ESSAY

WITH DISDAIN FOR THE CONSTITUTIONAL CRAFT: THE PROPOSED VICTIMS’ RIGHTS AMENDMENT

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Recent years have witnessed a growing concern over the rights of crime victims, as well as an accompanying debate over how best to protect those rights. One proposed solution took a significant step forward when the Senate Judiciary Committee voted to approve a Victims’ Rights Amendment to the United States Constitution. In this Essay, Professors Mosteller and Powell argue that the proposed Amendment, along with the “legislative history” interpreting it, represents a failed attempt by the drafters of the Amendment to pacify the interests of victims and various other constituencies concerned about the impact of the Amendment on successful prosecutions and civil rights. Accepting the worthy goal of honoring and protecting victims of crime, they contend that the proposed Amendment and the accompanying detailed and inconsistent judiciary committee report resemble much more closely a complicated and ill-thought-out statute than a statement of constitutional principle. Professors Mosteller and Powell contend that the Victims’ Rights Amendment, in its present form, shows disdain for the constitutional craft and, therefore, should not be adopted.

On July 7, 1998, the Judiciary Committee of the United States Senate approved a Victims’ Rights Amendment to the United States Constitution.¹ The 1998 legislative session ended without consideration of the Amendment by the full Senate, but the Judiciary

¹ See S. REP. No. 105-409, at 38 (1998) [hereinafter Majority Report] (Sup. Docs. No. y1.1/5:105-409). The proposed Amendment was embodied in Senate Joint Resolution 44. See S.J. Res. 44, 105th Cong. (1998). All references to the text of the proposed Amendment in this Essay will be to the version that is pending currently in the 106th Congress, Senate Joint Resolution 3, which is identical except for an additional right discussed infra note 5. Senate Joint Resolution 3 is reproduced in full in the Appendix.
Committee did submit its Report ("Majority Report") on the Amendment. We believe that the proposed Amendment, as interpreted by the Majority Report, is unprincipled, poorly developed, and shows clear disdain for the constitutional craft. The Amendment would ill-serve our nation if enacted as part of its fundamental charter.

Although the 105th Congress recessed without taking action on the proposal, the effort to add the Victims' Rights Amendment to the Constitution has continued. On the first day of the 106th Congress, an identical version of the proposed Amendment, which follows this Essay as an appendix, was introduced as Senate Joint Resolution 3 by Senator Jon Kyl on behalf of co-sponsor Senator Diane Feinstein and a group of other Senate supporters. In May 1999, the Senate Judiciary Subcommittee on the Constitution, Federalism, and Property approved the proposed Amendment. Democratic presidential candidate Al Gore announced his support for a federal victims' rights amendment in July. On September 30, 1999, the Senate Judiciary Committee approved Senate Joint Resolution 3 by a twelve-to-five vote. This effort to amend the Constitution is clearly serious, and, we believe, just as clearly misguided.

Let us begin by eliminating a red herring. The debate over the proposed Amendment is not a debate over the importance of respecting the victims of crime. Virtually everyone in America today agrees with that goal. For obvious reasons, the Amendment's advocates would like to portray the debate as a struggle between the friends and the enemies of victims' rights, but it is important that we see what is in fact at issue. As the Majority Report demonstrates, the advocates of the Amendment are proponents of an ill-thought-out measure that, by their own explanations, will not achieve the goals that they purport to seek.

The real issue in this debate is the appropriate means of

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4. See Jill Zuckman, Gore Offers His Gun Plan, Hits at Bush, BOSTON GLOBE, July 13, 1999, at A1 (noting that the Vice President offered his support for a victims' rights amendment during a speech in front of a Boston police station in which he outlined his position on crime issues); see also National Victims' Constitutional Amendment Network (visited Sept. 20, 1999) <http://www.NVCAN.org> (announcing Vice President Gore's endorsement of a federal constitutional amendment supporting victims of crime).
5. See Deirdre Shesgreen et al., Ashcroft Proposal Lets Him Target Clinton, Carnahan, ST. LOUIS POST-DISPATCH, Oct. 3, 1999, at A12. In approving the proposed Amendment, the Judiciary Committee also added a provision that gives victims the right to be notified of pardons and clemencies. See id.
providing genuine help to the victims of crime. The advocates of the Amendment would have us address this need by writing into the Constitution a high-sounding text that is both excessively detailed and intrinsically vague. Achieving too much detail and vagueness in the same document may seem impossible or may suggest to some that a happy balance has been achieved. In fact, however, the drafters have succeeded in providing both flaws because, it appears, they seek to satisfy conflicting objectives supported by different political constituencies.

The Amendment’s excessive detail will needlessly hamstring those who work in the criminal justice system. It will clutter the Constitution with details that should properly be handled by statutes that can be modified more easily as times and circumstances change. The Majority Report exacerbates this detail by reading more like a commentary to administrative regulations than a rough guide to the interpretation of a text that will last far into the future.

At the same time, the Amendment’s sweeping references to the rights that victims “shall have” will do nothing to provide victims with those rights. Our constitutional history shows that the assertion of rights in the Constitution changes nothing by itself: the Fourteenth Amendment’s central goal of guaranteeing the civil and legal equality of African Americans was a largely empty promise until Congress, the federal executive, and state governments adopted concrete statutes and enforcement policies—almost a century after the Amendment was adopted. The hard work of ensuring victims’ rights will not and cannot be done by adopting this Amendment.

The Majority Report itself shows that the proposed Amendment will not achieve the purposes that provide the rationale for proposing it. The Report identifies a twofold justification for advocating an amendment to the United States Constitution. First, the Majority finds that, despite existing statutory and state constitutional provisions, “crime victims are in fact often ignored”6 and that “the existing patchwork fails to transform paper promises to victims into effective protections.”7 The Majority asserts that “[a] Federal amendment can better ensure that victims’ rights are respected in the Nation’s State and Federal courts.”8 Second, the Majority believes that the existing set of victims’ rights provisions is undesirable because it creates an uneven pattern of nominal entitlements that a

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7. Id. at 8.
8. Id. at 5.
single, national standard would handle more effectively.\textsuperscript{9}

The proposed Amendment in itself patently will not address the first concern. The Majority provides no plausible reason to believe that the existence of yet another "paper promise" will be any more effective than existing guarantees. Furthermore, the Majority's description of the intended meaning of the Amendment—to the extent that it is an accurate forecast of how the courts would interpret the Amendment—clearly undercuts the other asserted goal of imposing a uniform standard. If the Majority is correct about the Amendment’s effect, it actually would foster a patchwork of significantly different protections.

Moreover, the proposed Amendment violates basic constitutional traditions. It would entrust the definition of the Amendment to discretionary choices by legislatures and courts, rather than adhering to our tradition of giving national definition to those norms in the Constitution itself. The proposed Amendment intentionally permits constitutional change through simple legislative action, but it leaves the interaction between federal and state enforcement legislation unresolved.

Finally, the Majority Report compounds the flaws of the proposed Amendment. In an attempt to answer difficult questions concerning the Amendment’s effect, the Report promises the sort of specificity typically associated with a statute. Responding to other political issues, however, the Report attempts to treat constitutionally specific language as providing flexibility. The result is to destroy any interpretive value that the Report otherwise might possess.

\textbf{I. THE PROPOSED AMENDMENT WILL DO LITTLE IF ANYTHING TO ADVANCE THE GOAL OF GIVING SUBSTANCE TO VICTIMS' RIGHTS}

No one would argue with the proposition that legal provisions and standards instituted for the purpose of protecting victims’ rights ought to be meaningful guarantees rather than paper promises. The Majority’s own analysis of current law, however, demolishes its assumption that adopting the proposed Amendment will advance the goal of making protection a reality.

As the Majority notes, Congress, state legislatures, and the states through their own constitutional processes repeatedly have adopted victims’ rights provisions, and the United States Supreme Court has admonished that, "in the administration of criminal justice, courts

\textsuperscript{9} See id. at 8.
may not ignore the concerns of victims.’”

State constitutional provisions are supreme law in state courts and for state law enforcement personnel and prosecutors, subject only to the Federal Constitution, which places little or no limitation on the vast majority of victims’ rights that the Majority favors. Valid federal and state statutes are equally binding on judges and officials in the federal and state criminal justice systems respectively.

Thus, existing victims’ rights provisions already enjoy essentially incontrovertible legal authority. The problem with making victims’ rights provisions effective does not stem from their lack of legal force and cannot be addressed by adding yet another paper provision to those already in place. A federal constitutional amendment would be no more binding; yet, if found deficient, it would have the distinct disadvantage of being subject to change only through a nationwide amendment process.

Nor is the problem with victims’ rights legislation due to existing provisions being too limited. As the Majority concedes, the existence of strong victims’ rights provisions often makes no practical difference in the treatment that victims actually receive. This fact is of enormous importance, for it reveals the true problem that victims face and that the Report acknowledges, but misinterprets: there has been a serious failure to incorporate concern for victims “into the daily functioning of all justice systems” so that such concern is “practiced by all justice professionals.”

Adopting the proposed

10. Id. at 6 (quoting Morris v. Slappy, 461 U.S. 1, 14 (1983)); see also Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O’Connor, J., concurring) (noting a strong societal consensus that the loss suffered by crime victims should be recognized and that murder victims should not remain faceless strangers during death sentencing procedures). Concurring in Payne, Justice O’Connor concluded that victims’ rights propositions are not inconsistent with the Eighth Amendment prohibition against cruel and unusual punishment. See Payne, 501 U.S. at 831 (O’Connor, J., concurring).

11. For example, state victims’ rights amendments often accord victims the right to notice of certain court proceedings and the right to confer with prosecutors. See, e.g., ARIZ. CONST. art. II, § 2.1(A)(3), (6); MICH. CONST. art I, § 24(I). The Federal Constitution in no way interferes with such provisions.

12. For example, federal legislation allowing restitution awards for victims of certain federal crimes, see 18 U.S.C. §§ 3663A, 3664 (Supp. III 1997), generally is free from constitutional constraint. See United States v. Dubose, 146 F.3d 1141, 1146–48 (9th Cir. 1998) (holding that the Mandatory Victims Restitution Act does not violate the Eighth Amendment’s prohibition against excessive fines or cruel and unusual punishment, the Equal Protection Clause, or the right to a jury trial under the Seventh Amendment), cert. denied, 119 S. Ct. 430 (1998).

13. See Majority Report, supra note 1, at 10 (citing a report explaining that, regardless of the strength of the state’s articulated legal protections, victims were equally unlikely to be informed of plea negotiations).

14. Id. at 11.
Amendment will not accomplish that aim any more than existing provisions do. The problem is not one of rules on paper, but of policies in practice. The proposed Amendment does nothing to affect the latter.

Even supporters of the Amendment are unclear as to what the measure would actually accomplish. The illogic implicit in the Majority’s advocacy of the proposed Amendment becomes apparent at many points in the Report. A typical example is the Majority’s discussion of a victim’s interest “that any trial be free from unreasonable delay.” The Majority notes the existence of various legal incentives to avoid such delay: the defendant’s Sixth Amendment right to a speedy trial, society’s interest in a swift resolution (an interest that has been recognized explicitly by the Supreme Court), and state constitutional and statutory provisions requiring courts to take the interests of victims into account in determining the date and progress of trials. The Majority also asserts that defendants often seek delay for tactical reasons and concludes that, “[g]iven natural human tendencies, efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise.” Nevertheless, the Majority offers no basis for believing that the proposed Amendment would alleviate this problem. Indeed, in Judiciary Committee debate, Senator Kyl, one of the chief sponsors of the Amendment, stated specifically that “[t]he victim has no right to have the trial speeded up, but merely to have his or her views considered.”

The reason for these inconsistencies could be that the Majority is serving multiple masters. The Majority may be giving political promises of expedited resolution to victims frustrated by the slow pace of the criminal justice system, while also assuring both prosecutorial interests and civil libertarians that trials will not be too speedy to deny the chance for effective prosecutions or adequate

16. See Barker v. Wingo, 407 U.S. 514, 519 (1972). According to the Barker Court, [t]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.

Id.
17. Majority Report, supra note 1, at 19.
defenses. Thus, the proposed Amendment gives a new constitutional guarantee to victims, but at the same time the Majority expressly denies that the provision would require a court to adopt the victims' preferences with regard to timing. According to the Majority, the Amendment would only require "courts to give 'consideration' to the victims' interest along with other relevant factors."

Because the Amendment would neither change "natural human tendencies" nor address criminal defendants' tactical concerns, and given the Majority's own insistence that the Amendment "would not require or permit a judge to proceed to trial" at the expense of the defendant's right to effective assistance of counsel, it is doubtful that the Amendment would make a tangible difference. Furthermore, if judges are ignoring clear state constitutional and statutory commands to pay heed to victims' interests, why should we think that they will be more responsive to a federal mandate? Thus, either the Majority's position is that the provision will make no practical difference and become yet another paper promise, or its assurance that fairness will not be sacrificed is disingenuous.

II. THE MAJORITY'S INTERPRETATION OF THE PROPOSED AMENDMENT WOULD ENSURE THAT THE MAJORITY'S GOAL OF IMPOSING A SINGLE NATIONAL STANDARD FOR VICTIMS' RIGHTS IS NOT ACCOMPLISHED

The Majority claims that a federal constitutional amendment is needed because state and federal statutory solutions cannot articulate and enforce a uniform, national standard and that such a standard is necessary. At the same time, the Majority repeatedly praises the

19. Senator Kyl noted that objections from the Justice Department and from prosecutors were the reason that the right to a speedy trial set forth in earlier drafts was softened in the current version to give only "consideration" to the victims' interests in a speedy trial. See id. at 65 (statement of Sen. Kyl).
20. Majority Report, supra note 1, at 19, 30. The Majority explicitly noted that the "other relevant factors" include time for both the prosecution and the defense to prepare and the assurance of effective assistance of counsel. Id. at 30-31. Among other relevant factors that may warrant delay in trial are court congestion and scheduling interests, availability of witnesses, and prosecutorial priorities in the sequencing of cases.
21. Id. at 31.
22. The Report states that "'[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction.'" Majority Report, supra note 1, at 8 (quoting Office for Victims of Crime, U.S. Dept of Justice, New Directions from the Field: Victims' Rights and Services for the 21st Century 10 (1998)). Also, it contends that "the existing patchwork fails to transform paper promises to victims..."
proposed Amendment precisely because it would not create a single national rule. The Majority laments the present “patchwork” enforcement of victims’ rights, but its proposal amounts to a suggestion that one patchwork be replaced with another.

A. The Proposed Amendment Deliberately Leaves Crucial Issues Unspecified for the Express Purpose of Permitting Non-Uniformity in the Definition and Enforcement of Victims’ Rights

Astonishingly, the Majority apparently finds non-uniformity desirable in what the Report describes as the “core provision” of the proposed Amendment—an Amendment that is supposed to impose a uniform national standard. All other federal constitutional provisions intended to protect individual rights mandate to whom the rights apply. In stark contrast, Section 1 of the proposed Amendment provides that the Amendment would apply to “[a] victim of a crime of violence, as these terms may be defined by law.” In other words, as the Report expressly states, the universe of those protected by the proposed Amendment will be defined not by the United States Constitution but by Congress, the state legislatures, and, in the absence of legislation, the courts of each separate jurisdiction.

23. In some instances, the provision specifies the relevant group. See, e.g., U.S. CONST. art. IV, § 2, cl. 1 (securing state privileges and immunities to “[t]he Citizens of each State”) (emphasis added); id. amends. I, II, IV (protecting “the right[s] of the people”) (emphasis added); id. amend. V (guaranteeing that “[n]o person be denied certain rights) (emphasis added); id. amend. VI (enumerating rights ensured to “the accused” in “all criminal prosecutions”) (emphasis added); id. amend. XIV (protecting, in different clauses, “[a]ll persons born or naturalized in the United States and any person”) (emphasis added); id. amends. XV, XIX, XXIV, XXVI (forbidding various forms of discrimination against “the right[s] of citizens of the United States”) (emphasis added). Other provisions impose general prohibitions on governmental conduct and by implication ordinarily extend to all persons. See, e.g., id. art. I, § 9, cl. 2 (stating that, except under certain circumstances, “[t]he privilege of the Writ of Habeas Corpus shall not be suspended”); id. amend. VII (declaring that “the right of [civil] trial by jury shall be preserved” in certain circumstances); id. amend. XIII (providing that “[a]ll slavery nor involuntary servitude . . . shall exist within the United States”).

The point is not to deny that there can be debate over the precise reach of an individual-rights provision. A well-known example is the question of whether corporations enjoy various individual rights—the Supreme Court’s answer is that it depends. Compare Santa Clara Co. v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (holding that a corporation is a “person” protected by the Equal Protection Clause of the Fourteenth Amendment), with Hemphill v. Orloff, 277 U.S. 537, 550 (1928) (holding that a corporation is not a “citizen” protected by the Privileges and Immunities Clause of Article IV). Under all existing individual rights provisions, however, the debate over the provision’s scope is a disagreement over the proper interpretation of what the provision commands, not over what a legislature or court believes would be good social policy.

According to the Majority Report,

[t]he "law" which will define a "victim" (as well as "crime of violence") will come from the courts . . . until definitional statutes are passed explicating the term. . . . The Committee anticipates that Congress will quickly pass an implementing statute defining "victim" for Federal proceedings. Moreover, nothing removes from the States their plenary authority to enact definitional laws for purposes of their own criminal system.\textsuperscript{25}

To be sure, the Report is peppered with reassuring comments about the existence of "ample precedents," the "straightforward" nature of determining who is a victim "[i]n most cases," and the scope of those crimes that "likely" will be included within the various state and federal definitions of "crime of violence."\textsuperscript{26} But as the Report's careful language reflects, all of this reassurance means nothing beyond the fact that those who will actually define the Amendment's scope—fifty-one independent legislatures and judicial systems—will work with the same basic issues. That situation is already true today, and, according to the Majority, the results are unsatisfactory. Yet, nothing in the Amendment will require more than a broad similarity between who is protected in one jurisdiction and who is protected in another.

The Majority Report suggests that numerous crimes could be construed as crimes of violence, but at the same time anticipates that in some jurisdictions the same crimes may not be defined as violent. For example, the Report states that vehicular offenses, including driving while intoxicated, likely would be included if the offense resulted in personal injury.\textsuperscript{27} The term may also include acts of "intended, threatened, or implied violence."\textsuperscript{28} Burglary may or may not be included, and the same goes for arson.\textsuperscript{29} According to the Report, the term "victim" presumes an identifiable person,\textsuperscript{30} but substantial and unanswered issues, such as how distant or how direct the victimization must be,\textsuperscript{31} will be entirely open to the decisions of

\textsuperscript{25} Majority Report, supra note 1, at 23. Apparently, Senator Hatch believes that the Amendment would place the sole power to give meaning to the term "victim" in the hands of Congress. See id. at 44 (additional views of Sen. Hatch); infra note 67 and accompanying text.

\textsuperscript{26} Majority Report, supra note 1, at 23.

\textsuperscript{27} See id. at 24.

\textsuperscript{28} Id.

\textsuperscript{29} See id.

\textsuperscript{30} See id. at 24–25.

\textsuperscript{31} See Transcript of July 7, 1998 Proceedings, supra note 18, at 29 (statement of Sen.
fifty-one legislatures.

The nation’s perception since Reconstruction has been that state legislatures cannot protect individual rights adequately, and this dissatisfaction has been the central driving force behind the creation of federal constitutional rights. Repeatedly, “We the People” have determined that individual legislatures have drawn unacceptable lines between persons and groups in the protection of personal rights. In response, the Nation has adopted constitutional provisions that mandate who is to be protected from a given type of interference.34 The Amendment that the Majority supports is based on a different and troubling premise that the determination of whose interests are deemed worthy of federal constitutional status should rest in the “plenary authority” of each state and of Congress.

B. The Majority Construes the Proposed Amendment’s Specific Provisions to Permit Wide Variance in the Actual Enforcement of Victims’ Rights, thus Reproducing the Pattern of Inconsistent Enforcement that the Amendment Is Supposedly Intended to Eliminate

It would be difficult indeed to eliminate all interpretive questions in any constitutional amendment that addresses a broad area of

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32. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70–71 (1872) (stating that the Fourteenth and Fifteenth Amendments rested on “the conviction” that state legislatures were imposing “onerous . . . burdens” and “curtail[ing]” the rights of African Americans and that “more was necessary in the way of constitutional protection”); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 41–85 (1997) (discussing generally the Reconstruction-era decision to place individual rights under national protection); Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 HARV. L. REV. 153, 193 (1997) (noting that “the Fourteenth Amendment rejects the idea that the rights of citizens should vary from state to state and group to group”).

33. U.S. CONST. preamble.

34. See, e.g., U.S. CONST. amend. XIV (declaring that a state may not deny equal protection of the laws to “any person within its jurisdiction”); id. amend. XV (commanding that “citizens” may not be denied the right to vote “on account of race, color, or previous condition of servitude”); id. amend. XIX (stating that “citizens” may not be denied the right to vote “on account of sex”).
individual rights and interests. By the Majority’s own account, however, many of the proposed Amendment’s requirements that seem the clearest could be satisfied in such a variety of ways as to belie the claim that the Amendment will create a uniform federal standard. The Amendment’s guarantee of a victim’s right to be heard at “any public proceedings” to determine the “acceptance of a negotiated plea” is a good example. On its face, this guarantee appears to mandate a single, national rule applying to all victims and all relevant proceedings. Yet, according to the Majority Report, “each State will determine for itself at what stage this right attaches.” In other words, the legislature of one state may require that victims be able to speak against the plea agreement when the defendant first offers to plead guilty. Another state legislature, however, might prevent a victim from speaking until many months later, perhaps after the trial of co-defendants and the preparation of a sentencing report for the defendant, at which point the victim could raise a futile protest against the plea agreement just prior to the judge entering a sentence on the conviction. In the latter state, the right to be heard at “all proceedings” to determine acceptance of a plea and the right to be heard at sentencing become the right to participate in a single conversation. The victim would first get to speak about the appropriateness of the plea at the same time he or she gets to speak about the sentence to be imposed. Additionally, another jurisdiction might give “all proceedings” its ordinary meaning and allow for a statement at the time the judge permits the defendant to enter the plea. State law might even let individual prosecutors determine the timing of the victim’s “right to be heard” on a case-by-case basis, thereby permitting prosecutors to discriminate between victims.

The Majority’s discussion of the right to be heard regarding the acceptance of a guilty plea demonstrates that its promises of national uniformity and of flexibility in enforcement are incompatible. Indeed, the Amendment appears to invite inconsistent enforcement when doing so is useful in allaying fears of the law-enforcement community that the provision would interfere with effective prosecution, which in some cases may require delay in a public defense of plea negotiations.

36. Majority Report, supra note 1, at 27.
37. See id. (stating that “[i]t may be that a State decides the right does not attach until sentencing”).
38. See infra notes 80–82 and accompanying text.
III. THE PROPOSED AMENDMENT FLAUNTS FUNDAMENTAL CONSTITUTIONAL TRADITIONS

A. By Entrusting the Actual Definition of the Scope and Content of Victims' Rights to the Discretionary Choices of Legislatures and Courts, the Proposed Amendment Would Contradict the Fundamental Principle that Constitutional Norms Are Superior to Legislative Choice

Since Reconstruction, whenever the nation has determined that the United States Constitution should protect an individual right, the resulting constitutional provision has employed a two-pronged approach. First, each new Amendment itself has identified the norm to be observed and, expressly or implicitly, the persons entitled to invoke the norm. Thus, both norm and scope are themselves rules of constitutional law that can be invoked in court and, where necessary, enforced through the courts’ exercise of the power of judicial review. 39 Second, each new Amendment has provided Congress with the power to enforce the Amendment through appropriate legislation. Recently, in City of Boerne v. Flores, 40 the Supreme Court discussed this tradition at length and laid great weight to the distinction between defining the meaning and scope of constitutional rights, which is a task performed by the people themselves in each amendment as interpreted by the courts, and creating remedial or preventative rules, which is Congress’s domain. 41 City of Boerne struck down the Religious Freedom Restoration Act 42 on the grounds that the Act went beyond creating enforcement mechanisms to determining, in a manner inconsistent with judicial precedent, “what constitutes a constitutional violation.” 43 Under the Justices’ analysis, the Act was an attempt by Congress to displace the Court’s interpretation of an individual rights amendment. 44

39. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (stating that the determination of “what constitutes a constitutional violation” is a judicial rather than a legislative power); United States v. Verdugo-Urquidez, 494 U.S. 259, 265-75 (1990) (noting that the determination of the scope of “the people” protected by the Fourth Amendment is a judicial function).
41. See id. at 519-20; see also id. at 516-24 (reasoning that the power to enforce constitutional rights does not include the power to determine what constitutes a violation of those rights).
43. City of Boerne, 521 U.S. at 519.
44. Many observers, including members of Congress, have expressed reservations about or disagreement with City of Boerne, and the authors of this Essay are not
The proposed Victims' Rights Amendment deliberately would grant to Congress and the state legislatures the very power that City of Boerne held that earlier constitutional amendments do not provide—the power to determine the actual meaning of the rights protected by the amendment. Section 3 of the proposed Amendment states in familiar fashion that "Congress shall have the power to enforce this article by appropriate legislation." In explaining Section 3, however, the Majority Report states something further and different:

This provision will be interpreted in similar fashion [to City of Boerne] to allow Congress to "enforce" the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment.

While the first of these sentences is consistent with City of Boerne, the second sentence apparently means that the Amendment would vest the national and state legislatures with precisely the power that City of Boerne held was beyond the scope of an enforcement clause—"the power to decree the substance of the . . . Amendment's restrictions on the States." For example, with regard to the right to a "trial free from unreasonable delay," the Majority Report states that "[t]he Committee also anticipates that more content may be given to this right in implementing legislation." Similarly, for the right to an order of restitution from the convicted defendant, the Majority Report states that "[t]he relevant details will be spelled out under the resulting case law or, more likely, statutes to implement the amendment."

necessarily convinced that these observers are wrong. See, e.g., Erwin Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights, 39 WM. & MARY L. REV. 601, 602 (1998); McConnell, supra note 32, at 193. On the issue of how to construe the scope of Congress's powers under Section 5 of the Fourteenth Amendment, however, City of Boerne was almost unanimous: only Justice Breyer even intimated that the Court's views on Section 5 might not be correct. Compare City of Boerne, 521 U.S. at 545 (O'Connor, J., dissenting) (agreeing with the Court's interpretation of Section 5), with id. at 566 (Breyer, J., dissenting) (declining to reach the Section 5 issue). There is thus no reason to think that the Court would be likely to reconsider that issue in the foreseeable future.

46. Majority Report, supra note 1, at 35.
47. City of Boerne, 521 U.S. at 519.
48. Majority Report, supra note 1, at 31 (emphasis added).
49. Id. (emphasis added).
In this and other instances, the Majority apparently intends the Amendment to permit legislatures, as well as courts acting as policymakers in the absence of legislation, to determine what specific interests will and will not be protected. Within the outer bounds of capricious misapplication, courts would have no constitutional basis for rejecting the choices policymakers might adopt. Unlike the existing individual rights provisions in the Constitution, the proposed Amendment in many instances would license legislatures to adopt their own preferences rather than subject those preferences to a superior constitutional rule. In such cases, the proposed Amendment would invert the fundamental relationship between the Constitution and legislative power by making the legislature the master, rather than the servant, of the constitutional norm at issue.

Not only is the Majority attempting to change prior constitutional practice, but it is attempting to do so indirectly and covertly through the Majority Report rather than directly and openly through the text of the Amendment. At the time hearings were conducted on the proposed Amendment in the Senate Judiciary Committee in April 1998, the text of Section 3 stated that "Congress and the States shall have the power to implement and enforce this article within their respective jurisdictions."50 Professor Paul Cassell, testifying in support of the Amendment, explained in his prepared statement that the "enforcement" power in the Crime Victims' Rights Amendment is somewhat broader than the power in Section 5 [of the Fourteenth Amendment], since the enforcement power includes not only the power to "enforce" but also the power to "implement." This language is necessitated by the Supreme Court's recent decision in City of Boerne v. Flores, which struck down the Religious Freedom Restoration Act of 1993. In that decision the Court described Congressional power to enforce the Fourteenth Amendment in rather crabbed terms. To avoid the possibility that the Court could strike down victims implementing legislation as beyond the power of Congress or the Courts, the Crime Victims' Rights Amendment specifically authorizes implementation.51

In response to questions posed at the hearing, Professor Cassell explained that the intent of the language in Section 3 was to avoid the

51. Id. at 44 (statement of Prof. Paul G. Cassell) (footnotes omitted).
holding in *City of Boerne*. His view was that the language created a new category: “not . . . changing constitutional rights, not enforcing rights, but implementing rights”—a “sort of intermediate category of power.”

Professor Cassell’s explanation of the newly formulated power to implement constitutional rights provided no clear basis to distinguish it from the power to define, and therefore to change, constitutional rights. In fact, no existing definition would create a workable distinction for an “intermediate category of power.” His remarks and the Majority Report make it clear that the very point of giving Congress and the states this so-called power of implementation is to enable them to determine, and thus to vary, what governmental conduct the Amendment requires and forbids. This is exactly the same authority that *City of Boerne* termed “the power to decree the substance of [an] Amendment’s restrictions on the States” and “to determine what constitutes a constitutional violation.” As Justice Stevens has explained, such a “legislative attempt ‘to interpret and elaborate on the meaning’ of [a constitutional provision] . . . violate[s] the principle that the ‘power to interpret the Constitution in a case or controversy remains in the Judiciary.’”

Shortly before the proposed Amendment was voted out of the Judiciary Committee, the language in Section 3 giving the states the power both “to implement” and to enforce the Amendment by legislation was dropped from the Amendment, as was Congress’s power “to implement” it by legislation. Nevertheless, the Majority, through its Report, apparently intended to preserve this unprecedented expansion of state and federal legislative power to define the substance of constitutional rights: “At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment.” This statement asserts a new power and is neither the result of the plain meaning of the proposed Amendment’s language nor of the operation of established law. It is both unprecedented and disingenuous.

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52. *Id.* at 118 (response of Prof. Paul G. Cassell).
B. The Proposed Amendment Intentionally Provides for Constitutional Change Through Simple Legislation

Unlike any existing constitutional amendment, the proposed Victims’ Rights Amendment provides a formula for exceptions by legislation. Section 3 states that “[e]xceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.” Senator Kyl described the provision as follows: “Now, ordinarily, the only way that you can change constitutional rights is to amend the Constitution, and that is a very significant process, as we all know. So we have gone a huge step by literally providing for an amendment to the Constitution here by legislative action.” In combination with the Majority Report’s interpretation of the proposed Amendment as permitting states to exercise the power to enforce and implement its provisions, this analysis is quite extraordinary. Not only is the substantive scope of the provision defined in the first instance by the legislative body, but states also may create exceptions that differ according to each jurisdiction’s perception of the imperatives of criminal law enforcement.

Section 3’s provision for amendment through legislation clearly demonstrates its proponents’ lack of serious commitment to the traditional American understanding of fundamental law. One of the major purposes of enshrining a provision in the Constitution, as opposed to including it in ordinary legislation, is to set it off limits from ordinary tinkering by legislation. To be sure, few constitutional rights are absolute; accordingly, the courts have recognized in many instances that societal necessity may permit governmental action that would otherwise infringe a protected liberty. As the Court uses it, the language of “compelling interest”

57. Transcript of July 7, 1998 Proceedings, supra note 18, at 89 (statement of Sen. Kyl); see also id. at 102 (statement of Sen. Kyl) (stating that the proposed Amendment itself could be altered by statute “if a compelling interest is established”).
58. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (rejecting the argument that “the legislature may alter the constitution by an ordinary act”); see also City of Boerne, 521 U.S. at 529 (stating that, if legislation could alter constitutional meaning, “it is difficult to conceive of a principle that would limit congressional power”); Oregon v. Mitchell, 400 U.S. 112, 288 (1970) (Stewart, J., concurring in part and dissenting in part) (“What the Constitution has fixed may not be changed except by constitutional amendment.”).
59. See, e.g., Board of County Comm’s v. Umbler, 518 U.S. 668, 675 (1996) (stating that “the First Amendment... does not guarantee absolute freedom of speech”); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (noting that when “race-based action is necessary to further a compelling interest, such action is within constitutional constraints if
indicates the point at which the judiciary recognizes a limit on the scope of a constitutional right. In identifying such limits, the courts are carrying out their duty to interpret the authoritative meaning of the Constitution. They are not exercising a discretionary power to create exceptions to the Constitution’s demands.

Section 3, in contrast, would vest Congress with legislative power to define exceptions to the constitutional rule. The Section’s first sentence, authorizing Congress to enforce the Amendment through appropriate legislation, is an express delegation of such power. Under common sense and customary norms of constitutional interpretation alike, the Section’s second sentence, which allows for exceptions in cases where the government has a compelling interest, also addresses Congress’s power. Section 3 thus borrows the language of “compelling interest” that the Supreme Court applies in defining the limits of constitutional rights for what appears to be the novel and disturbing purpose of expressly permitting Congress to create discretionary, policy-driven exceptions to judicially defined rights. Under the Amendment, Congress presumably would determine what interests are compelling and, thus, what exceptions to create. While the courts undoubtedly would retain the authority to invalidate wholly unreasonable legislative decisions, nothing in the text of the Amendment or in the Majority Report would legitimize any more searching judicial review.

At first glance, Section 3 might seem merely to be an example of inartful drafting. The provision’s purpose, surely, is to instruct the judiciary to apply the usual “strict scrutiny” approach when evaluating legislation that implicates victims’ rights, but, perhaps through some oversight, the drafters placed it in a confusing location in the text. Although the courts might read the sentence as an endorsement of strict scrutiny, the drafters have told us that they meant something different. Indeed, Senator Kyl’s remarks are a more flamboyant statement of a theme that pervades the Majority Report. As reflected in that document, the Amendment’s supporters maintain that they intend what they appear to be saying—the Amendment is supposed to be subject to substantive change through the legislative process. A constitutional provision that makes sense only if one relies on the courts to ignore both its text and its proponents’ explanations is not an Amendment that the Nation should be willing to add to its fundamental law.  

60. Indeed, the exceptions provision actually does not track the Supreme Court’s
The disturbing novelty and ambiguity of the exceptions provision is compounded by the uncertainty that the Majority Report creates about state legislative authority. In light of the Report's statements about the states' unwritten but plenary power to implement the Amendment, one must assume that each state will be equally free with Congress to exercise such power. The Majority labels this new legislative power as a "necessary flexibility." In fact, this authority is further confirmation of the Majority's radical indifference to our constitutional traditions.

In one of the Supreme Court's most famous decisions, the great Chief Justice John Marshall said that "[t]he constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." In Marshall's view, "[b]etween these alternatives there is no middle ground." The principle that the legislature cannot alter the meaning and application of the Constitution is "one of the fundamental principles of our society." The proponents of the Amendment are of a different mind. In the name of "necessary flexibility," they want to deny the status of "superior, paramount law" to the new rights that they are "protecting." It is ironic that, in the name of dignifying victims' rights, the Amendment's supporters propose to create a new and lesser constitutional status for those rights.

C. The Majority's Interpretation of the Proposed Amendment Leaves the Relationship Between Federal and State Enforcement Legislation Entirely Unclear

The Majority Report asserts that Section 3 of the Amendment, which delegates to Congress the power to enforce the Amendment by appropriate legislation, will be interpreted "in similar fashion" to the parallel language found in Section 5 of the Fourteenth Amendment.

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strict scrutiny test, which ordinarily requires that the legislation be narrowly tailored to accomplish a compelling governmental interest. See, e.g., Adarand, 515 U.S. at 227. This divergence substantially weakens any argument that the provision is simply an endorsement of the strict scrutiny test. Thus, the actual meaning of the provision, whether it addresses Congress's power or the courts' level of scrutiny, is quite uncertain.

61. Majority Report, supra note 1, at 35.
62. Marbury, 5 U.S. (1 Cranch) at 177.
63. Id.
64. Id.
65. Id.
66. Majority Report, supra note 1, at 35. Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the
Other passages in the Report, however, directly contradict this assertion. Congress's legislative authority under the enforcement clauses of existing amendments is, within its scope, superior to any state constitutional or statutory provisions. As long as it is enforcing an amendment, Congress is free to displace state choices. In the event of a conflict between a valid federal enforcement statute and a state law, the Supremacy Clause ensures that the federal statute must be followed.\textsuperscript{67} In contrast, as interpreted by the Majority, the proposed Amendment apparently would not authorize Congress to override state choices on a variety of issues that plainly would seem to involve enforcement of the Amendment. For example, the proposed Amendment specifies that victims shall receive "reasonable notice" of any proceeding, and it authorizes Congress to "enforce" the Amendment "by appropriate legislation." Senator Kyl, a chief sponsor of the Amendment, interpreted this language to mean that "[t]he State will determine, by enabling legislation, whether it is the court, whether it is the prosecutor, whether its is the clerk of court, whether it is the judge, whoever. I mean, each State could do this differently as we implement other constitutional amendments."\textsuperscript{68}

Senator Hatch, on the other hand, believed that the Amendment's provisions would "grant[ ] Congress sole power to enforce the provisions of the victims' rights amendment, and thus, inter alia, to define terms such as 'victim' and 'violent crime' and to enforce the guarantees of 'reasonable notice' of public proceedings."\textsuperscript{69} The Senator lamented the Amendment's enforcement-power provision as a further move toward "federalization of crime and the nationalization of our criminal justice system."\textsuperscript{70}

It is impossible at this point to know whether Senator Kyl or Senator Hatch is correct, although the Majority Report certainly provides strong support for the former. But it is unconscionable to propose an amendment to the Constitution of the United States so unclear that even its supporters cannot agree on the relationship it will create between the federal and state governments. Constitutional change is too serious a matter to be treated as a roll of the dice, with

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\textsuperscript{67} See U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

\textsuperscript{68} Transcript of July 7, 1998 Proceedings, supra note 18, at 70 (statement of Sen. Kyl).

\textsuperscript{69} Majority Report, supra note 1, at 44 (additional views of Sen. Hatch).

\textsuperscript{70} Id. (additional views of Sen. Hatch).
the winners and losers decided by chance and the unpredictable decisions of future legislators and judges.

IV. THE MAJORITY REPORT IS AN INCONSISTENT AND LIKELY INEFFECTIVE INTERPRETIVE TOOL

A. The Report Makes a False Promise of Statutory Specificity in an Effort to Answer Difficult Questions of Application

Through analysis in the Report, the Majority attempts to fine tune the apparent meaning of the Amendment in order to solve specific issues that it found politically problematic. The solutions that the Majority gives belong in statutory form rather than in a constitutional amendment, and the efficacy of the Amendment obviously would remain in doubt until courts have construed the Amendment after its passage.

A specific and debatable interpretation of the general language of the proposed Amendment is found in the Majority Report's interpretation of the right “to be heard, if present, and to submit a statement at all [public] proceedings to determine . . . a sentence.”71 The Report states that these words mean that Congress and the states remain free to set “certain limits” on what is relevant victim-impact testimony.72 By example, it states that a jurisdiction may determine that a victim's views on the desirability of a capital sentence are not relevant and, therefore, may not be expressed.73 With absolutely no support from the text of the proposed Amendment, the Majority asserts that the Amendment grants the opportunity to speak because making a statement sometimes can be a powerful catharsis for a victim.74 On that basis, the Report claims that a victim has the right to make a statement even if the sentence is mandatory.75 Thus, as to some types of statements by victims, the Majority Report contends that the language of the Amendment means that statements made irrelevant by some legislative judgments—such as a victim's opposition to the death penalty—are inadmissible. By contrast, the Majority Report contends other legislative determinations of irrelevancy, such as mandatory sentencing regardless of the victims' statements, do not render the statements inadmissible, however,

72. Majority Report, supra note 1, at 28.
73. See id. at 28-29.
74. See id. at 28.
75. See id.
because the purpose of the latter statements is to facilitate catharsis.

In other areas as well, the Majority Report describes differences in the allowed treatment of statements at sentencing despite the Amendment’s failure to address such distinctions. On the one hand, the Report states that reasonable limits may be placed on the length and content of victim impact statements at sentencing, as well as on the number of victims permitted to give oral statements when a large number of victims are involved. On the other hand and with no apparent textual support, it states that “victims should always be given the power to determine the form of the statement.” Thus, the fact that a prior statement by the victim is in the file is not a basis to deny the making of a new statement in the form desired by the victim. The basis for the Majority’s treating length, content, and number of statements differently than the form of the statement is inexplicable.

Additionally, the proposed Amendment creates the right for victims “to be heard . . . at all public proceedings to determine . . . an acceptance of a negotiated plea.” The Majority asserts that individual jurisdictions could decide “at what stage this right attaches,” apparently responding to prosecutors’ concerns that, in multiple-defendant cases, early disclosure of the factors motivating a plea agreement with one defendant might jeopardize the deal and impair effective prosecution of co-defendants. Thus, while the proposed Amendment provides the right to be heard at proceedings to determine the acceptance of a plea, the Majority Report asserts that states may decide that the right does not attach until sentencing if the plea “can still be rejected by the court” at that point. This interpretation may solve political problems with prosecutors and may be a permissible interpretation of the plain language of the proposed Amendment, but the Majority Report’s confidence in asserting it assumes a deeply problematic view of the role of legislative history in the interpretation of a constitutional amendment.

76. See id. at 29.
77. See id. at 36.
78. Id. at 29.
79. See id.
81. Majority Report, supra note 1, at 27.
82. Id.
83. Many prominent jurists and constitutional scholars reject any claim that the intentions of the drafters of a constitutional provision govern the interpretation of the provision once it is adopted. See, e.g., Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and
The Majority makes a similar attempt to provide the reassuring specificity of legislation for the unadorned clause guaranteeing "reasonable notice of a release or escape from custody." The Majority asserts that notice is not required by this provision if a prisoner is moved from one custodial facility to another, reclassified in terms of his security level, or allowed to participate in a supervised work detail outside the prison walls. Notice is required, however, if the prisoner enters a noncustodial work-release program or takes a weekend furlough. While these may be reasonable policy outcomes, they are hardly obvious as matters of constitutional interpretation, and the weight that a future court would place on such distinctions is quite uncertain.

These examples show how the Majority attempts to reconcile the competing interests of victims groups with those primarily concerned with efficient and effective criminal law enforcement by glossing the simple words of a constitutional clause with the detailed provisions of a lengthy piece of legislation. The effort is certainly unwieldy. Moreover, the Report may well prove ineffective in controlling the interpretation future courts place upon an amendment that is likely in the end to be judged by what its text plainly says. It is difficult to see how these problems could be lost on the drafters of the Majority Report, suggesting that their purpose may be as much to mollify for the moment the largely incompatible concerns of political constituencies as it is to shape the future interpretation of the proposed Amendment.

B. The Majority Report’s Assertion that the Amendment’s Apparently Clear and Inflexible Language Is Actually “Flexible” Renders That Language Indeterminate

Section 3 of the proposed Amendment states that “[t]he rights established by this article may be created only when

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84. S.J. Res. 3, § 1.
85. See Majority Report, supra note 1, at 30.
86. See id.

Similarly, “parole” is said to mean not only parole, but release with conditions in states that have abolished parole. Also, it is supposed to include conditional release from mental facilities. See id.
necessary to achieve a compelling interest." The "compelling interest" standard is well-established in constitutional law. It is demanding and unyielding. It is not a term that can be lightly disregarded or easily given new meaning.

It is this quite restrictive phrase—"compelling interest"—that provides the only basis for relief from enforcement of the Amendment's provisions. Yet, the Majority states that it provides "necessary flexibility for handling unusual situations." "Flexibility" is not a word that can be applied easily or sensibly to "compelling interest."

Indeed, the Majority misuses the term in order to reassure those concerned about the possibility that the Amendment may result in the denial of justice to defendants who turn out to be victims instead. During Committee deliberations, Senator Fred Thompson raised the question of the treatment of a "battered spouse" who shoots her husband, perhaps in self-defense:

I would assume, if she is charged, then the husband under those circumstances is the victim and he is entitled to all those rights. Even before she is convicted, he is entitled to be there and have say as to whether or not she gets out on bond and those sorts of things.

Senator Kyl's response was that the case presented an obvious problem and that Congress would deal with the issue by legislating an exception. The Senator did not, however, provide an explanation of how the legislation would be justified or defined. The Majority Report provides no better explanation for this troubling set of cases in which guilt is often legitimately in doubt and the label of victim is frequently highly debatable. Instead, the Report makes the following remarkable statement about the "compelling interest" test for domestic violence cases: "In some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This compelling interest provision offers the flexibility to do just that."

The desire not to bias an outcome against a domestic violence

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87. S.J. Res. 3, § 3.
89. Majority Report, supra note 1, at 35.
91. See id. at 43 (statement of Sen. Kyl).
92. Majority Report, supra note 1, at 36.
victim cast in the role of a defendant is understandable, but how that instinct translates into a compelling need that can be articulated categorically is entirely unclear and absolutely unexplained. Once again, the Majority is attempting through a congressional report to solve a political problem and to correct an inherent difficulty in the use of a general constitutional provision to address a complex and nuanced set of social problems.

C. The Majority Report's Inconsistent and Inadequate Analysis Undermines its Potential Utility as an Interpretive Tool and Thereby Destroys its Predictive Power

The Majority Report's inconsistency in analyzing the proposed Amendment's plain language renders it a worthless tool for forecasting or guiding subsequent judicial interpretation. Even if a commentary of such length and complexity were clear and sensible, it would be implausible to ascribe detailed knowledge of its content to the state legislatures that would be called upon to adopt the Amendment. But the Report is not clear and sensible. Instead, the Report is incompatible with normal constructs of interpretation and is crafted with predominantly political, rather than interpretive, purposes. Courts are unlikely to view such a commentary as probative of constitutional meaning.

V. THE PROPOSED AMENDMENT, CERTAINLY IN THIS FORM AND WITH THIS HISTORY, SHOULD NOT BE ADOPTED

This Essay examines the fundamental ways in which the proposed Amendment is flawed. Our focus is not on the numerous areas of detail where reasonable people might differ about the wisdom of providing crime victims with particular privileges. Instead, we show that the Amendment, as understood by its proponents, is fundamentally flawed even if one shares their stated goals.

The Essay makes three basic points. First, by the proponents' own arguments, merely enacting paper guarantees of victims' rights does little or nothing to help victims, and yet the proponents provide no plausible argument that enacting this paper guarantee will lead to any different result. The real problem is not one of rules on paper, but of policies in practice, and the Amendment does nothing to affect the latter. Second, the Amendment's broad language is on its face excessively and fussily specific for a constitutional amendment. Implicitly recognizing this fact, the Majority Report gives the language a surprisingly loose and indeterminate interpretation,
repeatedly trumpeting the flexibility that the Amendment will leave legislatures, courts, and individual prosecutors to decide exactly what to provide, and not to provide, to victims. This “interpretation” deviates so far from the text on its surface that the courts likely would not understand the text as described. Assuming the validity of the Majority Report’s reading, such an understanding of the Amendment patently contradicts the supposed goal of establishing a uniform, national standard. Third, Section 3, the enforcement provision, explicitly vests in Congress the power to create exceptions to the Amendment. The Majority Report reads Section 3 and the Amendment as a whole to authorize Congress and state legislatures to determine within very broad limits both the meaning of the Amendment’s substantive provisions and the universe of persons to whom those provisions apply. Indeed, some proponents of the Amendment candidly acknowledge that the Amendment is intended to permit legislative “amendment” of its guarantees. The Amendment thus would be a radical departure from the fundamental principle that constitutional rules enacted by the people are immune from change through ordinary legislation.

The proposed Amendment unfortunately displays a clear disdain for the constitutional craft. It is not ready for serious consideration by the Congress and ratification by the States. Its poorly crafted terms insure that the articulated goal of its supporters for a uniform set of rights will not be met. It gives no assurance that victims of crime will receive real benefits. Moreover, the proposed Amendment lacks clarity and is inconsistent with our constitutional tradition even as to the “paper promises” it provides. The drafters have attempted to wind their way between the interests of prosecutors, defendants, and victims. Their effort, though ambitious, was inconsistent. Perhaps through the detailed and changeable medium of legislation and administrative regulations they could have achieved some success. As a constitutional amendment, however, their effort has clearly failed. This so-called Victims’ Rights Amendment should not be adopted.
APPENDIX

SENATE JOINT RESOLUTION 3

106th Congress
1st Session
Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Article --

"SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

"to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

"to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

"to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

"to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;

"to reasonable notice of a release or escape from custody relating to the crime;

"to consideration of the interest of the victim that any trial be free from unreasonable delay;

"to an order of restitution from the convicted offender;

"to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

"to reasonable notice of the rights established by this article.

"SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying
or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

"SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

"SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

"SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States."