizens United*, see Alex Grout & Shanna Reulbach, *CU+The States*, WM. & MARY ELECTION LAW SOC’Y, <http://electls.blogs.wm.edu/links/citizens-united-and-the-states/> (last updated Nov. 2, 2011).

and re-regulation.”¹⁴⁵ In short, whatever its other virtues or flaws may be, the net effects of *Citizens United* upon the *ultimate* complexity of law are indeterminate.

B. Institutional Arguments

The chief institutional arguments about hyperlexis speak to one of two questions: first, whether there is too much federal law, as opposed to state law; and second, whether there is too much federal regulatory law, as opposed to federal statutory law.¹⁴⁶ As described below, key portions of both arguments rest upon questionable assumptions about the incentives of federal and state legislative actors.

1. The Argument from Federalism

The federalism account of hyperlexis criticizes the proliferation of federal law on the grounds that it unduly extends into matters traditionally regulated by state and local governments. This argument mates a legal argument with a positive claim. The legal argument is that Congress is acting in excess of the powers delegated to it by the Constitution, and the positive claim is that restricting congressional action to within the strict boundaries of Article I would result in a net reduction in the amount of federal law to which Americans are subject.

It lies beyond the scope of this (or perhaps any) Article to assess the continent of legal scholarship that addresses the first claim. Reasons to doubt the second claim, however, have been eloquently stated by Professor Daryl Levinson.¹⁴⁷ The conventional account of competitive federalism rests on the premise that the federal and state governments are “self-interested political actors with empire-building ambitions, pitted against each other in a competition for power.”¹⁴⁸ As Professor Levinson has argued, however, this assumption is unwarranted: “[T]here is no logical relationship between the policy interests of state citizens and the amount of regulation flowing from the federal government or left to the states.”¹⁴⁹ Consequently, “[e]ven if state officials had dictatorial influence over the policies of the federal government, there is no reason to expect that they would systematically prefer limiting federal power to expanding it.”¹⁵⁰

145. Stephen G. Wood et al., *Regulation, Deregulation and Re-regulation: An American Perspective*, 1987 BYU L. REV. 381, 383 (describing “[a] world of partial deregulation” (quoting Thomas J. Campbell, *Regulation, Deregulation, and Re-regulation: Theory and Practice*, 20 STAN. LAW. 25, 25 (1985))).

146. A third “institutional” argument, which contends that there is too much statutory and regulatory law and too little common law, is evaluated in the text accompanying *supra* note 111.

147. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

148. *Id.* at 944.

149. *Id.*

150. *Id.*; see also *infra* note 157 (giving an example of this dynamic at work).

It is therefore not clear, at least a priori, whether increased stringency in enforcing federalist principles would necessarily result in a reduction even in federal law.¹⁵¹ The consequences for state law are even murkier: there is no reason to think that the states would not enact their own versions of the federal laws deemed to exceed the constraints of federal law. In short, stringent enforcement of federalist principles has indeterminate effects upon the total quantum of law (even just of federal law).

An additional word must be said about the federalism-based critique of federal criminal law, sometimes referred to as the "overfederalization" of criminal law. The expansion of federal criminal law has produced concurrent state and federal criminal laws that carry disparate sentences for identical conduct. The resulting regime, the argument goes, offends values of fairness and federalism.¹⁵²

Differential consequences for identical conduct are an ordinary artifact of the dual system of American sovereignty. Of course, one might be troubled by arbitrary disparities in the criminal context, even if attaching different consequences to the same conduct in the civil context may seem unobjectionable or even beneficial. But even if we assume that criminal sentencing disparities are troubling and ought to be eliminated, it is not clear that reversing the expansion of federal criminal law is the best way to eliminate them. The laws of the fifty states are not identical, so any prosecution attaches consequences to conduct that are arbitrary, in the sense that they are based on geography. These disparities may represent the "policy choices of individual states," but they are disparities nonetheless. The federal system of prosecution is the only available technique for guaranteeing that an accused in Missouri will face the same set of potential consequences as an accused in Maine.¹⁵³ Thus, at least to some degree, concurrent federal criminal jurisdiction reduces, rather than augments, disparity of treatment. Taking the same point from the opposite angle, sentencing disparities could just as well be reduced by harmonizing the laws of the states with federal law, rather than by contracting federal criminal law. Sentencing disparities could also be reduced by dramatically

151. Levinson, *supra* note 147, at 941.

152. Baker, *supra* note 114, at 576 ("As federal criminal law duplicates more state crimes, the potential for disparity clearly escalates. The disparity in sentencing between those prosecuted in federal versus state court for the same crime reflects the efforts of Congress and the DOJ to take away from state legislatures, judges, and juries control of the police power in their communities."); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 776 (2005); Levinson, *supra* note 147, at 941.

153. For example, "the decision whether to ask for the death penalty is not made by the prosecutors in the local U.S. Attorney's Office but instead by a committee in Main Justice," which is "intended to ensure that federal law is enforced according to the same standards nationwide." Beale, *supra* note 152, at 770. Although this procedure "has the effect of overriding the choice of voters in states that have not authorized capital punishment," *id.*, it also has the effect of equalizing the consequences of conduct on a nationwide basis for the class of defendants subjected to federal prosecution.

increasing, not decreasing, the enforcement of federal criminal law, rather than by contracting its scope.¹⁵⁴

Other scholars have criticized the invasion of “local” realms of authority by federal criminal laws.¹⁵⁵ But, bracketing the difficulty of defining what is truly “local,” the expansion of federal criminal law may help and not hinder the achievement of local criminal policy priorities.¹⁵⁶ The states may prefer more federal criminal law, not less.¹⁵⁷ None of these points are particularly compatible with the view that federal law’s scope has expanded overmuch.

2. The Argument from Over-Delegation

The argument from over-delegation contends that a negligent or fearful Congress,¹⁵⁸ by delegating lawmaking power to executive agencies, enables the production of a surfeit of complex federal regulations that would not otherwise exist.¹⁵⁹ The argument from over-delegation criticizes both the “too many” statutes that delegate such power and the “too many” regulations that result from these illegitimate delegations.¹⁶⁰

154. *Id.* at 776 (recommending that “federal enforcement becomes the norm for a category of cases, even if that category is one that has not traditionally been treated as a federal crime,” to rectify disparities between federal and state prosecutions).

155. John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 712 (1999); Beale, *supra* note 152, at 776; Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995).

156. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 182 (2010) (“[I]f the severity of punishment for the same crime differs between two states, then rational criminals have an incentive to commit their crimes in the state with milder punishment. Perceiving this fact, states might enact severe punishments to deflect crime away from themselves and onto others. This interstate externality could cause the states to race towards severity, even though all states would benefit from lowering average punishments and reducing the burden on their prisons. Could Congress rely on this rationale to federalize all of criminal law?”).

157. See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1982 (2010) (Thomas, J., dissenting). In that case, twenty-nine states appeared as amici to argue that the federal government’s civil commitment scheme for sexual offenders was constitutional because, among other reasons, “the cost of detaining such persons is ‘expensive’—approximately \$64,000 per year—and these States would rather the Federal Government bear this expense.” *Id.* (quoting Brief for the States of Kansas et al., as Amici Curiae in Support of Petitioner at 2, *Comstock*, 130 S. Ct. 1949 (No. 08-1224)).

158. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006) (“The question, ‘Why do legislators delegate?’ and the closely related question, ‘Why do legislators draft ambiguous statutes?’ are the subject of a rich literature. Suggested explanations include the need to leave technical questions to experts, politicians’ desire to duck blame for unpopular choices or to create new opportunities for constituency service, the inability of multimember legislatures to reach stable consensus, and the impossibility (or excessive cost) of anticipating and resolving all relevant implementation issues in advance.”).

159. See, e.g., Adler, *supra* note 34, at 22–24 (“The dramatic increase in the scope of federal regulation has been facilitated by the practice of delegating substantial amounts of regulatory authority and policy discretion to federal regulatory agencies.”).

160. See, e.g., *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY:

Like the argument from federalism, the argument from over-delegation has two logically distinct components. The first component, which is a legal argument, contends that (at least some) congressional delegations of power to agencies are constitutionally flawed because of the Supreme Court's low threshold for what qualifies as an "intelligible principle" for guiding agency action.¹⁶¹ The second component is a positive claim that maintains that the wide-ranging regulations promulgated pursuant to these improper congressional delegations would not have existed in the absence of the delegations.¹⁶²

Of course, it is likely true that Congress could not manufacture regulations at anywhere near the same volume as the collected corps of federal agencies.¹⁶³ But this fact alone does not establish that curbing Congress's ability to delegate would lessen federal hyperlexis. Even the most ardent critics of delegation doctrine concede there is *some* way to formulate delegations that will make them constitutionally permissible.¹⁶⁴ It is more plausible that, if its hand were forced, Congress would pass legislation that met that threshold (whatever it was) than that it would abandon outright whole realms of federal power.

Congress might also employ alternative techniques that would eventually achieve an equally expansive terrain for federal law. The power to tax and spend is fungible with the power to specify standards of regulatory conduct; either tax-and-spend programs or regulatory mandates can be used to achieve the same practical results.¹⁶⁵ For example, instead of directing a

HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Adler, *supra* note 34, at 24 ("Over the course of the 20th century, Congress has delegated ever greater amounts of regulatory authority to an ever-expanding array of federal agencies. . . . The delegation of broad and far-reaching regulatory authority has undermined political accountability for regulatory decisions and has allowed for regulatory agencies to adopt policies that did not always align with congressional intent or contemporary priorities."); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 295-96 (1987).

161. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'").

162. See, e.g., Adler, *supra* note 34, at 24.

163. See Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) ("Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually."); Schuck, *supra* note 113, at 10 ("[T]he pervasive delegation of discretion to agencies (and to courts) means that the resulting legal regime is almost certain to become more dense, technical, institutionally differentiated, and indeterminate than if the legislature had simply promulgated a rule itself.").

164. See, e.g., David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1259 (1985) (distinguishing acceptable from unacceptable delegations).

165. MARK KELMAN, STRATEGY OR PRINCIPLE? THE CHOICE BETWEEN REGULATION AND TAXATION 44 (1999) ("[R]egulation and taxation are substitutes one for the other" and thus states may achieve policy goals "either through the public-spending programs that tax

federal agency to regulate the kinds of health insurance that companies may sell, Congress could tax insurers and appropriate the resulting federal funds for the executive branch to spend, at its discretion, on providing individuals with insurance. The executive branch agency charged with handing out the insurance could disburse it through a detailed discretionary scheme without running afoul of the delegation doctrine, at least as it is conventionally understood.¹⁶⁶ How can one reliably assess whether this scenario would result in a lesser total quantum of federal law?

Enforcing a more stringent threshold for congressional delegations may have a host of good or bad consequences on a number of axes. But if the axis is the quantity of federal law, the effects are likely indeterminate. Tighter limits upon delegation might restrain a particular channel for exercising federal authority, but there is little reason to think that it would ultimately reduce the expression of that authority through the other channels accessible to federal power.

C. Substantive Arguments

In the realm of formal and institutional objections to hyperlexis, concrete normative goals were elusive, or methods to obtain these goals were obscure. In the realm of substantive or policy-based critiques, one would expect to find more robust normative guideposts against which to judge the existence of too much law and more robust techniques for reaching these guideposts. As the discussion below shows, however, significant conceptual and logical hurdles face the chief substantive critique of federal hyperlexis: the argument that federal law is too costly.

The costs of federal law are borne by individuals, business organizations, labor unions, and state, local, and tribal governments. The federal government bears the costs of issuing and enforcing federal law, which include the costs of paying for federal agencies and associated personnel.¹⁶⁷

The costs of law come in many guises; they include not just direct outlays in the form of compliance costs but less tangible effects, such as foregone opportunities.¹⁶⁸ The law may incur costs even, or especially,

revenues finance or through regulatory mandates requiring that actors take certain steps and forbear from others”).

166. See *Clinton v. City of New York*, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 320 (2001) (noting that the Constitution’s history, purpose, and structure indicate that non-delegation doctrine does not apply to appropriations laws); Schoenbrod, *supra* note 164, at 1270–71 (“Congress, if it were providing a benefit, could decide whether it would be available by rule or administrative discretion,” and thus “Congress could . . . decide to make the benefit available on the basis of administrative discretion and authorize the Executive to exercise that discretion without encountering delegation problems.”).

167. See Dudley, *supra* note 21, at 7, 8 fig.1 (showing rising budgetary costs of running federal regulatory agencies).

168. Douglas A. Kysar, *Discounting . . . on Stilts*, 74 U. CHI. L. REV. 119, 135 (2007) (explaining that opportunity costs should be incorporated into cost-benefit analysis, although not without “first asking important normative questions about intergenerational justice”).

when its application is uncertain; some assert that “regulatory uncertainty” acts as a cost that harms the competitiveness of American businesses, though such claims are hard to substantiate.¹⁶⁹ Not only are such costs pervasive in the economy, but, according to this argument, they are also rising.¹⁷⁰ The argument from costs criticizes the quantity of federal law—statutory and/or regulatory—by contending that the aggregate costs flowing from that corpus of law have reached an unacceptably high level.¹⁷¹

1. The Argument from Statutory Costs

Although the argument from costs has a powerful superficial appeal, it nonetheless runs into multiple difficulties. With respect to statutes, the main problem is locating a normative baseline for what constitutes, in general terms, the “right” amount of money for America to spend on a federal law.

169. See, e.g., EBAN GOODSTEIN, *THE TRADE-OFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT* 19–20 (1999) (noting that “environmental regulation does not place any restrictions on job growth” and that such regulation may actually help in a downturn); Bruce Bartlett, *Misrepresentations, Regulations and Jobs*, N.Y. TIMES ECONOMIX BLOG (Oct. 4, 2011, 6:00 AM), <http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/> (noting and disputing the popular argument that “Barack Obama has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring”); Jan Eberly, *Is Regulatory Uncertainty a Major Impediment to Job Growth?*, DEP’T OF TREASURY (Oct. 24, 2011), <http://www.treasury.gov/connect/blog/Pages/Is-Regulatory-Uncertainty-a-Major-Impediment-to-Job-Growth.aspx> (using financial and survey data to argue that regulatory uncertainty is not causing unemployment); see also Robb Mandelbaum, *Do Small Business Owners Feel Overtaxed and Overregulated? A Survey Says No*, N.Y. TIMES YOU’RE THE BOSS BLOG (Nov. 21, 2011, 11:00 AM), <http://boss.blogs.nytimes.com/2011/11/21/small-businesses-over-taxed-and-over-regulated-a-survey-says-no/> (noting that small businesses cited regulations and taxes as less important than the lack of paying customers and unspecified complaints about the economy).

What assertions of harm to American economic competitiveness may lack in verifiability, they make up for in sheer rhetorical force. Competitiveness arguments “up the ante” by positing that the costs of hyperlexis are “not a parochial concern of certain industries or institutions, but a shared vital general interest.” Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 298 (2003). Professor Galanter is addressing arguments about the harms to competition of the proliferation of lawsuits, not regulatory costs, but his insight applies in this context.

170. See CRAIN & CRAIN, *supra* note 2, at 25 (“[T]he ‘real’ cost of economic regulations increased by \$63 billion between 2004 and 2008.”); see also J. Scott Moody et al., *The Rising Cost of Complying with the Federal Income Tax*, SPECIAL REP. (Tax Found., D.C.), Dec. 2005, at 1, available at <http://www.taxfoundation.org/files/sr138.pdf> (“In the last century the cost of tax compliance has grown tremendously.”).

171. See, e.g., Press Release, Business Roundtable, America’s CEOs Lay Out Roadmap for Comprehensive Regulatory Reform (Sept. 20, 2011), http://businessroundtable.org/uploads/studies-reports/downloads/BRT_Smarter_Reg_One_Pager_09_20_11.pdf (arguing that a Business Roundtable report “finds that federal regulation costs too much” and therefore “[i]t’s [t]ime to [e]nd [o]verly [p]rescriptive and [b]urdensome [f]ederal [r]egulation”); see also BUS. ROUNDTABLE, *ACHIEVING SMARTER REGULATION 5* (2011), available at http://businessroundtable.org/uploads/studies-reports/downloads/2011_09_BRT_Achieving_Smarter_Regulation.pdf (“[W]hile any individual regulation might be cost-effective, the cumulative impact of *all* regulations can be anything but.”).

The theoretical literature offers scant guidance on this question. Law and economics instructs that a law can increase overall utility when the law's compliance costs and enforcement costs are outweighed by the aggregated benefits of enacting it. But the theory of law and economics offers no answer to the question whether only economically efficient laws should be enacted.¹⁷² Many statutes are designed precisely to achieve objectives that the unconstrained actions of private actors would not otherwise bring about. "[N]o plausible theory of legislation treats congressional enactments as intended to promote efficiency, save in unusual circumstances."¹⁷³ Indeed, "[t]he very decision to create a regulatory system often reflects a rejection of private willingness to pay as the criterion of social choice."¹⁷⁴ With all due respect to Bentham, most would agree that this is as it should be: "Society is not best taken as some maximizing machine, in which aggregate output is all that matters."¹⁷⁵

The argument from costs ignores these theoretical knots by treating each dollar that a federal statute costs as an automatic mark against it. But the argument from costs skips over an essential conceptual element: an account of what federal law ought to cost and to whom.

A minor but concrete example—a recent kerfuffle concerning a new tax provision enacted as part of PPACA and then repealed—illustrates the slipperiness of the argument from statutory cost. The new tax provision would have required business owners, beginning in 2012, to file a tax reporting document known as a Form 1099 whenever the business purchased more than \$600 in goods or services in a single year from any vendor, including a corporation.¹⁷⁶ For nearly thirty years, the GAO has been worrying about the "tax gap," i.e., the gap between taxes legally owed and taxes paid.¹⁷⁷ They recommended, among other things, increasing the amount of reporting on 1099s.¹⁷⁸ Presidents from both parties, including George W. Bush and Obama, incorporated the 1099 proposal in their

172. See Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 287 (1979) ("In measuring economic costs and benefits, the economist *qua* economist is not engaged in the separate task of telling policymakers how much weight to assign to economic factors.").

173. Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1273 (1981).

174. Sunstein, *supra* note 70, at 488 ("Many statutes are designed to transform rather than to implement preferences, to redistribute resources, or to reflect the outcome of a deliberative process about relevant public values.").

175. Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1661 (2001). *But see* Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809, 815 (2005) (arguing that "one should demand of Congress that it begin efforts to measure" the costs of overcriminalization).

176. PPACA § 9006, 26 U.S.C. § 6041 (Supp. IV 2010).

177. See Richard B. Malamud & Richard O. Parry, *It's Time to Do Something About the Tax Gap*, 9 HOUS. BUS. & TAX L.J. 1, 11–15 (2008) (describing GAO activism on the tax gap).

178. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1014, TAX GAP: A STRATEGY FOR REDUCING THE GAP SHOULD INCLUDE OPTIONS FOR ADDRESSING SOLE PROPRIETOR NONCOMPLIANCE 48–49 (2007), available at <http://www.gao.gov/assets/270/265399.pdf> (suggesting that Form 1099 could include sole proprietors' gross receipts and transactions less than \$600).

proposed budgets to Congress.¹⁷⁹ The measure was predicted to raise billions in revenue, and it was enacted as part of PPACA on that basis.¹⁸⁰

After enactment, however, an acute case of “legislators’ remorse” set in.¹⁸¹ A chorus of complaints about the compliance costs of the provision promptly ensued.¹⁸² The calls for repeal were framed in the familiar language of hyperlexis; the 1099 rule was “bureaucratic red tape” that would unduly burden businesses, especially small businesses.¹⁸³ President Obama echoed these concerns in his State of the Union address, calling the provision a “flaw in the legislation that has placed an unnecessary bookkeeping burden on small businesses.”¹⁸⁴ The measure was subsequently repealed,¹⁸⁵ to the applause of lawmakers who had previously supported it as an important revenue-raising tool.¹⁸⁶

The fate of this ill-starred provision encapsulates why costs are a difficult metric on which to evaluate federal statutes. The costs of imposing the law on affected entities seemed bearable before PPACA was enacted (indeed for decades before) to bipartisan (and indeed nonpartisan) observers.

179. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-238, TAX GAP: IRS COULD DO MORE TO PROMOTE COMPLIANCE BY THIRD PARTIES WITH MISCELLANEOUS INCOME REPORTING REQUIREMENTS 8 (2009), available at <http://www.gao.gov/new.items/d09238.pdf> (noting that the Bush 2008 and 2009 budgets incorporated the 1099 rule); Julian Pecquet, *Obama Budget Retains Part of Health Reform’s 1099 Tax Reporting Requirement*, HILL HEALTHWATCH (Feb. 14, 2011, 6:03 PM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/144003-obama-budget-retains-part-of-health-reforms-1099-tax-reporting-requirement> (noting that, even after momentum for repeal emerged, Obama still included some of the 1099 rule in his 2011 budget).

180. N.C. Aizenman, *Health-Care Funding Provision Could Face Repeal*, WASH. POST, Aug. 29, 2010, at A4 (“[The provision] was projected to raise \$17.1 billion over 10 years toward the cost of the health-care law. . . . [I]n the spring of 2009, as Baucus and others were looking for ways to offset the cost of the health-care bill, the 1099 provision offered a ready answer.”).

181. Cf. *Friebel v. Paradise Shores of Bay Cnty., LLC*, No. 5:10-cv-120, 2011 WL 500001 (N.D. Fla. Feb. 7, 2011) (“This is a run-of-the-mill buyers’ remorse case, where the Plaintiffs are unsatisfied with the condition of their recently purchased condominium unit.”).

182. Aizenman, *supra* note 180 (“[A]fter the new law was adopted, as business groups started holding meetings to tease out the practical implications, . . . the outcry over the 1099 provision erupted.”).

183. E.g., Press Release, Congressman Mike Pence, Pence Supports Repeal of 1099 Section of Obamacare and Onerous Reporting Requirements (Mar. 3, 2011), http://mikepence.house.gov/index.php?option=com_content&task=view&id=4517&Itemid=55 (“Repealing the onerous 1099 requirement from Obamacare is a victory for Hoosier families, small businesses and family farms, as it will cut bureaucratic red tape and foster job creation.”).

184. Address Before a Joint Session of the Congress on the State of the Union, 2011 DAILY COMP. PRES. DOC. 47 (Jan. 25, 2011).

185. Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Pub. L. No. 112-9, § 4, 125 Stat. 36, 36–37.

186. The repeal was ultimately made revenue neutral by “forcing greater repayment of health insurance subsidies for families whose income unexpectedly exceeds certain thresholds.” Felicia Sonmez, *Obama Signs Repeal of Health Care Law’s ‘1099’ Tax Reporting Rule*, WASH. POST (Apr. 14, 2011), http://www.washingtonpost.com/blogs/2chambers/post/obama-signs-1099-repeal-into-law-marking-first-repeal-of-national-health-care-law-provision/2011/04/14/AFRhYjeD_blog.html; see also Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 § 4, 125 Stat. at 36–37.

Afterwards, once the deed was done, the bill became recast as yet another example of unnecessary bureaucratic red tape.

This pointless exercise of enactment and repeal occurred, basically, because no good method exists for pinpointing an acceptable level of diffuse administrative burdens for a federal statute to impose upon taxpayers to be worth a full \$20 billion in federal revenues already owed. This example was chosen because it was a simple case where the law's fiscal benefits were knowable. If the benefits of the law were less readily quantifiable and more contested—say, a law to reduce greenhouse gas production by home air-conditioners—or the costs of the law were morally irrelevant to its proponents—say, a law to eliminate employment discrimination against gays and lesbians—one would be even farther out at sea.

In short, the argument from costs presupposes that general answers exist to the thorny questions of who should pay for federal law and how much they should pay. Only the answers to these questions would equip us to announce that, as a general matter, federal statutory law costs too much. But no such answers exist.

2. The Argument from Regulatory Costs

While many of the above arguments apply with equal force to federal regulations, the picture is in some respects importantly different where federal regulations are involved. A congressionally imposed mandate requires that many regulations' net benefits exceed their net costs.¹⁸⁷ Thus, cost-benefit calculations are routinely applied to enormous swaths of the regulatory state,¹⁸⁸ despite the inherent difficulty of selecting appropriate metrics for measuring the attributes of costs and benefits.¹⁸⁹

The results of this analysis ought to be heartening. Many individual rules have net positive cost-benefit analyses, as does the system as a whole.¹⁹⁰ If

187. See Sunstein, *supra* note 175, at 1657 (describing OMB's "full accounting of the costs and benefits of all regulation").

188. See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION*, at ix (2002) (The "American government is becoming a cost-benefit state" and "government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation").

189. Sunstein, *supra* note 70, at 488 ("There is no uncontroversial metric with which to measure social costs and social benefits."). Cost-benefit accountings have a difficult time quantifying expressive and other intangible benefits of laws, such as ideals of justice, paternalistic motives or ethical constraints. Consequently, cost-benefit equations often have indeterminate outcomes. See Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315, 1320 (1974) (noting how consideration of nonmonetizable values implicates, albeit not uniquely so, the "universal difficulty of choosing among incommensurables").

190. On net, the OMB's numbers indicate that major federal regulations generate annual benefits in the aggregate between \$132 billion and \$655 billion, while the estimated annual costs are in the aggregate between \$44 billion and \$62 billion. OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3, 14 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

this math can be taken at face value—and there is good reason to think that some benefits are understated¹⁹¹—then these numbers should assuage cost-based fears of regulatory hyperlexis. But when looking at the subtraction of costs from benefits, many critics of hyperlexis insist upon citing only the enormous subtrahend of the equation and not the much more enormous minuend.¹⁹²

Such a selective focus has obviously perverse effects. Rules have benefits as well as costs. Attempting to reduce or cap regulatory costs without paying attention to regulatory benefits is counterproductive. Such a strategy will reliably make the regulatory system worse, not better.

Yet that is precisely what cost-focused critics of regulatory hyperlexis propose to do. For example, Senator Warner’s proposed “pay-go” system would require each new rule to be accompanied by a repeal of an existing rule that imposed the same cost, even if the new rule created only a slight benefit while the old rule created enormous benefits.¹⁹³ Another senator, Republican Susan Collins of Maine, has recently urged enacting a regulatory “moratorium” for rules that impose costs over a certain dollar threshold—without regard to whether the rule might create correspondingly large benefits.¹⁹⁴ This proposal would defer the effectiveness of good rules, thereby reducing their ultimate utility, while doing nothing to prevent inefficient rules from ultimately going into effect. President Obama implicitly endorsed such biased logic when in rejecting new smog standards he cited the “regulatory burdens” the proposed standards would impose, without ever mentioning, let alone questioning, their promised benefits.¹⁹⁵

Cost-benefit analysis has well-established constraints and flaws,¹⁹⁶ but no matter how severe these problems may be, cost-benefit analysis is more

191. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1266 (2006) (noting the concern that in OIRA review “regulatory benefits would be systematically undervalued”); Parker, *supra* note 30, at 1355 (demonstrating that oft-cited “regulatory scorecards” “grossly underestimate the value of lives saved, or the number of lives saved, or both”). *But see* Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1026–27, 1029–30 (2004) (disagreeing with Parker and arguing that the benefit of saving future lives should be discounted); Sunstein, *supra* note 175, at 1657 (“While the government’s own numbers should be discounted—agency accounts may well be self-serving—at least they provide a good place to start.”).

192. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 721–22 (2006) (plurality opinion) (quoting the fact that “over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits,” but not quoting any information about the corresponding benefits); CRAIN & CRAIN, *supra* note 2; *infra* notes 193–98. For an anecdotal analysis of the costs of land-use and housing assistance programs, see Ellickson, *supra* note 98, at 110–12.

193. See *Testimony of Mark Warner*, *supra* note 47.

194. See Susan Collins, Op-Ed., *The Economy Needs a Regulation Time Out*, WALL ST. J., Sept. 26, 2011, at A15.

195. See Statement on the Ozone National Ambient Air Quality Standards, 2011 DAILY COMP. PRES. DOC. 607 (Sept. 2, 2011). For the EPA’s assessment of the benefits of the proposed rule, see EPA, REGULATORY IMPACT ANALYSIS, FINAL NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE 7, 8 figs.S1.1 & S1.2 (2011), available at http://www.epa.gov/glo/pdfs/201107_OMBdraft-OzoneRIA.pdf.

196. See *supra* note 189.

intellectually coherent and useful than simply “cost” analysis. The analytical engine driving regulatory reform cannot be cost analysis rather than cost-benefit analysis. Sticker shock is simply not an adequate substitute for a reasoned analysis of whether a rule is worthwhile.¹⁹⁷

A separate word needs to be said about a more nuanced form of the argument from costs: a retail, or “mundane,”¹⁹⁸ version, which contends not that cost itself is objectionable in absolute terms, but rather that some identifiable subset of regulations are, to borrow a conventional formulation, “excessively burdensome” and ought to be eliminated. This is, in effect, an argument that the cost-benefit calculation for particular rules indicates that costs outweigh benefits, and that the system should at least be cleansed of those laws.

Here, at last, we see a metric for identifying the existence of “too much” law and a goal plausibly linked to that metric. And as far as it goes, this approach is hard to fault.¹⁹⁹ The question, then, is how far this approach actually goes toward achieving the world desired by critics of the costs of federal law.

Earlier forays at culling unnecessary regulations from the federal system have failed to produce much return on the efforts invested. “[T]here has been no shortage of initiatives to cull regulations” at the federal level and even at the state level.²⁰⁰ But these initiatives are beset by difficulties, including scarce agency resources,²⁰¹ legal restraints on agency action,²⁰²

197. For an example of a sticker shock argument at work, see Collins, *supra* note 194 (“[T]he Environmental Protection Agency proposed a new rule on fossil-fuel emissions from boilers that—by the EPA’s own admission—would cost the private sector billions of dollars and thousands of jobs.”). Senator Collins does not mention that “by the EPA’s own admission,” the new rule would also produce offsetting benefits, including benefits to the private sector, that exceed those private-sector costs. For another example, see HUSAK, *supra* note 95, at 7 (“The cost of federal and state prisons in 2003 was over \$185 billion. When the collateral costs on prisoners, their families, and their communities are included in the equation, the money expended on our punitive policies is astronomical. No social benefit can justify this staggering expenditure of resources.”). Here, the “social benefit” being discarded out of hand is any social benefit that may be ascribed to imprisoning anyone in America for any crime at all. It must be noted, however, that the arguments developed in Professor Husak’s book depend only to a minor extent, if at all, upon the economic costs of criminal law.

198. Sunstein, *supra* note 175, at 1660 (describing the need for “a more mundane search for pragmatic instruments designed to reduce three central problems: poor priority setting, excessively costly tools, and inattention to the unfortunate side-effects of regulation”).

199. There might be strong counterarguments to, for example, the executive branch’s deployment of cost-benefit analysis in a manner that nullified congressional intent or express instruction. See Sunstein, *supra* note 173, at 1279 (noting the serious separation of powers problems that would be raised by the Executive’s refusal to enforce a properly enacted statute on cost-benefit analysis grounds).

200. Ruhl & Salzman, *supra* note 30, at 777.

201. Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 148 (1996) (“Excessive time and scarce resources devoted to a formal review of all regulations could result in insufficient attention to other regulatory needs or statutory mandates. In some instances, a formal review of all regulations of one agency may result in the elimination of several obsolete rules, but may preclude consideration of a more important regulatory action.”).

and entrenchment of rules in the eyes of the public or of the regulated industry.²⁰³ Even efforts to deregulate outright have largely foundered.²⁰⁴ With respect to federal regulation, “the forces of erosion have been overwhelmed by the processes of accretion.”²⁰⁵

The new Obama initiative for regulatory reform will likely repeat this history. In compliance with the Obama Order, thirty executive departments and agencies have released preliminary plans of regulatory review.²⁰⁶ The Administrator of OIRA, Cass Sunstein, testified in June 2011 that:

Some of the steps outlined in the plans have already eliminated hundreds of millions of dollars in annual regulatory costs, and *over \$1 billion in savings* can be expected in the near future. Over the coming years, the reforms have the potential to eliminate *billions of dollars* in regulatory burdens.²⁰⁷

One billion dollars of avoided costs “in the near future” is not negligible, but it is clearly a very small portion of the \$62 billion in annual costs imposed by federal regulations.²⁰⁸

The point is not that OIRA or the executive agencies lack effort or resolve. The point is that trimming even a tenth of the costs imposed by federal regulation would be a massive undertaking—and yet it would almost certainly fail to satisfy critics of the costs of federal law, some of whom now suggest that federal law may impose trillions in costs rather than billions.²⁰⁹ In short, agencies may respond energetically to the mundane argument from costs, but their efforts will leave untouched the vast bulk of

202. *Id.* at 152. Ironically, some of the legal constraints identified by agencies are measures aimed at combating hyperlexis, such as the Paperwork Reduction Act and executive orders requiring agencies not to infringe upon federalism.

203. *Id.* at 153–54.

204. Ruhl & Salzman, *supra* note 30, at 778–79 (“While the Reagan administration had a reputation for deregulation, over two terms it ended only four regulatory programs. . . . [T]he [first] Bush administration tried to get rid of 246 small items (most of them not full-scale programs but projects and grants and the like) and spared only eight. President Clinton’s hard-won 1993 budget deal managed to eliminate only forty-one small programs’ The Republican-controlled 105th Congress did not fare much better, terminating about 200 programs and agencies that accounted for only one-quarter of one percent of the budget.” (second alteration in original) (quoting JONATHAN RAUCH, *GOVERNMENT’S END: WHY WASHINGTON STOPPED WORKING* 180 (1999))).

205. *Id.* at 782.

206. Cass R. Sunstein, Administrator, Office of Info. & Regulatory Affairs, Prepared Testimony Before the House Energy and Commerce Committee Oversight and Investigations Subcommittee 2 (June 3, 2011), *available at* <http://Republicans.EnergyCommerce.house.gov/Media/file/Hearings/Oversight/060311/Sunstein.pdf>.

207. *Id.* (emphasis added).

208. Moreover, the retrospective review process may not be a one-way street to fewer rules and lower costs: Mr. Sunstein has directed agencies to look not only at removing regulations but also to “explore how best to evaluate regulations in order to expand on those that work (and thus to fill possible gaps).” *See* Memorandum from Cass R. Sunstein, Administrator, Office of Info. & Regulatory Affairs, for the Heads of Independent Regulatory Agencies, M-11-28, at 4 (July 22, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf>. In the meantime, of course, the ordinary process of rulemaking proceeds apace.

209. *See* CRAIN & CRAIN, *supra* note 2, at 2–3; *see also* Laura Meckler, *White House to Scale Back Regulations on Businesses*, WALL ST. J., Aug. 23, 2011, at A2.

regulatory costs—as well as the criticism that considers costs alone to be ammunition.

D. A Summary

In what one hopes was a brisk but not unfair fashion, this part offered a cross-cutting survey of a considerable amount of legal and policy terrain. It is worthwhile to assess some intermediate conclusions at this point.

The discussion in this part categorized and criticized the most common theories of federal hyperlexis. The argument from numerosity, in its naked form, suffers from the lack of a meaningful normative baseline. The argument from complexity suffers from the same flaw; in addition, no good method exists for meaningfully reducing complexity in law. The arguments from federalism and over-delegation rest upon questionable assumptions about the likely results of correcting the constitutional flaws they assert. The argument from costs is difficult to apply to federal statutes, because of the absence of a theoretical yardstick for determining what a statute, let alone the aggregate of all federal statutes, ought to cost. The cost argument makes little sense when it measures only costs and not benefits, and the project of looking for and repealing non-cost-effective regulations is unlikely to make a meaningful dent in the corpus of federal law—or at least, a dent meaningful to those who deplore the cost of federal law.

A practical point about these arguments will not have escaped the reader's notice: many of the accounts of hyperlexis are mutually incompatible. For example, imposing procedural checks upon any regulation that exceeds a certain cost threshold will encourage the multiplication of regulations that do not exceed that threshold. Requiring Congress to specify its policy goals with greater precision when it delegates authority will produce increases in statutory complexity and numerosity. Reducing reliance upon federal regulatory schemes, as Professor Brown has argued, may encourage the proliferation of federal criminal laws.²¹⁰

If critiques of hyperlexis are difficult to operationalize individually, their crosscutting ramifications make them impossible to operationalize in concert. Like the weather, hyperlexis is something that everyone talks about but nobody can do anything about.

III. RAMIFICATIONS OF THE HYPERLEXIS CRITIQUE

Talk of hyperlexis and talk of the weather share more in common than the similarity just mentioned. Metaphors used to describe hyperlexis in law reliably evoke the imagery of weather, particularly floods, tidal waves, tsunamis, and other uncontrollable watery phenomena.²¹¹ In comparison,

210. Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 664–65 (2011) (“In significant part, I suggest, federal criminal law is so expansive because ideological support for the federal regulatory state is comparatively thin.”).

211. See *supra* notes 1, 6. Bayless Manning's initial article on hyperlexis is a notable exception. See Manning, *supra* note 8, at 767.

complaints about the prevalence of frivolous civil litigation tend to borrow the imagery of infection and illness, treating America’s litigiousness as a national disease or “epidemic.”²¹² But the idea of disease, even epidemic disease, holds within it at least the hope of cure. The imagery of weather, on the other hand, reflects a tacit claim that the phenomenon described lies beyond human control.

This is mildly ironic, because the reasons why there is more and more law lie, almost by definition, within human control. “[T]he most plausible theoretical and empirical explanations [for growth in government] tend to focus on changes in constituent demand for government-provided goods and services. For example, population growth, industrialization, and international trade have increased demand for various kinds of economic regulation, while progressive social movements have led to greater demand for government redistribution and welfare.”²¹³ In short, government power has grown, at least in part, “because officials are responsive to constituent demands for more government.”²¹⁴

Consider federal criminal law. Is its expansion (assuming it has meaningfully expanded) consistent with or contrary to democratic preference? Professor William Stuntz argues that the system of criminal liability “will always be broader than ordinary majoritarian politics would suggest, and the tendency will always—or at least until something in the lawmaking process changes—be toward more breadth.”²¹⁵ But though Professor Stuntz points to some symptoms of misalignment between “ordinary majoritarian politics” and the breadth of criminal codes,²¹⁶ his explanation for the proliferation of criminal laws—“[a] deeper politics . . . of institutional competition and cooperation” based on the interaction between prosecutors, legislatures, and judges²¹⁷—is not necessarily counter-majoritarian. Professor Stuntz admits that voter

212. See Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 456 (2004) (noting “the perennially popular assertion that the United States is experiencing an escalating epidemic of litigation and has become ‘the world’s most litigious nation’”).

213. Levinson, *supra* note 147, at 936.

214. *Id.*

215. Stuntz, *supra* note 119, at 528–29.

216. Stuntz argues that majoritarian politics alone should not “produce broad criminal codes that cover a range of ordinary, fairly innocuous behavior.” *Id.* at 509; see also *id.* at 524–25 (arguing that expansiveness of federal mail and wire fraud statutes targets “borderline dishonesty by middle-class offenders . . . the last thing any popularly elected legislature would want to criminalize”). In addition, if the criminal code responds to majoritarian pressures, it would be expected only to expand when criminal activity is higher and more politically salient. See *id.* at 509 (noting that the criminal code has been expanding since the mid-1800s despite wide variance in the political salience of crime). He also notes that new criminal statutes should target the crime that is rising. For instance, a rise in street and drug crime and increased public concern about street and drug crime should not have resulted in new federal offenses that targeted the Mafia and political corruption. See *id.* at 525. Finally, the expansion of the criminal code should occur at the level of enforcement. Because the street and drug crime is enforced at the state level, new federal offenses of any kind are off-base. See *id.* (“[T]he changes should have been in state codes, not the federal code.”).

217. *Id.* at 510.

pressure is often the cause of the governmental dynamics that ratchet up criminal law.²¹⁸ For instance, legislatures fear being blamed by a prosecutor if a wrongdoer escapes because the law was drafted too narrowly.²¹⁹ Prosecutors push for more prosecuting tools because the “the public seeks” both prosecutions and convictions, but the democratic process puts prosecutors on a budget.²²⁰ Similarly, courts may endorse ambitious interpretations of criminal law because they fear that politicians may supersede their decisions.²²¹ Just because competition and cooperation between prosecutors and legislatures produces more criminal law than Professor Stuntz might expect, then, does not mean that the outcome is one that a majority of the public does not like. The continual public pressure on legislatures and prosecutors to expand criminal law may signal public endorsement of the results of this deeper politics.²²² Indeed, if public demand is the correct yardstick to measure the excess of criminal law, one might conclude that there is, if anything, too little federal criminal law.²²³

What can one make of the democratic provenance of hyperlexis? To the extent that hyperlexis is the proper product of democratic choice, expressed through constitutional mechanisms, it may be entitled to at least some legitimacy, even if just a faint presumption of it. If, in contrast, the existence of hyperlexis reflected not democracy at work but some pathology or failure of democratic process, one might think differently. But without an account of the flaw in the democratic process that generates hyperlexis, it is difficult to avoid categorizing the mine-run of complaints of hyperlexis as just more instances of failed legislative coalition-building—whether by small businesses reluctant to fill out 1099 forms, by corporations who dislike spending money on coal-plant retrofitting, or by people who would prefer to be able to tear the tags off their mattresses without fear of federal charges.

To borrow the rubric set forth in Part II, we require an “argument from process” that can convincingly back up the assertion that the quantity of law unacceptably surpasses the quantity of law that the American people want—or at least deserve. As described below, however, such an account is elusive.

A. *The Elusive Argument from Process*

For all of the ink spilled upon hyperlexis, little effort has been made to trace it to some particular breakdown in the operations of democratic

218. *Id.* at 529 (“[C]rime is one of those matters about which most voters care a great deal.”).

219. *Id.* at 547–48.

220. *Id.* at 534, 535–38.

221. *See id.* at 562.

222. Stuntz admits such a reading is plausible. *Id.* at 600 (“[T]he way the system has evolved is, while certainly not dictated by public opinion, at least consistent with it.”).

223. *See Baker, supra* note 114, at 546 (“The general public, however, has no such awareness [of the explosive growth of federal crimes] and, if it did, most would likely not be concerned. Indeed, the continuing political appeal of ‘tough on crime’ policies has been driving the growth of federal criminal legislation.”).

government. Are industry interest groups reliably trumping the preferences of a broader majority in producing an accretion of self-serving laws? Or, alternatively, are federal bureaucrats routinely succeeding in inflating regulatory regimes to pad their budgets, to build their "empires," or to assuage their excessively cautious and risk-averse natures? Does the proliferation of federal laws accord with, or run counter to, the preferences of the median American voter?²²⁴ And, supposing that those preferences were stable and detectable, would a legislator honestly seeking to serve democratic values try to implement or strive to override those preferences?²²⁵

The natural place where one would expect to find the argument from process is in the literature on public choice theory. The vast scholarship in this area explains how the political economy of legislatures and agencies may result in the production of regulatory regimes that are inconsistent with the ends of democratic process and good public policy.²²⁶ But public choice theory does not offer an explanation of a pathology underpinning the systemwide generation of hyperlexis.²²⁷

Let us assume the accuracy of the core message of public-choice theorists: that individual self-interest and interest-group pressure sway administrative agencies and legislatures to enact laws that do not accord with the needs and wishes of the democratic electorate (or, at least, only

224. The evidence is ambiguous. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for A Complex World*, 72 CHI.-KENT L. REV. 987, 999 (1997) ("[V]oters through the 1980s relentlessly insisted that they wanted less government and more environmental protection. In the 1990s, we profess a strong commitment to achieving more affordable, broadly available health care, yet we simultaneously insist on our desire to retain a high degree of individual freedom of choice.").

225. *Id.* at 1006–07 ("[I]n some measure the test of a legitimate democratic regime is whether it 'gives the people what they want.' But the test is incomplete because based on the incomplete premise that the act of governing is a passive, mechanistic aggregation of citizen preferences, the legitimacy of which derives from full and fair counting. . . . [P]art of the legitimate realm of democratic governance is the shaping of values and the forging of commitments—and sometimes, the deliberate determination by our representatives to defy the will of the people in the interest of the community as a whole, or a vulnerable subsection of the community.").

226. Professor Farina's vivid summary encapsulates the theory's essential implications for the regulatory state:

Public choice offers a versatile and ambitious explanatory system derived from one, simple proposition: human self-interest. Citizens act to acquire the biggest piece of the collective resource pie at the lowest cost to themselves; legislators act to acquire reelection; bureaucrats act to acquire more power (bigger budget, wider authority, and so on) while in government and lucrative opportunities via the revolving door when they leave. A single postulated entity, rational man, motivated by a single postulated principle, interest maximization, can explain the existence of the regulatory universe and account for the various regulatory failures that so occupy scholarly and popular attention.

Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 110 (2000). See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

227. See Buzbee, *supra* note 30, at 37 ("Broad-based concerns about overregulation, in the sense of comprehensive regulatory intrusion, actually finds little support in the logic of public choice scholarship . . .").

accidentally accord with them).²²⁸ It still remains hard to see why the vast and multifarious spectrum of individual and group preferences, channeled through the various political-economic configurations of Congress and the agencies, and averaged over decades, would reliably result in the net *over*-production of federal law. The preferences of various participants in the lawmaking arena will conflict, not cohere, around (for example) whether rules should be simple or complex, sparse or detailed.²²⁹ Conventional accounts of agency capture and special interest behavior run counter to the idea that agencies will over-regulate.²³⁰ Under-regulation and stasis are equally plausible results.²³¹ In short, even if public choice theory sets forth accurately the equation by which self-interested preference results in legal enactments,²³² it is unclear what the integral of that equation might be.

B. *The Unavoidable Argument from Liberty*

The lack of an argument from process cannot, however, decisively quell the hyperlexis critique. Claims of hyperlexis draw upon and reflect philosophical beliefs about liberty and government that are far too deeply rooted to be dispelled by the dry prognostications of public choice theory. To adopt again the rubric of Part II, the “argument from liberty” is a persistent, unavoidable feature of nearly any debate over hyperlexis.

The argument from liberty castigates hyperlexis (conceived in various ways) for its toxic effects upon liberty (conceived in various ways). So, for example, businesses deplore the constraints upon economic liberty imposed by the network of federal rules.²³³ Libertarians condemn the threats to

228. See Farina, *supra* note 226, at 110.

229. See, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 99–100 (1983) (noting the indeterminate results for rule precision of the competing preferences of regulated entities, new entrants to markets, beneficiaries of regulation, and consumers).

230. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 122 (2000) (“[I]nterest groups do not generally rush to Congress and plead, ‘Regulate us!’ The impetus for the Clean Air Act, the Occupational Safety and Health Act, and other such laws was not intensive industry lobbying. To the contrary, the special interest groups tend to resist social regulation and complain about its costly mandates once it is passed.”).

231. Bagley & Revesz, *supra* note 191, at 1284 (debunking the idea that public theory predicts that agencies will regulate overzealously: “theories of agency overregulation often rest on faulty premises and are in any event no more plausible than alternative theories suggesting that agencies will routinely underregulate”); Buzbee, *supra* note 30, at 41 (“[T]he sum of politician and regulator self-interest, combined with industry and not-for-profit regulatory demands, will not necessarily result in onerous regulation, or any regulation at all.”).

232. It might not. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 67–68 (1990) (criticizing public choice writing “particularly from law schools” as “falsif[ying] not only human nature, but observable facts about the legislative process,” “[f]lattering and minimizing the roles of politicians and unorganized voters, and overlooking empirical evidence that could be found through a simple library search”).

233. See, e.g., Thomas J. Donohue, *Regulations Devastate Economic Growth*, U.S. CHAMBER OF COMMERCE (Oct. 14, 2010), <http://www.uschamber.com/press/opeds/regulations-devastate-economic-growth> (arguing that regulations threaten “free enterprise”).

liberty of holding innocent citizens accountable to a complex web of criminal and civil prohibitions.²³⁴ The encroachment of federal law is characterized as imperiling the safeguards for individual liberty crafted into the federalist system of government.²³⁵ These and other versions of the “argument from liberty” are both the culmination of, and the motivating force behind, the critiques of hyperlexis taxonomized above.

The argument from liberty has close ties to arguments against “big government,” an idea that itself has a venerable pedigree in American thought. “Fear and loathing of big and growing government has been a persistent theme in American political and constitutional discourse since the Founding.”²³⁶ In this larger narrative, the amount of federal law is just another yardstick with which to measure the encroaching shadow of the Leviathan. And each day seems to show that more and more Americans are wary of Leviathan and the laws it wields. The percentage of Americans who mistrust public institutions is at historical highs.²³⁷ Approval of Congress has dropped into the single digits on one poll,²³⁸ and remains stuck at record lows in the 13 to 15 percent range in another poll.²³⁹ Only one in ten Americans say that they can “always or most of the time” “trust the government in Washington to do what is right.”²⁴⁰ The low levels of approval do not vary across party.²⁴¹

It is no surprise that wide-scale deterioration of trust in federal institutions and officials would correlate closely with an uptick in concern that the federal government is creating too much law. And one can safely assume that at least Congress and the President, and perhaps even the federal judiciary, are responding to the prevailing popular sense that there is too much law when they decry federal hyperlexis in public statements, bills, hearings, executive orders, and opinions. These endorsements of the hyperlexis narrative may themselves encourage the perpetuation and entrenchment of the narrative. When the men and women responsible for running the modern administrative state criticize its rules, decry its costs, and bemoan its complexity, the public at large is more likely to credit those concerns. Talk of hyperlexis by those in the top echelons of government thus both feeds and feeds upon popular sentiment.

It is probably impossible to pinpoint whether mistrust of government is driving mistrust of law, whether mistrust of law is driving mistrust of government, or whether the causal arrows flow in both directions. “[T]he

234. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 739 (2005).

235. See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2363–64 (2011).

236. Levinson, *supra* note 147, at 916.

237. Jeff Zeleny & Megan Thee-Brenan, *New Poll Finds a Deep Distrust of Government*, N.Y. TIMES, Oct. 26, 2011, at A1.

238. *Id.*

239. *Congress’ Job Approval Entrenched at Record Low of 13%*, GALLUP (Nov. 14, 2011), <http://www.gallup.com/poll/150728/congress-job-approval-entrenched-record-low.aspx> [hereinafter *Congress’ Job Approval*].

240. Zeleny & Thee-Brenan, *supra* note 237.

241. See *Congress’ Job Approval*, *supra* note 239 (“[B]road levels of dissatisfaction with Congress . . . are affecting all political and ideological groups.”).

problem with thinking about the role of ideas is that they cannot readily be modeled or predicted.”²⁴² But perhaps one prediction can safely be ventured: as long as there are laws to count, the argument from liberty will continue to be levied against federal legislators and regulators.

C. *Leviathan and Legitimacy*

How might federal institutions be affected by the prominence and the permanence of the hyperlexis critique (and the argument from liberty that leverages that critique)? The chief challenge of the idea of “too much law” is that, as we have seen, it is easy to state but hard to operationalize. From the perspective of the public, the consequence is a large and unbridgeable gap between what is loudly declared both possible and necessary, and what is actually achieved.

This gap has one notable consequence from which many others flow: injury to what Professor Richard Fallon has called the sociological legitimacy of law.²⁴³ As Professor Fallon notes, “administrative agencies are widely believed to face a serious, even alarming, sociological legitimacy deficit.”²⁴⁴ But not very far down the road, one can perceive a world where the chronic legitimacy crisis that for decades has afflicted the federal administrative state has spread to all of federal law, statutory or regulatory.

A mismatch exists between existing theories of legal legitimacy and the sort of theory that would be necessary to rebut effectively the legitimacy challenge represented by the hyperlexis critique. Consider the legitimacy of federal statutes. Various theorists have come up with differing accounts of the sources of legitimacy of statutes. The leading accounts state that a statute’s legitimacy comes from some combination of the following: compliance with the formal rules that authorize its creation;²⁴⁵ the fact that the group that enacted it has been democratically elected;²⁴⁶ and/or the pluralistic deliberative process through which it is created.²⁴⁷ It is obvious that these legitimating mechanisms are oriented towards and validate the

242. Shaviro, *supra* note 232, at 100.

243. Professor Fallon explains:

[A] constitutional regime, governmental institution, or official decision possesses [sociological] legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward. . . . [L]egitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.

Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

244. *Id.* at 1844.

245. 1 MAX WEBER, *ECONOMY AND SOCIETY* 37 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).

246. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 53 (1999) (“The political value most naturally associated with the modern legislature and with the authority of its product—legislation as positive law—is *democratic legitimacy*.”).

247. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 72–73 (James Bohman & William Rehg eds., 1997).

source of statutory law. They do not attempt to legitimate the "back end" or upshot of lawmaking—the aggregate volume or growth of law—because they assume that the legitimacy of each discrete part is enough to establish the legitimacy of the aggregate whole.

Theories (or "models") of legitimacy applicable to federal regulations show the same skew in their orientation. Chief among these theories are the presidential control model;²⁴⁸ technocratic expertise model;²⁴⁹ and the interest group representation or pluralistic democracy model.²⁵⁰ A civic republican model has also been proposed,²⁵¹ as well as a model that focuses on reducing arbitrariness rather than upon enhancing accountability in administrative action.²⁵² All of these models ground regulatory law's legitimacy in the existence of safeguards on the means by which regulatory law is produced—whether those safeguards are the democratic accountability of executive branch actors, procedural protections against arbitrariness, availability of judicial review, or other mechanisms. Like the theories of statutory legitimacy canvassed above, theories of administrative legitimacy assume that once agency action can be defended as legitimate, the collected results of that action shall also be deemed legitimate.

The calls for legislative minimalism that are today ubiquitous prove that this assumption has been naive. The whole of American law is, somehow, less legitimate than the sum of its parts.

How does this reduction of law's sociological legitimacy make itself felt? Various types of harm might result. Erosion of sociological legitimacy may result in a reduced acceptance of the authoritative legal legitimacy of the laws—i.e., their legally binding nature.²⁵³ Individuals and entities might disobey particular laws or regulatory schemes regarded as especially illegitimate. The perception that particular laws are being disobeyed might metastasize into a wider-scale disobedience to law more generally.²⁵⁴

Generalized distrust and skepticism of regulatory and legislative action also has more immediate and pragmatic consequences. Such skepticism "affects the form, and more importantly, the efficacy of regulatory regimes including critical ancillary decisions such as funding and staffing of enforcement offices."²⁵⁵ Moreover, this dynamic has the propensity to compound itself. Distorting legal regimes to accommodate skepticism of law can itself generate skepticism of such regimes.

248. See Bressman, *supra* note 54, at 485 (describing presidential control model).

249. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1518 (1992) (describing the agency expertise model).

250. *Id.* at 1520–21 (describing the attempt to justify administrative power by appealing to theory of pluralistic democracy).

251. *Id.* at 1528.

252. Bressman, *supra* note 54, at 515.

253. Fallon, *supra* note 243, at 1795.

254. See Green, *supra* note 118, at 1612 (noting that a defendant's disobedience to the law causes "damage to the authority of the government; a lessening of the public's confidence in our institutions; public cynicism, fear, and uncertainty; and a social climate that is likely to lead to even greater disobedience").

255. Brown, *supra* note 210, at 679.

For a concrete example of this feedback loop in operation, witness the structure and implementation of PPACA. To accommodate concerns about the impact upon insurers and state governments of new federal rules governing health insurance, the statute authorized certain provisions of PPACA to be implemented in an incremental manner.²⁵⁶ Federal agencies used this statutory authority to defer, or “waive,” the application of rules promulgated pursuant to PPACA for hundreds of entities.²⁵⁷ The resulting patchwork regime—dubbed “government by waiver”—drew sharp criticism from some quarters on the grounds that such a system unjustly rewards the politically well-connected and savvy.²⁵⁸

Another example comes from the creation of the Consumer Finance Protection Bureau (CFPB), a new federal agency with authority to regulate consumer financial transactions. Due in large part to congressional wariness of creating new regulations, the administration was unable to obtain Senate confirmation of its first choice to head the CFPB.²⁵⁹ The result was that a powerful new federal agency came into being under the direction of a person who officially had no power over it and is now being run by an unconfirmed appointee. The question here is not who bears the political blame for this situation. The point is that congressional resistance to issuance of new federal rules has had the collateral consequence of reducing the CFPB’s democratic accountability and thus its legitimacy.²⁶⁰

A final example comes from the anemic response by federal prosecutors with respect to the 2008 mortgage crisis. The Department of Justice has declined to pursue criminal sanctions of many firms and individuals implicated in the crisis.²⁶¹ This reticence likely reflects the immense

256. See PPACA § 1332, 42 U.S.C. § 18052 (Supp. IV 2010).

257. See Julian Pecquet, *HHS Approves 200 More New Healthcare Reform Waivers*, HILL HEALTHWATCH (May 13, 2011, 3:52 PM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/161203-hhs-approves-200-more-new-healthcare-reform-waivers> (“The Obama administration approved 204 new waivers to Democrats’ healthcare reform law over the past month, bringing the total to 1,372.”).

258. See Richard A. Epstein, *Government by Waiver*, NAT’L AFF., Spring 2011, at 39, 52.

259. Opposition to the nomination of Professor Elizabeth Warren as the head of the new CFPB flowed from the (probably correct) belief that she would enthusiastically execute new rules to effectuate the agency’s intended purpose—regulating consumer financial transactions. President Obama subsequently invoked his recess appointment power to appoint Richard Cordray as the agency’s head. See Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

260. This diminution in accountability is separate from the question whether the CFPB may constitutionally be situated within the Federal Reserve. Even if one assumes that the CFPB’s structure comports with constitutional structural mandates, independent legitimacy concerns may arise from the fact that a major new agency is being run by an appointee who has not received Senate confirmation. See, e.g., Alan M. Parker, *Richard Cordray Recess Appointment Sparks More Bickering*, U.S. NEWS & WORLD REP. (Jan. 4, 2012), <http://www.usnews.com/news/articles/2012/01/04/richard-cordray-recess-appointment-sparks-more-bickering> (reporting a comment that recess appointment controversy adds “one more arrow” to the quiver of those who wish to challenge the legitimacy of the CFPB’s regulations or actions).

261. See Gretchen Morgenson & Louise Story, *A Financial Crisis with Little Guilt*, N.Y. TIMES, Apr. 14, 2011, at A1 (“[S]everal years after the financial crisis, which was caused in large part by reckless lending and excessive risk taking by major financial institutions, no senior executives have been charged or imprisoned . . .”).

traction that complaints about over-criminalization have enjoyed among powerful members of the federal criminal bar, particularly with respect to corporate criminal law.²⁶² The absence of criminal accountability has produced nationwide public outcries.²⁶³ Likewise, the leniency with which the federal government, through the Securities and Exchange Commission, has enforced civil fraud sanctions against Wall Street banks and their employees has provoked a stinging rebuke from one distinguished jurist.²⁶⁴

In all of these instances, the stature of federal law and federal institutions may ultimately have suffered injury due to attempts by federal actors to heed the call to legislative minimalism. Such dynamics will probably recur in the future, as the hyperlexis critique and calls to legislative minimalism intensify, and efforts to accommodate these ideas continue to backfire. When the hyperlexis critique constrains or hampers the government’s ability to act, the federal government’s capacity for addressing genuine problems is reduced—which takes the first turn down a spiral of incompetence that only further undermines confidence in government and in law.

CONCLUSION

The Moving Finger writes; and, having writ,
 Moves on: nor all thy Piety nor Wit
 Shall lure it back to cancel half a Line,
 Nor all thy Tears wash out a Word of it.

Omar Khayyám²⁶⁵

Much of this Article’s message is not reassuring; it is, more or less, a counsel of despair. The critics of federal hyperlexis—and who among us has not at some point wished for less federal law?—lack the Wit to erase a meaningful amount of what the Moving Finger of federal lawmaking has

262. U.S. Attorney Preet Bharara, whose office (the Southern District of New York) has jurisdiction over the major banks implicated by the housing bubble and the 2008 financial crisis, has made clear his belief that there is “too much” federal criminal liability for corporations. See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 59–60 (2007) (citing Professor Stuntz’s observation of the “institutional bias” in favor of broadening criminal liability and criticizing the “manifold” ways in which Congress has expanded corporate criminal liability). Over three years since the crisis began, his office has yet to indict one of these banks for criminal fraud stemming from the financial crisis.

263. See Mark Landler, *Protests Offer Obama Opportunity to Gain, and Room for Pitfalls*, N.Y. TIMES, Oct. 7, 2011, at A13 (“[T]he [Occupy Wall Street] protesters do not think the president has done nearly enough to crack down on abuses. Several pointed out the lack of prosecutions of investment bankers or others involved in the mortgage-finance industry.”).

264. See U.S. S.E.C. v. Citigroup Global Mkts. Inc., No. 11 Civ. 7387, 2011 WL 5903733, at *5 (S.D.N.Y. Nov. 28, 2011) (Rakoff, J.) (“But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency’s contrivances.”).

265. EDWARD FITZGERALD, *THE RUBÁIYÁT OF OMAR KHAYYÁM: FIRST AND FIFTH EDITIONS* 15 (Stanley Appelbaum ed., Dover Publ’ns, Inc. 1990).

writ, and the Piety to realize their impotence. What they do not lack are Tears. Mourning over the proliferation of law has become a popular pastime, and one that has recruited ardent enthusiasts from both parties and from the top reaches of the federal government.

This Article has sketched the chief contours of the hyperlexis critique and has shown how it interacts with various legal and policy debates that are conventionally regarded as distinct and unrelated. This critique, and the concept of legislative minimalism, will not soon fade from public discourse. Legislators and theorists must grapple both with these concepts and with the ramifications that their currency might have upon the legitimacy of federal law.